



In the Matter of:

SHEILA J. KALKUNTE,

**ARB CASE NOS. 05-139
05-140**

COMPLAINANT,

ALJ CASE NO. 2004-SOX-056

v.

DATE: October 15, 2009

**DVI FINANCIAL SERVICES, INC. and
AP SERVICES, LLC,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

R. Scott Oswald, Esq., Nicholas Woodfield, Esq., *The Employment Law Group, P.C.*, Washington, District of Columbia

For the Respondent DVI Financial Services, Inc.:

Michael D. Jones, Esq., Shannon McClure, Esq., *Reed Smith LLP*, Philadelphia, Pennsylvania

For the Respondent AP Services, LLC,

L.A. Hynds, Esq., Robert J. Muchnick, Esq., *Honigman Miller Schwartz & Cohn LLP*, Detroit, Michigan

**FINAL DECISION AND ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT WITH PREJUDICE**

Sheila Kalkunte complained that DVI Financial Services, Inc. (DVI) and AP Services, LLC (APS) violated the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX or Act),¹ and its implementing regulations² when they discharged her from employment with DVI in retaliation for disclosing and then inquiring into the progress of the investigation of what she reasonably believed were financial improprieties amounting to securities fraud. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in which he held that DVI and APS violated the Act and awarded damages. The Administrative Review Board (ARB or Board) adopted the ALJ's recommendation as to DVI's and APS's violations of SOX, but modified the damages award. DVI and APS appealed the ARB's decision to the United States Court of Appeals for the Third Circuit.

On September 18, 2009, Kalkunte, DVI, and APS reached a settlement of their case, and on September 28, 2009, the Court of Appeals partially remanded this matter to the ARB for approval of the settlement agreement. On October 2, 2009, the parties filed with the ARB a "Consent Motion To Approve Settlement And Dismiss Proceeding With Prejudice."

The applicable regulations specifically provide that "[a]t any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement" and such settlement is approved by the ALJ or the Board.³ "A copy of the settlement must be filed with the ALJ or the Board . . . as the case may be."⁴ A settlement under the SOX cannot become effective until its terms have been reviewed and determined to be fair, adequate, and reasonable, and in the public interest.⁵ Pursuant to well-established precedent, the Board will not dismiss a complaint in which there is a settlement between the private parties unless the settlement is provided to the Board for its review and approval.⁶

¹ 18 U.S.C.A. § 1514A (West Supp. 2005).

² 29 C.F.R. Part 1980 (2009).

³ 29 C.F.R. § 1980.11(d)(2).

⁴ *Id.*

⁵ *Bhat v. D.C. Water & Sewer Auth.*, ARB No. 06-014, ALJ No. 2003-CAA-017, slip op. at 2-3 (ARB May 30, 2006).

⁶ See e.g., *Macktal v. Sec'y of Labor*, 923 F.2d 1150, 1154 (5th Cir. 1991); *Willy v. The Coastal Corp.*, ARB No. 06-090, ALJ No. 2006-STA-025, slip op. at 2 (ARB Mar. 20, 2007).

Because Kalkunte, AVI, and AP have jointly submitted the settlement as required and no party has indicated any opposition to its terms, we deem the terms of the settlement agreement unopposed and will review it in accordance with the applicable regulations.⁷

Review of the agreement reveals that it may encompass the settlement of matters under laws other than the SOX.⁸ The Board's authority over settlement agreements is limited to the statutes that are within the Board's jurisdiction as defined by the applicable statute. Thus, our approval is limited to this case, and we approve the agreement only insofar as it pertains to Kalkunte's SOX claim in ARB Case Nos. 05-139 and 06-019, and ALJ Case No. 2004-SOX-056, the cases currently before the Board.⁹

The Agreement also provides that the parties shall keep the terms of the settlement confidential.¹⁰ The Board notes that the parties' submissions, including the Settlement Agreement, become part of the record of the case and are subject to the Freedom of Information Act (FOIA).¹¹ FOIA requires Federal agencies to disclose requested records unless they are exempt from disclosure under the Act.¹² Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.¹³ Furthermore, if the provisions in paragraph 12 of the Settlement Agreement were to preclude Kalkunte from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable "gag" provisions.¹⁴

⁷ See 29 C.F.R. § 24.111(d)(2) (2009).

⁸ Settlement Agreement, ¶¶ 5, 6, 7 and 8.

⁹ See *Bricklen v. Great Lakes Chem. Corp.*, ARB No. 05-144, ALJ No. 2005-CAA-008, slip op. at 3 (ARB Oct. 31, 2007).

¹⁰ Settlement Agreement, ¶ 12.

¹¹ 5 U.S.C.A. § 552 (West 2007).

¹² *Coffman v. Alyeska Pipeline Serv. Co. & Arctic Slope Inspection Serv.*, ARB No. 96-141, ALJ Nos. 1996-TSC-005, -006, slip op. at 2 (ARB June 24, 1996).

¹³ 29 C.F.R. § 70 *et seq.* (2007).

¹⁴ *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 6 (ARB Nov. 10, 1997); *Connecticut Light & Power Co. v. Sec'y, U.S. Dep't of Labor*, 85 F.3d 89, 95-96 (2d Cir. 1996) (employer engaged in unlawful discrimination by restricting complainant's ability to provide regulatory agencies with information; improper "gag" provision constituted adverse employment action).

Finally, we construe paragraph 18, stating that the agreement “shall be performed, interpreted and enforced according to the laws of the Commonwealth of Pennsylvania without regard to any choice of law provisions thereof” as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States.¹⁵

The parties have certified that the Agreement constitutes the entire settlement with respect to Kalkunte’s SOX claim.¹⁶ The Board finds that the settlement is fair, adequate, and reasonable, and in the public interest. Accordingly, we **APPROVE** the agreement and **DISMISS** the complaint with prejudice.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹⁵ *Phillips v. Citizens’ Ass’n for Sound Energy*, 1991-ERA-025, slip op. at 2 (Sec’y Nov. 4, 1991).

¹⁶ Settlement Agreement, ¶ 19.