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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

June 8, 2020

In the Matter of
Emile Tayeh, Jr.

OADR Docket No. WET-2019-016
DEP File No. SE 220-1353
Superseding Order of Conditions-DENIAL

Middleboro, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

This is an appeal of a Superseding Order of Conditions – Denial (“SOC”) issued by the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) pursuant to the Massachusetts Wetlands Protection Act, M.G.L. c 131, § 40, and the Wetlands Regulations, 310 CMR 10.00. The appeal is brought by Emile Tayeh, Jr. (“the Petitioner”). The SOC denied the Petitioner’s proposal to construct two wetland crossings in order to access an existing agricultural field. The Petitioner’s appeal was filed well beyond the deadline for filing the appeal. MassDEP has moved to dismiss the appeal as untimely. The Petitioner opposes dismissal, arguing that his appeal was filed late due to excusable neglect and the appeal deadline was tolled.

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As discussed below, I find that there is no equitable basis to toll the filing deadline or excuse the late filing. Because the appeal was not timely filed, the Office of Appeals and Dispute Resolution (“OADR”) lacks jurisdiction to adjudicate the appeal. Therefore, I recommend that the Department’s Commissioner issue a Final Decision dismissing the appeal and affirming the SOC.

FACTUAL & PROCEDURAL BACKGROUND

The Petitioner filed a Notice of Intent with the Town of Middleboro Conservation Commission (“MCC”) requesting approval for construction of two wetland crossings to access existing agricultural fields (“Proposed Project”). One of the crossings had already been constructed over an area of Bordering Vegetated Wetlands (“BVW”) and intermittent stream area. SOC Cover Letter at p. 1. The MCC issued an Enforcement Order (“EO”) to the Petitioner requiring removal of the existing culvert and restoration of the crossing area. SOC Cover Letter at p. 2. MassDEP issued the SOC to the Petitioner on April 8, 2019, denying the Proposed Project because the existing and proposed stream crossings did not meet or comply with applicable regulatory standards, and supporting the issuance and requirements of the EO. MassDEP sent the SOC by certified mail to the Petitioner in care of his attorney, Michael A. Kelly. See Notice of Claim, Exhibit A (SOC). According to the date stamp on Exhibit A, the SOC was received by Attorney Kelly on April 10, 2019. This appeal of the SOC was received by OADR on May 28, 2019, fifty days after issuance of the SOC.

After reviewing the Notice of Claim and determining that it was not timely filed as required by 310 CMR 10.05(7)(j)2,¹ I issued an Order to Show Cause to the Petitioner pursuant

¹ This section provides that to be timely filed, an appeal of “Reviewable Decision”, here the SOC, must be filed with OADR no later than ten business days after the SOC is issued. A “Reviewable Decision” means a MassDEP decision that is a superseding order of conditions or superseding denial of an order of conditions, a superseding

to 310 CMR 1.01(5) and 310 CMR 1.01(6)(d), directing him to show cause why this appeal should not be dismissed for lack of jurisdiction. At the same time, MassDEP moved to dismiss the appeal for lack of jurisdiction based on the late filing. After requesting and receiving an enlargement of time to file responses to the Order and MassDEP's motion, the Petitioner filed his response to the Order to Show Cause and MassDEP's Motion to Dismiss.

In his response, the Petitioner made two arguments. First, he argued that the filing deadline should be tolled on equitable grounds. Second, he argued that his failure to timely file the appeal resulted from excusable neglect. After the Petitioner filed his response, MassDEP renewed its Motion to Dismiss.

DISCUSSION

I. THE JURISDICTIONAL NATURE OF THE FILING DEADLINE

The Wetlands Regulations provide that a person with a right to file an appeal of a SOC must file the appeal within ten business days of the date the SOC is issued. 310 CMR 10.05(7)(j)2.a. The administrative cases have consistently construed the timely filing of an appeal as a jurisdictional requirement that has been strictly applied. Matter of Boyajian, OADR Docket No. WET-2010-030, Recommended Final Decision, 2011 MA ENV LEXIS 50 (February 23, 2011), adopted by Final Decision, 2011 MA ENV LEXIS 48 (March 9, 2011); Matter of Berkshire Housing Authority, Docket No. 2010-007, Recommended Final Decision (March 16, 2010) (dismissing appeal as untimely by one day), adopted by Final Decision (March 19, 2010); Matter of Stanley E. Bogaty and Frances Bogaty, Docket No. 2001-005, Final Decision (September 19, 2001) (dismissing appeal as untimely by one day); Matter of Joseph Demaio, Docket No. 97-063, Final Decision (April 9, 1998) (dismissing appeal as untimely by two days); determination of applicability, and/or a superseding order of resource area delineation, or a variance. 310 CMR 10.04.

see also Matter of Xarras, Docket No. 2008-059, Recommended Final Decision (June 26, 2008), adopted by Final Decision (June 27, 2008); Matter of Bay Park Development Trust, Docket No. 88-291, Final Decision - Order of Dismissal (March 31, 1989); Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993); Matter of Cross Point Limited Partnership, Docket No. 95-088, Final Decision (April 30, 1996). The Rules for Adjudicatory Proceedings authorize a Presiding Officer to dismiss an appeal where jurisdiction is lacking. 310 CMR 1.01(5)(a)2; see also 310 CMR 1.01(11)(d) (Motion to Dismiss may be filed for lack of jurisdiction); Matter of Boyajian, *supra*.

A. THE ASSERTED CIRCUMSTANCES OF THE LATE APPEAL

The undisputed facts are as follows: (1) MassDEP issued the SOC on April 8, 2019; (2) the Petitioner's attorney received the SOC on April 10, 2020; (3) the Petitioner consulted with his engineer to determine if an appeal should be brought; (4) when the engineer advised the Petitioner to file an appeal, the deadline for filing had already passed; (5) the Petitioner filed his appeal on May 28, 2019, fifty days after issuance of the SOC.

B. THERE IS NO BASIS FOR TOLLING THE FILING DEADLINE.

The issue is whether the circumstances described by the Petitioner to justify his late appeal provide a basis for tolling the filing deadline on equitable grounds. For the reasons discussed below, I find that they do not. Neither the Rules for Adjudicatory Proceedings, 310 CMR 1.01, nor the Wetlands Appeal Regulations at 310 CMR 10.05(7)(j), provide a Presiding Officer with the explicit authority to extend the ten business day filing requirement in an administrative appeal under the wetlands regulations.

Nonetheless, the doctrine of equitable tolling has been applied in MassDEP's administrative cases for at least the last thirty years under circumstances where a party entitled to

notice of a Reviewable Decision did not receive notice, and as a result of not having notice, missed an appeal deadline. See Matter of FTO Realty Trust, OADR Docket No. WET-2015-024RM, Recommended Final Decision After Remand, 2018 MA ENV LEXIS 65 (October 19, 2018), adopted by Final Decision, 2015 MA ENV LEXIS 64 (October 29, 2018); see also Matter of M.G. Hall Company, Docket No. WET-2012023, Recommended Final Decision (May 7, 2013) (citing prior decisions), adopted by Final Decision (March 19, 2014) (“In unusual circumstances, the Department has recognized that the ten day appeal period may be tolled where legally required notice was not given to a party entitled to receive it and where the failure to obtain notice caused that party's failure to timely file an appeal”); see also Matter of Cormier Homes Construction, OADR Docket No. WET-2015-002, Recommended Final Decision, 2015 MA ENV LEXIS 54 (June 23, 2015), adopted by Final Decision, 2015 MA ENV LEXIS 52 (June 25, 2015) (tolling does not apply to circumstances where Petitioner not entitled to notice; appeal period is jurisdictional and cannot be extended). These are the only circumstances in which OADR has applied the doctrine of equitable tolling, and the Petitioner has cited no others. The Petitioner indisputably timely received the SOC, and thus MassDEP’s tolling doctrine for when a party does not receive notice is inapplicable.

The Petitioner acknowledges that the ten-day filing deadline in 310 CMR 10.05(7)(j)2.a. has been strictly construed in administrative and court decisions as a jurisdictional requirement. He also acknowledges that the doctrine is used sparingly and is limited to specified exceptions, citing Shafnacker v. Raymond James & Assocs., 425 Mass. 724, 683 N.E.2d 662 (1997) (investor action against fiduciaries). But he argues that “the filing deadline should be considered similarly to a statute of limitations, which would provide for equitable doctrines to be applied, such as equitable tolling....” Petitioner’s Response at p. 2. He argues that MassDEP’s regulatory

interpretation of the WPA's process for appealing the SOC can be expanded to allow for tolling of the deadline. Petitioner's Response at p. 3. Further, he asserts that there is no explicit prohibition against tolling. He argues that because he made a good faith effort to pursue his appeal rights by seeking the advice of his engineers to ensure that his appeal was "intelligently filed and advisable" the filing deadline should be tolled. Petitioner's Response at 5-6. He asserts that he was pursuing his rights diligently and had no control over the time it took for his engineers to make their determination. He believes this lack of control should be considered "extraordinary circumstances" warranting equitable relief.²

The Petitioner's argument is not persuasive for the following reasons. First, there is no dispute that the Petitioner had notice of the SOC. As noted above, OADR has applied the doctrine of equitable tolling, but only in the circumstance where a person required to receive notice of a Reviewable Decision did not receive notice. That is not the case here. The Petitioner has not cited any OADR decision in which the doctrine of equitable tolling was applied except where there was a lack of notice.

Second, the Petitioner's argument that the administrative process for appealing the SOC should be expanded to allow for tolling of the deadline is without merit. He has not provided any facts that could possibly support an equitable basis for tolling. He argues that he has been pursuing his rights diligently and some extraordinary circumstance stood in his way, citing Burns v. Prudden, 588 F. 3d 1148, 1150 (8th Cir. 2009). Theoretically, this argument could apply to

² There are Massachusetts Rules of Civil Procedure which provide relief to litigants who have missed certain filing deadlines, for example, Mass. R. Civ.P. 60(b)(court has the power to vacate a judgment in limited situations to accomplish justice). A party seeking such relief must show "extraordinary circumstances suggesting that the party is faultless in the delay." Altieri v. Bothner, Memorandum and Order on Plaintiff's Motion to Vacate Judgment of Dismissal, 1996 Mass. Super. LEXIS 638, 5 Mass. L. Rep. 129, 1996 WL 1185136 (January 5, 1996), quoting Pioneer Inv. Serv. Co. v. Brunswick Assoc., Ltd., 507 U.S. 380, 113 S. Ct. 1489, 1497, 123 L. Ed. 2d 74 (1993). Relief requires exceptional circumstances warranting extraordinary relief. Id. The wetlands appeal regulations do not contain any analogous rule.

every appeal. Any Petitioner could file late and then justify the untimeliness by asserting that he was making sure his appeal was viable. This would render ineffective the regulatory deadlines to file an appeal.

Even if I were to accept his argument, which relies on civil precedents applying different rules in other jurisdictions, the Petitioner's conclusory statements that he was pursuing his rights diligently and that extraordinary circumstances stood in the way of a timely appeal are not supported by the facts he presents. See Petitioner's Response at p. 5 and Affidavit of Emile Tayeh, Jr. The circumstances he describes are hardly extraordinary. In every administrative appeal a party with a right to appeal must determine whether an appeal has merit.

The Petitioner argues that to "penalize [him] for the amount of time engineers took to make the determination that an appeal was practicable would be unjust." Petitioner's Response at p. 5. I disagree. The Petitioner asserts that he had no control over his engineers. *Id.* This conclusory statement is unsupported by any facts.

C. THERE IS NO BASIS TO TOLL THE FILING DEADLINE BASED ON EXCUSABLE NEGLIGENCE.

Next, the Petitioner argues that his appeal should be considered timely because the failure to file on time resulted from excusable neglect. He asserts that "the circumstances are unique because the reason for the late filing was that he was consulting with engineers to determine whether an appeal was appropriate due to [the Department's] decision." Petitioner's Response at p. 6; see also Affidavit of Emile Tayeh, Jr. He asserts that "he was in the process of determining whether an appeal was viable with the engineers when the deadline passed." *Id.* He argues that his appeal is meritorious and there is no prejudice to the Department if the appeal proceeds. *Id.* The Petitioner has not cited any precedent in the administrative cases where the concept of

excusable neglect has been applied to extend the deadline for filing an administrative appeal when, as here, the Petitioner received timely notice. The Department does not address this issue in its Motion to Dismiss.

Neither the wetlands appeal regulations at 310 CMR 10.05(7)(j) nor MassDEP's adjudicatory hearing regulations at 310 CMR 1.01 explicitly or implicitly contain any provision allowing for tolling or extending this filing deadline in cases of excusable neglect. As discussed below, even if the concept of excusable neglect could be applied, and even if I had the discretion under applicable rules to extend the appeal filing deadline, the Petitioner's failure to timely file this appeal did not result from excusable neglect, but rather from "garden variety oversight."

