U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

WILLIAM MARCUS,

COMPLAINANT

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

ARB CASE NO. 99-027

ALJ CASE NOS. 96-CAA-3
96-CAA-7

DATE: October 29, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stephen Kohn, Esq., *Kohn, Kohn, & Colapinto, Washington, DC*

For the Respondent:
Joanne M. Hogan, *U.S. Environmental Protection Agency, Washington, DC*

ORDER APPROVING SETTLEMENT AND DISMISSING COMPLAINTS

The Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on December 15, 1998, in these cases arising under the whistleblower provisions of six environmental laws.[1/] *See* 29 C.F.R. Part 24 (1999). The ALJ ordered the Respondent, the Environmental Protection Agency (EPA), to pay compensatory damages to Complainant William Marcus (Marcus), as well as attorney's fees and costs in an amount to be determined. R. D. & O. at 52. The ALJ also ordered that the parties enter into a consent agreement detailing a mutually

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[1/] The Complainant, William Marcus, alleged violations of the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. §7622 (1994); Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9i (1994); Solid Waste Disposal Act (SWDA), as amended, 42 U.S.C. §6971 (1994); Water Pollution Control Act (WPCA), 33 U.S.C. §1367 (1994); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610 (1994); and Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 (1994).

agreeable plan to reintegrate Marcus into the EPA within 60 days of issuing the R. D. & O. If the parties were unable to agree on such a plan, the ALJ directed each party to submit a proposed Order with the party's plan for reintegrating Marcus into the agency. *Id.*

On December 23, 1998, the EPA appealed the ALJ's recommended decision by filing a petition for review with the Administrative Review Board (ARB). While the appeal was pending before the ARB, the parties requested the ALJ to refer the case for appointment of a settlement judge pursuant to 29 C.F.R. §18.9. Recommended Decision and Order Approving Settlement Agreement and Settlement Agreement for Attorney's Fees and Costs and Dismissing Complaints (R. D. & O. App. Settle.) at 2. The ALJ referred the case as requested. *Id.*

The parties subsequently entered into two settlement agreements on August 17, 1999. One settlement agreement addressed the merits of the cases ("the merits settlement"). Among other things, the merits settlement agreement called for Marcus to withdraw the complaints with prejudice. Settlement Agreement [Merits], ¶ 2a. The second settlement agreement provided for payment of attorney's fees and costs ("the attorney's fees settlement").

The settlement agreements were submitted for approval to the ALJ who had initially tried the case. R. D. & O. App. Settle. at 2. Although the ALJ expressed some concern that she did not retain jurisdiction to approve the settlements, she nevertheless approved both agreements. The ALJ also noted that the attorney's fees settlement agreement presented by the parties was incomplete. Nevertheless, concluding that she could determine from the context of the paragraph that Marcus was voluntarily agreeing to the settlement, she found that the omission of "the last few words" was not a "basis for disapproving the settlement." *Id.* Although the case actually was pending on appeal before the ARB, the parties served the ARB only with "informational copies" of the agreements.

DISCUSSION

We hold that under the facts of this case, once the EPA filed a timely petition for review with the ARB pursuant to 29 C.F.R. §24.8(a), the ALJ no longer had authority to consider the proposed settlement of the case. Accordingly, the ALJ's referral of the case to a settlement judge while the case was on appeal to the ARB was improper. After an ALJ's recommended decision is appealed, it is the ARB – not the ALJ – that has the authority to review and approve (or disapprove) any settlement agreements subsequently reached by parties.[2/]

[2/] The TSCA, SDWA and CAA require that the Secretary must enter into or otherwise approve a settlement. *See* 15 U.S.C. §2622(b)(2)(A); 42 U.S.C. 300j-9(i)(2)(B)(i); 42 U.S.C. §7622(b)(2)(A). However, the WPCA, CERCLA, and SWDA contain no such requirement. *See Sayre v. Alyeska Pipeline Service Co.*, ALJ Case No. 97-TSC-6, ARB Case Nos. 99-091, 99-092, Order Approving Settlement and Dismissing Case, slip op. at 2 n.1 (neither the WPCA nor the SWDA contains a requirement that the Secretary approve settlements); *Biddy v. Alyeska Pipeline Service Co.*, ALJ Case No. 95-TSC-7 (ARB Aug. 1, 1996) slip op. at 2 n.1 (same). Therefore, we review these settlements under the TSCA and CAA only.

We also note that the ALJ erred in purporting to approve a settlement agreement which plainly was incomplete. We hold that if parties fail to provide a complete, final, signed copy of the settlement, it may not be approved by either an ALJ or the ARB.

Following repeated requests by this Board, the parties submitted complete copies of both settlement agreements, including the words omitted from one of the agreements the ALJ purportedly approved. We review settlement agreements to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. *See, e.g.,* 15 U.S.C. §2622(b)(2)(A). *Accord Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 556-557 (9th Cir. 1989); *Webb v. Numanco, LLC*, ALJ Case Nos.1998-ERA-27 & 28, ARB Case No. 98-149, Final Order Approving Settlement and Dismissing Complaint, Jan. 29, 1999, slip op. at 2-3.

Review of the merits settlement agreement reveals that it may encompass the settlement of matters under laws other than the environmental statutes. *See* Settlement Agreement ¶¶ 2, 4. Our authority to review settlement agreements is limited to the statutes within our jurisdiction and is defined by the applicable statute. *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, Nov. 2, 1987, slip op. at 2. We have therefore limited our review of the merits settlement agreement to determining whether its terms are a fair, adequate and reasonable settlement of Marcus' allegations that the EPA violated the TSCA, SDWA and CAA.

The Board requires all parties requesting settlement approval of cases arising under the TSCA, SDWA and CAA to provide the settlement documentation for any other claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that the parties have not entered into any such settlement agreements. *Biddy v. Alyeska Pipeline Service Company*, ARB Case Nos. 96-109, 97-015, Final Order Approving Settlement and Dismissing Complaint, Dec. 3, 1996, slip op. at 3. The parties have certified that the merits settlement agreement constitutes the entire and only settlement agreement with respect to Marcus' claims. *See* Settlement Agreement ¶ 2.

We find that the agreements, as so construed, are a fair, adequate, and reasonable settlement of the complaints. We therefore **APPROVE** the agreements and **DISMISS THE COMPLAINTS WITH PREJUDICE.** *See* Settlement Agreement ¶ 2a.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member