



In the Matter of:

ANTHONY ELLISON,

ARB CASE NO. 05-098

COMPLAINANT,

ALJ CASE NO. 2005-CAA-009

v.

DATE: September 25, 2007

**WASHINGTON DEMILITARIZATION
COMPANY, A SUBSIDIARY OF
WASHINGTON GROUP, INTERNATIONAL,
INC., (AKA WESTINGHOUSE ANNISTON,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mick G. Harrison, Esq., Berea, Kentucky

For the Respondent:

John J. Coleman, III and Katherine Morris Willis, *Burr & Forman LLP*,
Birmingham, Alabama

ORDER OF REMAND

Complainant Anthony Ellison (Ellison) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent Washington Demilitarization Company, a subsidiary of Washington Group, International, Inc. (a.k.a. Westinghouse Anniston), retaliated against him in violation of the employee protection provisions of the Clean Air Act,¹ the Comprehensive

¹ 42 U.S.C.A. § 7622 (West 2003).

Environmental Response, Compensation and Liability Act,² the Federal Water Pollution Control Act,³ the Solid Waste Disposal Act,⁴ the Toxic Substances Control Act,⁵ the Safe Drinking Water Act,⁶ (known collectively as the environmental acts), and their implementing regulations,⁷ and the Occupational Safety and Health Act.⁸

The Occupational Health and Safety Administration (OSHA) investigated the complaint and found it lacked merit. Ellison requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Prior to the scheduled hearing, the ALJ granted Respondent's Motion for Summary Disposition [sic] and canceled the hearing. Ellison filed a Petition for Review of the ALJ's Recommended Decision and Order with the Administrative Review Board (Board). The Board issued a Notice of Appeal on May 5, 2005. The issue before the Board is whether the ALJ prematurely issued his Recommended Decision and Order granting Respondent's Motion prior to the expiration of the time permitted by regulation for Ellison to respond to the Motion. For the following reasons, we find that the ALJ prematurely ruled on Respondent's Motion, and we remand the case to the ALJ.

BACKGROUND

Ellison worked at the Anniston Chemical Agent Disposal Facility in Anniston, Alabama from March 2003 until October 26, 2004, when his employer, Westinghouse Anniston, terminated his employment. Ellison stopped rocket disposal work on September 10, 2004, because he had concluded that the operation was in violation of standard operating procedures and would have been hazardous to two workers inside the

² 42 U.S.C.A. § 9610 (West 2005).

³ 33 U.S.C.A. § 1367 (West 2001).

⁴ 42 U.S.C.A. § 6971 (West 2003).

⁵ 15 U.S.C.A. § 2622 (West 1998).

⁶ 42 U.S.C.A. § 300j-9 (West 2003).

⁷ 29 C.F.R. Part 24 (2006). The Department of Labor has amended these regulations since Ellison filed his complaint in 2004. 72 Fed. Reg. 44,956 (Aug. 10, 2007). We have applied the regulations in effect when Ellison filed his complaint, and in any event, application of the amended regulations would not have altered our decision.

⁸ 29 U.S.C.A. §§ 651 et seq. We note that the Administrative Review Board does not have jurisdiction of Administrative Law Judge decisions under this Act. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

disposal area. Ellison admitted when deposed that during the September 10, 2004 incident, he had cursed and yelled at two other employees, threatening them by yelling, “[I]f you don’t stop, I’m going to come inside and you are not going to f---ing like it.” Ellison Deposition at 199-201. The United States Army permanently disqualified Ellison from the Chemical Personnel Reliability Program (CPRP) due to his behavior during the September 10, 2004 incident. Without the CPRP qualification, Ellison could not continue to perform his job handling chemical materials in the Container Handling Building and Unpack Area of the facility. On October 26, 2004, Westinghouse Anniston terminated Ellison’s employment because the United States Army had disqualified him from the CPRP.

Ellison filed a Complaint of Discrimination with OSHA on November 25, 2004, alleging that Westinghouse Anniston terminated his employment because he had previously engaged in protected activity, including “reporting unsafe [Washington Demilitarization Company] practices during the disposal of rockets filled with chemical warfare agent GB (sarin).”⁹ OSHA investigated the complaint and determined that Westinghouse Anniston had terminated Ellison’s employment because the United States Army had disqualified him from retention in the CPRP. Therefore, OSHA found that Westinghouse Anniston had a non-discriminatory reason for terminating Ellison’s employment, which action they would have taken against Ellison in the absence of any protected activity. OSHA concluded that Ellison’s complaint had no merit and dismissed the case.

Ellison objected to OSHA’s findings and requested a hearing before an ALJ. The ALJ issued certain pre-hearing orders in which he, (1) set the hearing for May 2, 2005; (2) ordered the parties to complete discovery by April 15, 2005; (3) ordered the parties to file any dispositive motion by April 18, 2005, with the other party having five days after service to respond to such motion; (4) ordered the parties to exchange with each other and file with the ALJ a pre-hearing statement by April 22, 2005; and (5) allowed the parties to file and serve pleadings and documents via facsimile.

On April 18, 2004, the Respondent filed with the ALJ its Motion for Summary Disposition. The Respondent argued that summary decision was appropriate because the evidence revealed no dispute as to any material fact.

On April 26, 2005, Ellison filed a Prehearing Submission with the ALJ in which he indicated, *inter alia*, that “[o]ther matters that may assist in expediting the matter will be presented in Complainant’s response to Respondent’s motion for summary decision ...”¹⁰ That same day, the Respondent filed with the ALJ its Motion to Bar Opposing Affidavits and Other Materials to Respondent’s Motion for Summary Disposition. The

⁹ Complaint at 3.

¹⁰ Complainant Anthony Ellison’s Prehearing Submission at 1.

Respondent argued that the time in which Ellison had to respond to its Motion for Summary Disposition had expired April 25, 2005, pursuant to Fed. R. Civ. P. 6.¹¹

Also on April 26, 2005, the ALJ issued his Recommended Decision and Order Granting Motion for Summary Decision and Cancelling Formal Hearing (R. D. & O.).¹² The ALJ initially noted that Ellison had not filed a response within five days of the April 15, 2005 service of Respondent's Motion, as the ALJ had ordered. The ALJ added:

Ordinarily, five (5) days are added to a prescribed period when documents are filed by mail. *See* 29 C.F.R. § 18.4(c). However, on March 10, 2005, the undersigned issued an "Order Granting Motion for Filing and Service of Pleadings and Documents via Facsimile" to facilitate the expeditious nature of this matter and its filings.

To date, Complainant has filed no responsive pleadings to respondent's motion. To be timely, a response should have been filed by April 22, 2005. Pursuant to 29 C.F.R. § 18.4(a) in computing any period of time, the time begins with the day following an act or event. When the period of time is less than seven (7) days, as here, intermediate Saturdays, Sundays and holidays shall be excluded in the computation.^[13]

Considering the merits of Respondent's Motion "in the absence of any timely response or affirmative evidence from Complainant," the ALJ found that Ellison had failed to put at issue any material fact, including whether the Respondent was ever his employer, whether Ellison ever made a protected complaint, or whether a causal nexus existed between any alleged complaint by Ellison and Westinghouse Anniston's decision to terminate his employment.¹⁴ Therefore, the ALJ concluded that the Respondent is

¹¹ The record contains no indication that the ALJ ever ruled on Respondent's Motion to Bar Opposing Affidavits and Other Materials to Respondent's Motion for Summary Disposition.

¹² The ALJ faxed and mailed copies of the R. D. & O. to counsel for both parties on the day he issued it, April 26, 2005. Service Sheet attached to R. D. & O.

¹³ R. D. & O. at 2-3.

¹⁴ *Id.* at 6.

entitled to summary decision and granted its Motion for Summary Disposition.¹⁵ The ALJ thus cancelled the scheduled hearing.¹⁶

Ellison submitted a Petition for Review of the ALJ's R. D. & O. to the Board. In his Petition, Ellison requests review of the ALJ's "conclusion and finding that Complainant was untimely in responding to Respondent's motion for summary decision, which is incorrect as a matter of fact, law, regulation and due process."¹⁷ We now consider Ellison's Petition for Review and the parties' briefs.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's R. D. & O.¹⁸ Under the Administrative Procedure Act, the Board, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. We review a decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.¹⁹

DISCUSSION

A. The Legal Standard

The rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges are found in Part 18 of Title 29 of the Code of Federal Regulations. These rules provide that "[a]ny party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding."²⁰

The regulation at 29 C.F.R. § 18.4(a) addresses time computations generally. This regulation provides, in pertinent part, that "time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday,

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ Petition for Review at 1.

¹⁸ 29 C.F.R. § 24.8 (2006); Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

¹⁹ 29 C.F.R. § 18.40 (2006).

²⁰ 29 C.F.R. § 18.40(a).

Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day,” and that when a period of time prescribed “is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded from the computation.”²¹

The regulation at 29 C.F.R. § 18.4(c)(1) pertains to the computation for delivery of documents by mail and provides that “[s]ervice of all documents other than complaints is deemed effected at the time of mailing.” Under 29 C.F.R. § 18.4(c)(3), “[w]henver a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.”

The regulation at 29 C.F.R. § 18.3(f)(1) provides, “Filings by a party may be made by facsimile (fax) when explicitly permitted by statute or regulation, or when directed or permitted by the administrative law judge assigned to the case.”

B. The Parties’ Arguments

Ellison argues to us that the ALJ prematurely issued his R. D. & O. before the expiration of the time that he had to respond to Respondent’s Motion for Summary Disposition.²² Ellison asserts that the ALJ misapplied the regulations in determining that his response was due April 22, 2005, failing to allot Ellison the five additional days required by 29 C.F.R. § 18.4(c)(3) where Respondent’s Motion was served by mail.²³ Ellison surmises that the ALJ “may have omitted consideration of this provision because he erroneously assumed that all filing and service would be by [facsimile].”²⁴ Ellison notes, however, that the ALJ’s pertinent Order allowed filing or service by facsimile and did not require filing or service by facsimile.²⁵ Ellison asserts that he had until April 27, 2005, the day after the ALJ issued his R. D. & O., to respond to Respondent’s Motion for Summary Disposition. Lastly, Ellison challenges the Respondent’s assertion, raised in its Motion to Bar Opposing Affidavits and Other Materials to Respondent’s Motion for Summary Disposition filed with the ALJ, that the Federal Rules of Civil Procedure apply where, as in this case, the Department of Labor has its own regulations to compute response time.²⁶

²¹ 29 C.F.R. § 18.4 (a).

²² Complainant’s Initial Brief at 10-11.

²³ *Id.* at 11-14.

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ *Id.* at 17-18.

The Respondent contends that the ALJ issued his R. D. & O. in accordance with 29 C.F.R. § 24.1(b) that provides procedures for the “expeditious handling of complaints by employees, or persons acting on their behalf, of discriminatory action by employers.” The Respondent characterizes this provision as a “mandate to expedite.”²⁷ The Respondent also asserts that the ALJ modified the time computation regulations provided in 29 C.F.R. § 18.4, as he is allowed to do under 29 C.F.R. § 18.1(b), in order to protect Part 24’s “mandate to expedite.”²⁸ The Respondent also argues that assuming arguendo that the ALJ did not accord Ellison the response time to which he was entitled, the error would not change the outcome of the case because the Respondent is entitled to summary decision on this record. Lastly, the Respondent argues that Ellison “should not be awarded another opportunity to file responsive materials before the ALJ because he has continually disregarded such deadlines.”²⁹

Ellison has filed a brief in rebuttal to the Respondent’s brief. Ellison argues that the Respondent’s assertion that the ALJ modified the time computation regulations at 29 C.F.R. § 18.4 is refuted by the record. Ellison reiterates his argument that the ALJ prematurely issued a decision on the merits of Respondent’s Motion for Summary Disposition, before the expiration of his response time. Ellison asserts that the ALJ erroneously deprived him of his opportunity to respond thereto.

C. Issuance of the ALJ’s R. D. & O.

In his pre-hearing Order dated March 4, 2005, the ALJ set the hearing for May 2, 2005. The ALJ ordered that any dispositive motion be filed no later than April 18, 2005. The Respondent timely filed its Motion for Summary Disposition with the ALJ on April 18, 2005. The Respondent submitted proof to the ALJ that it served its Motion for Summary Disposition by mail April 15, 2005, to Ellison’s counsel of record and that counsel received the Motion April 18, 2005.³⁰ Ellison does not dispute these facts. Because service of all documents other than complaints is deemed effected at the time of mailing, we find that the Respondent served its Motion on April 15, 2004, when it mailed it to Ellison’s counsel.³¹

²⁷ Response Brief at 7, 8.

²⁸ *Id.* at 8.

²⁹ *Id.* at 22.

³⁰ Federal Express Shipment Notification attached to Respondent’s Motion to Bar Opposing Affidavits and Other Materials to Respondent’s Motion for Summary Disposition.

³¹ 29 C.F.R. § 18.4(c)(1).

The ALJ ordered that any response to a dispositive motion, such as the Motion for Summary Disposition that the Respondent did file, be filed within five days after service of such motion. Starting with the day after the Friday April 15, 2005 service of Respondent's Motion on Ellison's counsel, and not counting Saturday April 16 or Sunday April 17, the ALJ required a response by Friday April 22 – five days after service and not counting the intermediate Saturday or Sunday since that prescribed period is “seven (7) days or less.”³² This was error. While we find that the five-day response time or “prescribed period” expired on Friday April 22, 2005, Ellison was entitled to five additional days under 29 C.F.R. § 18.4(c)(3), time which the ALJ did not allot to him.

Given that the ALJ required that Ellison respond within five days after service of Respondent's Motion for Summary Disposition, and because service was by mail, 29 C.F.R. § 18.4(c)(3) requires that five days “shall be added” to the five-day period the ALJ prescribed. Starting with the day after the April 22, 2005 expiration of the five-day period and counting five days, Ellison had until Wednesday April 27, 2005, to file a response to Respondent's Motion. When, on Tuesday April 26, 2005, the ALJ issued his R. D. & O., noting the absence of any timely response from Ellison and ruling on Respondent's Motion, we find that he acted prematurely. We conclude that the ALJ erred by issuing a decision on the merits of the Respondent's motion in advance of the expiration of the time in which Ellison had to respond to that motion.

Further, the ALJ relied on his March 10, 2005 Order Granting Motion for Filing and Service of Pleadings and Documents via Facsimile as a reason for not adding five days to the response time he allotted as required under 29 C.F.R. § 18.4(c)(3).³³ The Respondent had filed a Motion requesting that the ALJ enter an Order “allowing” both parties to file and serve pleadings and other documents, including discovery, via facsimile.³⁴ When, on March 10, 2005, the ALJ issued his Order granting this motion, he permitted the parties to file by facsimile but did not direct them to do so as he implies in his R. D. & O. Moreover, the ALJ in that Order did not change or otherwise modify the applicable deadlines. Therefore, we conclude that the ALJ mistakenly relied on his March 10, 2005 Order as a reason for not adding five days to the prescribed period as required under 29 C.F.R. § 18.4(c)(3).³⁵ Nothing in the ALJ's March 10, 2005 Order allowing the parties to file documents via facsimile changes our conclusion that he erred

³² 29 C.F.R. § 18.4 (a).

³³ R. D. & O. at 2.

³⁴ Respondent's Motion for Filing Service of Pleadings and Documents via Facsimile at 1, 2.

³⁵ We note that Ellison could have filed by fax on April 27, 2005 a response to Respondent's Motion for Summary Disposition and that response would have been timely. *See* 29 C.F.R. §§ 18.3, 18.4. The critical fact remains that the Respondent served Ellison by mail with its Motion for Summary Disposition, entitling Ellison to five additional days in which to respond. *See* 29 C.F.R. § 18.4(c)(3).

by issuing a decision on the merits of Respondent's Motion for Summary Disposition before the expiration of Ellison's response time.

CONCLUSION

The ALJ must give Ellison the time required by the regulations to respond to Respondent's Motion for Summary Disposition where that motion was served by mail. By issuing his R. D. & O. before the end of that response time, the ALJ erred. Therefore, we decline to adopt the ALJ's recommendation and **REMAND** this case for further proceedings consistent with this Order.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge