



Issue Date: 02 December 2009

CASE NO. 2009-SOX-00056

In the Matter of:

MICHAEL CROSIER,
Complainant,

vs.

THE BOEING COMPANY,
Respondent.

Order Dismissing Claim as Untimely

The Boeing Co. moved to dismiss this claim on the ground that the Complainant waited too long to request a hearing. The Assistant Secretary for OSHA, acting through an OSHA Regional Administrator, had dismissed this claim for employment protection under the Sarbanes Oxley Act¹ based on findings made in a letter to the parties dated May 12, 2009. The letter was correctly addressed and sent by certified mail, as the regulations require,² but the Complainant never claimed it. The U.S. Postal Service returned it to OSHA on June 2, 2009.³ As a consequence, he never requested a hearing in the 30 days available to him, and no reason has been offered for the Complainant's failure to claim the certified copy of the dismissal letter. After that certified copy was returned, an OSHA employee sent the dismissal to the Complainant in a .pdf file by email on June 3, 2009.

The Complainant filed a terse statement with the Office of Administrative Law Judges on July 7, 2009 that said he "wish[ed] to appeal the Seattle Office's Decision in this matter received on June 4, 2009." He said nothing about why he disagreed with OSHA's

¹ 18 U.S.C. § 1514A.

² 29 C.F.R. § 1980.105(b). The address on the Regional Administrator's dismissal letter is 625 11th Avenue North, Othello, WA 99344, the address on the Complainant's Sept 22, 2008, complaint to OSHA, the address he gave to this office in his July 7, 2009, request for hearing, and the return address the Complainant has given for his filings here. In his June 3, 2009, email to OSHA, the Complainant asserted that he is frequently away from his home address and requested that OSHA serve future documents by regular mail, indicating he would send a letter of acknowledgment upon receipt. Respondents' Motion to Dismiss, exhibit B, at 3 of 3. This email did not have any legal effect, however, since the applicable regulation requires service by "certified mail, return receipt requested," and the Complainant had not provided an alternate address for service before the findings were mailed. 29 C.F.R. § 1980.105(b).

³ Ex. B to Boeing's Motion to Dismiss.

decision, although the dismissal decision had required him “to file objections”⁴ as well as to request a hearing.

Boeing moved to dismiss the claim as untimely, and for his failure to articulate his objections. The hearing request also did not comply with the applicable regulation because the Complainant didn’t serve it on Boeing, when the Regional Administrator’s letter had given the names and addresses of individuals at Boeing for the Complainant to copy, and told him to serve them.⁵

The request for hearing is untimely if the 30 days to request a hearing ran from May 12, 2009. There is good reason to use this date, as the findings and dismissal were sent to the address the Complainant gave in his September 22, 2008 written complaint to OSHA, is the same address he gave in the request for hearing he ultimately filed, and is the address that appears on all his other filings at the Office of Administrative Law Judges. Another judge presented with an issue of timeliness determined that the time to request a hearing runs from the date of OSHA’s certified letter. As he observed, “it would make no sense to require actual delivery, since such a definition would allow a claimant to avoid service and hold open his ability to demand a hearing indefinitely.”⁶

If the time to request a hearing ran from the time the Complainant received the email rather than from the day the OSHA Regional Administrator sent the properly addressed certified letter to him on May, 12, 2009 the hearing request was due in Washington, D.C. by July 4, 2009. It was not filed until July 7, 2009. The national holiday would have allowed the request to be filed on the next business day,⁷ July 6, 2009, but that did not happen.

The Complainant’s July 7, 2009 request for hearing is late, whether his time to request it began on May 12 or June 3, 2009. The additional failures to file objections to the findings the Regional Administrator made or to serve Boeing with the hearing request aren’t jurisdictional,⁸ but show the Complainant failed to follow carefully the instructions the dismissal letter detailed for him.

⁴ Dismissal letter of May 12, 2009 at 5 of 6.

⁵ The dismissal letter told the parties that “[o]bjections must be filed in writing with” the chief administrative law judge “with copies to” Boeing. Dismissal letter of May 12, 2009 at 5 of 6. The regulation says objections “must be mailed at the same time to the other parties of record . . .” 29 C.F.R. § 1980.106(a).

⁶ *Robinson v. Northwest Airlines, Inc.*, 2004-AIR-37, slip op. at 5 (ALJ Oct. 28, 2004).

⁷ Under the time regulation “[i]n computing any period of time under these rules . . . the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day.” 29 C.F.R. § 18.4(a). This regulation applies in claims under the Sarbanes-Oxley Act. 29 C.F.R. § 1980.107(a).

⁸ *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, ALJ No. 2004-ERA-9, slip op. at 6 (ARB Oct. 31, 2005) (holding that the worker’s failure to serve the request for hearing on opponents as 29 C.F.R. § 24.4(d)(3) required in a claim for whistleblower protection under the Energy Reorganization Act isn’t a jurisdictional defect, while failure to file a timely request for hearing would be).

The request for hearing is dismissed as untimely. The unfavorable findings in the letter of May 12, 2009 constitute the final decision of the Secretary of Labor.⁹

So Ordered.

A

William Dorsey
U. S. ADMINISTRATIVE LAW JUDGE

San Francisco, California

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).

⁹ 29 C.F.R. § 1980.106(b)(2).