U.S. Department of Labor

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

In the Matter of:

THOMAS DUTKIEWICZ,

ARB CASE NO. 97-090

COMPLAINANT,

ALJ CASE NO. 95-STA-34

v.

DATE: June 11, 1997

CLEAN HARBORS ENVIRONMENTAL SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DENYING STAY

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1994). In a Recommended Decision and Order issued April 14, 1997, the Administrative Law Judge (ALJ) found that Complainant Thomas Dutkiewicz established that Respondent, Clean Harbors Environmental Services, Inc. (Clean Harbors) violated the STAA when it discharged him. As relevant here, the ALJ recommended that Clean Harbors be ordered to reinstate Dutkiewicz to his former position in Connecticut with the same pay and terms and privileges of employment, to pay back pay, and to pay compensatory damages.

Under STAA regulations, the ALJ's order requiring reinstatement was effective immediately upon Dutkiewicz' receipt of the decision. 29 C.F.R. § 1978.109(b). Clean Harbors submitted a motion to stay reinstatement, arguing that it should not be required to reinstate Dutkiewicz while the case is pending review by this Board. Dutkiewicz opposes the stay and seeks immediate reinstatement. For the reasons discussed below we deny the stay.

DISCUSSION

Typical stay motions are filed following final agency action in order to maintain the status quo pending judicial review. Here, Clean Harbors seeks a stay of one aspect of an ALJ's recommended order. The ALJ's order will remain in effect only until the Board issues its final decision on the merits of this case. When we issue the final agency decision, the ALJ's order will be superseded either by a final award of relief (which may differ from that the ALJ recommended) or by a decision finding no liability and denying relief. *See McCafferty v.*

Centerior Energy, Case No. 96-ERA-6, Order Denying Stay, Oct. 16, 1996, slip op. at 2 (concerning stay of a preliminary Board order).

The Department of Labor has applied a court-developed test to determine when its action should be stayed. *See Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n,* 259 F.2d 921 (D.C. Cir. 1958); *State of Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288 (6th Cir. 1987); *OFCCP v. University of North Carolina*, Case No. 84-OFC-20, Sec. Order Denying Stay, Apr. 25, 1989, slip op. at 7; *Goldstein v. Ebasco*, Case No. 86-ERA-36, Sec. Order Denying Stay, Aug. 31, 1992, reversed on other grounds *sub nom. Ebasco Constructors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 19, 1993). The factors set forth in *Celebrezze* are:

> . . . (1) the likelihood that the party seeking a stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting a stay.

812 F.2d at 290. Evaluation of Clean Harbors' motion based on these four factors leads to the conclusion that a stay should be denied.

First, Clean Harbors has not demonstrated that it is likely to prevail on the merits. Clean Harbors contends that the ALJ erred when she ruled that testimony of a Clean Harbors' witness concerning customer complaints was hearsay and could not be considered to refute Dutkiewicz' claim that he was discharged for engaging in protected activity. Clean Harbors argues that the testimony was evidence of "the corporate state of mind of Clean Harbors" and thus was admissible evidence.

Far from rejecting the testimony as hearsay, the ALJ admitted the testimony and judged the weight it was due. A Clean Harbors' witness testified that a customer was upset about Dutkiewicz insisting on "changing things" that included the labeling of hazardous materials to be transported, and found Dutkiewwicz' behavior "irritating, condescending, and inaccurate." R. D. and O. at 17. The ALJ declined to rely upon hearsay to judge whether Macomber's "irritation with complainant was based on a factor other than complainant's insistence on complying with DOT regulations." The ALJ noted that since none of the complaining customers testified, Dutkiewicz could not cross examine them and she had no opportunity to judge their credibility. The ALJ's reasoning on this issue, while subject to further review, is on its face sound and we decline to adopt this alleged error as a basis for finding that Clean Harbors will prevail on the merits.

Clean Harbors also argues that Dutkiewicz' going outside the chain of command justified his discharge. Dutkiewicz allegedly bucked the chain of command to complain about the "waste information tracking system," among other things. R. D. and O. at 13. Going outside the chain of command to raise safety complaints within the purview of the STAA would not provide a lawful reason for discharge. *See, e.g., Nichols v. Bechtel Const., Inc.,* Case No. 87-ERA-0044, Sec. Dec. and Remand Ord., Oct. 26, 1992, slip op. at 17, *aff'd, Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995); *Pillow v. Bechtel Const., Inc.*, Case No. 87-ERA-35, Sec. Dec. and Remand Ord., July 19, 1993, slip op. at 22, *aff'd, Bechtel Const. Co. v. Secretary of Labor,* Case

No. 94-5061 (11th Cir. Sept. 19, 1996) (both cases under analogous employee protection provision of the Energy Reorganization Act of 1974).

Further, Clean Harbors has not shown that it will be irreparably harmed absent a stay. Although it may well be true that the company "has no need for additional drivers in Connecticut," where Dutkiewicz was employed, Motion at 7, Clean Harbors is a sufficiently large company that it is not likely to suffer irreparable harm based upon the hiring of one additional employee.[1] In any event, "mere" financial loss cannot support a finding of irreparable harm. *Virginia Petroleum Jobbers*, 259 F.2d at 925; McCafferty, slip op. at 5.

In addition, Dutkiewicz would be harmed if a stay were entered because he would not be returned promptly to his employment in Connecticut, in which he earned a great deal more than he earns in his present employment in Indiana. Dutkiewicz points out that he has five dependents and prompt payment of the $500 weekly difference in pay is critical, notwithstanding that he eventually would receive that amount as back pay if he prevails before this Board.

Finally, the public interest militates against a stay. Both Congress and the Department of Labor weighed the public interest in promulgating 49 U.S.C.A. § 31105(b)(2)(B)(West 1994) and 29 C.F.R. § 1978.109(b) and determined that an ALJ's recommended order of reinstatement should have immediate effect, although other remedies must await a final decision. Congress and the Department most certainly were aware that a preliminary reinstatement order might be rejected at the departmental level. However, they were concerned that delay between the recommended order and the final decision would effectively deprive complainants of the benefits of reinstatement. Here, the public interest in securing an early reinstatement for whistleblower complainants weighs in favor of denial of a stay.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

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[1] Clean Harbors states that reinstating Dutkiewicz "will result in an innocent employee losing his or her job" for what may only be a temporary period. Motion at 7; Longo affidavit at Par. 8; Respondent's Reply at 3. Clean Harbors, which has 1,287 employees, including 165 drivers, has not shown that it would be impossible to retain the services of the driver "displaced" by Dutkiewicz' reinstatement, at least temporarily. We note that the STAA provides that the Board (as the Secretary's designee) shall issue a final decision within 120 days of the ALJ's recommended decision. Approximately 60 days have elapsed as of the date of this Order.