

September 25, 1996

EA 93-059

Mr. E. E. Fitzpatrick
Senior Vice President
Nuclear Generation Group
American Electric Power Company
500 Circle Drive
Buchanan, MO 49107-1395

SUBJECT: CIVIL PENALTY
(U. S. Department of Labor Case No. 92-ERA-37)

Dear Mr. Fitzpatrick:

This refers to the Notice of Violation and Proposed Imposition of Civil Penalty - \$25,000, and Demand for Information issued to American Electric Power Company (AEP), Indiana Michigan Power Company, on August 5, 1993, as the result of the Recommended Decision and Order for U. S. Department of Labor (DOL) Case No. 92-ERA-37. The case arose from a complaint to DOL that a tool accountability technician was improperly terminated by American Nuclear Resources (ANR), a subcontractor at the D. C. Cook Nuclear Power Plant, after he requested a report concerning his radiation exposure. The August 5, 1993 letter informed AEP that payment of the civil monetary penalty could be deferred until the Secretary of Labor (SOL) issued a final decision in this matter.

By letter date December 16, 1994, the NRC informed AEP that the SOL had issued a Decision and Order on December 1, 1994, and that payment of the civil penalty was now due. In a January 12, 1995 letter, AEP informed the NRC that ANR was in the process of appealing the SOL's decision. The NRC agreed that payment of the civil penalty could be deferred until the SOL ruled on the ANR appeal. On July 15, 1996, DOL issued a Final Decision and Order (Enclosure 1) upholding the earlier Orders and assessing attorneys' fees. NRC understands that ANR has filed a petition for review of the DOL action in the U. S. Court of Appeals for the Sixth Circuit. As provided for in our letter of August 5, 1995, you may defer your response to the proposed penalty until 30 days after the ruling from the Sixth Circuit Court of Appeals, if that ruling upholds the various Orders from DOL.

In order to follow this matter, we would appreciate if you would provide James Lieberman, Director NRC Office of Enforcement, with copies of the briefs filed in this court litigation and a copy of the decision when issued.

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Q PDR

JE141/1

E. Fitzpatrick

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September 25, 1996

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosures, and your response will be placed in the NRC Public Document Room (PDR).

Sincerely,

/s/ A. B. Beach

A. Bill Beach
Regional Administrator

Docket Nos.: 50-315, 50-316
License Nos: DPR-58, DPR-74

Enclosure: 7/15/96 DOL Final Decision and Order

cc & encl: A. A. Blind, Site Vice President
John Sampson, Plant Manager
James R. Padgett, Michigan Public
Service Commission
Michigan Department of Public Health

DOCUMENT NAME: G:\EICS\93059.DCC

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OFFICE	RIII	C	RIII	C	D:OE ¹	N	RIII	N		
NAME	BBurgess		GGrant	for	JLieberman		ABBeach			
DATE	09/23/96		09/24/96		09/ /96		09/26/96			

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¹ OE concurrence received on 9/17/96 from J. Lieberman, OE.

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JGilliland, OPA

HBell, OIG

GCaputo, OI

LTremper, OC

EJordan, AEOD

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DRP:RIII

CAA1:RIII (e-mail)

Docket File

U.S. Department of Labor

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



In the Matter of:

GREGORY A. SPRAGUE,

CASE NO. 92-ERA-37

COMPLAINANT,

DATE: JUL 15 1996

v.

AMERICAN NUCLEAR RESOURCES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

In this case arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988),^{2/} the Secretary of Labor found that Respondent, American Nuclear Resources, Inc. (ANR), violated the ERA when it discharged Complainant, Gregory A. Sprague. See Dec. 1, 1994 Dec. and Ord. The Secretary ordered certain affirmative action to remedy the violation, set forth the basis for calculating back pay, and remanded to the Administrative Law Judge (ALJ) to establish the amount of back pay, attorney's fees, and costs that ANR shall pay.

On remand, the parties agreed on the amount of back pay but not on the attorney's fees and costs. In a Supplemental Recommended Decision and Order (S. R. D. O.), the ALJ

^{1/} On April 17, 1996, the Secretary delegated jurisdiction to issue final agency decisions under, *inter alia*, the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988), and the implementing regulations, 29 C.F.R. Part 24, to the newly created Administrative Review Board (the Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization is also attached. The Secretary's earlier decision and the entire record in this case have been reviewed by the Board.

^{2/} The 1992 amendments to the ERA do not apply to this case because the complaint was filed prior to the effective date of those amendments.

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recommended that Respondent pay the agreed amount of back pay and \$12,562 in attorney's fees and costs. We accept the ALJ's R. D. O. in part and modify it as explained below.

DISCUSSION

The ALJ deducted from the requested attorney's fee \$506 for the hours claimed for preparing Complainant's brief on review by the Secretary.^{3/} Complainant's former counsel submitted the fee request concerning that brief in December 1994. The ALJ made the deduction because the brief was late filed and not considered by the Secretary. S. R. D. O. at 2.

Sprague contends that the deduction should not be made because ANR waived any objection to the hours claimed for preparing the brief when it did not oppose the earlier fee request. But the ERA requires a respondent to pay only those costs (including attorney's fees) reasonably incurred in bringing the complaint. 42 U.S.C. § 5251(b)(2)(B). We agree with the ALJ that preparing and filing a brief several months late, without seeking leave or providing any reason for the delay, was not reasonable. Therefore it was proper to deduct the hours devoted to preparing the brief.

ANR challenges the award of fees incurred for work relating to an appeal ANR filed in the United States Court of Appeals for the Sixth Circuit. ANR Brief at 3-4. The Sixth Circuit has ruled that the ERA does not authorize the Secretary (or now, the Board) to award attorney's fees for appellate work. *DeFord v. Tennessee Valley Authority*, 715 F.2d 231, 232-233 (6th Cir. 1983). We are compelled to follow *DeFord* because this case arises in the Sixth Circuit.^{4/} Accordingly, the fees relating to work in the court of appeals should be deducted from the recommended award. The deduction is \$2040 (13.6 hours X \$150).

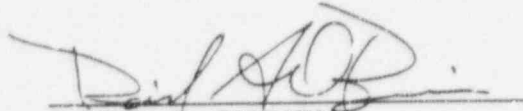
^{3/} Although the ALJ initially referred to the deduction as \$506 (4.6 hours X \$110 per hour), S. R. D. O. at 1, he reduced the fee petition by \$504. S. R. D. O. at 2. We find that the correct deduction is \$506.

^{4/} Compare *Blackburn v. Reich*, 79 F.3d 1375 (4th Cir. 1996) (ERA permits Secretary to order the respondent to pay attorney fees for appellate work in the court of appeals).

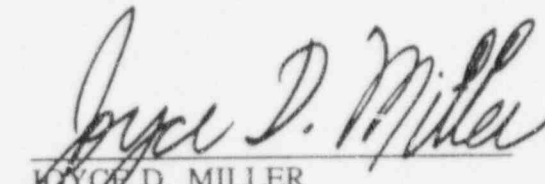
CONCLUSION

Respondent shall pay to Complainant \$4,448.00 in back pay. Respondent shall pay to Complainant's counsel \$10,520.00, representing \$10,085 in attorney's fees and \$435 in costs.

SO ORDERED.



DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

ADMINISTRATIVE REVIEW BOARD

CERTIFICATE OF SERVICE

Case Name: *Gregory A. Sprague v. American Nuclear Resources, Inc.*

Case No. : 92-ERA-37

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on

JUL 15 1996



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