

**United States Small Business Administration
Office of Hearings and Appeals**

VSBC Appeal of:

Better Metal, LLC,

Appellant

SBA No. VSBC-301-A

Decided: August 18, 2023

ORDER DISMISSING APPEAL

I. Introduction

A. Background

On July 19, 2023, 4:00 p.m., Eastern Daylight Time (EDT), Better Metal, LLC (Appellant) through counsel, appealed the denial of its application for certification as a Veteran-Owned Small Business (VOSB) to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA).¹ The appeal contained a certificate of service signed by counsel, certifying that the Director, Office of Government Contracting (D/GC) and SBA Counsel, via OPLservice@sba.gov and OPLservcie@sba.gov, respectively, received transmission of the appeal.

Upon receipt of this filing, OHA requested counsel to provide proof of service that all proper parties have been served with the appeal. On the next day, July 20, 2023, counsel forwarded the service email to OHA, which showed that a copy of the pleading was only served to OPLservide@sba.gov, a non-existent email account.² (E-mail from J. Gibbs to OHA (Jul. 20, 2023).

On July 25, 2023, OHA ordered Appellant to show cause why the instant appeal should not be dismissed for being noncompliant with the regulations and/or ultimately untimely, no later than August 1, 2023.

¹ Appellant received the denial letter on July 5, 2023, and had until July 19, 2023, 5:00 p.m., EDT, to submit a timely and compliant appeal in accordance with the regulations.

² Counsel provided a copy of the appeal petition with service to OPLservide@sba.gov after the close of business on July 19, 2023, 10:24, p.m., EDT. Therefore, it is counted as filed on the next business day. 13 C.F.R. § § 134.204(b)(2), 134.1106.

On July 27, 2023, counsel filed a notice of corrected certificate of service with OHA. Counsel explained that it made a “typographical error in typing the email address” by “misspelling ‘service’ as ‘servide’.” (Notice of Filing, at 1 (emphasis in original).) Counsel further corrected the date that a copy of the appeal petition was transmitted to D/GC and SBA Counsel, both at OPLservice@sba.gov is July 27, 2023, rather than July 19, 2023. (*Id.*, at 1-2.) However, on July 28, 2023, counsel filed and served the original petition with a corrected certificate of service to D/GC and SBA Counsel at OPLservice@sba.gov.³ The attached petition was in the original form and the corrected certificate of service was dated July 27, 2023.

B. Response to OHA's Order

On July 31, 2023, counsel filed an affidavit and response to OHA's order. In the affidavit, counsel indicates that it “personally attempted to serve the Appeal Petition at OPLservice@sba.gov but inadvertently spelled the word ‘service’ as ‘servide’” (J. Gibbs' Affidavit, ¶ 7 (emphasis in original).) Counsel states that it did not receive a notification through its firm's email system of a notice that OPLservide@sba.gov was not a working email address or any other indication that the email message serving the parties had been rejected. (*Id.*, ¶ 8.) Upon receipt of OHA's request to provide proof of service, on that night, counsel forwarded a copy of the email transmission. (*Id.*, ¶¶ 9-10.) In addition, counsel maintains that it was not advised by OHA that it had sent the email service to D/GC and SBA Counsel to an incorrect email address, nor was it aware that its email message was sent to an incorrect email address, until receipt of OHA's order to show cause on July 25, 2023. (*Id.*, ¶ 11.)

In its response, counsel argues that OHA should not dismiss this appeal for being noncompliant with the applicable regulations and/or ultimately untimely, because it “is not required by the applicable regulations as untimely filed, and dismissal in the discretion of the Judge is not equitable based on the error in service made by Appellant's Attorney which has been corrected.” (Response, at 1.) While counsel maintains that Appellant has filed an appeal on July 19, 2023 that included all of the items set forth in 13 C.F.R § 134.1105(a) with a certificate of service to D/GC and SBA Counsel at OPLservice@sba.gov as required by 13 C.F.R. § 134.1105(b) and 13 C.F.R. § 134.204, counsel made a typographical error in typing the email address and misspelled “service” as “servide,” which he has since corrected it. (*Id.*, at 1-3, citing J. Gibbs' Affidavit, ¶¶ 8-11.)

Counsel advances the following arguments. First, Appellant was required to file its appeal petition with OHA within 10 business days of the receipt of the Denial under 13 C.F.R §§ 134.1104(a); 134.202(d) and it did so. The appeal petition also satisfied all the requirements of 13 C.F.R § 134.1105(a). As it is undisputed that OHA received Appellant's appeal petition within 10 business days of the receipt of the Denial, so 13 C.F.R § 134.1104(c) is not applicable and OHA is not required to dismiss Appellant's appeal. (*Id.*, at 3, 5).

³ Counsel filed a copy of the appeal petition with OPLservice@sba.gov after the close of business on July 27, 2023, 5:38, p.m., EDT. Therefore, it is counted as filed on the next business day. 13 C.F.R. §§ 134.204(b)(2), 134.1106

Further, counsel makes note of 13 C.F.R § 134.1105(c) requiring Appellant to attach a certificate of service to the appeal petition. The certificate of service is not part of the appeal petition, and instead it is a certificate required to be attached to the appeal petition, which meets the requirements of 13 C.F.R § 134.204(d). Appellant's original certificate of service correctly stated the email address for D/GC and SBA Counsel (OPLservice @sba.gov). (*Id.*, at 4.)

Next, counsel reiterates that it has inadvertently misspelled the email address, attempting to serve D/GC and SBA Counsel, because counsel believed that he had correctly effected service. Counsel filed a corrected Certificate of Service and served the parties on July 27, 2023, eight days after filing the appeal petition and two days after receiving the Order to Show Cause. Here, counsel argues that SBA Counsel is not required to respond to the appeal petition until a notice and order is entered establishing the close of the record. As the notice and order has not been entered, SBA Counsel's time for responding to the appeal petition has not begun. Therefore, SBA Counsel is not prejudiced by counsel not effecting service on the date the appeal petition was filed. (*Id.*, at 5-6.)

Counsel contends that a discretionary dismissal of the appeal petition is not appropriate because (i) the appeal petition satisfied all of the requirements of 13 C.F.R § 134.1105(a); (ii) service was not effected on the date of Appellant's filing the appeal petition due to an inadvertent error of Appellant's counsel, counsel has corrected the certificate of service, and the parties have been served; (iii) the original certificate of service attached to the appeal petition met the requirements of 13 C.F.R § 134.204(d), and counsel believed that service would be effected as described in the original certificate of service; and (iv) neither the SBA nor SBA Counsel was prejudiced by Appellant's counsel not effecting service on the date Appellant filed the appeal petition.

As for OHA's order citing to its own precedent, counsel contends that *VSBC Appeal of So Cal Building & Restoration, Inc.*, SBA No. VSBC-285-A (2023), *VSBC Appeal of Freedom Flawless Cleaning*, SBA No. VSBC-280-A (2023); *VSBC Appeal of Shadowscape Inc*, SBA No. VSBC-266-A (2023), are distinguishable from Appellant's appeal. In *So Cal Building & Restoration*, the appeal petition filed by the appellant did not include a copy of the denial letter and did not indicate when appellant received the denial letter, both of which items are required to be included with the appeal petition under 13 C.F.R § 134.1105(a). Such appeal petition did not satisfy the requirements of 13 C.F.R § 134.1105(a), and the deficiency was not cured within the 10 business days for filing an appeal under 13 C.F.R § 134.1104(a). Therefore, the appeal petition was untimely. Counsel maintains that in such case, 13 C.F.R § 134.1104(c) required it to be dismissed. Additionally, such appellant did not respond to the order to show cause. (*Id.*, at 7.)

In contrast, Appellant argues that its appeal petition satisfied the requirements of 13 C.F.R § 134.1105(a), and therefore was not untimely, and mandatory dismissal under 13 C.F.R § 134.1104(c) does not apply. Further, Appellant's original certificate of service was attached to the appeal petition. Counsel concedes that it failed to serve the appeal petition as required by 13 C.F.R. § 134.1105(b) and that “[a]rguably, the certificate of service attached to the Appeal Petition did not satisfy the requirements of 13 C.F.R § 134.1105(c) because the date stated in the certificate of service [. . .] turned out to be incorrect.” (*Id.*, at 8.) Counsel justifies that “[s]uch was only because [of counsel's] misspelling the applicable email address (in the transmittal email

message and not in the certificate of service).” (*Id.*) Although a deficiency in service and a deficiency in the certificate of service are grounds for discretionary dismissal under 13 C.F.R. § 134.1105(d), for the reasons set forth, discretionary dismissal is not warranted. Further, counsel adds that it has corrected the certificate of service and defective service two days after being notified of it by OHA and timely responded to OHA's order, whereas the appellant in *So Cal Building & Restoration*, failed to respond. (*Id.*, at 8-9)

In *Freedom Flawless Cleaning*, counsel argues that the appellant's petition did not satisfy the requirements of 13 C.F.R. § 134.1105(a), and that appellant did not cure the deficiencies so that dismissal under 13 C.F.R. § 134.1104(c) was required. In contrast, Appellant's appeal petition satisfied the requirements of 13 C.F.R. § 134.1105(a), and therefore 13 C.F.R. § 134.1104(c) does not apply. In *Shadowscape*, counsel contended that the appeal petition was not timely filed, requiring mandatory dismissal under 13 C.F.R. § 134.1104(c). Here, Appellant's appeal petition clearly was filed timely and thus, 13 C.F.R. § 134.1104(c) does not apply.

Appellant thus asks that the appeal petition not be dismissed and that Appellant be permitted to proceed with its appeal.

II. Discussion

The original appeal petition filed on July 19, 2023, was timely but noncompliant, and upon corrective action on July 28, 2023, the appeal is now untimely but in compliance with the service requirements. Therefore, I must dismiss this appeal as untimely.

As a matter of law, the regulations require that for commencement of a VOSB appeal petition, a concern whose application for VOSB certification has been denied must file its appeal within 10 business days of receipt of the denial or decertification. 13 C.F.R. §§ 134.1104(a); 134.202(d). OHA must dismiss an untimely appeal. 13 C.F.R. § 134.1104(c). The appellant must serve copies of the entire appeal petition upon the D/GC and SBA Counsel at OPLservice@sba.gov. 13 C.F.R. § 134.1105(b). Appellant must attach to the appeal petition a signed certificate of service meeting the requirements of 13 C.F.R. § 134.204(d). 13 C.F.R. § 134.1105(c). An appeal petition that does not meet all the requirements of this regulation may be dismissed by the Judge at his/her own initiative or upon motion of a respondent. 13 C.F.R. § 134.1105(d). Moreover, OHA may not modify the “time period governing commencement of a case (i.e., when the appeal petition may be filed). . . .” 13 C.F.R. § 134.202(d)(2)(i)(A).

In looking at the record, D/GC's denial letter gave clear instructions as to how to file an appeal and identified the correct email address as follow:

You will need to attach a signed certificate of service to your appeal, and submit the entire appeal petition to the [D/GC] and SBA Counsel at OPLservice@sba.gov.

Denial, at 5.

Here, it undisputed that service of the original appeal petition was not made to OPLservice@sba.gov on July 19, 2023, the last day to file a timely and compliant appeal

petition. Thus, Appellant was noncompliant with 13 C.F.R. § 134.1105(b) and 13 C.F.R. § 134.1105(c). Further, Appellant's original certificate of service was also noncompliant, because actual service was in fact made to a non-existent email account. Counsel concedes that it was counsel's own error and did not effectuate service on July 19, 2023, when required by the regulations, *supra*.

Counsel's argument that neither SBA nor SBA Counsel was prejudiced by Appellant's counsel not effecting service on the date Appellant filed the appeal petition raises an irrelevant issue, because when commencing an appeal the regulations require an "appellant must serve copies of the entire appeal petition upon the D/GC and SBA Counsel at OPLservice@sba.gov." 13 C.F.R. § 134.1105(b). Certainly, the regulations did not carve out any exceptions when it comes to failing service, but rather give OHA authority to dismiss an appeal which fails to meet the regulatory requirements. 13 C.F.R. § 134.1105(d).

Counsel also offers a reading of the regulations without any support, arguing that if an appellant submits a timely appeal petition which is in compliance with 13 C.F.R. § 134.1105(a), irrespective of failing to follow other requirements under 13 C.F.R. § 134.1105, that an appellant may preserve the time of filing for its appeal. Section I.B, *supra*. Counsel fails to provide a precedent or regulation that permits such a reading, and I conclude that a noncompliant appeal cannot preserve the time of filing.

Lastly, I find it unpersuasive that *So Cal Building & Restoration, Freedom Flawless Cleaning*, and *Shadowscape* are distinguishable from Appellant's appeal. In *So Cal Building & Restoration*, an appellant represented by counsel failed to follow the regulations because the petition was missing a copy of the denial letter, the appeal did not indicate when appellant received the denial letter, and appellant did not include a signed certificate of service. *Id.*, at 1. While counsel stated that he was out of the office and did not see OHA's email, it was incumbent upon appellant and counsel to properly follow the rules for commencement of an appeal. OHA dismissed the appeal, not because appellant failed to respond to OHA's order or failed to cure the defects after the time for filing a timely appeal had expired; rather, OHA found that curing the defects at this stage would be ultimately untimely. Here, Appellant's counsel has corrected the deficiency in service after July 19, 2023, making this appeal untimely.

Similarly, in *Freedom Flawless Cleaning*, an appellant filed a deficient appeal and was noncompliant with 13 C.F.R. §§ 134.1105(a)(2), 134.1111, 134.1110. As the deficiency was not cured within the deadline for filing a proper appeal, OHA dismissed it. Counsel's argument that in all three precedents, *supra*, the appellants did not respond to OHA's order, while Appellant did respond, is also irrelevant. Failure to respond to OHA's order must be deemed to have approved the proposed disposition. On the other hand, a response to OHA's order does not give appellant a pass to proceed with its appeal.

The rules of practice are simple and clear.⁴ When applying them, OHA may summarily dismiss the appeal filed on July 19, 2023, as noncompliant with the regulations, and now that the

⁴ Certainly, counsel was aware of the regulations and D/GC and SBA Counsel's email address, OPLservice@sba.gov. That counsel did not receive notification that it served a non-

attempt to cure the deficient service is untimely, OHA must dismiss the appeal as untimely. 13 C.F.R. §§ 134.1105(d), 134.1104(c); *see e.g., So Cal Building & Restoration*, at 1; *Freedom Flawless Cleaning*, at 1; *Shadowscape*, at 1. Appellant's appeal petition filed on July 19, 2023 was deficient, and Appellant did not avail itself of the opportunity to cure the deficient service within the deadline for filing an appeal compliant with the regulations. Appellant's attempt to cure the defect after the deadline results in its appeal being plainly untimely.

III. Conclusion

Accordingly, the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(A); 13 C.F.R. § 134.1112(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

existent email account because counsel misspelled the email address and/or that OHA did not inform of it prior to issuing the Order to Show Cause, are vain attempts to shift responsibility, when the sender is responsible for the transmission.