



In the Matter of:

**Disputes concerning the payment of  
prevailing wage rates by:**

**TRI-GEM'S BUILDERS, INC.,  
Prime Contractor**

**and**

**Proposed debarment for labor  
standards violations by:**

**TRI-GEM'S BUILDER, INC.,  
Prime Contractor;**

**GOTHRIE SHORT, JR.  
President;**

**and**

**JASON GRIFFIN,  
Vice President**

**(with respect to laborers employed by  
the Prime Contract on Contracts Nos.  
DACA61-93-C-0056, F28609-94-C-0025  
and F286609-93-C-022 and with respect  
to laborers employed by the Subcontractor  
Smith Plumbing and Heating, Inc. on  
Contract No. DAHA28-93-D-0002 and  
Subcontractor Dynamic Developers, Inc.  
on Contract No. F28609-96-C-0003).**

**Appearances:**

*For the Petitioners:*

Thomas M. Keeley-Cain, Esq., *Cherry Hill, New Jersey*

*For the Respondent:*

**ARB CASE NO. 99-117**

**ALJ CASE NO. 98-DBA-17**

**DATE: November 22, 1999**

Steven J. Mandel, Esq., Paul L. Frieden, Esq., Lois R. Zuckerman, Esq. *U.S. Department of Labor, Washington, D.C.*

**ORDER ACCEPTING APPEAL  
AND ESTABLISHING BRIEFING SCHEDULE**

On July 14, 1999, Administrative Law Judge Daniel F. Sutton (“ALJ”) issued a Summary Decision and Order (“ALJ D.& O.”) in this matter arising under the Davis-Bacon Act, as amended, 40 U.S.C. §276a *et seq.* The ALJ found against the three Respondents in the case: Tri-Gem’s Builders, Inc., Gothrie Short, Jr., and Jason Griffin (collectively, “Tri-Gem’s”). The ALJ ordered the payment of back wages to employees and debarment.

On August 27, 1999, the Administrative Review Board (“ARB”) received from Tri-Gem’s a document titled “Exceptions to Summary Decision and Order of July 14, 1999 by Administrative Law Judge Daniel F. Sutton.” The Board noted an issue of timeliness, and on September 7, 1999, issued a Notice of Appeal and Order to Show Cause directing Tri-Gem’s to show cause why the appeal should not be dismissed for lack of a timely filing of an appeal of the ALJ decision.

The Department’s regulations governing appeals of ALJ decisions under the Davis-Bacon Act provide that:

Within 40 days **after the date of the decision** of the Administrative Law [J]udge (or such additional time as is granted by the Administrative Review Board) any **party aggrieved** thereby who desires review thereof **shall file a petition for review** of the decision **with supporting reasons**.

29 C.F.R. §6.34 (emphasis supplied). However, appended to the ALJ D.&O. was the following variant language describing Tri-Gem’s appeal rights:

Pursuant to the applicable regulations, which appear at 29 C.F.R. §6.34, **any interested person** may appeal, within 40 days **after receipt** of this decision, **by filing exceptions** thereto.

ALJ D.& O. at 5 (emphasis supplied). The ARB received Tri-Gem’s Exceptions on August 27, 1999, 44 days after the ALJ issued his decision. Tri-Gem’s mailed the document the prior day, August 26, 1999. The filing was untimely under the deadlines of the 29 C.F.R. §6.34 regulation.

In response to our Order, Tri-Gem’s states that it timely filed for review because 1) the Administrative Law Judge’s decision was issued on July 14, 1999, and “exceptions may be filed within forty (40) days after receipt of the decision”; and 2) the Code of Federal Regulations further provides that where service is accomplished by mail, five days shall be added to the “waiting prescribed period for a responsive pleading or action. 29 C.F.R. Section 18.4(c)(3).” Attorney Certification ¶¶ 3, 4.

The Deputy Administrator of the Department of Labor's Wage and Hour Division replied to Tri-Gem's response and, citing our recent order in *Superior Paving & Materials*, ALJ Case No. 98-DBA-11; Ord. Accept. Pet. for Rev. and Est. Brief. Sched., ARB Case No. 99-065 (Sept. 3, 1999), urged the ARB to modify 29 C.F.R. §6.34's limitations period in this case. The Deputy Administrator observed that the regulations at 29 C.F.R. Part 18, cited by Tri-Gem's are inapposite, given that they apply to proceedings before the Department of Labor's Administrative Law Judges, not the Administrative Review Board. Nevertheless, the Deputy Administrator argues that the ARB should relax the limitations period because the ALJ erroneously stated in his decision that any interested person may file exceptions within 40 days after receipt of the decision.

We agree with the Deputy Administrator that 29 C.F.R. Part 18, "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges," is not applicable to proceedings before the ARB. As 29 C.F.R. §18.1 provides, "These rules of practice are generally applicable to adjudicatory proceedings before the Office of Administrative Law Judges."

Furthermore, as quoted above, 29 C.F.R. §6.34 unambiguously provides that petitions for review shall be filed within 40 days after the date of the ALJ's decision. Tri-Gem's mailed its Exceptions to the Summary Decision and Order on the 43rd day after the date of the ALJ's decision and the ARB received it on the 44th day. Accordingly, it was neither mailed nor received within 40 days after the date of the ALJ's decision.

In *Gutierrez v. Regents of the University of California*, ALJ Case No. 98-ERA-19; ARB Case No. 99-116, Ord. Accept. Pet. for Rev. and Est. Brief. Sched. (Nov. 8, 1999), we held that it is within the ARB's discretion to relax or modify its procedural rules when such relaxation or modification would serve the interests of justice. *Accord American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970); *General Services Administration, Region 3*, ARB Case No. 97-052, Dec. & Ord. (Nov. 21, 1997), slip op. at 4 (The ARB may waive compliance with the Secretary of Labor's regulations governing service and filing requirements "provided that such waiver did not impinge upon the ability of the respective parties to participate in th[e] appeal."). The regulation establishing the 40-day limitations period, 29 C.F.R. §6.34, is an internal procedural rule adopted to expedite the administrative resolution of DBA cases, such as this one. Accordingly, under appropriate circumstances we will modify the 29 C.F.R. §6.34 limitations period.

In determining whether to relax the limitations period in a particular case, we are guided by the principles of equitable tolling that have been applied to cases with filing deadlines mandated by statute. *Gutierrez v. Regents of the University of California*, *supra*, at 2. In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complaint must be filed with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. However, the court held that because Congress, not the courts or administrative agency, was entrusted with the responsibility to determine the statutory time limitations, the restrictions on equitable tolling must be "scrupulously observed." *Id.* at 19. The court recognized three principal situations in which tolling is appropriate:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

*Id.* at 20 (citation omitted). The court did not decide, however, whether these three categories are exclusive. *Id.*

In *Rose v. Dole*, 945 F.2d 1331 (1991), the Sixth Circuit held that a similar statutory thirty-day limitations period for filing a complaint under the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. §5851 (1988), is also subject to equitable tolling. In determining whether the employee was entitled to such tolling, the court recognized five factors that must be weighed: 1) whether the plaintiff lacked actual notice of the filing requirements; 2) whether the plaintiff lacked constructive notice of the requirements; 3) whether the plaintiff diligently pursued his rights; 4) whether the defendant's rights would be prejudiced by the tolling of the limitations period; and 5) the reasonableness of the plaintiff's ignorance of his rights. 945 F.2d at 1335.

The ALJ's incorrect statement that Tri-Gem's could file exceptions within 40 days after it received the ALJ D. & O allegedly resulted in the untimely filing of Tri-Gem's appeal. A party's reliance on an ALJ's erroneous statement of review procedures does not fall squarely within the situations in which tolling is appropriate, as enumerated in *Allentown*. Nevertheless, although it behooves an attorney to read and follow the regulations under which he or she is taking action, we do not believe that Tri-Gem's should lose the opportunity for review of the ALJ D. & O. because it relied upon the ALJ's erroneous statement of the applicable appeal procedures. Therefore, because we find that Tri-Gem's reasonably relied upon the ALJ's erroneous statement and the Deputy Administrator has not even alleged that the government's rights have been prejudiced by the untimely filing, we **ACCEPT** this case for review.

In addition to misstating the applicable limitations period, the ALJ D.&O. also erroneously characterizes the nature of the document that an aggrieved party must file pursuant to 29 C.F.R. §6.34 to invoke the ARB's review. Contrary to the plain language of the regulation, the Decision and Order states that an "interested person" may appeal a decision by filing "exceptions thereto." ALJ D. & O. at 5. The applicable regulation provides that any aggrieved party who desires review of an ALJ's decision "shall file a petition for review of the decision with supporting reasons." 29 C.F.R. §6.34. The regulation further provides:

The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A Petition concerning the decision on debarment shall also state the aggravated or willful violations and/or disregard of obligations to employees and subcontractors, or lack thereof, as appropriate.

*Id.* In accordance with the instructions in the Decision and Order, Tri-Gem's filed exceptions to the ALJ's decision, but has not yet filed a petition for review as required by 29 C.F.R. §6.34. Accordingly, we establish the following briefing schedule:

1. Tri-Gem's shall file a petition for review pursuant to 29 C.F.R. §6.34—not to exceed 30 double-spaced pages—**on or before December 22, 1999.**

2. The Administrator, Wage and Hour Division, shall file a brief in response—not to exceed 30 double-spaced typed pages—**on or before January 21, 1999.**

3. Petitioner and all other Parties and Interested Persons may file a reply brief—not to exceed 20 double-spaced typed pages—on or before **February 20, 1999.**

4. All pleadings and briefs in this matter shall be filed with the Board and served upon all Parties and Intervening Interested Persons.

**5. All pleadings and briefs are expected to conform to the stated page limitations unless prior approval of the Board has been granted and should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced, with minimum one-inch left and right margins and minimum 1.25-inch top and bottom margins, printed on 8½ by 11-inch paper. An original and four copies of all pleadings and briefs shall be filed with the Board under the requirements of 29 C.F.R. Part 7.**

6. Only Parties and Interested Persons filing a notice of intervention and participation need be served with pleadings or briefs.

7. Docket entries for this matter shall be filed by directing submissions to:

Administrative Review Board  
United States Department of Labor  
200 Constitution Avenue, N.W.  
Room S-4309  
Washington, D.C. 20210

**SO ORDERED.**

**PAUL GREENBERG**  
Chair

**E. COOPER BROWN**  
Member

**CYNTHIA L. ATTWOOD**  
Member

**Note:** Questions regarding any case pending before the Board should be directed to the Board's staff assistant, Ernestine Battle.

Telephone: (202) 219-9039  
Facsimile: (202) 219-9315