



Issue Date: 14 May 2009

In the Matter of

BRUCE A. MINTHORNE
Complainant

Case Nos.: 2009 CAA 4
2009 CAA 6

v.

COMMONWEALTH OF VIRGINIA,
TIMOTHY M. KAINE, Governor of the Commonwealth of Virginia;
ROBERT S. BLOXOM, Virginia Secretary of Agriculture and Forestry;
WILLIAM P. DICKENSON, Deputy Secretary of Agriculture and Forestry,
(2009 CAA 6);
TODD P. HAYMORE, Commissioner of Virginia Dept. of Agriculture
and Consumer Services (“VDACS”);
DONALD G. BLANKENSHIP, Deputy Commissioner, VDACS;
ANDRES ALVAREZ, Director of Division of Consumer Protection, VDACS,
(2009 CAA 4);
ROBERT BAILEY, Program Manager, Office of Product
And Industry Standards, VDACS, (2009 CAA 4); and,
KAREN E. JACKSON, Human Resource Director, VDACS, (2009 CAA 6)
Respondents

Appearances: Mr. Bruce A. Minthorne
Pro se

Mr. Thomas W. Nesbitt, Asst. Attorney General
For the Respondents

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**INITIAL DECISION AND ORDER –
AMENDMENT OF COMPLAINTS,
DENIAL OF MOTION FOR SUMMARY JUDGMENT, &
DISMISSAL OF COMPLAINTS**

On March 29, 2009, I consolidated Mr. Minthorne’s two whistleblower discrimination complaints, 2009 CAA 4 and 2009 CAA 6, under Section 322 of the Clean Air Act, (“Act” or “CAA”), 42 USC § 7622, as implemented by 29 C.F.R. Part 24. At the same time, I issued a show cause order on whether 2009 CAA 6 should be dismissed on the basis of failure to state a cause of action and/or sovereign immunity. Previously, on February 27, 2009, I directed the

parties to show cause whether 2009 CAA 4 should be dismissed on the basis of un-timeliness, failure to state a cause of action, and/or sovereign immunity.

On March 3 and 30, 2009, Mr. Minthorne responded to the show cause order regarding 2009 CAA 4. The Respondents submitted a March 23, 2009 response. In his March 30, 2009 response, Mr. Minthorne included a Motion for Summary Judgment.

On April 10, 2009, the Respondents also replied to the 2009 CAA 6 show cause order and essentially adopted their response for 2009 CAA 4. Mr. Minthorne presented an April 13, 2009 response to the show cause order for 2009 CAA 6. In his latest response, Mr. Minthorne also requested to amend his complaints to include the Commonwealth of Virginia as a respondent.

Background

Based on my consolidation order, this case involves the following two CAA whistleblower discrimination complaints filed by Mr. Minthorne.

2009 CAA 4

In a December 5, 2008 letter to the Secretary, U.S. Department of Labor, (“Secretary” and “Sec’y”), care of the Regional Administrator, Occupational Safety and Health Administration (“OSHA”), which was received on December 8, 2008, Mr. Minthorne alleged that the named state officials, acting as employers, violated the employee protection provisions of the Act by discharging him on November 9, 2008 from his position as a Compliance Safety Officer IV in the Virginia Department of Agriculture and Consumer Services, Office of Product and Industry Standards, in retaliation for protected activities under the Act.

On February 3, 2008, upon investigation of Mr. Minthorne’s complaint, the Regional Administrator dismissed his complaint as untimely since it was not filed within 30 days of the adverse personnel action which consisted of an October 15, 2008 layoff notice that became effective November 9, 2008.

2009 CAA 6

In a January 24, 2009 letter to the Secretary, care of the Regional Administrator, OSHA, Mr. Minthorne alleged that the named state officials, acting as employers, violated the employee protection provisions of the Act by denying him compensation for his accrued annual leave in December 2008 without due process and then subsequently reporting the annual leave as dissolved to another agency in retaliation for a protected activity under the Act – his December 6, 2008 filing of a discriminatory discharge complaint, which is the subject of 2009 CAA 4.

On February 26, 2009, upon investigation of Mr. Minthorne’s complaint, the Regional Administrator dismissed his complaint on the basis that since Mr. Minthorne had subsequently received payment for his annual leave, he had been made whole and any adverse action had been abated.

Amendment of Complaints

In his April 13, 2009 show cause order response, in order to “meet the ends of justice and to cure any failure by the complainant to state a cause of action,” Mr. Minthorne requested that his two complaints be amended to add the Commonwealth of Virginia, defined as a “person” under 42 U.S.C. § 7602(e), as a respondent. To date, the counsel for the Respondents has not objected to the requested amendment.

The provisions of 29 C.F.R. § 18.5(e) address two situations in which a complaint may be amended. First, a complainant may amend a complaint once as a matter of right, “prior to the answer” (emphasis added). However, the adjudication of a whistleblower complaint does not follow the traditional litigation model of service of formal complaint upon a party and a corresponding answer from the respondent. Instead, a whistleblower files his complaint with the Regional Administrator who usually in turn contacts the other party for a response. Since the investigative summary and decision letter does not indicate when such contact with a respondent was made, determining the response date is not possible. Nevertheless, up until the close of the investigation, the Regional Administrator has the opportunity to obtain, and the Respondent may provide, an answer to the allegations in a whistleblower complaint. Consequently, I believe the conclusion of the Regional Administrator’s investigation is the appropriate time to terminate a complainant’s ability to amend his complaint as a matter of right since by that date a Respondent has effectively answered the complaint. Since Mr. Minthorne submitted his amendment request after the Regional Administrator completed the investigations of both complaints, I find he may not amend his complaints as a matter of right.

As a second means to amend a complaint under 29 C.F.R. § 18.5(e), when a respondent has already answered the complaint, an administrative law judge may permit an amendment to facilitate a determination on the merits, provided prejudice to the parties is avoided and the “administrative law judge determines that the amendment is reasonably within the scope of the original complaint.” Through numerous interpretations and applications of a similar provision in the Federal Rules of Civil Procedure, FED. R. CIV. P. 15, courts have provided several guiding principles and precedents concerning the parameters of an amended complaint. First, and significantly, the U.S. Supreme Court, citing FED. R. CIV. P. 15 (a), has declared amendments are to be “freely granted.” *Foman v. Davis* 371 U.S. 178, 182 (1962). Justice Goldberg explained that pleading technicalities should not be controlling; instead, “[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Id.* At the same time, the Court added some boundaries to a lower court’s discretion in granting an amendment. Undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of the amendment, or undue prejudice to the opposing party, may warrant denying an amendment. *Id.*

The court’s stated caveats to the liberal granting of an amended complaint are not applicable in Mr. Minthorne’s case. Clearly, prior failure to cure deficiencies and dilatory motive are not applicable. Likewise, neither bad faith, undue delay, nor futility provide a sufficient basis for denial of Mr. Minthorne’s amended complaints. In particular, his submission of the amendment request in response to the show cause orders regarding failure to state a cause

of action does not rise to the level of bad faith, especially considering that in the show cause orders I asked the parties to address whether a complaint against the Commonwealth of Virginia might be dismissed on the grounds of sovereign immunity. Finally, I find no undue prejudice to the opposing parties since the Respondent's counsel has submitted no objection to the amendment, my show cause orders directed the parties to consider the issue of sovereign immunity in regards to the Commonwealth of Virginia, and both parties have addressed that issue in their respective responses to the show cause orders.

Accordingly, I approve Mr. Minthorne's request to amend his complaints. The present caption reflects my approval of the requested amendment to add the Commonwealth of Virginia as respondent in the two complaints, 2009 CAA 4 and 2009 CAA 6.

Denial of Summary Judgment Motion

At the close of his March 30, 2009 response, Mr. Minthorne presented a Motion for Summary Judgment because the Secretary continued to violate the Act's employee protection provisions by failing to issue an order either providing his requested relief or denying his complaint within ninety days of receipt his complaint. Consequently, Mr. Minthorne requested that the Secretary order the Respondents to abate the violations, reinstate him to his former position with the compensation, terms, conditions, and privileges of that employment, pay back wages, and provide compensatory damages.¹

According to 42 USC 7622(b)(2)(A), "[w]ithin ninety days of receipt of such complaint the Secretary shall . . . issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint." However, Section 7622 does not indicate any consequence associated with the Secretary's failure to issue an order within ninety days. In addressing the procedural issue of time limitations on agency action where no statutory consequence for failure to adhere to those time limitations is imposed, the United States Supreme Court concluded in *Brock v. Pierce Company*, 467 U.S. 253, 265 (1986) and *Barnhart v. Peabody Coal Co.*, 123 S.Ct. 748, 757 (2003), that the use of the term "shall" is directory in nature and does not set a mandatory deadline.² Accordingly, since Section 7622 does not impose a sanction for the Secretary's failure to issue an order within ninety days of receipt of a complaint, Mr. Minthorne's summary judgment motion based on such failure is denied.

Dismissal of Complaints

As set out in the two show cause orders, the nature of Mr. Minthorne's complaints and the associated documentation raised issues on whether 2009 CAA 4 should be dismissed due to un-timeliness, failure to state a cause of action and/or sovereign immunity and 2009 CAA 6 should be dismissed for failure to state a cause of action and/or sovereign immunity.

¹The Respondents did not specifically respond to this motion.

²See also *U.S. Dep't. of Labor v. Nurses PRN of Denver*, ARB No. 97-131, ALJ No. 94 ARN 1, 8 (June 30, 1999) and *Cyberworld Enterprise Technologies, Inc. v. U.S. Dep't of Labor*, ARB No. 04-049, ALJ No. 2003 LCA 17 (May 24, 2006).

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to dismissal of a complaint in this situation, 29 C.F.R. § 18.1(a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, FED. R. CIV. P. 12(b)(1) and (6), address dismissal for lack of subject matter jurisdiction and failure to state a claim upon which relief may be given.

Courts recognize two approaches in considering dismissal under these provisions. First, a determination may be made based on whether the pleading or complaint, on its face, is sufficient. In reviewing a “facial” motion to dismiss, I consider the allegations in the complaint as true. Second, a factual consideration of the complaint may be conducted. In this “factual” analysis, no presumption of truthfulness applies to the allegations in the complaint. Instead, I may rely on affidavits and other documents submitted in support of the motion.

In Mr. Minthorne’s case, the un-timeliness issue is tied to subject matter jurisdiction and involves a “factual” review. Whereas, whether the named individuals and the Commonwealth of Virginia are proper respondents relates to failure to state a claim upon which relief may be given and requires a “facial” reviews.

Un-timeliness

Under 42 U.S.C. § 7622(b)(1) and 29 C.F.R. § 24.3, to invoke the CAA employee protection provisions, a complainant must file his allegation of a violation of the CAA whistleblower protections within 30 days after such violation occurs. According to the Administrative Review Board (“ARB” and “Board”), absent any equitable relief, failure to meet the statutory filing deadline precludes consideration of the CAA complaint. *Roberts v. Rivas Environmental Consultants, Inc.*, 96 CER 1 (ARB Sept. 17, 1997), slip op. at 3-4.

Parties’ Positions

Complainant

Noting that courts have indicated a statute of limitations should be construed liberally, Mr. Minthorne asserts that his CAA whistleblower complaint, 2009 CAA 4, is timely both standing alone and on the basis of the continuing violation contained in 2009 CAA 6. While he received notices about the proposed layoff in October 2008, personnel rules required the state to provide placement options in any available position prior to the final separation action. Only when the state was unable to find any other position for Mr. Minthorne did the involuntary termination action become final and unequivocal. Since he did not receive a final definitive layoff notice until November 9, 2008, his December 6, 2008 complaint was timely. Further, because the state continued its discriminatory retaliation after his separation in regards to compensation for accrued leave, his earlier complaint of discriminatory employment discharge remains timely.

Mr. Minthorne also maintains that equitable tolling is applicable for three reasons. First, strict application of the statutory procedural rules is unfair considering that the Assistant Secretary and OSHA failed to complete the investigation of his complaint within the statutorily

mandated 30 days and instead continued to proceed with his case. Second, the Respondents actively mislead him about their discriminatory motive behind the termination of his position and employment and interfered with his efforts to determine their motive. Third, once Mr. Minthorne became aware of the complaint filing requirements, he used due diligence in filing his complaint the next day.

Respondents

Mr. Minthorne's December 8, 2008 complaint, 2009 CAA 4, is untimely because he did not file it within 30 days of his notice of an adverse personnel action as required by 42 U.S.C. § 7622(b)(1). Between October 9, 2008 through October 17, 2008, Mr. Minthorne received official notice that he had been targeted for layoff, effective November 9, 2008. The 30 day limitation period begins to run on the date a complainant receives final and unequivocal notice of the adverse personnel action, which in Mr. Minthorne's case is October 17, 2008, rather than the effective date of the action. Mr. Minthorne failed to file his complaint within 30 days of October 17, 2008. Additionally, since Mr. Minthorne's complaint is time-barred, the Assistant Secretary was not duty bound to conduct an investigation.

Equitable tolling is not applicable in this case. In a previous case, the Secretary determined that fraudulent concealment of a discriminatory motive is not a sufficient basis to invoke equitable tolling. The concealment that would support equitable tolling relates to the nature of the adverse action, rather than motive. In Mr. Minthorne's case, the Respondents did not conceal the nature of the adverse personnel action. In regards to equitable relief based on continuing violations, Mr. Minthorne's unequivocal employment termination was a discrete employment action, separate from any subsequent decision regarding post-employment benefits.

Discussion

Upon consideration of the parties' positions, based on the information before me, in particular the November 9, 2008 final lay off notice that Mr. Minthorne attached to his December 8, 2008 complaint, I find a sufficient factual dispute exists regarding the nature of that final termination notice such that I must defer a decision on timeliness of Mr. Minthorne's 2009 CAA 4 complaint absent a hearing on the record. According to the November 9, 2008 final "Notice of Layoff or Placement," Mr. Minthorne was being placed on leave without pay for 12 months "because there is no placement opportunity available to you under the State Layoff Policy." Since Mr. Minthorne asserts the layoff policy required the state to seek placement opportunities for him up until the final notice, he has presented a colorable argument that any prior notices were conditional pending a determination on the lack of any other placement opportunity. Since the Respondents have not submitted copies of the earlier notifications, and absent any evidence on the relationship between the state's layoff policy and initial layoff notices, I am unable to determine at this time whether the October 2008 initial notices were presented because the state had already determined no placement opportunities existed for Mr. Minthorne or the state continued to seek placement for Mr. Minthorne after the initial notices. Accordingly, I defer a decision on whether Mr. Minthorne's complaint, 2009 CAA 4, was filed in a timely manner.

Failure to State a Cause of Action – Named Individuals

Parties' Positions

Complainant

All the named individuals are “persons” as defined by the Act and therefore proper respondents. Under state law, the Governor is the chief personnel officer for the state. The Agriculture Secretary carries out employer responsibilities. The other named individuals were directly in Mr. Minthorne’s chain of command and exercised supervisory authority over personnel decisions affecting Mr. Minthorne. The named persons are also liable in their individual capacity under 42 U.S.C. § 1983 for depriving Mr. Minthorne of constitutional rights under color of state law.

Respondents

None of the named individuals are proper respondents since they were not Mr. Minthorne’s employer. If state officials were employers, then all state employees would lose their jobs due to the termination of the employment relationship when the state officials left office. Instead, Mr. Minthorne’s employer was the Commonwealth of Virginia.

Discussion

The CAA definition of “person” includes “an individual,” 42 U.S.C. § 7602(e), and the employee protection provisions permit a CAA complaint to be filed against any person, 42 U.S.C. § 7622(b)(1). However, the CAA employee discrimination provisions apply only to employers; specifically 42 U.S.C. § 7622(a) states “No employer may discharge any employee or otherwise discriminate against any employee” with respect to employment benefits and entitlement because the employee engaged in protected activities under the Act (emphasis added). Likewise, while the statutory relief provision indicates that the Secretary shall order the “person” who committed the violation to take corrective and compensatory actions, only an employer has the ability to reinstate a complainant together with the compensation (including back pay), terms, conditions, and privileges of employment as required under the Act, 42 U.S.C. § 7622(b)(2)(B)(ii).

Consequently, although the Act does not define “employer,” clearly an employment relationship between the complainant and respondent is an essential element in any claim brought under the environmental whistleblower statutes. See *Varnadore v. Oak Ridge Nat’l Lab., et al.*, Case Nos. 1992 CAA 2, 92-CAA-5, 93-CAA-1, 94-CAA-2 and 3, and 95-ERA-1, slip op. at 36 (ARB June 14, 1996). Consequently, according to the Secretary, in *Stevenson v. National Aeronautical and Space Administration*, Case No. 94-TSC-5, slip op. at 3-5 (Sec’y July 3, 1995), individuals who are not employers are not subject to suit under the environmental whistleblower provisions of TSCA and the CAA, which, like the ERA, prohibit “employers” from retaliating against employees who engage in protected activity.³ A supervisory relationship is insufficient;

³In this case, the Secretary concluded individual NASA management employees are not employers under the CAA.

the respondent must be the employer of the complaint. *Kesteron v. Y12 Nuclear Weapons Plant, et al.*, Case No. 1995 CAA 12 (ARB Apr. 8, 1997).

Regarding the assertion that the named individuals are proper respondents based their alleged liability in their individual capacities under 42 U.S.C. § 1983, for violation of Mr. Minthorne's constitutional rights, I have no authority under the CAA to address that allegation. My sole jurisdiction as an administrative law judge in this case is established by 42 U.S.C. § 7622(b)(1)(A) and 29 C.F.R. §§ 24.6 and 24.7. As a result, Mr. Minthorne's assertion of that claim does not support a finding that the named individuals are proper respondents for complaints under the CAA.

Accordingly, Mr. Minthorne's complaints, 2009 CAA 4 and 2009 CAA 6, against Timothy M. Kaine, Governor of the Commonwealth of Virginia; Robert S. Bloxom, Virginia Secretary of Agriculture and Forestry; William P. Dickerson, Deputy Secretary of Agriculture and Forestry, Todd P. Haymore, Commissioner, VDACS; Donald G. Blankenship, Deputy Commissioner, VDACS; Andres Alvarez, Director of Division of Consumer Protection, VDACS; Robert Bailey, Program Manager, Office of Product and Industry Standards, VDACS; and Karen E. Jackson, Human Resource Director, VDACS, shall be dismissed for failure to state a cause of action upon which relief may be given.

Failure to State a Cause of Action – Commonwealth of Virginia

Parties' Positions

Complainant

In his initial response, Mr. Minthorne noted that the Commonwealth of Virginia had not asserted the defense of sovereign immunity and instead had participated in the proceedings at OSHA by filing a position paper. Subsequently, in response to the state's assertion of sovereign immunity, Mr. Minthorne relied on the rationale set out in a September 23, 2005 letter opinion from the Office of Legal Counsel, U.S. Department of Justice, to the Solicitor, Department of Labor, which opined that the United States had waived sovereign immunity under the CAA. As support for his opinion, the Acting Assistant Attorney General⁴ noted that a federal appeals court, after acknowledging the CAA separately prohibits retaliation by employers without defining that term and permits complaints against persons, primarily focused on the definition of "person" which specifically included the United States to conclude Congress had waived federal sovereign immunity under the CAA. Based on that reasoning, Mr. Minthorne maintains that since the CAA definition of "person" similarly includes "a State," Congress has also abrogated the Commonwealth of Virginia's immunity from suit under the CAA whistleblower protection provisions.

⁴I take judicial notice the Mr. Stephen G. Bradbury was the Acting Assistant Attorney General, Office of Legal Counsel from 2004 to 2009.

Respondents

Neither Congress nor the Commonwealth of Virginia has abrogated or waived the state's sovereign immunity. Additionally, individuals can not waive state sovereign immunity by participation in an OSHA investigation when the Commonwealth of Virginia was not a respondent at the time.

Discussion

Under the Eleventh Amendment to the Constitution, states have sovereign immunity against suits by private citizens which extends to private complaints against states in federal administrative proceedings. *Federal Mar. Comm. V. South Carolina Ports Auth.*, 535 U.S. 743 (2002); *see also Thompson v. University of Georgia*, ARB No. 05-031, ALJ No. 2005 CAA 1 (ARB Jan. 31, 2006). Although Congress has the power to abrogate Eleventh Amendment immunity, courts have concluded Congress must use unmistakably clear language in the statute. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *see also Powers v. Tennessee Dep't of Env't & Conservation*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003 CAA 8 and 2003 CAA 16 (ARB June 30, 2005 (reissued August 16, 2005)).

In previously considering whether Congress abrogated the sovereign immunity of the Commonwealth of Virginia, in *Ewald v. Commonwealth of Virginia, Dep't of Waste Management*, ARB No. 02-027, ALJ No. 1989 SDW 1 (ARB Dec. 19, 2003), the ARB rejected the argument that through the inclusion of "state" within the definition of "person" Congress abrogated the state's sovereign immunity. Instead, the Board relied on "mounting authority" that Congress did not abrogate states' immunity from whistleblower claims.

More specifically, in *Powers*, ARB Nos. 03-061 and 03-125, slip op. at 7, the Board first observed the Supreme Court concluded in *Hibbs*, 538 U.S. at 726, that Congress waived state sovereign immunity under the Family and Medical Leave Act because the statute permitted suits against "any employer (including a public agency)" for violations and state government and its agencies were included in the definition of "public agency." In comparison, the ARB noted that in the CAA although "person" was defined to include a state, only "employers" were prohibited from whistleblower discrimination and the term "employer" was "not defined to include states." As a result, the Board concluded "there is thus no unequivocal abrogation of sovereign immunity." The ARB also commented that 42 U.S.C. § 7604(a)(1)(ii) permitted citizen suits for enforcement of the Act's environmental provisions "but only to the extent permitted by the Eleventh Amendment."

In *Thompson*, ARB No. 05-031, the ARB reaffirmed its conclusion that the CAA does not contain unmistakably clear language necessary for the abrogation of states' sovereign immunity. Thus, in contrast to the Acting Assistant Attorney General's rationale, the ARB has focused on the absence of a definition for "employer" to include a state rather than the CAA's inclusion of a state within the definition of "person" to conclude Congress has not abrogated state sovereign immunity. Consequently, while respecting the reasoned opinion of the Acting Assistant Attorney General, and based on the ARB decisions which have precedential authority

in these proceedings, I conclude that Congress has not abrogated the Commonwealth of Virginia's sovereign immunity from CAA whistleblower complaints.

Concerning the asserted waiver of sovereign immunity by the Respondents' participation in the OSHA proceedings, the ARB has held that since sovereign immunity is jurisdictional, rather than a defense, its existence can be raised at anytime. *Thompson*, ARB No. 05-031, slip op. at 5. More significantly, participation in the initial administrative proceedings does not constitute a waiver of sovereign immunity. *Ewald*, ARB No. 02-027, slip op. at 10.

As result, since its sovereign immunity has been neither abrogated nor waived, the Commonwealth of Virginia is not a proper respondent and Mr. Minthorne's complaints, 2009 CAA 4 and 2009 CAA 6, against the Commonwealth of Virginia must be dismissed for failure to state a cause of action upon which relief may be given.

ORDER

1. The request by Mr. Bruce A. Minthorne to amend his two complaints, 2009 CAA 4 and 2009 CAA 6, by adding the Commonwealth of Virginia as respondent is **APPROVED**.

2. The summary judgment motion by Mr. Bruce A. Minthorne is **DENIED**.

3. The complaints by Mr. Bruce A. Minthorne, 2009 CAA 4 and 2009 CAA 6, against Timothy M. Kaine, Governor of the Commonwealth of Virginia; Robert S. Bloxom, Virginia Secretary of Agriculture and Forestry; William P. Dickerson, Deputy Secretary of Agriculture and Forestry, Todd P. Haymore, Commissioner, VDACS; Donald G. Blankenship, Deputy Commissioner, VDACS; Andres Alvarez, Director of Division of Consumer Protection, VDACS; Robert Bailey, Program Manager, Office of Product and Industry Standards, VDACS; and Karen E. Jackson, Human Resource Director, VDACS, are **DISMISSED**.

4. The complaints by Mr. Bruce A. Minthorne, 2009 CAA 4 and 2009 CAA 6, against the Commonwealth of Virginia are **DISMISSED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: May 14, 2009
Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. 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.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).