



In the Matter of:

GEORGE W. POWELL,

ARB CASE NO. 09-071

COMPLAINANT,

ALJ CASE NO. 2007-SDW-001

v.

DATE: March 4, 2011

CITY OF ARDMORE, OKLAHOMA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq., *Tate & Renner*, Dover, Ohio

For the Respondent:

Matthew Love, Esq., *The Law Offices of Margaret McMorrow-Love*, Oklahoma City, Oklahoma

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge*

ORDER DENYING RECONSIDERATION

The Complainant, George W. Powell, III, filed a retaliation complaint under the employee protection provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (West 2003); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 2003); the Water Pollution Control Act (WPCA), 42 U.S.C.A. § 1367 (West 2001); and the Toxic Substances Control Act of 1986 (TSCA), 15 U.S.C.A. § 2622 (West 1998); and their implementing regulations 29 C.F.R. Part 24

(2010) (collectively the “Environmental Whistleblower Statutes”). He alleged that the City of Ardmore (the City), violated the Environmental Whistleblower Statutes when it retaliated and discriminated against him because he raised concerns about the discharge and disposal of sewage and other hazardous waste at his workplace. Complaint at 1 (Aug. 18, 2006).

A Department of Labor Administrative Law Judge (ALJ) dismissed Powell’s complaint because he found that Powell did not meet his burden of showing that his protected activity caused or contributed to the termination of his employment. *Powell v. City of Ardmore*, 2007-SDW-001 (Nov. 25, 2008). On January 5, 2011, the Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) affirming the ALJ because Powell failed to prove that his protected activity played any role in the City’s termination of his employment and thus did not establish an essential element of his retaliation claim.

On January 18, 2011, Powell filed a Motion for Reconsideration of the F. D. & O., requesting reconsideration of our ruling. Powell argues that the City’s testimony contained inconsistencies that pointed to pretext and asks the Board to grant reconsideration and reverse the R. D. & O. The City filed a response to the motion on February 25, 2011.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007). Upon consideration of the motion’s merits, we deny reconsideration.

Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing “state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended” Fed. R. App. P. 40(a)(2). In considering a motion for reconsideration, the Board has applied a four-part test to determine whether the movant has demonstrated:

- (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court’s decision, (iii) a change in the law after the court’s decision, and (iv) failure to consider material facts presented to the court before its decision.

Getman v. Southwest Secs., Inc., ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 2 (ARB Mar. 7, 2006).

Powell argues that there is no basis in the record for the ALJ’s finding that Parrott made the decision to place Powell on administrative leave because Parrott and Collins were concerned about Powell’s state of mind, and because Collins wanted time to investigate Powell’s belief that he was being written up because he expressed environmental concerns. He also argues that there are inconsistencies in the City’s record testimony that point to the pretextual nature of the Respondent’s stated reasons for placing Powell on administrative leave and discharging him. He

asserts that the ALJ's findings are unsupported by evidence or based on conclusions that ignore inconsistencies in the testimony of the Respondent's witnesses and that he deserves an explanation of the inconsistencies.

The City asserts that Powell has raised no new issues of fact or law that were not previously submitted to the Board and requests the Board to deny Powell's motion.

Powell has not demonstrated that any of the provisions of the Board's four-part test apply. He does not argue that there has been a change in the law or that new facts have arisen since we issued our F. D. & O. And he does not indicate that we did not consider material facts prior to issuing our ruling. Instead, he repeats the arguments he presented to the Board and the ALJ about how the ALJ decided the case. We considered and rejected these arguments in our F. D. & O. F. D. & O. at 6-7. The ALJ considered and rejected them in his R. D. & O. R. D. & O. at 13, 17, and 19.

Accordingly, Powell's Motion for Reconsideration is **DENIED**.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge