U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

ADRIENNE ANDERSON, **ARB CASE NO. 01-103**

COMPLAINANT, **ALJ CASE NO. 97-SDW-7**

v. **DATE: May 29, 2003**

METRO WASTEWATER RECLAMATION DISTRICT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Susan J. Tyburski, Esq., *Boyle & Tyburski, Denver, Colorado*

For the Respondent:
Joel A. Moritz, Esq., Richard P. Brentlinger, Esq., Robert J. Thomas, Esq., *Inman Flynn & Biesterfeld, P.C., Denver, Colorado*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the following environmental statutes and regulations: Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (2000), the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (2000), the Federal Water Pollution Control Act, (FWPCA), 33 U.S.C. § 1367 (1994), the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (2000), and Department of Labor implementing regulations, 29 C.F.R. Part 24.

For the reasons set forth below, we hold that the Complainant Andrienne Anderson failed to prove that she was an "authorized representative" of employees and, therefore, failed to establish an essential element of her claim under the applicable whistleblower statutes. We consequently reverse the ruling of the Administrative Law Judge (ALJ), do not reach other issues on appeal, and deny Anderson's complaint.

BACKGROUND

I. Findings of fact

Complainant Anderson alleged that Respondent Metro Wastewater Reclamation District (Metro) discriminated against her in retaliation for raising health and safety issues concerning Metro's treatment of alleged radioactive contaminated wastewater. The following facts appear in the record.

At all relevant times, Metro was a local sewage collection and treatment authority, established under the laws of Colorado, specifically the Metropolitan Sewage Disposal Districts Act, C.R.S. § 32-4-501 *et seq.* (2001). Metro covered the City of Denver and a number of surrounding counties and municipalities, including the Lowry landfill, site of a former military weapons-testing range. CX 6.[1]

Metro employed more than 300 workers, including laboratory technicians. It served about 1.3 million residents and treated approximately 150 million gallons of wastewater daily. The service area included Denver, Arvada, Aurora, Lakewood, Thornton, Westminster, and parts of Jefferson, Adams, and Arapahoe counties. The treated wastewater was returned to the South Platte River under a state permit, and Metro sold the resulting sludge as commercial fertilizer. ALJ EX 35.

A 59-member board of directors, representing the more than 50 municipalities and sanitation districts in the Denver area, governed Metro. These directors came from a broad spectrum of society – civil servants, elected officials, attorneys, engineers, realtors, accountants, business persons, and teachers, among others. CX 95A; *see generally*, 1997 TR at 9-11.

Anderson, an acknowledged environmental activist in the Denver area and part-time instructor specializing in environmental issues at the University of Colorado, was appointed to the Metro board on February 22, 1996, by then-Mayor Wellington Webb. RX 35. Anderson's appointment was brought before the Public Works Committee of the Denver City Council, and she was eventually confirmed on June 10, 1996, after two committee hearings. CX 98. She was sworn in on July 16, 1996, and served until July 1998. RX 24, 30.

At its June 1996 meeting, Metro approved, as part of a proposed settlement of then-pending litigation, a plan to accept for treatment, wastewater from the Lowry landfill, a designated Superfund site. RX 137; TR at 1011. Almost immediately after becoming a Metro board member, Anderson began raising safety and health concerns about Metro's treatment plan for the Lowry site, specifically, that radioactive wastes had contaminated the site and constituted

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[1] The following abbreviations shall be used: Claimant's Exhibit, CX; Respondent's Exhibit, RX; Hearing Transcript, TR; Recommended Decision and Order, R. D. & O; Administrative Law Judge Exhibit, ALJ EX.

a danger to Metro workers and the public. She was adamantly opposed to the Lowry settlement, known as the POTW Treatment Option. RX 25, 32; CX 44, 52, 54, 76.

Richard J. Plastino, chairman of the Metro board in 1995-97, testified that at Anderson's first meeting in July 1996, she introduced herself as a representative of environmental interests and stated that she disagreed with the board's recent approval of the settlement agreement with the City and County of Denver. TR 1004-15. Plastino added that he dealt with Anderson as a board member. TR at 1029. Four other directors testified that they viewed Anderson as a fellow director who expressed written and vocal opposition to the majority view of the Metro board. TR 1028, 1276, 1362, 1457.

Anderson spoke to the public and the media about her concerns at an April 2, 1997 Environmental Protection Agency public hearing on the POTW Treatment Option. RX 2. She represented herself as a member of the Metro board who opposed its policies on the Lowry site.

Chairman Plastino sent Anderson a letter on April 16, 1997, which admonished her to make a disclaimer when she spoke in public that she was expressing her own views and not those of the Metro board. RX 6. The letter warned her that failure to do so could result in censure by the board. On May 20, 1997, Plastino sent another letter to Anderson advising her to make this disclaimer, suggesting explicit language for the disclaimer and again warning her of possible censure. RX 10.

Anderson complained that on April 9, 1997, a memorandum was circulated to the Metro board "making unfounded accusations and insinuations of impropriety against" her for her vocal opposition to Metro's Lowry policy. RX 4. Also, she charged that the Metro board held secret sessions of two committees without her knowledge, intimidated and demeaned her at Metro board meetings and in the media, and interfered with her academic career at the University of Colorado. As a result of Metro's actions, Anderson asserted that her professional reputation was damaged, her future income from teaching and consulting work had been reduced, and she suffered emotional distress and mental anguish.

II. Procedural history

On May 2, 1997, Anderson filed a complaint with the Occupational Safety and Health Administration (OSHA) under the environmental whistleblower protection provisions of the CERCLA, SWDA, ERA and FWPCA as well as the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(I) (2000), the Clean Air Act (CAA), 42 U.S.C. § 7622 (2000), and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (2000). An OSHA investigator found that Metro discriminated against Anderson under the CERCLA, FWPCA and SWDA, but made no findings on her claims under the other statutes.

Anderson did not appeal OSHA's failure to make findings under SDWA, CAA or TSCA, but did appeal "the denial" of her request for protection under the ERA. *Anderson*, slip op. at 3 n.2; R. D. & O. at 7. Both Anderson and Metro requested referral of the complaint to an Administrative Law Judge (ALJ) for adjudication.

On December 1, 1997, Metro filed a Motion for Summary Decision, arguing that Anderson lacked standing to seek whistleblower protection as an authorized representative of Metro's employees. Respondent's Motion for Summary Decision at 5. Metro contended that the statute under which Anderson was appointed empowered her to represent only the interests of the citizens of the municipality that appointed her. Further, according to Metro, Anderson had not produced evidence that Metro employees or their union had designated her as their authorized representative. *Id*. at 10. Anderson opposed the motion and presented several affidavits from herself and three union members in support of her status as an authorized representative. She argued that further discovery would demonstrate her standing to file a complaint under the whistleblower statutes. Complainant's Opposition to Motion.

The ALJ initially assigned to this case issued a recommended order granting Metro's motion. He stated that Anderson had produced no documents establishing when and how she became an authorized representative. The ALJ noted that some of Anderson's actions on behalf of the union and Metro employees had drawn expressions of gratitude, but that was not evidentiary support for her assertion that she was an authorized representative. Thus, she had no standing to pursue her complaint. 1998 R. D. & O. at 32-33.

On appeal, the Administrative Review Board (ARB) reversed and remanded the case. *Anderson v. Metro Wastewater Reclamation District*, ARB No. 98-087, ALJ No. 97-SDW-7 (ARB March 30, 2000). The ARB held that summary judgment was precluded because the affidavits of Anderson and others raised a genuine issue of material fact over whether Anderson was an authorized representative. The ARB provided legal guidance, indicating that, "without deciding the exact breadth," the term authorized representative "encompasses any person who is requested by any employee or group of employees to speak or act for the employee or group of employees in matters within the coverage of the environmental whistleblower statutes." *Id*., slip op. at 7-8.

The ARB noted that "an individual **selected** by a union representing employees covered by the whistleblower protection provisions to speak or act for the union (and by extension the employees) in matters within the purview of the environmental statutes . . . is also protected by the statutes' prohibitions of retaliation against" authorized representatives. *Id.* (emphasis added). Thus, the ARB remanded the case for the ALJ to make a factual determination on whether Anderson proved that she was an authorized representative of employees.[2]

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[2] The ARB asked the ALJ to determine and the parties to brief the issue of whether Anderson was covered by the ERA. *See* ALJ EX 24, 25. The parties were also asked to address the applicability of general principles of principal-agent law and the legislative history of the environmental whistleblower acts indicating that the employee protection provisions of the ERA are "substantially identical" to those of the CAA and FWPCA and the Secretary of Labor's regulations,

On remand, a hearing on the merits was held on November 6-8 and 13-16, 2000. Subsequently, citing continuing violations under all seven environmental whistleblower statutes, Anderson filed two supplemental complaints on December 15, 2000, and January 15, 2001.

The first of these new complaints alleged that Metro and Denver had retaliated against her by failing to reappoint her in July 1998 and by defaming her. The second of the new complaints charged that a Metro employee made false statements under oath at the November hearing and withheld documents, and that Metro restricted Anderson's ability to obtain information under the Colorado Open Records Act (CORA). Anderson also alleged that Metro circulated false material to members of the Oil Chemical & Atomic Workers International Union (OCAW), published alleged defamatory material, and tried to destroy her personal and professional reputation. These complaints were consolidated with her case at the request of OSHA, and both parties engaged in discovery, submitted additional evidence via affidavit and deposition, and filed briefs. R. D. & O. at 61-80.

A successor ALJ assigned to the case[3] issued a Recommended Decision and Order on September 20, 2001, concluding that Anderson had established a *prima facie* case of retaliation for her protected activities under CERCLA, SDWA, FWPCA, and ERA, and that Metro had failed to demonstrate any non-discriminatory reasons for its actions against her. Accordingly, the ALJ found that Anderson was entitled to $150,000 in compensatory damages, $150,000 in exemplary damages, and $125,000 for emotional distress. R. D. & O at 77. The ALJ also ordered affirmative relief. *Id*. at 78-80.

The ALJ concluded that Anderson was an authorized representative of employees under CERCLA, SWDA, and FWPCA, and a "person acting pursuant to [employees'] request" under the ERA. *Id*. at 60. The ALJ relied on OCAW's 1995 consulting contract with Anderson, her "subsequent appointment" to the Metro board, and the testimony of several witnesses including Anderson herself. *Id*. at 12-17. He found that Anderson was an authorized representative because she was "clearly someone who was empowered and directed to act on behalf of a class of persons," the Metro employees. *Id.* at 12, 19.

The ALJ found that Anderson had engaged in protected activities by, among other actions, speaking out in public about her environmental concerns, researching the Lowry treatment plan and participating in governmental investigations, and that she had a reasonable belief that Metro was violating the applicable environmental statutes. *Id*. at 22-29. He also found that Metro engaged in adverse actions against Anderson, including issuing a censure-warning letter to her, ridiculing and demeaning her at board meetings, and ensuring that she was

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which do not distinguish between the ERA and the CERCLA, FWCPA, and SWDA in describing the purpose and scope of the Acts, 29 C.F.R. § 24.1.

[3] The initially-assigned ALJ retired, and a successor ALJ was assigned on remand.

not reappointed. *Id*. at 29-39. He stated that Metro's treatment of Anderson "shocks the conscience." *Id*. at 73. Finally, the ALJ found that Anderson's supplemental complaints were timely filed and constituted continuing retaliation against Anderson for her protected activities. *Id*. at 76.

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ's initial decisions to the Administrative Review Board (ARB). 29 C.F.R. § 24.8 (2002). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia,* the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C. § 557(b); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

ISSUE

The issue we consider dispositive is whether Anderson proved by a preponderance of the evidence that she was an authorized representative of OCAW or Metro employees during her tenure as a Metro director, and was therefore protected under the environmental whistleblower statutes.

DISCUSSION

We have reviewed the record to determine whether Anderson established by a preponderance of the evidence that she was an authorized representative. Whether a politically appointed director of a legislative body such as Metro can be deemed an authorized representative under the pertinent whistleblower statutes represents a case of first impression for the ARB.

Metro argued on appeal that the ALJ's decision improperly interfered with the administration of the Metro sanitation district because it granted labor-friendly Metro directors whistleblower protection, thus affording them more political clout. The decision also clothed the ordinary give and take of the political process – "often no more attractive than sausage making"—in the mantle of adverse actions. Respondent's Initial Brief at 10. Metro contended

that factually the ALJ essentially wrote the word "authorized" out of the phrase, "authorized representative." Respondent's Reply Brief at 4.

Anderson argued that Metro was not immune from the application of the whistleblower statutes because of its claimed status as a legislative body of a political subdivision of Colorado. Complainant's Response Brief at 9. She contended that she was an authorized representative and a person acting pursuant to employees' requests under the plain meaning of the terms of the statutes and because OCAW previously had employed her. *Id.* at 14, 24.

To prevail under the whistleblower statutes, Anderson must establish that she was either an employee or an authorized representative of employees; that she engaged in protected activities; that she was subject to adverse action by an employer; that the employer knew of the protected activities when it took adverse action; and that the protected activities were the reason for the adverse action. *Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999); *Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 02-ERA-7, slip op. at 3 (ARB April 30, 2001). Failure to establish any of these elements deprives a complainant of relief under the applicable whistleblower statutes. *Jenkins, supra*, slip op. at 16. In this case, if Anderson fails to establish protected status as an authorized representative, her claim must fail.

I. Anderson is not entitled to relief under the SDWA, CAA, TSCA, and ERA

Three of the seven environmental whistleblower statutes expressly create a separate cause of action for the benefit of an authorized representative who is discriminated against for engaging in protected activities on behalf of an employee. The SWDA, 42 U.S.C. § 6971(a); the CERCLA, 42 U.S.C. § 9610(a) and the FWPCA, 33 U.S.C. § 1367(a), contain the same language and provide:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or **any authorized representative of employees** by reason of the fact that such employee or **representative** has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter . . . .

Emphasis added. If a statute's language is plain, the sole function of the courts is to enforce it according to its terms. *See Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d. 1379, 1382 (D.C. Cir. 1998). The language of SWDA, CERCLA, and FWPCA protects an employee and an authorized representative of an employee from discrimination and other forms of retaliation for engaging in protected activity.

By contrast, the other four environmental statutes, the SDWA, 42 U.S.C. §300j-9(d)(i)(1); the CAA, 42 U.S.C. § 7622(a); the TSCA, 15 U.S.C. § 2622(a) and the ERA, 42 U.S.C. § 5851(a)(1), afford a cause of action for an employee, but do not provide for a separate

cause of action for "any person acting pursuant to a request of the employee." The pertinent statutory language is:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (**or any person acting pursuant to a request of the employee)** [engaged in protected activities] . . . .

Emphasis added. The statutes further state:

> **Any employee who believes that he (the employee – TSCA) has been discharged or otherwise discriminated against** by any person in violation of subsection (a) of this section may, within 30 days after such violation occurs . . . .

SDWA, 42 U.S.C. § 300j-9(I)(2)(A); CAA, 42 U.S.C. § 7622(b)(1); TSCA, 15 U.S.C. § 2622(b)(1); ERA, 42 U.S.C. § 5851(b)(1) (emphasis added).

The SDWA, CAA, TSCA, and ERA clearly provide whistleblower protection to employees, but they omit any reference to authorized representatives of employees. Instead, these statutes use the phrase "any person acting pursuant to a request of the employee". The ALJ assumed that "any person acting at the request of the employee" under the ERA had the same meaning as "any authorized representative of employees" under the SWDA, CERCLA, and FWPCA. R. D. & O. at 60. Even if that is so, the pivotal question is whether "any person acting pursuant to a request of the employee" has a cause of action distinct from that of the employee.

Although the statutory language is identical to that of the ERA, the SDWA, CAA, and TSCA are not applicable to the facts in this case. *Anderson*, slip op. at 3. We therefore focus on whether Anderson can maintain a cause of action under the ERA. Having considered the ARB's order on remand and the findings of the ALJ, we conclude that only employees may file claims under the ERA.

The ERA, 42 U.S.C. § 5851(b)(1), provides that "No employer may discharge any employee or otherwise discriminate against any employee" because the employee or person acting pursuant to the employee's request has engaged in protected activities. The ERA, 42 U.S.C. § 5851(b)(1) allows "Any employee who . . . has been discharged or otherwise discriminated against" 30 days to bring a claim. Under the above-quoted language of the ERA, it is the employee and not the employee representative who may seek relief. By not including protection for an authorized representative or a person acting at an employee's request in the ERA, Congress must have intended that only employees would be entitled to file a claim under that statute. *See Muscogee (Creek) Nation*, 851 F.2d 1439 1444 (D.C. Cir. 1988).

In sum, unlike the SWDA, CERCLA, and FWPCA, the SDWA, CAA, TSCA, and ERA do not afford a separate cause of action for "any person acting pursuant to a request of the employee." Rather, if an employee suffers adverse action for the employee's protected activities or those of any person acting pursuant to his or her request, it is only the employee who can bring suit. Accordingly, we conclude that, even if Anderson had established that she was acting pursuant to a request of an employee, she could not have sought relief on her own behalf under the ERA.

II. Anderson cannot argue on appeal that she was an employee of Metro while serving as a director on the Metro board in 1996-98

On appeal, Anderson argues for the first time that, while she was not an employee as it is commonly defined, she was in fact employed by Metro as a director and received compensation for her service in 1996-98. Complainant's Response Brief at 25. Anderson urges that the term employee be given as broad an interpretation as possible. She notes that Metro set the terms of her compensation, established rules by which she had to operate, exercised control over her, and effectively terminated her employment by complaining about her to the Mayor, who did not reappoint her. *Id*. at 26.

Even if Anderson had timely raised this argument, the relationship between Metro and Anderson was decidedly not employer-employee. The statute under which Metro was established specifically prohibits Metro directors from receiving any compensation as an employee of the Metro district. C.R.S. § 32-4-509(8). Thus, during the time that she served as a director, Anderson was legally prohibited from also being an employee.

The terms of Anderson's compensation – $2,000 annually – are established by statute, C.R.S. § 32-4-509(8), as are the rules and by-laws under which the Metro directors operate. C.R.S. § 32-4-509-10, Metro By-laws Art. VII § 13. While Anderson could be removed from the Metro board for failure to attend the requisite number of meetings, C.R.S. § 32-4-509(7)(c); Metro By-laws, Art. IV, § 5(c) and Art. V, § 3, or for moving out of the district which she represented, C.R.S. § 32-4-509(4), Metro itself had no power over her actions in carrying out her duties as a director. Only the executive appointing her had discretionary power to remove her. C.R.S. § 32-4-509(3). Finally, reappointment to Metro, *vel non*, was not within the Metro board's power, but rested with the executive of the pertinent municipality. C.R.S. § 32-4-509(2)(a).

Further, Anderson conceded at the November 2000 hearing that she served a two-year term as a Metro director and was not an employee during that time. R. D. & O. at 20, n.8; RX 30; TR at 665-66. She also stated at the pre-hearing conference on September 17, 1997, that she was not an employee and that to achieve standing to file her whistleblower complaint, she had to establish that she was an authorized representative of the Metro employees. 1997 TR at 13-20.

Issues raised for the first time on appeal will generally not be addressed by appellate bodies, absent rare and unusual circumstances. *Singleton v. Wulff*, 428 U.S. 106, 119 (1976);

Sierra v. INS, 258 F.3d 1213, 1220 (10th Cir. 2001), *cert. denied* , 534 U.S. 1071 (2001); *Duprey v. Florida Power & Light*, ARB No. 00-070, ALJ No 00-ERA-5, slip op. at 11 n.54 (ARB Feb. 27, 2003). Nothing in this record or in Anderson's argument provides any grounds to make an exception to this rule. Thus, we do not consider Anderson's argument that she was a Metro employee, and proceed to the questions of whether she was an employee representative and had been authorized.

III. Anderson was not an authorized representative of OCAW or Metro employees during her 1996-98 tenure as a Metro director

The ARB remanded this case for the ALJ to determine the factual issue of whether Anderson had established her standing to file a claim for relief under the whistleblower statutes. Following the ARB directive, the ALJ ruled that the evidence established that Anderson was an authorized representative because she was "empowered and directed to act on behalf of a class of persons." R. D. & O. at 12.

We disagree with that conclusion for two reasons. First, Anderson could not represent OCAW or Metro employees as a Metro director because the statute authorizes the directors to represent the citizens of the City and County of Denver, not a particular interest group. Second, Anderson's evidence did not establish by a preponderance that Metro employees or OCAW authorized her to be their representative during 1996-98.

As the ARB noted in its decision on remand, *Anderson*, slip op. at 6, Congress has supplied no statutory definition of the phrase "authorized representative," and nothing in the legislative history of the three whistleblower statutes at issue in this case defines the term. The ARB discussed the legislative history of the Federal Water Pollution Control Act Amendments of 1972, which states that the employee protection provision "is patterned after the National Labor Management [sic] Act and a similar provision in [the Coal Mine Health and Safety Act] relating to the health and safety of the Nation's coal miners" and concluded that Anderson was an authorized representative if she had been asked to speak or act for OCAW or Metro employees in matters within the purview of the applicable statutes. *Id.* at 5-8.

The Secretary's regulations covering procedures for handling discrimination complaints under the whistleblower statutes do not specifically mention authorized representatives either. Instead, the regulations refer to "employees or persons acting on their behalf" and provide that an employee may file, "or have another person file on his or her behalf" a complaint alleging such discrimination. 29 C.F.R. §§ 24.1(b), 24.3(a). The regulations are silent on whether a person acting on another's behalf is also entitled to the protections against retaliation and discrimination afforded to employees under the whistleblower statutes. *See* 29 C.F.R. § 24.2(a)(b)(referring only to employees as those who may pursue relief under the acts).

Within the parameters set by the previous ARB panel, we turn to the evidence bearing on whether Anderson was (1) a representative and (2) whether she was authorized.

A. Anderson had no legal authority to represent Metro employees or the OCAW union during her 1996-98 tenure as a Metro director

Anderson was not able to be a representative of OCAW or Metro employees while serving as a Metro director simply because the Colorado statutes regarding the appointment of directors to the Metro board provide that the appointment may be for no purpose other than representing the citizens of the appointing municipality. C.R.S. § 32-4-509(2-4). The statute states that board members "shall be qualified electors who are qualified to vote at general elections in this state and who reside within the district and within the municipality from which they are appointed." C.R.S. § 32-4-509(3). It adds that members shall be appointed by the executive of each municipality with the approval of its governing body. C.R.S. § 32-4-509(2)(a).

The statute establishing Metro states its purpose – to serve a public use and promote the public health, safety, and general welfare. C.R.S. § 32-4-501. The statute does not create *ex officio* positions or designate any director as the representative of a particular segment of society, such as commerce, academia, or labor. Indeed, the 59 directors serving with Anderson represented a broad spectrum of the public, with the only qualifications that they be registered electors and reside within their appointed areas. Further, the oath of office administered to new directors requires them to support the United States Constitution and that of Colorado and to perform faithfully the duties of a director. RX 1. It says nothing about directors espousing the causes of any employees or other specific interests.

Finally, the Metro bylaws define the duties of a director, as set by statute. He or she shall "adhere to the highest standards of ethical conduct in the performance of their official duties." "As fiduciaries of the Metro district," directors shall

> [E]xercise all official duties for the benefit of the district, [and] hold in confidence all matters, written and verbal, of a privileged and confidential nature. Directors shall not reveal any information that is by law confidential, [or] use any confidential information for making a private profit or gaining personal benefit or benefit for others. . . .
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> [Directors shall] abide by the Colorado Ethics in Government Act, follow Metro policies and procedures, including these bylaws, in the governance of [Metro] business, [and] conduct themselves in a manner respectful of the office of director and the Metro district. Directors shall refrain from personal attacks on the public and their fellow directors and [shall not impugn] the motives of their fellow directors.

Under the bylaws, when making written or oral public statements, directors shall make a disclaimer that they are speaking personally and not on behalf of Metro.[4] Directors shall

[4] Section 4(h) of Article IV regarding the disclaimer was added subsequent to Anderson's

"acknowledge that all matters discussed in executive session are privileged and confidential in nature" and shall not make public any such information, in writing or verbally. Directors shall "vote on the official business" of Metro. RX 72, Art. IV, § 4(a)-(j).

Nothing in these specific duties refers to a director's representation of employees or anyone else. In fact, the bylaws specifically address the meeting situation in which a director might have, directly or indirectly, a personal or private interest. Article XI, section 1 requires that the director declare such interest, refrain from attempting to influence other directors in that regard, and not vote on the matter. Art. XI, § 1. Thus, we find that the bylaws indicate strongly that a director may not serve two masters – in this case, the interests of the citizens the director was appointed to represent and the interests of OCAW and Metro employees.

Indeed, Denver Mayor Webb appointed Anderson to the Metro board on February 22, 1996, and thanked her for her "willingness to serve the citizens of the City and County of Denver," which has 20 of the 59 members. CX 5, 9. The official letter states that Anderson was appointed "as the City of Denver's representative" to serve "in accordance with the laws of the State of Colorado and the By-laws of the Metro Wastewater Reclamation District." RX 30.

The Mayor's letter of appointment does not suggest that Anderson was appointed to serve OCAW or Metro employees. The record does not indicate that the Mayor appointed Anderson because he thought she was representing OCAW or Metro employees. Rather, he knew that she was sympathetic with labor causes, and that he was fulfilling his own policy objectives by appointing Anderson, who was recommended by OCAW. But such political decision-making does not confer legal authority on Anderson to serve as an authorized representative of employees under the whistleblower statutes.

Contrary to the ALJ's findings, the Mayor's motivation for appointing Anderson to the Metro board and the union's assumption that she would be their "voice" do not make her a representative of OCAW or Metro employees. We conclude that even if Mayor Webb believed that Anderson would "represent" the views of Metro workers and labor generally, he did not have the legal power to appoint her to the Metro board for that purpose. And even if OCAW or other Metro employees considered Anderson their "representative" on the Metro board, neither had any legal power to make her their representative in her capacity as a Metro director, or to bind her to make particular decisions in a particular way.

Thus, Anderson did not have status as OCAW's so-called representative on the Metro board, because the law establishing Metro does not provide for appointment of its directors on such a basis. The statute clearly relates that directors are to represent the various geographical areas from which they are appointed – the directors are not appointed to represent various

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April 2, 1997 speech at the EPA hearing. The bylaws also state that only the Chairman may speak publicly on behalf of the entire Metro board. Metro Bylaws Art. XV. RX 72.

segments of the body politic. Therefore, we find that Anderson could not be a representative of OCAW or Metro employees while serving as a Metro director.

B. Anderson failed to establish that OCAW or Metro employees authorized her to represent them during her 1996-98 tenure as a Metro director

In the decision on remand, the ARB suggested that there must be some tangible act of "selection" or authorization to enable the representative to perform any actions on behalf of the employees who selected him or her or authorized his or her representation. *Anderson*, slip op. at 7. The word "authorized" connotes some type of formal designation that a representative is acting on behalf of another and has authority from that other person to do so. BLACK'S LAW DICTIONARY defines authorize as "to empower . . . to give a right or authority to act . . . to clothe with authority, warrant, or legal power . . . to permit a thing to be done in the future. The word "has a mandatory effect or meaning, implying a direction to act" and indicates possession of "legal or rightful power." BLACK'S LAW DICTIONARY (4th Ed. Rev. 1968), p. 169. Representative is "one who represents or stands in the place of another." *Id.* at 1466.

To illustrate the distinction between being and not being an authorized representative, we consider that in 1994 Anderson was a consultant for OCAW with the title of "special projects coordinator." 1998 Anderson Affidavit. In that capacity, she authored a July 15, 1994 letter concerning a Metro rate hike. CX 1. In a September 14, 1994 memorandum, Anderson urged Metro lab workers to become personally involved in a "stepped-up campaign to win an improved working environment" at Metro. CX 2. In the course of her research for OCAW, she submitted on November 30, 1994 a CORA request concerning air quality information. CX 3.

Anderson testified that, during this time frame, she was asked to assist Metro workers "exclusively" to build "support in the general community" concerning their health and safety issues, their lack of a contract for many years, and their "plight" at the Metro facility. TR at 257-63. Anderson resigned her position in early 1995 due to pregnancy. TR at 270; 1998 Anderson Affidavit.

Actions Anderson took in coordinating special projects for Metro employees during 1994 could be construed as acting on behalf of the union and by extension its employee members. Certainly, her consulting contract with OCAW in 1994 was a tangible act "selecting" and authorizing her to represent Metro employees during that time frame. However, Anderson produced no evidence that she had any contact with the Metro board or managers in representing the workers during that time.[5]

By contrast, Anderson produced no similar written or testimonial evidence that OCAW or the Metro employees had "selected" or authorized her to act on their behalf during her tenure as a director on the Metro board. In her January 30, 1998 affidavit, Anderson stated that she had had "a close association" with OCAW for more than 15 years, but admitted that during a

[5] Anderson stated that she had submitted the CORA request on air quality information to Metro. Complainant's Response at 15. However, the letter was addressed to the Colorado Department of Health and Environment (CX 3) and nothing indicates that Metro received a copy.

December 1996 board meeting she "clarified that she does not now, nor did she when she was appointed to the Metro [board] work for [OCAW]." CX 44; ALJ EX 25; TR at 7-10.

At the hearing, Anderson submitted two letters dated June 4, 1996, and June 25, 1997, that she claimed reflected her status or relationship with OCAW. The former was from a representative of the lab workers at OCAW and explained some background about the union's lawsuits. CX 10. The latter was from Anderson in her "capacity as a board member" to other Metro directors seeking a special meeting. CX 68. Neither document remotely indicated that Anderson was an "authorized representative" of OCAW.

Anderson also submitted several newspaper articles dated April 26, May 22, and June 26, 1997, in support of her assertion that she was the authorized representative of OCAW. CX 51, 52, 64. These articles described Anderson in that manner but public statements reporting her own view of her status are hardly sufficient to designate her as a person acting on behalf of another with authority from that person to do so.

Nonetheless, Anderson alleged that the "record is replete with evidence that [she] was acting hand in hand with the Metro Lab workers to pursue health and safety issues arising from Metro's plan to accept wastewater from" Lowry. Complainant's Reply to Respondent's Closing Argument at 4. However, after reviewing the transcript and exhibits, we believe that Anderson was, at best, self-authorized.

The record reveals that Patricia B. Farmer, chief negotiator of Local 2-477 (OCAW), wrote to Donna Good in the Office of the Mayor of Denver on December 12, 1995. CX 4. Farmer requested that Anderson be considered to fill an open position on the Metro board of directors. She indicated that Anderson is a "recognized expert" on environmental issues, including the Lowry landfill, and should be appointed to hold Metro management accountable for its obligation to clean up the landfill.

Farmer added that Anderson had also "been helpful to the employees" of Metro, who are represented by OCAW, "in their fight for a fair contract." Farmer then stated that she, as "a representative for the Metro OCAW bargaining unit," believed that the Denver directors had a duty to represent the citizens of this city, and that the appointment of directors like Anderson would lead to Metro managers putting people and the environment first. CX 4. Farmer later testified that OCAW wanted a "union-friendly voice" on the Metro board, and felt that Anderson would be that voice "to get us a contract." TR at 635-39.

None of this evidence or that of former OCAW President Donald S. Holmstrom, Metro Director Albert S. Levin, OCAW research associate Alison Laevey, Denver City Councilman Dennis Gallagher, and retired laboratory technician Marilyn Ferrari establishes that OCAW or Metro employees authorized Anderson to act as their representative. What is established is that these witnesses believed that Anderson was sympathetic to their concerns, both generally regarding the Lowry landfill and specifically regarding OCAW's frustration over its inability to secure a contract, and would be supportive of their goals.

Holmstrom testified that he believed that OCAW needed "representation" on the Metro board and understood from a conversation with the Mayor's labor liaison, Paul Wishard, that the Mayor would appoint Anderson as "a worker representative." TR at 1497-98. Holmstrom indicated that Anderson had informed the union of her concerns about Lowry and had helped them draft letters to the Environmental Protection Agency and Metro. CX 41-42; TR at 1503, 1506.

He also described the letters the union wrote to Mayor Webb about his failure to re-appoint Anderson. In one letter Holmstrom stated that Anderson was as "a dedicated and tireless advocate for worker and community health and safety issues." He warned that her removal from the board "may now link" the City of Denver with violations of whistleblower violations afforded to "workers' representatives." A second OCAW letter to Mayor Webb referred to Anderson as "one of the few dissidents on the board, who consistently stood up for workers' issues." CX 83-84; TR at 1507.

As the local union president, Holmstrom undoubtedly had the power to select or authorize Anderson to act as OCAW's representative. Yet his December 12, 1997 affidavit merely reiterates that the union wanted Anderson "to serve as our representative" on the Metro board and that she had agreed. ALJ EX 25. While Holmstrom stated that Anderson had served as OCAW's authorized representative, had "taken our direction on issues to pursue" before the board, and had "provided invaluable expertise and advice on health and safety issues," he produced no evidence of what she had been authorized to do or how she was bound to follow the union's direction or to vote according to its wishes. *Id.*

Anderson may have "closely collaborated" with the union in drafting letters and opposing the Lowry settlement agreement, but these self-directed efforts do not constitute the union's "selection" to represent its member-employees. In fact, the Mayor selected her, not the union, to represent the citizens of Denver, not just union members.

Levin testified that Anderson indicated at her first board meeting that she was appointed by the Mayor's office "to represent the concerns and the welfare of the employees." Levin admitted that Anderson did not specify which employees. TR at 143.

Gallagher testified that he assumed the Mayor had appointed Anderson to the Metro board because of her work in the environmental area and that he had "defended" her appointment when questions arose at her confirmation hearing because he knew from his experience with her that she would look out for environmental health and safety. TR at 70, 74. On cross-examination Gallagher admitted that Anderson was not appointed to represent Metro workers, but to represent Denver and all the people in that district. TR at 77-78.

Laevey testified that she had a contract to coordinate a collective bargaining agreement campaign for OCAW and first met Anderson in mid-1995 when she briefed Laevey on the issues involved. TR at 84. Asked what she knew about Anderson's appointment, Laevey responded that the union was "looking for leverage . . . for friendly sympathetic faces on the Metro board

. . .” and understood that Mayor Webb was “also labor friendly.” TR at 86. Laevey added that the union was in close contact with Anderson and “obviously authorized” her appointment as a Metro director, but admitted on cross-examination that OCAW had never notified Metro that Anderson was an authorized representative for OCAW. TR at 91, 100.

Following Anderson’s second confirmation meeting on June 4, 1996, Laevey wrote a letter to Anderson stating that the union “applaud[ed] the City and County of Denver” for recognizing its problems and addressing them “through the appointment of equitable board members.” CX 10. Asked why she wrote this letter, Laevey stated that Anderson was “our representative” on the Metro board and might need that information in the letter about the three lawsuits the union had filed against Metro. TR at 89. Laevey also testified that she and other union workers met with Anderson to plan strategy over their opposition to Metro’s treatment of Lowry wastewater. TR at 96.

The OCAW letter is informative about the union’s lawsuits, but does not clothe Anderson with any authority to be the union’s “authorized representative.” Indeed, it refers to equitable board members, whoever they may be. Laevey’s conviction that Anderson was sympathetic to the union’s causes and her belief that Anderson was “our representative” on the Metro board are personal to Laevey. Her state of mind does not constitute the union’s authorization of Anderson as representative.

As discussed above, the statutes governing Metro provide no authority for individual directors to be designated as a representative for any specific group. Rather, the director represents all the citizens who reside in the particular area from which the director was selected. Further, Laevey had no power to select Anderson as OCAW’s “authorized representative.” In fact, Laevey stated in her June 4, 1996 letter that she was the representative of the lab workers at Metro. CX 10.

Ferrari, a 20-year veteran laboratory worker with Metro who retired in February 1997, testified that she helped to write Farmer’s letter to Mayor Webb submitting Anderson’s resume and recommending her as a Metro director. TR at 108. Ferrari noted that she had not attended any of the confirmation hearings, but had attended Metro board meetings at which Anderson had raised worker health and safety issues. TR at 110.

A former union official, Ferrari recalled a previous Metro director who had been sympathetic to the union’s concerns about safety issues. She was not reappointed and the union protested to the Mayor, who asked OCAW to submit a recommendation. TR at 103-05. Ferrari testified that she thought Anderson would be “a good representative” on the Metro board and that Anderson was “agreeable” to that. TR at 107. Ferrari’s testimony, like Laevey’s, does not establish that OCAW authorized Anderson to be its representative. Nor do similar views expressed by Denver City Councilman Ted Hackworth who called Anderson a “friend of union members and an extremist environmentalist,” TR at 88, 101, and James E. Gilman, former chief steward, who stated that Anderson was a labor-friendly voice. TR at 199. And finally, the testimony of two Metro workers, Delwin Lee Andrew and Anthony J. Broncucia, who went to

Anderson for help after they were fired, does not make Anderson their authorized representative. TR at 234-43, 816, 841-43; CX 67. In fact, both men belonged to the other, larger Metro union, the International Union of Operating Engineers.

Anderson's own letter to Hackworth on August 16, 1996 explaining her background commended Mayor Webb for providing greater representation of occupational and environmental health sectors on the Metro board "on behalf of Denver's residents and sewage system ratepayers," but did not mention her alleged status as an authorized representative of OCAW. RX 31. Nor did the July 3, 1997 letter to Anderson from the OCAW president, who thanked Anderson for her persistent dedication in looking out for the interests of OCAW and other workers and enclosed a $5,000.00 check to assist her whistleblower litigation. CX 71. Finally, the fact that OCAW presented Anderson with the Brown-Silkwood award in May 1998 for her efforts on behalf of health and safety issues does not make her an authorized representative of the union. TR at 217-19, 267.

However sympathetic toward the union's views Anderson might have been, she had no mandate to speak for OCAW members or Metro employees at Metro meetings. Union members may have thought of Anderson as their "voice" on the Metro board, Holmstrom believed that she was OCAW's authorized representative, Director Levin knew Anderson's views toward labor paralleled his, and Gallagher assumed that Anderson would be sympathetic to the union's concerns. But none of their personal states of mind conferred any authority on Anderson to be OCAW's authorized representative.

The fact that Anderson was not an authorized representative is borne out by the testimony of Kathryn E. Jensen, a teacher and Metro director. She stated that she was on Metro's management team in negotiating contracts for the two unions at Metro, OCAW and the much larger Operating Engineers from 1993 onward. She testified that Anderson had never been involved in any of the negotiations and that OCAW had never indicated that Anderson was the authorized representative. TR at 1362-65. Specifically:

> Q. Ms. Jensen, during that entire process, has Adrienne Anderson ever appeared in any of these sessions on behalf of a union?
>
> A. No.
>
> Q. Have you ever heard from any of the union representatives that she is the authorized representative of the employees at Metro?
>
> A. No.
>
> Q. Did you ever understand her to hold that status?
>
> A. No.

Q. You interfaced with numerous people on the union side during these negotiations?

A. Yes.

Q. You never heard that they believed that Ms. Anderson was

their authorized representative . . . .

A. No.

Q. . . . at the [Metro] District?

A. No, no.

TR at 1362-63.

On cross-examination, Jensen indicated that Anderson was not an authorized representative for purposes of bargaining under the National Labor Relations Act or "as Board member at meetings," and did not appear as an authorized bargaining agent at the bargaining table. TR at 1371-72. Even Farmer, who wrote the letter to Mayor Webb on Anderson's behalf and described herself as part of the union team trying to negotiate a new contract, admitted on cross-examination that Anderson had never appeared at any of the negotiating sessions between Metro and OCAW over a new contract. CX 4; TR at 633-36, 639.

Thus, the hearing record is replete with evidence that the OCAW lab workers considered Anderson their advocate and that other concerned people, including Metro directors and managers, as well as the media, were well aware of her long-standing union affiliation, her dedication to health and safety issues, and her dissident status as an opponent of Metro's Lowry landfill policy. There is no dispute that OCAW wanted Anderson on the Metro board. But the union's wishes and public perceptions did not confer "authorized representative" status, any more than one's affinity for political discourse makes one an official representative of a particular point of view or being sympathetic to a particular point of view gives the sympathizer the authority to act as an agent for one similarly inclined.

While extensive, the record does not establish that, from the end of 1995 through July 1998 when Anderson left the Metro board, she was the "authorized representative" of OCAW or Metro employees. There are no letters or other documentary evidence from the union appointing Anderson as an authorized representative. The testimony from witnesses did not prove that Anderson or the Metro board was informed that she was OCAW's authorized representative when she took office as a Metro director on July 16, 1996. As an appointed director, she had no authority to act for OCAW. Nor once a member of the Metro board was she bound to act or vote

in accordance with the union's wishes. In fact, her duty was to the public at large.

In sum, the environmental whistleblower statutes did not extend "authorized representative" protection to Anderson, who as a political appointee was required to serve the public interest and all the citizens of the area she represented. While the union sought Anderson's appointment as a Metro director and generally agreed with her views, she failed to prove that it had authorized her to act for OCAW and its Metro employees while she was a Metro director. We, therefore, hold that Anderson failed to meet her burden of proof in establishing an essential element of her environmental whistleblower claim, that she was an authorized representative of employees within the terms of CERCLA, SWDA, or FWPCA.

CONCLUSION

We need not address the other issues raised by the parties on appeal, *e.g.*, whether Anderson's activities in pursuit of her environmental concerns and worker health and safety issues constituted protected activities; whether Metro engaged in adverse actions through the responses of its directors and managers to Anderson's opposition to the Lowry treatment plan; or whether Anderson's second and third supplemental claims were timely. Nor do we reach the issues of damages or Metro's motion on appeal to submit newly discovered evidence.

Because Anderson did not prove that she was an authorized representative of employees, she was not entitled to the protections afforded by the whistleblower statutes. Accordingly, we deny her complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge