

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Robert G. Taub, Vice Chairman;  
Mark Acton;  
Tony Hammond; and  
Nanci E. Langley

Freistatt Post Office  
Freistatt, Missouri

Docket No. A2013-8

ORDER DENYING MOTION FOR LATE ACCEPTANCE OF APPEAL

(Issued September 24, 2013)

A pleading styled as a motion for late acceptance and appeal of the Postal Service's final determination to close the Freistatt, Missouri post office was posted to the Commission's website on July 22, 2013.<sup>1</sup>

The Postal Service filed a timely answer in opposition to the motion for late acceptance.<sup>2</sup> The Postal Service's Answer is supplemented by a separately filed

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<sup>1</sup> Request to Extend Due Date for Appeal & Accept Our Appeal for Review, July 22, 2013 (Petition).

<sup>2</sup> United States Postal Service Answer in Opposition to Petitioner's Request for Late Acceptance, August 1, 2013 (Postal Service Answer).

motion to dismiss proceedings.<sup>3</sup> Deborah Schoen (Petitioner) and the Public Representative filed answers in opposition to the Postal Service's motion to dismiss.<sup>4</sup> The Postal Service and the Public Representative filed additional pleadings in support of their respective positions.<sup>5</sup>

The argument in response to the Postal Service's motion to dismiss is entwined with the argument concerning the Petitioner's motion for late acceptance. Thus, all pleadings are considered when resolving the Petitioner's motion for late acceptance.

The motion for late acceptance is denied. With the motion for late acceptance denied, consideration of the motion to dismiss is moot.

*Petitioner's motion for late acceptance.* Petitioner explains that she is the City Clerk for the Village of Freistatt and is filing on behalf of the entire community. Petition at 1. Petitioner states that on or about June 17, 2013, she was informed by the Postmaster of Monett post office that the final determination to close the Freistatt post office was being posted to the back of the Freistatt Cluster Box Units (CBUs). PR Exhibit A, Declaration of Deborah Schoen. She explains that shortly after the posting of the Final Determination, there was an illness in her family that required her attention.

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<sup>3</sup> Motion of United States Postal Service to Dismiss Proceedings, August 1, 2013 (Postal Service Motion to Dismiss). The Postal Service also filed the Administrative Record on this date. See United States Postal Service Notice of Filing Administrative Record, August 1, 2013 (Administrative Record).

<sup>4</sup> Reply to Motion of United States Postal Service to Dismiss Proceedings, August 12, 2013 (Petitioner Answer). The Petitioner also filed a Brief in Support of Appeal to Closing of the Freistatt Post Office, August 19, 2013 (Petitioner Brief). 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, August 12, 2013 (PR Answer). The Public Representative also filed Public Representative's Notice of Filing Exhibit A (PR Exhibit A) on the same date. Although the Public Representative's argument in support of the petitioner's request to extend time is not timely, the argument will be considered.

<sup>5</sup> Surreply of United States Postal Service to the Public Representative's Response and Petitioner Schoen's Reply, August 20, 2013 (Postal Service Surreply). This was accompanied by Motion of the United States Postal Service for Leave to Surreply, August 20, 2013. Sur-Surreply to Motion of United States Postal Service to Dismiss Proceedings and Petitioner's Request to Extend Time for Filing, August 22, 2013 (PR Sur-Surreply). This was accompanied by Motion for Leave to File a Sur-Surreply to the Motion of United States Postal Service to Dismiss Proceedings and Petitioner's Request to Extend the Time for Filing, August 22, 2013. Both motions are granted. The Public Representative also filed reply comments. See Public Representative's Reply Comments, September 13, 2013.

Petition at 1. She states that she had no idea how long she would be away and had no way to communicate about the delay until she returned. *Id.*

Petitioner further contends there were many irregularities with the closing process, such as inadequate posting of the Final Determination, disingenuous lease negotiations, and failure to consider the effects upon the community that would warrant review of the Postal Service's closing decision. See Petitioner Answer.

For the above reasons, she requests an exception to allow the late filing of an appeal of the determination to close the Freistatt post office. *Id.*

*Postal Service's Answer.* The Postal Service contends the 30-day time limit for filing appeals appearing in 39 U.S.C. § 404(d)(5) is a limit on Commission jurisdiction that must be strictly construed. Postal Service Answer at 1. Therefore, the late appeal should be dismissed as untimely and moot. *Id.*

The Postal Service cites *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990) to support the proposition that statutory time limits initiating legal actions established by Congress are limited waivers of sovereign immunity that define the jurisdiction of the reviewing body. From *Irwin*, the Postal Service concludes "such congressional waivers of sovereign immunity must be construed very narrowly." Postal Service Motion to Dismiss at 2-3.

The Postal Service explains that *Irwin* identifies two circumstances where statutory time limits may be equitably tolled: "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." Postal Service Surreply at 2-3; *Irwin*, 498 U.S. 89 at 96 (footnotes omitted).

Concerning the Freistatt post office, the Postal Service contends it has complied with regulations, and provided notice of impending action. Postal Service Surreply at 5. Furthermore, the Postal Service contends there is no evidence that it has contributed to the late filing, or prejudiced the ability of any person served by the post office to file a timely petition. *Id.*

The Postal Service concludes by asserting that the Commission has consistently dismissed untimely appeals. Postal Service Motion to Dismiss at 3-4. See Docket No. A2011-41, Letter to Petitioner Closing the Appeal, August 16, 2011 (dismissing State University post office, AR appeal); Docket No. A2011-3, Order No. 672, Order Dismissing Appeal, February 11, 2011 (dismissing Graves Mills post office, VA appeal); and Docket No. A2012-64, Order No. 1189, Order Dismissing Appeal, February 1, 2012 (dismissing Little America post office, WY appeal).

*Public Representative's Answer.* The Public Representative contends the Commission has the authority to extend the filing time established by 39 U.S.C. § 404(d)(5). In extraordinary circumstances as presented in this docket, she urges the Commission to exercise this authority to either toll the statute of limitations or to equitably estop the Postal Service from asserting Petitioner's failure to timely file as a basis for its motion to dismiss. PR Answer at 4.

The Public Representative contends the Postal Service's assertion that the Commission consistently dismisses late-filed appeals is not supported by precedent. She references two dockets where motions to dismiss were denied: Docket No. A98-1, Order No. 1209 (discussing Postal Service's failure to deliver petitioner's appeal to the Commission in a timely fashion); and Docket No. A2001-1, Order No. 1296 (discussing Postal Service's failure to provide adequate notice prejudicing petitioner's ability to file timely appeal). She asserts that in neither of these dockets, or in any of the dockets cited by the Postal Service where the motion to dismiss was granted, did the Commission base its decision on a lack of jurisdiction to hear untimely appeals. *Id.* at 6.

The Public Representative reviews several federal court decisions addressing the tolling of filing time limits, which she suggests support the tolling of the filing time limit for the Petitioner's Appeal.<sup>6</sup> She argues that tolling is consistent with Congressional intent, takes into consideration the rights of unsophisticated claimants

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<sup>6</sup> *Irwin*, 498 U.S. 89; *Zipes v. Trans World Airlines, Inc. Independent Federation of Flight Attendants*, 455 U.S. 385, 102 S.Ct. 1127 (1982); *Bowen v. City of New York*, 476 U.S. 467, 106 S.Ct. 2022 (1986); and *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817 (2013).

who are not represented by counsel, and is justified by the facts of this docket. PR Answer at 7. The Public Representative notes that the doctrine of equitable tolling does not require a finding of misconduct on the part of the Postal Service. PR Sur-Surreply at 2.

The Public Representative further argues that it is in the interest of the general public for the Commission to review the Postal Service's Freistatt decision. PR Answer at 15. She questions whether the determination was based solely on the post office operating at a deficit, and whether the closing will in fact result in any cost savings. *Id.* at 16-17. She questions the circumstances surrounding the failed lease negotiations. *Id.* at 17-19. She questions whether the Postal Service considered all necessary factors before determining to close the Freistatt post office. *Id.* at 19-21.

*Commission analysis.* The time limit under which an appeal of a post office closing or consolidation may be filed with the Commission is established by 39 U.S.C. § 404(d)(5).

A determination of the Postal Service to close or consolidate any post office may be appealed by any person served by such office to the Postal Regulatory Commission within 30 days after such determination is made available to such person under paragraph (3).

39 U.S.C. § 404(d)(5).

The Postal Service contends "the 30 day time limit embodied in section 404(d)(5) is a limit upon the jurisdiction of the Commission...". Postal Service Answer at 1. The Public Representative contends the time limitation is not jurisdictional. PR Sur-Surreply at 1-2.

The Commission is guided by the discussion in *Sebelius*, which indicates absent a clear statement from Congress that a time limit is jurisdictional, the restriction should be treated as non-jurisdictional.<sup>7</sup> Consistent with this reading, the additional cases cited in the pleadings, and Commission precedent, the Commission finds that the time limit for filing post office appeals acts as a statute of limitations, rather than as a limitation on the Commission's jurisdiction.<sup>8</sup> While the PAEA clarified the 30-day time limit to timely postmarked appeals,<sup>9</sup> the statute of limitation interpretation is consistent with the post office appeal provision (section 404(d)) as a whole. This is especially evident when considering that the right to appeal extends to any person served by the affected post office, which includes individuals with little or no knowledge of the law.

The importance of the distinction is that a statute of limitations may be subject to waiver, estoppel, and equitable tolling, whereas a jurisdictional finding is not. See *Zipes*, 455 U.S. 385 at 393 (“hold[ing] that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”).

*Irwin* set forth general guidelines for the tolling of time limitations presented in federal statutes. In *Irwin*, the Court noted that “[t]ime requirements in lawsuits between private litigants are customarily subject to ‘equitable tolling...’” *Irwin*, 498 U.S. 89 at 95; citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27, 110 S.Ct. 304, 309, 107 L.Ed.2d 237 (1989). The Court held that “the same rebuttable presumption of equitable tolling

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<sup>7</sup> See *Sebelius*, 133 S.Ct. 817 (2013) at 824. *Sebelius* “concerns the time within which health care providers may file an administrative appeal from the initial determination of the reimbursement due them for inpatient services rendered to Medicare beneficiaries.” *Id.* at 821. The Court held that the statute governing the time for filing an appeal in this case was non-jurisdictional. *Id.* at 821. The Court further held that the equitable tolling presumption discussed in *Irwin* did not apply to administrative appeals of the kind presented here (*i.e.*, appeals brought by repeat, sophisticated institutional providers assisted by legal counsel). *Id.* at 828-29.

<sup>8</sup> For Commission precedent, see, *e.g.*, Docket No. A98-1, Order No. 1209, Order Denying Postal Service Motion to Dismiss, March 5, 1998, and Docket No. A2000-1, Order No. 1296, Order Denying Postal Service Motion to Dismiss, June 16, 2000.

<sup>9</sup> Postal Accountability and Enhancement Act, Pub. L. 109-435, 120 Stat. 3258 (2006) § 106; see 30 U.S.C. § 404(d)(6).

applicable to suits against private defendants should also apply to suits against the United States.” *Irwin*, 498 U.S. 89 at 95-96.

The Court observed that “[f]ederal courts have typically extended relief only sparingly.” *Id.* at 96. “[W]here the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period” and “where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass” are provided as examples. *Id.* The Court stated that it has been less forgiving “where the claimant failed to exercise due diligence in preserving his legal rights.” *Id.*

The Commission’s conclusion that equitable principles may be applied to the post office appeal time limitation is consistent with the holding in *Irwin*.

The Public Representative argues that the Petitioner’s untimely appeal should be allowed to proceed either under the doctrine of equitable tolling, or under the doctrine of equitable estoppel. PR Answer at 9-12.

*Cada v. Baxter Healthcare Corporation*, 920 F.2d 466 (7<sup>th</sup> Cir., 1991) provides insight on the distinctions between equitable tolling and equitable estoppel. In *Cada*, the court held that “a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information.” *Cada*, 920 F.2d 466 at 453. The Court explains that equitable estoppel “comes into play if the defendant takes active steps to prevent the plaintiff from suing in time....” *Id.* at 450. Equitable tolling “permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.” *Id.* at 451 (citations omitted), 452. Equitable tolling differs from equitable estoppel in that, equitable tolling “does not assume a wrong-or any-effort by the defendant to prevent the plaintiff from suing.” *Id.* at 451.

A final distinction must be made when applying either equitable tolling or equitable estoppel, specifically the distinction between any inequity concerning issues related to complying with the time limitation, and any inequity related to the underlying

cause of action.<sup>10</sup> The Commission will limit consideration to the inequity concerning issues with complying with the time limitation. Adopting the broader approach of considering the inequities raised in the pleadings of Petitioner and the Public Representative would require the Commission to develop a complete record for the appeal and is inconsistent with the intent of the statutory time limitation.

Considering the above, the Commission comes to the following conclusions. The 30-day time limit for filing a post office appeal will be strictly construed provided the Postal Service has met its notice obligations, including posting notice of a final determination pursuant to 39 U.S.C. § 404(d)(3) (or absent evidence to the contrary), and has not interfered with a petitioner's ability to file a timely appeal.<sup>11</sup>

In the case of Freistatt, the Postal Service conducted a discontinuance study and received input from the community. It reached a final determination to close the Freistatt post office and posted it at the nearby Stotts City post office on June 14, 2013, at the nearby Monett post office on June 15, 2013, and on the CBUs installed in Freistatt on June 17, 2013. See Postal Service Motion to Dismiss, Exhibit 1 2013-8.

The Postal Service filed the Administrative Record in support of its decision to close the Freistatt post office. The Postal Service's Motion to Dismiss, referenced in its Answer, draws upon the Administrative Record to demonstrate that information concerning the closing was available to the customers of the Freistatt post office.

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<sup>10</sup> The Petitioner and the Public Representative urge the Commission to consider the issues surrounding the Freistatt post office closing when ruling on the motion for late acceptance. Petitioner Answer at 2-10; PR Answer at 15-21 (asserting that a review would be in the public interest).

<sup>11</sup> 39 U.S.C. § 404(d)(3) provides:

“Any determination of the Postal Service to close or consolidate a post office shall be in writing and shall include the findings of the Postal Service with respect to the considerations required to be made under paragraph (2) of this subsection. Such determination and findings shall be made available to persons served by such post office.”

The Petitioner became aware of the posting of the Final Determination on or about June 17, 2013. PR Answer, Exhibit A, Declaration of Deborah Schoen. Petitioner cites personal reasons for her failure to file a timely appeal. The Final Determination includes notice of the right to appeal. See Administrative Record, Item 35. There is no indication that Petitioner did not understand her right to file an appeal at that time.

Petitioner and presumably others in the community were aware on June 17, 2013 that a final determination had been made regarding the discontinuance of the Freistatt post office.<sup>12</sup> Thus, there was ample time (until July 17, 2013) for any member of the community to file an appeal. That did not happen.

The final date for the Commission to receive an appeal was July 17, 2013, based on the posting date most advantageous to the Petitioner. The appeal was dated Sunday, July 21, 2013, and posted to the Commission's website on July 22, 2013. The filing of the appeal falls beyond the statutory deadline. There is ample evidence that timely information on the closing was made available to customers. There are no allegations that the Postal Service has interfered with the timely filing of appeals. Therefore, the motion for late acceptance of the appeal is denied.

*Supplemental information request.* Order No. 1791 included a request for the Postal Service to address Petitioner's allegation that, following the emergency suspension of service at the Freistatt post office, mail was not delivered to customers in Freistatt for 76 days until CBUs were installed.<sup>13</sup> It was further alleged that customers were obligated to drive 16 miles roundtrip to pick up their mail. Petition at 2.

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<sup>12</sup> The right to file an appeal was available to any customer of the Freistatt post office. See 39 U.S.C. § 404(d)(5). No other timely appeal was filed. While no other timely appeal was filed, the Commission notes that on or about April 18, 2013, it received correspondence concerning the Postal Service's actions regarding the Freistatt post office. Commission records indicate that a response was provided to the correspondent which, among other things, provided information on the appeal process, including deadlines that must be followed if the Postal Service decided to in fact close the Freistatt post office. This suggests that others in the community were aware of the ongoing discontinuance study and were in a position to file a timely appeal once a Final Determination had been made.

<sup>13</sup> Order No. 1791, Notice and Order Accepting Appeal and Establishing Procedural Schedule, July 24, 2013.

The Postal Service filed a response on August 1, 2013, which describes the chronology of events concerning the installation of CBUs in Freistatt.<sup>14</sup> The Postal Service asserts it “met with representatives from the Village of Freistatt on March 21, 2013, and requested permission to build CBUs in the village so that delivery would not be interrupted.” Response at 2. On March 29, 2013, an emergency suspension was put in place for the Freistatt post office. *Id.* This implies the Postal Service anticipated it would take eight days to have CBUs in place to avoid interruption of mail delivery.

The Village of Freistatt did not grant permission to install CBUs until March 29, 2013, a few days later. *Id.* The property lease was signed on April 11, 2013. *Id.* The time from when permission was granted to install CBUs to the resumption of mail delivery was 74 days, which far exceeds 8 days.

The Postal Service offers no explanation of why it took almost two months to internally authorize installation of the CBUs. The inordinately long delay in providing local delivery service is unwarranted and unacceptable. In situations like this, when negotiations fail and result in an emergency suspension and the Postal Service seeks to install CBUs as its local delivery option, it is incumbent on it to act expeditiously. There is no apparent reason why local service could not have been accomplished more quickly. Absent extraordinary circumstances, which are not present on this record, requiring patrons to travel 16 miles roundtrip for mail service for 60 days (April 11, 2013 to June 10, 2013) is not acceptable. The Postal Service must ensure mail delivery is not interrupted for extended periods of time.

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<sup>14</sup> Response of the United States Postal Service to Order No. 1791, August 1, 2013 (Response).

*It is ordered:*

The motion for late acceptance presented within the Request to Extend Due Date for Appeal and Accept Our Appeal for Review, filed July 22, 2013, is denied. The appeal of the closing of the Freistatt post office is dismissed.

By the Commission.

Ruth Ann Abrams  
Acting Secretary

Chairman Goldway, dissenting.

## DISSENTING OPINION OF CHAIRMAN GOLDWAY

I share the Commission's concerns that the delay in providing local delivery service is unwarranted and unacceptable, and I agree with the Commission's conclusion that the legal doctrine of equitable tolling may be applied to the filing deadline for post office appeals. However, I disagree with my colleagues that equitable tolling does not apply in this instance.

Generally, a litigant seeking equitable tolling bears the burden of establishing that he or she has been pursuing his or her rights diligently.

I view the community of Freistatt as the litigant in this docket. As the Petitioner asserts, she accepted the responsibility to represent the interests of the community.

The Administrative Record clearly demonstrates that the community as a whole was diligently pursuing its rights during the Postal Service's consideration to close the Freistatt post office. This includes a premature attempt by the Freistatt Board of Trustees to appeal the Postal Service's earlier decision to suspend service at the post office. The Administrative Record also demonstrates the Petitioner was personally involved in these matters. Thus, I conclude that the community, including the Petitioner, met the equitable tolling requirement of diligently pursuing its rights.

A litigant seeking equitable tolling also bears the burden of establishing that some extraordinary circumstance stood in his or her way of complying with the statutory deadline.

The Petitioner faced the extraordinary circumstance of a family emergency. Although I recognize that the law permits any customer of the Freistatt post office to file an appeal, as a former mayor, I recognize that in a very small community, the residents might be likely to defer to their community officials in undertaking a quasi-judicial appeal of an important matter affecting the entire town. It would be inequitable to disadvantage the entire community because its representative had to attend to urgent personal matters.

The Administrative Record also demonstrates other extraordinary circumstances, such as confusion caused by the initial emergency suspension, and then the sudden closure. Additionally, the Administrative Record indicates assurances to community members that any notice of a determination to close the post office would be posted in the Freistatt post office. This was not done.

I conclude that the community diligently pursued its legal rights, and if not for extraordinary circumstances, a timely appeal likely would have been filed. Thus, equitable tolling of the filing deadline is justified. I do not believe the Commission should be so hasty as to preclude the people of Freistatt from having their opportunity for a review.

Ruth Y. Goldway, Chairman