



In the Matter of:

**ADMINISTRATOR, WAGE AND  
HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR,**

**ARB CASE NOS. 01-031  
01-086**

**PROSECUTING PARTY,**

**ALJ CASE NO. 2000-NQW-1**

**DATE: August 8, 2001**

**and**

**DAVID EDDIS and GERALD EDDIS,**

**COMPLAINANTS,**

**v.**

**LB&B ASSOCIATES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>**

**Appearances:**

*For the Administrator:*

Lois Zuckerman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

*For the Complainants:*

David Eddis and Gerald Eddis, *pro se, Lindenwold, New Jersey*

*For the Respondent:*

Benjamin N. Thompson, Esq., Jennifer M. Miller, Esq., *Wyrick Robbins Yates & Ponton LLP, Raleigh, North Carolina*

**FINAL DECISION AND ORDER**

This case arose under Executive Order 12933, *Nondisplacement of Qualified Workers Under Certain Contracts*, 59 Fed. Reg. 53559 (Oct. 24, 1994), and its implementing regulations found at 29 C.F.R. Part 9 (2000).

---

<sup>1/</sup> This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

Complainants David Eddis and Gerald Eddis (collectively “the Eddises”) filed a complaint in October 1999 claiming that Respondent LB&B Associates (“LB&B”) had violated E.O. 12933 by not affording the Eddises a right of first refusal to be hired as maintenance workers on a service contract awarded by the General Services Administration to LB&B for the maintenance of the Federal Building and Courthouse complex in Philadelphia, Pennsylvania.

Following an investigation by the Wage and Hour Division, the Regional Administrator determined that the Eddises’ complaint had merit and that LB&B had violated E.O. 12933. LB&B disputed this determination and requested a hearing before an administrative law judge (“ALJ”). Following a hearing, the ALJ issued a Decision and Order in this case on January 9, 2001, ruling for LB&B and dismissing the Eddises’ complaint. *Eddis v. LB&B Associates, Inc.*, ALJ No. 2000-NQW-0001. Both the Wage and Hour Administrator and the Eddises filed timely appeals to this Board challenging the ALJ’s Decision and Order (“D&O”).<sup>2/</sup>

On February 17, 2001, the President issued Executive Order 13204, revoking E.O. 12933. 66 Fed. Reg. 11228. The new Executive Order directed the Secretary of Labor to “terminate, effective today, any investigations or other compliance actions based on Executive Order 12933” and to “promptly move to rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12933 of October 20, 1994, to the extent consistent with law.” *Id.* The Secretary of Labor subsequently rescinded the Part 9 Regulations on March 23, 2001, effective that same day. 66 Fed. Reg. 16,126.

Based on the new Executive Order, on February 22, 2001, the Acting Administrator withdrew his appeal in this case, explaining that he was “of the view that the Petition [for Review] is covered by the Executive Order’s directive to ‘terminate any investigations or other compliance actions based on Executive Order 12933.’”

The withdrawal of the Acting Administrator’s action nevertheless left the Eddises’ appeal before the Board for disposition. LB&B has now moved to dismiss the Eddises’ appeal, asserting that the appeal constitutes a “compliance action” barred under the 1994 Executive Order, and that the bases for the Eddises’ action (E.O. 12933 and the Part 9 Regulations) no longer have any force or effect. In response, the Eddises argue that LB&B violated the law during a period in time in which E.O. 12933 was enforceable, and that the new Executive Order could not “consistent with law” revoke their rights under E.O. 12933.

Because the Acting Administrator voluntarily has withdrawn the appeal in ARB No. 01-131, that appeal is dismissed. For the reasons discussed below, we dismiss the Eddises’ appeal in ARB No. 01-086 because the Board no longer has jurisdiction to consider this case.

---

<sup>2/</sup> The Administrator’s appeal was received on January 29, 2001, and was docketed as ARB No. 01-131. The Eddises’ appeal was received on February 1, 2001, but was not issued a separate case number. This was an oversight. The Eddises’ appeal has now been designated ARB No. 01-086.

## DISCUSSION

The Board's jurisdiction to hear appeals under the "Nondisplacement of Qualified Workers" Executive Order was grounded in the Department's Part 9 Regulations, specifically 29 C.F.R. §9.107(a). Authority to order relief and impose sanctions was set forth at 29 C.F.R. §9.107(d)-(f). The regulations provided that in considering matters within the Board's jurisdiction, the Board was to act "as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters." 29 C.F.R. §9.107(g).

The Part 9 Regulations were promulgated in May 1997 pursuant to the authority vested in the Secretary of Labor by E.O. 12933.<sup>3/</sup> Both the 1994 Executive Order and the Part 9 regulations were in effect in 1999, when the events underlying this dispute occurred and when the Eddises filed their complaint. However, E.O. 13204 revoked the previous Executive Order and directed the Secretary to both "terminate . . . any investigation or other compliance actions based on [E.O. 12933]" and "rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12933 . . . to the extent consistent with law." The Part 9 regulations were rescinded on March 23, 2001, with the Acting Administrator explaining that because "the authority for these regulations no longer exists," the rescission was "effective upon promulgation," and that "the revocation of Executive Order 12933 and the rescission of these regulations extend to all investigations or other compliance actions based on Executive Order 12933." 66 Fed. Reg. 16,126-27. E.O. 13204 did not include any language suggesting that appeals that were pending under the 1994 E.O. were preserved.

The central question before the Board at this juncture is whether the rescission of the Part 9 regulations has divested the Board of jurisdiction over this case.

As a general rule, "when a law conferring jurisdiction is repealed without any reservation ["savings clause"] as to pending cases, all cases fall with the law . . ." *Bruner v. United States*, 343 U.S. 112, 116-17 (1952), citing *Merchants' Insurance Co. v. Ritchie*, 5 Wall. 541, 544-45, 18 L.Ed. 540 (1867) ("It is clear, that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction.") and *The Assessors v. Osbournes*, 9 Wall. 567, 19 L. Ed. 748 (1870).

The rule as pronounced by the Supreme Court in *Bruner* "has seen frequent application in cases wherein a statute negating jurisdiction became effective pending appeal." *DeRodulfa v. United States*, 461 F.2d 1240, 1251 n. 56 (D.C. Cir. 1972). Most often, a statute negating a court's jurisdiction has operated merely to preclude review in a *particular* tribunal, but has not

---

<sup>3/</sup> Section 5 of E.O. 12933 provides in relevant part: "The Secretary of Labor is responsible for investigating and obtaining compliance with this Executive Order. In such proceedings the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. . . . [D]isputes regarding the requirements of the contract clause shall be disposed of only as provided by the Secretary of Labor in regulations issued under this Executive Order. . . . The Secretary of Labor shall . . . issue regulations . . . to implement the requirements of this Executive Order." (Emphasis added.)

entirely extinguished the underlying claim. *See Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (“Application of a new jurisdictional rule usually ‘takes away no substantive right but simply changes the tribunal that is to hear the case.’”) quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916). *See, e.g., Merge v. Troussi*, 394 F.2d 79 (3d Cir. 1968) (in suit under Federal Housing Act “based on a ‘right’ created by federal statute . . . the court loses all jurisdiction, even in a case already pending, when Congress amends the governing statute by taking jurisdiction from the courts”; as a result, final agency action on claim is not subject to judicial review). Although it is less common, a statutory change affecting jurisdiction also can result in the elimination of a claim. *See Bruner*, 343 U.S. at 117 n.8 (“This jurisdictional rule [*i.e.*, that all cases before a court fall when a statute is enacted repealing the grant of jurisdiction, unless there is a savings clause] does not affect the general principle that a statute is not to be given retroactive effect *unless such construction is required by explicit language or by necessary implication.*” (Emphasis added). *See also Hospital Ass’n of New York State v. Toia*, 577 F.2d 790 (2d Cir. 1978) (court loses jurisdiction in action brought against state when Congress retroactively repeals Medicare requirement that states agree to waive sovereign immunity (“consent to suit”); without waiver requirement, sovereign immunity held applicable to pending case). *See also* 13A CHARLES A. WRIGHT, ARTHUR R. MILLER AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §3533.6 n.6 (2d ed. 1984).

In like manner, the repeal or revocation of an agency’s jurisdictional authority without an express reservation clause will result in the loss of the agency’s jurisdiction over any pending cases. “Administrative agencies are tribunals of limited jurisdiction. As a general rule, they have only such adjudicatory jurisdiction as is conferred on them by statute.” 2 AM JUR 2D *Administrative Law* §275 (1994). “Jurisdiction, although once obtained, may be lost, and in such a case proceedings cannot be validly continued beyond the point at which jurisdiction ceases.” *Id.*

E.O. 13204 repealed E.O. 12933 and included no savings clause suggesting that cases pending at the time the Order was issued could be litigated further. To the contrary, although E.O. 13204 does not include “explicit language” stating that it applies in a manner that extinguishes all pending claims, it is our view that this is the “necessary implication” of the Executive Order (*Bruner, supra*) in light of the Presidential directive to “terminate . . . any investigation or other compliance actions” and “rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12933 . . . to the extent consistent with law.” This view is further supported by the Department’s repeal of the Part 9 Regulations without any savings language, firmly suggesting that this Board no longer has jurisdiction to decide the Eddises’ case.

In support of their claim that the Board continues to have jurisdiction over their case, the Eddises point to the “to the extent consistent with law” phrase in E.O. 13204 and argue that the repeal of E.O. 12933 was unlawful because the right of first refusal granted by the earlier Executive Order was necessary to the enforcement structure of the Service Contract Act, 41 U.S.C.A. §351 (West 1987)(“SCA”). We disagree. Although both the SCA and E.O. 12933 relate to Federal service procurements, it is clear that they address distinctly different rights – the right to receive no less than the prevailing wage (SCA) *vs.* the right of certain service

workers to be rehired when a new contractor is engaged by a federal agency. Just as the SCA's prevailing wage system operated successfully for 19 years prior to the promulgation of E.O. 12933, we see no legal reason that the SCA cannot operate now without the separate Executive Order that created rehire rights.

In conclusion, we **DISMISS** the Acting Administrator's appeal in ARB No. 01-131 because it has been withdrawn. Further, we hold that with the promulgation of Executive Order 13204 and the consequent repeal of the Department's Part 9 Regulations, the Board no longer has jurisdiction over the Eddises' appeal. Accordingly, the appeal in ARB No. 01-086 is hereby **DISMISSED**.

**SO ORDERED.**

**PAUL GREENBERG**  
Chair

**E. COOPER BROWN**  
Member