PDR available per J. Lee

TVA

Tennessee Valley Authority, Post Office Box 2000, Spring City, Tennessee 37381-2000

AUG 2 4 1998

U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
Washington, D.C. 20555

Gentlemen:

In the Matter of) Docket Nos. 50-390
Tennessee Valley Authority)

WATTS BAR NUCLEAR PLANT (WBN) - UNIT 1 - DEPARTMENT OF LABOR (DOL) CASE NO 97-ERA-53 (CURTIS C. OVERALL V. TENNESSEE VALLEY AUTHORITY)

In a letter to John A. Scalice dated July 17, 1998, NRC requested that TVA provide NRC with copies of future filings made to DOL by TVA in the Overall case. TVA committed to that requested action in a letter dated August 7, 1998. Enclosed is TVA's most recent filing entitled, "Respondent's Reply Brief."

If you have any questions concerning this latest filing, please contact me at (423) 365-1824.

Sincerely,

P. L. Pace
Site Licensing and Industry Affairs

Enclosure
cc: See page 2

D030

AUG 2 4 1998

cc (Enclosure):
Mr. Luis A. Reyes
U.S. Nuclear Regulatory Commission
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Mr. James Lieberman, Director, Office of Enforcement
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ENCLOSURE

ADMINISTRATIVE REVIEW BOARD (ARB) BRIEF
ARB CASE NOS. 98-111 AND 98-128
(ALJ CASE NO. 97-ERA-53)

RESPONDENT'S REPLY BRIEF

BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR

IN THE MATTER OF	)	
	)	
CURTIS C. OVERALL	)	
	)	
Complainant	)	
	)	
v.	)	ARB Case Nos. 98-111 and 98-128
	)	
TENNESSEE VALLEY AUTHORITY	)	(ALJ Case No. 97-ERA-53)
	)	
Respondent	)	

RESPONDENT'S REPLY BRIEF

Complainant's initial brief focuses on his disagreement with some elements of the attorneys' fee award from the preliminary order on relief issued by the Administrative Law Judge (ALJ) and on the ruling in the recommended decision and order (RDO) that complainant had not shown that he was entitled to equitable tolling of the time limit to file his complaint. For the most part, complainant's arguments are not well taken. For ease of reference, this reply will use the section designations from complainant's brief.

I.A. Complainant correctly points out that there was a typographical error in paragraph 3 on page 2 of the preliminary order.

I.B. Complainant tacitly admits that he is not entitled to recover his attorney's full hourly rate for the time his attorney spent traveling to several depositions. However, he argues that the preliminary order was in error by calculating a reduction of the fee based on all the hours claimed by his attorney for the depositions in question. While there is some merit to complainant's general proposition that his attorney is entitled to a higher hourly fee for time actually spent in the deposition than for travel, the problem was created by complainant's attorney and not the ALJ. The billing records submitted by complainant's attorney in support of the fee request listed only the total time spent on the depositions and did not differentiate between travel time and time actually spent in the depositions. Faced with the incomplete information supplied in support of the fee petition, the ALJ appropriately construed those records against complainant and reduced the fee.

I.C. As with the issue in I.B., TVA has no quarrel with the general proposition put forth by complainant that he is entitled to recover a reasonable amount for the fees charged by the attorneys who filed affidavits in support of the fee petition. However, again as with I.B., the problem was created by complainant and not the ALJ. As complainant, with appropriate candor, makes clear, he was tardy in submitting the request for the expert fee at issue to the ALJ, and the ALJ did not include

that amount in the preliminary order. The parties were fully aware that the ALJ intended to act quickly on the order for interim relief under the terms of the remand order from this tribunal. It was incumbent on complainant to get accurate and complete information to the ALJ on an expedited basis. The ALJ's decision not to award this fee was proper under the circumstances.

I.D. Complainant takes strong issue with the ALJ's reduction of the hours spent on posthearing matters, including the reading and indexing of the hearing transcript and the preparation of the posthearing brief. However, the ALJ correctly adjusted the hours for this work.

Complainant's principal attorney made a tactical choice with respect to reading and indexing the hearing transcript. Instead of assigning this task to a paralegal or legal secretary, as TVA did for the most part, complainant's attorney had another lawyer in his office, a lawyer who had not attended any of the hearing or the depositions, to read and index the transcript. According to complainant's attorney, this decision was driven by his assignment of the initial drafting of the posthearing brief to this other lawyer.

To put it directly, complainant seeks to have TVA pay for the time spent by a lawyer who did not attend the hearing to educate herself about the proof in the case so that she could

write the first draft of the posthearing brief. The inefficiency of this procedure is apparent. In contrast, the same TVA attorney who handled the hearing had his secretary prepare most of the hearing transcript index and wrote the posthearing brief himself. Another lawyer did not have to spend time becoming familiar with the testimony and the exhibits, and an attorney did not perform the paralegal work of indexing the transcript. The ALJ properly refused to require TVA to pay the claimed amount which arose solely from complainant's counsel's choices about how work was going to be allocated in his office.

Complainant's counsel also challenges the ALJ's reduction of the time allocated to the posthearing brief. TVA agrees with complainant that the posthearing brief was an important submission. However, many of the legal and factual issues covered in the posthearing briefs had been covered, in some instances in great detail, in the parties' briefs on TVA's motion for summary decision. Under these circumstances, the ALJ's reduction in hours spent on this part of the case was proper.

