



In the Matter of:

DANIEL MCDOWELL,

ARB CASE NO. 97-053

COMPLAINANT,

ALJ CASE NO. 96-TSC-0008

v.

DATE: May 19, 1997

DOYON DRILLING SERVICES, LTD,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This case arises under the Clean Air Act (CAA), 42 U.S.C. § 7622, Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971, Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, and Water Pollution Control Act (WPCA), 33 U.S.C. § 1367.^{1/} The parties have submitted a Memorandum of Settlement seeking approval of the settlement and dismissal of the complaint. No copy of the settlement agreement was submitted to the Administrative Law Judge (ALJ) and therefore, it was not reviewed prior to the issuance of his January 13, 1997 Recommended Order. We issued an Order on March 7, 1997 instructing the parties to submit their settlement to the Board for review.

The parties responded to our Order, claiming that submission of the settlement agreement would constitute a *de facto* waiver of the confidentiality provision of the agreement. This claim is without merit. The request for approval is based on an agreement entered into by the parties, therefore, we must review it to determine whether the terms are a fair, adequate and reasonable settlement of the complaint. 29 C.F.R. § 24.6. *Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko and Yunker v. Georgia Power Co.*, Case Nos. 89-ERA-9, 89-ERA-10, Sec. Order, Mar. 23, 1989, slip op. at 1-2.

^{1/} Complainant Daniel McDowell's Pre-Hearing Statement of Position, page 1.

The TSCA provides in pertinent part:

(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within 30 days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting on behalf of the complainant) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this paragraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for agency hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

15 U.S.C. § 2622(b)(2)(A). The CAA contains a similar provision:

(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

42 U.S.C. § 7622(b)(2)(A). Approval by the Secretary, or her designee, the Board, is a necessary component of an enforceable settlement. We simply cannot approve a settlement that we have never seen. Since the parties have not complied with our March 7, 1997 Order, we cannot affirm the ALJ's Recommended Order.

With respect to the parties' request that the March 7, 1997 Order be amended to direct submittal of the settlement agreement "under seal," we note that the parties' submissions in whistleblower cases under 29 C.F.R. Part 24 (1996) become part of the record in the case and the Freedom of Information Act, 5 U.S.C. § 552 (1988), requires federal agencies to disclose requested records unless they are exempt from disclosure under that Act. *Coffman v. Alyeska*

Pipeline Services Co. and Arctic Slope Inspection Services, ARB Case No. 96-141, Final Order Approving Settlement and Dismissing Complaint, June 24, 1996, slip op. at 2-3. *See also Plumlee v. Alyeska Pipeline Services Co.*, Case Nos. 92-TSC-7, 10; 92-WPC-6, 7, 8, 10, Sec. Final Order Approving Settlements and Dismissing Cases with Prejudice, Aug. 6, 1993, slip op. at 6. We must therefore deny the parties' request that the Settlement remain under seal. *Mitchell v. Arizona Public Service Co.*, Case Nos. 92-ERA-28, 29, 35, 55, Sec'y. Final Order Approving Settlement Agreement and Dismissing Cases, Jun. 28, 1993, slip op. at 2 (request to place settlement agreement under seal denied).

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.

Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information. *See* 29 C.F.R. Part 70 (1995).^{2/}

The Board requires that all parties requesting settlement approval of cases arising under the employee protection provisions of the whistleblower statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or to certify that no other such settlement agreements were entered into between the parties. *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. Additionally, if the settlement involves any monetary distribution to the Complainant, the Board must know the amount the Complainant will receive in order to determine if the settlement agreement is fair, adequate and reasonable. This amount affects not only the Complainant's individual interest, but impacts on the public interest as well, because if the amount is not fair, adequate and reasonable, other employees may be discouraged from reporting

^{2/} Pursuant to 29 C.F.R. § 70.26(b), submitters may designate specific information as confidential commercial information to be handled as provided in the regulations. When FOIA requests are received for such information, the Department of Labor shall notify the submitter promptly, 29 C.F.R. § 70.26(e); and the submitter will be given a reasonable period of time to state its objections to disclosure, 29 C.F.R. § 70.26(e); and the submitter will be notified if a decision is made to disclose the information, 29 C.F.R. § 70.26(f). If the information is withheld and suit is filed by the requester to compel disclosure, the submitter will be notified, 29 C.F.R. § 70.26(h).

safety violations. *See Plumlee v. Alyeska Pipeline Service Co.*, 92-TSC-7, Sec. Dec. and Order, Aug. 6, 1993, slip op. at 5; *Biddy v. Alyeska Pipeline Service Company*, ARB Case Nos. 96-109, 97-015, Order, May 31, 1996, slip op. at 1-2.

CONCLUSION

Accordingly, this case is REMANDED to the ALJ in order to give the parties opportunity to submit their settlement documentation consistent with the instructions in this order.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member