U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ERNEST A. OLIVER **ARB CASE NO. 97-063**

COMPLAINANT, **ALJ CASE NO. 91-SWD-0001**

v. **DATE: January 6, 1998**

HYDRO-VAC SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER ON REMEDIES

On November 1, 1995, the Secretary found that Respondent Hydro-Vac Services, Inc. discriminated against Complainant Ernest A. Oliver for engaging in activities protected under the Solid Waste Disposal Act of 1988, 42 U.S.C. §1967 (1988), and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1367 (1988), when it fired him in August 1990. The Secretary ordered Hydro-Vac to reinstate Oliver to his former position and remanded this case to the Administrative Law Judge for a recommended decision on the appropriate amount of damages. The case was assigned to another ALJ who on February 19, 1997 recommended the following: (1) $12,500 in back pay plus interest at 5.52%; (2) $25,000, with interest, in front pay in lieu of reinstatement; (3) and $6,000 in attorney's fees and costs. Recommended Decision and Order (R. D. & O.) at 8. The ALJ denied compensatory damages.

Both parties filed exceptions to the ALJ's recommendations. Oliver and Hydro-Vac both object to the refusal of the ALJ to issue third party subpoenas. Oliver "takes issue with the [amount of] front pay and failure to enforce reinstatement," but does not explain in any more detail the basis for his exception to the front pay award or how much additional front pay he seeks. Oliver also requests a new hearing to give him an opportunity to present evidence on compensatory damages and asks for a Department of Labor investigation into the "fraud, perjury, and conspiracy against Complainant and [the Board]."

In addition to excepting to the refusal of the ALJ to issue third party subpoenas, Hydro-Vac objects to the ALJ's admission in evidence of certain documents. Hydro-Vac also asserts that Oliver did not seek to mitigate his damages with reasonable diligence so that no back pay or front pay should be awarded. It also argues that, if any back pay is due, it should be cut off at the point that Oliver's former position was eliminated for nondiscriminatory reasons.

The parties exceptions to the failure of the ALJ to issue subpoenas to individuals who are not parties, or officials and managers of an entity that is a party are denied.[1/] It is well established that an agency has no authority to issue subpoenas absent explicit statutory authority. *Equal Employment Opportunity Commission v. Children's Hospital Medical Center of Northern California*, 719 F.2d 1426, 1428-29 (9th Cir. 1983); *U.S. ex rel Richards v. De Leon Guerrero,* 4 F.3d 749, 753 (9th Cir. 1993). The Secretary has held that the Secretary (or an ALJ) has no power under the ERA (Energy Reorganization Act) to issue subpoenas or to punish for contempt for failure to comply with a subpoena. Under the APA, an employee presiding at a hearing only has authority to "issue subpoenas authorized by law," section 7(b), 5 U.S.C. §556(c)(2), and there is no such authorization in the ERA. Compare section 710 of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-9 (1982). It is fairly well settled that "[t]his power to punish [for contempt] is not available to federal administrative agencies." *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 1893). *Malpass and Lewis v. General Electric Co.,* Case Nos. 85-ERA-38 and 39, Sec'y. Dec. March 1, 1994, slip op. at 22.

There is no subpoena power granted to the Department of Labor in either the Solid Waste Disposal Act or the Federal Water Pollution Control Act. *See* 29 C.F.R. §18.29(a)(4) (1996) (ALJ has authority to issue subpoenas "as authorized by statute or law.")[2/] The Acting Assistant Secretary for Occupational Safety and Health, the Department of Labor agency that administers the whistleblower provisions of those statutes, was given an opportunity to express his views on whether the Department of Labor has the authority to issue subpoenas and he agreed that there is no express or implied authority to do so under those laws.

The record in this case has been reviewed and we find it supports the ALJ's conclusions that: (1) Oliver did not carry his burden of proving that he had a contract with Hydro-Vac to set up a full service laboratory for which they would pay him $50,000 a year; (2) his earnings at Tech Labs from August of 1990 to May of 1991 fully offset any back pay due from Hydro-Vac because his salary and benefits at Tech Labs exceeded that at Hydro-Vac; (3) that Hydro-Vac has not carried its burden of showing that Oliver failed to exercise reasonable diligence in mitigating damages when he resigned from Tech Labs because they requested him to perform illegal acts; and (4) Oliver presented no evidence which would entitle him to compensatory damages.[3/]

[1/] The ALJ has adequate authority to compel testimony and production of documents from witnesses in control of parties under 29 C.F.R. §18.29(a)(3), and by making appropriate adverse findings for failure of a party to comply. *See, e.g.,* Fed. Rules of Civ Pro. 37(b)(2)(A), (B), and (C).

[2/] We also find that the ALJ acted within his discretion in admitting certain documents objected to by Hydro-Vac and according them appropriate weight in light of the lack of an opportunity for cross-examination. 29 C.F.R. §24.5(e).

[3/] Oliver had an opportunity to prove entitlement to compensatory damages when this case was remanded by the Secretary. We find no basis for a remand now for another hearing on this issue and (continued...)

However, we disagree with the ALJ that Oliver is entitled to back pay for one year from the "date of judgment." R. D. & O. at 7. The ALJ credited the testimony of William Foxworth, the President of Hydro-Vac, that the position held by Oliver was filled by Sharon Pennington and was eliminated when she left the company sometime in 1991.[4/] The Secretary has adopted for ERA cases the "long accepted rule of remedies in labor law that the period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found." *Francis v. Bogan*, Case No. 86-ERA-8, Sec. Final Dec., Apr. 1, 1988, slip op. at 6. *See also Martinez v. El Paso County*, 710 F.2d 1102, 1106 (5th Cir. 1983) (cutting off back pay because, even if transferred to position sought, plaintiff would have been terminated in three months when position eliminated); *Walker v. Ford Motor Company*, 684 F.2d 1355, 1363 (11th Cir. 1982) (terminated participant in minority automobile dealership training program awarded back pay only until end of program because no certainty he would have been offered dealership on completion of program); *Welch v. University of Texas and Its Marine Science Institute*, 659 F.2d 532, 535 (5th Cir. 1981) (back pay awarded from date of constructive discharge to date grant expired because "it is simply a matter of speculation" whether grantee would have received another grant); *Lamb v. Drilco Division*, 32 FEP Cases 105, 107 (S.D. Tex. 1983) (discriminatorily discharged employee awarded back pay until date she would have been laid off in reduction-in-force). The same rule applies under the environmental whistleblower statutes. The record supports a finding that the position in question had been eliminated no later than the end of 1991[5/] and therefore Oliver is entitled to back pay from May 10, 1991 until Dec. 31, 1991. For the same reason, Oliver is not entitled to reinstatement or front pay.

[3/](...continued)
Oliver's request is denied.

[4/] The record is not clear on exactly when Ms. Pennington left Hydro-Vac's employ; Mr. Foxworth testified "she left on the 17th of 1991," but did not specify a month.

[5/] We make this finding because Hydro-Vac failed to introduce evidence to establish an earlier elimination date. *Hoffman v. W. Max Bossert and Boss Insulation and Roofing, Inc.*, Case No. 94-CAA-004, ARB Dec. Jan. 22, 1997, slip op. at 2; *OFCCP v.. Lawrence Aviation Industries, Inc.*, Case No. 87-OFC-11, Sec'y. Dec. Jun. 15, 1994, slip op. at 9.

Finally, the Secretary and the Board have held numerous times that interest on back pay should be calculated at the rate prescribed in 26 U.S.C. § 6621 (1988). *See, e.g., Tracy A. James v. Pritts-MC Enany Roofing, Inc.,* Case No. 96-ERA-5**,** Final Dec. Sept. 6, 1996. Oliver is therefore entitled to back pay for eight months at $2083.33 per month, with interest at the above prescribed rate from the date of the Secretary's 1995 decision until payment is made. [6/]

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

[6/] The Board has no authority to act on Oliver's request for a hearing on his allegations of fraud, perjury and conspiracy and the request is denied.