U.S. Department of Labor

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

In the Matter of:

JOSEPH J. MACKTAL, JR.,

COMPLAINANT,

v.

BROWN AND ROOT, INC.,

RESPONDENT.

ARB CASE NOS. 98-112
98-112A

ALJ CASE NO. 86-ERA-23

DATE: October 16, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stephen M. Kohn, Esq., Michael D. Kohn, Esq., David K. Colapinto, Esq.,
Kohn, Kohn & Colapinto, P.C., Washington, DC

For the Respondent:
Richard K. Walker, Esq., Thomas D. Arn, Esq.,
Streich Lang, Phoenix, AZ

DECISION AND ORDER ON ATTORNEY'S FEES

In 1987, Complainant Joseph J. Macktal, Jr. (Macktal) and Respondent Brown and Root entered into an agreement that purported to settle Macktal's whistleblower complaints under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (1988). The settlement agreement called for Brown and Root to make a cash payment of $35,000 to Macktal ($15,000 in damages, and $20,000 in attorney's fees). The agreement also included a provision that restricted Macktal's right to contact government agencies. *See generally Macktal v. Brown and Root, Inc.*, Case No. 86-ERA-23, ARB Case No. 97-25, Fin. Dec. and Ord., Jan. 6, 1998.

Brown and Root paid the settlement monies to Macktal. However, the Secretary later refused to approve the settlement agreement because it included the provision restricting Macktal's legal rights, finding that the restrictive clause was illegal. After significant additional litigation, in January 1998 the Administrative Review Board remanded this case to the presiding Administrative Law Judge (ALJ) to calculate attorney's fees due to Macktal. *Id.*

After remand, the ALJ has submitted to the Board a recommended Decision and Order Granting Attorney's Fees (ALJ's Order) in which he applied the "lodestar" approach to the calculation of attorney's fees, *i.e.*, multiplication of the reasonable number of hours expended on the litigation times a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The ALJ reduced the number of hours claimed by Macktal's attorneys, and also reduced the claimed hourly rate. ALJ's Order at 4. In addition, the ALJ awarded Macktal $3,830.07 in costs. Significantly, the ALJ recommended crediting Brown and Root the $20,000 in attorney's fees already paid to Macktal under the 1987 settlement agreement.

Macktal has filed a brief to this Board on attorney's fees and costs, but Brown and Root did not file a brief. Macktal only objects to the provision of the ALJ's Order granting Brown and Root a credit of $20,000 toward attorney's fees due. He does not challenge the ALJ's reduction in the number of hours claimed or the reduction in the attorneys' hourly rates.

Earlier in this case, Brown and Root had requested that the Secretary order Macktal to return the monies that had been paid under the 1987 settlement agreement. At that time, the Secretary held that he had no authority under the ERA to order restitution of the money that Macktal had retained. *Macktal v. Brown and Root,* Inc., Case No. 86-ERA-23, Sec. Ord., July 11, 1995. Relying on this earlier precedent, Macktal now argues that it similarly is inappropriate for the Board to grant Respondent Brown and Root a credit for the $20,000 in attorney's fees previously paid under the settlement agreement that later was ruled invalid.

We do not agree and find the two situations distinguishable. It is true that there is no authority in the ERA to order repayment of money paid under a settlement agreement later found illegal. *Id.* However, we think it would be an abuse of our authority under the ERA to award attorney's fees if we were to award, in effect, a windfall double payment of attorney's fees to Macktal by failing to credit Brown and Root with the amount already paid. Further, we disagree with Macktal's assertion that the crediting of the earlier attorney's fees will discourage whistleblowers from reporting safety and quality violations. In our view, the offset recommended by the ALJ, and which we order here, only assures that counsel for whistleblowers receive just compensation for their representation, and not more.

Because Brown and Root did not file a brief excepting to the ALJ's Recommended Order, it is not necessary for us to address the additional arguments in Macktal's brief.

We accept the ALJ's recommendations with regard to attorney's fees and costs. It is ordered that Brown and Root pay Macktal $51,092.96 in attorney's fees and $3,830.07 in costs. ALJ's Order at 4.

SO ORDERED.

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member