U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 30 July 2012

ARB CASE NO.: 10-061
ALJ CASE NO.: 2004-ERA-00022
2004-ERA-00027

IN THE MATTER OF

SYED M.S. HASAN,
Complainant

v.

ENERCON SERVICES, INC.,
Respondent

APPEARANCES:
SYED M.A. HASAN,
Pro Se Complainant

TERRY M. KOLLMORGEN, ESQ.
On Behalf of Respondent

BEFORE:
CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER ON REMAND

This case is before the undersigned on remand from the Administrative Review Board's (Board) Decision and Order dated July 28, 2011, wherein the Board stated that in construing complaints and papers liberally in deference to Hasan's lack of training in the law and with a degree of adjudicative latitude, that it was incorrect to engage in fact finding without an evidentiary hearing concerning Respondent's assertions for its rejection of Hasan in 2003 and 2004 for temporary or career civil/structural engineering positions.[1] While the Board stated that the undersigned could still credit Respondent's reasons for not hiring Hasan it was not proper to

[1] While Hasan does not possess a law degree he clearly exhibited during these proceedings more than a rudimentary understanding of the legal concepts and issues involved, for example, putting Respondent on notice of his protected activities while at the same time telling Respondent not to discriminate him because of such activities.

do so without giving Hasan an evidentiary hearing in which he was allowed to call witnesses and challenge the credibility of Respondent's assertions.

In remanding this case the Board also stated that it was unique in that it did not involve simply one application for one job vacancy whereupon Hasan application was filed away and forgotten as likely occurs to thousands of applicants each day across the country. Rather, Hasan's claim was one in which he repeatedly applied for positions over a two year period at any place, for any shift and for any salary Respondent deemed reasonable only to be told that Respondent would keep his resume on file and hope to identify a work opportunity in the future. Respondent never contacted him while it hired more than a dozen engineers in this same time period while aware of Hasan's whistle blowing activities, including the fact that Hasan had filed a complaint against Respondent.

In accord with the Board's remand, a hearing was held in Huntsville, Alabama, January 17 through 19, 2012 and April 24 through 27, 2012 in Marietta, Georgia. The hearing covered more than 1,500 pages of testimony during which Hasan limited his case in chief to the introduction of multiple exhibits and personal testimony while waiting until Respondent presented its witnesses who were responsible for hiring civil/structural engineers in 2003 and 2004 for advertised and unadvertised positions before beginning his cross examination.[2]

At various times during the hearing, Hasan stated that he did not have an adequate opportunity to cross examine witnesses, for example, John Richardson, Respondent's president and CEO. Richardson was present for examination on January 17 and April 24, 2012 and was told by the undersigned he did not have to return on April 25, 2012 for additional questioning by Hasan. Hasan could have called and questioned Richardson any time on January 17, 2012 or before the conclusion of his case in chief on April 24, 2012 but chose to wait until 4:45 p.m. on April 24, 2012 to begin his examination of Richardson, leaving him an hour and 15 minutes, or until 6:00 p.m., to complete his examination. Hasan knew Richardson had commitments for the following day and could not return. Under these circumstances and considering that Respondent presented other corporate officials who had direct information concerning Respondent's alleged discrimination and whom Hasan did cross examine, I find that Hasan had sufficient opportunity to cross examine Respondent and that to require Richardson to return for further cross would not be proper.

Also during the hearing and in his brief, Hasan accused the undersigned of "railroading" him, allowing Respondent's counsel and Respondent to repeatedly lie and perjure themselves by: (1) denying knowledge of his protected activities except for McGoey who knew about Hasan's protected activities on February 21, 2004 and not May 30, 2004 as McGoey admitted when he learned of Hasan's complaint in *Hasan 1*; (2) claiming that some of Respondent's advertisements were designed to enhance its database of potential candidates; (3) falsely inflating the number of structural/civil engineers in its data bases; (4) leading him to believe that his resume would be

[2] Hasan introduced 88 exhibits. Of these exhibits the following were accepted as relevant: CX-1, 5-10, 12-15, 17-22, 29-30, 32, 37-41, 43-50, 52, 68, 69, and 78. Judicial notice was taken of the party's pleadings and Court orders: CX-16, 22, 23, and 24. The following were rejected as not relevant: CX-2, 3, 4, 11, 26-28, 31, 33-36, 42, 51, 53-67 70-77, 79-88. Respondent introduced exhibits (RX-1, 9-17-29, 30-33, 35-38, 39, 53) which were received.

pulled and referred to prospective clients when in fact it never was. In addition, Hasan alleged that the undersigned allowed Respondent's counsel to (5) educate witnesses by using hand signals and repeated unfounded objections so as to prevent his cross examination of Respondent's witnesses; (6) "took away" previously allowed documents (CX-80); (7) refused to order Respondent to produce Ken Whitmore; and (8) did not consider redacted and unredacted documents submitted to the Nuclear Regulatory Commission (NRC).

Like similar allegations Hasan has made in the past, these allegations are meritless and constitute part of Hasan's incessant attacks upon the justice system when it does not agree or support his theory of discrimination. Contrary to his assertions, McGoey did not learn of Hasan's self-proclaimed whistle blowing activities until May 30, 2003. Some of Respondent's advertisements were designed to build up its data base to allow it to respond to future rather than current job demands which was consistent with industry practice. There is no basis for Hasan to claim that Richardson or anyone else falsely inflated the number of civil engineers in its data base. While McGoey did tell Hasan they would keep his resume on file and review it against company needs and let him know of the results of this review, he did so without knowledge of Respondent's actual practice of notifying prospective data base employees only when a client needed to fill a job that required that employees particular background and skills. In responding to Hasan, McGoey was trying to provide positive feedback as was his practice over many years with his past employer, GPU. Rather than take McGoey's letter as a positive response but nonetheless a rejection, Hasan expected Respondent to provide his resume to all clients seeking structural engineers. In essence he was demanding special treatment *because of* his whistle blower status.

Respondent's counsel did not engage in any improper conduct at the hearing. The undersigned did not allow Hasan to extend his complaints beyond what he had previously alleged, which included advertised and unadvertised positions in 2003 and 2004 and, in accord with the Board's instructions, directed Respondent to produce for examination those responsible for hiring the 16 structural and civil engineers it hired for unadvertised positions during the relevant period while allowing Hasan to introduce any contradictory statements Respondent made to the NRC concerning its conduct during that period; this he failed to do.

As will be seen in this decision, Hasan, despite being given the opportunity to examine all supervisors responsible for Respondent's ads and the hiring of 16 individuals for various civil/structural positions, produced no evidence that his protected activities contributed in any manner to Respondent's action in not hiring him, whether that action be described as disparate treatment or blacklisting as Hasan has claimed.[3]

[3] Contrary to what Hasan claims, Respondent was requested by the undersigned and did present all supervisors responsible for the ads and hiring of civil/structural engineers for the pertinent time period. Hasan had ample opportunity to present his case in chief and cross examine Respondent's witnesses. Hasan chose to spend a large portion of his allotted time on facts and issues already decided in *Hasan 1* and on exploring immaterial discrepancies in affidavits and resumes.

I. Prior Proceeding- *Hasan 1*

This case involved the second and third of four complaints filed by Hasan against Respondent for its failure to hire him for advertised and unadvertised civil/structural engineering positions allegedly due to Hasan's whistle blowing activities in support of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 *et seq.*, and its regulations promulgated at 29 C.F.R. Par 24.

Hasan filed the first complaint against Respondent on May 21, 2003.[4] This case involved three work orders from a client company (First Energy or FENOC). First Energy initially requested that Respondent provide civil/structural engineering services in connection with its operation of the Perry Nuclear Power Plant in North Perry, Ohio. Those services were to be performed both at the plant and at Respondent's Mt. Arlington, New Jersey office. The first work order required a civil/structural engineer with a thorough knowledge of and experience with ANSYS, a specialized finite element structural program used in the construction of a steel platform at the Perry plant. On January 10, 2003, Respondent hired Folgu J. Nag rather than Hasan because the job had to be completed in a short amount of time and thus required extensive knowledge and experience with ANSYS which Nag possessed and Hasan did not. Nag was hired as a temporary employee and released when the job was complete.

The second work order was for engineering work at Respondent's Mount Arlington Office. On January 13, 2003, Respondent hired Juan J. Vicaya for this position because of his superior qualifications, experience, and background as confirmed by two former workers considered by Respondent to be reliable sources.

The third work order was for temporary outage work at the Perry plant. Between January 13 and 16, 2003, First Energy civil/structural manager, Donna Haviland, contacted Ken Whitmore, senior civil/structural engineer of Respondent's Mount Arlington office, about the temporary outage position. Whitmore reports to Rick McGoey, director of the Mount Arlington office. Because Respondent was unsure of the availability of its employees, additional resumes were reviewed including Hasan's. Hasan had both a telephone and an in-person interview with Whitmore on January 23 and 24, 2003, respectively. It was at this interview on the morning of January 24, 2004 that Hasan claims that Whitmore offered him a job subject to McGoey's approval.[5](Tr. 73-82).

---

[4] The first complaint filed by Hasan on against Respondent (*Hasan 1*, ALJ Case No. 2003-ERA-330) was denied by ALJ Larry Price on January 15, 2004 on a motion for summary judgment and subsequently affirmed by the ARB on May 18, 2005, ARB Case No. 04-045. On November 2, 2009, Hasan filed a Motion for Reconsideration with the ARB which the ARB denied on January 13, 2010. The Third Circuit Court of Appeals on October 6, 2010, summarily denied Hasan's appeal at 396 Fed.Appx. 887, 2010 WL 3899648 (3d Cir. 2010)(CX-12, 14, 19). Thereafter on November 1, 2001, the Third Circuit on Hasan's Petition for a Panel Rehearing denied his appeal again. Despite its dismissal, Hasan insisted at the hearing on his second and third complaint to spend much of the time on *Hasan 1*. I allowed him to do so only as background for the present proceeding. Hasan filed a 4th complaint against Respondent (*Hasan 4*, ALJ Case No. 2012-ERA-3) on December 19, 2011. ALJ Patrick M. Rosenow dismissed this complaint on summary judgment on April 10, 2012.

[5] Hasan contends a verbal offer of employment was made by Whitmore on the morning of January 24, 2003. Hasan never mentioned this alleged offer in any of his subsequent correspondence with Respondent. Indeed, the first time he mentioned such an alleged offer was in his complaint before Judge Price. McGoey denied such an offer was made stating that all offers had to be in writing and come from Respondent's HR office. Hasan claimed he did not

McGoey subsequently reviewed the available candidates which included Hasan, Leon Whittle, and Jerry Lombard and selected Whittle based upon his extensive experience, technical skills, immediate availability, field experience, and recommendations of managers and recruiters. On January 27, 2003, Hasan sent a letter to Whitmore in which he submitted his expenses in connection with the interview of January 23 along with a favorable evaluation by a former supervisor. (Tr. 85).

On January 29, 2003 Ms. Haviland and Whitmore met and discussed Respondent's proposal. In that meeting, Ms. Haviland told Whitmore that First Energy's need for the position had changed and that she needed to review Respondent's proposal with her management. On January 30, 2003, Ms. Haviland informed Whitmore that management had decided to use in-house resources to complete the work through use of overtime and thus, Respondent was not needed to perform the work.

On February 3, 2003, Respondent's recruiting activity report was updated to remove the temporary outage position. On February 5, 2003, McGoey sent a letter to Hasan in which he said:

> Please find enclosed a check for $140.84 to cover expenses on January23rd and 24th, 2003 for an interview with Mr. Ken Whitmore. ENERCON is impressed with your capabilities and are interested in possible employment opportunities. At this time we do not have an opportunity which matches your skills.
>
> We plan to keep your resume on file and hope to identify a work opportunity in the future.
> (CX-21, Tr. 85)

On February 21, 2003, Hasan saw an internet ad from Respondent seeking civil and structural engineers for temporary positions at client nuclear power plants throughout the country and an ad for immediate opportunities for engineers who can contribute to the growth of its Germantown office (Tr. 86-97). On the same day, Hasan sent a letter and fax to McGoey and Whitmore applying for the advertised positions and stating:

> I am willing to work for your company at any place, for any shift and for any salary that you deem reasonable.
> Please do not discriminate and retaliate against me for being a truthful and honest whistleblower of this country-- I have repeatedly informed the NRC and others about serious safety

---

mention the offer in his correspondence with Respondent because he did not want to displease McGoey and close off opportunities of future employment. Judge Price found that a formal offer letter was the official and only manner in which Respondent made offers of employment. (CX-12. Section 2, paragraph 5). In accord with Judge Price's decision, I do not credit Hasan that such an offer was made because Hasan's explanation for not raising such an issue before filing his first complaint makes no sense. Indeed many of his allegations against Respondent and the undersigned make no sense either. (Tr. 833-847)

> concerns regarding certain nuclear power plants of this country. The NRC has substantiated my safety concerns. Thanks very much for time and interest.
> (CX-19, attachment 1, pp.4, 5, 12)

On March 17, 2003, Hasan saw similar ads for civil/structural engineers at client nuclear power plants throughout the country and at its Germantown office whereupon he resent to McGoey and Whitmore on March 19, 2003 another copy of his February 21, 2003, fax and letter. (CX-19, attachment 1 at pp. 1, 14, 15, 22, 23). Hearing no response from Respondent, on May 21, 2003, when he saw ads on Respondent's website for the same positions, Hasan filed a complaint against Respondent for its failure to hire him because of his past protected activities in raising safety concerns before the NRC. (CX-19, attachment 1 at pp. 1-11; Tr. 136-143).

That complaint (*Hasan 1*) was litigated before ALJ Larry W. Price and dismissed on a motion for summary judgment based in large part on Hasan's failure to show knowledge of his protected activity when Respondent made the decision not to hire him. In the present cases, Hasan asserts Respondent and its supervisors knew of his protected activity involving the filing of safety complaints before it decided not to hire him for either advertised or non-advertised positions and that such activity play a contributing and significant role in its decision not to hire him.

II. Present Cases-*Hasan 2* & *3*

On May 3, 2004, Hasan filed the third complaint, 2004-ERA-00022, alleging that Respondent was refusing to hire him for advertised positions because of his protected activities in filing complaints against Respondent. In the complaint, Hasan asserted he applied and was qualified for the Germantown, Maryland civil/structural engineering job which Respondent advertised on November 22, 2003 and was not hired. The Germantown ad, which was previously identified as a career opportunity, read as follows:

> Immediate opportunities exist for mechanical, electrical, nuclear, and structural engineers with commercial nuclear power experience. ENERCON is looking for motivated engineers Germantown, MD engineering office. Local candidates are preferred. Available positions range from junior engineers to senior level engineers.

Hasan applied for the position in writing and by fax to McGoey and Whitmore in Mount Arlington, New Jersey on November 24, 2003, and listed his qualifications as including 23 years of design and analysis as a civil/structural engineer in the nuclear industry in the U.S. with over 25 years experience as a civil/structural engineer. (TR-157-167; CX-29). Hasan also advised McGoey in his application he was willing to work for Respondent at any place, for any shift, for any salary he deemed reasonable and asked him not to discriminate against him for being a whistleblower and for filing a complaint against Respondent and raising safety concerns with the NRC. (CX-29, attachment 1, pp.5 and 6).

On December 15, 2003, McGoey by letter replied as follows to Hasan

> I am in receipt of your letter dated November 24, 2003 concerning employment opportunities at ENERCON Services, Inc. Your letter and resume are being reviewed against Company needs.
>
> We will keep you informed of the results of this review.

McGoey copied J. Richardson, President of Respondent and K. Cruse, Human Relation Manager with his reply. (CX- 20, Tr. 180).

On July 23, 2004, Hasan filed a third complaint (*Hasan III*) against Respondent concerning its refusal to hire him for the Germantown job which he saw advertised on Respondent's web site on February 5, 2004. Hasan saw the same ad on February 21; March 17 and 27, 2003; and June 27, 2004. (CX-32; Tr. 264). On June 27, 2004, Respondent also advertised temporary jobs for civil/structural engineers in the design and installation of nuclear power plant security systems at multiple occasions. (CX-32, p. 41). On October 2, 2004, Hasan amended the second and third complaints to include this advertisement and the 16 individuals hired up to that date in 2004.

Hasan argues that despite the fact that he repeatedly applied for civil structural positions for which he was qualified Respondent never responded, considered or referred his application to prospective clients for advertised and other non-advertised positions, yet Respondent hired 16 structural engineers from November 2003 to October 2004. Hasan argues the only reason for Respondent's refusal to hire him was his past protected whistle blowing activities in filing complaints against Respondent and raising safety concerns with the NRC. (Tr. 520-534, 536-560, 581, 590).

Hasan's central theme is that McGoey lied in stating that he did not know until May 30, 2003 about Hasan protected activities when Hasan sent his resume, letter and fax describing his whistle blowing activities to McGoey on February 17, 2003 and March 1¸ 2003. Further, that McGoey allegedly lied when he claimed Hasan's protected activities played no role in his hiring decisions when, in fact, McGoey and other supervisors of Respondent hired less experienced and less qualified civil/structural engineers to fill available positions.

While Hasan may assert that McGoey and supervisors of Respondent regarded him as "a known performer," the only evidence of record that Hasan can show is the fact that in 1985, almost 18 years before the present complaint, Hasan worked for System Energy Resource at Arkansas Nuclear One and Grand Gulf Power Plants. McGoey and Respondent's other supervisors except for Doug Whitson did not hire for this site. None of these supervisors, including Whitson regard Hasan as "a known performer" either because of his work at these job sites or because of the 18 year time gap involved.

III. Respondent's Treatment of Hasan

John Richardson

At the hearing, Respondent initially called president and CEO, John Richardson, to provide an overview of Respondent's safety, hiring, advertisement and non-discrimination policies. Richardson has been employed for 28 years in various positions including vice president of Respondent's nuclear services group, chief operating officer from 2000 to 2003 and CEO and president from 2003 to the present. (Tr. 851-85). Richardson denied any discrimination against Hasan and testified as follows:

On the issue of safety Richardson stated that Respondent regarded safety and its promotion in a work environment free of harassment and discrimination to be a core value. Respondent published its commitment to safety in employee handbooks and actively encouraged employees to report safety concerns over the internet to line management, Respondent's Director of Human Relations and the NRC. (RX-17, 18, 19, 20; Tr.857-863, 880-883, 887).

Richardson testified that safety was so important to Respondent that it supported employees when they reported safety problems, even in the face of client opposition. As evidence of such, Richardson gave the example of employee David Lochbaum, who Respondent backed over client opposition, when he reported safety concerns over the issue of spent fuel pool heating to the NRC. (Tr. 884-886). Respondent supported Lochbaum even though by doing so it lost revenues.

Regarding its hiring procedure, Richardson testified that when filling existing positions Respondent gives preference to its existing employees who are available and qualified. If none are available, Respondent will then select individuals the client recommends. If none are recommended, Respondent will select a person known by the client to be a high performer because of the person's work for the client or at the jobsite. If none are available, Respondent selects high quality performers who have worked for it in the past. If none are available, it will then go to its data base and select an individual who meets the skill sets and job qualifications. (CX-37, Tr. 864-868). Hasan's resume is currently in its data base along with 15,000 other resumes. It has been in Respondent's data base since 2003 along with 2,400 to 3,000 other civil structural engineers. (RX-16; Tr. 903-904).

Concerning advertisement for jobs, Richardson testified that Respondent, on occasion, will advertise for existing openings when such do not exist. In doing so Respondent follows industry practice which allows it to build up its data base to keep the pipeline open with updated resumes, maintain its image of being a viable growing concern, and allow it the ability to more quickly respond to clients that need employees within several days, an impossibility if it placed ads only when jobs were needed (Tr. 889- 894). In this case, Hasan asserted that Respondent ran three civil/structural advertisements which indicated a need for civil/structural engineers for which he qualified and should have been, but was not, hired because of his protected activity. The ads include a Germantown, MD ad for immediate career opportunities; an ad for temporary positions in the design and installation of nuclear security systems at multiple locations; and an

ad expressing a continuing but temporary need to provide support to commercial nuclear power plants at various locations. (CX-78).

In the case of the Germantown ad, Richardson testified that David Studley, newly hired Director of Engineering for Germantown Office, placed that ad in 2002 in the Washington Post and several months later on Respondent's web site. At this time Studley was working for Respondent on a major project at the Davis-Besse Nuclear Power Plant, spending up to 70 hours per week at that site. In his absence from Germantown, Studley needed employees he could trust to build that office and in turn hoped to recruit employees that he knew and worked with at his former employer, Scientech and Bechtel.

As it turned out, Studley's work at Davis-Besse lasted much longer than expected into 2004 which in turn prevented him from opening and hiring any employees in 2003 and 2004. The Germantown ad also remained on Respondent's website longer than it should have, coming down in July 2004. (CX-78, Tr. 894-898).

The ad for temporary positions in nuclear security at multiple locations which appeared on Respondent's web site from January 2004 through July 2004 produced no new jobs because, contrary to Respondent's expectations, the increase in security was accomplished by employees already on client payrolls. (CX-78. RX-90; Tr. 899-901). The ad which asserted a continuing need for civil structural engineers to provide field support at various nuclear power plants on a temporary basis was placed by Respondent not because of an immediate need for such engineers but rather, according to Richardson and Richard McGoey, Director of Respondent's Mt. Arlington, New Jersey office, to build up its data base by soliciting resumes from engineers employed by competitors (CX-19, attachment 1, page 12 of 35; Tr. 889, 1419).

Richardson testified that in 2003 and 2004 Respondent had Hasan's resume in its data base along with 3000 other civil structural engineer resumes. Respondent treated Hasan's resume in the same non-discriminatory manner that it did other resumes never (1) instructing any one not to hire him, (2) conducting any background search to discover Hasan's whistle blowing activities, or (3) informing hiring personnel about Hasan's protected complaint-filing activity. Rather, it restricted knowledge that Hasan had filed a complaint against it to those who had a need to know such as McGoey and Whitmore thereby minimizing any potential of such information being used against Hasan. (Tr. 903-912).

Richardson acknowledge however that McGoey did not follow Respondent's hiring procedure when he informed Hasan after receiving his resume and placing it in Respondent's data base that it would be considered against Respondent's future needs. Rather, once initially considered and not chosen Hasan's resume, like all others, was not reviewed unless a prospective employer requested an engineer with Hasan's particular background or skills. (Tr. 917- 926). Respondent did not have the time to routinely review all resumes nor did it routinely submit all resumes to prospective employers because prospective employers expected Respondent to do the initial screening. (Tr. 911)

On cross Richardson said he was aware of McGoey's correspondence with Hasan wherein McGoey told Hasan his resume would be reviewed against Respondent's needs and

Hasan would be informed of the results of that review. However, McGoey was not representing Respondent's policies when he gave him that information for it was inconsistent with Respondent's policies which did not provide for periodic review but rather the entry of the resume into its data base for use in its hiring procedure which may or may not provide for HR or a hiring managers review. (Tr. 919-930). Further, McGoey to his knowledge did not read the letter or resume Hasan sent in February for two months. (Tr. 931-937). Moreover, Studley did not read resumes but rather just scanned it to see if it was sent by one of his former workers at Scientech. (Tr. 958).

David Studley

Studley began his employment in the commercial nuclear industry in 1980 when hired by Nuclear Utility Services (NUS). He stayed with NUS until 1989 when Scientech acquired it and he was assigned to the position of Director of Utilities responsible for administration of a general service agreement with First Energy for work at the Perry, Beaver Valley, and Davis-Besse nuclear power plants. (Tr. 1198-1201). In March of 2002, Studley was assigned to create and manage an engineering board responsible for overseeing the work done at Davis-Besse to remediate a serious situation involving a control rod drive wobble that led to NRC's shut down of that facility. The control rod nozzles had cracked over a period of time leaving a hole in the reactor head. (Tr. 1306, 1314). As a result of Studley's and his board's efforts First Energy was fined millions of dollars by the NRC and had to spend $600 million in remediation. (Tr. 1316).

At the same time, Studley was concerned about the viability of Scientech having lost about 250 out of 300 employees. Studley approached Jim Gannon of Respondent about the idea of opening an office (Germantown, MD) to enable him to win a rebid of general service agreement with First Energy thereby securing work for himself and his co-workers at Scientech. On July 1, 2002, after several months of negotiating, Studley became an employee of Respondent and placed an ad in the Washington Post and later on Respondent's intranet seeking mechanical, electrical and structural engineers. On the same day he hired former Scientech project and mechanical engineer Tim O'Riley and later electrical engineer, Gordon Cole. No structural engineers were hired until more than two years later when he hired former Scientech structural engineer, Don McGuigan, on April 28, 2004, as a senior consultant and project manager. (CX-47). As it turned out Studley's work at Davis-Besse was all consuming requiring him to spend almost 70 hours per week at Davis-Besse while allowing him to come into the Germantown office less than once a month during which he glanced at the resumes to see if he recognized any of his former Scientech employees. Studley did not recall seeing Hasan's resume in this process. (Tr. 1202-1222, 1226).

Studley considered the ad to be truthful when published because there were immediate opportunities for mechanical, electrical, nuclear, and structural engineers and, in fact, hires were made in the electrical and mechanical fields. (Tr. 1216). Structural engineers were not hired initially because Respondent first needed to get the business and Studley was attempting to get that business with McGuigan. (Tr. 1216-1217).

Concerning safety, Studley, as an employee of Respondent, reported safety concerns and no adverse action was taken. Rather Respondent regarded his reporting of safety issues as a

positive attribute. (Tr. 1223-1225). No one told Studley not to hire Hasan or consider his resume. (Tr. 1228). Further no one ever provide him with a copy of Hasan's complaint. (Tr. 1229).

On cross, Studley testified he raised numerous and safety issues to the license while at Davis-Besse that were immediately remediated. Respondent and the NRC were aware of those issues. (Tr. 1304). After finishing this assignment, Studley went to Perry Nuclear Power Plant and raised similar issues resulting in the NRC imposing substantial fines on First Energy. (Tr. 1233-1241, 1246-1247). Studley further stated that he joined Respondent to win or maintain the general services agreement (GSA) with First Energy and, once that was accomplished, to grow and build the Germantown, MD office. (Tr.1256). Studley did not learn of Hasan filing a complaint until November 2004 and even then did not learn of the number or contents of such. (Tr. 1259).

Studley stated that he had been promoted and now is the Division Manager and Engineering Director of the Northeast and Midwest operations that includes Northern New Jersey and Mount Arlington offices. However, McGoey is not nor has ever been in the same division as Studley. Rather McGoey is in the new nuclear power plant division as a salesman soliciting business for them. (Tr. 1266). Studley knew nothing of McGoey's letter of November 24, 2003 telling Hasan that his letter and resume were being evaluated against company needs and he would be informed of the results of that review. (Tr. 1286). He further stated the purpose of the Germantown ad was to announce to his previous co-workers that he was opening a new office and wanted to get them in first and then grow the office. (Tr. 1275, 1288). Studley admitted he never considered Hasan's resume because he was not a former co-worker. (Tr. 1289).

Richard McGoey

McGoey, who was hired by Respondent in 2000 as its Director of Northeast Operations in Mount Arlington, New Jersey, confirmed Respondent's hiring procedures as outlined by Richardson (Tr.1389-1395). McGoey reviewed Hasan's resume and recommended in January 2003, Folgu Nag and Whittle for two positions based upon Nag's familiarity with ANSYS, which Hasan did not possess, and Whittle who, in contrast to Hasan, had worked for Respondent in the past and was a known performer to Respondent. (Tr. 1398-1403). On January 13, 2003, McGoey hired Juan Vizcaya based in large part upon the recommendation of two coworkers who had worked with Vizcaya in the past. (CX-12, page 12).

In responding to Hasan, McGoey testified that on February 3, 2003, he was merely following his past practice at GPU to provide positive feedback, telling persons who they interviewed and are impressed with that, in fact, they were impressed and would keep Hasan's resume on file. However in so telling Hasan, McGoey did not promise to accord special treatment to Hasan's resume and, in fact, treated it the same as all other resumes. McGoey was not aware of Hasan's whistle blowing activities until May 30, 2003, after Hasan filed his first complaint against Respondent. (Tr. 1407-1415). McGoey confirmed with Whitmore, consistent with Respondent's past practice, that Whitmore did not make any verbal offers of employment.

Further, McGoey testified that in regard to Hasan's letter of November 23, 2003, he did not place any ads for this position. When he responded to Hasan on December 25, 2003, telling him his resume was being reviewed against company needs and Respondent would inform him of the results of this review, McGoey was unaware of Respondent's policy of only Human Relations responding to such requests. Nonetheless, McGoey treated Hasan's resume like all others by placing it in Respondent's data bank. (Tr. 1412-1416, 1420-1425). Moreover, Respondent's ads, like those Hasan saw on February 21, 2003 and May 23, 2003 that indicate a continuing need for degreed and experienced engineers at various locations, were designed to attract the interest of engineers currently employed and those employed by Respondent's competitors to build up its data base. (CX-19, attachment 1, page 12 and 23 of 25; Tr. 1419).

Regarding the employment of other individual engineers in 2003 and 2004, McGoey testified that he hired Raymond Markowski, Michael Ying, David Rollins, Clyde Stroup, Arun Pal, and Surendra K. Goel.[6] McGoey hired Markowski on December 22, 2003 for the Oyster Creek Nuclear Power Plant because McGoey and the client knew Markowski had successfully worked for McGoey at GPU doing the exact task and possessed all necessary skills to do so in the future. (Tr.1428). McGoey hired Michael Ying on September 30, 2003 because McGoey knew Ying had extensive experience with GT STR:UDL, the software package used to perform the work. In addition, Ying had successfully worked at Foster Wheeler with Respondent's employee Paul Huebsch with whom Ying would be working. (Tr. 1429). McGoey hired Rollins on January 16, 2004 because McGoey and the client knew Rollins to be a successful performer possessing the skills and experience necessary to perform the work at the Vermont Yankee Nuclear Power Plant. (Tr. 1430, 1431, RX-31-34).

McGoey hired Clyde Stroup on May 3, 2004 for work at the Nine Mile Nuclear Plant because the job required extensive firsthand knowledge of the plant which he possessed. Stoup and the client knew each other. Project manager for the job, Joe Mancinelli, who worked for McGoey also knew and recommended Stoup. (Tr. 1432; RX-35). Arun Pal was hired on April 5, 2004 to perform work on a dry fuel storage project at the Fitzpatrick Nuclear Power Plant based on the recommendation of the client. He had previously work as project manager on that job and was chosen by Respondent once it verified his capabilities for this work in accord with Respondent's practice of honoring a client's recommendation. (Tr. 1433; RX-36). McGoey hired Surendra K. Goel on November 17, 2003 to help analyze the tie down of cabinets in the control room at the Indian Point Nuclear Power Plant because he was a known performer having worked successfully for Respondent at the Davis–Besse and Riverbend Nuclear Power Plants. (Tr.1435; RX-37). Indian Point is located on the Hudson River north of New York City while Fitzpatrick is located by Oswego, New York. All hires were done without reference to Respondent's data base. Hasan resume was treated in the same manner as other resumes. Hasan was not blacklisted and there was no search of the internet. (Tr. 1436).

On cross, McGoey confirmed the fact that Hasan's resume that was initially received from Manpower Professionals in November 2002 was put in Respondent's data base. The second resume and letter in February 2003 was not opened until Hasan filed his complaint in

[6] The dates of employment for all civil/structural engineers hired for the 16 unadvertised positions are set forth in the undersigned Decision and Order Granting Respondent's Motion for Summary Judgment issued December 22, 2004, which is included in CX-15, pp. 8-12.

May 2003 because McGoey had no need to look at it since Hasan had already been interviewed (Tr. 1493-1495). McGoey confirmed Respondent's hiring practice. (Tr. 1502, 1503). When he responded to Hasan that his resume would be reviewed against company needs and would be informed of the results McGoey was merely being courteous. (Tr. 1512-1516). By keeping the second resume in his office, McGoey actually increased Hasan's chances of getting a job because he had it readily able to review if the opportunity presented itself to use Hasan's services. (Tr. 1519). The fact that resumes of those hired did not contain all information about the person's education and training was not considered important since McGoey knew of the persons past good performance and when hiring them did not rely upon their resumes. (TR. 1525-1537)

Robert Bryan

In further defense of its non-discriminatory treatment of Hasan, Respondent called Robert Bryan, Vice President of Power Group; Jim Gannon, Director of Client Services; Tien Lee, West Coast Operations Manager; David Studley, Engineering Director; Doug Whitson, Client Services Manager. Bryan joined Respondent in 1993 as senior civil engineer. (974, 975) In 1995 he was promoted to principal civil engineer followed by appointments to engineering manager, engineering director for the Atlanta office covering the South East and West Coast regions of the United States and his current position in 2011. (Tr. 976).

Bryan described Respondent's primary business as providing engineering services to the commercial nuclear industry consisting primarily of repeat business for the country's l04 nuclear operating reactors. Respondent services include design engineering and analytical work where Respondent both manages and oversees the work (manage task project) or provides a technical resource to the utility that in turn directs and oversees that resource. (Tr. 977). Bryan confirmed the general hiring procedure as outlined by Richardson while bearing in mind the needs of the client, Respondent's limited resources and its need for repeat business. (Tr. 978-980). Thus Respondent looks for individuals who are known by either itself or the client as good performers.

Bryan confirmed the importance of safety as stated by Richardson. Bryan testified that he expects employees to report safety concerns without fear of retaliation by use of the company intranet to human resources and the NRC. (Tr. 981-983). Bryan also confirmed the industry practice of advertising jobs as having openings when none were available. (Tr. 984).

Regarding the hiring of civil/structural engineers in 2003 and 2004, Bryan testified he hired Michael Brady on May 24, 2003 to work at Diablo Canyon Power Plant for Pacific Gas and Electric because he had worked for the same utility before and was known by Tien Lee, manager of Respondent's Oakland Office to have a good reputation and possessed a professional engineering license required by the client. (Tr. 985-988; CX-38; RX-26).

Bryan hired Behrooz Shakibnia on May 24, 2003 to work at Diablo Canyon for Pacific Gas and Electric because, like Brady, he had a professional engineering license, had worked in the past for the same client and was known to be a good performer by Respondent and the client and had experience in seismic earth quake engineering, the same type of work for which he was hired to do. (Tr. 989, 990, 991; RX-21).

Bryan also hired as structural engineers, Dinesh Patel, Ashwin Patel, Nalin Patel, and Robert J. Sand. Dinesh Patel was initially hired before 2003 as a limited term, limited benefit employee (hired for a specific task with no benefits but higher pay and then let go).[7] Dinesh went on vacation for a month in August 2003 and was rehired in September 2003 when he returned based upon his previous good work for Respondent. Ashwin Patel was also a limited term, limited benefit employee originally hired by Respondent in July 2000, let go in February 2004 and rehired in April 2004 when additional work became available based upon Respondent's high regard for his work. Nalin Patel's situation was similar to Ashwin Patel who, as a limited term, limited benefit employee was let go by Respondent in January 2004 when his worked ended and rehired two months in March 2004 when work was available because of his past good work for Respondent in pipe support and analytic software. Sand was a professional engineer who was originally hired as a limited term, limited benefit employees who was offered a job on July 1, 2003 as a regular employee because of his reputation as a good employee and recommendations by other Respondent employees. He lost no time working for Respondent but was treated as a new hire because of his change in status. (RX-22-25; Tr. 992-1003).

In hiring the above individuals Bryan testified he had no knowledge of Hasan protected activities. Moreover he never received any instruction not to hire him, conducted no search of the intra net to determine his whistleblower status and consulted no data base and issued no advertisements in determining to hire them. (Tr. 1004-1007)

On cross Bryan testified he never saw Hasan's resume. (Tr. 1008). Further the resumes when put in Respondent's data based are Enerconized, i.e., put in the same format. (Tr. 1030), When hiring, Bryan did not base his decision on the amount of experience or information in the resume. HR does the background check on academic qualifications and experience. (Tr. 1068, 1069). Bryan had no knowledge of Hasan's discrimination suits when hiring. (Tr. 1054).

Jim Gannon

Jim Gannon, Director of Client Services, was hired by Respondent in February 1989 as a limited term employee. From there he progressed to a regular employee in 1993 as a senior engineer in Respondent's Atlanta office, Client Service Manager from 1996 to 2005 and thereafter to his current position. (Tr. 1084-1087). Gannon testified about Respondent hiring, safety, and advertising practices, confirming Richardson's testimony on these issues. (Tr. 1088 to 1090). During the period from 2003-2004, Gannon hired two civil structural engineers: Gani Kotwani and Abe Lofti. Kotwani was hired on April 12, 2004 for Florida Power and Light Turkey Point plant located near Miami based upon the good recommendations of client civil supervisor, Jim Gianpietro, who had recently supervised Kotwani at clients St. Lucy Plant and

[7] Dinish Patel has a B.S. degree in Architectural/Structural and not an M.S. or masters degree as alleged by Hasan. Dinish Patel has over 26 years experience as an engineer an Ashwin Patel has over 20 years experience as an engineer. In any event they were rehired based upon the good work they had done for Employer as opposed to Hasan who never worked for Employer. Hasan's attempt to show a lack of training or experience based upon their resumes had no merit because it was not based upon their resume that engineers such as the Patels were hired or rehired but because of their previous good work for Respondent or the client in question.

regarded Kotwani as a high performer. (RX-28; Tr. 1093-1098).[8] Gannon hired Lofti on November 21, 2004 to work for Respondent at the Davis-Besse Nuclear Power Plant based upon the client, FENOC, having identified Lofti as a person whom they wanted to retain following his employer non-retention at the job site. FENOC in this case did the selection and Gannon agreed based upon the client's wishes and Gannon's knowledge that Lofti was a good performer. In so doing, Gannon did not consult the data base but simply told human resources who in turn approved the request and sent out a written offer to Lofti. Respondent did not "enerconize" Lofti's or Kotwani's resume. (Tr. 1099).

Gannon had no knowledge of Hasan's protected activities. Gannon never saw or sent out Hasan's resume and had no knowledge of any blacklisting of Hasan when making the decision to hire Kotwani or Lofti. (Tr. 1100-1105).

On cross, Gannon testified that as client service manager he was responsible for business service. (Tr. 1114). He had no employees reporting to him. (Tr.1130). The jobs he filled were not advertised. Employees were encouraged to report safety concerns. (Tr. 1134).

Tien Lee

Tien Lee was hired by Respondent in 2000 as a principal engineer in charge of the Oakland office. In 2005, he was promoted to West Coast Operations Manager. (Tr. 1138-1139). While in charge of the Oakland office he hired Armen Begdasarian on April 15, 2004 with whom he had previously worked with at Pacific Gas and Electric's Diablo Canyon Power Plant. The work consisted of a $2.5 billion project to restore PG&E's license which was accomplished in 1985 through the efforts of Begdasarian whom Lee ranked among the top 5 out of 200 to 300 engineers assigned to the project. (Tr.1142-1149). Lee hired him based upon his knowledge of Begdasarian's work and the client's recommendation and his possession of civil and structural professional licenses. Lee also recommended the hiring of Behrooz Shakibnia and Mike Brady to Robert Bryan. (Tr. 1150).

Lee verified the industry or Bechtel practice of advertising for jobs that are not available to build up a data base which allows employers such as Bechtel to staff a job with 1,200 employees in a 3 month interval. When making the above recommendations Lee had no knowledge of Hasan's activities and did not consult any data base. (Tr. 1152-53). On cross Lee admitted that Brady's resume, RX-21, did not list his academics. However he personally knew Brady had a degree from the University of Santa Clara. (Tr. 1178-79).

Doug Whitson

Doug Whitson, client service manager for Respondent for the past 10 years, was initially hired by Respondent in 1983 to work at the Grand Gulf Nuclear. There he was assigned to review plant safety evaluations. As part of his review he determined there was a potential safety issue with a configuration that was not in accord with the design basis and flagged and reported to his supervisor. By doing so his action was view favorably by his supervisor who in turn told

[8] Gannon did not hire Kotwani for the Germantown office as Hasan stated. Rather Kotwani worked at that office at some time during these proceedings. Tr. 1135.

the client and the condition was remediated. Six months later, Whitson was promoted to project manager for that project. (Tr. 1331-1333).

In the fall of 2004, Whitson referred and hired Victor Penacerrada as a civil engineer for Arkansas Nuclear One facility based upon Respondent and his knowledge of Penacerrada as a high performer. (Tr.1338-39). There is no evidence to suggest that either Whitson or Arkansas Nuclear regarded Hasan who had worked at this facility 18 years before as a known or high performer.

IV. Discussion and Conclusion

To prevail in an ERA case, Complainant must prove by a preponderance of the evidence that (1) he was an employee who engaged in protected activity; (2) employer knew about this activity and took adverse action against him; (3) his protected activity was a contributing factor in the adverse action. 42 U.S.C.A. § 5851 (b)(3) (C); *Hasan v. Enercon Sevices Inc.,* ARB No. 04-045, ALJ No.03-ERA-31, slip op.3 at 3(ARB May 18, 200); *Hasan v. Southern Co., Inc,* ARB No. 04-040, ALJ No. 03-ERA-32, slip op. at 3; (ARB Mar. 29, 2005). A contributing factor means any factor which alone or in connection with any factor tends to affect in any way the outcome of the decision. *Marano v. Dept. of Justice,* 2 F.3d 1137, 1140 (Fed Cir. 1993). Whereas in this case a prospective employee has no direct evidence of discrimination but rather bases his case upon indirect or circumstantial evidence, each piece of evidence should be examined with all the other evidence to determined if it supports or detracts from the prospective employee's claim including motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pre-text, shifting explanations and material changes in employer practices. In weighing these factors the court should consider how substantial they are in the context of the hiring decisions. *Bobreski v. J. Givoo Consultants, Inc.,* ARB Case No. 2008-ERA-03 (June 24, 2011).

Regarding protected activity, Respondent does not contest the fact that Hasan has proven he was a prospective employee who engage in protected activity by filing a complaint against it. However Respondent disputes knowledge of such until Hasan filed a complaint against it in *Hasan 1* and McGoey learned of it on May 30, 2003. Hasan argues that Respondent learned of such activity when he sent McGoey and Whitmore a fax and letter applying for the Germantown, MD job on February 17, 2003.

Regarding the date McGoey knew of Hasan's protected activities, the undersigned finds the exact date to be immaterial because the only individuals hired between February 17 and May 30, 2003 by Respondent were Brady and Shakibnia who were hired by Bryan in March, 2003 and possessed licensed professional engineering degrees which was needed for the jobs in California and which Hasan did not possess. However, assuming the date is important the undersigned credits McGoey that he put aside the letters, faxes, and resumes because he had no need to reread such information since he already had more information than they were likely to reveal because of Hasan's interview by Ken Whitmore. Judge Price, contrary to what Hasan claims, did not determine the date of Respondent's knowledge to be February 21, 2003.

As far as the other elements of circumstantial evidence, the undersigned finds contrary to Hasan assertions no evidence of improper motive, bias, animus, temporal proximity pretext, shifting explanations or material changes in employer practices that warrant a discriminatory finding against Respondent. Rather, the evidence of record supports a finding of encouragement of whistle blowing activities by Respondent such that individuals who blow the whistle are hired and promoted within Respondent's structure.

The undersigned credits Richardson that he limited knowledge of Hasan to those with a need to know, McGoey and Whitmore, so as to avoid charges of discrimination. The undersigned does not credit Hasan's testimony in *Hasan 1* that Whitmore verbally offered him a job when he met with him on January 24, 2003, because Respondent did not make verbal offers of employment and none of Hasan's subsequent correspondence with Respondent's refers to such an alleged offer. (Tr. 872-874, 1417).

The undersigned finds no evidence to suggest that McGoey discriminated against Hasan when he did not chose him to fill the subsequent positions filled by Markowski, Ying, Rollins, Pal or Goel. Contrary to Hasan, all of these employees were either known by Respondent or the client to be good performers possessing the necessary skills for continued performance in the future. Upon receiving Hasan's initial resume, McGoey forwarded it to Respondent's HR department where it was entered into Respondent's data base along with about 3,000 of civil/structural engineer resumes. In a like manner, the undersigned finds no evidence of discrimination by Robert Bryan, Jim Gannon, Tien Lee, Doug Whitson.

What Hasan wants in this case is for Respondent to refer his resume to all potential clients. While Hasan denies he wants special treatment because of his protected activities, it is obvious to the undersigned that is precisely what he demands from Respondent. Respondent has no such obligation. Rather it has the obligation not to discriminate against him for engaging in protected activities. In that regard the undersigned finds no evidence of any discrimination by Respondent in filling or not filling advertised or unadvertised positions.

Rather the undersigned finds a deep and abiding respect for safety emanating from Respondent's president to its hiring managers and directors, with employees rewarded and promoted for raising such issues even though doing so could cost the client substantial sums of money and, in some cases, result in a loss of business for Respondent. Indeed safety has to be a priority because of adverse consequences to the public if it is not observed both in theory and in practice

Concerning its advertisements, Hasan pointed to three ads as indicative of jobs for which he was qualified but not hired: a Germantown, MD advertisement indicating immediate openings which was posted initially in the Washington Post for several months starting in July 2002 and thereafter on Respondent's internet to July 2004; an advertisement for temporary positions at multiple locations for the design and installation of nuclear power plant security systems that ran from January-November, 2004; and a third advertisement for a continuing need for civil/structural engineers in temporary positions throughout the country.

The Germantown advertisement was designed to attract former Scientech employees that had worked with David Studley and upon whom he could rely to build up and run that office in his absence. As it turned out no new employees were hired as civil/structural engineers because Studley was preoccupied with chairman duties at Davis-Besse, however the advertisement did represent a real need when published for civil engineers. The advertisement for civil/structural engineers in security systems also represented what Respondent believe to be a real need for engineers in that field which unfortunately did not materialize. The other advertisement, while having no immediate need for engineers, represented an industry practice of allowing Respondent to build up its data base thereby allowing it to respond more effectively to client needs which would not be the case if it started to advertise only when the need arose.

In no case did Hasan show any jobs created during the 2003-2004 period by these advertisements. Nor did Hasan show Respondent black listing or refusing to hire him because of his protected activities. As Respondent noted in *Pickett v. Tennessee Valley Authority,* ARB Nos. 02-056 and 02-059, slip op. at 8-9 (ARB Nov.28,2003) blacklisting occurs when an individual or group of individuals act in concert to disseminate damaging information that affirmatively prevents another person from finding employment. There must be evidence of objective action rather than a subjective belief by a complainant, such as the case here, that said conduct occurred. In this case, Hasan repeatedly asserted without any objective proof that Respondent blacklisted him. The objective evidence in this case shows rather, Respondent consistently using legitimate criteria in its hiring process. Hasan adduced no evidence or elicited any testimony from either Richardson or Respondent's other witnesses to contradict or impeach their testimony or establish any basis for his theories of discrimination.

Contrary to what Hasan alleges he had more than an adequate opportunity to cross examine Respondent's witnesses. No one "railroaded" him. The fact that he could not prove his case rests with the fact that there was no case for him to prove, despite the fact that he provided certain of Respondent's hiring officials and its President and CEO with knowledge of his protected activities. Hasan's theory of discrimination rests upon McGoey knowing of his protected activities and using that knowledge in refusing to hire him for the Germantown job or any other advertised or unadvertised job while hiring less qualified and experienced individuals for these positions. However, the fact remains that Hasan was not a known performer. All of those individuals hired by Respondent were known, either by Respondent or the client, as proven past performers. Respondent had no need to and did not consult its data base of resumes. The advertised jobs produced no new hires.

Accordingly, the undersigned finds no evidence of discrimination by Respondent against Hasan and therefore Hasan's complaints against Respondent in *Hasan 2* and *3* are **DENIED**.

SO ORDERED this 30th day of July 2012, at Covington, Louisiana.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages. With your supporting legal brief you may also submit an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.