

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

JEWISH HOSPITAL & ST. MARY'S
INC. d/b/a OUR LADY OF PEACE

and

Cases: 09-CA-066542

AFSCME COUNCIL 62, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES

OPPOSITION TO RESPONDENT'S MOTION
TO ACCEPT LATE FILING OF EXCEPTIONS AND BRIEF
IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION

Counsel for the Acting General Counsel opposes Respondent's motion for the Board to accept the late filing of its exceptions and brief in support of exceptions to the Administrative Law Judge's Decision. The gravamen of Respondent's argument is that it did not receive a copy of the Order Transferring Proceeding (Order) until April 6, 2012, and that "it deemed the email transmission of the Decision from Gill to be the modern-day service equivalent /substitution for facsimile transmission." Respondent asserts, therefore, that in "good faith" it "determined that the due date for its Exceptions and Brief in Support were due 28 days later, on April 4, 2012." For the reasons set forth more fully below, Respondent's motion should be denied because Respondent has failed to meet the requirements of Section 102.111(c) of the Board's Rules and Regulations by showing that its failure to timely file its exceptions and related brief is due to excusable neglect.

1. Initially, it is noted that in addition to serving the Order on Ms. Gournis, the Affidavit of Service attached to the Order states that the Order was served on Mr. Nelson (Ms. Gournis' co-counsel during the administrative hearing), Mr. Stickler (Respondent's counsel during the

administrative investigation) and Respondent's CEO, Jennifer Nolan. Although the affidavit from Ms. Gournis, which is attached to the motion, asserts that "neither I, nor Mr. Stickler or any of my other colleagues received the NLRB's Order," the motion does not contain an affidavit from Mr. Stickler, Mr. Nelson or Ms. Nolan, all of whom have personal knowledge of the facts and who could have corroborated Ms. Gournis' assertions that they (Stickler, Nelson and Nolan) did not receive a copy of the Order. Indeed Section 102.11(c) of the Board's Rules and Regulations requires "that the specific facts relied on to support the motion **shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts.**"

(Emphasis supplied.) In addition, the affidavit of service states that the Order was served on Respondent and Respondent's counsel. More should be required to refute this than a simple assertion that the Decision was received but not the Order. Accordingly, for these reasons it is submitted that Respondent's motion does not comport with Section 102.111(c) and should be denied.

2. Respondent did not have a good faith belief that the email delivery of the Decision by Gill was service by the Board. In its motion Respondent avers that Counsel for the Acting General Counsel sent Respondent, via e-mail, a copy of the "Complaint" that had been filed with the U.S. Federal District Court for the Western District of Kentucky by General Counsel in support of its 10(j) petition in Case 3:12-mc-00006-TBR. Counsel for Respondent further avers that "the parties appeared before Senior Judge Thomas B. Russell in the U.S. District Court for the Western District of Kentucky. The parties agreed that Respondent would be deemed to have been properly served on March 1, 2012 based on Gill's e-mail delivery of the Complaint to Respondent." (Resp. Motion par. 4; Resp. Aff. par. 7, n. 1.) Respondent's argument that as a result it honestly believed that the emailing by Gill constituted service of the Administrative Law Judge's decision is without merit and should be rejected.

First, Respondent is relying on documents filed in an ancillary proceeding. Documents submitted for the 10(j) proceeding, as prescribed by the Federal District Court and filed by Counsel for the General Counsel, were filed by e-mail and served on Respondent's Counsel for that proceeding and is not relevant in support of Respondent's argument regarding the filing of exceptions to the Administrative Law Judge's decision. Second, the parties have not appeared in District Court and have not agreed as to any date that Respondent could rely on for the filing of exceptions in response to the Administrative Law Judge's Decision. The filing of the petition in Federal District Court in Case 3:12-mc-00006-TBR occurred on February 22, 2012, prior to the date the Administrative Law Judge decision was issued. Thirdly, Respondent is currently represented by a different law firm in Case 3:12-mc-00006-TBR and not by Counsel in the instant proceeding. The letter dated March 6, 2012, referred to by Respondent in its Motion was sent by Counsel for the Acting General Counsel to the Clerk of Courts in Case 3:12-mc-00006-TBR to advise the Court that the Administrative Law Judge's decision had issued on March 5, 2012. In addition to a copy of the Administrative Law Judge's decision, a copy of the letter was sent to Respondent's Counsel in compliance with the service requirements by the Court and was not sent for the purpose of serving Respondent with the Administrative Law Judge's decision, or to inform Respondent of any dates for Respondent to use for purposes of calculating the due date for filing exceptions to the Administrative Law Judge's decision.

3. Respondent avers in its Motion (par. 7, Aff. 7-8) that it "deemed the e-mail transmission from Gill to the modern-day service/substitute for facsimile transmission. Based on the e-mail transmission of the Decision from Gill, Respondent determined that the due date for its Exceptions and Brief in Support were due 28 days later, on April 4, 2012." Respondent alludes to having received the Administrative Law Judge's decision on March 12, 2012, but avers that the documents did not include the Order Transferring Proceeding to the Board.

Respondent further avers that “it was reasonable to accept the emailed Decision (in the ancillary case) as proper service by Counsel for General Counsel.” (Par. 16; Aff, par. 12-13) This argument is without merit and should be rejected.

Respondent counsel’s reliance on the Board’s decision in *WGE Federal Credit Union*, 346 NLRB 183 (2005) is misplaced. In *WGE*, respondent’s counsel had contacted the Board’s Executive Secretary’s Office concerning the looming deadline in filing exceptions. When told by the Board’s representative that she could seek an extension of time, but that there were no assurances that the request would be granted, Respondent’s counsel decided to file the exceptions by the deadline. However, the exceptions were filed late but only by 30 minutes. Because Respondent missed the deadline by only a few minutes, and no one was prejudiced by the delay, the Board granted the filing of the exceptions. In the instant case, Respondent’s Counsel did not face a looming deadline as was the case in *WGE*, nor did she attempt to inquire with the Board as to the correct deadline for filing the exceptions but simply relied on ancillary documents to calculate what she believed was the date for filing the exceptions.

Respondent’s reliance on an e-mail document filed in an ancillary case in order to determine the appropriate due date for the filing of exceptions in an administrative law case shows lack of due diligence on behalf of Counsel for Respondent. Contrary to Respondent’s assertion, Section 102.113(d) of the Board’s Rules and Regulations only allows for facsimile transmission with the consent of the receiving party. Rather, Rule Sec. 102.46(a) specifically states that exceptions are to be filed “within 28 days, or within such further period as the Board may allow, **from the date of the service of the order transferring the case to the Board....**” Respondent’s reliance on copies of a document used in an ancillary proceeding in order to calculate or determine the filing date to file exceptions goes beyond excusable neglect as defined in the Board’s Rule Sec. 102.111(c). A misreading of the Board’s Rules does not constitute

excusable neglect. See, *International Union of Elevator Constructors, Local No. 2*, 337 NLRB 426 (2002). Respondent counsel's lack of due diligence is further shown by her failure to inquire about having not received that part of the decision that included the "Affidavit of Service of Decision and Recommended Order of the ALJ and Order Transferring Proceeding." If Respondent's Counsel had not received the Order transferring the Proceeding to the Board, a telephone call to the Board's Executive Secretary's Office could have provided her any information necessary for the correct filing date of the exceptions. Moreover, other parties to the proceeding have not indicated that they failed to receive the Order Transferring the Proceeding to the Board. Finally, Respondent's counsel admits to a misinterpretation of the Board's rules by stating in her motion, "As a result of its interpretation of the Board Rules that its Exceptions and Brief in Support were due on April 4, 2012, Respondent filed such documents on that date."

(Par. 9) As the Board has held, a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date. *Elevator Constructors*, supra.

For the above reasons, Counsel for the Acting General Counsel respectfully requests that Respondent's motion to accept its late filing of exceptions be denied.

Dated at Cincinnati, Ohio this 18th day of April 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Opposition to Respondent's Motion to Accept Late Filing of Exceptions and Brief in Support of Exceptions to the Administrative Law Judge's Decision was electronically filed and also served by electronic mail to the following persons:

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