U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

BRUCE A. MINTHORNE,	**ARB CASE NO. 09-098**
COMPLAINANT,	**ALJ CASE NOS. 2009-CAA-004 2009-CAA-006**
v.	**DATE: July 19, 2011**

COMMONWEALTH OF VIRGINIA, TIM KAINE (Gov. of Virginia), ROBERT BLOXOM (VA Sec'y of Agriculture), WILLIAM DICKENSON (VA Deputy Sec'y of Agriculture), TODD HAYMORE (Commissioner of VA Dept. of Agriculture and Consumer Servs.), DONALD G. BLANKENSHIP (Deputy Commissioner of same), ANDRES ALVAREZ (Director of Division of Consumer Protection of same), ROBERT BAILEY (program manager at same), and KAREN JACKSON (Human Resource director at same),

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Bruce A. Minthorne, ***pro se*****, Woodbridge, Virginia**

For the Respondent:
Thomas W. Nesbitt, Esq., ***Assistant Attorney General, Office of the Attorney General of Virginia*****, Richmond, Virginia**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge***

DECISION AND ORDER OF REMAND

The Complainant, Bruce A. Minthorne, filed two retaliation complaints under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003), on December 5, 2008, and on January 24, 2009. Minthorne appeals from a Department of Labor Administrative Law Judge's (ALJ) dismissal of both complaints pursuant to a Decision and Order issued May 14, 2009. For the following reasons, we affirm the ALJ's decision in part, and reverse and remand in part for further consideration.

BACKGROUND AND PROCEDURAL HISTORY

Minthorne's December 5, 2008 complaint alleges that his former employer, the Commonwealth of Virginia, as well as named individuals who were Commonwealth officials, violated CAA whistleblower protection provisions when they discharged him because he engaged in protected activity. Decision and Order (D. & O.) at 2.

Minthorne's January 24, 2009 complaint alleges that the named State official Respondents, acting as employers, violated the CAA whistleblower provisions by denying Minthorne compensation for his accrued annual leave in December 2008, without due process and then reported the annual leave as dissolved to another agency because he filed his first complaint. *Id.*

OSHA dismissed the first complaint as untimely and dismissed the second complaint because the Regional Administrator found that any adverse action had been abated regarding Minthorne's annual leave. *Id.*. Minthorne timely appealed both complainants to the ALJ.

After consolidating the two complaints, the ALJ dismissed the claims against all parties for failure to state a cause of action. The ALJ dismissed the individual Respondents after determining that the CAA does not cover individuals who are not employers, and finding that the named individuals were not Minthorne's employers. The ALJ further concluded that 42 U.S.C.A. § 1983 (Thomson Reuters 2011) could not be used to establish the ALJ's jurisdiction over the named individuals. Finally, the ALJ dismissed the Commonwealth of Virginia after concluding that the state was entitled to sovereign immunity, which Congress had not abrogated in the CAA and which Virginia had not waived.

The ALJ also denied Minthorne's motion for summary judgment, which claimed that because the Secretary had not provided relief or denied his initial complaint within ninety days of receiving it, Minthorne was entitled to summary decision under 42 U.S.C.A. § 4622 (Thomson Reuters 2011). The ALJ concluded that 42 U.S.C.A. § 4622 imposed no sanction for the Secretary's failure to issue an order within ninety days.

We affirm the ALJ's dismissal of the named individual Respondents and the denial of Minthorne's motion for summary judgment. We remand with respect to the Commonwealth of Virginia, having determined that Congress expressly abrogated the state's sovereign immunity under the CAA.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review the ALJ's decisions pursuant to 29 C.F.R. § 24.110 (2010) and Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.100(a), including the CAA).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.110.

The standard for granting summary decision in whistleblower cases is analogous to summary judgment under the Fed. R. Civ. P. 56(e). The ALJ "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d)(2010). The ARB reviews an ALJ's recommended grant of summary decision de novo. *Farmer v. Alaska Dep't of Transp. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-011, slip op. at 4 (ARB Dec. 17, 2004); *Ewald v. Commonwealth of Va., Dep't of Waste Mgmt.*, ARB No. 02-027, ALJ No. 1998-SDW-001, slip op. at 4 (ARB Dec. 19, 2003).

DISCUSSION

Minthorne raises the following issues on appeal: (1) whether the Secretary's failure to issue an order within ninety days requires the entry of summary decision in his favor; (2) whether the ALJ improperly dismissed the named individual Respondents because they were not Minthorne's employers; (3) whether the ALJ had jurisdiction to address alleged violations of constitutional rights by the named individual Respondents under 42 U.S.C.A. § 1983; and (4) whether Congress abrogated State sovereign immunity under the CAA. Minthorne asks the Board to enter final judgment in his favor.

1. Denial of Complainant's Motion for Summary Decision

42 U.S.C.A. § 7622(b)(2)(A) provides in relevant part: "Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. . . . Within ninety days of the receipt of such complaint the Secretary shall . . . issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint." Citing this provision, Minthorne moved for summary decision seeking, in effect, an order of default in his favor because the Secretary had not issued a decision within the prescribed 90-day period. The ALJ found that 42 U.S.C.A. § 7622 does not impose a sanction for the Secretary's failure to issue an order within ninety days of the receipt of a complaint. Accordingly, the ALJ denied Minthorne's motion for summary decision. On appeal, Minthorne challenges the ALJ's denial of his motion for summary decision, arguing that the statute's lack of sanction is an insufficient reason to deny his motion for summary decision.

The Supreme Court has consistently rejected arguments, like Minthorne's, for a mandatory default sanction simply because an agency decision deadline passes. More specifically, the Court has ruled that a statutorily set decision deadline, without statutorily specified consequences, does not require the agency to grant the requested relief upon expiration of the statutory time period. In *Brock v. Pierce County,* 476 U.S. 253 (1986), the Supreme Court found that the Secretary of Labor's 120-day deadline to issue a final determination on a complaint of federal grant fund misuse was meant to spur him to action, not to limit the scope of his authority, so that his untimely action was valid. If a statute does not specify a consequence for noncompliance with statutory timing provisions, federal courts will not ordinarily impose their own coercive sanction. *Barnhart v. Peabody Coal*, 537 U.S. 149, 159 (2003); *United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 63 (1993). We thus affirm the ALJ's denial of Minthorne's motion for summary decision. As the CAA imposes no particular sanction or consequence if the Secretary fails to issue a timely decision, we view the time period prescribed by 42 U.S.C.A. § 7622(b)(2)(A) as directory only, and thus not a basis upon which Minthorne is entitled to summary relief.

2. Dismissal of Named Individual Respondents

The ALJ dismissed the claims against the named individual Respondents for failure to state a cause of action upon which relief may be granted because "individuals who are not employers are not subject to suit" under the CAA. D. & O. at 7 (citing *Stephenson v. National Aeronautical & Space Admin. (NASA)*, 1994-TSC-005, slip op. at 2-3 (Sec'y July 3, 1995)). Minthorne argues that the named Respondents may still be liable in their personal capacities because they acted under the color of state law and had statutory or executive authority to affect the terms and conditions of his employment by the Commonwealth of Virginia.

We affirm the ALJ's dismissal of Minthorne's complaints against the individual Respondents under the CAA. 42 U.S.C.A. § 7622(a) provides in pertinent part that "[n]o *employer* may discharge an employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activity under the CAA." (Emphasis added). Although the term "employer" is not defined in the CAA, it would inordinately expand the plain meaning of that term to include co-workers and supervisors who are merely agents of a governmental entity or a legally distinct business entity such as a corporation. We recognize that the CAA expressly includes "individuals" within the definition of "persons" subject to whistleblower claims under the CAA. However, reading the whistleblower provisions as a whole, we conclude that the reasonable interpretation of the use of the word "employer" and "person" is that the respondent must be a person that is also an employer. *See*, *e.g.*, *Stephenson v. NASA, supra* (in which the Secretary found that the individually named management personnel were not "employers" under the Toxic Substances Control Act, 15 U.S.C.A. § 2622 and the CAA because they were employees like the complainant). Here, the ALJ found that the Commonwealth of Virginia employed Minthorne, and the named individual Respondents did not. Therefore, the ALJ properly dismissed the claims against the named individual Respondents.

3. Jurisdiction to Adjudicate Claims under 42 U.S.C.A. § 1983

As the ALJ correctly held, DOL jurisdiction in this case is limited to Minthorne's claims of CAA whistleblower protection violations, pursuant to 42 U.S.C.A. § 7622(b) and 29 C.F.R. §§ 24.107 and 24.109. DOL has no jurisdiction over constitutional claims against named individuals arising under 42 U.S.C.A. § 1983. *Accord* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010) (delegating to the Board the Secretary's authority to review cases under the statutes listed, which do not include 42 U.S.C.A. § 1983). Accordingly, we affirm the ALJ's decision that the DOL lacks subject matter jurisdiction to adjudicate any claims raised by Minthorne under 42 U.S.C.A. § 1983.

4. Abrogation of State Sovereign Immunity under the CAA

Citing Board precedent,[1] the ALJ concluded that the Eleventh Amendment entitled the Commonwealth of Virginia to sovereign immunity from a private suit under the CAA's whistleblower provisions.[2] The ALJ dismissed Minthorne's claim against the Commonwealth of Virginia after concluding that the Commonwealth had not waived its sovereign immunity, and Congress had not abrogated its sovereign immunity under the CAA.

Minthorne does not challenge the ALJ's determination that the Commonwealth of Virginia has not waived its sovereign immunity with regard to his claims. Minthorne contends, however, that Congress abrogated the States' sovereign immunity when it enacted the CAA whistleblower provisions, making the Commonwealth of Virginia amenable to suit for violations of those provisions.

For over a century, the Supreme Court has clearly held that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States, and that the Eleventh Amendment generally bars a private citizen from suing a nonconsenting State in the federal courts. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 73 (2000); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890). State sovereign immunity applies in administrative adjudications as well as in Article III adjudications. *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 761 (2002) ("[I]t would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings . . . but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply.").

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1 *Thompson v. Univ. of Georgia*, ARB No. 05-031, ALJ No. 2005-CAA-001 (ARB Jan. 31, 2006); *Powers v. Tennessee Dep't of Env't & Conservation*, ARB Nos. 03-061, -125; ALJ Nos. 2003-CAA-008, -016 (ARB June 30, 2005) (reissued Aug. 16, 2005).

2 The Eleventh Amendment by its terms limits the "[j]udicial power of the United States" to entertain certain types of "suit[s] in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States." U.S. Const. Amend. XI.

Congress may, however, abrogate a State's sovereign immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its constitutional authority. *Hibbs*, *538 U.S. 721*; *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996). "In order to determine whether Congress has abrogated the State's sovereign immunity, we ask two questions: first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity; and second, whether Congress has acted 'pursuant to a valid exercise of power." *Seminole Tribe of Fla.*, 517 U.S. at 55 (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)), *accord*, *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001). Because Minthorne is a private citizen attempting to bring suit against a nonconsenting State in a federal administrative adjudication, the Eleventh Amendment bars his suit unless Congress abrogated State sovereign immunity when it enacted the CAA's whistleblower protection provisions.

A. <u>Intent</u>

"Congress' intent to abrogate the State's immunity from suit must be obvious from 'a clear legislative statement.'" *Seminole Tribe of Fla.*, 517 U.S. at 55. Congress may abrogate the States' constitutionally secured immunity from suit "only by making its intention unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989). To determine whether Congress intended to abrogate the States' sovereign immunity under the CAA's whistleblower provisions, we must consider two pertinent provisions. The first provision is section 7622(a)'s anti-retaliation provision in. As previously indicated, this section provides in pertinent part, "No *employer* may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in CAA-protected activity (emphasis added).

As previously noted, the CAA does not define the term "employer." Nevertheless, the second relevant provision, section 7622(b) (the "Liability Provision"), permits aggrieved employees to file a complaint against "any person" who violates section 7622(a),[3] with "person" defined to include, inter alia, a "State" and a "political subdivision of a State." See 42 U.S.C.A. § 7602(e).[4]

In previous CAA whistleblower cases,[5] the ARB focused on section 7622(a) and, citing the lack of any definition for the term "employer," concluded that the Congress had failed to

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[3] 42 U.S.C.A. § 7622(b)(1) states in relevant part: "Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may . . . file (or have any person file on his behalf) a complaint with the Secretary of Labor . . . alleging such discharge or discrimination."

