**U.S. Department of Labor**

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**Issue Date: 01 May 2008**

CASE NO.: 2004-SDW-00003

*In the Matter of*:

**DAVID J. YARBROUGH,**
Complainant,

v.

**U.S. DEPT. OF THE ARMY,**
**CHEMICAL AGENT MUNITIONS DISPOSAL SYSTEM (CAMDS),**
Respondent.

**RECOMMENDED DECISION AND ORDER APPROVING SETTLEMENT AND DISMISSING ACTION DUE TO SETTLEMENT OF PARALLEL MSPB LITIGATION**

## *A. Relevant Chronology*

On February 5, 2004, after a jury trial, David J. Yarbrough ("Complainant") was convicted of seven counts for work-related false official statements under 18 U.S.C. subsections 1001 and 2(b). Ex 2 to Respondent's March 24, 2005 Motion for Summary Judgment ("MSJ"). Before that time, Complainant:

> … worked as the division chief for the monitoring division at the Deseret Chemical Depot (Depot) near Tooele, Utah. He supervised technicians who maintained various air-monitoring systems as part of the Depot's program of destroying chemical weapons. The technicians maintain an automated continuous air monitoring system (ACAMS), comprised of a series of machines or units, that continuously monitor the air released from the test facilities for any trace of toxic chemicals. At trial, [Complainant] admitted that he directed a statistician to use the data from his worksheets to create the INACCMO report, [a report prepared every fours weeks comprised of recorded data from all the ACAMS units]. [Citation omitted.] Anthony Pavlik, the investigator, testified that [Complainant] admitted to changing the data to make it appear that a unit (station 26D) passed when it had failed. [Citation omitted.] When Mr. Pavlik asked about another unit, [Complainant] stated "since I admitted to the one, what's the point in going through all of them?" [Citation omitted.]

January 14, 2008 Order and Judgment in Complainant's Tenth Circuit Court of Appeals criminal case at pp. 2-3.

Later in February 2004, Complainant was notified by Respondent of his removal from federal employment based on the convictions. Ex 1 to MSJ.

On March 22, 2004, Complainant filed a complaint of employment retaliation against Respondent U.S. Dept. of the Army, Chemical Agent Munitions Disposal System (the "Army" or "Respondent"**)** under Section 1450(i) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300j-9(i); Section 322 of the

Clean Air Act ("CAA"), 42 U.S.C. 7622; Section 507(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1367; Section 7001 of the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. 6971, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), at 42 U.S.C. §§ 9601 *et seq.* He says that he internally and externally reported apparent impermissible releases of chemical warfare agent to the environment from the Depot during the timeframe of 1999 to 2003. He claims that in retaliation for this reporting, his employment at Respondent was terminated in February 2004.

On or about March 26, 2004, Complainant filed a parallel action appeal with the U.S. Merit Systems Protection Board (the "MSPB Appeal") alleging the same facts as in this case that he was improperly removed, defamed, and subjected to other retaliatory acts by Respondent in violation of various environmental whistleblower protection laws, seeking reinstatement and damages. EX 1 to Respondent's November 7, 2007 Reply to Order to Show Cause Why Case Should Not be Dismissed ("Respondent's Reply").

This case was assigned to me on July 12, 2004 after Complainant appealed the June 28, 2004 findings of the Occupational Safety and Health Administration ("OSHA") dismissing the complaint and finding that Complainant's termination of employment was motivated by his criminal conviction. Trial was continued various times on Complainant's request due to his incarceration from the aforementioned criminal conviction.

On March 24, 2005, Respondent filed its MSJ. Complainant failed to file an opposition to the MSJ by April 8, 2005, as previously ordered by me.

On June 9, 2005, I issued a recommended decision and order granting Respondent's motion for summary decision and dismissing the complaint in this case. Complainant later appealed the dismissal to the Administrative Review Board ("ARB") arguing, among other things, noncompliance with 29 C.F.R. section 24.6(e)(4)(ii), a recently eliminated regulation that previously provided that in any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order.[1]

On August 14, 2007, Complainant and Respondent settled the MSPB Appeal whereby Complainant agreed, among other things, to withdraw his appeal, substitute his voluntary resignation for his removal or employment termination, and he also agreed not to contest any employment-related matters relative to the MSPB Appeal in any other administrative forum. Ex 2 at p. 4 to Respondent's 9/10/07 Motion to Withdraw Remand and Dismiss Appeal (the "Motion to Dismiss").

On August 30, 2007, the ARB issued its Order of Remand agreeing with Complainant's argument that I must give Complainant an opportunity to show cause why his case should not be dismissed in accordance with the procedures outlined in 29 C.F.R. section 24.6 as in effect when Complainant's case was last before me.

[1] On August 10, 2007, the Department of Labor issued final interim regulations establishing new procedures for the handling of retaliation complaints under the environmental whistleblower laws. *See* Fed. Reg. 44,956 (Aug.10, 2007)(to be codified at 29 C.F.R. Part 24). The new regulations eliminate section 24.6 and require that hearings conducted pursuant to the environmental whistleblower laws "be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, 29 CFR part 18." *Id.* at 44,965.

On September 10, 2007, Respondent filed and served its Motion to Dismiss which, among other things, asks that the ARB dismiss this case because Complainant and Respondent settled the parallel MSPB litigation on terms that, "specifically paragraph 8, preclude further administrative litigation of [Complainant's] [employment] termination (initially in February 2004) from federal service." EX 2 to Motion to Dismiss at 4.

On September 25, 2007, I issued an Order to Show Cause why this case should not be dismissed after the ARB remand due to either Complainant's MSPB Appeal settlement or for Complainant's failure to comply with my prior orders and procedural deadlines by not responding to Respondent's earlier MSD (the "OSC").

On October 26, 2007, Complainant filed his response to the OSC (the "Response') admitting that the MSPB Appeal settlement took place but that if the MSPB Appeal settlement was going to be used to dismiss any portion of this case, the settlement would require my review and approval before dismissing any portion of his complaint here. Complainant adds that his settlement in the MSPB Appeal only applies to his wrongful removal allegations in this case leaving other alleged retaliatory acts and damages not a part of the MSPB Appeal. Complainant's Response at 21-22. Stated differently, Complainant argues that his alleged improper employment removal, as was part of the MSPB Appeal settlement, was only one of several alleged adverse acts in this case thereby leaving open and unsettled "issues such as the Army's pattern of hostile actions and defamatory actions that were retaliatory and harmed [Complainant] by causing damage to his reputation, causing emotional distress and causing a bad faith and unjustified prosecution and imprisonment are still alive in the instant action case…." *Id*. Complainant's Response also argues that dismissal should not occur despite Complainant's failure to comply with my prior orders because the Tenth Circuit Court of Appeals was considering whether to allow newly discovered evidence which had not been presented in this forum or his criminal case, which allegedly involves a complicated fraud and pattern of falsification of records which would do away with his earlier criminal convictions. Complainant's Response at 20-21.

On November 7, 2007, Respondent replied to Complainant's Response (the "Reply") by arguing that the settled MSPB Appeal included more than just Complainant's removal action but also all of his other retaliation claims contained in this action. Respondent's Reply at 4-6; EX's 1-3 attached to Respondent's Reply. Specifically, Respondent's Reply contains evidence that the same adverse acts and claims for damages that appear in this action are also in the settled MSPB Appeal. Respondent's Reply, EX's 1-2. For example, Complainant's Continuation Sheet responding to questions posed in the MSPB Appeal form, where he further alleges that "[h]e started to receive reprimands and disciplinary write-ups and actions from his supervisor in the year 2000/2001 but only after he had engaged in protected activities under the federal environmental statutes including RCRA, the Clean Water Act, the Safe Water Drinking Act, and the Clean Air Act. [Complainant] raised several protected concerns directly with his mangers over the term of his employment. [Complainant's] concerns included internal and external reports starting in 1999 and continuing through his termination in 2003 regarding potential worker safety and environmental violations and dangers at the chemical weapons facility where he worked, including the occurrence of unpermitted, undetected and unreported releases to the environment of chemical welfare agent from the nearby chemical weapons incinerator, and that the chemical agency monitoring systems in use do not work – i.e. are not capable of producing reliable, valid and accurate detections of chemical agent." EX 1 to Reply at 10; EX 2 to Reply at p.2.

Moreover, EX 1 is a 3/26/04 filing by Complainant with the MSPB showing that the MSPB Appeal also included claims for whistleblower retaliation, consequential damages and alleged "pretextual reprimands and disciplinary actions that were unfounded, demeaning changes in work assignments, false and defamatory statements made about [Complainant ] and his family, … - all of which were unjustified,

motivated by [Complainant's] protected activities, began occurring prior to the controversy arising about [Complainant's] allegedly submitting false data …." Respondent's Reply at 5-6; EX 1 to Reply at 9.

On November 14, 2007, I conducted a telephone status conference with counsel to the parties and discussed, among other things, the MSPB Appeal settlement. At that time, the parties indicated that they would pursue use of this Office's settlement judge procedure most likely some time in January 2008.

I take administrative notice that on January 14, 2008, the Tenth Circuit Court of Appeals issued its order and judgment affirming the district court's denial of Complainant's second motion for a new trial and request for discovery and an evidentiary hearing in his criminal action based on alleged newly discovered evidence which would show that his criminal convictions were obtained using false or misleading evidence. The Court of Appeals disagreed with Complainant in its order and judgment and found that "[s]ubstantially all of the evidence [Complainant] claims is newly discovered was disclosed to him and available at trial" and "[e]ven assuming some was not available, he has not established that the 'newly discovered evidence' is material, i.e. a reasonable probability that the outcome would be different had the evidence been disclosed. [Citation omitted.]" January 14, 2008 Order and Judgment in Complainant's Tenth Circuit Court of Appeals criminal case at p. 5.

***B. Discussion***

Once the ARB remanded this case to me, I resumed jurisdiction to comply with the order of remand and give Complainant an opportunity to show good cause why his case should not be dismissed. The settlement of the MSPB Appeal also occurred in or around the same time as the ARB remand and is relevant to whether this case goes forward particularly in light of paragraph 8 of the settlement agreement whereby, Complainant agreed that in exchange for converting his employment removal/termination to a voluntary resignation, and other consideration, Complainant agreed not to contest any employment-related matters relative to the MSPB Appeal in any other administrative forum. See EX 2 at 4 to 9/10/07 Motion to Dismiss.

*1. Paragraph 8 from the Settled MSPB Appeal Court Transcript Is Enforceable to Settle and Dismiss This Entire Action*

I find that Complainant and his counsel concede that settlement of the MSPB Appeal carries over to dismissal of this action at least with respect to Complainant's allegations of retaliatory removal from his employment. *See* Complainant's Response at 21-22 (Due to paragraph 8, "the MSPB settlement may be a proper basis for dismissal of the portion of the DOL complaint dealing with the removal action."). As argued by Respondent and supported by the language in Complainant's MSPB Appeal filings, I find that the MSPB Appeal contained the same legal theories and issues as the instant action and extended well beyond Complainant's removal from employment in 2004. Respondent's Reply at 5-6; EX's 1-3 attached to the Reply. Moreover, I further find that the parties' voluntary settlement of the MSPB Appeal extends to fully resolve all issues in this case.

I reject as non-credible Complainant's argument that paragraph 8 of the MSPB Appeal settlement was intended only to relate to allegations of retaliatory removal from his employment as his earlier MSPB filings extend to other employment-related matters relative to the MSPB Appeal such as environmental whistleblower protected activities, claims of defamation, and allegations of various retaliatory acts that pre-date his removal from employment. EX 1 to Reply at 9-10. I further find the language of the MSPB Appeal settlement agreement enforceable in this case as a binding contract which prohibit Complainant from litigating the same issues he settled in the MSPB Appeal. As such, I further find that both parties and their counsel initially consented to this broader dismissal language at paragraph 8 of the MSPB Appeal settlement on August 14, 2007 and that Complainant cannot withdraw his consent as his consent

at the time of my review of the terms of settlement applied to this action is irrelevant. *See Macktal v. Secretary of Labor*, 923 F.2d 1150, 1156-57 (5th Cir. 1991)(So long as Macktal consented initially to the settlement he cannot withdraw his consent before the Secretary completes her review of the settlement.)

*2. Consent to the MSPB Appeal Settlement As Binding Approved Settlement and Dismissal of Case*

In this Office's administration of whistleblower protection statutes, it reviews settlement agreements between complainants and their employers reached during the adjudicative stage to ensure they are just and reasonable, in the public interest, and that the employee's consent was knowing and voluntary. 29 C.F.R. subsection 24.111. I can approve a settlement agreement if I find that it adequately protects the public's interest and equitably treats the employee. *See Macktal, supra*. 923 F.2d at 1154. The importance of safety in the handling of radioactive materials cannot be gainsaid; there is a crucial public interest at stake when issues of non-compliance with safety regulations arise. *See Hoffman v. Fuel Economy Contracting,* Case No. 87-ERA-33, Sec. Ord., Aug. 4, 1989, slip op. at 4; *see also Rose v. Sec'y of Labor* , 800 F.2d 563, 565 (6th Cir. 1986)(Edwards, J., concurring, describing nuclear technology as "one of the most dangerous" ever invented).

A limited number of settlement agreements contain clauses wherein a complainant waives the right to seek further employment with his or her employer. In those cases, this Office should ensure that such clauses are consistent with the underlying purposes of our whistleblower protection programs. Based on a recent review of prior settlement agreements, this Office believes it is appropriate to examine, on a case-by-case basis, all future employment waiver clauses under the various whistleblower protection provisions that this Office sits for adjudication and enforces. In certain circumstances, an employment waiver in a whistleblower settlement may not be reasonable or in the public interest. Accordingly, this Office will specifically review the terms of any employment waiver clause in a settlement agreement as part of the existing review process. The validity of a future employment waiver will depend upon the facts and circumstances of each case.

Among the factors that I consider before approving the parties settlement agreement here in which the Complainant agrees to waive his or her rights to future employment are:

1) The breadth of the waiver. I find that the terms of settlement at paragraph 9 narrowly waive Complainant's right to work for Respondent, his former employer at Deseret Chemical Depot, Tooele Army Depot, and Dugway Proving Ground. EX 2 to Motion to Dismiss at 4.

2) The amount of the remuneration. Respondent agreed to allow Complainant to voluntarily resign from employment and converted the removal from employment to a voluntary resignation as of August 14, 2007. EX 3 to Reply. In addition, Respondent agreed to pay Complainant's medical bill up to a set limit incurred in preparing his retirement application. Reply at 6. I find that Complainant received adequate consideration in exchange for his agreement not to apply for future employment with Respondent, his former employer, particularly given Complainant's lack of success at the District Court and Tenth Circuit Court of Appeals levels in attempting to reverse his criminal convictions.

3) The strength of the Complainant's retaliation case. I further find that the settlement agreement between the parties is "fair, adequate, and reasonable," due to the relative weakness in Complainant's case given his prior lack of success defending his criminal case where he raised the same claims in defense as he raised here and in his MSPB Appeal. Since Complainant raised the same claims in defense in his criminal case and lost, I find that his burden of proof would be higher in this case than in his criminal case where the government was required to prove its case beyond all reasonable doubt.

4) Representation by counsel. Complainant was represented at settlement by counsel and Complainant stated that he understood the terms of settlement and knowingly and voluntarily entered into settlement with Respondent on advice of his counsel. EX 2 to Motion to Dismiss at 3-7. I find that Complainant's voluntary participation and consent to the MSPB Appeal settlement carries over to this action.

5) Other relevant factors. I find that in light of Complainant's decision to seek medical disability retirement, settlement is appropriate of Complainant's whistleblower complaints before the Merit Systems Protection Board and this Office. While serious safety concerns to the general public are raised by Complainant, their threat to the public is greatly diminished and outweighed by the weakness of Complainant's case and adjudications of his criminal convictions as referenced above.

I further find that the MSPB Settlement Agreement is an enforceable binding contract which carries over to this action based specifically on the language at paragraph 8 as discussed above. I further find that the MSPB Appeal Settlement Agreement is just and reasonable on its face. The parties are both represented by counsel and have been advised concerning settlement by the same. The parties initially consented to have the MSPB Appeal settlement carry over to this entire action as it is a mirror of the MSPB Appeal. As a result, I further find that the parties have agreed that the complaint in this action can be dismissed. I approve the MSPB Appeal settlement as adequately protecting the public's interests and equitably treating Complainant.

Accordingly, **IT IS HEREBY ORDERED** that the 8/14/07 MSPB Settlement Agreement between Complainant and Respondent is **APPROVED** and the complaint in this action is hereby **DISMISSED with prejudice**.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

*San Francisco, California*

**NOTICE OF REVIEW**:

**NOTICE**: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Suite S-5220, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.