



Issue Date: 11 September 2018

Case No.: 2018-NTS-00006

In the Matter of:

MARGARET-ANNE HILLIARD,

Complainant,

v.

COUNTY OF HENRICO,

Respondent.

**DECISION AND ORDER GRANTING RESPONDENT’S MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION**

This matter arises from a complaint filed under the employee protection provisions of the National Transit Systems Security Act of 2007, 6 U.S.C. § 1142, (“NTSSA” or the “Act”) and the implementing Regulations at 29 C.F.R. Part 1982. Per 29 CFR §1978.107, the proceeding will be held in a manner consistent with the procedural rules set forth in federal regulations at 29 CFR Part 18, Subpart A (29 CFR §18.10 to §18.95).

By Motion dated August 1, 2018, Respondent County of Henrico filed its Motion to Dismiss with Prejudice and Memorandum in Support. By Motion dated August 16, 2018, Complainant filed her Motion in Opposition to Respondent’s Motion to Dismiss.

Summary

Respondent argued a jurisdictional challenge that the United States Department of Labor and the Office of Administrative Law Judges lack subject matter jurisdiction over the Complainant’s claims. Respondent County of Henrico argued that it is not a “public transportation agency.” Complainant was not an employee of a “public transportation agency” but a county employee, such that there is no subject matter jurisdiction under the Act.

For jurisdictional purposes, Complainant argued that her whistleblower complaint was covered by the NTSSA stating that County of Henrico was a “public transportation agency” since it was a member of the Greater Richmond Transit Company (GRTC). Complainant argued that her whistleblower complaint should be adjudicated by the U. S. Department of Labor, Office of Administrative Law Judges, applying the whistleblower provisions of NTSSA.

Arguments of the Parties

Respondent moved “to dismiss claims brought against it on the following grounds:

1. In her claim, Complainant alleges the County violated the National Transit Systems Security Act ("NTSSA").
2. The County is not subject to the NTSSA as it is not a "public transportation agency, contractor, or subcontractor of such agency, or officer or employee of such agency." 29 C.F.R. § 1982.102(a)(1). Therefore, the County is not a proper respondent.

Respondent argued that:

The Complainant filed a Whistleblower Online Complaint on January 25, 2018 alleging that she was subject to discipline, a negative performance evaluation, and harassment/intimidation from her employer, the County, in violation of the National Transit Systems Security Act ("NTSSA"). See Exhibit A.

Respondent quoted Complainant’s statement.

The employer has tried to paint a picture that I am incompetent to perform my position as a Capital Projects Manager. My job is to manage federally funded road infrastructure projects that are subject to open consultant competition under the Brooks Act. I stated that the locality was in violation of the Brooks Act. Within a week I received a poor performance evaluation. I subsequently filed a grievance. I found no relief only more penalty for filing a grievance. *Id.*

Respondent argued that Complainant did not engage in any activity protected as defined by NTSSA. It argued that Respondent is not subject to the statute.

County is not subject to the statute because it is not a public transportation agency, a contractor or subcontractor of such agency, or an officer or employee of such agency as defined by 6 U.S.C. § 1131(5).

Respondent argued that the investigator conducted an investigation and noted that per the allegation summary:

Complainant alleges she notified Respondent management that the road improvement project she oversaw was in violation of the Brooks Act. Complainant further alleges on 10/26/2017 she was subjected to discipline, harassment, and a negative performance evaluation. Subsequent to filing of this present matter, Complainant was terminated on 2/2/2018. Complainant asserts the adverse actions identified above were reprisal for reporting her concerns about the road-project, in violation of NTSSA.

Id. (Respondent Exhibit B)

The Respondent argued that:

The 'Case Comments' state that the investigator interviewed the Complainant on two occasions and the Complainant 'confirmed the project in question involved the widening and straightening of a road to support increased traffic. Complainant further confirmed no public transit used the road in question. Complainant further stated Henrico County does not have any public transit.' *Id.*

The Respondent stated that on April 27, 2018, Celmouth A. Steward, Jr., Assistant Regional Administrator of the Whistleblower Protection Program for Region III of the Occupational Safety and Health Administration, issued the Secretary's Findings. Mr. Steward found that:

Complainant did not engage in any activity protected as defined by NTSSA. The project in question involved the widening and straightening of a road in Henrico County in order to support a high volume of traffic... Because these projects under Complainant's supervision did not involve the use of public transit, the issues she raised are not covered under NTSSA. Consequently, this case is dismissed. Exhibit C.

Respondent argued that:

The NTSSA states that 'a public transportation agency, a contractor or subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due to the employee's whistleblowing.' 6 U.S.C. § 1142(a). The statute defines 'public transportation agency' as 'a publicly owned operator of public transportation eligible to receive Federal assistance under Chapter 53 of Title 49.' 6 U.S.C. § 1131(5). Public transportation is not defined by the statute, but is defined in 29 C.F.R. Part 1982 which establishes the 'procedures for the handling of retaliation complaints under the National Transit Systems and Security Act...' 29 C.F.R. § 1982.101 defines public transportation as 'regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income.' *Id.* The Complainant does not allege that the County is a public transportation agency and in fact, the County does not provide such services to the public. Complainant admitted this fact during the initial investigation. See Exhibit B.

Respondent noted that:

In her appeal letter, the Complainant claims that the County's status as a

member of the TPO brings the County under the jurisdiction of the NTSSA but does not assert that the TPO is a public transportation agency. According to Complainant's appeal, MPOs generally are 'responsible for the development of regional long-range transportation plans for the regions they represent... [and] are authorized to issue contracts for studies and to develop and approve transportation plans and improve programs to the full extent permitted by federal law.' Exhibit D, page 2, 3

Respondent argued that:

Nowhere in the appeal's extensive list of duties of the TPO, Exhibit D, page 2, does it state that the TPO is a 'publicly owned operator' providing 'regular, continuing shared- ride surface transportation services.'

Respondent argued that:

Finally, even if the TPO were determined to be a 'public transportation agency,' the County's membership by itself does not transform the County into a 'public transportation agency.' Categorizing all voting members of the TPO as public transportation agencies based on their membership in the TPO would lead to a ridiculous outcome. For example, the Capital Region Airport Commission, another member of the TPO that clearly does not provide 'regular, continuing shared-ride *surface* transportation' would become, by Complainant's logic, a 'public transportation agency.' Because Complainant fails to allege that Complainant was an employee of a public transportation agency, the claim should be dismissed.

Respondent further argued that:

Even if County were a public transportation agency, Complainant's alleged protected action did not relate to 'public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security' as required 6 U.S.C. § 1142(a).

Respondent argued that:

The NTSSA states that an employee is protected when they, in good faith, act:

(1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of Federal grants or other public funds intended to be used for public transportation safety or security, if the information or assistance is provided to or an investigation stemming from the provided

information is conducted by-

(A) A Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978 (5 U.S.C. App.; Public Law 95-452);

(B) any Member of Congress, any Committee of Congress, or the Government Accountability Office; or

(C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;

6 U.S.C. § 1142(a)(1) (emphasis added by Respondent). In her appeal, the Complainant alleges she reported a violation of the Brooks Act on a road improvement project in a staff meeting. Exhibit D, Page 4. She does not allege that project in question was related to public transportation safety or security, or even public transportation generally. Therefore the Complainant does not plead that she reported a violation of any Federal law, rule, or regulation relating to public transportation safety and security and does not plead a required element of a claim under the NTSSA. During the investigation, the Complainant confirmed that the project about which she reported the alleged violation of the Brooks Act involved the widening and straightening of a road to support increased traffic and that no public transit used the road in question. See Exhibit B.

Because the Complainant does not plead that the alleged violation she reported was related to public transportation safety or security, even if the County were considered a public transportation authority, she has failed to allege that she committed any of the protected acts under U.S.C. § 1142(a).

Complainant responded and filed her Motion in Opposition to the Motion to Dismiss. Complainant argued:

She worked for County of Henrico, Virginia in March 2007 as Capital Projects Coordinator in the Department of Public Works. She was promoted to Capital Projects Manager. She stated she was ‘responsible for providing professional assistance to Director of Public Works and other County Management for the planning, budgeting, design, and construction of road and related infrastructure projects.’ She stated the managers ‘work with County departments, review agencies, consultants, and contactors to assure the successful completion of capital projects.’

Complainant argued that:

Ms. Hilliard raised concerns that Henrico was violating the Brooks Act by improperly awarding a contract to a consulting group for the Sadler Road project without the proper allocation of federal funds or following the proper

processes. The Sadler Road project utilized the allocation of state and federal funding.

Complainant stated she was given a “lowered performance evaluation for the first time in her employment with the County.” She argued that she “grieved the lowered evaluation” and stated she “was concerned she was being retaliated against for reporting her concerns.”

Complainant argued that her complaint falls within the law of the NTSSA stating that the County of Henrico is a public transportation agency. She argued:

For the NTSSA to apply, Henrico must be a public transportation agency, a contractor, or a subcontractor of such agency, or an officer or employee of such agency. 6 U.S.C. § 1142(a). A public transportation agency is not defined in the statute, but is defined in the regulations as follows: a publicly owned operator of public transportation eligible to receive Federal assistance under 49 U.S.C. chapter 53 [49 U.S.C. § 5301 et seq.]. 29 C.F.R. § 1982.I01(i). 49 U.S.C. § 5302 does not use the term ‘public transportation agencies,’ but uses the term ‘public transportation.’ See 49 U.S.C.S. § 5302.

Complainant argued that:

Agencies that receive public assistance are maintained in a statutorily required database. 49 U.S.C. § 5335(a). This database is maintained by the Federal Transit Administration (“FTA”). The Greater Richmond Transit Company (“GRTC”) is a recipient of FTA funding assistance and is therefore subject to the Title VI compliance conditions associated with the use of these funds pursuant to FTA Circular 4704.1, ‘Title VI Program Guidelines for Grant Recipients,’ dated July 26, 1988; Part II, Section 117(a) of the FTA Agreement; and FTA Circular 4702.1, ‘Title VI Program Guidelines for Federal Transit Administration Recipients,’ dated May 26, 1988. In 2014, GRTC received \$24.9 million in federal funds for the construction of the ‘Broad Street Bus Rapid Transit Line’ in Henrico County. See Exhibit 10. That program was completed just this past Spring. See Exhibit 10, noting that the engineering team worked with project partners, including Henrico County.

Applicable Law

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, found in 29 C.F.R., Part 18, provide the standard to be applied on a Motion for Dispositive Action. See 29 C.F.R. 18.70. A party may make a motion to dismiss “part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” Id. at (a). If there is a situation not covered by “these rules, or a governing statute, regulation, or executive order” the Federal Rules of Civil Procedure apply. See 29 C.F.R. § 18.10; see also Ahluwalia v. ABB, Inc., 2007-SOX-44, *1, *2 (ARB Sept. 24, 2007) (for application of pre-2015 amendment 29 C.F.R. § 18.1, which mirrors the language found in 18.10). An administrative law judge must

dismiss the matter once they make a determination that subject matter jurisdiction is lacking. 29 C.F.R. § 18.70(a).

Subject matter jurisdiction “refers to a tribunal’s power to hear a case.” Snyder v. Bechtel Int’l Oil, Gas, & Chem., ALJ Case No. 2015-CPS-00004 (2015) (quoting Morrison v. Nat’l Australian Bank, 561 U.S. 267 (2010)). “The Department of Labor’s subject matter is invoked ‘when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court’s action is obviously not frivolous.’ ” Snyder, 2015-CPS-00004 at 10 (quoting Sasse v. U.S. Dept. of Justice, ARB No. 99-053, ALJ No. 1998-CAA-007, slip op. at 3 (ARB Aug. 31, 2000)). Under the analogous Federal Rule of Civil Procedure 12(b)(1) and controlling law as incorporated by 29 C.F.R. 18.70(a), the Complainant bears the burden of proof in asserting that the court’s jurisdiction is proper. Ahluwalia, 2007-SOX-44 at 2; see also 29 C.F.R. 18.70(a).

The National Transit Systems Security Act of 2007, 6 U.S.C. § 1142 was enacted as part of The Implementing Recommendations of the 9/11 Commission Act of 2007, (“9/11 Act”) Public Law No: 110-053. (Aug. 3, 2007).

The NTSSA prohibits a public transportation agency, a contractor or subcontractor of such an agency, or an officer or employee of such an agency from discharging or otherwise discriminating against an employee if such action is because of the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done to (1) provide or cause to provide information, or assist in an investigation regarding conduct that the employee believes to be a violation of any federal law, rule, or regulation related to public transportation safety or security, or fraud, waste, or abuse of public funds intended for public transportation, if the information or assistance is provided to specified individuals or government entities; (2) refuse to violate or assist in the violation of any federal law, rule, or regulation related to public transportation safety or security; (3) file a complaint or cause a proceeding related to the enforcement of the NTSSA’s whistleblower provisions, or testify in such proceeding; (4) cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board (NTSB); or (5) furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the NTSB, or any federal, state, or local regulatory or law enforcement agency about the facts related to an accident or incident resulting in the injury or death of an individual or damage to property that occurs in connection with public transportation. 6 U.S.C. § 1142(a).

A review of Respondent’s Exhibit B, shows Complainant filed her whistleblower application on January 25, 2018. Investigator Amy Bailey completed the “investigation Information Case Summary.” Investigator Bailey stated in the “allegation summary” that:

Complainant alleges she notified Respondent management that the road improvement project she oversaw was in violation of the Brooks Act. Complainant further alleges on 10/26/2017 she was subjected to discipline, harassment, and a negative performance evaluation. Subsequent to filing of this present matter, Complainant was terminated on 2/2/2018. Complainant asserts the adverse actions identified above were reprisal for reporting her concerns about the road-project, in violation of NTSSA.

Per Respondent's Exhibit B, page 2, Investor Bailey stated on March 1, 2018 that she interviewed Complainant two times. She interviewed on January 29, 2018 and February 21, 2018. In the "Case Comments," Investigator Bailey stated:

The RI Investigator interviewed Complainant on 1/29/18 and 2/21/18 to obtain further information regarding her allegations. Complainant confirmed the project in question involved the widening a straightening of a road to support increased traffic. Complainant further confirmed no public transit used the road in question. Complainant further stated Henrico County does not have any public transit. In light of the fact public transit does not use the road in question, it was concluded Complainant did not engage in legally protected activity under NTSSA or any of the acts enforced by DWPP. Complainant was notified of this determination on 2/26/18.

Based on the facts of this complaint, the County of Henrico is not a public transportation agency as defined by 6 U.S.C. § 1131(5) but a County Government. It has no public transportation. The Greater Richmond Transit Company (GRTC) is a separate entity. The GRTC has members consisting of a group of different entities. Complainant argued that as a member of the GRTC, Henrico is, therefore, a public transportation agency. While Henrico is a member of the Greater Richmond Transit Company, the GRTC is a distinct and separate regional authority. The GRTC is not the County of Henrico. Complainant argued that the Capital Regional Airport Commission provides "regular continued shared ride service" by providing shuttles such that Henrico is a public transportation agency. That argument is not persuasive for the same reasons. Based on the facts presented by Complainant to the investor on January 29, 2018 and February 21, 2018, she "confirmed no public transit used the road in question. Complainant further stated Henrico County does not have any public transit." Complainant "confirmed the project in question involved the widening and straightening of a road to support increased traffic."

The facts and the statute do not support Complainant's argument that County of Henrico is a public transportation agency. The facts support that no public transit used the road she was overseeing, that she was working on a road widening project, and that the County of Henrico does not have public transit. Accordingly, the County of Henrico is not a public transportation agency.

The National Transit Systems Security Act of 2007 does not cover a municipality that is not "a public transportation agency." Complainant has failed to show that as a County employee, she was an employee of a public transportation agency. For the reasons stated, this court finds that it does not have subject matter jurisdiction to adjudicate Complainant's claim. The court has no authority to address the merits or weigh the credibility of Complainant's claim.

Accordingly, the court cannot hear the Complainant's claim, grants Respondent's Motion To Dismiss, and dismisses Complainant's Complaint for lack of subject matter jurisdiction pursuant to 29 C.F.R. 18.70(a).

ORDER

It is hereby **ORDERED** that:

1. Respondent County of Henrico's Motion to Dismiss the Complainant's Claim for lack of subject matter jurisdiction is **GRANTED**.
2. Respondent's Motion to Dismiss with Prejudice is **GRANTED**.

SO ORDERED.

DANA ROSEN
Administrative Law Judge

DR/mjw
Newport News, VA

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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. § 1982.110(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. § 1982.110(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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).