[4] 42 U.S.C.A. § 7602(e) defines "person" to include "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof."

[5] *See Yagley v. Hawthorne Ctr. of Northville*, ARB No. 09-061, ALJ No. 2009-CAA-002 (Apr. 30, 2010); *Yagley v. Hawthorne Ctr. of Northville*, ARB No. 06-042, ALJ No. 2005-TSC-003 (ARB May 29, 2008); *Thompson* ARB No. 05-031.

provide an unequivocal abrogation of State sovereign immunity under the CAA. In *Powers,* ARB Nos. 03-061, -125, the ARB analyzed whether the CAA evidenced an unequivocal expression of congressional intent to abrogate State sovereign immunity:

> Under the CAA, an 'employer' is prohibited from discriminating against whistleblowers, 42 U.S.C.A. § 7622(a), but only a 'person' who discriminated is subject to the process and remedies for discrimination. § 7622(b). Although 'person' is defined in CAA to include states, § 7602(e), 'employer' is not defined to include states. There is thus no unequivocal abrogation of sovereign immunity.

Powers, slip op. at 7.[6]

In *Erickson v. U.S. EPA*, ARB Nos. 03-002, -003, 04-64; ALJ Nos. 1999-CAA-002, 2001-CAA-008, -013, 2002-CAA-003, -018 (ARB May 31, 2006) the Board took note of a Department of Justice Office of Legal Counsel Opinion, rendered in September 2005, addressing the issue of sovereign immunity waiver under the CAA and other environmental whistleblower acts.[7] Acknowledging the binding effect on executive branch agencies of OLC opinions,[8] the ARB in *Erickson* redirected the focus for sovereign immunity analysis under the CAA to the definition of "person" in the Liability Provision consistent with the OLC's opinion letter. *See also Kanj v. Viejas Band of Kumeyayy Indians*, ARB No. 06-074, ALJ No. 2006-WPC-001 (ARB Apr. 27, 2007) (in which the Board cited the OLC opinion and relied upon its rationale to find that Congress expressed its intention to abrogate the Tribe's immunity under the CWA because it allowed employees to file suit against "any person" and defined "person" as including "municipalities" which in turn, included "Indian Tribes").

Citing the Tenth Circuit's analysis in *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999), of the whistleblower protection provisions of the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i), whose language parallels that of the CAA, the Office of Legal Counsel explained that the proper statutory focus for assessing whether Congress intended to abrogate sovereign immunity is on the enforcement and remedial provisions of the

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[6] In reaching the same conclusion in *Yagley I, Yagley II,* and *Thompson,* the Board did not engage in independent analysis, but merely cited to and relied upon *Powers.*

[7] DOJ Office of Legal Counsel Letter Opinion for the Solicitor Department of Labor, "Waiver of Sovereign Immunity with Respect to Whistleblower Provisions of Environmental Suits," dated September 23, 2005 (unpublished).

[8] Office of Legal Counsel opinions are generally viewed as providing binding interpretative guidance for executive agencies. *See Smith v. Jackson*, 246 U.S. 388, 389-391 (1918) (finding that Auditor did not have power to refuse to carry out law and any doubt he may have had should have been subordinated to ruling of the Attorney General); *United States v. Arizona*, 641 F.3d 339, 385 n.16 (9th Cir. 2011). *See also* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 32 Admin. L. Rev. 1303 (2000).

statute – which under the CAA are found in section 7622(b).[9] Consistent with that analysis, we conclude that Congress unequivocally expressed its intent to abrogate the States' sovereign immunity under the CAA. The CAA's inclusion of "State" in the CAA's definition of what entities constitute "persons" for purposes of suit (and against whom remedy may be secured) under the Act's whistleblower provisions indicates a clear and unmistakable intent on the part of Congress to abrogate State sovereign immunity with regard to suit under the Act's whistleblower protection provisions.

B. Power to Abrogate

As previously noted, in determining whether Congress has abrogated the States' sovereign immunity pursuant to a congressional enactment the second question that must be resolved is whether Congress, having clearly expressed its intent to abrogate State sovereign immunity, has done so pursuant to a valid exercise of constitutional authority. In this case, the resolution of this question would involve determining whether Congress, by including States among those subject to suit under the CAA, did so pursuant to a valid exercise of its enforcement authority under Section 5 of the Fourteenth Amendment. *See Seminole Tribe of Fla.*, 517 U.S. at 59. However, as the ARB previously recognized in *Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 7 (Sept. 29, 1998), the adjudication of the constitutionality of congressional enactments exceeds the ARB's jurisdiction. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Oestereich v. Selective Serv. Sys.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result); *United States v. Bozarov*, 974 F.2d 1037, 1040 (9th Cir. 1992).

Similar to the recognition in *Jones v. EG&G Def. Materials* that the adjudication of the constitutionality of congressional enactments exceeds the ARB's jurisdiction, the Department of Labor's Employees' Compensation Appeals Board (ECAB) has noted, "Administrative agencies are entrusted to administer statutes and thus perform quasi-judicial duties by ascertaining facts and interpreting the law in carrying out the will of the legislature. . . . Congressional enactments are administered under a presumption of constitutionality, and the Board accepts the presumption of constitutionality found [under the act therein challenged]." *In re Gerald Lepre & DOJ Bureau of Prisons*, 1998 WL 1666969 (ECAB Sept. 22, 1998). *See In re D.K. & U.S. Postal Serv.*, 2010 WL 3524008 (ECAB July 2, 2010) ("Congressional enactments are administered under a presumption of constitutionality and the [Employees' Compensation Appeals] Board accepts the presumption of constitutionality of [the challenged proviso]."); *In re G.H. & U.S. Postal Serv.*, 2009 WL 638326 n.7 (ECAB Jan. 26, 2009); and *Longshore & Warehousemen Local 6 & Hershey Chocolate Corp.*, 153 NLRB 1051, 1067, 1965 WL 16083 (July 1, 1965).

Consistent with the foregoing, we conclude that as an administrative agency of the Federal Government, it would be inappropriate for the ARB to pass upon the constitutionality of

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[9] *Osage Tribal Council*, in turn, cited to and relied upon *Seminole Tribe of Fla.,* 517 U.S. at 57, wherein the Supreme Court looked to the remedial scheme available under the Indian Gaming Regulatory Act to a party filing suit in resolving "any conceivable doubt as to the identity of the defendant" properly to be sued.

the CAA. Thus we will presume the constitutionality of the act insofar as the question of abrogation of State sovereign immunity is concerned absent binding court decisions to the contrary.[10]

CONCLUSION

In summary, we affirm the ALJ's denial of Minthorne's motion for summary decision, his dismissal of the named individuals Respondents, and his decision that the DOL lacks subject matter jurisdiction to adjudicate any claims Minthorne raised under 42 U.S.C.A. § 1983. However, we conclude that Congress unequivocally intended the CAA's employee whistleblower protection provisions to apply to the States and, consistent with the ARB's jurisdictional constraints, presume that Congress validly abrogated the States' sovereign immunity consistent with its constitutional authority. Therefore, we reverse the ALJ's decision to dismiss the Commonwealth of Virginia because we find that the CAA has abrogated Virginia's sovereign immunity.

ORDER

The ALJ's Decision and Order is affirmed in part and reversed in part, and remanded for further proceedings consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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[10] While we may not have authority to pass on the constitutionality of the CAA's whistleblower provisions as applied to the States, the Administrative Procedure Act (APA) provides for the proper resolution of the issue of whether Congress acted within its constitutional authority in subjecting the States to suit under the CAA's whistleblower protection provisions in the courts of the United States. *See* 5 U.S.C.A. § 706 ("Scope of Review," providing that the reviewing court of an agency action "shall hold unlawful and set aside agency action, findings, and conclusions found to be contrary to constitutional right, power, privilege, or immunity . . . ." 5 U.S.C.A. § 706 (2)(B)). *See also Califano v. Sanders*, 430 U.S. at 109.