U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

GEORGE HOWLETT, **ARB CASE NO. 99-044**

COMPLAINANT, **ALJ CASE NO. 99-ERA-1**

v. **DATE: March 13, 2001**

NORTHEAST UTILITIES/
NORTHEAST NUCLEAR ENERGY CORP.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

***Appearances*:**

For the Complainant:
Scott W. Sawyer, Esq., *New London, Connecticut*

For the Respondent:
Paul J. Zaffuts, Esq., Thomas A. Schmutz, Esq., *Morgan, Lewis & Bockius LLP, Washington, D.C.*
Duncan MacKay, Esq., *Northeast Utilities Service Co., Hartford, Connecticut*

FINAL DECISION AND ORDER

This case arose when George Howlett filed a complaint with the Department of Labor, Occupational Safety and Health Administration (OSHA), alleging that Northeast Utilities/Northeast Nuclear Energy Corporation had discriminated against him in violation of the employee protection provision of the Energy Reorganization Act, 42 U.S.C. §5851 (1994). By certified letters dated June 29, 1998, the OSHA office in Hartford, Connecticut notified both Howlett and his counsel of the results of its investigation. The letters also informed Howlett and his counsel of his right to appeal the decision to an Administrative Law Judge (ALJ) and the short time frame within which to do so.[1/]

[1/] Effective March 11, 1998, 29 C.F.R. Part 24 was amended to permit the filing of a request for an ALJ hearing in an ERA case within five **business** days of the receipt of the OSHA determination letter. 63 Fed. Reg. 6622 (Feb. 9, 1998). Previously the regulation had required that the hearing request be filed within five
(continued...)

Howlett received the letter on June 30, 1998. The copy of the letter addressed to Howlett's counsel was delivered to his office on July 1, 1998. Nevertheless, no request for a hearing was filed until October 9, 1998, some sixty-nine business days after the OSHA determination. In the letter requesting the hearing, Howlett's counsel stated that, because a newly-hired employee misfiled the determination letter, he did not see it until October 7, 1998. Howlett's counsel argued that, because the delay was the result of a clerical error, the ALJ should have tolled the five-day filing requirement. The ALJ did not find this excuse sufficient to justify equitable tolling and recommended that the complaint be dismissed.

We have reviewed the record, the ALJ's Order, and Howlett's challenges to it. We conclude that the ALJ is correct with regard to the facts as well as the law, and therefore we adopt the Recommended Order of Dismissal and attach a copy to this decision.[2/]

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

[1/](...continued)
calendar days. 29 C.F.R. §24.4(d)(3)(i)(1997). The ALJ noted that Howlett's opening brief erroneously cites to the old "five *calendar* days" language but did not note the same discrepancy in the original OSHA determination letter, which states that "you must within five (5) calendar days of the receipt of this letter, file your request for a hearing . . . ." OSHA's error was harmless because even under the five business day rule applicable to this case, Howlett's hearing request was untimely.

[2/] With our concurring colleague, we agree fully with the general proposition that this Board has the authority to relax or modify procedural rules to promote justice, consistent with the Supreme Court's guidance in *American Farm Lines v. Black Ball Freight Servs.*, 397 U.S. 532 (1970). This is an important legal principle, and it underlies the entire proposition that filing deadlines may be waived in certain circumstances – but it is not the end of the discussion. The key question is what ***standard*** should be applied by this Board and/or the Labor Department's administrative law judges when deciding whether to relax the filing deadlines found in the Department's regulations, either the deadline for requesting a hearing (29 C.F.R. §24.4(d)(3)) or appealing an ALJ's recommended decision to the Administrative Review Board (29 C.F.R. §24.8(a)).

We have previously held that the principles of equitable tolling are applicable to cases before us in which a hearing request or appeal is filed out-of-time, and we have looked to the courts for guidance on the situations in which tolling is appropriate. Although the concurrence suggests that the waiver/tolling criteria should be broader in some way that has yet to be articulated clearly, we see no compelling reason to plow new legal ground based on the facts before us in this case. Let it suffice to say that we are unanimous that this case does not warrant a waiver of the time limitation under any reasonable standard.

E. Cooper Brown, Member, concurring:

I concur in the majority's affirmance of the ALJ's Recommended Order of Dismissal. I write separately because I consider the applicable test for determining whether Complainant should be relieved from the timeliness requirement of 29 C.F.R. §24.4(d)(2) to be that which the Board has recognized as controlling when applying the similar timeliness requirement of 29 C.F.R. §24.8(a).

The Board has recognized that the principles of equitable tolling relied upon by the ALJ provide useful guidance in assessing when and under what circumstances an agency-promulgated regulatory limitations period may be waived. *See, e.g., Duncan v. Sacramento Metro Air Quality Management Dist.*, ARB No. 99-011, ALJ No. 97-CAA-12 (ARB Sept. 1, 1999). At the same time, the Board has acknowledged that equitable tolling principles constitute "alternative bases" for waiver and/or modification of internally-established time limits under the Board's authority. *Garcia v. Wantz Equipment*, ARB No. 99-109, ALJ No. 99-CAA-11, slip op. at 2, n.1 (ARB Feb. 8, 2000).

The ALJ issued his recommended decision in December of 1998. Since that time, the Board has determined that the regulation establishing a ten-day limitations period for filing a petition for review with the ARB, 29 C.F.R. §24.8(a), is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes, rather than a jurisdictional prerequisite. Accordingly, the Board has held that it is within the ARB's discretion to relax or modify this time limitation when in a given case the interests of justice so require, provided the rights of an opposing party are not prejudiced as a result. *See Duncan v. Sacramento Metro Air Quality Management Dist., supra*; *Gutierrez v. Regents of the Univ. of California*, ARB No. 99-116, ALJ No. 98-ERA-19 (ARB Nov. 8, 1999); *Garcia v. Wantz Equipment, supra*; *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ No.99-ERA-14 & 15 (ARB Aug. 31, 2000). *Cf. In re General Service Admin., Region 3*, ARB No. 97-052 (Nov. 21, 1997) (failure to comply with procedural requirements governing filing and service of notice of appeal to ARB under Service Contract Act, 41 U.S.C. §351 *et seq.*), *In re Tri-Gem's Builders*, ARB No. 99-117, ALJ No. 98-DBA-17 (ARB Nov. 22, 1999) (failure to timely file petition for review with ARB from ALJ decision under Department regulations governing Davis-Bacon Act proceedings, 40 U.S.C. §276a *et seq.*). In reaching this conclusion, the Board has in each of the foregoing decisions relied upon the general principle articulated by the Supreme Court in *American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532, 90 S.Ct. 1288 (1970):

> It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.

397 U.S. at 539 (citations omitted). This rule should apply with especial force where, as in the adjudication of environmental whistleblower claims, the agency is charged with acting in the public

interest.[1/]. *Cf. N.L.R.B. v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953) (labeling the contention that the N.L.R.B. was powerless in the public interest to relax the time provisions of its procedural rules in cases before it "not worthy of serious consideration").

I find nothing that would distinguish in a meaningful way the procedural filing requirement at 29 C.F.R. §24.4(d)(2) governing requests for hearings before an ALJ from that governing appeals to the ARB set forth at 29 C.F.R. §24.8(a). Thus, I am of the opinion that the Board's case law, set forth above, is equally applicable when an ALJ must assess whether an untimely request for a hearing should nevertheless be allowed.

E. COOPER BROWN
Member

[1/] In the adjudication of claims under the environmental whistleblower laws, the Department of Labor "does not simply provide a forum for private parties to litigate their private employment discrimination suits," but also "represents the public interest." *Beliveau v. Dep't of Labor*, 170 F.3d 83, 87-88 (1st Cir. 1999) (quoting from *Hoffman v. Fuel Econ. Contracting*, 87-ERA-33 (Sec'y Order Denying Reconsideration, Aug. 4, 1989). *Accord Rose v. Secretary of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (J. Edward concurring).