U.S. Department of Labor

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

In the Matter of:

MARRITA M. LEVEILLE **ARB CASE NO. 98-079**

and **ALJ CASE NOS. 94-TSC-3**
94-TSC-4

DANIEL J. LEVEILLE,

DATE: May 16, 2000

COMPLAINANTS,

v.

NEW YORK AIR NATIONAL GUARD,
and SECRETARY OF THE AIR FORCE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
David K. Colapinto, Esq.; Stephen M. Kohn, Esq.; Jason S. Garber, Esq.,
Kohn, Kohn & Colapinto, P.C., Washington, D.C.

For the Respondent:
Major Paul J. Sausville, Legal Counsel, *New York Army National Guard,*
Latham, New York

ORDER GRANTING RECONSIDERATION

On February 15, 2000, this Administrative Review Board issued an Order Granting in Part Complainant's Second Supplemental Application for Attorneys' Fees and Costs (Supplemental Attorney Fee Order, or Order). The Supplemental Attorney Fee Order awarded Complainant Marrita Leveille significantly less than the total fees and costs that had been requested in her petition. Complainant had requested compensation for attorney time expended on a reply brief that exceeded the page limitation in the Board's briefing schedule, and also for work on a response to Respondent's Reply brief that was not authorized by the briefing schedule. The Order noted in particular that "Complainant did not seek leave of the ARB to file a 'Reply' brief substantially exceeding the page limitation, nor did Complainant seek leave to file the additional brief not contemplated by the ARB's briefing schedule." Because the Board concluded that "significant time was invested by counsel

developing materials that were not authorized by the ARB's briefing schedule," Order at 3, the Board awarded 38% of the total attorneys' fees and costs requested in the petition.

Complainant promptly moved for reconsideration of the Order on the ground that Complainant had, in fact, moved for leave to exceed the page limitation in the reply brief and for leave to file a reply to Respondent's reply brief. Complainant attached as exhibits to her motion for reconsideration copies of these two earlier motions. *See* Exhibits 2 and 4 to Complainant's Motion for Reconsideration, dated February 25, 2000.

Complainant is correct. The Board has reviewed the case record carefully, and now recognizes it erred in declaring that the two motions had not been filed. The question presented now is whether, taking those two motions into account, the Board should reconsider the Supplemental Attorney Fee Order.

1. Reconsideration Authority

The Board previously has analyzed in depth the circumstances under which it has authority to reconsider its decisions. *See Macktal v. Brown and Root, Inc.*, ARB Case Nos. 98-112, 98-112A, ALJ Case No. 86-ERA-23, Order Granting Reconsideration (Nov. 20, 1998). The question of reconsideration authority can be answered only with specific reference to the statute(s) underlying the challenged decision. Thus in *Macktal*, a case under the Energy Reorganization Act, the Board observed that:

> Agency authority to reconsider may be inherent or statutory. Absent congressional intent to the contrary, agencies have inherent authority to reconsider their final adjudicative orders for error within a reasonable time.
>
> Where Congress has enacted legislation delegating to an agency explicit statutory authority to reconsider its decisions, the agency must act within the parameters of that explicit authority. In these instances, an agency may not rely on an assertion of "inherent authority" to reconsider as a means to circumvent any strictures imposed by the express limitations of its statute.
>
> Whether an agency's reconsideration authority is inherent or derived from an explicit statutory delegation, the authority to reconsider never includes authority for an agency to reconsider the wisdom of its final order merely because of a change in agency policy.
>
> The employee protection provision of the ERA is the basis of our jurisdiction over this case. The ERA is directed generally to the development and safe utilization of energy resources and places. Nothing in the statutory text of the employee protection provision or elsewhere in the ERA addresses the issue of reconsideration of final

> orders in the whistleblower protection cases within the Secretary of Labor's jurisdiction. Therefore, unless reconsideration by the Board would interfere with, delay or otherwise adversely affect accomplishment of the Act's safety purposes and goals, the Board has inherent authority to reconsider a final ERA order.

Macktal, slip op. at 3-5 (citations and footnotes omitted); *see also United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965) ("[a]n agency, like a court, can undo what is wrongfully done by virtue of its order"); *Gorbach v. Reno*, 179 F.3d 1111, 1123-24 (9th Cir. 1999). Applying these principles in *Macktal*, the Board held that it had authority to reconsider decisions in cases under the Energy Reorganization Act.

This case involves a complaint under the employee protection provisions of six environmental laws: the Toxic Substances Control Act, 15 U.S.C. §2622 (1994); the Safe Drinking Water Act, 42 U.S.C. §300j-9(I) (1994); the Clean Air Act, 42 U.S.C. §7622 (1994); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994); the Clean Water Act, 33 U.S.C. §1367 (1994); and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (1994). In an order granting reconsideration in *Jones v. EG&G Defense Materials, Inc.*, ARB Case No. 97-129, ALJ Case No. 95-CAA-3, Order Granting Reconsideration (Nov. 24, 1998), the Board determined that it had inherent authority to reconsider its decisions in appropriate circumstances under three of these statutes: the Clean Air Act, the Toxic Substances Control Act, and the Solid Waste Disposal Act:

> As in *Macktal*, we find that the Board's reconsideration of its decisions under the environmental laws [*i.e.*, the CAA, TSCA and SWDA] would not interfere with or adversely affect the general enforcement provisions of the environmental acts or the goals of the employee protection provisions themselves. . . . [W]e find in this case that the general enforcement authority of the three environmental statutes at issue here is assigned to the Administrator of the Environmental Protection Agency; that the Administrator's enforcement role operates separate and apart from the Secretary of Labor's employee protection function; and that reconsideration of the Board's order in this case would not impact adversely the Administrator's administration of the environmental statutes. Further, we note that EG&G's motion to reconsider was filed soon after the Board issued its order.

Jones, slip op. at 2-3.

With regard to the three additional statutes at issue in this case (*i.e.*, the Safe Drinking Water Act, the Clean Water Act and the Comprehensive Environmental Response, Compensation and Liability Act), we find that the analysis applied in *Jones* holds true. None of the statutes has an explicit grant of reconsideration authority; therefore, "unless reconsideration by the Board would interfere with, delay or otherwise adversely affect accomplishment of the Act's safety purposes and

goals, the Board has inherent authority to reconsider a final . . . order." *Macktal, supra.* As in *Jones*, we find that the general enforcement authority of the three additional environmental statutes at issue here (SDWA, CWA, CERCLA) is assigned to the Administrator of the Environmental Protection Agency; that the Administrator's enforcement role operates separate and apart from the Secretary of Labor's employee protection function; and that reconsideration of the Board's order in this case would not have an adverse impact upon the Administrator's administration of the environmental statutes. We therefore hold that we have authority to reconsider orders issued by the Board under these statutes, in appropriate circumstances.

We find reconsideration to be appropriate in this instance, where our Supplemental Attorney Fee Order was based in part on erroneous information, and where Complainant acted promptly in submitting her motion for reconsideration. Accordingly, the motion for reconsideration is **GRANTED.**

2. Attorneys' fees

The statutes under which this case was filed provide that, when an order is issued requiring relief for the complaining party, the Board "shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) *reasonably incurred,* as determined by the [Board], by the complainant for, or in connection with, the bringing of the complaint . . . ." Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1)(B) (1994) (emphasis added). Our task is to determine what expenditures for attorneys' fees were "reasonably incurred" in connection with the litigation of the compensatory damages issue.

With respect to the motion to exceed the page limitation, Complainant argued that its first brief on compensatory damages required an extensive review of prior awards for emotional suffering and damage to professional reputation. We cannot agree that the damages issues in this case were so out of the ordinary that a 67 percent expansion of the page limitation was warranted.

In the Secretary's 1995 decision on the merits of the complaint, the Secretary found that Respondent unlawfully discriminated against Marrita Leveille when Respondent's officials provided adverse employment references on two occasions (blacklisting), and because the adverse information given on one of those occasions would remain in Complainant's Office of Personnel Management file. *Leveille v. New York Air Nat'l Guard,* Case Nos. 94-TSC-3 and 4, Sec'y Dec. (Dec. 11, 1995), slip op. at 22. On remand, the ALJ recommended that Complainant be awarded $45,000 for her resulting emotional distress, and $25,000 for injury to her professional reputation. *Leveille v. New York Air Nat'l Guard*, ALJ Case Nos. 94-TSC-3 and 4, Rec. Dec. and Ord. upon Rem. (Feb. 9, 1998).

The facts underlying compensatory damage awards in other cases decided by the Board and by the Secretary often have been far more complicated than in this case. For example, in *McCuistion v. Tennessee Valley Authority*, Case No. 89-ERA-6, Sec'y Dec. (Nov. 13, 1991), slip op. at 21-22, the Secretary awarded $10,000 in compensatory damages in a case in which the Complainant had been harassed, blacklisted, and fired. He forfeited his life, health, and dental insurance, and he was unable to find other employment. The retaliation against him exacerbated preexisting hypertension

and caused frequent stomach problems. He experienced problems sleeping at night, exhaustion, depression, and anxiety. In *Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Sec'y Dec. (Jan. 18, 1996), slip op. at 7, the complainant proffered testimony of a psychologist on his loss of sleep and nightmares, changed eating habits, loss of interest in sex, and humiliation. The Secretary there had to distinguish between damages caused by a confrontation with the complainant's supervisors, which had been settled, and damages caused by discriminatory references very similar to this case. *See also Smith v. Esicorp, Inc.,* ARB Case No. 97-065, ARB Dec. (Aug. 27, 1998), slip op. at 2-5, discussing numerous cases. We note that in none of these cases was it necessary to engage in a fifty page discussion of compensatory damages to adequately compare the case at hand with comparable cases. We therefore conclude that the 30-page limitation found in our original briefing schedule was sufficient for Complainant to argue her case, and will not order the Air Force to reimburse her for attorneys' fees associated with the over-limit pages.

Although the original briefing schedule did not contemplate a second brief from the Complainant, we find that it was appropriate to give Complainant an opportunity to reply to the Air Force's brief. However, we find that 15 pages should have been sufficient for Complainant's reply to Respondent's rebuttal brief. Complainant's motion for leave to file a reply to Respondent's only brief on damages is granted, but the pages are limited to 15, *nunc pro tunc*.

We adopt the following methodology for recalculating the assessment for attorneys' fees and costs as reasonable in these circumstances: the attorneys' fees and costs requested should be reduced by the ratio that the allowed total number of pages, 45, bears to the total number of pages filed, 79, or 57 per cent. Complainant's request for $51,532.35 in attorneys' fees and $1,970.40 in costs is reduced to $29,373.44 in attorneys' fees and $1,123.13 in costs.

Complainant also requested that she be allowed to file a petition for additional fees and costs incurred since November 15, 1999.[1/] Decisions of the Secretary hold that a complainant may be entitled to recover attorneys' fees and costs for time reasonably expended litigating the attorneys' fees issue. *See, e.g., Larry v. The Detroit Edison Co.*, Case No. 86-ERA-32, Sec'y Dec. and Order on Costs and Expenses Including Attorney's Fees (May 19, 1992), slip op. at 5 ("Counsel are entitled to compensation for time reasonably spent in preparing a fee claim[,]" *citing Coulter v. State of Tenn.*, 805 F.2d 146, 151 (6th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987) and *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982)). In this case, we will entertain such a petition.

[1/] In her submissions to the Board, Complainant has noted critically that Respondent often failed to comply with the procedural expectations of the Board. We agree that Respondent has taken a cavalier attitude toward briefing schedules, failing to comply with the time limits and page limitations for pleadings. For example, the February 25, 1998, briefing schedule required Respondent's rebuttal brief on the ALJ's Decision and Order on Remand to be filed on or before May 12, 1998, and it was not to exceed 10 pages, but Respondent filed its rebuttal brief of 16 pages on May 29, 1998; Respondent also failed to comply with the time limit for filing its reply to Complainant's Second Supplemental application for Attorneys' Fees, which was due on November 25, 1999, instead filing a motion for extension of time on December 10, 1999. Respondent's careless regard for its litigation responsibilities has imposed additional burdens on the Complainant, thus contributing to Complainant's entitlement to additional fees.

Complainant should bear in mind the Supreme Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In addition, we are mindful that requests for fees for preparing a petition for attorneys' fees should not become "a cascading, 'ad infinitum' series of fee requests. . . ." *Ragan v. Commissioner of Internal Revenue*, 2000 WL 430906, *3 (5th Cir. Apr. 21, 2000). Complainant may submit a supplemental application for attorneys' fees and costs incurred since November 15, 1999, not to exceed five typed double-spaced pages, within 20 days of receipt of this order. Respondent may file a response to this supplemental application, not to exceed five typed, double-spaced pages, within 20 days of receipt of Complainant's supplemental application. No further briefing and no further requests for attorneys' fees will be allowed.[2/]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

[2/] Board Member E. Cooper Brown did not participate in the consideration of this case.