



In The Matter of

OWEN MCCAFFERTY, DENNIS MALONEY,
SEAN KILBANE, TERRY McLAUGHLIN,
SEAN McCAFFERTY, and ROBERT PROHASKA,

ARB CASE NO. 96-144

(ALJ CASE NO. 96-ERA-6)

COMPLAINANTS,

DATE: July 15, 1996

v.

CENTERIOR ENERGY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

PRELIMINARY ORDER

On June 11, 1996, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. and O.) in this case arising under the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993), as amended by the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776, 3123. The ALJ found in favor of all Complainants, and recommended various forms of relief, including reinstatement in accord with his instructions, back pay, removal of the denial of access flag from the personnel records of Complainants, and interest on the back pay awards. R. D. and O. at 21. The ALJ also ordered Respondent Centerior Energy (Centerior) to pay Complainants' costs and expenses, including attorney's fees reasonably incurred. *Id.* The ALJ allowed Complainants thirty days within which to submit their application for fees and costs and Centerior ten days in which to respond. *Id.* Thus,

^{1/} On April, 17, 1996, Secretary's Order 2-96 was signed delegating jurisdiction to issue final agency decisions under the environmental and nuclear whistleblower statutes and the regulations at 29 C.F.R. Part 24, to the newly created Administrative Review Board. 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 Board 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 specific amount of attorney's fees and costs owed has not yet been ordered by the ALJ. A final decision on the merits of the R. D. and O. must await a decision by the Board on the substance of this case.

In 1992 the employee whistleblower provision of the ERA was amended in several respects by Section 2902 of the CNEPA. The amended provision is applicable to this case, which was filed subsequent to the effective date of the CNEPA. It provides in pertinent part:

Upon the conclusion of [a public hearing before an ALJ] 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.

* * * *

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C. § 5851(b)(2)(A) & (B) (1988 and Supp. V 1993).^{2/}

Thus, the amended ERA requires a preliminary order enforcing the R. D. and O. provisions against Centerior regarding abatement, reinstatement, back pay, and attorney's fees and costs. *See Varnadore v. Oak Ridge National Laboratory and Lockheed Martin Energy Systems, Inc.* Case Nos. 94-CAA-2, 94-CAA-3, Preliminary Order, September 11, 1995, slip op. at 5.

Therefore, Centerior Energy is preliminarily ordered to:

- 1) Reinstate Complainants in accordance with the directives of the R. D. and O. at pages 15-16.
- 2) Pay Complainants back pay in accord with the directives of the R. D. and O. at pages 16-20, together with interest on the back pay in accord with the directive of the R. D. and O. at page 21.

^{2/} Subparagraph B was not amended by the CNEPA. On March 16, 1994, the Secretary of Labor proposed regulations to implement the CNEPA amendments to the ERA. 59 Fed. Reg. 12506. These regulations have not yet been finalized.

3) Remove denial of access flags from the records of all Complainants.

Once the ALJ has issued a Recommended Supplemental Decision and Order concerning the payment of costs and expenses, including attorney's fees, the Board will supplement this preliminary order.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member