



In the Matter of:

MICHAEL B. GARCIA,

ARB CASE NO. 99-109

COMPLAINANT,

ALJ CASE NO. 99-CAA-11

v.

DATE: February 8, 2000

WANTZ EQUIPMENT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael B. Garcia, Pro se, *Sacramento, California*

**ORDER ACCEPTING PETITION FOR REVIEW
AND ESTABLISHING BRIEFING SCHEDULE**

The Administrative Law Judge (ALJ) issued his Recommended Decision and Order (R. D. & O.) in this case arising under the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (1994) on May 17, 1999. Department of Labor regulations implementing the whistleblower provisions of the Clean Air Act provide that any party seeking review of a R. D. & O. must file a petition for review with the Administrative Review Board (ARB). 29 C.F.R. §24.8(a)(1998). The regulations provide further that "[t]o be effective, such a petition must be received within ten business days of the date of the [R. D. & O.]" *Id.*

The tenth business day after May 17, 1999 (the date of the R. D. & O.) was June 1, 1999. The complainant, Michael Garcia, received the ALJ's R. D. & O. on May 23, 1999. His handwritten Petition for Review is dated May 28, 1999, and the ARB received it on June 10, 1999.

On July 12, 1999, Garcia requested an "extension" of time for filing the Petition for Review in a handwritten letter sent to the ARB by facsimile. He states that he was unable to file the Petition for Review within the ten business days provided in 29 C.F.R. §29.8(a) because he suffers from a 40% permanent disability which makes him housebound and unable to get to the Post Office. In addition, he claims he did not have sufficient money to send the Petition for Review by facsimile or ship it by the United Parcel Service.

The Supreme Court has recognized the general principle that

“[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.” *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 [8th Cir.1953].

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970). In the principal authority upon which the Court relies, *NLRB v. Monsanto Chemical Co.*, the facts are similar to those in this case. A discharged employee filed an application for review of an order of the National Labor Relations Board’s Regional Director six days after the time fixed by the NLRB’s rules for filing an application for review. Noting that there was no proof or claim of prejudice to opposing parties, the Eighth Circuit rejected the argument that the NLRB had no authority to relax a time provision of its procedural rules. 205 F.2d at 764. In fact, the court stated that the contention that the NLRB was powerless to relax its rules “is not worthy of serious consideration.” *Id.*

The Board has also held that it has the authority to waive service and filing requirements provided no prejudice to other parties is shown. *See, e.g., Tri-Gem’s Builders, Inc.*, ARB Case No. 99-117, Nov. 22, 1999, slip op. at 5 (reliance on ALJ’s erroneous statement of appeal rights causing filing of appeal four days late justifies waiver of filing time limit); *Gutierrez v. Regents of the Univ. of Calif.*, ARB Case No. 96-116, Nov. 8, 1999, slip op. at 3-4 (filing timely appeal in wrong forum sufficient to put opposing party on notice and supports waiver of filing requirement);^{1/} *Duncan v. Sacramento Metro. Air Quality Management Dist.*, ARB Case No. 99-011, Sept. 1, 1999, slip op. at 3 (same); *Superior Paving & Materials, Inc.*, ARB Case No. 99-065, Sept. 3, 1999, slip op. at 3 (erroneous reliance on inapplicable regulation causing filing three days late justified waiver of time limit); *General Serv. Admin., Reg. 3*, ARB Case No. 97-052, Nov. 21, 1997, slip op. at 4 (failure to comply with regulation requiring service on opposing party of request for extension of time waived in absence of prejudice to other party). In waiving the limitations period in *Superior Paving*, the ARB distinguished cases in which a petition for review was filed as much as five weeks late or petitioners filed late and also had not complied with other time limits established by the ALJ, thus demonstrating a pattern of noncompliance with deadlines. *Superior Paving*, slip op. at 3.

^{1/} In *Gutierrez* and other cases, the Board has said it is guided by the principles of equitable tolling articulated in cases such as *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16 (3d Cir.1981). We view the grounds for equitable tolling stated in *Allentown v. Marshall* as alternative bases for waiver of internally established time limits under the authority of the Board to relax procedural rules in the interests of justice and in the absence of prejudice to other parties.

We note first that we are dealing here with a very short time limit for perfecting an appeal, one which would make it difficult even for a party represented by counsel to make a carefully considered decision to appeal an ALJ decision. Garcia was acting *pro se* and also claims he was housebound with a disability, could not get to the Post Office, and could not afford to send his Petition by facsimile or ship it by United Parcel Service. Garcia only received a copy of the ALJ decision on May 23, 1999, and his Petition for Review is dated May 28, 1999. The respondent, Wantz Equipment, has not filed any pleading opposing acceptance of the Petition for Review and nothing in the record shows that it has been prejudiced in any way by the slightly delayed filing of the Petition. For the reasons discussed above, we **GRANT** Garcia's request for an extension of time and **ACCEPT** his Petition for Review of the ALJ's R. D. & O. Accordingly, we establish the following briefing schedule:

1. Garcia may file an initial brief, not to exceed thirty (30) double-spaced typed pages, on or before **March 5, 2000**.

2. Wantz Equipment may file a reply brief, not to exceed thirty (30) double-spaced typed pages, on or before **April 4, 2000**.

3. Garcia may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed ten (10) double-spaced typed pages, on or before **April 19, 2000**.

4. **All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. See, e.g., Fed. R. Civ. P. 7(b).**

5. **All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1¼ inch top and bottom margins, printed on 8½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted.**

6. An original and four copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C., 20210.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member