



Issue Date: 06 June 2018

CASE NO.: 2018-SOX-00009

In the Matter of:

RUSSELL CARBON,
Complainant,

v.

SHIRE PHARMACEUTICALS,
Respondent.

ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act (“SOX”), 18 U.S.C. § 1514A and the implementing regulations at 29 C.F.R. Part 1980. Pursuant to 29 C.F.R. §1980.107, the proceeding will be held in a manner consistent with the procedural rules set forth in federal regulations at 29 C.F.R. Part 18, Subpart A (29 C.F.R. §18.10 to §18.95). Complainant Russell Carbon alleges that he was terminated in retaliation for having reported to his supervisors that Respondent Shire Pharmaceuticals was dumping contaminated wastewater into a public water system and was concealing it from upper management and shareholders.

On March 1, 2018, I issued an Order to Show Cause why this matter should not be dismissed, based on evidence that Mr. Carbon’s objection and request for hearing were untimely filed. After learning that the parties did not receive the March 1 order, the deadlines were extended. Mr. Carbon filed a response on May 1, 2018, and Respondent Shire Pharmaceuticals (Shire) filed its reply on May 30, 2018.

The regulations implementing SOX provide in pertinent part:

Any party who desires review, including judicial review, of the findings and preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under the Act, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to §1980.105(b). The objections and/or request for a hearing must be in writing and state whether the objections are to the findings and/or the preliminary order, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing....

29 C.F.R. § 1980.106(a).

Failure to file a timely objection results in the Secretary's Findings becoming the final, non-appealable order of the Secretary. 29 C.F.R. § 1980.106(b).

Here, the evidence shows, and I find:

1. Mr. Carbon filed his discrimination complaint with the Occupational Safety and Health Administration on May 8, 2017.
2. The OSHA Assistant Regional Administrator issued the Secretary's Findings dismissing Mr. Carbon's complaint on November 16, 2017.
3. The U.S. Postal Service delivered the Secretary's Findings to Mr. Carbon's counsel's office ("Front Desk/Reception") at 12:25 p.m. on November 28, 2017.
4. The Secretary's Findings were opened and date-stamped by a legal assistant in Mr. Carbon's counsel's office on November 30, 2017.
5. Mr. Carbon, through counsel, objected to the Secretary's Findings and requested a hearing by letter dated December 29, 2017.¹
6. Counsel's letter was sent from counsel's office in Alpharetta, Georgia on December 29, and delivered to OALJ on January 2, 2017.

Under the regulation quoted above, the December 29 mailing of Complainant's objection and request for a hearing was timely if the Secretary's Findings were "received" on or after November 29, 2018. Here, the Secretary's Findings were delivered to Complainant's counsel on November 28, and opened by counsel's legal assistant on November 30. The question then becomes whether delivery to counsel's office constitutes "receipt," or the act of opening the envelope constitutes "receipt." If delivery equals receipt, then Complainant's objections and request for hearing were untimely filed. If opening the envelope equals receipt, then Complainant's objections and request for hearing were timely.

Complainant cites *Erhard v. C.I.R.*, 87 F.3d 273 (9th Cir. 1996) in support of his argument that the 30-day appeal period was triggered when counsel's legal assistant opened the envelope containing the Secretary's Findings. Complainant argues that the language in that opinion holding that "actual, physical receipt of the notice is ... required to have actual notice." *Id.* at 274. As Employer aptly points out, however, that quote is incomplete. The complete quote is that "[a]ctual, physical receipt of the notice is all that is required to have actual notice – the taxpayer does not have to open or read the notice." *Ibid.* Clearly, in the context of this case, the complete quote supports a finding that delivery to counsel's office constitutes "receipt" within the meaning of the regulation.

Likewise, in a case similar to this one, an administrative law judge dismissed a hearing request as untimely when it was made 80 days after the Secretary's Findings were delivered to the complainant's last known address, even though the complainant was living elsewhere at the time. *Robinson v. Northwest Airlines, Inc.*, 2004-AIR-00037 (ALJ Oct. 28, 2004).

¹ The first page of the multi-page letter is dated January 29, 2017, but that date is clearly in error; the remaining pages are dated December 29, 2017, and the FedEx label show that it was mailed on the latter date and delivered to OALJ on January 2, 2018.

Based on the findings of fact above and the cases cited herein, I find and conclude that Complainant received the Secretary's Findings on November 28, 2017, when the U.S. Postal Service delivered them to his counsel's office. The regulation suffers from no ambiguity or lack of clarity; it establishes a bright-line rule. To find otherwise – that Complainant received the Secretary's Findings on November 30, when counsel's legal assistant opened the envelope – would encourage gamesmanship in proceedings such as this.

Because the Secretary's Findings were received by Complainant's counsel on November 28, 2017, Complainant's objection and request for a hearing were due to be postmarked no later than December 28, 2017. They were postmarked December 29, 2017. The latter date is 31 days after the receipt by counsel of the Secretary's Findings, and the objections and request for a hearing were therefore untimely filed.²

Accordingly, IT IS ORDERED that the complaint of Complainant Russell Carbon is DISMISSED, and the Secretary's Findings are the final order of the Secretary.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

² Although the 30-day deadline is subject to equitable tolling, Complainant has presented no evidence and made no argument that he is entitled to it. I therefore find that he is not.