



In the Matter of:

JEAN F. GREENE,

ARB CASE NO. 03-094

COMPLAINANT,

ALJ CASE NO. 2002-SWD-1

v.

DATE: June 14, 2005

EPA CHIEF JUDGE SUSAN BIRO, U.S.  
ENVIRONMENTAL PROTECTION AGENCY  
(EPA), EPA OFFICE OF INSPECTOR GENERAL  
(OIG), AND EPA OFFICE OF ADMINISTRATIVE  
LAW JUDGES (OALJ),

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

*For the Complainant:*

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

*For the Respondents:*

Paul M. Winick, Esq., *U.S. Environmental Protection Agency, Washington, D.C.*

### FINAL DECISION AND ORDER DISMISSING APPEAL

The Petitioner, Administrative Law Judge Jean F. Greene (retired), has filed a complaint against the Respondents, Environmental Protection Agency (EPA); EPA Chief Judge Susan Biro; EPA Office of Inspector General and EPA Office of Administrative Law Judges alleging that the Respondents retaliated against her in violation of the

whistleblower provisions of several environmental protection laws.<sup>1</sup> The issue before the Administrative Review Board is whether we should accept Greene's untimely-filed petition for review. As explained below, because Greene has failed to demonstrate exceptional circumstances that precluded her from timely filing her petition for review, we decline to accept her untimely-filed petition.

## BACKGROUND

On February 10, 2003, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order granting the Respondent's motion for Summary Decision and dismissing Greene's complaint (R. D. & O.).<sup>2</sup> Attached to the R. D. & O. is a Certificate of Service attesting that the Chief Docket Clerk sent a copy of the R. D. & O. to "Honorable Jean F. Greene, P.O. Box 1676, New Smyrna Beach, FL 32169" on

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<sup>1</sup> 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. § 9610 (West 1995); 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 2003); and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998).

<sup>2</sup> On June 20, 2002, the ALJ had issued an Order of Disqualification forbidding Greene's Counsel, Edward A. Slavin, from appearing before him in this or any other matter and from acting in an advisory capacity to any party in this or any other matter because of repeated misconduct including insulting, abusive and unprofessional behavior, making false statements and failing to comply with an order the ALJ issued. The Board affirmed the ALJ's disqualification of Slavin from appearing in any capacity in this case before him but reversed his disqualification from future cases. *Edward A. Slavin, Jr.*, ARB No. 02-109 (June 30, 2003).

On March 31, 2004, a Department of Labor Associate Chief Administrative Law Judge issued an order denying Slavin the authority to appear in any representational capacity before the Office of Administrative Law Judges, with leave to reapply for admission in no less than five years from the date of the Judge's order. *Edward A. Slavin, Jr.*, 2004-MIS-2. The Board affirmed this decision. *Edward A. Slavin, Jr.*, ARB No. 04-088, ALJ 2004-MIS-2 (Apr. 29, 2005).

On August 27, 2004, the Supreme Court of Tennessee suspended Slavin from the practice of law for two years. *Bd. of Prof. Resp. of the Sup. Ct. of Tenn. v. Slavin*, 145 S.W.3d 538 (Tenn. 2004). We have issued an order giving reciprocal effect to the Tennessee Supreme Court's suspension. *Edward A. Slavin, Jr.* ARB No. 04-172 (Apr. 12, 2005). Accordingly, while we will consider documents Slavin has filed on Greene's behalf at the Board prior to April 12, 2005, we will not permit him to represent Greene or any other party (other than himself) before the Board after that date until the Supreme Court of Tennessee lifts its suspension.

February 10, 2003. On May 5, 2003, Greene filed with the Board a Petition for Review and Sworn Complaint to DOL and HUD Inspectors General. The petition states:

Complainant J.F. Greene respectfully petitions for review of the February 10, 2003 RDO filed by the ALJ . . . . HUD's failure to serve Judge Greene properly with the RDO and also not properly serving either her counsel and [sic] OSHA Office of Investigative Assistance Director Hon. John R. Spear is improper as a matter of law and has not been remedied. Judge Greene did not learn of the RDO until her counsel saw it on the internet on May 2, 2003. . . . HUD ALJ admits it has no green card and did not send the document certified.

Attached to the petition for review is a "Declaration of Verification" signed by Greene that states, "[The ALJ's] failure to serve the RDO on me, my counsel and OSHA Office of Investigative Assistance . . . is freighted with HUD OALJ's intention to retaliate for my protected activity in raising concerns about his lack of independence."

The Secretary of Labor has delegated her authority to issue final agency decisions involving the whistleblower protection provisions at issue in this case to the Administrative Review Board.<sup>3</sup> Greene's petition for review was due at the Board no later than February 25, 2003.<sup>4</sup> Because, on its face, the petition for review was untimely, the Board ordered Greene to show cause why the Board should not dismiss Greene's appeal. Greene filed responses to the Board's Order,<sup>5</sup> and EPA filed a reply to Greene's responses.<sup>6</sup>

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<sup>3</sup> Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. § 24.8(a)(2004).

<sup>4</sup> 29 C.F.R. § 24.8 (2004) provides, "To be effective [a petition for review] must be received within ten business days of the date of the recommended decision of the administrative law judge . . . ."

<sup>5</sup> Complainant's Partial Response to Order to Show Cause and Motion for Enlargement of Time, Complainant's Further Response to Order to Show Cause.

<sup>6</sup> U.S. Environmental Protection Agency's Response to Complainant's Further Response to Order to Show Cause.

## DISCUSSION

Because the regulation establishing a ten-business-day limitations period for filing a petition for review with the Board does not confer important procedural benefits upon individuals or other third parties outside the Board, we may, under the proper circumstances, accept an untimely petition for review.<sup>7</sup> Principles of equitable tolling guide the Board in determining whether to relax the limitations period in a particular case and accept an untimely petition.<sup>8</sup> The ARB has recognized three situations in which it will accept an untimely petition:

- (1) [when] the respondent has actively misled the complainant respecting his rights to file a petition,
- (2) the complainant has in some extraordinary way been prevented from asserting his or her rights, or
- (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.<sup>9</sup>

Greene bears the burden of justifying the application of equitable modification principles.<sup>10</sup> Greene argues that she was prevented from asserting her rights in an extraordinary way because the ALJ did not properly serve her with a copy of the R. D. & O. Greene states that the service was defective because the ALJ did not serve her attorney or the OSHA Office of Investigative Assistance and did not send the R. D. & O.

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<sup>7</sup> *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999); *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).

<sup>8</sup> *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, 4-5, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez*, slip op. at 2.

<sup>9</sup> *Id.*, citing *School Dist. v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981) (the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and therefore may be subject to equitable tolling).

<sup>10</sup> *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

by certified mail. Greene contends that due to this defective service, she never received the R. D. & O. from the ALJ. We do not find Greene's argument to be persuasive.

Because the ALJ properly disqualified Slavin from representing Greene in this proceeding, Slavin was no longer Greene's attorney when the ALJ issued the R. D. & O. Therefore, Slavin was not entitled to receive the R. D. & O., and neither Greene nor Slavin should have reasonably expected that the ALJ would serve him with it. Furthermore, administrative law judges are required to serve decisions by regular mail.<sup>11</sup> Moreover, Greene has cited no statutory provision or regulation that requires administrative law judges to serve the OSHA Office of Investigative Assistance.

Finally, Greene argues that "she never read or received [the] RDO until her counsel found it on [the] DOL OALJ website on May 2, 2003." But Greene's sworn declaration does not support her argument.<sup>12</sup> Her declaration states, "[u]nder penalty of perjury, I hereby swear and declare pursuant to 28 U.S.C. § 1746: . . . I did not see the February 10, 2003 RDO until it was sent to me by my counsel electronically, on or about May 2, 2003." (emphasis added). Thus Greene does not swear that the R. D. & O. was never delivered to her post office box. She swears only that she did not "see" it until her counsel brought it to her attention. Given the certificate of service attached to the R. D. & O. affirming that the Chief Docket Clerk mailed the R. D. & O. to Greene at the correct address and in the absence of any evidence to the contrary, we find that the decision was appropriately delivered to Greene's post office box. Furthermore, given that the decision was delivered to her post office box, her failure to "see" the decision, per se, does not constitute an exceptional circumstance precluding the timely filing of her petition.

Given that Greene is a retired administrative law judge and must well know the penalty for perjury, we can only assume that she chose the words of her declaration carefully and with precision. Her selection of words is all the more telling given that EPA, in a filing with the Board on May 21, 2003, essentially stated that it would concede that Greene's appeal was timely if she would submit an unambiguous affidavit swearing under oath that she diligently checked her mail and the R. D. & O. was never delivered to

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<sup>11</sup> 29 C.F.R. § 18.3(c).

<sup>12</sup> We have admonished Slavin previously for filing documents containing patently false statements with the Board. *Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 02-STA-044, slip op. at 6-7 (Nov. 25, 2003); *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 03-STA-11, slip op. at 4 (Oct. 14, 2003). We have cautioned Slavin that the Board would be reluctant to accept at face value any statement counsel made that was not confirmed by independent collaborating evidence. *Somerson*, ARB No. 03-042, slip op. at 4.

her post office box.<sup>13</sup> Yet, even in the face of this concession, Greene failed to swear that the decision had never been delivered to her post office box and instead relies on the ambiguous assertion that she did not see the R. D. & O. until her counsel sent it to her. The Board has recognized that the three *Marshall* elements are not necessarily exclusive and Greene's failure to satisfy one of these elements would not have necessarily been fatal to her claim, if she had identified another factor that would justify tolling the limitations period. We find, however, that she has failed to do so.

Accordingly, we conclude that Greene has not established that exceptional circumstances precluded her from timely filing a petition for review and we **DISMISS** her appeal.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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

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<sup>13</sup> Environmental Protection Agency's Response to, inter alia, Complainant's Motion for Summary Reversal of HUD's RDO. at 2.