

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of:

HAROLD AND DOLORES CALLANDER,

Complainants,

v.

NORTHERN MANAGEMENT REAL ESTATE SERVICES, INC.,
BIG NORWAY, LLC, and LAURA SCHRODEN ,

Respondents.

HUDALJ 11-M-070-FH-30

January 27, 2012

RULING ON TIMELINESS OF NOTICE OF ELECTION BY RESPONDENTS

The above-captioned matter was referred to the undersigned for hearing pursuant to 42 U.S.C. § 3601, et seq., as implemented by 24 C.F.R Part 180. A Notice of Hearing and Order was issued on October 13, 2011, which noted that, as provided by 42 U.S.C. § 3612(a), the time in which to elect to proceed with a civil action in a District court instead of the instant administrative proceeding expired on October 12, 2011.¹

No election to proceed in federal district court had been filed with the Docket Clerk for the HUD Office of Hearings and Appeals at the time the Notice of Hearing and Order was issued. However, a copy of such a notice, from counsel for Respondents, addressed to counsel for Complainants was received by the Docket Clerk on October 14, 2011.

In a subsequent telephonic conference with the parties, the undersigned determined that copies of Respondents' election had been received by counsel for Complainants on October 11, 2011, and by counsel for the Charging Party on October 12, 2011.² It also became clear in the

¹ Service of the Charge of Discrimination was reported by the HUD Regional Counsel to have been made on the Respondent(s) on September 22, 2011. By law, the parties have twenty days from receipt of the Discrimination Complaint to elect to proceed in federal district court. If no party so elects, the matter is resolved in an administrative hearing. The twentieth day after service on all parties was October 12, 2011.

² Respondents' mailed Notice of Election was received in a timely manner by all addressees except the Docket Clerk. Some of those addressees were located in a building only four blocks away from the Docket Clerk's office. Doubtless the envelope addressed to the Docket Clerk was unduly delayed, through no fault of the sender. The U.S. Postal Service is usually prompt and reliable, but everyone is aware of anecdotal reports of post cards and letters being delivered decades after they were mailed. Afforded the choice of filing the Notice of Election by mail, facsimile, or email, it was the Respondents' decision to file only by mail.

telephonic conference that counsel for Complainants preferred to proceed with an administrative hearing, rather than having the matter moved to federal district court.

Fundamentally, the issue presented is one of jurisdiction. If this Court determines that Respondents' election was timely, then this administrative forum is divested of jurisdiction. The parties were directed to submit briefs on the matter, which have been considered by the Court.

By virtue of instructions sent with the Charge of Discrimination, the parties are amply advised of the time limit to elect for a trial in federal district court, and that if no party so elects, the matter will be tried in an administrative hearing.³ The statute requires that the election be made within 20 days of receipt of the Charge of Discrimination.⁴ By regulation, the Secretary has directed that such election be made by timely service upon the Docket Clerk.⁵ In the matter at hand, service on the Docket Clerk was not made within 20 days, so jurisdiction apparently remained with this administrative court.

However, as cogently pointed out by counsel for Respondents, and conceded by counsel for the Charging Party, another portion of the regulations promulgated by the Secretary provides that "when documents are filed by mail, three days shall be added to the prescribed time period for filing any responsive pleading."⁶ In this case, the Respondents' election was filed with the Docket Clerk by U.S. mail on the 22nd day following service of the Charge of Discrimination upon Respondents. Thus, the filing of the election notice constituted a timely election if—and only if—the election notice was a "responsive pleading."

The Court invited supplemental briefs from counsel addressing specifically the question of whether or not the statutory election notice is a "responsive pleading." As pointed out by counsel for the Complainants, although it is a "document" the election notice is not a "pleading" as defined in the Federal Rules of Civil Procedure. Fed.R.Civ.P. 7(a). Thus, the three days extension for mailing time of responsive pleadings does not apply to the filing of a Notice of Election.

³ The instructions are titled "IMPORTANT NOTICE" and include relevant statutory and regulatory provisions as set forth in 24 C.F.R. § 180.410(b), along with the contact information necessary to give notice to the parties and others, including the Docket Clerk.

⁴ When a charge is filed under section 3610 of this title, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed, may elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section in lieu of a hearing under subsection (b) of this section. The election must be made not later than 20 days after the receipt by the electing person of service under section 3610(h) of this title or, in the case of the Secretary, not later than 20 days after such service. The person making such election shall give notice of doing so to the Secretary and to all other complainants and respondents to whom the charge relates. Title 42 U.S.C. § 3612(a).

⁵ Such election must be made not later than 20 days after receipt of service of the charge by serving written notice of such on the Docket Clerk, each respondent, each aggrieved person on whose behalf the charge was issued, the Assistant Secretary, and the General Counsel. 24 C.F.R. § 108.410(b)(2).

⁶ *Computation of time for delivery by mail.* When documents are filed by mail, three days shall be added to the prescribed time period for filing any responsive pleading. Documents are not filed until received by the Docket Clerk. 24 C.F.R. § 108.405(d).

Respondents' counsel counters, however, that the judge may afford a party additional time where the filing deadline is not statutory.⁷ Counsel notes that all of the parties received timely notice (within 20 days) as required by the statute, and that the Docket Clerk is not a party, nor listed in the statute to receive the notice. Thus, counsel argues, the requirement for the notice of election to be given to the Docket Clerk is not statutory, and therefore the judge may exercise discretion to forgive the untimely filing with the Docket Clerk.

As persuasive as this argument may seem, it obscures the fact that, in promulgating 24 CFR § 180.410(b), the Secretary who—by statute must be provided timely notice of the election—has designated the Docket Clerk to receive the statutory notice. Further, the Secretary has stated and that “documents are not filed until received by the Docket Clerk.” 24 CFR § 180.405(d). This was also made clear in the “IMPORTANT NOTICE” that accompanied the Charge of Discrimination.

Counsel for Respondents also suggests that the regulations governing this matter permit the judge to apply the Federal Rules of Civil Procedure as a general guide where there is no specific provision covering the matter.⁸ In fact however, as previously discussed, the applicable regulations do cover mail time extensions, but make them available only for “responsive pleadings.” Moreover, as previously discussed, the judge is instructed by the regulations not to enlarge time periods required by statute.⁹

The Court is constrained to interpret the notice of election in this case to be untimely as it was not served on the Docket Clerk as a designee of the Secretary within the statutorily required period of time. As Respondents have not made a timely election to proceed in district court the matter will be resolved in this administrative forum. A Second Notice of Hearing and Order will issue.

So Ordered,

/s/

J. Jeremiah Mahoney
Chief Administrative Law Judge (Acting)

⁷ *Modification of time periods.* Except for time periods required by statute, the ALJ may enlarge or reduce any time period required under this part where necessary to avoid prejudicing the public interest or the rights of the parties. Requests for extension of time should set forth the reasons for the request. 24 CFR § 180.405(b).

⁸ 24 C.F.R. § 180.105(b) provides that “in the absence of a specific provision, the Federal Rules of Civil Procedure (FRCP) shall serve as a general guide.” Rule 6(d), Fed.R.Civ.P. provides that [w]hen a party may or must act with a specified time after service . . . 3 days are added after the period would otherwise expire under Rule 6(a).

⁹ Even if, arguably, this Court could, in its discretion, enlarge the time after-the-fact for filing the Notice of Election, the Court chooses not to do so

