In the Matter of:

ANN P. HARRIS, **ARB CASE NO. 99-004**

COMPLAINANT, **ALJ CASE NOS. 97-ERA-26**
97-ERA-50

v. **DATE: November 29, 2000**

TENNESSEE VALLEY AUTHORITY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lynn Bernabei, Esq., Michael C. Subit, Esq., *Bernabei & Katz, Washington, D.C.*

For the Respondent:
Edward S. Cristenbury, Esq., Thomas F. Fine, Esq., Brent R. Marquand, Esq., Linda J. Sales-Long, Esq., Tennessee Valley Authority, *Knoxville, Tennessee*

ORDER VACATING ORDERS AND REMANDING CASE

This case presents the question whether under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. §5851 (1994), a Department of Labor Administrative Law Judge has jurisdiction to award costs, including attorneys' fees, where the parties have entered into a no-fault settlement agreement. Complainant Ann P. Harris (Harris) filed a complaint against Respondent Tennessee Valley Authority (TVA) under the ERA. Following assignment of the case to an ALJ, Harris and TVA signed a settlement agreement which provided, among other things, that TVA would "be responsible for payment of Ms. Harris's attorneys' fees and expenses in an amount to be determined" by the ALJ. On joint motion of the parties, the ALJ approved the settlement and dismissed the case. Following briefing on the attorneys' fees issue, the ALJ then issued an order recommending the award of attorneys' fees in the amount of $217,852 and expenses in the amount of $39,016.54. For the

reasons discussed below we **VACATE** the ALJ's recommended orders and **REMAND** the case to the ALJ for further proceedings.

BACKGROUND

On October 7, 1996, Harris filed an ERA discrimination complaint claiming that TVA unlawfully had: failed to give her an 8% salary increase; reassigned her to a job which was below her level; and terminated her employment through a reduction in force (RIF). The Department of Labor's Wage and Hour Division investigated and concluded that Harris' complaint could not be sustained. Harris then requested a formal hearing, which was docketed as Case No. 97-ERA-26 and assigned to an ALJ.

On March 19, 1997, Harris filed a "supplemental complaint of discrimination" concerning events "that occurred subsequent to, but as a part of the same continuing course of discriminatory conduct as, the matters raised in [the] October 7, 1996, complaint." Harris claimed that: she was denied performance reviews for fiscal years 1995 and 1996; a TVA attorney had made a negative comment about her; TVA had not paid her the full Performance Incentive Plan cash award to which she believed she was entitled; a TVA official had prevented her from representing another employee in an unrelated sexual harassment proceeding; and TVA had not paid Harris the full bonus to which she believed she was entitled for fiscal year 1996. The Department of Labor's Occupational Safety and Health Administration investigated Harris' supplemental complaint and found that it had no merit.[1/] Harris requested another hearing, which was docketed as Case No. 97-ERA-50 and assigned to the same ALJ who had been assigned Case No. 97-ERA-26.

The cases were set for a three-day hearing, and on the first day the ALJ recessed the hearing so that the parties could engage in settlement negotiations. On the third day, June 25, 1998, the parties submitted to the ALJ a settlement agreement and a Recommended Order of Dismissal which were signed by all parties. The agreement provided that TVA would pay "up to $180,000 for an annuity" for Harris, and that Harris would not be "reemployed or reinstated by TVA." The settlement also provided:

> 7. TVA shall be responsible for payment of Ms. Harris's attorneys' fees and expenses in an amount to be determined by [the ALJ]. The parties retain their rights to pursue all legal remedies including appeals following [the ALJ's] decision. Ms. Harris shall have 30 days from the execution of this agreement to submit a petition for attorneys' fees and expenses to ALJ Teitler. TVA

[1/] Effective for all complaints received on or after February 2, 1997, the Secretary of Labor delegated the authority to investigate complaints under the ERA to the Assistant Secretary of the Occupational Safety and Health Administration. Secretary's Order 6-96 (62 FR 11, Jan. 2, 1997, as corrected by 62 FR 8085, Feb. 21, 1997).

> shall have 20 days from its receipt by telecopies of the petition to file a response. The ALJ shall make every reasonable effort to decide the petition for attorneys' fees and expenses no later than 30 days after the filing of TVA's response.
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> 8. TVA is not by this agreement or otherwise admitting any violation of the ERA or any other law or regulations, or any liability to Ms. Harris, or that she has incurred any damages arising out of the subject matter of her DOL complaints, or otherwise.

The ALJ signed the Recommended Order of Dismissal but did not serve it on the parties. Neither Harris nor TVA – both of whom had urged the ALJ to sign the order of dismissal – filed a petition for review of that order.

Three days later, on June 29, 1998, the ALJ issued an Order granting Harris the opportunity to file an application for fees and costs. Harris then petitioned for an award of fees and costs totaling approximately $275,000. In support of the petition Harris argued:

> The Energy Reorganization Act of 1974 provides that, where the Complainant has prevailed, the Secretary "shall assess . . . a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant, for, or in connection with, the bringing of the complaint." 42 U.S.C. §5851(b)(2)(B). Given the very substantial settlement Ms. Harris obtained, it [is] unquestionable that Ms. Harris has prevailed. Therefore, she is entitled to an award of <u>all</u> reasonable attorneys' fees, costs and expenses she incurred in connection with this case, and such an award is mandatory.

Complainant Ann P. Harris' Application for Attorneys' Fees, Costs, and Expenses at 9 (emphasis in original). TVA opposed the fee petition, arguing:

> In this case, the Secretary has not determined that TVA violated [ERA] Section 211(a). Thus, the Secretary has no authority to issue an order under Section 211(b)(2)(B) directing TVA to provide any relief to complainant. Further, since there is no basis to issue an order under Section 211(b)(2)(B), the Secretary has no authority under the ERA to assess attorneys' fees and costs in favor of complainant. The ERA grants the Secretary no other authority to award attorneys' fees and costs.

Response to Application for Attorneys' Fees, Costs, and Expenses at 4. TVA also urged several arguments on the merits of the request.

On October 13, 1998, the ALJ issued a Supplemental Decision and Order Granting Attorney Fees (SD&O). The ALJ concluded that, because Harris obtained a larger settlement than TVA had initially offered, she was a "prevailing party" as defined by the Supreme Court in the case of *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) ("prevailing party" for purposes of Civil Rights Attorney's Fees Awards Act is one who succeeds on any significant issue in litigation which achieves some of the benefits the parties sought in bringing the suit). The ALJ concluded that, as a "prevailing party," Harris was entitled to reasonable attorneys' fees and costs and determined that Harris' attorneys were entitled to fees of $217,852 and expenses of $26,787.38. SD&O at 5. The ALJ also found that Harris was entitled to expenses of $12,229.16.

TVA filed a timely petition for review of the Supplemental Decision with this Board. We have jurisdiction pursuant to 42 U.S.C. §5851(b)(2)(A) and 29 C.F.R. §24.8 (2000). On appeal TVA argues that the ALJ – and by extension this Board – does not have the authority to make **any** award of attorneys' fees under the circumstances of this case. Alternatively TVA argues that the award should be reduced.

DISCUSSION

This case raises a significant issue: whether under the ERA an ALJ may make an award of attorneys' fees where – because the parties entered into a no-fault settlement – there has been no determination "that a violation of [the ERA whistleblower anti-retaliation provision] has occurred." 42 U.S.C. §5841(b)(2)(B). However, this issue arises in a most perplexing and troubling way: in its settlement with Harris, TVA explicitly agreed that it "shall be responsible for payment of Ms. Harris's attorneys' fees and expenses in an amount to be determined by [the ALJ]." Settlement at ¶7. After first agreeing to pay attorneys' fees, TVA then challenged the ALJ's jurisdiction to make **any** attorneys' fees award.

As we discuss below, we conclude that the language of the ERA provision precludes an attorneys' fees award where there has been no determination of a violation and where the parties by settlement agreement have not expressly provided for payment of fees and costs. However, because this conclusion also makes it impossible for TVA to pay Harris' attorneys' fees and costs in the manner contemplated by paragraph 7 of the settlement agreement, we conclude that the settlement is void. Therefore, we remand the case to the ALJ for further proceedings consistent with this decision.

I. The ERA does not provide for an award of attorneys' fees where the parties have entered into a no-fault settlement, and the parties may not by agreement vest jurisdiction in the ALJ and the Board to award attorneys' fees absent statutory authorization.

