In the Matter of:

JAMES F. NEWPORT, **ARB CASE NO. 06-110**

COMPLAINANT, **ALJ CASE NO. 2005-ERA-024**

v. **DATE: June 19, 2008**

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
James F. Newport, *pro se*, Blue Springs, Missouri

For the Respondent:
Mitchell S. Ross, Esq., Julie S. Holmes, Esq., *Florida Power & Light Company,* Juno Beach, Florida

ORDER DENYING RECONSIDERATION

On February 29, 2008, the Administrative Review Board (ARB or Board) issued a Final Decision and Order in this case arising under the employee protection section of the Energy Reorganization Act.[1] The Board concluded that James F. Newport violated the Administrative Law Judge's (ALJ) order to refrain from engaging in threatening behavior directed at witnesses and counsel. The Board also determined that the ALJ did not abuse

[1] 42 U.S.C.A. § 5851 (West 2007).

his discretion in dismissing Newport's complaint. On March 14, 2008, Newport submitted a Motion for Reconsideration (Motion) of our Final Decision and Order.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.[2] Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure.[3] Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[4] A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position that may prove more successful.[5] Likewise, issues not presented in initial briefs or during oral argument are not appropriate subjects for rehearing.[6] But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome.[7] Thus, the Board will reconsider a final decision if the movant demonstrates:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[[8]]

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[2] *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 1986-ERA-023, slip op. at 2-6 (ARB Nov. 20, 1998); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006, slip op. at 1 (ARB Feb. 17, 2005). *Accord Thomas & Sons Bldg. Contractors*, ARB No. 98-164, ALJ No. 1996-DBA-033, slip op. at 2-4 (ARB June 8, 2001). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

[3] *Powers v. Pinnacle Airlines, Inc.*, ARB No. 06-078, ALJ Nos. 2006-AIR-004, 2006-AIR-005, slip op. at 3 (ARB Jan. 30, 2008).

[4] Fed. R. App. P. 40(a)(2).

[5] *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

[6] *Utahns for Better Transp. v. United States Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993).

[7] *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989).

[8] *Powers, supra*; *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-184; ALJ Nos. 2002-CAA-005, 2003-ERA-010, slip op. at 2 (ARB May 17,

We have examined Newport's motion and conclude that he has not demonstrated that any of the provisions of the Board's four-part test apply. Instead, the Motion repeats arguments the Board has already considered and rejected. Accordingly, we **DENY** the Motion.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 2003-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.*, ARB No 04-120, ALJ No. 2004-SOX-054, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-LCA-003, slip op. at 3 (ARB Oct. 24, 2005).