

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

UNITED STATES OF AMERICA :
UNITED STATES COAST GUARD :

v. :

MERCHANT MARINER CREDENTIAL :

Issued to: JEFFREY JOHN BADUA, JR. :

DECISION OF THE
VICE COMMANDANT
ON APPEAL
NO. **2726**

APPEARANCES

For the Government:
Jennifer Mehaffey, Esq.
LCDR Alex Satchel, USCG
LT Lisa Liu, USCG

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

Administrative Law Judges:
Bruce T. Smith
Brian J. Curley

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5, and 33 CFR Part 20.

By an Order dated October 17, 2019, an Administrative Law Judge (ALJ) of the United States Coast Guard denied as untimely what he construed to be Respondent Mr. Jeffrey John Badua, Jr.'s request for a hearing on the Coast Guard's Notice of Failure to Complete Settlement Agreement (Respondent's request was captioned "Motion to Enforce Settlement Agreement").

Respondent appeals.

FACTS

At all relevant times, Respondent held a Merchant Mariner Credential (MMC) issued by the United States Coast Guard. On February 27, 2018, Respondent took a required pre-employment drug test, pursuant to 46 CFR Part 16. The urine sample provided by Respondent tested positive for hydromorphone. Respondent maintains that the positive result was the result of a one-time, inadvertent use of another person's prescription medication.

The Coast Guard issued its Complaint against Respondent's MMC on April 13, 2018, for use of a dangerous drug, in violation of 46 USC § 7704(c). On April 30, 2018, the Coast Guard and Respondent entered into a Settlement Agreement.

By signing the Settlement Agreement, Respondent admitted the jurisdictional and factual allegations of the Coast Guard Complaint. The Settlement Agreement provided that Respondent's MMC was revoked, but that the revocation would be stayed in order to allow Respondent to complete the elements of "cure" from use or addiction to use of a dangerous drug. *See* 46 U.S.C. § 7704; 33 CFR § 20.502; 46 CFR § 5.901(d); *Appeal Decision 2535 (SWEENEY)*, 1992 WL 12008768.

Paragraph 2.k. of the Settlement Agreement provides that Respondent will send all evidence and documentation of the elements of cure to Coast Guard Sector Honolulu. Paragraph 3 provides that, upon review of Respondent's evidence and documentation, the Coast Guard shall do one of three things:

- a. Accept the evidence and notify the Respondent and Docketing Center of the successful completion and return the Respondent's Credentials and Endorsements. . . .
- b. Reject the evidence, notify the Respondent in writing of any deficiencies in the evidence and grant Respondent 30 days to correct the deficiencies; or
- c. Reject the evidence and notify the Respondent and Docketing Center of the failure to complete and that an order of REVOCATION will be automatically invoked in accordance with . . . this Agreement unless the Respondent requests a hearing before an ALJ on the Coast Guard's rejection of the Respondent's evidence by filing a written request with the Hearing Docket Clerk within 10 days of receiving the notice of failure to complete.

Paragraph 4 provides: “If the Respondent requests a hearing before an ALJ under the provisions of paragraph 3c, then the revocation will be stayed until the ALJ issues an order.”

On May 7, 2018 the Coast Guard filed a motion for approval of the Settlement Agreement, and the following day a Coast Guard ALJ issued a Consent Order approving the terms of the Agreement.

PRIOR PROCEDURAL HISTORY

On September 10, 2018, Respondent filed a “Motion to Reopen and Amend the Settlement Agreement” (petition to reopen). The Coast Guard opposed this motion. A Coast Guard ALJ issued an Order denying the petition on November 5, 2018.

Respondent filed notice of appeal from that Order on December 10, 2018. The ALJ Docketing Center informed Respondent that his appeal was untimely, and Respondent then filed a Motion to File Late Appeal. On March 12, 2019, Respondent was granted leave to proceed with his appeal of the ALJ’s denial of the petition to reopen. [Decision of the Vice Commandant on Motion to File Late Notice of Appeal.]

Following full briefing, my decision affirming the ALJ’s denial of Respondent’s petition to reopen, *Appeal Decision 2722 (BADUA)*, 2019 WL 6701325, was signed on October 21, 2019.

PROCEDURAL HISTORY OF PRESENT APPEAL

On June 20, 2019, the Coast Guard served Respondent with a Notice of Failure to Complete Settlement Agreement (Notice of Failure). Under the terms of the Settlement Agreement, quoted above at page 2, Respondent had ten days in which to request an ALJ hearing on the Notice of Failure.

On July 18, 2019, Respondent filed a “Motion to Enforce Settlement Agreement and For an Order to Show Cause Why Complainant United States Coast Guard Should Not Be Held in

Contempt,” arguing that Respondent had complied with the terms of the Settlement Agreement, and requesting sanctions against the Coast Guard. The Coast opposed this motion.

On October 17, 2019, the ALJ issued a written Order, construing Respondent’s Motion as a request for hearing on the Notice of Failure, and denying the request as untimely.

Respondent filed notice of appeal from the ALJ decision on October 30, 2019, and perfected that appeal by brief of December 16, 2019. The Coast Guard filed a brief in opposition on February 11, 2020. This appeal is properly before me.

BASES OF APPEAL

Respondent appeals from the ALJ’s finding that Respondent’s Motion to Enforce Settlement was untimely, arguing, first, that the finding was incorrect, as a matter of fact and law, and, second, that the finding was contrary to public policy. This opinion will also consider whether the ALJ abused his discretion in refusing to allow Respondent to proceed with an untimely request for hearing, as that question is implicitly raised.

OPINION

I.

Did the ALJ err in finding Respondent’s request for hearing untimely?

Respondent argues that the ALJ erred in finding that the Motion of July 18, 2019, was untimely. Respondent insists that the Settlement Agreement gave him up to 30 days to respond to the Notice of Failure, so his request for hearing, filed 28 days after receipt of that Notice, was timely in fact.

Timeliness is a mixed question of fact and law. The date of any particular filing is a question of fact, but the application and calculation of filing deadlines may require legal interpretation.

Here, there is no factual dispute about the relevant dates: Respondent was served with the

Coast Guard Notice of Failure on June 20, 2019, and Respondent filed the instant Motion and request for hearing 28 days later, on July 18, 2019.

The question on appeal, then, is a question of legal interpretation: Respondent argues that the ALJ erred in applying Settlement Agreement Paragraph 3.c.'s ten-day response deadline to his request for hearing. The ALJ found: "The Settlement Agreement is clear, if the Coast Guard rejects Respondent's evidence and notifies him of a failure to complete, Respondent has ten days to request a hearing challenging the failure to complete. . . . The Respondent clearly missed the ten-day deadline as he was 18-days late." [October 17, 2019 Order at 4.] According to Respondent, "The Settlement Agreement clearly provided two options once the Coast Guard rejected the evidence; option 3.b. or 3.c." [Respondent Appellate Brief at 11 (emphasis in the original).] Respondent therefore reasons that, upon receipt of the Notice of Failure, "According to section 3.b. of the Settlement Agreement, Respondent had 30 days to correct any deficiencies."¹ [*Id.* at 12.]

This argument is contrary to the texts of the Settlement Agreement and the Notice of Failure. "A settlement agreement is a contract, and is reviewed, like all contracts, to ascertain its meaning [W]hen a contract's words and meaning are unambiguous, its terms are not subject to variation." *Slattery v. Dep't of Justice*, 590 F.3d 1345, 1347 (Fed. Cir. 2010) (affirming Merit Systems Protection Board interpretation of settlement agreement in federal employment dispute). Here, the language of Paragraph 3 is unambiguous: upon receipt of Respondent's evidence of cure, the Coast Guard shall review that evidence and proceed with one of three courses of conduct: (a) accept the evidence and return Respondent's credential; (b) reject the evidence and grant Respondent 30 days to remedy deficiencies; or (c) reject the evidence and notify Respondent that he has failed to complete the elements of cure, resulting in automatic revocation under the terms of the Agreement, unless he requests a hearing.

The Notice of Failure, received by Respondent on June 20, 2019 reads:

¹ It is unclear, from Respondent's brief, whether he is arguing that the Coast Guard intended the Notice of Failure to be a notification of deficiencies, under Paragraph 3.b., or that the Settlement Agreement grants Respondent the choice of how to respond to a Coast Guard notification of inadequacy, under either 3.b. or 3.c. Neither argument holds water.

The Coast Guard and Respondent entered into a settlement agreement, which was approved by a Consent Order that was issued on 5/08/2018. Under the terms of the settlement agreement, if the respondent failed to successfully complete the requirements of the agreement, the stayed order would go into effect in accordance with the agreement.

* * *

Under the terms of the agreement, the records at the Docketing Center and the Respondent's Merchant Mariner's Records will be modified to reflect that the stayed sanction is in full force and effect, unless the Respondent requests a hearing under the terms of the agreement.

This language clearly and unambiguously uses the language of Paragraph 3.c. of the Settlement Agreement: unless Respondent requests a hearing, the full sanction of revocation will be invoked.

Respondent argues that the Notice of Failure gave him 30 days to correct deficiencies (per Paragraph 3.b.), but that Notice's provision for automatic lift of the stay on revocation (should Respondent not request a hearing) and, indeed, the caption of the document, "Notice of Failure to Complete Settlement Agreement," unambiguously refer to Paragraph 3.c. of the Settlement Agreement. While an explicit mention of the ten-day time limit for filing a request for hearing in the text of a Notice of Failure might prevent future claims of confusion, there is no legitimate confusion here. Respondent had full and fair notice from the Notice of Failure that the Coast Guard was invoking Paragraph 3.c. of the Settlement Agreement, and, per the terms of that agreement, Respondent had ten days in which to request a hearing if he wished to prevent the full entry into force of the stayed sanction of revocation.

Because the Settlement Agreement and the Notice of Failure clearly and unambiguously established a ten-day filing deadline for any request for hearing, I affirm the ALJ's finding that Respondent's request for a hearing was, as a matter of fact and law, untimely.

II.

Did the ALJ abuse his discretion by disallowing Respondent's untimely request for hearing?

The preceding section has resolved the legal and factual question of timeliness. But, of course, not every missed filing deadline is fatal to a litigant's case. In these administrative

proceedings, as in the federal courts, an extension of a filing deadline may be granted, even after the expiration of that deadline, on motion describing why the failure to timely file was excusable. See 33 CFR § 20.306(c); Fed. R. Civ. Pro. 6(b); *Appeal Decision 2710 (HOPPER)* at 4-5, 2015 WL 6777337 at 3-4.

Here, Respondent has filed no such motion. Even absent a formal request for leave to untimely file, the ALJ, in his Order denying Respondent's request for hearing, considered the "excusable neglect" equitable analysis for allowance of late filings, provided by *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 394 (1993). [October 17, 2019 Order at 5.] "The decision to grant an extension is a matter of discretion. Here, Respondent has provided no good cause for the delay in filing. As a result, even after applying the standards set forth in *Pioneer*, there is no excusable neglect." [*Id.*]

As noted above, Respondent missed a prior deadline in this matter, for filing notice of appeal of the ALJ's denial of a motion to reopen and amend the Settlement Agreement. There, the ALJ Docketing Center notified Respondent that his notice was untimely, and Respondent filed a successful motion for leave to file late appeal. In that motion, Respondent explained that his tardy filing was the result of a calendaring error, and should be considered "excusable neglect."

My March 12, 2019 Decision on Respondent's motion for leave to file late appeal applied the equitable *Pioneer* "excusable neglect" analysis. I accepted Respondent's explanation, and, seeing no countervailing factors, allowed him to proceed with his tardy appeal. [Decision of the Vice Commandant on Motion to File Late Notice of Appeal at 2.]

The situation now is quite different. Respondent has missed a second deadline, this time by 18 days. Here, unlike before, Respondent did not argue that his tardy filing was justified, by good cause, excusable neglect, or any other legal theory. He argues, rather, that he is not required to make any such showing: "Respondent did not state a reason for untimeliness in filling his motion, because Respondent was not untimely." [Respondent Appellate Brief at 12.]

In these circumstances, where Respondent has not provided any explanation, the ALJ's refusal to allow an untimely filing was no abuse of discretion.

III.

Was the ALJ's refusal to consider Respondent's request for hearing contrary to public policy?

Respondent argues that the ALJ's order, denying his request for hearing as untimely and thereby upholding revocation of his credential, is contrary to public policy and "inconsistent with the full and impartial course of justice. . . ." [Respondent Appellate Brief at 10.] According to Respondent, "The question as to whether Respondent was untimely or not in filing his motion to enforce the settlement agreement should not be the fundamental decision in this matter." [Respondent Appellate Brief at 12.] This is essentially a plea that Respondent's opportunity to demonstrate the elements of cure, and seek modification of the revocation order, should not be thrown out on a technicality.

On review of the ALJ Order, and the complete administrative record in this case, I find no compelling public policy interest in allowing Respondent to flout the rules of procedure established by duly enacted regulation. "[T]he time limits in 33 CFR Part 20, Subpart J . . . are mandatory processing rules that should not be lightly relaxed when they are exceeded without a prior request for extension. No party . . . should expect that these time limits will be routinely relaxed in those circumstances." *Appeal Decision 2710 (HOPPER)* at 4, 2015 WL 6777337 at 3.

Respondent has missed a regulatory filing deadline, and not for the first time. Respondent has provided no explanation for his failure to timely file. The ALJ was legally and procedurally justified in denying Respondent's untimely request for hearing, and I will not disturb his ruling on appeal.

CONCLUSION

The ALJ's denial of Respondent's motion as untimely was neither erroneous nor an abuse of discretion. No relief is warranted.

ORDER

The ALJ's Order dated October 17, 2019 is AFFIRMED.


ADMIRAL USCG
VICE COMMANDANT

Signed at Washington, D.C., this 27 day of APRIL, 2020.