In the Matter of:

CHRIS WHITE,

COMPLAINANT,

v.

THE OSAGE TRIBAL COUNCIL ON BEHALF OF THE OSAGE NATION,

RESPONDENT.

ARB CASE NO. 00-078
(Formerly ARB Case No. 96-137)

ALJ CASE NO. 95-SDW-1

DATE: April 8, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John T. Edwards, Esq., *Oklahoma City, Oklahoma*

For the Respondent:
Bradley D. Brickell, Esq., Andrew J. Waldron, Esq., *Brickell & Associates, P.C., Oklahoma City, Oklahoma*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i)(2000). Complainant Chris White filed a complaint alleging that Respondent The Osage Tribal Council (Osage Council) violated the SDWA when it terminated his employment as an environmental inspector responsible for monitoring the Osage Council's compliance with certain provisions of the SDWA.

On May 31, 1996, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order finding in White's favor and ordering the Osage Council to reinstate him with back pay, and awarding him compensatory and punitive

damages, attorney's fees, costs and expenses. The Osage Council appealed the ALJ's Recommended Decision and Order to the Administrative Review Board. On August 8, 1997, the Board issued a Decision and Order of Remand affirming the ALJ's ruling on the merits, reversing the award of punitive damages, and remanding the case for the sole purpose of calculating back pay, fees and costs. *See White v. The Osage Tribal Council,* ARB No. 96-137, ALJ No. 1995-SDW-1 (ARB Aug. 8, 1997).[1]

On remand, an ALJ[2] issued a [Recommended] Decision and Order on Remand and Order Denying Respondent's Motion for Additional Discovery and/or Briefing and Joinder of Additional Party (R. D. & O. on Rem.). The ALJ awarded White $44,408.00 plus interest in back pay as well as $41,601.74 in attorney's fees and costs and denied its request for additional briefing and to join the United States Environmental Protection Agency (EPA) as an additional party. The Osage Council filed a timely Petition for Review with the Board pursuant to 29 C.F.R. § 24.8 (2002).

This Board has jurisdiction to review the ALJ's R. D. & O. on Rem. under 29 C.F.R. § 24.8 and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002)(delegating to the Board the Secretary's authority to review cases under, *inter alia,* the statutes listed in 29 C.F.R. § 24.1(a), including the SDWA). The Board is not bound by either the ALJ's findings of fact or conclusions of law, but reviews both *de novo. See* 5 U.S.C. § 557(b)(2000); *Masek v. Cadle Co.,* ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000) and authorities there cited.

The Osage Council has identified five issues on appeal to the Board. Initial Brief of the Osage Tribal Council at 4-6. Consideration of issues 1-4 would require us to revisit the Board's holding in its Decision and Order of Remand in this case that the Osage Council terminated White's employment in violation of the whistleblower protection provisions of the SDWA. We consider our holding regarding the merits of White's complaint to constitute the law of the case, and absent exceptional circumstances[3] not present in this case, we will not reconsider it. *See, e.g., Johnson v.*

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[1] After the Board remanded the case, the Osage Council filed an interlocutory appeal with the United States Court of Appeals for the Tenth Circuit challenging the Board's determination that the Osage Council was not entitled to tribal immunity. The Tenth Circuit affirmed the Board's conclusion that the Osage Council is a covered employer and is not entitled to such immunity. *The Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174 (10th Cir. 1999).

[2] The ALJ who had issued the initial Recommended Decision and Order had left the Department of Labor, so the case was assigned to another ALJ on remand.

[3] In *Huffman v. Saul Holdings Ltd. Partnership,* 262 F.3d 1128, 1133 (2001), the Tenth

Roadway Express, Inc., ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 8-9 (Dec. 30, 2002).

The Osage Council also requests the Board to review the ALJ's refusal to order additional discovery and/or briefing. However, the Osage Council's brief to the Board includes no argument addressing any alleged error in the ALJ's refusal to order such briefing or discovery. Accordingly, finding no reason to depart from the ALJ's refusal to order additional briefing or discovery, we affirm his conclusion. R. D. & O. on Rem. at 3

Finally, the Osage Council requests review of the ALJ's refusal to add EPA as a party to this litigation. As we stated above, we consider the Board's previous decision on the merits of White's complaint to constitute the law of this case. The Osage Council has cited no precedent that would allow the addition of a party to litigation after the merits of the complaint have been decided. Accordingly, we agree with the ALJ's conclusion that the Osage Council's motion to add EPA as a party is untimely and affirm his denial of the Osage Council's motion requesting such joinder.

