U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 January 2007

CASE NO. 2007-ERA-0002

In the Matter of:

THEO MARTIN,
Complainant,

vs.

U.S. DEPARTMENT OF ENERGY,
Respondent.

ORDER APPROVING SETTLEMENT AGREEMENT AND DISMISSING COMPLAINT WITH PREJUDICE

This is a proceeding arising under the Energy Reorganization Act of 1974 ("ERA"), as amended, 42 U.S.C. Section 5851 (1988 and Supp. IV 1992), and its implementing regulations found at 20 C.F.R. Part 24.

On November 30, 2006, Complainant's counsel filed the parties' settlement agreement. In the cover letter accompanying the settlement agreement, Complainant's counsel asked "the OALJ to retain jurisdiction over the execution of the settlement agreement."

On December 27, 2006, Complainant's counsel filed a motion for voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). The motion also stated, "Complainant respectfully requests the OALJ retain jurisdiction to enforce the terms of the settlement agreement to ensure such execution is fair, adequate, and reasonable."

Upon careful review of the settlement, I find that the settlement agreement fully comports with precedent established by the Secretary and/or the Administrative Review Board.

I must review the settlement agreement to determine whether its terms are a fair, adequate, and reasonable settlement of the complaint. 42 U.S.C. 5851(b)(2)(A); 29 C.F.R. 24.6(f)(1), 24.7(a), 24.8(a); *Thompson v. U.S. Department of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Hoffman v. Fuel Economy Contracting*, 1987-ERA-33 (Sec'y Aug. 4 1989). I find that the terms of this settlement agreement are a fair, adequate, and reasonable settlement of Complainant's allegation that the Respondent violated the ERA.

The Secretary also requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or certify that no other such settlement agreements were entered into between the parties.

Biddy v. Alyeska Pipeline Service Co., 95-TSC-7 (ARB Dec. 3, 1996), slip op. at 3. The settlement agreement states that it serves "to fully settle the above-cited MSPB, DOL, EEOC, and worker's compensation proceedings, as well as any other appeals or complaints alleging any improper personnel action that [Complainant] currently has pending, as well as any allegations or proceedings that [Complainant] could have brought or could bring, in any forum, against DOE or any of its current or former officers, officials, or employees, based upon any alleged events or omissions occurring prior to the effective date of this Settlement." I find that there are no other settlement agreements arising from the same factual circumstances which formed the basis for this claim.

Where attorney's fees are incorporated into an agreement, the administrative law judge does not approve the fee amount. If, however, the parties submit an agreement providing for the complainant to pay his attorney, the ALJ must take into consideration whether the net amount to be received by the complainant is fair, adequate and reasonable. *Tinsley v. 179 South Street Venture*, 89-CAA-3, Sec. Order of Remand, Aug.3, 1989, slip op. at 3. In this settlement agreement, Respondent has agreed to pay Complainant's attorney an amount not to exceed $10,000.00 to cover documented attorney's fees related to the instant Complaint. As Complainant in this case is not required to pay his attorney, I need not make that determination nor take any action regarding approval of the amount incorporated into the agreement.

In addition, paragraph 4 of the settlement agreement restricts disclosure of information relating to Complainant's employment, this case, and this settlement, with some delineated exceptions. I note, however, that the parties have attempted to bring this provision into compliance with applicable case law by specifically providing in paragraph 5 that the provision does not restrict disclosure where required by an official investigation. Thus, the provisions restricting disclosure of this settlement agreement do not violate the Secretary's prohibition against "gag provisions" in such agreements, which would be against public policy. *Brown v. Holmes & Narver, Inc*., 90-ERA-26 (Sec'y May 11, 1994).

Lastly, I must deny Complainant's requests that I retain jurisdiction over the execution of this settlement agreement. The ERA provides that a party seeking compliance with an order may bring a civil action in United States District Court. 42 U.S.C. § 5851(e). Based on this clear statutory guidance, the ARB has held the Department of Labor "has no authority, either express or implied, to enforce a settlement agreement in an ERA case." *Thompson v. Houston Lighting & Power Co*., ARB No. 98-101, ALJ No. 1996-ERA-34 (ARB Mar. 30, 2001)

Accordingly, it is hereby RECOMMENDED that the Settlement Agreement between Complainant Theo Martin and Respondent United States Department of Energy be APPROVED and that the matter be DISMISSED WITH PREJUDICE.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of the Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. 24.7 and 24.8.