

**UNITED STATES OF AMERICA  
DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD**

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
v.	:	
	:	ON MOTION TO FILE
MERCHANT MARINER CREDENTIAL	:	
	:	LATE NOTICE OF APPEAL
<u>Issued to: JEFFREY JOHN BADUA, JR.</u>	:	

APPEARANCES

For the Government:  
Jennifer Mehaffey, Esq.

For Respondent:  
Ted H. S. Hong, Esq.

Administrative Law Judge: Brian J. Curley

On May 8, 2018, an Administrative Law Judge of the Coast Guard (ALJ) issued an order approving the terms of a settlement agreement between Complainant Coast Guard and Respondent to resolve the Complaint herein. On September 10, 2018, Respondent filed a Motion to Reopen and Amend the Settlement Agreement (Motion to Reopen). On November 5, 2018, after the Coast Guard filed an opposition to the motion and Respondent filed a reply, the ALJ issued an order denying Respondent's Motion to Reopen. The order was served on Respondent on the same date.

On December 10, 2018, Respondent filed a Notice of Appeal, appealing the order. The Docketing Center informed Respondent that the notice was untimely, whereupon Respondent filed the instant Motion for Leave to File Late Notice of Appeal. The Coast Guard opposes this motion.

Respondent's counsel explains that his office calendared the appeal deadline at sixty days rather than thirty days, based on the Federal Rules of Appellate Procedure for filing appeals in the federal courts. On the thirty-fifth day, a paralegal noticed the error and the Notice of Appeal was

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filed the same day. Respondent argues that under Federal Rule of Civil Procedure 6(b), an extension of time can be granted, after a deadline has expired, for good cause and “based on a showing of excusable neglect.” 33 CFR 20.306(c) similarly allows for an extension to be requested by motion, after a deadline has expired, describing why the failure to file was excusable.

As Respondent notes, “excusable neglect” is applied in an equitable analysis that includes the following factors: the danger of prejudice to the opposing party, the length of the delay and its potential impact on the proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 394 (1993). A *per se* rule denying extensions of time is “not consistent with *Pioneer*.” *Pincay v. Andrews*, 389 F.3d 853 (9<sup>th</sup> Cir. *en banc* 2004). Further, excusable neglect is not limited to omissions caused by circumstances beyond the control of the movant. *Pioneer*, 507 U.S. at 391, 392.

The Coast Guard argues that a calendaring mistake is not excusable neglect, citing *Appeal Decision 2710 (HOPPER)* (2015) as binding precedent, and urges that Respondent’s motion be denied.

The decision whether to grant an extension is fundamentally a matter of discretion. Hence to describe *HOPPER* as binding precedent, implying that it forbids ever granting an extension for a calendaring mistake, is inapt. The Coast Guard’s argument also seeks to establish a *per se* rule, which, as already noted, is not consistent with *Pioneer*. *HOPPER* should not be read to support the notion of a *per se* rule.

In this case, the Notice of Appeal was filed only five days late. This did not prejudice the Coast Guard and had no impact on the proceeding. There is no hint of other than good faith on the part of Respondent. As for the reason for the delay, it was within the control of Respondent, but it was not a matter of a complete lack of appropriate management systems. To the contrary, a mistake was made in using calendaring software; no doubt Respondent’s counsel conducts much more business in the federal courts than in Coast Guard Suspension & Revocation Proceedings.

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Further, the mistake was discovered internally, and the Notice of Appeal was filed with no further delay.

Respondent's Motion for Leave to File Late Notice of Appeal should be granted. Respondent has filed an appellate brief, received by the Docketing Center on January 7, 2019.

**ORDER**

The Motion for Leave to File is granted. Respondent's appellate brief will be considered. The Coast Guard may file a reply brief with the Docketing Center thirty-five days or less after service of this Order.

Signed at Washington, D.C., this 12 day of MARCH, 2019.

 ADMIRAL, U.S. C.G.

