In the Matter of:

RICHARD T. MULL,

COMPLAINANT,

v.

SALISBURY VETERANS ADMINISTRATION MEDICAL CENTER,

RESPONDENT.

ARB CASE NO. 09-107

ALJ CASE NO. 2008-ERA-008

DATE: August 31, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stephen A. Boyce, Esq., Winston-Salem, North Carolina

For the Respondent:
Winnie Jordan Reaves, Esq., ***Agency Representative, Department of Veterans Affairs,*** **Winston-Salem, North Carolina**

For the Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae:
Deborah Greenfield, Esq.; William C. Lesser, Esq.; Ellen R. Edmond, Esq.; Rachel Goldberg, Esq.; ***United States Department of Labor,*** **Washington, District of Columbia**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge.*** **Judge Brown filed a separate dissenting opinion.**

FINAL DECISION AND ORDER

Richard T. Mull, filed a complaint alleging that the Respondent, Salisbury Veterans Administration Medical Center (SVAMC), terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 2003 & Supp. 2008) (ERA), because he complained that SVAMC intended to hire an unqualified Radiation Safety Officer in violation of applicable regulations.

BACKGROUND

SVAMC is a Department of Veterans Affairs (DVA) medical facility. It is a Department of Energy licensee and is thus an "employer" as the ERA defines the term. SVAMC terminated Mull's employment on July 25, 2007.

Mull filed his initial complaint with the Occupational Safety and Health Administration (OSHA) on December 20, 2007, and he filed a First Amended Complaint on February 1, 2008. This complaint identified James B. Peake, who at that time was the Secretary of the DVA, as the Respondent. Mull described the remedy sought as "equitable relief in the form of reinstatement or front pay in lieu of reinstatement, back pay, protection from further retaliation, an injunction prohibiting further violations of the law, and attorney fees as allowed by law." *Mull v. Salisbury Veterans Admin. Med. Ctr.*, ALJ No. 2008-ERA-008, slip op. at 2 (ALJ Apr. 13, 2009) (Ruling on Respondent's Motion to Dismiss the Complaint).

OSHA, citing the Administrative Review Board's decision in *Pastor v. Department of Veterans Affairs*, concluded that sovereign immunity barred the complaint. ARB No. 99-071, ALJ No. 1999-ERA-011 (ARB May 30, 2003). Mull objected to OSHA's findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). *See* 29 C.F.R. § 24.106 (2010).

Before the ALJ, SVAMC filed a Motion to Dismiss the complaint on the grounds of sovereign immunity. The ALJ denied the Motion. Interpreting the Administrative Procedure Act (APA), the ALJ concluded that where an employee has been injured by agency action within the ERA's coverage, the employee may seek equitable relief (non-monetary damages) from the agency. 5 U.S.C.A. § 702 (West 1996). The ALJ also found that because Mull requested equitable relief, rather than monetary damages, his case was distinguishable from *Pastor*, in which the complainant requested only monetary damages. ALJ Ruling at 3-7.

SVAMC requested the ALJ to certify the sovereign immunity question for interlocutory review, pursuant to 28 U.S.C.A. § 1292(b) (West 1993).[1] Mull opposed the motion.

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[1] 28 U.S.C.A. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such

In considering certification, the ALJ found that sovereign immunity is a "controlling question of law" within the terms of 28 U.S.C.A. § 1292(b) because it is a complete bar to litigation against the sovereign. Accordingly, the ALJ granted SVAMC's motion for certification of the sovereign immunity question to the Administrative Review Board (the Board). Citing Federal Rule of Appellate Procedure (FRAP) 5(a)(3), the ALJ rejected Mull's argument that SVAMC's motion for certification was untimely because it was not filed within 10 days of the ALJ's Ruling. Mull has not renewed this objection before the Board.

Both parties initially filed briefs on the sovereign immunity question with the Administrative Review Board (ARB or Board). Upon consideration of the parties' arguments, the Board concluded that it was appropriate to grant interlocutory review of the sovereign immunity issue that SVAMC raised in this case because whether SVAMC is entitled to sovereign immunity is a legal issue completely separate from the merits of Mull's claim that SVAMC retaliated against him in violation of the ERA's employee protection provisions. We further noted that as sovereign immunity provides immunity from suit, not just from judgment, a denial of sovereign immunity is effectively unreviewable on appeal from the final judgment. *Accord Chao v. Virginia Dep't of Trans.*, 291 F.3d 276, 279 (4th Cir. 2002); *Eckert Int'l Inc. v. Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 78 (4th Cir. 1994); *Overall v. Tennessee Valley Auth.*, ARB No. 04-073, ALJ No.1999-ERA-025, slip op. at 5 (ARB June 29, 2007).

Mull, SVAMC, and the Assistant Secretary of Labor for OSHA,as amicus curiae, each filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority and assigned responsibility to the Board to act for the Secretary in review or on appeal, including, but not limited to, the issuance of final agency decisions for a number of statutes including the CAA, the FWPCA, and the TSCA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010)(the "Board's authority includes the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute").

> order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.110.

SOVEREIGN IMMUNITY STANDARDS

Sovereign immunity shields the federal government and its agencies from suit absent a waiver by the government. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999). Waivers of sovereign immunity must be "unequivocally expressed." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992); *U.S. v. Mitchell*, 445 U.S. 535 (1980). The extent of the federal government's waiver of sovereign immunity and the type of damages allowable are defined by the express language of the waiver, and the language is to be narrowly construed. *Taylor Enter., Inc. v. Clarinda Prod. Credit Ass'n*, 403 N.W.2d 794 (Iowa 1987). The extent of the waiver of the federal government's immunity is not to be extended beyond the clear and unambiguous language of the statute; waiver must be strictly construed in favor of the United States. *Idaho Dept. of Water Res. v. U.S.*, 122 Idaho 116 (1992), judgment rev'd on other ground, 508 U.S. 1 (1993); *McMahon v. United States*, 342 U.S. 25, 27 (1951); *U.S. v. Trident Seafoods Corp.*, 92 F.3d 855 (9th Cir. 1996).

Sovereign immunity applies in administrative adjudications as well as in Article III adjudications. *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 761 (2002) ("[I]t would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings . . . but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply"); *United States v. Puerto Rico*, 287 F.3d 212 (1st Cir. 2002) (holding that the United States was entitled to invoke sovereign immunity in proceedings before the administrative agency).

Moreover, the waiver must be established by the statute itself. "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text: 'the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text.'" *Lane v. Pena*, 518 U.S. 187, 192 (1996) (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. at 37); *accord, Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999). Additionally, "in resolving the question, we may not enlarge the waiver beyond the purview of the statutory language." *United States v. Williams*, 514 U.S. 527, 531 (1995), citing *Dep't of Energy v. Ohio*, 503 U.S. 607, 614-616 (1992). The Congressional intent to waive sovereign immunity is determined by reference to the underlying congressional policy rather than by the application of a ritualistic formula. *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512 (1984).

DISCUSSION

1. 5 U.S.C.A. § 702 does not waive the Respondent's sovereign immunity

The ALJ found that the APA (5 U.S.C.A. § 702) waives sovereign immunity for claims other than money damages. ALJ Ruling at 6. Because Mull asked for the equitable remedy of reinstatement, rather than for money damages, the ALJ found that the APA waived SVAMC's sovereign immunity at least as to this remedy and denied SVAMC's motion to dismiss the complaint. ALJ Ruling at 7.

Mull argues that 5 U.S.C.A. § 702 waives sovereign immunity against the federal government before an administrative agency regarding equitable relief. He asserts that sovereign immunity applies the same way to administrative adjudications as to Article III courts, citing *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 761 (2002).

SVAMC and the Assistnat Secretary each assert that 5 U.S.C.A. § 702 does not apply to administrative adjudications.

APA Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

This section is not applicable to appeals reviewed by an appellate board within the administrative process; it applies to the judiciary, as do all of the provisions of 5 U.S.C.A. § 701, et seq. The portions of the APA that apply to appeals to an appellate board within the administrative agency procedures are found at 5 U.S.C.A. §§ 551, 552.

As the Assistant Secretary points out, waiver of sovereign immunity in one forum does not affect waiver in other forums; thus, while 5 U.S.C.A. § 702 may waive the federal government's sovereign immunity before judicial courts, it does not apply to administrative agency tribunals, and does not waive immunity in this forum. Asst. Sec'y's Br. at 17; see *West v. Gibson*, 527 U.S. 212, 226 (1999) (Kennedy, J. dissenting); *McGuire v. U.S.*, 550 F.3d 903, 913 (9th Cir. 2008).

2. The ERA does not contain an unequivocal expression of intent to waive the Respondent's Sovereign Immunity

The ALJ found that because "[n]o waiver of sovereign immunity [wa]s expressed in the ERA, none could properly be inferred from it." ALJ Ruling at 4. Mull and SVAMC did not address the issue of whether the ERA waives sovereign immunity within the whistleblower provision or anywhere else in the AEA. The Assistant Secretary asserts that the ERA waives SVAMC's sovereign immunity through the AEA. The Assistant Secretary asks that the Board reconsider and overrule *Pastor*, to find that the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE) as well as federal licensees of the NRC have waived their sovereign immunity under the ERA because the ERA incorporates the AEA's definition of "person," 42 U.S.C. § 2014(s), which includes federal government agencies other than the Atomic Energy Commission.

To determine whether the federal government waived its sovereign immunity under the ERA, we first look to the statutory language in the whistleblower provision, which is the statute in question. Two distinct parts of the ERA whistleblower law directly pertain to the question of sovereign immunity. The first provision pertaining to the sovereign immunity question is the anti-retaliation provision found in Section 5851(a) of the ERA (the Anti-Retaliation Provision). That section provides as follows:

> (1) *No employer* may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –
>
> > (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);
> >
> > (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.], if the employee has identified the alleged illegality to the employer;
> >
> > (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.];
> >
> > (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.], or a proceeding for the

> administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (E) testified or is about to testify in any such proceeding or;
>
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.].

42 U.S.C.A. § 5851(a).

For purposes of § 5851, the term "employer" includes –

> (A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. § 2021);
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> (B) an applicant for a license from the Commission or such an agreement State;
>
> (C) a contractor or subcontractor of such a licensee or applicant;
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> (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;
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> (E) a contractor or subcontractor of the Commission;
>
> (F) the Commission; and
>
> (G) the Department of Energy.

42 U.S.C.A. § 5851(a)(2). (Emphasis added).

The second relevant provision is the remedies provision in Section 5851(b) (the "Remedy Provision"), which establishes specific processes for filing, investigating, and adjudicating employee complaints:

> (b) Complaint, filing and notification

> (1) Any employee who believes that he has been discharged or otherwise discriminated against by *any person* in violation of subsection (a) of this section may, within 180 days after such violation occurs, file . . . a complaint with the Secretary of Labor. . . . Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint . . . .
>
> (2)(A) Upon receipt of a complaint . . . the Secretary shall conduct an investigation. . . . Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant . . . and the person alleged to have committed such violation of the results of the investigation. . . . Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary . . . issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing 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. . . .

Id. (Emphasis added).

OSHA, the agency to which the Secretary has delegated her investigatory authority under § 5851(b)(2)(A), investigates these complaints and issues a determination as to whether a violation occurred. 42 U.S.C.A. § 5851(b)(2)(A); 29 C.F.R. § 24.105 (2009). Either or both parties may appeal OSHA's preliminary determination to a Labor Department Administrative Law Judge (ALJ) who, after a hearing, issues a decision. 29 C.F.R. §§ 24.106, 24.109. That decision may be appealed to this Board. 29 C.F.R. § 24.110 [2] If there is such an appeal, this Board issues the final order.

If the Secretary (through her delegatees, the Office of Administrative Law Judges or this Board) concludes a violation occurred, remedies may be ordered against the person who committed the violation:

> (B) If, in response to a complaint . . . the Secretary determines that a violation of subsection (a) . . . has occurred, the Secretary shall order the person who committed the

[2] The ALJ's decision becomes the final order of the Secretary if it is not appealed. 29 C.F.R. § 24.110(a).

> violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with . . . compensation . . . 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) . . . .

42 U.S.C.A. § 5851(b)(2)(B).

Any person adversely affected or aggrieved by the Secretary's order may obtain review from the United States Court of Appeals for the Circuit in which the violation allegedly occurred. *Id*. at § 5851(c).

After analyzing the ERA, we conclude that it does not contain any language that expresses congressional intent to waive the federal government's sovereign immunity. Certainly, it is self-evident that there is no statement that "federal sovereign immunity" is waived.

The ERA whistleblower provisions generally prohibit employers from discriminating against employees. 42 U.S.C.A. § 5851(a)(1). "Employer" is generally defined to include "all licensees" of the Commission. 42 U.S.C.A. § 5851(a)(2)(A). There is no dispute among the parties about whether SVAMC qualifies as an "employer" under the ERA. They agree that SVAMC is a "licensee of the Commission" under 42 U.S.C.A. § 5851(a)(2)(A). Therefore, given the parties' briefing, the statute clearly prohibits the SVAMC from discriminating against employees such as Mull. This general definition does not sufficiently answer the question of whether Congress waived SVAMC's sovereign immunity. *See Lane v. Pena*, 518 U.S. 187 (1996) (In which the Supreme Court found that while Section 504 of the Rehabilitation Act clearly prohibited the Academy, as an "Executive Agency" from discriminating against Lane, federal government sovereign immunity was not waived because remedies were available only against "Federal providers," not against "Executive Agencies.") In defining "employer," Congress expressly included only two federal entities, the DOE and the NRC. 42 U.S.C.A. § 5851(a)(2)(F) and (G). While it could be argued that this express inclusion of the DOE and the NRC is intent to waive those entities' sovereign immunity, the definition of "employer" does not support any further indications of waiver by the federal government. The language of this section in the whistleblower provisions is not an unequivocal expression of intent to waive respondents' (such as SVAMC's) sovereign immunity. Therefore, we will look at the remaining ERA the whistleblower provisions.

Turning to the Remedy Provision, the ERA whistleblower provision pertaining to remedies applies remedies to "any person" but "person" is not defined anywhere in the ERA. 42 U.S.C.A. § 5851(b). It is not clear either way whether Congress intended for "person" to mean the same entity or a different entity than "employer." We discussed this issue in *Pastor*. *See*

Pastor, ARB No. 99-071, slip op. at 15-18. Based on the principles of statutory construction "that to the extent possible all Congressional provisions are to be given meaning, and that when Congress uses two different words in close proximity, the use of different words indicates a difference in meaning," we concluded that we could not assume that because a respondent is an "employer" under 42 U.S.C.A. § 5851(2), it is also a "person" under 42 U.S.CA. § 5851(b). Indeed, "[t]he use of different terminology ("person") in § 5851(b)(2)(B) (and thereby the apparent lack of a clear reference to such a federal agency in the remedies section), . . . , runs counter to a finding that Congress intended to waive sovereign immunity . . . . *Pastor*, ARB No. 99-071, slip op. at 17-18.

The lack of clarity in 42 U.S.C.A. § 5851's provision that an employee can bring a complaint against "any person," with "person" being undefined is underscored by the precision with which Congress waived the Federal Government's sovereign immunity under 42 U.S.C.A. § 7622 (Thomson/West 2003) of the Clean Air Act, which prohibits discrimination on the basis of protected activity under the Clean Air Act in employment decisions by the Federal Government. In 42 U.S.C. § 7622, Congress allows an employee to file a CAA complaint with OSHA against "any person in violation of" the CAA whistleblower provisions. In 42 U.S.C. § 7602 (e), "person" is defined to include "any agency, department, or instrumentality of the United States," thereby unequivocally expressing the intent to waive the federal government's sovereign immunity.

In contrast, 42 U.S.C.A. § 5851's lack of any language including the federal government as an entity against which complaints can be filed or otherwise waiving its sovereign immunity, tends to suggest that Congress did not intend the federal government's sovereign immunity to be waived. Therefore, we agree with the ALJ and conclude that "no waiver of sovereign immunity is expressed in the ERA . . . ." ALJ Ruling at 4.

The Assistant Secretary asks that we look outside of the ERA's language, to the AEA's definition of "person" to find that the federal government has waived its immunity under the ERA. However, we can find no language in the ERA that expressly requires or directs us to look outside of its provisions. While the Supreme Court has "never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time," *Kimel v. Florida*, 528 U.S. 62, 76 (2000), the Court has required that Congress make a clear statement in the statutory text, even if simply by including in the statute, language that incorporates provisions from other statutes. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Kimel*, 528 U.S. at 74-77.

The Assistant Secretary's argument that the ERA and the AEA are so intertwined that the definition of "person" from the AEA is applicable to the ERA gives us pause, because Congress could have certainly intended for "person" to apply to the ERA from the AEA.[3] However, while the Assistant Secretary's rationale is logical, we believe that it creates a debatable point rather

[3] We note however, that the AEA's definition of "person" is, by the terms of the definitions section, expressly limited to that chapter. 42 U.S.C.A. § 2014; *see Pastor*, ARB No. 99-071 at 18-19.

than an unequivocal waiver as the Supreme Court has required for a waiver of federal sovereign immunity. Because the government's consent to be sued must be "construed strictly in favor of the sovereign," *McMahon*, 342 U.S. at 27, we cannot adopt the Assistant Secretary's position. Therefore, we conclude that the ERA does not contain an unequivocal expression of intent to waive sovereign immunity, either in its statutory text or in an incorporation-by-reference within its statutory text. Thus, federal government sovereign immunity is not waived under the ERA.

The Office of Legal Counsel's opinion concerning three other whistleblower statutes[4] does not compel a different result. In the OLC opinion, each of the three statutes analyzed permits claims against any "person," and "person" is expressly defined within the statute, whether within the whistleblower provisions (CAA and FWPCA) or elsewhere within the statute (SWDA). The CAA and the SWDA define "person" to include the federal government; thus, the OLC found that federal government sovereign immunity was waived. The waiver was not based on a leap to an entirely different part of the federal laws. Under the FWPCA, the definition of "person," while express, does not include the federal government; thus, the OLC found that the federal government did not waive its sovereign immunity. The ERA is decidedly different than these three examples, because unlike each of them, the ERA never defines "person," the entity employees are permitted to sue, anywhere in its language. Neither does it direct us to seek that definition elsewhere. The leap that the Assistant Secretary argues is logical but it is done by inference and not at the direction of Congress.

Finally, we disagree with the Assistant Secretary's argument that Congress' amendment of Section 211 to specifically include the DOE and the NRC within the definition of "employer" necessarily bolsters the conclusion that the ERA waives federal sovereign immunity. The opposite argument could also be made, that since Congress amended the definition of "employer" in 2005 and was aware of the Board's 2003 decision in *Pastor*, Congress was validating *Pastor*'s holding that federal sovereign immunity was not waived under the ERA.[5] If Congress intended to waive sovereign immunity, then it can be argued that in light of *Pastor* Congress would have also amended the ERA to include a definition of "person" that included the federal government or otherwise amended the statute to effectuate that purpose. In any event, we point out that we see validity in arguments on both sides of the issue as to whether Congress intended to waive federal government sovereign immunity, and this, considered in favor of the sovereign, compels us to conclude that the ERA does not waive immunity because we find no unequivocal expression of intent to waive in the ERA.

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[4] Those statutes are the Clean Air Act, 42 U.S.C. § 7622 (2000) (CAA); the Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000) (SWDA); and the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (2000) (FWPCA).

[5] *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). Here, it could be argued that Congress was aware of *Pastor*'s interpretation of the absence of a definition of "person," which included the federal government and that by re-enacting the statute without adding such a definition or otherwise explicitly waiving federal government sovereign immunity, it was adopting the Board's interpretation of the ERA in *Pastor*.

CONCLUSION

Congress has not unequivocally waived the federal government's sovereign immunity under the ERA. The ALJ found that the federal government's sovereign immunity was waived. Consequently, we **REVERSE** the ALJ's Ruling that SVAMC waived its sovereign immunity and **REMAND** Mull's complaint for proceedings consistent with this decision.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, dissenting:

The instant case presents the issue (by way of interlocutory appeal) of whether the sovereign immunity has been waived under either the Energy Reorganization Act (ERA) or the Administrative Procedure Act (APA), thereby subjecting to liability Respondent Salisbury Veterans Administration Medical Center for violation of the whistleblower protection provisions of the ERA, 42 U.S.C. § 5851. The ALJ held that the ERA does not waive sovereign immunity, citing the ARB's decision in *Pastor v. Dept. of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-011 (ARB May 30, 2003), but that because the relief sought is equitable in nature, sovereign immunity is waived under the APA. For the reasons set forth in the majority's opinion, I am of the opinion that the APA does not afford a waiver of sovereign immunity for the equitable relief that Mull seeks. I nevertheless dissent from my colleagues for I am of the opinion that the ERA, when read as it necessarily must in conjunction with the Atomic Energy Act (AEA), does provide a waiver of sovereign immunity in the instant case.

As noted by the majority, section 5851(a) prohibits any "employer," as defined therein, from retaliating against any employee who engages in any of the protected activities set forth therein, including whistle-blowing with respect to violation of the provisions of the Atomic Energy Act. As also previously noted, any employee who believes he has been retaliated against by "any person" in violation of subsection (a) may file a complaint with the Secretary of Labor pursuant to section 5851(b)(1), and if it is found that a violation of subsection (a) has occurred, the Secretary is authorized to order relief on behalf of the employee against "the person who committed such violation" pursuant to subsection (b)(2)(B).

The question of whether the Salisbury V.A. Medical Center is a covered employer within the meaning of section 5851(a) of the ERA is not in dispute in the instant case because the V.A.

Center is a licensee of the Nuclear Regulatory Commission. By virtue of 42 U.S.C. § 5851(a)(2)(A), licensees of the NRC are expressly included in the definition of employer. *Accord Pastor*, ARB No. 99-071, slip op. at 13. However, this alone does not resolve the question of whether the V.A.'s sovereign immunity has been waived. For this we must turn to an analysis of whether the term "person" found within 42 U.S.C. § 5851(b), the remedy provision of the ERA, includes government agencies. See, *Erickson v. U.S. Envtl. Prot. Agency*, ARB Nos. 03-002 et seq., 1999-CAA-002 et seq. (ARB Mar. 31, 2006) (waiver of agency sovereign immunity under the Clean Air Act and the Solid Waste Disposal Act); *Kanj v. Viejas Ban of Kumeyaay Indians*, ARB No. 06-074, 2006-WPC-001 (ARB Apr. 27, 2007) (abrogation of tribal sovereign immunity under the Clean Water Act); *Minthorne v. Commonwealth of Va., et al.*, ARB No. 09-098, ALJ No. 2009-CAA-004 (ARB July 19, 2011) (abrogation of state's Eleventh Amendment immunity from suit under the Clean Air Act).[6]

The argument against a waiver of sovereign immunity for purposes of awarding relief pursuant to the ERA whistleblower provision is, of course, that the term "person" is not defined by the ERA amendments to the Atomic Energy Act, and therefore the required express statutory waiver of sovereign immunity does not exist. "Person" is, however, defined under the Atomic Energy Act at 42 U.S.C. § 2014(s). Within the scope of the AEA, "person" is an all-encompassing term that includes any "Government agency" and which did not change with the adoption of the 1974 ERA amendments.[7]

Nevertheless, the majority rejects the AEA's definition of "person" as a basis for finding that the federal government has waived its immunity from suit under the ERA. Citing the ARB's prior decision in *Pastor*, the majority refuses to recognize the ERA's incorporation of the AEA's definition, distinguishing other whistleblower statutes where the definition of "person" was

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[6] In each case the ARB cited to and relied upon an opinion issued by the Department of Justice's Office of Legal Counsel (OLC) to the Solicitor of Labor (dated September 23, 2005) wherein the OLC explained that the proper focus for determining whether sovereign immunity had been waived under various federal whistleblower provisions was the remedies provision identifying against whom suit could be brought and the definition of the term "person" found therein, citing the binding interpretive guidance for executive agencies of OLC. *See e.g., Minthorne*, ARB No. 09-098, slip op. at 7, n.8.

[7] Under the Atomic Energy Act the term "person" includes: "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the [Atomic Energy] Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing." 42 U.S.C. § 2014(s). The term "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government." 42 U.S.C. § 2014(l).

found sufficient to constitute a waiver of sovereign immunity as not requiring "a leap to an entirely different part of the federal laws."

I do not, however, view the Energy Reorganization Act (ERA), 42 U.S.C. § 5801 *et seq*., as an act separate and apart from the Atomic Energy Act (AEA), 42 U.S.C. § 2011 *et seq*. As the courts have recognized, they together form an integrated statutory scheme consisting of a comprehensive regulatory framework for the development and oversight of civilian nuclear power in the United States, with the licensing and regulatory functions that had previously resided in the Atomic Energy Commission transferred to the Nuclear Regulatory Commission upon adoption of the ERA in 1974. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 526 n.2 (1978); *New Jersey Dep't of Envtl. Pro. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 133 (3d Cir. 2009); *United States v. Construction Prods. Research, Inc*., 73 F.3d 464, 471 (2d Cir. 1996); *County of Rockland v. U.S. Nuclear Regulatory Comm'n*, 709 F.2d 766, 769 (2d Cir. 1983).. The 1974 ERA amendments to the AEA abolished the Atomic Energy Commission (*see* 42 U.S.C. § 5814(a)), established the Nuclear Regulatory Commission (pursuant to 42 U.S.C. § 5841(a)), and transferred to the NRC "all the licensing and related regulatory functions of the Atomic Energy Commission." 42 U.S.C. § 5841(f).[8] As the legislative history to the 1974 amendments explains, the authority and responsibilities of the NRC set forth at 42 U.S.C. § 5841(a)-(f) are virtually identical to the licensing and regulatory authority and responsibilities of the AEC as set forth in the provisions that had existed at sections 21 and 22 of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2031 and 2032, both provisions of which were repealed by the 1974 amendments. The licensing and regulatory authorities assumed by NRC are codified throughout the Atomic Energy Act.[9] Most notable and pertinent among these various provisions to the issue before the Board in the instant case is 42 U.S.C. § 5842, pursuant to which the NRC is charged with responsibility for issuing nuclear power commercial and R&D licenses to "persons" pursuant to 42 U.S.C. §§ 2133 and 2144. *See also* 42 U.S.C. § 2131. Moreover, and contrary to the majority's opinion, 42 U.S.C § 5851, adopted pursuant to the 1978 ERA amendments, expressly incorporates the substantive requirements and standards of the various licensing and regulatory provisions found under the Atomic Energy Act in establishing what constitutes protected activity. As previously noted, the whistleblower protection provision codified at section 5851 references the Atomic Energy Act throughout, and prohibits retaliating against any employee who engages in any of the protected activities expressly set forth therein -- including whistle-blowing with respect to violation of the provisions of the Atomic Energy Act.

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[8] Not only did the Energy Reorganization Act of 1974 provide the NRC with all the licensing and regulatory functions previously possessed and exercised by the AEC, but Congress intended by this action to "up-grade the regulation of nuclear power." S. Rep. No. 93-980, 93d Cong., 2d Sess. 1 (1974). The establishment of the NRC not only evidenced Congress' continuing recognition of the importance of the regulatory duties that had been previously delegated to the AEC, in establishing the NRC with its enhanced authority, Congress reemphasized its concern for the efficient regulation of the Nation's nuclear facilities. *Id*.

[9] See e.g., 42 U.S.C. § 5841(g)(2); 42 U.S.C. § 5842; 42 U.S.C. § 5843(b)(1); 42 U.S.C. § 5844(b); 42 U.S.C. § 5846; 42 U.S.C. § 5848.

In light of the integrated nature of the regulatory framework of the two Acts, with the Energy Reorganization Act clearly serving as but amendment to the Atomic Energy Act notwithstanding the separate names by which the two are identified, I find persuasive the Solicitor of Labor's argument that "[i]t would be unreasonable . . . to incorporate the standards of the AEA in establishing what activities are protected under section 211 of the ERA [42 U.S.C. § 5851], and not also incorporate the definition of "person" from the AEA [found at 42 U.S.C. § 2014(s)] to make all covered employers subject to the whistleblower provision of the statute." OSHA Amicus Brief, p. 8-9. The ERA must necessarily be read as encompassing all of the terms of the AEA, including the AEA's definition of "person." *See Engel v. Davenport*, 271 U.S. 33, 38 (1926) ("The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length. It brings into the later act 'all that is fairly covered by the reference,' that is to say, all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act [citations omitted] ."). *See also*, 2B N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 51.08 (5th rev. ed. 1992). *Cf. Kimel v. Florida*, 528 U.S. 62, 76 (2000) (noting, in the similar context of congressional abrogation of state sovereign immunity, that Supreme Court "cases have never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time").[10]

In *Pastor* the ARB was not persuaded by the definition found in the AEA, concluding that the definition of "person" found at 42 U.S.C. § 2014 only applies to Chapter 23 of the Atomic Energy Act. Slip op. at 18-19. However, upon the adoption of the ERA in 1974, Section 301(b) thereof (42 U.S.C. § 5871(b)) expressly provided that "all orders, determinations, rules, regulations [etc.]" previously issued and in effect pursuant to the Atomic Energy Act were to continue in effect unless modified, terminated, superseded, set aside or revoked. "Person" as defined by the regulations adopted by the AEC in January of 1961 (26 FR 284-01), was identical to the definition provided at 42 U.S.C. § 2014(s). That definition remains in effect, at 10 C.F.R .§ 40.4 (2009), modified only to the extent that it has been expanded to include the Department of Energy within the definition of "person" to the extent that DOE facilities and activities are subject to NRC licensing and regulation.[11] Given that "person" was already defined under the

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[10] Referenced by the Court were its decisions in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7–13 & n.2 (1989) (consulting original provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and 1986 amendments to that Act) (overruled on other grounds); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56–57 (1996) (confirming clear statement in one statutory subsection by looking to provisions in other subsection). Consistent with *Kimel v. Florida*, the Office of Legal Counsel, in its Opinion Letter to the Solicitor of Labor (see n.1, *supra*), opined that the definition of "person" to include the federal government was sufficient to constitute a waiver of sovereign immunity under the SWDA's whistleblower provision (42 U.S.C. § 6971) notwithstanding that the definition was contained in a separate provision of the act defining various terms used in the SWDA generally. This cross-reference, the OLC opined, "does not dull the clarity of the waiver of sovereign immunity." OLC Opinion Letter at 3.

[11] 10 C.F.R. § 40.4 defines "person" to mean: "(1) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the

Atomic Energy Act to include the federal government, its agencies, offices, and officials, it is logical to conclude, in light of the inextricable nature of the ERA amendments to the Atomic Energy Act, that Congress saw no need to redefine the term "person" upon adoption of the 1978 amendments.

Bolstering the conclusion that Congress relied upon the AEA's definition of "person" at the time of the 1978 amendments are two other provisions that were at that time adopted. At 42 U.S.C .§ 2210a, Congress provided a new provision pertaining to conflicts of interest relating to the procurement of contracts, requiring any "person" seeking to enter into any contract under the jurisdiction of the NRC to adhere to certain disclosure and compliance requirements. "Person" as that term is used in Section 2210a is not therein defined but, consistent with the expansive definition of "person" found at 42 U.S.C. § 2014(s) and 10 C.F.R. § 40.4, the legislative history accompanying this amendment refers to the coverage as pertaining to "prospective contractors." 42 U.S.C. § 5851(f) was also adopted in 1978. This provision makes available mandamus proceedings pursuant to section 1361 of title 28 of the United States Code for the enforcement of "any nondiscretionary duty imposed by this section". 28 U.S.C. § 1361 provides federal court jurisdiction "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff," thus clearly suggesting that Congress intended "person" to include federal agencies within the meaning of 42 U.S.C. § 2014(s), for otherwise subsection 5851(f) would seemingly be meaningless as an avenue for relief where a "person" refused to comply with an order for relief issued by the Secretary pursuant subsection 5851(b)(2).

Because the remedies provision of the ERA's whistleblower provision, set forth at 42 U.S.C. § 5851(b), are available against "persons," and the ERA does not define "persons," the Board in *Pastor v. Dept. of Veterans Affairs* held, as does the majority in the instant case, that the necessary express waiver of sovereign immunity required in order for the complainant to secure the relief sought does not exist,[12] and thus the Department of Labor does not have jurisdiction

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Commission or the Department of Energy except that the Department of Energy shall be considered a person within the meaning of the regulations of this part to the extent that its facilities and activities are subject to the licensing and related regulatory authority of the Commission pursuant to section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244) and the Uranium Mill Tailings Radiation Control Act of 1978 (92 Stat. 3021), any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing."

[12] In *Pastor* the relief sought was monetary. In *Mull* the relief sought is equitable in nature. For purposes of sovereign immunity analysis under the ERA, I view this as a meaningless distinction for purposes of sovereign immunity analysis. See *Ardestani v. INS*, 502 U.S. 129, 137 (1991); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 255 (5th Cir. 2006).

over ERA whistleblower complaints against the V.A.[13] The Solicitor of Labor, on behalf of the Assistant Secretary for OSHA, urges the Board to reject *Pastor* and hold that the ERA waives the sovereign immunity of federal licensees of the NRC. Based upon my analysis of the statutory language of the ERA and AEA I would agree with the Assistant Secretary, overturn *Pastor*, and hold accordingly.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

[13] *Pastor* has since been invoked by the Board in *Bath v. U.S. Nuclear Regulatory Comm'n*, ARB No. 02-041 (Sept. 29, 2003) to reject a claim under the ERA by Bath against the NRC, his employer. *Bath* further held that because the ERA's prohibition against retaliation applies only to "employers," Bath's claim against several named individuals who he alleged were involved in the retaliation was also barred.