As stated above, the Board remanded this case to the ALJ for the limited purpose of calculating the precise amount of White's back pay, fees, expenses and costs. Neither party has appealed the ALJ's recommended calculation.[4] Consequently, finding no reason to depart from the ALJ's well-reasoned determinations, we **AFFIRM** the ALJ's [Recommended] Decision and Order on Remand, as attached to this decision.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

Circuit recognized that courts may deviate from the law of the case doctrine under exceptional circumstances involving "(1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; or (3) if blatant error from the prior . . . decision would result in serious injustice if uncorrected."

[4] White did not petition for review of the R. D. & O. on Rem. However, White notes his continued disagreement with the Board's determination that the Osage Council was not liable for punitive damages, "and requests the final decision of this Board be entered so that an appropriate appeal can be taken." Reply Brief of Complainant Chris White at 3.

U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: August 10, 2000

CASE NO.: 1995-SDW-1

In the Matter of

CHRIS WHITE
Complainant

v.

THE OSAGE TRIBAL COUNCIL
ON BEHALF OF THE OSAGE TRIBE OF INDIANS
Respondent

DECISION AND ORDER ON REMAND
AND
ORDER DENYING RESPONDENT'S MOTION FOR ADDITIONAL DISCOVERY AND/OR BRIEFING AND JOINDER OF ADDITIONAL PARTY

Background

On May 31, 1996, Judge Quentin P. McColgin, formerly of this office, issued a Recommended Decision and Order finding that Respondent violated the employee protection provisions of the Safe Drinking Water Act (SDWA) when it terminated Complainant for engaging in reporting activity protected by the SDWA. In his Decision and Order, Judge McColgin required reinstatement of Complainant with back pay and benefits, awarded Complainant compensatory damages of $40,000.00 and punitive damages of $60,000.00 and required the expungement of Complainant's wrongful termination from his personnel file. By order dated July 9, 1996, Complainant was also awarded costs, expenses and attorney's fees of $25,281.19.

On August 8, 1997, the Administrative Review Board (ARB) issued a Decision and Order generally adopting Judge McColgin's recommendations as to Complainant's entitlement to reinstatement, back pay, compensatory damages and fees, costs and expenses, but remanded the case to the Office of Administrative Law Judges (OALJ) for the limited purpose of determining the precise amount of Complainant's back pay, fees, expenses and costs. The

ARB let stand the award of compensatory damages in the amount of $40,000.00 but reversed the award of punitive damages. The expungement of Complainant's personnel records was affirmed.

Respondent filed a collateral appeal to the United States Court of Appeals for the Tenth Circuit asking that Court to determine whether the SDWA abrogated tribal immunity. On August 4, 1999, the Tenth Circuit issued a ruling upholding the ARB's findings that the Tribal Council is a covered employer and not entitled to tribal sovereign immunity. The case was returned to the ARB, and by order dated September 29, 1999, the matter once more was remanded to the OALJ, just as it originally had been on August 8, 1997, for the same limited purpose of determining the precise amount of damages and costs previously awarded by Judge McColgin.[1]

Following the first remand of this matter to the Office of Administrative Law Judges on August 8, 1997, all parties were given an opportunity to present additional evidence and briefs in support of their respective positions concerning the issues on remand. The following seven (7) items were filed at that time, and the remand was ripe for a Decision when the record was returned to the ARB, by Order dated March 30, 1998, pending the outcome of the Tenth Circuit appeal. The items submitted were as follows:

1. Filed October 29, 1997, Complainant's "Computation of Damages and Brief in Support Thereof";

2. Filed November 9, 1997, Respondents' "Response to Complainant's Computation of Damages";

3. Filed December 30, 1997, Complainant's Deposition taken December 19, 1997, accompanied with a "Supplemental Brief and Documentation of Additional Attorney's Fees and Costs";

4. Filed January 7, 1998, Respondent's "Motion to Toll Briefing Period" based on the Tenth Circuit U.S. Court of Appeals' December 30, 1997, Order;

5. Filed January 23, 1998, Respondent's "Supplemental Brief on the Issue of Back Wages and Complainant's Duty to Mitigate His Damages";

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[1] Subsequent to the Tenth Circuit's ruling, Respondent sought certiorari to the United States Supreme Court which was denied.

6. Filed February 9, 1998, Complainant's response to Respondent's supplemental briefing; and

7. Filed February 17, 1998, Respondent's objection to Complainant's supplemental reply brief.

Following the ARB's latest remand, and the Supreme Court's denial of certiorari, by letter dated June 20, 2000, the parties, through counsel, were advised that once again the file had been returned to the OALJ for consideration of the two issues originally remanded by the ARB in 1997, and while it appeared nothing further need be submitted both parties were granted ten (10) days to make any further comments.[2]

By letter dated July 10, 2000, Complainant's counsel advised that additional briefs were unnecessary. By letter and Motion dated July 22, 2000, however, Respondent's counsel seeks additional time for discovery and/or possible briefing as well as the joinder of the Environmental Protection Agency (EPA) as an indispensable party to this case. As grounds, Respondent alleges that EPA participated in the termination of Complainant.

Discussion

I am under an admonition from the ARB to consider specific issues on remand only. Notwithstanding that directive, in my opinion, the circumstances of this case do not warrant joining additional parties and reopening the record at this time, nor do the issues on remand warrant further discovery and/or briefing.

Following the first remand of this case to the Office of Administrative Law Judges on August 8, 1997, conference calls and letters between the undersigned and counsel for both parties focused on accumulating the additional evidence and briefs necessary to decide the issues on remand. The goal was accomplished and the matter ripe for Decision when a delay was occasioned solely by Respondent's unsuccessful appeal to the Tenth Circuit. Had such an appeal not been taken, a Decision and Order on Remand would have issued at that time based on the record that then existed. With Respondent's unsuccessful appeal now over and the matter once more before this office solely to determine the original remanded issues, it would, in my opinion, violate principals of due process and finality to join, at this late date, another party to this litigation without affording that party a trial on all issues. The joinder of an additional party could possibly have been accomplished early on when this matter was initially tried by Judge McColgin in 1995, but it was not. The issue of Respondent's liability has been established and now nothing remains but the determination of the precise amount of damages and costs to be awarded Complainant. I will now do that without further adieu.

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[2] By request of Complainant's counsel's office the deadline for additional briefing was extended to July 24, 2000.

1) Computation of Complainant's wages

The parties computation of back wages owed to Complainant are relatively close. Respondent computed Complainant's wages, retirement, and annual leave to total $44,408.00, while Complainant's computation renders a total of $49,245.85. Based upon the evidence presented, I find Respondent's figure most persuasive based upon the explanation of the calculations provided in its brief.

Respondent's computation is explained clearly in "Osage Tribal Council's Response to Complainant's Computation of Damages" dated November 9,1997. Therein, Respondent sets out Complainant's wages for the years 1995, 1996 and 1997 based on pay periods and hourly wage rates. The retirement benefits are based on 5 percent of the gross wages per the Tribal Retirement Plan, and the accrued leave is arrived at by use of the maximum leave permitted at 40 hours per year. Complainant's computation in his brief entitled "Computation of Damages and Brief in Support Thereof" dated October 27, 1997, by contrast is calculated on handwritten notes submitted as attachment B. The explanation lacks clarity and supporting data. In sum, Complainant's computation is not as persuasive as Respondent's calculations.

The real issue regarding computation of wages arises because the parties are in disagreement as to whether Complainant adequately mitigated his damages following his termination. Wrongfully discharged complainants have an obligation to use reasonable efforts to mitigate their damages. EEOC v. Sandia Corporation, 639 F.2d 600, 627 (10th Cir. 1980). The 10th Circuit has held that, "once a violation has been demonstrated and back pay has been awarded, the employer has the burden of showing that the discriminatee did not exercise reasonable diligence in mitigating damages caused by the employer's illegal action." Sandia Corp., 639 at 627, citing United States v. Lee Way Motor Freight, Inc. 625 F.2d 918 (10th Cir. 1979). In defining "reasonable diligence", the 10th Circuit explained that "a claimant is required to make only reasonable exertions to mitigate damages, and is not held to the highest standards of diligence. It does not compel him to be successful in mitigation. It requires only an honest good faith effort." Id.

In order to satisfy the burden, the Respondent must establish that (1) there were suitable positions available which Complainant could have discovered and for which he was qualified; and (2) that Complainant failed to use reasonable care and diligence in seeking such a position. Id. The Osage Tribal Council argues it has met its burden by way of Complainant's deposition taken on December 19, 1997. However, from my review of Complainant's deposition testimony, I disagree with Respondent. I find that Complainant made reasonable efforts to mitigate his damages.

Respondent attempts to meet its burden based upon a list of employment opportunities presented to Complainant at the time of his deposition. However, of the more than twenty

positions listed, Complainant noted that he lacked the specific qualifications or that Osage preference was required for all but two of the positions, that of a warehouse worker or janitor.[3] Although Complainant acknowledged that he did not apply for either position, he testified to a variety of employment opportunities to which he did apply.

According to Complainant's testimony, after his OALJ hearing in October, 1995, he diligently sought employment with a variety of employers, but he explained that the job market in Osage County was basically non-existent. Complainant testified that he sought employment with several radio stations because he had previous radio experience; with the tribal chairman regarding possible liaison work; with a friend regarding work in a smoke shop; with the Cherokee Nation for environmental positions; with Native Americans for a Clean Environment; with a fish processing plant; with Quik Trip Corporation for an environmental technician; and with the Oklahoma Scenic Rivers Commission. According to Complainant, he searched the classifieds and attempted to network, but to no avail.

Eventually, Complainant noticed that there appeared to be a constant need for truck drivers and inquired into obtaining financial assistance to attend a state operated vocational school which offered a truck driving course. When his financial assistance was approved, Complainant began his commercial driving license curriculum, and upon graduating he was hired by Arrow Trucking Company on August 26, 1997, where he earns 25% of the gross earnings of his truck which he testified amounts to about $400 to $450 a week.

Based upon the evidence presented, I find Complainant made an honest effort to search for employment in a variety of fields following his unlawful termination. Although Complainant failed to seek minimum wage positions, he explained to my satisfaction that such employment would be impossible as it would not afford enough income to provide child care. While Complainant noted that Osage County was not an economically advantaged area and the job market was lacking, Complainant testified that his wife worked during the majority of Complainant's unemployment as a Tribal Court administrator with the Osage National Tribal Court, and as she was the primary breadwinner of the family relocation would have been difficult. Additionally, Complainant testified that he and his wife had extended family in Osage County and therefore the location was ideal for raising their family.[4]

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[3] Although the list identified 29 positions, the first position listed was the position from which Complainant was terminated and several other positions were duplicated in the report. Additionally, although Complainant acknowledged that he was aware of various positions within the tribe held by non-tribal members, he stated that he was not of Osage preference.

[4] While Complainant originally obtained employment in Bartlesville, Oklahoma following his termination with Respondent, the position only lasted two weeks as his job duties expanded to include solicitation, which he was original informed he would not have to perform. Additionally, the job was located approximately thirty miles from his home and when the family suffered the loss of one of their vehicles the distance to this employment became exceedingly difficult. Thus, I

Because of these difficulties, Complainant searched for positions in and near his home as well as positions which would provide adequate financial support to justify his work outside of the home. While initially Complainant's search was limited to positions in which he had previous expertise, when unsuccessful he expanded his search and obtained additional training in order to ensure his employment prospects. Therefore, based upon Complainant's testimony I find that even if there was a warehouse position available during this period which Complainant failed to apply for, there were a multitude of viable employment opportunities which Complainant made a good faith effort to obtain following his termination. Consequently, I find Complainant has satisfied his burden to mitigate damages and that Respondent is liable for Complainant's back wages in the amount of $44,408.00.

2) Pre-judgment Interest

I fail to find any language in the ARB decision that would preclude an award of pre-judgment interest in this matter. As numerous decisions have noted, back pay awards are designed to make whole the employee who has suffered economic loss as a result of an employer's illegal discrimination. Because of the lapse of time in this instance, I find the assessment of pre-judgment interest is necessary to achieve this end. See Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). Therefore, I find Complainant is entitled to pre-judgment interest of his back wages.

Regarding calculation of this interest, the ARB has previously held that "the usual interest rate employed on back pay awards under....whistleblower provisions is the interest rate for underpayment of federal taxes, set forth at 26 U.S.C. § 6621(a)(2) (short term federal rate plus three percentage points)." Doyle v. American Hydro Nuclear Services, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000). Furthermore, the ARB observed that in whistleblower cases it awards the same rate of interest on back pay awards, both pre- and post-judgment, that is, compounded and posted quarterly. Id.

3) The Attorneys' Fees and Costs

In his "Computation of Damages and Brief in Support Thereof" filed October 29, 1997, Complainant's counsel seeks, inclusive of the $25,281.19 awarded by Judge McColgin, $37,637.25 in attorney's fees and $514.00 in expenses. Subsequently, under cover letter dated December 30, 1997, Complainant's counsel seeks additional fees of $2,950.00 and additional expenses of $402.68. Respondent objects arguing that $200.00 an hour is inappropriate in

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find that Complainant's decision to end this employment does not equate with lack of a good faith effort to locate and maintain employment. To the contrary, I find Complainant's decision to attempt employment located far from home and earning minimum wages only offers further support of Complainant's good faith effort to locate suitable employment.

Oklahoma, the billing should not be calculated on quarter hour increments and that no documentation was provided to support Complainant's counsel's claims for expenses.

On July 9, 1996, Judge McColgin issued a Recommended Decision and Order Awarding costs and expenses in the aggregate amount of $25,281.19. Complainant's counsel concedes this fact in his current application and for that reason I will not examine fees and expenses itemized and/or incurred prior to July 7, 1996, inasmuch as those were the subject of Judge McColgin's decision. Subsequent to July 7, 1996, Complainant's counsel's two fee applications reflect fees totaling $15,991.25 and expenses in the amount of $568.99.

As to an hourly rate of $200.00, given the nature and complexity of this litigation as well as Complainant's success, I do not agree with Respondent that such a rate is excessive in this instance. To the contrary, given the length of the case and the inherent risk in this type litigation, I find $200.00 per hour, where sought, to be reasonable. Likewise, I do not sustain Respondent's objection to the quarter hour billing. Respondent has provided me with no specific instances, such billing seldom appears in the application and where it does the time claimed for the task performed does not on its face unreasonable.

Finally, as to the matter of expenses, it is my finding that telecopy, long distance expenses, postage and xerox expenses and computer research time are all part of office overhead, a cost of doing business, and should not be allowed. As to "Professional Services" used on October 9, 1997, I do not know what those services were for or about and concur with Respondent that this item should fail for lack of documentation. In sum, the only expense I find allowable is $329.30 for Freelance Reporters, Inc., on December 29, 1997, inasmuch as that expense was obviously for the court reporting service that presided over Complainant's deposition on December 19, 1997. Therefore, based upon the foregoing, it is my determination and recommendation that in addition to the $25,281.19 previously awarded by Judge McColgin that Complainant recover additional attorney's fees in the amount of $15,991.25 and additional expenses in the amount of $329.30.

RECOMMENDED ORDER

Based upon the foregoing it is my recommended order that:

a. Respondent's Motion For Entry of Scheduling Order Setting Discovery and Briefing Deadlines, Motion for Order Requiring Joinder of Indispensable Party be **DENIED**;

b. Respondent pay to Complainant back wages in the amount of $44,408.00 plus prejudgment interest from date of Complainant's termination until entry of final judgment; and

c. In addition to the fees and expenses previously awarded in the amount of $25,281.19, Respondent shall pay to Complainant $16,329.55 for additional attorney fees and expenses incurred in connection with this action.

SO ORDERED this ___ day of August, 2000, at Metairie, Louisiana.

C. RICHARD AVERY
Administrative Law Judge

CRA:kw

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).