

UNITED STATES OF AMERICA  
 SMALL BUSINESS ADMINISTRATION  
 OFFICE OF HEARINGS AND APPEALS  
 WASHINGTON, D.C.

	)	
IN THE MATTER OF:	)	Docket No. BDPT-2007-01-22-01
	)	
Commercial Roofing of Delaware, Inc.	)	Decided: February 12, 2007
	)	
Petitioner	)	
	)	

ORDER DISMISSING UNTIMELY APPEAL

Facts and Argument

On January 22, 2007, Petitioner Commercial Roofing of Delaware, Inc. (Petitioner), by its attorney, filed with the Small Business Administration (SBA) Office of Hearings and Appeals (OHA) an appeal of a determination by the Associate Administrator for 8(a) Business Development (AA/8(a) BD) terminating Petitioner from the 8(a) program (Termination Letter). Accompanying the Appeal Petition was a Certification by Petitioner's attorney.

The Certification states that: (1) on November 6, 2006, Petitioner received the Termination Letter; (2) its appeal of the Termination Letter was due on December 21, 2006; (3) on December 18, 2006, Petitioner's attorney sent, by first class mail, copies of its Appeal Petition to the AA/8(a) BD, to the SBA's Office of General Counsel, Office of Litigation (OGC), and to Petitioner; and (4) states: "I respectfully request that the SBA look to the merits of Commercial's appeal and permit the late filing of the enclosed petition."

On January 23, 2007, I ordered Petitioner to show cause, no later than January 30, 2007, why its Appeal Petition should not be dismissed as untimely because it was not filed with OHA within 45 days from the date it received SBA's Termination Letter. *See* 13 C.F.R. § 134.202(a)(1).

On January 29, 2007, Petitioner timely filed its Response to the Order to Show Cause. First, Petitioner asserts (1) the AA/8(a) BD and OGC have the same physical mailing address as OHA, and (2) neither the regulation governing filing and service at 13 C.F.R. § 134.204, nor the various materials OHA provided Petitioner on November 28 and 30, 2006, contained any other U.S. Mail address for filing or service of an appeal petition. Second, Petitioner asserts that because the Appeal Petition was timely served by first class mail, it was also timely filed, citing 13 C.F.R. § 134.204(e)(21) [sic], *United States v. Ceballos*, 302 F.3d 679 (7th Cir. 2002), *Carter v. McGowan*, 524 F. Supp. 1119, 1120-21 (D. Nev. 1981), and *Samson Sales, Inc. v. Honeywell, Inc.*, 421 N.E.2d 522, 523-24 (Ohio 1981). And third, Petitioner argues that the SBA has not been prejudiced by the timing of the appeal filing, so it should be considered on the merits.

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Attached to Petitioner's Response, at Exhibit A, are two fax memos, one appeal petition form, and two certificate of service forms that an OHA staff attorney provided to Petitioner on November 28 and 30, 2006. OHA's fax memo dated November 30, 2006, states, in part: "The first certificate of service is to be completed and filed with your appeal petition. The second certificate of service is blank and can be used with future filings."

### Discussion

A party other than the SBA "may commence a case by filing a written petition . . . no later than 45 days from the date of receipt of the SBA action or determination to which the petition relates." 13 C.F.R. § 134.202(a)(1). Petitioner states it received the SBA's Termination Letter on November 6, 2006. Thus, the deadline for filing its appeal was December 21, 2006. Petitioner filed its Appeal Petition with OHA on January 22, 2007, over one month after the deadline. Therefore, the Appeal Petition is untimely filed.

#### I.

Petitioner's first argument is that because the SBA's AA/8(a) BD and OGC share the same "physical" street address as OHA, Petitioner is excused from having to file its pleadings with OHA, so long as it serves the SBA's AA/8(a) BD and OGC. This argument assumes that OHA, AA/8(a) BD, and OGC are one and the same and has the same address as OHA, which is not the case.

The Small Business Act requires appeals of 8(a) BD terminations to be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and be presided over by an Administrative Law Judge who by statute is independent of the SBA. Small Business Act of 1958, § 8(a)(9)(A), (B)(ii), as amended, 15 U.S.C. § 637(a)(9)(A), (B)(ii). Therefore, OHA and other parts of the SBA do not work together on 8(a) BD appeals.

In fact, the SBA (AA/8(a) BD) is the party opposing Petitioner, and is represented by OGC. Thus, even if the AA/8(a) BD and OGC had been aware that the appeal petition served upon them had not actually been filed with OHA, they were not obliged to correct the opposing party's litigation error by providing a copy to OHA. I judicially note that a copy of the appeal petition was not provided to OHA by either the AA/8(a) BD or OGC.

Further, although these offices may be at the same street address, 409 Third Street, SW, they do not share the same address, which includes the office name. See discussion of 13 C.F.R. § 134.204, *infra*, at II, 2.

Accordingly, Petitioner's first argument is without merit.

#### II.

Petitioner's second argument, that proper and timely service may substitute for proper and timely filing for the purpose of commencing an 8(a) appeal, also is meritless. The SBA

regulations governing appeals treat filing and service differently in at least three different respects:

1. Service is not the same as filing. SBA regulations highlight the difference. *Compare* 13 C.F.R. § 134.204(c) (defining service as “the mailing, delivery, or facsimile to all other parties of a copy of each pleading or other submission filed with OHA”) *with* 13 C.F.R. § 134.204(b) (defining filing as “the receipt of pleadings and other submissions at OHA”). For 8(a) appeals, the regulations reiterate the distinction between filing with service: “Concurrent with its filing with OHA, a concern must *also* serve . . . .” 13 C.F.R. § 134.403(a) (emphasis added).
2. The regulations also specify separate office addresses within the SBA, although not separate street addresses, for filing and service. *Compare* 13 C.F.R. § 134.204(b)(1) (providing OHA’s address as “Docketing Clerk, Office of Hearings and Appeals, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416”) *with* 13 C.F.R. §§ 134.204(c)(3), 134.403(a)(2), (b) (requiring service in 8(a) appeals to be made “to the applicable Associate General Counsel at the Small Business Administration, 409 3rd Street, SW, Washington, DC 20416).
3. The regulations provide a different rule for the timing of service than for the timing of filing. *Compare* 13 C.F.R. § 134.204(c)(2) (providing service is effective the date of sending or mailing) *with* 13 C.F.R. § 134.204(b)(2) (providing a filing is effective the date it is received at OHA).

The three cases cited by the Petitioner, in connection with its second argument, all address sufficiency of service. They do not address the issue in this case, that is, whether proper service of an appeal petition can be a substitute for filing the appeal petition. Thus, these cases are inapposite and do not support Petitioner’s argument that proper service meets the SBA’s regulatory filing requirements.

In addition, the Petitioner here received additional, specific instructions from an OHA staff attorney that emphasized the distinction between filing and service.

Thus, Petitioner’s second argument must also fail.

### III.

Third, Petitioner’s equitable argument must fail. The Small Business Act requires me to decline to accept jurisdiction if an appeal is untimely filed. Small Business Act, § 8(a)(9)(E)(ii), 15 U.S.C. § 637(a)(9)(E)(ii) *see also* 13 C.F.R. § 134.405(a)(2) (providing the Administrative Law Judge “shall decline to accept jurisdiction over any matter if . . . [t]he appeal is untimely filed under § 134.202”). The regulations further prohibit a Judge to modify time limits established by statute and those governing when a case may be commenced. 13 C.F.R. § 134.103(b).

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IV.

In sum, Petitioner's timely service of its appeal petition in compliance with the requirements of 13 C.F.R. § 134.204(c) does not satisfy the filing requirements of 13 C.F.R. § 134.204(b). Accordingly, Petitioner did not file its appeal when it was properly served. Petitioner's subsequent correct filing after the 45-day deadline, a time limit which cannot be modified, must be considered untimely.

Conclusion

Accordingly, because the Appeal Petition is untimely filed and I must decline to accept jurisdiction over it, the appeal is DISMISSED.

Subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. *See* Small Business Act, § 8(a)(9)(D), 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

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RICHARD S. ARKOW  
Administrative Law Judge