

Case No. LWX-0013

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Supplemental Order

Name of Petitioner: David Ramirez

Date of Filing: April 18, 1994

Case Number: LWX-0013

This Decision supplements an Initial Agency Decision, dated March 17, 1994, issued by the undersigned Hearing Officer of the Office of Hearings and Appeals (OHA) of the Department of Energy in a case involving a "whistleblower" complaint filed by David Ramirez (Ramirez) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. See David Ramirez, 23 DOE & 87,505 (1994) (Ramirez or "the March 17 Decision").^{1/} In the March 17 Decision I found that Brookhaven National Laboratory/Associated Universities, Inc. (BNL or "the Laboratory"), a DOE contractor, had violated the provisions of 10 C.F.R. ' 708.5 by directing the termination of Ramirez' employment as a BNL subcontractor employee in reprisal for his making protected safety disclosures. The March 17 Decision further determined that Ramirez should be awarded back pay and reimbursement for all costs and expenses reasonably incurred by him in bringing his complaint. Since there was no evidence in the record as to the amount of Ramirez' damages, he was provided an opportunity to supplement the record by providing certain specified information regarding back pay and expenses. Ramirez submitted this information on April 18, 1994, in a submission consisting of an affidavit (Ramirez Aff.) with attached exhibits and an attorney's affirmation by his attorney, Claire C. Tierney (Tierney Aff.). BNL submitted a response to the April 18 submission on May 16, 1994.^{1/} This Supplemental Order awards Ramirez \$122,088.18 in back pay

(including interest) and costs and expenses (including attorney's fees).

I. Ramirez' Claim

As compensation for his damages, Ramirez requests a total of \$121,474.28, of which \$89,822.08 is for lost wages and benefits (and reimbursement for miscellaneous expenses) and \$31,652.20 is for attorney's fees and disbursements.

A. Back Pay

Ramirez calculates that his lost pay (including fringe benefits and estimated overtime pay) during the period from his layoff at BNL on March 20, 1992 through his rehiring by a BNL subcontractor on June 7, 1993 was \$90,493.30.^{1/} From this amount, Ramirez subtracted \$3,397.26 in earnings from UE&C Catalytic, Inc. in April 1993 and \$17,700 in state unemployment benefits to arrive at a net lost pay figure of \$69,396.04.

B. Attorney's Fees

In her attorney's affirmation in support of Ramirez' request for attorney's fees reasonably incurred in bringing the complaint in this case, Ms. Tierney describes her legal experience and states that her normal and customary fee in a case of this type is \$175 per hour. She also indicates that she made an informal survey of the hourly fees of plaintiff's-side labor attorneys on Long Island, and that the range of those fees is from \$175 to \$225. Ms. Tierney also states that she has spent, or will spend, approximately 140 hours on this case. In an attached schedule, she documents 138.5 hours that she spent from October 25, 1993 through April 15, 1994. At 140 hours, Ms. Tierney's fee would total \$24,500 (\$175 x 140). Ms. Tierney also states that her law clerk, a third year law student, worked a total of 24 hours on the case and is paid at the rate of \$10 per hour. Finally, Ms. Tierney documents disbursements of \$87.35. The total of these fees and documented disbursements is \$24,827.35 (\$24,500 + \$240 + \$87.35). The total amount requested by Ms. Tierney is \$31,652.20.^{1/} No explanation is given for the additional requested amount of \$6,824.85 (\$31,652.20 - \$24,827.35).

C. Other Costs and Expenses

Ramirez asserts that he was compelled to withdraw money from his union annuity and welfare funds as a result of his being laid off from his job at BNL, and requests \$19,625 for the damages that he alleges he incurred as a result of these withdrawals. Finally, Ramirez requests reimbursement of \$801.04 for incidental expenses incurred in bringing his whistleblower complaint.

II. BNL's Response

In its response to Ramirez' April 18 submission, BNL disputes only two parts of Ramirez' claim. The Laboratory contends that Ramirez has not proven that he was compelled to withdraw money from his union annuity and welfare funds, and therefore should not be compensated for those withdrawals. Citing cases decided under Rule 54(d) of the Federal Rules of Civil Procedure (FRCP), the Laboratory argues that any costs that Ramirez may have incurred as a result of these withdrawals were not "reasonable costs and expenses" incurred by him in bringing his complaint under Part 708. In addition, BNL contends that Ramirez' request for \$2,755 in lost overtime pay should be denied. The Laboratory argues that there is no evidence in the record that he would have earned any overtime pay during the period in which he was laid off.

III. Discussion

Section 708.10(c) states that an Initial Agency Decision may include back pay and "reimbursement to the complainant up to the aggregate amount of all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision was issued." This section, by its reference to "costs and expenses," is by its very terms broader than FRCP Rule 54(d), which refers only to "costs."1/ Thus, the first Initial Agency Decision under the DOE whistleblower regulations interpreted the "costs and expenses" covered by section 708.10(c) more expansively than the way the word "costs" is generally interpreted under FRCP Rule 54(d). Compare Ronald A. Sorri, 23 DOE & 87,503 at 89,016-89,018 (1993) (Sorri), with 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure ' 2677 at 370-372 (1983). In the general discussion on remedy in the March 17 Decision, I indicated that I would follow the standards set forth in the Sorri Decision. Ramirez, 23 DOE at 89,035-037. With these considerations in mind, I now turn to the remedy requested by Ramirez.

A. Back Pay

After considering the submissions by Ramirez and BNL, I have decided to approve, with the adjustments noted below, Ramirez' request for back pay, including overtime.

Ramirez has documented the number of hours that he would have worked by reference to a logbook maintained by his former foreman (Briggs) for the period from March 20, 1992 through March 26, 1993 (Ramirez Aff. Exhibit 6) and by reference to the pay stubs of a BNL subcontractor journeyman electrician employee for the remainder of the relevant period (Ramirez Aff. Exhibit 7). He has also documented the amount of hourly wages, including fringe benefits, that he, as a unionized journeyman electrician working for a BNL subcontractor, would have earned (Ramirez Aff. Exhibits 5A and 5B). BNL has not objected to this aspect of Ramirez' back pay claim, and his calculations are, for the most part, accurate.1/ Accordingly, after making the adjustments indicated in footnote 6, I find that Ramirez' lost regular pay for the period of his layoff is \$89,187.78.

Ramirez, however, has not justified the total amount of overtime pay that he claims. Using the Briggs logbook, he calculates that during the relevant period BNL subcontractor electrician employees worked 141 hours of overtime at one and a half times basic hourly pay and 50 hours at double time.1/ Ramirez asserts that overtime was generally divided among five subcontractor electrician employees, and, on that basis, divides the total number of overtime hours by five to arrive at the amount of hours that he claims that he would have received overtime pay at time and a half and at double time. He therefore requests \$1,871 for 28.2 hours at \$66.36 per hour and \$884 for 10 hours at \$88.48 per hour.

Contrary to the argument advanced by BNL, I find that the logbook constitutes sufficient evidence of the likelihood that Ramirez would have worked some overtime and a means to estimate that amount. According to the logbook, during the relevant period there were 22 subcontractor employees, of whom 12 worked a total of 149.5 hours overtime at time and a half. Although 10 employees did not work overtime, the four experienced electricians who were on the "skeletal crew" (see Ramirez, 23 DOE at 89,031) at the time Ramirez was laid off all worked overtime at time and a half. I find it reasonable to assume that, like the other members of his team, Ramirez would have worked some overtime too. Since the total amount of overtime presumably would have been the same even if Ramirez had been employed, I have divided 149.5 by 13 (the 12 employees who worked overtime plus Ramirez) to arrive at 11.5 hours as a reasonable estimate of the number of overtime hours that Ramirez would have worked at time and a half. Since Ramirez has documented that the hourly rate for overtime at time and a half was \$66.36, he is entitled to back pay of \$763.14 for this lost overtime pay. Similarly, I have divided the 50 double time hours by 7 (the 6 employees who worked this overtime plus Ramirez) to arrive at 7.14 hours as a reasonable estimate of the number of overtime hours that Ramirez would have worked at double time. Since the hourly rate for overtime at double time was \$88.48, Ramirez is entitled to back pay of \$631.75 for this lost overtime pay. Thus the total amount of pay that Ramirez lost as a result of his lay off was \$90,582.67 (\$89,187.78 + \$763.14 + \$631.75).

As indicated above, Ramirez has deducted from his back pay claim \$3,397.26 in earnings in April 1993 and \$17,700 in state unemployment benefits. However, on the basis of the Initial Agency Decision in the Sorri case, I have decided not to offset Ramirez' lost wages by the unemployment compensation payments that he received. The determination in Sorri was in accordance with the generally accepted "collateral source rule." See 23 DOE at 89,016 (citing NLRB v. Gullett Gin Co., 340 U.S. 361 (1951)). This doctrine holds that as a general rule damages cannot be mitigated or reduced because of payments received by an injured party from a source wholly independent of and collateral to the wrongdoer. Although state unemployment benefits have not always been treated as collateral source payments, in recent years federal circuit courts of appeal generally have determined that unemployment benefits should not be deducted from back pay awards. See Gaworski v. ITT Commercial Finance Corp., 17 F.3rd 1104, 1112-14 (8th Cir. 1994), and cases cited therein. Although those cases involved discrimination complaints, the policy reasons for applying the collateral source rule in those cases are equally applicable to whistleblower cases; namely, to make victimized employees whole for the injuries suffered as a result of prohibited conduct by an employer and to deter such conduct by the employer in the future. Id. at 1113. Accordingly, I have decided not to deduct the state unemployment benefits received by Ramirez from the back pay award in this case. Ramirez is thus entitled to \$87,185.41 in back pay (\$90,582.67 less \$3,397.26 in earnings in April 1993).

In addition, as decided in the March 17 Decision, Ramirez is entitled to pre-judgment interest on this back pay award. The total amount of interest that will have accrued during the period through June 30, 1994 is \$9,278. Compound interest was calculated by multiplying the aggregate net amount of lost wages, fringe benefits and overtime for each calendar quarter by the quarterly "overpayment rate" for that quarter.1/ The "overpayment rate," as established by the Secretary of the Treasury pursuant to 26 U.S.C. ' 6621, is the Federal short-term rate, plus two percentage points. The Federal short-term rate for a particular quarter is the short-term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent. See Rev. Rul. 94-21, 1994-14 I.R.B. 9.

B. Attorney's Fees

I have decided to approve Ramirez' request for reasonable attorney's fees. The specific dollar award will be limited to those fees that have been documented in Ms. Tierney's affirmation and the attached schedule.

As indicated above, Ms. Tierney has documented 138.5 hours of work that she performed on this case and has explained how she arrived at a fee of \$175 as a reasonable hourly fee. She has also estimated that she would spend 1.5 hours on preparing the reply brief to BNL's brief in support of its request for review of the March 17 Decision. BNL has not objected to either the amount of hours or the hourly fee claimed by Ms. Tierney and both factors appear reasonable. Accordingly, Ramirez will be awarded reasonable attorney's fees in the amount of \$24,740.1/

However, there is no basis in the record for approving the \$6,824.85 which Ms. Tierney requests over and above her documented fees and disbursements. Since Ms. Tierney expressly requests leave to revise Ramirez' attorney fee claim in the event the reply brief consumes more time than anticipated, see n. 4, supra, I assume that the additional amount, totally or in large part, reflects an "upward adjustment" in her hourly fee and not an amount for unanticipated work. Ms. Tierney does not present any reasons in support of this enhancement and, accordingly, it must be denied. See *Blum v. Stenson*, 465 U.S. 886 (1984), cited in Ramirez, 23 DOE at 89,018.

C. Other Expenses

The bulk of the remaining costs and expenses for which Ramirez requests reimbursement relates to funds that Ramirez received from his union during the period of his lay off. For the reasons set forth below, this request will be denied with respect to the union payments, but will be approved, with one adjustment, for the incidental costs and expenses incurred by Ramirez or disbursed by Ms. Tierney.

Ramirez documents that he prematurely withdrew \$9,000 from his union annuity fund during the relevant portion of 1992 and \$5,000 more during four of the first five months of 1993. He requests reimbursement for these amounts plus what he claims is a 20 percent penalty for these early withdrawals. He also documents his receipt of \$2,700 from his union welfare fund in 1992 and \$675 from his union health and benefit fund in 1993, and requests reimbursement for these amounts.

This portion of Ramirez' claim is denied. In my view, the withdrawal of these funds does not meet the section 708.10(c) criterion of "reasonable costs and expenses ... reasonably incurred by the complainant in bringing the complaint upon which the [initial agency] decision was issued." Most of the amount claimed by Ramirez involves payments received by him and not expenses incurred by him. With respect to the annuity fund payments, the exhibits submitted by Ramirez contradict his claim that he incurred a 20 percent penalty because of the premature withdrawal of these funds.1/ The 20 percent figure represents not a penalty, but the amount of Federal income tax withholding required when there is a premature withdrawal of an annuity. See Ramirez Aff. Exhibit 4 (a union instruction sheet entitled, "To: Applicants for Annuity Fund Pre-Retirement Benefits") & 5. Moreover, according to the W-2 forms submitted by Ramirez, while a portion of his annuity payments was withheld in 1993, nothing was withheld in 1992. See Ramirez Aff. Exhibits 3A and 3B. The union instruction sheet does indicate that there is a 10 percent penalty tax for the withdrawal of annuity funds. Ramirez Aff. Exhibit 4 & 6. However, there is no penalty if the recipient is 59 1/2 years of age or older or qualifies for certain other exemptions. *Id.* Ramirez does not allege that he incurred the 10 percent penalty tax and it is not reflected in his Federal income tax returns for 1992 and 1993. See Ramirez Aff. Exhibits 3A and 3B.1/ Finally, Ramirez has not explained or quantified how he was damaged by his receipt of the other union benefits included in his claim.1/

Even if Ramirez incurred uncompensated financial loss as a result of his withdrawal of money from the union funds, he has not shown that this loss was incurred in connection with his bringing this case. Rather, as his affidavit makes clear, he needed these funds in order to meet his living expenses. See Ramirez Aff. && 7, 25. This is understandable in view of his lack of employment, but it appears to be too remote from the litigation-related costs and expenses for which reimbursement is provided by section 708.10(c). Examples of the types of expenses which are covered by this section are payment for court reporters for a hearing transcript, photocopying of the transcript, long distance telephone calls and postage. Accordingly, Ramirez will be awarded \$797.42 as reimbursement for expenses incurred by him for the hearing transcript and long distance telephone calls and \$87.35 as reimbursement for Ms. Tierney's disbursements for copying and postage.1/

V. Conclusion

For the reasons set forth above, Ramirez shall be awarded the following amounts of back pay and reimbursement for costs and expenses in accordance with the provisions of 10 C.F.R. ' 708.10(c):

Back Pay (including overtime)	\$87,185.41
Interest on Back Pay	\$9,278.00 (as of 6/30/94)
Attorney's Fees	\$24,740.00

Miscellaneous Expenses	\$884.77	
Total		\$122,088.18

It is Therefore Ordered That:

(1) Brookhaven National Laboratory/Associated Universities, Inc.

shall pay to David Ramirez the following amounts in compensation for actions taken against him in violation of 10 C.F.R. '708.5:

(a) \$87,185.41 for lost wages, fringe benefits, and overtime pay for the period from March 20, 1992 through June 7, 1993.

(b) \$9,278 in interest on the lost wages, fringe benefits and overtime pay as of June 30, 1994, plus additional interest from July 1, 1994 until the date of payment calculated by multiplying the cumulative amount of unpaid back pay plus interest each calendar quarter by the quarterly "overpayment rate" for that quarter.

(c) \$797.42 for reimbursement for incidental expenses incurred by David Ramirez in bringing his complaint under 10 C.F.R. Part 708.

(d) \$24,827.35 for attorney's fees and disbursements incurred in this proceeding with respect to Claire C. Tierney, Esq.

(e) An additional amount, at the rate of \$175 per hour for each hour in excess of 140 hours reasonably spent by Claire C. Tierney, Esq. in representing David Ramirez before the Department of Energy in this case.

(f) An additional amount as reimbursement for documented, reasonable disbursements incurred by Claire C. Tierney, Esq. in her representation of David Ramirez in this case subsequent to April 15, 1994 and for long distance telephone calls documented in the attachment to Ms. Tierney's affirmation, dated April 15, 1994.

(2) This is a Supplemental Order to the Initial Agency Decision issued on March 17, 1994, and shall be subject to review by the Secretary of Energy or her designee pursuant to the request for review that Brookhaven National Laboratory submitted to the Office of Contractor Employee Protection on April 1, 1994.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

1/ The OHA case number for the Ramirez Decision is LWA-0002. As indicated above, the OHA case number for this Supplemental Order is LWX-0013. 1/ On April 1, 1994, BNL submitted a request for review of the March 17 Decision pursuant to 10 C.F.R. '708.10(c). That request is currently pending, and this Supplemental Order is being issued with the expectation that it will be reviewed by the Secretary of Energy or her designee together with the March 17 Decision. 1/ This consists of \$87,738.30 for lost wages, see n. 6, infra, and \$2,755 in estimated lost overtime pay. 1/ Ms. Tierney requests that this amount be subject to revision should her reply brief to BNL's brief in support of its request for review of the March 17 Decision consume more time than anticipated. 1/ In Crawford Fitting Co. v. J.J. Gibbons, Inc., 482 U.S. 437 (1987), the Supreme Court held that costs awarded under Rule 54(d) are limited to the items set forth in 28 U.S.C. '1920 and other related statutes. 1/ In paragraph 21 of his affidavit, Ramirez submits the following breakdown for 61 of the 62 weeks of his lay off (through the week ending May 28, 1993): 5 weeks of 35 hours at \$41.90 per hour = \$ 7,332.50 45 weeks of 35 hours at \$44.24 per hour= \$69,678.00 (includes 4 weeks with one paid vacation day) 4 weeks of 28 hours at \$44.24 per hour = \$ 4,954.88 (includes 4 weeks with one unpaid vacation day) 4 weeks of 32 hours at \$45.14 per hour = \$ 5,772.92 (should be \$5 more [\$5,777.92]) 1 unpaid Christmas week 0.00 2 weeks union-paid vacation in 1992 0.00 61 weeks \$87,738.30 Since Ramirez did not return to work at BNL until June 7, 1993, there was one additional week of 32 hours at \$45.14 per hour for a total of \$1,444.48. Thus the gross amount of lost pay is \$89,187.78 (\$87,738.30 + \$5.00 + \$1,444.48). The payment of two weeks' vacation is verified by a W-2 Form from the union VHT fund for 1992. See Ramirez Aff. Exhibit 3A. 1/ During the relevant time period, BNL subcontractor electricians were paid at time and a half when they worked more than the standard number of hours in a day or week (7 hours a day for 5 days during the period prior to May 1, 1993, and 8 hours a day for 4 days for the period beginning May 1, 1993) and were paid double time when they worked on a Saturday. See Ramirez Aff. & 11, 12, 16. 1/ These calculations are summarized in the Appendix to this Supplemental Order. The work week ending March 27, 1992 has been included in the first quarter for which interest was calculated, the quarter ending June 30, 1992. For the purpose of calculating the accrual of interest on lost overtime pay, the \$1,395 of lost overtime pay was prorated according to the approximate number of overtime hours during the relevant periods as follows: \$625 during the quarter ending September 30, 1992, \$221 during the quarter ending December 31, 1992, and \$549 during the quarter ending March 31, 1993. As a result of the rounding of the back pay figures used in the interest calculations, the cumulative back pay + interest figure in the Appendix is slightly less than the total of the back pay and interest figures in ordering paragraph (1)(a)&(b). 1/ This amount is the total of 140 hours of work performed by Ms. Tierney at \$175 and the 24 hours of work performed by Ms. Tierney's law clerk multiplied by \$10. 1/ Ramirez requests reimbursement for \$2,250, which he claims was the 20 percent penalty incurred in 1992, but he does not specify an amount for 1993. 1/ Ramirez has also not attempted to quantify the amount of the interest income that he lost as a result of his withdrawal of money from the union annuity fund. Even assuming that such damages are covered by section 708.10(c), they would be compensated for by the interest on back pay being awarded by this Supplemental Order. 1/ Although Ramirez does not refer to these payments as supplemental

unemployment benefits, they are identified as "S.U.B." benefits in his W-2 forms for 1992 and 1993. See Ramirez Aff. Exhibits 3-A and 3-B. While Ramirez could have been damaged if these benefits were depleted as a result of BNL's wrongful reprisal, he has not alleged that these benefits have not been available to him as a result of his receipt of payments made during the March 1992 to June 1993 period. 1/ The amount approved for long distance telephone calls is slightly less than the amount claimed by Ramirez because of the deduction of two telephone calls that were made not to the DOE, but to the National Labor Relations Board. Ms. Tierney has documented the date and length, but not the cost, of approximately one dozen long distance calls made in connection with this case. Ramirez will be entitled to reimbursement for the cost of these calls and for other, reasonable, documented disbursements made after April 15, 1994 by Ms. Tierney in her representation of Ramirez before the DOE.