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: February 2, 2011

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 DENYING MOTION FOR RECONSIDERATION

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

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

Clean Air Act (CAA),[2] the Solid Waste Disposal Act (SWDA),[3] and the Toxic Substances Control Act (TSCA).[4] A Department of Labor Administrative Law Judge issued a decision dismissing Prince's appeal. Prince filed a petition for review with the Administrative Review Board. On November 17, 2010, the Board issued a Final Decision and Order dismissing Prince's appeal because Prince had failed to timely file his petition for review. In so holding, the Board concluded that Prince, who was represented by counsel, neither filed his petition for review on time, nor requested an enlargement of time to file the petition. Further, he failed to establish sufficient grounds for tolling the limitations period for filing the petition for review. On November 29, 2010, Prince filed a Motion for Reconsideration, on December 3, 3010, he filed a brief in support of the Motion for Reconsideration, and on December 8, 2010, he filed an amended and corrected brief in support of the Motion for Reconsideration.

DISCUSSION

The ARB may reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the ARB issued the decision.[5] Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[6] In considering a motion for reconsideration, the ARB has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[7]

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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 *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

6 Fed. R. App. P. 40(a)(2).

7 *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006).

Prince has neither addressed, nor demonstrated that any of the provisions of this four-part test apply. In moving for reconsideration, he presents no new material matters of law or fact of which he could not have known through reasonable diligence. Instead, he repeats his previous arguments that (1) that 29 C.F.R. § 24.110 is constitutionally deficient because it 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, (2) that the limitations should have begun to run when Prince received actual notice of the adverse decision, rather on the date the ALJ issued the decision, (3) Prince was diligent in his attempts to file the petition, and the short time for filing a petition and the requirement that the petition must specifically identify the findings, conclusions, or orders to which exception is taken are unduly burdensome, and (4) that he was unsuccessful in his attempts to contact the ARB. We considered, but rejected, these arguments when we held that Prince's counsel failed to demonstrate diligence when he failed to timely file the petition for review or a motion for enlargement of time to file the petition.

One new argument that Prince did raise in his motion for reconsideration was that he did not know that he could request an enlargement of time to file the petition. Admittedly, the Board does not have a regulation covering this procedure. However, in the past twelve months at least two other counsel have filed motions for enlargements of time to file petitions for review, which the Board granted, and one pro se complainant filed four such requests, which the Board granted. Therefore the lack of a published regulation did not preclude these counsel from diligently representing their clients.

Further this explanation addresses why Prince did not file a motion for an extension of time, but it does not address Prince's failure to provide a sufficient justification for his attorney's failure to file a petition on or before March 17, 2010. Repeating a key factor discussed in our Final Order dismissing this matter, Prince's attorney was familiar with Prince's case, having represented him, and discussed the petition with Prince on March 9, 2010. We remain convinced that Prince's counsel's failure to file such a motion demonstrates lack of due diligence. In considering whether attorney error constitutes an extraordinary factor for tolling purposes, the Board has consistently held that it does not because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys."[8]

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[8] *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug. 27, 2002). *Accord Blodgett v. Tennessee Dep't of Env't & Conservation*, ARB No. 03-043, ALJ No. 03-CAA-7, slip op. at 2-3 (ARB Mar. 19, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 03-SOX-024, slip op. at 4, (ARB Jan. 13, 2004); *Herchak v. America W. Airlines, Inc*., ARB No. 03-057; ALJ No. 02-AIR-12 slip op. at 6 (ARB May 14, 2003); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 99-ERA-015 (ARB Aug. 31, 2000). The Supreme Court did note in *Link v. Wabash R. R. Co*. however, that "if an attorney's conduct

Accordingly, Prince's Motion for Reconsideration is **DENIED.**[9]

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. 626, 634 n.10 (1962).

[9] We note that the National Whistleblower Center filed an Amicus Curiae brief in support of the Complainant. But like Prince's Motion for Reconsideration, this brief neither addressed nor demonstrated that any of the elements of the Board's four-part test for reconsideration apply.