U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

VIMALRAJ MANOHARAN,

COMPLAINANT,

v.

HCL AMERICA, INC.,

RESPONDENT.

ARB CASE NO. 2019-0067[1]

ALJ CASE NO. 2018-LCA-00029

DATE: December 7, 2020

Appearances:

For the Complainant:
Vimalraj Manoharan, pro se, Tamilnadu, India

For the Respondent:
R. Blake Chisam, Esq., K. Edward Raleigh, Esq., and Samantha Anne Caesar, Esq.; *Fragomen, Del Rey, Bernsen & Loewy, LLP*, Washington, District of Columbia

BEFORE: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell, *Administrative Appeals Judge;* and Randel K. Johnson, *Administrative Appeals Judge*

ORDER OF REMAND

This case arises under the H-1B visa program of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2014) and 8 U.S.C. § 1182(n) (2013). The statute has implementing regulations at 20 C.F.R. Part 655, subparts H and I (2020). Vimalraj Manoharan (Complainant) filed a complaint

[1] We note that the caption in this matter has changed because we vacated the Board's November 27, 2019 order consolidating two appeals. See n.13 *infra*. Thus, the Board will address ARB No. 2020-0007 separately.

against his former employer, HCL America, Inc. (Respondent), with the Wage and Hour Division of the U.S. Department of Labor (WHD), alleging that Respondent failed to pay him required wages and terminated his employment in retaliation for protected conduct.

After an investigation, the WHD issued a letter determining that Respondent failed to pay Complainant required wages, but did not address the retaliation complaint. Complainant requested a hearing with the Office of Administrative Law Judges regarding the WHD's failure to investigate the retaliation charge and the WHD's assessment of back wages. After the Administrative Law Judge (ALJ) issued an Order to Show Cause and the parties responded, the ALJ entered an Order Dismissing Claim in Part and Holding the Claim in Abeyance in Part. The ALJ dismissed the retaliation claim for lack of jurisdiction, concluding that Complainant could not request a hearing on the charge because the WHD had neither conducted an investigation nor issued a determination on the matter.

Complainant appealed the ALJ's order to dismiss the retaliation claim to the Board.[2] Because the WHD failed to issue a determination whether there was reasonable cause for an investigation on the retaliation claim, we reverse the ALJ's order and remand this case to the WHD to make the required determination.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to 20 C.F.R. § 655.845. Under the Administrative Procedure Act, the ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[3]

BACKGROUND

On February 22, 2017, Complainant, an H-1B worker, filed a complaint with the WHD, alleging that his former employer, Respondent, had committed several violations of the H-1B provisions of the INA, including failure to pay him the required wage rate and retaliation against him for protected conduct.[4] The WHD subsequently notified Respondent that it intended to conduct an H-1B investigation concerning Complainant's employment.[5] During the course of the investigation,

---

[2] Complainant had also petitioned the Board to review the ALJ's order holding the wage claim in abeyance, but the Board denied the petition because the claim was not ripe. Order Denying Petition for Review in Part and Notice of Intent to Review in Part and Briefing Schedule at 2.

[3] *Lubary v. El Floridita*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 5 (ARB Apr. 30, 2012).

[4] Complainant's brief on appeal (Comp. Br.) at 4.

[5] Respondent's brief on appeal (Resp. Br.) at 4.

Complainant communicated with WHD investigators regarding his complaint and inquired about the status of his retaliation claim on several occasions but was unable to ascertain the status of the claim.[6]

On August 2, 2018, the Administrator of the WHD (Administrator) issued a determination letter that included findings that Respondent committed several violations of the INA, including failing to pay Complainant required wages, failing to specify the H-1B nonimmigrant's occupation on the Labor Condition Application (LCA), and inaccurately stating the prevailing wage rate on the LCA.[7] The letter did not discuss Complainant's retaliation claim, nor did it explain whether an investigation on the claim had occurred.[8] The letter ordered Respondent to comply with relevant H-1B regulations and noted that Respondent already paid Complainant the $8,999.45 in assessed back wages.[9] The Administrator did not assess any further penalties.[10]

On August 6, 2018, Complainant requested a hearing on the matter. In relevant part, he complained that the WHD never responded to his request for the retaliation claim to be investigated as required under 20 C.F.R. § 655.806(a)(2).[11] On February 21, 2019, the ALJ issued an Order to Show Cause why the retaliation claim should not be dismissed for lack of jurisdiction.[12] On June 25, 2019, the ALJ entered an order dismissing the retaliation claim.[13] The ALJ determined that

---

[6] Comp. Br. 4-7. According to Complainant, after an initial meeting with a WHD investigator regarding the complaint, Complainant discussed the details of the retaliation charge in great depth with the investigator, and provided evidentiary material for the claim. Complainant had several further discussions with the investigator on the evidence. A few months after the complaint, the investigator informed Complainant that the case was in its final stages. However, a new investigator took over the case shortly after, and Complainant was informed several times thereafter that the investigation on his complaint was still ongoing. The Administrator did not issue its determination letter until a year after the initial investigator informed Complainant that the investigation was in its final stages, which still failed (as noted below) to address the retaliation claim.

[7] Respondent's Exhibit (RX) A.

[8] *Id.* Indeed, Complainant never received any type of substantive feedback from WHD in any form as to whether or not the agency had formed any type of opinion on the merits of his claim.

[9] *Id.*

[10] *Id.*

[11] Resp. Br. 5.

[12] Order to Show Cause at 4.

[13] Order Dismissing Claim in Part and Holding the Claim in Abeyance in Part (O.D.C.) at 1. Complainant had also argued to the ALJ that the back wages assessment was too low. In the June 25 Order, the ALJ held the claim in abeyance, concluding that only the WHD

Complainant could not request a hearing on the retaliation charge because "an investigation and determination are prerequisites for a request for hearing" and the "Administrator neither investigated nor issued a determination for a retaliation claim, which is factually distinct from the back wages claim."[14] The ALJ added that "a request for hearing is not proper to review [the] Administrator's failure to adhere to the [20 C.F.R.] § 655.806(a)(2) ten-day investigation decision deadline because that alleged failure is not a 'determin[ation], [made] after investigation' as required by [20 C.F.R.] § 655.820(b)."[15] Thereafter, Complainant filed a timely appeal of the dismissal.

DISCUSSION

Under 20 C.F.R. § 655.820(b), an interested party may request a hearing with an ALJ on an H-1B complaint when the Administrator "*determines, after investigation*, that there is no basis for a finding that an employer has committed violation(s)" or "that the employer has committed violations."[16] Because the Administrator never informed Complainant whether an investigation on his retaliation claim had been completed or issued a determination on whether Respondent committed retaliation, the ALJ concluded that Complainant was unable to request a hearing and, therefore, dismissed the claim for lack of jurisdiction.[17]

Complainant presents several arguments on appeal contending that the ALJ did have jurisdiction over the retaliation claim.[18]

We need not address Complainant's arguments, however, because the WHD failed to follow its basic regulatory requirements. When the WHD receives a complaint, the Administrator must determine within ten days whether the complainant presents a reasonable cause for an investigation.[19] If the Administrator determines that the complainant did not present reasonable cause, "the

---

could be a prosecuting party for the claim because it had found that Respondent committed a wage violation. After the WHD declined to prosecute and the ALJ dismissed the claim, Complainant filed a petition for review with the Board challenging the ALJ's decision, which the Board granted (ARB-2020-0007). On November 27, 2019, the ARB, in its Notice of Intent to Review and Briefing Schedule for ARB No. 2020-0007, consolidated appeal ARB No. 2020-0007 with this appeal, ARB No. 2019-0067. Because we are remanding this matter, we vacate the order consolidating the two appeals.

14 O.D.C. 6-7.

15 O.D.C. 7.

16 *Id.* (emphasis added).

17 O.D.C . 6-7.

18 Comp. Br. 4-7.

19 20 C.F.R. § 655.806(a)(2).

Administrator *shall so notify the complainant*," who may submit a new complaint with additional necessary information.[20] If the Administrator determines that an investigation is warranted, "an investigation *shall* be conducted and a determination issued."[21] The commands that the Administrator "shall" notify the complainant of a determination that no investigation was warranted or the results of an investigation are clearly mandatory and not within the agency's discretion.[22]

After Complainant had filed his complaint, the WHD never notified him whether he presented reasonable cause for an investigation on the retaliation claim, nor did the Administrator issue a determination on the claim, if an investigation had actually occurred. Complainant, despite his efforts, could not know whether the WHD had made a decision to investigate his claim or not. Indeed, because of the WHD's failure to adhere to its regulatory duty, it is unclear whether such investigation ever occurred.

It is an elementary principle "that an agency must adhere to its own rules and regulations" and that "departures from those rules . . . cannot be sanctioned."[23] Indeed, the Board has applied this principle to the actions of the WHD. *In Administrator, Wage and Hour Division v. Fernandez Farms, Inc.*, for example, an ALJ concluded that certain parties were not properly before the ALJ at a hearing to debar them from participating in the H-2A worker program, because the pertinent regulation required that "the person against whom such action is taken shall be notified in writing of such determination" but the parties had never received prior notice of the proceedings from the WHD.[24] Noting that agencies cannot "ignore the requirements of existing regulations and then ask the administrative judiciary to approve that conduct," the Board affirmed the ALJ's decision.[25]

Here, we will not approve of such conduct either. The WHD's own regulations mandated that the Administrator inform Complainant if they determined that there

---

[20] *Id.* (emphasis added).

[21] § 655.806(a)(3) (emphasis added).

[22] *See Admin, Wage & Hour Div. v. Advanced Pro. Mktg., Inc.*, ARB No. 2012-0069, ALJ No. 2008-LCA-00017, slip op. at 10-11 (ARB June 3, 2014); *Brock v. Pierce Cty.*, 476 U.S. 253, 260 & n.7 (1986).

[23] *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) (citing Teleprompter Cable Systems v. FCC, 543 F.2d 1379, 1387 (D.C. Cir. 1976)); see also Eric Biber, Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction, 26 VA. ENVTL. L.J. 461, 477-78 (2008) ("Courts . . . will require agencies to comply with duties that they impose upon themselves through a regulation or other binding rule-making proceeding.").

[24] *Admin, Wage & Hour Div. v. Fernandez Farms, Inc.*, ARB No. 2016-0097, ALJ No. 2014-TAE-00008, slip op. at 7 (ARB Sept. 16, 2019) (quoting 29 C.F.R. § 501.31).

[25] *Id.* at slip op. 4 n.10, 7.

was not a reasonable cause for an investigation or the results of an investigation if one occurred. The WHD clearly failed to adhere to those regulations. If the ALJ's reasoning here were to stand, Complainant would be left with no process to vindicate his claims of retaliation and be caught in a "Catch-22," because the failure of the agency to respond with any determination at all precludes any avenue of relief—a situation particularly egregious here where the Complainant has no private right of action in court.[26] Phrased another way, the agency could insulate itself from review by its complete failure to take any action whatsoever. We shall not allow Complainant to "be penalized" and foreclosed from pursuing any avenue for possible relief by the agency's failure to follow its own rules.[27]

CONCLUSION

We **REVERSE** the ALJ's order dismissing the retaliation claim and **REMAND** the case to the WHD to issue a determination as required by its own regulations.[28]

SO ORDERED.

---

[26] *See, e.g.*, *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 423–24 (4th Cir. 2005) ("[A]n implied private right of action . . . is not implied under 8 U.S.C. § 1182(n).").

[27] *See Kahn v. Pepsi Cola Bottling Grp.*, 526 F. Supp. 1268, 1270 (E.D.N.Y. 1981) (refusing to dismiss a complaint under Title VII of the Civil Rights Act because the EEOC failed to provide the plaintiff, through no fault of his own, with a right to sue letter, a jurisdictional prerequisite to a Title VII lawsuit, that he had lawfully requested).

[28] On remand, the Administrator may indeed determine that an investigation is not warranted, which would end the enforcement process because that decision is not reviewable. *Gupta v. Headstrong, Inc.*, ARB Nos. 2011-0065, -0008, ALJ No. 2011-LCA-00038, slip op. at 8 (ARB June 29, 2012); 20 C.F.R. § 655.806(a)(2). If the Administrator does find reasonable cause to investigate, the WHD would then be required to conduct an investigation and issue a determination as to whether retaliation occurred. § 655.806(a)(2) & (3). If the Administrator determines no retaliation occurred after the investigation, Complainant could then have that decision reviewed by an ALJ. § 655.820(b)(1).