

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: July 15, 2002

GSBCA 15856

BETTY HAMLIN,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Betty Hamlin, pro se, Plymouth, MA.

David G. Gherlein, Office of Regional Counsel, General Services Administration,
Boston, MA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **GOODMAN**.

DANIELS, Board Judge.

The General Services Administration (GSA), respondent, moves the Board to dismiss this case for lack of jurisdiction. According to GSA, the appeal was filed too late for the Board to have authority to hear it.

GSA calls to our attention two provisions of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994 & Supp. V 1999). The first, 41 U.S.C. § 606, says, "Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals." The second provision, 41 U.S.C. § 605(b), says, "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter."

The Court of Appeals for the Federal Circuit, after reviewing these provisions, has held, "If no appeal to the Board is taken within the ninety day statutory period set forth in section 606, the Board has no jurisdiction to hear the claim." D. L. Braugher Co. v. West, 127 F.3d 1476, 1480 (Fed. Cir. 1997) (citing Cosmic Construction Co. v. United States, 697

F.2d 1389, 1390 (Fed. Cir. 1982)). This Board has enforced the Court's rule many times. E.g., Mid-South Metals, Inc. v. General Services Administration, GSBCA 15702, 02-1 BCA ¶ 31,723 (2001); CWI Consultants & Services v. General Services Administration, GSBCA 13889, 98-1 BCA ¶ 29,343 (1997); D. L. Woods Construction, Inc. v. General Services Administration, GSBCA 13882, 97-2 BCA ¶ 29,009 (1996).

The appellant, Betty Hamlin, received on January 18, 2002, the contracting officer's decision she now appeals. Her notice of appeal was received by the Board on April 29, 2002. Because April 29 was 101 days after January 18, and 101 days is more than the ninety days allowed by statute for appeal, GSA concludes that the appeal was untimely filed, so the Board may not hear it.

This argument is based on an incomplete reading of the Board's Rules of Procedure regarding filing. Under those rules, "[a] notice of appeal . . . is filed upon the earlier of (A) its receipt by the Office of the Clerk of the Board or (B) if mailed, the date on which it is mailed. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date thereof." Rule 101(b)(5)(i) (48 CFR 6101.1(b)(5)(i) (2001)). As this rule makes clear, if a notice of appeal is mailed, the date on which it is mailed, not the date on which our Clerk receives it, is the date of filing. Because Ms. Hamlin mailed her notice of appeal to us, the date of mailing becomes crucial in determining whether the notice was timely filed.

The envelope in which the notice was enclosed bears a postmark which is quite dark and very difficult to read; the date on it is not clear. We therefore asked Ms. Hamlin for any evidence she might have as to the date of mailing. In her response to GSA's motion, she stated, "The letter was stamped by the post office on April 15, 2002." We then pointed out in an order that because a statement in a pleading is not evidence, it cannot serve as necessary proof as to the date of mailing. We allowed the appellant to supplement her response by filing a sworn affidavit or an unsworn declaration under penalty of perjury (see 28 U.S.C. § 1746 (2000)) as to the mailing of the notice. Ms. Hamlin then submitted an unsworn declaration under penalty of perjury which does not confirm the statement in her response, but instead merely "certif[ies] . . . that [she] mailed a letter dated April 15, 2002" – the date on the notice of appeal – to the Board. This declaration is silent as to the key matter here – the date on which that letter was mailed.

Faced with an absence of evidence from the appellant which might prove the date of mailing, we reexamined the envelope more carefully, enlarging the image of the Postal Service's own metered stamp and modifying the shading of that image to heighten contrasts within it. From this reexamination, we have determined that the notice of appeal was mailed on April 17, 2002. Thus, we have credible evidence that the notice of appeal was mailed – and thereby filed, for purposes of our rules – eighty-nine days after Ms. Hamlin received the contracting officer's decision which she challenges.

Because eighty-nine days is within the ninety days allowed by statute for the filing of a notice of appeal, and the Board has jurisdiction over timely-filed appeals, we have jurisdiction over this case.

Decision

The respondent's motion to dismiss the appeal for lack of jurisdiction is **DENIED**. The Board, through the presiding judge in this case, will separately issue an order on further proceedings in the case.

STEPHEN M. DANIELS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge