In the Matter of:

JEROME REID, **ARB CASE NO. 00-082**

COMPLAINANT, **ALJ CASE NO. 2000-ERA-23**

v. **DATE: August 30, 2002**

NIAGARA MOHAWK POWER CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jerome Reid, *pro se*

For the Respondent:
Robert A. LaBerge, Esq., Michele F. Mitchell, Esq., *Bond, Schoeneck & King, LLP,* Syracuse, New York

DECISION AND ORDER OF REMAND

BACKGROUND

This case arose when Jerome Reid filed a complaint with the Department of Labor's Wage and Hour Division (Wage and Hour) alleging that Niagara Mohawk Power Corporation violated the whistleblower protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A § 5851 (West 1995), by reducing his grade and pay level because he engaged in covered activities protected under these provisions. Recommended Decision and Order Dismissing Complaint (R. D. & O.) at 1-2. Wage and Hour investigated the complaint and determined that his allegations could not be substantiated. *Id.* In a letter dated July 30, 1993, a Wage and Hour Assistant Director informed Reid of the results of the Wage and Hour investigation and of Reid's right to request a hearing before a Department of Labor Administrative Law Judge if he disagreed with the determination. *Id.* Specifically, the Assistant Director wrote:

> This letter is notification to you that, if you wish to appeal the above findings, you have a right to a formal hearing on the record. To

> exercise this right you must, within five (5) calendar days of receipt of this letter, file your request for a hearing by telegram to:
>
> The Chief Administrative Law Judge
> U.S. Department of Labor
> 800 K St., N. W.
> Washington, D.C. 20001-8002
>
> Unless a telegram is received by the Chief Administrative Law Judge within the five-day period, this notice of determination will become the final Order of the Secretary of Labor dismissing your complaint.

ALJ Exhibit (ALJ Ex.) 5 at Exhibit E. Although Reid requested a hearing, he did not request it by telegram as provided in 29 C.F.R. § 24.4(d)(2)(i) (1993).[1] R. D. & O. at 2. Instead, on August 21, 1993, he requested the hearing by facsimile sent to a machine located in the Office of Administrative Law Judges' administrative office, rather than in its docket section.[2] *Id.* It appears that the hearing request never reached the docket section, and thus, the Office of Administrative Law Judges (OALJ) did not docket the case or schedule a hearing as provided in 29 C.F.R. § 24.5(a) (1993).[3] *Id.*

By letter dated April 26, 2000, Reid wrote to Chief ALJ John Vittone inquiring as to the status of his "appeal." *Id.*; ALJ Ex. 2. Reid stated that although he had submitted a request for a hearing, the OALJ had failed to schedule one. ALJ Ex. 2. He attached to his letter a copy of his hearing request and a facsimile transmission report reflecting that a document had been transmitted to the OALJ on August 21, 1993. R. D. & O. at 2; ALJ Ex. 2.

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[1] These regulations have since been amended. At the relevant time the regulations provided:

> If on the basis of the investigation the Administrator determines that the complaint is without merit, the notice of determination shall include, or be accompanied by notice to the complainant that the notice of determination shall become the final order of the Secretary denying the complaint unless within five calendar days of its receipt the complainant files with the Chief Administrative Law Judge a request by telegram for a hearing on the complaint.

[2] Reid maintains that he received the Wage and Hour determination on August 16, 1993, and Niagara Mohawk does not dispute this claim. Hearing Transcript (H. T.) at 71.

[3] A complainant must serve a copy of any request for a hearing upon the Respondent and the Administrator. 29 C.F.R. § 24.4(d)(2)(ii). The ALJ noted in his R. D. & O. that "there is no contention made that the Complainant failed to serve his request upon the Respondent . . .." R. D. & O. at 5. The hearing request, which Reid alleges he faxed to the OALJ, indicates that he sent copies of the request to the Assistant District Director, USDOL, Wage and Hour Division in Syracuse, NY and to John J. Hennigan, Esq. at Niagara Mohawk Power Corporation. It appears that the copy to the Assistant District Director was received on August 26, 1993. (Exhibit D attached to Reid's initial brief).

On May 1, 2000, Thomas M. Burke, Associate Chief Judge, issued a Notice of Docketing. R. D. & O. at 2. Judge Burke concluded, "Although OALJ has no record of having received the [hearing] request, the transmittal confirmation report is adequate proof to show that Complainant's hearing request was timely filed before this Office." ALJ Ex. 3. Accordingly, the ALJ ordered the cases docketed and assigned to a "presiding judge to conduct a formal hearing at the earliest possible time." *Id.*

On May 9, 2000, ALJ Daniel F. Sutton issued a Notice scheduling the hearing for June 6, 2000. ALJ Ex. 4. On May 27, 2000, Niagara Mohawk filed a motion requesting the ALJ to issue an order to show cause "why the determination rendered by the Department of Labor on or about July 30, 1993 should not become the final order of the Secretary of Labor in this matter." ALJ Ex. 5. In support of the motion Niagara Mohawk asserted that Reid:

> (1) failed to request a hearing on his complaint in the form and manner prescribed by the governing regulations and (2) failed to diligently pursue his appeal, resulting in a delay of almost seven years and potentially prejudicing the Respondent's ability to present a defense.

Id.

The ALJ concluded that Niagara Mohawk had raised a "substantial question" as to whether Reid was entitled to a hearing on the merits. ALJ Ex. 6. Accordingly, he granted Niagara Mohawk's motion and ordered Reid to show cause why his complaint should not be dismissed. *Id.* Because of Reid's *pro se* status and the fact that the ALJ had scheduled a hearing on June 6, 2000, the ALJ permitted Reid to file his response on the record at the hearing prior to the introduction of any evidence. *Id.*

The ALJ limited the hearing to the issue of whether Reid's complaint should be dismissed either on the basis of the untimely filing of his request for a hearing, or because he failed to diligently prosecute his case.[4]

Reid admitted that he had not sent a telegram to request the hearing as provided by the regulations governing requests for ALJ hearings. R. D. & O. at 2; H. T. at 35-36. Although Reid had previously filed a timely request for a hearing in another ERA case, he did not remember if he had requested the hearing in that case by telegram. H. T. at 36-37. He stated that he had gotten the facsimile number to which he sent his hearing request from correspondence from an attorney in the OALJ. R. D. & O. at 3; H. T. at 37. He indicated that he had previously faxed information to the OALJ at this number without difficulty. R. D. & O. at 3; H. T. at 36. Reid stated that he called the OALJ to confirm that the office had received the hearing request facsimile, but that his call was answered by an answering machine. R. D. & O. at 3; H. T. at 38. He said that he left a message regarding the hearing request. *Id.*

Reid stated that he telephoned the OALJ in the following six years on a number of occasions. H. T. at 40. Although he stated that he talked to a "technician," he did not describe the precise nature of the telephone calls or their subject matter. R. D. & O. at 4; H. T. at 40. However, he averred that

[4] Testimony was not taken under oath.

he never learned the status of his request for a hearing. H. T. at 40. Although Reid's prior ERA whistleblower claim had been scheduled expeditiously, Reid explained that he did not consider it to be unusual that the OALJ had not contacted him because he had been involved in other proceedings, including grievances and his discrimination complaint before a state civil rights agency, which had been pending as long as ten years. R. D. & O. at 4; H. T. at 42-46. Ultimately, he wrote to Judge Vittone because his state case was scheduled, and he wanted to be able to report the status of his ERA whistleblower case. R. D. & O. at 4; H. T. at 46-49.

Reid also testified that he had been under psychiatric care since 1988 and currently was taking prescribed medication for stress and depression. R. D. & O. at 4; H. T. 20-21, 27-28. He had been hospitalized for treatment of these conditions, but not since 1989. R. D. & O. at 4; H. T. 28.

At hearing, Niagara Mohawk relied primarily on its previously filed brief in support of the motion for a show cause order. Counsel for respondent argued that Reid's failure to comply with 29 C.F.R. § 24.4(d)(2)(i) (1993) should not be excused because the regulation was clear, and he had been specifically informed in the determination letter of the required procedure and the consequences of his failure to follow this procedure. H. T. at 50. Counsel also emphasized Reid's prior experience litigating ERA cases and argued that ARB precedent indicates that the regulations governing hearing requests are to be strictly construed. *Id.* at 52, 55. Regarding the issue of Reid's failure to prosecute, Counsel stated:

> [O]ver the course of the past seven years, several individuals who may have knowledge, or may be involved with respect to some of the issues that Mr. Reid intends to raise in this case, have retired or otherwise left the company. Some people have moved out of the area. I believe again, depending on . . . the issues that we have to respond to, and it's difficult for me . . . to say this because we haven't heard Mr. Reid's proof. Some of these people are beyond subpoena authority. And none of these issues or complications would have been present in terms of the freshness of the issues, the people's recollection, the ability of Niagara Mohawk to call all of the individuals that it might want to call to respond to any allegation that Mr. Reid may make in a Hearing, would have been avoided if, in fact, the procedures had been followed in this case, if the request had been filed by telegram.

Id. at 54-55.

Counsel for Niagara Mohawk also noted that the regulations for requesting, scheduling and holding a hearing in ERA cases clearly anticipate expedited proceedings for the "benefit of all the parties." *Id.* at 55.

The ALJ issued a Recommended Decision and Order in which he recommended that Niagara Mohawk's motion for dismissal be granted and that Reid's complaint be dismissed with prejudice. Initially, the ALJ found that Reid properly filed his hearing request because as long as the request was timely, the fact that it was filed by facsimile, rather than telegram as provided in 29 C.F.R. § 24.4(d)(2)(i) was irrelevant. R. D. & O. at 5. Nevertheless the ALJ recommended that the complaint

be dismissed. He evaluated Reid's attempts to litigate his complaint and concluded that Reid's allegations concerning bouts of depression and stress and vague statements as to his sporadic efforts to contact the OALJ were not sufficient to establish that he had diligently prosecuted his appeal, especially given the "palpable" prejudice to Niagara Mohawk. R. D. & O. at 7.

Reid filed a petition for review of the R. D. & O. with the Administrative Review Board (ARB or Board), to which the Secretary of Labor has delegated authority to issue final decisions in cases arising under the ERA. *See* 29 C.F.R. § 24.8(a); Secretary's Order 2-96, Fed. Reg. 19,978 (May 3, 1996).

ISSUES PRESENTED FOR REVIEW

1) Whether Reid's hearing request was fatally defective under 29 C.F.R. § 24.4(d)(2)(i) (1993), thus requiring dismissal of Reid's complaint.

2) If Reid filed an acceptable request for a hearing, whether the Board should dismiss the complaint because Reid failed to diligently pursue his case.

STANDARD OF REVIEW

Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C.A § 557(b) (West 1996). As a result, we are not bound by the conclusion of the ALJ, but retain complete freedom to review factual and legal findings *de novo*. *See Gale v. Ocean Imaging,* ALJ No. 97-ERA-38, ARB No. 98-143, slip op. at 6 (ARB July 31, 2002).

DISCUSSION

1. Sufficiency of Reid's hearing request

The regulation governing the filing of hearing requests with the OALJ provided that the party requesting the hearing must do so by telegram within five calendar days of receipt of the Wage and Hour Division's notice of determination. 29 C.F.R. § 24.4(d)(2)(i). The OALJ received, albeit by facsimile, Reid's request for a hearing within five calendar days of Reid's receipt of the Wage and Hour Division's notice of determination that his complaint was without merit. We agree with the ALJ that the timeliness of the filing, rather than the means by which the request is filed is the preponderant requirement of the regulation. If the request is received by the OALJ within the five-day limitations period, we cannot conceive of any rational basis for rejecting the hearing request simply because it was transmitted by facsimile rather than by telegram. Moreover, Niagara Mohawk has failed to suggest any such basis.

Niagara Mohawk argues in support of its position that the complaint should be dismissed because the hearing request was filed by facsimile that "[e]xamination of the prior decisions of the USDOL confirms that this agency has construed these filing requirements strictly and has not hesitated to dismiss ERA cases whenever the complainant has filed an improper or belated request." Respondent's Reply Memorandum of Law in Opposition to the Petition for Review (Resp. Mem.)

at 13. However, the cases Niagara Mohawk cites in support of its argument are readily distinguishable from this case. In *Crosier v. Westinghouse Hanford Co.*, No. 92-CAA-3 (Sec'y Jan 12, 1994), the complainant sent his hearing request by mailgram, rather than telegram as provided in the relevant regulations. Although the Secretary of Labor affirmed the ALJ's recommendation that the case be dismissed, *Crosier* is distinguishable from this case because the OALJ received the mailgram after the five-day limitations period had expired.[5] *Accord Staskelunas v. Northeast Utilities Co.,* ARB No. 98-035, ALJ No. 98-ERA-7 (ARB May 4, 1998) (complaint dismissed where hearing request filed by certified mail (in violation of applicable regulations) and was untimely); *Backen v. Entergy Operations, Inc.,* No. 95-ERA-46 (Sec'y June 7, 1996)(complaint dismissed where hearing request sent by regular mail (in violation of applicable regulations) and was untimely).[6] Thus, given the predominant significance of the timeliness requirement, we are not persuaded by Niagara Mohawk's argument that the holdings of *Crosier, Staskelunas* and *Backen* compel us to dismiss Reid's complaint because he filed his hearing request by facsimile rather than telegram.

Niagara Mohawk also argues that the manner of filing was relevant in this case because the ALJ has attributed the Chief ALJ's failure to schedule a hearing to the fact that the facsimile was transmitted to the OALJ's administrative office rather than to its docketing section. However, the Assistant Director's instructions directed Reid to forward his hearing request to the Chief Administrative Law Judge – neither the instructions, nor the applicable regulations specify that the notice should be addressed to the docketing section. Even the current regulations, which permit facsimile filing, do not specify the docketing section as the appropriate recipient of a facsimile. Thus, Reid's failure to address the facsimile to the docketing section, in the absence of any direction to file the request in a particular office within the OALJ, is fully explicable, and does not preclude acceptance of a timely filed hearing request.

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[5] In any event, as demonstrated by the Secretary's subsequent Order Denying Requests for Reconsideration in the case, the Secretary's decision on this issue in *Crosier* is *dicta. Crosier v. Westinghouse Hanford Co.*, No. 92-CAA-3 (Sec'y Dec. 8, 1994). In addition to holding that Crosier's request for a hearing was untimely, the Secretary, in his initial decision, also determined that Crosier failed on the merits of his retaliation claim. *Id.* On reconsideration, the Wage and Hour Administrator took exception to certain aspects of the Secretary's determination that the hearing request was untimely. *Id.* In response, the Secretary held, "Although the Administrator's arguments concerning the timeliness of the hearing request seem meritorious, it is not necessary or in the interest of economy to reconsider the ruling on timeliness. Even if the hearing request were found to be timely, it would not alter the ultimate outcome: dismissal of the complaint on the merits." *Id.* at 5.

[6] In *Staskelunas v. Northeast Utilities Co.,* No. 97-ERA-8 (ARB May 4, 1998), the Board explained that "[a] complainant who relies on an alternative means of delivery, *e.g.*, by mail, assumes the risk that the request may **be received** beyond the due date, and untimely." (Emphasis added). We note that Niagara Mohawk, citing to the holding of *Staskelunas,* has inaccurately paraphrased this quotation, stating in its memorandum of law, "a complainant who relies upon alternative methods of delivery not provided for in the regulations assumes the risk that the request may not be **docketed** within the prescribed time limits." Resp. Mem at 14. This incorrect statement of the *Staskelunas* holding is significant because the applicable regulation does not require the OALJ to docket the hearing request within five days; it only requires that the OALJ receive the request within five days. In this case the hearing request was received within the limitations period and was thus, timely filed.

Accordingly, we hold that because Reid's request for a hearing was filed with the OALJ within five days of Reid's receipt of the notice of determination, the fact that he sent the request by facsimile, rather than telegram is not relevant. Therefore, we accept the ALJ's finding that "the complaint is not subject to dismissal based on an untimely or procedurally defective hearing request." R. D. & O. at 5.

2. Failure to prosecute

Courts possess the "inherent power" to dismiss a case for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). 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 630-631. Like the courts, the Department of Labor's Administrative Law Judges and this Board must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." *Smith v. Lyondell-Citgo Refining LP*, ARB No. 01-012, ALJ No. 2000-CAA-8 (ARB June 27, 2001); *Mastriana v. Notheast Utilities Corp.,* ARB No. 99-012, ALJ No. 98-ERA-33 (ARB Sept. 13, 2000).

Nevertheless, dismissal of a case for want of prosecution is a very severe penalty to be assessed in only the most extreme cases. *LeSane v. Hall's Security Analyst, Inc.,* 239 F.3d 206, 209 (2d Cir. 2001); *Boudwin v. Graystone Insurance Co.*, 756 F.2d 399, 401 (5th Cir. 1985); *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978); *Richman v. General Motors Corp.*, 437 F.2d 196, 199 (1st Cir. 1971). The power of a court to prevent undue delays must be balanced against the strong policy in favor of deciding cases on their merits. *Dodson v. Runyon,* 86 F.3d 37, 40 (2d Cir. 1996); *Bluestein & Co. v. Hoffman,* 68 F.3d 1022, 1025 (7th Cir. 1994); *Richman v. General Motors Corp.*, 437 F.2d at 199. Furthermore, according to the Second Circuit, in procedural matters *pro se* complainants should be given particular leniency. *LeSane v. Hall's Security Analyst, Inc.,* 239 F.3d at 209. The Second Circuit Court of Appeals has established five factors to be considered in reviewing a court's determination to dismiss a case for failure of prosecution. *Id.* In evaluating whether this case should be dismissed for want of prosecution, we have considered the Second Circuit's guidelines. The factors identified by the Second Circuit are:

> [1] the duration of the plaintiff's failures, [2] whether the plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . and [5] whether the judge has adequately assessed the efficacy of lesser sanctions.

Id. (citation omitted). None of the five factors is individually dispositive. *Id.* at 210.

The fact that this case lingered in limbo for almost seven years is most certainly a significant factor. However, we note that during that time Reid was not in dereliction of a statutory or regulatory duty to take any specific action. Once Reid filed his hearing request, it was incumbent

upon the ALJ to take the next step to move the case forward, *i.e.,* to schedule the hearing and notify the parties of the hearing date. 29 C.F.R. § 24.5(a).

In consideration of factor two, Reid received no notice that further delay would result in dismissal of his case, and thus he did not have the opportunity to proceed with prosecution of the case prior to such dismissal. In *Magette v. Dalsheim,* 709 F.2d 800, 802 (1983), the Second Circuit held:

> [A] dismissal for failure to prosecute will not be sustained unless it is clear from the record that the party has either by direct notice or other circumstances acquired knowledge that dismissal by virtue of his conduct or omission to act is a possibility. . . . The interests of justice will be better served if before granting a default judgment or a dismissal by virtue of default in the case, as here, of a *pro se* incarcerated plaintiff, he is advised by the court of the action contemplated. As we have said, a default judgment is a drastic remedy, a weapon of last, rather than first, resort.

See also Knoll v. American Telephone & Telegraph Co., 176 F.3d 359, 363 (6th Cir. 1999)*; Williams v. Chicago Board of Education,* 588 F.2d 853, 857-858 (7th Cir. 1998).

It would appear that given the passage of almost seven years, both parties have been prejudiced by the long delay in resolving the case. *See Lyell Theatre Corp. v. Loews Corp.,* 682 F.2d 37, 43 (2d Cir. 1982) (prejudice to defendants from "unreasonable" delay may be presumed). However, although Niagara Mohawk has stated that some witnesses who may have had relevant information have left the company, retired or moved out of the area, Respondent has not identified any specific prejudice to its case should the case proceed.

Finally, in regard to factor four, Reid's case did not add to court calendar congestion since it was not on the calendar. This is not a case in which a party has requested serial continuances in an effort to avoid litigating his case, and in the process has wasted the court's time and resources.[7]

Niagara Mohawk has cited to a number of decisions in which cases have been dismissed for lack of diligent prosecution, in most of which the delay was much shorter than in this case. Resp. Mem at 8-11. However, none of those cases involved a *pro se* complainant who was given no warning that continued failure to prosecute would result in dismissal of his case. Thus, although the length of delay and potential prejudice to Niagara Mohawk's defense are certainly serious considerations, given Reid's *pro se* status, the fact that there is no evidence in the record that Reid's failure to proceed was an intentional ploy to avoid or prolong litigation, and the fact that Reid was given no warning, we reject the ALJ's recommendation that this case be dismissed for failure to diligently pursue the case.

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[7] Since we find that Reid was not derelict in any duty, we do not consider factor five, whether a lesser sanction should have been imposed.

CONCLUSION

For the foregoing reasons, we **DENY** Niagara Mohawk's motion to dismiss Reid's case, and we **REMAND** this case to the ALJ for further proceedings in accordance with this decision.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge