

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

IN THE MATTER OF:

FREISTATT POST OFFICE
FREISTATT, MISSOURI 82929

DOCKET No. A2013-8

**SURREPLY OF UNITED STATES POSTAL SERVICE
TO THE PUBLIC REPRESENTATIVE'S RESPONSE
AND PETITIONER SCHOEN'S REPLY**

(August 20, 2013)

On August 12, 2013, the Public Representative filed a response opposing the Postal Service Motion to Dismiss and supporting Petitioner Schoen's request for late acceptance.¹ On August 12, 2013, Petitioner Schoen filed a reply, opposing the Postal Service Motion to Dismiss.² Both the Public Representative's response and Petitioner Schoen's reply raise arguments that warrant additional clarification or response. Specifically, the Public Representative argues that the Postal Service's Motion to Dismiss misstates the holding in Irwin v. Dept. of Veterans Affairs to support an argument that the Postal Regulatory Commission (Commission) lacks the authority to toll the 30 day appeal period. Petitioner Schoen argues that she is the only person capable to file an appeal to the Commission. Reply at 1. The instant pleading will

¹ Public Representative's Opposition to United States Postal Service Motion to Dismiss and Response in Support of Petitioner's Request to Extend Time for Filing ("Response")(August 12, 2013).

² Reply to Motion of United States Postal Service to Dismiss Proceedings ("Reply")(August 12, 2013).

elaborate upon the Supreme Court's holding in Irwin, and how the holding in that proceeding militates in favor of dismissal.

The Public Representative argues that the Postal Service's Motion to Dismiss "misstates the holding of Irwin." Response at 6. She disagrees with the Postal Service's argument that "39 U.S.C. §404(d)(5) is a limit upon jurisdiction of the Commission that must be strictly construed." Response at 4. The Postal Service argued, however, that Irwin holds that "congressional waivers of sovereign immunity must be construed narrowly." Motion, at 2, citing Irwin, 498 U.S. 89, 94 ("Respondent correctly observes that § 2000e-16(c) is a condition to its waiver of sovereign immunity, and thus must be strictly construed."). An understanding of the underlying controversy in Irwin demonstrates that it clearly supports the principle for which it was cited.

In Irwin, the claimant, Shirley Irwin, filed a complaint with the Equal Employment Opportunity Commission (EEOC) after he was fired from his job by the Veteran's Administration. The EEOC dismissed his complaint by letter. 498 U.S. 89, 91. The letter, which was sent to both Mr. Irwin and his attorney, informed Mr. Irwin had the right to file a civil action within 30 days of receipt of the EEOC notice. Id. The Supreme Court held that the same rebuttable presumption of equitable tolling applies to suits against the government, but should be applied sparingly. Id. at 94-95. The Supreme Court identified two narrow circumstances where the courts may apply equitable tolling principles: "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant has been

induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Id. at 96 (internal citations removed). In Irwin, neither circumstance existed. The Supreme Court held that upon delivery of the EEOC notice to Irwin's attorney, the 30 day period began. Since "the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." Id. Because the relief that Irwin requested, i.e., tolling the 30 day limitation because his attorney was out of town, is not one that is typically granted in litigation between private parties, the Supreme Court affirmed lower courts judgments dismissing the claim. As described in Irwin, the standard for invoking equitable tolling is quite high;³ and the principles do "not extend to what is at best a garden variety claim of excusable neglect." 498 U.S. 89, 96.

Here, as in Irwin, the Petitioner's request for late acceptance should not be granted and the petition dismissed as untimely. The Public Representative and the Petitioner argue that Petitioner Schoen's absence, due to an unavoidable family emergency, should toll the 30 day appeal period. However, neither alleges affirmative misconduct on the part of the Postal Service resulting in the untimely filing. Nor do they allege the Petitioner filed a defective pleading during the 30 day appeal period. Rather, in Petitioner Schoen's Reply, she argues that "there is no other capable person available to file the Appeal in a timely manner." Reply at 1.

³ See also Washington v. Washington Metropolitan Area Transit Authority, 160 F.3d 750 (D.C. Cir. 1998)("The court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances.")(internal citation omitted).

However, this circumstance does not merit tolling the 30 day appeal period for two reasons. First, 39 U.S.C. § 404(d) grants a number of individuals, i.e., any person served by the closing Post Office, the right to appeal the Post Office discontinuance to the Commission. Second, the requirements to file a petition to review are not overly burdensome because no legal argument or analysis is necessary. The Commission merely requires the petition for review to state that 1) the person submitting it is served by the Post Office the Postal Service decided to close; 2) the name and address of the person filing it; and 3) the name or location of the Post Office to be closed. 39 C.F.R. § 3025.10(b).

The Public Representative cites two former Postal Rate Commission orders to support the application of equitable estoppel to the instant appeal. First, in Nassau, Minnesota, due to a delay in the delivery of the appeal, which was postmarked prior to the expiration of the 30 day appeal period, the Postal Rate Commission found that the Postal Service's actions prejudiced the petitioner's ability to comply with the 30 day filing requirement. Order No. 1209, Order Denying Postal Service Motion to Dismiss, Postal Rate Commission Docket A98-1, Nassau, Minnesota (March 5, 1998). Second, in Roanoke, West Virginia, the Postal Rate Commission determined that the Postal Service's failure to adhere to notification procedures throughout the proposal and final determination process prejudiced the petitioner's ability to file an appeal in a timely manner. Order No. 1296, Order Denying Postal Service Motion to Dismiss, Postal Rate Commission Docket A2000-1, Roanoke, West Virginia (June 16, 2000), at 3.

The Public Representative's reliance on these orders is misplaced because the Postal Service complied with regulations throughout the discontinuance process and provided affected customer notification of the impending action. There is no evidence that Postal Service actions contributed to the late filing, such as through delays in mail delivery, or prejudiced the ability of any person served by the Freistatt Post Office to timely file a petition within the 30 day appeal period.

Here, the Postal Service provided adequate notice and made additional efforts to ensure customers in Freistatt had actual notice of the Final Determination to close the Freistatt Post Office. Postal regulations require the Postal Service to post the Final Determination at affected Postal Service-operated retail facilities for thirty days.⁴ Handbook PO-101 Section 422.32. The Final Determination must be "prominently posted for at least 30 days in the affected facilities where the proposal was posted under 352.1." Id. If a facility is under an emergency suspension, then the notice need not be posted at the suspended facility itself but rather the Final Determination must be posted at nearby Postal Service operated retail facilities.⁵

The Public Representative argues that the cluster box units (CBUs) should be deemed as a "USPS-operated retail facility" for purposes of the regulation.

Response at 14. However, Handbook PO-101 defines a "Postal Service-

⁴ The Public Representative argues that 39 U.S.C. § 404(d)(5) "focuses on the availability of the notice, not the date stamp on the notice of final determination." Response, at 7. However, the date of availability of the final determination has long been recognized as when the Postmaster or postal employee posted the record. The round date stamp serves to record the date of posting. Thus, the round-date stamp is evidence of when the document was made available to the public.

⁵ "For offices whose operations are suspended, the posting instead takes place at the Postal Service-operated retail installation(s) providing alternative service, since that is where customers can see it." Handbook PO-101, Section 352.1.

Operated Retail Facility,” as “a Post Office, classified station, or classified branch operated by the Postal Service” and CBUs are not within the scope of this definition.

This is also consistent with Commission precedent. In Graves Mills, the Commission held, “[a]s Petitioner notes, notice could have been posted at the cluster box unit. Postal Service regulations, however, do not require such additional notice requirements.” PRC Order No. 672, Order Dismissing Appeal, PRC Docket No. A2011-3, Graves Mills Post Office, (February 11, 2011), at 7. Since postal regulations do not require the Postal Service to post the Final Determination at the CBUs, the Commission concluded, in the case of an emergency suspension, posting the Final Determination in a nearby Post Office and the Administrative Post Office provided sufficient notice. Id. Thus, since the Postal Service provided adequate notice, the Commission concluded that the petitioner’s request for review, which was filed after the 30 day appeal period, was untimely and dismissed the appeal. Id. at 8 (“Therefore, the appeal is dismissed as untimely”).

The facts presented are nearly identical to those presented in Graves Mills Post Office. Here, like in Graves Mills, the appeal involves the closing of a suspended retail facility. The Postal Service posted the Final Determination at the nearby Post Office and at the Administrative Post Office. Additionally, the Postal Service went beyond Handbook PO-101 section 422.32 requirements, and posted the Final Determination at the CBUs. Due to the lack sufficient space on the front of the units, the Postal Service affixed the Final Determination to the

back of the units. If the Postal Service attached the Final Determination on the front of the unit, it ran the risk of having the record destroyed as any location would have obstructed customer access to their box. The Postal Service should not be penalized for voluntarily publicizing information about the Final Determination on the back side of the CBUs.

Here, the Postal Service followed the regulations governing posting the Final Determination when the closing facility is suspended. Further, there was no Postal Service action or omission which contributed to delay or prejudiced any person served by the closing Post Office the ability to timely file an appeal. Thus, the appeal should be ruled untimely. This outcome serves important policy objectives to ensure finality of decisions and enhance the predictability of Postal Service management's planning prerogatives. Once the 30 day appeal period expires and no appeal is filed, the Postal Service should be able to plan appropriately for implementation of discontinuance actions, without the doubt and ambiguity caused by the prospect of untimely appeals.

In sum, the 30 day time limit embodied in section 404(d)(5) is a limit upon the jurisdiction of the Commission that must be strictly construed. None of the facts presented here justify tolling the 30 day appeal period. Therefore, the Commission should dismiss the late appeal as untimely.

Respectfully submitted,

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