



In the Matter of:

JAMES SPEEGLE,

ARB CASE NO. 11-029

COMPLAINANT,

ALJ CASE NO. 2005-ERA-006

v.

DATE: April 13, 2011

**STONE & WEBSTER
CONSTRUCTION, INCORPORATED,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

David J. Marshall, Esq., *Katz, Marshall & Banks*, LLP, Washington, District of Columbia

For the Respondent:

Jason C. Schwartz, Esq., *Gibson, Dunn & Crutcher LLP*, Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

On September 24, 2009, the Administrative Review Board (ARB) issued a Final Decision and Order of Remand (F. D. O.)¹ in this case arising under the whistleblower

¹ *Speegle v. Stone & Webster Constr. Co.*, ARB No. 06-041.

protection provisions of the Energy Reorganization Act (ERA).² In the F. D. O., the Board held that the Respondent, Stone & Webster Construction, Inc., unlawfully retaliated against Speegle when it terminated his employment because he made a safety complaint that was protected under the ERA's employee protection provisions. The Board remanded the case to the presiding Administrative Law Judge (ALJ) to enter an order awarding damages and other relief consistent with the Board's F. D. O.

On February 9, 2011, the ALJ issued a Decision and Order (D. & O.) finding that Speegle, was entitled to, among other remedies, reinstatement, damages for lost back pay, and a supplemental amount to the date of reinstatement. The ALJ ordered that the supplemental amount would either be determined by the agreement of the parties and submitted in a joint motion for approval or by a supplemental order following submission of briefs and supporting exhibits.³ On February 23, 2011, the Board received Respondent's Petition for Review. The Petition noted that pursuant to the ALJ's D. & O., "the parties met and conferred and have filed a joint motion with the ALJ seeking approval of their stipulation with respect to back and front pay."⁴ The petition further indicated that the parties do not intend to contest the appropriateness of the award, assuming that the ALJ approved it, but if the stipulation is disallowed or modified in any respect, the Respondent reserved its rights to appeal the ALJ's preliminary order of reinstatement.

Given Stone & Webster's reservation of the right to appeal the ALJ's damages order, it had effectively petitioned the Board to review a non-final order. But the Board has a long-standing policy against accepting piecemeal appeals of ALJ decisions.⁵ Accordingly, the Board accepted the Petition for Review, but issued an order suspending the briefing schedule pending Stone & Webster's notification to the Board that the ALJ had issued the supplemental order and whether either party intended to appeal it, in addition to Stone & Webster's appeal of the case on its merits.

² 42 U.S.C.A. § 5851(a)(1) (West 2003 & Supp. 2010). The Secretary of Labor has delegated authority to the Administrative Review Board to review an ALJ's recommended decision and order under the environmental whistleblower statutes, including the ERA, and to issue the final agency decision. 29 C.F.R. § 24.110 (2010). *See also* 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) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.100(a), including the ERA).

³ D. & O., slip op. at 39.

⁴ Respondent's Petition for Review at 3.

⁵ *Dempsey v. Fluor Daniel, Inc.*, ARB No. 01-075, ALJ No. 2001-CAA-005, slip op. at 3 (ARB May 7, 2002).

Stone & Webster subsequently filed a second Petition for Review notifying the Board of the ALJ's approval of the stipulated damages.⁶ In the Petition for Review, Stone & Webster stated:

Respondent has met and conferred with the Complainant regarding this Petition for Review, and is authorized to represent that the Complainant supports the adoption of the ALJ's Amended Decision and Order on Stipulated Damages as the Secretary's final decision on damages so that Respondent can seek judicial review of the ARB's September 24, 2009, decision finding Respondent liable for violating the ERA.^[7]

Accordingly, the Board ordered the parties to show cause why the Board should not summarily affirm the ALJ's February 9, 2011 Decision and Order and February 28, 2011 Amended Decision and Order on Stipulated Damages, so that the "Respondent can seek judicial review of the ARB's September 24, 2009, decision finding Respondent liable for violating the ERA."⁸

In Stone & Webster's Response to the Board's Order to Show Cause, it reiterated that it "continues to object to the ARB's 2009 decision finding that Respondent violated the ERA in any respect"⁹ In particular it specified two issues for review:

1. Whether the ARB exceeded the scope of substantial-evidence review in overturning the ALJ's determination that Complainant's profane and insubordinate outburst—and not some other supposed protected activity—was the reason for his termination?
2. Whether the ARB erred in holding that substantial evidence establishes that Complainant's nuclear safety complaints contributed to Stone & Webster's decision to suspend and terminate him?^[10]

⁶ See *Speegle v. Stone & Webster Constr. Co.*, 2005-ERA-006 (ALJ Feb. 28, 2011).

⁷ Respondent's Petition for Review at 5 (Mar. 10, 2011).

⁸ Order to Show Cause at 3 (Mar. 18, 2011).

⁹ Respondent's Response to Board's Order to Show Cause at 4. Speegle did not respond to the Board's Show Cause Order.

¹⁰ *Id.*

Stone & Webster also stated that it objects to all preliminary findings that gave rise to those determinations.¹¹ While Stone & Webster stated that it would welcome the opportunity to present its case to the Board to the extent that the Board might wish to reconsider its September 24, 2009 F. D. O., should the Board chose not to do so, it supports “the adoption of the ALJ’s Decision and Order and Amended Decision and Order on Stipulated Damages as the Secretary’s final decision on damages ‘so that Respondent can seek judicial review of the ARB’s September 24, 2009, decision finding Respondent liable for violating the ERA’”¹²

The Board has reviewed its September 24, 2009 F. D. O. and Stone & Webster’s Petition for Review and Response to Board’s Order to Show Cause. Finding no basis on which to reconsider our September 24, 2009 F. D. O., we summarily affirm the ALJ’s Decision and Order and Amended Decision and Order on Stipulated Damages as the Secretary’s final decision on damages and these Orders along with the Board’s September 24, 2009 F. D. O. hereby become the final agency decision in this case.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹¹ These preliminary findings included: “that Complainant’s complaints constituted protected activity under the ERA; (2) that substantial evidence did not support the ALJ’s decision that Complainant failed to prove that his purported protected activity contributed to Stone & Webster’s decision to suspend and then terminate him; (3) that substantial evidence did not support the ALJ’s determinations that Stone & Webster did not invent different reasons for terminating Speegle and that those explanations did not constitute pretext; (4) that substantial evidence did not support the ALJ’s determination that the company did not treat Speegle differently than other similarly insubordinate employees; and (5) that Stone & Webster would not have suspended and fired Speegle even absent his alleged protected activity.” *Id.* at 4-5. Stone & Webster further “reserves the right to challenge all findings and conclusions encompassed within the foregoing issues and/or modify the following.” *Id.* at 5.

¹² *Id.*