This conclusion is reinforced by a review of the time records submitted by complainant's counsel. According to those records, counsel spent a total of 217.65 hours on the posthearing brief, or nearly five and one-half weeks (60.9 hours by Mr. Van Beke, 156.75 hours (including the 41.25 hours reading and indexing the transcript) by Ms. Boulton). Since complainant

received the transcript on or about February 2, 1998, and served his posthearing brief on March 11, 1998, a period of less than five weeks, complainant's claim reflected an apparent duplication of effort by counsel which would fully support a reduction in the hours claimed.

II. Complainant also asserts that his complaint was timely filed on grounds other than the continuing violation theory adopted in the RDO--namely what he terms the lack of a final and unequivocal notice and equitable tolling. These arguments shed more light on the inherent weaknesses of complainant's claim than lend any support to that claim.

The pertinent facts are well established. The crux of this complaint is the elimination of complainant's position at TVA's Watts Bar Nuclear Plant (Watts Bar) in 1995. Complainant knew (or should have known) in August 1994 that his position at Watts Bar was slated for elimination during fiscal year 1995. He received formal written notice to that effect in September 1994. In June 1995, the date for his transfer from Watts Bar to TVA Services was firmly set for mid-September, and he was in fact transferred to Services on September 18, 1995. Services was an entirely separate organization from Watts Bar and was not part of TVA Nuclear. Shortly after complainant transferred to Services, he was formally placed in a job in Services that had been created

for him and on which he had applied in June, thus severing all of his administrative ties to Watts Bar and TVA Nuclear.

Based on these facts, it is clear that complainant knew no later than August 1994 that his position was slated for elimination, knowledge which prompted him to apply for the job in the Services organization which had been created for him. He knew no later than June 1995 that his position would be eliminated in September 1995 and he would be transferred to Services. He knew in September 1995 that his position had been eliminated and he was, in fact, transferred to Services, and he knew in early October 1995 that he had accepted a job in Services and was no longer an employee of either Watts Bar or TVA Nuclear. Accordingly, he had final and unequivocal notice no later than June 1995 that he would no longer be employed at Watts Bar, which was confirmed by his actual transfer in September 1995 and acknowledged by him by his formal acceptance of the job in Services in early October 1995.

Complainant also contends that he is entitled to have the time limits equitably tolled. TVA's position on the timeliness of the complaint is set out in TVA's initial brief (at 17-23) and need not be repeated here. Complainant's main argument is that he thought that his move to Services--in particular his acceptance of the job which had been created for him in

Services--would give him additional job security and so shield him from being terminated from TVA employment. According to complainant, he was actively misled about his situation in Services and so his untimely filing of his complaint should be excused.

The difficulties with this argument are manifest. In the first place, complainant does not, and cannot, argue that TVA "actively misled" him about the elimination of his job at Watts Bar, the linchpin of this case. He does not, and cannot, argue that he had any administrative ties with Watts Bar or TVA Nuclear after he accepted the Services job in early October 1995. There is no dispute that Services was not a part of the TVA Nuclear organization. Since complainant's entire case turns on his claim that his Watts Bar job was eliminated because he had raised a nuclear safety issue, and he knew that his Watts Bar job had been eliminated effective September 18, 1995, he was not "actively misled" at all about the core event of his case. There simply was no confusion that as of September 1995 complainant no longer was a Watts Bar employee.

His reliance on being "actively misled" by Services is misplaced. Services had nothing to do with his job situation at Watts Bar and had no role in the issue he raised in April 1995 about the ice basket screws. In 1996, when Services decided to eliminate complainant's job (along with many others), that

decision was made by Services management with no input whatsoever from anyone in TVA Nuclear. More fundamentally, the job he accepted in Services gave him the opportunity, but not the guarantee, of continued employment with TVA if he successfully marketed his professional skills, a point he knew or should have known when he joined Services in 1995. His lack of success in that marketing effort meant that Services eliminated his job as part of a large cutback in Services' workforce by the end of fiscal year 1996.

Reduced to simplest terms, complainant was aware that his Watts Bar job had been eliminated as of September 18, 1995. Instead of challenging that action at that time, he chose to wait to see if his efforts to market his skills through the Services organization would be successful. On July 24, 1996, complainant learned that his efforts in Services had not been successful and that he was going to be terminated through a reduction in force effective September 30, 1996 (CX27). Only in January 1997 did he file his complaint in this case, a complaint directed not at his reduction in force from Services, but the elimination of his Watts Bar job. He chose to delay pursuing his legal remedies based on considerations which apparently made sense to him at the time, and not because he was "actively misled" by anyone at TVA.

Based on the foregoing, complainant's petition for review should be denied.

Respectfully submitted,

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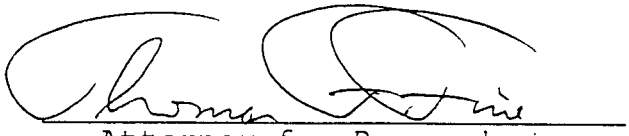
CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief has been served on complainant by mailing a copy to Charles W. Van Beke, Esq., Wagner, Myers & Sanger, P.C., 1801 First Tennessee Plaza, P.O. Box 1308, Knoxville, Tennessee 37901-1308; on the Chief Administrative Law Judge by mailing a copy to The Honorable John Vittone, Office of Administrative Law Judges, United States Department of Labor, Suite 400 North, 800 K Street, Washington, D.C. 20001-8002; on the Assistant Secretary, Occupational Safety and Health Division, by mailing a copy to Charles N. Jeffress, United States Department of Labor, 200 Constitution Avenue, NW, Room S2315, Washington, D.C. 20210; and on the Associate Solicitor, Division of Fair Labor Standards, by mailing a copy to Steven J. Mandel, Esq., United States Department of Labor, 200 Constitution Avenue, NW, Room N2716, Washington, D.C. 20210.

This 12th day of August, 1998.



Attorney for Respondent