



**In the Matter of:**

**JEROME REID,**

**ARB CASE NO. 04-181**

**COMPLAINANT,**

**ALJ CASE NO. 00-ERA-23**

**v.**

**DATE: December 8, 2004**

**NIAGARA MOHAWK POWER CORPORATION,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearance:**

*For the Complainant:*

**Jerome Reid, pro se, Syracuse, New York**

### **FINAL DECISION AND ORDER**

The Petitioner, Jerome Reid, filed a complaint against the Respondent, Niagara Mohawk Power Corp., alleging that Niagara Mohawk retaliated against him in violation of the whistleblower protection provisions of the Energy Reorganization Act (ERA).<sup>1</sup> On September 8, 2004, an Administrative Law Judge (ALJ) issued a Supplemental Decision and Order on Remand (S. D. & O. R.) in which he recommended that Reid's complaint be dismissed with prejudice.

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the ERA.<sup>2</sup> The Board must receive a petition for review of an ALJ's recommended decision within ten business days of the date on which the ALJ issued the recommended decision.<sup>3</sup> Pursuant to this regulation, Reid's petition for review of the S. D. & O. R. was due on September 22, 2004. But Reid

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<sup>1</sup> 42 U.S.C.A. § 5851 (West 1995).

<sup>2</sup> Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 24.8(a).

<sup>3</sup> 29 C.F.R. § 24.8(a).

filed his petition for review by facsimile on September 23, 2004. Because on its face, Reid's petition for review was untimely, the Board ordered Reid to show cause no later than October 21, 2004, why the Board should not dismiss his petition for review because he did not timely file it. Reid signed for the Board's Show Cause Order on October 12, 2004, but he did not respond to the Order.

As the Board informed Reid in its Show Cause Order, the regulation establishing a ten-day limitations period for filing a petition for review with the ARB from an ALJ's ERA decision, is an internal procedural rule adopted to expedite the administrative resolution of cases.<sup>4</sup> Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review.<sup>5</sup>

The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case.<sup>6</sup> Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.<sup>7</sup>

But the Board has not determined that these categories are exclusive.<sup>8</sup> Accordingly we gave Reid the opportunity to "to explain why the Board should accept the untimely-filed petition, i.e., whether and, if so, how the facts of this case fall within any of the three

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<sup>4</sup> 29 C.F.R. § 24.1(b); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 3; *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).

<sup>5</sup> *Gutierrez*, slip op. at 3; *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>6</sup> *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

<sup>7</sup> *Gutierrez*, slip op. at 3-4.

<sup>8</sup> *Id.* at 3.

categories the Board has recognized for accepting untimely-filed petitions, or for some additional appropriate reason.”<sup>9</sup>

Reid has failed to respond to the Board’s Order and accordingly, has failed to show cause why the Board should not dismiss his untimely filed petition for review. Accordingly, we **DISMISS** his appeal.

**SO ORDERED.**

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

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

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<sup>9</sup> Order to Show Cause at 2.