



Issue Date: 25 January 2008

CASE NO.: 2008-STA-4

In the Matter of:

CHARLES K. PFINGSTEN,
Complainant

v.

COUNTY MATERIALS CORPORATION,
Respondent

**RECOMMENDED ORDER APPROVING SETTLEMENT
AND DISMISSING COMPLAINT**

This proceeding arises under Section 31105 of the Surface Transportation Assistance Act (STAA) of 1982 (49 U.S.C. section 31101) and the regulations promulgated thereunder at 29 C.F.R. Part 1978 (1989). On January 17, 2008, the parties filed a Settlement Agreement (“Agreement”) in accordance with 29 C.F.R. section 1978.111(d)(2). The Agreement resolves the controversy arising from the complaint of Charles K. Pfingsten against County Materials Corporation, under the statute. The Settlement Agreement is signed by the complainant and the employer.

The Settlement Agreement provides that complainant releases respondent from claims arising under the Surface Transportation Act as well as under various other laws. This review is limited to whether the terms of the settlement are a fair, adequate and reasonable settlement of complainant’s allegations that respondent violated the STAA. *Kidd v. Sharron Motor Lines, Inc.*, 87-STA-2 (Sec’y July 30, 1987); *Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec. Ord., Nov. 2, 1987, slip op. at 2. As was stated in *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, (Nov. 2, 1987):

The Secretary’s authority over the settlement agreement is limited to such statutes as are within [the Secretary’s] jurisdiction and is defined by the applicable statute. *See Aurich v. Consolidated Edison Company of New York, Inc.*, Case No. 86-CAA-2, Secretary’s Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary’s Order on Remand, issued November 3, 1986.

I have therefore limited my review of this Agreement to determining whether the terms thereof are a fair, adequate and reasonable settlement of Mr. Pfingsten’s allegation that respondent had violated the STAA.

Under the STAA and implementing regulations, a proceeding may be terminated on the basis of a settlement provided either the Secretary or the Administrative Law Judge approves the agreement. 49 U.S.C. app. section 2305(c)(2)(A); 29 C.F.R. section 1978.111(d)(2). The parties must submit for review an entire agreement to which each party has consented. *Tankersley v. Triple Crown Services, Inc.* 92- STA-8 (Sec’y Feb. 18, 1993). The agreement must be reviewed to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. *Macktal v. Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991); *Thompson v. U.S. Department of Labor*, 885 F.2d 551 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec’y Ord. Mar. 23, 1989, slip op. at 1-2. This Order approving the settlement is final since all parties have joined in the Agreement. *Swischer v. Gerber Childrenswear, Inc.*, 93-STA-1 (Sec’y Jan. 4, 1993).

The Agreement provides that upon the issuance of an order dismissing the complaint with prejudice, Respondent will pay Mr. Pfingsten a specified sum of money, and will pay a specified sum of money to the complainant’s attorney. The parties agree that these payments will satisfy all claims against the respondent, Central Processing Corporation, et al by the complainant and his counsel.

The Agreement provides a general release, in paragraph B. That paragraph could possibly be construed as a waiver by Complainant of a cause of action potentially arising in the future, unless it is construed as being modified by further language which limits the waiver to causes “up to the date of the execution of this Agreement” and by paragraph O providing no release for future matters arising after execution of the Agreement. The provision must be interpreted as limited to the right to sue in the future on claims or causes of action arising out of facts or any set of facts occurring before the date of the agreement. *Bittner v. Fuel Economy Contracting Co.*, Case No. 88-ERA-22, Sec. Ord. Approving Settlement Agreement and Dismissing Complaint (June 28, 1990), Slip op. at 2. Paragraph O, dealing with future suits and proceedings, is appropriately limited to a waiver of action for matters arising on or before the date of the settlement agreement.

The parties also agree not to sue one-another or the parties released on any matter released by the Agreement. The Respondent agrees to release all claims against the Complainant, as well. No admissions of liability are made and the Agreement provisions are severable.

Two provisions merit further discussion: first, paragraph F, “No Application for Employment”; and, paragraph L, “Third-Party Claims.” Complainant does not work for the Respondent or parties released. In paragraph F, he agrees not to apply to work for the released parties and will not communicate with the Company. Both parties are represented by legal counsel. The Complainant is not presently employed by the released parties. The purpose of the Act lies in “promoting highway safety and protecting employees from retaliatory discharge.” *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987). The STA is “aimed at preventing intimidation...” *Long v. Roadway Express, Inc.*, 1988-STA-31 (Sec’y Mar. 9, 1990). While those concerns were raised in the complaint, the parties have agreed to end the litigation, upon terms they have decided are favorable to each of them, without any admission of liability. The courts are designed to resolve “disputes.” With approval of this Agreement, there is no longer

any dispute requiring a resolution. The parties, who are intimately familiar with the pros and cons of the alternative, i.e., litigation, themselves have resolved any dispute. Such resolutions are to be encouraged. Given the plethora of truck driving jobs available, this limitation is not unreasonable. Nor should the courts second-guess the Complainant's choice not to work for the released parties.

Secondly, like the general release, discussed above, paragraph L is very broad. It may be approved only to the extent it is within the Secretary's purview. Moreover, it must be considered as modified by the terms of paragraph O, dealing with non-waiver of his "rights" in "future" claims. Paragraph L does not preclude the Complainant's assistance in any and all third-party claims against the Company, which might be invalid because it might discourage other potential whistleblowers. Rather, it limits such participation to instances of "compulsion" by court order or "other process of law." Such other "process of law" includes OSHA or other government investigations, as well as compliance with the law. For example, if Department of Transportation regulations require the Complainant to submit certain documents or paperwork, the Complainant's assistance would be required by law. In any case, if found invalid, the clause is nevertheless severable and the remainder of the Agreement may be approved.

I find the overall settlement terms to be reasonable but some clarification is necessary. The Agreement contains a confidentiality provision limiting all disclosures except under certain stated circumstances. It has been held in a number of cases with respect to confidentiality provisions in Settlement Agreements that the Freedom of Information Act, 5 U.S.C. section 552, *et seq.* (1988) (FOIA), requires federal agencies to disclose requested documents unless they are exempt from disclosure. *Faust v. Chemical Leaman Tank Lines, Inc.*, Case Nos. 92-SWD-2 and 93-STA-15, ARB Final Order Approving Settlement and Dismissing Complaint, March 31, 1998. The records in this case are agency records which must be made available for public inspection and copying under the Freedom of Information Act. However, the employer will be provided a pre-disclosure notification giving the employer the opportunity to challenge any such potential disclosure. In the event the Agreement is disclosed, pursuant to 5 U.S.C. section 552, *et seq.*, the parties have provided such disclosure is not a violation of the agreement and will not result in a violation of the agreement. (See paragraphs 5 and 7). The Agreement itself is not appended and will be separately maintained and marked "PREDISCLURE NOTIFICATION MATERIALS."

I find the terms of the "confidentiality" provision do not violate public policy in that they do not prohibit the Complainant from communicating with appropriate government agencies. *See, e.g., Bragg v. Houston Lighting & Power Co.*, 94-ERA-38 (Sec'y June 19, 1995); *Brown v. Holmes & Narver*, 90-ERA-26 (Sec'y May 11, 1994); *The Connecticut Light & power Cop. v. Secretary Of United States Department of Labor*, No. 95-4094, 1996 U.S. App. LEXIS 12583 (2d Cir. May 31, 1996); and, *Anderson v. Waste Management of New Mexico*, Case No. 88-TSC-2, Sec. Final Order Approving Settlement, December 18, 1990, slip opin. at 2, where the Secretary honored the parties' confidentiality agreement except where disclosure may be required by law.

The Agreement also notes at Paragraph N that it is governed and interpreted in accordance with the laws of the State of Wisconsin, but that nothing shall restrict the authority of

the Secretary or any U.S. Court. That provision is interpreted as not limiting the authority of the Secretary or any U.S. court to seek or grant appropriate relief under any applicable federal whistleblower statute or regulation. *Phillips v. Citizens Assoc. for Sound Energy*, Case No. 91-ERA-25, Sec. Final Order of Dismissal (Nov. 4, 1991).

As so construed, noting that the parties are represented by counsel, I find the terms of the Agreement to be fair, adequate and reasonable, and therefore approve it. Accordingly, the complaint filed by Charles Pfungsten, is hereby dismissed with prejudice.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Order Approving Settlement, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Order Approving Settlement, the parties may file briefs with the Administrative Review Board ("Board") in support of, or in opposition to, the administrative law judge's order unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.