

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

EUGENE R. WALKER, JR.,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 15-3371
)	
ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLEE’S MOTION FOR LEAVE TO FILE
THE RECORD OF PROCEEDINGS
OUT OF TIME**

Pursuant to U.S. Vet. App. R. 26(b), Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully requests leave of the Court to file the Record of Proceedings in this case, out of time.

This motion is being filed in response to the Court’s Order dated September 21, 2016, which stated that the time for the filing of the Record of Proceedings (ROP) had expired, and requested that the Secretary file the ROP and a motion for leave to file a late document within 7 days of the Order.

The Secretary respectfully disagrees that the time in which to file the ROP has expired. Under the Court’s Rules and Procedures (Court Rule), an appellant may file a brief in reply to the Secretary’s brief. Court Rule 28.

Generally, the reply brief may be filed not later than 14 days after the service of the Secretary's brief. Court Rule 31(a)(3). However, if the Secretary's brief is served by means other than through CM/ECF on an appellant who is located outside of the United States, Puerto Rico, or the Virgin Islands, 30 additional days are added to the applicable period. Court Rule 26(c)(2).

Thereafter, the Secretary shall file and serve the record of proceedings on all parties not later than 14 days after the reply brief is filed and served, or if no reply brief is filed, not later than 14 days after the reply brief was due to be filed. Court Rule 28.1.

In the present case, the Secretary filed and served his brief on August 26, 2016. Thereafter, Appellant had 14 days to reply to the Secretary's brief under Court Rule 31(a)(3), plus an additional 30 days under Court Rule 26(c)(2), as it was mailed to him as a resident of the Philippines. Accordingly, his reply brief is due October 11, 2016, following the National Holiday.

On September 4, 2016, Appellant filed a statement stating, "I do not find a need to interrupt the Court by filing a Reply Brief", and requested that the Court continue its proceedings. The Court posted Appellant's statement to the docket and marked it as "RECEIVED". No further action was taken by the Court until the September 21, 2016 Order was issued,

directing the Secretary to file a motion for leave to file the record of proceedings, as the time to do so had expired.

The Secretary respectfully proffers that a reasonable reading of the Court's rules, as they pertain to the present circumstances, did not clearly indicate that when an appellant simply expresses a desire to expedite the proceedings in his case, that the Secretary should respond without further direction from the Court. Court Rule 28.1 does not provide instruction to the Secretary regarding the timing of the filing of the ROP when an appellant expresses an intention not to file a reply brief, although there is remaining time to do so under the Rule. Further, Appellant's September 4, 2016 statement, addressed to the Clerk of Court, was marked "RECEIVED" on the docket, generally indicating to the parties that further action may be forthcoming from the Court regarding such correspondence.

Under certain circumstances the Court may interpret an appellant's statement as a forfeiture of his remaining time as dictated by the Court's rules. For example, the Court may choose to issue a notice to file appellant's brief within 60 days if an appellant indicates he has no dispute with the Record Before the Agency. However, the Secretary notes under such circumstances, the Court acts on its own authority in response to its interpretation of the appellant's statement. It is not within the parameters of the Secretary's discretion to interpret an opposing party's statements without further instruction from the Court, particularly when such an

interpretation eliminates further opportunity for an appellant to plead his case.

As such, the Secretary respectfully maintains that the ROP was due October 25, 2016, 14 days after the expiration of time for Appellant to file his reply brief, unless otherwise directed by the Court. However, insofar as the Court determines that the record of proceedings was due prior to the September 21, 2016 Order, the Secretary respectfully seeks leave of the Court to file the ROP at this time.

Appellant is acting *pro se* in this matter.

WHEREFORE, Appellee Robert A. McDonald, Secretary of Veterans Affairs, respectfully requests that the Court grant his Motion for Leave to File the ROP, out of time, in the above-captioned matter.

Respectfully submitted,

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General Counsel

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CERTIFICATE OF SERVICE

On the 23rd day of September 2016, a copy of the foregoing was mailed postage prepaid to:

Eugene R. Walker, Jr.
Unit 6-B Tower Condominium
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Philippines

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Julia A. Turner
JULIA A. TURNER
Counsel for Appellee