



Issue Date: 15 January 2021

Case No.: 2021-STA-00004

In the Matter of:

MARGARET GILLEN,
Complainant,

v.

JACOBUS ENERGY, LLC,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT’S MOTION TO DISMISS AS
OBJECTIONS AND APPEAL NOT TIMELY FILED**

This matter arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (“STAA”) and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978. Per 29 CFR §1978.107, the proceeding will be held in a manner consistent with the procedural rules set forth in federal regulations at 29 CFR Part 18, Subpart A (29 CFR §18.10 to §18.95).

On December 16, 2019, Complainant filed her Complaint alleging her termination was due to reporting a work injury and it was retaliatory. On September 23, 2020, the Regional Administrator on behalf of the Secretary issued findings and dismissed the complaint stating Complainant was laid off as part of a 16 person lay off and it was not retaliatory. On October 1, 2020, the U. S. Postal Service Tracking confirmed mail received by Complainant at 9:29 a.m. Complainant stated in her objections that she received the findings and dismissal on October 2, 2020. On November 2, 2020, Complainant filed her appeal, objections, and request for hearing, which was filed at 10:30 p.m.

Pursuant to 29 CFR 1978.105, the Secretary’s findings are effective 30 days after receipt by Respondent unless objections are timely filed. Pursuant to 29 CFR 1978.106, any party who desires review must file objections and a request for hearing within 30 days of receipt of the findings pursuant to Section 1978.105. Pursuant to the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 CFR Part 18.32(a) (2), Computing Time is addressed in detail. Per the Rules of Practice and Procedure, when the period is stated in days, the last day for filing “ends at 4:30 p.m. local time....”

On November 24, 2020, Respondent filed its Motion to Dismiss. Respondent argued Complainant's objections to the Secretary's findings and request for hearing were not timely filed. Respondent argued that Complainant received the Secretary's findings on October 1, 2020 per the U. S. Post Office Tracking. Thirty days later would be November 1, 2020. Respondent argued that even if she received the findings on October 2, 2020, Complainant's objections were untimely filed. Respondent cited to the mandatory time deadline in 29 CFR Part 18.32(a) (2) requiring filing by 4:30 p.m., but stated Complainant filed at 10:30 p.m. The Regulations specifically state filings (the appeal and objections to the findings here) must be filed by 4:30 p.m. Respondent argued that, "Because no timely objection was filed, in accordance with 29 CFR 1978.106 (b) the Secretary's findings and order of dismissal automatically became a final decision of the Secretary and is not subject to judicial review."

On November 30, 2020, Complainant filed her Opposition to Respondent's Motion to Dismiss. Complainant stated that, "Respondent's argument for dismissal based on the argument that the objections and request for hearing had to be filed by 4:30 p.m. do not merit dismissal." She stated the document was e mailed after counsel's mediation that day and that counsel "stayed late at work on November 2, 2020 to catch up on e mails that need to be sent...." Complainant stated that the Regulations contained "ambiguity about the timing of the mailing, [and] such semantics should not prejudice Complainant."

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 CFR Part 18.32(a)(2) are clear and unambiguous. They specifically state that all filings are to be made by 4:30 p.m. on the "last day" the filing is due. Complainant's filing was submitted at 10:30 p.m. Complainant cites to the Rules of Civil Procedure which are not applicable here. The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges are controlling.

Complainant did not file the objections and request for a hearing by 4:30 p.m. as required. For these reasons, the court finds Complainant's objections and request for hearing were not timely filed, and the complaint must be dismissed.

Accordingly, Respondent's Motion to Dismiss Complainant's Objections and Request for Hearing is GRANTED. The Findings of the Regional Administrator on behalf of the Secretary are FINAL. Complainant's Complaint is DISMISSED WITH PREJUDICE.

SO ORDERED.

Dana Rosen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

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. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for electronic filing is changing beginning on Monday, December 7, 2020, at 8:30 a.m.

Thus, if you intend to e-file your appeal online on or after December 7, 2020, at 8:30 a.m., be sure to allow sufficient time to register under the new system and to learn how to file an appeal.

You may pre-register to use the new system from November 9, 2020, until 5:00 pm EST on December 3, 2020. As part of the migration to EFS, the Board's current EFSR system will go offline permanently at 5:00 pm Eastern Standard Time (EST) on December 3, 2020. This means that you will not be able to e-file any appeals or other documents with the ARB after 5:00 pm EST on December 3rd through December 7th, at 8:30 a.m. If you intend to file on these dates, please plan to file by other means (conventional mail, hand delivery, etc.).

Although you may pre-register earlier, you will not be able to file using the new system until December 7, 2020, at 8:30 a.m.

Filing Your Appeal Online

If you e-file your appeal on or before 5 p.m. on December 3, 2020, you must use the Board's current Electronic File and Service Request (EFSR) system at dol-appeals.entellitrak.com. Again, the Board's current EFSR system will go offline at 5 p.m. Eastern Time on December 3, 2020, for

deployment related activities. Please plan your filings accordingly. Information regarding registration for access to the EFSR system, a step by step user guide, and answers to FAQs are found at that website link. If you have any questions or comments, please contact Boards-EFSR-Help@dol.gov

Beginning on Monday, December 7, 2020, at 8:30 a.m., the U.S. Department of Labor will implement a new eFile/eServe system ("EFS") at <https://efile.dol.gov/>. If you use the current website link, dol-appeals.entellitrak.com, you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at login.gov (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-brb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-brb>.

BE SURE TO REGISTER IN ADVANCE! Again, you may preregister for EFS from November 9, 2020, until 5:00 pm EST on December 3, 2020. Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. You are still responsible for serving the notice of appeal on the other parties to the case.

Filing Your Appeal by Mail

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor
Administrative Review Board
ATTN: Office of the Clerk of the Appellate Boards (OCAB)
200 Constitution Ave. NW
Washington, DC 20210-0001

Access to EFS for Non-Appealing Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at:
<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, on or after December 7, 2020, at 8:30 a.m., you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.