U.S. Department of Labor

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

In the Matter of:

THEODORUS J. FABRICIUS, **ARB CASE NO. 97-144**

COMPLAINANT, **ALJ CASE NO. 97-CAA-14**

v. **DATE: February 9, 1999**

TOWN OF BRAINTREE/PARK DEPARTMENT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
William T. Salisbury, *Salisbury & Neelon, Quincy, Massachusetts*

For the Respondent:
Arthur A. Smith, Jr., *Office of the Town Counsel, Braintree, Massachusetts*

FINAL DECISION AND ORDER WITH LIMITED REMAND CONCERNING ATTORNEY FEES

This case arises under the employee protection provision of the Clean Air Act, 42 U.S.C. §7622 (1994) (CAA). Complainant, Theodorus J. Fabricius (Fabricius), alleged that Respondent, the Town of Braintree Park Department (the Town) violated the CAA when it disciplined him for two different infractions. In a Recommended Decision and Order (RD), the Administrative Law Judge (ALJ) found that the Town's disciplinary actions violated the CAA. The ALJ recommended, among other things, that the Town expunge the two disciplinary notices from Fabricius' personnel file, pay Fabricius one day's pay and compensatory damages, and pay attorney fees and costs.

The ALJ's Recommended Decision is now before the Board for review and final decision. We affirm the ALJ's RD with the principal exception of the issue of attorney fees, which is remanded to the ALJ for further proceedings consistent with this Final Decision.[1/]

BACKGROUND

The facts in this case are set forth fully in the Recommended Decision at 4-13. In brief, Fabricius began working for the Town in July 1988 as a motor equipment operator with additional duties of performing carpentry work. Hearing Transcript (T.) 26. On March 25, 1997, Fabricius and a co-worker, Dan Gray, were gutting the interior and exterior of the bathhouse at a local lake in preparation for the renovation of the structure. T. 33, 42. In the course of the demolition work, debris and dust from the ceiling fell on the two workers. T. 47. Fabricius suspected the material contained asbestos, and together with Gray, left the building immediately. T. 47-50. Fabricius tried unsuccessfully to radio his immediate supervisor, Al Graziano, to say that he and Gray were leaving the bathhouse unlocked. T. 48-50. On the way back to the town garage at the end of the work day, Fabricius stopped at the building inspector's office to see if he could get information concerning asbestos in the bathhouse ceiling. T. 52.

The next day, March 26, Fabricius was admonished for going to the building inspector's office prior to notifying Graziano about the asbestos issue. T. 60, 219, 279. Graziano instructed Fabricius to notify him prior to leaving any job assignment and to call again upon arriving at the next job site. *Id*. When Graziano told Fabricius to return to the bathhouse to work, Fabricius refused until the material in the ceiling was tested for asbestos. T. 61. Graziano gave him other work to do instead. T. 62. That day on his way back to the garage, Fabricius visited the Water and Sewer Department, which had the original plans for the bathhouse, and discovered that the ceiling consisted of transite tile, which Fabricius knew to contain asbestos.[2/] T. 69-74.

On March 27 or 28, Fabricius telephoned the Occupational Safety and Health Administration (OSHA) for information on how to dispose of the clothes he was wearing when he worked in the bathhouse, since he believed they were contaminated with asbestos. T. 65. OSHA, in turn, telephoned the building inspector's office to see whether it was investigating the possibility of asbestos in the bathhouse. T. 66.

[1/] We also decline to award other, minor elements of relief that the ALJ recommended. *See infra* n.15.

[2/] Testing confirmed that the ceiling contained asbestos. T. 167; Administrative Law Judge's Exhibit (ALJX) 8, Tab D.

On March 31, the Town issued two disciplinary notices to Fabricius.[3/] First, Fabricius received a warning notice for leaving his work site (to go to the town offices) without first notifying a supervisor. ALJX 9G. Second, he received a disciplinary notice for chronic tardiness, together with a one day suspension without pay.[4/] Gray received a warning notice for tardiness as well.[5/] T. 138.

Fabricius filed a complaint with OSHA, ALJX 9I, contending that he received the disciplinary notice for visiting the town offices because he sought information about asbestos.[6/] The Area Director of OSHA found that issuing this notice was a violation of the CAA.[7/] ALJX 3, 9P. In response to the Area Director's finding, the Town sought a hearing before the ALJ.

DISCUSSION

To prevail on a whistleblower complaint under the CAA, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action because he engaged in activity protected under that Act.[8/] *See Carroll v. Bechtel Power Corp.*, Case No. 91-

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[3/] The first notice, labeled a "warning," did not contain a penalty. The second, called a "discipline notice," carried with it a one day suspension without pay. Both notices are disciplinary because they were issued pursuant to a progressive discipline system under which an employee could be discharged after receiving four written wamings for the same infraction. T. 82; RD at 8 n.11.

[4/] This was Fabricius' fifth written notice about tardiness. T. 227.

[5/] Graziano initially believed that it was Gray who had gone into the Building Inspector's office on March 25. T. 60, 218; RD at 9.

[6/] Fabricius also filed two union grievances with the Town concerning the asbestos incident. In the first, he grieved the issue of assignment to work with toxic materials. ALJX 9C. In the second, he grieved the warning notice for his visits to the town offices, ALJX 9H. Both grievances were denied at the first step and, at the time of the hearing, they were scheduled to proceed to the second step. RD at 9.

[7/] Asbestos and asbestos containing materials are regulated under both the CAA and the Toxic Substances Control Act, 15 U.S.C. §2622 (1994). The Environmental Protection Agency has issued regulations pursuant to the CAA that regulate work practices and training standards for workers who handle asbestos and asbestos containing materials. 40 C.F.R., Part 61, Subpart M, at §61-140 to §61-157 (1998).

[8/] The CAA provides in relevant part, 42 U.S.C. §7622(a):

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

(continued...)

ERA-36, Sec'y Fin. Dec. & Ord., Feb. 15, 1995, slip op. at 10-12, *aff'd, Carroll v. United States Dep't of Labor*, 78 F.2d 352 (8th Cir. 1996) (under analogous whistleblower provision of the Energy Reorganization Act (ERA)).

1. <u>The discipline for raising concerns with other Town offices about possible asbestos hazards violated the CAA</u>

The ALJ concluded that the true motivation behind the Town's warning notice for leaving the work site without permission was retaliation against Fabricius for having engaged in activities protected under the CAA. RD at 16. The Town now concedes that at the time Fabricius brought his concerns about the potential of an asbestos hazard in the bath house to the attention of officials at the town offices, he was a protected employee engaged in protected activity under the CAA. Town Opening Brief (Open. Br.) at 8; Town Reply Brief (Reply Br.) at 1. In addition, the Town concedes that it was aware of the activity (raising concerns about asbestos) at the time it issued the disciplinary notices. Open. Br. at 7; ALJX 9G.

We concur with the ALJ's finding that the asserted legitimate reason for the warning notice, *i.e.,* that Fabricius left his work area without permission, in violation of Park Department policy, was a pretext for retaliation against him for raising concerns about asbestos. RD at 14-15. First, the department had no formally documented policy about leaving a work site to report an environmental hazard.[9/] Second, to the extent it could be argued that an informal policy existed, the Town did not even apply the purported policy uniformly, since Gray also left the work site without permission but did not receive a warning for so doing. RD at 15. Third, even if there were a policy requiring an employee to ask permission before "leaving" a work site, it is not clear that it was, in the instant case, violated. As the ALJ found, Fabricius' superiors did not know the amount of time that Fabricius was gone from the work site without permission. *Id.* As the ALJ reasoned, since the Town offices were on Fabricius' way as he returned to the Park Department garage at the end of the work day, not only

does it appear that he spent very little time there to inquire about asbestos, *id.* at 16, it is questionable that this could be construed as leaving the work site. *Id*.

[8/](...continued)

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

[9/] The only evidence of a written policy about leaving the work site concerned leave taken for personal reasons or for union business, which clearly was not the motivation for Fabricius' visits to the town offices.

The warning notice stated that it was issued for leaving the work site without permission. At the hearing, the Town asserted an additional rationale in support of the warning: that Fabricius had failed to follow the established chain of command when inquiring about the asbestos. RD at 16. Assuming that there was a policy about following the chain of command (although there is no record evidence in this regard), nevertheless under the whistleblower protection provisions of the ERA, 42 U.S.C. §5851 (1994), and similar laws (including the CAA), an employee may not be disciplined for failing to observe an established chain of command when making safety complaints. *Leveille v. New York Nat'l Guard,* Case No. 94-TSC-3/4, Sec'y Dec. & Ord. of Rem., Dec. 11, 1995, slip op. at 9; *Carson v. Tyler Pipe Co.,* Case No. 93-WPC-11, Sec'y Fin. Dec. & Ord., March 24, 1995, slip op. at 8; *Pillow v. Bechtel Constr., Inc.,* Case No. 87-ERA-35, Sec'y Dec., July 19, 1993, slip op. at 22-23; *Nichols v. Bechtel Constr. Co.,* Case No. 87-ERA-0044, Sec'y Rem. Ord., Oct. 26, 1992, slip op. at 17, *aff'd sub nom. Bechtel Constr. Co. v. Sec'y of Labor,* 50 F.3d 926 (11th Cir. 1995) (citing *Pogue v. Dep't of Labor,* 940 F.2d 1287, 1290 (9th Cir. 1991)). Accordingly, we concur in the ALJ's rejection of the Town's argument that its claimed chain of command procedure provides a legitimate, non-discriminatory explanation for issuance of the warning. RD at 14.

The ALJ found that the Town gave shifting explanations for the disciplinary action, and that the shifting reasons for issuing the warning notice indicate pretext. RD at 17.[10/] In addition, the ALJ found that the statements and animated demeanor of one of Fabricius' supervisors, William Hedlund, at the hearing indicated that Hedlund faulted Fabricius for reporting the asbestos hazard. *Id.* at 16-17. Based on our review of the record, we concur in these findings. Accordingly, we conclude that the warning notice for leaving the work site to visit the town offices violated the CAA.

2. <u>The discipline for chronic tardiness violated the Clean Air Act</u>

The Town objects to the ALJ's finding that it violated the CAA when it disciplined Fabricius for chronic tardiness. Open. Br. at 9-15. The ALJ points out that six days after Fabricius engaged in protected activity by visiting the Town offices to get information on asbestos, he received a disciplinary warning for tardiness and a one day suspension without pay. RD at 19. The Town contends that the timing is coincidental and that Fabricius' five year record of tardiness justifies its action. Open Br. at 5, 9; Reply Br. at 5.

In support of its argument that Fabricius' prior tardiness problem provided a legitimate reason for the March 31 disciplinary notice, the Town directs the Board's attention to numerous documents it attached to its Opening Brief before this Board. These documents were not presented before the ALJ, and therefore they run afoul of the regulation providing that in hearings before Department of Labor administrative law judges, the record is closed at the conclusion of the hearing, and additional evidence shall not be accepted, absent a showing that it is new and material and was

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[10/] A shifting explanation for the adverse action often is an indication that the asserted legitimate reasons are pretext. *See Hoffman v. Bossert*, Case No. 94-CAA-0004, Sec'y Dec. and Rem. Ord., Sept. 19, 1995, slip op. at 9 (finding shift in respondent's theory of the case a strong indication of pretext); *Priest v. Baldwin Assoc.*, Case No. 84-ERA-30, Sec'y Fin. Dec. and Ord., June 11, 1986, slip op. at 12 (holding that the reasons not relied upon at the time of the adverse action, but later presented, were pretextual).

not readily available prior to the close of the hearing. 18 C.F.R. §18.54(a) and (c) (1998). Fabricius objects to the consideration of these documents on the ground that the tendered documents were in the Town's control and thus were readily available prior to the close of the record. Complainant's Brief (Comp. Br.) at 12-13.

The Town answers Fabricius' objection with the assertion that it lacked notice, prior to the hearing, that Fabricius challenged the tardiness disciplinary notice. Fabricius' complaint, ALJX 8A, admittedly did not mention the issue.

When the tardiness issue arose at the hearing, the ALJ cured the notice problem by inviting the Town to submit copies of Fabricius' time cards after the hearing and by asking both parties to address the tardiness issue in their post hearing briefs. T. 383-84. The ALJ thus delayed the close of the hearing until the parties could address the tardiness issue fully. We find that the request for post-hearing evidence and argument logically extended to all documents in the Town's possession concerning Fabricius' tardiness. Thus, even after the hearing, the Town was given an opportunity to submit these materials for inclusion in the case record; however, the Town failed to take advantage of this opportunity. Because the additional documents were available prior to the close of the record before the ALJ, but were not presented to him, we will not consider the additional documents tendered by the Town.[11/] *See Mitchell v. EG&G (Idaho)*, Case No. 87-ERA-22, Sec'y Fin. Dec. and Ord., July 22, 1993, slip op. at 19 (denying request to present additional evidence to the Secretary where the complainant had the opportunity to present the evidence to the ALJ).

Turning to the merits of the Town's assertion of a legitimate basis for disciplining Fabricius for chronic tardiness, we note that prior to engaging in protected activity on March 25, the last time Fabricius had been late to work was March 19, and he was late that day by only one minute. RX 2. The ALJ found it "highly suspicious" that the Town waited 12 days to issue a disciplinary notice precipitated by lateness of one minute. RD at 19. As the ALJ explained, it is questionable whether an employee's lateness by one, two, or three minutes reasonably may be classified as tardiness, since it would require that the employee's watch be synchronized with the time clock at work. *Id*. The ALJ also noted the parallel treatment of Dan Gray, who had been two minutes late to work on many occasions but had never received a warning after being two minutes late until he participated with Fabricius in raising concerns about asbestos. RD at 19.

[11/] Were we to consider the documents, we note that they tend to support Fabricius' case, rather than the Town's. The Town contends that the similar dates on which warnings about tardiness were issued to a number of employees "reinforce the Respondent's assertion that it regularly reviewed attendance records of all departmental employees and issued warnings to chronic offenders." Reply Br. at 5. However, the tardiness notices submitted with the Town's Brief (a total of 9 notices concerning 4 employees), do not appear to be issued in any regular, periodic fashion, as the Town contended. More importantly, the only employees who received notices on March 31, 1997 (shortly after Fabricius raised asbestos concerns), were the two employees involved in the issue, Fabricius and Gray. The fact that Fabricius and Gray were singled out on March 31, 1997, only five to six days after visiting the town offices to raise concerns about asbestos, lends support to the conclusion that the tardiness disciplinary notice was retaliatory.

In addition to these circumstantial indications of retaliatory intent, the record contains more direct evidence of retaliation by Hedlund, who issued the disciplinary notice to Fabricius. At the hearing, Hedlund was asked the meaning of a statement he had made to the OSHA investigator, that Fabricius "has been walking on the fence for a long time and is using administrative avenues to protect his hide." ALJX 9N at 2. Hedlund explained that this statement referred to Fabricius' tardiness. T. 312. Later in the same statement, Hedlund made clear that "administrative avenues" referred to making a complaint to OSHA. ALJX 9N at 3. Hedlund further opined that Fabricius was not justified in complaining to OSHA: "I feel that Ted Fabricius is using OSHA and that the warning was merited." *Id.*

The Secretary has found in another case that a supervisor's disapproval of an employee's complaining to a government agency indicates discriminatory intent. In *Blake v. Hatfield Elec. Co.*, Case No. 87-ERA-4, Sec'y Dec. and Remand Ord., Jan. 22, 1992, a case filed under the analogous employee protection provision of the ERA, the supervisor commented that the complainant used the Nuclear Regulatory Commission as a threat. The Secretary found that the statement "virtually amounts to direct evidence of discrimination." *Blake*, slip op. at 5. Here, Hedlund indicated disapproval of Fabricius' complaining to OSHA. As in *Blake*, we find that Hedlund's statement is very strong evidence of discriminatory intent.

In view of Hedlund's comment about Fabricius "using" OSHA, and the suspicious timing of the March 31 disciplinary notice about tardiness, we conclude that Fabricius showed by a preponderance of the evidence that the notice and accompanying suspension violated the CAA.[12/] We affirm the ALJ's similar findings and conclusion.[13/]

3. <u>The continuing harassment claim properly may be raised in a separate complaint</u>

Fabricius asks the Board to consider newly tendered evidence of continuing harassment. Comp. Br. at 18-22. As he acknowledges, Fabricius first asked the ALJ to reopen the record and reconvene the hearing to take evidence on his allegations of continuing harassment. CX 9 (Motion to Reopen the Record and Reconvene the Hearing for Additional Evidence and Testimony). In that

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[12/] Even if we determined that there was a legitimate reason for issuing the tardiness notice, we have found that there also was an impermissible reason, Fabricius' protected activities concerning asbestos.

Where "dual motive" is found to exist, *i.e.,* where the trier of fact finds that there was both a permissible and an impermissible motive for the challenged employment action, "the burden then shifts to the respondent to prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the illegitimate factor." *Carroll*, 78 F.2d at 357, *citing Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). We conclude that, under the dual motive analysis, the Town did not sustain its burden of establishing that it would have issued the tardiness notice even if Fabricius had not engaged in any protected activity.

[13/] We do not mean to state that an employer may not legitimately discipline an employee for tardiness, but rather that an employer may not do so when the motivation for the discipline is retaliation for engaging in protected activities.

motion, Fabricius argued that judicial economy supports reconvening the hearing and reopening the record, rather than "requiring the Complainant to file and pursue another complaint." *Id*.

The ALJ denied the motion, stating that granting the request would unduly delay a final disposition of this case. ALJX 11 at 4. The ALJ also noted that Fabricius could "contact OSHA with reference to any specific act(s) not covered by the current complaint." *Id*.

The ALJ's denial of the motion to reopen the record and reconvene the hearing was sound for two reasons. First, an ALJ has control of his docket and reasonably may decide that it is more expeditious to handle new allegations in a separate complaint. *See Billings v. Tennessee Valley Authority*, Case No. 89-ERA-16, et al., Sec'y Final Dec. & Ord., July 29, 1992, slip op. at 3 (administrative agency's power to control its docket is similar to that of a court).

Second, Fabricius has recourse to a separate retaliation complaint under which he may receive a complete remedy. The CAA and similar statutes explicitly forbid acts of retaliation against an employee because the employee has filed a complaint under the whistleblower provision. 42 U.S.C. §7622(a)(1); *see Cowan v. Bechtel Constr., Inc.,* Case No. 95-ERA-38, Sec'y Final Dec. and Ord., Mar. 24, 1995, slip op. at 3 (filing a complaint under the ERA's whistleblower provision is itself a protected activity giving rise to a complaint). A separate retaliation complaint is a proper means of raising the additional allegedly retaliatory actions to which Fabricius has been subjected, and, if Fabricius succeeds in such a complaint, he would be made whole for the retaliation. For this reason, we will not admit attachments A and B to Complainant's Brief.[14/]

Fabricius argues that the remaining documents he tendered, Attachments C through E to his brief, show that he is entitled to an additional amount of compensatory damages because of the alleged continuing acts of retaliation. Comp. Br. 22. Again, on a separate complaint of retaliation, Fabricius is free to submit any evidence of pain and suffering caused by any such harassment.

For the same reasons, we also decline to admit into the record the documents tendered with the Town's Reply Brief for the purpose of responding to Fabricius' claim of continued acts of retaliation.

4. <u>The Remedy</u>

Under the CAA's employee protection provision, a successful complainant is entitled to affirmative action to abate the violation, including reinstatement to his former position and back pay. 42 U.S.C. §7622(b)(2)(B) (1994). With the goal of abating the violation, the ALJ recommended expunging the disciplinary notices from Fabricius' personnel file and paying him one day's back pay, plus interest, for his suspension without pay. We affirm these remedies.

The CAA also allows an award of compensatory damages. 42 U.S.C. §7622(b)(2)(B). The ALJ recommended that the Town pay Fabricius $1500 for his pain and suffering. We affirm the

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[14/] Fabricius appears to have taken up the ALJ's suggestion. Attachment A to his brief is a written complaint to an OSHA investigator about the alleged additional retaliatory acts.

award and find that it justly compensates Fabricius for depression that he and his counselor attribute to stress caused by the two disciplinary notices issued on March 31. RD at 24.

The ALJ also recommended that the Town repay Fabricius "for the cost of obtaining medical treatment and medications for his emotional upset caused by Respondent's wrongful conduct and medical treatment for Complainant's exposure to asbestos." RD at 25. We find that the Town is obligated to pay only the cost of obtaining medical treatment and medications for emotional upset, and only to the extent that Fabricius paid these medical costs himself.[15/] *Michaud and Asst. Secretary of Labor v. BSP Transport, Inc.*, ALJ Case No. 95-STA-29, ARB Case No. 97-113, Final Dec. and Ord., Oct. 9, 1997, slip op. at 8, *rev'd on other grounds sub nom. BSP Trans., Inc., v. United States Dep't of Labor*, 160 F.3d 38 (1st Cir. 1998).

5. Attorney Fees and Costs

The CAA also requires us to assess against the respondent all costs and expenses reasonably incurred in bringing the complaint. The Town objects to the amount of attorney fees awarded to Fabricius on the ground that the hourly rates charged by his two attorneys are excessive. Town Br. at 15.

In cases under the employee protection provision of the CAA and related statutes, the Department of Labor uses the lodestar method to determine the amount of attorney's fees, calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *See, e.g., Van Der Meer v. Western Kentucky Univ.,* ARB Case No. 97-078, ALJ Case No. 95-ERA-38, Final Dec. and Ord., Apr. 20, 1998, slip op. at 9-10 and cases there cited. The complainant has the burden of establishing the reasonableness of the fees. *West v. Systems Applications Int'l,* Case No. 94-CAA-15, Sec'y Dec. and Rem. Ord., Apr. 19, 1995, slip op. at 12. We have noted that a complainant's attorney fee petition must include "adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area," as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs. *Van Der Meer,* slip op. at 10; *see also Pillow v. Bechtel Constr., Inc.*, ARB Case No. 97-040, ALJ Case No. 87-ERA-35, Supplemental Order, Sep. 11, 1997, slip op. at 5 (faulting counsel for not providing an affidavit attesting to his qualifications or that the claimed hourly rate is reasonable in his community).

Fabricius' counsel provided a fee petition in the post hearing brief to the ALJ and a supplemental fee petition in Complainant's brief to this Board. Neither petition contained evidence, such as an affidavit of counsel, indicating that the hourly rate charged by counsel was reasonable for this type of case or that the hourly rate was consistent with practice in the Boston area, where

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[15/] We do not order payment of the medical costs related to Fabricius' exposure to asbestos, because these costs are not a consequence of the Town's discrimination. Similarly, we do not adopt the ALJ's recommendation that the Town reimburse Fabricius for the cost of his contaminated clothing. RD at 25. The clothing contamination was caused by Fabricius's exposure to asbestos, not by the Town's retaliation for raising concerns about asbestos in the bath house.

counsel is located. Rather, the fee petitions merely claimed hourly rates of $225 for the senior attorney and $175 for the associate attorney.

We therefore remand the case to the ALJ for the limited purpose of taking evidence and issuing a supplemental recommended decision on the reasonableness of the hourly attorney rates requested by Fabricius' counsel, including the supplemental fee petition. There is no dispute concerning the claimed costs of $1,269.45.

CONCLUSION

The Town of Braintree Park Department violated the CAA when it issued a warning notice to Fabricius concerning his visits to the town offices and a disciplinary notice and suspension concerning tardiness.

It is **ORDERED** that Respondent shall:

1. Expunge Complainant's personnel file of the warning notice about visiting the town offices and the disciplinary notice for tardiness, both issued on March 31, 1997, and of any negative reference relative to his protected activity;

2. Pay Complainant one day's pay for his suspension, with interest payable at the rate specified in 26 U.S.C. §6621 (1994);

3. Pay Complainant $1,500.00 in compensatory damages for pain and suffering;

4. Pay Complainant for the cost of medical treatment and medications for his emotional upset caused by Respondent's wrongful conduct, to the extent these medical costs were borne by Complainant;

5. Pay to Complainant's counsel costs in the amount of $1,269.45; and

6. Post a written notice for a period of 30 days in a centrally located area frequented by most, if not all, of Respondent's employees, advising its employees that the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaint has been decided in his favor.

It is further **ORDERED** that the case is remanded to the Administrative Law Judge to take evidence and make a supplemental recommended decision, consistent with this decision and order,

on the amount of attorney fees to which Complainant's counsel is entitled.[16/]

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Acting Member

[16/] Because this decision resolves all issues with the exception of the collateral issue of attorney fees, it is final and appealable. *See Fluor Constructors, Inc. v. Reich,* 111 F.3d 979 (11th Cir. 1997) (under analogous employee protection provision of the ERA, a decision that resolves all issues except attorney fees is final).