



In the Matter of:

BRYCE P. SABIN,

ARB CASE NO. 04-032

COMPLAINANT,

ALJ CASE NO. 2003-STA-5

v.

DATE: July 29, 2005

YELLOW FREIGHT SYSTEM, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Bryce P. Sabin, pro se, Chicago, Illinois

For the Respondent:

Anderson B. Scott, Esq., Fisher & Phillips LLP, Atlanta, Georgia

FINAL DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997), and the implementing regulations at 29 C.F.R. Part 1978 (2004). The STAA protects employees from retaliation for engaging in specific types of activities that are related to motor vehicle carrier safety. 49 U.S.C.A. § 31105(a)(1)(A), (B). On November 14, 2003, the Administrative Law Judge (ALJ) issued a [Recommended] Final Decision and Order Approving Complainant's Withdrawal of Objections to the Secretary's Findings, Reinstating and Affirming the Secretary's Findings, Dismissing Claim with Prejudice, and Awarding Respondent Costs (R. D. & O.). In that decision, the ALJ accepted Bryce Sabin's withdrawal of his request for hearing before an ALJ on the determination of the Department of Labor Occupational Safety and Health Administration (OSHA) that Yellow Freight did not discharge Sabin in retaliation for engaging in whistleblowing activity. The ALJ's decision also awarded Yellow Freight costs against Sabin in the

amount of \$150.00. On December 19, 2003, the ALJ issued an Order Denying Complainant's Motion for Reconsideration (Ord. Denying Recon.), which rejected Sabin's contention that he had not understood the legal effect of his withdrawing his objection to OSHA's findings. As we explain, we adopt the ALJ's conclusion that the consequence of Sabin's withdrawal of his objection is the termination of his complaint with prejudice, but we reverse the ALJ's award of costs to Yellow Freight.

BACKGROUND

Sabin is a former truck driver, whose employment Yellow Freight terminated on September 13, 2001. On March 11, 2002, Sabin filed a complaint with OSHA, asserting that Yellow Freight improperly discharged him in retaliation for reporting unsafe conditions at Yellow Freight to the Illinois State Police, the United States Department of Transportation, print and electronic news media, and a United States Department of Labor administrative law judge. Yellow Freight responded that it discharged Sabin because it learned that he was working a second truck driving job on days he called in sick to Yellow Freight. Following an investigation, OSHA issued findings against Sabin, in which OSHA concluded that Yellow Freight terminated Sabin's employment "for dishonesty in that he was scheduled for work . . . and used sick/personal days to work at another employer . . ." Secretary's Findings, October 18, 2002. OSHA rejected Sabin's defense that other Yellow Freight drivers had worked on additional jobs under similar circumstances, finding instead that other drivers had worked at such jobs on days when they were not scheduled to work for Yellow Freight. *Id.* Consequently, OSHA dismissed Sabin's whistleblower complaint. *Id.*

Sabin requested a hearing before an ALJ, pursuant to 29 C.F.R. § 1978.105(a). The ALJ initially scheduled a hearing in the case for February 11, 2003, but the hearing was delayed as the result of several motions to continue that the parties filed jointly and individually. In addition, a different ALJ conducted settlement discussions with the parties in May 2003. After Sabin refused to sign the resulting negotiated settlement agreement in July 2003, the attorney who had represented Sabin until that time requested leave to withdraw from the case. The ALJ assigned to the underlying case granted the motion and Sabin has proceeded pro se. Subsequent to Sabin's rejection of the settlement agreement, Yellow Freight moved for summary judgment. On August 7, 2003, the ALJ issued a Notice of Hearing, scheduling an evidentiary hearing for October 7, 2003, in Chicago. The ALJ later denied Yellow Freight's motion for summary judgment.

The ALJ's hearing notice provided that "NO written requests for continuances will be considered by the judge if filed within five days of the hearing. These requests for continuances must be made in person at the hearing." Despite this directive, on Friday, October 3, 2003, one business day before the scheduled hearing, Sabin faxed a "Motion for Stay of STAA Case No. 2003-STAA-5 Until the Outcome Of a Soon to Be Filed State Charge of Retaliatory Discharge." In support of his motion for a stay, Sabin asserted only: "Complainant Bryce Sabin respectfully seeks this motion to stay case # 2003-STAA-5 so Mr. Sabin can file and move forward with a State charge of Retaliatory Discharge." Adhering to his notice of hearing, the ALJ denied the motion as untimely

and required the parties to appear at the hearing scheduled for October 7, 2003, in Chicago.

In anticipation for the hearing, Yellow Freight's counsel flew from Atlanta, its in-house counsel traveled from Kansas City, and the ALJ flew from Pittsburgh to Chicago. Tr. at 6-7. Yellow Freight was prepared to produce a witness who came in from South Chicago. *Id.* At the commencement of the hearing, the ALJ took up the request for a continuance (i.e., stay). As grounds, Sabin stated that he anticipated filing an action for retaliatory discharge in state court. Counsel for Yellow Freight objected and the ALJ denied the motion:

JUDGE TIERNEY: Thank you. Mr. Sabin, you filed a motion on Friday for a continuance, is that correct?

MR. SABIN: Yes, sir.

JUDGE TIERNEY: The grounds for the continuance were that you are about to or sometime in the future will file a state action?

MR. SABIN: Yes, sir. That should happen this week. The complaint's been filled out and signed. The attorney has been retained and the case -- it should be filed this week.

JUDGE TIERNEY: You have an attorney for that action?

MR. SABIN: Yes, sir.

JUDGE TIERNEY: Mr. Scott [counsel for Yellow Freight], do you have any opinion on whether or not we should continue this case?

MR. SCOTT: Your Honor, we would oppose it. We received the motion for a continuance after the close of business on Friday when I was already in Chicago. The grounds on which he's moved for a continuance are grounds that he could have determined weeks or even years ago. This case has been going on for two years now. And to say at the 11th hour, to fax in a motion to us after the close of business two days before the case is set to start, is simply unacceptable.

JUDGE TIERNEY: Thank you. I feel the same way. The motion was filed too late. I can't continue a case just because you might file a case in state court.

MR. SABIN: The case is being filed in state court, sir.

JUDGE TIERNEY: Nonetheless, it was too late. Are you ready to proceed today?

Tr. at 4-5.

In fact, Sabin was not prepared to proceed. He was ready to offer a second written motion for a stay, but, because the ALJ had already ruled that he would not stay the case pending the outcome of the state court action, Sabin withdrew his objection to OSHA's finding against him. Sabin reasoned out loud that, even if he prevailed at the hearing on the merits, Yellow Freight would appeal, and he could not handle the appeal without counsel. He could not incur both the cost of a lawyer representing him in an appeal and the cost of proceeding with one in state court, so he elected to proceed in state court, where he would have the benefit of a jury trial:

MR. SABIN: I have a second motion but I -- with your talk there I don't think that you'll accept that one, so I'll just go to withdrawing my objections to the [OSHA] findings.

JUDGE TIERNEY: Are you ready to proceed with your case?

MR. SABIN: Yes, I'm going to withdraw my objections to the findings at this time.

....

MR. SABIN: I'm withdrawing my objections to the findings, sir. I have a motion here.

JUDGE TIERNEY: To the Director's findings?

MR. SABIN: Yes, sir.

JUDGE TIERNEY: Okay. You're asking for a dismissal of this case.

MR. SABIN: I'm withdrawing my objections to the findings, sir.

JUDGE TIERNEY: All right. You're asking for a dismissal, is that correct?

....

JUDGE TIERNEY: You're sure you want to dismiss this case?

