U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 August 2020

Case No.: 2020-AIR-00011

In the Matter of

JOHN E. KESTLER
Complainant

v.

METROPOLITAN JETS AND
METROPOLITAN AVIATION LLC[1]
Respondents

DECISION AND ORDER DISMISSING RESPONDENTS' APPEAL AS UNTIMELY AND REINSTATING THE SECRETARY'S FINDINGS.

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.[2] Implementing regulations are at 29 C.F.R. Part 1979, published at 68 Fed. Reg. 14,107 (Mar. 1, 2003). Per 49 U.S.C. § 42121(b)(2)(A), and implemented by 29 C.F.R. § 1979.100(b), the hearing in this matter is to commence expeditiously, except upon a showing of good cause or otherwise agreed to by the parties.

On May 10, 2016, Complainant filed an online whistleblower complaint concerning alleged adverse actions beginning on or about April 27, 2016 with the Occupational Safety and Health Administration ("OSHA"). On October 29, 2019, an OSHA supervisory investigator recommended merit findings be issued concerning Complainant's assertions that Respondent violated the Act. On November 5, 2019, the Secretary issued findings to Mr. Alan Cook (President of both Metropolitan Jets and Metropolitan Aviation) that Respondent violated the Act and ordered Respondent to: reinstate Complainant to his former position; pay Claimant's back

[1] According to the Secretary's findings and the investigatory report of investigation, Complainant filed his whistleblower complaint against Metropolitan Jets located at 10661 Frank Marshall Lane, Manassas, VA 20110. However, Mr. Cook confirmed that Complainant was employed by Metropolitan Aviation located at 23411 Autopilot Drive, Suite 208, Hangar B, Dulles, VA 20166, not Metropolitan Jets. Consequently the Secretary amended the complaint to include Metropolitan Aviation as an additional Respondent. For whatever reason, when this matter was forwarded to the Tribunal the docket did not make reference to Metropolitan Aviation. As it was clearly OSHA's intent to include both Respondents, the Tribunal added Metropolitan Aviation as a named Respondent and subsequently served documents to this Respondent's last known address as well.

[2] Pub. L. 106-181, tit. V, § 519(a), Apr. 5, 2000, 114 Stat. 145. *See* 49 U.S.C. § 42121.

pay wages in the amount of $185,250 (minus interim earnings); provide for any bonuses Complainant would have received had he remained employed; pay interest on back wages and bonuses; make various compensatory damages payments; expunge Complainant's employment records; reimburse Claimant for $14,575.00 for personal tools Respondent never returned; and to post the notice of the Secretary's findings at Respondent's facilities.

On November 13, 2019, the OSHA's Regional III Assistant Regional Administrator forwarded a copy of the Secretary's findings to the Office of Administrative Law Judges in case one of the named parties appealed the Secretary's findings.

On April 16, 2020, Mr. Alan Cook wrote to the Office of Administrative Law Judges on behalf of Respondent concerning the letter he had received from the OSHA about the Secretary's findings. This letter is on Metropolitan Aviation letterhead.[3] Mr. Cook indicates that Respondent Metropolitan Jets "did not survive and was shut down on September 27, 2019." Mr. Cook hoped that his letter "closes this out."

On June 16, 2020, this matter was assigned to the undersigned. On June 19, 2020, the Tribunal issued a Notice of Assignment, Conference Call and Initial Pre-hearing Order. In this Notice and Order, the Tribunal directed Respondent[4] to:

- Submit all documents to the Tribunal via email;;
- Provide an email address of where they wanted their documents served;
- Submit a pre-hearing conference call document addressing five questions;
- File a pleading complaint within 14 days of the Notice and Order; and
- Participate in a teleconference on July 7, 2020 at 12:00 p.m.

On June 26, 2020, Complainant's counsel filed his Notice of Appearance. On June 29, 2020, Complainant's counsel filed Complainant's pre-teleconference submission. On July 6, 2020, Complainant filed his pleading complaint. On July 7, 2020, at the appointed time, the Tribunal held a teleconference. While Complainant's counsel did participate, Respondents' representative did not. Further in reviewing the case file, Respondents had not complied with any of the requirements set forth in the June 19, 2020 Notice and Order. Complainant's counsel also represented that he had not been successful in communicating with Respondents.

On July 10, 2020, the Tribunal issued an Order to Show Cause to Respondents directing them to show cause as to how Mr. Cook's letter to the Office of Administrative Law Judges constituted a complying request for a hearing of the Secretary's findings. Additionally, Respondents were directed to show cause for their failure to participate in the scheduled teleconference. Respondents' response was due July 24, 2020. The Tribunal specifically informed Respondent's that "[i]n the absence of a justifiable reason for such a late filing, or a failure to respond to this Order by the date established, the Tribunal will dismiss this appeal as

[3] The letterhead indicates Metropolitan Aviation's address as 11654 Plaza American Drive, Suite 533, Reston, VA 20190. Mr. Cook's signature block identifies the company as Metropolitan Aviation LLC.

[4] The Tribunal required both parties to comply with this order, but as the Respondent is the party subject to the Order to Show Cause, it is tailored accordingly.

untimely." The Tribunal further warned Respondents that this would result with them being required to comply with the Secretary's November 5, 2019 Order as it would be the final decision of the Secretary. This Order was served by certified return receipt request mail to all of Respondents' know addresses. On July 23, 2020, the Tribunal issued a Second Order to Show Cause to Respondents reiterating the contents of the first one, but gave them an additional week to respond. The Order to Show Cause was delivered by United Parcel Service Overnight mail to all of Respondents known addresses. Respondents have failed to respond to either Orders to Show Cause.

Discussion

Per 49 U.S.C. § 42121(b)(2)(A), once a party is notified of the Secretary's findings, they must request a hearing within 30 days. "If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review." *Id. See also* 29 C.F.R. §§ 1979.105(c) and 1979.106(a) and (b)(2). The Secretary's findings were issued November 5, 2019, yet Mr. Cook did not write to the Office of Administrative Law Judges until April 16, 2020, more than five months later. Respondents have not provided a valid reason for their late filing. Accordingly the Tribunal finds that Respondents letter to the Office of Administrative Law Judges was untimely. *See Robinson v. Northwest Airlines, Inc.*, 2004-AIR-37 (ALJ Oct. 28, 2004); *Bodine v. International Total Services*, 2001-AIR-4 (ALJ Nov. 20, 2001). Additionally, by their failure to appear at the scheduled pre-hearing conference as well as their failure to respond to the two Orders to Show Cause, it appears that Respondents have abandoned their appeal.[5]

Accordingly, Respondents' appeal is hereby **DISMISSED** with prejudice. The Secretary's November 5, 2019 findings are the Agency's final decision and Respondents are hereby ordered to comply with the terms therein. Among the remedies ordered by the Secretary are reinstatement of Complainant to his former position. *Cf.* 29 C.F.R. § 1979.113 (under AIR 21, "[w]henever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred").

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

[5] The ARB has long recognized that Tribunals such as this have the inherent power to dismiss a case on their own initiative for lack of prosecution. *Bowens v. Infrastructure*, ARB Case No. 08-073, ALJ Case No. 2008-STA-017 (Mar. 30, 2009); *Kruml v. Patriot Express*, ARB Case No. 03-015, ALJ No. 2002-STA-007 (Feb. 25, 2004).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).