



In the Matter of:

WILLIAM J. McCLOSKEY,

ARB CASE NO. 06-033

COMPLAINANT,

ALJ CASE NO. 2005-SOX-093

v.

DATE: February 29, 2008

AMERIQUEST MORTGAGE COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William J. McCloskey, *pro se*, Philadelphia, Pennsylvania

For the Respondent:

Laura P. Worsinger, *Buchalter Nemer*, Los Angeles, California

ORDER OF REMAND

William J. McCloskey filed a complaint with the United States Department of Labor in which he alleged that Ameriquest Mortgage Company (Ameriquest) violated the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX)¹ when it terminated his employment on March 1, 2005. After Ameriquest failed to appear at a hearing on the complaint and failed to respond to an order to show cause why a default judgment should not be issued against it, an Administrative Law Judge (ALJ) issued a

¹ 18 U.S.C.A. § 1514A (West Supp. 2005). Regulations implementing the SOX are found at 29 C.F.R. Part 1980 (2007).

Decision and Order Granting Default Judgment (D. & O.). We vacate his decision and remand the case for further proceedings consistent with this Order.

BACKGROUND

On June 16, 2005, McCloskey filed a complaint with DOL's Occupational Safety and Health Administration (OSHA). Exh. ALJ-2. On July 14, 2005, OSHA issued its findings that Ameriquest was not a company covered by the SOX, as defined at 18 U.S.C.A. § 1514A(a), and that McCloskey did not file his complaint within 90 days of the alleged adverse action, as required by the SOX at 18 U.S.C.A. § 1514A(b)(2)(D).² McCloskey filed objections to OSHA's findings on July 28, 2005.³

On August 5, 2005, the ALJ issued a Notice of Hearing, setting the hearing for September 27, 2005. He sent the notice by certified mail to Ameriquest at its field office address on Westlakes Drive in Berwyn, Pennsylvania, the office where McCloskey had been employed. The ALJ also sent McCloskey a copy of the Notice of Hearing by certified mail.

McCloskey appeared at the hearing pro se, but Ameriquest did not appear. The ALJ opened the hearing and noted that he had sent the Notice of Hearing to Ameriquest by certified mail and that Ameriquest had not returned the card acknowledging receipt of the hearing notice.⁴ The ALJ stated, "I'm going to assume, for purposes of this hearing, that they were served by certified mail with a copy of the Notice of Hearing and that they chose not to appear." Tr. at 5. On September 28, 2005, the ALJ issued to Ameriquest by certified mail an order to show cause within fifteen days why default judgment should not be entered against it. Ameriquest did not respond to the order and did not return the card acknowledging receipt of the order. D. & O. at 1.

On December 6, 2005, the ALJ issued the Decision and Order Granting Default Judgment, awarding McCloskey back pay of \$8,469.31 with interest and front pay of \$706. McCloskey filed a petition for review of the ALJ's decision on December 20, 2005. On January 10, 2006, the Administrative Review Board (ARB or Board) issued a Notice of Review and Briefing Schedule apprising the parties of their right to submit briefs supporting or opposing the ALJ's decision. Relying on the ALJ's certificate of

² There is no record evidence that OSHA sent a copy of its findings to Ameriquest.

³ There is no certificate of service indicating that McCloskey mailed his objections to Ameriquest. McCloskey acknowledged at the hearing that he sent Ameriquest a pdf file. Tr. at 5. There is a pdf file in the record, labeled "Case File," which contains copies of documents filed by McCloskey. There is no evidence, however, that this was the pdf file that McCloskey mentioned at the hearing.

⁴ The record shows that McCloskey's wife acknowledged receipt of the Notice of Hearing on August 6, 2005. Exh. ALJ-4.

service, the Board sent its notice to Ameriquest at the company's Westlakes Drive address.

On April 11, 2006, the Board received a letter from Elizabeth Murphy, attorney for Ameriquest, alleging that Ameriquest did not receive proper notice of the ALJ's hearing or any other proceedings in this case and that the company had not received documents concerning the case in a timely manner. Murphy averred that the Westlakes Drive field office address was not a proper address for service of process and that no one at the office was authorized to accept service on behalf of the company. Murphy also requested copies of documents admitted into evidence.

Both McCloskey and Ameriquest have filed briefs before the Board. McCloskey challenges the ALJ's damages award. Ameriquest contends in response that the ALJ lacked personal jurisdiction over Ameriquest due to defective service of process, that the ALJ lacked subject matter jurisdiction over the case because Ameriquest is not an employer covered by the SOX, and that McCloskey's complaint was untimely.

DISCUSSION

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB.⁵ Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.⁶ In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision"⁷ Therefore, the Board reviews an ALJ's conclusions of law de novo.⁸

The SOX statute incorporates the procedural rules of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) set forth in section 42121(b) of Title 49, United States Code.⁹ These rules provide that the Secretary of Labor must

⁵ See Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002). See also 29 C.F.R. § 1980.110.

⁶ See 29 C.F.R. § 1980.110(b).

⁷ 5 U.S.C.A. § 557(b).

⁸ See *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

⁹ 18 U.S.C.A. § 1514A(b)(2)(A) (Action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.)

notify the employer of the filing of the complaint, the allegations, supporting evidence, and the opportunities for a hearing.¹⁰

The SOX's implementing regulations require that ALJs follow the procedural rules set forth in 29 C.F.R. § 18.3 (discussing requirements for service by the Office of Administrative Law Judges).¹¹ In turn, these Rules of Practice and Procedure provide that copies of all documents shall be served on all parties of record and that service is effected if made upon an attorney or other representative of the party "by personal delivery or by mailing a copy to the last known address."¹² The regulations also provide that both "the complainant and the named person shall be parties in every proceeding"¹³ and that the Office of Administrative Law Judges "serve[]" all "orders" upon "all parties of record."¹⁴

The regulations further provide that service of a complaint¹⁵ shall be made either "(1) By delivering a copy to the individual, partner, officer of a corporation, or attorney of record; (2) by leaving a copy at the principal office, place of business, or residence; (3) by mailing to the last known address of such individual, partner, officer or attorney."¹⁶ Finally, the regulations provide that when a party fails to appear at a hearing without good cause, the administrative law judge may enter a default decision against that party.¹⁷

There is no evidence that McCloskey served his objections to OSHA's findings in accordance with 29 C.F.R. § 8.3(d), by mailing them to an individual, partner, officer of the corporation, or to an attorney of record. The record evidence also does not support the ALJ's finding that Ameriquest was "served . . . with a copy of the Notice of Hearing and . . . chose not to appear." Tr. at 5. Our adversarial system relies upon the

¹⁰ 49 U.S.C.A. § 42121(b)(1).

¹¹ 29 C.F.R. § 1980.100(b).

¹² 29 C.F.R. § 18.3(a), (b).

¹³ 29 C.F.R. § 1980.108(a); *see also* 29 C.F.R. § 1980.101 (defining "named person" as the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act.).

¹⁴ 29 C.F.R. § 18.3(a).

¹⁵ "Complaint" is defined in the regulations as "any document initiating an adjudicatory proceeding, whether designated a complaint, appeal or an order for proceeding or otherwise . . ." 29 C.F.R. § 18.2(d).

¹⁶ 29 C.F.R. § 18.3(d).

¹⁷ 29 C.F.R. § 18.39(b).

fundamental concept that decisions affecting parties' rights should not be made without giving those parties notice and the opportunity to be heard.¹⁸ Therefore, the ALJ abused his discretion in entering a default judgment against Ameriquest. Accordingly, we remand this case to give Ameriquest an opportunity to respond to the ALJ's Order To Show Cause.

Because of our decision to remand, we need not address Ameriquest's arguments concerning lack of subject matter jurisdiction and timeliness of the complaint. With regard to jurisdiction, however, we note that statutory limitations on coverage are not jurisdictional unless Congress has explicitly ranked them as jurisdictional. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

CONCLUSION

We **VACATE** the ALJ's default judgment and **REMAND** for further proceedings consistent with this Order.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹⁸ *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 7 (ARB Aug. 31, 2007).