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April 14, 2001

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Janet R. Dunlop
General Counsel
U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W. Room S-4309
Washington, D.C. 20210

RE: Pastor v. Veterans Affairs Medical Center, ARB Case N0. 99-071
ALJ Case No. 99-ERA-11

Dear Ms. Dunlop:

Enclosed for filing with the Administrative Board of Review please find an original and five copies of the Respondent Veterans Medical Center's Brief in the above referenced matter pursuant to the Administrative Review Board's order of March 1, 2001.* Copies have been served on all of the parties as per the attached certificate of service.

Thank you for your attention to this matter.

Sincerely,

JOSE H. LOPEZ
Regional Counsel

Enclosure:
cc: Individuals named on Certificate of Service.

* On April 5, 2001 the Administrative Review Board issued an order granting an extension until April 16, 2001 for the filing of briefs.

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UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD
WASHINGTON, D.C.

In the matter of
JOAN PASTOR,
Complainant,

ARB CASE NO. 99-071
ALJ CASE NO. 99-ERA-11

v.

VETERANS AFFAIRS MEDICAL CENTER,
Respondent

BRIEF OF RESPONDENT VETERANS AFFAIRS MEDICAL CENTER

Pursuant to the March 1, 2001 Order of the Department of Labor Administrative Review Board the Respondent Veterans Affairs Medical Center, by its counsel, Jose H. Lopez, hereby submits its brief addressing the issue of whether the United Sates has waived sovereign immunity under the whistleblower protection provisions of the Energy Reorganization Act. For the reasons discussed below it is Respondent's position that the United States has not waived sovereign immunity with respect to the application of the whistleblower provisions of the Energy Reorganization Act, hereinafter referred to as ERA.

STATEMENT OF THE ISSUE

Has the United States waived sovereign immunity concerning the payment of compensatory damages for violations of the whistleblower protection provisions of the Energy Reorganization Act?

ARGUMENT

It is a fundamental and long-settled proposition of law that the United States enjoys sovereign immunity absent an express waiver of that immunity. It is also well settled that only Congress can waive this immunity and that such waiver must be clear and unequivocal. See Dalehite v. United States, 346 U.S. 15, 30 (1953) Moreover any such waiver must be cautiously examined and as stated by the Supreme Court in McMahon v. United States, 342 U.S. 25, 27 (1951) "construed strictly in favor of the sovereign". The question of what constitutes an "an unequivocal waiver" has been addressed by federal courts on many occasions. In United States v. Mitchell, 445 U.S. 535, 538 (1980), the Supreme Court quoting United States v. King , 395 U.S. 1, 4 (1969) stated that a waiver of sovereign immunity " cannot be implied but must be unequivocally expressed." Webster's Encyclopedic Dictionary of the English Language (1996 Edition) defines unequivocal as: *not equivocal, unambiguous, clear; having only one possible meaning or interpretation*

The whistleblower protections provisions of the ERA found at 42 U.S. Sec. 5851 (a)(1) prohibit discriminatory acts against any employee for engaging in protected activities by

any "employer". Section 5851(a)(2)(A) defines employer to include a "licensee" of the Commission. The Respondent has been issued a license by the Commission and consequently fits within the definition of "employer" under the ERA. The fact that the Respondent is an "employer" as defined by the ERA is not, however dispositive of the issue of waiver of sovereign immunity.

Section 5851 (b)(2)(B) empowers the Secretary of Labor to redress violations of the whistleblower protections by ordering the "person" who committed the violation to reinstate the complainant to his/her former position, order compensation including back pay and also order payment of compensatory damages. Noticeably missing from the aforementioned provisions of the ERA is any definition whatsoever of the term "person". Of necessity any argument that the United States has waived sovereign immunity would require a supposition that the term "person" is synonymous and interchangeable with the term "employer" in Section 5851(b)(2)(B) of the ERA. Such a supposition cannot be the sole basis for any determination that there has been a waiver of sovereign immunity. To the contrary basing a finding that there has been a waiver of sovereign immunity on supposition would fly in the face of the long-standing legal principle that a waiver of sovereign immunity must be based on a clear unequivocal expression by Congress. It is patently clear that the statute does not contain any language that demonstrates a clear unambiguous articulation by Congress that it intended for the United States to be liable for the payment of compensatory damages, nor has any such language been identified. See Clinton County Commissioners v. United States Environmental Protection Agency, 116 F. 3d 1018, 1021 (3d Cir. 1997) (en banc), cert. Denied, 118 S.Ct. 687 (1998) where

the Third Circuit held that a plaintiff "must identify a specific statutory provision that waives the government's immunity." In the absence of a clear expression of congressional intent to waive sovereign immunity there is simply no such waiver, nor can such a waiver be implied or assumed merely on the basis of one possible interpretation of the language in the ERA. i.e. that the term " person" also includes an "employer" . See United States v. King , Supra.

In support of its argument that there has not been an "unequivocal waiver" by the United States Respondent urges the Administrative Review Board to consider the absurd results that would ensue if the Respondent's status as an "employer" under the ERA were to be deemed to also include Respondent as a "person' under the ERA. Section 5851(c) states than "any person adversely affected" by an order issued by the Secretary can obtain review of said order in the appropriate federal circuit court of appeals. Section 5851(d) provides that the Secretary may initiate an action in district court to require compliance with the Secretary's order. If indeed the term "person" is synonymous with the term "employer" in the context of the ERA, by virtue of the review and complaint provisions, Section 5851(c) and (d), the United States would be placed in the ludicrous position of litigating against itself in federal court. It is unlikely that this was the intent of Congress. In contrast Respondent urges the Administrative Review Board to consider the judicial review provisions of the Whistleblower Protection Act, 5 USC 1214 (c)(1) where judicial review of Merit Systems Protection Boards's corrective action must be requested, not by the Office of Special Counsel, but by the appellant/employee. It is unlikely that Congress would have intended to have the federal government litigate against itself in cases

involving whistleblowers under the ERA and not under the Whistleblower Protection Act in Title 5 U.S.C., hereinafter referred to as WPA.

Additionally it should be noted that the Whistleblower Protection Act already provides equivalent protection and remedies to employees engaged in whistleblowing activities. The WPA has a very clear waiver of sovereign immunity whereas the ERA statute is shrouded in obscurity on the issue of sovereign immunity. In fact the Complainant has already availed herself of the WPA remedies following a determination by the Merit Systems Protection Board that she was the victim of a hostile work environment as a result of whistleblowing activities. It is also highly unlikely that Congress intended such wasteful redundancy of judicial resources. In order to avoid wasteful redundancy Congress probably intended to give Complainant redress under the specific waiver of sovereign immunity contained in the WPA provisions, 5 U.S.C. 1214(g), which include reinstatement, attorney's fees, back pay, related benefits, medical costs, travel expenses, and any other reasonable and foreseeable **consequential damages.** (Emphasis added) It is improbable and illogical to assume that Congress intended to waive sovereign immunity only on the issue of consequential damages in the WPA and also waive sovereign immunity as relates to compensatory damages in the ERA, especially when we consider that both the WPA and the ERA prohibit the same type of conduct.

The fact that the Respondent can be construed as an "employer" because of Respondent's licensee status does not automatically make Respondent, as an instrumentality of the United States, liable for compensatory damages **unless** there is a clear and unambiguous

waiver of sovereign immunity by Congress. While the Respondent's "employer" status may subject the Respondent to the Secretary's order to reinstate an employee with back pay, to suggest that said status also means that the United States has waived sovereign immunity on the issue of payment of compensatory damages is a quantum leap in logic. It is Respondent's position that while it may be subject to an order from the Secretary to take affirmative action to abate a violation, reinstate the complainant to his former position with back pay and with the same terms, conditions, and privileges enjoyed by the employee prior to a discriminatory act, it is not subject to an order to provide compensatory damages because there has been no clear unequivocal waiver of sovereign immunity as to the compensatory damages. On this point Respondent notes that it is not inconsistent for an agency of the United States to be subject to some portions of a statute but specifically not subject to portions of the same statute which impose liability for compensatory damages. This was clearly illustrated in the case of James Griffin Lane v. Federico F. Pena, Secretary of Transportation, ET AL., 518 U.S. 186. In Lane the plaintiff was separated form the U.S. Merchant Marine Academy because of a medical condition which disqualified him for service in the Merchant Marine. Plaintiff filed an action under Section 504(a) of the Rehabilitation Act, which prohibits discrimination on the basis of disability by any program or activity conducted by an executive agency of the Federal Government. The Supreme Court held that there was no clear waiver of sovereign immunity concerning the specific issue of an award of compensatory damages although the Rehabilitation Act prohibited discrimination on the basis of disability by an executive agency of the United States.

The ERA does not have any language within it that demonstrates a clear, unambiguous, intention by Congress of a waiver of sovereign immunity. As noted in Lane v. Pena , Supra , "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, see, e.g. *United States v. Nordic Village, 503 U.S. 30, 33-34, 37, 117 Ed. 2d 181, 112 S. Ct. 1011 (1992),* and will not be implied, *Irwinv. Department of Veterans Affairs, supra, at 95"* What is "clear" in the ERA is that its language is ambiguous at its best, and silent at its worst on the issue of a waiver of sovereign immunity. To read into that language that there has been a waiver of sovereign immunity is nothing more an exercise in implication and supposition. Where there is an ambiguity in statutory language the Supreme Court is very clear that the ambiguity must be "construed in favor of immunity. Library of Congress Et Al. v. Shaw, 478 U.S. 310, 318. Consequently any ambiguity must be resolved in favor of sovereign immunity.

CONCLUSION

For the foregoing reasons it is clear that there has been no unequivocal waiver of sovereign immunity by the Untied States and the Administrative Review Board must conclude that there has been no such waiver.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jose H. Lopez, Esquire, counsel for Respondent, Veterans Affairs Medical Center, hereby certify that a copy the Brief of Respondent Veterans Affairs Medical Center was sent by first class mail on April 14, 2001 to the following:

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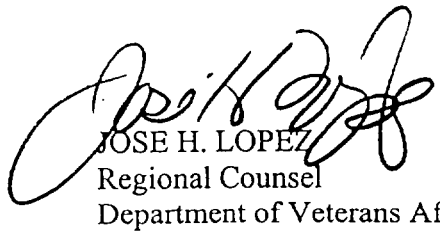

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