



Issue Date: 10 December 2010

CASE NO.: 2009-SWD-00004

In the Matter of:

HEATH GUNNS,
Complainant,

v.

CONSOLIDATED GUN RANGES LLC d/b/a NORPOINT SHOOTING AND
TACTICAL TRAINING CENTER, A LIMITED LIABILITY CORPORATION,
BRIAN N. HALLAQ and JAN GOSSING, individuals,
Respondents.

**DECISION AND ORDER GRANTING COMPLAINANT'S UNOPPOSED
MOTION TO DISMISS COMPLAINT AND VACATING HEARING DATE**

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Solid Waste Disposal Act ("SWD"), 42 U.S.C. § 6971, and its implementing regulations found at 29 C.F.R. §§ 18 and 24. The complaint alleged that the Complainant was terminated in retaliation for reporting a safety violation. The Occupational Safety and Health Administration ("OSHA"), as the agent of the Secretary of Labor, investigated the complaint and reported its findings on September 23, 2009. Those findings ordered Respondents to take several actions to correct its violation of the SWD. On September 24, 2009, Respondents appealed the OSHA determination to the Office of Administrative Law Judges (OALJ).

On October 14, 2009, I issued a notice of trial and pre-trial order that required Complainant to file a pre-trial statement, exhibit list, and witness list on or before January 8, 2010, and which set this case for trial for February 10, 2010 in Seattle, Washington.

On August 5, 2010, I issued an order which, among other things, provided the following:

Furthermore, Complainant is **ORDERED** to respond immediately to Respondents' outstanding discovery requests *or risk dismissal of his complaint.* (Emphasis added.)

I find that Complainant has not fully responded to Respondents' discovery requests.

On September 7, 2010, I issued and telefaxed the parties an order that ordered Complainant to file his pre-hearing statement no later than September 10, 2010.

On September 15, 2010, I issue an order granting Complainant's counsel's request to withdraw as counsel for Complainant and I stayed this proceeding until December 3, 2010 so Complainant could retain new counsel or proceed in *pro se*. I also ordered the parties to serve on opposing counsel and file with this Office its pre-hearing statements, and witness and exhibit lists as referenced in my October 14, 2009 pre-trial order no later than December 3, 2010.

On December 3, 2010, Respondents filed their supplemental pre-hearing statement. As of December 9, 2010, Complainant has failed to file his pre-hearing statement and witness and exhibit lists.

My October 14, 2009, August 5, September 7, and September 15, 2010 Orders require Complainant actively prosecute his complaint, and some of them warned Complainant that if he continued to fail to properly respond to my orders setting various deadlines, his complaint could be dismissed.

On December 1, 2010, Complainant submitted his letter motion requesting that his complaint be dismissed because he is unable to secure a legal representative and he is unable to proceed on his own, in *pro se*.

On December 6, 2010, Respondents submitted their response to Complainant's request for dismissal and joined in the request and made further arguments that the complaint be dismissed due to Complainant's continued noncompliance with my earlier orders and his lack of prosecution in this case. Specifically, Respondents argue Complainant admits he will be unable to comply with the other requirements of my pre-trial orders, including the filing of a pre-trial statement, witness list, and exhibit list by December 3, 2010.

The regulations at 29 C.F.R. § 18.6(d)(2)(v) provide me authority to rule that a decision of the proceeding be rendered against the non-complying party denying the complaint for failure to comply with my October 14, 2009, August 5, September 7, and September 15, 2010 Orders. This authority to dismiss a case also comes from my "inherent power" to control my docket and prevent undue delays in the disposition of pending cases by dismissing cases for lack of prosecution. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962) (Courts possess the "inherent power" to dismiss a case for lack of prosecution). "This power is governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-31. In *Mastrianna v. Northeast Utilities Corp.*, ARB No. 99-012, ALJ No. 1998-ERA-033 (Sept. 13, 2000), the Board dismissed a complaint in a case in which the complainant failed to adequately explain his failure to comply with the Board's briefing schedule. The Board explained that it has the inherent power to dismiss a case for want of prosecution in an effort to control its docket and to promote the efficient disposition of its cases. *Id.*, slip op. at 2. *Accord Muggleston v. EG&G Def. Materials*, ARB No. 04-060, slip op. at 2 (ARB June 30, 2004); *Blodgett v. Tenn Dep't of Env'tl & Conservation*, ARB No. 03-043, slip op. at 2 (ARB Mar. 19, 2004).

As of December 9, 2010, Complainant has failed to comply with my earlier orders requiring him to serve and file pre-trial statements and witness and exhibit lists. His December 1st letter motion requests dismissal and indicates he will not be able to prosecute his complaint.

Finally, I find that any lesser sanction would be inadequate given the repeat orders and warnings ignored by Complainant to file and serve pre-trial documents. As a result, his complaint shall be denied for lack of prosecution.

DECISION AND ORDER

Complainant has filed no prehearing statement, witness list, or exhibit list and has stated that he cannot prosecute his complaint or go forward in a timely manner. This case has been in this Office since early October 2009. Therefore, he has not attempted to demonstrate by a preponderance of the evidence that any violation of the Solid Waste Disposal Act and the regulations of the Secretary of Labor published at 29 C.F.R. Parts 18 and 24 has occurred or that any protected activity was a contributing factor in Respondent's adverse action alleged in his complaint. Consequently, Complainant has failed to establish good cause for his failure to comply with my earlier orders in this case. Accordingly, I **GRANT** his motion requesting that this case be dismissed, **VACATE** the hearing on January 24, 2011, and **DENY** his complaint and **DISMISS** this action *with prejudice* for lack of prosecution.

IT IS SO ORDERED.

A

GERALD M. ETCHINGHAM
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. 29 C.F.R. § 24.110(a). The Board's address is as follows: Administrative Review Board, U.S. Department of Labor, Room 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; however, if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *Id.* Your Petition must specifically identify the findings, conclusions, or orders to which you object. *Id.* Generally, you waive any objections you do not raise specifically. *Id.*

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. *Id.* 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, 200 Constitution Avenue, NW, N 2716, Washington, DC 20210. *Id.*

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to *Id.* § 24.109(e). 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 id.* § 24.110(b).

In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.