



In the Matter of:

SYED M. A. HASAN,

ARB CASE NO. 00-043

COMPLAINANT,

ALJ CASE NO. 99-ERA-17

v.

DATE: December 28, 2000

**COMMONWEALTH EDISON CO.
AND THE ESTES GROUP, INC.,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Syed M.A. Hasan, *Pro se, Madison, Alabama*

For the Respondents:

Burr Anderson, Esq., *Anderson & Thomas, Chicago, Illinois*

Donn C. Meindertsma, Esq., *Winston & Strawn, Washington, DC*

FINAL DECISION AND ORDER

I. INTRODUCTION

This case arises under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C.A. §5851 (1995). The relevant facts follow. Respondent, Commonwealth Edison Company (“ComEd”), owns and operates a nuclear power plant in Illinois. The plant is composed of two nuclear units: Unit 1 and Unit 2. In 1996, Unit 2 was shut down in order to replace the reactor fuel and perform corrective maintenance (Tr. 484-485).

Over 300 contract engineers were involved in ComEd’s two-year effort to restart Unit 2 (Tr. 494). Those engineers were obtained from ComEd’s co-respondent, The Estes Group (“Estes”), a

company that supplies temporary technical or system engineering personnel to its clients in the nuclear power industry (Tr. 347, 464-465, 475).^{1/}

In late 1998, ComEd needed a design engineer and forwarded a request for such services to Estes. This was the only request for a design engineer that Estes had ever received (Tr. 347). In response to ComEd's request, Estes hired Complainant Syed Hasan and sent him to the ComEd plant. It is uncontroverted that Hasan understood that the assignment was temporary and that his services were needed only in conjunction with ComEd's efforts to restart Unit 2 (Tr. 233, 235). Shortly after his arrival at the plant, Hasan became concerned that a pipe support connection in Unit 2 had been incorrectly modeled as a hinged connection, whereas he believed that it should have been modeled as a fixed connection. Hasan brought this matter to the attention of his superiors and ultimately recommended that ComEd recalculate the problem using a semi-rigid modeling assumption (Tr. 241-242).

By mid-March 1999, all work required for the restart of Unit 2 had been completed. As a result, ComEd released Hasan along with hundreds of other contract engineers (Tr. 548-551). Hasan subsequently filed a complaint with the Occupational Safety and Health Administration ("OSHA") against both ComEd and Estes, alleging that the real reason for his termination was that he raised a safety concern at the ComEd plant. In view of the allegedly retaliatory nature of his termination, Hasan asserted that Respondents violated the employee protection provisions of the ERA.^{2/} OSHA found no merit to Hasan's claim. Hasan objected to that determination and the matter was referred to an Administrative Law Judge ("ALJ") for hearing.

At the hearing before the ALJ, the parties stipulated that: 1) Respondents are subject to the ERA; 2) Hasan was an employee protected under the ERA; 3) Hasan engaged in protected activity in that he voiced safety concerns; and 4) Respondents knew of Hasan's protected activity, although Estes did not know immediately. Based on the evidence and testimony, the ALJ found no violation of the ERA and, by Recommended Decision and Order ("RD&O") dated February 18, 2000, recommended that Hasan's complaint be dismissed. This appeal followed.

II. JURISDICTION

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8 (2000).

^{1/} Estes does not find jobs for people. Instead, it supplies personnel only when it has a contract to do so (Tr. 475). Estes maintains an employment relationship with a temporary worker only as long as that worker is on an assignment. Once the assignment ends, the temporary worker's relationship with Estes is automatically severed and the worker is removed from its payroll (Tr. 348).

^{2/} The ERA prohibits an employer from discriminating against or otherwise taking an unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity.

III. PROCEDURAL MATTERS

Complainant has filed an initial brief, Respondents have filed reply briefs, and Complainant has filed a rebuttal brief. ComEd objected to Hasan's Rebuttal Brief on the grounds that it includes an exhibit and various assertions that were not part of the record and moved to strike this extra-record material. Hasan objected to that motion. ComEd responded by asserting that, in his objection, Hasan has again attempted to introduce extra-record information. ComEd requests that the Board not only strike the non-record information, but also impose sanctions on Hasan for his repeated violations of the rules regarding the submission of evidence. Estes subsequently filed its own motion to strike Hasan's extra-record material.

The Board has held that, when considering whether to admit new evidence, it will rely on the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Administrative Law Judges, 29 C.F.R. §18.54(c) (1998), which provides:

Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

Doyle v. Hydro Nuclear Services, ARB Case No. 98-022, ALJ Case No. 89-ERA-22, Fin. Dec. & Ord., Sept. 6, 1996, slip op. at 2.

Hasan does not assert that the proffered material is new evidence, nor does he argue that the evidence was previously unavailable to him prior to the close of the record. Consequently, we decline to consider this material on appeal. As to ComEd's request for sanctions, we note that Hasan is a *pro se* litigant and cannot reasonably be expected to plead his case with the precision of an attorney. Therefore, ComEd's request for sanctions is denied.

IV. STANDARD OF REVIEW

Under the Administrative Procedure Act, the Board has plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C. §557(b). As a result, the Board is not bound by the conclusions of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co.*, ARB Case No. 97-069, ALJ Case No. 95-WPC-1, Dec. and Ord., April 28, 2000, slip op. at 7.

V. DISCUSSION

In this case, Hasan complained that Respondents terminated him because he engaged in protected activity. The ALJ disagreed, reasoning as follows:

This Complainant has not met his burden of proof by showing the protected activity on his part in any way contributed to the termination

of his temporary employment. To the contrary, Respondent ComEd has demonstrated that Complainant's termination, along with many other contract employees, was a legitimate, non-discriminatory business decision. Complainant was brought on the assignment at ComEd's LaSalle Nuclear Station in November, 1998, for a limited term. This was understood by everyone involved He was hired for a temporary assignment and released when the assignment was completed As to Estes, the evidence is without contradiction that this Respondent knew nothing of Complainant's protected activity until sometime later than his March 26, 1999, termination from ComEd [W]hen Complainant's assignment ended with ComEd his employment with Estes, the placement agency, automatically terminated. This is the normal practice in the trade, and Complainant has established no discrimination against him on the part of Estes by not maintaining him on Estes' payroll beyond March 26, 1999.

Hasan also asserted that Respondents discriminated against him by refusing to hire him for two temporary positions that opened after he was terminated. Again, the ALJ disagreed. Specifically, the ALJ found that ComEd had two openings: one for a "scheduler/scheduler analyst" and the other for a project manager. The ALJ determined that Hasan did not qualify for either position and, therefore, Respondents had a legitimate reason for not hiring him.

In our view, the ALJ rendered a well-reasoned decision that reflects a careful consideration of all the evidence in this case. The complainant in an ERA whistleblower case has the burden of proof and that burden must be met by a preponderance of the evidence. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997). After reviewing the record, we concur with the ALJ that Hasan has not met his burden of proving that his protected behavior was a contributing factor in the personnel action. Even if Hasan had met that burden, Respondents have offered clear and convincing evidence that it would have taken the same action anyway. Accordingly, we find that Respondents have not violated the ERA and conclude that this case should be dismissed.^{3/}

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

RICHARD A. BEVERLY

Alternate Member

^{3/} Hasan has raised a number of other arguments regarding the manner in which the ALJ conducted proceedings in this case. The Board finds those arguments without merit.