U.S. Department of Labor

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

In the Matter of:

WALTER R. MOORE,

COMPLAINANT,

v.

U.S. DEPARTMENT OF ENERGY

RESPONDENT.

ARB CASE NO. 99-094

ALJ CASE NO. 99-CAA-14[1]

DATE: July 14, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

On June 10, 1999, Complainant, Walter Moore, filed a pair of motions with this Board: (1) a Motion for Quo Warranto Hearing on *Ex Parte* Communications and Other Due Process Problems, Counsel's Declaration, and (2) a Motion to Order DOL and DOE Employees to Answer Questions. In particular, Complainant alleges that there would be an appearance of impropriety should Cynthia L. Attwood, one of the three Administrative Review Board members, hear any cases in which Complainant's counsel, Edward A. Slavin, Jr., is appearing.

Complainant's allegation of an appearance of impropriety is based on a Memorandum from Richard Fairfax, the Occupational Safety and Health Administration's [OSHA] Director of the Directorate of Compliance Programs, to John B. Miles, Jr., Regional Director, OSHA, dated February 19, 1999. Fairfax's Memorandum apparently was written in response to correspondence from Complainant's counsel raising concerns about whistleblower investigations being performed by the OSHA Region VI office. Fairfax, in his Memorandum, states that

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[1]On June 10, 1999, the Administrative Review Board received Complainant's Petition for Review. The caption identified the recommended decision and order of which review is sought as ALJ case 1999-CAA- 15, issued by ALJ Larry W. Price on June 4, 1999. The ALJ issued an order in 1999-CAA-15 on June 4, 1999, but he issued no recommended decision and order in that case on that date. However, the ALJ did issue a recommended decision and order in a second case involving complainant Moore, 1999-CAA- 14, on June 4, 1999. We have spoken with Complainant's counsel by telephone and he has confirmed that his petition for review was mis-captioned, and that he intended to petition for review of the recommended decision and order in 1999-CAA-14, rather than of the order in 1999-CAA-15.

Complainant's counsel previously has corresponded with the Secretary about these concerns, and that Complainant's counsel has raised similar complaints about investigative work in other OSHA regional offices. Fairfax also states in his Memorandum that Complainant's counsel "has also asked for the recusal of all Administrative Law Judges who have presided over hearings for his clients, and made charges against Chief Administrative Law Judge John Vittone and Administrative Review Board Member Cynthia Atwood [sic]."

Complainant contends that the Fairfax Memorandum's reference to ARB Member Attwood "raises a clear question as to whether there was any an [sic] *ex parte* communication between Mr. Fairfax and a member of the ARB or its staff on matters being litigated before them."

Quo warranto is "the prerogative writ by which the government can call upon any person to show by what warrant he holds a public office or exercises a public franchise." *Newman v. United States el rel. Frizzle,* 238 U.S. 537, 545-546 (1915). It has been defined as "'an information, criminal in form, presented to a court of competent jurisdiction, by the public prosecutor, for the purpose of correcting the usurpation, mis-user, or non-user, of a public office or corporate franchise . . . and while still retaining its criminal form, it has long since come to be regarded as in substance, a civil proceeding, instituted by the public prosecutor, upon the relation of private citizens, for the determination of purely civil rights.'" *United States ex rel. State of Wisconsin v. First Federal Savings and Loan Assoc.,* 248 F.2d 804, 807 (7th Cir. 1957)(citation omitted).

An administrative agency is a tribunal of limited jurisdiction which may exercise only the powers granted to it by statute. *Pentheny, Ltd. v. Virgin Islands,* 360 F.2d 786, 790 (3d Cir. 1966). *Accord Federal Trade Commission v. National Lead Co.,* 352 U.S. 419, 428 (1957). The environmental statutes under which Complainant has sought relief do not confer quo warranto jurisdiction upon the Administrative Review Board, nor has Complainant cited to any other source of such jurisdiction. *Cf. United States ex rel. State of Wisconsin v. First Federal Savings and Loan Assoc., supra,* 248 F. 2d at 808 (except as otherwise specifically provided by statute, there is no original jurisdiction in the federal district court to entertain quo warranto actions). Accordingly, Complainant's motion for a quo warranto hearing is **DENIED.** Furthermore, the denial of Complainant's motion for a quo warranto hearing renders moot his motion to order DOL and DOE employees to answer questions. The purpose of these questions is to adduce evidence to be presented in the quo warranto proceeding. Consequently. the motion to order DOL and DOE employees to answer questions is also **DENIED.**

Finally, the Board, of course, must consider carefully the allegation that a Board Member's participation in a case would raise an appearance of impropriety. However, we strongly disagree with Complainant's assertion that Fairfax's Memorandum raises a "clear" question as to the existence of any *ex parte* communication, whether direct or indirect, between Board Member Attwood and Fairfax. Member Attwood does not know Richard D. Fairfax, and to her knowledge has never had any direct or indirect communication with him. No Board Member has communicated with Fairfax, and we are not aware that any member of the Administrative Review Board's staff has communicated with Fairfax. We therefore conclude that

Member Attwood's consideration of Complainant's case would not create an appearance of impropriety because Complainant's allegation that Member Attwood possibly engaged in *ex parte* communication with Richard Fairfax is baseless.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member