(412) 644-5754

DATE ISSUED: November 25, 1998

CASE NO.: 1998-ERA-31

In the Matter of

MICKEY R. HAMBY,
Complainant

v.

CAROLINA POWER & LIGHT, INC.,
Respondent

Appearances:

Richard W. Rutherford, Esq.,
For the Complainant

Douglas E. Levanway, Esq. and
Rosemary G. Kenyon, Esq.,
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

This proceeding arose under the employee protection provisions of the Energy Reorganization Act of 1974 (the "Act"), 42 U.S.C. 5851, and the implementing regulations at 29 C.F.R. Part 24. Complainant, Mickey R. Hamby, filed a complaint with the Secretary of Labor, on December 11, 1997 alleging that he was a protected employee engaged in a protected activity within the scope of the Act, and was separated by the Respondent, Carolina Power and Light Company (hereinafter "CP&L") as a result of this activity.

A compliance investigation was conducted by the Atlanta, Georgia, Occupational Safety and Health Administration (OSHA), U.S. Department of Labor. On May 26, 1998, OSHA announced its determination that the complainant was offered another position with the employer or a severance package as a result of a legitimate reorganization and that there was no evidence substantiating he was subjected to disparate treatment or reprisals as a result of any protected

activities. Mr. Hamby sought a hearing before an administrative law judge.

I was assigned the matter on June 8, 1998 and issued a Notice of Hearing on June 18, 1998. The hearing, scheduled for August 11, 1998, was twice continued at the request of the parties. The hearing was finally scheduled for December 8, 1998, in Raleigh, North Carolina.

On November 19, 1998, I received a copy of a Settlement Agreement and General Release from the parties. The Agreement provides that upon the issuance of an order dismissing the complaint with prejudice, Respondent will pay Mr. Hamby a specified sum of money, a portion of which is designated "severance" payment subject to payroll withholdings, a portion of which is designated as compensatory damages, and a portion of which is designated as attorneys' fees and costs payable, under Section 211 of the Act. The parties agree that these payments will satisfy all claims against CP&L by Mr. Hamby and his counsel.

The complainant further agrees to a "general release" of all claims relating to his employment with CP&L up until the date of the Settlement Agreement, including, but not limited to claims arising under the Energy Reorganization Act, the Atomic Energy Act, the Age Discrimination Act of 1967, the Civil Rights Act of 1967, any similar state and local laws, and any state or federal laws or common law claims. The parties agree to keep the matter of the agreement confidential, with some limited exceptions. Additionally, Mr. Hamby agrees not to sue, either alone or with others, CP&L *et al* on any of the released claims. The Agreement states that it "does not restrain the right of Mr. Hamby or CP&L to report or provide information" to the Nuclear Regulatory Commission or any other government agency with jurisdiction over possible violations of the Atomic Energy Act, Energy Reorganization Act, any nuclear safety concern, or any work place safety concern.

The agreement must be reviewed to determine whether the terms are a fair, adequate and reasonable settlement of the complainant's allegations. *See, e.g., Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, November 2, 1987, slip opin. at 2 and *Bunn v. MMR/Foley, 89-ERA-5 (Sec'y Aug. 2, 1989)*. Moreover, review and approval of the settlement is limited to matters arising under the employee protection provisions under the jurisdiction of the Department of Labor, in this case the Energy Reorganization Act. *Mills v. Arizona Public Service Co.*, 92-ERA-13 (Sec'y Jan. 23, 1992); *Anderson v. Kaiser Engineers Hanford Co.*, 94-ERA-14 (Sec'y Oct. 21, 1994); and, *Poulos, supra*.

I find the terms of the "confidentiality" provision do not violate public policy in that they do not prohibit the Complainant from communicating with appropriate government agencies. *See, e.g., Bragg v. Houston Lighting & Power Co.*, 94-ERA-38 (Sec'y June 19, 1995); *Brown v. Holmes & Narver*, 90-ERA-26 (Sec'y May 11, 1994); *The Connecticut Light & power Cop. v. Secretary Of United States Department of Labor*, No. 95-4094, 1996 U.S. App. LEXIS 12583 (2d Cir. May 31, 1996); and, *Anderson v. Waste Management of New Mexico*, Case No. 88-TSC-2, Sec. Final Order Approving Settlement, December 18, 1990, slip opin. at 2, where the Secretary honored the parties' confidentiality agreement except where disclosure may be required by law.

The "release and covenant not to sue" provision, paragraph 8, is likewise acceptable

because it only limits the right to sue in the future on claims or causes of action arising out of facts occurring before the date of the agreement and arising out of his employment with the Respondent. *Armijo v. Wackenhut Services, Inc.*, 94-ERA-7 (Sec'y Aug. 22, 1994); *Saporito v. Arizona Public Service Co.*, 92-ERA-30, 93-ERA-26 and 93-ERA-43 (Sec'y Mar. 21, 1994); and, *McCoy v. Utah Power*, 94-CAA-1 and 6 (Sec'y Aug. 1, 1994).

I am concerned with the highlighted language of the following clause, in paragraph 8:

> . . . Hamby will not sue CP&L, its past, present, future parents, subsidiaries, divisions, affiliates, related companies, successors, assigns, officers, directors, employees or agents on any of the released claims <u>or join as a party with others who may sue on any such claims.</u>

At best, the language may be superfluous because Hamby has already agreed not to sue the Respondents, in nearly any and all of its possible forms, on the released claims. However, requiring him not to join as a party others who may sue on "any such claims" could be construed as over-broad and violative of public policy. *Cf. Thompson v Detroit Edison Co.*, 87-ERA-2 (Sec'y July 9, 1990). If the meaning of the words "any such claims" merely referred to the released claims during the same time period, it would be redundant, but acceptable. However, if the language refers to claims which others may have under the broad list of referenced laws and is not so temporally limited, it is inappropriate. Because the sentence uses the conjunctive "or" thus adding a new subject matter, i.e., "any such claims" versus the earlier "released claims," I find it over-broad and violative of public policy. However, the "Severability" clause, paragraph 13, permits its severance without jeopardizing the remainder of the agreement. *Brown v. Holmes & Narver, Inc.*, 90-ERA-26 (Sec'y May 11, 1994).

Additionally, the Secretary has interpreted provisions such as the one in paragraph 15 of this Agreement which specify interpretation under the laws of North Carolina (and applicable federal law), as not limiting the Secretary's authority under the statute and regulations. *See, Phillips v. Citizens Association for Sound Energy*, Case No. 91-ERA-25, Sec. Final Order of Dismissal, November 14, 1991, slip opin. at 2.

The provision concerning modification of the agreement, in paragraph 12, may be construed as including the requisite approval of the Secretary for any modification. *Elliot v. Enercon, Services, Inc.*, 92-ERA-47 (Sec'y June 28, 1993).

The fact the agreement does not contain the provisions found in 29 C.F.R. § 18.9(b) does not invalidate it as those provisions apply to consent findings not settlements. *Simmons v. Arizona Public Service Co.*, 90-ERA-6 (Sec'y Sept. 7, 1994).

The parties asked that the Agreement be treated as exempt from disclosure, under the Freedom of Information Act, pursuant to 29 C.F.R. § 70.4 and under 29 C.F.R. Part 70a implementing the Privacy Act. In *Seater v. Southern California Edison Co.*, 95-ERA-13 (ALJ March 11, 1997), Judge Kaplan invited the Administrative Review Board to address the apparent conflict between the Department of Labor's FOIA responsibilities and the precedents discussing the importance of public disclosure of the true dollar amounts of whistleblower settlements. *See,*

i.e., *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996). Judge Kaplan pointed out that the regulations and the Secretary's policy appear to allow parties to so limit public access. *See, Klock v. Tennessee Valley Authority*, 95-ERA-20 (ARB, May 1, 1996); *Ezell v. Tennessee Valley Authority*, 95-ERA-39 (ARB, Aug. 21, 1996); *Cianfrani v. Public Service Electric & Gas Co.*, 95-ERA-33 slip opinion at 2 n. 3 (ARB, Sept. 19, 1996).[1] Thus, the Agreement itself is not appended and is forwarded separately and marked "PREDISCLOSURE NOTIFICATION MATERIALS."

There are no further aspects of the agreement which need be discussed for purposes of this recommendation.

I have no basis on which to recommend that the amount agreed upon is not fair, adequate and reasonable. Nor do I have reason to believe other provisions in the agreement, except as noted, are inappropriate.

Subject to the limitations discussed above, and noting that the parties are represented by counsel, it is hereby RECOMMENDED that the Secretary of Labor find the terms of the agreement fair, adequate and reasonable, except as otherwise noted, and therefore approve the Settlement Agreement and General Release. It is further RECOMMENDED that the complaint be dismissed with prejudice.

SO ORDERED.

RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

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[1] In ***Seater v. Southern California Edison Co.***, 95-ERA-13 (ARB Mar. 27, 1997), however, the ARB declined the ALJ's suggestion *sub silentio*. Rather, the ARB employed the following standard boilerplate language in approving the settlement:

> The records in this case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record of this case is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding.

Slip op. at 2.

NOTICE: This Recommended Order of Dismissal will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petitition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).