U.S. Department of Labor

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

In the Matter of:

WILLIAM C. BIDDY, **ARB CASE NOS. 96-109**
97-015

COMPLAINANT, **ALJ CASE NO. 95-TSC-7**

v. **DATE: December 3, 1996**

ALYESKA PIPELINE SERVICE COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINT

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). The parties requested dismissal of the complaint with prejudice and previously submitted a Joint Motion to Approve Settlement Agreement and For Order of Dismissal and a Settlement Agreement, Release and Covenant Not to Sue (Settlement Agreement # 1) Hearing Exhibit (Ex.) 4, in support of such request. The Administrative Law Judge issued a decision on April 22, 1996, recommending that the settlement be approved.

The Board issued an Order on May 31, 1996, and a Second Order on June 19, 1996, requiring the parties to advise the Board of the totality of financial details pertaining to Complainant's action against Respondent arising from the fact situation underlying Complainant's federal case. As stated in the Board's May 19th Order at 2, the Board's concern reaches beyond the Complainant's individual interest and goes to the public interest as well, to

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[1/] On April 17, 1996, Secretary's Order 2-96 was signed delegating jurisdiction to issue final agency decisions under these statutes and pertinent regulations to the Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). The Order also contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions.

ensure that other employees not be discouraged from reporting safety violations pursuant to the above statutes. Counsel was not forthcoming with the necessary information to permit the Board to make an informed judgment regarding approval of the proposed settlement. The Board issued an Order of Remand on August 1, 1996, in a further effort to gain compliance with its requirement for full disclosure of information regarding the proposed settlement of Complainant's claims. In response to the Remand Order, a telephonic hearing was held on November 1, 1996, between the parties and the presiding ALJ. At this hearing a second settlement agreement, titled "General Release and Covenant Not to Sue" (Settlement Agreement # 2) was introduced for the first time. Ex. 5. We note that both settlement agreements were executed on the same date. Ex. 4 at 11; Ex. 5 at 12.

It is evident that counsel for Respondent continues to misapprehend the Board's concern with regard for the public policy aspect of this case. The Board's concern is not only centered on the fee and cost arrangements between Mr. Biddy and his counsel, (Joint Response to Administrative Law Judge's Order at 4 n.3), but on counsels' refusal to reveal the total amount of the settlement.

We note that the all compensatory damages that could have been awarded to Complainant based upon any "other claims that *have been* or *could be* asserted by Mr. Biddy against respondent" (emphasis supplied), Settlement Agreement # 2 at 2, were available to him as a remedy under his federal case. It is evident from Biddy's testimony, Transcript (T.) at 11, as well as from the fact that Settlement Agreement # 2 cites only the federal claim and fails to identify any state case citation, that no state action was undertaken by Complainant.

Our concern is the fractionizing of the claim such that anyone who reviews only Settlement Agreement # 1 would be mislead as to the actual total amount of the settlement, since settlement Agreement # 2 represents the overwhelming portion of the total settlement amount. Publication of nominal awards to successful claimants may well have a chilling effect on future claimants. Future potential whistleblowers may choose to remain silent rather than risk losing their jobs when the potential compensation for such a grave loss is a nominal sum. The purpose of these environmental statutes would not be served and the environment would suffer as a result.

We are perturbed at counsels' persistence in attempting to maintain the fiction of two separate, independent settlement agreements, when the information contained in both agreements is directly required by the Board in carrying out its statutory responsibilities. *See Rex v. Ebasco Services, Inc.*, Case Nos. 87-ERA-6, 87-ERA-40, Sec. Final Dec. and Order, Mar. 4, 1994, slip op. at 6 (setting out disciplinary process for review of allegation of attorney misconduct). Due to counsels' reluctance to provide the necessary information in this case, we continue to be concerned with the nominal settlements of the federal claims in other cases that appear to have a common nexus with this case. They 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; and *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.

Although these cases were cited in our Remand Order, the ALJ did not pursue an inquiry into these matters. We are now requesting the parties to voluntarily furnish such information as may be appropriate with regard to other settlements in these matters, or certify to us within thirty (30) days of the issuance of this Order, that there were no other settlements which arose out of the same fact situation that formed the bases for these complainants' federal claims.

In the future, the Board will require all parties requesting approval of settlements of cases arising under the employee protection provisions of the environmental protection statutes to provide us with the settlement documentation for any other claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties.

We are mindful that counsels' actions should not adversely impact the settlement payment due Complainant, therefore it is out of consideration for him that we approve the settlement before us. Because the request for approval is based on an agreement entered into by the parties, we have reviewed it to determine whether the terms of the total settlement are a fair, adequate and reasonable settlement of the complaint. 29 C.F.R. § 24.6. *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.

The agreement pertaining to Complainant's federal case appears to encompass the settlement of matters arising under various laws, beyond those enumerated above. *See* ¶¶ 3, 7, 8 and 9. For the reasons set forth in *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2, we have limited our review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of the Complainant's allegations the Respondent violated the above enumerated Acts.

Paragraph 4 provides that the Complainant shall keep the terms of the Settlement Agreement confidential. We interpret this language and the provisions of ¶ 14 as not preventing Complainant, either voluntarily or pursuant to an order or subpoena, from communicating with, or providing information to, State and Federal government agencies about suspected violations of law involving the Respondent. *See Corder v. Bechtel Energy Corp.,* Sec. Order, Feb. 9, 1994, slip op. at 6-8 (finding void as contrary to public policy a settlement agreement provision prohibiting the complainant from communicating with Federal or state agencies concerning possible violations of law).

The parties' submissions, including the agreements become part of the record of the case and are subject to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988). FOIA

requires Federal agencies to disclose requested records unless they are exempt from disclosure under the Act.[2/] *See Debose v. Carolina Power and Light Co.*, Case No. 92-ERA-14, Order Disapproving Settlement and Remanding Case, Feb. 7, 1994, slip op. at 2-3 and cases there cited.

We find that the agreement, as here construed, is a fair, adequate and reasonable settlement of the complaint. We note that the hearing transcript indicates that the Complainant will pay only attorney's fees, not costs, from the total proceeds of the entire settlement. T. at 12. Accordingly, we APPROVE the agreement and DISMISS THE COMPLAINT in Case No. 95-TSC-7 WITH PREJUDICE. Paragraph 2.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[2/] Pursuant to 29 C.F.R. § 70.26(b), submitters may designate specific information as confidential commercial information to be handled as provided in the regulations. When FOIA requests are received for such information, the Department of Labor will notify the submitter promptly, 29 C.F.R. § 70.26(c); the submitter will be given a reasonable amount of time to state its objections to disclosure, 29 C.F.R. § 70.26(e); and the submitter will be notified if a decision is made to disclose the information, 29 C.F.R. § 70.26(f). If the information is withheld and a suit is filed by the requester to compel disclosure, the submitter will be notified, 29 C.F.R. §70.26(h).