No. 03-9570

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADRIENNE ANDERSON,
Petitioner,
v.

ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
and
METRO WASTEWATER RECLAMATION DISTRICT,
Respondents.

On Petition for Review of the Final Decision
and Order of the Secretary of Labor

BRIEF FOR THE SECRETARY OF LABOR

HOWARD M. RADZELY
Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate
Litigation

MARY J. RIESER
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
N 2716
Washington, D.C. 20210
(202) 693-5555

ORAL ARGUMENT REQUESTED

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Cases:

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There are no prior or related appeals in this case.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9610; the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. 6971; the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. 1367; and the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. 5851, as well as the implementing regulations at 29 C.F.R. Part 24. Congress authorized the Secretary of Labor ("Secretary") to investigate whistleblower complaints, conduct hearings, and

order abatement of a violation where one is found to have occurred. See 42 U.S.C. 9610(b), 42 U.S.C. 6971(b), 42 U.S.C. 5851(b), and 33 U.S.C. 1367(b). This Court has jurisdiction to review the Secretary's final decision under 42 U.S.C. 6971(b), 42 U.S.C. 5851(c), and 33 U.S.C. 1367(b).[1] On May 29, 2003, the Administrative Review Board ("ARB") issued its Final Decision and Order on behalf of the Secretary disposing of all parties' claims.[2] Adrienne Anderson filed a timely Petition for Review with this Court on July 24, 2003.

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[1] CERCLA provides for original jurisdiction in the district court. See 42 U.S.C. 9610(b) and 9613(b). Since the agency decision is based on several statutes, some of which provide for direct review in the court of appeals, judicial economy and consistency justify review of the entire proceeding in the court of appeals. See Ruud v. U.S. Dep't of Labor, 347 F.3d 1086, 1090 (9th Cir. 2003) ("[T]he court of appeals should entertain a petition to review an agency decision made pursuant to the agency's authority under two or more statutes, at least one of which provides for direct review in the court of appeals, where the petition involves a common factual background and raises a common legal question. Consolidated review of such a petition avoids inconsistency and conflicts between the district and appellate courts while ensuring the timely and efficient resolution of administrative cases."). See also Shell Oil Co. v. F.E.R.C., 47 F.3d 1186, 1195 (D.C. Cir. 1995) ("[W]hen an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the court of appeals, the entire decision is reviewable exclusively in the appellate court.") (citation and internal quotation marks omitted).

[2] The Secretary has delegated authority to the ARB to review an Administrative Law Judge's decision, and thereby to issue the final agency decision, under the statutes at issue here and others. See Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. 24.1(a)).

STATEMENT OF THE ISSUE

Whether the ARB correctly denied Anderson's complaint on the ground that, as a member of Metro's Board of Directors, Anderson was not an "authorized representative of employees" entitled to protection under the environmental whistleblower statutes.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The whistleblower provisions of CERCLA, SWDA, and the FWPCA protect an "authorized representative of employees" from being fired or otherwise discriminated against for engaging in certain specified protected activity. See 42 U.S.C. 9610(a), 42 U.S.C. 6971(a), 33 U.S.C. 1367(a). On May 2, 1997, Adrienne Anderson, a member of the Board of Directors of the Metro Wastewater Reclamation District ("Metro"), filed a complaint with the Occupational Safety and Health Administration ("OSHA"), United States Department of Labor (R. 1),[3] under the environmental whistleblower provisions of the CERCLA, SWDA, FWPCA, ERA (which does not protect "authorized representatives of employees," see infra), and three other statutes.[4] Anderson alleged that Metro

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[3] "R" refers to the "Certified List of Documents Filed Of Record In The Administrative Proceeding Before The United States Department Of Labor."

[4] Anderson's complaint also asserted claims under the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300j-9(I); the Clean Air

discriminated against her for raising health and safety issues concerning Metro's treatment of purportedly contaminated wastewater. OSHA investigated the complaint and found that Metro had discriminated against Anderson under CERCLA, SWDA, and FWPCA, but denied her claim under the ERA. (R. 3).

Both parties, Anderson and Metro, requested a hearing before an Administrative Law Judge. (R. 6-7). On November 26, 1997, Metro filed a Motion for Summary Decision, arguing that Anderson was not an "authorized representative of employees" and, therefore, was not covered by the whistleblower statutes. (R. 43, Respondent's Motion for Summary Decision). On February 19, 1998, the Administrative Law Judge issued a recommended order granting Metro's motion. (R. 48, Administrative Law Judge's Recommended Order Granting Respondent's Motion for Summary Decision).

On March 30, 2000, the ARB issued a Decision and Remand Order. (R. 54, ARB's Decision and Remand Order). The ARB ruled that a material issue of fact existed precluding summary disposition, and remanded the case to the Administrative Law Judge for a factual determination on the issue whether Anderson was an "authorized representative of employees." After

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Act ("CAA"), 42 U.S.C. 7622; and the Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2622. The OSHA investigator made no findings on these claims, and Anderson did not appeal.

examining the statutory language and the legislative history,[5] the ARB provided the following guidance:

> [A]nderson is an "authorized representative" of Metro employees if a Metro employee or group of Metro employees requested her to speak or act for the employee or group of employees in matters within the coverage of the SWDA, CERCLA, or FWCPA, or if a union representing Metro employees (*e.g.*, OCAW [the Oil Chemical and Atomic Workers International Union]) requested her to speak or act for the union (and by extension the employees) in matters within the purview of these statutes.

(R. 54, p. 7-8). The ARB also instructed the Administrative Law Judge to determine whether Anderson was covered by the ERA.

A hearing was held on November 6-8 and 13-16, 2000.[6] On September 18, 2001, the ALJ issued a Recommended Decision and

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[5] The legislative history of the whistleblower provision of the FWPCA (the earliest of the environmental statutes at issue here) notes that the provision is based on "the National Labor Management [sic] Act and a similar provision in [the Coal Mine Health and Safety Act]." Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3748. While the National Labor Relations Act, 29 U.S.C. 158(a)(4), does not contain the phrase "authorized representative of employees," the employee protection provision of the Federal Coal Mine Health and Safety Act of 1969 refers to "any authorized representative of miners." 30 U.S.C. 820(b)(1). According to the legislative history of that Act, "the term 'representative of miners' includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws." H.R. Conf. Rep. No. 91-761, Statement of the Managers on the Part of the House, reprinted in 1969 U.S.C.C.A.N. 2503, 2582.

[6] The Administrative Law Judge who had issued the recommended decision granting Metro's motion for summary judgment retired, and a successor Administrative Law Judge ("ALJ") was assigned to hear the case on remand. After the hearing, Anderson filed two

Order. (R. 153, ALJ's Recommended Decision and Order). The ALJ concluded that Anderson had established a prima facie case of retaliation under the whistleblower provisions of the CERCLA, SWDA, FWPCA, and ERA, and that Metro had failed to produce a nondiscriminatory reason for its actions. Accordingly, the ALJ ordered affirmative relief, including an award of $150,000 in compensatory damages, $150,000 in exemplary or punitive damages, and $125,000 in damages for emotional distress.

On May 29, 2003, the ARB reversed the ruling of the ALJ and denied Anderson's complaint. (R. 171, ARB's Final Decision and Order). Anderson then filed a Petition for Review with this Court.

B. Statement of Facts

1. Metro is a local sewage collection and treatment authority established under the laws of Colorado, specifically under the Metropolitan Sewage Disposal Districts Act, Colorado Revised Statues ("C.R.S.") § 32-4-501 et seq. Metro covers the City of Denver and a number of surrounding counties and municipalities. Within the covered area is the Lowry landfill, which is the site of a former military weapons testing range. (R. 171, ARB's Final Decision and Order, p. 2). Metro serves

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supplemental complaints alleging, among other things, retaliation and defamation. These complaints were consolidated with the initial complaint and both parties engaged in discovery, submitted additional evidence, and filed briefs.

about 1.3 million residents of Denver and the surrounding counties and municipalities. Specifically, the service area includes Denver, Arvada, Aurora, Lakewood, Thornton, Westminster, and parts of Jefferson, Adams, and Arapahoe counties. (Id.). Metro employs over 300 workers, including laboratory technicians. (Id.). The laboratory technicians were represented by the Oil, Chemical and Atomic Workers International Union, Local 2-477 ("OCAW").[7]

2. Metro's Board of Directors is composed of 59 directors representing more than 50 Denver-area municipalities. (R. 171, ARB's Final Decision and Order, p. 2). The directors, who serve a two-year term, are required to reside within this district and within the particular municipality from which they are appointed, and must be eligible to vote in the general election in the state; the Board of Directors is reapportioned every two years. (Id., pp. 9, 11). The Board of Directors includes individuals who are civil servants, elected officials, attorneys, engineers, realtors, accountants, business people, and teachers, among others. (Id., p. 2).

Members of the Metro Board are appointed by the executive of each municipality, with the approval of that municipality's

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[7] Following a merger, these workers are now represented by the Paper, Allied-Industrial, Chemical and Energy Workers Union, Local 5-477 ("PACE"). See Brief of Amicus Curiae, PACE, p. iv.

governing body. (R. 171, ARB's Final Decision and Order, p. 11). The Mayor of the City of Denver has the authority, under the applicable statute, to appoint directors to the Metro Board to represent the City and County of Denver, which has 20 representatives on the Board. (Id., pp. 9, 11). The governing body of the City and County of Denver, the Denver City Council, has the power to approve or disapprove the proposed appointees. (Id., p. 11). Only the Mayor has the discretion to remove a director whom he has appointed from the Board. (Id., p. 9).

3. The relevant Colorado statutory provision states that "[i]t is declared that the organization of metropolitan sewage disposal districts having the purposes and powers provided in this article will serve a public use and will promote the public health, safety, and general welfare." C.R.S. § 32-4-501 ("Legislative declaration"); (R. 171, ARB's Final Decision and Order, p. 11). The Bylaws of the Metro Wastewater Reclamation District state that the oath of office taken by the new directors of the Metro Board requires them to support the constitutions of the United States and Colorado, and to perform faithfully the duties of a director. (R. 171, ARB's Final Decision and Order, p. 11; RX 72). The Bylaws further state that the directors shall, "as fiduciaries of the Metro district, exercise all official duties for the benefit of the District," and shall "abide by the Colorado Ethics in Government Act."

(Id.). They further state that the directors shall "follow Metro District policies and procedures, including these Bylaws, in the governance of Board business," and "conduct themselves in a manner respectful of the office of Director and the Metro District." (Id.). Finally, the Bylaws state that directors shall, "when finding it necessary to make a written or oral public statement, make a disclaimer statement, being clear that the Director is not speaking on behalf of the Metro Wastewater Reclamation District, and the views expressed are the Director's own personal opinions and not those of the Metro District." (Id.). Directors also shall "acknowledge that all matters discussed in executive session are privileged and confidential in nature and no such information, written or verbal, shall be made available to the public by a Director." (Id.) (internal quotation marks omitted).

4. Adrienne Anderson is an environmental activist in the Denver area and is a part-time instructor at the University of Colorado with a specialty in environmental ethics issues. (R. 171, ARB's Final Decision and Order, p. 2). Anderson had a consulting contract with OCAW during 1994-1995; she held the title of "special projects coordinator." She resigned her position with OCAW in early 1995. (Id., p. 13).

5. On December 12, 1995, Patricia B. Farmer, chief negotiator for Local 2-477 of OCAW, wrote to Donna Good in the

Office of the Mayor of Denver, suggesting that the Mayor consider Anderson to fill an open position on the Metro Board. (R. 171, ARB's Final Decision and Order, p. 14; CX 4). Farmer stated in that letter that "[t]he majority of our members are taxpayers in the city of Denver and we believe the Denver Directors have a duty to represent the citizens of the city." (Id.).

On February 22, 1996, Denver Mayor Wellington Webb sent Anderson a letter appointing her to the Metro Board of Directors to fill a vacated position, and for an additional two-year term ending on June 30, 1998. (R. 171, ARB's Final Decision and Order, pp. 2, 12; CX 5). The letter concluded, "Please accept my deep appreciation for your willingness to serve the citizens of the City and County of Denver in this important role." (CX 5). On June 10, 1996, after two hearings, the Public Works Committee of the Denver City Council confirmed Anderson's appointment. On July 8, 1996, Mayor Webb signed the official document appointing Anderson as "the City of Denver's representative on the Board of Directors of Metro Wastewater Reclamation District, to serve a term of two years, beginning July 1, 1996, and ending June 30, 1998, in accordance with the laws of the State of Colorado and the By-laws of the Metro Wastewater Reclamation District." (RX 30). Anderson was sworn

in as a director on July 16, 1996 and served until July 1998. (R. 171, p. 2).

6. In June 1996, the Metro Board approved a proposed settlement of pending litigation concerning a plan to accept wastewater for treatment from the Lowry landfill, a designated Superfund site. (R. 171, ARB's Final Decision and Order, p. 2). After becoming a director, Anderson expressed disagreement with the Board's approval of the settlement agreement. She raised health and safety concerns regarding Metro's treatment plan for the Lowry landfill, asserting that the site was contaminated with radioactive waste which could affect the workers and the public. (Id., pp. 2-3).

On April 2, 1997, Anderson spoke at a public hearing sponsored by the Environmental Protection Agency concerning the wastewater treatment option. Anderson identified herself as a Metro Board member who disagreed with the Board's policy concerning the Lowry landfill. (R. 171, ARB's Final Decision and Order, p. 3). Metro Board Chairman Richard J. Plastino sent a letter to Anderson, dated April 16, 1997, advising her to make a disclaimer when she spoke in public for purposes of clarifying that she was not speaking on behalf of Metro, and warning her that failure to do so could result in censure by the Board. (Id.; RX 6). Plastino sent a second letter to Anderson on May 20, 1997, reiterating the importance of making such a disclaimer

and suggesting express language that she could use. Plastino again warned her that she could face censure if she did not comply. (R. 171, ARB's Final Decision and Order, p. 3; RX 10). Plastino and four other members of the Board of Directors viewed Anderson as a fellow director, who expressed a minority view on the Board. (R. 171, ARB's Final Decision and Order, p. 3; TR. 1028, 1276, 1362, 1457). Mayor Webb did not reappoint Anderson to the Metro Board when her term expired.

7. Anderson alleged that she faced retaliation from Metro for her opposition to the wastewater treatment option approved by the Board of Directors. This retaliation took the form, according to Anderson, of a memorandum dated April 9, 1997, circulated to the Board, which made derogatory comments about her; secret sessions of two committees of the Board held without her knowledge; intimidation at Metro Board meetings; and interference with her academic career at the University of Colorado. In the words of the Board, "As a result of Metro's actions, Anderson asserted that her professional reputation was damaged, her future income from teaching and consulting work had been reduced, and she suffered emotional distress and mental anguish." (R. 171, ARB's Final Decision and Order, p. 3).

C. Decisions Below

1. Decision of the ALJ on Remand

In its Recommended Decision and Order on remand, dated September 18, 2001, the ALJ, in relevant part, concluded that Anderson was an "authorized representative" under CERCLA, SWDA, and the FWPCA, and was a "person acting pursuant to [employees'] request" under the ERA. (R. 153, ALJ's Recommended Decision and Order, p. 60). In reaching his conclusion that Anderson was an "authorized representative," the ALJ relied on Anderson's consulting contract with OCAW prior to her tenure as a director on the Metro Board and her subsequent appointment to the Board, as well as on the testimony of several witnesses, including Anderson. (Id., pp. 12-17). The ALJ concluded that Anderson was an "authorized representative" because she was "clearly someone who was empowered and directed to act on behalf of a class of persons," specifically the Metro employees. (Id., pp. 12, 19).

The ALJ proceeded to find that Anderson engaged in protected activity by speaking out in public regarding her environmental concerns, and by researching the Lowry treatment plan and participating in governmental investigations; the ALJ found that Anderson had a reasonable belief that Metro was violating the applicable environmental statutes. (R. 153, ALJ's Recommended Decision and Order, pp. 22-29). He found that Metro

had engaged in adverse actions against Anderson, which included sending her a censure-warning letter, demeaning her at Board meetings, and ensuring that she was not reappointed to the Board. (Id., pp. 29-39). The ALJ stated that Metro's treatment of Anderson "shocks the conscience." (Id., p. 73). The ALJ also found that Anderson's supplemental complaints were timely, and that they constituted continuing retaliation against Anderson for her protected activities. (Id., p. 76).

The ALJ, as noted above, ordered $150,000 in compensatory damages, $150,000 in exemplary or punitive damages, and $125,000 for emotional distress. He also ordered Metro to "cease and desist from retaliating against the Complainant and its other employees because of their protected activity." (R. 153, ALJ's Recommended Decision and Order, p. 77).

2. ARB's Final Decision and Order

The ARB, in its Final Decision and Order dated May 29, 2003, exercised de novo review and concluded that Anderson had failed to prove by a preponderance of the evidence that she was an "authorized representative of employees" during the period from 1996-1998 when she was a Metro Board director. The ARB, therefore, denied Anderson's complaint, concluding that she had failed to establish an essential element of a prima facie case under the relevant whistleblower statutes -- CERCLA, SWDA, and FWPCA. The ARB also determined that Anderson was not entitled

to relief under the employee protection provisions of the ERA.[8] Disagreeing with the ALJ on whether Anderson was an "authorized representative of employees," the ARB concluded:

> First, Anderson could not represent OCAW or Metro employees as a Metro director because the [Colorado] statute authorizes the directors to represent the citizens of the City and County of Denver, not a particular interest group. Second, Anderson's evidence did not establish by a preponderance that Metro employees or OCAW authorized her to be their representative during 1996-1998.

(R. 171, ARB's Final Decision and Order, p. 10).

The ARB stated that "Anderson was not able to be a representative of OCAW or Metro employees while serving as a Metro director simply because the Colorado statutes regarding the appointment of directors to the Metro board provide that the appointment may be for no purpose other than representing the citizens of the appointing municipality." (R. 171, ARB's Final Decision and Order, p. 11). In the words of the ARB, "The

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[8] The ERA protects employees from discrimination, but offers no protection for authorized representatives. See 42 U.S.C. 5851(a)(1), (b)(1). As the ARB stated in the decision under review, "By not including protection for an authorized representative or a person acting at an employee's request in the ERA, Congress must have intended that only employees would be entitled to file a claim under that statute." (R. 171, ARB's Final Decision and Order, p. 8). Anderson's argument that she was a Metro employee, raised for the first time on appeal before the ARB, was rejected by the ARB because it was waived, see Wilburn v. Mid-South Health Development, Inc., 343 F.3d 1274, 1280 (10th Cir. 2003), and, even if not waived, was not persuasive. Anderson essentially argues on appeal that she is an "authorized representative" of OCAW and Metro employees, not that she is an employee of Metro.

statute does not create *ex officio* positions or designate any director as the representative of a particular segment of society, such as commerce, academia, or labor." (Id.). Furthermore, "the bylaws indicate strongly that a director may not serve two masters - in this case, the interests of the citizens the director was appointed to represent and the interests of OCAW and Metro employees." (Id., p. 12). The ARB concluded that, while the Mayor of Denver knew that Anderson was sympathetic to labor, he did not appoint her to represent OCAW or Metro employees. (Id.). "[S]uch political decision-making does not confer legal authority on Anderson to serve as an authorized representative of employees under the whistleblower statutes." (Id.) The ARB emphasized that neither the Mayor, the union, nor any group of employees had the power to appoint Anderson as the authorized representative of employees in her capacity as a Metro Board member. "The statute clearly relates that directors are to represent the various geographical areas from which they are appointed - the directors are not appointed to represent various segments of he body politic." (Id., pp. 12-13).

The ARB also concluded that "Anderson produced no . . . written or testimonial evidence that OCAW or the Metro employees had 'selected' or authorized her to act on their behalf during her tenure as a director on the Metro Board." (R. 171, ARB's

Final Decision and Order, p. 13). While acknowledging that there was evidence in the hearing record that OCAW considered Anderson its advocate and that other Metro directors were aware of her union sympathies and her particular opposition to Metro's Lowry landfill policy, the ARB stated that "the union's wishes and public perceptions did not confer 'authorized representative' status, any more than one's affinity for political discourse makes one an official representative of a particular point of view or being sympathetic to a particular point of view gives the sympathizer the authority to act as an agent for one similarly inclined." (Id., p. 18). Specifically, "[t]here are no letters or other documentary evidence from the union appointing Anderson as an authorized representative." (Id.).

The ARB thus concluded: "In sum, the environmental whistleblower statutes did not extend 'authorized representative' protection to Anderson, who as a political appointee was required to serve the public interest and all the citizens of the area she represented. While the union sought Anderson's appointment as a Metro director and generally agreed with her views, she failed to prove that it had authorized her to act for OCAW and its Metro employees while she was Metro director." (R. 171, ARB's Final Decision and Order, p. 19). Having determined that Anderson was not an "authorized

representative" entitled to the protection of the relevant whistleblower statutes, the ARB did not reach the questions of whether Anderson engaged in protected activity, whether Metro took adverse action against her, whether her supplemental claims were timely filed, or damages.

SUMMARY OF ARGUMENT

Congress protected an "authorized representative of employees" from retaliation under the relevant environmental whistleblower statutes, but did not expressly define that term. Thus, the ARB's interpretation of who may be considered an "authorized representative" under those statutes is entitled to controlling deference if reasonable.

The ARB, in the instant case, reasonably concluded that Anderson was not an "authorized representative" of OCAW or the Metro employees as a matter of law, because under the Colorado statute establishing the Metro Board (as supported by the Board's Bylaws), directors are appointed by their respective municipalities to represent the interests of that municipality's citizens, not to represent the interests of any particular group. The Mayor of Denver who appointed Anderson could not have been more clear in this regard. In his letter informing Anderson of her appointment as a director to the Metro Board, the Mayor stated: "Please accept my deep appreciation for your willingness to serve the citizens of the City and County of

Denver in this important role." Although the record leaves no doubt that Anderson was appointed in large part because of her ties to organized labor and her experience as an environmental activist, this in no way affected her legal obligation to represent the citizens of the City and County of Denver as a whole.

Moreover, even if Anderson could legally be the "authorized representative" of OCAW or the Metro employees, substantial evidence supports the conclusion that she was never actually authorized to represent either. The union recommended to the Mayor of Denver that Anderson be appointed to the Metro Board, and expected that, after her appointment, she would serve as a "voice" of its interests. There is even some indication that Anderson was perceived, and indeed perceived herself, as just such a voice. This does not, however, mean that Anderson was formally authorized to represent OCAW or the Metro employees by those entities. They could not, and did not, make such an authorization. As the ARB stated, "While the union sought Anderson's appointment as a Metro director and generally agreed with her views, she failed to prove that it had authorized her to act for OCAW and its Metro employees while she was a Metro director."

ARGUMENT

THE ARB CORRECTLY DENIED ANDERSON'S WHISTLEBLOWER COMPLAINT ON THE GROUND THAT SHE FAILED TO ESTABLISH THAT SHE WAS AN "AUTHORIZED REPRESENTATIVE OF EMPLOYEES" ENTITLED TO PROTECTION UNDER THE WHISTLEBLOWER PROVISIONS OF THE ENVIRONMENTAL STATUTES

A. Standard of Review

1. The Secretary's decision is reviewed under the standard established by the Administrative Procedure Act ("APA"). See, e.g., 42 U.S.C. 9613(j)(2); 33 U.S.C. 1367(b). Under the APA, the reviewing court will set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). A court's review of the Secretary's factual findings is deferential; the Secretary's factual determinations will be upheld unless they are "unsupported by substantial evidence." 5 U.S.C. 706(2)(E). See Trimmer v. United States Department of Labor, 174 F.3d 1098, 1102 (10th Cir. 1999). Substantial evidence is such evidence that is "'enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion to be drawn is one of fact.'" Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994) (quoting Illinois Central R.R. v. Norfolk & Western Ry., 385 U.S. 57, 66 (1966)). Under the APA, "'[s]ubstantial evidence' is more than a mere scintilla; it must be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Olenhouse, 42 F.3d at 1581

(citing Frey v. Bowen, 816 F.2d 508, 512, (10th Cir. 1987), in turn citing Richardson v. Perales, 402 U.S. 389, 401 (1971)). Ultimately, this standard of review is narrow; the court may not substitute its judgment for that of the agency. See Universal Camera Co. v. NLRB, 340 U.S. 474, 488 (1951); see also Trimmer, 174 F.3d at 1102.

2. Legal issues are reviewed de novo with due deference to the Secretary's reasonable construction of a statute that Congress has committed to the agency's administration and enforcement. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); Trimmer, 174 F.3d at 1102. In accordance with the Supreme Court's direction, this Court has held that "an agency's interpretation of a statute entrusted to that agency for administration should be accepted if it is a reasonable one, even if another interpretation may exist that is equally reasonable." Thunder Basin Coal Co. v. Federal Mine Safety and Health Review Comm'n, 56 F.3d 1275, 1277 (10th Cir. 1995) (citing Utah Power & Light Co. v. Sec'y of Labor, 897 F.2d 447, 449-50 (10th Cir. 1990)). As the Supreme Court has stated, "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the

overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." United States v. Mead Corp., 533 U.S. 218, 230 (2001) (footnotes and citation omitted) (emphasis added). See also McCloy v. U.S. Dep't of Agriculture, 351 F.3d 447, 450 (10th Cir. 2003) (deference to reasonable agency construction of a statute in the course of agency adjudication).

3. In the instant case, as set forth below, the ARB's final decision reasonably interpreted the term "authorized representative of employees" not to apply to Anderson, i.e., to someone who was, pursuant to state law, appointed by an elected official to serve as a director on a public board for the express purpose of representing all the citizens of a municipality. This ultimate legal conclusion, based on statutory interpretation, is entitled to Chevron deference. Moreover, substantial evidence supports the ARB's conclusion that, even if Anderson could have been the "authorized representative" of OCAW or Metro employees, she was not in fact authorized by them to be such a representative.

B. Statutory Background and Burden of Proof

Congress authorized the Secretary of Labor to enforce and administer the whistleblower provisions of the environmental statutes, including the three laws at issue here. The CERCLA, FWPCA, and the SWDA protect employees and "authorized

representatives of employees" from discrimination because of their protected activity. Using identical language, the statutes provide in relevant part:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has [engaged in protected activity].

42 U.S.C. 6971(a); 42 U.S.C. 9610(a); 33 U.S.C. 1367(a).

To prevail under the whistleblower statutes, Anderson was required to establish a prima facie case by showing that she was covered by the applicable statutes, i.e., that she was either an employee or an authorized representative of employees; that she engaged in protected activity; and that the employer took adverse action against her because of her protected activity. See Trimmer, 174 F.3d at 1101; Bechtel Construction Co. v. Secretary of Labor, 50 F.3d 926, 933-34 (11th Cir. 1995). It is only the first requirement that is at issue here, specifically, whether Anderson has established by a preponderance of the evidence that she was an "authorized representative of employees."

Congress has not defined the term "authorized representative" in any of the whistleblower statutes. Furthermore, the legislative history of the three statutes does not provide a definition of the term. The Secretary also has not promulgated any regulation defining the term "authorized

representative." In the context of this absence of legislative or regulatory guidance, and "[w]ithin the parameters set by the previous ARB panel," the ARB reasonably concluded that Anderson could not, by operation of Colorado law, be the representative of anyone other than the citizens of the municipality whom she was appointed by the Mayor of Denver to represent as a member of the Metro Board of Directors. The ARB also concluded that, in any event, Anderson had not proven that she was authorized by OCAW or by any group of Metro employees to represent them during her tenure as a Metro Board director. (R. 171, ARB's Final Decision and Order, p. 10).

C. The ARB correctly concluded as a matter of law that, as an appointed member of the Metro Board of Directors, Anderson could not have been the "authorized representative" of either OCAW or Metro employees.

1. The language of the Colorado statute and the Metro Bylaws unequivocally supports the ARB's conclusion that Anderson did not have the legal authority to represent OCAW or Metro employees in her capacity as a Metro Board director. As the ARB explained, "Anderson could not represent OCAW or Metro employees as a Metro director because the statute authorizes the directors to represent the citizens of the City and County of Denver, not a particular interest group." (R. 171, ARB's Final Decision and Order, p.10).

The Colorado Metropolitan Sewage Disposal Districts Act provides that "[t]he members of the board of directors from each municipality shall be appointed by the executive of each such municipality with the approval of the governing body of such municipality." C.R.S. § 32-4-509(2)(a). In districts with more than 11 member municipalities, like the Metro district at issue here, the directors are appointed proportionally, according to the number of people in the municipality. For instance, with certain exceptions, "the board of directors shall consist of one member from each municipality included within the district for each twenty-five thousand of population, or fraction thereof, in any such municipality, plus one member for each additional twenty-five thousand of population, or fraction thereof, in any such municipality." Id. Moreover, Board members must be qualified electors who are eligible to vote in state general elections, and must "reside within the district and within the municipality from which they are appointed." C.R.S. § 32-4-509(3). Further, "[a] change of residence of a member of a board of directors to a place outside the area which he represents shall constitute an automatic resignation and shall create a vacancy on the board." C.R.S. § 32-4-509(4). Additionally, every two years, the representation on the Board of Directors is reapportioned so that the representation on the Board reflects the population of the district. C.R.S. § 32-4-

509(2)(b), (c), and (d). Significantly, the legislative declaration of the state statute declares that "the organization of metropolitan sewage disposal districts . . . will serve a public use and will promote the public health, safety, and general welfare." C.R.S. § 32-4-501. It is thus clear that directors on the Metro Board, like Anderson, are by law representatives of the citizens of the municipality whom they were appointed to serve. As The ARB stated, "[t]he [Colorado] statute does not create *ex officio* positions or designate any director as the representative of a particular segment of society, such as commerce, academia, or labor." (R 171, ARB's Final Decision and Order, p. 10).

2. The Bylaws also "indicate strongly that a director may not serve two masters - in this case, the interests of the citizens the director was appointed to represent and the interests of OCAW and Metro employees." (R. 171, ARB's Final Decision and Order, p. 12). Indeed, Metro Board directors are considered "fiduciaries of the Metro district" and are required to "exercise all official duties for the benefit of the District." (RX 72; R. 171, ARB's Final Decision and Order, p. 11). The oath the directors take, which is contained in the Bylaws, states that "I will support the Constitutions of the United States of America and of the State of Colorado, and that I will faithfully perform the duties and responsibilities of the

Office of Director of the METRO WASTEWATER RECLAMATION DISTRICT, to which I have been appointed." (Id.). Directors are also required to declare when they have a conflict of interest and to refrain from participating in any decision in which they have "a personal or private interest." (RX 72; R. 171, ARB's Final Decision and Order, p. 12). The Bylaws are thus explicit about the directors' responsibilities -- they are responsible for representing the municipalities they serve and the Board itself.

3. The Mayor of Denver appointed Anderson to a seat on the Metro Board as a representative of the citizens of the City and County of Denver. (RX 30). In fact, the Mayor specifically stated in his February 22, 1996 letter of appointment, "Please accept my deep appreciation of your willingness to serve the citizens of the City and County of Denver in this important role." (CX 5). The official appointment form, signed by the Mayor, appointed Anderson "as the City of Denver's representative on the Board of Directors of Metro Wastewater Reclamation District, to serve a term of two years, beginning July 1, 1996, and ending June 30, 1998, in accordance with the laws of the State of Colorado and the By-laws of the Metro Wastewater Reclamation District." (RX 30).

As the ARB stated, "[t]he Mayor's letter of appointment does not suggest that Anderson was appointed to serve OCAW or Metro employees." (R. 171, ARB's Final Decision and Order, p.

12). The ARB correctly concluded that the Mayor "knew that [Anderson] was sympathetic with labor causes, and that he was fulfilling his own policy objectives by appointing Anderson, who was recommended by OCAW. But such political decision-making does not confer legal authority on Anderson to serve as an authorized representative of employees under the whistleblower statutes." (Id.). The ARB cogently explained "that even if Mayor Webb believed that Anderson would 'represent' the views of Metro workers and labor generally, he did not have the legal power to appoint her to the Metro board for that purpose. And even if OCAW or other Metro employees considered Anderson their 'representative' on the Metro board, neither had any legal power to make her their representative in her capacity as a Metro director, or to bind her to make particular decisions in a particular way." (Id.).

4. Anderson contends that there is no language in the applicable Colorado statute or in the Bylaws "which prohibits Directors from advocating on behalf of individuals or special interest groups during Board deliberations." (Petitioner's Brief at 28). This misses the point. The directors, once on the Metro Board, may presumably advocate on behalf of any particular interest they choose; they are, however, by operation of law, appointed to represent the citizens of a specific geographical area and not "various segments of the body

politic." (R 171, pp. 12-13). When acting as Board members, they are not the "authorized representatives" of any union or group of employees.

D. Substantial evidence supports the ARB's conclusion that neither OCAW nor Metro employees authorized Anderson to represent them during her tenure as a director on the Metro Board.

Even if, contrary to our prior argument, Anderson could have been the "authorized representative" of OCAW or Metro employees, substantial evidence supports the ARB's conclusion that neither OCAW nor Metro employees actually authorized her to be their representatives during the relevant time period. As the ARB explained, consistent with the plain meaning of "authorized," "there must be some tangible act of 'selection' or authorization to enable the representative to perform any actions on behalf of the employees who selected him or her or authorized his or her representation." (R. 171, ARB's Final Decision and Order, p. 13, citing to R. 54, ARB's Decision and Remand Order, p. 7). As an example of a tangible act of selection, the ARB noted that Anderson's "consulting contract with OCAW in 1994 was a tangible act 'selecting' and authorizing her to represent Metro employees during that time frame." (R. 171, ARB's Final Decision and Order, p. 13). The ARB, however, concluded that "Anderson produced no similar written or testimonial evidence that OCAW or the Metro employees had 'selected' or authorized her to act on

their behalf during her tenure as a director on the Metro board." (Id.).[9]

The Mayor's office invited OCAW to submit resumes of candidates for consideration as prospective Board members after the union wrote a letter of protest to Paul Wishard in the Mayor's office complaining that Cecile Rose, a director whom the union perceived to be sympathetic to its concerns, had not been reappointed by the Mayor. (Tr. 103-05). Marilyn Ferrari, vice-president of the OCAW local, asked Anderson to provide a resume for submission to the Mayor, "[b]ecause of all her environmental experience, we felt that this would be -- she would be a really welcome member on the Board, and we wrote a cover letter." (TR.

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[9] Anderson cites Kerr-McGee Coal Corp. v. Federal Mine Safety and Health Review Commission, 40 F.3d 1257 (D.C. Cir. 1994), for support of a broad construction of "authorized representative." Kerr-McGee deals with the question of "whether a non-elected labor organization can serve as a miners' representative at a non-unionized mine under the Federal Mine Safety and Health Amendments Act of 1977." 40 F.3d at 1259. The Secretary of Labor defined the statutory term "miners' representative" to include "[a]ny person or organization which represents two or more miners . . . for the purposes of the Act." 30 C.F.R. 40.1(b)(1). By including "organizations," the Secretary contemplated that non-elected labor unions may serve as miners' representatives. Kerr-McGee, 40 F.3d at 1262. The court deferred to the Secretary's reasonable interpretation of the statute (as well as to her interpretation of her own regulation), which did "not expressly address whether a non-elected labor organization can serve as a miners' representative at a non-unionized mine." Id. The Secretary's position in this case does not turn on whether Anderson is a representative of an elected or non-elected labor organization, but rather on whether any union or group of employees could and actually did authorize her to represent them. Thus, Kerr-McGee is inapposite.

106). Pat Farmer, the union representative who wrote the letter recommending Anderson, recalls that Wishard (from the Mayor's office) asked the union to "suggest someone to be on the Board." (TR. 634). Farmer noted that Anderson "had worked with the union, and we knew that she would represent us fairly, and she had a strong environmental background, which we felt would be beneficial to the District." (TR. 635). Farmer further testified: "We were looking for a voice on the Board to get us a contract." (TR. 636) (emphasis added).

On December 12, 1995, the union submitted Anderson's resume to the Mayor's office with Farmer's cover letter, noting that she "is a recognized expert on environmental issues and is well versed on matters regarding the Lowery Landfill." (CX 4). The letter also mentioned that Anderson had been "helpful" to Metro employees "in their fight for a fair contract." (Id.). The union did not indicate that Anderson's name was being proposed as an "authorized representative" of Metro's employees or the union. In fact, the union's letter states: "The majority of our members are taxpayers in the city of Denver and we believe the Denver Directors have a duty to represent the citizens of this city." (Id.). The letter indicates the union's desire to have the Mayor appoint a director who understood its concerns, one "who will put people and the environment first." (Id.).

Albert Levin, a former Metro Board member, testified that when Anderson introduced herself to the Metro Board, "she indicated that she was appointed by the [City] Council and the Mayor's office to represent the concerns and the welfare of the employees." (TR 143). Levin did not testify that either OCAW or Metro employees authorized Anderson to be their representative. It is also noteworthy that the chairman of the Metro Board of Directors, Richard J. Plastino, and four other directors on the Board, testified that they viewed Anderson as a fellow Board member, not as any "authorized representative." (R 171, ARB's Final Decision and Order, p. 3; TR. 1028-29, 1276, 1362, 1457). As the ARB concluded, "Anderson was, at best, self-authorized." (R 171, ARB's Final Decision and Order, p. 14).

The testimony of Theodore Hackworth, a Denver City Councilman and one of the directors of the Metro Board, reveals his initial concerns about Anderson's relationship to OCAW and her subsequent assurance that she was not an OCAW representative. Hackworth testified on direct examination that prior to the City Council's ratification of Anderson's appointment in the spring of 1996, he requested that she make a second appearance before the Public Works Committee. The exchange is instructive.

Q. What do you recall about your dialogue with Ms. Anderson at this meeting?

A. Well, what I wanted to know, was the -- her relationship with OCAW a continuing relationship that would in fact create conflicts on the Board. I also wanted to know, were the groups that she represented, representing some kind of environmental extremism, that in fact would create a problem with the relationships of Denver with the other Board members.

Q. What do you recall the answers being from Ms. Anderson?

A. I believe she stated that she was no longer representing the union, so that was not a concern, and that she didn't consider the groups that she had represented to be extreme.

* * *

Q. And did you vote for her confirmation based upon the answers she provided you?

A. Absolutely. I would have never approved her if she hadn't satisfied that - - me that in her statements that she wasn't representing the union, nor extreme environmental positions.

(TR 1418-1422).

Alison Laevy, a consultant and campaign coordinator for OCAW, testified that the union was "looking for friendly, sympathetic faces on the Board at Metro." (TR 86). Laevy stated: "[W]e wrote to [the Mayor] to ask for representation on the Board of the Metro Wastewater. Someone who could be an advocate for union members." (TR 86). While Laevy considered Anderson to be "our representative on the Board" (TR 89), she acknowledged that OCAW never notified anyone on the Metro Board that the union considered Anderson to be its representative.

Q. Okay. I want to know what notice the OCAW put the District on that Ms. Anderson was the authorized representative of the employees when she was appointed to the Board. How did you notify the District and tell them about that status?

A. I don't recall there was any.

Q. There wasn't any, was there?

A. No, not to my recollection.

Q. So, as far as you know, the District never knew that she was the authorized representative of the employees.

A. Right.

(TR 100). Similarly, Kathryn E. Jensen, a Metro director who was on Metro's union negotiating team, testified that Anderson was never involved in any of the negotiations, and that during these negotiations OCAW never indicated that Anderson was its "authorized representative." (TR. 1362-63).

Finally, in a Metro Wastewater Reclamation District Directors Information form, dated October 31, 1996, after her appointment as a director, Anderson identified her occupation as an instructor of environmental ethics at the University of Colorado at Boulder. (RX 35). Anderson noted that her volunteer community activities included "environmental advocacy and public interest civic development around environmental hazards, public health issues". (Id.). She listed special skills as "Consumer/public health research & advocacy." (Id.).

Anderson did not state anywhere in this form that she was an "authorized representative" of OCAW.

In sum, while the union may have considered Anderson, and Anderson may have considered herself, as being a voice for the interests of OCAW and Metro employees, neither the union nor any group of employees specifically authorized her to be their representative nor, as argued above, could they have. As the ARB stated, "There is no dispute that OCAW wanted Anderson on the Metro board. But the union's wishes and public perceptions did not confer 'authorized representative' status, any more than one's affinity for political discourse makes one an official representative of a particular point of view or being sympathetic to a particular point of view gives the sympathizer the authority to act as an agent for one similarly inclined." (R. 171, ARB's Final Decision and Order, p. 18).

CONCLUSION

For the foregoing reasons, this Court should affirm the final decision of the ARB dismissing Anderson's complaint for failure to establish that she was an "authorized representative of employees" under the whistleblower provisions of CERCLA, SWDA, and FWPCA.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

Mary J. Rieser

MARY J RIESER
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
N 2716
Washington, D.C. 20210
(202) 693-5555

ORAL ARGUMENT REQUESTED

The Secretary of Labor requests oral argument in this case. The issue for decision is one of first impression. The Department of Labor is the agency charged with administering and enforcing the employee protection provisions of the environmental statutes at issue in this case. Accordingly, the Secretary believes that she would be of assistance to this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(5), that this Brief of the Secretary of Labor contains 8,308 words in monospaced typeface, 12 point New Courier.

Mary J. Rieser

MARY J. RIESER
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2004, the undersigned sent copies of the Brief of the Secretary of Labor to the following, by U.S. Mail, first-class, postage pre-paid:

Lee Katherine Goldstein
Senn, Visciano, Kirschenbaum, P.C.
1801 California Street, Suite 4300
Denver, CO 80202

Donn C. Meindertsma
Winston & Strawn LLC
1400 L Street N.W.
Washington, D.C. 20005

Richard P. Brentlinger
Joel A. Moritz
Robert J. Thomas
Inman, Flynn & Biesteerfeld, P.C.
1660 Lincoln Street, Suite 1700
Denver, CO 80264

Donald S. Holmstrom
Denver Area Labor Federation
140 Sheridan
Denver, CO 80226

Mary J. Rieser

MARY J. RIESER
Attorney