U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

MARVIN B. HOBBY,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

ARB CASE NOS. 98-166
98-169

ALJ CASE NO. 90-ERA-30

DATE: April 20, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
Michael D. Kohn, Esq., Stephen M. Kohn, Esq., *Kohn, Kohn & Colapinto, P.C., Washington, D.C.*

For the Respondent:
James Joiner, Esq., Laura H. Kriteman, *Troutman Sanders LLP, Atlanta, Georgia*

ORDER DENYING STAY

In August 1995, the Secretary of Labor issued a decision finding that Respondent Georgia Power Co. discriminated against Complainant Marvin Hobby in 1989 in violation of the whistleblower protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (1988), when the company terminated Hobby's employment. The Secretary ordered Georgia Power to reinstate Hobby, and remanded the case to an administrative law judge to determine other damages. *Hobby v. Georgia Power Co.*, No. 90-ERA-30 (Sec'y Aug. 4, 1995) ("Sec'y 1995 Dec."). This Administrative Review Board[2/] recently issued a Final Decision and Order on Damages in

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[1/] This case has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2/] The Secretary of Labor issued final agency decisions in ERA whistleblower cases prior to 1996. In April 1996 the Secretary delegated this authority to the newly-created Administrative Review Board. (continued...)

which we again ordered Georgia Power to reinstate Hobby, along with back pay and other damages. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166/169, ALJ No. 90-ERA-30 (ARB Feb. 9, 2001) ("ARB 2001 Dec."). Georgia Power has appealed the case to United States Court of Appeals for the Eleventh Circuit, and has moved this Board to stay its decision pending appeal.

This Board utilizes a four-part test to determine whether to stay its own actions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting a stay. *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No.1989-ERA-22 (May 17, 2000); *Dutkiewicz v. Clean Harbors Environmental Svcs, Inc.*, ARB Case No. 97-090, ALJ No. 1995-STA-34 (ARB Sept. 23, 1997); *McCafferty v. Centerior Energy*, Case No. 96-ERA-6 (ARB Oct. 16, 1996). Georgia Power fails to meet any of these criteria and therefore its request must be denied.

1. Georgia Power is not likely to prevail on the merits.

In its Brief in Support of its Motion for Stay (Brief), Georgia Power argues that it is likely to prevail on appeal because the Secretary failed to give deference to the ALJ's credibility determinations when issuing his 1995 decision on liability, asserting that the Secretary erred because he "reversed ALJ Williams on critical credibility determinations based only on his reading of a cold record." Brief at 5-6. While we agree that an ALJ's demeanor-based credibility findings are entitled to great deference, it is clear that the Secretary's 1995 decision on liability is not premised on any disagreement with a demeanor-based credibility finding by ALJ Williams. Georgia Power's argument therefore is misleading and entirely without merit.

Hobby alleged that he was terminated from his job at Georgia Power in retaliation for two activities that he claimed were protected under the ERA: (1) objecting to alleged requests by Georgia Power's attorneys that he provide false testimony in the *Fuchko* whistleblower case (in January 1989), and (2) expressing concerns that Georgia Power was violating NRC regulations by delegating operating authority for its nuclear plants to the newly-created SONOPCO organization (in April 1989). We review separately the Secretary's disagreements with the ALJ's fact-finding regarding both of Hobby's protected activity claims.

The January 1989 pre-hearing meeting regarding the Fuchko case – The "Findings of Fact" section of the ALJ's 1991 Recommended Decision and Order is relatively brief, spanning only 5 pages. *Hobby v. Georgia Power Co.*, USDOL/OALJ Reporter (HTML), ALJ No. 90-ERA-30 at 44-49 (ALJ Nov. 8, 1991) ("ALJ 1991 Dec.").[3/] It is very clear in that section that the only ALJ fact finding that ***arguably*** could be viewed as demeanor-based is the ALJ's conclusion that Georgia

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[2/](...continued)
Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996). *See also* 29 C.F.R. §24.8 (2000).

[3/] References to the 1991 ALJ Dec. are to the opinion as published on the Department of Labor's World Wide Web site www.oalj.dol.gov, using the OALJ citation format found at www.oalj.dol.gov/cite.htm.

Power's attorneys did not ask Hobby to provide false testimony in the *Fuchko* case. *Id.* at 45 ("The memo in preparation for the Fuchko and Yunker trial occurred six days after the memo establishing NOCA was issued. I find that Complainant's testimony, in regard to his having been told by anybody involved in the proceeding that he would have to change any testimony that he would give in that matter to conform to that of Mr. McDonald, *to be totally unbelievable*." (Emphasis added.)). However, a close reading of this section of the ALJ's decision reveals that if we take the ALJ's language at face value, the ALJ does not reject Hobby's version of the *Fuchko*-related matter because of demeanor but instead because (a) the ALJ found Hobby's account illogical, and (b) the ALJ found the testimony of Georgia Power's witnesses more persuasive:

> I fail to see where Respondent's attorneys would even consider having the Complainant testify about the SONOPCO selection process as he was not involved in the same and any testimony he would have given relating thereto would have been nothing more than hearsay. The Complainant is unable to identify the attorney who purportedly approached him with such an incredible request. The two partner attorneys, who conducted the two sessions which the Complainant attended, have denied making such a statement and I consider them to be credible witnesses. There were two other associate attorneys present at the meeting, but the Complainant made no attempt to subpoena them to the hearing. Although he allegedly related the purported conversation to Mr. McHenry the next day, Mr. McHenry was not examined at the hearing in regard thereto and I decline to credit his affidavit, prepared with the Complainant's assistance 1 1/2 years after the purported event.

Id. While the ALJ affirmatively found Georgia Power's witnesses to be credible, and declined to credit an affidavit proved by McHenry, *nowhere did the ALJ conclude that Hobby was to be disbelieved based upon his demeanor at trial*. Thus to the extent that the ALJ decided to believe Georgia Power's version of events, it really was based on inferences that the ALJ drew from conflicting evidence in the record, and not on demeanor. The ALJ concluded from these inferences that Georgia Power's lawyers did not ask Hobby to provide false testimony on January 2, 1989, and that Hobby therefore did not engage in protected activity by refusing to provide false testimony himself in the *Fuchko* matter.

The Secretary had plenary power to review the ALJ's factual and legal conclusions in ERA whistleblower cases *de novo.* 5 U.S.C.A. § 557(b) (West 1996). Pursuant to this authority, on appeal the Secretary reviewed the record thoroughly and reached inferences different from the ALJ's inferences. The Secretary noted that Hobby:

> attended the pre-hearing session [with Georgia Power's lawyers in the *Fuchko* matter] as a prospective witness and in effect refused to testify to facts contained in the outline of proposed testimony which he believed was false. Contrary to Respondent's argument, the changes insisted upon by Complainant were not "consistent" with Respondent's defense. In the end, Complainant was not called to

> testify, and Respondent settled the case shortly after hearing began. These facts alone are sufficient to show that Complainant engaged in a protected refusal to cooperate in Respondent's defense.

Sec'y 1995 Dec. at 10-11 (record citations omitted). Specifically, the Secretary noted that:

> The outline [of Hobby's testimony that had been prepared by Georgia Power's attorneys] indicated that Complainant had urged [Georgia Power Sr. V.P.] McDonald to terminate Fuchko and Yunker in August 1988, after their protected activity, but that McDonald "vetoed" the request. Complainant maintained that he recommended that Fuchko and Yunker be reassigned or released in April 1988, before their protected activity; that McDonald refused; and that he [Hobby] had no involvement with Fuchko and Yunker after June 1, 1988.

Id. at 10 n.6 (record citations omitted).

With regard to Georgia Power's stay motion, the Secretary's rejection of the ALJ's finding with regard to the *Fuchko* pre-hearing event is significant in two key respects, each of which is sufficient to refute definitively Georgia Power's claim that it will prevail on appeal. First, as noted above, nowhere does the Secretary's disagreement with the ALJ's fact-finding on this issue involve overturning a demeanor-based credibility determination; therefore, in light of the Secretary's *de novo* review authority, the Secretary committed no legal error in drawing inferences from the record different from the ALJ and reaching a different conclusion. Second, although the Secretary concluded (contrary to the ALJ) that Hobby's January 1989 refusal to cooperate in the *Fuchko* matter was protected, the Secretary also concluded that the event did not play a role in Georgia Power's ultimate decision to terminate Hobby:

> [W]hile McDonald was uncooperative and, in fact, took steps that proved to be detrimental to Complainant's employment, I am not convinced that Complainant's January 2 protected activity motivated his actions. Furthermore, even if the managers who were directly involved in the termination decision were aware of Complainant's January 2 protected activity, there is insufficient proof that it motivated their decision.

Id. at 13. Thus, even assuming *arguendo* that the Secretary's disagreement with the ALJ could be viewed as rejecting an ALJ's demeanor-based credibility fact-finding, the Secretary's contrary conclusion with regard to the *Fuchko* matter has no decisional significance and cannot possibly support Georgia Power's argument on that it will prevail on appeal.

Hobby's April 27, 1989 memorandum about SONOPCO and NRC licensing concerns – Georgia Power's claim that the Secretary improperly reversed ALJ credibility findings with regard to the company's response to Hobby's April 1989 memo has even less vitality than its argument regarding the *Fuchko* matter. Both the ALJ and the Secretary found that the April 1989

memorandum raised protected concerns. The ALJ concluded that Georgia Power's decision to terminate Hobby's employment was not motivated by retaliation for the concerns raised in the April 1989 memo, crediting the testimony of Georgia Power witnesses Williams and Evans. ALJ 1991 Dec. at 48-49. However, the Secretary analyzed the record in much greater detail than the ALJ and concluded to the contrary, noting that "[t]he ALJ's findings ignore significant and conflicting evidence, and cannot be upheld." Sec'y 1995 Dec. at 18.

As with the *Fuchko* matter, the ALJ nowhere ties his finding of "no retaliation" as the result of the April 27 memorandum to a demeanor-based credibility determination. Instead, the ALJ reviewed the evidence and made his recommended determination that Hobby did not prove retaliation. On appeal, the Secretary similarly weighed the evidence as part of his *de novo* review – but examined the record in much greater detail than the ALJ – and reached a contrary conclusion. There is no legal error in this aspect of the Secretary's 1995 decision, and therefore no likelihood that Georgia Power will prevail in its appeal.[4/]

2. Georgia Power will not be irreparably harmed absent a stay.

Georgia Power asserts that it would suffer irreparable harm if Hobby is reinstated into its management ranks. The company raises again various arguments about Hobby's competence that the Board already has rejected in our decision on damages. ARB 2001 Dec. at 9-12. In addition, Georgia Power argues it would be inappropriate for Hobby to be given access to confidential and proprietary information when "his reinstatement is tenuous, at best." Brief at 7-11.

We disagree. In our February 2001 Final Decision and Order on Damages, we acknowledged that Georgia Power may experience some inconvenience by rehiring Hobby, but this inconvenience

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[4/] As an aside, we note specifically our disagreement with Georgia Power's exaggerated reaction to one statement from the Secretary's 1995 decision. In its brief in support of its stay motion, Georgia Power argues that the Secretary erred and proclaims that "Incredibly, Secretary Reich concluded that Mr. Williams '*inherently would have* included Complainant's assertions of wrongdoing and predictions of NRC intervention as a corollary to McDonald's lack of cooperation with NOCA.'" Georgia Power brief at 6, quoting Sec'y 1995 Dec. at 24 (emphasis supplied). What the Secretary really said was "[Sr. V.P.] Williams admitted that he, at least, informed them [*i.e.*, Georgia Power executives Dahlberg and Baker] of some of the concerns raised in the [Hobby] April 27 memo, which inherently would have included Complainant's accusations of wrongdoing and predictions of NRC intervention as a corollary to McDonald's lack of cooperation with NOCA."

In its full context, the Secretary's statement plainly is reasonable, albeit inartful in its use of the word "inherent." If McDonald informed Dahlberg fully about the contents of Hobby's April 27 memo, then the Secretary's statement plainly is correct because it follows that McDonald would have reported Hobby's concerns about his (McDonald's) alleged non-cooperation and possible licensure repercussions at the NRC. These concerns are clear on the face of the memorandum. Thus in suggesting that such a reporting was "inherent," the Secretary apparently assumed that McDonald's report to his superiors about Hobby's concerns would have been comprehensive and truthful, and would have included aspects of Hobby's April 27 memo that were critical of his own behavior. McDonald openly admitted making a report to his superiors about Hobby's April 27 memo; if McDonald withheld this critical information when making his report to Baker and Dahlberg, such an omission would raise significant doubts about *McDonald's* credibility.

is insufficient to justify a remedy other than reinstatement. With regard to the question of reinstatement during the period when Georgia Power's appeal is pending before the Court of Appeals, we are confident that a company as large and resourceful as Georgia Power will find ways to reintegrate Hobby into its management workforce without compromising sensitive matters. For example, the record shows that the company repeatedly has suggested that Hobby will require retraining to come "up to speed" with a changed electric utility industry, and the record also shows that there are various mechanisms routinely employed by Georgia Power (most notably, extensive classroom retraining) to ensure that its managers will have the knowledge needed to perform their duties in new assignments. It might be appropriate to begin retraining Hobby immediately. In addition, we anticipate that there would be a variety of other means by which Georgia Power could productively use Hobby's skills while his case is being litigated.

We note also that our order that Hobby be reinstated immediately is strictly in accordance with the mandates of the ERA, which provides that:

> If . . . the Secretary determines that a violation . . . has occurred, the Secretary shall order the person who committed such violation to. . . . (ii) reinstate the complainant to his former position . . . .

42 U.S.C. §5851(b)(2)(B) (1988).[5/] Furthermore, Congress plainly contemplated that reinstatement ordinarily will be effected immediately upon the Secretary's (or the ARB's) issuing a Final Order, inasmuch as the statute declares that "[t]he commencement of . . . [an appeal] shall not, unless ordered by a court, operate as a stay of the Secretary's order." 42 U.S.C. §5851(c)(1).

For these reasons, we find Georgia Power's argument that it will be irreparably harmed absent a stay to be unpersuasive.

3. Hobby will be further harmed if a stay is granted.

We have noted that delay in reinstatement can further stigmatize a complainant when that complainant finds himself working in a position with fewer responsibilities or lower pay. *See, e.g., Jones v. EG&G Defense Materials, Inc.*, ARB Case No. 97-129, ALJ No. 1995-CAA-3, slip op. at 14 (ARB Dec. 24, 1998). Additionally, a stay would mean that Hobby must wait even longer to receive his back pay and other damages. It has been more than 10 years since Georgia Power discharged Hobby, and more than 5 years since the Secretary issued his Decision ordering Hobby's reinstatement. Hobby continues to be harmed seriously by the continuing delay in being reinstated, and we find that this factor too militates against Georgia Power's motion.

[5/] Hobby's complaint was filed in 1990. The ERA was amended in 1992; however, the language relating to reinstatement is the same in both the pre- and post-1992 versions of the statute.

4. A stay is contrary to the public interest.

In addition to protecting the public, one of the purposes of the whistleblower provision of the ERA is to restore a successful complainant to the status he enjoyed prior to the respondent's statutory violation. *See, e.g., Jones, supra,* slip op. at 14. We disagree with Georgia Power's contention that this principle should not apply to senior managers, whose relationship with an employer may differ from that of lower level personnel. As we noted in our Final Decision, there is no reason why senior managers should receive less protection under the ERA than workers who occupy lower rungs on the corporate ladder. ARB 2001 Dec. at 10.

The motion for stay pending judicial review is therefore **DENIED.**

SO ORDERED.[6/]

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

[6/] Board Member E. Cooper Brown did not participate in the consideration of this case.