We begin our discussion of this issue with the language of ERA §211(b), which states in relevant part:

> Within ninety days of the receipt of [an ERA whistleblower] 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 and the person alleged to have committed such violation, 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. . . .
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> (B) If, in response to [an ERA whistleblower complaint], the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, 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) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.*

42 U.S.C. §5851(b)(2)(A) and (B)(emphasis added).[2/] TVA argues that by its explicit terms, the ERA only provides for attorneys' fees where two conditions have been met: 1) "the Secretary

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[2/] For reasons that are not apparent, the ALJ purported to award attorneys' fees and costs in this case pursuant to the Equal Access to Justice Act [EAJA] and its implementing U.S. Department of Labor regulations. 5 U.S.C. §504; 29 C.F.R. §§16.101-16.308 (1998). And the ALJ determined the amount of the award by resorting to regulations which are applicable to cases brought under the LHWCA. Any award of attorneys' fees to the complainant in this case must be pursuant to the ERA attorneys' fees provision; neither EAJA nor the LHWCA regulations are applicable. *See* 29 C.F.R. §16.104 (listing Labor Department proceedings to which EAJA applies); 20 C.F.R. §702.101 (scope of the LHWCA regulations).

has determin[ed] that a violation of [the whistleblower provision] has occurred; and 2) the Secretary has "ordered the person who committed such violation" to provide relief, such as back pay and compensatory damages. On the other hand Harris argues that, although the ERA mandates that the Secretary **shall** award attorneys' fees where she has determined that a violation has occurred and has ordered relief, the Secretary **may** award attorneys' fees to a "prevailing party" even where there had been no determination of a violation. We conclude that TVA's argument is more consistent with the ERA's statutory scheme.

Any discussion regarding the scope of a statutory attorneys' fees provision such as that contained in the ERA must begin with the "American Rule." Under the American Rule parties to litigation ordinarily bear their own costs, including attorneys' fees. *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y,* 421 U.S. 240, 247 (1975). In *Alyeska* the Court noted that Congress "while fully recognizing and accepting the general rule, [has made] specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Alyeska*, 421 U.S. at 260. The Court emphasized the diversity of statutory attorneys' fees provisions: "These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves." *Id.* at 260-61. Thus, "Congress in its specific statutory authorizations of fee shifting has in some instances provided that either party could be given such an award depending upon the outcome of the litigation and the court's discretion, . . . while in others it has specified that only one of the litigants can be awarded fees." *Id.* at 264 n.37. And "Congress has specifically provided in the statutes allowing awards of fees whether such awards are mandatory under particular conditions or whether the court's discretion governs." *Id.* at 264 n.38. The Court concluded that "[u]nder this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id.* at 262. Subsequent Supreme Court decisions have emphasized the need for explicit statutory authorization for the award of attorneys' fees. Thus, in *Runyon v. McCrary*, 427 U.S. 160, 185 (1976), decided a year after *Aleyska*, the Court held that "the law of the United States, but for a few well-recognized exceptions not present in these cases, has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." *See also Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters*, 456 U.S. 717, 724-25 (1982); *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-15 (1994).

With these principles in mind, we analyze the attorneys' fees provision of ERA §211(b)(2)(B). This provision does not, on its face, authorize the award of attorneys' fees where there has been a no-fault settlement of an ERA complaint. The provision authorizes an award of attorneys' fees where "an order is issued under this paragraph . . .," and provides that the attorneys' fees shall be "assess[ed] against the person *against whom the order is issued* . . . ." "Against" means "in opposition to" or "contrary to." Webster's New World Dictionary 24 (3d ed. 1988). The ordinary, common meaning of this provision is that attorneys' fees shall be awarded where there has been a determination that respondent has violated the ERA anti-retaliation provision, and where there has been an order that respondent provide relief.

Harris argues, however, that although the provision **requires** the award of attorneys' fees where there has been a determination of a violation, it **permits** an award of attorneys' fees in other circumstances:

> TVA has pointed to nothing in the ERA that restricts the power of the Secretary to award fees only to cases where there has been an actual finding of discrimination. The statute provides that [the] Secretary shall award fees where there has been an order issued under 42 U.S.C. §5851(b)(2)(B). It does not provide the Secretary shall only award fees where there has been such an order. Nor does the statute suggest that the Secretary may not award fees where a case has been resolved by settlement under 42 U.S.C. §5851(b)(2)(A). The only reasonable reading of the ERA is that where a case has been settled and no order under section 5851(b)(2)(B) has been issued, the Secretary may in his discretion award the complainant her fees, costs, and expenses, but is not required to do so.

Reply Brief of Complainant Ann P. Harris at 10-11 (emphasis in original). In short, Harris argues that the attorneys' fees provision implicitly encompasses a right to attorneys' fees when a complainant has "prevailed," even if the legal victory comes in the form of a no-fault settlement. In Harris' view, the Secretary (and this Board) should exercise discretion in this case and award attorneys' fees to Harris because the settlement shows that she "prevailed" in her complaint, even though there has been no admission of liability by TVA, nor a finding of liability by the ALJ.[3/]

But *Alyeska* teaches that in the absence of express statutory authority to award attorneys' fees, the American Rule prevails (*i.e.*, parties bear their own costs). Therefore, in order to award attorneys' fees in this case, we would have to conclude that the ERA expressly authorizes a fee

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[3/] Under statutes that allow an award of attorneys' fees to prevailing parties, it is well-established that a party that agrees to settle a case may be deemed to "prevail." In its analysis of the Civil Rights Attorney's Fees Awards Act of 1976, as amended, 42 U.S.C. §1988 (which authorizes courts discretion to award attorneys' fees to the prevailing party in certain civil rights actions), the Supreme Court observed that:

> The fact that [the plaintiff] . . . prevailed through a settlement rather than through litigation does not weaken her claim to [attorneys'] fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."

Maher v. Gagne, 448 U.S. 122, 129 (1980).

award when there has been a no-fault settlement agreement. Applying traditional tools of statutory construction, we cannot find such authority.

We begin with the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Summit Valley Indus., Inc.*, 456 U.S. at 722, *quoting Perrin v. United States*, 444 U.S. 37, 42 (1979). The ERA states that the Secretary may award costs and expenses to a complainant "[i]f an order is issued" finding that discrimination has occurred. The ordinary, common meaning of the ERA's fee provision is clear: attorneys' fees are to be awarded by the ALJ in one circumstance – where there has been a determination that there has been a violation of the ERA whistleblower provision.[4/]

Moreover, it is clear that Congress knows how to enact a "prevailing party" attorneys' fees provision when it has that in mind. Indeed, on occasion Congress has enacted different attorneys' fees provisions in the same statute. Thus, for example, the attorneys' fees provision of the Clean Air Act (CAA) that applies to administrative proceedings before the EPA (and follow-on judicial review) states that "[i]n any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines that such award is appropriate*." 42 U.S.C. §7607 (emphasis added). Virtually identical language applies to the CAA's citizen suit provision, and apparently would authorize a fee award to a "prevailing party" at the discretion of the court. But the whistleblower protection provision of the CAA does not use this broad authorizing language, but instead contains more restrictive text limiting the award of attorneys' fees to those cases in which the Secretary has issued a finding against the respondent – text virtually identical to the ERA provision at issue in this case. *See* 42 U.S.C. §7622(b)(2)(B). Likewise, the citizen suit provision of the Solid Waste Disposal Act (SWDA) provides that the court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party. . . ." 42 U.S.C. §6972(e). However, the whistleblower protection

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[4/] The ERA's legislative history is not particularly instructive, but lends some support to our reading of the provision. Thus, the Senate Committee Report summarizes the whistleblower protection provision as follows:

> If the Secretary should find a violation, he would issue orders to abate it, including, where appropriate, the rehiring of the employee to his former position with back pay. Also, the person committing the violation could be assessed the costs incurred by the employee to obtain redress.
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> This provision would safeguard the rights of employees, but it should not encourage employees to frivolously allege violations since the employee would have to pay the cost of the proceedings unless the violation is proved.

S. Rep. No. 95-848, 95th Cong. 2d Sess. 29-30 (1978).

provision of the SWDA provides that "whenever an order is issued under this section to abate such violation" a reasonable attorneys' fee "shall be assessed against the person committing such violation." 42 U.S.C. §6971(c). The citizen suit provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) also provides for the award of costs including attorneys' fees to the "prevailing or substantially prevailing party (42 U.S.C. §9659(f)), while CERCLA's whistleblower protection provision is identical to the SWDA whistleblower provision. 42 U.S.C. §9610(c). We do not think we should approach these legislative language choices lightly. *See, e.g., Eastern Associated Coal Corp. v. Federal Mine Safety and Health Review Comm.,* 815 F.2d 639 (4th Cir. 1987) (refusing to construe an explicit grant of the right to attorneys' fees in one subsection of the Mine Safety and Health Act as impliedly granting the right to attorneys' fees in another subsection).

Equally important, we do not find any persuasive policy justification for inferring a right to an attorneys' fee award under the circumstances presented. The broader purposes of the ERA whistleblower provision – to make legitimate victims of unlawful employer retaliation whole, and thus indirectly to encourage employees to expose violations of the underlying laws – are served if the ERA provision is given its obvious meaning. A complainant who brings an action which results in a finding of a violation "shall" be awarded attorneys' fees. Of course, a complainant who brings an action and then enters into a no-fault settlement agreement is free to negotiate a settlement that includes her attorneys' fees as well.[5/] However where a complainant enters into a no-fault settlement of his or her case **without** at the same time settling the attorneys' fees issue would he or she be precluded from an award of attorneys' fees. We cannot determine – and Harris has not proposed – any overarching purpose in the ERA which would warrant our expansion of the attorneys' fees provision to include this category of cases not expressly encompassed by the language of the provision. Congress had the authority, had it so desired, to provide for attorneys' fees for all prevailing complainants; we cannot find support for the proposition that it has done so here.

We now turn to the question whether, in spite of the fact that there is no statutory authority for an award of attorneys' fees where the parties have entered into a no-fault settlement of an ERA claim, the parties can vest that authority by agreement. We think not. It is black

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[5/] The Secretary and this Board have routinely and regularly approved settlements which include the payment of attorneys' fees. *See, e.g., Pillow v. Bechtel Constr. Co.,* Case No. 87-ERA-35, Sec'y Final Decision and Order (Aug. 16, 1994) (settlement agreement including payment of attorneys' fees approved without finding of ERA violation); *accord Alcala v. Hanford Envtl. Health Found.*, ARB Case No. 98-029, ALJ Case No. 97-ERA-55 (Dec. 16, 1997); *Jones v. Pac. Gas & Elec. Co.*, ARB Case No. 98-014, ALJ Case No. 97-ERA-3 (Nov. 4, 1997); *James v. Pritts-McEnany Roofing, Inc.,* ARB Case No. 96-184, ALJ Case No. 96-ERA-5 (Feb. 11, 1997); *Bracken v. Entergy Operations, Inc.,* ARB Case No. 97-021, ALJ Case No. 96-ERA-18 (Jan. 17, 1997); *Norway v. Niagra Mohawk Power Corp.,* ARB Case No. 97-010, ALJ Case No. 95-ERA-5 (Nov. 22, 1996); *Edzell v. TVA,* ARB Case No. 96-142, ALJ Case No. 95-ERA-39 (Aug. 21, 1996); *Thompson v. Houston Lighting & Pow. Co.,* Case Nos. 93-ERA-2, 95-ERA-48, Sec'y Final Order Approving Settlement (Dec. 4, 1995). *See also Fuchko and Yunker v. Georgia Power Co.,* Case Nos. 89-ERA-9, 89-ERA-10, Sec'y Order (June 13, 1994) (withholding approval of settlement until parties submitted the amount of attorneys' fees to be paid).

letter law that an administrative adjudicatory body may only exercise authority over matters in its jurisdiction. The parties cannot by agreement augment that jurisdiction. *See Williams v. Metzler,* 132 F.3d 937, 942 (3d Cir. 1997) (the parties to an ERA settlement cannot confer authority to perform a function not authorized by the statute).

II. Because of the impossibility of performance of the attorneys' fees provision, the settlement agreement is void.

Harris and TVA agreed that "TVA shall be responsible for payment of Ms. Harris's attorneys' fees and expenses in an amount to be determined by [the DOL ALJ]." It appears that the parties were unable to agree on the amount of fees at the time the settlement agreement was drafted but did not want this lack of agreement to prevent settlement of Harris' complaint. It is therefore understandable – if ill-advised in hindsight – that the parties sought to diffuse the issue by attempting to vest the ALJ with authority to determine later the amount of the fees award. However, in light of the amount of fees potentially at stake in this case we find it implausible that Harris and TVA intended to enter into an agreement regarding fees which could result in no award whatsoever.[6/]

TVA now argues that it cannot keep its promise to "be responsible for the payment of Ms. Harris's attorneys' fees and expenses in an amount to be determined by [the ALJ]," because the ALJ lacked jurisdiction to make the award. In so doing, TVA pleads something akin to an impossibility defense to its obligation under paragraph 7 of the settlement agreement. "[A] party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable." *Opera Co. of Boston v. Wolf Trap Found. for the Performing Arts*, 817 F.2d 1094, 1101 (4th Cir. 1987). "[W]hen an unexpected or non-bargained-for event makes performance so vitally different from that which the parties originally contemplated, [ ] the change in performance can be said to have vitiated the consent of the parties." *Wheelabrator Envirotech Operating Servs., Inc. v. Massachusetts Laborers District Council Local 1144,* 88 F.3d 40, 45 (1st Cir. 1996).

We are persuaded that neither of the parties anticipated at the time of settlement that TVA would be precluded from paying the ALJ's award of Harris' attorneys' fees because the judge lacked jurisdiction to make the award. Payment of the award has thus been rendered impossible. The equities therefore require us to rule that the settlement agreement is void, vacate the order approving that agreement, vacate the ALJ's recommended award of attorneys' fees and

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[6/] TVA raised its jurisdictional defense to the fees award within two months of the settlement – which might lead one to question whether TVA intended to raise that defense at the time it entered into the settlement. We prefer to take a more charitable view of events and assume that it did not occur to TVA that the ALJ lacked jurisdiction to make the fees award until after the settlement had been signed.

expenses, and remand the matter to the ALJ for further proceedings consistent with this decision.[7/] On remand the parties are free to settle the case, including the attorneys' fees issue, or to litigate to a decision on the merits.[8/] Should the ALJ issue an order determining that there has been a violation of the ERA, the ALJ shall also make an award of attorneys' fees and expenses reasonably incurred by Harris.[9/]

[7/] Although not essential to our disposition of this case, we note also that TVA repeatedly has questioned whether the ALJ ever approved the settlement agreement, as required by 42 U.S.C. §5851(b)(2)(A). In its initial brief to this Board, TVA states that it "has never received any order which would show that the ALJ had reviewed and approved the settlement. It is our understanding that the ERA requires that a complaint may not be dismissed on the basis of a settlement 'unless the Secretary finds that the settlement is fair, adequate and reasonable.'" Respondent Tennessee Valley Authority's Brief at 2 n. 2 (citation omitted). This point is reiterated in TVA's rebuttal brief: "We pointed out in our main brief. . . that an award of fees was premature since there was no order of dismissal." Rebuttal Brief at 2 n. 1.

Based on the record before us, it appears that the ALJ signed an Order of Dismissal in the presence of the parties in open court on June 25, 1998, and that the Order had been drafted by TVA itself. We therefore are not persuaded that TVA credibly can claim that it has "never received an order" from the ALJ; even if the ALJ failed subsequently to serve the parties with a copy of the Order, none of the parties could claim to be unaware that the Order had been entered. But if we were to accept TVA's assertion, TVA's argument would simply reinforce our conclusion that the ALJ's approval of the settlement (and his dismissal of the case) was defective and lacked finality, and that the case therefore is still alive.

[8/] Of course the parties may avail themselves of all the tools available for resolution of this case, including the use of a settlement judge. *See* 29 C.F.R. §18.9. TVA should bear in mind that the amount of attorneys' fees for which it could become liable can only increase. These fees would include compensation for time spent responding to TVA's appeal of the ALJ's S.D.&O.

[9/] We note that we are not ordering Harris to repay the amount TVA paid to her in conjunction with the voided settlement agreement pending the outcome of this case. *See, e.g., Macktal v. Brown and Root*, Case No. 86-ERA-23, Secretary's Order, slip op. at 4 (July 11, 1995) (no authority in ERA to order restitution of monies paid under partially performed settlement agreement).

CONCLUSION

We conclude that the settlement agreement between Harris and TVA is void, **VACATE** the order approving that agreement, **VACATE** the ALJ's recommended award of attorneys' fees and expenses, and **REMAND** the case to the ALJ for further proceedings consistent with this decision.

SO ORDERED

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member