



Issue Date: 25 April 2005

CASE NO.: 2005-ERA-00005

IN THE MATTER OF:

ANDRES FLORES,
Complainant,

v.

WACKENHUT NUCLEAR SERVICES,
Respondent.

**RECOMMENDED DECISION AND ORDER
APPROVING VOLUNTARY DISMISSAL WITHOUT PREJUDICE**

This proceeding arises under the Energy Reorganization Act (ERA) of 1974, 42 U.S.C. A. §5851. Any action brought under these statutes is governed by the rules and procedures set forth in 29 C.F.R. Part 24. On November 23, 2004, the Complainant filed objections to the Secretary's Findings and Order dated November 18, 2004. I issued a Notice of Hearing and scheduled a hearing to begin on January 12, 2005. By an Order issued December 22, 2004, I granted the Complainant's request to delay the scheduled hearing to provide additional time to obtain counsel. The hearing was rescheduled to begin on May 10, 2005.

During a January 27, 2005, pre-hearing telephone conference to discuss pre-hearing matters and the hearing schedule, the Complainant stated he was considering a voluntary dismissal since he had not been able to hire an attorney. I discussed with the parties factors to consider concerning a voluntary dismissal. The practical effect, due to the statute of limitations, would be to bar the Complainant from filing another ERA case related to the claim in this case. I also discussed the option to try his case *pro se*. The Complainant decided that he would continue the case on a *pro se* basis. He stated that he might hire an attorney at a later time.

On March 16, 2005, I received a March 10, 2005 letter from the Complainant which stated, "This correspondence is in furtherance of my Dismissal Request due to lack of time and personal problems." He further stated he would no longer proceed with the case, Andres Flores vs. Wachenhut Nuclear Services. He finished the letter by stating, "I apologize and truly appreciate your time in this matter."

During our conference call with all parties on January 27, 2005, the Complainant appeared to understand the discussion related to his suggestion of voluntarily dismissing his case. He acknowledged that due to the statute of limitations, a voluntary dismissal at that time would bar the Complainant from filing another ERA case related to the claim in this case.

I find that the Complainant, by his March 10, 2005 letter, is making a knowing and voluntary request to dismiss this case.

The Respondent has no objection to the Complainant's request.

There is no indication that a settlement is involved in this request for dismissal.

A voluntary dismissal of an ERA whistleblower complaint is covered by Rule 41 of the Federal Rules of Civil Procedure. Rule 41 applies, because there are no procedures for voluntary dismissals contained in either the ERA, the implementing regulations at 29 C.F.R. Part 24, or the regulations at 29 C.F.R. Part 18. Under the ERA whistleblower provisions, a complainant is entitled to a unilateral, unconditional dismissal of the complainant's ERA complaint in accordance with Rule 41(a)(1)(i), where the respondent has not filed the functional equivalent of either an answer to the complaint or a motion for summary judgment.

An administrative law judge dismissal under Rule 41(a) is a recommended dismissal. A Rule 41 (a)(1)(i) dismissal can only be effected by the final order of the Secretary.

Considering the above factors, I recommend approval of the Complainant's request dismissal. Since the Complainant has not submitted an unequivocal request for a dismissal with prejudice, and there is not a joint motion for a dismissal with prejudice, I recommend this case be dismissed without prejudice. The Complainant has been told that the statute of limitations would bar him from filing another ERA case related to the claim in this case. A dismissal without prejudice does not toll a statute of limitations; expiration of the limitations period will bar a complainant from filing another ERA complaint based on the same facts.

RECOMMENDED ORDER

Upon consideration of the foregoing,

IT IS HEREBY ORDERED that the Complainant's request to dismiss this case shall be granted. This case shall be dismissed without prejudice.

A

WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:dj

NOTICE OF REVIEW:

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29