U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

OSCAR SHIRANI,

COMPLAINANT,

v.

CALVERT CLIFFS NUCLEAR POWER PLANT, INC. (CONSTELLATION ENERGY GROUP),

RESPONDENT.

ARB CASE NO. 04-101

ALJ CASE NO. 2004-ERA-9

DATE: October 31, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Billie Pirner Garde, Esq., ***Clifford & Garde, Washington, D.C.***

For the Respondent:
Charles C. Thebaud, Jr., Esq., Lewis M. Csedrik, Esq., ***Morgan, Lewis & Bockius, LLP, Washington, D.C.***

DECISION AND ORDER OF REMAND

A U. S. Department of Labor Administrative Law Judge (ALJ) held that he lacked jurisdiction to decide the merits of Oscar Shirani's Energy Reorganization Act (ERA)[1] whistleblower complaint against Calvert Cliffs Nuclear Power Plant, Inc. (Calvert) because Shirani did not comply with a regulation that required him to serve Calvert with

[1] 42 U.S.C.A. § 5851 (West 2003). Regulations implementing the whistleblower protection section of the ERA are found at 29 C.F.R. Part 24 (2005).

a copy of his request for an evidentiary hearing. Therefore, the ALJ dismissed Shirani's complaint. We reverse and remand.

BACKGROUND

In October 2003, Shirani filed a complaint with the Secretary of Labor. He alleged that Calvert violated the ERA whistleblower protection provision when it did not consider him for employment.[2] Shirani alleged that Calvert rejected him because he had raised nuclear safety concerns when he worked as a contract employee at Calvert's work site in 2003 and previously when he worked for the Exelon Corporation.

The Occupational Safety and Health Administration (OSHA) investigated Shirani's complaint. In December 2003, OSHA notified Shirani and Calvert that the complaint lacked merit. OSHA found that Calvert did not consider Shirani for employment because the company had "no positions available for complainant's specific skills and experience."

The final paragraph of OSHA's finding and preliminary order advised Shirani of his right to a hearing on the record:

> Respondent and Complainant have 5 days from receipt of these Findings and Preliminary Order to file objections and request a hearing on the record, or they will become final and not subject to court review. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street NW Suite 400, Washington, D.C. 20001 and with the Regional Administrator, U.S. Department of Labor, OSHA, The Curtis Center, Suite 740 West, 170 S. Independence Mall West, Philadelphia, PA 19106.

See 29 C.F.R. § 24.4(d)(2).

Shirani received OSHA's notice on December 27, 2003. On December 31, Shirani mailed a request for a hearing by certified mail to the Chief Administrative Law

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[2] The ERA's section 5851(a) provides that no employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee complained about nuclear safety hazards or engaged in related activities. 29 C.F.R. § 24.2 (2005). An "employee" under the ERA includes an applicant for employment. *See Flanagan v. Bechtel Corp.,* 1981-ERA-7, slip op. at 5-9 (Sec'y June 27, 1986).

Judge and to the OSHA Regional Administrator but did not send a copy to or otherwise serve the request for hearing on Calvert. 29 C.F.R. § 24.4(d)(3) requires that a party requesting a hearing serve a copy of the request on the opposing party:

> 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.[[3]]

Shirani's complaint was assigned to a Labor Department ALJ. Calvert moved to dismiss Shirani's request for a hearing and underlying complaint on the basis that Shirani did not serve it with a copy of the hearing request. Calvert argued that since Shirani had not served it with the request for hearing, the ALJ lacked jurisdiction to hear the case and that OSHA's determination became the Secretary of Labor's final order.

The ALJ granted Calvert's motion. "Complainant failed to perfect a timely appeal in this matter by failing to serve his request for appeal and hearing upon Respondent in a timely or acceptable manner. Accordingly, I am without jurisdiction to hear Complainant's appeal and OSHA's determination should be the final order of the Secretary." Recommended Decision & Order (R. D. & O.) at 5. She also stated that "Complainant's failure to notify Respondent of his appeal prejudices Respondent, which, in the absence of such notice, had every reason to believe that the Notice of Determination issued by OSHA became the Secretary's final order." *Id.*

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the Energy Reorganization Act. *See* 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Berkman v. United*

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[3] We note that since Shirani sent his hearing request to the Chief Administrative Law Judge by certified mail, he did not comply with 29 C.F.R. § 24.4(d)(3). That section requires that the hearing request be filed with the Chief Administrative Law Judge "by facsimile (fax), telegram, hand delivery, or next-day delivery service."

States Coast Guard Acad., ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000); *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-572 (11th Cir. 1997). The Board is not bound by an ALJ's findings of fact or conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("[T]he agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself.").

DISCUSSION

This case presents a question of first impression for this Board: Does a party's failure to comply with the service requirement at 29 C.F.R. § 24.4(d)(3) deprive the ALJ of jurisdiction to hear and decide the merits of the case? The Labor Department's Administrative Law Judges are divided on the question. *Compare, e.g., Ponzi v. Williams Group Int'l*, ALJ No. 2004-ERA-28 (ALJ Oct. 22, 2004) (service is jurisdictional); *Cruver v. Burns Int'l*, ALJ No. 2001-ERA-31 (ALJ Dec. 5, 2001) (same); *Webb v. Numanco,* ALJ Nos. 98-ERA-27, 98-ERA-28 (ALJ July 17, 1998) (same), *with Hibler v. Exelon Nuclear Generating Co.*, ALJ No. 2003-ERA-9 (ALJ May 5, 2003) (service is not jurisdictional); *Stoner v. General Physics Corp.*, ALJ No. 1998-ERA-44 (ALJ Sept. 4, 1998) (same).

1. The ARB Has Authority to Decide What § 24.4(d)(3) Means.

Before discussing this question of first impression, we briefly address Calvert's argument that we would be exceeding the authority the Secretary delegated to the Board if we were to overrule the ALJ on this issue. Calvert Br. at 2, 11-12. Calvert relies on that part of the Secretary's Delegation of Authority to the Board which states: "The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions." 67 Fed. Reg. 64272, 64273 (Oct. 17, 2002). The delegation order also stipulates that the Board lacks jurisdiction to deny or grant exemptions. *Id.* According to Calvert, "Reinstating Mr. Shirani's Appeal, however, would essentially invalidate the Secretary's decision to make service requirements jurisdictional and grant Mr. Shirani an exemption from having to serve Calvert." Calvert Br. at 2.

Calvert misunderstands the delegation order. The prohibition on invalidating regulations or granting exemptions reflects the important principle that agencies must use the same procedures for repealing a rule that they used for promulgating the rule in the first instance. If a rule is promulgated by notice and comment, as was section 24.4, it can only be repealed by notice and comment. Agencies may not repeal duly promulgated rules or create exemptions thereto by means of agency adjudication. *Tunik v. MSPB,* 407 F.3d 1326, 1341-1342 (Fed. Cir. 2005). But Calvert's argument confuses the repeal, or invalidation, of a notice-and-comment rule with the task of applying that rule to particular

facts. It is most emphatically our responsibility to determine how regulatory text applies to the facts of a case. A necessary part of that process is deciding what the regulatory text means.

2. The R. D. & O.

The ALJ dismissed Shirani's request for a hearing, relying on *Webb v. Numanco,* ALJ Nos. 98-ERA-27, 98-ERA-28 (ALJ July 17, 1998).[4] The *Webb* ALJ concluded that the service requirement is jurisdictional and thus never yields to equitable defenses of estoppel, waiver, or tolling.[5] He believed that the Secretary amended sections 24.4(d)(2) and (d)(3) in 1998 specifically to change the service provision from a "directive" requirement that could be adjusted under appropriate circumstances into a rigid "jurisdictional" requirement. *Webb*, slip op. at 3-5. He also concluded that failure to properly serve the hearing request is inherently prejudicial to the opposing party. *Id.* at 5. But these conclusions cannot be reconciled with either the text or the regulatory history of sections 24.4(d)(2) and (d)(3).

A. Plain Meaning.

The two sections at issue deal with distinctly different aspects of the request for a hearing. Section 24.4(d)(2) addresses the adjudication aspect:

> (2) The [OSHA] notice of determination [whether the alleged violation has occurred] shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days 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

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[4] *Webb* was vacated pursuant to a settlement agreement. ARB No. 98-149, ALJ Nos. 98-ERA-27, 98-ERA-28 (ARB Jan. 29, 1999). The ALJ also relied on *Cruver v. Burns Int'l*, ALJ No. 2001-ERA-31 (ALJ Dec. 5, 2001). R. D. & O. at 4. Because *Cruver* adopts Webb's reasoning, for simplicity's sake, we refer in our discussion only to *Webb*.

[5] "It may be most accurate to describe as 'jurisdictional' an access-to-court rule that is in all instances unalterable, i.e., never bends, while denominating simply 'mandatory' a rule . . . that accommodates rare exceptions, i.e., hardly ever bends." *AFL-CIO v. OSHA*, 905 F.3d 1568, 1571 (D.C. Cir. 1990) (Ginsburg, J.).

> by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed.

Section 24.4(d)(2) plainly identifies the action that will vest the Labor Department's Office of Administrative Law Judges with jurisdiction over an investigated complaint.

On the other hand, section 24.4(d)(3) sets out the requirements for filing and serving the hearing request:

> (3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. 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, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

The *Webb* ALJ found that the two sections "must be viewed *in pari materia, i.e.,* the sections must be read, construed and applied together in order to understand the intent of the Secretary in promulgating them." *Webb,* slip op. at 5. Therefore, he reasoned, a party requesting a hearing must also serve the request in order to perfect an appeal. *Id.*

But neither section contains any language that makes a party's right to adjudication contingent on compliance with section 24.4(d)(3). Furthermore, service requirements, generally, are imposed to afford notice that litigation has commenced, rather than to trigger a court's power to adjudicate a claim. "Service of process, we have come to understand, is properly regarded as a matter discrete from a court's jurisdiction to adjudicate a controversy of a particular kind, or against a particular individual or entity." *Henderson v. United States,* 517 U.S. 654, 671 (1996). "Its essential purpose is auxiliary. . . . [T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." *Id.*

B. No Inherent Prejudice.

The *Webb* ALJ also found that failure to properly serve the request is inherently prejudicial to the opposing party. *Webb*, slip op. at 5. But, in effect, the rules governing ERA whistleblower cases assure that the opposing party learns of the hearing request

within a short time because the ALJ must notify the parties within seven days of the time and place for a hearing. 29 C.F.R. § 24.6(a).

Moreover, the facts here demonstrate that failure to serve the opposing party is not necessarily inherently prejudicial. Had Shirani served Calvert on the same day he filed his hearing request, Calvert would have received it on December 31 or January 1. But Calvert must have had actual notice of Shirani's request for a hearing by January 9, 2004, because the record shows that on that date counsel for Calvert faxed a request to the ALJ to add the name of Calvert's in-house counsel to the ALJ's service list. The 8-9 day delay here did not prejudice Calvert.

C. The 1998 Amendments.

According to the *Webb* ALJ, prior to 1998, the service requirements were "loose" and not jurisdictional. *Webb,* slip op. at 4. He found that the Secretary amended sections 24.4(d)(2) and (d)(3) in 1998. He concluded that these changes "elevate[] the matters of service and the acceptable means of service to a jurisdictional level, rather than separating them into jurisdictional versus directive considerations." *Id.* at 5.

In fact, in 1998 the Secretary only amended section 24.4(d)(2) by adding the right to cross-appeal the OSHA determination within five business days of the day the other party files and serves its request for a hearing. The Secretary explained why she added the cross-request right:

> One commenter suggests that the regulations should make clear that in a case where only a prevailing complainant appeals to an ALJ because of dissatisfaction with the remedy ordered by [OSHA] the non-appealing respondent would have an opportunity to contest liability before the ALJ. This would prevent respondents from having to file appeals in cases in which they have decided not to challenge [OSHA's] ruling, not knowing in which cases the complainant will contest the remedy. Allowing cross-appeals would eliminate the need for complainants and respondents to guess in such cases or to file appeals in all such cases. This section is amended accordingly to allow for cross appeals. In addition, this section is simplified to provide the mechanism for appeals of both the complainant and the respondent in the same paragraph.

63 Fed. Reg. 6614, 6617 (Feb. 9, 1998).

The *Webb* ALJ found that this right to cross-appeal was "rather significant." *Webb,* slip op. at 5. He reasoned that if the party who first requests a hearing does not serve the opposing party, the opposing party may not learn that a hearing will be held

until after the time for filing a cross-request has expired. *Id.* To the *Webb* ALJ, since a party would lose its cross-appeal right if the other party neglects to properly serve the initial request, section (d)(2) is linked to section (d)(3). Therefore, according to the ALJ, since the section (d)(2) requirement for requesting a hearing is jurisdictional, the section (d)(3) requirement to serve the opposing party becomes jurisdictional.

But this analysis must fail because the section (d)(2) requirement for requesting a hearing is not jurisdictional. *See Howlett v. Northeast Utility*, ARB No. 99-044, ALJ No. 99-ERA-1 (ARB Mar. 13, 2001) (equitable tolling applies to the (d)(2) filing deadline but not justified by facts of the case). Therefore, reading sections (d)(2) and (d)(3) *in pari materia*, as the ALJ did, leads to the conclusion that the service requirement at (d)(3) is not jurisdictional.

Furthermore, administrative adjudication is meant to be less formal than adjudication in federal courts. *Cf. West v. Gibson*, 527 U.S. 212, 219 (1999) (Title VII "encourage[s] quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court"). But *Webb* would turn this principle on its head by making the rules for an ERA administrative hearing less flexible than the rules governing federal courts. *See, e.g.,* Federal Rule of Civil Procedure 4(m), which expressly directs federal judges to extend the time for service of process for good cause.[6]

Our holding that both the filing and service requirements are not jurisdictional is also consistent with the regulatory history of sections (d)(2) and (d)(3). The *Webb* ALJ apparently believed that the 1998 amendments added not only the cross-appeal right, but also language concerning the finality of OSHA's investigative determination and the requirement that the requesting party serve the request on the day of filing. *Webb*, slip op. at 3. To the ALJ, this combination of changes was designed "to be deliberately stringent on the matter of service." *Id.* at 5. But as we noted earlier, the Secretary added only the cross-appeal right to section (d)(2) in 1998. The other two requirements have been in the regulations since at least 1991. *See* 45 Fed. Reg. 1836 *et seq*. (Jan. 8, 1980); 59 Fed. Reg. 12,506 *et seq*. (Mar. 16, 1994); 59 Fed. Reg. 41, 874 *et seq.* (Aug. 15, 1994; 60 Fed. Reg. 26,970 *et seq.* (May 19, 1995); 63 Fed. Reg. 6614 *et seq.* (Feb. 9, 1998). Thus, there was no major shift from a "loose" to a "strict" regulatory scheme as the *Webb* ALJ thought.

Moreover, the Secretary's explanation for adding the cross-request right is wholly incompatible with the ALJ's conclusion that the service requirement is jurisdictional. As

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[6] **(m) Time Limit for Service**. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative, after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

she explained in the preamble, quoted earlier, she added the provision to avoid the filing of unnecessary requests for hearings in cases in which OSHA determined that a violation occurred and ordered reinstatement and/or compensation for the employee. Some employers who would have been willing to accept OSHA's determination nonetheless filed "protective" hearing requests just in case the employee requested a hearing to challenge the remedy awarded. If the employee did appeal the remedy, the employer would be able to litigate the merits of the complaint.

Finally, if the Secretary had intended that the five-day deadline to file the cross-request be absolute and inflexible, *i.e*., jurisdictional, she surely would have said so explicitly, because a rigid service requirement would be an unusual deviation from the norm. Procedural requirements that an agency uses to control administrative adjudications are presumptively subject to waiver, tolling, and equitable estoppel, i.e., not jurisdictional. *See e.g*., *Duncan v. Sacramento Metro. Air Quality Dist.*, ARB No. 99-011, ALJ No. 97-CAA-12 (ARB Sept. 1, 1999) (ten-day deadline for filing a petition for review of an R. D. & O. "is procedural in nature, comparable to a statute of limitations, which may be tolled for equitable reasons"); *In re Superior Paving & Materials, Inc.*, ARB No. 99-065, ALJ No. 98-DBA-11 (ARB Sept. 3, 1999) (40-day limit for filing petition for review of prevailing wage decision under Davis-Bacon Act is not jurisdictional). Even in the more formal setting of federal adjudication, statutory time limits are customarily not jurisdictional. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). *Cf. Zipes v. TWA*, 455 U.S. 385, 397 (1982) (declining to read VII filing deadline literally: "[A] technical reading would be particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.") (internal quotations omitted); *Whitaker v. CTI-Alaska, Inc.,* ARB No. 98-036, ALJ No. 97-CAA-15 (ARB May 28, 1999) (statutory 30-day limit for filing whistleblower complaint with Secretary of Labor is statute of limitations subject to waiver, tolling, and estoppel).

CONCLUSION

We reject the holding in *Webb* that a party's failure to comply with the service requirements of 29 C.F.R. § 24.4 (d)(3) deprives the ALJ of jurisdiction to hear and decide the merits of a whistleblower case brought under the ERA or any other statute within the scope of 29 C.F.R. Part 24. We conclude that the plain meaning of the language contained in sections 24.4 (d)(2) and (d)(3) and the regulatory history of these rules cannot be construed as indicating that the Secretary intended the service requirement to be jurisdictional. Moreover, failure to properly serve a copy of the request for a hearing is not inherently prejudicial. Finally, administrative and federal case law demonstrate that agency procedural regulations are usually not jurisdictional.

Therefore, since the ALJ below relied upon *Webb* in dismissing Shirani's request for hearing, we **REVERSE** and **REMAND** for proceeding consistent with this order.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge