



IN THE MATTER OF:

ADORACION YABOT,

ARB CASE NO. 12-012

COMPLAINANT,

ALJ CASE NO. 2011-LCA-059

v.

DATE: February 21, 2013

BOARD OF EDUCATION OF
PRINCE GEORGE'S COUNTY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Adoracion Yabot, *pro se*, Hyattsville, Maryland

For the Respondent:

Mary E. Pivec, *Williams Mullen*, Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arose under the H-1B provisions of the Immigration and Nationality Act, as amended.¹ On September 19, 2011, a Department of Labor Administrative Law

¹ 8 U.S.C.A §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(c) (West 1999 & Thomson Reuters Supp. 2012) (INA). See 20 C.F.R. § 655.845 (2012). The Secretary of Labor has

Judge (ALJ) issued an Order of Dismissal in this case. The ALJ granted the Wage and Hour Administrator's Motion to Strike the Complainant's Response to the ALJ's Order to Show Cause and found that the Complainant did not successfully show cause "why this matter should not be dismissed. The request for hearing was either untimely or premature."²

BACKGROUND

The Respondent, Board of Education, hired the Complainant, Adoracion Yabot, under the INA's H-1B provisions as a Special Education teacher.³ On or about November 22, 2010, Yabot filed a Nonimmigrant Worker Information Form with the Wage and Hour Division (WHD), on which she listed a number of alleged violations of the H-1B provisions that she averred the Respondent had committed. On the form she checked a box next to the statement, "Employer retaliated or discriminated against an employee, former employee, or job applicant for disclosing information, filing a complaint, or cooperating in an investigation or proceeding about a violation of the applicable nonimmigrant worker and the employer." A WHD District Director informed Yabot in a letter dated November 22, 2010, "We reviewed your information pertaining to the alleged violations(s) of the H-1B program and determined that there is reasonable cause to conduct an investigation based on the information you provided."

On April 4, 2011, the WHD issued a determination finding that the Board of Education had committed numerous violations of the H-1B provisions with respect to the employment of 1,044 H-1B workers, including Yabot, most, if not all, of whom were

delegated her authority to issue final agency decisions in cases arising under the INA's H-1B provisions to the Administrative Review Board. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378-69380 (Nov. 16, 2012).

² *Yabot v. Board of Educ. of Prince George's County*, ALJ No. 2011-LCA-059, slip op. at 2 (Sept. 19, 2011)(O.D.)

³ The INA permits an employer to hire nonimmigrant alien workers in "specialty occupations" to work in the United States for prescribed periods of time. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. An employer seeking to hire an H-1B worker must obtain DOL certification by filing a Labor Condition Application (LCA). 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731-733. The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. § 655.731, 732. After securing the certification, and upon approval by the Department of Homeland Security (DHS), the Department of State issues H-1B visas to these workers. 20 C.F.R. § 655.705(a), (b).

employed as teachers in the Prince George's County school system.⁴ As provided in the H-1B implementing regulations,⁵ the School Board and six individual H-1B workers in the Prince George's County school system requested a hearing to review the WHD's determination.⁶ These regulations provide that the Chief Administrative Law Judge must receive a request for a hearing no later than 15 calendar days after the date of the determination.⁷

On June 27, 2011, Yabot filed a hearing request with the Chief Administrative Law Judge stating:

In accordance with the provisions of Section 6-202(a)(4)n of the Education Article, Annotated Code of Maryland, I would like to make an appeal to the decision of the Board of Education of Prince George's County Public Schools regarding my termination after the determination has been made by the Department of Labor of various violations regarding non-immigrant H-1B provisions of the [I]mmigration and Nationality Act which had been inflicted on me for more than three (3) years that led me to file a complaint against Prince George's County Public School on November 22, 2010.

In response to this hearing request, the ALJ issued an Order to Show Cause. In this order, he noted that Yabot "had submitted no document reflecting that the Administrator made a determination regarding Ms. Yabot's complaint under 20 C.F.R. § 655.805 and 655.815. Under 20 C.F.R. § 655.820, an interested party may request a hearing only after the Administrator has made a determination on the party's complaint."⁸ The ALJ further stated that Yabot was among the H-1B workers whom the Administrator found were entitled to remedies, including back wages, in her April 4, 2011 determination, but that ,

⁴ *Administrator, Wage & Hour Div. v. Board of Educ. of Prince George's County*, ALJ No. 2011-LCA-026, slip op. at 1 & n.2 (Sept. 20, 2011).

⁵ 20 C.F.R. § 655.820(a).

⁶ *Administrator, Wage & Hour Div. v. Board of Educ. of Prince George's County*, ALJ No. 2011-LCA-026, slip op. at 2. Of the six workers who filed requests for hearing, five objected to the WHD's recommendation that the Respondent be debarred from hiring H-1B workers and one raised only the issue of retaliation by the Board in response to his action of raising concerns about the H-1B process. *Popoola v. Board of Educ. of Prince George's County*, ALJ No. 2011-LCA-027, slip op. at 3 (Oct. 5, 2011).

⁷ 20 C.F.R. § 655.820(d).

⁸ Order to Show Cause at 1.

“[i]t is uncertain whether that determination was intended to be a determination on Ms. Yabot’s complaint.”⁹ Accordingly, the ALJ ordered Yabot “not later than August 26, 2011 (postmark date), [to] show cause why her appeal should not be dismissed (1) as premature, if there has been no determination by the Administrator on her complaint, or (2) as an untimely appeal of the Administrator’s determination of April 4, 2011, if that determination is considered to be a determination on Ms. Yabot’s complaint”¹⁰

Yabot did not file a response to the Show Cause Order postmarked no later than August 26th as ordered, but she did file a response postmarked September 6, 2011.¹¹ Attached to the response was a handwritten note stating, “I am awfully sorry I was not able to mail it immediately because I got sprained on my right foot and hurts for several days due to the earthquake on Aug. 22, 2011. I hurriedly go down to the 12 steps (stairs) from the small room attic where I presently live.” The Respondent filed a motion to strike Yabot’s response as untimely, and the Deputy Administrator also filed a reply to Yabot’s response.

On September 19, 2011, the ALJ issued an Order of Dismissal. Granting the motion to strike Yabot’s response to the Show Cause Order as untimely,¹² the ALJ found that:

Ms. Yabot’s explanation for her untimely response is not credible. First, the earthquake that affected the local area occurred on August 23, not August 22. Second, Ms. Yabot has not supported her claim of injury with medical documentation or with any other form of corroboration. I find her explanation to be self-serving and not worthy of belief.

I find that Ms. Yabot has not successfully shown cause why this matter should not be dismissed. The request for hearing was either untimely or premature.^[13]

Yabot timely requested the ARB to review the ALJ’s D.O.

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 2.

¹¹ D.O. at 2. Yabot’s response was dated August 20, 2012.

¹² The ALJ incorrectly attributed the motion to strike to the Deputy Administrator, but as stated above, the Respondent actually filed it.

¹³ D.O. at 2.

DISCUSSION

We first address the issue whether the ALJ properly granted the motion to strike because Yabot failed to timely respond to his Order to Show Cause. Dismissing a complaint because a pro se party failed to timely respond to a show cause order is a most severe sanction. Yabot did not altogether fail to prosecute her case, but simply missed the deadline for timely filing of a response to an order. While an ALJ must, of course, remain impartial, we have held that a judge must warn pro se parties, in advance, of the potential consequences of failing to timely respond to such an order.¹⁴ There is no evidence in this record suggesting that the ALJ gave Yabot any such warning. Accordingly, in the absence of a history of obstructive or non-compliant behavior or a warning of the consequences for failing to timely file, the ALJ abused his discretion when he dismissed Yabot's complaint because she failed to timely respond to his Show Cause Order.

Nevertheless, a remand to the ALJ to consider Yabot's response is unnecessary because we have determined that as a matter of law, her response to the Show Cause Order compels dismissal of her complaint.¹⁵ The ALJ's Order directed Yabot to demonstrate that her hearing request was neither premature because she had not yet received a WHD determination, nor untimely because she failed to file it within 15 days of the WHD's April 4, 2011 determination. Yabot directly addressed neither of these alternatives. However she did make what could be interpreted as an argument that the limitations period for filing the request should be tolled. The ARB has applied tolling principles to the limitations period for requesting a hearing under 20 C.F.R. § 655.820(d).¹⁶

In determining whether the Board will toll a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the employer's own acts or omissions have lulled the plaintiff into

¹⁴ *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040, slip op. at 4 (ARB Dec. 16, 2011).

¹⁵ *Myers v. AMS/Breckenridge/Equity Grp. Leasing One*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008; slip op. at 12 n.29 (ARB Aug. 3, 2012). *Accord Dantran v. U.S. Dep't of Labor*, 171 F.3d 58, 73 (1st Cir. 1999) ("when a reviewing court discovers a serious infirmity . . . the ordinary course is to remand[,] . . . [b]ut such a course is not essential if remand will amount to no more than an empty exercise") (internal citations omitted).

¹⁶ *Wakileh v. Western Ky. Univ.*, ARB 04-113, ALJ No. 2003-LCA-023, slip op. at 4 (Oct. 20, 2004).

foregoing prompt attempts to vindicate his rights.¹⁷ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Yabot's claim.¹⁸

In her response to the Order to Show Cause, Yabot argued that on April 7, 2011, she was told by a "Lady" in the WHD's Baltimore district office that

there is no need for me to make an appeal since I agree or amenable to the determination of the Department of Labor in violation of Prince George's County Public School H-1B program. My concern is that my case that I filed on November 22, 2010 is a separate or different from the general issue of teachers and that a separate determination must also be given to my case. So just because of the explanation made by the lady in Baltimore district Office I did not send a letter of appeal to the administrative Law Judge because I was advised not to do so henceforth, my plan of making an appeal was thwarted.^{19]}

Even viewing Yabot's statements in the light most favorable to her, they do not compel tolling of the limitations period. At most, the district office employee informed her that if she agreed with the WHD's determination, she did not need to appeal it. Her advice was accurate. Yabot indicates that she believed her complaint to be different from the other teachers, but she does not indicate that she conveyed her belief to the district office employee or that the employee understood her complaint to be different from those of the other teachers. While there may have been a misunderstanding as to the nature of Yabot's complaint, the district office employee did not and could not, in any way, have prevented Yabot from filing a timely hearing request with the Chief Administrative Law Judge, as did six other Prince George's County teachers. Further, we note that on June 27, 2011, Yabot did, in fact, file a hearing request with the Chief Judge, but there is no explanation of her motivation for doing so at that time, and so it is not possible to determine if she timely filed her request after she realized that it was appropriate to do so.

¹⁷ *Selig v. Aurora Flight Scis.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 3-4 (ARB Jan. 28, 2011).

¹⁸ *Id.* at 4.

¹⁹ An Appeal Against Premature Dismissal of My Petition at 1 (Yabot's response to the Order to Show Cause).

Accordingly, concluding that Yabot has failed to demonstrate grounds for equitable tolling of the limitations period for filing a hearing request, we **DISMISS** her complaint.²⁰

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

²⁰ Although the merits of Yabot's retaliation complaint are not before us, it does not appear that Yabot could have prevailed on this complaint. Her complaint against her employer for H-1B violations and complaint of retaliation were filed simultaneously on or about November 22, 2010. A review of the record demonstrates that all of the adverse actions that she alleges the Respondent took against her were either taken before she filed her complaint of a violation of the H-1B rules and thus could not have been taken in retaliation for a complaint that she had not yet filed or after she filed her retaliation complaint, so that they could not be the subject of a complaint that had already been filed.