

PSBCA 6255

APPEAL OF KATHLEEN A. OZBILEN

Under Contract No. HCR 32067

May 25, 2010

APPEARANCE FOR APPELLANT Kathleen A. Ozbilen

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OPINION OF THE BOARD ON MOTION TO DISMISS

Appellant, Kathleen A. Ozbilen, appealed from the contracting officer's denial of her claim arising under her contract with Respondent, United States Postal Service, for the delivery of mail to boxes on a route operating in St. Augustine, Florida. Respondent has filed a motion to dismiss the appeal, alleging that Appellant failed to file her appeal within 90 days of receipt of the contracting officer's final decision.

FINDINGS OF FACT

1. Appellant was originally awarded Contract No. HCR 32067 on March 21, 2007, for service to commence on March 24, 2007, and end on June 30, 2010. For reasons not relevant here, Appellant was denied access to the mail in May 2007, but continued to operate her contract using employees until October 2007, when the contract was terminated for default. In December 2007, Appellant's access to the mail was reinstated, as was her contract, effective January 1, 2008. (Appeal File Tabs (AF) 40, 34, 23, 9, 8).

2. In a letter dated March 20, 2008, Appellant requested reimbursement of additional costs she claimed she had incurred between May 2007 and December 2007 because she had been denied access. The total amount of Appellant's claim was \$22,469.42. (AF 6).

3. In a final decision dated April 18, 2008, the contracting officer denied Appellant's claim in its entirety. In the final decision, the contracting officer advised Appellant that if she wished to appeal the decision to this Board, she "... must provide written notice (preferably in triplicate) to the contracting officer within 90 days from the date you received this decision." (AF 5).

4. Appellant received the April 18, 2008 final decision no later than May 10, 2008. On May 16, 2008, Appellant mailed documents to the contracting officer. She included triplicate copies of certain documents, although the documents are not specifically identified in the record. However, all of those documents are among the documents in the Appeal File filed by Respondent. Appellant did not include a cover letter or letter of transmittal along with the copies. (Declarations of Kathleen Ozbilen and Sharon Vitulli, dated January 6, 2010; Order and Memorandum of Telephone Conference, dated March 23, 2010). [FN1]

5. In an April 5, 2009 letter to the successor contracting officer, Appellant repeated her request for reimbursement and stated: "I have made the decision to appeal Mr. Bobby Mays, my contracting officer at the time, and ask that the funds be awarded according to my contract." The successor contracting officer forwarded Appellant's letter to the Board, which docketed it as an appeal. (AF 2).

6. In a motion filed on October 23, 2009, Respondent asked that the appeal be dismissed for lack of jurisdiction on the basis that Appellant had not filed a notice of appeal within 90 days of receipt of the contracting officer's final decision. [FN2] In response to Respondent's motion, Appellant alleged for the first time that she had filed documents with the contracting officer approximately one month after receiving the final decision. After several more exchanges of correspondence and a telephone conference, Appellant, who is appearing pro se, filed the declarations referred to in Finding 4, above. She was unable to describe or provide copies of the documents she claimed to have sent the contracting officer in May 2008. In a telephone conference held on March 23, 2010, however, Appellant advised that all of the documents she sent were contained in Respondent's Appeal File and that she had not included a separate cover letter or notice of transmittal with her May 16, 2008 mailing.

DECISION

As Respondent correctly argues, under the Contract Disputes Act, any appeal to this Board must be filed within 90 days of receipt of the contracting officer's decision from which the appeal is made. 41 U.S.C. §§605(b), 606. The 90-day deadline is jurisdictional and may not be waived by the Board. *Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982). Moreover, where jurisdiction has been challenged, Appellant bears the burden of showing, by a preponderance of the evidence, that the Board has subject matter jurisdiction over the appeal. E.g., *Opportunities for the Aging Housing Corporation and Opportunities for the Aging Housing Corporation II v. Department of Housing and Urban Development*, CBCA No. 1501, 10-1 BCA ¶ 34,311; *D & F Marketing, Inc.*, ASBCA No. 56043, 09-1 BCA ¶ 34,108, at 168,664.

In this instance, the sole question before us relating to jurisdiction is whether Appellant filed what could be considered a notice of appeal within 90 days of receiving the contracting officer's final decision. A notice of appeal need not be in any particular form, so long as it evidences disagreement with the final decision and indicates an intent to appeal the decision to a higher authority. *Auburn Flying Serv.*, PSBCA Nos. 1509, 1510, 86-3 BCA ¶ 19,273; *Hubbard Trucking, Inc.*, PSBCA No.

3790, 97-1 BCA ¶ 28,913. In this instance, we have credited Appellant's assertion that she mailed documents to the contracting officer within 90 days of receiving the final decision. However, the Board has examined the Appeal File, which Appellant has stated contains all of the documents she sent (Finding 4). Other than Appellant's April 5, 2009 appeal letter, there is no document in the Appeal File that could constitute a notice of appeal of the April 18, 2008 final decision.

Based on these facts, Appellant has failed to satisfy her burden of demonstrating that the Board has jurisdiction over this appeal. Accordingly, Respondent's motion to dismiss is granted, and the appeal is dismissed for lack of jurisdiction.

David I. Brochstein

Administrative Judge

Vice Chairman

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

Norman D. Menegat

Administrative Judge

Board Member

FN1. Although we find that documents were mailed, we note that Appellant offered no evidence of mailing or receipt, such as a certified mail receipt or delivery confirmation record, and also kept no record of exactly what she sent. Respondent's contract file contains no record of receipt of any documents from Appellant at about the time identified by Appellant. (Declaration of Keith Harris, dated March 29, 2010; see also, Declaration of Bobby L. Mays, dated December 2, 2009; Declaration of David Dilges, dated August 20, 2009).

FN2. Before any of the evidence underlying Finding 4, above, had been received into the record, the Board indicated its concern to the parties that it might not have jurisdiction over the appeal, based on the nearly one-year span between the April 18, 2008 final decision and Appellant's April 5, 2009 notice of appeal. Because at that time Respondent was unable to produce evidence showing when Appellant had actually received the final decision, the Board ultimately allowed the appeal to proceed. After receiving information on that topic during discovery, however, Respondent concluded that it had evidence that Appellant had received the final decision more than 90 days prior to her April 5, 2009 appeal, and filed the motion to dismiss that is before us.