Whistleblower Newsletter Miscellaneous Cases

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U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002
(202) 693-7500
www.oalj.dol.gov

John M. Vittone
Chief Judge

Thomas M. Burke
Associate Chief Judge
for
Black Lung and
Traditional

PIPELINE SAFETY IMPROVEMENT ACT

NO RETROACTIVE APPLICATION OF THE WHISTLEBLOWER PROVISION OF THE PIPELINE SAFETY IMPROVEMENT ACT

In ***Saban v. Morrison Knudsen***, ARB No. 03-143, ALJ No. 2003-PSI-1 (ARB Mar. 30, 2005), the ARB affirmed the ALJ's holding that since the alleged adverse action predated the effective date of the whistleblower protection provision of the Pipeline Safety Improvement Act of 2002, and since Congress did not intend that the Act be applied retroactively, the complaint should be dismissed. *See Landgraf v. USI Film Products,* 511 U.S. 244 (1994).

ATTORNEY DISCIPLINARY PROCEEDINGS

[Nuclear and Environmental Whistleblower Digest IX M 2]
[STAA Whistleblower Digest II M]
ATTORNEY MISCONDUCT; JURISDICTION OF ARB TO REVIEW SECTION 18.34(g)(3) SUSPENSION ORDER; DE NOVO REVIEW OF PROCEDURE AND FACTUAL AND LEGAL CONCLUSIONS RELATING TO ISSUE OF WHETHER

THERE HAD BEEN MISCONDUCT; ABUSE OF DISCRETION REVIEW OF CHOICE OF SANCTION

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ had suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). The attorney and his client appealed to the ARB, which found that it had jurisdiction to review the section 18.34(g)(3) suspension because it occurred in relation to whistleblower proceedings over which the Secretary had delegated the responsibility to review the recommended decisions of ALJs. Because the conduct occurred in different types of cases in which the type of review conducted by the ARB varied, the ARB concluded that it would use the most comprehensive level of review -- i.e., de novo review -- of the procedure that the Associate Chief ALJ had followed for compliance with due process guidelines, and his factual findings and legal conclusions regarding the instances of misconduct. The Board, however, applied an abuse of discretion standard to the Associate Chief ALJ's choice of sanction.

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ATTORNEY MISCONDUCT; ROLE OF THE OFFICE OF THE SOLICITOR IS TO REPRESENT THE DEPARTMENT'S INTERESTS

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ had suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). On appeal, the Solicitor of Labor had filed an amicus brief on behalf of the Assistant Secretary for OSHA in support of the suspension. The attorney and his client filed a motion to disqualify the Solicitor as the Assistant Secretary's representative. The ARB denied the motion noting, inter alia, that "the Solicitor's representation of the Assistant Secretary in this appeal from [the Associate Chief ALJ's] disqualification of Mr. Slavin pursuant to Section 18.34(g)(3) accords with the Secretary's directive in *Rex v. Ebasco Servs.* that the Solicitor represent the Department's interests in attorney disqualification proceedings. *Rex,* No. 87-ERA-6, slip op. at 4 (Sec'y Oct. 3, 1994)."

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ATTORNEY MISCONDUCT; 29 C.F.R. § 18.34(g)(3) PERMITS A BAR OF AN ATTORNEY FROM APPEARING IN FUTURE CASES

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ had suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). On appeal, the attorney and his client argued that § 18.34(g)(3) does not authorize entry of an order barring a representative from appearing in <u>future</u> cases. The ARB rejected this argument based on *In re Edward A. Slavin, Jr.,* ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003) (distinction between 18.34(g)(3) and 18.36 proceedings) and *Rex v. Ebasco Servs.,* 1987-ERA-6 and 40 (Sec'y Oct. 3, 1994) (Secretary's order agreeing to conduct a single proceeding to resolve question of attorneys' conduct rather than serial proceedings before each ALJ before which those attorneys appeared).

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ATTORNEY MISCONDUCT; WHAT CONSTITUTES ADEQUATE DUE PROCESS UNDER SECTION 18.34(g)(3)

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ had suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). On appeal, the ARB considered whether this procedure complied with due process safeguards as interpreted within the context of attorney disciplinary proceedings.

The Board observed that section 18.34(g)(3) does not delineate a step-by-step process for rendering a determination. The Board carefully examined the Associate Chief ALJ's procedure and found that it comported with due process. Specifically, the ALJ's Notice of the Judicial Inquiry clearly identified the evidentiary basis for the section 18.34(g)(3) inquiry and the types of professional misconduct that were at issue. The Board found that the Notice also explained the procedure that would be followed and the means by which the attorney could defend against the charges, including the prerequisites for the scheduling of an evidentiary hearing. The ARB observed that because of the lack of detail in section 18.34(g)(3), it had been especially important to provide this information to the attorney. Finally the Board found that the Notice unambiguously advised the attorney of the consequences of a failure to timely respond, a failure to meet the prerequisites for an evidentiary hearing, and a failure to successfully defend against the charges.

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ATTORNEY MISCONDUCT; ORAL, EVIDENTIARY HEARING NOT REQUIRED IF ATTORNEY FAILS TO PRESENT THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT; PRIOR JUDICIAL RULINGS ON MISCONDUCT AS EVIDENCE

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ had suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). In the Notice of Judicial Inquiry, the judge had informed the attorney of the charges, which were based on holdings of DOL ALJs, the ARB, and state and federal courts in prior proceedings. The judge explained the procedure that would be followed. The judge instructed, inter alia, that the attorney needed to present a genuine issue of material fact on the charges in order for an oral, evidentiary hearing to be convened, noting that in the prior cases the attorney had not denied that he had engaged in the conduct cited by the presiding officers but rather had typically defended based on First Amendment and justification defenses. The judge also informed the attorney that he would not be permitted to re-litigate any matter that he had been afforded a full and fair opportunity to contest in the case in which the misconduct occurred. When the attorney, in his response to the Notice, did not identify any evidence to present on any fact issues, the judge decided the case on the existing record without first convening an oral, evidentiary hearing.

On appeal the attorney and his client argued that the judge erred by failing to conduct an oral hearing. The Board, however, found that the Associate Chief ALJ's application of threshold requirements before such a hearing would be scheduled was "consistent with the procedural safeguards afforded an attorney who is the subject of

a disciplinary proceeding. *Cf. In re Keiler,* 316 NLRB 763, 764-66 (1995) (discussing basic due process safeguards provided attorneys in disciplinary proceedings and by the agency's procedural rules, and concluding that attorney's response to the Board's show cause order failed to demonstrate a basis for an "oral or trial-type hearing"). The Board also found no error in informing the attorney that he would not be allowed to re-litigate matters in which he had been afforded an opportunity to challenge in the prior proceedings, noting that this was consistent with principles of issue preclusion, and that the Associate Chief ALJ had reviewed the "factual circumstances" evidenced by the court documents that were properly in the record. Moreover, the Board stated that "court or agency generated documents, including decisions and orders, that address an attorney's questionable conduct in a particular case may provide competent evidence in a later disciplinary proceeding regarding whether the attorney engaged in such conduct." (citations omitted).

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ATTORNEY MISCONDUCT BEFORE OALJ; PREPONDERANCE OF THE EVIDENCE STANDARD OF PROOF

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3), finding that documents from the official records of federal courts, state courts and DOL administrative proceedings provided "clear and convincing" evidence of misconduct. In an amicus brief on appeal, the Assistant Secretary for OSHA argued that the judge need not have applied a "clear and convincing" standard of proof, but should have used a preponderance of the evidence standard. The ARB agreed that the Secretary of Labor's decision in *Rex v. Ebasco Servs*. 1987-ERA-6 (Sec'y Oct. 3, 1994), provides for a preponderance of the evidence standard of proof in attorney misconduct cases before OALJ, but also agreed with the judge that the documentation provided such clear and convincing evidence, thus obviating any need to review the evidence under a lower standard.

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ATTORNEY MISCONDUCT; USE OF ABA MODEL RULES OF PROFESSIONAL CONDUCT TO DETERMINE WHETHER THERE WAS MISCONDUCT AND THE ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS TO DETERMINE THE SANCTION

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). The ARB found that the judge properly used the *Model Rules of Professional Conduct* in considering whether the attorney's conduct was improper. In addition, the Board found that the judge did not abuse his discretion in relying on the *ABA Standards for Lawyer Discipline and Disability Proceedings* (1992) to determine the time period for which the Section 18.34(g)(3) bar should be imposed.

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ATTORNEY MISCONDUCT; FIRST AMENDMENT CONSTRAINED WHEN FILING DOCUMENTS OR OTHERWISE COMMUNICATING WITH A COURT

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3). The attorney's chief defense was that his conduct was protected under the First Amendment. On review, the ARB agreed with the judge that much of the conduct for which the attorney was being suspended, like failing to file pleadings in a timely manner, with proper information and in the required format, could not reasonably be construed as speech protected by the First Amendment. The ARB also found that the judge properly concluded that the attorney's speech-based misconduct was subject to the constraints imposed on the language used by attorneys when filing documents with or otherwise communicating with a court, and thereby properly rejected the attorney's contention that the Section 18.34(g)(3) proceeding had been undertaken as retaliation for the attorney's exercise of his First Amendment rights through public criticism of the DOL whistleblower program. The ARB's decision includes several pages of discussion of the balance between protecting the integrity of the adjudicative process and the First Amendment.

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ATTORNEY MISCONDUCT; FIVE YEAR DISQUALIFICATION APPROPRIATE WHERE THE ATTORNEY ENGAGED IN CONDUCT THAT BREACHED DUTIES TO HIS CLIENTS AND THE LEGAL SYSTEM AND WHERE THERE WERE NO MITIGATING CIRCUMSTANCES BUT A NUMBER OF AGGRAVATING FACTORS

In ***Edward A. Slavin, Jr.***, ARB No. 04-088, ALJ No. 2004-MIS-2 (ARB Apr. 29, 2005), the Associate Chief ALJ suspended an attorney from practice before OALJ under 29 C.F.R. § 18.34(g)(3) for an indefinite period of no less than five years. The ARB, employing an abuse of discretion standard of review in regard to the choice of sanction, found that the judge properly relied on the *ABA Standards for Lawyer Discipline and Disability Proceedings* (1992) to determine the time period for the sanction, that the judge carefully followed the comprehensive formula that the ABA standards provide, thoroughly explained his conclusions that the attorney had breached duties to his clients and to the legal system, and had explained his findings that there were no factors that weigh against imposing a severe sanction and that there were a number of aggravating factors that provide further support for the sanction. The Board therefore affirmed the five year disqualification.