MR. SABIN: I would rather you stay it so I can pursue my case in state court where I can afford competent legal counsel. Where in this matter, I can't afford legal counsel. And with Mr. Scott's and Yellow's position as stated in my second motion for a stay, that they will appeal any adverse decision. I can't fathom how I would handle that without an attorney.

JUDGE TIERNEY: All right. Your motion for a continuance has been denied.

MR. SABIN: I understand. I have a second motion for a continuance --

JUDGE TIERNEY: On what grounds is the second motion?

MR. SABIN: Like I just stated, Yellow's going to appeal any adverse decision and I can't imagine how I

would handle that without an attorney. I can't afford two attorneys to handle both cases.

I feel that my opportunity to go in front of a jury should outweigh this court here. To be heard by a jury of my peers in this matter, which the state court allows.

....

JUDGE TIERNEY: All right. Your motion for a continuance is denied. And I'll accept your withdrawal of your complaint. So the case will be dismissed --

MR. SABIN: I'd like to file my motion as my -- as my withdrawing of my objections.

JUDGE TIERNEY: I'm sorry, what did you --

MR. SABIN: I have a motion here withdrawing my objections. I'd like to file that.

JUDGE TIERNEY: Oh, sure.

MR. SABIN: Okay. I have a copy here.

JUDGE TIERNEY: Would you bring it up, please?

Tr. at 5-8.

Sabin's written motion stated:

Pursuant to 29 U.S.C./ [C.F.R.] 1978.111(c)(Ex. 1) complainant Bryce Paul Sabin is withdrawing his objections to the findings by OSHA of Yellow Freight/Sabin/5-1260-02-021. (Ex. 2) His former attorney Paul Taylor on 10/23/02 raised Mr. Sabin's objections. (Ex. 3) Mr. Sabin is withdrawing his objections, as he was unable to have a stay on the proceedings issue. Both the stay motion and the withdraw motion are filed so Mr. Sabin can move forward with a State charge of Retaliatory Discharge. Mr. Sabin was able to retain an Attorney for the State charge.

The ALJ inquired of Yellow Freight's counsel whether he objected to dismissal of Sabin's complaint, and counsel said he did not object, so long as the complaint was dismissed with prejudice. The ALJ stated and Sabin testified that he understood that, if he withdrew his objections, he could not bring his OSHA complaint again:

JUDGE TIERNEY: Mr. Scott?

MR. SCOTT: Your Honor, if he wants to dismiss this case with prejudice, that's his choice and of course that's - we want this case to go away as well, that's why we're here. I, again, wonder why he couldn't have done that before we all get together in this courtroom, but if he wants to dismiss it with prejudice, then we will go along with that.

....

JUDGE TIERNEY: Do you want to respond [to Sabin's withdrawal of his appeal], Mr. Scott?

MR. SCOTT: No, sir, I don't believe any response is necessary.

JUDGE TIERNEY: I don't believe so either. All right, your motion to withdraw your complaint is granted. You understand this is the finality of this case? The case is now final. You can't refile this case.

MR. SABIN: I understand.¹

Tr. at 8-9.

Before concluding the hearing, the ALJ scolded Sabin, "You've put a lot of people to great expense to be here today for five minutes of proceeding." Tr. at 9.

JURISDICTION AND STANDARD OF REVIEW

This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a) ("The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."). The Secretary of Labor has delegated her jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) to the Administrative Review Board (ARB or Board). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c) (2004).

In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's legal conclusions de novo. *See Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

However, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

We review allegations that an administrative law judge erred in ruling on procedural issues under the abuse of discretion standard. In other words, we determine whether, in ruling as he did, the administrative law judge abused the discretion vested in

¹ Inconsistently, Sabin added: "And I intend to appeal your denying of my motion to continue this case, sir."

him to preside over the proceedings. *See Khandelwal v. Southern Calif. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-6, slip op. at 2 (ARB Nov. 30, 2000); *see also Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, ALJ No. 2003-STA-26, slip op. at 4-5 (ARB Aug. 31, 2004) (applying abuse of discretion standard in reviewing administrative law judge's denial of continuance request).

ISSUES

At issue are whether the ALJ erred in: (1) denying Sabin's motion to stay (continue) the October 7, 2003 evidentiary hearing until the conclusion of an as-yet-to-be-filed state retaliatory discharge claim; (2) holding that Sabin understood that, if he withdrew his objections to OSHA's findings, he could not refile his DOL complaint; and (3) awarding costs against Sabin for the attendance of the Yellow Freight witness.

DISCUSSION

I. Denial of stay

We first consider whether it was an abuse of the ALJ's discretion to deny Sabin's motion to stay the October 7, 2003 evidentiary hearing until the outcome of a state wrongful discharge claim that Sabin admitted has not yet been filed.

Section 1978.112 of the STAA regulations provides for postponement of the investigation and adjudication of a STAA complaint under certain circumstances while a complainant is pursuing other remedies (such as grievance arbitration proceedings under collective bargaining agreements) based on the same alleged employment action. 29 C.F.R. § 1978.112(a), (b) (2004). An ALJ may defer to the outcome of those proceedings "on a case-by-case basis." § 1978.112(c); *see, e.g., Faust v. Chemical Leaman Tank Lines, Inc.*, ARB No. 98-078, ALJ Nos. 92-SWD-2, 93-STA-15, slip op. at 2 (ARB Mar. 31, 1998) (noting that administrative law judge had stayed proceedings while the parties arbitrated an issue regarding the handling of the settlement agreement). Under the Office of Administrative Law Judges (OALJ) Rules of Practice and Procedure, "Continuances will only be granted in cases of prior judicial commitments or undue hardship, or a showing of other good cause," and "[e]xcept for good cause arising thereafter, . . . must be filed within fourteen (14) days prior to the date set for the hearing." 29 C.F.R. § 18.28(a), (b) (2004). "Motions for continuances, based on reasons not reasonably ascertainable prior thereto, may also be made on the record at . . . hearings." § 18.28(c).

Sabin was seeking a postponement of the STAA action until the resolution of the state court action he intended to file, so "stay" and "continuance" are used interchangeably at the hearing and in the ALJ's opinion. Sabin made no substantive argument about how the outcome of a state court retaliatory discharge action would affect his STAA claim before the ALJ. Rather, he said he could not afford an attorney to proceed in both forums, and he preferred to allocate his resources to state court proceeding, in which he would be entitled to a jury trial. Tr. at 5-8. Sabin's OSHA

complaint had been pending since March 2002, settled, continued before, scheduled for evidentiary hearing two months beforehand, and Yellow Freight was ready to go forward, whereas Sabin's state court action had not yet been filed and he made no representation about when it would be completed. Inasmuch as the STAA regulations permit (but do not require) an ALJ to postpone STAA adjudication while a complainant pursues other remedies and to defer to the outcome on a case by case basis, it was not an abuse of discretion for the ALJ to deny the stay.

Likewise, Sabin had two months notice of the hearing on the merits, which had been continued before. On the Friday before the Tuesday hearing, he filed his motion to continue (stay). The motion was untimely under both STAA regulations, which required that the motion be filed 14 days before the scheduled hearing, and under the ALJ's pre-trial order, which required 5 days. Although the regulations allow a party to request a continuance out of time or even at the hearing itself, the moving party must demonstrate "good cause" "arising" after the deadline had passed, "based on reasons not reasonably ascertainable prior" to the hearing. Yellow Freight had fired Sabin two years before the scheduled hearing, and he proffered no evidence about why he could not have secured a lawyer to pursue his state law cause of action before the eve of his federal hearing on the merits. The facts on which he based his decision to retain a lawyer and to pursue a state law claim were reasonably ascertainable long before the scheduled October 7, 2003 hearing. The ALJ and Yellow Freight's counsel had traveled long distances and were prepared to go forward. Consequently, the ALJ did not abuse his discretion in denying another continuance.

II. Effect of withdrawal of objections

We next consider the effect of Sabin's withdrawal of his objections to the OSHA investigation findings. When the ALJ denied the stay, Sabin informed him that he wanted to withdraw his objections and he presented the ALJ with a written motion under 29 C.F.R. § 1978.111(c). Counsel for Yellow Freight did not object, so long as the dismissal of the appeal would be "with prejudice," i.e., Sabin could not refile a complaint with OSHA on the same set of facts. The ALJ then granted Sabin's motion but, directing his comment to Sabin, said, "You understand this is the finality of this case? The case is now final. You can't refile this case." Sabin replied, "I understand." Tr. at 8-9.

On November 18, 2003, Sabin filed a Motion for Reconsideration of the ALJ's November 14, 2003 D. & O. After previously saying he "understood" that he could not refile his case in the DOL, Sabin stated, "at no time did I want to drop this matter." Sabin's letter/motion requesting recon., filed Nov. 18, 2003. But then he correctly noted, "I thought withdrawing my objections to the [OSHA] findings would close this case with those findings being affirmed." *Id.* After reviewing the record, the ALJ determined that Sabin previously understood and agreed that he could not refile his OSHA complaint. Ord. Denying Recon. In his brief to us, Sabin makes plain what was not clear before: that his concern has been that a "with prejudice" dismissal in the DOL would prevent him from bringing a state retaliatory discharge claim.

When the Judge told Mr. Sabin “You understand this is the finality of this case? This case is now final. You can’t refile this case[.]” Mr. Sabin responded, “I understand[.]” Mr. Sabin thought the Judge was talking about the STAA case only. It makes no sense for Mr. Sabin to retain a lawyer and sign a State charge and then do something to stop that from happening.

Comp. brief filed Dec. 15, 2003, at 1-2.

There is a distinction between withdrawing a complaint and withdrawing an appeal to an ALJ from OSHA’s findings. The voluntary dismissal of a complaint can be granted without prejudice where there has been no finding on the merits. *See, e.g., Anderson v. DeKalb Plating Co.*, ARB No. 98-158, ALJ No. 97-CER-001 (ARB July 27, 1999) (rejecting respondent’s argument that administrative law judge properly dismissed whistleblower’s voluntarily withdrawn complaint with prejudice); *Cable v. Ariz. Pub. Serv. Co.*, No. 90-ERA-15 (Sec’y Nov. 13, 1992) (adopting ALJ’s recommendation for dismissal of whistleblower complaint without prejudice).

On the other hand, a withdrawal of objections to OSHA’s findings and a request for a hearing before an ALJ does operate as a final decision of DOL and hence is considered with prejudice. Section 1978.111(c) provides:

At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.

29 C.F.R. § 1978.111(c). When OSHA has found against a complainant and the complainant withdraws his objections to the findings, the result is a final order upholding the OSHA findings. *See Hardy v. Env’tl. Restoration, LLC*, ARB No. 05-019, ALJ No. 2004-STA-20, slip op. at 2 (ARB Jan. 11, 2005); *Snow v. TNT Red Star Express, Inc.*, No. 91-STA-44, slip op. at 2-3 (Sec’y Mar. 13, 1992).

Therefore, when Sabin withdrew his objection to OSHA’s findings against Sabin, in which OSHA concluded that Yellow Freight terminated Sabin’s employment “for dishonesty in that he was scheduled for work . . . and used sick/personal days to work at another employer . . . [.]” that became the final decision of the DOL. It was “with prejudice” because Sabin could not refile a complaint in the DOL alleging the same facts. However, Sabin mistakenly seems to have concluded that the termination of his complaint “with prejudice” could prevent adjudication of a retaliatory discharge

complaint in a state forum. *See generally Willy v. Coastal Corp.*, ARB No. 98-060, ALJ No. 85-CAA-1, slip op. at 24-25 (ARB Mar. 1, 2004) (distinguishing between federal whistleblower and state wrongful discharge causes of action and noting that collateral estoppel only precludes relitigation of identical issues of fact that were actually litigated). Accordingly, the ALJ did not err in ruling that Sabin's case was terminated "with prejudice."

III. Costs for attendance of witness

Finally, we take up the question of the ALJ's award of \$150 to Yellow Freight for the attendance of its witness on the scheduled hearing date.

As prevailing party, Yellow Freight filed a bill of costs. For authority, Yellow Freight cited the OALJ Rules of Practice and Procedure, 29 C.F.R. § 18.1 (2004), which states, "The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules. . . ." Fed. R. Civ. Pro. 54(d)(1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party . . ." 28 U.S.C.A. § 1920 (West 1994) allows taxation of costs for (2) "the stenographic transcript necessarily obtained for use in the case" and (3) "[f]ees for witnesses." Pursuant to these authorities, Yellow Freight sought taxation of costs of \$150 for the attendance fee and mileage for its witness; \$2,290.35 in stenographic fees for depositions; and various photocopying charges in the amounts of \$196.95, \$510.15, and \$39.05. Sabin objected, citing "undue [financial] hardship." R. D. & O. at 2.

The ALJ awarded Yellow Freight \$150 for the costs associated with its witness, but denied the other costs. *Id.* at 2-3. This was error. As authority for the award, the ALJ cited Fed. R. Civ. Pro. 41(d), which allows a court to award costs where "a plaintiff who has once dismissed an action in any court commences on action based upon or including the same action against the same defendant . . ." Sabin did not dismiss and then recommence his DOL action. Likewise, in *Hester v. Blue Bell Servs.*, No. 86-STA-11 (Sec'y July 9, 1986), upon which the ALJ relied heavily, the complainant filed a STAA complaint alleging retaliatory suspension and then sought to dismiss it without prejudice so that it could be consolidated with a new complaint alleging retaliatory discharge. The Secretary noted that a voluntary dismissal without prejudice may, in certain circumstances, be conditioned on a complainant's agreement to pay specified costs that the respondent defendant has incurred in defending against the legal action. *Id.*, slip op. at 3.

But this is not a case in which a complainant was allowed to take a voluntary dismissal if he paid the opposing parties' costs. Sabin withdrew his appeal to an ALJ pursuant to 29 C.F.R. § 1978.111(c). We note that the OALJ Rules of Practice and Procedure do not provide for the award of court costs as a matter of course to a prevailing respondent. *Cf.* Fed. R. Civ. Pro. 54(d)(1); 28 U.S.C.A. § 1920. Although Yellow Freight was a prevailing respondent as a consequence, the STAA provides for the award of "costs" only to prevailing complainants. 49 U.S.C.A. § 31105(b)(3)(B) (allowing

assessment of “costs” (including reasonable attorney’s fees) against respondent that complainant incurred in bringing complaint). *See Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 02-STA-44, slip op. at 9 (ARB Nov. 25, 2003) (citing *Abrams v. Roadway Express, Inc.*, No. 84-STA-2, slip op. at 1-2 (Sec’y May 23, 1985)). We thus conclude that the STAA does not authorize an award of costs to Yellow Freight under the circumstances presented here, and we reject the ALJ’s recommended award.

CONCLUSION AND ORDER

Based on a review of the record and examination of the relevant legal authority, we concur in the ALJ’s recommendation that a withdrawal of an objection to OSHA’s findings under 29 C.F.R. §1978.111(c) amounts to a dismissal with prejudice, but we reject the ALJ’s recommendation to award costs to Yellow Freight. The complaint is therefore **DISMISSED** with prejudice and the ALJ’s award of costs is **REVERSED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge