



In the Matter of:

WALTER R. MOORE,

ARB CASE NO. 00-038

COMPLAINANT,

ALJ CASE NO. 99-CAA-15

v.

DATE: January 30, 2001

U.S. DEPARTMENT OF ENERGY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Complainant:

Edward Slavin, Esq., *St. Augustine, Florida*

For the Respondent:

Pamela Arias-Ortega, Esq., *U.S. Department of Energy, Albuquerque, New Mexico*

FINAL DECISION AND ORDER

This case involves the third of three complaints that Walter R. Moore (Moore) brought against the Department of Energy (DOE).^{2/} Moore alleged that DOE violated the employee whistleblower protection provisions of the Clean Air Act, 42 U.S.C. §7622 (1994) (CAA), and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (CERCLA) (the Acts). We agree with the Administrative Law Judge (ALJ) that Moore failed to prove that DOE took any adverse action against Moore, and dismiss the case.

BACKGROUND

Moore is a Special Agent of the Transportation Safeguards Division (TSD) of DOE's Albuquerque Operations Office. Special Agents transport nuclear weapons, components and

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

^{2/} The first two cases, *Moore v. U.S. Department of Energy*, ARB Case No. 99-094, ALJ Case No. 99-CAA-14 (alleging violations of the CAA, CERCLA, and the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31101) and *Moore v. U.S. Department of Energy*, ARB Case No. 99-047, ALJ Case No. 1998-CAA-16 (alleging violations of the CAA and the STAA), are pending before the Board.

materials between various sites around the country. Moore has not worked as a Special Agent since August 1997, and has been on disability leave since December 1997.

In response to a report on the management and operation of TSD, TSD manager Debbie Miller established a Professionalism Team made up of eleven volunteers, including six Special Agents. The Team was to review the operations of TSD and make recommendations on ways to enhance professionalism within the organization. On January 25, 1999, the Professionalism Team circulated to all TSD employees draft recommended TSD Standards for Conduct, Dress and Grooming. The Team solicited the comments and suggestions of all employees, explaining that the draft was “by no means final” and was intended to elicit comments from employees. Many employees did provide comments criticizing the draft standards, and the standards were never implemented because no consensus could be reached within TSD on their content. However, immediately following the circulation of the draft, Moore filed a whistleblower complaint, alleging that the draft standards were issued to retaliate against him for filing his first two whistleblower complaints and had a chilling effect on TSD employees’ exercise of their whistleblower rights.

Following an evidentiary hearing, the ALJ found that the members of the Professionalism Team were not aware of Moore’s previous whistleblower complaints. RD&O at 4. The ALJ acknowledged that employer actions that have a chilling effect on employees’ whistleblower rights may constitute adverse action, and that if, “hypothetically” the recommended standards were ever adopted a case might be made that “some aspect of the Standards created a chilling effect on some aspect” of those rights. However, the circulation of the **draft** standards was not “hostile, threatening, chilling, gagging or adverse.” RD&O at 7, 8. “As the coverletter makes abundantly clear, the Recommended TSD Standards were by no means final and all TSD employees, including Complainant, had the opportunity to provide input. Rather than being an illegal gag order as characterized by Complainant, the coverletter was asking for suggestions and comments from TSD employees.” *Id.* at 8. The ALJ noted that “a majority of the employees in TSD responded [to the draft] with comments and suggestions” *Id.* For those reasons, the ALJ found that Moore had not been subject to adverse action and recommended that the case be dismissed.

We have jurisdiction pursuant to the CAA, 42 U.S.C. §7622; CERCLA, 42 U.S.C. §9610; and 29 C.F.R. § 24.8(a)(2000). Under the Administrative Procedure Act, we have plenary power to review an ALJ’s factual and legal conclusions. *See* 5 U.S.C. §557(b). As a result, the Board is not bound by the conclusions of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co.*, ARB Case No. 97-069, ALJ Case No. 95-WPC-1, Dec. and Ord., Apr. 28, 2000, slip op. at 7.

DISCUSSION

The CAA provides that “[n]o 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 [engaged in protected activity].” 42 U.S.C. §7622(a). CERCLA has a slightly different formulation: “[N]o person shall fire or in any other

way discriminate against, or cause to be fired or discriminated against, any employee . . . [because the employee engaged in protected activity].” 42 U.S.C. §9610(a). Embedded in these provisions is the concept of “adverse action.” Thus, for example, in *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, Sec’y Fin. Dec. and Ord., February 15, 1995, slip op. at 11, n.9, *aff’d sub nom. Carroll v. Sec. of Labor*, 78 F.3d 352 (8th Cir. 1996), the Secretary held that “[i]n order to prevail in an environmental whistleblower case such as the one before us, the complainants must prove, by a preponderance of the evidence, that they engaged in protected conduct, and that the employer took some adverse action against them because of that protected conduct.” This case turns on the fact that DOE engaged in no action which, by any stretch of the imagination could be characterized as “adverse.” Indeed, we conclude that this is a frivolous appeal of a case wholly lacking in merit.^{3/}

Of critical importance here is that the complained-of action was that the Professionalism Team issued a draft set of standards of conduct on which they expressly requested comment from TSD employees, including Moore. Comments were received. In fact, the comments were sufficiently negative that the draft standards were never finalized. As a result, Moore cannot rationally maintain that he was “adversely” affected by them.^{4/}

Moore did not prove that DOE took adverse action against him; the complaint therefore is **DISMISSED**.

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

^{3/} Moore raises two evidentiary issues on appeal. First, Moore argues that the ALJ erroneously failed to order DOE to produce Debbie Miller -- the upper level manager who set the Professionalism Team in motion and selected its leader -- for cross-examination at the hearing. Complainant’s Opening Brief (Comp. Br.) at 1-3. Moore argues that Miller’s testimony would have been relevant in establishing retaliatory motive on the part of DOE. *Id.* at 2. As we conclude that there was no adverse action taken against Moore in issuing the draft standards, Miller’s motives in appointing the Professionalism Team are beside the point.

In a related point, Moore argues that the ALJ erred in allowing the “rank hearsay” testimony of the leader of the Professionalism Team as to the directions Miller gave him when she selected him to lead it. *Id.* Moore is mistaken. The team leader’s testimony was not introduced to prove the truth of Miller’s statement, but rather to show what the team leader understood was the charge to the team. *See* 29 C.F.R. §18.801(c) (“Hearsay is a statement . . . offered in evidence to prove the truth of the matter asserted.”).

^{4/} *See Griffith v. Wackenhut Corp.*, ARB Case No 98-067, ARB Dec. Feb. 29, 2000, slip op. at 11 (“personnel actions that cause the employee only temporary unhappiness do not have an adverse effect on the employee’s ‘compensation, terms, conditions or privileges of employment’”). *See also Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000) (surveying case law on adverse action under Title VII).