U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,

CASE NO. 94-OFC-12

DATE: November 26, 1996

COMPLAINANT,

v.

CAMBRIDGE WIRE, INC.,

RESPONDENT,

and

UNITED STEELWORKERS OF AMERICA,

INTERVENOR.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

ORDER DECLINING REVIEW FOR LACK OF JURISDICTION

On December 18, 1995, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order Approving [a] Consent Decree (R. D. and O.). It concluded that the Consent Decree opposed by the Intervenor Union was fair, reasonable and adequate under Executive Order No. 11,246, 3 C.F.R. 339 (1964-65), *reprinted as amended* in 42 U.S.C. § 2000e note (1988). R. D. and O. at 17. The Consent Decree provides job and monetary relief to an affected class of minority and female applicants who applied for machine operator positions in 1989 and 1990. Under the Decree, Respondent Cambridge agrees to pay a total of $150,000 in five annual installments to

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[1/] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the executive order and regulations involved in this case to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

approximately 460 affected class members. Cambridge also agrees to provide retroactive seniority to September 25, 1989 to those minority/female applicants who applied in 1989, and to January 2, 1990, for those who applied in 1990, for a total of 32 new and current female and minority employees. *Id.* at 7 and n.5. These retroactive seniority dates would be used for determining pay rates and service-related benefits (vacations, severance pay, furlough-related determinations) and, for class members who complete two years of service, would be used for job bidding purposes. Consent Decree, 5-11, 11-19; R. D. and O. at 7.

In approving the Consent Decree, the ALJ held, in part: (1) the Intervenor Union's concurrence was not necessary for approval of the Decree, R. D. and O. at 8; (2) OFCCP had demonstrated statistically that Cambridge engaged in a pattern or practice of discrimination for the machine operator position in 1989 and 1990, *id.* at 11; (3) a judicial finding of discrimination was not required because the Consent Decree did not alter the collective bargaining agreement, or impose any legal obligation or duty on the Union, *id*. at 11-12; (4) the seniority relief for the 32 individuals did not impose such an unusual adverse impact on incumbents as to preclude such relief, *id*. at 13-16.

The ALJ stated that the Consent Decree was submitted for approval pursuant to 41 C.F.R. § 60-30.13, R. D. and O. at 2.[2/] Similarly, the Consent Decree itself states that it was negotiated and executed pursuant to 41 C.F.R. § 60-30.13, *id*. at 1, and contains the general provisions required under § 60-30.13(b) for approval of consent decrees, *id*. at 4.

The relevant regulation at 41 C.F.R. § 60-30.13(d) (1995) states:

> *(d) Disposition*. In the event an agreement containing consent findings and an order is submitted within the time allowed, the Administrative Law Judge, within 30 days, shall accept such agreement by issuing his decision based upon the agreed findings, *and his decision shall constitute the final Administrative order*.

(Emphasis added). In view of this provision, the ALJ's decision is final, not recommended, as characterized by the R. D. and O. at 1 and 17.[3/] *See* ARB Notice of Case Closing in *OFCCP v. RDS Manufacturing, Inc.*, ARB Case No. 96-167 (ALJ Case No. 94-OFC-15), July 29, 1996; *OFCCP v. Fleet Bank of New York*, ARB Case No. 96-148 (ALJ Case No. 95-OFC-2), July 25, 1996.

[2/] Typed incorrectly in the R. D. and O. at 2 as "41 C.F.R. § 6-30.13."

[3/] The Consent Decree itself states that it "shall become final and effective when it has been signed by the Administrative Law Judge," *id*. at 5, and "shall constitute the final Administrative Order in this case," *id*. at 25.

None of the parties has raised this jurisdictional issue in their pleadings[4/] to the Board. However, subject matter jurisdiction cannot be waived. We would be remiss in failing to determine whether we have jurisdiction to decide this case. Where apparent, we are obliged to notice lack of jurisdiction on our own motion. *OFCCP v. Yellow Freight System, Inc.*, Case No. 79-OFCCP-7, Spec. Asst. to Asst. Sec. Dec. and Ord. of Rem., Aug. 24, 1992, slip op. at 6-8 and cases cited.

Because the ALJ's decision approving the Consent Decree is final, the Board is precluded from further review of this matter.[5/] Therefore, we express no opinion on the propriety of the Consent Decree.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL A. SANDSTROM
Member

Alternate Member Joyce D. Miller, dissenting:

Since this proceeding involves a contested consent decree, 41 C.F.R. § 60-30.13(d) (1995) is not a jurisdictional bar to the Board's review because its ALJ finality provision is limited to

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[4/] We deny OFCCP's motion to strike the Union's reply brief to OFCCP's and Cambridge's responses to the Union's exceptions. OFCCP did not contend that the Union's reply brief was unfair or prejudicial to OFCCP's interests. Review of this brief was necessary to ensure that the Board had a full understanding of this case. *See Billings v. TVA,* Case No. 91-ERA-12, Sec. Ord. of Rem., Apr. 9, 1992, slip op. at 4, n. 5.

[5/] *OFCCP v. Carolina Freight Carriers Corp.*, Case No. 93-OFC-15, Sec. Ord. Approv. Cons. Decr., Mar. 16, 1995, stated:

> Since the ALJ's document is captioned as a recommended decision [under Executive Order No. 11,246, as amended], I have treated it accordingly to ensure finality and eliminate ambiguity. However, both paragraph 33 of the Revised Consent Decree and the concluding paragraph of the ALJ's R. D. state that the Revised Consent Decree constitutes the final administrative order in this case, and paragraph 3 of the Revised Consent Decree states that it is negotiated and executed pursuant to 41 C.F.R. § 60-30.13. Under 41 C.F.R. § 60-30.13(d), an ALJ's decision approving such a consent decree constitutes the final administrative order in the proceeding and no further action by the Secretary is necessary to make the order final and effective.

Id., slip op. at 2, n. 1. *OFCCP v. USAIR, Inc.*, Case No. 88-OFC-17, Sec. Ord. Approv. Cons. Decr., Jun. 30, 1992, adopted an ALJ's recommended order approving a consent decree under Executive Order No. 11,246 and approved the decree. However, the Secretary's decision in *USAIR* did not address her jurisdiction to review the ALJ's order. *Id.*, slip op. at 2.

uncontested consent decrees. It states that the ALJ, "within 30 days, shall accept such agreement by issuing his decision based upon the agreed findings . . . ." This language does not refer to procedures for contested consent decrees.[1/] Further, the short, thirty-day time frame for issuance of an ALJ's decision is incompatible with the length of time necessary for intervenors to challenge comprehensive consent decrees, for OFCCP and consenting contractors to respond, and for the ALJ to subsequently rule thereon. Moreover, the preceding provisions in § 60-30.13 do not refer to union intervenors or other objectors to a consent decree, but rather are directed solely to the parties to the decree. *See* § 60-30.13(b) and (c). In view of the inapplicability of 41 C.F.R. § 60-30.13(d), the ALJ's decision should remain a recommended decision under 41 C.F.R. § 60-30.28.

Upon review of the record, I would remand this case to the ALJ for a "faimess hearing" to consider whatever objections the Union presents. The ALJ's review of written submissions under the show-cause order was at variance with fairness hearing procedures courts provide to review contested consent decrees in employment discrimination cases to determine whether they are fair, adequate and reasonable. These hearings involve testimony, documentary evidence and other elements to evaluate the propriety of proposed consent decrees.[2/] The lack of a fairness hearing may have prevented the Union from effectively challenging the Consent Decree because it was not provided the benefits of direct or cross-examination of witnesses.

Contrary to OFCCP's contention, the Union did not waive the opportunity for a fairness hearing since the ALJ's show-cause order did not indicate that such a hearing would be provided.

[1/] For contested consent decrees, *see Local No. 93, Firefighters v. City of Cleveland,* 478 U.S. 501, 528-30 (1986); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 552 (6th Cir. 1982), *rev'd on other grounds sub nom Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Freeman v. City of Philadelphia*, 751 F.Supp. 509, 516-19 (E.D.Pa. 1990), *aff'd,* 947 F.2d 935 (3rd Cir. 1991) (column dec.), *cert denied*, 503 U.S. 984 (1992); *Kirkland v. N.Y. State Dept. of Correctional Services*, 711 F.2d 1117, 1126 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *OFCCP v. Carolina Freight Carriers Corp.,* Case No. 93-OFC-15, Rec. Dec. Rem. Cons. Decr., Oct. 20, 1993, Rec. Dec. Approv. [Rev.] Cons. Decr., Apr. 7, 1994, *aff'd,* Sec. Ord. Approv. [Rev.] Cons. Decr., Mar. 16, 1995; *OFCCP v. USAIR*, Case No. 88-OFC-17, Rec. Ord. Approv. Cons. Decr., Mar. 26, 1992, *aff'd*, Sec. Ord. Approv. Cons. Decr., Jun. 30, 1992. Significantly, the ALJ did not adhere to this thirty-day limitation. The Consent Decree was received on March 7, 1995, and the ALJ's decision was issued on December 18, 1995.

[2/] *See Edwards v. City of Houston*, 37 F.3d 1097, 1102, 1106 (5th Cir. 1994); *United Black Firefighters Assn. v. City Akron*, 976 F.2d 999, 1003 (6th Cir. 1992); *Williams v. City of New Orleans*, 729 F.2d 1554, 1556 (5th Cir. 1984); *Stotts v. Memphis Fire Dept.*., 679 F.2d 541, 552 (6th Cir. 1982), *rev'd on other grounds sub nom Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Moore v. City San Jose*, 615 F.2d 1265, 1269 (9th Cir. 1980); *EEOC v. McDonnell Douglas Corp.*, 894 F.Supp. 1329, 1331 (E.D.Mo. 1995); *Shuford v. Alabama State Bd. of Education,* 846 F.Supp. 1511, 1517 (M.D.Ala. 1994); *EEOC v. Pan American World Airways, Inc.*, 622 F.Supp. 633, 634-35 (N.D.Cal. 1985), *appeal dismissed*, 796 F.2d 314 (9th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987); *OFCCP v. Carolina Freight Carriers Corp.*, Case No. 93-OFC-15, Rec. Dec. Rem. Cons. Decr., Oct. 20, 1993, at 1-2, Rec. Dec. Approv. [Rev.] Cons. Decr., Apr. 7, 1994, at 3; *OFCCP v. USAIR, Inc.*, Case No. 88-OFC-17, Rec. Ord. Approv. Cons. Decr., Mar. 26, 1992, at 4.

Moreover, the Union specifically informed the ALJ that "as a procedural and practical matter, we note that the Consent Decree should not be approved based on an Order to show cause . . . . If, after consideration of the responses to the Order to Show Cause the Judge is not prepared to reject the Consent Decree, the Union believes that it should have an opportunity to raise its objections at a fairness hearing." Intervenor's Response to Order to Show Cause at 7, n.1; *id.* at 52.

JOYCE D. MILLER
Alternate Member