

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 29 August 2008

Case No.: 2008-CAA-00001

In the Matter of

KURT R. ROGERS,
Complainant

v.

PREGIS INNOVATIVE PACKAGING, INC.,
Respondent.

Appearances: Roy D Burbrink, Esquire
Burbrink & Clemons PC
Plymouth, Indiana
For the Complainant

Elizabeth Leifel Ash, Esquire
Kenneth Dolin, Esquire
Mark A. Lies, II, Esquire
Seyfarth & Shaw LLP
Chicago, Illinois
For the Respondent

Before: **JOHN M. VITTONE**
Chief Administrative Law Judge

FINAL ORDER APPROVING SETTLEMENT

This case arises under the whistleblower provision of the Clean Air Act (CAA), 42 U.S.C. § 7622, and the implementing regulations at 29 C.F.R. Part 24. On or about October 6, 2006, the Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent violated the employee protection section of the CAA. OSHA denied the complaint on September 21, 2007, and the Complainant requested a hearing before an administrative law judge. The case was assigned to Administrative Law Judge Michael P. Lesniak. Judge Lesniak scheduled a

hearing to commence on April 22, 2008, but later granted the parties' request for a continuance. The hearing was rescheduled to commence on July 22, 2008. Prior to the hearing date, the parties requested that Judge Lesniak mediate a settlement under the settlement judge regulation at 29 C.F.R. § 18.9(e). Judge Lesniak was appointed as a settlement judge, and the undersigned became the presiding trial judge.¹ On July 22, 2008, the parties, each represented by legal counsel, convened in South Bend, Indiana, in an attempt to mediate the dispute with Judge Lesniak serving as the mediator. On August 15, 2008, counsel for the Respondent faxed to the undersigned the parties' Joint Motion to Approve Settlement and Dismiss Claims With Prejudice ("Joint Motion").

On August 28, 2008, I conducted a telephone conference call with the attorneys for the parties, Roy D Burbrink for the Complainant, and Elizabeth Leifel Ash and Mark A. Lies, II, for the Respondent,² in order to obtain a full understanding of the terms of the agreement, to confirm that the Complainant understood those terms, and to clarify the identity and authority of the person who signed the agreement on behalf of the Respondent.³

Applicable Regulation

The regulation governing whistleblower complaints under the Clean Air Act was amended after the complaint in this matter was filed. *See* 72 Fed. Reg. 44,956 (Aug. 10, 2007). The regulations in effect at the time of the filing of the complaint did not expressly discuss adjudicatory settlements. *See* 29 C.F.R. Part 24 (2006). The current regulations, however, provide:

(2) Adjudicatory settlements under the Energy Reorganization Act, the Clean Air Act, the Safe Drinking Water Act, and the Toxic Substances Control Act. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement must be filed with the administrative law judge or the Board, as the case may be.

¹ Under the settlement judge rule, the presiding judge and the settlement judge cannot be the same person. 29 C.F.R. § 18.9(e)(3)(B).

² Mr. Lies was unable to participate in the entire conference call because of prior engagements, but Ms. Ash was present throughout the call.

³ The signature for the Respondent on the settlement agreement is illegible. The attorneys for the Respondent, however, averred that the person who signed the agreement for the Respondent was Tom O'Neill, who is the Chief Financial Officer for the Respondent and who is authorized to sign such agreements for the Respondent.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board will constitute the final order of the Secretary and may be enforced pursuant to § 24.113.

29 C.F.R. § 24.111(d)(2) and (e). These regulations, being procedural rather than substantive, became effective immediately for pending cases upon publication in the Federal Register. *See* 72 Fed. Reg. at 44962 (Paragraph VI. Administrative Procedure Act).

Motion to Place Settlement Agreement in Restricted Access Portion of the File

The parties state that the settlement agreement, which is entitled “Separation Agreement and Release of All Claims,” contains confidential commercial information as that term is defined under the Freedom of Information Act, 5 U.S.C. § 552, and also request that the agreement “be placed in a ‘restricted access’ portion of the Court’s file pursuant to 29 C.F.R. § 18.56 and withheld from disclosure in response to any relevant FOIA request.” (Joint Motion at ¶ 9).

The Administrative Review Board and the Secretary of Labor have consistently held that once submitted for review, the parties’ submissions including settlement agreements and all related documents become a part of the public record in the case and are subject to FOIA, which requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act. Thus, it is error for the ALJ to maintain a settlement agreement under seal. *See, e.g., Porter v. Brown & Root, Inc.*, 1991-ERA-004 (Sec’y Feb. 25, 1994); *Bettner v. Crete Carrier Corp.*, ARB No. 07-093, ALJ No. 2007-STA-3 (ARB Sept. 27, 2007). Accordingly, the motion to place the settlement agreement under a restricted access portion of the file pursuant to 29 C.F.R. § 18.56 is denied.

The settlement agreement in this case, however, will be marked as having been designated as confidential commercial or financial information subject to predisclosure notification under 29 C.F.R. § 70.26. Should a FOIA request for the agreement be filed, the parties will be afforded an opportunity to provide a written statement showing why the settlement should be found to be exempt from disclosure pursuant to FOIA Exemption 4.

Whether the Agreement is Fair, Adequate and Reasonable

The standard for review of settlement of a CAA whistleblower complaint is a determination of whether the terms are 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).

The settlement agreement contains a provision in which the Complainant waives any and all employment rights with the Respondent. Settlement agreement at ¶ 1. In certain circumstances, such a waiver may not be reasonable or in the public interest. *See OSHA Policy on Settlement Agreements Containing Future Employment Waiver Clauses* (July 23, 2007) (explaining policy considerations implicated when a settlement

agreement contains a future employment waiver clause).⁴ A large percentage of the telephone conference call on August 28, 2008 was spent in discussing this provision. In particular, I noted that because the Respondent's rights under the settlement could be assigned to successor companies, *see* Settlement agreement at ¶ 23, the future waiver clause could potentially result in an employment waiver broader than with just the Pregis facility at which the Complainant worked

In the instant case, the Complainant was represented by Mr. Burbrink, who stated that he thoroughly reviewed all of the terms of the settlement agreement with the Complainant to ensure that the Complainant understood those terms and their implications. In particular, Mr. Burbrink informed the Complainant that he could not seek re-employment with the Respondent, or with any successor company. The Complainant, who is apparently in his mid-30s, was employed by the Respondent, a packing products company, as a fork-lift operator.⁵ According to Mr. Burbrink, the Complainant has obtained new employment with a company that manufactures windows, and does not believe that it is likely that the future employment waiver clause will substantially impede his career prospects other than with the Respondent. The Complainant's attorney stated that the Complainant was willing to live with the future employment waiver clause, even interpreted in its broadest form, and was anxious to resolve this matter expeditiously and to obtain the monetary proceeds from the agreement.⁶

I also note that the Complainant indicated on the face of the agreement that he has gone over the terms of the agreement with his counsel, and carefully read and fully understands the agreement, and has had sufficient time to consider those terms. Settlement agreement at ¶ 28. Although this matter did not proceed far enough into litigation for me to get a sense of the relative merits of the parties' positions, I note that the Secretary's Findings issued by OSHA were not in the Complainant's favor. Thus, I conclude that the settlement includes a reasonable monetary payment to the Complainant in consideration for his agreement to the terms of the agreement.

Accordingly, in view of these factors, I find that the future employment waiver clause was a reasonable term for the Complainant to agree to in order to resolve the complaint and is not against the public interest.

During the conference call, the attorneys for the parties clarified the relationship between paragraphs 3 and 4 of the agreement, which describe the monetary terms of the

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www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/OSHA_SETTLEMENT_POLICY_07_23_2007.PDF.

⁵ The Complainant had also been employed by the Respondent as a foreman or group leader at one time, but was no longer in that role when his employment ended.

⁶ During the conference call, Ms. Ash noted that the agreement at paragraph 17, would permit the Complainant to seek an amendment if the agreement worked a true hardship.

settlement, and were in consensus that the monetary amounts stated in paragraph 4 are the total compensation to which the Complainant is entitled.

The agreement encompasses the settlement of matters under laws other than the CAA. Settlement agreement at ¶ 7. Because the Department of Labor's authority over settlement agreements is limited to such statutes as are within the Department's jurisdiction and is defined by the applicable statute, I approve only the terms of the agreement pertaining to the Complainant's CAA claim.

During the conference call, the attorneys for the parties both agreed that paragraph 10 of the agreement, which provides for limitations on the Complainant's communications relating to any company investigation with which he may be asked to cooperate, was not intended to restrict the Complainant from communicating voluntarily with, and providing information to, any Federal or state government agencies.

The agreement states that the laws of the State of Illinois shall govern the agreement. I construe this choice of law provision as not limiting the authority of the Secretary of Labor and any Federal court, which shall be governed in all respects by the laws and regulations of the United States.

Accordingly, with the reservations noted above, I **APPROVE** the Settlement Agreement and **DISMISS** the complaint with prejudice.

SO ORDERED.

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JOHN M. VITTON
Chief Administrative Law Judge