

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Daniel Koshy d/b/a 7-Eleven 11321
Docket No. A-18-1
Decision No. 2828
October 26, 2017

**DECISION TO DECLINE REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

This case is before the Departmental Appeals Board (DAB) on a notice filed by Daniel Koshy d/b/a 7-Eleven 11321 (Respondent) seeking to appeal an August 14, 2017 initial decision of an Administrative Law Judge, *Daniel Koshy d/b/a 7-Eleven 11321*, DAB TB1762 (ALJ Decision). The ALJ sustained a determination of the Center for Tobacco Products (CTP) to impose a civil money penalty (CMP) of \$5501 against Respondent. The ALJ found that Respondent sold tobacco products to a minor in violation of federal law and that the CMP amount was reasonable based on Respondent's history of violations.

We decline to review the ALJ Decision because Respondent did not file a notice of appeal in the time required by the applicable regulations or establish good cause why its late submission should not be treated as untimely.

The letter transmitting the ALJ Decision stated that a party may file an appeal of the ALJ decision within 30 days from the date the decision was issued and that more information about a notice of appeal is available at 21 C.F.R. § 17.47. Section 17.47(b)(1) provides that a "notice of appeal may be filed at any time within 30 days after the presiding officer issues an initial decision. . . ." Section 17.47(b)(2) provides that the Board may, within its discretion, extend the initial 30-day period for an additional period of time if a "respondent files a request for an extension within the initial 30-day period and shows good cause." *See also Guidelines – Appellate Review of Decisions of Administrative Law Judges in Food and Drug Administration Tobacco Products Cases* ("Your notice of appeal must be filed within 30 days of the date that the ALJ issues a decision unless you make a written request for an extension which the Board grants for good cause shown. Any request for an extension must be filed within the initial 30-day period and should explain why there is good cause for the requested extension.") (attached to ALJ Decision).

In this case, the deadline for a party to file a notice of appeal of the ALJ Decision was September 13, 2017. Respondent filed a notice of appeal on September 18, 2017. Respondent acknowledged in the submission that there was a “delay” in filing the appeal, stating that the “paperwork was ready on September 11th to send but [its] computer was down.”

On October 3, 2017, the Board issued an Acknowledgment of Respondent’s notice of appeal and Order to Show Cause why the Board should not treat the appeal as untimely. The Board’s Order explained that the Director of the Civil Remedies Division – Tobacco Cases informed the Appellate Division that on Saturday, September 16, 2017, Respondent’s son left two voicemails with the Division’s Deputy Director stating that he needed assistance to upload a file to the DAB E-File system. In the second message, he stated that he had been trying to upload the file since September 11 without success. The administrator for the DAB E-File system reported, however, that the system did not show any activity from Respondent after August 16, 2017, when Respondent logged into the system to view a document, until September 16, 2017. Based on the regulatory deadline for filing a notice of appeal and the circumstances described, the Board ordered Respondent to show cause why the Board should not consider the September 18, 2017 notice of appeal untimely. The Board ordered Respondent to submit its argument no later than October 13, 2017.

On October 13, 2017, Respondent filed a document stating only: “This is a request for extension for the new deadline of appeal of October 13th, 2017. I was not able to log on to read the file until just now.”

We deny Respondent’s October 13, 2017 extension request. As explained in the Board’s October 3, 2017 Order, since Respondent submitted its notice of appeal electronically using DAB E-File, both parties would be deemed to have consented to accept electronic service of appeal-related documents via DAB E-File (including documents from the Board). The Order further stated that extensions of time would be granted only for good cause shown. The Board’s Order was served on Respondent on October 3, 2017, and Respondent failed to show good cause why the Board should grant it additional time to respond to the Order.

Furthermore, Respondent had ample notice of the time period in which to file an appeal of the ALJ Decision and opportunity to explain why it had good cause not to meet the appeal deadline. Nevertheless, Respondent failed to meet the deadline or explain why it had good cause not to meet the deadline. Thus, there is no basis to disturb the ALJ's factual findings or legal conclusions. We therefore decline review of the ALJ's initial decision. Accordingly, the ALJ's initial decision becomes final and binding 30 days after this declination. *See* 21 C.F.R. §17.47(j).

/s/

Constance B. Tobias

/s/

Susan S. Yim

/s/

Leslie A. Sussan
Presiding Board Member