U.S. Department of Labor

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

In the Matter Of:

RANDOLPH FRADY,

COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

CASE NOS. 92-ERA-19
92-ERA-34

DATE: June 7, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER AND APPROVAL OF AGREEMENT CONCERNING DAMAGES

The Secretary issued a decision in this case, which arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988), on October 23, 1995. In that Decision and Order of Remand (DOR), the Secretary dismissed certain of Complainant's allegations of discrimination under the ERA but held that Respondent had violated the ERA by failing to select Complainant for hire as a machinist or steamfitter trainee, or a SE-5 nuclear inspector. The case was therefore remanded to the Administrative Law Judge (ALJ) for a determination concerning Complainant's complete remedy in this case.

[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia*, the the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988) and the implementing regulations, 29 C.F.R. Part 24, to the newly created Administrative Review Board (ARB). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978
(May 3, 1996)(copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the ARB now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization is also attached. The Secretary's decision of October 23, 1995, and the entire record in this case have been reviewed by the ARB.

On March 26, 1996, the ALJ issued a Recommended Order Approving Joint Stipulation, recommending that an agreement entered into by the parties concerning Complainant's remedy in this case be approved. On the following basis, we approve the parties' agreement as to the issue of damages only.

The parties' agreement, which is signed but not dated, is entitled "Joint Stipulation." The agreement indicates that Respondent intends to seek judicial review of the Secretary's decision of October 23, 1995, *see* 29 C.F.R. § 24.7,[2/] and expressly provides that Respondent's obligation to provide relief to Complainant under the agreement is contingent upon the affirmance of the DOR by an appellate court.[3/] Joint Stipulation, ¶¶ 1-4.

We have reviewed the terms of this settlement regarding damages to determine whether the agreement is a fair, adequate and reasonable resolution of the issue of Complainant's complete remedy in this case.[4/] *See* 42 U.S.C. § 5851(b)(2)(A) (1988); *Macktal v. Sec'y of Labor,* 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. United States Dep't of Labor,* 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.,* Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2. Based on a review of the parties' agreement, as well as the record in this case, we conclude that the terms of this contingent settlement as to Complainant's damages, as herein construed, constitute a fair, adequate and reasonable resolution of that issue. *See generally Pillow v. Bechtel Construction, Inc.,* Case No. 87-ERA-35, Sec. Dec., Aug. 16, 1994 (approving agreement concerning issue of damages only*); Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (concluding that ALJ erred in rejecting parties' stipulation concerning amounts of back pay and compensatory damages due), *rev'd on other grounds sub nom., Ebasco Constructors, Inc. v. Martin,* 986 F.2d 1419 (5th Cir. 1993)(table). Based on the foregoing, we accept the ALJ's recommendation that the agreement be approved.

[2/] Respondent agrees not to seek a stay of this final decision concerning damages pending judicial review. Joint Stipulation,
¶ 3.

[3/] In the event that a timely appeal to the appropriate United States Court of Appeals is not taken by Respondent, the Secretary's October 23, 1995 decision becomes a final and enforceable order. *See* 42 U.S.C. § 5851 (c),(d), (e) (1988); 29 C.F.R. §§ 24.7, 24.8. In the event an appeal is taken, Respondent's liability, on this record, remains the same if at least one of the three nonselection violations found by the Secretary is affirmed following judicial review.

[4/] The "applicable rate" of interest referred to in ¶ 4 of the parties' agreement is that which is provided for by 26 U.S.C. § 6621 (1988). *See Nichols v. Bechtel Const., Inc.,* Case No. 87-ERA-44, Sec. Dec., Nov. 18, 1993, slip op. at 12, *aff'd on other grounds sub nom.*, *Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926 (11th Cir. 1995); *Wells v. Kansas Gas & Elec. Co.,* Case No. 85-ERA-0022, Sec. Dec., Mar. 21, 1991, slip op. at 17, *appeal dismissed,* No. 91-9526 (10th Cir. Aug. 23, 1991); *see generally Johnson v. Bechtel Const. Co.,* Case No. 95-ERA-0011, Sec. Dec., Sept. 28, 1995, slip op. at 2-3 (addressing date from which prejudgment interest must accrue).

ORDER

Accordingly, and as provided by the agreement of the parties, it is ORDERED that:

1. Respondent Tennessee Valley Authority will pay Complainant Randolph Frady back pay in the amount of $57,930.35,
plus interest, at the rate provided at 26 U.S.C. § 6621 (1988), to accrue from the dates that each salary payment, minus the applicable interim income, *see* Joint Stipulation, ¶ 4, would have been paid had Complainant been hired by Respondent to fill the position of machinist or steamfitter trainee or SE-5 nuclear inspector, *see* Decision and Order of Remand, at 49-50.

2. Respondent Tennessee Valley Authority will restore the balance of Complainant's sick and annual leave accounts and will credit those accounts for the sick and annual leave that Complainant would have earned for the period from January 13, 1992 to February 5, 1996.

3. Respondent Tennessee Valley Authority will pay Complainant's attorney, Donald Mart Lasley, $8,000 for attorney's fees and expenses incurred in this proceeding.

4. Respondent Tennessee Valley Authority will reinstate Complainant to TVA employment in the position of Computer Graphics Technician, at an annual salary of $39,640.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member