



In the Matter of:

R. SCOTT LEWIS,

ARB CASE NO. 11-070

COMPLAINANT,

ALJ CASE NO. 2010-NTS-003

v.

DATE: August 8, 2011

**METROPOLITAN TRANSPORTATION
AUTHORITY, NEW YORK CITY TRANSIT
AUTHORITY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DENYING MOTON FOR WRIT OF MANDAMUS

The Complainant, R. Scott Lewis, has filed a complaint under the employee protection provisions of the National Transit Systems Security Act¹ and its implementing regulations.² On July 18, 2011, Lewis filed with the Administrative Review Board a document entitled “USDOL-OSHA Review Board Writ of Mandamus to Lower Court.” In this document, “complainant is petitioning the USDOL-OSHA APPEAL REVIEW BOARD [sic] to compel Judge Adele H. Odegard to issue a final decision on a motion for summary judgment in USDOL-OSHA Civil Action No. 2010-NTS-003.”

In support of this Motion, Lewis avers:

WHEREAS, this petition is within the complainant’s right and is within accordance to the “Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges” set forth at 29 C.F.R. Part 18.

¹ 6 U.S.C.A. § 1142 (Thomson/West Supp. 2011)(NTSA).

² 29 C.F.R. Part 1982 (2010).

This petition is to inform the higher court that the Judge in the lower court has abstained from ruling within the prescribed time frame of 60 days (i.e. 5 MAY 11). CONSEQUENTLY, complaint [sic] prays for relief by way of the US DOL-OSHA ARB.

The Administrative Review Board's authority to act for the Secretary of Labor is limited by the terms of the Secretary's delegation of authority to the Board.³ This delegation includes the authority to issue final administrative decisions upon appeals of final decisions of Department of Labor Administrative Law Judges and the discretionary authority to review interlocutory rulings in exceptional circumstances, in cases arising under the NTSA.⁴ Lewis has failed to establish how, in the absence of a decision by an ALJ, the Board has authority to act in this matter at this stage of the proceedings. The Secretary's Order does not specifically delegate mandamus authority to the Board. Nor has Lewis identified any statutory or regulatory authority or case precedent establishing the Board's authority to grant the mandamus order he has requested.

In any event, even if the Board has authority to issue mandamus orders, "the remedy of mandamus is reserved for extraordinary circumstances in which the petitioner demonstrates that his right to issuance of the writ is clear and indisputable and that no other adequate means to obtain relief exist."⁵ The United States Court of Appeals for the Second Circuit⁶ has held that there are three conditions that a party requesting an order of mandamus must establish before a writ of mandamus may issue.⁷ The party requesting mandamus: (1) must establish that it has no other adequate means to obtain the relief it desires, (2) the court issuing the relief must conclude that the writ is appropriate under the circumstances, **and** (3) the party requesting the order must demonstrate that the right to have the writ issued is "clear and indisputable."⁸

Addressing these requirements in reverse order, Lewis has failed to cite to any statutory provision, regulation, or case precedent establishing that the ALJ had a

³ See 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).

⁴ *Id.* at §§ (c) 28, 48.

⁵ *Byrd v. Reno*, 180 F.3d 298, 302 (D.C. Cir. 1999).

⁶ The Court of Appeals for the Second Circuit would have jurisdiction of any appeal of the Department of Labor's final decision in this case. See 6 U.S.C.A. § 1142 (c)(4)(A).

⁷ *In re The City of New York*, 607 F.3d 923, 933 (2010) citing *Cheny v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004).

⁸ *Id.*

mandatory 60-day deadline in which to issue her decision. In any event, where the statute or regulations have established time periods for the investigation and adjudication of whistleblower complaints, the Board has considered these periods to be directory rather than mandatory.⁹ Therefore, Lewis has failed to demonstrate that his right to the order is “clear and undisputable.”

Furthermore, given that Lewis has failed to establish that the Board has authority to issue mandamus orders and that he would have an indisputable right to the issuance of such order in any case, we do not conclude that the issuance of such order is appropriate under the circumstances. Finally, if Lewis is dissatisfied with the length of time it is taking the ALJ to adjudicate his complaint, he does have another option. Under the NTSA, if the Secretary of Labor has not issued a decision within 210 days after the date on which the complainant filed his complaint and the delay is not due to the complainant’s bad faith, the complainant may obtain de novo review in the appropriate district court of the United States.¹⁰

Consequently, because Lewis has failed to establish that the Board has authority to issue mandamus orders and because he has an alternative to litigating his case before the Department of Labor, we are not convinced that issuing the writ would be appropriate under the circumstances, and Lewis has not established a “clear and indisputable” right to the writ, his motion for a writ of mandamus is **DENIED**.

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R. Dunlop
General Counsel

Note: Questions regarding any case pending before the Board should be directed to the Board’s paralegal specialists:

Telephone: 202-693-6200
Facsimile: 202-693-6220

⁹ See *Timmons v. Mattingly Testing Servs.*, 1995-ERA-040 (Sec’y June 21, 1996). See also *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 268 (1987)(“The Secretary interprets these time requirements not as mandatory but rather as ‘directory in nature.’”).

¹⁰ 6 U.S.C.A. § 1142(c)(7).