



In the Matter of:

DAVID W. PICKETT,

ARB CASE NO. 02-076

COMPLAINANT,

ALJ CASE NO. 01-CAA-18

v.

DATE: October 9, 2002

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

Appearances:

For the Complainant:

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

For the Respondent:

Linda J. Sales-Long, Esq., Tennessee Valley Authority, Knoxville, Tennessee

ORDER DISMISSING APPEAL

On September 19, 2002, the Administrative Review Board issued an order directing the Complainant, David Pickett, to show cause why this case should not be dismissed because the Complainant has failed to file an opening brief as provided by the Board's briefing schedule, as amended. Finding that Pickett has failed to demonstrate sufficient cause for failing to comply with the briefing schedule, we dismiss this appeal.

Background

On April 22, 2002, a Department of Labor Administrative Law Judge ("ALJ") issued an order recommending that the Respondent, Tennessee Valley Authority ("TVA") pay Pickett's counsel an attorney's fee of \$14,621.82 for services rendered and costs Pickett incurred in successfully litigating his complaint under a number of environmental whistleblower statutes.²

¹ This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19, 978 § 5 (May 3, 1996).

² These statutes include the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Comprehensive (continued...)

Pickett filed an appeal of this recommended order with the Board pursuant to 29 C.F.R. § 24.8.

In response to Pickett's petition for review, the Board issued a "Notice of Appeal and Order Establishing Briefing Schedule." Pickett was ordered to file his opening brief on or before June 21, 2002. Pickett subsequently filed a motion for an enlargement of time in which to file his opening brief. We granted the motion and enlarged the time for filing the opening brief until July 11, 2002. Pickett filed a second motion for an enlargement of time. We granted this motion, as well, and enlarged the time for filing until July 31, 2002. Pickett filed a third motion for an enlargement of time. Again we granted the motion and ordered Pickett to file his brief on or before September 5, 2002. Pickett failed to file his brief on or before September 5, 2002, as ordered.

On September 19, 2002, we ordered Pickett to show cause why we should not dismiss his petition for review because he had failed to comply with our briefing order. On September 21, 2002, sixteen days after his brief was due, Pickett filed a fourth request for an enlargement of time. The request was open ended, specifying no date on which the opening brief would be filed. As grounds for this request Pickett stated:

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.

Complainant's [4th] Motion for Enlargement of Time on Attorney Fee Petition.

On September 27, 2002, TVA filed a "Response to Complainant's Fourth Motion for Enlargement of Time on Attorney Fee Petition" ("TVA Resp."). TVA argues:

Despite the Board's decision to grant Complainant's three previous extensions totaling 76 days, he continues to seek extensions while disregarding the Board's orders granting these extensions. . . . [M]ost recently the Board granted Complainant's third motion for an enlargement of time until September 5. Rather than file his brief, or even timely communicate with the Board that he would be unable to make such a filing, Complainant ignored the deadline established by the Board. The record clearly shows that Complainant has constantly disrupted the Board's docket, as well

(...continued)

Environmental Response, Compensation, and Liability Act, 42 U.S.C.A § 9610 (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).

as unfairly interfered with the schedule for TVA's counsel. Complainant's actions amount to nothing more than his failure to follow the procedural expectations established by the Board and to diligently pursue this case.

TVA Response at 2.

On October 7, 2002, Pickett filed a response to our show cause order incorporating his previously filed fourth motion for enlargement and indicating that his counsel had "suffered from a head cold since his return from Tennessee." Complainant's Response to Order to Show Cause on Attorney 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, after the Board granted Pickett three enlargements of time, Pickett failed to file either the promised brief or even a request for a further enlargement by September 5, 2002, the filing date specified in the Board's order. In fact, Pickett did not communicate with the Board for more than two weeks after the due date for his brief had passed. In this communication, Pickett's counsel requested a fourth enlargement of time citing a head cold and longer than anticipated trial schedules, but not even suggesting a date by which he would file Pickett's brief. To date, the Board has accommodated Pickett's counsel's schedule, in an attempt to offer Pickett every reasonable opportunity to file a brief in this case. However, we do not find counsel's head cold or busy trial schedule a sufficient explanation for his failure, not only to file a brief as ordered, but to even timely communicate his apparent inability to do so.

Accordingly, we hold that Pickett has failed to justify his failure to comply with the Board's briefing order and, we **DISMISS** this appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge