In the Matter of:

PERRY ELLIOTT, **ARB CASE NO. 14-020**

COMPLAINANT, **ALJ CASE NO. 2013-ERA-006**

v. **DATE: September 17, 2014**

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Perry Elliott, *pro se*, Evensville, Tennessee

***For the Respondents*:**
Edwin W. Small, Esq.; Brent R. Marquand, Esq.; and Maria V. Gillen, Esq.; *Tennessee Valley Authority General Counsel's Office*, Knoxville, Tennessee

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.

ORDER OF REMAND ON INTERLOCUTORY REVIEW

This case arises under the whistleblower provisions of the Energy Reorganization Act (ERA).[1] Perry Elliott filed a whistleblower complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, the Tennessee Valley Authority (TVA), violated the ERA when it terminated his employment. After conducting an investigation, OSHA dismissed Elliott's complaint. Elliott filed a timely request for a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ).

[1] 42 U.S.C.A. § 5851(a)(1) (West 2003 & Supp. 2014).

Before the ALJ, the TVA filed a motion for summary decision on the grounds that Elliott did not engage in protected activity under the ERA and, alternatively, that the TVA's sovereign immunity bars Elliott's ERA complaint. The ALJ denied the TVA's motion. Nevertheless, the ALJ certified the issue of the TVA's sovereign immunity under the ERA for interlocutory review to the Administrative Review Board (ARB) pursuant to 28 U.S.C.A. § 1292(b) (West 1993). Specifically, the ALJ found that the issue of the TVA's sovereign immunity under the ERA is a "controlling question of law as to which there is substantial ground for difference of opinion" within the meaning of 28 U.S.C.A. § 1292(b)[2] and further found that "appellate resolution of the issue may materially advance the ultimate resolution of the case."[3]

Subsequently, the TVA filed a Petition for Interlocutory Review on the issue of the TVA's sovereign immunity under the ERA. The Board granted the TVA's Petition, agreeing that the sovereign immunity issue is a controlling question of law as to which there is a considerable ground for difference of opinion and that appellate resolution of the issue may materially advance the final resolution of this case. The TVA has filed a brief asserting that sovereign immunity bars Elliott's ERA complaint against the TVA.[4] We hold that the TVA is an employer and Elliott is an employee subject to the ERA's employee protection whistleblower provisions.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the ERA.[5] The Secretary's delegated authority to the Board includes

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[2] 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 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 . . . .

[3] Order Denying Respondent's Motion for Summary Decision (Order) at 6 (ALJ Dec. 3, 2013).

[4] We note that while Elliott filed a response to the TVA's Petition for Interlocutory Review and supporting brief, his response does not address the sovereign immunity issue in this case. In addition, although the Board also invited the Assistant Secretary of OSHA to submit a brief on the sovereign immunity issue, the Assistant Secretary of OSHA informed the Board that he decided not to file a brief in this interlocutory appeal.

[5] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378-69,380 (Nov. 16, 2012); 29 C.F.R. §§ 24.100(a), 24.110.

"discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."[6] 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.[7]

DISCUSSION

A. ALJ's Order Denying Respondent's Motion for Summary Decision

The ALJ stated that while the ERA lists federal agencies as among the employers subject to its whistleblower protection provisions at 42 U.S.C.A. § 5851, the ERA's whistleblower protection provisions do not explicitly waive the Federal Government's sovereign immunity.[8] Moreover, the ALJ noted that the Board has previously held that sovereign immunity is not waived under the ERA in regard to 1) monetary damages, in *Pastor v. Dep't of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-011, slip op. at 23 (ARB May 30, 2003), and 2) equitable relief, in *Mull v. Salisbury Veterans Admin. Med. Clinic*, ARB No. 09-107, ALJ No. 2008-ERA-008, slip op. at 9 (ARB Aug. 31, 2011).[9]

But with regard to the TVA, as "a hybrid agency that is structured to operate in many respects like a private corporation," the ALJ noted the Board's holding in *Overall v. Tenn. Valley Auth.* (*Overall II*), ARB No. 04-073, ALJ No. 1999-ERA-025, slip op. at 8 (ARB July 16, 2007). In *Overall II*, the Board held that the TVA Act provides the TVA the power to "sue and be sued in its corporate name."[10] Thus, because Congress did not expressly restrict TVA's ability to sue and be sued and because the TVA had not shown any implied exception to the waiver of sovereign immunity under its "sue and be sued" clause, the Board held that the TVA was not immune from an ERA whistleblower complaint.[11] Consequently, while the ALJ denied the

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6 Secretary's Order No. 02-2012, § 5(c)(48).

