U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 October 2004

Case No.: 2004-ERA-00028

In the Matter of

JOHN A. PONZI
Complainant

and

WILLIAMS GROUP INTERNATIONAL
and WILLIAMS POWER CORPORATION
Respondent

Appearances: John A. Ponzi, Pro se; Thomas M. Closson, Esq., For Respondent

Before: Robert D. Kaplan
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
DISMISSING RESPONDENT'S REQUEST FOR A HEARING

This proceeding arises under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851 ("ERA"), and the implementing regulations at 29 C.F.R. Part 24. The ERA protects employees from discrimination in their employment for filing "whistleblower" complaints or engaging in other protected activity relating to concerns regarding environmental health and safety.

Issue

The issue to be determined is whether Respondent's failure to serve Complainant with timely notice of its request for a hearing requires dismissal of Respondent's request for a hearing.

Procedural History

On February 4, 2004 the Occupational Safety and Health Administration ("OSHA") received Complainant's complaint alleging that Respondent discriminated against him in his employment because of his protected activity under the ERA.

After investigating the allegations in the complaint, on September 8, 2004 OSHA issued a "Notice of Determination" in which it found that the complaint was meritorious and that

Respondent had violated the ERA because it "de-selected" Complainant from employment due to his protected activity. The Notice of Determination provided a remedy for Respondent's violation under the heading "Order to Abate the Violation" in which Respondent was directed, *inter alia*, to pay Complainant back wages in the amount of $9,360.00 plus interest, compensatory damages of $10,000.00, expunge a portion of Complainant's employment records, provide a neutral employment reference for Complainant, refrain from future discrimination and retaliation against Complainant, post a prescribed "Notice to Employees," and post a notice entitled "Your Rights Under the ERA."

In a letter dated September 9, 2004 from Respondent's attorney Thomas M. Closson to the Office of Administrative Law Judges ("OALJ"), Respondent stated that "it wishes to appeal OSHA's merit finding . . . and respectfully requests that the matter be scheduled for a formal hearing on the record." The letter indicates that a copy was mailed to OSHA but it lists no other recipient. Respondent's September 9, 2004 request for a hearing was stamped by OALJ as received on September 14, 2004. Complainant did not file a request for a hearing.

This case was assigned to me on September 16, 2004. On that date I issued a Notice of Hearing scheduling the formal hearing on November 9, 2004.

On October 14, 2004 I issued an Order to Show Cause in which I required Respondent to show cause why its request for a hearing should not be dismissed and OSHA's determination of September 8, 2004 should not become the final order of the Secretary of Labor because it appeared that Respondent had failed to provide Complainant with timely service of its request for a hearing.

Respondent filed a response to the Order to Show Cause on October 20, 2004. Complainant did not file a response.

Findings and Conclusions

The regulations contain the following provisions regarding appealing an OSHA determination and obtaining a hearing before OALJ at 29 C.F.R. § 24.4(d):

> (2) The [OSHA] notice of determination shall [inform the parties that] any party who desires review of the determination or any part thereof . . . shall file a request for a hearing with the Chief Administrative Law Judge within five business days of the date of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination . . . shall become inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.

> (3) A request for a hearing shall be filed with the Chief Administrative Law Judge . . . . A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall also be sent to the assistant Secretary for Occupational Safety and Health and to the Associate Solicitor . . . .

In its October 20, 2004 response to the Order to Show Cause, Respondent concedes that it has not provided Complainant with a copy of its request for a hearing. However, Respondent argues that this failure should be excused for the following reasons. Respondent's counsel first states that he believed he did not have Complainant's correct address. Counsel also states that about September 10, 2004 he attempted to obtain confirmation of Complainant's address from OSHA but about September 14, 2004 OSHA advised that it would not do so because of privacy concerns. Counsel adds that he then attempted to contact Respondent to obtain Complainant's address, but that before Respondent replied to him the Notice of Hearing was issued on September 16, 2004. Counsel states that at that point he believed that sending Complainant the request for a hearing "would serve no purpose." Counsel also posits that Complainant was not prejudiced by not receiving the request for a hearing. Finally, counsel argues that an administrative law judge ("ALJ") has no authority to dismiss a request for a hearing because the filing party failed to serve it on the other party, under 29 C.F.R. § 24.6(c)(4).

I disagree with Respondent's contentions. The regulatory provisions governing requests for a formal hearing before OALJ in ERA cases clearly require that the party requesting a hearing shall "on the same day" send a copy of the request to the other party. 29 C.F.R. § 24.4(c)(3). Further, providing the other party with the request for a hearing is not a perfunctory or insignificant act, as it provides that party with notice that the OSHA determination is being challenged and that such party "in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party." 29 C.F.R. § 24.4(d)(2).[1] Moreover, Respondent's counsel has failed to explain why he did not believe he had Complainant's correct address or, more important, why Respondent failed to make any attempt to serve Complainant at the address it did have for him.[2]

Although I have not found any determination by the Administrative Review Board of the issue present here, three ALJs have held that the failure of a party in an ERA case to timely serve the other party with a request for a hearing deprives OALJ of jurisdiction to hear and decide the merits of the case: Webb v. Numanco, LLC, 98-ERA-27, -28 (ALJ Roketenetz, July 17, 1998); Cruver v. Burns Int'l., 2001-ERA-31 (ALJ Levin, Dec. 5, 2001); Steffenhagen v. Securitas, AB, 2005-ERA-3 (ALJ Bullard, Dec. 16, 2003); Shirani v. Calvert Nuclear Power Plant, Inc., 2004-

[1] The regulations setting forth the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges also require that "copies of all documents shall be served on all parties of record." 29 C.F.R. § 18.3(a).

[2] In addition, under 29 C.F.R. § 24.5(c) (2) OSHA would have provided Respondent with a copy of the complaint. This document contains Complainant's address.

ERA-9 (ALJ Bullard, April 29, 2004). Another ALJ found no jurisdictional impediment flowed from the failure to timely serve the request for a hearing on the other party in Hibler v. Exelon Nuclear Generating Company, 2003-ERA-9 (ALJ Lesniak, May 5, 2003). In Hibler the ALJ's initial basis for his ruling was that the party who requested the hearing "is pro se."[3] (Hibler, slip op. at 2) However, in the instant case Respondent is represented by counsel.

Based on the foregoing, I find that I do not have jurisdiction to hear and decide the merits of this case because Respondent failed to serve a copy of its request for a hearing on Complainant on the same day that it was sent to OALJ. 29 C.F.R. §§ 24.4(d)(2)(3). Therefore, I shall dismiss Respondent's appeal and request for a hearing. 29 C.F.R. § 24.6(e)(4). Consequently, the September 8, 2004 determination by OSHA constitutes the final order of the Secretary of Labor. 29 C.F.R. § 24.4(d)(2).

ORDER

It is ORDERED that the appeal and request for a hearing filed by Respondent is dismissed and the September 8, 2004 determination by OSHA constitutes the final order of the Secretary of Labor.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

[3] Although the concept of giving procedural slack to parties who are unrepresented by an attorney holds some sway at the Department of Labor, in my view it is justified only rarely. Similarly, Shirani rejected the argument that the complainant's failure to serve the respondent should be excused because the complainant did not have legal representation at the time he requested a hearing. Shirani also rejected the contention that failure to serve the request for a hearing on the other party should be excused because OSHA had not advised the parties that a request for a hearing had to be served on the other party. At any rate, in the instant case Respondent has been represented by legal counsel, and OSHA's Notice of Determination did advise the parties of the requirement of serving a request for a hearing on the other party.

It is also interesting that all four decisions referred to above involved failure by the complainants to serve employer-respondents with the appeal of OSHA's determination that the complaints had no merit. The instant case presents the obverse side of the coin, as Respondent is attempting to appeal OSHA's finding that the complaint has merit and the remedy that OSHA imposed for the violation of the ERA.

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 C.F.R. §§ 24.7(d) and 24.8.