U.S. Department of Labor

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

In the Matter of:

MATTHEW VANNOY,

COMPLAINANT,

v.

CELANESE CORPORATION,

RESPONDENT.

ARB CASE NO. 09-118

ALJ CASE NO. 2008-SOX-064

DATE: November 4, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thad M. Guyer, Esq., *T.M. Guyer & Friends, P.C.*; Medford, Oregon

For the Respondent:
Charles M. Poplstein Esq., Brian A. Lamping, Esq.; *Thompson Coburn LLP*, St. Louis, Missouri

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge;* Lisa Wilson Edwards, *Administrative Appeals Judge*

ORDER GRANTING MOTION FOR RECONSIDERATION AND REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, as amended, 18 U.S.C.A § 1514A (Thomson/West Supp. 2013) ("SOX"), and its implementing regulations, 29 C.F.R. Part 1980 (2013). Following an order on remand by the Administrative Board (ARB) on September 28, 2011, an Administrative Law Judge (ALJ) held an evidentiary hearing and on July 24, 2013, entered a Decision and Order on Remand

determining that Respondent Celanese Corporation's (Celanese's) adverse action against Complainant Michael Vannoy violated SOX, and ordered relief. Celanese petitioned the ARB for review.

On September 17, 2013, prior to briefing, the parties filed with the ARB a Joint Motion to Approve Settlement and Vacate the Administrative Law Judge's Decision and Order on Remand and appended a copy of the settlement agreement signed by the parties. The parties moved jointly for approval of a settlement that included a provision directing the ARB to vacate the ALJ's Decision and Order on Remand (dated July 24, 2013). See Joint Motion to Approve Settlement (Sept. 17, 2013), at ¶ 6 (requesting that ALJ's July 24, 2013, Order in this case be vacated and removed "from any website or database affiliated with the United States Department of Labor or record of published opinions."); see also Settlement Agreement at ¶ 3. We declined to vacate the ALJ decision, but approved the settlement and dismissed the complaint on September 27, 2013. On October 15, 2013, the parties jointly moved the ARB to reconsider our order approving the settlement. See Joint Motion to Reconsider (filed Oct. 15, 2013). We grant the motion, and remand the case without prejudice to the ALJ for further proceedings.

DISCUSSION

In the Joint Motion to Reconsider before us, the parties state that our September 17, 2013, Order "did not approve the settlement agreed to by the parties and instead modified the terms of the settlement and dismissed the case, even though no such dismissal had been requested . . . ." Joint Motion to Reconsider at 2. The parties state that the modifications are not acceptable to them, and that the settlement is "null and void" because the "settlement cannot be effected under the terms of the Order." *Id.* The parties jointly request that we reconsider and vacate our initial Order, and either remand to the ALJ or refer the case to the Board's settlement judge program.

As we stated in our initial Order, the scope of the ARB's authority to vacate an ALJ's prior decision as part of our review of a settlement agreement is questionable; the "ALJ's order is precedent, however, it is not our practice to vacate an underlying ALJ decision in the context of reviewing a settlement agreement pursuant to 29 C.F.R. § 1980.111(d)(2)." ARB Final Decision and Order Approving Settlement slip op. at 2 (Sept. 27, 2013). While the question is clearly presented in the context of this settlement agreement that the parties seek our approval, the issue is not briefed in the Joint Motion filed. The ARB, however, is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the Board issued the decision. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 2 (ARB May 30, 2007).[1] The ARB "may not reconsider its own decisions

[1] In determining whether to reconsider a prior decision on the merits, the ARB generally applies a four-part test to determine whether the movant has demonstrated: (1) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision. *Toland v. FirstFleet, Inc.*, ARB No. 09-091, ALJ No. 2009-STA-011, slip op. at 2; (ARB Mar. 8, 2011); *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008,

if to do so would be arbitrary, capricious, or an abuse of discretion." *Maktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002). In this case, reconsidering our Final Decision and Order Approving Settlement is within the scope of our authority, and doing so is not arbitrary or capricious, as it is consistent with the joint motion advanced by the parties in this case.

The parties represented in the Joint Motion to Reconsider that the ALJ stated in a conference call below that he would vacate the July 24, 2013, decision "if a settlement could be reached and had no problem with vacating his decision if that would facilitate settlement." Joint Motion to Reconsider at 3. In view of this representation by the parties, we vacate the October 15, 2013, Final Decision and Order Approving Settlement and remand the case to the ALJ for the exclusive purpose of facilitating settlement of this case. See 29 C.F.R. § 1980.111(d)(2) ("At 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 the settlement is approved by the administrative law judge if the case is before the judge . . . .").

CONCLUSION

For the foregoing reasons, the Joint Motion to Reconsider is **GRANTED**, the September 27, 2013, Final Decision and Order Approving Settlement is **VACATED**, and the case is **REMANDED** without prejudice to the ALJ for further proceedings to facilitate settlement.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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slip op. at 1-2 (ARB Mar. 7, 2006). Reconsideration may also be granted to correct manifest errors of law or fact upon which the judgment is based or to prevent manifest injustice. *OFCCP v. Florida Hospital of Orlando*, ARB No.11-011, ALJ No.2009-OFC-002, slip op. at 5 (ARB July 22, 2013)(Order Granting Motion for Reconsideration).