In the Matter of :

DAVID J. YARBROUGH, **ARB CASE NO. 05-117**

COMPLAINANT, **ALJ CASE NO. 2004-SDW-003**

v. **DATE: August 30, 2007**

U.S. DEPT. OF THE ARMY, CHEMICAL AGENT MUNITIONS DISPOSAL SYSTEM (CAMDS),

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mick G. Harrison, Esq., Berea, Kentucky

For the Respondent:
Laurie Ann Kwiedorowicz, *U.S. Army RDECOM,* Aberdeen Proving Ground, Maryland

ORDER OF REMAND

Complainant David J. Yarbrough filed a complaint pursuant to the whistleblower protection provisions of the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9 (West 2003); the Clean Air Act, 42 U.S.C.A. § 7622 (West 2003); the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003); and the Comprehensive Environmental Response, Compensation and

Liability Act, 42 U.S.C.A. § 9610 (West 1995) (collectively, the environmental whistleblower laws), and implementing regulations at 29 C.F.R. Part 24 (2004).[1]

On March 24, 2005, Respondent United States Department of the Army, Chemical Agent Munitions Disposal System (the Army) submitted a Motion for Grant of Summary Judgment to an Administrative Law Judge (ALJ), requesting that Yarbrough's complaint be dismissed. On June 9, 2005, the ALJ issued a Recommended Decision and Order (R. D. & O.), which is now before the Administrative Review Board (Board) pursuant to Yarbrough's Petition for Review. For the following reasons, we remand the case to the ALJ.

BACKGROUND

Yarbrough was employed by the Army as a Monitoring Systems Mechanic Supervisor when the Army terminated his employment on February 26, 2004. On March 22, 2004, he filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that the Army terminated his employment because he "raised several protected concerns directly with his managers over the term of his employment."[2] OSHA investigated the complaint and concluded that the Army had fired Yarbrough because he had been convicted on six felony counts of false statements to a federal agency.

Yarbrough objected to OSHA's findings and requested a hearing on his complaint before a Department of Labor Administrative Law Judge. A hearing was scheduled but subsequently continued because of Yarbrough's incarceration and because the parties disputed various discovery issues. The ALJ conducted a telephone conference with the parties, during which the parties agreed that discovery would be stayed pending the ALJ's ruling on the Army's "anticipated motion for summary dismissal."[3]

On March 11, 2005, the ALJ issued two orders. The first order was captioned "Order: (1) Granting Complainant's First Motion To Compel Discovery Responses, In Part; and (2) Granting Respondent's Renewed Motion For A Protective Order Limiting The Scope Of Discovery." This order granted in part Yarbrough's motion to compel discovery responses, and granted the Army's motion for a protective order. It also indicated that "discovery would be stayed pending the outcome of Respondent's anticipated motion to dismiss which is the subject of a separate order that will be issued concurrently herewith."

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[1] The Department of Labor has amended these regulations since Yarbrough filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). We have applied the regulations in effect when Yarbrough filed the complaint.

[2] Complaint at 2.

[3] R. D. & O. at 3.

The second order was captioned: "Order: Setting Briefing Schedule For Respondent's Anticipated Motion To Dismiss Case and Related Stay Of Discovery and Continuance Of Trial." In this order, the ALJ ordered the Army to "file and serve it [sic] Motion to Dismiss the complaint in this case on or before March 25, 2005" and ordered Yarbrough to "file and serve his response to the motion to dismiss on or before April 8, 2005." The order also indicated that the hearing would be continued to September 19, 2005.

On March 24, 2005, the Army filed its Motion for Grant of Summary Judgment (Motion), with a supporting memorandum and exhibits. The Army contended that Yarbrough failed to establish a prima facie case of retaliation and that, because Yarbrough had been fired for his criminal conviction, his claim of whistleblower retaliation is barred by the doctrine of issue preclusion. Yarbrough did not respond to the Motion by April 8, 2005, as ordered by the ALJ.

On June 9, 2005, the ALJ issued an R. D. & O. dismissing Yarbrough's case and granting the Army's Motion. The ALJ noted that, as of the date of the R. D. & O., Yarbrough had not filed a response to the Motion. The ALJ held that Yarbrough's claim should be dismissed for his failure to comply with the March 11, 2005 Order:

> Moreover, I further interpret local regulations 29 C.F.R. Section 24.6(e)(4)(B) and 29 C.F.R. § 18.6(d)(2)(v) as providing me with discretion to find that Complainant's failure to comply with my March 11 Order and corresponding failure to timely oppose Respondent's MSJ judgment constitutes "consent" to granting the motion. *See U.S. v. Real Property Located in Incline Village*, 47 F.3d 1511, 1519 (9th Cir. 1995)(Case dismissed pursuant to local district court rule allowing implied consent to dismissal for failing to file a pleading).[4]

In granting the Army's Motion, the ALJ held that: (1) Yarbrough failed "to establish a prima facie case against Respondent of a violation of any applicable employee protection provisions as Complainant has not produced evidence and there is no basis to infer retaliatory discrimination;" and (2) because Yarbrough litigated his discharge in Federal District Court, "the doctrine of collateral estoppel/issue preclusion is applicable and herein bars Complainant from relitigating the cause of his discharge or the allegation of conspiracy as alleged in his administrative complaint and as decided by the District Court."[5]

Yarbrough submitted a Petition for Review of the R. D. & O. to the Board on June 22, 2005. In his Petition he contends that: (1) the ALJ failed to issue an Order to

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4 R. D. & O. at 10.

5 *Id*. at 20, 22.

Show Cause as required by 29 C.F.R. § 24.6(e)(4) prior to dismissing Yarbrough's complaint; (2) the ALJ's ruling on dismissal for failure to respond precluded consideration of the Army's Motion for Summary Judgment; (3) discovery had not been completed; and (4) the Army had engaged in fraudulent behavior that affected the discovery process. We now consider Yarbrough's Petition for Review.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's R. D. & O.[6] Under the Administrative Procedure Act, the Board, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board reviews, de novo, the ALJ's recommended decision.[7]

DISCUSSION

The rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges are found in Part 18 of Title 29 of the Code of Federal Regulations. These rules provide that "[a]ny party may, at least twenty (20) days before the date fixed for any hearing, move with or without supporting affidavits for a summary decision on all or any part of the proceeding."[8] Part 18 also indicates that an ALJ may take such action "as is just" when a party fails to comply with an order of the ALJ.[9]

When Yarbrough's case was before the ALJ, the regulations implementing the environmental whistleblower laws, found at Part 24 of Title 29, also contained a

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[6] 29 C.F.R. § 24.8 (2004); Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[7] *See* 5 U.S.C.A. § 557(b) (West 2004); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-002, slip op. at 15 (ARB Feb. 29, 2000).

[8] 29 C.F.R. § 18.40(a).

[9] *See* 29 C.F.R. § 18.6(d)(2) ("If a party ... fails to comply with ... an order ... the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including .... (v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.").

provision governing dismissals.[10] These regulations indicated that an ALJ may dismiss a claim for failure to comply with a lawful order.[11] However, they also required an ALJ to issue a show cause order prior to such dismissals.[12]

The Secretary addressed this requirement in *Billings v. TVA*, 89-ERA-016, 025; 90-ERA-002, 008, 018 (Jan. 9, 1992), a case arising under the Environmental Reorganization Act (ERA).[13] In *Billings*, the complainant failed to submit a prehearing statement, as ordered by the ALJ. The ALJ issued orders directing the complainant to submit the statement and indicating that "[f]ailure to timely comply with this Order without good cause will result in the DISMISSAL of the proceeding or the imposition of other appropriate sanctions."[14] The complainant did not submit the prehearing statement, and the ALJ recommended dismissal of the complainant's case pursuant to 29 C.F.R. §§ 18.6 and 18.29. Upon review, the Secretary remanded the case because the ALJ had not issued a show cause order prior to dismissal of the complainant's claim.

The Secretary held that the Part 24 regulations that were then applicable to ERA proceedings "have a section which governs dismissals for cause and takes precedence over the general rules of practice and procedure in 29 C.F.R. Part 18."[15] These same

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[10] *See* 29 C.F.R. § 24.6(e)(4). On August 10, 2007, the Department of Labor issued final interim regulations establishing new procedures for the handling of retaliation complaints under the environmental whistleblower laws. *See* 72 Fed. Reg. 44,956 (Aug. 10, 2007) (to be codified at 29 C.F.R. Part 24). These new regulations eliminate § 24.6, and require that hearings conducted pursuant to the environmental whistleblower laws "be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, 29 CFR part 18." *Id.* at 44,965.

[11] *See* 29 C.F.R. § 24.6(e)(4) (2004) ("The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim ...(B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.").

[12] *See* 29 C.F.R. § 24.6(e)(4)(ii) (2004) ("In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include a recommended order dismissing the claim, defense or party.").

[13] 42 U.S.C.A. § 5851 (West 2003).

[14] *Billings*, slip op. at 2.

[15] *Id.* In *Billings*, the Secretary referred to the provision at 29 C.F.R. § 24.5(e)(4), which was codified at 29 C.F.R. § 24.6(e)(4) when this case was before the ALJ.

regulations were applicable to Yarbrough's case.[16] The Secretary went on to emphasize the importance of issuing a show cause order even when a party is aware that failure to comply with an order could result in dismissal:

> Although the ALJ's August 9, 1990 orders warned that a dismissal was possible if Plaintiff failed to comply without good cause, they neither ordered Plaintiff to show cause why dismissal was not warranted nor provided him an opportunity to address the good cause issue. Because dismissal is a drastic sanction, strict compliance with the applicable regulation is required.[[17]]

The ALJ's March 11, 2005 orders do not constitute show cause orders pursuant to 29 C.F.R. § 24.6(e)(4)(ii) (2004). Neither of the March 11 orders instruct Yarbrough to show cause why his complaint should not be dismissed, nor do they mention any penalty for a failure to respond to the Army's Motion. The Army's Motion was not before the ALJ on March 11, 2005, as the Army did not file it until March 25, 2005.

We also note that the case cited by the ALJ as justification for a default ruling against Yarbrough was governed by a specific local rule permitting default judgment against a party for failure to respond to a motion for summary judgment.[18] The regulations governing environmental whistleblower cases did not contain any such regulation.

Dismissal of a complaint for failure to comply with an order of an ALJ is a "very severe penalty to be assessed in only the most extreme cases."[19] The Part 24 regulations

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[16] *See* 29 C.F.R. § 24.1(a) (2004) ("This part implements the several employee protection provisions for which the Secretary of Labor has been given responsibility pursuant to the following Federal statutes: Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Energy Reorganization Act of 1974, 42 U.S.C. 5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610.").

[17] *Billings*, slip op. at 2.

[18] *See U.S. v. Real Property Located in Incline Village*, 47 F.3d at 1519 (federal district court's local rule provided that "[t]he failure of an opposing party to file a memorandum of points and authorities in opposition to any motion shall constitute a consent to the granting of the motion.").

[19] *See, e.g., Howick v. Campbell-Ewald Co.*, ARB Nos. 03-156, 04-065, ALJ Nos. 2003-STA-006, 2004-STA-007, slip op at 7 (ARB Nov. 30, 2004) (citing *Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003); *Ehrehaus v. Reynolds*, 964 F.2d 916, 920 (10th Cir. 1992)).

that governed Yarbrough's case required the ALJ to issue a show cause order prior to assessing that penalty. Because the ALJ failed to do so, we remand the case.[20]

CONCLUSION

The ALJ must give Yarbrough an opportunity to show cause why his case should not be dismissed. We therefore decline to adopt the ALJ's recommendation and **REMAND** this case for further proceedings in accordance with the procedures outlined in 29 C.F.R. § 24.6 as in effect when Yarbrough's case was before the ALJ.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[20] We note that because we have decided this case under 29 C.F.R. § 24.6 (2004), we need not consider, nor do we decide here, what procedure is necessary before an ALJ may dismiss a case pursuant to 29 C.F.R. § 18.6(d)(2)(v). We do note however, that ALJs have routinely issued orders to show cause, *see, e.g., Townsend v. Big Dog Holdings, Inc.*, 2006-SOX-028 (Feb. 14, 2006); *Somerson v. Eagle Express Lines, Inc.*, 2004-STA-012 (Dec. 6, 2005) or warnings specifying the consequences of failure to comply, *see, e.g., Rose v. ATC Vancom, Inc.*, 2005-STA-014 (Aug. 31, 2006); *Dickson v. Butler Motor Transit*, 2001-STA-039 (July 15, 2002), prior to dismissing cases pursuant to this regulation.