Tate & Renner, attorneys at law

Alfred L. Tate (1942-1995)
Richard R. Renner

www.taterenner.com

921 Loxford Terrace
Silver Spring, MD 20901
(301) 681-0664

Email: rrenner@igc.org

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Mr. Todd Smyth
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street NW Suite 400-North
Washington, DC 20001-8002

RE: Public comments on Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges (Document ID DOL-2012-0007-0001)

Dear Mr. Smyth:

This letter contains my comments to the proposed Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges (Document ID DOL-2012-0007-0001).

I am an attorney with some experience in handling whistleblower matters at the U.S. Department of Labor. My web page is at: www.taterenner.com

Modernizing the OALJ Rules of Practice has been a monumental achievement. While amendments to the Federal Rules of Civil Procedure (FRCP) occur every few years, and sometimes every year, the three decades since the 1983 Rules have created a large number of thorny legal issues to address. I congratulate you and your staff on completing the task so thoroughly.

As to the whistleblower process, addressing a few issues might be helpful. First, I address the remedial purpose of the whistleblower laws, and the importance of rooting policy in those purposes. Second, in sections B, C and D below, I address the different natures of administrative and judicial adjudication, with an eye toward the type of administrative process that can best serve the remedial purposes. In particular, I address the importance of discovery in proving whistleblower retaliation claims in Section D below. Thereafter, I address electronically stored information (ESI), electronic filing, the definition of "last day," the time limit for *amicus* briefs and motions to correct the transcript, and finally, the overall effect of a more complicated set of rules on *pro se* litigants.

A. The main theme of whistleblower protection is the remedial purpose of the law.

My initial and primary concern is that the Department's commentary on the proposed rules fails

to mention that the laws enforced by OALJ are remedial laws, and the new powers conferred on ALJs should be used in ways that further the remedial purposes. The mission of the Department's whistleblower program is not to look like a federal court, but rather to enforce the laws. That is why "administrative adjudications do not take place in a court." Ref. 77 FR 72148.

The purpose at stake is to afford protection for those who help the environment, make our transportation safer, give integrity to our financial markets and assist the government in obtaining compliance. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993); *Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). Employees can play an important role in protecting the public from environmental and nuclear safety dangers, for example They can keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters such employee efforts on behalf of the public purposes. Accordingly, the federal statutes prohibit such discrimination. To achieve the ends of eliminating discrimination, and protecting complainants from retaliation, the law mandates that "employees must feel secure that any action they may take" furthering "Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities." *Egenrieder v. Metropolitan Edison Co./GPU*, 85-ERA-23, Order of Remand by SOL, pp. 7-8 (April 20, 1987). The whistleblower protection laws were passed in order to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). Accord, *Hill, et al. v. T.V.A.*, 87-ERA-23/24, D&O of Remand by SOL, pp. 4-5 (May 24, 1989). Consequently, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). In *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

In 2002, Congress enacted the Sarbanes-Oxley Act. The Energy Policy Act of 2005, Public Law 109-58, was enacted on August 8, 2005. Among other provisions, this new law amended the employee protection provisions for nuclear whistleblowers under Section 211 of the ERA, 42 U.S.C. 5851. These and subsequent laws added provisions for *de novo* review by a United States District Court in the event that the Secretary has not issued a final decision within one year after the filing of a complaint, and there is no showing that the delay is due to the bad faith of the complainant. Congress obviously wanted to expand the avenues of relief available to whistleblowers. The *de novo* process in district courts is available as an option for complainants, but is not required. As such, rules intended to accomplish the congressional purpose should respect the complainant's options, and work in their favor, not to their detriment.

B. OALJ can and should strive to be better for whistleblower protection than U.S. District Courts.

At 77 FR 72146, Section II(G) of the Department's comments state, "The procedure ought to be the same at the OALJ as in U.S. district courts; any divergence creates an incentive for a party to prefer the forum with the summary decision régime most favorable to its position." The comment cites no authority for this claim. The remedial purposes of the whistleblower laws will actually be better served if the Department strives to be a better forum than the U.S. District Courts. The Department has specialized knowledge and experience that can save the parties from needing to educate the judge. The administrative process is fundamentally distinct from federal court practice. It is intended to be less formal and less expensive, and a complainant should not have to master the FRCP to pursue a claim at DOL. Many complainants are pro se and the DOL should not create a complicated process for adjudicating whistleblower cases that has the effect of denying access to pro se complainants.

Congress created the judicial bypass in SOX, for example, as a way for whistleblowers to move their cases forward in the event the Department's process takes longer than they want, During debate over SOX in the Senate, Senator Patrick Leahy stated "Only if there is not a final decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she bring a de novo case in federal court with a jury trial available." Legislative History of Title VIII of HR 2673, the Sarbanes-Oxley Act of 2002, Section 806, 148 Cong. Rec. S7418, S7420 (July 26, 2002) (internal citations omitted). In *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239 (4th Cir. 2009), the Court stated:

> Congress unquestionably chose an aggressive timetable for resolving whistleblower claims and reasonably created a cause of action in an alternative forum should the DOL fail to comply with such schedule.

The judicial channel is not a call for the Department of Labor to mimic the federal courts, but rather a call to makes its process more attractive to whistleblowers.

C. Use of summary decisions is contrary to the remedial goals of determining cases on the merits, and accordingly, such decisions should be discouraged.

The federal courts' record of using summary judgment in employment discrimination cases is not a happy record for employees with civil rights claims. *See*, Joe Cecil & George Cort, Federal Judicial Center, Estimates of Summary Judgment Activity in Fiscal Year 2006 (2007); Elizabeth M. Schneider, The Dangers of Summary Judgment: Gender and Federal Civil Litigation, 59 Rutgers L. Rev. 705, 709 n.22 (2007); Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 205–06 (1993) (arguing that "the increased inappropriate use of summary judgment" has "silently curtail[ed] workers' civil rights claims" and that the "misapplication of civil procedural rules to employment discrimination cases threatens substantive antidiscrimination law"); Richard Moberly, "Sarbanes-Oxley's Whistleblower Provisions - Ten Years Later," 64 S.C. L. Rev., Book 1. Accordingly, seeking to emulate the federal court record on summary judgments would be contrary to the remedial purpose of protecting whistleblowers.

Especially when summary decision is sought on the sensitive issue of causation, granting such a motion leaves the whistleblower feeling that the outcome was determined on less than all the available evidence and circumstances. Summary decisions issued close to the date set for hearing also deprive the parties of the primary advantage of summary judgment in federal court practice – saving the time and labor of preparing for the hearing. Counsel will have to prepare for the imminent hearing anyway. In *Franchini v. Argonne National Laboratory*, ARB No. 11-006, ALJ No. 2009-ERA-14 (ARB Sept. 26, 2012), the ARB reversed a summary decision on the merits. The ARB explained that:

> The burden of producing evidence "is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim." *White v. Baxter Healthcare Corp*., 533 F.3d 381, 400 (6th Cir. 2008); *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 252.

The ARB acknowledged that summary decision is poorly suited to the issue of causation which is rooted in the true motives of the employer and its agents:

> Obviously, the issue of causation in discrimination cases involves questions of intent and motivation when the complainant argues that the employer's asserted reasons were not the real reasons for its actions. Summary decision on the issue of causation is even more difficult in ERA whistleblower cases where Congress made it "easier for whistleblowers to prevail in their discrimination suits," requiring only that the complainant prove that his protected activity was "a contributory factor" rather than the more demanding causation standards like "motivating factor," "substantial factor" or "but for" (determinative factor) causation. *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999). Contributory factor means any factor which, alone or in connection with other factors, "tends to affect in any way the outcome of the [employment] decision." Even where a respondent asserts legitimate, nondiscriminatory reasons for its actions, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could (1) discredit the respondent's reasons or (2) show that the protected activity was also a contributing factor even if the respondent's reasons are true.

The ARB listed examples of the types of evidence that can support a finding of causation:

> [I]nconsistencies in the respondent's reasons could present sufficient circumstantial evidence for the ALJ to reject the employer's asserted reasons and, if sufficiently persuasive, accept the complainant's claim that protected activity was a contributory factor. Other circumstantial evidence may include evidence about motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, and material changes in employer practices, among other types of evidence.

These last five words make clear that the list is not the complete list, and other circumstances of an individual case can support a finding of causation. On temporal proximity, the ARB stated

that the length of time alone is not determinative, "but context matters." ALJs must consider the nature of the protected activity and the evolution of the adverse decision.

The Department can distinguish the administrative process as one that is more friendly to whistleblowers and pro se litigants by minimizing the use of summary decisions.

D. Discovery is a necessary component of effective whistleblower protection.

A regular motif of the proposed changes is to make the process more "efficient" by finding ways to "limit or avoid abusive, frivolous, or unnecessary discovery." I certainly agree that discovery should not be used to abuse an adversary or to waste resources. For example, I find the use of mental health examinations, rationalized through the complainant's request for garden variety emotional distress damages, to be particularly offensive as it creates further emotional trauma as part of a process that should remediate the trauma of whistleblowers. Still, I am mindful that discovery issues are often decisive in the adjudication of liability. I have had several cases in which resolution of a discovery dispute became the catalyst for settlement. I also recall with frustration whistleblower cases my clients have lost after being denied crucial discovery. The Department's preface at 77 FR 72145 notes that, "The amendments were not meant to block needed discovery, but to provide judicial supervision to curtail excessive discovery." I am concerned that this and similar wording in the Department's explanations will lead ALJs to believe that limiting discovery is more important than giving whistleblowers the evidence they need to win their cases.

At 77 FR 72143, the commentary states:

> several regulations that govern whistleblower claims explicitly grant the presiding judge ''broad discretion to limit discovery'' as a way to ''expedite the hearing.'' 29 CFR 1979.107(b), 1980.107(b), 1981.107(b).

It would be equally true to say that ALJ's have "broad discretion" to enforce discovery requests that help a party prove the merits of their claims. The addition of 29 CFR 1983.107(b), for example, occurred after the close of the public comment period in 2010. It would be helpful if the Department's comments in the final rules are balanced to recognize that ALJs have a duty to enforce discovery when it is necessary to prove a relevant point, and they also have discretion to limit discovery when the discovery is not necessary.

Speed of adjudication is not a substitute for true justice. It had been well established that the time limits for adjudication can be extended or waived to allow for the completion of discovery. *Timmons v. Mattingly Testing Services*, 95-ERA-40, D&O of Remand by ARB, pp. 5-6 (June 21, 1996). An initial request to extend the time limits is routinely granted. *Tracanna v. Arctic Slope Inspection Service*, 97-WPC-1, ARB No. 97-123, D&O of Remand by ARB, at 5 (Nov. 6, 1997). Adequate time is absolutely necessary to accomplish proper discovery in a manner consistent with the Federal Rules of Civil Procedure. In *Stone*, cited above, the Court stated:

> Both a complainant that has suffered adverse job consequences and the public therefore have a strong interest in Congress aiding whistleblower plaintiffs, even if in so doing Congress's scheme may be less efficient than the scheme contemplated by the Secretary.

Most cases of discrimination or retaliation lack a smoking gun. *See*, *Lockhart v. Westinghouse Credit Corp*., 879 F.2d 43, 48 (3d Cir. 1989). One federal judge explained, "Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it. ... It is a simple task for employers to concoct plausible reasons for virtually any adverse employment action ranging from failure to hire to discharge." *Raymond v. U.S.A. Healthcare Center-Fort Dodge, LLC*, 468 F. Supp.2d 1047, 1054 (N.D. Iowa 2006).

Employee protection cases are often based on circumstantial evidence of discriminatory intent. *See*, *Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)). In assessing a dispute about intent, courts must consider the totality of circumstances. *United States v. Arzivu*, 534 U.S. 266 (2002) (Justice Rehnquist admonishes the lower courts for examining the facts surrounding the investigatory stop in isolation. Only by viewing the totality of the circumstances could the court give due weight to the factual inferences drawn by the border patrol agent in deciding to conduct the stop.); *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 82 (1998) (Justice Scalia wrote the opinion of the Court and explained that: [t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.) This type of "totality of the circumstances" analysis recently led the ARB to reverse a post-hearing dismissal. *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 09-057, ALJ No. 2008-ERA-3, Order of Remand (ARB June 24, 2011). Discovery is often the key to find the patterns that point to unlawful motive.

The Secretary of Labor has stated that parties to DOL whistleblower proceedings have "all the discovery mechanisms of the Rule of Practice" available to them to assist in preparing for a hearing. *Malpass v. General Electric Co.,* 85-ERA-38/39, D&O of SOL, slip op. at 12 (March 1, 1994). It would be helpful if the Department's preamble to its final rules said the same. In *Holub v. H. Nash Babcock, Babcock & King, Inc.*, 96-ERA-25, Discovery Order of ALJ (March 2, 1994), the ALJ ruled that "the law is well settled regarding the appropriateness of extensive discovery in employment discrimination cases. Further, the courts have held that liberal discovery in these cases is warranted." *Id*., slip op. at 6. *Also see*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1073) (extensive discovery in employment discrimination cases is necessary and the refusal to adhere to the "liberal spirit" of discovery would be an abuse of discretion); *Duke v. University of Texas at El Paso*, 729 F.2d 994, 997 (5th Cr. 1984) ("procedural technicalities" to impede liberal discovery are improper). One member of the ARB explained:

> In employment discrimination cases, the courts have held that discovery should be permitted "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 295 (D.Del. 1975) (citations omitted). "In such cases, the plaintiff must be given access to information that will assist the plaintiff in establishing the existence of the alleged discrimination." *Lyoch v. Anheuser-Busch Companies, Inc.*, 164 F.R.D. 62, 65 (E.D. Mo. 1995) (citations omitted). *Accord Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983) (vacating protective order which limited discovery in part because, "imposition of

> unnecessary limitations on discovery is especially frowned upon in Title VII cases."); *Flanagan v. Travelers Insurance Co.*, 111 F.R.D. 42, 45 (W.D.N.Y. 1986) (same). Consistent with this body of case law, the Secretary of Labor and the ALJs have recognized the broad scope of discovery to be afforded parties in whistleblower cases. *See, e.g., Malpass v. General Electric Co.*, Case Nos. 85-ERA-38/39, Sec'y Dec., Mar. 1, 1994, slip op. at 12; *Holub v. Nash, Babcock, et al.*, Case No. 93-ERA-25, ALJ Disc. Ord., Mar. 2, 1994, slip op. at 6. *See generally Timmons v. Mattingly Testing Services, Inc.*, ALJ Case No. 95-ERA-40, ARB Dec. & Ord. of Rem., June 21, 1996, slip op. at 4-6 (discussing the "full and fair presentation" of a whistleblower case by the parties).
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> *Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), concurring opinion of E. Cooper Brown.

In *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), the U.S. Court of Appeals for the Federal Circuit explained how determination of a retaliation claim must be made with consideration of all the pertinent record evidence. It explained that whether evidence is sufficiently clear and convincing to meet the employer burden of proof is not determined by examining only the evidence that supports the ultimate conclusion reached. 680 F.3d. at 1368. Instead, evidence satisfies this burden of proof only when it is considered with all the pertinent record evidence and despite the evidence that fairly detracts from that conclusion. *Id*. The court further specifically stated that it is error to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been adequately proven. *Id*.

Many discovery disputes arise in the context of whether other employees are fair comparators to the whistleblower. For example, evidence that a "comparable, non-protected" person was treated better serves to establish both the fourth prong of the prima facie case and pretext. *See*, *e.g.*, *Ercegovich v. Goodyear Tire & Rubber Co*., 154 F.3d 344, 350 (6th Cir. 1998). In examining retaliatory motive, the *Whitmore* court cautioned against taking an unduly dismissive and restrictive view, noting that, where the whistleblowing disclosure reflects on managers, or is highly critical of the employer's conduct, officials may be motivated to retaliate even when they are not directly implicated by the disclosures, do not know the whistleblower personally, are outside the whistleblower's chain of command, were not directly involved in the alleged retaliatory actions, or were not personally named in the disclosure. 680 F.3d at 1370-72. The *Whitmore* court further stated that, when applying the retaliatory motive factor, the MSPB should consider any motive to retaliate on the part of the agency official who ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision. *Id*. At 1371. The ARB reached a similar conclusion after reviewing the Supreme Court's decision in *Staub v. Proctor*, 131 S. Ct. 1186 (2011). *See*, *Bobreski v. J. Givoo Consultants*, ARB No. 9-057, OALJ No. 2008-ERA-3 (Order of Remand, June 24, 2011), p. 16.

The court criticized an unduly narrow view of the meaning of "similarly situated" in determining whether an employer met its burden of proving by clear and convincing evidence that it would have taken the alleged personnel actions in the absence of the appellant's whistleblowing. *Id*. at 1373. The MSPB has taken this direction to heart in *Mattil v. Department of State*, 2012 MSPB 127, ¶¶ 25-28.

While I generally favor the use of initial disclosures, I join with Rebecca Hamburg Cappy's suggestion on behalf of NELA that the Department consider adoption of the *Pilot Project*

Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action currently being implemented in federal district courts around the country. *See*, *generally*, *Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action*, Federal Judicial Center (November 2011), available at: http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf. At the 2010 Conference on Civil Litigation at Duke University, attendees supported case-type-specific "pattern discovery" as a way to stem unnecessary cost and delay in the litigation process and agreed that employment cases would be a good place to start. The Protocols may further simplify the discovery process. As whistleblower cases are adverse action cases, the protocols are more finely honed to the employment matters at OALJ than the standard initial disclosures.

The Department of Labor gives a nod to the importance of discovery at 77 FR 72160, saying that the scope of discovery seeks "to control discovery costs without interfering with the fair resolution of the case." In light of the rarity of ARB adjudications on discovery issues since *Khandelwal,* it would be helpful if the Department's comments more clearly connected the scope of discovery to the remedial purposes of the laws at issue.

E. OALJ regulations can give more specific and helpful guidance on ESI discovery in Sections 18.50(b)(3)(C) and 18.61.

I appreciate that the proposed 29 CFR 18.50(b)(3)(C) and 18.61 address electronically stored information (ESI). It would be helpful if the Department's comments on these rules noted that the prevalence of ESI make the search and production of information cheaper. That is why American business has embraced paperless records.

I specifically suggest that the Department require parties to provide discovery responses in searchable electronic forms when a party has the responsive information in such forms. I continue to see parties printing out emails, for example, and producing the hard copies to frustrate an opponent's ability to save and search the responsive documents for key names or phrases. The companies go to extra effort to make their electronic records harder for complainants to use. The searchable electronic form is necessary to properly search and manage the documents. It is not fair that respondent can search the relevant emails, policy files, and other documents electronically while complainant and his counsel would have to read through all the of pages of paper to get the same information. We mention a searchable electronic form because some respondents' counsels have been converting documents to PDF forms by scanning the hardcopy or otherwise making the PDF file non-searchable. That frustrates the purpose of electronic discovery. Courts that have considered the issue have held that production of electronic documents in their electronic form is proper. *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993), reversed on other grounds, 90 F.3d 553 (D.C.Cir. 1996). *See also Anti-Monopoly, Inc. v. Hasbro, Inc.,* 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y.) "Production of materials in hard copy form does not preclude a party from receiving the same information in electronic form."; *see also Cobell v. Norton,* 2002 U.S. Dist. LEXIS 5291 (D.D.C.) (request for permission to produce emails on paper draws sanctions). Production electronically is easier for the producing party and more useful to the receiving party. It is the right thing to do.

F. OALJ needs to make service and filing easier, and adopt electronic filing. Ref. 29 CFR 18.30.

Speaking of electronic records, it is long overdue for OALJ to embrace electronic case filing (ECF). The are now several well-developed systems for OALJ to choose. U.S. District Courts and Courts of Appeals each have their own systems, as do MSPB and the NLRB. OALJ can pick any of these systems and allow the parties to file, receive, and review filings transparently.

Electronic filing will be cheaper and more efficient for litigants, ALJs, and reviewing tribunals. The ARB is now asking parties to submit relevant portions of the record as an appendix, and this would be unnecessary if everyone had access to the full record electronically. It is an expense to print and ship hardcopies. For large records, it is literally a burden.

It is scary to think how parties and their counsel will meet filing deadlines for documents over 12 pages. Proposed rule 29 CFR 18.30(b)(3) and (4) allow a judge to refuse permission to file documents by fax (if they are over 12 pages) or email. Yet, 29 CFR 18.30(b)(2) requires that documents be actually received by the deadline. There are not enough lawyers handling whistleblower matters as it is. Most lawyers do not practice near any of the eight OALJ offices. I urge the Department to modify this regime to make practice before the OALJ easier, not harder. Electronic filing would be sufficient. If OALJ has not adopted electronic filing by the time the final rules are issued, then I urge a provision allowing filing by fax without a page limitation, or by email. I note that computers can be set to receive faxes so that no paper will be wasted by long faxes.

G. Making deadlines fall earlier than midnight will entrap parties and derail cases from adjudications on the merits. I urge deletion of 29 CFR 18.32(a)(2).

I must object to the proposed definition of "last day" at 29 CFR 18.32(a)(2). This proposed rule states, "Unless a different time is set by a statute, regulation, executive order, or judge's order, the ''last day'' ends at 4:30 p.m. local time where the event is to occur." This rule is a trap. Lawyers are used to deadlines falling at the end of a day, specifically at 11:59 pm (just as the comments to these rules are due). Particularly for those attorneys who are busy, the seven and a half hours between 4:30 and 11:59 pm can be most productive. It is not unusual for me to be spending these hours crafting a brief for my client. The way that the 4:30 pm deadline is buried in a definition, without any explanation in the Department's comments, leaves a trap that all but the most familiar advocates will miss. Moreover, the 4:30 pm deadline is completely unnecessary. Items filed at 4:29 pm would receive the most attention the next day or on subsequent days. Many more unforeseen events are likely to occur before 4:30 pm than before 11:59 pm. Therefore, 11:59 pm is a more tranquil deadline for completing documents that deserve thoughtful consideration. Even if a lawyer missed this deadline but filed a document the next morning, I would hope that the claims and issues would still be adjudicated on the merits as no prejudice is caused by the short delay.

The *Prince* case amply demonstrates how the ARB can use unnecessary rules to dismiss cases and avoid an adjudication on the merits. *Prince v. Westinghouse Savannah River Co*., ARB No. 10-079, ALJ No. 2006-ERA-1, Decision and Order Denying Motion for Reconsideration (ARB Feb. 2, 2011), *aff'd* by Fourth Circuit in Case No. 11-1322, *cert. denied,* 01/14/2013. The OALJ

mailed the adverse decision to the wrong address. Prince was unrepresented at the time. Once he received the decision, he contacted counsel who telephoned the ARB for information about how the ten (10) day time limit for filing a petition for review would be applied. The ARB did not respond to counsel's telephone messages, and counsel undertook preparation of a petition for review, complying with the requirement in 29 CFR § 24.110(a) to set out the errors for review. The ARB dismissed the petition for review because it arrived on the eleventh day after the ALJ's decision was mailed. Even on reconsideration, with undisputed evidence of how complainant's medical condition impeded compliance with the ten (10) day deadline, and undisputed evidence that the petition was filed within ten (10) days of actual notice of the adverse decision, the ARB refused to apply 29 CFR § 24.115 so that that Mr. Prince could have his case considered on the merits.

This failure to reach the merits resulted entirely from a departmental regulation that added an unnecessary hurdle. The ARB did not show the desired "[f]lexibility in applying procedural rules[.]" Ref. 77 FR 72147. Since rules are not always used as intended, it would be better to avoid making rules that can foreseeably entrap parties into losing their rights and frustrate the goal of adjudications on the merits.

When Congress entrusts a remedial goal to an administrative agency, it is appropriate for that agency to have an accepting attitude toward cases that moves them along to a decision on the merits whenever possible. In *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 397, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982), the Supreme Court stated:

> In *Love v. Pullman Co.,* 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 404 U. S. 527. That principle must be applied here as well.

In *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011), the Supreme Court made clear that a "claim processing rule" should not be treated as jurisdictional unless Congress made clear that it intended the rule to be jurisdictional. As such, departmental regulations that establish a time limit should never be treated as jurisdictional unless they are implementing a statute that conveys a congressional intention to make a deadline jurisdictional. The Court rejected the notion that "all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." Quoting *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U. S. ___, 130 S.Ct. 584, 597 (2009).

To assure that whistleblower cases are decided on the merits, I urge the department to amend 29 CFR 18.32(a)(2) to make a day end at 11:59 pm, or better yet, just delete 29 CFR 18.32(a)(2).

H. Amicus participation and transcript corrections are more logically timed with the deadline for post-hearing briefs. Ref. 29 CFR 18.24 and 18.88.

On a technical matter, I notice that proposed rule 29 CFR 18.24 provides that, "Unless otherwise directed by the judge, an amicus brief must be filed by the close of the hearing." At 77 FR 72156, the Department notes that this provision was, "added to provide a timeframe for filing."

In most whistleblower cases, the ALJ provides a schedule for post-hearing briefs. The briefs are rarely due earlier than 60 days after the close of the hearing. Although transcripts are due 30 days after the hearing, the court reporting service often needs longer. A good brief will be the result of a careful review of the transcript, and may need more than the 60 days allowed. Whatever the deadline is for the post-hearing brief, that date would be suitable basis for amicus participation. The analogous Federal Rule of Appellate Procedure 29(e) allows amicus briefs to be filed seven (7) days after the brief of the party supported by the amicus. This wise rule allows the amicus to review the supported party's brief to avoid duplication of argument. The parties will still have the normal time to respond to the brief before the ALJ issues a determination. I suggest that this sentence be modified to say, "Unless otherwise directed by the judge, an amicus party must file its brief no later than 7 days after the post-hearing brief of the party being supported is filed." This would also provide a timeframe for filing, and allow the amicus to review the transcript and the brief of its ally.

I suggest that the same timeframe would be appropriate for motions to correct the transcript under 29 CFR 18.88(b). Counsel typically review the transcript as the write the brief. The goal of the transcript is to make an accurate record of the hearing. Counsel can be more helpful in this regard after they have reviewed the transcript in preparation for their brief.

I. OALJ regulations and commentary deserve consideration of *pro se* litigants.

At 77 FR 72142, the Department comments that, "The OALJ rules of practice and procedure are analogous to the Federal Rules of Civil Procedure used in the United States District Courts." As the comments later note, there are some important differences. For example, whistleblowers ordinarily do not have to plead a claim through a complaint. See *Evans v. United States Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-3, Decision and Order of Remand (ARB July 31, 2012).

Overall, the new rules will make litigation of whistleblower claims harder on *pro se* parties. In *Farrar v. Roadway Express*, ARB No. 06-003, ALJ No. 2005-STA-46 (ARB Apr. 25, 2007), the ARB construed the Complainant's position liberally and with a degree of judicial latitude because of his *pro se* status. It would be helpful if the Department's comments to these rules made clear that decisions on the merits are the goal, and compliance to procedural rules should bend where necessary to meet that goal.

Thank you for your attention to my concerns.

Very Truly Yours,

Richard R. Renner
Attorney at Law