DATE: March 1, 1994
CASE NOS. 85-ERA-38
85-ERA-39

IN THE MATTER OF

JOY MALPASS AND JOHN
CLARENCE LEWIS,

COMPLAINANT,

v.

GENERAL ELECTRIC COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case raises important questions of the authority of an Administrative Law Judge (ALJ) over prehearing procedures, to set the time for a hearing, and to impose sanctions for failure to comply with his orders under the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988) (ERA or the Act) and its implementing regulations, 29 C.F.R. Part 24 (1993), as well as the Department of Labor Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (1993) (Rules of Practice). The ALJ recommended dismissing these complaints because Complainants and their counsel failed to appear for the hearing scheduled for December 2, 1985, and because complainants failed to respond to various discovery requests by respondent and refused to comply with the ALJ's pre-hearing and discovery orders. ALJ Recommended Order of Dismissal (R.O.D.) at 9. I find that the ALJ was well within his authority in the actions he took in this case and I adopt his recommendation that these complaints be dismissed. I also agree with the ALJ, although for different reasons, that attorney's

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fees and costs may not be assessed against Complainants or their counsel.

BACKGROUND

The complaint in these consolidated cases was filed May 23,

1985 and subsequently amended three times. After an investigation, the Wage and Hour Division of the Department of Labor's Employment Standards Administration (Wage-Hour) found no violation and so notified the parties on August 30, 1985. Complainants filed a timely request for a hearing on September 5, 1985.

The ALJ contacted counsel for the parties by conference call on September 18, 1985, setting December 2, 1985 for the hearing. During that call, Mozart Ratner, counsel for complainants, [1] objected to the December 2, 1985 date on the grounds that he had "prior judicial commitments" (see 29 C.F.R. § 18.28(a)), and that he had a right to a complete copy of the Wage and Hour Division's final investigation report (with only the names of informants deleted) in order to begin his preparation in the case and before his clients could be required to respond to any discovery. Mr. Ratner's prior judicial commitments were the writing of the
initial and reply briefs in *English v. General Electric*, 85-ERA-2, which were due on October 1, 1985 and November 1, 1985, respectively, and another unspecified commitment of 10 days duration. The ALJ did not accept these arguments, and by pre-hearing order of October 10, 1985 confirmed the hearing date of December 2, 1985 and set November 15, 1985 as the last date for the parties to exchange witness lists, exhibits and a pre-hearing statement.

On October 16, 1985 Respondent served notice of the depositions of the Complainants to be taken on October 31, 1985, and served a request for production of documents with a response date of November 20, 1985. Respondent also served its first set of interrogatories on Complainants on September 30, 1985, with responses requested by November 15, 1985.

The day before the depositions were to be taken, October 30, 1985, Mr. Ratner made an oral motion for a protective order in a conference call between the ALJ and counsel for Respondent. He argued that he could not respond to any of Respondent's discovery until he had an unredacted copy of the Wage and Hour final investigation report. He had made a Freedom of Information Act (FOIA) request for the full report, which had been denied by Wage-Hour and which he was appealing to the Solicitor. See 29 C.F.R. § 70.22. In his written motion for a protective order, filed on November 4, 1985, and read over the telephone in the conference call of October 30, 1985, the only grounds upon which Mr. Ratner based his request for a protective order with respect to G.E.'s interrogatories was that G.E. would be able to discover

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the names of employees who had spoken to the Wage-Hour investigator, information which the Wage-Hour Division always kept confidential. Mr. Ratner offered no further explanation of why he and his clients could not respond to any of G.E.'s other discovery without a full copy of the final investigation report. The ALJ denied the motion for a protective order and ordered complainants to appear for their depositions the next day. They did not.

On November 15, 1985 the ALJ ordered complainants to appear for their depositions on November 22 and 23, 1985 and to respond

to G.E.'s interrogatories and request for production of documents. Complainants did not comply with that order. [2] Complainants moved for involuntary dismissal on November 7, 1985 in order to seek review of the ALJ's denial of their request for a protective order. That motion was denied on November 15, 1985. On November 25, 1985 Respondent made a motion for an order to show cause why the complaints should not be dismissed and why attorney's fees and costs should not be awarded against

Complainants. The ALJ's recommended decision constitutes his ruling on that motion.

On November 29, 1985, Complainants moved the Secretary for a stay pending appeal to postpone the hearing scheduled for December 2, 1985. That motion was denied on December 20, 1985. The ALJ and counsel for Respondent appeared for the hearing on December 2, 1985 in Wilmington, N.C., but neither Complainants nor their counsel appeared, and they gave no prior notice that they would not appear. The ALJ issued an order to show cause why the complaints should not be dismissed and costs and attorney's fees should not be awarded against Complainants and their counsel. The ALJ considered Complainants' and Respondent's responses to this order and concluded that Complainants had not shown good cause and recommended that their complaints be dismissed. However, he denied Respondent's request for attorney's fees and costs, holding that imposition of those sanctions would have a chilling effect on whistleblowers and their counsel.

DISCUSSION

The authority of an administrative law judge to control the course of a hearing and rule on procedural matters derives, in the first instance, from section 7(b) of the Administrative Procedure Act, 5 U.S.C. § 556(c) (1988) (APA) which provides that, among other things,

> employees presiding at hearings may -
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> * * * *
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> (5) regulate the course of the hearing;
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> * * * *
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> (7) dispose of procedural requests or

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> similar matters;

As to setting the time and place for hearings, section 5(a) of the APA only requires that "due regard shall be had for the convenience and necessity of the parties or their representatives." 5 U.S.C. § 554(b).

The Department of Labor has supplemented the APA with regulations applicable to all administrative hearings, the Rules of Practice, and with specific regulations applicable to ERA cases, 29 C.F.R. Part 24. The questions involved here are (1) the scope of an ALJ's discretion under the APA and 29 C.F.R. § 18.28 to grant a continuance of the hearing, (2) the scope of an ALJ's authority under the APA and 29 C.F.R. § 18.21 to compel compliance with discovery, and (3) the appropriate sanctions under the Rules of Practice and 29 C.F.R. Part 24 for failure to comply with an ALJ's orders regulating the course of a hearing.

I - *Denial of Continuance*

At the outset, I reject Complainants' argument that 29 C.F.R. § 18.28 leaves the ALJ with no discretion to deny a request for a continuance once counsel has identified "prior judicial commitments." The nature of the prior commitment must constitute "good cause" just as any other reason for a continuance. The circumstance of this case are an excellent example of why the ALJ retains discretion to evaluate the nature of the prior commitment in deciding whether to grant the

continuance. An argument scheduled in the Supreme Court on the same day as the hearing, for example, would present a fairly compelling case for a continuance. At the other end of the spectrum are cases such as this where counsel have briefs due, or perhaps depositions scheduled, interrogatories to respond to, or pre-trial orders to comply with. Few trial lawyers do not have several cases in active litigation with many overlapping due dates to be met. The ALJ must have discretion to evaluate the nature and extent of these competing commitments or control of administrative proceedings will be in the hands of counsel, not the ALJ. Therefore, I view the issue here to be whether the ALJ abused his discretion.

The courts have uniformly held, in a variety of administrative contexts, that the grant or denial of a continuance is within the sound discretion of the ALJ. *NLRB v. A.J. Siris Products Corp. of Virginia*, 186 F.2d 502 (4th Cir. 1951). The Seventh Circuit summarized the law on an ALJ's authority to grant a continuance saying, "[i]t is well established that the grant or denial of a continuance is within the discretion of the ALJ and will not be overturned absent a clear showing of abuse. [Citation omitted.] Such an abuse will be found only where the exercise of discretion 'is demonstrated

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to clearly prejudice the appealing party.' *Electronic Design and Development Co. v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969)." *NLRB v. Pan Scape Corp.*, 607 F.2d 198, 201 (7th Cir. 1979).

A review of some of the circumstances under which the courts have found that denial of a continuance was not an abuse of discretion strongly supports the ALJ's action in this case. In *Pan Scape*, a denial of a continuance was upheld where the employer sought time to obtain the presence of assertedly key management witnesses when the hearing had been scheduled well in advance. In *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982), PATCO sought a thirty day continuance to prepare and present evidence in mitigation of the remedy sought by the FLRA. The court enumerated several factors to be considered by an ALJ in exercising his discretion: "the length of the delay requested, the potential adverse effects of that delay, the possible prejudice to the moving party if denied the delay, and the importance of the testimony that may be adduced if the delay is granted." 685 F.2d 547, 588. PATCO never identified, either before the FLRA or the court of appeals, the nature of the evidence it would have offered in mitigation, while it had had several months to prepare. PATCO was at least under an obligation to make a "proffer" of evidence which it did not do. The court held it was not an abuse of discretion to deny the continuance in these circumstances. 685 F.2d 547, 589.

In *United Fruit and Vegetable Co., Inc. v. Director of the Fruit and Vegetable Division, Marketing Service, United States Department of Agriculture*, 668 F.2d 983 (8th Cir. 1982), *cert. denied* 456 U.S. 1007, the court held it was not an abuse of discretion for an ALJ to deny a continuance for United Fruit to obtain its own records from the FBI after they had been seized in a criminal investigation. The

court said United Fruit did not show what purpose a continuance would serve and did not make an offer of proof as to what the records would establish.

The authority of an ALJ over the course of a hearing is analogous to that of a federal district judge over pre-trial and trial proceedings. Here too, the courts of appeal have sustained the broad discretion of district judges to grant or deny continuances. In *Leve v. Schering Corp.*, 73 F.R.D. 537 (D.N.J. 1975), aff'd 556 F.2d 567 (3rd Cir. 1975), plaintiffs failed to appear for their depositions and to produce documents, and offered as a reason for that failure and as grounds for a continuance the personal difficulties of their counsel - the death of an associate, the medical leave of a partner. Rejecting these grounds, and denying a continuance, the district court said "if the personnel problems were so serious, no explanation is given of the failure to turn the case over to someone else.

Plaintiffs' interests required that this matter be given attention, and if present counsel was unable to do so, he had a professional obligation to see that someone else who could do so be engaged." 73 F.R.D. at 540.

I find that the ALJ here did not abuse his discretion in rejecting Mr. Ratner's grounds for a continuance, that is, the briefs due in *English v. General Electric* and another unspecified commitment, and the need for the Wage-Hour Final Investigation Report to prepare for trial. Mr. Ratner had 75 days actual notice of the hearing (September 18, 1985 to December 2, 1985) and had a considerable amount of time prior to that for preparation, having filed the original complaint on May 23, 1985. As I pointed out above, a deadline like filing a brief which falls in the same general time period as a scheduled hearing is the type of commitment which the ALJ must have discretion to evaluate, and some clear showing of prejudice to the moving party must be made before an abuse of discretion can be found. [3]

Mr. Ratner has made no showing or proffer of what kind of information he could gain from the Wage-Hour final investigation report which would be so crucial to his preparation in this case as to warrant a continuance. In addition, he has made no argument or proffer with respect to this document which could justify refusing to proceed with discovery at all and instructing his clients not to appear for their depositions. The final investigation report is not part of the record in an ERA case. It is not admissible as an exhibit in the case because the hearing before the ALJ is a trial *de novo* and the final investigation report is not entitled to any weight or deference. *Egenrieder v. Metropolitan Edison Co./GPU*, Case No. 85-ERA-23, Sec. Order, April 20, 1987, slip op. at 8 n.9. There is no regulation requiring that the final investigation report be made part of the record or be filed with the ALJ. [4] It is therefore not part of the record for decision under section 8 of the APA,
5 U.S.C. § 557, as defined in section 7(d), 5 U.S.C. § 556(e).

Complainants sought the final investigation report by means of a FOIA request, not through discovery under the Rules of Practice. But the FOIA is not a means of circumventing

discovery, and pendency of an FOIA claim is not grounds for enjoining an agency proceeding. See *Bannercraft Clothing Co. v. Renegotiation Board*, 415 U.S. 1 (1974); *Abrahamson Chrysler Plymouth v. NLRB*, 561 F.2d 63 (7th Cir. 1977). [5]

II. *Refusal To Proceed With Discovery*

It is difficult to conceive what Mr. Ratner could glean from the only portion of the Wage-Hour final investigation report that was not provided to him, the investigator's reasoning and conclusions, which could be so crucial to his trial preparation as to warrant a continuance or justify an absolute refusal to

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proceed with discovery at all. Complainants could have had their depositions taken and Mr. Ratner could have noted appropriate objections for the record to be ruled on at the hearing by the ALJ if Respondent sought to use the depositions. Mr. Ratner could have tried the case under an objection and sought review by showing how his clients were prejudiced by the lack of access to that one portion of the report. Mr. Ratner, of course, had all the discovery mechanisms of the Rules of Practice available to him to prepare for the hearing. He should have made reasonable attempts to obtain by other means the information he sought through the withheld portion of the final investigation report before refusing to proceed at all.

Moreover, I reject the grounds Complainants set forth in their motion for a protective order as the basis for refusing to answer Respondent's interrogatories. They argued that Respondent would be abe to obtain the names of informants who gave information to the government. In effect, Complainants would treat interrogatories served on them as interrogatories served on the Department of Labor and attempt to assert the informer's privilege on behalf of the Wage-Hour Administrator. That privilege is simply not theirs to assert. The informer's privilege is a governmental privilege, *Wirtz v. Governmental Finance & Loan Company of West End*, 326 F.2d 561 (5th Cir. 1964), and is assertable only by the government, *U.S. v. Reynolds*, 345 U.S. 1 (1952); *Carr v. Monroe Manufacturing Co.*, 431 F.2d 384 (5th Cir. 1970). The proper procedure to follow would have been to notify the Wage-Hour Administrator of the discovery being sought to give the Administrator an opportunity to intervene for the limited purpose of protecting informers' names. Moreover, Respondent's interrogatories did not request the names of employees who spoke to the Wage-Hour investigator. The interrogatories sought, among other things, the names of employees other than Complainants who were intimidated and harassed by Respondent, and the acts or statements which constituted such intimidation and harassment. It is doubtful whether the informer's privilege is even applicable to shield this type of information. See *United States v. Julius Duchin Enterprises, Inc.*, 370 F. Supp. 942, 944-45 (D. Tenn. 1973). In addition to their refusal to answer interrogatories, Complainants never gave any explanation of why the lack of that portion of the final investigation report justified refusal to have their depositions taken.

I also reject Complainants' assertion that fear of reprisal justifies a "total curtailment of employer discovery" of the names of a whistleblower's witnesses prior to the hearing. Such

a limitation on a party's pre-trial preparation would be totally inconsistent with modern theories of discovery. "[T]he sporting

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theory of litigation thrives on surprise - including surprise witnesses. Elimination of this sort of tactic is a legitimate purpose of the discover rules. . . ." J. Moore, Federal Practice ¶ 26.57(4), at 26-212. One of the leading articles in the area, Tomlinson, Discovery in Agency Adjudication, 1971 Duke Law Journal 89, points out that, where there is an explicit anti-retaliation provision "[t]he disclosure of witnesses' names may in some instances actually protect them. . . . [T]he . . . employer knows that his treatment of the [witness] will be closely scrutinized to insure that there is no discrimination against him. . . . The [employer's] awareness of this scrutiny deters from seeking reprisals against the [witness]." *Id.* at 101. In order to obtain a protective order from disclosing the name of a witness, the applicant "must produce substantial evidence, not just unverifiable fears, that disclosure would endanger the witness." *Id.* at 102 (footnote omitted). Complainants presented no such evidence at all here. [6]

III. *Sanctions.*

The ALJ recommended that the complaints in this case be dismissed, but recommended that Respondent's attorney's fees and costs not be assessed as a sanction against Complainants or their attorney. He believed assessing attorney fees and costs as a sanction "would have a chilling effect on other potential 'whistleblowers' and could have a similar effect on the willingness of attorneys to represent such 'whistleblowers.'" R.O.D. at 9. Complainants excepted to the dismissal of their complaints for failure to show good cause for their failure to appear for the hearing. Respondent excepted to the failure of the ALJ to award attorney's fees and costs.

1 - Dismissal

Department of Labor regulations implementing the ERA provide that an ALJ may "dismiss a claim (A) Upon the failure of the complaint or his or her representative to attend a hearing without good cause; [or] (B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge." 29 C.F.R. § 24.5(e)(4). The Secretary has not previously considered the question of what constitutes good cause for failure to attend a hearing or comply with an ALJ's order. [7] The Secretary also has not considered whether dismissal could be ordered for the misconduct of a party's attorney. The courts, however, have considered this issue in a variety of contexts.

The leading Supreme Court decision on the authority of a district judge to dismiss an action for failure of the plaintiff to prosecute is *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). The district judge dismissed the action there six years after it had been filed, after postponing the trial twice, and after plaintiff's counsel failed to appear for a pre-trial conference.

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Trial judges have the authority to dismiss an action for failure to prosecute, the Court held, to "prevent undue delays . . . and to avoid congestion in [court] calendars." *Id.* at 629-30.

The Court found no violation of due process in the failure of the district court to hold a hearing and dismissal of the action on the court's own motion. *Id.* at 632. Here, of course, the ALJ complied with the regulations by issuing an order to show cause, giving Complainants an opportunity to present good cause for their actions.

In *Link*, the Court also found "no merit" to the argument that dismissal for the misconduct of one's attorney is unjust to the party. "Petitioner voluntarily choose this attorney . . . and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. . . . [A] party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all the facts, notice of which can be charged upon the attorney.'" *Id.* at 633-34 (citation omitted).

In cases applying *Link*, the courts of appeals have recognized a tension between a court's power to prevent delays and the public policy that cases should be decided on their merits. The Fourth Circuit has said that "dismissal 'must be tempered by a careful exercise of judicial discretion' [and] is permitted 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.'" *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974)(citation omitted). The Fourth Circuit has established four factors which should be considered before dismissing a case for failure to prosecute: 1) the plaintiff's degree of personal responsibility; 2) the amount of prejudice caused the defendant; 3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and 4) the effectiveness of sanctions less drastic than dismissal. *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir. 1989).

A key factor in many cases is whether there was a deliberate attempt to delay, or only sloppiness or a lackadaisical attitude of a party's attorney. *Herbert v. Saffell*, 877 F.2d at 270. ("[W]e do not condone the lackadaisical response [of plaintiffs counsel to] the district court's deadlines [but] we see no evidence of deliberate delay."); *Hillig v. Commissioner of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990) ("The record indicates sloppiness and a lack of communication, but it does not support a conclusion that the delay was deliberate.") *See also Roland v. Salem Contract Carriers, Inc.*, 811 F.2d 1175, 1177 (7th Cir. 1987) (dismissal for failure to prosecute under rule 41(b) should be granted "only when there exists a clear record of delay or contumacious conduct or when less drastic sanctions have proven ineffective.")

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The Seventh Circuit has held that deliberate abuses of the trial court's authority by an attorney justify dismissal. *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058 (7th Cir. 1989). In a bankruptcy proceeding, Pyramid's counsel never filed its pre-trial order, though ordered to do so several times by the court. Finally, counsel did not appear for trial. The court of appeals affirmed dismissal saying "[t]hese facts represent exactly the kind of dilatory behavior courts should not tolerate or condone." *Id.* at 1061. On the failure of counsel to appear for trial, the court said "[w]hatever the reason . . . the bankruptcy court need not have

tolerated this flagrant abuse of judicial time and resources." *Id*. n.7. The court rejected Pyramid's argument that it should be excused because the abuses were those of its attorneys, holding that "a court may dismiss an action with prejudice against a plaintiff for the actions of counsel [because] a party who chooses his counsel freely should be bound by his counsel's actions." *Id*. (Footnote omitted.) The court explained "[o]therwise, the court's power to control its docket, and compel attorneys to proceed within the time frame set by the court and not their own would erode and eventually disappear. . . . A trial court is entitled to say, under proper circumstances, that enough is enough . . . and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear." *Id*. at 1062.

In this case, it is clear from the record that Complainants' counsel engaged in delaying tactics without justification. As discussed above, the failure to the Department of Labor to respond favorably to counsel's FOIA request for the unredacted Wage-Hour investigation report is not an acceptable reason for refusing to proceed with discovery or go to trial. The ALJ also acted well within his discretion in denying counsel's request for a continuance. When the ALJ denied counsel's request on October 30, 1985 for a protective order postponing depositions of Complainants, counsel directed his clients not to appear, and again directed his clients not to comply with the ALJ's order of November 15, 1985 to appear for depositions on November 22 and 23, 1985. When the ALJ's order was read to him over the phone the day it was issued, counsel expressed contempt for it and the ALJ, saying he would not comply with it. Having lost their attempts to delay the proceedings before the ALJ, as well as their request to the Secretary for a stay pending appeal, neither Complainants nor their counsel appeared for the hearing or even notified the ALJ or opposing counsel that they would not appear. This is exactly the kind of dilatory and contumacious conduct an ALJ need not condone. *Pyramid Energy, Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1061. In these circumstances, the ALJ need not have considered whether other sanctions short of

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dismissal were appropriate. [8]

2. Attorney's fees and costs.

Respondent has excepted to the ALJ's recommendation not to assess attorney's fees and costs as a sanction for Complainants' refusal to comply with discovery requests and orders, and failure to appear for the hearing. Respondent characterizes Complainants' counsel's conduct as "dilatory and vexatious" justifying sanctions, including attorney's fees and costs, beyond the sanction of dismissal. Respondent argues that attorney's fees and costs should be assessed under Rule 11 of the Federal Rules of Civil Procedure. [9]

I have no doubt that, had this case been tried in federal district court, the court would have had the authority and sufficient grounds to impose sanctions for Mr. Ratner's refusal to comply with discovery orders, Fed. R. Civ. P. 37(b) and (d), and refusal to comply with the order scheduling the trial, Fed. R. Civ. P. 16(f). Indeed, some of Mr. Ratner's conduct may have

warranted holding him in contempt or imposing sanction under Rule 11 (e.g., direct refusal to obey the ALJ's orders; contumacious conduct in response to the ALJ's order, see note 1, supra.)

But I have considerable doubt about the Secretary's authority directly to order sanctions beyond an order controlling the hearing and proceedings before the Secretary (e.g. refusal to permit a party to testify, taking certain facts to be established, barring an attorney from participation, or dismissal of the matter.) [10] It seems clear, for example, that the Secretary (or an ALJ) has no power under the ERA 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).

The ALJ believed his authority to impose sanctions derived from the Federal Rules of Civil Procedure, incorporated by reference in the Rules of Practice at 29 C.F.R. § 18.29(a), and from 28 U.S.C. § 1927 (1988). The ALJ reasoned that his orders would be enforceable under the provision of the ERA granting jurisdiction to the district courts of actions by the Secretary to enforce orders issued under the Act. 42 U.S.C. § 5851(d).

But the orders referred to in section 5851(d), those issued under section 5851(b)(2), are only orders directed to an employer, after a finding of a violation, to provide a remedy to the discriminated against employee, and to pay the employee's attorney's fees and costs. Thus, for example, the Secretary has held that he has no authority to award attorney's fees and costs when he has found in favor of the respondent under section 405 of the Surface Transportation Assistance Act. *Abrams v. Roadway Express, Inc.*, 84-STA-2 Sec. Decision, May 23, 1985, slip op. at 1-2.

Furthermore, I do not believe the Secretary can assume powers not delegated to him by Congress simply by incorporating provisions, such as the Federal Rules of Civil Procedure, in departmental regulations. If he could, any agency could adopt rules, for example, giving itself subpoena power, which as noted above, it can only exercise when explicitly delegated. I think the incorporation of the Federal Rules in 29 C.F.R. § 18.29 is for purposes of procedure and case management to fill in any gaps where no specific provision in the Rules of Practice is applicable. It did not give the Secretary the authority directly to impose sanctions and penalties if not otherwise authorized by law. Therefore, I adopt the ALJ's recommendation that costs and attorney's fees not be assessed against Complainants, but for the reasons discussed above rather than those in the ALJ's decision.

Accordingly, the complaints in this case are dismissed.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Mr. Ratner is deceased. *See* Notice of Appearance of Daniel I. Oshtry and Stephen M. Kohn on behalf of Complainant Joy Malpass.

[2] I must note at this point one document in the record which the ALJ, apparently exercising great restraint, did not mention in his recommended decision. The ALJ directed his attorney-advisor to read his November 15, 1985 order to counsel for the parties over the phone the same day it was issued. In a Report of Contact (ALJ Exhibit #7) the attorney-advisor reported that after reading the order to him, Mr. Ratner said he would not comply with the order, that the ALJ could "go to hell", and the ALJ could "shove. . ." the order.

[3] I would note that both briefs in the *English* case were due more than a month before the scheduled hearing in this case, and, in addition, Mr. Ratner had co-counsel in that case who participated in the hearing and was presumably capable of drafting those briefs.

[4] This is distinct from the determination of the Wage-Hour Administrator, which becomes the final order of the Secretary if a timely request for a hearing is not filed. 29 C.F.R. §§ 24.4(d)(2)(i) and (d)(3)(i).

[5] I find no support for Complainants' position in Judge Brissenden's ruling on a motion to a quash a subpoena in the *English* case. That ruling is the law of that case only and not binding precedent for other whistleblower cases. The case of *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), holding that a charging party is not a member of the "public" under sections 706(b) and 709(e) of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e-5(b) and 2000e-8(e) (1982)), to whom EEOC may not disclose information in its investigation file, is inapposite.

[6] In fact, several employees whose names did become known (e.g. Bill Bullard, Bob Carpenter, Gary Coronado and Bob Hudson) signed affidavits stating they have not been intimidated or harassed by G.E. See attachments to Respondent's Motion to Dismiss and Motion for Partial Summary Decision.

[7] I agree with the ALJ that *Nolder v. Raymond Kaiser Engineers, Inc.*, Case No. 84-ERA-5, Sec. Decision June 28, 1985, is not applicable here because it dealt only with the question whether an ALJ could impose conditions on voluntary

dismissal by a complainant.

[8] In a case arising under another whistleblower law, the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. app. § 2305 (1988), the Secretary held that an ALJ has the authority to impose sanctions for failure of a party to comply with discovery or other orders under 29 C.F.R. § 18.6(d)(2). *Gaspar v. Gammons Wire Feeder Corp.*, Case No. 87-STA-5, Sec. Decision September 17, 1987, slip op. at 2-3. In *Gaspar*, the Secretary upheld imposition of the sanction, for failure to comply with a discovery order, of entering an order that "all requested evidence would have been adverse to the Respondent, that all such matters are taken as established adversely to the Respondent, [and] that the Respondent may not now introduce evidence in support of his appeal or object to the Plaintiff's evidence." *Id.* *See* 29 C.F.R. § 18.6(d)(2)(i)-(iii). Those regulations also provide for the sanction that "a decision of the proceeding be rendered against the non-complying party. . . ." 29 C.F.R. § 18.6(d)(2)(v).

[9] *See also Stack v. Preston Trucking Co.*, Case No. 89-STA-15, Sec. Decision April 18, 1990, slip op. at 9, a case arising under the employee protection provision of the Surface Transportation Assistance Act of 1982, 29 U.S.C. app. § 2305, where the Secretary indicated that Rule 11 is not applicable if a situation is provided for in the ALJ Rules of Practice. In view of my holding discussed below that the Secretary does not have the power under the ERA to impose attorney's fees and costs against a complainant, I reject Respondent's argument. Furthermore, for the same reason, as well as the fact that Mr. Ratner is deceased, I need not consider whether the sanctions in 29 C.F.R. § 18.36 are the only ones which can be imposed on an attorney in these circumstances or whether they would have been appropriate here.

[10] An ALJ, of course, has no more authority than the Secretary under the ERA.