



In the Matter of:

**SAPORITO ENERGY CONSULTANTS,
INC.,**

and

THOMAS SAPORITO,

COMPLAINANTS,

v.

U.S. NUCLEAR REGULATORY COMMISSION,

RESPONDENT.

ARB CASE NO. 10-083

ALJ CASE NO. 2009-ERA-016

DATE: June 16, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

Thomas Saporito, *pro se*, Jupiter, Florida

For the Respondent:

Laura C. Zaccari, Esq., *U.S. Nuclear Regulatory Commission*, Rockville, Maryland

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, Luis A. Corchado, *Administrative Appeals Judge*, and Lisa Wilson Edwards, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

Thomas Saporito and Saporito Energy Associates (Saporito) filed a complaint on March 23, 2009, with the United States Department of Labor's Occupational Safety and Health

Administration (OSHA) alleging that the U.S. Nuclear Regulatory Commission (NRC) violated the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C.A. § 5851 (Thomson/West 2010) (ERA) and its implementing regulations.¹ OSHA investigated the complaint and dismissed it on September 9, 2009. On September 17, 2009, Saporito objected to OSHA's finding and requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).

On March 7, 2010, Saporito filed a document with the ALJ assigned to this case seeking to withdraw the complaint "in accordance with Rule 41, under the Rules of Practice and Procedure before the Office of Administrative Law Judges." The ALJ construed Saporito's request as a motion for leave to withdraw Saporito's objections to OSHA's findings under 29 C.F.R. § 24.111(c), which the ALJ granted and then dismissed the complaint with prejudice. Saporito has appealed the ALJ's order, contending that the ALJ erred in dismissing his complaint with prejudice. We affirm the ALJ's order as a proper exercise of his discretion and in accordance with law.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review DOL ALJ decisions under the environmental whistleblower statutes, including the ERA.² 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 environmental whistleblower statutes.³ We review the ALJ's conclusions of law *de novo*.⁴ The issue in this appeal – what rule of law applies to the dismissal of Saporito's complaint – is a question of law.⁵

DISCUSSION

Saporito contends that he sought to have his ERA whistleblower complaint dismissed without prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure. Thus, he argues

¹ See 29 C.F.R. Part 24 (2010).

² 29 C.F.R. § 24.110 (2010). See also 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 ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.100(a)).

³ See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.100(a).

⁴ 5 U.S.C.A. § 557(b).

⁵ See *Saporito v. FedEx Kinko's Office & Print Serv., Inc.*, ARB No. 06-043, ALJ No. 2005-CAA-018, slip op. at 4 (ARB Mar. 31, 2008).

that the ALJ erred in construing his request as a motion to withdraw his objections to OSHA's findings.

As a practical matter, whether the ALJ granted Saporito's motion with or without prejudice makes no difference. Pursuant to 29 C.F.R. § 24.106, a party has thirty days to file a request for hearing after receiving OSHA's decision on an ERA whistleblower complaint. If no request for hearing is filed before the 30-day deadline, then OSHA's decision becomes final and is not subject to judicial review.⁶ It is the request for hearing that gives the Office of Administrative Law Judges (OALJ) the authority to consider the ERA whistleblower complaint and commence the ALJ proceedings. OALJ does not require the filing of a new "complaint." Withdrawing a matter from the OALJ necessarily withdraws the request for a hearing. Where a motion to withdraw an ERA complaint is filed and granted six months after OSHA's ruling, OSHA's decision becomes final by operation of law. Here, it would be frivolous for Saporito to file a motion to withdraw his "complaint" six months after OSHA's decision and then attempt to re-litigate it.

In addition to the practical realities, the regulations now clearly provide that a withdrawal of an ERA complaint constitutes a withdrawal of the request for hearing. The general regulations governing the procedures to be followed before the Office of Administrative Law Judges (OALJ) are set forth at 29 C.F.R. Part 18, which provide, at § 18.1(a), "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules" Before 2007, the rules of practice before the OALJ and the environmental whistleblower statutes' implementing regulations found at 29 C.F.R. Part 24 did not directly address the voluntary dismissal of complaints. Thus, the ARB held that Rule 41 of the Federal Rules of Civil Procedure governs voluntary dismissals of environmental whistleblower cases, such as those arising under the ERA.⁷

Prior to the filing of Saporito's ERA complaint in this case, the Part 24 regulations were amended.⁸ The implementing regulations of the environmental statutes, applicable to Saporito's ERA complaint in this case, now provide only two options for a party to terminate a case pending with an ALJ prior to final adjudication.⁹ Under one option, a party may withdraw his or

⁶ 29 C.F.R. § 24.106(b).

⁷ *See Saporito*, ARB No. 06-043, slip op. at 5 (applying Rule 41 to case arising under the ERA).

⁸ 72 Fed. Reg. 44,956 (Aug. 10, 2007); *see also Saporito*, ARB No. 06-043, slip op. at 2, n.1. These regulations have been amended since Saporito filed his complaint, but the regulations relevant to this decision remain unchanged. *See Procedures for the Handling of Retaliation Complaints under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974*, as amended, 76 Fed Reg. 2808 (Jan. 18, 2011).

⁹ 29 C.F.R. § 24.111(c), (d)(2); *see also Hamilton v. PBS Env'tl. Bldg. Consultants, Inc.*, ARB No. 11-010, ALJ No. 2009-CER-003, slip op. at 2, n.9 (ARB Feb. 28, 2011).

her objections to OSHA's findings or order by filing a written withdrawal with the ALJ. In that case OSHA's findings or order becomes the final order of the Secretary.¹⁰ In the alternative, the parties may enter into an adjudicatory settlement.¹¹ If the parties enter into a settlement in a case arising under the ERA, the regulations require the parties to file a copy of the settlement with the Board for its review.¹² Because the parties did not enter into a settlement in this case, the ALJ, within his discretion, construed Saporito's filing of a written withdrawal of his ERA complaint in this case as a withdrawal of his objections to OSHA's findings pursuant to 29 C.F.R. § 24.111(c), the only other option available for Saporito to terminate his case before the ALJ prior to its final adjudication.¹³ Accordingly, the ALJ's order construing Saporito's request to withdraw his complaint as a withdrawal of his objections to OSHA's findings, thereby deeming his objections as withdrawn, and dismissing Saporito's ERA complaint with prejudice is **AFFIRMED** as in accordance with the ERA's implementing regulation at 29 C.F.R. § 24.111(c). Consequently, as provided in 29 C.F.R. § 24.111(c), OSHA's September 9, 2009 findings becomes the Secretary of Labor's final decision in this case.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

¹⁰ 29 C.F.R. § 24.111(c); *see also Hamilton*, slip op. at 3, n.10.

¹¹ 29 C.F.R. § 24.111(d)(2); *see also Hamilton*, slip op. at 3, n.11.

¹² *Id.*

¹³ Saporito notes that in *Hutchins v. TNT Logistics*, ARB No. 05-065, ALJ No. 2004-STA-009, slip op. at 4 (ARB Jan. 31, 2008), the Board held that it must issue the final administrative decision in cases in which a party wishes to withdraw his or her objections to the Secretary's findings. Saporito's reliance on the holding in *Hutchins* is misplaced, however, as this requirement is only for cases arising under the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, based on the Secretary's delegation of authority to the Board to issue final agency decisions in cases arising under the STAA and the plain language of the STAA's interpretive regulations. 49 U.S.C.A. § 31105 (West 1997); 29 C.F.R. §§ 1978.109(a), (c); 1978.111(c) (2010). The holding in *Hutchins* is inapplicable to this case arising under the ERA.