December 12, 1995

EA 95-277

Georgia Power Company
ATTN: Mr. W. George Hairston, III
Executive Vice President
Post Office Box 1295
Birmingham, Alabama 35201

SUBJECT: DEPARTMENT OF LABOR CASE NOS. 91-ERA-01 and 91-ERA-11

Dear Mr. Hairston:

By Decision and Remand Order, dated November 20, 1995, in Department of Labor (DOL) Case Nos. 91-ERA-01 and 91-ERA-11, the Secretary of Labor reversed lower DOL decisions and concluded that Georgia Power Company (GPC) discriminated against Mr. Allen Mosbaugh, in violation of Section 211 of the Energy Reorganization Act (ERA), when GPC terminated Mr. Mosbaugh. In his decision, the Secretary of Labor concluded that Mr. Mosbaugh engaged in a protected activity "by making lawful tape recordings that constituted evidence gathering in support of a nuclear complaint" and that other employees' potential unwillingness to communicate with Mr. Mosbaugh was not a legitimate reason for discharging him. This Decision and Remand Order rejected the DOL's Administrative Law Judge's Recommended Decision and Order issued on October 30, 1992, which found that actions taken against Mr. Mosbaugh were not discriminatory. A copy of the Secretary of Labor's decision is enclosed.

The Secretary of Labor concluded that GPC's termination of Mr. Mosbaugh was an act of retaliation for his engaging in protected activities. This is an apparent violation of 10 CFR 50.7, Employee Protection, which prohibits discrimination against an employee engaging in protected activities such as providing an employer information about alleged violations of NRC requirements. This apparent violation is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. Based on the information available in the DOL case record, it may not be necessary to conduct a predecisional enforcement conference in order for the NRC to make an informed enforcement decision in this case. This was discussed between you and Messrs. Ellis Merschoff and Bruno Uryc of my staff on December 11, 1995. During that conversation, you agreed that a predecisional enforcement conference was not required at this time. A Notice of Violation is not presently being issued for this apparent violation. Before the NRC makes its enforcement decision, however, we are providing you the opportunity to either (1) respond to the apparent violation addressed in the Secretary of Labor's Decision and Remand Order within 30 days of the date of this letter, or (2) request a predecisional enforcement conference.

Your response should explain your views on the apparent violation, its root causes, and a description of planned corrective actions. In addition, this is an opportunity for you to point out any disagreement with the facts and findings presented in the Secretary of Labor's decision.

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We are also concerned with the potential chilling effect that may have resulted from this apparent violation and the issuance of the Secretary of Labor's finding that GPC discriminated against Mr. Mosbaugh. Therefore, notwithstanding the information requested above and whether or not you agree with the Secretary of Labor's decision, we expect you to address the actions taken or planned to assure that this adverse employment action does not have a chilling effect on other licensee employees who raise perceived safety concerns.

Your response should be submitted under oath or affirmation and may reference or include previously docketed correspondence, if the correspondence adequately addresses the required response. If an adequate response is not received within the time specified or an extension of time has not been sought and granted by the NRC, the NRC will proceed with its enforcement decision or schedule a predecisional enforcement conference.

If you choose not to provide a response and would prefer participating in a predecisional enforcement conference, please contact Mr. Pierce Skinner at (404) 331-6299 as soon as possible, and no later than seven days after you receive this letter.

In addition, please be advised that the number and characterization of the apparent violation described above may change as a result of further NRC review. You will be advised by separate correspondence of the results of our deliberations on this matter.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and your response (if you choose to provide one) will be placed in the NRC Public Document Room (PDR). To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be placed in the PDR without redaction.

The response to the apparent violation is not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub. L. No. 96.511.

Should you have any questions concerning this letter, please contact us.

Sincerely,

Original Signed by
Jon R. Johnson for

Stewart D. Ebneter
Regional Administrator

Docket Nos. 50-424, 50-425
License Nos. NPF-68, NPF-81

Enclosure: Secretary of Labor Decision
dated November 20, 1995

cc w/encl: (See next page)

cc w/encl:

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DATE: November 20, 1995
CASE NOS. 91-ERA-1 and 91-ERA-11

IN THE MATTER OF

ALLEN MOSBAUGH,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

In these consolidated cases arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988),[1] Complainant, Allen Mosbaugh, alleged that Respondent, Georgia Power Company, violated the ERA when it downgraded his performance evaluation, removed his company car, suspended him with pay, and discharged him. In a Recommended Decision and Order (R. D. and O.), the Administrative Law Judge (ALJ) recommended dismissal of the complaint on the ground that Mosbaugh did not establish that

[1] Section 2902 of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-86, 106 Stat. 2776, amended the ERA for claims filed on or after the date of its enactment, October 24, 1992. See Section 2092(i) of Pub. L. No. 102-486. These complaints were filed in 1990 and therefore the 1992 amendments do not apply.

Enclosure

Georgia Power violated the ERA. The ALJ's findings of fact, R. D. and O. at 4 - 32, are well supported by the record and I adopt them. After review of the record, however, I decline to adopt some of the inferences drawn from the facts and relied upon by the ALJ in reaching his recommended decision.[1] Therefore, I reject the ALJ's recommendation, find that Georgia Power violated the ERA when it discharged Mosbaugh, and remand the complaint to the ALJ for a recommended decision concerning remedies.

BACKGROUND

Mosbaugh was a high level manager for Georgia Power at its Plant Vogtle nuclear power station near Augusta, Georgia. While serving as Acting Assistant General Manager of Plant Support in early 1990, Mosbaugh anonymously reported to the Nuclear Regulatory Commission (NRC) that other plant managers willfully had violated NRC technical standards. T. 140-144; CX 15. As a result, the NRC's Office of Investigation (NRC-OI) began an on-site investigation and questioned several employees. T. 149-150. Mosbaugh observed that senior managers' attitudes toward him changed after the company learned of the NRC-OI investigation. T. 151-158 The plant's General Manager, George Bockhold, told Mosbaugh that "if you can't conform" to company standards, "you need to get out." T. 159, 162. Mosbaugh observed that plant

[1] Under any standard of review I am free to evaluate and reject inferences drawn by the ALJ from the facts presented. *See Hedstrom Co. v. NLRB*, 629 F.2d 305, 316 (3d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981) (agency has authority to draw its own inferences from proven facts in the record without deference to the inferences drawn by the ALJ).

employees were afraid to disagree with management's opinions. T. 184-185.

As a member of the Plant Review Board, Mosbaugh spoke out against using an experimental filtration device called a FAVA filter because it did not meet NRC standards. T. 175-181. Mosbaugh filed an extensive, written internal Quality Concern about the company's decision to use the FAVA filter, T. 181, CX 22, and followed up with additional written memoranda concerning it. CX 23, 24. Bockhold took the investigation of Mosbaugh's concern away from the Quality Concerns Coordinator and handled it himself. T. 182-183.

Mosbaugh believed that his notes and recollections about conversations and events were not sufficient proof of the safety violations that he believed occurred. T. 189-190. He read a legal opinion letter advising Georgia Power that surreptitious one-party tape recording was lawful in the State of Georgia. CX 26. As a means to document his safety concerns and any retaliation for expressing them, Mosbaugh began to surreptitiously tape record selected conversations in which he participated. T. 202-205.

In a March 1990 accident, Plant Vogtle lost all electrical power and was unable for a time to keep the back up generator running. The event caused the reactor to heat up unsafely. T. 207-209. Consequently, Georgia Power declared a serious "site area emergency." T. 211.

Prior to restarting the reactor after the emergency, Georgia Power had to assure the NRC in a Confirmation of Action Letter (COAL) that the reactor could resume power operations safely. T. 255-256. Mosbaugh reviewed the COAL that was submitted to the NRC, CX 40, and determined that Georgia Power may have intentionally misstated the reliability of the generators. T. 258-259. He sent a memorandum to Bockhold reporting the problems with the generators' air quality system, T. 263, CX 41, and obtained further data that verified generator failures. T. 265-267. Mosbaugh reported the false statements to his managers. T. 267.

The COAL did not end the matter, however. Mosbaugh reviewed a draft Licensee Event Report (LER) that contained the same false information about the generators as the COAL. T. 268-269. He promptly reported the false information in the draft to responsible managers, but the final LER submitted to the NRC retained the false information. T. 269-270; CX 42. Mosbaugh followed up with another memorandum to Bockhold enclosing the data that showed the falseness of the statements regarding the generators. T. CX 43. Mosbaugh later worked on revisions to correct the false statements in the LER and the COAL. T. 273, 279-280.

At a staff meeting after the site area emergency, a manager made a statement that Mosbaugh interpreted as promoting a lax attitude toward adherence to technical safety requirements if it

would delay the restart of the reactor. T. 213-214. As a result, Mosbaugh began to tape record more of his conversations.

Mosbaugh learned that Tom Greene, the Assistant General Manager whom Mosbaugh had temporarily replaced, was returning from school and would reclaim his position. T. 278-279. Mosbaugh feared for his future in the company because he had no definite assignment since the position he formerly occupied had been abolished. T. 282. When Greene returned, Mosbaugh also was removed from the Plant Review Board. T. 280-281; CX 44.

Mosbaugh filed two additional anonymous complaints with the NRC concerning safety issues at the plant. T. 219-222; CX 35, 36. Mosbaugh also learned that the NRC called senior managers to Washington, D.C. and criticized the attitude at Plant Vogtle as "cowboy, cavalier, and cocky." T. 274-275; *see also* T. 856.

The NRC granted Mosbaugh "confidential alleger" status in June 1990 and sought his cooperation in an investigation concerning the company's intentional submission of material false information. T. 286-287; CX 45. An NRC-OI investigator later asked Mosbaugh to wear a concealed tape recorder onto the Plant Vogtle site. T. 304-305. Mosbaugh did not reveal that he had made such tape recordings on his own, T. 289-290, 304, and eventually declined the request.

Mosbaugh learned that the NRC would conduct a rare Special Safety Inspection at the plant. T. 297. Bockhold intentionally did not invite Mosbaugh to a meeting of the plant managers concerning how to prepare for the inspection. T. 299, 670-671.

Mosbaugh later overheard Vice President Ken McCoy state that the special inspection occurred "because of some immature behavior on the part of an employee or employee alleger." T. 259.

In the midst of the two week special inspection, Mosbaugh received a mid-year performance rating of "average" that was the lowest overall rating he had ever received at Georgia Power. T. 301-302; CX 48. The appraisal listed improving communications as a goal for Mosbaugh to achieve. CX 48.

Mosbaugh was selected to attend school to receive a Senior Reactor Operator license ("SRO school") and learned that he was not entitled to keep his company car while attending SRO school. RX 32.

At a pre-hearing deposition taken by Georgia Power in an earlier ERA case, Mosbaugh revealed that he had filed several confidential allegations with the NRC and also revealed the existence of his tape recordings. T. 308-309. The same day, Mosbaugh joined a former Georgia Power employee in a petition to the NRC seeking review of the transfer of certain management functions concerning Plant Vogtle to a new entity, Southern Nuclear Power Company (Southern Nuclear). CX 49.

Vice President McCoy was upset about the tape recording and recommended that Mosbaugh be placed on administrative leave while the company investigated the taping. T. 568-570. Georgia Power's President, A.W. Dahlberg, agreed and suspended Mosbaugh with pay. T. 594. Thirty days later, Georgia Power discharged

Mosbaugh for engaging in surreptitious tape recording at Plant Vogtle. T. 478-479, 581; CX 53, 54.

Mosbaugh filed ERA complaints challenging the lawfulness of the lowered performance appraisal, removal of his company car, suspension, and discharge.

MOTIONS CONCERNING THE RECORD

1. Motions to exceed page limitations in briefs.

Mosbaugh's unopposed motions to exceed the page limitation in his initial brief and in his 1994 supplemental brief are granted and the briefs are accepted as filed.

2. Georgia Power's motion to strike portions of Mosbaugh's brief and reply brief.

Georgia Power asks that I strike portions of Mosbaugh's brief and reply brief because they attempt to introduce evidence that is not part of the record. Since I agree that offers of proof are not evidence (Motion at 3, 8), I shall not rely upon any statements in the offers as evidence.

Mosbaugh attached to his Reply Brief a copy of the February 19, 1993 decision of the NRC's Atomic Safety and Licensing Board (ASLB Decision) that granted Mosbaugh's petition to become a party in the case in which Georgia Power sought authority to transfer its operating license to Southern Nuclear. The ASLB decision was issued after the close of the record, the issuance of the recommended decision, and the transfer of the record to the Secretary.

Under the regulations governing proceedings before Department of Labor administrative law judges, a party may seek

authority to supplement the record with newly discovered evidence that was not readily available prior to the close of the record. 18 C.F.R. § 18.54(c). I will treat Mosbaugh's reference to the ASLB decision as a request to supplement the record with the decision.

The ASLB decision is a relevant public document that became available only after the close of the hearing and the transfer of the record to me. Although I do not consider the ASLB decision critical to my decision in this case and I have not relied upon it, I will, in the interest of a complete record, admit the ASLB decision into the record for whatever probative value it may have. *See* 5 U.S.C. 557(B) (1988): "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."

3. Letters from NRC Chairman to Secretary of Labor and to Senator Baucus.

In response to an inquiry from the Senate Committee on Environment and Public Works, the NRC's Chairman wrote a letter to the committee's Chairman, Max Baucus, giving the NRC's views "whether one-party taping of conversations by employees of NRC licensees could constitute, in some circumstances, protected activity under section 211 of the Energy Reorganization Act of 1974." Pursuant to Baucus' suggestion, the NRC Chairman provided a copy of his views to the Secretary of Labor and served a copy on the parties to this proceeding. Although I have not relied upon the views of the NRC Chairman in reaching a decision on

Mosbaugh's complaint, the July 14, 1993 letters from the NRC Chairman to Senator Baucus and to the Secretary of Labor are admitted into the record in this case for whatever probative value they may have.

4. NRC-OI Memorandum and Report of Investigation.

Mosbaugh seeks to admit into the record the December 17, 1993 NRC-OI Report of Investigation entitled "Vogtle Electric Generating Plant: Alleged False Statements Regarding Test Results on Emergency Diesel Generators," and a December 20, 1993 memorandum from the Director of the NRC-OI concerning that report. The report and memorandum refer to investigation of safety concerns that Mosbaugh brought to the NRC's attention. Georgia Power opposes their admission.

Pursuant to a memorandum of understanding, the Department of Labor has agreed to administer its responsibilities under the ERA's employee protection provision with maximum cooperation and "timely exchange of information in areas of mutual interest" with the NRC. Memorandum of Understanding Between NRC and Department of Labor, Employee Protection, 47 Fed. Reg. 54585 (Dec. 3, 1982). To that end, copies of both recommended and final decisions in ERA cases are provided to the NRC to aid in its responsibility to ensure the safety of nuclear power installations.

Since the memorandum and NRC-OI report were issued in 1993, they were not readily available prior to the 1992 hearing. In view of the NRC's responsibility concerning nuclear safety and the unavailability of the documents prior to the close of the

hearing, I will admit into the record the December 17, 1993 NRC-OI report and the December 20, 1993 memorandum of the NRC-OI Director concerning that report for whatever probative value they may have, although I have not relied upon the report and memorandum in reaching this decision.

5. Motion to reopen the record, grant a new trial and for other relief.

Mosbaugh sought to reopen the record to obtain the testimony of an NRC-OI investigator Larry Robinson concerning the report discussed above. Subsequently, Mosbaugh moved to reopen the record, grant additional discovery, and for a new trial on the basis of the testimony of Joseph Farley, former Executive Vice President - Nuclear of Southern Company and Southern Company Services, at the ASLB proceeding concerning transfer of the license for Plant Vogtle to Southern Nuclear. Farley's testimony purportedly reveals that Farley communicated animus against Mosbaugh to Georgia Power president Dahlberg, who made the decisions to suspend and discharge Mosbaugh. Georgia Power opposes the motions.

In light of the disposition of this complaint in Mosbaugh's favor, there is no reason to remand to the ALJ for the purpose of reopening the record to permit Mosbaugh to conduct additional discovery and adduce additional testimony. Accordingly, the motions are denied.

In connection with this motion, Mosbaugh requested leave to file a reply to Respondent's Brief in Opposition to Complainant's Motion to Reopen the Record, etc. Georgia Power opposed the

request. In the interest of a complete record of pleadings, Mosbaugh's motion for leave to file a reply is granted and the reply is accepted into the record, as is Georgia Power's Brief in Opposition to Complainant's Motion to File a Reply.

DISCUSSION

Where a respondent has introduced evidence to rebut a *prima facie* case of a violation of the ERA's employee protection provision, it is unnecessary to examine the question of whether the complainant established a *prima facie* case. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 and n.9, petition for review docketed, No. 95-1729 (8th Cir. Mar. 27, 1995). "The [trier of fact] has before it all the evidence it needs to determine whether 'the defendant intentionally discriminated against the plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Thus, the question is whether Mosbaugh proved by a preponderance of the evidence that Georgia Power discriminated against him for engaging in protected activity.

There is no dispute that Mosbaugh's complaints to the NRC about nuclear safety issues constituted protected activities under the ERA. Also protected were his internal safety complaints to superiors. *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). After Mosbaugh made a confidential complaint to the NRC he engaged in secret one-party

tape recording that was legal in the State of Georgia.[1] Indeed, the NRC later asked Mosbaugh to make such recordings to aid in its investigation of Mosbaugh's allegations concerning management actions at Plant Vogtle. Georgia Power argues that even though the tape recording was legal, its effect was so detrimental to open communication that Mosbaugh's discharge was appropriate.

The Secretary previously has found that "assisting the government by . . . secret tape recording of conversations concerning alleged illegal dumping practices" constituted protected activity under the employee protection provision of the Solid Waste Disposal Act, 42 U.S.C. 6971. *Haney v. North American Car Corp.*, Case No. 81-SDWA-1, Sec. Dec., June 30, 1982, slip op. at 4. Here, Mosbaugh's recordings clearly supported his complaints to the NRC concerning management actions at Plant Vogtle.

The ALJ stated that even if Mosbaugh's tape recording constituted protected activity at the outset, its duration and scope "became so egregious and potentially disruptive to the workplace that it lost any protected status it may have once possessed." R. D. and O. at 35. The ALJ opined that after the

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[1] Contrary to Respondents' argument (Resp. Brief at 25), I find that Mosbaugh's lawful tape recording is not analogous to the situation in *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Dec. and Final Ord., Apr. 25, 1983. In that case, the employer fired an employee who violated the company's explicit instruction when he took confidential personnel files from the company vault and placed them in his truck. *Dartey*, slip op. at 10. The Secretary found in that case that misappropriation of confidential company records was a lawful reason to suspend or discharge an employee. *Id.* at 12.

NRC was engaged in investigating Mosbaugh's three complaints, there was no reasonable or appropriate reason for Mosbaugh to continue tape recording his conversations at Plant Vogtle. *Id.*

The NRC, however, asked Mosbaugh to make secret recordings during the period in which the ALJ found that Mosbaugh's taping constituted egregious, disruptive behavior. No one discovered that Mosbaugh made the tapes until he revealed their existence, and therefore I question whether his behavior can be called disruptive.

I disagree that the duration and scope of the recording removed it from being a protected activity. I find that Mosbaugh engaged in protected activity under the ERA by making lawful tape recordings that constituted evidence gathering in support of a nuclear safety complaint. Mosbaugh's tape recording is analogous to other evidence gathering activities that are protected under employee protection provisions, such as making notes and taking photographs that document environmental or safety complaints. *See, e.g., Adams v. Costal Production Operations, Inc.*, Case No. 89-ERA-3, Dec. and Order of Remand, Aug. 5, 1992, slip op at 9 and n.4 (photographing oil spill constituted protected activity).

Georgia Power attempts to justify the discharge on the ground that Mosbaugh could not be an effective manager once other employees learned of his tape recording. The company argues that the employees would not likely engage in free and frank communication with Mosbaugh because of fear of being taped.

According to Georgia Power, open communication among employees is critical in a nuclear plant.

I reject Georgia Power's argument for several reasons. It was Georgia Power that revealed the existence of the tape recordings in a general announcement to all employees and also conducted staff meetings to discuss the taping. T. 679; RX 22. Mosbaugh sought no publicity, kept the tapes in a locked safe, and gave the tapes only to the NRC. Moreover, he only revealed the tapes' existence in response to a question at a sworn deposition taken by Georgia Power.

Further, other employees' potential unwillingness to communicate with Mosbaugh is not dispositive. Dahlberg testified that the company would not have fired Mosbaugh if he had made the secret recordings at the request of the NRC.[1] T. 428. But the chilling of open communication would be the same even if the NRC had directed Mosbaugh's secret taping. Further, if Mosbaugh were simply known as a whistleblower and not as a recorder of conversations, the chilling effect would be the same. I therefore find that other employees' potential unwillingness to communicate with Mosbaugh was not a legitimate reason for discharging him.

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[1] Dahlberg distinguished Mosbaugh's tape recording from the case of a Georgia Power accountant who, at the request of the Internal Revenue Service, secretly tape recorded conversations related to the IRS' criminal investigation into certain Georgia Power accounting practices. T. 469-471; *see* CX 84. Since the NRC asked Mosbaugh to do the kind of tape recording that he did on his own, however, I do not agree that there is a significant distinction between the two situations.

Georgia Power's president admitted that he suspended and discharged Mosbaugh solely because of his tape recording. R. D. and O. at 36. Therefore, the company admittedly fired Mosbaugh for engaging in activity that was legal and in furtherance of protected activity. Thus, Georgia Power has admitted to a violation of the ERA employee protection provision.

I will turn now to another adverse action about which Mosbaugh complained, his "average" interim performance rating in August 1990. Both Bockhold and McCoy testified that Mosbaugh needed to improve his communication skills and teamwork, particularly in coordinating with his counterpart, the Assistant Plant Manager for Operations, Skip Kitchens. T. 527, 640. One of Mosbaugh's subordinates, Richard Mansfield, agreed that Mosbaugh was ineffective in working with other departments. T. 845. Moreover, Mosbaugh's performance rating for 1989 similarly mentioned the goals of improving "organizational synergy" and improving relations with Kitchens to better than "peaceful coexistence." CX 8. Since Mosbaugh introduced no testimony to overcome the various witnesses' assessments of his need to improve coordination and communication with other departments, I find that the average rating was given for permissible reasons and did not violate the ERA.

Mosbaugh also complained about the removal of his company car. Georgia Power explained that it provided Mosbaugh with a car to use for company business when his position required him to go to the plant at unusual hours. T. 566-567. McCoy testified

that the company removed the car when Mosbaugh was assigned to SRO school because he no longer would need to go to the plant at unusual hours. T. 567. Although Tom Greene kept his car while attending SRO school, McCoy explained that Greene's car was part of his compensation as a higher level employee than Mosbaugh. *Id.* The record reveals that other employees with status equal to Mosbaugh's similarly lost their company cars while attending SRO school. *Id.* I find that Mosbaugh did not overcome the evidence that removal of the car was proper under company policy.

REMEDIES

A successful complainant under the ERA is entitled to reinstatement and back pay. 42 U.S.C. § 5851(b)(2)(B)(ii). Accordingly, I will order Georgia Power to reinstate Mosbaugh to the position he occupied when he was discharged, or an equivalent position with the same terms, conditions, and privileges of employment.

Mosbaugh is entitled to back pay from the date of discharge until reinstatement, less any interim earnings. *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec. and Ord., Dec. 1, 1994, slip op. at 12. He also is entitled to interest on the back pay amount, at the rate specified for underpayment of Federal income tax. 26 U.S.C. § 6621. *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Order on Damages, Oct. 30, 1991, slip op. at 18-19, *aff'd in relevant part and rev'd on other grounds, Blackburn v. Martin*, 982 F.2d 125 (4th Cir. 1992).

Although the record reflects Mosbaugh's monthly salary at the time of discharge, CX 55, there has been no calculation of the exact amount of back pay owed. For example, Mosbaugh is entitled to salary increases that reasonably would have occurred in the five years since his discharge. Accordingly, I will remand to the ALJ for any further proceedings he deems necessary in this regard and for a recommended decision setting forth the amount of back pay.

Mosbaugh also received various employee benefits. See CX 56 and 57. He is entitled to repayment of benefits that Georgia Power would have provided to him from the date of discharge to reinstatement.

The ERA also authorizes compensatory damages for a complainant's pain and suffering. 52 U.S.C. § 5851(b)(2)(b)(ii) (1988). To recover compensatory damages, Mosbaugh had "to show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992), *citing Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978).

Mosbaugh testified that his professional reputation was destroyed by the discharge and that in one and a half years between his discharge and the hearing, he was unable to obtain any employment despite documented efforts to find a position at nuclear facilities that he knew were hiring. T. 322-324; see CX 58 through 75. Mosbaugh reported that he experienced, stress, headaches, family problems, and feeling "bad" about not finding

another position. T. 323. He testified that additional stress occurred because he had to use the funds set aside for his children's college education to pay his legal expenses. *Id.*

The very fact of being discharged in violation of the ERA may have a serious emotional impact on a complainant. *Blackburn,* 982 F.2d at 132. Although a complainant may support his claim of pain and suffering with the testimony of medical and psychiatric experts, it is not required. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Final Dec. and Order, Sept. 17, 1993, slip op. at 27-28; *Busche v. Burkee*, 649 F.2d 509, 519 n.12 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981). Mosbaugh is entitled to some compensatory damages based on the existing record, which demonstrates his anguish over losing his job and remaining unemployed for a lengthy time.

Mosbaugh attempted to introduce the testimony of an expert witness, Dr. Donald Soeken. In lieu of permitting Soeken's testimony, the ALJ accepted into the record a written offer of proof concerning the expert's expected testimony. T. 322, 946. Soeken, a social worker who regularly counseled whistleblowers, interviewed Mosbaugh and Mosbaugh's wife and would have testified to the stress and financial difficulties that the discharge caused Mosbaugh and his family. *See* Soeken offer of proof submitted to the record on March 18, 1992.

On remand, the ALJ shall permit the examination and cross-examination of Dr. Soeken concerning stress, emotional distress,

and related subjects, and shall recommend the amount of compensatory damages to which Mosbaugh is entitled.

Mosbaugh also is entitled to payment of his attorney's fees and costs. Since the record does not contain any statement of costs and attorney's fees, on remand Mosbaugh may submit a detailed petition and Georgia Power shall be afforded the opportunity to respond. In view of the ALJ's recommended decision dismissing the complaint, I consider the attorney's fees and costs associated with Mosbaugh's various requests to reopen and supplement the record to have been reasonably incurred in bringing the complaint, *see* 42 U.S.C. § 5851(b)(2)(b), even though I have denied some of the requests as unnecessary in light of the disposition of the case.

ORDER

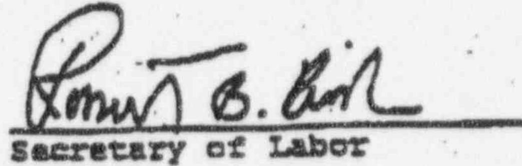
1. Georgia Power shall immediately offer Mosbaugh reinstatement to the same position he occupied at the time of discharge, or a substantially similar position, with the same terms, conditions, and privileges of employment.

2. The case is REMANDED to the ALJ for any necessary supplemental proceedings consistent with this decision and a supplemental recommended decision on the amount of back pay, benefits and compensatory damages to which Mosbaugh is entitled. The amount of back pay and benefits owed shall be subject to interest at the rate specified in 26 U.S.C. § 6621.

3. The ALJ shall afford Mosbaugh the opportunity to submit a detailed petition setting forth his costs and attorney's fees,

and shall afford Georgia Power the opportunity to respond. In the recommended supplemental decision, the ALJ shall set forth the amount of costs and attorney's fees to which Mosbaugh is entitled, consistent with this decision.

SO ORDERED.



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