In the Matter of:

RUDRANATH TALUKDAR and HARJINDER VIRDEE,	**ARB CASE NO. 04-100**
PROSECUTING PARTIES,	**ALJ CASE NO. 02-LCA-25**
v.	**DATE: January 31, 2007**

U.S. DEPARTMENT OF VETERANS AFFAIRS, MEDICAL AND REGIONAL OFFICE CENTER, FARGO, NORTH DAKOTA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Prosecuting Parties*:**
Beth E. Bertelson and Andrea R. Gesellchen, *Bertelson Law Offices, P.A.*, Minneapolis, Minnesota.

For the Respondent:
Alan Duppler, *Department of Veterans Affairs, Office of Regional Counsel,* Fargo, North Dakota.

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Immigration and Nationality Act, as amended (INA), and its implementing regulations. 8 U.S.C.A. § 1182(n)(2)(C)(iv) (West 2007); 20 C.F.R. § 655.801 (2006). Doctors Rudranath Talukdar and Harjinder Virdee brought a complaint against their former employer, the Department of Veterans Affairs' Medical Center and Regional Office in Fargo, North

Dakota (VAMC). A Department of Labor (DOL) Administrative Law Judge (ALJ) determined that VAMC had discriminated against Talukdar and Virdee by ending their employment because they had cooperated in a DOL investigation. VAMC has appealed. We affirm the ALJ's determination with regard to Talukdar's claim.

Virdee settled her claim in April 2006. VAMC has submitted a Stipulation for Dismissal seeking dismissal of VAMC's appeal with regard to Virdee's claim. The Stipulation is signed by both Virdee and VAMC. Although the INA and its implementing regulations contain no provision regarding settlement-based dismissal, we have authority to dismiss VAMC's appeal with regard to Virdee.

The Administrative Procedure Act (APA) provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision." 5 U.S.C.A. § 557(b) (West 2007). Before providing the initial decision in an INA case, the ALJ may "permit negotiation of a settlement" and may dismiss the case if the parties "[n]otify the [ALJ] that the parties have reached a full settlement and have agreed to dismissal of the action." 29 C.F.R. § 18.9(a), (c)(2) (West 2007). Because the ALJ may dismiss a settled case, and we have "all the powers" of the ALJ, we may dismiss VAMC's appeal with regard to Virdee's claim if the settlement between VAMC and Virdee is a full settlement and if VAMC and Virdee have agreed to dismiss VAMC's appeal.

VAMC and Virdee have represented that their settlement is a full settlement, which resolves all outstanding issues between them. Further, VAMC and Virdee have agreed that the "action" should "be dismissed." Stipulation for Dismissal, at 1. Therefore, VAMC's settlement with Virdee meets the standards set forth in 29 C.F.R. § 18.9(c)(2), and we may dismiss VAMC's appeal with regard to Virdee's claim.

Our authority to dismiss this portion of VAMC's appeal is discretionary, rather than mandatory. But we believe such dismissal is appropriate here, for two reasons. First, the settlement has rendered this portion of VAMC's appeal moot. *See U.S. Bancorp Mortg. Co., v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) (recognizing "mootness by reason of settlement"); *see also* Martin H. Redish & Adrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 592 (2006) ("There are a number of cases in which the Court has dismissed a suit as nonadversarial due to settlement while appeal was pending."). We and our predecessors frequently have recognized not only our authority, but also our preference, for dismissing a case or claim that has become moot. *See, e.g., Lane v. Roadway Express, Inc.*, ARB No. 03-006, ALJ No. 02-STA-38, slip op. at 3 (ARB Feb. 27, 2004) ("Although administrative proceedings are not bound by the constitutional requirement of a 'case or controversy,' the Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot."); *Weeks Marine, Inc.*, No. 99-021, slip op. at 2 (ARB Jan. 29, 1999) ("[W]e are under no obligation to render decisions in cases where no relief can be granted."). Although we are not required to dismiss on grounds of mootness, doing so is our preferred option absent exceptional policy considerations. *See*,

e.g., *Canteen Food & Vending Serv.*, No. 92-34, slip op at 2 (BSCA Nov. 30, 1992) (dismissing petition as moot); *PHCC Mech. Contractors of Fairbanks, Inc.*, No. 86-20, slip op. at 3 (WAB Nov. 26, 1986) ("The Board prefers to have the issue presented in an actual case or controversy."); *McGee Creek Project*, Nos. 81-11 and 82-01, slip op at 9 (WAB Dec. 24, 1982) ("The Board does not intend to adopt the procedure of . . . issuing a decision that is merely advisory. . . . The Board prefers to have the issue presented in a live case or controversy.")

Second, the INA and its implementing regulations contain no suggestion that we should refrain from exercising our dismissal authority in the present situation. "If Congress had intended a drastic juridical rule disallowing" dismissal due to settlement, then "Congress would have stated it." *Nolder v. Raymond Kaiser Eng'rs, Inc.*, 1984-ERA-5, slip op. at 3 (Sec'y June 28, 1985) (permitting complainant to withdraw complaint). Nor is there any requirement in the INA or its implementing regulations that we review the settlement agreement before dismissing this portion of VAMC's appeal. *Cf.* 29 C.F.R. §§ 1978.111(d)(2) (2006) (requiring, in Surface Transportation Act cases, that ARB review terms of settlement agreement entered into while appeal is pending), 1979.111(d)(2) (same, Wendell H. Ford Aviation Investment and Reform Act for the 21st Century), 1980.111(d)(2) (2007) (same, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act). Absent statutory or regulatory instruction, we decline to engage in such review.

