



Issue Date: 20 November 2012

Case No.: 2011-SOX-00042
OSHA No. 3-0050-11-013

In the Matter of:

ELLIOT RANK,
Complainant,

v.

BECTON DICKINSON DIAGNOSTIC SYSTEMS,
Respondent.

DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT

This proceeding arises from a complaint of discrimination filed by Elliot Rank (“Complainant”) against Becton Dickenson Diagnostic Systems (“Respondent”) under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002 (“SOX”), 18 U.S.C.A. § 1514A (West 2004) and the procedural regulations found at 29 C.F.R. Part 1980 (2004). The formal hearing was set for December 12-13, 2011, in Washington D.C., and was canceled when I received a *Joint Motion to Suspend Proceedings Pending Private Mediation*. On July 2, 2012, I received a letter informing me the parties had reached a settlement. On November 5, 2012, I issued an *Order to Submit Settlement for Approval*, allowing the parties seven days to file a copy of the settlement. On November 12, 2012, Complainant’s attorney submitted a copy of the *Settlement Agreement, General Release and Covenant Not to Sue* (“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 Respondent violated the SOX whistleblower provisions. My authority over settlement agreements is limited to the statutes that are within my jurisdiction as defined by the applicable statute. Therefore, insofar as I approve the Settlement Agreement, my approval only extends to the terms of the Settlement Agreement pertaining to Complainant’s current SOX case, 2011-SOX-00042.

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. § *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).

In paragraph 7, Complainant agreed to waive the right to recover any damages or other individual relief in any claim he, the EEOC, or some similar state or local agency brings on his behalf. In paragraph 9, Complainant agreed not to initiate, encourage, participate in, or assist in any individual, class or collective lawsuit against Respondent. Settlement agreements may not contain waivers of a complainant’s rights with respect to future claims.¹ Accordingly, I approve these provisions only to the extent that they are applicable to the subject matter of Complainant’s particular allegations set forth in this claim.²

I have carefully reviewed the remainder of the Settlement Agreement, and I find that it constitutes a fair, adequate, and reasonable settlement of the complaint, and is in the public interest.

ORDER

1. **IT IS HEREBY ORDERED** that the Settlement Agreement filed on November 12, 2012, is **APPROVED**, and;

¹ See *Polizzi v. Gibbs & Hill, Inc.*, 87-ERA-38 (Sec’y July 18, 1989) (The Secretary will not approve terms of a settlement agreement that include a waiver of the complainant’s right with respect to claims that might arise in the future); *Ruud v. Westinghouse Hanford Co.*, 88-ERA-33 @ n12 (ARB Nov. 10, 1997) (finding that Complainant’s waiver of his right to make additional remarks or comments concerning employment at Respondent is not saved from being an unlawful gag provision by an exception permitting Complainant to respond to lawful subpoenas since not all regulatory agencies possess the authority to issue subpoenas). See also 18 U.S.C.A. § 1514A(a)(2) (prohibiting discrimination against an employee who testifies, participates in, or assists in a proceeding relating to an alleged violation of section 1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of the Federal law relation to fraud against shareholders).

² See *McCoy v. Utah Power*, 94-CAA-1 and 6 (Sec’y Aug. 1, 1994) (the Secretary interpreted the agreement as limited to the right to sue in the future on claims arising out of facts occurring before the date of the agreement, rather than disapproving the entire agreement). See also *Ryan v. Niagara Mohawk Power Corp.*, 88-ERA-7 (Sec’y Jan. 25, 1990) (the Secretary disapproved a waiver of future claims, but still approved the agreement because another provision provided the agreement would remain in full force in the event any part of a provision is removed).

2. **IT IS FURTHER ORDERED** that the complaint filed in this matter is **DISMISSED WITH PREJUDICE**.

CHRISTINE L. KIRBY
Administrative Law Judge

Washington, D.C.