U.S. Department of Labor

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

IN THE MATTER OF:

COLIN DeBUSE,

COMPLAINANT,

v.

CORR FLIGHT S.
***d/b/a* NICHOLAS AIR,**

RESPONDENT.

ARB CASE NO. 2023-0036

ALJ CASE NO. 2020-AIR-00015
ALJ SCOTT R. MORRIS

DATE: February 28, 2025

Appearances:

***For the Complainant*:**
Gary Linn Evans, Esq., George Andrew Coats, Esq., and Ashley Ann Sander, Esq.; *Coats & Evans, P.C.*; The Woodlands, Texas

***For the Respondent*:**
Edwin S. Gault, Jr., Esq.; *Forman Watkins & Krutz LLP*; Jackson, Mississippi; and Wendi Litton, Esq.; *Nicholas Air*; Oxford, Mississippi

Before THOMPSON and ROLFE, Administrative Appeals Judges

ORDER DENYING RECONSIDERATION

PER CURIAM:

This case arises under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21 or Act).[1] On December 6, 2024, the Administrative Review Board (Board) issued a Decision and Order finding substantial evidence supports the ALJ's finding that

[1] 49 U.S.C. § 42121 (amended 2020), as implemented by the regulations at 29 C.F.R. Part 1979 (2024).

Complainant Colin DeBuse engaged in protected activity and affirming the Administrative Law Judge's (ALJ) award against Respondent Corr Flight S.[2]

On February 4, 2025, Respondent filed a Motion for Reconsideration of Decision and Order, arguing that the Board should reverse the ALJ's decision or stay the case because it filed an Appointments Clause challenge to the removal provisions governing Department of Labor ALJs in the United States District Court for the Northern District of Mississippi .[3] Alternatively, Respondent argues the Board erred in affirming the ALJ's decision because the ALJ did not properly weigh the evidence in finding Complainant engaged in protected activity and because the Board overlooked legal authority -- that Respondent does not identify in its motion -- in its original decision.[4] On February 13, 2025, Complainant responded, arguing Respondent provided no legal or factual support for its arguments that would permit the Board to disturb its original decision.

We deny Respondent's motion. As threshold dispositive issues, Respondent's motion is untimely, and the federal district court challenge has no relevance to this case because Respondent forfeited its removal challenge by not raising it to the ALJ and instead asserting it for the first time on a motion for reconsideration before the Board. Moreover, Respondent's remaining arguments plainly do not meet the criteria that would permit us to disturb our original decision.

1. Respondent's motion is untimely.

A party may move the ARB to reconsider its decision upon the filing of a motion for reconsideration within a "reasonable time" of the date on which the Board issued decision.[5] In applying this timeliness requirement, the Board has presumed a motion for reconsideration is timely when the motion was filed within a short time after the decision.[6] The Board has also "granted reconsideration where a petition, though filed after a longer period, raised [Federal Rule of Civil Procedure]

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2 *DeBuse v. Corr Flight S.*, ARB No. 2023-0036, ALJ No. 2020-AIR-00015 (ARB Dec. 6, 2024).

3 Respondent's Motion for Reconsideration of Decision and Order at 2-5. Respondent also argues that the Board should stay a decision on the current motion for reconsideration because it has also filed a constitutional challenge to the applicable regulations in a United States District Court. *Id.* at 1-2.

4 *Id.* at 5-7.

5 *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 11 (ARB May 30, 2007).

6 *Id.* at 15.

Rule 60(b)-type grounds or showed 'good cause' for the delay."[7] The Board has found that twelve days or less is a "short period."[8]

The Board issued its decision in this case on December 6, 2024. Yet Respondent did not submit its Motion for Reconsideration until February 4, 2025. Respondent's motion thus was submitted 60 days after the Board's decision -- and not within a "short time." Indeed, the Board has determined that motions for reconsideration filed thirty-four days, sixty days, and four months after the Board's decision, respectively, were each untimely.[9] So too here.

Moreover, Respondent has not even attempted to argue that any of the factors in Fed. R. Civ. P. 60(b) excuse its untimeliness. Instead, it argues simply that its motion is timely because it was filed before "the deadline for appeal."[10] But that, demonstrably, is not the standard. And Respondent's motion is untimely under the correct one. We thus would deny the motion in its entirety on that basis alone, if not for other some equally straightforward dispositive grounds.

2. Respondent cannot raise the ALJ removal argument for the first time on a motion for reconsideration; regardless, it already forfeited the argument by not raising it to the ALJ and pressing it to the Board.

If Respondent's request for reconsideration had been timely, we nevertheless would deny reconsideration. We will reconsider our decisions under limited circumstances which include: (i) material differences in fact or law of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, or (iv) failure to consider material facts presented to the court before its decision.[11]

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7 *Id.*

8 *Id.* at 12-13 n.27.

9 *Id.* at 17 (a motion filed 60 days after the Board's decision was not within a short period and thus not filed within a reasonable time); *Powers v. Paper, Allied-Indus. Chem. & Energy Workers Int'l Union*, ARB No. 2004-0111, ALJ No. 2004-AIR-00019, slip op. at 4-5 (ARB Dec. 21, 2007) (same for motion filed after thirty-four days); *Williams v. United Airlines, Inc.*, ARB No. 2008-0063, ALJ No. 2008-AIR- 00003, slip op. at 2 (ARB June 23, 2010) (four months).

10 Respondent's Motion for Reconsideration of Decision and Order at 1.

11 *Rosenfeld v. Cox Enters., Inc.*, ARB No. 2016-0026, ALJ No. 2014-SOX-00033, slip op. at 2-3 (ARB May 26, 2017).

Even assuming Respondent has the threshold standing to challenge the removal provisions governing DOL ALJs,[12] it has not attempted to demonstrate the removal argument fits the narrow circumstances required for the Board to consider its argument. Nor could it: the facts on the removal issue have been set since the case's inception, and all the law cited in Respondent's motion predates our most recent decision by a long time. There thus was nothing preventing Respondent from pressing this argument from the beginning, and it therefore cannot be raised for the first time on a motion for reconsideration under the relevant reconsideration factors.[13]

And even more fundamentally -- and as a separate issue -- Appointments Clause arguments are subject to the ordinary rules of issue preservation and issue exhaustion.[14] In terms of the general principle of issue preservation, "[w]hether in proceedings before an administrative body or a court of law, a party customarily forfeits secondary review of issues not properly raised in an underlying phase of the proceeding."[15] Constitutional claims are no different: "Appointments Clause claims . . . have no special entitlement to review[] [and a] party forfeits the right to

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[12] *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 88-89 (3d Cir. 2024); *K & R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023) (finding a party had not "asserted any possible harm regarding" ALJ removal and could not sue); .

[13] Under our well-established precedent, the Board declines to consider arguments that a party raises for the first time on appeal. *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. The Residences at Boland Place*, ARB No. 2020-0031, slip op. at 9 (ARB Apr. 30, 2021) (citing *Privler v. CSX Transp., Inc.*, ARB No. 2018-0071, ALJ No. 2018-FRS-00021, slip op. at 3 (ARB Mar. 24, 2020)); *see also Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. N.M. Nat'l Elec. Contractors Ass'n*, ARB No. 2003-0020, slip op. at 4 (ARB Oct. 19, 2004) (declining to consider argument that was not raised in petitioner's original appellate brief because "new arguments . . . are not appropriate grounds for reconsideration"); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. U.S. Dep't of Energy, Richland, Wash.*, ARB No. 2003-0016, slip op. at 4 (ARB Oct. 6, 2004) (denying reconsideration request because petitioner "'either did make or could have made all of its present arguments in its Brief [in the original appeal]"); *Young v. Schlumberger Oil Field Servs.*, ARB No. 2000-0075, ALJ No. 2000-STA-00028, slip op. at 1-2 (ARB May 1, 2003) (denying reconsideration because "Complainant raises the issue for the first time, without any explanation for the delay, after we have rendered a final decision.").

[14] *See Lucia v. SEC*, 585 U.S. 237 (2018); *Edd Potter Coal Co., Inc. v. OWCP, U.S. Dep't of Lab.*, 39 F.4th 202 (4th Cir. 2022); *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093 (D.C.C. 2021); *Budri v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 858 F.App'x 117 (5th Cir. 2021).

[15] *Joseph Forrester Trucking v. OWCP, U.S. Dep't of Lab.*, 987 F.3d 581, 586 (4th Cir. 2021) (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial."[16]

In addition, issue exhaustion requirements in administrative proceedings can derive from statute, regulation, or judicial prudence.[17] Generally speaking, they oblige "a party to challenge an issue it disputes during an initial proceeding" to inform any subsequent review.[18] "Just like a runner must tag every base before running to home plate, a party must touch each base of the preservation process during the administrative and court proceedings."[19]

And in the almost five years this case was pending at OALJ and the Board -- including during a three-day hearing and in two separate trips to the ARB -- Respondent never once mentioned an Appointments Clause challenge until the absolute eleventh hour and fifty-ninth minute of the administrative process. Straightforward issue preservation law (and basic fairness) dictates that is simply too late.

3. Respondent's remaining arguments do not justify reversing our previous order.

Respondent's remaining claims do not require much discussion. As Complainant aptly points out, beyond not even attempting to satisfy the criteria for reconsideration, Respondent "cites to no rule, case law, or statute that would [demonstrate] reversible error" in our previous decision.[20] Nor could we independently discern one (were we inclined to look for one on our own). And therefore all that remains is Respondent's simple request for the Board to reweigh the facts underlying the ALJ's decision. But under our substantial evidence standard of review, we once again are prohibited from doing so.[21]

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16 *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 893-94 (1991) (Scalia, A., concurring).

17 *Joeseph Forrester Trucking*, 987 F.3d at 587 (citation omitted).

18 *Id.* at 586 (citing *Sims v. Apfel*, 530 U.S. 103, 108-09 (2000)).

19 *Id.* at 590.

20 Complainant's Response to Respondent's Motion for Reconsideration of Decision and Order at 6.

21 *DeBuse*, ARB No. 2023-0036, slip op. at 6. The Board "must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we 'would justifiably have made a different choice had the matter been before us de novo.'" *Sharpe v. Supreme Auto Transp.*, ARB No. 2017-0077, ALJ No. 2016-STA-00073, slip op. at 5 (ARB Dec. 23, 2019) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Respondent's Motion for Reconsideration of Decision and Order is **DENIED**.

SO ORDERED.

ANGELA W. THOMPSON
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge