U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

C. D. VARNADORE,

COMPLAINANT,

v.

OAK RIDGE NATIONAL LABORATORY, LOCKHEED MARTIN ENERGY SYSTEMS, INC., AND LOCKHEED MARIETTA CORP.,

RESPONDENTS.

ARB CASE NO. 99-121

ALJ CASE NOS. 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 94-CAA-3, 95-ERA-1

DATE: JUN - 9 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER

Complainant in these consolidated cases under the environmental whistleblower laws and the Energy Reorganization Act, 29 C.F.R. Part 24 (1999), moved for an order "to draw adverse inferences," for oral argument, to make corrections to his March 3, 2000 rebuttal brief, and included a Freedom of Information Act request. For the reasons set out below, the motion to draw adverse inferences and for oral argument is denied; the motion to make corrections is granted and, as explained below, the FOIA request is being addressed separately.

1. Motion for an order drawing adverse inferences

Complainant urges the Administrative Review Board to draw the inference that the Occupational Safety and Health Administration and the Office of the Solicitor have no objection to reopening this case and overruling the 1996 Final Decisions[1] because those agencies filed no response to Complainant's motions of May 2, 1998, and January 5, 1999, in the nature of motions under Rule 60(b) of the Federal Rules of Civil Procedure. It is not surprising, of course, that OSHA

[1] *See Varnadore v. Oak Ridge Nat 'l Lab.,* Case Nos. 92-CAA-2, 92-CAA-5, 93-CAA-1, Sec'y. Dec. Jan. 26, 1996 and *Varnadore v. Oak Ridge Nat'l. Lab., Case Nos.* 92-CAA-2, 92CAA-5, 93-CAA-1, 94-CAA-2, 92-CAA-3, 95-ERA-1, ARB Dec. Jun. 14, 1996.

has not responded to Complainant's motions since it is not a party to these cases and has not sought leave to participate as *amicus curiae.*[2]

Should there have been any doubt as to the position of OSHA on this matter, it has now been entirely dispelled. On April 6, 2000, the Office of the Solicitor, representing OSHA, wrote to the General Counsel of the Administrative Review Board stating that:

> OSHA has not been a party to the administrative adjudication of the decisions at issue [in *Varnadore v. Oak Ridge National Laboratory*]. As such, there should be no inference drawn from the absence of briefs filed by OSHA . . . . It would not be appropriate to infer that the absence of a brief by OSHA lends any support to either party's position on the Rule 60(b) motions.

Accordingly, Complainant's Motion for an order drawing adverse inferences is **DENIED.**

2. Motion for oral argument

Complainant renews his request for oral argument. Complainant refers by analogy to the practice before other adjudicatory boards in the Department of Labor, the Employees' Compensation Appeals Board, the Benefits Review Board, the Wage Appeals Board and the Board of Service Contract Appeals.[3] Each of those boards has explicit regulations either requiring oral argument upon request or providing that the board in question has discretion to grant oral argument. *See, e.g.,* 29 C.F.R. §7.14(b) (ARB procedures delegated from the former WAB); 29 C.F.R. §8.16 (ARB procedures delegated from the former Board of Service Contract Appeals); 20 C. F. R. §501.5(a) (Employees' Compensation Appeals Board); 20 C. F. R. §802.306 (Benefits Review Board).

There is no provision on oral argument before the ARB under the regulations implementing the environmental whistleblower laws, 29 C. F. R. Part 24, and the absence of such a provision implies that granting oral argument is within the discretion of the Board. Furthermore, Complainant mischaracterizes the holding in *Morgan v. United States,* 298 U.S. 468 (1936), as promoting oral argument in administrative proceedings. To the contrary, *Morgan* explicitly states that "[a]rgument may be oral or written." 298 U.S. at 481. We find that oral argument would serve no useful purpose in our decision regarding Complainant's motions to reopen the record. The request is **DENIED**.

3. Motion to correct errors

Complainant's motion to correct errors in his March 3, 2000 rebuttal brief is **GRANTED**.

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[2] The Briefing Order initially issued in this case stated a briefing date for the Assistant Secretary. Briefing order dated September 28, 1999. However that error was corrected in a subsequent order. Order clarifying Briefing Schedule, dated February 26, 2000.

[3] The authority and responsibility of the Wage Appeals Board and the Board of Service Contract Appeals were transferred to the Administrative Review Board by Secretary's Order No. 2-96, 61 Fed. Reg. 19978 (May 3, 1996) .

4. Freedom of Information Act

Complainant's Freedom of Information Act request is being processed in accord with applicable Department of Labor FOIA procedures.

Accordingly, Complainant's motion is denied in part and granted in part as described above.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member