U.S. Department of Labor

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

In the Matter of:

WILLIAM C. BIDDY, **CASE NO. 95-TSC-7**

COMPLAINANT, **DATE:** August 1, 1996

v.

ALYESKA PIPELINE SERVICE COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER OF REMAND

This case arises under the employee protection provisions of the Toxic Substances Control Act, 15 U.S.C. § 2622 (1988), the Water Pollution Control Act, 33 U.S.C. § 1367 (1988), the Clean Air Act, 42 U.S.C. § 7622 (1988) and the Solid Waste Disposal Act, 42 U.S.C. § 6971 (1988).

BACKGROUND

The Administrative Law Judge in this case forwarded his April 22, 1996, Recommended Decision and Order to the Board for review, recommending that the settlement between the parties be approved and the complaint be dismissed with prejudice. The Board found upon its review of the settlement agreement that it could not determine the actual amount of money to be paid to the Complainant pursuant to the proposed settlement. The Board issued an Order on May 31, 1996, requiring the parties to provide that information.

Counsel for the parties responded on June 10, 1996, and advised the Board that no part of the settlement amount provided for in the settlement of the *federal* cause of action would be used to pay attorneys' fees or costs. Counsel noted that there was a second settlement between the parties which pertained to state law claims the Complainant *may have* against the Respondent. Counsel further stated that "all of [Complainant's] attorneys' fees and cost reimbursements due his attorney, *including fees and costs relating to this [federal] matter*, will be paid out of the proceeds of that separate payment." (Emphasis supplied). Joint Response to May 31, 1996 Order (First Response) at 3.

The Board issued a Second Order on June 19, 1996, restating the requirement that the parties advise it as to the amount the Complainant will ultimately receive pursuant to the settlement of his federal whistleblower complaint, regardless of the ultimate source of the payment of attorneys' fees and costs. Second Order at 2. The parties submitted their Joint Response to Second Order (Second Response) on July 3, 1996, reiterating that none of the federal case settlement would be used for attorneys' fees or costs, and that information regarding the details of the settlement of the state-law based claim was beyond the purview of the Board's authority.

DISCUSSION

This case was brought under the provisions of the Toxic Substances Control Act (TSCA) and the Clean Air Act (CAA) which provide at § 2622(b)(2)(A) and § 7622(b)(2)(A) respectively, that the Secretary must enter into or otherwise approve any settlement of the parties, or in the alternative, issue an order providing relief as set forth in the statute or deny the complaint.[1/] The Secretary has consistently interpreted the pertinent statutory language as requiring a review of the settlement to determine if it is fair and reasonable. The Secretary stated in a case arising under the Energy Reorganization Act (ERA), 42 U.S.C. § 5851(b)(2)(A)(1988), (which contains identical settlement language) that:

> [w]here a settlement is not fair and equitable to a complainant, I cannot approve it for to do so would be an abdication of the responsibility imposed upon me by Congress to effectuate the purposes of section 5851, which is to encourage the reporting of safety violations by prohibiting economic retaliation against employees reporting such [violations].

[1/] The relevant portions of the statutes provide as follows:

> (2)(A) Upon receipt of a complaint . . . the Secretary shall conduct an investigation of the violation alleged . . . . [T]he Secretary shall complete the investigation and shall notify . . . the complainant . . . and the person alleged to have committed such violation of the results of the investigation . . . . [T]he Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis *of a settlement entered into by the Secretary* and the person alleged to have committed such violation, issue an order either providing the relief prescribed . . . or denying the complaint. . . . The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant. (Emphasis supplied).

Neither the Water Pollution Control Act nor the Solid Waste Disposal Act contain a provision *vis a vis* the Secretary's responsibility when the parties settle a case.

Macktal v. Brown & Root, Inc., Case No. 86-ERA-23, Order to Submit Settlement, May 11, 1987, slip op. at 2.

This interpretation of the statute was affirmed by the court of appeals in *Macktal v. Secretary of Labor,* 923 F.2d 1150 (5th Cir. 1991). The court found that the Secretary did not have the authority to unilaterally modify the agreement. But, the court specifically agreed with the position that the Secretary has the authority to "approve a settlement if it adequately protects the public's interest and equitably treats the employee." *Id.* at 1154.

The Board's responsibility in approving a settlement includes assuring that a settlement does not contain provisions which are contrary to public policy. This responsibility entails keeping channels of communication open between employees who may be knowledgeable of environmental or safety violations and the relevant governmental agencies; protecting employees who report concerns regarding environmental or safety infractions from retaliation by employers; and safeguarding those employees from potential financial loss because of their whistleblowing activities. Settlements which appear to be unfair or financially detrimental to whistleblowing employees also could have a chilling influence on other employees who may be discouraged from reporting violations.

The parties have not indicated directly or by citation whether a state suit was in fact commenced, referring instead to a "second agreement pursuant to which Biddy will release state law claims *he may have* against Alyeska,. . ." (emphasis added), First Response at 2, and a statement that Respondent settled Biddy's state claims. Second Response at 5. Counsel noted that in settling Biddy's claims "a firm offer was made to resolve all [ ] claims," and only later was a portion of that settlement amount attributed to the federal claim. Second Response at 4.

Counsel characterizes the settlement amount in the federal claim as *de minimis,* and further characterizes the amount of "the settlement for the secondary state-based claims as also small." Second Response at 4. The Board was contacted by Complainant's spouse subsequent to the Complainant's receipt of the Board's first Order, who advised a Board staff member that the actual total settlement amount was greatly in excess of the revealed federal settlement amount.[2/]

Counsel avers that Complainant's counsel accepted "a substantial reduction in her contingent fee along with payment of case expenses." Second Response at 5. We have been advised that counsel in fact is to receive the full contingency fee as per the fee agreement with regard to the putative state-based settlement.

[2/] Because of the parties' request for confidentiality, we are not at this time specifying the amounts of the settlement as revealed to us and because of attorney-client privilege concerns, we are not forwarding copies of the materials referenced below.

Counsel states that "there has been no active litigation of this case . . .." Second Response at 7. We are in receipt of an itemized statement billing Complainant over $8,000 as his proportional share for case costs incurred prior to the settlement of his complaints.

Counsel asserts that "pursuant to the terms of the fee arrangement between Mr. Biddy and his counsel, all of Mr. Biddy's attorneys' fees and costs for the pursuit and resolution of all claims against Alyeska would be paid from the proceeds of the separate [non-federal based] agreement." Second Response at 3. We are in receipt of what appears to be Complainant's written fee agreement(s) with his counsel. The agreement(s) received by the Board do(es) not contain a provision for the payment of fees and costs out of a non-federal claim.

We are aware that there are approved settlement agreements and dismissed complaints in at least four other cases brought before the Secretary for individuals who were identified as having been joint complainants with Complainant. These Complainants accepted nominal amounts to settle their federal cases and agreed to give up their employment with Respondent. Those cases are: *Robert Plumlee v. Alyeska Pipeline Service Co. et al.,* Case Nos. 95-TSC-2, 95-TSC-13, Sec. Order Approving Settlement and Dismissing Complaint, Oct. 3, 1995; *R. Glen Plumlee v. Alyeska Pipeline Service Co. et al.,* Case Nos. 95-TSC-3, 95-TSC-13, 95-TSC-14, Sec. Order Approving Settlement and Dismissing Complaint, Oct. 3, 1995; *James Schooley v. Alyeska Pipeline Service Co. et al.,* Case Nos. 95-TSC-10, 95-TSC-12, 95-TSC-13, Sec. Order Approving Settlement and Dismissing Complaint, Oct. 3, 1995; *Larry Coffman v. Alyeska Pipeline Service Co. et al,* Case Nos. 96-TSC-5, 95-TSC-6, ARB Order Approving Settlement and Dismissing Complaint, June 26, 1996. We do not know if there were undisclosed sidebar agreements which indicate the true value of those complaints. We are mindful of our responsibility toward the public under the relevant statutes, and believe we have no recourse but to remand this matter for additional findings consistent with this Order.

ORDER

This case IS REMANDED to the presiding Administrative Law Judge for reconsideration and the taking of such additional evidence deemed necessary to comply with this Order.

The Office of the Solicitor, Associate Solicitor, Division of Fair Labor Standards, is requested to review this matter and appear on behalf of the Secretary before the Administrative Law Judge, if deemed appropriate, in order to ensure that the provisions of the TSCA and the CAA are complied with regarding the Secretary's role in the settlement of such cases.

The Wage and Hour Administrator is also requested to appear before the Administrative Law Judge, if deemed appropriate, in order to conduct any investigation necessary to confirm compliance with the TSCA and the CAA.

Further, the Wage and Hour Administrator and the Solicitor are requested to review, if deemed appropriate, the *R. Plumlee*, *R.G. Plumlee, Schooley* and *Coffman* cases cited above and take appropriate action to ensure that those settlements comply with the TSCA and the CAA.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member