NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

DAVID B. NOLAN, SR.,
Petitioner

v.

DEPARTMENT OF ENERGY,
Respondent

2023-2242

Petition for review of the Merit Systems Protection Board in No. DC-1221-17-0681-W-1.

ON MOTION

Before LOURIE, MAYER, and STARK, *Circuit Judges*.

PER CURIAM.

O R D E R

In response to this court's August 30, 2023, order to show cause, the Department of Energy urges dismissal of this petition for review as untimely. David B. Nolan, Sr., responds and moves "for a U.S. Supreme Court referral," ECF No. 11 at 1, and summary judgment, ECF No. 12.

In 2001, the Merit Systems Protection Board rejected Mr. Nolan's challenge to his removal from the Department, including Mr. Nolan's assertion that the agency action was the result of discrimination. *Nolan v. Dep't of Energy*, No. DC-0752-01-0289-I-1, 2001 WL 1620680 (M.S.P.B. May 17, 2001). In 2017, Mr. Nolan filed the present action at the Board, alleging retaliation for whistleblowing activity. The Board docketed the action as an individual right of action ("IRA") appeal and issued its final decision dismissing the action on May 25, 2023. On July 28, 2023, this court received Mr. Nolan's petition.

Under 5 U.S.C. § 7703(b)(1)(B), a petition for this court's review of a final decision by the Board in an IRA appeal must be filed "within 60 days after the Board issues notice of the final . . . decision." The court has found identical language in § 7703(b)(1)(A), for appeals to this court from the Board in other types of cases, to provide a deadline that is mandatory and jurisdictional, and thus cannot be waived or equitably tolled. *Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017). Here, we received the petition outside of that deadline, and we conclude dismissal is appropriate. We also see no reason to certify a question to the Supreme Court under 28 U.S.C. § 1254(2). *See Rutherford v. Am. Med. Ass'n*, 379 F.2d 641, 644–45 (7th Cir. 1967).*

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* Mr. Nolan's suggestion that this is a "mixed case" generally subject to review in federal district court, *see Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420 (2017), conflates this action with his prior 2001 case. The Board treated the present matter solely as an IRA appeal and not a direct appeal from the removal action. Thus, as this matter has come to us on review, it is not a mixed case. *See Ash v. Off. of Pers. Mgmt.*, 25 F.4th 1009, 1011 (Fed. Cir. 2022)

Accordingly,

IT IS ORDERED THAT:

(1) The case is dismissed.

(2) All pending motions are denied.

(3) Each side shall bear its own costs.

FOR THE COURT

November 6, 2023
Date

Jarrett B. Perlow
Clerk of Court

("Individual Right of Action appeals cannot be mixed cases . . . .").