In the Matter of:

DOUGLAS W. FOLEY, **ARB CASE NO. 99-022**

COMPLAINANT, **ALJ CASE NO. 97-ERA-56**

v. **DATE:** January 31, 2001

BOSTON EDISON COMPANY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Douglas Foley, *Pro Se, Forestdale, Massachusetts*

For the Boston Edison Company:
Robert P. Morris, Esq., Keith B. Muntyan, Esq., *Morgan, Brown & Joy, LLP, Boston, Massachusetts*

FINAL DECISION AND ORDER

I. INTRODUCTION

This case arises under the employee protection ("whistleblower") provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. § 5851 (West 1995).[1/] By this Order, and for the reasons set forth herein, we dismiss the complaint.

Respondent Boston Edison Company ("BECO") operated the Pilgrim nuclear power plant in Plymouth, Massachusetts. Complainant Douglas Foley worked at the Pilgrim plant as an associate quality control engineer inspecting materials received for use in the plant. On occasion Foley operated the Rockwell/Hardness Tester ("RHT"), a device that tests the hardness of nuclear-grade materials. In May 1995, while inspecting some materials under the direction of Paul Sullivan, a management employee, Foley refused to perform a specific operation on the RHT because he believed the machine was not properly calibrated. When Sullivan disagreed

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[1/] The ERA prohibits an employer from discharging any employee or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. 29 C.F.R. § 24.2 (2000).

with Foley's assessment and insisted that he perform the work, an argument erupted and Foley stormed off the job.

As a result of this altercation, BECO initiated an audit of Foley's work. When the audit revealed that Foley had falsified documents relating to the inspection of various materials, BECO reprimanded Foley, removed him from the quality assurance department, revoked his certification as a plant engineer, and suspended him for 20 days. Additionally, BECO required Foley to undergo a "remediation" process which included progress tests and evaluations. Dissatisfied with these constraints, Foley sought another position with the Company.

In November 1995, Foley began work as a mechanical planner. Ten months later, however, Foley claimed that he was suffering from severe emotional stress and went on disability leave. When Foley returned to work in March 1997, he requested a transfer away from the Pilgrim plant. In response, BECO reassigned Foley to a clerical position in the billing department of its corporate offices in Boston at the same wages and benefits.

In June 1997, Foley requested tuition reimbursement for an $8,000 computer course on network administration that was scheduled to begin in September of that year. Although BECO initially denied it, the request was ultimately approved. Foley, however, never took the course as he again went on disability leave in August 1997 and subsequently resigned from the Company in May 1998.

On July 7, 1997, Foley filed a written complaint with the Department of Labor ("DOL") alleging that BECO retaliated against him in violation of the ERA. Specifically, Foley alleged that he engaged in protected activity in May 1995 when he insisted that the RHT was not properly calibrated and that BECO retaliated by reprimanding and suspending him. Foley further alleged that BECO also retaliated against him in 1997 by transferring him to clerical duties and by initially denying his request for tuition reimbursement.

DOL found no merit to Foley's complaint at the initial investigation stage. Foley objected to that determination and the matter was referred to an Administrative Law Judge ("ALJ") for disposition. After a hearing, the ALJ found that Foley's complaints regarding the 1995 acts of retaliation were time-barred because Foley did not file a complaint regarding these acts within the 180-day statutory time limit. As to Foley's allegations regarding the 1997 transfer to clerical work at the Boston office and the tuition reimbursement approval, the ALJ found that they were neither adverse nor discriminatory.[2/] Therefore, in a Recommended Decision and Order ("R.D.&O.") dated December 2, 1998, the ALJ recommended that Foley's case be dismissed in its entirety. This appeal followed.

II. JURISDICTION

[2/] Even though he dismissed some of the allegations of the complaint as untimely and the remainder of the case for failure to prove that the actions were either adverse or discriminatory, the ALJ nevertheless found that Foley engaged in protected activity during his altercation with Sullivan in May 1995. We take no position on this finding.

We have jurisdiction pursuant to 42 U.S.C.A. § 5851 and 29 C.F.R. § 24.8.

III. STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C.A. § 557(b) (West 1996). As a result, the Board is not bound by the conclusion of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co.*, ARB Case No. 97-069, ALJ Case No. 95-WPC-1, Dec. and Ord., Apr. 28, 2000, slip op. at 7.

IV. DISCUSSION

A. Timeliness

The ERA and its implementing regulations provide that any complaint shall be filed, in writing, within 180 days after the occurrence of the alleged violation. 42 U.S.C.A. § 5851(b)(1); 29 C.F.R. § 24.3(b)(2). In his appeal, Foley argues that the ALJ erred in not tolling the 180-day time limit because:

> (1) He had a medical condition which should excuse an untimely filing;
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> (2) The ERA is internally inconsistent in that one section states that a complaint must be filed within 180 days while another section states that the time period is one year; and
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> (3) He informed the Nuclear Regulatory Commission ("NRC") of his safety concerns in 1995 and, if the NRC had conducted a prompt investigation, it might have "assisted" him in filing a timely complaint with DOL.[3/]

Foley did not make these particular arguments prior to the close of the record.

The Board and its predecessors generally have not considered arguments that are raised for the first time on appeal. *See*, *e.g.*, *Swanson Group, Inc.*, BSCA No. 94-05 (BSCA May 31, 1995) slip op. at 8 (in Service Contract Act enforcement action, "failure to raise a defense [before an ALJ] in a timely manner constitutes waiver of that claim," citing *Thompson Brothers, Inc*., BSCA Case No. 92- 32 (Jan. 29, 1993)). *Cf. Immanual v. Wyoming Concrete Industries*,

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[3/] Although not crystalized as arguments, Foley makes a number of other allegations in his filings. None of them, however, has any bearing on the issue of the timeliness of his complaint and, to the extent that he is attempting to file a new complaint, it is not properly before us because it has not been previously filed with DOL's office of Occupational Safety and Health Administration. *See* 29 C.F.R. § 24.3.

Inc., ARB No. 96-022, ALJ No. 95-WPC-3 (ARB May 28, 1997) *rev'd on other grounds sub nom. Immanuel v. U.S. Dept. of Labor*, 139 F.3d 889 (4th Cir. 1998)(Table) slip op. at 2-3 (although argument raised on appeal to ARB was not briefed to the ALJ, the claim was raised at trial and therefore preserved). Even if we were to consider these arguments, they are clearly without merit.

Foley's first argument is nothing more than a bald assertion that he was incapacitated. Although Foley has submitted letters showing that he was under a doctor's care, his doctor does not state or even suggest that Foley's illness was so debilitating that it prevented him from either understanding his legal rights or acting upon them. In support of his second argument, Foley submitted a copy of H.R. No. 101-474 (VIII), reprinted in 1992 U.S. Code Cong. & Admin. News 1953 , 2296-2297. The reprint is a section-by-section analysis of a bill that was introduced in the U.S. House of Representatives and references a proposal to increase the time limit for filing a complaint from thirty days to one year. This particular proposal did not become law, so it is not inconsistent with the 180-day time limit finally adopted by Congress and codified in 42 U.S.C.A. § 5851(b)(1). Furthermore, as Foley filed his complaint approximately two years after the alleged adverse action, even with a one-year filing requirement his complaint would still be untimely. Foley's last argument is simply that, if the NRC had acted sooner, he might have chosen not to sit on his rights. Absent a showing that the NRC's actions somehow prevented Foley from exercising his right to file a complaint, we see no basis upon which to conclude that the statute's 180-day time limit should be tolled.

B. The Discovery Process

Foley's remaining challenge to the Recommended Decision concerns what he believes were inappropriate actions by both BECO and the ALJ during the post-hearing discovery process. Specifically, Foley notes that, when he attempted to obtain a particular investigative file through discovery, BECO objected on the grounds that it was irrelevant to Foley's case. Although the ALJ ultimately ordered BECO to provide Foley with the documents, he also issued a protective order precluding Foley from disclosing the contents or substance of the documents to any person or entity and requiring Foley to sign a statement if he agreed to accept the restriction. Post Hearing Order No. 3. Foley agreed to abide by the protective order. However, when BECO proffered an agreement adopting the non-disclosure language of the protective order, Foley refused to sign it and asserted that BECO's proffer of the agreement constituted a new retaliatory action.

Foley argues before this Board that BECO's proffer of the agreement is just the last in a series of retaliatory actions which began in 1995 and, as such, is evidence of a continuing violation which would make his complaint timely.[4/] We disagree. As the ALJ pointed out in his

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[4/] Foley also requests that the Board reopen the record to admit a letter from the NRC to the DOL regarding the ALJ's protective order. The Board has held that, when considering whether to admit new evidence, it will rely on the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Administrative Law Judges, 29 C.F.R. § 18.54(c), which provides that, once the record (continued...)

Recom-mended Decision, to establish a continuing violation, a complainant must show that the employer engaged in a series of related discriminatory acts, one or more of which fell within the 180-day period. BECO's actions in 1995 and its proffer of the agreement in 1998 are not part of a pattern of related discriminatory conduct but are clearly unrelated discrete acts, and that circumstance does not change simply because Foley claims the 1998 proffer is retaliatory. For that reason, BECO's proffer of the agreement cannot be viewed as part of a continuing violation and, therefore, has no bearing on the timeliness of his complaint.

Finally, although the ALJ's protective order has no bearing on whether the ALJ properly determined that his complaint was untimely with regard to the 1995 acts and that the 1997 acts were neither adverse nor discriminatory, Foley maintains that this order illegally prohibits him from disclosing the investigative file to the NRC. However, one of the documents Foley submitted to the Board is a letter in which the NRC confirms that BECO provided the NRC with all of the investigative file documents which Foley reviewed. Inasmuch as the NRC has the documents in question, any disclosure restrictions in the ALJ's order regarding the NRC are now moot.

We find the ALJ's decision to be well reasoned, supported by the evidence of record, and consistent with applicable law. Accordingly, we concur with his recommendation that this case be dismissed.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[4/](...continued)
is closed, additional evidence shall be accepted only upon a showing that it is new and material and was not readily available prior to the closing of the record. *Doyle v. Hydro Nuclear Services*, ARB Case No. 98-022, ALJ Case No. 89-ERA-22, Fin. Dec. & Ord., Sept. 6, 1996, slip op. at 2. We consider evidence material when it is of sufficient weight to warrant a different outcome. *See Wright v. U.S. Postal Service*, 183 F.3d 1328 (Fed. Cir. 1999). The "evidence" Foley seeks to admit has no bearing on whether the ALJ properly determined that the complaint is untimely with regard to the 1995 acts and that the 1997 acts were neither adverse nor discriminatory. Consequently the evidence is immaterial.