In the Matter of:

MICHAEL McNEILL,	**ARB CASE NO. 02-002**[1]
COMPLAINANT,	**ALJ CASE NO. 2001-ERA-3**
v.	**DATE: December 20, 2002**
CRANE NUCLEAR, INC., AND LIBERTY TECHNOLOGIES, INC.,	
RESPONDENTS.	

BEFORE: **THE ADMINISTRATIVE REVIEW BOARD**

Appearances:

For the Complainant:
    John T. Burhans, Esq., *Burhans Law Offices, St. Joseph, Mississippi*

For the Respondent:
    Marty Denis, Esq., *Barlow, Kobata & Denis, Chicago, Illinois*

ORDER DENYING RESPONDENT'S MOTION FOR
STAY OF PRELIMINARY RELIEF ORDER

This case arises under the whistleblower protection provision of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995), and implementing regulations at 29 C.F.R. Part 24 (2002).

On October 4, 2001, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in favor of Complainant, Michael McNeill. The ALJ found that McNeill had engaged in protected activity when he complained to his employer, Crane Nuclear, Inc., and Liberty Technologies, Inc., (Crane) about being required to perform work pursuant to work orders that were incomplete, incorrect, and therefore led to unsafe work practices. The ALJ also found that Crane fired McNeill in retaliation for McNeill's protected activity, thereby

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[1]   Respondent's appeal has been assigned two Docket Numbers, 02-002 and 02-055. The second Number, 02-055, was assigned in error and accordingly, it is cancelled.

violating 42 U.S.C.A. § 5851. *McNeill v. Crane Nuclear,* No. 2001-ERA-0003 (ALJ Oct. 4, 2001).

On October 16, 2001, Crane filed a petition with the ARB for review of the ALJ's R. D. & O. Crane's petition is now pending with the ARB under Docket Number 01-002. On October 23, 2001, Crane filed with ARB a motion for a stay of a "preliminary order" issued by the ALJ below.

A "preliminary order" is an order issued in ERA whistleblower cases in which the ALJ recommends that the employee's complaint be affirmed. The order grants the interim relief pending final disposition by the Board. 42 U.S.C.A. § 5851(b)(2)(A):

> Upon the conclusion of [an ALJ] hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order.

42 U.S.C.A. § 5851(b)(2)(A), Pub. L. 102-486, Energy Policy Act of 1992. Preliminary relief "prescribed in subparagraph (B)" includes reinstatement, back pay, and such other action as may be necessary to abate the violation, but not compensatory damages.

Implementing regulations in effect since 1998 require ALJs to issue preliminary orders in addition to their Recommended Decision & Orders and make the preliminary order effective immediately upon issuance:

> In cases brought under the Energy Reorganization Act, when an administrative law judge issues a recommended order that the complaint has merit . . . the [ALJ] shall also issue a preliminary order providing . . . relief. . . . This preliminary order shall constitute the preliminary order of the Secretary and shall be effective immediately, whether or not a petition for review is filed. . . .

29 C.F.R. § 24.7(c)(2); *Overall v. TVA,* ARB No. 98-111, ALJ No. 97-ERA-053, slip op. at 1 (ARB Apr. 27, 1998), ("Regulations effective March 11, 1998, specify that the ALJ who issues a recommended decision that the complaint has merit is also to issue a preliminary order granting relief under Section [5851]. . .").

In this case, the ALJ did not issue an interim, or, "preliminary" order. Nor is there any basis in the ALJ decision for construing some of the recommended final remedies as preliminary remedies. (Nowhere in the R. D. & O. does the ALJ refer to a "preliminary relief order" or to the relevant statutory or regulatory text).

In short, Crane's motion to stay a preliminary order refers to an order that does not exist. Thus, we have nothing to stay.

Accordingly, Respondent's Motion for a Stay is denied.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge