**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue Date: 30 October 2013**

**CASE NO: 2013-FRS-00053**

***In the Matter of:***

ROGER BALLARD,
*Complainant*,

*v.*

NORTHEAST ILLINOIS REGIONAL
COMMUTER RAILROAD CORP.,
*Respondent.*

## ORDER DISMISSING COMPLAINT AND DENYING COSTS

By letter dated August 30, 2013, counsel for Complainant Roger Ballard advised me that Mr. Ballard wished to "withdraw and/or dismiss" this "whistleblower case" and that Mr. Ballard would not participate in the hearing. As the implementing regulations do not permit a complainant to withdraw his complaint after either party has objected to the Assistant Secretary's findings and requested a hearing, I issued an order on September 4, 2013 that the parties show cause whether this matter should be dismissed for lack of prosecution. I also canceled the hearing that was then scheduled to begin on September 17, 2013.

On September 11, 2013, I received a pleading dated September 10, 2013, by which the parties submitted an "Agreed Motion to Dismiss, Vacate OSHA Decision of April 19, 2013, and for an Award of Costs." In that Motion, the parties have agreed that I may dismiss this "action," terminate all further proceedings, vacate the OSHA findings of April 19, 2013, and assess costs of $850.00 against Complainant to be paid to Respondent. I denied the agreed motion because (1) 29 C.F.R. § 1982.111(a) does not permit withdrawal of a complaint at this stage of the proceedings; (2) I lack authority to vacate the OSHA findings, and (3) I can only impose monetary sanctions if I find that the complaint was frivolous or was brought in bad faith. At the same time, I extended the time period for the parties to show cause whether this matter should be dismissed for want of prosecution. In addition, I allowed Respondent to make a motion for monetary sanctions under 29 C.F.R. § 1982.109(d)(2). Mr. Ballard responded on September 24, 2013, and Metra responded on September 26, 2013.

### Dismissal

In his response, Mr. Ballard stated unambiguously that he did not desire to go forward with a hearing because he had, by bringing the claim in the first place, placed enough pressure on Respondent that Respondent would "think long and hard" about treating its employees the way it

had treated Complainant. Mr. Ballard further stated that the case was never about money, that it had been a stressful two years since he was treated poorly, and that he has suffered physically and mentally from that stress. He indicated that he no longer has the time or energy to pursue his claim, and simply wants to work his last 12 months until retirement without the turmoil of pursuing it.

Respondent filed a response to my order to show cause, agreeing that this matter should be dismissed "as Mr. Ballard has abandoned his claims."

Because Mr. Ballard has expressed a clear intent not to pursue his claim, and not to appear at a hearing should one be called, I find and conclude that he has abandoned his claim, and that it should be dismissed for want of prosecution.

Sanctions

Respondent moved for sanctions in the amount of $958.16, representing the costs expended by its counsel in defending it in this matter. Respondent argues that Mr. Ballard conducted himself in bad faith and that therefore it is entitled to monetary sanctions under 29 C.F.R. § 1982.109(d)(2).

That regulation provides that if an ALJ determines that a complaint "was frivolous or was brought in bad faith, the ALJ may award to the respondent a reasonable attorney's fee, not exceeding $1,000." Thus, there are two bases for an award of attorney's fees: (1) that Mr. Ballard's complaint was frivolous, or (2) that the complaint was brought in bad faith. As Respondent agrees it cannot show that the complaint was frivolous, an award may only be made if it was brought in bad faith.

The meaning of the phrase "brought in bad faith" as used in 29 CFR § 1982.109(d)(2) has not been addressed by the ARB or by another ALJ. In a case involving the identical language under the Sarbanes-Oxley whistleblower provision, the Board apparently equated "bad faith" with "vexatious reasons." *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at p. 10 (ARB Sep. 30, 2005). The Board did not, however, base its decision on that definition. "Bad faith" has been addressed by administrative law judges in a small number of cases. In general, attorney's fees have been denied if a complainant has "a sincere belief a legitimate claim could be brought." *Pittman v. Siemens AG*, ALJ Case No. 2007-SOX-013 (ALJ July 26, 2007), p. 8; *Grant v. Dominion East Ohio Gas*, ALJ Case No. 2004-SOX-063 (ALJ Mar. 10, 2005), p. 51; see also *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003 (ARB Jan. 30, 2004) (no award of attorney's fees where complainant had a firm and sincere belief that he was the victim of retaliation). In this case, Respondent has not shown that Complainant did not have such a "firm and sincere belief." Indeed, Complainant prevailed on his claim before OSHA, and it was Respondent who objected to that finding and requested a hearing. It would be difficult indeed to find bad faith on the part of a complainant who initially prevailed.[1]

[1] Ironically, it appears from the file that Respondent did not respond to OSHA's document requests during the OSHA investigation, leading OSHA to find in favor of Complainant – thus, if Complainant acted in bad faith at the OALJ level, then by the Respondent's reasoning, Respondent acted in bad faith at the OSHA level.

Further, Respondent does not argue that Complainant *brought* his claim in bad faith, but that he "*conducted himself*" in bad faith after the matter was forwarded to the Chief Administrative Law Judge for a hearing. Respondent argues that Complainant failed to respond timely to discovery requests, and that he re-scheduled his deposition three times before deciding to withdraw his complaint, so that he never did appear for deposition. I note that under Respondent's recitation of the facts, Complainant was only two weeks late in responding to its discovery requests; this is hardly an indication of bad faith. Further, Respondent claims, Complainant only decided to withdraw his claim after an employee of Respondent testified at a deposition on August 28, 2013 concerning the decision to abolish Complainant's position. Thus, accepting Respondent's facts as true, they do not demonstrate that Complainant initially brought his complaint in bad faith.

In addition, it is common for a party to realize, after discovery, that it is unlikely that he will prevail at a hearing, and to take steps to end the proceedings; and in this case, Complainant requested withdrawal of his complaint only two days after, apparently, coming to such a realization.[2] Even if Respondent were entitled to fees for conducting himself in bad faith during the post-referral proceedings, it has not shown that Complainant's acts were taken in bad faith. Accordingly, as Respondents has not demonstrated that Complainant's complaint was brought in bad faith, the motion for attorney's fees must be denied.

## ORDER

Based on the foregoing, IT IS ORDERED:

1. The Complaint in this matter is DISMISSED WITH PREJUDICE for want of prosecution; and
2. Respondent's request for an award of costs is DENIED.

**SO ORDERED.**

Digitally signed by PAUL JOHNSON
DN: CN=PAUL JOHNSON,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

PAUL C. JOHNSON, JR.
Associate Chief Administrative Law Judge

[2] The manager's deposition took place on August 28, 2013 and Complainant's letter requesting withdrawal of his complaint was dated August 30, 2013.