

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 17 December 2013

CASE NO.: 2013-ERA-00009

In the Matter Of:

STEPHEN LAVOIE,
Complainant,

v.

DAY & ZIMMERMAN, NPS,
Respondent.

ORDER GRANTING MOTION TO WITHDRAW OBJECTION WITH PREJUDICE

This proceeding arises from a complaint of discrimination filed under Section 211 of the Energy Reorganization Act of 1974 (the “ERA”), 42 U.S.C. § 5851 and the procedural regulations found at 29 C.F.R. Part 24 (2008). By letter dated April 1, 2013, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued an order dismissing the complaint under the employee protection provisions of the ERA. On May 6, 2013, the Complainant filed via facsimile an objection to the Secretary’s preliminary order and requested a hearing pursuant to 29 C.F.R. § 24.106. The formal hearing commenced on Tuesday, October 22, 2013, in New London, Connecticut and ended on Friday, October 25, 2013. At the close of the hearing, the parties requested an opportunity to discuss a consensual resolution of the pending Complaint. On December 2, 2013, the parties filed a document entitled: “Confidential Agreement and General Release” (hereinafter “Settlement Agreement”).

In reviewing the Settlement Agreement, I must determine whether the terms of the agreement fairly, adequately and reasonably settle the Complainant’s allegations that the Respondent violated the SOX whistleblower provisions. I find that the Settlement Agreement complies with the standard required and it is APPROVED pursuant to 29 C.F.R. § 1980.111(d)(2), subject to my comments below.

The Respondent has asserted its pre-disclosure notification rights in accordance with 29 C.F.R. § 70.26, and the copy of the Settlement Agreement therefore is being maintained in a separate envelope and identified as being confidential commercial information pursuant to the parties' request. *See Duffy v. United Commercial Bank*, 2007-SOX-00063 (Oct. 23, 2007). In this regard, I find that the Settlement Agreement contains financial information and business information that is privileged or confidential within the meaning of 29 C.F.R. §70.2(j), as well as personal information relating to Complainant.

With regard to confidentiality of the Settlement Agreement, the parties are advised that notwithstanding the confidential nature of the Settlement Agreement, all of their filings, including the Settlement Agreement, are part of the record in this case and may be subject to disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C.A. § 552 *et seq.* The Administrative Review Board has noted that:

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 is applicable, the document would have to be disclosed.

Seater v. S. Cal. Edison Co., USDOL/OALJ Reporter (PDF), ARB No. 97-072, ALJ No. 1995-ERA-00013 at 2 (ARB March 27, 1997) (emphasis added). Should disclosure be requested, the parties are entitled to pre-disclosure notification rights under 29 C.F.R. § 70.26.

The parties have also requested that access to the Settlement Agreement be restricted by the undersigned under 29 C.F.R. § 18.56 (Restricted Access). I find good cause for such restricted access and the Settlement Agreement will be so maintained under that authority in the sealed envelope. *See* 29 C.F.R. §§ 18.56 & 70.26. *See Sharp v. The Home Depot, Inc.*, ALJ No. 2006-SOX-00129, 2008 DOLSOX LEXIS 4, at *3 (ALJ Jan. 16, 2008).

In reviewing the Settlement Agreement, the Non-Disparagement clause lacked mutuality and it is therefore ORDERED that the Complainant Stephen Lavoie and all management officials and higher ranked employees¹ of Respondent Day & Zimmermann NPS, Inc. not to make any statement to any employee of the Respondent, any member of the press or media, or any statement which they believe may be publicly disseminated, which is detrimental to Complainant

¹ Employees of Respondent who are members of a union are not included within this group.

or Respondent, or which reflects negatively upon either, regardless of the speaker's belief in the truth of such statement.

I also note that my authority over settlement agreements is limited to the statutes that are within my jurisdiction as defined by the applicable statute. Therefore, I approve only the terms of the Agreement pertaining to Lavoie's current SOX case, 2013-SOX-00009. *Anderson v. Schering Corp.*, ARB No. 10-070, ALJ No. 2010-SOX-7 (ARB Jan. 31, 2011).

Accordingly, it is **ORDERED** that:

- (1) The parties request to approve the Settlement Agreement is **GRANTED**;
- (2) The Settlement Agreement is **APPROVED**;
- (3) The Settlement Agreement shall be designated as confidential and maintained in a separate sealed envelope, subject to the procedures requiring disclosure under FOIA; and
- (4) The Complaint of Stephen Lavoie is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts