



In the Matter of:

KENNETH BOWERS,

ARB CASE NO. 08-045

COMPLAINANT,

ALJ CASE NO. 2006-ERA-012

v.

DATE: June 30, 2008

**BARTLETT NUCLEAR, INC., and
FLORIDA POWER & LIGHT
COMPANY,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kenneth W. Bowers, *pro se*, Norfolk, Virginia

For the Respondent Bartlett Nuclear Inc.:

Larry J. Rappoport, Esq., *Stevens & Lee*, King of Prussia, Pennsylvania

For the Respondent Florida Power & Light Co.:

Mitchell S. Ross, Esq., Kelly C. Sulzberger, Esq., Juno Beach, Florida

FINAL DECISION AND ORDER

BACKGROUND

The Complainant, Kenneth W. Bowers, filed a petition with the Administrative Review Board, requesting the Board to review a Department of Labor Administrative

Law Judge's Decision and Order Dismissing Claim as Untimely Appealed (D. & O.) in this case arising under the whistleblower protection provisions of the Energy Reorganization Act (ERA).¹ On February 8, 2008, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule. Under the terms of the Order, Bowers's opening brief to the Board was due on or before March 10, 2008. Bowers failed to file an opening brief.

On March 7, 2008, Respondent Florida Power & Light (FPL) filed a Motion to Dismiss Appeal in this case. The Motion was based on three allegations: 1) that the Complainant's petition requesting the Administrative Review Board to review the Administrative Law Judge's D. & O.² in this case was insufficient because "not only has Complainant failed to identify the specific RD&O from which he is seeking ARB review, he has also failed to identify the findings or conclusions to which he takes exception,"³ 2) the appeal is defective as to FPL because "FPL has never been made a Respondent to this action,"⁴ and 3) the Complainant's appeal to the ARB is untimely.⁵ On March 19, 2008, FPL filed an Addendum to Motion to Dismiss Appeal. As an additional grounds requiring dismissal of Bowers's petition for review, FPL alleged that Bowers had failed to timely file his opening brief on our before March 10, 2008, as provided in the ARB's Notice of Appeal and Order Establishing Briefing.

On April 8, 2008, Respondent Bartlett Nuclear filed a Motion to Dismiss Appeal of Complainant Kenneth Bowers. Bartlett raised three grounds for this appeal: 1) the Complainant's appeal to the Administrative Review Board (ARB) is untimely, 2) the Complainant failed to identify the specific Decision and Order from which he is seeking ARB review and to identify the findings or conclusions to which he takes exception, and 3) he failed to file his initial brief in accordance with the terms of the ARB's briefing schedule.⁶

On April 9, 2008, the Board issued an Order to Show Cause in response to FPL's Motion. Initially we denied FPL's Motion to Dismiss on the grounds that the Complainant's petition for review was not timely filed. A petition for review must be filed within ten business days of the date on which the administrative law judge issued

¹ 42 U.S.C.A. § 5851(a) (West 2007).

² *Bowers v. Bartlett Nuclear, Inc. & Florida Power & Light Co.*, ALJ No. 2006-ERA-012 (Jan. 15, 2008).

³ Florida Power & Light Co.'s Motion to Dismiss Appeal at 3.

⁴ *Id.*

⁵ *Id.*

⁶ Bartlett Nuclear Inc.'s Motion to Dismiss Appeal at 5-6.

the order of which review is sought.⁷ The ALJ issued his D. & O. on January 15, 2008. The tenth business day following January 15, 2008, was January 30, 2008. The ARB received Bowers's Petition for Review by facsimile on January 30, 2008. Accordingly, Bowers timely filed the petition for review.

Before reaching the remaining arguments in FPL's original Motion to Dismiss Appeal, we stated that we would first resolve the argument in the Addendum, i.e., that the Board should dismiss the appeal because Bowers has failed to file an opening brief in compliance with the Board's briefing schedule. The Board explained that it has the inherent power to dismiss a case for want of prosecution in an effort to control its docket and to promote the efficient disposition of its cases.⁸ Accordingly, we ordered Bowers to show cause no later than April 24, 2008, why the Board should not dismiss his case because he has failed to timely prosecute it by filing an opening brief as provided in the Board's briefing order. We permitted both FPL and Bartlett to reply to Bowers's response no later than May 8, 2008.⁹

The Board subsequently granted Bowers's motion for an enlargement of time to respond to the Show Cause Order. In accordance with the Board's Order Granting Request for an Enlargement of Time, Bowers submitted his response on June 5, 2008. FPL submitted a reply to Bowers's response on June 18, 2008.

DISCUSSION

In *Mastrianna v. Northeast Utils. Corp.*,¹⁰ the Board dismissed a complaint in a case in which the complainant failed to adequately explain his failure to comply with the Board's briefing schedule. The Board explained that it has the inherent power to dismiss a case for want of prosecution in an effort to control its docket and to promote the

⁷ 29 C.F.R. § 24.8(a). The ERA's implementing regulations, found at 29 C.F.R. Part 24, have been amended, since Bowers filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). But the limitation period for filing a petition for review with the Board has not changed. *Compare* 29 C.F.R. § 24.8(a)(2007) *with* 29 C.F.R. 24.110(a), 72 Fed. Reg. at 44,966.

⁸ Order to Show Cause at 2. *Accord* *Mugleston v. E G & G Def. Materials*, ARB No. 04-060, ALJ No. 2002-SDW-004, slip op. at 2 (ARB June 30, 2004); *Blodgett v. Tenn. Dep't of Env't & Conservation*, ARB No. 03-043, ALJ No. 2003-CAA-007, slip op. at 2 (ARB Mar. 19, 2004).

⁹ On April 14, 2008, we issued an Order responding to Bartlett's Motion to Dismiss reiterating our conclusion that Bowers timely filed his petition for review and permitting Bartlett to reply to Bowers's response to our Show Cause Order.

¹⁰ ARB No. 99-012, ALJ No. 1998-ERA-033 (Sept. 13, 2000).

efficient disposition of its cases.¹¹ In our Order to Show Cause, we informed Bowers that it was incumbent upon him to “explain why his failure to timely file his brief should be excused.”¹² Furthermore, we warned Bowers that a failure to respond to the Board’s Order could result in the dismissal of his appeal. Nevertheless, Bowers did not explicitly address his failure to file an opening brief in his response. Instead he spent the preponderance of his response arguing that he had engaged in protected activity and as a result the Respondents terminated his employment.¹³ Bowers did state that he had searched extensively for an attorney without success, but he did not explain why he failed to file an opening brief in support of his petition for review pursuant to the Board’s briefing order.

The Board recognizes that dismissal of an appeal because a party failed to file an opening brief is a very serious sanction and one not to be taken lightly.¹⁴ Accordingly, the Board considered the lesser sanction of construing Bowers’s petition for review as a brief and requiring the Respondents to reply only to those arguments set forth in the petition. But after careful consideration, the Board has concluded that it would serve no purpose to require the Respondents to respond to the points raised in the petition for review. The ALJ recommended that Bowers’s claim be dismissed because Bowers failed to timely request a hearing and he did not demonstrate that he was entitled to equitable tolling of the limitations period.¹⁵ Bowers asserted in his petition for review that there is “plenty evidence of cover-ups, corruptions, perjury to federal investigations [sic] by both respondents,” and that “[t]he matters in [the] last letter in this case [sic], I do not agree with.” But Bowers did not specifically challenge, nor address, the ALJ’s findings that his request for a hearing was untimely and that he had failed to demonstrate that he was entitled to equitable tolling of the limitations period. Thus, because Bowers has presented no argument on the decisive issue, there is no reason to require the Respondents to reply to the contentions raised in the petition for review.

CONCLUSION

Bowers did not file an opening brief in support of his petition for review, and in response to the Board’s Order to Show Cause, he failed to explain why he disregarded the Board’s briefing order. Bowers’s petition for review neither challenges nor addresses the

¹¹ *Id.*, slip op. at 2. *Accord Mugleston*, slip op. at 2; *Blodgett v. Tenn. Dep’t of Env’t & Conservation*, ARB No. 03-043, ALJ No. 2003-CAA-007, slip op. at 2 (ARB Mar. 19, 2004).

¹² Order to Show Cause at 2 (Apr. 9, 2008).

¹³ Response to Order at 1-5.

¹⁴ *Ingram v. Shelly & Sands Inc.*, ARB No. 04-090, ALJ No. 2002-ERA-027, slip op. at 4 (ARB Mar. 31, 2008).

¹⁵ D. & O. at 4-5.

ALJ's resolution of the decisive timeliness issue, and thus it would serve no purpose to treat it as a substitute for an opening brief. Because in the absence of an opening brief, Bowers has provided the Board with no relevant grounds for rejecting the ALJ's recommended decision, we **DISMISS** Bowers's appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge