

UNITED STATES DEPARTMENT OF JUSTICE  
 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
 OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

DAVE O'BRIAN TINGLING,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 19B00009
	)	
CITY OF RICHMOND, VA,	)	
Respondent.	)	
	)	

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ORDER DENYING COMPLAINANT’S MOTION FOR  
 EXTENSION OF TIME TO FILE MOTION FOR SUMMARY DECISION

**I. PROCEDURAL HISTORY**

Before the Court is Complainant’s Motion for Extension of Time to File a Motion for Summary Decision. A brief procedural history of this case follows:

This litigation began on January 15, 2019; the parties, shortly thereafter initiated discovery in this matter. On October 31, 2019, Respondent filed a partial motion for summary decision, largely related to the terms of a release Complainant signed with Respondent in January 2018, and its collateral effects on the scope of purported liability and damages in the instant proceedings.

On January 31, 2020, the Court granted Respondent’s partial motion for summary decision, limiting the scope of Complainant’s case to matters arising from Complainant’s employment which occurred after January 19, 2018, and setting a hearing in this matter for March 2020.

This matter was initially scheduled for a hearing in late March 2020; the hearing was postponed due to the state of emergency caused by the COVID-19 pandemic.

Complainant’s counsels withdrew from the case on August 7, 2020. On September 1, 2020, the Court held a status conference with the parties during which it set a hearing for October 13, 2020. Complainant subsequently moved to vacate the hearing date to obtain counsel; the Court assented and vacated the hearing date.

On November 5, 2020, in response to a submission from Complainant which the Court deemed to be ambiguous as to whether Complainant intended to proceed with the litigation, the Court directed Respondent to advise by November 20, 2020 as to whether he intended to proceed.

On November 18, 2020, the Court determined that the appropriate course of action in light of Complainant's unwillingness to represent himself, but his desire for this matter to proceed to a hearing, was to direct the parties to file dispositive motions. The Court ordered that the deadline for submissions shall be by December 15, 2020.

Respondent timely filed a motion for summary decision. Complainant sought an extension of time to file the motion; he alleged that due to procedural due process issues stemming from the circumstances of his counsel's withdrawal from the case that he should be permitted an extension of time to file the opposition. Respondent opposed the motion.

Complainant sought to have an ex parte discussion with the Court concerning the alleged violations; the Court in a written order on December 30, 2020, directed that ex parte discussions would not be permitted, however Complainant may file an ex parte submission with the Court outlining the issues. The Court directed that it may, upon review of the document, determine that the information should be provided to Respondent.

On February 24, 2021, the Court issued an order directing that the ex parte submissions must be shared with Respondent. The Court further provided that Respondent may supplement its opposition to Complainant's Motion for Extension of Time to File a Motion for Summary Decision within 14 days of the order. Respondent declined to file any supplementation. The Motion for Extension of Time is therefore fully briefed and ripe for decision.

## II. GOOD CAUSE FOR EXTENSION OF TIME

OCAHO rules do not provide specific standards for granting extensions, but the standard routinely applied is good cause. *See United States v. Noriega-Perez*, 5 OCAHO no. 811, 680, 686 (1995); *United States v. Exim and Monardes*, 3 OCAHO no. 591, 1925, 1929 (1993); *United States v. Christie Auto. Prods.*, 2 OCAHO no. 361, 485, 487 (1991).

Federal Rule of Civil Procedure 6(b)(1)(B) provides that "when an act may be or must be done within a specified time, the court may, for good cause, extend the time . . . on a motion made after the time has expired if the party failed to act because of excusable neglect." Good cause is "a demonstration of good faith on the part of the party seeking an enlargement of time and some reasonable basis for noncompliance within the time specified in the rules." *U.S. ex rel. Shaw Env't, Inc. v. Gulf Ins. Co.*, 225 F.R.D. 526, 528 (E.D. Va. 2005) (citing 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (3d ed. 2002)).

In general, a showing of good cause requires a showing of diligence in attempting to meet the Court's deadline, or some other evidence that new information or changed circumstances prevent the movant from, in good faith, meeting the terms of the court's order. *See, e.g., Innovative Therapies, Inc. v. Meents*, 302 F.R.D. 364, 382 (D. Md. 2014) (citations omitted) (requiring the moving party to demonstrate diligence to establish good cause); *Marcum v. Zimmer*, 163 F.R.D. 250, 254 (S.D. W. Va. 1995) ("Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment."); *Candelaria v. Molina Healthcare, Inc.*, No. 18-

725 WJ/GBW, 2019 WL 4643946, at \*4 (D. N.M. Sept. 24, 2019) (collecting cases and noting the similarities between Rule 6(b) and Rule 16(b)'s good cause standards). In determining whether good cause exists, a court should consider "whether the moving party acted in good faith, the length of the delay and its effects, and whether the delay will prejudice the non-moving party." Wonasue v. Univ. of Maryland Alumni Ass'n, 295 F.R.D. 104, 107 (D. Md. 2013); *accord* Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 625 (9th Cir. 1992) (Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification.) (internal citations omitted). "If [the moving] party was not diligent, the inquiry should end." Innovative Therapies, Inc., 302 F.R.D. at 383 (citing Marcum, 163 F.R.D. at 254).

In Gordon v. TBC Retail Group, Inc., the court in evaluating good cause under Rule 6(b) asserted that the concept of excusable neglect is an "elastic concept," but that it is not limited strictly to circumstances beyond the control of the movant. No. 2:14-CV-03365-DCN, 2020 WL 5877065, at \*1 (D.S.C. Oct. 2, 2020) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd., P'ship, 507 U.S. 380, 395 (1993)). Excusable neglect may include instances of "delay caused by inadvertence, mistake, or carelessness, at least when the delay was not long, there is no bad faith, there is no prejudice to the opposing party, and the movant's excuse has some merit." Pioneer Inv. Servs. Co., 507 U.S. at 395. "Excusable neglect" is not easily demonstrated, nor was it intended to be." Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530, 534 (4th Cir. 1996)

### III. ANALYSIS

As described above, Complainant has timely filed his Motion for Extension of Time; accordingly, the issue before the Court is only whether Complainant's motion demonstrates sufficient good cause for the extension, rather than whether the motion demonstrates good cause *and* whether the otherwise untimely motion would be accepted due to excusable neglect.

Complainant argues in support of his claim of good cause that he has outstanding Freedom of Information Act (FOIA) requests which would support his motion for summary decision. He seeks an extension until the FOIA requests are fulfilled. Complainant does not provide a copy of the correspondence seeking information under FOIA, nor does he identify when the request was made, nor the substance of what information was sought as part of the FOIA request, nor even an argument as to how the sought for information would be relevant to his case. This lack of information prevents the Court from determining whether Complainant was acting diligently. As Complainant bears the burden of persuasion on his motion, this lack of information alone makes Complainant's motion challenging to grant.

The posture of this case similarly works to Complainant's disadvantage with regard to the request for an extension. As the procedural history of this case makes clear, this litigation has been underway for more than two years. The parties have already engaged in significant discovery, gone through one prior round of dispositive motions practice, and the Court twice previously attempted to set this matter for a hearing. The Court directed that the parties engage in another round of dispositive motions practice only after Complainant expressed concern about being unwilling to proceed. In short, the Court has provided ample opportunities for discovery and

motions practice. At this stage of the proceedings, the prejudice to the parties through another delay is acute. Nevertheless, Complainant's motion fails to describe what new or changed circumstances justify the delay in light of the age of this case and the parties' prior opportunities to develop the record.

The Court is not unmindful of the recent history in this matter — specifically, Complainant's separation from his counsel, and the global challenges created by COVID-19. However, Complainant must show good cause for the extension. He presents no cogent argument that these events affected his awareness of the need to obtain information by a FOIA request, nor evidence of his diligent efforts to do so. Accordingly, Complainant's Motion for Extension of Time to File a Motion for Summary Decision is DENIED.

SO ORDERED.

Dated and entered on April 6, 2021.

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Honorable John A. Henderson  
Administrative Law Judge