7 *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.110.

8 Order at 4.

9 *Id*. In *Mull*, the Board noted that the ERA's whistleblower provision, pertaining to remedies at 42 U.S.C.A. § 5851(b), provides that an employee may bring a complaint against "any person," but "person" is not defined anywhere in the ERA. *Mull*, ARB No. 09-107, slip op. at 9. The Board concluded "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." *Id*. at 11.

10 *See* 16 U.S.C.A. § 831c(b) (West 2000).

11 *Overall II*, ARB No. 04-073, slip op. at 8. Specifically, the Board held that the TVA did not demonstrate that 1) an ERA whistleblower claim is "inconsistent with the TVA Act;" 2) an ERA

TVA's motion for summary decision based on its sovereign immunity under the ERA, the ALJ certified the issue of the TVA's sovereign immunity under the ERA for interlocutory review to the Board pursuant to 28 U.S.C.A. § 1292(b) for the Board to decide whether to reconsider its decision in *Overall II* in light of its holding in *Mull* or other recent authorities.

The TVA argues that subsequent to *Overall II*, the United States Supreme Court held in *United States v. Bormes*, __ U.S. __, 133 S. Ct. 12, 17 (Nov. 13, 2012), that "[w]here . . . a statute contains its own self-executing remedial scheme, [courts] look only to that statute to determine whether Congress intended to subject the United States to damages liability."[12] Thus, the TVA contends that *Bormes* precludes the Board from relying on *Overall II* in importing the waiver of sovereign immunity from the separate TVA Act and its "sue or be sued" clause to hold that the TVA is not immune from an ERA whistleblower complaint, as the ERA's whistleblower protection provisions do not waive the Federal Government's sovereign immunity.

B. The TVA is an "employer" and Elliott is an "employee" subject to the ERA

It has long been established that TVA is subject to the ERA prohibitions without regard to sovereign immunity. Indeed, dating from at least 1983 in *DeFord v. Sec'y of Labor*, 700 F. 2d 281 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has upheld the determination that the TVA is an "employer" and that a TVA employee, such as Elliott, is considered an "employee" within the meaning of the ERA and therefore covered by the ERA's antidiscrimination employee whistleblower provisions.[13] The TVA also consistently did not dispute that it was an "employer" and that a TVA employee was an "employee" within the meaning of the ERA in cases arising before the Board up through 2001.[14] Consequently, as the Sixth Circuit Court of Appeals has applied the ERA's employee

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whistleblower claim would gravely interfere with the TVA's congressionally mandated power generation program; 3) Congress intended to use TVA's "sue and be sued" clause narrowly, as the clause is to be construed broadly. *Id*. [citations omitted].

[12] Specifically, the Supreme Court held that statutes that provide a "general" waiver of sovereign immunity "do not themselves 'create substantive rights,' but 'are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law,'" *Bormes*, 133 S. Ct. at 16-17 (*citing United States v. Navajo Nation*, 556 U.S. 287, 290 (2009)) ; *see also Bormes*, 133 S. Ct. at 18 (referring to statutes that merely provide "more general remedies," (citations omitted)), 19 (referring to statutes that merely provide "general" jurisdiction).

[13] *DeFord*, 700 F.2d at 286 (it was "not questioned that TVA is an employer subject to the Act."); *see also Bartlik v. U.S. Dep't of Labor*, 73 F.3d 100, 104 (6th 1996)(no dispute that the TVA is an employer subject to the ERA); *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1334 (6th Cir. 1995) (petitioners were "employees" and the TVA an "employer" within the meaning of the ERA and covered by the Act's antidiscrimination provisions).

[14] *Overall v. Tenn. Valley Auth.*(*Overall I*), ARB No. 98-111, ALJ No. 1997-ERA-053 (ARB Apr. 30, 2001); *Miller v. Tenn. Valley Auth.*, ARB No. 98-006, ALJ No. 1997-ERA-002 (ARB Sept. 29, 1998).

whistleblower provisions to the TVA and its employees since at least 1983 in *DeFord*, we also hold that the TVA is an "employer" under the ERA and that TVA employees such as Elliott can be treated as private sector employees under the ERA, as they are not subject to the civil service laws applicable to federal employees.[15]

C. The TVA's enabling statute authorizing the TVA to "sue and be sued" waives sovereign immunity

Even though since *DeFord*, the Sixth Circuit has presumed that TVA was not immune from administrative complaints arising out of the ERA whistleblower provisions, the TVA Act's enabling statute permitting the TVA to "sue and be sued" expressly waives the TVA's sovereign immunity.[16]

"Sovereign immunity shields the federal government and its agencies from suit absent a waiver by the government." *Mull*, ARB No. 09-107, slip op. at 4 (*citing Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999)); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988) ("Absent a waiver of sovereign immunity, the Federal Government is immune from suit."). A waiver of sovereign immunity is "strictly construed in favor of the United States." *Mull*, ARB No. 09-107, slip op. at 4 (*citing Idaho Dep't of Water Res. v. United States*, 122 Idaho 116 (1992), judgment rev'd on other grounds, 508 U.S. 1 (1993)); *McMahon v. United States*, 342 U.S. 25, 27 (1951); *United States v. Trident Seafoods Corp.*, 92 F.3d 855 (9th Cir. 1996). "Congress, however, has waived the sovereign immunity of certain federal entities from time of their inception by including in the enabling legislation provisions that they may sue and be sued." *Loeffler*, 486 U.S. at 554. The Supreme Court in *Federal Housing Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940), explained:

> [S]uch waivers by Congress of governmental immunity . . . should be liberally construed . . . . Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a

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15 *See* 16 U.S.C.A. § 831b(a).

16 16 U.S.C.A. § 831c(b).

> private enterprise under like circumstances would be. [Footnote omitted.]

See also Loeffler, 486 U.S. at 554-555 (*citing Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 517-518 (1984)); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 84-85 (1941). "Encompassed within this liberal-construction rule is the principle 'that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings.'" *Loeffler*, 486 U.S. at 555 (*quoting J.G. Menihan Corp.*, 312 U.S. at 85). For instance, in *Loeffler*, the Supreme Court observed that "[i]n accord with this approach, this Court has recognized that authorization of suits against federal entities engaged in commercial activities may amount to a waiver of sovereign immunity from awards of interest when such awards are an incident of suit." *Id.* at 555 (*citing Standard Oil Co. v. United States*, 267 U.S. 76, 79 (1925)) ("When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.").

Under these principles, the Supreme Court in *Loeffler* examined the Postal Service's sovereign immunity in the award of prejudgment interest in a Title VII employment discrimination action. 486 U.S. at 552-553. When Congress created the Postal Service in 1970, it empowered the service to "sue and be sued in its official name." 39 U.S.C.A. § 401(1) (West 2002). "This sue and be sued clause was a part of Congress' general design that the Postal Service 'be run more like a business than had its predecessor, the Post Office Department.'" *Id.* at 556 (*quoting Franchise Tax Bd. of Cal.*, 467 U.S. at 520). On examining the commercial nature of the Postal Service's operations, the Supreme Court stated as follows:

> By launching "the Postal Service into the commercial world," and including a sue and be sued clause in its charter, Congress has cast off the Service's "cloak of sovereignty" and given it the "status of a private commercial enterprise." It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards.

Loeffler, 486 U.S. at 556 (*quoting Library of Cong. v. Shaw*, 478 U.S. 310, 317, n. 5 (1986)).

The Supreme Court's holding in *Loeffler* is controlling here. Congress created the TVA in 1933 as a "wholly-owned corporate agency and instrumentality of the United States." *Hill v. United States Dep't of Labor*, 65 F.3d 1331, 1333 (6th Cir. 1995). The TVA's enabling statute is the TVA Act, 16 U.S.C.A. § 831 *et seq.*, which states that TVA was created for the purpose of "maintaining and operating the properties now owned by the United States . . . , in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins." 16 U.S.C.A. § 831. The TVA Act created for TVA certain corporate powers that include authority to "sue and be sued in its corporate name." 16 U.S.C.A. § 831c(b). The TVA Act further grants TVA other indicia of independence from the Executive Branch. The TVA's independence is underscored by its corporate form (16 U.S.C.A. § 831a); its maintenance of a separate legal staff (16 U.S.C.A. § 831b(a)); its removal of centralized corporate control

from Washington, D.C., (16 U.S.C.A. § 831g(a)); its discretionary rate-making authority (16 U.S.C.A. § 831a(g)(1)(K)-(L)); its authority to issue bonds, notes, and evidences of indebtedness to, among other things, finance power programs (16 U.S.C.A. § 831n-4); authority granted to a Board of Directors to approve compensation plans for the "chief executive officer and employees of the Corporation" (16 U.S.C.A. § 831a(i)(1)); and authority of the "chief executive officer to appoint, with advice and consent of the Board, and without regard to the provisions of the civil service laws applicable to officers and employees of the United States, such" employees that are "necessary for the transaction of the business of the Corporation" (16 U.S.C.A. § 831b(a)). *See also Tenn. Valley Auth. v. U.S. Envtl. Prot. Agency*, 278 F.3d 1184, 1192 (11th Cir. 2002) (stating that the TVA is "exempt[] from at least sixteen provisions of the Administrative Procedures Act," 49 Tenn. L. Rev. 699, 701 n.6 (Summer 1982)).

Congress' intent that the TVA be independent from the Executive Branch is furthered by its independent litigation authority that is well established and recognized by the courts. "Since its inception in 1933, TVA has represented itself in litigation by attorneys of its own choosing." *Tenn. Valley Auth.*, 278 F.3d at 1191. "[O]n three separate occasions, TVA conducted litigation over the objections of the Attorney General and in all three cases the courts found that TVA had independent litigating authority under the TVA Act." *Id*. (*citing Dean v. Herrington,* 668 F. Supp. 646 (E.D. Tenn. 1987)); *Cooper v. Tenn. Valley Auth.*, 723 F.2d 1560 (Fed. Cir. 1983); *Algernon Blair Indus. Contractors, Inc. v. Tenn. Valley Auth.*, 540 F. Supp. 551 (M.D. Ala. 1982).

The TVA has "enjoyed an independence possessed by perhaps no other agency." *Tenn. Valley Auth.*, 278 F.3d at 1192. Indeed, the TVA states on its website that "[a]ppropriations for the TVA power program ended in 1959, and appropriations for TVA's environmental stewardship and economic development activities were phased out by 1999."[17] "TVA is now fully self-financing, funding operations primarily through electricity sales and power system financings."[18] The TVA's independence is consistent with Congress' intent that the TVA be self-sustaining as a private operation. The original House Committee stated on TVA's inception:

> We are fully persuaded that the full success of the Tennessee Valley development project will depend more upon the ability, vision, and executive capacity of the members of the Board than upon legislative provisions. We have sought to set up a legislative framework, but not to encase it in a legislative straitjacket. We intend that the corporation shall have much of the essential freedom and elasticity of a private business corporation. We have indicated the course it shall take, but have not directed the particular steps it shall make.

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17 *See* http://www.tva.com/abouttva/history.htm.

18 *Id*.

House Conference Report No. 130, 73d Cong. 1st Sess. 19 (May 15, 1933). Just as the Supreme Court observed in *Loeffler*, "[b]y 'launching [the TVA] into the commercial world' and including a sue-and-be-sued clause in its charter, Congress has cast off [the TVA's] 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.'" 486 U.S. at 556 (citing *Shaw*, 478 U.S. at 317, n. 5).[19]

D. Congress' authorization for the TVA to "sue and be sued" distinguishes this case from United States v. Bormes

TVA argues that under *Bormes*, the TVA's sovereign immunity must be determined by the ERA. Under *Bormes*, the Supreme Court examined whether the Little Tucker Act, 28 U.S.C.A. § 1346(a)(2) (Thomson/West 2006), waives the sovereign immunity of the United States with respect to damages for actions brought under the Fair Credit Reporting Act (FCRA), 15 U.S.C.A. § 1681(b) (Thomson Reuters 2009). The Court held that the Little Tucker Act does not create substantive rights, but is a "jurisdictional provision[] that operate[s] to waive sovereign immunity for claims premised under other sources of law." *Bormes*, 133 S. Ct. at 16-17 (*citing United States v. Navajo Nation*, 556 U.S. 287, 290 (2009)). The Supreme Court in *Bormes* remanded the case to the court of appeals to determine whether the FCRA waives the federal government's immunity from damages under Section 1681(b). The TVA argues that *Bormes* directs that we look to the ERA to determine whether the TVA's sovereign immunity is waived. The language in the TVA Act, however, directs otherwise.

The TVA Act is the enabling statute that creates and sets out the scope of authority for the TVA; the Little Tucker Act was not characterized by the Supreme Court in *Bormes* as an

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[19] Moreover, while there are "exceptions to the liberal-construction rule that guides [the Supreme Court's] interpretation of the waiver of [the TVA's] immunity," those exceptions are not operative here. *See Loeffler*, 486 U.S. at 556. First, there is nothing to support that the ERA administrative whistleblower case Elliott brought is "not consistent with the statutory or constitutional scheme." *Burr*, 309 U.S. at 245. Elliott contends in his ERA complaint to OSHA that TVA retaliated against him for disclosing that his supervisor told him to falsely report that certain work-orders were closed. The TVA Act states that "[t]he Corporation shall at all times maintain complete and accurate books of accounts" and imposes annual auditing of the Corporation's transactions. 16 U.S.C.A. § 831g(b), 831h(c). Second, there is nothing in the TVA Act to support that the TVA's authority to sue and be sued should be restricted to "avoid grave interference with the performance of a government function." *Burr*, 309 U.S. at 245. Indeed, disclosure of fraud in the completion of work-orders, and certainly any reporting of safety concerns consistent with the ERA, would further the functioning of the TVA by ensuring accurate corporate reporting and safe TVA operations. *See Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112, 98-112A; ALJ No. 1986-ERA-023, slip op. at 4 (ARB Nov. 20, 1998) (The ERA is directed "to the development and safe utilization of energy resources and places," (*citing* 42 U.S.C.A. § 5801)). Finally, there is nothing in the TVA Act stating that "it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Burr*, 309 U.S. at 245. Indeed, unlike in *Loeffler*, where the Supreme Court found in the Postal Reorganization Act "several narrow and specific limitations on the operation of the sue-and-be-sued clause, *see* 39 U.S.C.A. § 409, none of which [were] applicable," 486 U.S. at 557, Congress set forth no limitation to the "sue and be sued" language set out in the TVA Act. 16 U.S.C.A. § 831c(b).

enabling statute for the United States government and indeed does not contain the "sue and be sued" authority that the TVA Act grants to the TVA. Unlike the statutory language of the Little Tucker Act, the TVA Act is an express waiver of sovereign immunity that is premised on its creation as an independent corporate-oriented entity. *See supra* at 6-7. While the Supreme Court held in *Bormes* that the United States' immunity is driven by the terms of the FRCA due to its "own self-executing remedial scheme," the Court reached this holding without disturbing its precedent in *Loeffler* that involved distinctly different statutory language; the "to sue and be sued" language in the Postal Service's enabling statute at issue in *Loeffler* is language that is identical to language in the TVA enabling statute. Nowhere in *Bormes* does the Supreme Court disturb the applicable holding in *Loeffler* that Congress' authorization for a congressionally-created commercial entity to "sue and be sued" constitutes a waiver of sovereign immunity. *Loeffler*, 486 U.S. at 556.

The TVA argues that the TVA Act's sue and be sued language has no bearing on the TVA's sovereign immunity with respect to the ERA, and that the ERA is the sole determinant of whether Elliott can bring his whistleblower complaint against the TVA. This argument is similar to that raised by the respondent in *Loeffler*, who argued that "the only waiver of sovereign immunity relevant to a Title VII suit against the Postal Service is the waiver of sovereign immunity found in Title VII itself" 486 U.S. at 559. The Court expressly rejected this argument:

> We reject the notion that Congress' silence when it creates a new federal entity, with regard to a cause of action that is generally unavailable to federal employees, can be construed as a limitation on the waiver of that entity's sovereign immunity effected by the inclusion of a sue and be sued clause.

486 U.S. at 561.

E. A holding that the TVA's enabling statute waives sovereign immunity for purposes of the ERA whistleblower complaint before the Department of Labor does not disturb ARB precedent

Finally, our holding in this case that the TVA Act's "sue and be sued" language waives immunity with respect to Elliott's ERA administrative whistleblower complaint, does not conflict with the Board's precedent in *Mull*. *Mull* involved an ERA whistleblower complaint filed against the Salisbury Veteran's Administration Medical Center (VAMC), a medical facility operated by the Department of Veteran's Affairs. *Mull*, ARB No. 09-107, slip op. at 2. The Board held that the Administrative Procedure Act, 5 U.S.C.A. § 702, did not waive VAMC's sovereign immunity from suit before the DOL. *Id.*, slip op. at 5. The Board further held that the ERA did not waive VAMC's sovereign immunity because 42 U.S.C.A. § 5851(a) did not contain an unequivocal expression of intent to waive the sovereign immunity of the Department of Veteran's Affairs. *See id*., slip op. at 9-11. However, unlike in *Mull*, the TVA Act contains an express waiver of immunity by virtue of the "sue and be sued" clause in its enabling statute – a statutory provision that is not contained in the enabling statute creating the Department of Veteran's Affairs. Thus, in light of the TVA Act's "sue and be sued" clause constituting a waiver of sovereign immunity, TVA employees are not considered to be federal employees for

the purposes of sovereign immunity as addressed in *Mull*, but are employees of "a hybrid agency that is structured to operate in many respects like a private corporation." *Overall II*, ARB No. 04-073, slip op. at 8.

CONCLUSION

The TVA is an "employer" and a TVA employee is an "employee" within the meaning of the ERA and therefore covered by the ERA's antidiscrimination employee whistleblower provisions. Accordingly, we **REMAND** Elliott's complaint for further proceedings.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge