In the Matter of:

LARRY DAN PRINCE,

COMPLAINANT,

v.

WESTINGHOUSE SAVANNAH RIVER COMPANY,

RESPONDENT.

ARB CASE NO. 10-079

ALJ CASE NO. 2006-ERA-001

DATE: November 17, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John P. Batson, Esq., Augusta, Georgia

***For the Respondent*:**
Charles F. Thompson, Jr., Esq., *Malone, Thompson Summers & Ott, L.L.C.*, Columbia, South Carolina

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge*

DECISION AND ORDER DISMISSING APPEAL

The Complainant, Larry Dan Prince, filed a complaint alleging that the Respondent, Westinghouse Savannah River Company, retaliated against him in violation of the whistleblower protection provisions of the Energy Reorganization Act (ERA),[1] the Clean Air Act (CAA),[2] the

[1] 42 U.S.C.A. § 5851 (West 2003 & Supp. 2010)

Solid Waste Disposal Act (SWDA),[3] and the Toxic Substances Control Act (TSCA).[4] The Board must determine whether to accept Prince's untimely petition for review. For the reasons below, we decline to do so.

BACKGROUND

Prince filed a complaint with the Occupational Safety and Health Administration (OSHA) on May 20, 2005, alleging that Westinghouse discharged him in violation of the whistleblower protection provisions of the above-referenced statutes. Following an investigation, OSHA dismissed Prince's complaint, finding it to be without merit. Prince filed a hearing request with the Office of Administrative Law Judges (OALJ) on November 12, 2005. A Department of Labor Administrative Law Judge (ALJ) held a formal hearing, during which counsel represented both parties. On November 25, 2008, Prince informed the presiding ALJ that he would subsequently be representing himself.

On March 3, 2010, the ALJ issued a Recommended Decision and Order (R. D. & O.), dismissing Prince's claim. The R. D. & O. included this "Notice of Appeal Rights," which provided in pertinent part:

> This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board… within 10 business days of the date of this decision . . . . The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing.[5]

This Notice cited as authority, "29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007)."[6] These regulations became effective on August 10, 2007, but Prince filed his complaint before the regulations' effective date. The regulations in effect at the time of Prince's initial complaint to OSHA provided, in pertinent part:

> Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a

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2 42 U.S.C.A. § 7622 (Thomson/West 2003).

3 42 U.S.C.A. § 6971 (Thomson/West 2003).

4 15 U.S.C.A. § 2622 (Thomson Reuters 2009).

5 R. D. & O. at 38.

6 *Id.* at 39.

> petition for review with the Administrative Review Board . . . , which has been delegated the authority to act for the Secretary and issue final decisions under this part. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge . . . .[7].

The ALJ served his decision on Prince at an address in Martinez, Georgia, but Prince avers that he had previously notified the ALJ that he had moved to Kenniwick, Washington. The ALJ also served Prince's former counsel, John Batson, Esq., with a copy of the R. D. & O. On March 8, 2010, Batson contacted Prince to inform him of the R. D. & O. because he noted that it had been sent to Princes former address. Batson e-mailed a copy of the R. D. & O. to Prince. Prince and Batson spoke again on March 9, 2010, and Batson agreed to file the Petition for Review for Prince on March 11th.[8] On March 12, 2010, the ALJ re-served the R. D. & O., sending it to Prince at the Kenniwick, Washington address, and Prince received the decision on or about March 15, 2010. Batson avers that he called the ARB on March 12 and the "ARB or ARB-related places" on March 15 and 17, 2010.[9]

The Board received Prince's petition for review on March 18, 2010, the eleventh business day after the ALJ issued the R. D. & O.[10] Westinghouse objected that Prince's petition was due by March 17, 2010, and as such, should be dismissed as untimely. The Board ordered Prince to show cause why we should not dismiss his untimely appeal.[11] After receiving a requested extension of time in which to respond to the Board's order, Prince filed his response on April 22, 2010, and an amended response on April 29, 2010. Westinghouse declined to respond to the Board's Order.

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[7] 29 C.F.R. § 24.8(a) (2007).

[8] Prince Declaration (Prince Decl.) at 12.

[9] Batson does not further explain and the Board has no knowledge of what might constitute "ARB related places."

[10] The Secretary of Labor has delegated her authority to issue final agency decisions in cases arising under the whistleblower protection provisions at issue in this case to the Administrative Review Board. 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).

[11] The Board's Order also directed Prince to address the issue of which of the above-referenced versions of the regulations providing for Board review applied to his claim and whether the outcome of the timeliness issue would vary depending on the version applied. The Complainant failed to do so. Because Prince's petition was filed by facsimile, in this instance the Board concludes that the date of filing and the date of receipt are the same, and as such the timeliness issue is not affected by the version applied.

DISCUSSION

The procedures adopted under 29 C.F.R. Part 24 are intended to facilitate the "expeditious handling of retaliation complaints made by employees" arising under the environmental whistleblower statutes.[12] Nevertheless, the regulation establishing a ten-business-day limitations period for filing a petition for review with the Board is not jurisdictional and is therefore subject to equitable modification.[13] Accordingly, we have consistently held that it is within our discretion to consider an untimely filed petition for review.[14]

When determining whether to relax the limitations period in a particular case, the Board is guided by the principles of equitable tolling set forth in *School District of Allentown v. Marshall*.[15] Accordingly, the Board has recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[16]

The Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Prince's claim.[17] But the Board, like the courts, has "'generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in

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[12] 29 C.F.R. § 24.100(b). *Accord Williamson v. Washington Savannah River Co.*, ARB No. 07-071, ALJ No. 2006-ERA-030, slip op. at 3 (ARB June 28, 2007).

[13] *Accord Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 3 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 3 (ARB Nov. 8, 1999).

[14] *Williamson*, ARB No. 07-071, slip op. at 3; *Gutierrez*, ARB No. 99-116, slip op. at 3; *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 1997-CAA-121 (ARB Sept. 1, 1999).

[15] 657 F.2d 16, 19-20 (3d Cir. 1981).

[16] *Williamson*, ARB No. 07-071, slip op. at 3.

[17] *Id. Accord Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-030, slip op. at 7 (ARB Mar. 32, 2010)(An additional basis recognized as giving rise to equitable estoppel, . . . is "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." (citations omitted)).

preserving his legal rights.'"[18] Moreover, although an absence of prejudice to the non-petitioning party may be a factor in determining whether to toll the limitations period, "[an absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedure."[19] Ultimately, Prince bears the burden of justifying the application of equitable tolling principles.[20]

The Eleventh Circuit Court of Appeals, the court to which the Board's decision in this case would be appealed, has held, "Equitable tolling is an extraordinary remedy which is typically applied sparingly."[21] To be entitled to equitable tolling, a petitioner must act diligently, and the untimeliness of the filing must be the result of circumstances beyond his control.[22] Confirming equitable tolling's status as an extraordinary remedy, the Eleventh Circuit "has rejected most claims for equitable tolling."[23]

Prince bears the burden of justifying the application of equitable tolling principles.[24] His response to the Order to Show Cause sets forth several grounds, which he claims justify the equitable tolling of the limitations period. Although the gist of Prince's argument is not entirely clear, Prince's tolling arguments appear to rest on the notion that extraordinary circumstances prevented him from expeditiously pursuing his claim. We find Prince's tolling arguments unconvincing.

Prince first contends that equitable tolling should be granted because, despite having informed the OALJ of his change in residence, the ALJ mistakenly sent the R. D. & O. to his former address.[25] This mailing error is insufficient grounds for equitable tolling. By his own admission, Batson informed Prince of the R. D. & O. on March 8, 2010, and e-mailed him a copy of it. Batson's receipt of the R. D. & O., expeditious notification to Prince, and forwarding of a copy of the R. D. & O. undercuts the claim that the mistake in addresses prevented him from

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[18] *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

[19] *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984).

[20] *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears the burden of establishing entitlement to equitable tolling).

[21] *Steed v. Head*, 219 F.3d 1298, 1300 (2000).

[22] *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286-87 (11th Cir.2002).

[23] *Diaz v. Sec'y for the Dep't of Corr.*, 362 F.3d 698, 701 (2004).

[24] *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

[25] Prince's Amended Brief in Response to Order to Show Cause (Amend. Br.) at 4.

timely filing his petition. Batson previously represented Prince before the ALJ on this complaint. He knew both the facts and issues of the case. If he believed that he could not adequately represent Prince given the time remaining to him to file the Petition for Review, he should have declined to do so and recommended that Prince seek other assistance. But once he had agreed to represent Prince, he was obliged to timely file within the limitations period. Both Prince and Batson had notice prior to the expiration of the filing date and adequate time to either file the Petition for Review or to file a motion with the Board requesting additional time to file the Petition. Batson, representing Prince, did neither. [26]

Prince next alleges that the "Notice of Appeal Rights" included in the R. D. & O. misled him to believe his petition needed to be exhaustive in scope.[27] The relevant portion of the Notice states:

> The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.[28]

Prince states that this requirement both worsened his medical condition and added time and effort into the petition, preventing him from timely filing.[29] Again, once Batson agreed to represent Prince, he had an obligation to comply with the applicable rules. If he could not do that, then he should not have agreed to represent Prince or he should have filed a motion for an enlargement of time to file the Petition. While we acknowledge Batson's unsuccessful efforts to contact the Board to seek clarification, it does not absolve him of the responsibility to file within the limitations period or seek an enlargement.

Prince further contends that he was unable to file his petition within the limitations period due to the deleterious health effects of dealing with his complaint, effects only worsened by the

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[26] Assuming that Prince had no knowledge of the ten-business-day period in which to file his petition with the Board, Batson, in possession of the R. D. & O. and acting on Prince's behalf, had at least constructive knowledge of the limitations period. Once Batson agreed to file the Petition for Prince, Prince was not relieved of responsibility for his attorney's failure to act. We have consistently held that "attorney error does not constitute an extraordinary factor because '[u]ltimately, clients are accountable for the acts and omissions of their attorneys.'" *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5, quoting *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006); *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5-6 (ARB Aug. 27, 2002).

[27] Amend. Br. at 17.

[28] R. D. & O. at 38.

[29] Amend. Br. at 17.

belief that his petition needed to be exhaustive.[30] While a medical condition which prevents a complainant from timely pursuing his or her legal rights has been held to be an "extraordinary" circumstance that justifies equitable tolling,[31] we do not find that Prince has established that his condition precluded timely completion of his petition. Batson represented Prince, and Prince provides no evidence establishing how his condition precluded Batson from timely filing the petition or from filing a motion requesting an enlargement of time to do so.[32] In fact, Prince averred, that shortly after Batson notified him of the ALJ's R. D. & O., "[W]e [Prince and Batson] began to talk about possible things to list that night."[33] Prince also described further contacts with Batson, stating, "I spoke to Mr. Batson on March 9 and I spent time going through the transcript and record in reference to some of the matters I wanted to bring up about errors I thought I found in the order,"[34] and "I spoke to Mr. Batson repeatedly until the petition was filed."[35] Prince contends that "[b]y the [sic] about March 12th, [he] was losing it and therefore Batson had to take over."[36] While we understand that filing a whistleblower complaint can be stressful, we do not find that it prevented Prince from assisting Batson or Batson from timely filing either a petition or motion for enlargement. .

Additionally, in March 2010, Prince was working full time as a Quality Engineer in Washington at the Hanford Nuclear site, a job Prince described as "very demanding."[37] Prince alleges that "association with the details of his past employment added stress and anxiety and can result in depression" and that it could "only be regulated by avoidance of completing the Petition."[38] But as previously discussed, that Batson resumed his duties as of March 11th only strengthens our conclusion that Batson, acting for Prince could have timely filed the petition or a motion for enlargement within the limitations period if Prince, through his counsel, had proceeded diligently.

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30 *Id.* at 18.

31 *See, e.g.*, *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (plaintiff who was "completely psychiatrically disabled" such that she could not effectively communicate with counsel and therefore could not timely pursue her claim).

32 Prince Decl. at 10.

33 *Id.* at 9.

34 *Id.* at 10.

35 *Id.* at 12.

36 Amend. Br. at 18.

37 Prince Decl. at 10.

38 Amend. Br. at 18 (emphasis added).

Prince also insists that the limitations period should be equitably tolled because he acted diligently and the Respondent suffered no harm.[39] As noted above, we disagree with Prince's assertion that he pursued his legal rights with due diligence. Furthermore, while an absence of prejudice to the non-moving party will be considered in determining whether to toll the limitations period, it alone is not sufficient justification for doing so.[40] Whether or not the Respondent has been prejudiced by Prince's untimely filing, he has not demonstrated other grounds upon which to justify equitable tolling.

In his final tolling argument, Prince insists that he is entitled to equitable tolling due to his reasonable belief that he was permitted, pursuant to 29 C.F.R. § 18.4(c)(3), to add five days to the limitations period.[41] But Prince's "reasonable belief" was based upon a misreading of the regulations. As the Eleventh Circuit wrote in rejecting a similar argument in *Ellison v. Dep't of Labor*,

> The regulation delimiting the scope of Part 18, however, states that Part 18 applies to proceedings before ALJs; nothing suggests that it applies to proceedings before the ARB. *See* 29 C.F.R. § 18.1. And, a separate provision in Part 18 suggests that its rules do not apply to procedures for appeals. *See* 29 C.F.R. § 18.58 ("The procedures for appeals shall be as provided by the statute or regulation under which hearing jurisdiction is conferred."). *See also Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-12, slip op. at *2 (Dep't of Labor Admin. Rev. Bd. May 14, 2003) (rejecting argument that an untimely petition for review was rendered timely by 29 C.F.R. § 18.4(c)(3)). While in certain contexts, the ARB "often looks to the Rules of Practice and Procedure for Administrative Hearings ... for guidance on procedural matters," *Madonia v. Dominick's Finer Foods, Inc.*, ARB No. 99-001, ALJ No. 98-STA-2, slip op. at *3 (Dep't of Labor Admin. Rev. Bd. January 29, 1999), the ARB is not bound to do so, and it has never suggested that it would apply the procedures for administrative hearings to determine filing deadlines.[42]

Furthermore, 29 C.F.R. § 18.1 states that to "the extent that [section 18's] rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling." Because section 24.110 clearly states that the limitations

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39 *Id.*

40 *Baldwin County Welcome Ctr.*, 446 U.S. at 152.

41 Amend. Br. at 6-7, 19.

42 2010 WL 2490906, slip op. at *2 (June 17, 2010)(unpubl.).

period for filing a petition with the Board begins on the date of the ALJ's decision, section 18.4(c)(3)'s provision allowing for 5 extra days must be considered as inconsistent with the language of section 24.110. Therefore, the limitations period of section 24.110 controls. While the Complainant urges the Board to read the two regulations together, we conclude that had the allowance for mailing of section 18.4(c)(3) been intended to apply to section 24.110 filings, the regulations would so state.

Finally even if the Part 18 rules were applicable to ARB proceedings, section 18.4(c)(3) specifically provides, "Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period." But 29 C.F.R. § 24.110(a) provides that "[a] petition must be filed within 10 business days of the date of the decision of the administrative law judge," not within 10 days of the date upon which the decision was served upon "said party." Thus, 29 C.F.R. § 18.4(c)(3), by its terms, is inapplicable to the filing of a petition for review.[43]

In addition to the tolling arguments, Prince also attacks the constitutionality of 29 C.F.R. § 24.110. He argues that section 24.110 does not require that the adversely affected party in an ALJ's decision be given notice of that decision before the limitations period for filing a petition for review with the Board begins to run. As such, Prince contends that section 24.110 violates the adversely affected party's right to due process of the law.[44] Initially, we note that pursuant to the Secretary of Labor's delegation of authority to the Board to decide cases like this one, "The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."[45]

In any event, Prince relies upon the Supreme Court's decision in *Mullane* holding that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise

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[43] *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 4 (ARB May 14, 2003), *aff'd on different grounds sub nom Herchak v. U.S. Dep't of Labor*, 125 Fed. Appx. 102 (9th Cir. 2005)(unpubl.). On appeal to the Ninth Circuit, Herchak did not raise the argument that the ALJ's rule 18.4d(c)(3) governed the period for filing the petition for review. Instead, among other arguments, he averred that the Board should toll the limitations period for one day due to the extraordinary circumstance that Airborne Express failed to deliver overnight as promised. The Ninth Circuit agreed with the Board Airborne Express's failure to deliver was not an extraordinary circumstance and that Herchak failed to exercise due diligence when he failed to ascertain whether the petition had been delivered on time. Had he done so, he could have met the deadline by simply faxing a copy of his petition for review to meet the deadline.

[44] *Id.* at 1-2.

[45] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), § 5(c)(48),75 Fed. Reg. 3924 (Jan. 15, 2010).

interested parties of the pendency of the action and afford them an opportunity to present their objections."[46] What Prince has failed to show is that section 24.110 is not "reasonably calculated" to provide parties notice and does not allow them an opportunity to object. While Prince suggests dramatic hypotheticals in which parties are denied any opportunity to petition for review, those circumstances are of the sort dealt with by equitable tolling. Were Prince to present grounds justifying the application of equitable tolling, the Board would readily allow the filing of his otherwise untimely petition. Prince has failed to do so. Prince's counsel had notice of the adverse decision prior to the date on which the limitations period expired, and though several days had passed, he agreed to file the petition for Prince. If he believed that he could not timely file the petition, he had two choices – he could have either refused to represent Prince or he could have filed a motion for an enlargement of time to file the petition. Unfortunately, Prince's counsel did neither. Instead based upon a misinterpretation of the regulations, he filed the petition after the limitations period for doing so had elapsed. While we acknowledge Prince's concern that the limitations period for filing a petition with the Board, in general, is short, many parties, including pro se parties, effectively and promptly file within the ten-business-day window or request enlargements of time to do so. That Prince failed to do so is not evidence of the unconstitutionality of 29 C.F.R. § 24.110, but rather of his counsel's error in interpreting the applicable regulations or lack of diligence in either timely filing the petition or in failing to obtain an enlargement of time.

CONCLUSION

Because we find that Prince has not presented any grounds justifying the tolling of the limitations period, we **DISMISS** his petition for review as untimely.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

[46] *Mullane v. Central Hanover Bank & Co.*, 339 U.S. 306, 314 (1950).