



In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR
DIVISION, EMPLOYMENT STANDARDS
ADMINISTRATION, UNITED STATES
DEPARTMENT OF LABOR,**

ARB CASE NO. 09-131

ALJ CASE NO. 2009-LCA-024

DATE: October 28, 2009

PROSECUTING PARTY,

v.

SILICONLINKS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER OF REMAND

Vikas Taank filed a complaint with the United States Department of Labor Employment Standards Administration (ESA), alleging that his employer, Siliconlinks, Inc., violated the Immigration and Nationality Act (INA),¹ as amended by the American Competitiveness and Workforce Improvement Act of 1998,² and its implementing regulations³ when it failed to provide him fringe benefits and required him to pay an impermissible filing fee. A Department of Labor Administrative Law Judge (ALJ) dismissed the complaint because the Regional Office of the Solicitor (RSOL), representing the prosecuting party, the Administrator of the Wage and

¹ 8 U.S.C.A. §§ 1101(a)(15)(H)(i)(b), 1182(n) (West 1999 & Supp. 2004).

² Pub. L. 105-277, 112 Stat. 2681 et seq.

³ 20 C.F.R. Part 655, Subparts H and I (2007).

Hour Division, failed to attend the hearing, and the ALJ found that the Administrator did not show good cause for his failure to appear.

The Administrator timely appealed and argues that the ALJ abused his discretion in dismissing the claim. We agree with the Administrator that dismissal of Taank's complaint was too severe a sanction for the RSOL's failure to attend the hearing, given the circumstances of this case. Therefore, we reverse the ALJ's decision to dismiss the complaint and remand this case for a hearing on its merits.

BACKGROUND

The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations.⁴ These workers commonly are referred to as H-1B nonimmigrants. Specialty occupations are those occupations that require "theoretical and practical application of a body of highly specialized knowledge, and ... attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."⁵ To employ H-1B nonimmigrants, the employer must fill out a Labor Condition Application (LCA) and file it with the Department of Labor (DOL).⁶ The LCA stipulates the wage levels and working conditions that the employer guarantees for the H-1B nonimmigrant for the period of his or her authorized employment.⁷ After securing DOL certification for the LCA, the employer petitions for, and the nonimmigrant may receive, an H-1B visa from the State Department upon United States Citizenship and Immigration Services (USCIS) approval.⁸

On April 14, 2008, Taank filed a complaint with the ESA alleging that his employer, Siliconlinks, Inc., failed to provide fringe benefits to H-1B workers equivalent to those provided to U.S. workers and that it required him to pay all or part of his \$1,500.00 filing fee in violation of the Immigration and Nationality Act and its implementing regulations. On May 12, 2009, the Administrator issued a determination, finding that Siliconlinks had violated the INA by requiring or accepting payment of the additional petition fee and that it owed back wages in the amount of \$1,500.00 to Taank. Siliconlinks timely requested a hearing before an Administrative Law Judge (ALJ).

On June 5, 2009, the ALJ issued a notice scheduling the hearing for June 23, 2009. Although the notice of hearing provided for pre-hearing discovery, no such discovery was

⁴ 8 U.S.C.A. § 1101(a)(15)(H)(i)(b).

⁵ 8 U.S.C.A. § 1184(i)(1).

⁶ 8 U.S.C.A. § 1182(n).

⁷ 8 U.S.C.A. § 1182(n)(1)(A)(i); 20 C.F.R. §§ 655.731, 655.732.

⁸ 20 C.F.R. § 655.705(a), (b).

conducted.⁹ On June 22, 2009, the ALJ's law clerk made a telephone call to Wage and Hour's Raleigh, North Carolina District Office regarding the hearing scheduled for the next day. At that point, the Raleigh office contacted RSOL in Atlanta, which represents the Administrator in H-1B claims arising in Region 4, regarding the hearing. Two RSOL attorneys then called the ALJ's law clerk to inform her that the RSOL had not received the Notice of Hearing and that since no pre-hearing discovery had been conducted, it had no notice of the hearing whatsoever until they received the information from the Raleigh office on that day, June 22, 2009.¹⁰ The RSOL attorneys told the ALJ's law clerk that RSOL attorneys would not be able to attend the hearing the next day and that they understood that the ALJ would be so informed.

On June 23, 2009, no RSOL attorney appeared at the hearing. In response, the ALJ issued a Notice of Order to Show Cause ordering the Administrator to show good cause why the matter should not be dismissed for his failure to comply with his order to appear at the hearing. The ALJ noted that while no one from RSOL was at the hearing, the Respondent was present and prepared for the hearing.

On June 30, 2009, the Administrator submitted his Response to Court's Notice of Order to Show Cause, stating that RSOL did not receive a copy of the notice of hearing and that it had no notice that the ALJ had set the hearing for June 23, 2009, until the afternoon of June 22, 2009, when the Raleigh District Office contacted RSOL. The Administrator's response stated that counsel promptly contacted the ALJ's law clerk to inform her that they had not had any notice of the hearing scheduled for the next day. The RSOL explained that neither did it have any notice of the hearing based on any communications between the parties in the form of pre-hearing disclosures and exchanges as identified in the Notice of Hearing that it had not received. The Administrator explained that because his counsel did not receive notice of the hearing until the afternoon of June 22, 2009, his counsel was unable to appear at the hearing the following morning and that counsel had contacted the ALJ about this on the afternoon of June 22. The

⁹ The ALJ's Prehearing Order required the parties to meet and confer with each other on discovery issues within 5 days of the date on which the ALJ issued the Order. The Administrator and the Respondent were jointly responsible for arranging the conference as provided in the Order. The ALJ also ordered the parties to exchange information regarding parties with discoverable information and a description of documents that would be used to support claims and defenses. Finally, the parties were to confer and file with the ALJ a Joint Pre-Trial Stipulation. The ALJ warned the parties that any documentary evidence not exchanged could be excluded from the record. Nevertheless, the Respondent did not contact RSOL as the Order required.

¹⁰ There is some discrepancy as to when and how the RSOL first received notice of the hearing. The RSOL stated in its motion to the Board that it first received notice in an e-mail from the Raleigh District Office at 3:25 p.m., on June 22, 2009; the RSOL's response to the ALJ's order to show cause stated, however, that the first notice it received was a telephone call from the Raleigh District Office on the afternoon of June 22, 2009; while the ALJ stated in the R. D. & O. that his law clerk left voicemails with the RSOL in the morning and spoke to someone in the RSOL on June 22, 2009, before she talked to the RSOL attorney who was apparently assigned the matter at 3 or 4 o'clock p.m. In any event, it is clear that the RSOL did not receive notice of the hearing scheduled for June 23, 2009, until sometime between late morning and the afternoon of June 22, 2009.

Administrator represented that his counsel had acted in good faith in this matter and submitted that good cause existed why the matter should not be dismissed.

On July 13, 2009, the ALJ issued a Decision and Order Dismissing the Complaint, noting that the Certificate of Service for the notice of hearing clearly indicated that the RSOL in Atlanta was sent a copy of the notice. The ALJ stated that the lack of any pre-hearing disclosures or exchanges from the Respondent was not a defense for RSOL's failure to appear in court or to comply with his order. The ALJ further noted that the parties were given courtesy telephone calls by his law clerk the day before the hearing. The ALJ found that the Administrator's response did not demonstrate good cause to show why the complaint should not be dismissed and did not find the explanations in the response to be entirely credible. He stated that the RSOL had timely notice of the time, place, and date of the hearing and that all good efforts should have been made to ensure that they complied with his order. The ALJ concluded by stating that the RSOL's failure to provide an attorney after being made aware of the situation showed a lack of concern for the importance of such a case and demonstrated a general lack of professional courtesy to the Court, to the Complainant, and to the Respondent. Thus, the ALJ dismissed the claim pursuant to 29 C.F.R. Parts 18.5(b) and 18.39(b).

The Deputy Administrator filed a Motion for Summary Reversal or, in the alternative, a Petition for Review of the ALJ's order with the Administrative Review Board on August 12, 2009.¹¹ The Board denied the Deputy Administrator's Motion for Summary Reversal but established an expedited briefing schedule allowing the Respondent to submit a brief on or before September 11, 2009, and considering the Deputy Administrator's Motion for Summary Reversal as his brief. Siliconlinks did not submit a brief.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to review the ALJ's decision.¹² Under the Administrative Procedure Act, the Board, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial

¹¹ The Deputy Administrator attached an affidavit of John A. Black to its motion and petition for review which we do not consider on appeal as it was not submitted to or considered by the ALJ in this matter.

¹² 8 U.S.C.A. § 1182(n)(2); 20 C.F.R. § 655.845 (2008). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

decision”¹³ The Board has plenary power to review an ALJ’s factual and legal conclusions de novo.¹⁴

The ARB reviews an ALJ’s determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard, i.e., whether, in ruling as he did, the ALJ abused the discretion vested in him to preside over the proceedings.¹⁵

DISCUSSION

We consider whether the ALJ abused his discretion when he dismissed the Complainant’s complaint because the RSOL failed to attend the hearing and to comply with his order to do so.

Department of Labor ALJs have an inherent power, governed not by rule or statute, but by the control necessarily vested in courts, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.¹⁶ ALJs must exercise this power carefully, however, fashioning appropriate sanctions for conduct that abuses the judicial process.¹⁷ Because dismissal is perhaps the severest sanction and because it sounds “‘the death knell of the lawsuit,’ [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious.”¹⁸

The Administrator’s counsel argues that following the principle that dismissal is appropriate for only extreme and egregious actions or delay, that the ALJ abused his discretion when he dismissed this action because the RSOL showed good cause for failing to appear at the hearing. The Administrator’s counsel states that when the RSOL first became aware of the hearing the day before it was to take place, it acted with due diligence and promptly contacted the ALJ’s office on two occasions. During the first conversation with the ALJ’s law clerk, the

¹³ 5 U.S.C.A. § 557(b) (West 2008).

¹⁴ *Yano Enters., Inc. v. Adm’r*, ARB No. 01-050, ALJ No. 2001-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Adm’r v. Jackson*, ARB No. 00-068, ALJ No. 1999-LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

¹⁵ *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115, ALJ Nos. 2004-SOX-020, 2004-SOX-036, slip op. at 8 (ARB June 2, 2006); *Waechter v. J.W. Roach & Sons Logging and Hauling*, ARB No. 04-183, ALJ No. 2004-STA-043, slip op. at 2 (ARB Dec. 29, 2005).

¹⁶ *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, ALJ No. 2005-ERA-024, slip op. at 4 (ARB Feb. 29, 2008).

¹⁷ *Id.*

¹⁸ *Id.* (quoting *Somerson v. Mail Contractors of Am.*, ARB No. 02-057, ALJ Nos. 2002-STA-018, 2002-STA-019, slip op. at 8-9 (ARB Nov. 25, 2003) (citations omitted)).

RSOL informed the clerk that they had just found out about the hearing. In the second conversation, the RSOL understood that the ALJ would be informed of the RSOL's inability to appear at the hearing the following morning.

As the RSOL had no notice of the hearing prior to the day before it was to take place, and as the RSOL contacted the OALJ to inform the ALJ of this as soon as they discovered that the hearing was set for the next morning, good cause existed not to dismiss the claim. Although the service sheet on the notice of hearing listed the RSOL in Atlanta, counsel averred that the RSOL did not receive the notice of hearing and had no notice of the hearing until July 22, 2009. Although the ALJ did not find the RSOL's explanations "entirely credible,"¹⁹ this credibility determination was not based on the witnesses' demeanor, and we find no reason to disbelieve the attorney's averment that the RSOL did not receive the notice.²⁰

This situation does not present an example of egregious misconduct but of an apparent delivery mistake, which was discovered too late to be rectified satisfactorily, i.e., the hearing taking place at the scheduled time. We acknowledge that rather than simply announcing to the ALJ's clerk that no attorneys would appear, that the RSOL might have handled this situation more professionally by filing a motion for continuance, or by asking counsel for the local Solicitor's Office to appear at the hearing to explain the RSOL's position. This deficiency and lack of proper courtesy to the court does not merit dismissal of the claim, however.²¹

We note that the person most prejudiced by dismissal is the Complainant, who was completely without fault in this matter and who was reliant upon the RSOL to prosecute his claim. This case is distinguishable from those in which a party is held responsible for the deficiencies of his or her counsel.²² The RSOL was the prosecuting party and, as such, was not Taank's counsel, nor did Taank choose the RSOL attorneys to represent him. Taank should not be penalized and the public interest prejudiced because of the RSOL's failure to appear at the

¹⁹ Decision and Order Dismissing Complaint at 3.

²⁰ Compare *Wainscott v. Pavco Trucking Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 4 (ARB Oct. 31, 2007) (The Board accords special weight to an ALJ's explicitly demeanor – based credibility finding.).

²¹ We also decline to penalize the Complainant because the District Office did not contact the RSOL to ensure that they were represented in the matter, as we conclude that the District Office reasonably relied on the service sheet indicating that the RSOL had been served regarding the hearing date.

²² See e.g., *McCrimmons v. CES Env't'l. Servs.*, ARB No. 09-112, ALJ No. 2009-STA-035, slip op. at 5-6 (ARB Aug. 31, 2009) (Attorney ignorance of the filing deadline does not constitute grounds for equitable tolling because clients are accountable for the acts and omissions of their attorneys.); *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 5 (ARB Feb. 28, 2007) (citations omitted) (same).

hearing.²³ As good cause existed that the claim should not be dismissed because the RSOL had no notice of the hearing until the day before it was to take place, the ALJ abused his discretion in dismissing the claim.

CONCLUSION

Thus, though the RSOL failed to attend the hearing, it showed good cause for not appearing. Therefore, we reverse the ALJ's recommended decision and order dismissing the claim and **REMAND** this matter for further proceedings consistent with this Order.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

²³ Deputy Administrator's Mot. Sum. Rev., at 9, August 12, 2009 (citing *Brock v. Pierce County*, 476 U.S. 253, 261 (1986) (in accordance with public policy, the public's interests may not be prejudiced by the negligence of government agents whose job it is to guard those public interests) (citations omitted)).