



In the Matter of:

JAMES HARDY,

ARB CASE NO. 05-019

COMPLAINANT,

ALJ CASE NO. 2004-STA-20

v.

DATE: January 11, 2005

ENVIRONMENTAL RESTORATION, LLC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:

Paul K. Travous, Witzel, Kenney, Dimmitt & Travous, L.L.C., St. Louis, Missouri

FINAL DECISION AND DISMISSAL ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA).¹ On December 15, 2003, the Occupational Safety and Health Administration (OSHA) investigated James Hardy's complaint that the Respondent, Environmental Restoration had discriminated against him in violation of the STAA's whistleblower protection provisions and determined that Environmental Restoration had not violated the STAA.

Hardy requested a hearing before a Department of Labor Administrative Law Judge (ALJ).² The ALJ held a telephone hearing on November 6, 2004, to consider three discovery motions Environmental Restoration had filed.³ At the hearing Hardy stated

¹ 49 U.S.C.A. § 31105 (West 1997).

² See 29 C.F.R. 1978.105 (2004).

³ Recommended Order of Dismissal due to Withdrawal of Complaint (R. D. & O.) at 1.

Continued . . .

that since his attorney had withdrawn from the case, he had been unable to find representation.⁴ He informed the ALJ that he would rather withdraw his complaint than respond to the discovery requests.⁵ He indicated that he understood that if he withdrew his complaint, the matter would be concluded, and he could not reinstate it.⁶

On November 17, 2004, the ALJ issued a Recommended Order of Dismissal Due to Withdrawal of Complaint (R. D. & O.). The ALJ found that under the STAA's interpretive regulations a party may withdraw his or her objections to the Assistant Secretary of Labor for Occupational Safety and Health's findings "[a]t any time before the findings or order become final . . . by filing a written withdrawal with the administrative law judge."⁷ The ALJ treated Hardy's unequivocal statement during the telephone hearing "as the equivalent of a written statement of his intention to withdraw his objection to the findings of December 15."⁸ Consequently, the ALJ recommended that Hardy's request for voluntary withdrawal of his complaint be granted and this matter dismissed with prejudice.⁹

The ALJ's decision and the record were forwarded to the Administrative Review Board for automatic review and to issue a final decision.¹⁰ The Board issued a Notice of Review and Briefing Schedule, directing the parties to file with the Board, briefs in support of or in opposition to the R. D. & O., within thirty days from the date on which the ALJ issued the R. D. & O.¹¹ The Board requested that a party that decided not to file a brief, to so inform the Board by letter, telephone, or facsimile. On December 6, 2004, Environmental Restoration submitted a letter agreeing with the ALJ's R. D. & O. and stating that it would not file a brief. Hardy did not respond to the Board's briefing order.

⁴ R. D. & O. at 1.

⁵ *Id.*

⁶ *Id.*

⁷ *See* 29 C.F.R. § 1978.111(c).

⁸ R. D. & O. at 2.

⁹ *Id.*

¹⁰ 29 C.F.R. § 1978.109(a).

¹¹ *See* 29 C.F.R. § 1978.109(c)(2).

The Board is required to issue a final decision and order based on the record and the decision and order of the ALJ.¹² Accordingly, the Board has reviewed the record and the R. D. & O. The Board concludes that, pursuant to the plain language of 29 C.F.R. § 1978.111(c), the ALJ should have required Hardy to submit a written withdrawal.¹³ But given Hardy's failure to object to this deviation from the regulation in a brief to this Board, we find the ALJ's departure from the regulation to be harmless error. Accordingly, we **APPROVE** the recommended order and **DISMISS** Hardy's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

¹² 29 C.F.R. § 1978.109(c)(1).

¹³ In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's legal conclusions de novo. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).