U.S. Department of Labor

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

In the Matter of:

MARK DUNCAN, **ARB CASE NO. 99-011**

COMPLAINANT, **ALJ CASE NO. 97-CAA-12**

v. **DATE: June 13, 2000**

SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mark Duncan, *pro se*, *Shingle Springs, California*

For the Respondent:
Kenneth Swenson, Esq., Matthew D. Evans, Esq., *Duncan, Ball, Evans & Ubaldi*, *Sacramento, California*

ORDER

Complainant Mark Duncan has filed a "Motion to Accept New Evidence Into the Record and Motion to Grant a Thirty-Day Extension for the Filing of the Initial Brief." This motion requested the Administrative Review Board to accept new evidence into the record: 1) transcripts of the arbitration proceedings which arose from Duncan's discharge from employment by the respondent Sacramento Metropolitan Air Quality Management District (the District), including the exhibits presented during those proceedings; 2) a May 13, 1999 complaint of blacklisting against the District and associated attachments previously filed with the Board; and 3) a bank statement showing payment of check #2008 from Duncan to the District, covering the cost of his alleged misuse of a District cellular phone. Duncan subsequently filed a "Motion to Expand the Initial Brief Page Limitation from Thirty to Fifty Pages."

In response to Duncan's request to supplement the record, the District filed Respondent's "Statement of Provisional Non-Opposition to Complainant Duncan's Motion to Supplement the Record" (Statement of Provisional Non-Opposition). The District stated that it does not oppose the motion to

supplement the record provided the Board also admits into evidence the Arbitration Opinion and Award which issued as a result of the arbitration proceeding. The District subsequently filed a "Motion to Reopen the Record to Supplement it with the Arbitration Opinion and Award Concerning Termination of Complainant Mark Duncan; and Declaration of Kenneth L. Swenson in Support Thereof" (District's Motion to Reopen the Record).

A. Transcripts of the Arbitration Proceedings and Arbitration Award.

When considering a motion to reopen the record to admit new evidence, the Board and its predecessor, the Secretary, ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which provides:

> Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

29 C.F.R. §18.54(c). *See, e.g., Lassin v. Michigan State University*, 93-ERA-31, Fin. Dec. & Ord. (June 29, 1995). The ALJ initially closed the record in this case on March 26, 1998. *See* Order to Show Cause (April 13, 1998). However, by order dated May 7, 1998, the ALJ reopened the record upon the District's motion to allow the District to submit into evidence a copy of an arbitrator's decision dated March 25, 1998, concerning Duncan's challenge of a five-day suspension the District had imposed in March 1997. The District also asserts in its Statement of Provisional Non-Opposition that the ALJ issued an order on July 7, 1999, again reopening the record to permit Duncan to introduce ALJX9, "'transcript of the May 14, 1998 arbitration proceeding before arbitrator Geraldine M. Randall.'" Although an examination of the record did not reveal the ALJ's July 7, 1999 order, ALJX9 is, in fact, in the ALJ record. The ALJ issued his Recommended Decision and Order on October 16, 1998.

The Arbitration Award the District seeks to introduce into evidence was not issued until November 23, 1998. Thus, it was not available prior to the closing of the record or the issuance of the ALJ's decision. The arbitration transcripts and exhibits Duncan seeks to introduce first became available after the ALJ closed the record, but apparently before the ALJ issued his decision.[1/]

The District, at least provisionally, does not object to the introduction of the evidence. Furthermore, because "'strong federal policies'" favor collectively bargained arbitration agreements, the ARB generally will consider arbitration proceedings and decisions in cases concerning alleged

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[1/] Both the District and Duncan successfully petitioned the ALJ to reopen the record to include additional evidence after he initially closed the record. Duncan does not explain why he did not request the ALJ to reopen the record to accept the transcripts and exhibits so that the ALJ could initially rule upon the request and, if he granted it, could consider the transcripts and exhibits in rendering his recommended decision and order. Allowing the ALJ initially to consider this request would certainly be the preferred course of action.

discrimination under an employee protection provision. *See Lassin v. Michigan State University*, 93-ERA-31, Fin. Dec. & Ord. (June 29, 1995), *quoting Roadway Express, Inc. v. Brock,* 830 F.2d 179, 181 (11th Cir. 1987). Thus, we are inclined to grant Duncan's motion to reopen the record and introduce the arbitration transcripts and exhibits as well as the District's motion to reopen the record to introduce the arbitration decision. However, we do not rule on the motion at this time because we note that although we granted the District permission to respond to Duncan's motion to reopen, we have not yet given Duncan the opportunity to respond to the District's motion. Thus, Duncan may respond to the District's Motion to Reopen the Record on or before **June 27, 2000.**

B. Blacklisting Complaint.

On April 1, 1999, Duncan wrote to the Secretary of Labor complaining that the information the District posted on its internet website concerning the ALJ's Recommended Decision and Order in this case constituted blacklisting. In a follow-up letter to the Secretary dated May 9, 1999, Duncan indicated that he had faxed a copy of his complaint to the San Francisco Occupational Safety and Health Office (OSHA), but had received no reply. He also indicated that the comments, of which he complained, remained on the website. The Executive Director of the Labor Department's Office of Adjudicatory Services responded to Duncan's letters for the Secretary. He wrote, "Since you have an appeal pending, you may file a Motion directly with the Administrative Review Board formally raising this issue for its review." Duncan subsequently filed a "Motion to Review a New Complaint of Retaliation: Blacklisting" dated May 13, 1999, with the ARB.

As Duncan recognizes, his blacklisting complaint constitutes a "new" complaint. As provided in 29 C.F.R. §24.8(a), the ARB reviews administrative law judges' recommended decisions and orders. However, no such recommended decision and order on Duncan's blacklisting complaint has been issued in this case. Thus, this complaint is not currently in a posture for review by the ARB.

Duncan alleges that he filed this complaint with the local OSHA office, however from the record before us, it does not appear that OSHA took any action on the complaint. Accordingly, assuming that OSHA has not investigated the complaint, we remand the complaint to the San Francisco OSHA office for investigation as provided in 29 C.F.R. §24.4.[2/] If the complaint is in the process of being investigated, the current investigation should be completed as provided in 29 C.F.R. §24.4.

[2/] While reaching no conclusions on the merits of Duncan's blacklisting claim, we note that we previously have found that given the "invidious and insidious" nature of blacklisting, it may be appropriate to apply the continuing violation theory in determining the timeliness of a blacklisting claim. *See Egenrieder v. Metropolitan Edison Co.*, 85-ERA-23, Ord. of Rem., slip op. at 6 (April 20, 1987). We also note that even if Duncan had not filed a complaint with the OSHA office, his April 1, 1999 letter to the Secretary of Labor, if timely filed, would be sufficient to constitute a "complaint" pursuant to section 7622(b)(1) of the Clean Air Act, 42 U.S.C. §7622(b)(1) (1994) and 29 C.F.R. §24.3(d). *Accord School District of Allentown v. Marshall*, 657 F.2d 16, 18-20 (3d Cir. 1981).

C. Bank Statement.

The bank statement Duncan seeks to introduce dated June 12, 1998, was not available prior to the date upon which the ALJ closed the record, although it was available prior to the issuance of the ALJ's decision. Nevertheless, even if we were to consider Duncan's request to be timely, the evidence must also be "material."

Duncan has failed to establish how the bank statement allegedly establishing that Duncan repaid the District for the alleged misuse of a District cellular phone on June 9, 1998, is relevant to the District's termination of Duncan's employment on September 27, 1997, or to any of the other allegedly adverse actions which serve as the bases of Duncan's complaint that the District impermissibly retaliated against him under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (1994). Accordingly, we **DENY** Duncan's motion to reopen the record to introduce the bank statement showing payment of check #2008 from Duncan to the District, covering the cost of his alleged misuse of a District cellular phone.

Once we have ruled on Duncan's Motion to Reopen the record to introduce the arbitration transcripts and exhibits, we will establish a briefing schedule and rule on Duncan's Motion to Expand the Page Limitations.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member