U.S. Department of Labor

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

In the Matter of :

JOSEPH J. MACKTAL, JR.

COMPLAINANT,

v.

BROWN AND ROOT, INC.

RESPONDENT.

ARB CASE NOS. 98-112
98-122A

ALJ CASE NO. 86-ERA-23

DATE: November 20, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

For the Complainant:
Stephen M. Kohn, Esq., Michael D. Kohn, Esq., David K. Colapinto, Esq.
Kohn, Kohn & Colapinto, P.C., Washington, DC

For the Respondent:
Richard K. Walker, Esq., Thomas D. Arn., Esq.
Streich Lang, Phoenix, AZ

ORDER GRANTING RECONSIDERATION

On January 6, 1998, the Administrative Review Board determined that Complainant, Joseph J. Macktal (Macktal), was entitled to attorney fees and costs in connection with his successful abrogation of a 1987 settlement agreement with Brown and Root, Inc. The settlement agreement concerned a complaint filed by Macktal against Brown and Root pursuant to the employee protection provision of the Energy Reorganization Act of 1974, (ERA), 42 U.S.C. §5851 (1988).[1/] We remanded the case to the Administrative Law Judge for calculation of a fee and costs award.

The Administrative Law Judge issued a recommended order awarding Macktal fees and costs on March 30, 1998. Both Brown and Root and Macktal filed timely petitions before the Board seeking review of the judge's recommended order. On April 17, 1998, we issued a briefing schedule

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[1/] Macktal's complaint was filed in 1985. The ERA was amended in 1992. *See* n. 4, *infra*. However, this case was decided under the pre-1992 law.

setting May 8, 1998, as the date for the parties to file simultaneous briefs in support of their petitions. The briefing schedule subsequently was extended.

We received a brief from Macktal. However, Brown and Root's brief was misdelivered to the Department of Labor's Benefits Review Board (BRB), apparently because of an error in the mailing address used by the company's counsel.[2/] As a consequence, this Board never received the brief.

Our Decision and Order on attorney fees, issued October 16, 1998, adopted the ALJ's recommendations on the award of attorney fees and costs. It also noted explicitly that Brown and Root had not filed a brief in the case. Decision and Order at 2.

Immediately upon receipt of our Decision and Order, Brown and Root moved for reconsideration on the ground that it had filed a brief, but that the brief apparently had been misrouted within the Department. Macktal opposes Brown and Root's request for reconsideration, asserting that the Board lacks jurisdiction to reconsider its determination that attorney fees are justified; that Brown and Root has failed to show good cause for reconsideration; and that reconsideration would be futile. We disagree, and hereby grant Brown and Root's request for reconsideration.

DISCUSSION

We consider first Macktal's challenge to the Board's authority to reconsider our Decision and Order. Citing *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321-22 (1961) (*CAB*), and the Secretary's Order in *Bartlik v. TVA,* 88-ERA-15 Sec. Ord. at 3-4 (July 16, 1993), Macktal disputes the Board's authority to grant reconsideration, declaring that "[t]he ARB does not have subject matter jurisdiction to grant the motion for reconsideration. Neither the statute nor the published regulations applicable to this case allow for motions for reconsideration. *See* 42 U.S.. §5851 and 29 C.F.R. Part 24." Complainant's Opposition to the Motion for Reconsideration at 4. Upon a full review of the applicable case law, it is our view that Macktal's analysis is flawed, and that the Board has jurisdiction to reconsider its decisions under appropriate circumstances.

Agency authority to reconsider may be inherent or statutory. Absent congressional intent to the contrary, agencies have inherent authority to reconsider their final adjudicative orders for error within a reasonable time. *Belville Mining Co. v. United States*, 999 F.2d 989 (6th Cir. 1993) (and

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[2/] Brown and Root's brief, forwarded via U.S. Postal Service Express Mail, specifically was addressed to "Tom Shepherd, Clerk, U.S. Department of Labor, Administrative Review Board." Mr. Shepherd is the Clerk of the BRB, and never has been associated with the Administrative Review Board. It is apparent that the brief was delivered to Mr. Shepherd, because a copy of the brief was returned to Brown and Root's attorney with a BRB date stamp.

The BRB is located in the same building as the Administrative Review Board, and ordinarily such misdelivered mail would be re-routed to this Board. However, the transfer of the brief did not take place in this instance.

cases cited therein); *Dun & Bradstreet Corp. Found. v. United States Postal Serv.*, 946 F.2d 189 (2d Cir. 1991) (and cases cited therein); *Henderson v. Veterans Admin.*, 790 F.2d 436, 441 (5th Cir. 1986) (citing other circuit decisions that hold administrative forums have inherent authority to reconsider in support of dictum that "[l]ike any federal agency, the VA may revise its decisions as long as it acts in a reasoned and nonarbitrary manner").[3/]

Where Congress has enacted legislation delegating to an agency explicit statutory authority to reconsider its decisions, the agency must act within the parameters of that explicit authority. In these instances, an agency may not rely on an assertion of "inherent authority" to reconsider as a

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[3/] In a few isolated instances, it has been suggested that "inherent authority" to reconsider final adjudicative orders cannot exist, because adjudicative agencies have only such power as is expressly delegated to them by Congress. *See, e.g., Bartlik v. United States Dept. of Labor*, 1994 WL 487174, *3 (6th Cir. 1994), *and vacating order*, 34 F.3d 368 (1994), *and en banc decision*, 62 F.3d 163 (1995). Viewing the case law in its totality, however, it is clear that this reasoning is incorrect.

Although adjudicative agencies have only the powers delegated to them and do not carry the full complement of equitable powers of Article III courts, it simply does not follow that adjudicative agencies have no inherent authorities whatever. It is beyond dispute, for example, that adjudicative agencies have inherent authority to correct inadvertent ministerial errors. *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958) ("[T]he presence of authority in administrative officers and tribunals to correct such [inadvertent ministerial] errors has long been recognized--probably so well recognized that little discussion has ensued in the reported cases"). Nor can there be any doubt that administrative tribunals have inherent authority to bar persons from appearance before them on grounds of improper conduct. *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926). Similarly, agencies have inherent authority to set and enforce standards of conduct for attorneys while appearing before them. *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979). Indeed, it has even been said that "[i]f the powers exercised by the agency constitute a 'legitimate reasonable and direct adjunct to the Commission's explicit statutory power,' *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 655 (1978), *quoting from United States v. Chesapeake & Ohio Railway Co.*, 426 U.S. 500, 512 (1976), then an express grant of authority is not necessary to sustain the validity of the challenged rule or regulation." *Touche Ross*, 609 F.2d *supra* at 579 - 580.

It is also clear that Congress' omission of any reference to reconsideration authority in the Energy Reorganization Act must be construed in light of the truism that Congress may be presumed to know the law. *Cannon v. University of Chicago*, 441 U.S. 677, 698-699 (1979). The decisional law is substantial and long standing for the proposition that agency power to consider includes inherent power to reconsider -- absent contrary congressional intent. A Congress that wanted to preclude, limit or otherwise regulate an agency's power to reconsider would do so expressly, knowing that silence on the matter would be construed to leave the agency's inherent authority intact. In short, there is simply no support for the proposition that unless Congress itemizes reconsideration authority in an adjudicative agency's enabling legislation, the agency has none.

means to circumvent any strictures imposed by the express limitations of its statute. *CAB*, *supra*.[4/]

Whether an agency's reconsideration authority is inherent or derived from an explicit statutory delegation, the authority to reconsider never includes authority for an agency to reconsider the wisdom of its final order merely because of a change in agency policy. *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958) (*ATA*).

The employee protection provision of the ERA is the basis of our jurisdiction over this case. 42 U.S.C. §5851 (1988).[5/] The ERA is directed generally to the development and safe utilization of energy resources and places. 42 U.S.C. §5801. Nothing in the statutory text of the employee protection provision or elsewhere in the ERA addresses the issue of reconsideration of final orders in the whistleblower protection cases within the Secretary of Labor's jurisdiction. Therefore, unless reconsideration by the Board would interfere with, delay or otherwise adversely affect accomplishment of the Act's safety purposes and goals, the Board has inherent authority to reconsider a final ERA order. *Cf. Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 246 (5th Cir. 1980) ("In the interests of accuracy and fairness, the EEOC should be able to reconsider a determination whenever such reconsideration would not prejudice the parties before it *or violate the legislative purpose for which it was created.*") (emphasis added).

It is clear in this case that reconsideration would not interfere with or adversely affect the general enforcement provisions of the Act. The nuclear energy safety and health purposes of the ERA are accomplished independently of the work of the Board. Employers subject to the ERA must report to the Nuclear Regulatory Commission information that indicates noncompliance with applicable safety requirements or defects that could create substantial safety hazards. 42 U.S.C.

[4/] *CAB* does not stand for the proposition that agencies lack inherent authority to reconsider, as the complainant asserts. Complainant's Opposition to the Motion for Reconsideration at 4. Rather, it holds that when a statute prescribes specific terms and conditions for reconsideration, the agency cannot act beyond those terms and conditions by invoking a broader inherent authority.

Nor does the Secretary's comment in *Bartlik v. TVA*, 88-ERA-15, *supra*, questioning whether the Federal Rules of Civil Procedure could be a basis for reconsideration, amount to an admission in support of Complainant. *Id*. The Secretary was merely referring to the fact that the Rules are not themselves a grant of substantive authority. 28 U.S.C. § 2072(b) (the federal rules of procedure "shall not abridge, enlarge or modify any substantive right"). The procedural rules for reconsideration set out in the Rules apply only when and if the reconsidering forum is exercising the right to reconsider based on statutory or inherent powers. *Cf. Brennan v. OSHRC*, 502 F.2d 30, 33 (5th Cir. 1974) ("To allow the Commission to avail itself of Rule 60(b), F.R.Civ.P. in the situation here present would be to extend the limits of statutorily conferred jurisdiction through the expediency of a procedural rule, a result we cannot countenance").

[5/] The whistleblower provisions of the Energy Reorganization Act were amended in 1992. Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776. However, the 1992 amendments to the Act did not address the Board's authority to reconsider its decisions.

§5846(a). Substantial safety hazards that may be implicated in ERA complaints are clearly within the scope of this provision. Thus, the Commission gains knowledge of hazardous conditions involved in whistleblower complaints independently of Board proceedings. The Commission is authorized to investigate these matters. *Id*. at §5846(d). Therefore, the Commission is not dependent in any way on the pace or results of the Board's proceedings. In fact, the statute mandates that the Board's determinations concerning the ERA whistleblower complaint "shall not be considered by the Commission or the Department of Energy in its determination of whether a substantial safety hazard exists." *Id*. at §5851(j)(2). *Compare Freehold Cogeneration Associates, L.P. v. State of New Jersey*, 44 F.3d 1178, 1192 (3d Cir.), *cert. denied sub nom*., *Jersey Cent. Power & Light Co. v. Freehold Cogeneration Associates, L.P.*, 516 U.S. 815 (1995), *and New Jersey Div. of Ratepayer Advocate v. Freehold Cogeneration Associates, L.P.*, 616 U.S. 815 (1995) (state agency could not rely on inherent authority to reconsider when doing so would contravene the "overall scheme" of federal statute and "its stated goal").

We also believe it is clear that our decision to reconsider in this case does not undermine or otherwise adversely affect the goals of the whistleblower provision itself. Reconsideration under the circumstances of this case creates no precedent that will discourage employees from seeking the protection of the ERA, nor does the ERA's effectiveness depend on extraordinary speed of Board proceedings.

The fact that reconsideration temporarily deprives Macktal of a favorable fee decision and may eventually alter the outcome altogether is undoubtedly undesirable from Macktal's personal point of view. But the value of due process -- both to Brown and Root particularly, and to the integrity of our proceedings generally -- is paramount. Under the totality of the circumstances of this case, the public interest in correct and just outcomes should prevail, and reconsideration should be granted.

Reconsideration in this case is appropriate because it gives the Board an opportunity to correct an error, and because reconsideration has been requested within a reasonable time. The error in this case was loss within the Department of Labor of a party's timely-filed brief,[6/] followed by our issuance of a final decision and order adverse to that party. Further, we find Brown and Root's request for reconsideration timely, as it was filed immediately after the company learned from our final decision and order that our disposition of the case had been rendered under the incorrect assumption that Brown and Root had abandoned its petition and its opposition to the employee's petition.

In addition to its assertion that the Board generally lacks jurisdiction to reconsider a decision, which we have rejected, Macktal further argues that the request for reconsideration is both untimely and futile because the lost brief does not challenge the amount of the ALJ fee award that came before

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[6/] We do not hold Brown and Root blameless: the company had several opportunities to detect the error, not the least of which was its own service copy of the brief containing the date stamp of the BRB. However, given the importance of the opportunity to be heard and the fact that errors were made within the Department, we conclude that justice is best served in this case by allowing Brown and Root to place its arguments before us.

us in May, but instead challenges our predicate determination in January 1998 that Macktal was entitled to fees. Macktal contends that since Brown and Root did not challenge our January ruling when it was issued, Brown and Root either has waived its objections to the ruling or is seeking reconsideration of it far too late.

In a different case it might be appropriate to deny a request for reconsideration because the substantive claims the movant seeks to place before us have been waived, are frivolous or because of some similar circumstance. In a case such as this, however, where the error is a procedural one for which the Department carries some responsibility, we prefer to accept the missing brief and consider it with the others filed in the case (*i.e.*, the brief filed earlier by Macktal) as a unified whole and issue a new final order. We note that in taking this approach, we act squarely within the scope of the Supreme Court's *ATA* observation that agency tribunals have inherent authority to correct inadvertent ministerial errors, not to mention the broader, more substantive doctrine of inherent authority to reconsider to correct error, even substantive error.

For the foregoing reasons, we also reject Macktal's claims that Brown and Root has failed to show good cause for reconsideration and that reconsideration would be futile. Respondent's motion for reconsideration is **GRANTED.**

REPLY BRIEF

Although the briefing schedule in this case did not originally provide for a reply brief, in the interests of equity for both parties under these unusual circumstances, each party will be afforded an opportunity to file a reply brief, limited to a response to the arguments raised in the briefs on review of the ALJ's Initial Decision on Attorney's Fees. Such reply briefs are not to exceed 10 double-spaced, typed pages in length, and must be filed on or before December 18, 1998**.**

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Acting Member