



In the Matter of:

JOHN J. BELIVEAU, JR.

ARB CASE NO. 98-032

COMPLAINANT,

ALJ CASE NO. 97-SDW-6

v.

DATE: June 30, 1999

**NAVAL UNDERSEA WARFARE
CENTER,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant

Sarah L. Levitt, Esq., Richard E. Condit, Esq.
The Project on Liberty & the Workplace, Washington, D.C.

For the Respondent

Andrea Heffernan Brisbin, Esq., Neaclesa P. Anderson, Esq.
Department of the Navy, Washington, D.C.

ORDER

This case arose under the Toxic Substances Control Act of 1986, 15 U.S.C.A. §2622 (1998); the Water Pollution Control Act, 33 U.S.C.A. §1367 (1998); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (1998); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §9610 (1998); the Resource Conservation and Recovery Act, 42 U.S.C.A. §6971 (1998); the Clean Air Act, 42 U.S.C.A. §7622 (1998) [the environmental statutes]; and the regulations implementing these statutes at 29 C.F.R. Part 24. On February 15, 1995, Complainant John Beliveau, filed a whistleblower complaint with the U.S. Department of Labor's Wage and Hour Division alleging that he had been subjected to unlawful retaliation by his employer, Naval Undersea Warfare Center (NUWC), in response to engaging in activities protected under the statutes. On June

15, 1995, prior to the completion of the Wage and Hour Division's investigation, Beliveau and NUWC entered into a settlement agreement and Beliveau withdrew his complaint.

On April 28, 1997, Beliveau filed a Motion to Reopen the 1995 complaint and declare the settlement void on the grounds that the Secretary had not approved the settlement. This Board disagreed, reasoning that because Beliveau and the NUWC settled the complaint before either party filed an appeal of the Wage and Hour Division's finding by requesting a hearing before the Labor Department's Office of Administrative Law Judges, the Secretary was not required to enter into a settlement to terminate the action initiated by the complaint. *Beliveau v. Naval Undersea Warfare Center*, ARB Case No. 97-097, Order Denying Interlocutory Appeal (Aug. 14, 1997); ARB Case No. 98-032, Final Decision and Order (June 26, 1998).

By order dated March 10, 1999, the U. S. Court of Appeals for the First Circuit reversed the Administrative Review Board's decision and remanded the case to the Secretary of Labor "for her review of the Settlement Agreement, to be followed by such further proceedings as may be called for on completion of that review." *Beliveau v. U. S. Department of Labor*, 170 F.3d 83 (1st Cir. 1999).

Before the Administrative Review Board, Beliveau argued that the settlement should be considered void because the Secretary had not approved it. In essence, Beliveau argued that he had the right to withdraw from the settlement until the Secretary approved it. However, assuming that Beliveau participated in and consented to the settlement at the time it was negotiated, he is bound by his initial negotiated consent to settle the complaint until such time as the Secretary approves or rejects the settlement. *Macktal v. Brown & Root*, 86-ERA-23 (Sec'y Nov. 14 1989).^{1/}

Although parties to a proposed settlement agreement ordinarily are bound to the agreement while its approval is pending before the Secretary, we nevertheless remand this case to the Administrative Law Judge for further proceedings. Beliveau contends that "[g]iven the collusive nature of the relationship between McAndrew [Beliveau's attorney at the time of the settlement] and the Navy, it is doubtful that Mr. Beliveau was adequately represented by legal counsel insigning this Agreement." Complainant's Reply Brief at 6. A complainant may not repudiate a settlement because of alleged fraud or duress by his own attorneys. *Macktal v. Brown & Root*, 86-ERA-23 (Sec'y Nov. 14 1989); accord *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1157 (5th Cir. 1991). However, an opposing party's improper conduct may render a settlement agreement voidable. *Macktal v. Brown & Root*, 86-ERA-23 (Sec'y Nov. 14 1989) citing *Jurgensen v. Fairfax County*, 745 F.2d 868, 889 (4th Cir. 1984). Thus, on remand, the Administrative Law Judge should consider

^{1/} The U.S. Court of Appeals for the Fifth Circuit reversed the Secretary's determination in *Macktal* that, in the absence of a severability provision in the settlement, she could nevertheless sever settlement terms that violate public policy and otherwise enforce the remainder of the settlement. *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-1156 (5th Cir. 1991). However, in *dicta*, the court upheld the Secretary's determination that as long as the Complainant initially consented to the settlement, he may not withdraw from it prior to the Secretary's consideration of the settlement. 923 F.2d at 1156-1157.

Beliveau's allegation that NUWC colluded with Beliveau's attorney, McAndrew, or otherwise engaged in improper conduct in negotiating the settlement agreement.

If the Administrative Law Judge finds that such improper conduct did occur, he should consider the settlement to be void and hold a hearing on the merits of Beliveau's whistleblower complaint. If, however, the Administrative Law Judge finds that Beliveau failed to establish that the NUWC engaged in improper conduct, he should consider Beliveau's alternative argument that certain of the settlement terms constitute "gag" provisions that violate public policy, and which therefore are unacceptable in a settlement agreement approved by the Secretary. *See* Complainant's Brief In Opposition to the ALJ's Recommended Order of Dismissal at 10-12. Unlike the settlement in *Macktal*, we note that the settlement agreement in this case contains a savings provision.^{2/} Thus, the Administrative Law Judge may strike those provisions, if any, that he finds violate public policy and uphold the remainder of the settlement. Accordingly, we **REMAND** this case to the Administrative Law Judge for further consideration consistent with this opinion.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member

^{2/} The parties' Memorandum of Agreement and Settlement, ¶ 16, provides, "Any provisions of this Settlement Agreement declared or determined by any court, administrative tribunal, or agency to be illegal or invalid will not affect the validity of the remaining provisions."