



**In the Matter of:**

**DENNIS MCQUADE, COMMIE R.  
BYRUM, VIRGINIA JOHNSON &  
KENNETH WARDEN,**

**COMPLAINANTS,**

**v.**

**ARB CASE NO. 02-087**

**ALJ CASE NOS. 99-CAA7**

**99-CAA-8**

**99-CAA-9**

**99-CAA-10**

**DATE: October 18, 2002**

**OAK RIDGE OPERATIONS OFFICE  
U.S. DEPARTMENT OF ENERGY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1</sup>**

**Appearances:**

*For the Complainant:*

*Edward A. Slavin, Jr., Esq., St. Augustine, Florida*

*For the Respondent:*

*Ivan Boatner, Esq., U.S. Department of Energy, Oak Ridge, Tennessee*

**ORDER DISMISSING APPEAL**

**Background**

Although this case is captioned *Dennis McQuade, Commie R. Byrum, Virginia Johnson and Kenneth Warden, Complainants v. Oak Ridge Operations Office, U.S. Department of Energy, Respondents*, the petitioner in this case is actually Attorney Edward A. Slavin, Jr. Slavin formerly represented the Complainants in a matter in which they filed complaints under a number of whistleblower protection statutes.<sup>2</sup>

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<sup>1</sup> This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 1-2002. 67 Fed. Reg. 64272 § 5(b) (Oct. 17, 2002).

<sup>2</sup> These statutes include the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A §

(continued...)

During the course of the litigation, Complainants terminated their relationship with Slavin and obtained new legal counsel to litigate their cases. A Department of Labor Administrative Law Judge (“ALJ”) issued a recommended decision and order finding in favor of three of the four Complainants and awarding compensatory damages. While appeals on the merits of this case were pending before the Administrative Review Board,<sup>3</sup> Slavin filed a petition for attorney’s fees and costs with the ALJ.

On June 18, 2002, the ALJ issued a “Supplemental Decision and Order Dismissing Application for Attorney’s Fees.” Shortly thereafter, Slavin filed a “Petition for Review of ALJ’s June 18, 2002 Order on Award of Attorney Fees.” In response the Board issued a “Notice of Appeal and Order Establishing Briefing Schedule.” The order established August 14, 2002, as the due date for Slavin’s opening brief. However, Slavin failed to file his opening brief by this date.

On September 19, 2002, the Administrative Review Board issued an order directing Slavin to show cause why this case should not be dismissed because he had failed to file an opening brief as provided by the Board’s briefing order. On September 21, 2002, Slavin filed a request for an enlargement of time, thirty-eight days after his brief was due. The request was open ended, specifying no date on which Slavin intended to file the opening brief. As grounds for this request Slavin stated:

Judge Vittone has not yet made the transcript in quo available to the undersigned, which has prejudiced his rights. The undersigned counsel just completed eight days in trial before Judge Edward Terhune Miller and has another five day trial commencing on Monday before Judge Joseph Kane. The trial before Judge Miller was scheduled sooner and took longer than anticipated when the extension was requested.

Motion for Enlargement of Time Re: Fee Petition.

On October 7, 2002, Slavin filed a response to our show cause order incorporating his previously filed motion for enlargement and requesting the Board to order Chief Administrative Law Judge John Vittone to provide him with a copy of a transcript which he alleges will show that “Complainants did not authorize anyone to file a pro se opposition to the fee petition of the undersigned.” Response to Order to Show Cause and Motion to Order Judge Vittone to Release

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(...continued)

9610 (West 1995); the Energy Reorganization Act, 42 U.S.C.A § 5851 (West 1995); the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995); and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998).

<sup>3</sup> The Board subsequently approved the parties’ settlement of this case. *McQuade v. Oak Ridge Operations Office*, ARB Nos. 01-093, 01-094; ALJ Nos. 1999-CAA-7, 1999-CAA-8, 1999-CAA-9, 1999-CAA-10 (ARB Nov. 28, 2001).

Transcript Showing Complainants did not Sign/Authorize “Pro Se” Opposition to Counsel’s August 27, 2001 Fee Petition.”

### **Discussion**

Courts possess the “inherent power” to dismiss a case for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). This power is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 630-631. In *Mastrianna v. Northeast Utilities Corp.*, ARB No. 99-012, ALJ No. 98-ERA-33 (Sept. 13, 2000), 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 efficient disposition of its cases. Slip op. at 2.

In this case, Slavin failed to file his opening brief as provided in the Board’s briefing order. Furthermore, he failed to file his request for an enlargement of time to file the brief until thirty-eight days after the brief was due and that request specified no date on which Slavin proposed to file the brief. Finally, Slavin has failed to adequately explain why he failed to timely file either his brief or a request for an enlargement of time.

On September 21, 2002, Slavin stated that he “just completed” an eight-day trial with ALJ Miller. However, this assertion does not explain why Slavin was unable to file either a brief or a motion for an enlargement of time, which were due no later than August 14, 2002. Similarly the fact that Slavin was going to be trying a case beginning September 23, 2002, does not justify his failure to file either a brief or motion for enlargement on August 14.

Accordingly we hold that Slavin has failed to substantiate his failure to comply with the Board’s briefing order, and we **DISMISS** this appeal. Given our disposition of this case, we **DENY**, as moot, the motion requesting the Board to order Chief Administrative Law Judge John Vittone to provide Slavin with a copy of a transcript. However, we note that the dispute with Judge Vittone appears to have resulted from Judge Vittone’s response to Slavin’s request for a fee waiver under the Freedom of Information Act, 5 U.S.C.A § 552 (West 1996). Exhibit A attached to Slavin’s response to order to show cause. Appeals of such denials do not fall within the coverage of the whistleblower acts under which the Complainants filed this action. *Rockefeller v. Carlsbad Area Office, U.S. Dep’t of Energy*, ARB Nos. 99-002, 99-067, 99-068, 99-063; ALJ Nos. 98-CAA-10, 98-CAA-11, 99-CAA-1, 99-CAA-4, 99-CAA-6 (ARB Oct. 31, 2000).

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**