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Issue Date: 09 December 2008

CASE NO. 2008-CAA-0007

In the Matter of:

DIANA LOVE,
Complainant,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT AND
DISMISSING COMPLAINT WITH PREJUDICE**

This is a proceeding arising under the employee protections provisions of Section 322 of the Clean Air Act, amendments of 1977 (42 U.S.C. § 7622), Section 110 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (42 U.S.C. § 9610), Section 1450 of the Safe Drinking Water Act of 1974 (42 U.S.C. § 300j-9(i)) and Section 7001 of the Solid Waste Disposal Act of 1976 (42 U.S.C. § 6971) (collectively, “the Acts”), and implementing regulations at 29 C.F.R. Part 24.

On November 13, 2008, Complainant’s counsel filed the parties’ settlement agreement. The agreement includes a provision providing for the withdrawal, with prejudice, of Complainant’s whistleblower complaint against Respondent.

When parties settle whistleblower complaints under the Clean Air Act and the Safe Drinking Water Act that are before an administrative law judge (ALJ), the ALJ must approve the settlement. 29 C.F.R. § 41.111 (a), (d)(2). Settlements of complaints brought under CERCLA and the Solid Waste Disposal Act may be submitted to the ALJ for approval. 29 C.F.R. § 41.111 (a). Any settlement approved by an ALJ constitutes a final order on the complaint and may be enforced pursuant to 29 C.F.R. § 24.113.

Fairness, Adequacy, and Reasonableness

The terms of a settlement agreement must reflect a fair, adequate, and reasonable settlement of the complaint. *See, e.g., Bricklen v. Great Lakes Chemical Corp.*, ARB No. 05-144, ALJ No. 2005-CAA-8 (ARB Oct. 31, 2007); *Beliveau v. Naval Undersea Warfare Center*, ARB Nos. 00-073, 01-017, 01-019, ALJ Nos. 97-SDW-1, 4, 6 (ARB Nov. 30, 2000); *Marcus v. U.S. Environmental Protection Agency*, ARB No. 99-027, ALJ No. 1996-CAA-3,7 (ARB Oct.

29, 1999). The terms of the instant agreement indicate that it was arrived at fairly. Both parties were represented by counsel, and nothing indicates the undue imposition of the will of one party against the other. *See Bray v. The Hospital Center at Orange*, 93-ERA-13 (ALJ May 11, 1993, Sec'y June 30, 1993). I further note that the Paragraphs 11 and 12 of the Agreement provide that Complainant's attorney reviewed the agreement and that Complainant's signature was knowing, voluntary, and uncoerced. Paragraph 17 also provides that it became effective seven days after signature to afford Complainant an opportunity to review the agreement, seek counsel, and, if she desired, to revoke the agreement. The financial settlement is substantial, was adequate enough to elicit Complainant's approval, and appears to be a reasonable resolution of the dispute and apparently adequate.

Side Agreements

The authority of an ALJ to approve settlements extends only to those claims arising under employee protection statutes that the ALJ has jurisdiction to adjudicate. *See, e.g., Brodeur v. Westinghouse Hanford Co.*, 92-SWD-3 (Sec'y Oct. 16, 1992); *Scott v. Yeargin, Inc.*, 91-SDW-1 and 2 (Sec'y May 6, 1992); *Aurich v. Consolidated Edison Co. of New York, Inc.*, 86-CAA-2 (Sec'y July 29, 1987). When parties resolve claims both within and outside the ALJ's jurisdiction that arise from the same factual circumstances, the settlement must disclose the agreement(s) on the claim(s) outside the ALJ's jurisdiction, or certify that the parties did not enter into such side agreements. *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996). The settlement agreement here resolves claims under the employee protection provisions of the four statutes noted above, all of which I have jurisdiction to adjudicate. It also provides in Paragraph 2 for withdrawal of an Equal Employment Opportunity complaint before the Environmental Protection Agency Office of Civil Rights, which is outside my jurisdiction. I find, therefore, that the settlement has made the required disclosure of side agreements required by *Biddy*.

Attorney Fees

When a settlement agreement contains a provision for payment of attorney fees an ALJ does not approve the fee amount. Rather, she must determine whether the net amount to be received by the complainant (*i.e.*, after deduction of the agreed-upon attorney's fees) is fair, adequate and reasonable. *Tinsley v. 179 South Street Venture*, 1989-CAA-3 (Sec'y Aug. 3, 1989); *Gaballa v. Carolina Power & Light Co.*, ALJ Nos. 1996-ERA-43, 1998-ERA-24 (ALJ May 27, 1999). The settlement here provides that Respondent will pay reasonable attorney fees and costs to Complainant's attorney in the amount of \$65,000. As Respondent's payment of Complainant's attorney fees does not reduce the net amount to be received by Complainant, it has no effect on the settlement's fairness, adequacy and reasonableness.

Confidentiality

Paragraph 10 of the Agreement provides that the parties agree that the terms of the settlement are to be kept confidential and that Complainant will not "disclose or discuss the terms or substance of the Agreement with any persons, other than her immediate family members, her attorney(s) and tax consultant(s), and those Agency [*i.e.*, Respondent's] personnel

responsible for implementing the agreement, unless she is required to do so by a court of competent jurisdiction.”

Confidentiality agreements are carefully reviewed to insure that they are not contrary to public policy, *See, e.g., Brown v. Holmes & Narver, Inc.*, 90 ERA-26 (Sec’y May 11, 1994); *Stites v. Houston Lighting & Power*, 89-ERA-1, 41 (Sec’y Mar. 16, 1990); *Polizzi v. Gibbs & Hill, Inc.*, 87-ERA-38 (Sec’y July 18, 1989). Such agreements are disfavored when they restrict a Complainant’s ability to provide information to the Department of Labor or other authorities. *See, e.g., Macktal v. Brown & Root*, 1986-ERA-23 (Sec’y Oct. 13, 1993); *Williams v. Indiana Vocational Technical College*, 1989-SWD-1 (Sec’y Apr. 23, 1990). As the Secretary noted in *Polizzi*, 87-ERA-38, the effect of restrictions that do so “would be to ‘dry up’ channels of communication which are essential for government agencies to carry out their responsibilities.” *Polizzi*, 87-ERA-38 (quoting *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).)

In *Brown v. Holmes & Narver, Inc.*, 1990-ERA-26 (Sec’y May 11, 1994) (Final Order Approving Settlement and Dismissing Complaint) a provision in the settlement provided, in relevant part:

Except to carry out the specific covenants of this Agreement or *unless specifically required by court order or government agency order*, none of the parties shall directly or indirectly, or by any means or manner whatsoever disclose, urge, encourage, cooperate in, cause or permit the disclosure. . . [or] dissemination to any person or entity the contents or substances of this Agreement. . . . (emphasis added)

Similarly, the settlement agreement at issue in *Wampler v. Pullman-Higgins Co.*, 1984-ERA-13 (Sec’y Feb. 14, 1994) (Final Order Disapproving Settlement and Remanding Case) provided that “[n]either party will discuss or disclose the facts of this case except if ordered to do so by [a] court, tribunal or agency of competent jurisdiction.” (emphasis added) In both cases, the Secretary found that the provision was void as contrary to public policy and was not enforceable to the extent that it could be construed as restricting Complainant from communicating with, or providing information to any Federal or state government agencies.

As the Secretary did in *Brown* and *Wampler*, I find that Paragraph 10 of the instant agreement is void as contrary to public policy and unenforceable to the extent that it restricts Complainant from voluntarily communicating with and providing information to federal or state government agencies. I note that Paragraph 19 of the Agreement provides that the illegality or invalidity of any provision does not affect the remaining terms or provisions of the agreement.

Privacy Act and Freedom of Information Act

Paragraph 10 of the agreement also requires Respondent “to treat the agreement in accordance with the Privacy Act, 5 U.S.C. § 552(a).” This provision incorrectly cites the Privacy Act, which is found at 5 U.S.C. § 552a, not 5 U.S.C. § 552(a). (emphasis added) The provisions beginning at 5 U.S.C. § 552(a) and continuing through 5 U.S.C. § 552(g) constitute the Freedom of Information Act (FOIA). The Privacy Act regulates the collection, maintenance, use, and dissemination of personal information by federal executive branch agencies. It restricts agencies

from disclosing a record without the consent of the person to whom it pertains. 5 U.S.C. § 552a(b). FOIA compels federal agencies to disclose requested records unless they are exempt from disclosure under the Act. The apparent tension between these Acts is resolved by an exception to the Privacy Act's no disclosure without consent rule when disclosure is required by FOIA. 5 U.S.C. § 552a(b)(2).

As a federal agency, Respondent is bound to comply with both the Privacy Act and FOIA. 5 U.S.C. § 551(1); 5 U.S.C. § 552(a); 5 U.S.C. § 552a (b). Thus, the provision of Paragraph 10 of the Agreement quoted above imposes no restrictions on Respondent beyond those already imposed by the Privacy Act and by FOIA. I therefore, construe this provision as memorializing the applicability of both the Privacy Act and FOIA to Respondent's treatment of the Agreement.

The parties' submissions, and the Agreement itself, become part of the record of this case. *See McCuiston v. Tennessee Valley Authority*, 90-ERA-44 (Sec'y Aug. 31, 1992); *O' Sullivan v. Northeast Nuclear Energy Co.*, 88-ERA-37, 89-ERA-34, 90-ERA-4, 33, 34, 91-ERA-51, 92-ERA-3 (Sec'y June 17, 1992). As noted above, FOIA requires Respondent to disclose records, if requested, unless the record is exempt from disclosure under FOIA. *See* 5 U.S.C. § 552(b) (listing the exceptions to FOIA's disclosure requirement); *Hamka v. The Detroit Edison Co.*, 88-ERA-26 (Sec'y Aug. 5, 1992) (Order to Submit Attachments); *Reid v. Tennessee Valley Authority*, 91-ERA-17 (Sec'y Aug. 31, 1992).

I find that the Agreement, as construed in this decision, is a fair, adequate, and reasonable settlement. Accordingly, the Settlement Agreement is APPROVED as herein construed and the complaint is DISMISSED WITH PREJUDICE.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge