



Issue Date: 09 February 2009

IN THE MATTER OF:

WILLY TURNER,
Complainant,

CASE NO: 2008-NTS-00003

v.

CITY OF KENOSHA,
Respondent.

ORDER GRANTING MOTION TO DISMISS

This matter arises under the National Transit Systems Security Act (“NTSSA”), Pub. L. No. 110-53 (August 3, 2007), 6 U.S.C. § 1142 *et seq.* (the “Act”). Complainant Willy Turner filed a complaint with the Milwaukee Area Office of the Occupational Health and Safety Administration. After conducting an investigation, the Area Director for OSHA determined that no violation of the Act had occurred. Complainant thereafter requested a hearing before this Office.

Background

Complainant, a bus driver for Respondent City of Kenosha, was suspended without pay for three days on April 17, 2008. On April 28, 2008, Complainant filed the complaint herein, alleging that his suspension was in retaliation for his refusal to drive a replacement bus that was sent to him after the bus he was assigned to drive developed a problem shifting gears. Complainant’s position is that the replacement bus was of a model that historically had brake problems, which he believed to be continuing, rendering the bus unsafe. Respondent’s position on the merits is that the replacement bus that was provided to Complainant on April 17, 2008 was safe to drive, and that Complainant’s suspension was for his allegedly having deserted his position, leaving 15 passengers abandoned for 30 minutes.

On July 17, 2008, the OSHA Area Director issued findings that no violation of the Act had occurred, and dismissed Complainant’s complaint.

By letter dated August 27, 2008, Complainant objected to the Area Director’s findings and requested a hearing before this Office.

Motion to Dismiss

Respondent has filed a Motion to Dismiss, alleging that Complainant's objections and request for a hearing were untimely under the Act. Complainant has filed no response to Respondent's motion, and his time for doing so has passed.

1. The Statute

The pertinent section of the Act provides:

Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record... If a hearing is not requested in such 30-day period, the preliminary order shall be deemed to be a final order that is not subject to judicial review.

6 U.S.C. § 1142(c)(2)(A).

2. Discussion

The issue involved herein is whether Complainant objected and requested a hearing within 30 days of the date of notification of the Area Director's findings. The Area Director's findings were forwarded to Complainant by letter dated July 17, 2008. Forty-one days later, on August 27, 2008, Complainant submitted his objections and request for hearing. Under the Act, if the "date of notification" was on or after July 28, 2008, then Complainant's request was timely. If the "date of notification" occurred before July 28, 2008, the Complainant's request was untimely.

The Act does not define "date of notification," and no regulations have been promulgated that might shed light on the matter. The legislative history of the Act suggests that its employee protection provision was modeled on the similar provision contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 42 U.S.C. § 42121(b)(2)(A) ("AIR 21"). H. Rep. 110-259 (2007) (Conf. Rep.). Indeed, the AIR 21 employee-protection provision contains language identical to that contained in the Act. The regulations implementing AIR 21 define "date of notification" as the date the findings and preliminary order of the Department of Labor are received by the complainant. 29 CFR § 1979.106(a). Although no similar regulation has been promulgated under the Act, I will assume for the purposes of this Order that the "date of notification" is the date of receipt by the complainant.

Unfortunately, Complainant has not provided any information to show when he received the Area Director's findings. Based on that failure, I must conclude that he received them earlier than July 28, 2008. The evidence in the record supports such a finding: Respondent received the findings on July 22, 2008, five days after the date on the forwarding letter. Likewise, the copy of the Area Director's findings forwarded to this Office arrived on the same date. It is likely that

Complainant, who lives slightly more than one mile from Respondent's mailing address, received the letter on or about the same day. I find, based on the evidence of record, that Complainant received the Area Director's findings on or about July 22, 2008, and therefore was required to file his objection and request for hearing no later than August 21, 2008. His submission of August 27, 2008 was six days late, and he has provided no basis to toll the statute. As a result, the decision of the Area Director is final by operation of law, and I have no jurisdiction over this matter.

ORDER

In light of the foregoing, IT IS HEREBY ORDERED:

1. Respondent's Motion to Dismiss is GRANTED;
2. This matter is DISMISSED WITH PREJUDICE; and
3. The hearing scheduled for February 18, 2009 is CANCELLED.

IT IS SO ORDERED.

A

PAUL C. JOHNSON, JR.
Administrative Law Judge

NOTICE OF REVIEW: Review of this Order is by the Administrative Review Board pursuant to ¶¶ 4.c. (43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the National Transit Systems Security Act of 2007. Accordingly, this Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington, DC 20210. See generally 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.