



In the Matter of:

**RONALD STASKELUNAS,**

**ARB CASE NO. 98-035**

**COMPLAINANT,**

**ALJ CASE NO. 98-ERA-7**

**v.**

**DATE: May 4, 1998**

**NORTHEAST UTILITIES COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

### **FINAL DECISION AND ORDER**

The Administrative Law Judge (ALJ) submitted a Recommended Order of Dismissal (R. O.) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. §5851 (1988 and Supp. V 1993), recommending that the complaint be dismissed on two grounds. First, the ALJ recommended dismissal for failure of the Complainant to file a timely request for a hearing after receipt of the adverse determination by the Occupational Safety and Health Administration (OSHA) on the investigation of his complaint.<sup>1/</sup> R. O. at 3. The ALJ also recommended dismissal for failure to respond in a timely manner to his order to show cause and failure to address the issue presented in that order. We agree with the ALJ that this case should be dismissed on both grounds.

### **BACKGROUND**

Complainant filed a complaint under the ERA on September 9, 1997 and OSHA notified him of its determination that the complaint did not have merit by a letter of October 16, 1997. The letter explicitly informed Complainant, as provided in the regulations, that the notice of determination would become the final order of the Secretary, unless Complainant filed "within five (5) calendar days of receipt of [the] letter, [a] request for a hearing by facsimile (fax), overnight/next day delivery mail or telegram to" the Chief Administrative Law Judge. *See* 29

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<sup>1/</sup> Responsibility for investigation of complaints under the ERA was transferred from the Administrator of the Wage and Hour Division of the Department of Labor to the Assistant Secretary for Occupational Safety and Health by Secretary's Order No. 6-96 (62 Fed. Reg. 111, Jan. 2, 1997).

C.F.R. §24.4(d)(2)(i) (1997). Complainant filed a request for a hearing dated October 23, 1997 by certified mail which was not received in the Office of Administrative Law Judges until October 29, 1997.

The ALJ issued a Notice of Hearing and Pre-hearing Order on October 28, 1997, in response to a letter of reference from OSHA of October 16, 1997. However, after review of the file, the ALJ did not find that Complainant had filed a request for a hearing.<sup>2/</sup> Therefore, on November 6, 1997, the ALJ issued an order to show cause why the complaint should not be dismissed for failure to file a timely request for a hearing.<sup>3/</sup> Counsel for Complainant responded by letter dated November 25, 1997, which was received by the Office of Administrative Law Judges on December 1, 1997, inquiring about the status of Complainant's "appeal" of the October 16, 1997 determination by OSHA. That letter did not provide any reasons in response to the ALJ's order to show cause why Complainant's request for a hearing should not be dismissed as untimely. The letter also did not state the date on which Complainant received the OSHA determination letter.

## DISCUSSION

### I. Timeliness of request for hearing

We agree with the ALJ that Complainant filed his request for a hearing out of time. The ERA whistleblower protection provisions require expedited filing. The regulations in effect when Complainant submitted his complaint mandate that a request for a hearing be filed within five calendar days of receipt of the OSHA determination letter,<sup>4/</sup> and that the request be filed by "facsimile (fax), telegram, hand delivery or next-day delivery service." 29 C.F.R. §24.4(d)(2)(i) (1997). A complainant who relies on alternative means for delivery, *e.g.*, by mail, assumes the risk that the request may be received beyond the due date, and untimely.

Complainant has not provided any evidence establishing definitively when he received the October 16, 1997 OSHA determination letter, nor is there other evidence in the record

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<sup>2/</sup> In order to avoid confusion in the future, the Office of Administrative Law Judges or the ALJ to whom a case is assigned should assure that a timely request for a hearing has been filed before issuing a hearing notice and pre-hearing order.

<sup>3/</sup> Complainant's request for a hearing has two OALJ stamp dates indicating receipt, one on October 29, 1997 and another on November 7, 1997. Apparently, the first date is the date the request was received by the Office of the Chief ALJ, and the second is the date it was received by the ALJ to whom the case was assigned in the Boston office of administrative law judges.

<sup>4/</sup> Effective March 11, 1998, the filing deadline in ERA whistleblower cases was changed to require filing within five business days of the receipt of the OSHA determination letter. 63 Fed. Reg. 6622 (Feb. 9, 1998), to be codified at 29 C.F.R. §24.4(d)(2). However, the instant complaint was filed while the prior time limitation was in effect.

indicating the date of receipt. However, even if the Board were to assume that he received the OSHA determination on the same day that he sent his request for hearing, his request would be untimely.

Complainant's letter requesting a hearing is dated October 23, 1997. Assuming a receipt date of October 23 for the OSHA determination letter, a request for hearing should have been filed no later than the fifth calendar day following October 23, *i.e.*, by October 28, 1997, in order to be timely. However, the request for hearing was not received by the Office of Administrative Law Judges until October 29, 1997, a day later and out of time.<sup>5/</sup>

Complainant's only argument before us is that the ALJ acknowledged that a request for a hearing was received when the ALJ issued his pre-hearing order. There is no dispute that Complainant filed a request for a hearing; the only question is whether that request was timely. When the ALJ reviewed the record, he realized that there was a question as to the timeliness of the request for a hearing and issued an order to show cause why the complaint should not be dismissed for that reason. Complainant has not asserted any reason for tolling the time limitation for filing a request for a hearing and, as the ALJ noted, that time limitation has been strictly construed. *See Backen v. Entergy Operations, Inc.*, Case No 95-ERA-46, ARB Dec. June 7, 1996, slip op. at 4; *Crosier v. Westinghouse Hanford Co.*, Case No. 92-CAA-3, Sec. Dec. Jan. 12, 1994, slip op. at 10 (request for hearing not timely where filed by mailgram, rather than telegram, and received 10 days after expiration of time for requesting a hearing). Complainant's request for a hearing was untimely and the complaint will be dismissed for that reason.

## II. Failure to comply with ALJ's order.

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<sup>5/</sup> The Administrative Law Judge concluded that Complainant's hearing request was untimely, but relied upon a time calculation rooted in the 29 C.F.R. Part 18 regulations, which govern proceedings before the Office of ALJs. Relying on the Part 18 provisions, the ALJ imputed a "date of receipt" to the Complainant by assuming that Complainant received the OSHA determination letter no later than five days after it was mailed. R. O. at 3.

In this situation, we decline to apply the Office of ALJ procedural rules to events that took place *prior* to the time when a case has come within the jurisdiction of the Office, *i.e.*, prior to filing. The relevant provisions for determining whether a timely hearing request has been filed in a whistleblower case are found in the 29 C.F.R. Part 24 regulations. The whistleblower regulations state explicitly that the limitations period runs from the date of a complainant's "receipt" of the OSHA determination letter. 29 C.F.R. §24.4(d)(2). It is the Board's view that the term "receipt" should be interpreted literally in this context, *i.e.*, the date that complainant actually receives the document from OSHA. Thus, when determining whether a hearing request has been timely filed, an Administrative Law Judge should make a determination of the date of actual receipt, and should insure that there is evidence supporting the "date of receipt" determination in the administrative record. If there is a dispute as to the actual date of receipt, the complainant bears the burden of establishing that his or her request for hearing was timely filed.

As an alternative grounds for dismissal, the ALJ found that Complainant did not respond to the ALJ's order to show cause in the time provided. In addition, he found that Complainant's response did not address the issue raised in that order, whether the request for a hearing was timely. The order to show cause issued on November 6, 1997 provided ten days for a response, R. O. at 4, and allowing five days for mailing should have been answered on or before November 24, 1997. Complainant's counsel wrote a letter to the ALJ on November 25, 1997, which was not received by the Office of Administrative Law Judges until December 1, 1997. That letter only inquired about the status of Complainant's request for a hearing, but did not present any reasons or arguments why the request for a hearing should not be dismissed as untimely. We find that the ALJ acted within his discretion under the regulations when he recommended that the complaint be dismissed for failure to comply with the order to show cause. 29 C.F.R. §24.5(e)(4)(i)(B).

Accordingly, for the reasons discussed above, we adopt the ALJ's recommendation and the complaint in this case is **DISMISSED**.

**SO ORDERED.**

**KARL J. SANDSTROM**  
Chair

**PAUL GREENBERG**  
Member