In the Matter of:

ANGEL NEGRON, **ARB CASE NO. 04-021**

COMPLAINANT, **ALJ CASE NO. 2003-AIR-10**

v. **DATE: January 8, 2004**

VIEQUES AIR LINK, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER GRANTING MOTION FOR LEAVE TO CORRECT CLERICAL ERROR AND RESETTING BRIEFING SCHEDULE

On October 21, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) in this case arising under section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A § 42121 (West 2003 Supp. Pamphlet)(AIR 21). Finding that the Respondent, Vieques Air Link, Inc., had retaliated against the Complainant, Angel Negron, in violation of AIR 21's whistleblower protection provisions, the ALJ ordered the Respondent, inter alia, to "Pay to Complainant compensatory damages in the amount of $50,000 for the infliction of the emotional distress…." D. & O. at 24. However, previously in the "Remedies" section of the D. & O., the ALJ had stated:

> Therefore, it is determined that Complainant is entitled to **$10,000** in compensatory damages for mental anguish and emotional distress. This figure is based on the amount awarded by the Secretary in analogous cases. *See Crow, supra, citing Smith v. Littenberg*, 1992-ERA-00052, slip op. at 7 (Sec'y Sept. 9, 1995) (deciding that where complainant had secured a higher paying job, $10,000 should be awarded for mental and emotional stress because of discharge); *DeFord v. Tennessee Valley Authority*, 1981-ERA-00001, slip op. at 4 (Sec'y Apr. 30, 1984) (awarding

> $10,000 for emotional stress and damage to reputation because of demotion); *McCuistion v. Tennessee Valley Authority*, 1989-ERA-00006, slip op. at 21-22 (Sec'y Nov. 13, 1991) (awarding $10,000 for emotional distress because of harassment, blacklisting, and discharge).

D. & O. at 22 (emphasis supplied). Thus there was a discrepancy in the ALJ's D. & O. between the amount of damages to which the ALJ found Negron entitled in the "Remedies" section ($10,000) of his decision and the amount of damages he subsequently ordered Vieques to pay ($50,000).

On November 4, 2003, Vieques filed a Petition for Review of the D. & O. with the Administrative Review Board pursuant to 29 C.F.R. § 1979.110(a). On November 19, 2003, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule permitting the parties to submit briefs in opposition to or in support of the ALJ's D. & O.

On November 19, 2003, the ALJ issued three documents: 1) a Motion for Leave to Correct Clerical Error (ALJ Motion), 2) an Erratum, 3) a Corrected Decision and Order (C. D. & O.). In the Motion, the ALJ requests the Board to permit him to correct a clerical error in the D. & O. as provided in Federal Rule of Civil Procedure 60(a).[1] ALJ Motion at 1. As grounds for this motion, the ALJ averred that

> Due to a clerical oversight, there is a misprint in the compensatory damages section of the slip opinion.
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> The last full sentence on page twenty-two states "it is determined that Complainant is entitled to $10,000 in compensatory damages for mental anguish and emotional distress." *Slip Opinion*, at 22. That sentence should state that "it is determined that Complainant is entitled to **$50,000** in compensatory damages for mental anguish and emotional distress." The amount of $50,000 was intended

[1] FRCP 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

> to be awarded to the Complainant. This is why $50,000 is the amount stated for Vieques Airlink Inc. to pay Complainant, as ordered on page twenty-four of the Slip Opinion.

Id. In addition, the ALJ requested the Board to permit the insertion of additional text following the corrected sentence[2] that would replace text in the original decision.[3] *Id.* at 2-3. In support of this request the ALJ stated:

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[2] The text the ALJ requested the Board to insert reads:

> This figure of $50,000 is justifiable based on the duration and level of mental anguish, emotional distress, and professional harm endured by Complainant. Furthermore, this amount is comparable to recent awards in similar cases.[*] *See, e.g., Jones v. EG&G Def. Materials Inc.,* ARB Case No. 97-129, ALJ Case No. 1995-CAA-00003 (ARB Sept. 29, 1998)(awarding $50,000 for emotional distress based solely on the testimony of the complainant); *see also Leveille, supra* (awarding $45,000 for mental pain and anguish, and awarding $25,000 for injury to professional reputation); *Doyle v. Hydro Nuclear Services*, ARB Case Nos. 99-041, 99-042, and 00-012, ALJ Case No. 1989-ERA-00022 (ARB May 17, 2000)(increasing compensatory damage award from $40,000, awarded in 1996, to $80,000 due to the determination that respondent's failure to pay the earlier ordered damages caused additional mental distress during the pendency of the claim): *Martin v. The Department of Army*, ARB No. 96-131, ALJ Case No. 1993-SDW-00001 (ARB July 30, 1999)(awarding $75,000 for emotional distress): *Van Der Meer v. Western Kentucky Univ.*, ARB Case No. 97-078, ALJ Case No. 1995-ERA-00038 (ARB Apr. 20, 1998)(adopting ALJ's award of $40,000 for embarrassment because of escorted removal from university job even where the complainant suffered little out-of-pocket loss).
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> [*] Although in years past, the Secretary of Labor has, on some occasions, awarded lower amounts of compensatory damages, those cases are not as persuasive as the cases decided within the last five to six years, because the older cases were decided under outdated economic conditions. *See Hobby v. Georgia Power Co.,* ARB Case No[s]. 98-166, 98-169, ALJ Case No. 1990-ERA-00030 (ARB Feb. 9, 2001), *quoting Leveille v. New York Air National Guard,* ARB Case

Continued . . .

> By replacing this text, no harm or injustice would result to either party since the replacement language simply adds legal support and does not change the findings upon which [the] award determination was made. Also, the amount of $50,000 matches the amount ordered for compensatory damages on page twenty-four of the slip opinion. *See Slip Opinion*, at 24. Therefore, Vieques Airlink was on notice that it has been ordered to pay $50,000 to Angel Negron for compensatory damages.

Id. at 3.

The ALJ's Erratum stated his intention to correct the D. & O. as indicated above and attached to the Erratum was a Corrected Decision and Order, which included the previously described corrections.

> No. 98-079, ALJ Case Nos. 1994-TSC-00003, 4 (ARB Oct. 25, 1999) ("[E]xclusive reliance on damage awards in prior whistleblower cases easily could result in the level of compensatory damages becoming frozen in time, ignoring even such basic factors as inflation – a result that would be inconsistent with the statutory mandate that the victims of unlawful discrimination be compensated for the fair value of their loss.").

ALJ Motion at 2.

[3] The text that the ALJ requested the Board to replace states:

> This figure is based on the amount awarded by the Secretary in analogous cases. *See Crow, supra, citing Smith v. Littenberg*, 1992-ERA-00052, slip op. at 7 (Sec'y Sept. 9, 1995)(deciding that where complainant had secured a higher paying job, $10,000 should be awarded for mental and emotional stress because of discharge); *DeFord v. Tennessee Valley Authority*, 1981-ERA-00001, slip op. at 4 (Sec'y Apr. 30, 1984)(awarding $10,000 for emotional stress and damage to reputation because of demotion); *McCuistion v. Tennessee Valley Authority*, 1989-ERA-00006, slip op. at 21-22 (Sec'y Nov. 13, 1991)(awarding $10,000 for emotional distress because of harassment, blacklisting, and discharge).

ALJ Motion at 2-3.

On December 5, 2003, Vieques Air Link filed an Opposition to Motion for Leave to Correct Alleged Clerical Error. Initially, Vieques asserted that Fed. R. Civ. P. 60(a) is not applicable to administrative proceedings arising under AIR 21. Vieques also argued that the ALJ failed to establish that his statement on page 22 of the D. & O. that "Complainant is entitled to $10,000" was in error and that it was just as likely that the ALJ's order that Vieques pay Negron $50,000 as stated on page 24 of the D. & O., was incorrect.

Proceedings before the Office of Administrative Law Judges under AIR 21 are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges codified at subpart A of 29 C. F. R. part 18. 29 C.F.R. § 1979.107(a). In any situation to which these rules do not provide or in any situation in which these rules or any statute, executive order or regulation do not control, the Rules of Civil Procedure for the District Courts of the United States shall apply. 29 C.F.R. § 18.1(a). *Accord Ford v. Northwest Airlines, Inc.*, ARB No. 03-014, ALJ No. 02-AIR-21, slip op. at 2 (ARB Jan. 24, 2003). Vieques has not identified any applicable Rule of Practice and Procedure providing for correction of an Administrative Law Judge's clerical error, nor any controlling statute, executive order or regulation, and we are not aware of any such rules, controlling statutes, executive orders or regulations. Accordingly, we hold that Fed. R. Civ. P. 60(a) is applicable to AIR 21 proceedings.

To determine whether Fed R. Civ. P. 60(a) permits correction of an asserted clerical error in this case, this Board must determine whether the correction is intended to conform the order to reflect the intent of the ALJ when he entered the original order or whether the correction has been requested in an attempt to correct a factual or legal error in the original decision. *American Fed'n of Grain Millers v. Cargill Inc.*, 15 F.3d 726, 728 (7th Cir. 1994). Describing this distinction, the Ninth Circuit wrote:

> The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of "blunders in execution" whereas the latter consist of instances where the court *changes its mind,* either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Blanton v. Anzalone, 813 F.2d 1574, 1577 n.2 (1987)(citation omitted).

As an initial matter, we note that the ALJ's issuance of the Erratum and Corrected Decision and Order after Vieques had filed a Petition for Review of the D. & O. with the Board and while the ALJ's Motion to Correct Clerical Error was pending before the Board was erroneous. Most obviously, the ALJ's action was at the very least premature given that the Board had not yet ruled on the ALJ's Motion to Correct Clerical Error. In

addition, once Vieques filed the Petition for Review with the Board, the ALJ lacked jurisdiction to reconsider and amend the D. & O. *Cf., Jusino v. Zayas,* 875 F.2d 986, 990 (1st Cir. 1989)(district court should have requested appellate court to remand case before correcting decision while case was on appeal to appellate court). However, in any event, given the circumstances of this case, we would have remanded the case to the ALJ for correction and therefore any error was harmless. *Accord Jusino v. Zayas,* 875 F.2d at 990.

A district court's latitude to correct clerical errors is very wide. *Blanton v. Anzalone,* 813 F.2d at 1577. The ALJ has unequivocally stated that the $10,000 figure was a clerical error. This statement is directly supported by the fact that the ALJ subsequently ordered Vieques to pay $50,000 in compensatory damages in the "Order" portion of the D. & O. Although a more fulsome explanation of how this clerical error was made would have buttressed the ALJ's contention, we have absolutely no basis for disbelieving the ALJ's assertion of clerical error. Furthermore, the error was expeditiously identified, and the parties were immediately alerted to the ALJ's intention to request permission to correct the error. Finally, the Board reviews the ALJ's legal determinations de novo, and thus Vieques may present argument to the Board in opposition to the ALJ's legal citations in support of the $50,000 award. *Cf., Yellow Freight Sys., Inc. v. Reich* 8 F.3d 980, 986 (4th Cir. 1993)(analogous provision of Surface Transportation Assistance Act, 49 U.S.C.A § 31105 (West 1997)). Accordingly we **GRANT** the ALJ's Motion to Correct Error and recognize the ALJ's Corrected Decision and Order as the decision on appeal in this case.

In light of our decision we establish the following amended briefing schedule:

The Respondent may file an initial brief, not to exceed thirty (30) double-spaced typed pages, on or before **February 9, 2004.** The Complainant may file a reply brief, not to exceed thirty (30) double-spaced typed pages, on or before **March 10, 2004.** The Respondent may file a rebuttal brief, exclusively responsive to the reply brief and not to exceed ten (10) double-spaced typed pages, on or before **March 24, 2004. If a party decides not to file a brief, please inform the Board by letter, telephone, or facsimile.**

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. *See, e.g.*, Fed. R. Civ. P. 7(b).

All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 13 inch top and bottom margins, printed on 8 1/2 by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted.

An original and four copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C., 20210.[4]

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R. Dunlop
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Note: Questions regarding any case pending before the Board should be directed to the Board's staff assistant, Ernestine Battle. Telephone: (202) 693-6200
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[4] In a letter dated December 18, 2003, counsel for Respondent requested an internet address for the regulations applicable to the review proceedings in this case. The only applicable regulations are those found at 29 C.F.R. Part 1979. These are available at http://www.gpoaccess.gov/cfr/index.html. The Board does not currently have its own procedural regulations.