Therefore, we dismiss VAMC's appeal as it relates to Virdee's claim.[1] We review, and affirm, only those portions of the ALJ's Decision and Order (D. & O.) that relate to Talukdar's claim. In so doing, we have reviewed the "complete hearing record" developed before the ALJ, *see* 20 C.F.R. § 655.845(d), including evidence submitted with regard to Virdee that sheds light upon Talukdar's claim.

BACKGROUND

The INA permits employers in the United States to hire nonimmigrant alien workers in specialty occupations including medicine. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b). These workers are commonly referred to as H-1B nonimmigrants. VAMC, a federal health care facility administered by the United States Department of Veterans Affairs, hired Talukdar, an H-1B nonimmigrant, as a primary care physician. Hearing Transcript (T.) at 198. That appointment, which began April 1999, was for a three-year term ending April 28, 2002. *Id.* at 284-86, 468-70. Talukdar's appointment was characterized as

[1] Because we are not "affirming the decision and order" of the ALJ with regard to Virdee, that order remains inoperative as provided by 20 C.F.R. § 655.845(c). *See, e.g.*, *Pawlowski v. Hewlett-Packard Co.*, ARB No. 99-089, ALJ No. 97-TSC-3, slip op. at 4 n.3 (ARB May 5, 2000) ("Given that Hewlett-Packard's timely appeal rendered the ALJ's . . . Recommended Decision and Order inoperative by law, 29 C.F.R. § 24.8(a), the parties' request that we vacate the Recommended Decision and Order is moot.").

"temporary" because he was hired under the authority of 38 U.S.C.A. § 7405(a)(1), which allows the Department of Veterans Affairs to employ physicians "[o]n a temporary full-time basis." Agency Exhibit 2.

Talukdar reported to Dr. Ronald Johnson, VAMC's Site Director for Primary Care, who in turn reported to Dr. Ned Nichols, VAMC's Chief of Staff and Chief of Specialty Care. T. 55, 234, 236, 246, 254-255. Nichols reported to Douglas Kenyon, VAMC's Center Director. T. 464. Kenyon also was the Director of Surgical and Specialty Care for the Veterans Administration Integrated Service Network, of which VAMC was a part. *Id.* at 197-199, 464.

In May or June 2000, Talukdar began working on union matters at VAMC as a union activist, advocate, and official. T. 237-238. Talukdar became deeply involved in activities relating to pay inequities between H-1B nonimmigrant physicians and other VAMC physicians. *Id.* Along with Robert E. Redding, the President of Local 225 of the National Federation of Federal Employees (Local 225), the union which represented VAMC physicians, Talukdar and Virdee were co-leaders of a physician pay study. Local 225 provided this study to VAMC officials sometime after its publication in January 2001. T. 12, 37, 38, 59, 60, 92-93, 105, 358-363.

In January 2001 the DOL's Wage and Hour Division (WHD), in response to a complaint filed by one of VAMC's H-1B nonimmigrant physicians, began investigating and auditing VAMC's H-1B nonimmigrant physician pay practices. *Administrator, WHD, U.S. DOL v. Fargo VA Med. Ctr.*, ARB No. 03-091, ALJ No. 02-LCA-013, slip op. at 3 (ARB Sept. 30, 2004); T. 94. Talukdar and Virdee participated in WHD's investigation, representing and advocating for the complainant physicians. T. 94, 160, 237-246, 253, 254, 471. By this time, Talukdar and Virdee both had become permanent residents of the United States. T. 34 (Virdee), 227 (Talukdar).

Despite his union activities, Talukdar received praise and promotion from his supervisors. His performance rating, which had been "High Satisfactory" in April 2000, rose to "Outstanding" in the ratings given in April 2001 and April 2002. Claimant's Exhibits (CX) 31-33 (Talukdar's rating reports).[2] Further, in spring 2001 Johnson promoted Talukdar to the position of leader of the Blue Team, a group of physicians and other medical professionals working in primary care. T. 236, CX 38 at 2 (recommendation for two-step pay advancement based on Talukdar's performance as Blue Team leader); T. 250-51 (Talukdar testimony that Johnson made him leader of the Blue Team in approximately June 2001).[3]

---

[2] There is no information in the record as to when the April 2002 report was prepared.

[3] The date of the promotion, and its precise approving officials, are not clear. Johnson's memo contains the typed date "April 6, 2001," but "April" is crossed out and "Sept." is handwritten over it. CX 38 at 2. The handwritten initials "RJ" appear near this change, presumably reflecting Johnson's initials. *Id.* There seems to have been an internal delay in the processing of Johnson's recommendation. On August 15, 2001 Redding e-

Johnson also recommended Talukdar for "a special advancement for performance . . . step increase of 15-4 to a 15-6." CX 38 at 2. In support of his recommendation, Johnson noted that "Dr. Talukdar has done well since taking over the difficult leadership role of the Blue Team and has also been active in promoting advanced clinical access principles. These have been formidable tasks and while there is work to do, significant progress has been made." *Id.* Nichols approved the recommendation. *Id.* [4]

At around the same time, Kenyon approved the award of specialty pay to Talukdar. T. 142, 283, 284-286, 290, 468-470, 483-484; CX 41 (Special Pay Agreement effective July 1, 2001). The VA is authorized to award specialty pay in order to recruit and retain physicians in disciplines where there is a shortage of personnel. *See* 38 U.S.C.A. § 7431 (West 2007) (authorizing specialty pay); *see also* T. 224 (Talukdar's testimony that VAMC had "a chronic shortage of primary care physicians"). Talukdar's specialty pay took effect on July 1, 2001. CX 41.

Then, on March 20, 2002, the WHD Administrator made public her determination that VAMC had violated the INA's H-1B provisions by failing to pay the applicable prevailing wage to ten H-1B nonimmigrant physicians. The Administrator ordered VAMC to pay these physicians back wages totaling in excess of $200,000.00. CX 9.[5] VAMC became the subject of unfavorable publicity and media reports, including an April 26, 2002 article in a local newspaper. T. 100, 273-74, 484.

Talukdar testified that "as the months went by" from March into May 2002, he and Virdee were subjected to increasing hostility by their supervisors and other VAMC officials and staff. T. 293-295. The public hostility peaked at a May 9, 2002 meeting, during which VAMC supervisors, officials, and staff were "extremely hostile" towards Talukdar and Virdee. T. 297-310. At this meeting Talukdar and Virdee, who both had been asked by VAMC to serve as members of a by-law revision team, proposed revisions to VAMC's by-laws dealing with internal governance and assignment of medical duties.

---

mailed Johnson stating, "As the PCPSL Site Director it is your call to promote Rudy [Talukdar] the 2 steps and all that need be done, as I understand it, is a form 50 or 52 highlighting your reasons. . . . I feel bad for Dr. Talukdar and I have been mis advising [sic] him by telling him all was fine." *Id.* at 1. Johnson replied, "It was my screw up actually. We will get it fixed." *Id.* Neither Nichols nor Johnson testified at the hearing.

[4] Nichols indicated his approval by circling the word "APPROVED" and signing his name. CX 38 at 2. The date of Nichols's signature is not clear. *Id.*

[5] VAMC requested a hearing. On March 27, 2003, a DOL ALJ granted the Administrator's motion for summary decision. *U.S. DOL v. Fargo Med. Ctr.*, 2002-LCA-13, ALJ slip op. at 6 (ALJ Mar. 27, 2003). VAMC appealed, and we affirmed. *See Fargo VA Med. Ctr.*, ARB slip op. at 1.

T. 297-299. An e-mail from Johnson, sent the day after this meeting as an "open letter" to VAMC staff, illustrates the hostility that Talukdar felt. Johnson's e-mail stated:

> I firmly believe that this self gov [sic] nonsense is not the reason, but [merely] cover. There's a very small group of people here at this facility who have a very different agenda than the rest of us. I think that this group sees itself as above everyone else here, and that the rest of us exist to serve them . . . Revenge is clearly a motive, and what happened yesterday was in many ways pay-back for past perceived slights to their egos. If the goal of yesterday['s] action was to cause anger, resentment and create division among people, they have succeeded beyond their wildest dreams.
>
> I really don't care who reads this. I also don't give a darn about [Equal Employment Opportunity] complaints or [Unfair Labor Practices.] I may set the world records for both. If you agree with me forward this to your friends. If you think I am wrong, print this off and use it against me any way you want.

Joint Exhibit 1. Talukdar testified that the hostility, as evidenced by the meeting and by Johnson's "open letter," was so bad that he was "afraid to go back" to work. T. 310, 311. After the meeting, Talukdar took sick leave. T. 311. Because he was then notified of the end of his employment, Talukdar did not return to work.

In the weeks leading up the May 9 meeting, VAMC's leadership made several decisions affecting Talukdar. We describe them in the order in which they were communicated to Talukdar:

First, Johnson informed Talukdar, without explanation, that he would not receive the second step of the promised two-step pay increase. T. 250-270. Talukdar then resigned as leader of the Blue Team. *Id.* at 270.

Second, Kenyon extended Talukdar's appointment from April 28, 2002 to June 30, 2002. Agency Exhibit 2 (Notification of Personnel Action effective April 28, 2002). Kenyon testified that he had extended the appointment so that Talukdar would not have to repay any of his specialty pay. As Kenyon explained it, Talukdar otherwise would have been liable for such repayment when his employment ended because he would not have worked a full year from the specialty pay's effective date of July 1, 2001. T. 142, 284-286, 290, 468-470, 483-484.

Third, Kenyon decided to end Talukdar's employment. T. 271-73, 464, 467-468, 483. Kenyon sent Talukdar a memo dated May 1, 2002, which notified Talukdar of the

"[t]ermination of employment." CX 40; T. 483.[6] The memo noted that Talukdar's "temporary appointment" would expire on June 30, 2002, and stated that the appointment would not be renewed "[d]ue to the current budget deficit." CX 40; T. 272, 273, 464, 467-468. Talukdar asked Johnson for an explanation, telling Johnson that he suspected the termination was due to his union activities. T. 273. According to Talukdar, Johnson replied: "I know you will think that as long as you live, but that [i.e., budget] is the reason I am going to give you." *Id.*

Kenyon also ended Virdee's employment as a staff psychiatrist in VAMC's primary care section. T. 272, 273, 464, 467-468, 470, 483. Virdee had worked extensively with Talukdar and Redding on union issues, including the pay inequity issue, and there had been several altercations between Virdee and various VAMC officials. D. & O. at 7, 9-16, 19. Kenyon informed Virdee of the termination by sending a memo dated May 10, 2002, which she received May 13, 2002. D. & O. at 17; CX 6. The memo stated that Virdee's temporary appointment would be "terminated effective close of business on June 6, 2002" – more than two months before her appointment otherwise would have ended. *Id.*[7] The memo explained that Virdee's "services in the Primary Care Patient Service Line [we]re no longer needed." *Id.* A subsequent memo clarified that Virdee's dismissal was based on "budget matters." CX 7.

