



In the Matter of:

JOSEPH F. DE MELO,

ARB CASE NO. 03-027

COMPLAINANT,

ALJ CASE NO. 02-ERA-17

v.

DATE: June 22, 2004

**UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Joseph F. DeMelo, *pro se*, Toronto, Canada

For the Respondent:

Kathleen J. Tulloch, Esq., *Department of Veterans Affairs, Brooklyn, New York*

FINAL DECISION AND ORDER

This is an appeal from a Recommended Decision and Order (R. D. & O.) issued pursuant to the whistleblower protection provision of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851(b) (West 2004). The R. D. & O. recommends that the complaint be dismissed on the merits. The Complainant, Robert F. DeMelo, argues on appeal that the Recommended Decision is not supported by the record and is contrary to law. We have authority over this appeal pursuant to 29 C.F.R. § 24.8 (2004) and Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

The R. D. & O. was issued in October 2002. *DeMelo v. United States Dep't of Veterans Affairs*, ALJ No. 2002-ERA-00017 (ALJ Oct. 30, 2002). In May 2003, this Board ruled that it lacks jurisdiction over § 5851(b) complaints against Federal agencies such as the Department of Veterans Affairs because Congress did not waive sovereign immunity from such claims. *Pastor v. Department of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30,

2003). Therefore, *Pastor* requires dismissal of this complaint for lack of jurisdiction. *Cf. Rivers v. Roadway Express*, 511 U.S. 298, 311-312 (“judicial decisions operate retrospectively”); *Bath v. NRC*, ARB No. 02-041, ALJ No. 2001-ERA-41 (ARB Sept. 29, 2003) (applying *Pastor* to complaint filed and R. D. & O. issued before *Pastor*).

Accordingly, this complaint is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge