U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 November 2005

CASE NO.: 2005-ERA-25

In the Matter of:

KEVIN MORGAN,
Complainant

v.

FIRST ENERGY NUCLEAR
OPERATING COMPANY,
Respondent

Appearances:

Julie A. Harris, Esq.,
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

This proceeding arose under the employee protection provisions of the Energy Reorganization Act of 1974 (the "Act"), 42 U.S.C. 5851, and the implementing regulations at 29 C.F.R. Part 24. Complainant, Kevin Morgan, filed a complaint with the Secretary of Labor, on June 6, 2005 alleging that he was a protected employee engaged in a protected activity within the scope of the Act, and was, in effect, separated by Securitas Security Services USA, Inc. (hereinafter "Securitas"), which provided contract security services for the Respondent, First Energy Nuclear Operating Co. (hereinafter "FENOC") as a result of this activity.

FENOC engages in the operation of a licensed nuclear power station, among other activities. FENOC is a Division of First Energy Corporation, headquartered in Akron, Ohio. The Complainant was employed at FENOC's Beaver Valley Nuclear Power Station.

Mr. Morgan's security access authorization had been removed by First Energy, on February 17, 2005, in effect ending his job. Mr. Morgan resigned his position, as a security supervisor, with Securitas, on February 22, 2005. On March 5, 2005, he signed a Separation and Severance Agreement with Securitas receiving nine weeks of current base salary less regular payroll withholding and deductions and nine weeks of continuous of medical, dental and vision insurance.

A thorough compliance investigation was conducted by the Philadelphia, Pennsylvania,

Occupational Safety and Health Administration (OSHA), U.S. Department of Labor. On August 20, 2005, OSHA announced its determination that there was no evidence substantiating the Complainant was subjected to disparate treatment or reprisals as a result of any protected activities. Mr. Morgan sought a hearing before an administrative law judge.

I was assigned the matter on September 19, 2005 and issued a Notice of Hearing on September 21, 2005. The hearing was scheduled for January 17, 2006. On November 8, 2005, I approved the Complainant's counsel's Motion to Withdraw Appearance.

On November 10, 2005, I received a copy of a Settlement Agreement from the parties. The Agreement provides that upon the issuance of an order dismissing the complaint with prejudice, Respondent will pay Mr. Morgan a specified sum of money. The parties agree that these payments will satisfy all claims against FENOC *et al* by Mr. Morgan, his agents, representatives, or assigns and his former counsel.

The Complainant further agrees to a "general release" of all claims relating to his employment with FENOC up until the date of the Settlement Agreement, including, but not limited to claims arising under the Energy Reorganization Act, the Atomic Energy Act, the Age Discrimination Act of 1967, 29 U.S.C.A. Sections 621 *et seq*., Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Employee Retirement Income Security Act ("ERISA"), the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), any similar state and local laws, and any state or federal laws or common law claims. The parties agree to keep the matter of the agreement confidential, with some limited exceptions. Additionally, Mr. Morgan agrees not to sue, either alone or with others, FENOC *et al* on any of the released claims. The Agreement states that it does "not prohibit, penalize or discourage" the right of Mr. Morgan or FENOC to report or provide information" to the Nuclear Regulatory Commission or any other government agency with jurisdiction over possible violations of the Atomic Energy Act, Energy Reorganization Act, any nuclear safety concern, or any work place safety concern. Mr. Morgan agreed not to seek reemployment with FENOC, its contractors, and related or affiliated companies.

The agreement must be reviewed to determine whether the terms are a fair, adequate and reasonable settlement of the complainant's allegations. *See, e.g., Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Order, November 2, 1987, slip opin. at 2 and *Bunn v. MMR/Foley, 89-ERA-5 (Sec'y Aug. 2, 1989)*. Moreover, review and approval of the settlement is limited to matters arising under the employee protection provisions under the jurisdiction of the Department of Labor, in this case the Energy Reorganization Act. *Mills v. Arizona Public Service Co.*, 92-ERA-13 (Sec'y Jan. 23, 1992); *Anderson v. Kaiser Engineers Hanford Co.*, 94-ERA-14 (Sec'y Oct. 21, 1994); and, *Poulos, supra*.

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 release and covenant not to sue provisions are likewise acceptable because they only limit the right to sue in the future on claims or causes of action arising out of facts occurring before the date of the agreement and arising out of his employment with the Respondent. *Armijo v. Wackenhut Services, Inc*., 94-ERA-7 (Sec'y Aug. 22, 1994); *Saporito v. Arizona Public Service Co.*, 92-ERA-30, 93-ERA-26 and 93-ERA-43 (Sec'y Mar. 21, 1994); and, *McCoy v. Utah Power*, 94-CAA-1 and 6 (Sec'y Aug. 1, 1994).

Additionally, the Secretary has interpreted provisions such as the one in paragraph 5.1 of this Agreement which specify interpretation under the laws of Ohio (and applicable federal law), as not limiting the Secretary's authority under the statute and regulations. *See, Phillips v. Citizens Association for Sound Energy*, Case No. 91-ERA-25, Sec. Final Order of Dismissal, November 14, 1991, slip opin. at 2.

The provision concerning modification of the agreement, in paragraph 10.1, is construed as including the requisite approval of the Secretary for any modification. *Elliot v. Enercon, Services, Inc*., 92-ERA-47 (Sec'y June 28, 1993).

The fact the agreement does not contain some of the provisions found in 29 C.F.R. § 18.9(b) does not invalidate it as those provisions apply to consent findings not settlements. *Simmons v. Arizona Public Service Co.*, 90-ERA-6 (Sec'y Sept. 7, 1994).

The parties asked that the Agreement be treated as exempt from disclosure, under the Freedom of Information Act, pursuant to 29 C.F.R. § 70.4 and under 29 C.F.R. Part 70a implementing the Privacy Act. In *Seater v. Southern California Edison Co.*, 95-ERA-13 (ALJ March 11, 1997), Judge Kaplan invited the Administrative Review Board to address the apparent conflict between the Department of Labor's FOIA responsibilities and the precedents discussing the importance of public disclosure of the true dollar amounts of whistleblower settlements. *See, i.e., Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996). Judge Kaplan pointed out that the regulations and the Secretary's policy appear to allow parties to so limit public access. *See, Klock v. Tennessee Valley Authority*, 95-ERA-20 (ARB, May 1, 1996); *Ezell v. Tennessee Valley Authority*, 95-ERA-39 (ARB, Aug. 21, 1996); *Cianfrani v. Public Service Electric & Gas Co.*, 95-ERA-33 slip opinion at 2 n. 3 (ARB, Sept. 19, 1996).[1] Thus, the

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[1] In ***Seater v. Southern California Edison Co.***, 95-ERA-13 (ARB Mar. 27, 1997), however, the ARB declined the ALJ's suggestion *sub silentio*. Rather, the ARB employed the following standard boilerplate language in approving the settlement:

> The records in this case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record of this case is made by a member of the public, that request must be responded to as provided in the FOIA. 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. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding.

Slip op. at 2.

Agreement itself is not appended and is forwarded separately marked "PREDISCLOSURE NOTIFICATION MATERIALS."

There are no further aspects of the agreement which need be discussed for purposes of this recommendation.

I have no basis on which to recommend that the amount agreed upon is not fair, adequate and reasonable. Nor do I have reason to believe other provisions in the agreement, except as noted, are inappropriate.

Subject to the limitations discussed above, it is hereby RECOMMENDED that the Secretary of Labor find the terms of the agreement fair, adequate and reasonable, except as otherwise noted, and therefore approve the Settlement Agreement. It is further RECOMMENDED that the complaint be dismissed with prejudice. The hearing scheduled for January 17, 2006 is CANCELLED.

SO ORDERED.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).