UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS F. DABBS, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER NY07529200521I1 DATE: DEC 02 1992

Thomas F. Dabbs, Peekskill, New York, pro se.

Christopher Wood, Esquire, Brooklyn, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

Chairman Levinson issues a dissenting opinion.

OPINION AND ORDER

The appellant has petitioned for review of the initial decision issued on January 7, 1992, that dismissed his appeal as untimely filed. For the reasons set forth below, we GRANT the appellant's petition for review, REVERSE the initial decision, and REMAND the appeal to the regional office for adjudication on the merits.

BACKGROUND

The agency removed the appellant from the position of Nursing Assistant, GS-5, effective September 7, 1991. The appellant filed an untimely petition for appeal of the agency's action with the Board's New York Regional Office on October 22, 1991. *See* Initial Appeal File (IAF), Tab 1. The appellant did not respond to the administrative judge's show-cause order on timeliness, dated October 28, 1991, *see* IAF, Tab 8, but did respond to the show-cause order dated November 25, 1991. *See* IAF, Tab 10.

In his response, the appellant stated that after preparing his appeal with his attorney (Bruce Braswell), he called Braswell to ask whether the appeal had been filed, and Braswell replied that it had been. *See id.* He stated further that after receiving the administrative judge's show-cause order on timeliness, dated October 28, 1991, he attempted unsuccessfully several times to contact Braswell in order to determine whether Braswell had responded promptly to the order; the appellant asserted that when he then went to Braswell's office, Braswell claimed to have discussed the timeliness issue with the administrative judge, and that the administrative judge "was not so concern [sic] with the issue of timeliness." *See id.* The appellant stated that he was surprised to receive the show-cause order dated November 25, 1991, believing that Braswell had settled the timeliness issue in his conversation with the administrative judge; he claimed

that "the situation that I am in is due to the negligence and incompetency [sic] of my attorney." *See id.*

In an initial decision dated January 7, 1992, the administrative judge dismissed the appeal as untimely filed. *See* Initial Decision (I.D.) at 1-3. He found that the appellant remained personally responsible for the prosecution of his appeal, even if he believed that Braswell would timely file his appeal; on the issue of timeliness, the administrative judge found that the appellant was bound by the action or inaction of his counsel, and Braswell's "mistake" did not constitute good cause for waiver of the filing deadline. *See* I.D. at 2-3.

With his petition for review, the appellant has submitted a sworn statement that closely mirrors his response to the November 25, 1991 show-cause order. *See* Petition for Review File (PFRF), Tab 1. He states that shortly before the deadline for filing his petition for appeal, he emphasized to Braswell that he had only twenty days to file the appeal, and Braswell reassured him that it would be filed immediately; he asked Braswell the following week whether the appeal had been filed, and Braswell maintained that it had been. *See* PFRF, Tab 1. Similarly, after receiving the October 28, 1991 show-cause order, the appellant states that he urged Braswell to respond promptly, and Braswell asserted that he would, ultimately claiming that he had resolved the timeliness issue in a conversation with the administrative judge. *See id.* The appellant contends that these events show not merely negligent

action or inaction by Braswell, but actual deception on Braswell's part that prevented the appellant from timely filing his appeal and responding to the first show-cause order on timeliness; he maintains that this constitutes good cause for waiver of the filing deadline. *See id.*

ANALYSIS

To establish good cause for the untimely filing of a petition for appeal, a party must show that he exercised diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). It is well settled that a client is bound by the action or inaction of his chosen representative. *See Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981). However, the Board has held that it will not apply this principle when the client has proven that his diligent efforts to prosecute his appeal were, without his knowledge, thwarted by the attorney's deceptions. *See Dunbar v. Department of the Navy*, 43 M.S.P.R. 640, 643 (1990). Whether he did so intentionally or not, if the attorney "'misled and lulled his client into believing th[e] case was proceeding smoothly,'" and if the client acted in an otherwise diligent manner to prosecute the appeal, good cause exists for waiver of the time limit for filing an appeal. *See Dunbar*, 43 M.S.P.R. at 643-44, citing *Primbs v. United States*, 4 Cl. Ct. 366, 370 (1984), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985) (Table), *cert. denied*, 471 U.S. 1068 (1985).

Here, the appellant's unrebutted sworn statement shows that he checked with Braswell about the status of his appeal before and shortly after the deadline for filing the appeal, and that the appellant ceased his efforts only when Braswell told him that the appeal had been filed. *See, e.g., Schaefer v. United States Postal Service*, 42 M.S.P.R. 592, 595 (1989) (affidavits that are not rebutted are competent evidence of the matters asserted therein, and, if uncontested, such affidavits prove the facts they assert). Moreover, the statement shows that the appellant also attempted to ensure that Braswell would promptly respond to the October 28, 1991 show-cause order, and that he ended his monitoring efforts only after Braswell reassured him that the timeliness issue had been satisfactorily addressed. The record therefore demonstrates that the appellant acted diligently in pursuing his appeal but that Braswell repeatedly misled him about the status of the appeal, rendering his efforts ineffective and causing the appeal to be filed late.

Under these circumstances, we find that the appellant has shown good cause for the untimeliness of his appeal. *See Dunbar*, 43 M.S.P.R. at 644-45. We hereby waive the filing deadline and REMAND the appeal to the regional office for adjudication.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF
CHAIRMAN DANIEL R. LEVINSON

In
Dabbs
v.
Department of Veterans Affairs
(NY0752920052-I-1)

I respectfully dissent. Unlike the majority, I do not think this case is analogous to *Dunbar v. Department of the Navy*, 43 M.S.P.R. 640 (1990). Rather, insofar as the timeliness of the petition for appeal is concerned, it involves the same sort of attorney nonfeasance for which the Board has long held clients responsible. *See, e.g., Shavers v. United States Postal Service*, 52 M.S.P.R. 187 (1992); *Whittington v. Department of Health and Human Services*, 51 M.S.P.R. 141, 144 (1991); *Carter v. Department of the Navy*, 34 M.S.P.R. 493 (1987); *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667 (1981).

In *Dunbar*, the appellant filled out his petition for appeal three days before it was due, called his attorney to see if it had been filed, and even went to his office *before* the deadline in an unsuccessful effort to retrieve the petition and file it himself. As it turned out, his petition for appeal had not been filed because the attorney's secretary deliberately defied her boss's orders. Here, in contrast, the appellant filled out the petition only the day before the due date. When he pointed out that he only had 30 days in which to file his petition, his attorney said he should file it right away. But,

according to the appellant, his attorney also said they had ample time.

Given the appellant's knowledge that the deadline was looming and counsel's apparent nonchalance regarding it, the appellant could have filed the petition himself. He, after all, retains the ultimate responsibility for ensuring that his appeal is properly processed. *Rowe v. Merit Systems Protection Board*, 802 F.2d 434, 437-38 (Fed. Cir. 1986). However, there is no evidence the appellant made any attempt to do so. While it is clear tha the attorney did misrepresent the status of the appellant's case on several occasions *after* the filing deadline had elapsed, there is no evidence that his original promise to file right away was made in bad faith. Simply put, the attorney here did not actively prevent the appellant from filing a timely petition for appeal, as happened in *Dunbar*.

To be sure, he did expressly promise to file the appeal by the deadline and then failed to do so. But the significance of that promise is questionable. Even without it, the client would have had every right to expect that his attorney would comply with the Board's procedural rules, especially filing deadlines. Thus, the logic of today's decision would seem to expand *Dunbar's* reach to encompass any case in which an attorney's negligence causes an untimely filing. This is too sweeping. Accordingly, I do not believe this case falls within those "limited circumstances" where "in the interest of fairness an appellant should not be penalized when his

represent[illegible] his diligent efforts to prosecute his appeal. [illegible] P.R. at 190.

[illegible] initial decision dismissing the appeal as unt[illegible]

Daniel R. Levinson
Daniel R. Levinson
Chairman

DEC 0 2 1992
Date