



In the Matter of:

**RICHARD G. SMITH,**

**ALJ CASE NO. 92-ERA-52**

**COMPLAINANT,**

**v.**

**DATE: April 29, 1997**

**RICHARD L. LITTENBERG, M.D.  
AND HONOLULU MEDICAL GROUP,**

**RESPONDENTS.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1</sup>

**ORDER DENYING MOTION TO VACATE**

Complainant and Respondents jointly have moved us to vacate the September 6, 1995 Decision and Limited Remand Order of the Secretary and the December 13, 1994 Recommended Decision and Order of the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988).<sup>2</sup> A brief recitation of the procedural posture of this complaint will focus the discussion.

Complainant Richard G. Smith contended that Respondents violated the ERA when they discharged him from employment. The District Director of the Wage and Hour Division found merit in Smith's complaint and ordered some of the relief which he requested. When

---

<sup>1</sup> On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the statute and regulations involved in this case to the Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

<sup>2</sup> Section 2902(b) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, amended the ERA for claims filed on or after its date of enactment, October 24, 1992. The amendments do not apply to this case filed in June 1992.

Smith sought a hearing to establish his entitlement to reinstatement and additional remedies, Respondents argued that, under the implementing regulations, Smith was not entitled to a hearing before an ALJ because he had prevailed before the District Director. The ALJ agreed and, in a recommended order, dismissed the complaint.

The Secretary reversed the ALJ and found that a complainant who has obtained partial relief before the District Director has the right to a hearing to establish his entitlement to other relief sought. Secretary's Decision and Remand Order, June 30, 1993. On remand, the ALJ recommended reinstatement and other affirmative relief and ordered payment of back pay and compensatory damages.

The Secretary adopted much of the ALJ's recommended order on remand and ordered a limited remand to the ALJ for a recommendation on attorney's fees and costs. Sept. 6, 1995 Decision and Limited Remand Order. Respondents sought judicial review of that order in the United States Court of Appeals for the Ninth Circuit.

Smith and Respondents engaged in mediation and reached a settlement agreement that prevented the parties from revealing its terms to the Secretary, who was not a party to the court settlement.<sup>3</sup> Asking that this Board "respect the parties' wishes," Smith and Respondents now ask us to vacate the Secretary's and ALJ's decisions. We deny the motion.

## DISCUSSION

The motion states that "Respondents are particularly concerned that the Secretary's Order and the ALJ's Recommended Decision should be vacated because of the potential for stigmatizing Respondents." Memorandum in Support of Motion at 3. However, Respondents did commit a violation of the ERA and any "stigma" that attaches to that conduct is a consequence of that violation.

The Supreme Court has opined that, when the parties settle a case that is pending on appeal, the public interest must be considered in deciding whether to vacate a lower court's

---

<sup>3</sup> The ERA provided at 42 U.S.C. § 5851(b)(2)(A) (1988):

Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by [42 U.S.C. § 5851(b)(2)(B)] or denying the complaint.

In this case, after the Secretary entered a final decision and order providing the relief prescribed by the ERA, Smith and the respondents entered into a settlement agreement while a petition for review was pending in the court of appeals.

decision. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994); *accord, Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996). The Supreme Court explained that “judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.” *U.S. Bancorp, quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting).

In this case, we find that the public interest will be served by permitting the ALJ’s and the Secretary’s decisions to stand since those decisions resolved issues concerning deductions from back pay and entitlement to compensatory damages and interest on compensatory damages. The same issues can arise in other complaints filed under the whistleblower provisions of the ERA and several other Federal statutes. The public interest favors allowing the decisions to stand as legal precedent.

In this case there is an additional reason to let the decisions stand. Unlike the usual ERA case in which there is a settlement, in this case the Secretary did not examine or enter into the settlement agreement because it occurred after the issuance of a final agency decision. Since the Secretary was not a party to the settlement, the Secretary’s decisions are the Department’s final position in this case.

We find that it is in the public interest to permit the ALJ’s and the Secretary’s decisions to stand. Accordingly, the motion to vacate is **DENIED**.

**SO ORDERED.**

**DAVID A. O’BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member