U.S. Department of Labor

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

In The Matter Of:

ROGER J. BACKEN, CASE NO. 95-ERA-46

COMPLAINANT, DATE: June 7, 1996

v.

ENTERGY OPERATIONS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER

This matter comes before the Administrative Review Board (the Board) for review of the Recommended Decision and Order (R. D. and O.) of the Administrative Law Judge (ALJ) in this case which arises under Section 211,[2/] the employee protection provision, of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 & Supp. IV 1992). The ALJ ruled that Complainant's request for an evidentiary hearing was untimely filed under applicable law, 29 C.F.R. § 24.4(d)(2)(I), and (ii) and, therefore, recommended dismissal of the complaint.

[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia*, the Environmental Reorganization Act and its implementing regulations to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive orders and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

[2/] Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.

BACKGROUND

The initial decision of the Regional Supervisor of the Occupational Safety and Health Administration (OSHA) was issued on July 8, 1995 and Complainant received the decision on July 10, 1995. The regulation at 29 C.F.R. § 24.4(d)(2)(I) states that the initial 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." Complainant's request for a hearing in this case, while dated July 11, 1995, was not mailed until July 22, 1995.[3/]

In addition to being untimely the notice was sent by regular mail, which is not authorized by the regulations. Also, a copy of the notice was not filed with the Respondents as required by the applicable regulation. Finally, the ALJ issued an Order to Show Cause (in response to Respondent's Motion to Dismiss for Failure to Timely File Notice of Appeal) and Complainant confirmed, without adequate explanation, that he had missed the deadline and proceeded to urge consideration of the merits of his complaint. R. D. and O. at 2.

DISCUSSION AND CONCLUSIONS

While filing periods may, under certain specific circumstances, be subject to equitable tolling,[4/] this Complainant has not demonstrated the right to avail himself of any of the recognized tolling exceptions.[5/] Rather, it appears that Complainant simply chose to ignore certain procedural requirements of the ERA's employee protection provision.

The initial letter of decision contained specific instructions regarding the proper way to file an appeal. Complainant was on notice with regard to the ERA's procedural requirements and time limitations and failed to comply. The law is clear that the time limitation period is to be strictly construed. *Gunderson v. Nuclear Energy Services, Inc.*, Case No. 92-ERA-48, Sec. Dec. Jan. 19, 1993.

[3/] In order to have been timely filed, Complainant's notice would have had to be received by the Office of Administrative Law Judges by July 15, 1996. 29 C.F.R. § 24.4(d)(2)(I).

[4/] *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

[5/] Equitable tolling has been applied in whistleblower cases where "the plaintiff has in some extraordinary way been prevented from asserting his rights, or . . . raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981), quoting *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978).

Accordingly, this complaint is DISMISSED and the initial determination (copy appended) of July 8, 1995 is hereby adopted as the final order in this case.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member