



IN THE MATTER OF:

CASE NO. 92-ERA-37

GREGORY A. SPRAGUE,

DATE: July 15, 1996

COMPLAINANT,

v.

AMERICAN NUCLEAR RESOURCES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

In this case arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988),^{2/} the Secretary of Labor found that Respondent, American Nuclear Resources, Inc. (ANR), violated the ERA when it discharged Complainant, Gregory A. Sprague. *See* Dec. 1, 1994 Dec. and Ord. The Secretary ordered certain affirmative action to remedy the violation, set forth the basis for calculating back pay, and remanded to the Administrative Law Judge (ALJ) to establish the amount of back pay, attorney's fees, and costs that ANR shall pay.

^{1/} On April 17, 1996, the Secretary delegated jurisdiction to issue final agency decisions under, *inter alia*, the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988), and the implementing regulations, 29 C.F.R. Part 24, to the newly created Administrative Review Board (the Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization is also attached. The Secretary's earlier decision and the entire record in this case have been reviewed by the Board.

^{2/} The 1992 amendments to the ERA do not apply to this case because the complaint was filed prior to the effective date of those amendments.

On remand, the parties agreed on the amount of back pay but not on the attorney's fees and costs. In a Supplemental Recommended Decision and Order (S. R. D. O.), the ALJ recommended that Respondent pay the agreed amount of back pay and \$12,562 in attorney's fees and costs. We accept the ALJ's S. R. D. O. in part and modify it as explained below.

DISCUSSION

The ALJ deducted from the requested attorney's fee \$506 for the hours claimed for preparing Complainant's brief on review by the Secretary.^{3/} Complainant's former counsel submitted the fee request concerning that brief in December 1994. The ALJ made the deduction because the brief was late filed and not considered by the Secretary. S. R. D. R. at 2.

Sprague contends that the deduction should not be made because ANR waived any objection to the hours claimed for preparing the brief when it did not oppose the earlier fee request. But the ERA requires a respondent to pay only those costs (including attorney's fees) reasonably incurred in bringing the complaint. 42 U.S.C. § 5251(b)(2)(B). We agree with the ALJ that preparing and filing a brief several months late, without seeking leave or providing any reason for the delay, was not reasonable. Therefore it was proper to deduct the hours devoted to preparing the brief.

ANR challenges the award of fees incurred for work relating to an appeal ANR filed in the United States Court of Appeals for the Sixth Circuit. ANR Brief at 3-4. The sixth Circuit has ruled that the ERA does not authorize the Secretary (or now, the Board) to award attorney's fees for appellate work. *DeFord v. Tennessee Valley Authority*, 715 F.2d 231, 232-233 (6th Cir. 1983). We are compelled to follow *DeFord* because this case arises in the Sixth Circuit.^{4/} Accordingly, the fees relating to work in the court of appeals should be deducted from the recommended award. The deduction is \$2040 (13.6 hours X \$150).

^{3/} Although the ALJ initially referred to the deduction as \$506 (4.6 hours X \$110 per hour), S. R. D. O. at 1, he reduced the fee petition by \$504. S. R. D. O. at 2. We find that the correct deduction is \$506.

^{4/} Compare *Blackburn v. Reich*, 79 F.3d 1375 (4th Cir. 1996) (ERA permits Secretary to order the respondent to pay attorney fees for appellate work in the court of appeals).

CONCLUSION

Respondent shall pay to Complainant \$4,448.00 in back pay. Respondent shall pay to Complainant's counsel \$10,520.00, representing \$10,085 in attorney's fees and \$435 in costs.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM,
Member

JOYCE D. MILLER
Alternate Member