U.S. Department of Labor

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

In The Matter of:

C. D. VARNADORE, **ARB CASE NO. 98-119**

COMPLAINANT, **ALJ CASE NOS. 92-CAA-2**
92-CAA-5, 93-CAA-1,

v. **94-CAA-2, 94-CAA-2**

OAK RIDGE NATIONAL LABORATORY, DATE: May 14, 1998
LOCKHEED MARTIN ENERGY SYSTEMS,
INC., AND LOCKHEED MARIETTA CORP.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

On April 6, 1998, a three member panel of the United States Court of Appeals for the Sixth Circuit issued a unanimous decision in *Varnadore v. Secretary of Labor*, Docket Nos. 3888/4389, affirming the decisions of the Secretary of Labor and the Administrative Review Board in *Varnadore v. Oak Ridge National Laboratory and Lockheed Martin Energy Systems, Inc.*, Case Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1 (*Varnadore I*), 94-CAA-2 (*Varnadore II*), and 94-CAA-3 (*Varndaore III*); Sec. Dec. Jan. 26, 1996; ARB Dec. June 14, 1996. In late April 1998, Complainant C.D. Varnadore (Varnadore) filed in the Sixth Circuit a Request for Reconsideration and Suggestion of Rehearing *En Banc*, and Motion to Supplement the Record. Varnadore moved "pursuant to Federal Rule of Appellate Procedure 16(b) to supplement the record" with seven pages of the transcript of an ALJ hearing involving another complainant in another case. On April 29, 1998, attorneys for the Department of Justice, representing the Secretary of Labor, filed an Opposition to Petitioner's Post-Decision Motion to Supplement the Record.

On May 2, 1998, counsel for Varnadore wrote the Secretary of Labor and the Administrative Review Board, stating in part:

> In a telephone communication initiated by the Clerk of the Sixth Circuit the Clerk of the Sixth Circuit Court of Appeals requested that Complainant: (1) petition the Secretary of Labor to reopen the case and consider this evidence, and

(2) refile the petition for *en banc* review on or before May 21, 1998. This filing is made pursuant to that request, and on an urgent basis.

Letter from Edward A. Slavin, Jr. to Secretary Alexis M. Herman and David A. O'Brien,[1/] dated May 2, 1998 (Letter), at 3. Varnadore requested that:

> . . . the Secretary and ARB . . . reopen the record, [and] reconsider their decisions:
>
> 1. [C]onsider Ms. Shelton's testimony regarding Mr. Wright's motives and intent, and his resistance to moving Mr. Varnadore from R-151 in the first place;
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> 2. [V]acate the Board's decision and the Secretary's decision;
>
> 3. [A]llow oral argument before the Secretary and ARB during the first three weeks of May 1998;
>
> 4. [A]gree that the Secretary of Labor should personally decide this case, as Secretary Reich promised to do on January 26, 1996 . . . .

Id.

On May 5, 1998, Beverly L. Harris, En Banc Coordinator for the Sixth Circuit, wrote to Mr. Slavin "to reiterate our conversation of April 20, 1998 . . . ."[2/] The letter states in relevant part that, "[y]ou were also advised that the motion to supplement the record was not properly before this court as it should be submitted to the Secretary, then renewed in this court if the Secretary denies the motion."

On May 12, 1998, Energy Systems filed a Response to Varnadore's Petition.

DISCUSSION

Varnadore seeks to supplement the record in his case with seven pages of testimony from a hearing held in another whistleblower case involving a worker at Oak Ridge National Laboratory. The testimony which Varnadore seeks to add to the record was given by Brenda Washington Shelton in her whistleblower case against Lockheed Martin Energy Systems. *Shelton v. Oak Ridge National Laboratory, Lockheed Martin Energy Systems Inc., et al.*, Case No. 95-CAA-19. Shelton's August 31, 1995 testimony was given after the ALJ had issued his decision in *Varnadore I*, but before the issuance of the Secretary's January 26, 1996 Decision

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[1/] Mr. O'Brien had been the Chair of the Administrative Review Board until his resignation in April 1998.

[2/] Ms. Harris sent copies of her letter to the Departments of Labor and Justice and to Lockheed Martin Energy Systems (Energy Systems).

and Order in *Varnadore I* and the Board's June 14, 1996 Final Consolidated Decision and Order in *Varnadore I, II, and III.*

Under the regulations governing the Department of Labor administrative law judges, a party may seek permission to supplement the record with newly discovered evidence that was not readily available prior to the close of the record. 29 C.F.R. §18.54(a). Varnadore openly admits that Shelton's testimony is not "newly discovered" evidence. Letter at 2. As his attorney also represents Ms. Shelton, her testimony can have come as no surprise. Yet Varnadore made no attempt to supplement the record in his cases with Shelton's testimony while those cases were still pending before the Department.

Varnadore argues that until the Sixth Circuit panel issued its decision there was no reason to believe that his case would turn on whether Varnadore's supervisor "threatened" to return Varnadore to a room allegedly contaminated with radioactive waste. Letter at 2. The record simply does not support this contention.

First, as early as his complaint before the Wage and Hour Division, Varnadore characterized the supervisor's conversation with him as a threat, amounting to a retaliatory act. Letter from Clifford T. Honicker and Jacqueline O. Kittrell to George Friday, District Director, Wage and Hour Division, dated November 20, 1991, at 3-4.

Second, both before the ALJ as well as on review before the Department of Labor, Energy Systems argued that the *Varnadore I* complaint was untimely filed. Energy Systems specifically addressed the question whether Wright's conversation with Varnadore about possible reassignment to R-151 was actionable retaliation, and could render Varnadore's complaint timely:

> According to complainant, the last pre-complaint act of retaliation, the one that occurred within the 30-day limitations period, took place when Wright told him that he might be reassigned to R-151.

Brief of Respondent Martin Marietta Energy Systems, Inc., filed with the ALJ on February 1, 1993.[3/] On appeal before the Department of Labor, Energy Systems renewed its contention that the complaint was not timely. *See,* Respondent's Brief in Opposition to the Recommended Decision and Order, filed August 23, 1993, at 10-17. Varnadore responded to these arguments before the Secretary of Labor:

> [W]ithin 30 days of filing the original complaint, as a result of an effort to again relocate complainant due to the industrial hygiene department's recommendation that he be removed from E-259 because of the presence of

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[3/] The ALJ noted in *Varnadore I* that "Respondent asserts that Complainant's action is barred by the 30-day statute of limitations in the applicable environmental statutes." R. D. and O. at 77.

> uncontained, visible mercury, he was told by Dr. Shults' Administrative Assistant, Mr. Darryl Wright, that he would probably be moved back to R-151, since Mr. Wright believed the radioactive barrels would soon be removed . . . .

Complainant's Reply to Respondent's Brief in Opposition to the Recommended Decision and Order, filed Sept. 22, 1993.

It is impossible to conclude, given the record cited above, that "there was no reason for the Complainant to believe that" Wright's conversation with Varnadore "would become the fulcrum upon which the whole case would turn until the issuance of the Panel decision." Letter at 2. Because Varnadore has not shown that Shelton's testimony was "new and material evidence [which became] available which was not readily available" while the Varnadore case was pending before the Department of Labor, we DENY Varnadore's request to supplement the record.[4/] *Doyle v. Hydro Nuclear Services,* Case No. 89-ERA-22, ARB Final Dec. and Ord., Sept. 6, 1996, at 2.

Because this case is presently pending before the Sixth Circuit Court of Appeals, we do not have jurisdiction to reconsider the January 26, 1996, decision of the Secretary of Labor or the June 14, 1996, decision of the Board. Accordingly, Varnadore's other requests contained in his counsel's letter of May 2, 1998, are **DENIED.**

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member

[4/] Even were we to find that the Shelton testimony was not readily available, we would conclude that it is irrelevant to the issue whether Wright took adverse action against Varnadore when he discussed the possibility of reassigning him to R-151. Shelton was not present at that conversation. More critically, the seven pages of testimony sought to be included in the record relate to her interpretation of a hearsay report recounting what Wright allegedly had said in a conversation with another person months prior to the conversation at issue.