



In the Matter of:

DOUGLAS A. COUPAR,

ARB CASE NO. 05-108

COMPLAINANT,

ALJ CASE NO. 2005-WPC-002

v.

DATE ISSUED: April 14, 2008

**UNICOR (FEDERAL PRISON
INDUSTRIES),**

REISSUED DATE: April 22, 2008

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Douglas A. Coupar, *pro se*, Terminal Island, California

For the Respondent:

**Douglas S. Goldring, Esq., *Federal Prison Industries, Inc.*, Washington,
District of Columbia**

**ORDER GRANTING RECONSIDERATION AND
RE-ESTABLISHING FINAL BRIEFING SCHEDULE**

On March 13, 2008, the Administrative Review Board issued a Final Decision and Order Dismissing Appeal (F. D. & O.) in this case arising under the whistleblower provisions of the Federal Water Pollution Control Act (WPCA).¹ In this decision, we

¹ 33 U.S.C.A. § 1367 (West 2001). The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the WPCA to the Administrative Review Board. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. §§ 24.1, 24.8 (2007). The WPCA's implementing regulations, found at 29 C.F.R. Part 24, have been amended since Coupar filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). We did not decide in our original decision whether the amendments applied to this case, because even if

granted the Respondent Unicorn's Motion to Dismiss Douglas Coupar's appeal because he failed to file a brief as provided in our Order Re-establishing the Briefing Schedule issued January 8, 2008.

On or about March 20, 2008, the Board received two documents in the mail. The first was the copy of the Board's F. D. & O. that we had sent to Coupar. The envelope of the returned document was stamped with the notation "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD." The second document was Complainant's Answer to Motion to Dismiss dated March 12, 2007.

Coupar stated in the Answer to Unicorn's Motion to Dismiss that he had not responded to the Order Re-establishing Briefing Schedule because he had not received it and that "the Federal Bureau of Prisons once again tampered; with the United States Mail."² We find that there is evidence to support Coupar's statement that he did not receive the Board's briefing order.

The Briefing Order was addressed to Coupar at the Federal Penitentiary, Lompoc, California. The Order was sent via certified mail and M. Medina signed for Coupar's copy of the Order on January 14, 2008. But, it appears that some time between the time Coupar filed his Petition for Review and his address was entered on the Board's docket and November 11, 2007, Coupar was transferred to the Federal Correctional Institution at Terminal Island, San Pedro, California.³ Thus, Coupar was not at Lompoc when the Board's Order was delivered and it seems likely that, as Coupar has alleged, he did not receive the Briefing Order.

We construe Coupar's Answer to Unicorn's Motion to Dismiss as a request that we reconsider our decision dismissing his appeal. The Board has authority to reconsider its decisions under the environmental acts.⁴ We have adopted principles that federal courts employ in deciding requests for reconsideration. We will reconsider our decisions under

the amendments had applied, the amended provisions were not at issue in this case and thus they would not have affected our decision.

² Complainant's Answer to Motion to Dismiss at 1.

³ Coupar indicated in a return address in a letter he sent to the Board on November 16, 2007 that his address was Terminal Island. Coupar did otherwise bring the change of address to the Board's attention.

⁴ See e.g., *Leveille v. N.Y. Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-003 and -004, slip op. at 4 (ARB May 16, 2000) (concluding that ARB has authority to reconsider decisions made under SDWA, the CWA, and the CERCLA); *Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 2-3 (ARB Nov. 24, 1998) (concluding that ARB has authority to reconsider decisions made pursuant to the CAA, the TSCA, and the SWDA).

similar limited circumstances, which include: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.⁵

When the Board issued its F. D. & O. in this case, Coupar reasonably did not know that a briefing schedule had been issued because the briefing order was not sent to his current address. We consider this to be a material difference in fact than that presented to the Board. Accordingly, we will reconsider our opinion after giving Coupar one last opportunity to prosecute his appeal in this case. No further enlargements of time will be granted.

The briefing schedule is re-established as follows:

1) The Complainant may file an initial brief, not to exceed thirty **(30)** double-spaced typed pages, on or before **May 20, 2008**. If the Complainant fails to file the initial brief on time, the Board may dismiss the Complainant's appeal for failure to timely prosecute it.⁶

2) The Respondent may file a reply brief, not to exceed thirty **(30)** double-spaced typed pages, on or before **June 19, 2008**.

3) The Complainant may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed ten **(10)** double-spaced typed pages, on or before **July 7, 2008**. **In all other respects the Board's initial Order Establishing Briefing Schedule issued July 5, 2005, remains in effect.**

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

⁵ See, e.g., *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *Weinstock v. Wilk*, 2004 WL 367618, at *1 (D. Conn. Feb. 25, 2004); *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 582-586 (D. Ariz. 2003).

⁶ See, e.g., *McQuade v. Oak Ridge Operations Office*, ARB No. 02-087, ALJ Nos. 1999-CAA-7 to 10 (ARB Oct. 18, 2002); *Pickett v. TVA*, ARB No. 02-076, ALJ No. 2001-CAA-18 (ARB Oct. 9, 2002).