U.S. Department of Labor

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

IN THE MATTER OF:

SHANNON FAGAN,

COMPLAINANT,

v.

DEPARTMENT OF THE NAVY,

RESPONDENT.

ARB CASE NO. 2023-0006

ALJ CASE NO. 2021-CER-00001
ALJ EVAN H. NORDBY

DATE: February 28, 2024

Appearances:

For the Complainant:
Paula Dinerstein, Esq., Peter T. Jenkins, Esq., Colleen E. Teubner, Esq., Hudson B. Kingston, Esq.; *Public Employees for Environmental Responsibility*; Silver Spring, Maryland

For the Respondent:
Rachel J. Goldstein, Esq., Julie C. Ruggieri, Esq., Alana M. Sitterly, Esq.; *Naval Litigation Office, Office of General Counsel*; Washington, District of Columbia

For the Solicitor of Labor, as Amicus Curiae:
Seema Nanda, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Megan E. Guenther, Esq., Lindsey Rothfeder, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For Tate & Renner, as Amicus Curiae:
Richard R. Renner, Esq.; *Tate & Renner*; Silver Spring, Maryland

For Whistleblowers of America, as Amicus Curiae:
Joseph P. Wade, Jr., Esq., Jacqeline Garrick, Esq.; *Whistleblowers of America*; Pensacola, Florida

Before HARTHILL, Chief Administrative Appeals Judge, WARREN and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

HARTHILL, Administrative Appeals Judge:

This case arises under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[1] the Safe Drinking Water Act (SDWA),[2] and their implementing regulations.[3] Shannon Fagan (Complainant) filed a complaint against the Department of the Navy (Respondent) alleging that it terminated her employment because she engaged in conduct protected under six environmental statutes, including the CERCLA and the SDWA.[4] On October 7, 2022, a Department of Labor (Department) Administrative Law Judge (ALJ) issued an Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing (Order Denying Subpoenas), concluding that he did not have subpoena authority under either statute.[5] At Complainant's request and pursuant to 28 U.S.C. § 1292(b), the ALJ certified for interlocutory review the question of "whether ALJs have subpoena authority in whistleblower and other proceedings with trial-type hearings but no express statutory authorization."[6] Complainant timely filed a petition for interlocutory review with the Administrative Review Board (Board).[7]

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1 42 U.S.C. § 9610.

2 42 U.S.C. § 300j-9(i).

3 29 C.F.R. Part 24 (2023).

4 In addition to the CERCLA and the SDWA, Complainant alleged Respondent violated the Clean Air Act (CAA), the Federal Water Pollution Control Act (FWPCA), the Solid Waste Disposal Act (SWDA), and the Toxic Substances Control Act (TSCA). These six statutes are known collectively as the Environmental Acts. *See Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 2003-0046, ALJ Nos. 2000-CAA-00020, 2001-CAA-00009, -0011, slip op. 8 n.8 (ARB June 30, 2004) (finding that the six environmental statutes contain the same basic whistleblower protection provisions).

5 Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing, at 1 (Oct. 7, 2022) (Order Denying Subpoenas).

6 Order Granting Motion to Certify Interlocutory Appeal and Stay Proceedings, at 1 (Oct. 19, 2022) (Order Granting Interlocutory Appeal). The ALJ's analysis below was limited to the CERCLA and the SDWA. Order Denying Respondent's Motion for Summary Decision at 1 n.1 (Sept. 14, 2022) (Summary Decision Order) (finding that the parties were proceeding under the CERCLA and the SDWA and noting that the parties disputed whether the CAA and SWDA were also at issue). On interlocutory appeal before the Board, the parties are proceeding only under the CERCLA and the SDWA. Complainant's (Comp.) Brief (Br.) at 1; Respondent's (Resp.) Br. at 1. As such, we limit our analysis to the CERCLA and the SDWA.

7 Complainant's Petition for Interlocutory Review (Oct. 30, 2022).

On April 6, 2023, the Board accepted the interlocutory appeal and issued a concurrent Order Allowing Filing of *Amicus Curiae* Briefs. The Board specified the question on review as whether *Childers v. Carolina Power & Light Co.*[8] "and its progeny mandate an outcome different than that ordered by the ALJ below."[9] Complainant and Respondent filed timely briefs.[10]

After thoroughly examining the parties' arguments and amicus briefs, the Board concludes that the CERCLA and the SDWA do not expressly or implicitly provide authority for the ALJ to issue subpoenas. Thus, *Childers* and its progeny do not mandate an outcome different from that ordered by the ALJ below and we affirm the ALJ's Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing.

BACKGROUND

Complainant began working for Respondent at Naval Facilities Engineering Command Southwest (NFECS) as an environmental law attorney in June 2017.[11] Complainant contended that she engaged in protected activity on multiple occasions from October 5, 2017, to June 11, 2018.[12] On June 15, 2018, Respondent terminated Complainant's employment, citing unprofessional conduct as the reason.[13]

On July 18, 2018, Complainant filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent

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[8] *Childers v. Carolina Power & Light Co.*, ARB No. 1998-0077, ALJ No. 1997-ERA-00032, slip op. at 8-10 (ARB Dec. 29, 2000) (finding, in dictum, that ALJs have the authority to issue subpoenas in formal trial-type hearings under the Energy Reorganization Act (ERA)).

[9] Order Granting Interlocutory Appeal at 10 (explaining that the Board is not tied to the particular question formulated by the ALJ but may instead exercise discretion to specify the question(s) considered) (internal citations omitted).

[10] In addition, the Board received *Amicus* briefs from the Solicitor of the U.S. Department of Labor (Solicitor); Richard R. Renner, Esq. (Renner) of Tate & Renner; and Joseph P. Wade, Esq. and Jacqueline Garrick, Esq. of Whistleblowers of America (WoA). Complainant and Respondent also filed responses to the Solicitor's brief.

[11] Deposition of Sarah Fagan, Volume I at 29 (May 26, 2022); Respondent's Motion for Summary Decision at 4, Exhibit (EX) B (June 15, 2022).

[12] Complainant's Responses to Navy's First Set of Discovery Requests, Interrogatory No. 6 (May 23, 2022).

[13] Respondent's Opposition to Complainant's Motion to Hold Hearing by Videoconference, EX B (Aug. 9, 2022); Respondent's Motion for Summary Decision at 5, EX A (June 15, 2022) (notice of termination); Deposition of Sarah Fagan, Volume II at 39, EX 10 (May 27, 2022).

terminated her employment in retaliation for engaging in protected activity in violation of the six Environmental Acts.[14] On July 22, 2021, OSHA determined that Respondent retaliated against Complainant in violation of the Environmental Acts.[15]

Respondent appealed OSHA's determination to the Department's Office of Administrative Law Judges (OALJ) and requested a hearing with an ALJ. On June 1, 2022, Complainant sought multiple subpoenas to compel deposition testimony from third-party witnesses who had worked with her at the NFECS.[16] The requested witnesses were no longer employed by Respondent.[17] On June 3, 2022, the ALJ issued an order quashing the subpoenas based on his finding that he did not have authority to issue subpoenas under the CERCLA or the SDWA.[18]

On June 15, 2022, Respondent filed a motion for summary decision.[19] On September 14, 2022, the ALJ denied Respondent's motion and set the matter for hearing.[20]

Also on September 14, 2022, Complainant filed a motion to subpoena third-party witnesses to testify at the hearing.[21] On October 7, 2022, the ALJ denied Complainant's motion, finding that he did not have the authority to issue subpoenas to third-party witnesses.[22] The ALJ reasoned that "the OALJ rules of procedure are not an independent source of authority for issuance of subpoenas; they provide that an ALJ 'may issue a subpoena *authorized by statute or law*.'"[23] The ALJ recognized that in *Childers*, the Board opined that ALJs could issue subpoenas under the ERA as an extension of the power to adjudicate parties' rights in a formal trial-type hearing.[24] But he contrasted *Childers* with the District Court for the District of Columbia's decision in *Bobreski v. U.S. E.P.A.*, which found that the Environmental

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14 Complainant's Opposition to Motion for Summary Decision, EX 1 (June 29, 2022).

15 OSHA Determination Letter (July 22, 2021).

16 Complainant's Motion for Assistance in Securing Attendance at Deposition or Subpoena (June 1, 2022).

17 Complainant's Motion to Certify Interlocutory Appeal and Stay Proceedings, at 5 (Oct. 11, 2022).

18 Order Denying Subpoenas at 1.

19 Respondent's Motion for Summary Decision (June 15, 2022).

20 Summary Decision Order.

21 Order Denying Subpoenas at 1.

22 *Id.* at 2-5.

23 *Id.* at 2.

24 *Id.*

Acts, including the CERCLA and the SDWA, do not provide subpoena authority and found the latter more compelling.[25]

The ALJ adopted the reasoning of *Bobreski* and concluded that neither the CERCLA nor the SDWA provides subpoena authority in this matter.[26] The ALJ first found that the Secretary of Labor has no general subpoena authority, but rather that such "authority has been granted to the Secretary of Labor by Congress on a statute-by-statute basis."[27] The ALJ also found that "the OALJ rules of procedure do not extend subpoena authority to OALJ proceedings in general, but rather, limit subpoenas to those 'authorized by statute or law.'"[28] The ALJ then concluded that no statute or law authorizes the proposed subpoenas in this matter.[29]

In reaching this conclusion, the ALJ disagreed with *Childers*' inference of subpoena power from statutory authorization to investigate, enforce compliance, and hold trial-type hearings.[30] Rather, the ALJ opined that the opposite is true:

> Congress has routinely granted subpoena power to executive branch agencies that hold trial-type hearings but has not done so for the Secretary of Labor except on a statute-by-statute basis. This is true *even though* Congress knows that the Secretary through OALJ holds trial-type hearings to adjudicate whistleblowers' rights, as Congress continues to create new whistleblower protections and assign investigation and adjudication to the Secretary.[31]

The ALJ recognized that, while statutes can contain implied subpoena authority, such implied authority does not arise at "OALJ from statutory authority granted to conduct hearings or from other agencies' statutes."[32]

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25 Order Denying Subpoenas at 2 (citing *Bobreski v. U.S. Env't Prot. Agency*, 284 F. Supp. 2d 67 (D.D.C. 2003)).

26 *Id.* at 4-5.

27 *Id.* at 4.

28 *Id.* (quoting 29 C.F.R. § 18.56(a)(1)).

29 *Id.*

30 *Id.*

31 *Id.* The ALJ posited a possible rationale for this choice—that Congress provided many whistleblowers with the ability to "kick out" their cases to federal district court, where parties have access to compulsory process under the Federal Rules of Civil Procedure. *Id.*

32 *Id.*

Turning to the statutes at issue, the ALJ found as a matter of statutory interpretation that neither the CERCLA nor the SDWA contain such authority.[33] Rather, the ALJ found that the provisions of the CERCLA "authorizing subpoenas for one purpose and protecting whistleblowers without authorizing subpoenas were enacted at the same time by the same Congress."[34] The ALJ further found that, while the SDWA was silent as to subpoena authority, the legislative history demonstrated the absence of intent to authorize subpoenas.[35] The ALJ distinguished *Childers* on the basis of the Board's explanation of ERA's statutory text and legislative history: the ERA was "amended more than once at different times by different Congresses" which "led the Board not to draw the inference that a court would ordinarily draw from statutory text differing between different sections of the same statute."[36]

Thus, the ALJ concluded that "Congress spoke to the issue by not enacting subpoena authority in the CERCLA or the SDWA."[37] Therefore, the ALJ denied Complainants' motion to subpoena third-party witnesses to testify at the hearing.[38] The Board subsequently granted the request for interlocutory review to address the question of subpoena authority under the CERCLA and the SDWA.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator's final determinations under the Environmental Acts.[39] The Board reviews questions of law de novo.[40]

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33 *Id.* at 5 (citations omitted).

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 6.

39 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

40 *Wright v. R.R. Comm'n of Tex.*, ARB No. 2019-0011, ALJ No. 2015-SDW-00001, slip op. at 3 (ARB May 22, 2019) (citation omitted).

DISCUSSION

Complainant contends the ALJ erred in finding he does not have authority to subpoena third-party witnesses under the CERCLA and the SDWA. First, Complainant asserts the ALJ should have followed *Childers*, and not *Bobreski*.[41] Because this case arises in the Ninth Circuit, Complainant argues the ALJ wrongly followed *Bobreski*, a case that arose in the District of Columbia.[42] Rather, Complainant contends *Childers* controls since the Board "is the appellate authority over the Department of Labor ALJs."[43] Second, Complainant contends Department of Labor administrative hearings are subject to the requirements of the Administrative Procedure Act (APA), which Complainant asserts provides the subpoena authority as integral to an ALJ's function.[44] Finally, Complainant raises due process concerns,[45] and Amicus Renner similarly opines that whistleblower laws are remedial that must be construed broadly to accomplish their purpose.[46]

Respondent counters that Congress must explicitly delegate subpoena authority, it cannot be simply inferred from a formal hearing.[47] Respondent also contends the relevant portion of *Childers* is dicta,[48] and the other cases

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41 Comp. Br. at 6.

42 *Id.*

43 *Id.* Amicus Renner also contends that *Bobreski* was wrongly decided. Renner notes that the District Court was swayed by some sections of the Environmental Acts authorizing subpoena authority while the whistleblower provisions did not contain explicit subpoena power and argues that the court could have reached the opposite conclusion that the statutes said nothing to prohibit the issuance of subpoenas. Amicus Br. of Renner at 5-6.

44 Comp. Br. at 8-9, 11, 14. Similarly, Amicus Renner contends that the Department's ability to adjudicate a whistleblower's case would be hampered if ALJs were not permitted to issue subpoenas. Amicus Br. of Renner at 3-4.

45 Comp. Br. at 14-15. Amicus WoA also contends that subpoena power is necessary to protect the rights of whistleblowers and uphold the principles of fairness and due process. Amicus Br. of WoA at 2-3.

46 Amicus Br. of Renner at 2-3. Renner also argues that *Touhy* regulations do not authorize the federal agencies to withhold information from proceedings in which the agency is a party. *Id.* at 6-7. The issue before us is whether ALJs have the authority to subpoena third-party witnesses, not whether Respondent is withholding information from the ALJ. Thus, we decline to address this argument.

47 Resp. Br. at 13-15.

48 *Id.* at 15-16. The Solicitor likewise opines that *Childers* is not controlling because the part of the opinion regarding subpoena power is dicta and that neither *Childers* nor a subsequent Board decision discussing ALJ subpoena power arose from the CERCLA or the SDWA. Amicus Br. of the Solicitor of Labor at 12-13 (referring to *Adm'r, Wage & Hour Div.,*

Complainant relies on do not suggest that an ALJ has the authority to issue subpoenas under the CERCLA or the SDWA.[49] Finally, Respondent contends that due process does not require complainant to subpoena witnesses.[50]

The Solicitor of Labor, as amicus, opines that the authority to conduct hearings under the APA does not, alone, convey the authority to issue and enforce third-party subpoenas.[51] Rather, the Solicitor asserts that the APA permits subpoenas only when "authorized by law"[52] and the Board must review the text, structure, and legislative history of the CERCLA and the SDWA to determine whether these statutes expressly or implicitly provide ALJs with subpoena authority.[53]

1. The Administrative Procedure Act Does Not Confer Subpoena Authority

Both the CERCLA and the SDWA grant the Secretary of Labor the authority to conduct record hearings on whistleblower claims.[54] Section 554 of the APA delineates certain procedural rights afforded to parties in administrative hearings conducted "on the record," and Section 556(c) lays out the powers hearing officials possess to effectuate those procedural rights.[55] Specifically, Section 556(c) provides, "[s]ubject to published rules of the agency and within its powers, employees presiding at hearings may . . . issue subpoenas *authorized by law*."[56]

U.S. Dep't of Lab. v. Integrated Informatics, Inc., ARB No. 2008-0127, ALJ No. 2007-LCA-00026 (ARB Jan. 31, 2011)).

49 Resp. Br. at 20-24.

50 *Id.* at 24-25.

51 Amicus Br. of the Solicitor of Labor at 8.

52 *Id.* at 9.

53 *Id.* at 13.

54 *See* 42 U.S.C. § 9610(b) ("[T]he Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation . . . . Any such hearing shall be of record and shall be subject to section 554 of Title 5."); 42 U.S.C. § 300j-9(i)(2)(B)(i) ("[T]he Secretary shall conduct an investigation of the violation alleged in the complaint . . . An order of the secretary shall be made on the record after notice and opportunity for agency hearing.").

55 5 U.S.C. §§ 554 and 556(c).

56 5 U.S.C. § 556(c)(2) (emphasis added).

Complainant contends that the language "authorized by law" is not limited to explicit statutory text.[57] Rather, Complainant asserts that "the 'express authorization' doctrine is a judge-made rule to be applied only when the normal tools of statutory construction would result in 'highly unusual departures from legal norms.'"[58] Complainant contends the language "authorized by law" "is not rendered superfluous if explicit statutory language authorizing subpoenas is not required."[59] Complainant further argues that "subpoenas must be related to the underlying statute's purposes, be reasonably specific . . . not unreasonably burdensome, and not in violation of constitutional rights. Further, the agency must have published rules for issuance of subpoenas and have followed those rules in issuing the subpoena."[60]

Contrary to Complainant's arguments, the APA's text does not automatically grant ALJs general authority to subpoena third-party witnesses nor is subpoena power an intrinsic feature of the administrative process.[61] Rather, the APA repeatedly provides that, in administrative hearings conducted "on the record," agency subpoena authority may be exercised where "authorized by law."[62] Similarly, the OALJ rules of practice and procedure also provide that a "judge may issue a subpoena *authorized by statute or law*."[63] A straightforward reading of this language establishes Congress grants subpoena power to the Secretary of Labor on a statute-by-statute basis.[64]

The APA does not automatically infer subpoena power based on the authority to conduct hearings—the phrase "authorized by law" refers to the threshold question of whether the agency has the power to issue third-party subpoenas, as

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57 Comp. Br. at 10.

58 *Id.* (citing *Childers*, ARB No. 1998-0077, slip op. at 6).

59 *Id.* at 13.

60 *Id.* (quoting 5 U.S.C. § 556(c)).

61 *Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980) ("subpoena power is not an intrinsic feature of the administrative process . . ."); *Hyser v. Reed*, 318 F.2d 225, 239-40 (D.C. Cir. 1963) (subpoena power "is not an inherent attribute of agency authority" and courts "cannot read into the statute").

62 5 U.S.C. § 555(d) (Providing that "[a]gency subp[o]enas *authorized by law* shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.") (emphasis added); 5 U.S.C. § 556(c)(2) (providing that, "[s]ubject to published rules of the agency and within its powers, employees presiding at hearings may . . . issue subp[o]enas *authorized by law*") (emphasis added).

63 29 C.F.R. § 18.56(a)(1) (emphasis added).

64 *Compare, e.g.* 29 U.S.C. § 209 (Fair Labor Standards Act, adopting Federal Trade Commission Act subpoena authority by reference) *with* 42 U.S.C. § 9610 (CERCLA "employee protection" provision).

several authoritative bodies' explanations of the APA confirm. As the Solicitor explained in her amicus brief, the Attorney General's Manual on the APA 67 (1947) prepared by the United States Department of Justice emphasized that "section 555(d) relates only to existing subpoena power conferred upon agencies; it does not grant power to issue subpoenas to agencies which are not so empowered by other statutes."[65] In addition, the Administrative Conference of the United States has also acknowledged that the APA does not automatically endow ALJs with subpoena power, but rather that "[a] statute other than the APA must grant an agency statutory authority to issue subpoenas before that agency can sub-delegate the authority to its ALJs."[66]

We agree with Respondent and the Solicitor that the grant of authority to conduct hearings in accordance with the APA by itself is insufficient to provide ALJs with the power to subpoena third-party witnesses. Because Congress's use of the phrase "authorized by law" refers to the question of whether an agency has the statutory authority to issue third-party subpoenas, we turn to the text, structure, and legislative history of the CERCLA and the SDWA.

2. The CERCLA and the SDWA Do Not Provide Subpoena Authority

The starting point for all statutory interpretation is the language of the statute itself.[67] We must first "determine whether Congress directly addressed the precise question at issue" by using the traditional tools of statutory construction.[68] "If the precise question at issue is addressed, then the unambiguously expressed intent of Congress controls. A 'clear and unambiguous' statutory provision is one in which the meaning is not contradicted by other language in the same act."[69] "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole."[70] "If 'the language is not dispositive, we look to

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65 Amicus Br. of the Solicitor of Labor at 9-11 (citing Senate Comparative Print of June 1945, p. 14 (Sen. Doc. Pp. 29-30)).

66 Final Report, Administrative Conference of the United States (Mar. 31, 2014), https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf, at 19-20; *see also* ACUS Recommendation No. 74-1, 39 Fed. Reg. 23041, June 26, 1974 (recommending amendments to the APA to ensure hearing officers have administrative subpoena authority in administrative adjudications).

67 *Diaz-Jimenez v. Sessions*, 902 F.3d 955, 960 (9th Cir. 2018).

68 *Id.*

69 *Id.*

70 *Pit River Tribe v. Bureau of Land Mgmt.,* 939 F.3d 962, 970 (9th Cir. 2019) (citation omitted); *see also Murray v. UBS Secs., LLC*, 144 S. Ct. 445, 452-54 (Feb. 8, 2024)

the congressional intent revealed in the history and purposes of the statutory scheme.'"[71]

The text of the CERCLA does not answer the question. The statute provides that when an employee who has filed a whistleblower complaint with the U.S. Department of Labor:

> [T]he Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5.[72]

As the plain text neither explicitly nor implicitly provides subpoena authority, we look to statutory context.

And that statutory framework, on the other hand, provides a clear answer. When Congress enacted the CERCLA, it granted both the whistleblower provision and subpoena authority to an arbitration board that was charged with resolving hazardous substances claims. But it did not grant subpoena authority to the Secretary of Labor.[73] The distinction between the two implies the Secretary's lack of subpoena power is by design: variations in language within a statute are presumed to be intentional.[74] Moreover, the Supreme Court has held that, "[w]hen Congress

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(interpreting statutory terms in another whistleblower statute, the Sarbanes-Oxley Act, by analyzing text and statutory context).

71 *Id.*

72 42 U.S.C. § 9610(b).

73 Congress has since replaced the arbitration board with new administrative procedures, and thus, this subpoena authority no longer exists. Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99–499, § 112 (1986); *see also* H.R. Conf. Rep. No. 99–962 (1986). Despite this, its former existence demonstrates that Congress did not intend to grant the Secretary of Labor with subpoena authority when the CERCLA was enacted.

74 *See Bittner v. United States*, 598 U.S. 85, 107 (2023) (Barrett, J., dissenting) (The "normal rule of statutory interpretation" is that "identical words used in different parts of the same statute are generally presumed to have the same meaning.") (citation omitted); *see also Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'where Congress includes particular language in one section

includes particular language in one section of a statute and omits it from a neighbor, the Court normally understands that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."[75] Similarly, the Ninth Circuit, in which this case arises, has held that when a statute designates certain persons, things, or manners of operation, it is presumed that "all omissions should be understood as exclusions."[76]

Bobreski, the only federal court decision addressing ALJ subpoena authority under the CERCLA, accurately recognized this distinction creates a difference, finding that "because each [of six environmental statutes] except the SDWA contains some form of subpoena authority enacted elsewhere in the same legislation as its whistleblower provision, Congress' omission of whistleblower subpoena authority appears to be intentional."[77] Regarding the CERCLA, the court found that "Congress authorized both the whistleblower provision and subpoena power for an arbitration board charged with resolving hazardous-substance claims."[78]

Likewise, based on that context, we find that Congress did not intend to authorize subpoena power under the statute's whistleblower provision.

The SDWA similarly provides that, following an investigation into a whistleblower complaint, "[a]n order of the Secretary shall be made on the record and after notice and opportunity for agency hearing."[79] Like the CERCLA, the SDWA does not expressly provide for ALJ subpoena power, but unlike the CERCLA, it does not provide subpoena authority under any other provision. Thus, we will

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of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'")).

[75] *Bittner*, 598 U.S. at 94.

[76] *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1054 (9th Cir. 2018) (citations omitted).

[77] *Bobreski*, 284 F. Supp. 2d at 76 (citation omitted); *cf. Immanuel v. U.S. Dep't of Lab.*, No. 97-1987, 1998 WL 129932, at *5 (4th Cir. 1998) (finding that Congress did not intend to authorize the issuance of subpoenas for the purposes of carrying out the whistleblower provision of the FWPCA because statute granted subpoena power for certain purposes of the FWPCA while not extending subpoena power to other provisions, including the whistleblower provision). We note that the Fourth Circuit in *Immanuel* followed the rationale of the Board's decision in *Malpass v. Gen. Elec. Co.*, Nos. 1985-ERA-00038, -00039 (Sec'y Mar. 1, 1994), which was subsequently revisited in *Childers*.

[78] *Bobreski*, 284 F. Supp. 2d at 76 (citing CERCLA, Pub.L. No. 96-510, §§ 110, 112 (1980)).

[79] 42 U.S.C. § 300j-9(i)(2)(B)(i).

examine the legislative history and purpose of the SDWA.[80] In *Bobreski*, the District Court found that the SDWA's legislative history demonstrated that "Congress did not intend to provide whistleblower subpoena authority."[81] Specifically, the court found Congress intended the SDWA to have the same whistleblower protections as other environmental statutes:

> In offering the whistleblower provision as an amendment to the bill, its sponsors made clear that they patterned it after, and intended it to go no further than, existing whistleblower provisions. 120 Cong. Rec. H36393 (daily ed. Nov. 19, 1974) (statement of Rep. Symington) (noting that "it is significant to emphasize that we are not initiating a new concept with the amendment, but rather we are extending to workers affected by the act the same protection" authorized under the [F]WPCA and the Occupational Safety and Health Act), (statement of Rep. Heinz) (stating that "[w]hat this amendment would accomplish is nothing new").[82]

The District Court found that FWPCA did not authorize subpoena power for the whistleblower provision because legislation amending the statute contained both the whistleblower provision and a separate provision that authorized the administrator of the Environmental Protection Agency (EPA) to "issue subpoenas to obtain information regarding state water quality and to evaluate the employment impact of effluent orders."[83] The disparate treatment in the same amendment again established similar congressional intent not to include subpoena power under the FWPCA.[84] Since Congress intended the SDWA to align with the FWPCA, we thus agree with the District Court's reasoning and conclusion in *Bobreski* that the SDWA does not authorize an ALJ to issue subpoenas to third-party witnesses.

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80 *See Pit River Tribe,* 939 F.3d at 970 (where "the language is not dispositive, we look to the congressional intent revealed in the history and purposes of the statutory scheme") (citation omitted).

81 *Bobreski*, 284 F. Supp. 2d at 77.

82 *Id.*

83 *Id.* (citing FWPCA Amendments of 1972, Pub.L. No. 92–500, § 2 (1972)); *see also Immanuel v. U.S. Dep't of Lab.*, No. 97-1987, 1998 WL 129932, at *5 (4th Cir. 1998) (finding that the FWPCA does not authorize subpoena power under the whistleblower provision because the FWPCA authorized subpoena authority for certain purposes of the FWPCA but did not authorize such power for the whistleblower provision).

84 *Id.*

We further reject Complainant's contention that *Childers* rather than *Bobreski* controls.[85] In *Childers*, the Board found that an ALJ's authority to issue subpoenas was not limited to statutes where Congress explicitly granted such authority.[86] The Board reasoned that the ERA provided the Secretary of Labor with authority to issue orders "on the record after notice and an opportunity for a public hearing."[87] The Board found this indicated Congress intended to convey the power to employ "procedural mechanisms routinely used by courts to manage the gathering of material evidence" regardless of whether it was "mentioned in the legislation."[88] In reaching this conclusion, the Board considered that the Nuclear Regulatory Commission (NRC) was granted general administrative subpoena power pursuant to 42 U.S.C. § 2201(c), though the ERA did not contain a similar provision that explicitly granted subpoena authority to Department of Labor ALJs.[89] The Board analyzed the ERA's legislative history, in particular the twenty-four year gap between the 1978 amendments that added whistleblower protections and the original 1954 Atomic Energy Act, which granted the NRC with subpoena authority, and found that Congress was not "deliberate and purposeful" in granting subpoena authority in some sections but not in the whistleblower section.[90] Thus, the Board rejected the ALJ's ruling that he lacked subpoena power under the ERA.[91]

We find *Childers* not controlling. First, we agree with the Respondent and the Solicitor that the discussion of ALJ subpoena authority in *Childers* was dicta.[92] Although the Board concluded that the ALJ erred in denying Childers' request to subpoena three coworkers, the Board did not remand the case on the matter because Childers failed to demonstrate his coworkers' testimony would have supported his whistleblower retaliation allegation.[93] Thus, the Board's subpoena discussion was not essential to the disposition of Childers' claim, and the Board is not bound by it.

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85 Comp. Br. at 9-11, 16. Although we are not bound to follow *Bobreski* because this case arises in the Ninth Circuit, we find that *Bobreski* is persuasive.

86 *Childers*, ARB No. 1998-0077, slip op. at 7-8.

87 *Id.* at 8.

88 *Id.* at 9.

89 *Id.* at 11-12.

90 *Id.*

91 *Id.* at 15. The Board revisited this question in *Integrated Informatics, Inc.*, a case that arose under the Immigration and Nationality Act (INA). Although the INA does not contain a reference to hearings "on the record," the Board concluded in dicta that ALJs had subpoena authority because the INA provided ALJs with the power to conduct formal hearings. *Integrated Informatics, Inc.*, ARB No. 2008-0127, slip op. at 7-8.

92 Resp. Br. at 15-16; Amicus Br. of the Solicitor of Labor at 12.

93 *Childers*, ARB No. 1998-0077, slip op. at 15.

Second, even if *Childers* was binding, *Childers* did not arise from either the CERCLA or the SDWA. Rather, *Childers* analyzed ALJ subpoena authority under the ERA—a different statute with different text, structure, purpose, and legislative history. Notably, in *Childers*, the Board emphasized the importance of the legislative history and statutory structure of the ERA, finding that, had there not been a twenty-four-year gap between the enactment of the relevant sections of the ERA, the Board may have reached a different conclusion about congressional intent.[94] Conversely, as the District Court explained in *Bobreski*, the CERCLA provisions authorizing subpoenas for one provision while not granting subpoena authority in the whistleblower provision was enacted at the same time by the same Congress.[95]

Complainant also asserts that an ALJ's authority to issue subpoenas need not be explicitly granted but can be implied based on the power to conduct a hearing on the record.[96] Complainant contends that "it would frustrate the will of Congress to deny DOL ALJs the power to compel the testimony of witnesses when they will not appear voluntarily."[97]

The cases Complainant relies on to support her argument, however, are inapposite. They address an agency's authority to regulate or obtain information, and do not involve a private party seeking to obtain third-party discovery.[98]

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[94] *Id.* at 12.

[95] *See Bobreski*, 284 F. Supp. 2d at 75-77. Although Complainant is correct that *Bobreski* was not decided by a federal court in the Ninth Circuit, it is the only federal court decision (that the Board is aware of) directly on point.

[96] Comp. Br. at 10-12.

[97] *Id.* at 11.

[98] *See Dow Chem. Co. v. United States*, 476 U.S. 227, 233 (1986) (finding that the EPA had authority to conduct aerial observations because "[r]egulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted"); *Boliden Metech, Inc. v. United States*, 695 F. Supp. 77, 82-83 (D. R.I. 1988) (finding that the EPA had implicit authority to obtain an inspection warrant under the TSCA); *Atl. Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 795-96 (D. C. Cir. 1984) (finding that the Department of Energy could impose sanctions for noncompliance with discovery orders even though that power was not expressly conferred); *United States v. M/V Sanctuary*, 540 F.3d 295, 300 (4th Cir. 2008) (finding that the EPA had implied authority to obtain administrative warrants to "carry out its inspection authority under the TSCA"); *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060, 1066-67 (7th Cir. 1978) (finding that the APA requirement of legal authorization did not require express authority because the Secretary of Labor has broad rulemaking authority and power to engage in fact-gathering and to hold enforcement hearings to prosecute violations); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973) (finding that the Federal Trade Commission (FTC) was authorized to regulate in an area

Moreover, they do not provide that implied authority exists where Congress has already considered the matter, but rather find implied authority exists where it would further the purpose of the statute.[99] As discussed above, when Congress enacted the CERCLA, it granted subpoena authority for some provisions while withholding it for the whistleblower provision. As such, and although subpoena authority could assist in the function of formal hearings, we find that Congress has not granted ALJs an implied authority to issue third-party subpoenas under the CERCLA. In addition, we find that implied subpoena authority does not exist under the SDWA based on the legislative history, as discussed above.

Thus, we agree with the ALJ that Congress spoke to this issue by not enacting subpoena authority in the CERCLA or the SDWA. Therefore, we affirm the ALJ's finding that the CERCLA and the SDWA do not provide ALJs with the authority to subpoena third-party witnesses.

3. The Remedial Purpose of the CERCLA and the SDWA and Due Process Do Not Provide Subpoena Power

Amici curiae Renner and WoA assert that the remedial purpose of the CERCLA and the SDWA to protect whistleblowers would be hampered if an ALJ cannot issue subpoenas.[100] Renner argues that pivotal information about alleged violations and investigations could be rendered unavailable.[101] Renner further posits that some whistleblowers may conclude that they need to kick-out their cases to federal court and that other whistleblowers would be foreclosed from information where the statutes lack a kick-out provision.[102] Amicus WoA concludes that subpoena power is necessary to ensure that whistleblowers have a fair opportunity to present their case.[103]

The ALJ acknowledged that subpoena power could further the purposes of whistleblower statutes and promote compliance with the underlying law and

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not specifically authorized by statute because the extent of the FTC's powers should be interpreted to further the purposes of the statute); *Fed. Trade Comm'n v. Brigadier Indus. Corp.*, 613 F.2d 1110, 1115-16 (D.C. Cir. 1979) (finding that the FTC had implied authority to promulgate regulations delegating power to issue subpoenas because such power was consistent with the purpose of the statute); *Taylor v. Shinseki*, 13 F. Supp. 3d 81, 90 (D.D.C. 2014) (citation omitted) (finding that "[c]ompulsory process over witnesses is often 'essential' to getting a 'full and true disclosure of the disputed facts'").

99 *See id.*

100 Amicus Br. of Renner at 3; Amicus Br. of WoA at 3.

101 Amicus Br. of Renner at 3.

102 *Id.* at 3-4.

103 Amicus Br. of WoA at 3.

function of formal hearings.[104] Nevertheless, he concluded that Congress has not granted such authority. Although we are sympathetic to Amici's argument, we agree with the ALJ that Congress has not granted subpoena power under the CERCLA and the SDWA. Moreover, whistleblower complainants have several methods available to obtain information from employers or other parties without a subpoena through the discovery process.[105] In addition, complainants can obtain third-party information via the Freedom of Information Act or declarations.[106] Thus, we conclude that the remedial purpose of the CERCLA and the SDWA does not provide ALJs with subpoena power.

Complainant and Amicus WoA also suggest the lack of ALJ subpoena power could possibly raise due process concerns.[107] But neither party has provided any legal argument demonstrating why due process compels the need for ALJ subpoena power under the CERCLA and the SDWA. Regardless, due process requires notice and the opportunity to be heard.[108] Congress's decision not to include subpoena power in the CERCLA and the SDWA does not deprive Complainant of either.[109]

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104 Order Denying Subpoenas at 5.

105 29 C.F.R. § 18.56.

106 5 U.S.C. § 552.

107 Comp. Br. at 15 ("Subpoena rights . . . may be necessary to comply with constitutional due process[.]"); Amicus WoA Br. at 2.

108 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (citation omitted); *Arizmendi-Medina v. Garland*, 69 F.4th 1043, 1055 (9th Cir. 2023) ("The touchstone of due process is notice and the opportunity to be heard.")

109 *See, e.g., Ubiotica v. Food and Drug Admin.*, 427 F.2d 376, 381 (6th Cir. 1970) (finding lack of administrative subpoena power does not render proceedings before the Food and Drug Administration unconstitutional under the due process clause); *Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 947 F.2d 269, 281-82 (7th Cir. 1991) (rejecting assertion that lack of agency subpoena authority made administrative proceedings unconstitutional); *Hyser v. Reed*, 318 F.2d at 239-40 ((finding that compulsory process is not a constitutional requirement in the criminal parole violation hearing process).

CONCLUSION[110]

Accordingly, we **AFFIRM** the ALJ's Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing.

SO ORDERED.

SUSAN HARTHILL
Chief Administrative Appeals Judge

IVEY S. WARREN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[110] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).