U.S. Department of Labor

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

In the Matter of:

STEPHEN M. PAINE,

COMPLAINANT,

v.

SAYBOLT, INC.,

RESPONDENT.

ARB CASE NO. 97-102

ALJ CASE NO. 97-CAA-4

DATE: JUL 22 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DISAPPROVING SETTLEMENT AND REMANDING CASE

This case arises under the Clean Air Act (CAA), 42 U.S.C. §7622 (1988). The parties have submitted a Settlement Agreement and General Release seeking approval of the settlement and dismissal of the complaint. The Administrative Law Judge issued a Recommended Decision and Order (R. D. and O.) on May 20, 1997 approving the settlement. After a review of the agreement and R. D. and O., we remand the case to the ALJ.

Paragraph 16 of the agreement indicates that the record in this case shall be covered by a protective order and designates the contents of the record "confidential commercial information," thus attempting to shield the entire record from disclosure pursuant to the Freedom of Information Act (FOIA). It is unlikely that the entire contents of any record would qualify for complete nondisclosure under the FOIA. Confidential commercial information refers to "records provided to the government by a submitter that arguably contain material exempt from release under [FOIA], because disclosure could reasonably be expected to cause substantial competitive harm." 29 C.F.R. §70.2. The intent is to protect specific information which the submitter in good faith claims could reasonably be expected to cause such harm. Designating the entire contents of the record, some portions of which would not qualify for FOIA exemption under any circumstances (e.g. the hearing transcript and exhibits which are already public records) does not constitute a good faith designation. Therefore, we refuse to accept the designation presented by the parties and, as a consequence, refuse to approve the settlement.

The ALJ points to our approval of a settlement agreement in *Seater v. Southern California Edison Company,* Case No. 95-ERA-13, Final Order Approving Settlement and Dismissing Complaint, Mar. 27, 1997, in concluding that the blanket-like protection sought by

the parties in this case has been endorsed by the Board. We note that in *Seater* the agreement designated certain financial information regarding the settlement and not the entire record. Our approval of the settlement agreement in *Seater* should not be interpreted as an endorsement of the type of protection sought by the parties in this case.[1]

We remind the parties that submissions in whistleblower cases under 29 C.F.R. Part 24 (1996) become part of the record in the case, and FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under that Act. *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services,* ARB Case No. 96- 141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. *See also Plumlee v. Alyeska Pipeline Services Co.,* Case Nos. 92-TSC-7, 10; 92WPC-6, 7, 8, 10, Sec. Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6. We must therefore deny the parties' request for a protective order. *Mitchell v. Arizona Public Service Co.,* Case Nos. 92-ERA-28, 29, 35, 55, Sec'y. Final Order Approving Settlement Agreement and Dismissing Cases, Jun. 28, 1993, slip op. at 2 (request to place settlement agreement under seal denied).

The ALJ recommended that the portion of 1 16 attempting to establish a protective order be severed from the agreement. R. D. and O. at 3. We expressly reject this recommendation because the Board cannot sever or modify material terms of a negotiated settlement. *See, e.g., Macktal v. Secretary of Labor,* 923 F.2d 1150, 1154-56 (5th Cir. 1991) (Secretary may only approve or disapprove settlement as written, but may not sever terms agreed to by parties).

For the reasons discussed above, the R. D. and O. is DENIED and the case is hereby REMANDED to the ALJ.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

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[1] The ALJ in *Seater* also suggested that "it would be best if the [ALJ] Who has to recommend approval, or not, of the settlement should be permitted (even encouraged) to set forth the financial terms of a settlement in his determination, which is a public document and easily and quickly obtainable." *Seater v. Southern California Edison Company,* Case No. 95-ERA-13, Recommended Dec. and Order, Mar. 11, 1997. We recognize that publishing the financial terms of a settlement may serve the purpose of encouraging employees to engage in whistleblowing activities. However, we also recognize that publishing the financial terms of settlements would likely lead to fewer settlements, perhaps more contentious litigation and potentially have a chilling effect on whistleblowing activities. Therefore, we decline to adopt the ALJs suggestion in *Seater.*