



Issue Date: 23 February 2007

Case No.: 2007-CER-00001

In the Matter of:

CHARLES COMISKEY,  
Complainant

v.

BHE ENVIRONMENTAL, INC.,  
Respondent

### **RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT**

Dr. Charles Comiskey (“Complainant”) filed a discrimination complaint against BHE Environmental, Inc. (“Respondent”) under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9610; the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2622, *et seq.*, as amended; the Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300j-9, and the regulations promulgated thereunder at 29 C.F.R. Part 24, alleging he was wrongfully discharged by Respondent under the various statutes. On January 12, 2007, Respondent filed a Motion to Dismiss for untimeliness. An Order to Show Cause why the complaint should not be dismissed was issued on February 5, 2007. Complainant responded on February 14, 2007, and Respondent filed a reply to the response on February 21, 2007.

Title 29 C.F.R. § 24.4(d)(2) provides that a party disagreeing with the Secretary’s Findings/Notice of Determination must file his/her request for a hearing within five business days of receiving the findings. Respondent argues that it received the findings of the Occupational Safety and Health Administration (“OSHA”) on December 26, 2006, and that Complainant should have also received the findings around that date. Therefore, Respondent argues, the objections should have been filed no later than January 3, 2007. Complainant asserts that his attorney **received the Findings on January 3, 2007**, but submits no evidence of receipt.<sup>1</sup> Complainant argues, that as a result of the January 3, 2007, receipt, the objections were due by

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<sup>1</sup> Title 29 C.F.R. Part 18, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, applies to these proceedings. See *Gale v Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002). In the case, such as herein, where the Complainant has not provided adequate evidence of the date of Complainant’s receipt of the decision, an argument could be made that 29 C.F.R. § 18.4(c)(3) provides guidance as to presumed receipt of a document which is mailed, in the absence of proof of receipt:

Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.

Such argument would presume receipt by December 27, 2006, and mandate filing by no later than January 5, 2007.

Wednesday, January 10, 2007. Complainant filed his objections on January 9, 2007, by facsimile. However, Complainant has failed to provide the Court with actual evidence or a sworn affidavit stating when he or his attorney received the findings.<sup>2</sup> The findings were delivered by certified mail and, therefore, there should be proof of receipt. The case law overwhelmingly shows that Complainant must bring forth some type of evidence to prove that his claim was timely filed. *See Day v. Georgia Power Co.*, 88-ERA-42 (ALJ June 23, 1989), *aff'd*, (Sec'y Mar. 23, 1990); *Rex v. Ebasco Services, Inc.*, 87- ERA-6 (Sec'y Apr. 13, 1987).

The Administrative Review Board has held that the time limit for filing a request for hearing is not jurisdictional, and is subject to the principles of equitable tolling. *See Shelton v. Oak Ridge National Laboratories, et al.*, ARB Case No. 98-100, March 30, 2001; *Reid v. Niagara Mohawk Power Corporation*, ARB Case No. 03-154, October 19, 2004; *Howlett v. Northeast Utilities*, ARB Case No. 99-044, March 13, 2001. Therefore, the fact that Complainant failed to comply with the time limits set forth at 29 C.F.R. § 24(d)(2) does not automatically bar adjudication of his complaint. I must determine whether equitable tolling applies in these circumstances. There is no evidence of erroneous advice or information provided to Complainant by an employee of the Secretary (OSHA) for example. I find that there is nothing advanced by Complainant which would meet the limited grounds for granting relief from the filing time requirement of 29 C.F.R. § 24(d)(2).

Therefore, since Complainant has failed to provide the Court with evidence concerning when he received the Secretary's findings, I find Complainant's request for a hearing untimely. Accordingly, Complainant's appeal should be dismissed, and OSHA's determination of December 22, 2006, should be the final order of the Secretary.

### **RECOMMENDED ORDER**

It is hereby recommended that Respondent's Motion to Dismiss be GRANTED, the appeal and request for hearing filed by Dr. Charles Comiskey be DISMISSED, and the determination rendered by OSHA be recognized as the final order of the Secretary.

**A**

JOSEPH E. KANE  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the Administrative Law Judge's Recommended Decision and Order. The

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<sup>2</sup> Complainant, himself, responded to Respondent's Motion in letter form. In a letter dated January 9, 2007, Complainant states that his attorney will not have the time to pursue the matter further on his behalf. If Ms. De Haven is still representing Complainant, she should enter an appearance. Furthermore, the parties have continuously addressed the Court in letter form. Respondent, which is certainly represented by counsel, should know better, and is reminded to address the Court in the future by making a formal motion with a memorandum in support.

Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC, 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case 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, 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the petition and briefs on 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.

If no petition is timely filed, the Administrative Law Judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).