Despite his expressed concerns about VAMC's budget, Kenyon did not end the employment of any other VAMC physicians. (Indeed, in the previous decade, no primary care physician other than Talukdar had been dismissed for budgetary reasons. T. 474-476.) Nor did Kenyon take other significant cost-cutting measures, although he did shift funds from VAMC's capital account to its operating account and obtain a loan from the Network "to get us through the end of the fiscal year." T. 475. "[T]here was a balance shown at the very end," which the network "took . . . back since they also had other shortfalls." T. 475. In addition, after ending Talukdar's and Virdee's employment Kenyon hired a psychiatrist for the Fargo location and a primary care physician for the community-based outpatient clinic in Grand Forks, while an acting director approved the hiring of an interior decorator. T. 147, 149, 158, 166-175, 198-200, 447-450, 452-454, 456-57, 461-462, 575, 578, 584-585, 588; D. & O. at 7 ("VAMC is also responsible for administering several community-based outpatient clinics, including one in Grand Forks."). VAMC sought permission to hire a psychiatrist on May 24, 2002, indicating on the application that the period of employment would begin July 1, 2002. D. & O. at 19. VAMC hired the psychiatrist on September 16, 2002, before the end of the 2002 fiscal year. *Id.*

---

[6] Although Talukdar did not begin his sick leave until after the May 9, 2002 meeting, he did not receive Kenyon's May 1, 2002 memo until May 15. Nothing in the record explains this delay.

[7] The D. & O. contains more information about VAMC's treatment of Virdee at 6-19.

Meanwhile, on June 3, 2002 Redding had filed a complaint with DOL on behalf of Talukdar and Virdee. Redding alleged that VAMC had "terminated" the employment of Talukdar and Virdee because of their "cooperation with [DOL's] investigation of pay inequities at the Fargo VA[MC]." Complaint at 1. The WHD Administrator investigated the complaint and found no violation of the INA. Administrator's July 25, 2002 Determination, at 1. Talukdar and Virdee requested a hearing, and an ALJ found in their favor.

The ALJ found that Talukdar and Virdee had engaged in activities protected by the INA's employee protection provision, that VAMC had taken adverse action against Talukdar and Virdee, and that VAMC's proffered reason, its budget deficit, was "not believable" and was a pretext for retaliation. The ALJ awarded various forms of relief, including reinstatement and back pay. As permitted under 20 C.F.R. § 655.845, VAMC timely petitioned for our review.

JURISDICTION AND STANDARD OF REVIEW

Under the INA's employee protection provision, a covered employer must not "intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee because the employee . . . has disclosed information . . . that . . . evidences a violation of [the H-1B requirements,] or because the employee cooperates . . . in an investigation or other proceeding concerning the employer's compliance with the [H-1B] requirements." 8 U.S.C. § 1182(n)(2)(C)(iv). The Board has jurisdiction to review ALJ decisions enforcing this provision. *See id.*; 20 C.F.R. §§ 655.700(a)(4) (INA enforcement system as administered by DOL), 805(a)(13) (DOL investigations of alleged violations of INA's employee protection provision), 655.820 (ALJ hearings), and 655.845 (ARB review of ALJ decisions); Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), § 4(c)(18) (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board) (giving ARB authority to review ALJ decisions "as provided for or pursuant to . . . 8 U.S.C. § 1182(n)").

The Board reviews only those aspects of the ALJ decision that are specified in the petition for review and listed in the Board's notice of review. *See* 20 C.F.R. §§ 655.845(b)(3), (e)(1). Whether the specified issues are questions of law or questions of fact, the Board has the authority to review specified issues de novo. *See* 5 U.S.C.A. § 557(b) ("On appeal from or on review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Innawalli v. Am. Info. Tech. Corp.*, ARB No. 04-165, ALJ No. 04-LCA-13, slip op. at 6 (ARB Sept. 29, 2006) (standard of review is de novo); *Administrator v. Jackson*, ARB No. 00-68, ALJ No. 1999-LCA-4, slip op. at 3 (ARB Apr. 30, 2001) (standard of review is de novo). No factual issues have been specified for review in this case. Therefore, in addressing the issues presented, we rely upon the facts found by the ALJ.

ISSUES PRESENTED

1. Was Talukdar covered by the INA's employee protection provision?

2. Did the ALJ err in concluding that VAMC had retaliated against Talukdar?

3. Did the ALJ err in ordering reinstatement?

DISCUSSION

VAMC does not dispute the ALJ's conclusion that Talukdar's participation in DOL's investigation and audit of VAMC's nonimmigrant physician pay practices under the H-1B program constituted protected activity.[8] VAMC also does not take issue with the ALJ's implicit but necessary conclusion that VAMC knew of Talukdar's participation. Nor does VAMC dispute that Kenyon's decision to end Talukdar's employment constituted adverse action.

VAMC does take issue with the ALJ's conclusion that Talukdar was covered by the INA's employee protection provision. VAMC also argues that the evidence did not establish retaliation on VAMC's part and that, in any case, reinstatement is not an appropriate remedy.[9] We discuss VAMC's arguments in turn.

Coverage

To support its contention that Talukdar is not covered by the INA's employee protection provision, VAMC points out that Talukdar was appointed to his job at VAMC pursuant to 38 U.S.C.A. § 7405(a)(1), which authorizes appointments "without regard to civil service or classification laws, rules, or regulations." Brief at 3. VAMC then asserts, without discussion or citation, that the INA is a "civil service" law. *Id.* at 5. In VAMC's view, "since [Talukdar and Virdee] were Federal Employees, [the INA's whistleblower protection provision's] application to them can be seen as a form of civil service law." *Id.* at 3. Because civil service laws do not apply to employees hired under 38 U.S.C.A. § 7405(a)(1), VAMC would have us conclude that the INA's employee protection provision does not apply to Talukdar. *Id.* at 5. Talukdar argues that the INA is not a

---

[8] VAMC stipulated at the hearing that Talukdar and Virdee had advocated on behalf of allegedly underpaid H-IB nonimmigrant physicians at VAMC and had participated in DOL's investigation and audit of VAMC's pay practices. T. 244-245.

[9] VAMC withdrew a fourth issue raised in its Petition for Review. Brief at 5.

"civil service" law, because it "is part of Title 8 . . . [and] Title 8 does not involve civil service laws." Response at 6 & n.3.

VAMC's position founders because it offers no support for its proposition that the INA's whistleblower provision is a "civil service" law. VAMC does cite decisions holding that the Whistleblower Protection Act (WPA) and the "Title 5 Reduction in Force (RIF) law" do not apply to persons appointed under § 7405. But these decisions were based upon conclusions that the WPA and Title 5's RIF provision were civil service laws. *See, e.g., Beckstrom-Parcell v. Dep't of Veterans Affairs*, 91 M.S.P.R. 656, 658 (June 25, 2002) ("Title 5 RIF procedures . . . are part of the civil service laws"); *Chan v. Dep't of Veterans Affairs*, 53 M.S.P.R. 617, 620 (Apr. 21, 1992) (holding WPA not applicable to Veterans Administration (VA) employees, citing *Orloff v. Cleland*, 708 F.2d 372, 376 (9th Cir. 1983) ("[T]he Veterans Preference Act [VPA] falls within the category of 'civil service laws'") (abrogated by statute)).

Though we need not define the exact contours of civil service laws in order to determine whether the INA's whistleblower provision is such a law, it seems likely that civil service laws apply to – and only to – persons in the civil service. For example, the WPA, the VPA, and Title 5's RIF provision all are placed in Title 5 of the United States Code and apply only to federal employees. *See also Horner v. MSPB*, 815 F.2d 668, 671 (Fed. Cir.1987) ("The placement of § 1206(e)(1)(D) within Title 5, its enactment as part of the CSRA [Civil Service Reform Act], and its bearing on civil servants demonstrate that § 1206(e)(1)(D) is a civil service law."); *Orloff*, 708 F.2d at 376 n.4 ("It may be that all laws codified in Title 5 are not included in th[e] definition [of the term 'civil service laws']"). In contrast, the INA applies to every "employee" of every "employer that has an employment relationship with H-1B . . . nonimmigrants." 20 C.F.R. § 655.715 (2006) (further defining employer as "a person, firm, corporation, contractor, or other association or organization in the United States"). Thus, the INA applies not only to persons employed by the federal government, but also to those employed by all other covered employers.

Moreover, VAMC has cited no law or decision supporting its assertion that the INA's whistleblower protection provision is a civil service law or can be deemed to be one when it is applied to federal employees. We are aware of no such law, and relevant precedent suggests otherwise. *See, e.g., King v. Lynch*, 21 F.3d 1084, 1089 (Fed. Cir. 1994) ("discrimination laws . . . applicable to federal employers [but with] broader application [as well,] are not themselves civil service laws").

Because VAMC has not convinced us that the INA is a "civil service" law, the "without regard" provision in 38 U.S.C.A. § 7405(a)(1) does not authorize VAMC to act without regard to the INA's provisions. Thus, those provisions apply to VAMC.

Under those provisions, any "employee" of a covered "employer" is a covered employee. *See* 20 C.F.R. § 655.715. We previously have concluded that VAMC is a covered employer. *Fargo VA Med. Ctr.*, slip op. at 5 (VAMC was "employer" under the INA's H-1B provisions); *see also Administrator, WHD, U.S. DOL v. Dallas VA Med.*

Ctr., ARB Nos. 01-077, 01-181, ALJ No. 98-LCA-03, slip op. at 4-5 (ARB Oct. 30, 2003) (Dallas VAMC was "employer" under H-1B provisions of INA). VAMC does not ask us to reconsider that holding, nor does VAMC argue that Talukdar was not an employee as defined in the INA. Therefore, Talukdar is a covered employee and is protected by the employee protection provision of the INA.

Retaliation

VAMC's fallback argument is that the ALJ erred in finding that it discriminated against Talukdar because of his protected activities.[10] VAMC's arguments focus upon the ALJ's treatment of the evidence relating to temporal proximity and pretext. Brief at 6-8. Talukdar, of course, argues that the ALJ correctly concluded from the evidence that VAMC had retaliated. Response at 9-24.

A. Temporal Proximity

VAMC first argues that the ALJ erroneously inferred evidence of causation from her view that there was "proximity in time between events." Brief at 7.[11] Pointing out that Talukdar's involvement in the pay inequity issue began in 2000, some two years before VAMC ended Talukdar's employment in 2002, VAMC argues that important events occurred before the sequence of events highlighted by the ALJ, and that this longer timeframe is less suggestive of retaliation. *Id.* at 6-8.

Talukdar argues that the ALJ's reasoning was correct, and we agree. The ALJ acknowledged that Talukdar's protected activity began in mid-2000, but the ALJ concluded that "the H-1B issue truly came to the forefront at the VAMC" upon the issuance of the WHD Administrator's March 20, 2002 determination that VAMC had

---

[10] Absent congressional indication that a different standard applies, we have found that an employer acts "because of" protected activity when the employer is "motivated" by that activity. *See Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 4 n.6 (ARB Nov. 29, 2006) (discussing ARB's use of motivating factor standard unless Congress has indicated that a different standard applies). Although Congress has specified a "contributing factor" standard in the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West Supp. 2005), and the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A (West Supp. 2005), Congress has not made any such specification in the INA. Thus, we apply a "motivating factor" standard in reviewing the ALJ's determination that VAMC acted "because of" protected activity.

[11] The ALJ found that "the sequence of events representing the crux of this case transpired over a period of less than two months" starting with the Administrator's March 20, 2002 determination that VAMC had violated the H-1B pay provisions, and ending with Kenyon's May 1 memo "terminating" Talukdar's employment. D. & O. at 20.

violated the H-1B pay provisions of the INA, and the adverse publicity that ensued in April 2002. D. & O. at 10, 21-23. VAMC does not dispute the ALJ's finding that Kenyon's late April 2002 decision to end Talukdar's employment came soon after these two events. Indeed, Kenyon's decision to extend Talukdar's appointment – effective April 28, 2002 – demonstrates that Kenyon already had decided to end the appointment, because the extension otherwise would not have been needed. (Talukdar would have stayed at VAMC, hence he would have worked through July 1, and hence he would not have needed to repay any specialty pay.) Thus, the proximity noted by the ALJ supports a conclusion that retaliation motivated the decision.

B. Pretext

VAMC next argues that in concluding that its budget deficit was a pretext, the ALJ erred by mis-emphasizing facts and by relying upon irrelevant evidence. Brief at 6-9. Talukdar again argues that the ALJ did not err, and we again agree.

VAMC first contends that the ALJ should not have found relevant "the fact that the Medical Center hired a staff psychiatrist shortly after dismissing Dr. Virdee, and began advertising for a primary care physician shortly after Dr. Talukdar's appointment was not renewed," because there also was "direct testimony [from Kenyon] that neither Dr. Talukdar's position nor Dr. Virdee's was filled behind them." *Id.* at 7. But we see no error in the ALJ's conclusion that VAMC's hiring of personnel, during the same period that it released Talukdar and Virdee, constituted evidence that VAMC had not been as concerned about the budget as it had claimed. The ALJ certainly was not required to believe Kenyon's testimony simply because it was "direct."

VAMC further contends that the ALJ erroneously based her conclusions upon incidents "unrelated to the H-1B audit." *Id.* In VAMC's view, these "unrelated" incidents included the "salary dispute between Dr. Talukdar and Dr. Johnson." *Id.* But – assuming that by this "dispute" VAMC means to refer to the two-step increase that never happened – the evidence easily could be understood to suggest that while the delay of the increase was due to error, its ultimate denial was due to discrimination. Thus we see no error in the ALJ having relied upon that evidence to support her finding of discrimination.

VAMC then contends that the ALJ should not have relied upon evidence showing "discontent" among VAMC's staff. Brief at 8. As VAMC sees it, although "the fact that both [Talukdar and Virdee] were also two of the more 'discontented' may have made the selection easier," such discontent was not the basis for their selection. Rather, they "were carrying the smallest workloads, so they were the logical ones to let go." *Id.* But VAMC fails to mention – and did not list as an issue for appeal – the ALJ's finding that "the record is clear that [Talukdar] was carrying his weight" of the workload, "as he did have the highest per hour figure, and . . . the number of patients in his panel . . . was within the range of the other doctors in primary care." D. & O. at 18 n.15. In light of this finding, we are not inclined to believe VAMC's explanation that Talukdar had the "smallest" workload. (Kenyon had testified that he chose Talukdar for termination because

Talukdar's appointment was due to expire and his workload could be redistributed. T. 272, 273, 464, 467-469. But VAMC does not repeat these two arguments upon appeal – perhaps because neither of these factors distinguished Talukdar from VAMC's other physicians, including the more junior physicians whose appointments were renewed. T. 438-446, 474-476.).

VAMC also does not take issue with the ALJ's findings that VAMC ended Fiscal Year 2002 with a budget surplus; that VAMC had a budget deficit in the year it hired Talukdar and Virdee, D. & O. at 21; and that ending Talukdar's and Virdee's employment had constituted a departure from VAMC's decade-long practice of renewing all temporary appointments.

In sum, VAMC has given us no persuasive reason to diverge from the ALJ's clear and cogent reasoning. Having reviewed the entire record, we agree with the ALJ that Kenyon's stated reason for ending Talukdar's employment, the budget deficit, was not believable. Because VAMC has not provided any other reason why we should not affirm the ALJ's conclusion that VAMC retaliated against Talukdar, we affirm that conclusion and proceed to VAMC's arguments concerning the appropriate remedies.[12]

Reinstatement

The ALJ ordered VAMC to reimburse Talukdar $4,500 for moving expenses he incurred in leaving Fargo upon the end of his employment with VAMC, and to offer him reinstatement with the same salary and benefits as if there had been no gap in his service.

---

[12] Pursuant to our normal practice, a copy of this decision will be sent to the WHD Administrator. Under the INA and its implementing regulations, the Administrator is responsible for notifying the Department of Homeland Security (DHS) when DOL has determined that an employer has violated the INA's employee protection provision. *See* 8 U.S.C.A. § 1182(n)(2)(C)(ii)(II) ("If the Secretary [of Labor] finds . . . a . . . violation of clause (iv) . . . the Attorney General shall not approve petitions filed with respect to that employer . . . during a period of at least 2 years."); 20 C.F.R. §§ 655.810(d) ("The Administrator shall notify the DHS . . . that the employer shall be disqualified from approval of any petitions filed by . . . the employer . . . for . . . [a]t least two years for violation(s) of any of the provisions specified in paragraph (b)(2)."); 810(b)(2)(iii) ("Discrimination against an employee"), 655.855 ("The Administrator shall notify the DHS and ETA of the final determination of any violation requiring that the DHS not approve petitions filed by an employer."). For the avoidance of doubt, we note that neither the ALJ nor the Board has the authority to waive this disqualification sanction. *See Cyberworld Enter. Techs., Inc. d/b/a Tekstrom, Inc. v. Administrator, WHD, U.S. DOL*, ARB No. 04-049, ALJ Case No. 03-LCA-17 (ARB May 24, 2006) (noting mandatory nature of disqualification sanction for any covered employer found to have committed listed violations of INA). Therefore, we have no authority to review the ALJ's advisory view, *see* D. & O. at 26, that disqualifying VAMC would be inappropriate.

D. & O. at 26-27. The ALJ specified that if Talukdar accepted the offer of reinstatement, VAMC was to pay him moving expenses to return to Fargo, allow him to contribute to his retirement plan(s) for the period covered by the back wages, and pay him back wages and benefits from June 30, 2002 until the date he resumed employment. If Talukdar declined the offer of reinstatement, VAMC would have to pay him back wages and benefits up to the date he did so. *Id* at 27.

VAMC does not take issue with the ALJ's order regarding moving expenses, but argues that reinstatement is not an appropriate remedy. Petition for Review at 1-2; Brief at 9, 10.

VAMC also alludes to its disagreement with the ALJ's award of back pay, arguing that "if the appointments have expired there can be no back pay." Reply at 2.[13] This latter argument has been waived. (Forfeited might be a more accurate term. *See United States v. Olano*, 507 U.S. 725, 731-33 (1993) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (citation omitted).) Under the INA's implementing regulations, a petition for review of an ALJ's decision must "[s]pecify the issue or issues stated in the administrative law judge decision and order giving rise to such petition" and "[s]tate the specific reason or reasons why the party petitioning for review believes such decision and order are in error." 20 C.F.R. § 655.845(b)(2), (3). VAMC did not raise any argument regarding back pay in its petition for review. The ARB's Notice accepting VAMC's petition for review did not include back pay as an issue. Notice of Intention to Review, at 1, 2. VAMC did not alert the ARB that the Notice had omitted any issue, nor did VAMC raise the back pay issue in its opening brief. Because VAMC failed to comply with the requirements of 20 C.F.R. § 655.845(b)(2) and (3), and did not raise an argument regarding back pay in time to allow Talukdar or Virdee to respond, we conclude that VAMC has waived this argument.

With regard to reinstatement, VAMC points out that Talukdar's appointment has expired, and asserts that only the VA has authority to make new appointments under 38 U.S.C. § 7405. Brief at 9. In VAMC's view, "Talukdar's position" is "gone" and thus "there are no positions open for reinstatement." *Id.* at 10. Based on this view, VAMC argues that "[i]f the ALJ's order stands, it will have the effect of creating [a] position[] that do[es] not currently exist, and will convert a temporary appointment to a permanent one. The ALJ has no authority to do either." *Id.* VAMC does not argue that the Board has no reinstatement authority; rather, VAMC's argument is limited to the contention that reinstatement is impossible here because Talukdar's position has "expired . . . . There is nothing to reinstate him to." Reply at 2.

Talukdar counters that reinstatement is authorized by the INA, and that it is appropriate in this case. Response at 25-27.

---

[13] VAMC sent a letter "in lieu of formal rebuttal." We construe this as VAMC's Reply.

VAMC has failed to persuade us that Talukdar's position is "gone." Brief at 10. VAMC continues to employ physicians to provide primary care. *Cf. Doyle v. Hydro Nuclear Servs., Inc.*, No. 89-ERA-22, slip op. at 7-8 (ARB Sept. 6, 1996) (excusing reinstatement as "impossible or impractical" where employer's successor company no longer engaged workers in the job classification occupied by complainant and had no positions for which complainant qualified). Where reinstatement is ordered but the complainant's former position no longer exists, the employer generally must offer the complainant reinstatement to "a substantially equivalent position in terms of duties, functions, responsibilities, working conditions, and benefits." *Agbe v. Texas S. Univ.*, ARB No. 98-072, ALJ No. 97-ERA-13, 1999 WL 566971, at *21 (ARB July 27, 1999) (requiring employer to offer reinstatement to equivalent position, where complainant's former position had been abolished).[14] VAMC has not argued that Talukdar's position was unique, or that substantially equivalent positions are not available.

That Talukdar held a limited term appointment is not in itself a bar to reinstatement. As discussed above, VAMC did not dispute that it regularly renewed limited term appointments. *Cf. Blackburn v. Metric Constructors, Inc.*, 1986-ERA-4 (Sec'y Oct. 30, 1991) (reversing order reinstating electrician because evidence developed on remand showed that company's other electricians had been terminated at conclusion of project with no expectation of continued employment).

Under the INA, "the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including but not limited to reinstatement of workers who were discriminated against in violation of § 655.805(a) . . . or other appropriate legal or equitable remedies." 20 C.F.R. § 655.810(e)(2). We believe that reinstatement is "appropriate" in this case. When a violation of an employee protection provision has been found, we generally seek to make the employee whole insofar as feasible and authorized. *See, e.g., Amtel Group, Inc. v. Yongmahapakorn*, ARB No. 04-087, ALJ No. 04-LCA-6, slip op. at 12 (ARB Sept. 29, 2006) (awarding interest on backpay, despite lack of express authorization in INA, because whistleblower provision was "remedial" and goal of backpay award was to make complainant whole); *Kutty*, slip op. at 12 (INA's employee protection provision should be interpreted with reference to other DOL-administered whistleblower protection provisions); *Hobby v. Georgia Power Co.*, ARB Nos. 98-166/169, ALJ No. 1990-ERA-30, slip op. at 7 (ARB Feb. 9, 2001) (noting that "reinstatement is . . . a 'make-whole' remedy . . . intended to

---

[14] We recognize that reinstatement is a mandatory remedy under the employee protection provision of the Energy Reorganization Act of 1974 (ERA). *See* 42 U.S.C.A. § 5851(b)(2)(B) (West 1995). But the INA's whistleblower provision is sufficiently similar to the ERA's that we can draw guidance for INA reinstatement from ERA reinstatement decisions. *See U.S. DOL v. Kutty*, ARB No. 03-022, ALJ Nos. 01-LCA-010 through 01-LCA-025, slip op. at 12-13 (ARB May 31, 2005) (quoting 65 Fed. Reg. 80,178 (2000) to support conclusion that ARB "in interpreting and applying INA's [employee protection provision] should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by" DOL).

return the complainant to the position that he . . . would have occupied but for the unlawful discrimination," and finding Title VII reinstatement orders to be relevant guidance in ERA whistleblower cases); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-21 (1975) (discussing make-whole purpose of Title VII).

Contrary to VAMC's assertion, Reply at 2, our order does not go beyond a make-whole purpose and require VAMC to appoint Talukdar to a "permanent" position. We order only that VAMC return Talukdar to the situation he would have occupied absent VAMC's discrimination – i.e., the situation he would have occupied had his appointment been renewed. Thus, once it has reinstated Talukdar to a temporary position, VAMC will have fulfilled its obligations under this order.[15]

Because VAMC has offered no other reason why we do not have authority to order reinstatement, or should refrain in this case, we affirm the ALJ's order of reinstatement.[16]

Attorney's Fees

Talukdar seeks attorney's fees for his costs on appeal. Response at 27. Under the American Rule, however, courts generally do not award fees to a prevailing party absent explicit statutory authority. *See Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health and Human Res.,* 532 U.S. 598, 602 (2001) (in United States parties ordinarily required to bear own attorney's fees; prevailing party is not entitled to collect fees from loser); *Key Tronic Corp. v. United States,* 511 U.S. 809, 819 (1994) (following American Rule, Court "adhere[s] to a general practice of not awarding fees to a prevailing party absent explicit statutory authority"); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247-262 (1975) (tracing origins and development of the American Rule). The INA does not provide for the recovery of attorney's fees, and Talukdar has provided no reason why we should not follow the general rule in his case. Therefore, we conclude that Talukdar is not entitled to recover such fees.

CONCLUSION

Because Virdee and VAMC have settled, we dismiss VAMC's appeal relating to Virdee's claim. Because Talukdar is covered by the employee protection provision of the INA, VAMC violated that provision by ending Talukdar's employment in retaliation for

---

[15] If VAMC subsequently discriminates against Talukdar under circumstances suggesting that it is again penalizing Talukdar for his INA-protected activities, Talukdar may again seek redress under the Act.

[16] Although Talukdar has moved from North Dakota to Texas, he has not indicated that he no longer wishes reinstatement. VAMC has no obligation to find Talukdar a position elsewhere, although VAMC is free to attempt settlement with Talukdar by doing so.

his cooperation with DOL's investigation, and Talukdar's reinstatement is appropriate, we **AFFIRM** the ALJ's decision with respect to Talukdar, and **ORDER** that VAMC comply with the remedies ordered by the ALJ.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge