



In the Matter of:

JAMES M. STONEKING,

ARB CASE NO. 03-101

COMPLAINANT,

ALJ CASE NO. 2002-AIR-7

v.

DATE: July 29, 2003

AVBASE AVIATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:

Roy J. Shechter, Esq., Lichko & Schechter, Cleveland, Ohio

FINAL DECISION AND ORDER

BACKGROUND

James A. Stoneking filed a complaint alleging that his former employer, AvBase Aviation, LLC (AvBase), retaliated against him in violation of the whistleblower protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997) and its implementing regulations, 29 C.F.R. Part 1979. On March 17, 2003, a Department of Labor Administrative Law Judge, (ALJ) issued a Decision and Order (D. & O.) concluding that Stoneking's complaint should be dismissed. The D. & O. included this "Notice":

This decision shall become the final order of the Secretary pursuant to 29 C.F.R. § 1979.110 (2002), unless a petition for review is timely filed with the Administrative Review Board ("Board"), United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution

Avenue, NW, Washington, D.C. 20210. Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file a written petition for review with the Board, which has been delegated the authority to act for the Secretary and issue final decisions under 29 C.F.R. Part 1979. To be effective, a petition must be received by the Board within 15 days of the date of the decision of the administrative law judge. The petition must be served on all parties and on the Chief Administrative Law Judge. . . . See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

Pursuant to 29 C.F.R. § 1979.110(a), as applicable to this case,¹ Stoneking's petition for review was due at the Administrative Review Board no later than April 1, 2003. However Stoneking failed to file a petition for review by April 1st. Instead, on May 7, 2003, the Cincinnati, Ohio Office of Administrative Law Judges received a letter from Stoneking dated May 1, 2003, requesting review of the D. & O. and stating:

I, James M. Stoneking, am in receipt of your Court decision for the aforementioned case number, as of April 22, 2003. The document was not sent to the correct address for timely delivery.

Stoneking Petition for Review at 1. The Office of Administrative Law Judges forwarded the petition for review to the ARB, where it was received on May 13, 2003.

In response to the petition for review, AvBase filed a letter with the ALJ opposing the petition for review on the ground that Stoneking did not timely file it. AvBase contends:

The attempt to appeal this court's order should be denied, as both the Respondent and his attorney Joel I. Newman were served with your decision on March 17, 2003 at the addresses they provided to the Court. Nevertheless, they failed to file the requisite Petition for Review within 15 days

¹ On April 1, 2002, the Occupational Safety and Health Administration (OSHA) published the interim final rules applicable to this case. 67 Fed. Reg. 15454. OSHA subsequently published final rules effective March 21, 2003. These rules provide that a petition for review must be filed within ten business days of the date of the administrative law judge's decision, however, "the date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt." 29 C.F.R. § 1979.110, 68 Fed. Reg. 14100 (March 21, 2003).

AvBase letter dated May 8, 2003.

Because the petition for review was not received within the prescribed 15-day period, the Board issued an Order requiring Stoneking to Show Cause why the Board should not dismiss his appeal because he did not timely file it.

Stoneking's response was due no later than 14 days after he received the Order. The certified mail return receipt indicates that Stoneking received the Order to Show Cause on June 7, 2003. Accordingly, Stoneking's response was due no later than June 21, 2003. However Stoneking has failed to file a response to the order with the Board.

DISCUSSION

The regulation establishing a fifteen-day limitations period for filing a petition for review with the ARB was an internal procedural rule adopted to expedite the administrative resolution of cases arising under the AIR 21. 29 C.F.R. § 1979.100(b). *Accord Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-12, slip op. at 4 (ARB May 14, 2003). Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review. *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-12, slip op. at 4.

The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Id.* at 4-5. Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. However, the Board has not determined that these categories are exclusive. *Id.*

In this case, although given ample opportunity, Stoneking has failed to allege to the Board any basis for tolling the limitations period. The unexplained and unsupported statement in the petition for review that the ALJ's D. & O. "was not sent to the correct address for timely delivery" is insufficient to support a finding that the limitations period should be tolled, especially given the fact that Stoneking was represented by counsel

before the ALJ. *Accord Day v. Oak Ridge Operations, United States Dep't of Labor*, ARB No. 02-032, ALJ No. 99-CAA-23, slip op. at 2 (ARB July 25, 2003). Accordingly, we **DISMISS** the untimely-filed petition for review.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge