



**In the Matter of:**

**SUSAN ANDERSON,**

**ARB CASE NO. 10-070**

**COMPLAINANT,**

**ALJ CASE NO. 2010-SOX-007**

**v.**

**DATE: January 31, 2011**

**SCHERING CORPORATION,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Susan Anderson, *pro se*, Fanwood, New Jersey**

*For the Respondent:*

**Rosemary Alito, Esq., *K&L Gates, LLP*, Newark, New Jersey**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Joanne Royce, *Administrative Appeals Judge***

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

This case arose when the Complainant, Susan Anderson, filed a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).<sup>1</sup> On

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<sup>1</sup> 18 U.S.C.A. § 1514A (Thomson/West Supp. 2010).

February 9, 2010, a Department of Labor Administrative Law Judge (ALJ) issued an Order of Dismissal (O. D.) dismissing Anderson's whistleblower complaint because she failed to timely file it.

The Secretary of Labor has delegated her authority to issue final administrative decisions in SOX cases to the Administrative Review Board.<sup>2</sup> Anderson filed a timely petition for review with the Board. In response, the Board issued a Notice of Review and Briefing Schedule. Both Anderson and the Respondent Schering Corporation filed briefs in response to the ARB's order.

On December 17, 2010, the Board received a joint Stipulation of Dismissal with Prejudice notifying the Board of Anderson's intention to dismiss all of her claims with prejudice. The SOX implementing regulations provide three options for terminating a case pending at the Board prior to final adjudication.<sup>3</sup> First, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the Board. In that case the findings or order becomes the final order of the Secretary.<sup>4</sup> Second, the parties may enter into an adjudicatory settlement.<sup>5</sup> If the parties enter into a settlement, the regulations require the parties to file a copy of the settlement with the Board for its review.<sup>6</sup> Third, if the Board has not issued a final decision within 180 days of the filing of the complaint, the complainant may bring an action at law or equity for de novo review in the appropriate United State district court.<sup>7</sup>

Anderson did not state in her stipulation requesting withdrawal, under which of these three options she intended to proceed. Therefore the Board ordered her to notify the Board no later than January 24, 2011, of the provision upon which she is relying. Furthermore, the Board ordered Anderson to state whether or not she has entered into a settlement of her SOX complaint, and if she has, to provide a copy of the settlement for the Board's review.

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<sup>2</sup> Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

<sup>3</sup> 29 C.F.R. § 1980.111(c), (d)(2); 29 C.F.R. § 1980.114.

<sup>4</sup> 29 C.F.R. § 1980.111(c).

<sup>5</sup> 29 C.F.R. § 1980.111(d)(2).

<sup>6</sup> See e.g., *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1154 (5th Cir. 1991); *Barker v. Perma-Fix of Dayton*, ARB No. 06-045, ALJ No. 2006-SOX-001 (ARB July 10, 2006)(SOX settlements must be filed with the ARB).

<sup>7</sup> 29 C.F.R. § 1980.114.

In response, Schering Corporation submitted a copy of a separation agreement and general release executed by Anderson. As this agreement compromises Anderson's right to continue the litigation of her SOX complaint, we will review it as we would a settlement. A settlement under the SOX cannot become effective until its terms have been reviewed and determined to be fair, adequate, and reasonable.<sup>8</sup>

In reviewing the Separation Agreement, we note that it includes the settlement of matters under laws other than the SOX.<sup>9</sup> The Board's authority over settlement agreements is limited to the statutes that are within its jurisdiction as defined by the applicable statute. Therefore, we approve only the terms of the agreement pertaining to Anderson's current SOX case, ARB No. 10-070, ALJ No. 2010-SOX-007.<sup>10</sup>

Additionally, the Separation Agreement contains confidentiality and non-disparagement clauses.<sup>11</sup> The ARB notes that the parties' submissions, including the Separation Agreement, become part of the record of the case and are subject to the Freedom of Information Act (FOIA).<sup>12</sup> FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act.<sup>13</sup> Department of Labor regulations provide specific procedures for responding to FOIA requests and for appeals by requestors from denials of such requests.<sup>14</sup> Further, if the confidentiality and non-disparagement clauses were interpreted to preclude Anderson from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore constitute unacceptable "gag" provisions.<sup>15</sup>

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<sup>8</sup> *Carciero v. Sodexo Alliance, S.A.*, ARB No. 09-067, ALJ No. 2008-SOX-012, slip op. at 2 (ARB Sept. 30, 2010).

<sup>9</sup> Separation Agreement and General Release at 2.

<sup>10</sup> *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 2000-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

<sup>11</sup> Separation Agreement and General Release at 4-5.

<sup>12</sup> 5 U.S.C.A. § 552 (Thomson/West 1996 & Supp. 2010).

<sup>13</sup> *Norton v. Uni.-Group, Inc.*, ARB No. 08-079, ALJ Nos. 2007-STA-035, -036, slip op. at 3 (ARB May 30, 2008) (citing *Coffman v. Alyeska Pipeline Serv. Co. & Artic Slope Inspection Serv.*, ARB No. 96-141, ALJ Nos. 1996-TSC-005, -006, slip op. at 2 (ARB June 24, 1996)).

<sup>14</sup> 29 C.F.R. § 70 *et seq.* (2010).

<sup>15</sup> *Kingsbury v. Gordon Express, Inc.*, ARB No. 07-047, ALJ No. 2006-STA-024, slip op. at 2-3 (ARB Aug. 31, 2007).

Finally, the Separation Agreement provides that it shall be governed by and construed in conformance with the laws of the State of New Jersey.<sup>16</sup> We construe this choice of law provision 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.<sup>17</sup>

The parties have certified that the Separation Agreement constitutes the entire understanding between Anderson and Schering Corporation.<sup>18</sup> The Board finds that the agreement is a fair, adequate, and reasonable settlement of Anderson's SOX complaint. Accordingly, we **APPROVE** the agreement and **DISMISS** the complaint with prejudice.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>16</sup> Separation Agreement and General Release at 5.

<sup>17</sup> *Trucker v. St. Cloud Meat & Provisions, Inc.*, ARB No. 08-080, ALJ No. 2008-STA-023, slip op. at 3 (ARB May 30, 2008).

<sup>18</sup> Separation Agreement and General Release at 5.