1. The Concept of Excusable Neglect

Neither 310 CMR 10.00 nor 310 CMR 1.01 nor the administrative cases authorize, or provide guidance or precedent for, applying the concept of excusable neglect to an appeal filing deadline. My research identified a single administrative case in which the concept was discussed but in the context of a request for an extension of time to file pre-filed testimony, not file an appeal, and with circumstances purported to be akin to "law office failure." See Matter of Massachusetts Water Resources Authority, Decision and Order on Petitioner's Motion to Extend Time to File Prefiled Direct Testimony, 2004 MA ENV LEXIS 100, Docket No. 2003-166 (September 15, 2004)(finding insufficient grounds for extending time to file testimony).³

³ Black's Law Dictionary (11th ed. 2019) defines "Excusable Neglect" as:

A failure – which the law will excuse – to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care or vigilance of the party's counsel or on a promise made by the adverse party.

There are Massachusetts Rules of Civil Procedure and Massachusetts Rules of Appellate Procedure that explicitly allow a judge to apply the concept of excusable neglect to provide relief to a party who has failed to meet a deadline for some action. See, e.g. Mass.R.Civ.P. 6(b)⁴ , Mass.R.Civ.P. 60(b)⁵ and Mass.R.App.P. 4(c).⁶ These rules speak to an application of equitable principles and a consideration of all the circumstance surrounding the failure to complete an action. Raymond v. IBM Corp., 148 F.3d 63, 66 (2d Cir. 1998), quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993). Civil cases applying these Rules provide some guidance for determining whether conduct or circumstances constitutes excusable neglect. These cases make clear that simply taking time to decide whether to bring an appeal, as asserted here, does not meet the standard of conduct constituting excusable neglect.

“The excusable neglect standard has been characterized as ‘stringent’ and calls for “unique or extraordinary circumstances.” “Garden Variety” oversight will not suffice.” Feltch v. General Rental Company, 383 Mass. 603, 613-614, 421 N.E. 2d 67 (1981). In Shaev v. Alvord,

⁴ This rule relating to service and filing of pleadings and other papers provides in pertinent part:

When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect. . . (emphasis added).

"Rule 60(b) of the Massachusetts Rules of Civil Procedure provides a limited exception to the finality of a judgment. Relief is available in a narrow set of circumstances, specified in subdivisions (b)(1) through (b)(6), to accomplish justice." Johnny's Oil Co. v. Eldaya, 82 Mass. App. Ct. 705, 978 N.E. 2d 86 (2012), quoting Jones v. Boykan, 79 Mass. App. Ct. 464, 468, 947 N.E.2d 87 (2011).

⁵ This rule governing relief from judgment or order provides, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect....

⁶ Pursuant to Mass.R.App.P. 4(c), the 30-day time for filing a notice of appeal of a judgment, decree, appealable order, or adjudication may be extended “[u]pon a showing of excusable neglect....”

66 Mass. App. Ct. 910, 848 N.E.2d 438 (2006), applying Mass.R.App.P. 4(c), the plaintiff's lawsuit was dismissed for failure to comply with the pleading requirements of Mass.R.Civ.P. 23.1, governing shareholder derivative actions. The plaintiff failed to file his notice of appeal of the judgment of dismissal within the deadline prescribed by Mass.R.App.P. 4(a). He moved for leave to file an appeal late pursuant to Mass.R.App.P. 4(c), asserting that the failure was the result of excusable neglect, to wit, a failure of communication between attorneys serving as local counsel, resulting in their failure to notify New York counsel of the judgment dismissing the action. *Shae v.*, 66 Mass. App. Ct. 910, at 911. The superior court allowed the motion, finding that the acts of counsel constituted excusable neglect. The judge noted that the matter was important to the parties, the legal issues were significant and debatable, and the client should not suffer the consequences of the lawyer's neglect. *Id.* The Appeals Court reversed, stating that "[t]hese are simply not factors that are relevant to an analysis whether the neglect involved was excusable." *Id.* Rather, excusable neglect "is meant to apply to circumstances that are unique or extraordinary, not to any 'garden-variety oversight.'", *Id.* at 66 Mass. App. Ct. 910, 911, 848 N.E. 2d 438, 440 (2006); see also *Edward R. Pierce v. Hansen Engineering & Manufacturing Co., Inc.*, 95 Mass. App. Ct. 713, 130 N.E. 3d 812 (2019) (defendants' lawyers' mistaken belief as to who would file a notice of appeal constituted garden variety miscommunication and not excusable neglect). "Excusable Neglect...is meant to take care of emergency situations only." *Id.*, quoting *BJ's Wholesale Club, Inc. v. City Council of Fitchburg*, 52 Mass. App. Ct. 585, 587-588 (2001); see also *Johnny's Oil Co. v. Eldaya*, 82 Mass. App. Ct. 705, 978 N.E. 2d 86 (2012)(applying Mass. R. Civ. P. 60(b); "extraordinary circumstances" where wife failed to give husband complaint that had been served until after the time to answer had passed; motion for relief from default judgment denied under Rule 60(b) on other grounds).

Other cases applying these rules make clear that the analysis of whether there has been excusable neglect in any particular case is fact specific. See, e.g., Wallace v. Bajema, Memorandum and Order, 2003 Mass. Super. Lexis 440, 17 Mass. L. Rep. 117 (Superior Ct. at Worcester, Agnes, J., Dec. 5, 2003)(denying motion to dismiss untimely appeal of a denial of a motion for a new trial where delay of several days was due to misinterpretation of procedural rules and not neglect); Brunelle v. Blaise, Memorandum of Decision and Order, 2004 Mass. Super. Lexis 545, 18 Mass. L. Rep. 556 (Superior Ct. at Worcester, Agnes, J., November 24, 2004)(allowing motion to enlarge time under Mass. R. Civ. P. 6(b)(2) where plaintiff failed to complete service of a complaint within 90 days of filing pursuant to Mass. R. Civ. P. 4(j) because of a clerical error in plaintiff's counsel's office due to unexpected staffing changes). The court in Brunelle noted that "[Excusable neglect] governs situations in which counsel for the moving party has neglected his or her responsibilities." Brunelle, 2004 Mass. Super Lexis 545, *13. "'Excusable neglect 'for cause shown' under Rule 6(b) necessarily means that a party's failure to act within required time period under one or another of the rules is the result of a reasonable excuse.'" Id., quoting Motta v. Schmidt Manufacturing Corporation, 41 Mass. App. Ct. 785, 791, 673 N.E. 2d 874 (1996)(upholding dismissal of a complaint for failure to timely substitute administratrix of estate). More than a showing of simple good faith is required. Brunelle, 2004 Mass. Super Lexis 545, *18; see also Neda Dev. Corp. v. Whitman & Bingham Assoc., LLC, Memorandum and Order on Plaintiff's Motion to Vacate Default and Dismissal, 2008 Mass. Super. Lexis 249 (Super. Ct. at Worcester, Lemire, J., August 11, 2008)(motion to vacate allowed; record supported a finding of excusable neglect under Mass. R. Civ. P. 60(b) where medical and personal problems affected counsel's ability to do his work).

As these cases explain, the concept of excusable neglect is meant to apply to unique or extraordinary circumstances, not a party's delay in making a decision whether to file an appeal. And where these cases apply civil and appellate rules that explicitly provide a safe haven for a neglectful litigant, the wetlands appeals regulations do not. The record is devoid of any explanation for the late filing that amounts to circumstances that are unique or extraordinary.

2. The Circumstances Presented Do Not Constitue Excusable Neglect.

The undisputed facts noted above at p. 4 do not constitute unique or extraordinary circumstances. Rather, they constitute "garden variety" oversight, to wit, a simple failure to pay any mind to the filing deadline. There is nothing in the record to indicate that any effort was made to make a timely filing, or any description of circumstances that made a timely filing not possible, such as medical, personal or personnel problems. Here, the Petitioner simply failed to file on time, and I find no basis for excusing the untimely filing.

CONCLUSION

The Petitioner has provided no persuasive authority to support his arguments, and there is simply no provision in 310 CMR 10.05(7)(j) or 310 CMR 1.01 analogous to the rules of civil and appellate procedure cited above and discussed in the cases interpreting and applying those rules that provides the authority for tolling the filing deadline or excusing the late filing. For these reasons, I recommend that the Department's Commissioner issue a Final Decision dismissing the appeal and affirming the SOC.

Date: 6/8/2020



Jane A Rothchild
Presiding Officer

SERVICE LIST

IN THE MATTER OF:

Emile Tayeh, Jr.

Docket No. WET-2019-016

Middleboro

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