



**Issue Date: 16 February 2005**

**CASE NO.: 2004-ERA-00017**

**In the Matter of:**

**ARTHUR ROBERT CLARK,  
Complainant,**

**v.**

**SOIL CONSULTANTS, INC.,  
Respondent.**

**RECOMMENDED DECISION AND ORDER APPROVING SETTLEMENT,  
CANCELING HEARING, AND DISMISSING COMPLAINT**

This matter arises under the employee protection (“whistleblower”) provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, 29 C.F.R. Part 24. A hearing is currently scheduled to be held from February 22 to 25, 2005 in Washington, D.C.

The matter now before me is the settlement agreement entered into by the parties that was transmitted for approval on February 4, 2005 (hereafter “Settlement Agreement”) together with a draft Consent Order signed by the parties. Under the Energy Reorganization Act (ERA), settlements in whistleblower cases must be reviewed to determine whether they are fair, adequate and reasonable. *Hoffman v. Fuel Economy Contracting*, 1987-ERA-33 (Sec’y Aug. 4, 1989) (Order) *citing* 42 U.S.C. § 5851(b)(2)(A). *Compare Indiana Dept. of Workforce Development v. U.S. Dept. of Labor*, 1997-JTP-15 (Admin. Review Bd. Dec. 8, 1998) (holding administrative law judge has no authority to require submission of settlement agreement in JTP case when parties have stipulated to dismissal under Rule 41(a)(1)(ii), FRCP, and contrasting ERA cases, which require approval of settlements.) To the extent that the Settlement Agreement may be deemed to relate to matters under laws other than the ERA, I have limited my review to determining whether the terms thereof are a fair, adequate and reasonable settlement of Complainant's allegations that the Respondents violated the ERA. *See Poulos v. Ambassador Fuel Oil Co., Inc.*, 1986-CAA-1 (Sec’y Nov. 2, 1987). Under 29 C.F.R. §24.7, this Recommended Decision and Order will become the final order of the Secretary unless a petition for review is timely filed with the Administrative Review Board.

The Settlement Agreement, as interpreted herein, is consistent with public policy considerations. In this regard, to the extent that provisions of the agreement may make reference to future claims, they are construed as relating solely to the right to sue in the future on claims or causes of action arising out of facts occurring before the date of the agreement. *See generally*

*McCoy v. Utah Power*, 1994-CAA-0001 (Sec'y. Aug. 1, 1994). Moreover, any reference to the law of a particular state controlling is construed as not limiting the authority of the Secretary or the United States District Court under the statute and the regulations. See *Phillips v. Citizens Assoc. for Sound Energy*, 1991-ERA-25 (Sec'y Nov. 4, 1991).

The parties request that the Settlement Agreement be sealed and remain confidential pursuant to 29 C.F.R. § 70.26. In accordance with the request of the parties, the Settlement Agreement is being maintained in a separate envelope or folder identified as containing Predisclosure Notification Materials, and the Consent Order and this Decision and Order will be associated with the envelope or folder. The confidentiality provision does not run afoul of the requirements of law. See generally *Connecticut Light & Power Co. v. Secretary of the U.S. Department of Labor*, 85 F.3d 89 (2d Cir. 1996); *Bragg v. Houston Lighting & Power Co.*, 1994-ERA-38 (Sec'y June 19, 1995). However, the parties are advised that records in whistleblower cases are agency records which the agency must make available for public inspection and copying under the Freedom of Information Act (FOIA), 5 U.S.C. §552, and the Department of Labor must respond to any request to inspect and copy the record of this case as provided in the FOIA. As the Administrative Review Board (ARB) has noted: "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." *Seater v. Southern California Edison Co.*, 1995-ERA-13 (ARB Mar. 27, 1997). The parties are entitled to pre-disclosure notification rights under 29 C.F.R. § 70.26.

Under 29 C.F.R. §24.6(f)(1), the Assistant Secretary for the Occupational Health and Safety Administration (OSHA) may participate as a party at any time in proceedings before the ERA and may petition for review of a recommended decision of an administrative law judge, including a decision based on a settlement agreement between a complainant and a respondent. Thus, the Solicitor's office, on behalf of the Assistant Secretary, will be sent a copy of the Settlement Agreement in a sealed envelope or folder, identified as containing Predisclosure Notification Materials. See 29 C.F.R. §24.6(f)(2), 70.26.

Having reviewed the Settlement Agreement and, finding it to be adequate and reasonable, I have signed the associated Consent Order. Accordingly, I make the following Findings and issue the following Order, in accordance with 29 C.F.R. §18.9 and 29 C.F.R. Part 24:

### **FINDINGS**

1. This Decision and Order incorporating the Settlement Agreement and Consent Order shall have the same force and effect as an Order made after a full hearing.
2. The entire record on which this Decision and Order is based shall consist solely of the complaint, the Settlement Agreement, and the Consent Order.
3. The parties have waived any further procedural steps before the undersigned administrative law judge.

4. The parties have waived any rights to challenge or contest the validity of this Decision and Order entered into in accordance with the Settlement Agreement.

5. The Settlement Agreement provides a fair, adequate and reasonable settlement of the allegations raised in the complaint.

6. The Settlement Agreement shall remain confidential and the parties shall be entitled to pre-disclosure notification in accordance with 29 C.F.R. § 70.26, subject to the requirements of FOIA.

### **ORDER**

**IT IS HEREBY ORDERED** that the hearing set for February 22 to 25, 2005 in Washington, D.C. be, and hereby is **CANCELED**; and

**IT IS FURTHER ORDERED** that the Settlement Agreement and Consent Order be, and hereby are, **APPROVED**, and the parties shall comply with the terms thereof; and

**IT IS FURTHER ORDERED** that this action be, and hereby is **DISMISSED WITH PREJUDICE**.

**A**

PAMELA LAKES WOOD  
Administrative Law Judge

Washington, D.C.

**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition 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. §§ 24.7(d) and 24.8.