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Issue Date: 08 June 2005

Case No.: 2005-CAA-11

In the Matter of:

EDWARD A. SLAVIN, JR.,
Complainant

vs.

UCSB DONALD BREN SCHOOL,
Respondent.

ORDER

Procedural Background

This matter arises from a complaint filed by Edward A. Slavin, Jr. (Complainant) against the University of California at Santa Barbara (Respondent) based on the employee protection provisions of the Clean Air Act[1], the Comprehensive Environmental Response Compensation and Liability Act[2], the Federal Water Pollution Control Act[3], the Safe Drinking Water Act[4], the Solid Waste Disposal Act[5], the Toxic Substances Control Act[6], and the applicable regulations.[7]

On 15 Dec 04, Complainant filed an administrative complaint with the Occupational Safety & Health Administration (OSHA). OSHA issued a report of investigation on 22 Mar 05. On 12 Apr 05, Complainant filed a request for a formal hearing, and a motion to remand the case for a new administrative investigation. On 24 May 05, Complainant filed a motion to stay the case and appoint a settlement judge.

[1] 42 U.S.C. § 7622(2004)
[2] 42 U.S.C. § 9610(2004)
[3] 33 U.S.C. § 1367(2004)
[4] 42 U.S.C. § 300j-9(2004)
[5] 42 U.S.C. § 6971(2004)
[6] 15 U.S.C. § 2622(2004)
[7] 29 C.F.R. Part 24(2004)

Discussion

Remand

Complainant argues that the matter should be remanded for a new investigation by a new investigator. He cites a number of flaws in the way the investigation was conducted and alleges bias against him on the part of the investigator. Respondent answers that while it has no knowledge of the specifics steps taken by the investigator; she clearly received and considered Complainant's submissions, contacted and gathered information from Respondent, and made a determination on the merits of the complaint.

The applicable regulations provide that

> "The Assistant Secretary shall, … investigate and gather data concerning such case, and as part of the investigation may enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed.[8]

The remedy for a party which is dissatisfied with the investigation is to request a de novo hearing before an administrative law judge.[9] The essential element of the administrative investigation is that it makes a determination on the merits of the complaint. While some cases have been remanded to the investigator by the ALJ, they involved a failure to make a substantive finding on the merits. They do not involve a review of the quality of the investigation or its observance of due process.[10]

Even assuming that an investigation was not conducted properly, the due process protection for either side is a fair and impartial de novo hearing before an ALJ. Consequently, as long as the agency addressed and made a determination on the merits of the complaint, as it did in this case, remand is not an appropriate remedy.

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[8] 29 C.F.R. §24.4(b)(2004)

[9] 29 C.F.R. §24.4(d)(2)(2004)

[10] *See, e.g.,* Floyd v. Arizona Public Service Co. 1990-ERA-23 (1990) (Investigator refused to address merits because of incomplete complaint); Odom v. Anchor Lithmemko/Int'l Paper 1995-WPC-2 (1995) (Investigator refused to address merits because of untimely complaint); Pickett v. Tenn. Valley Auth. 1999-CAA-25 (1999) (Investigator refused to address merits because of alleged failure of complainant to cooperate) ; Rockefeller v. DOE 2002-CAA-5 (2002) *and* Ford v. Northwest Airlines 2002-AIR-21 (2002) (Remanded for investigation of new issues not addressed)

Settlement Judge

Complainant additionally moves to stay the case and appoint a settlement judge. The rules applicable to practice before ALJs are specific that "[a]t any time after the commencement of a proceeding, the parties **jointly** may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding."[11](emphasis added). While I would welcome such a joint motion, there is no provision allowing an ALJ to compel participation in the settlement judge program.

Order

Complainant's motions to remand and appoint a settlement judge are denied.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

[11] 29 C.F.R.§18.9(a)(2004)