U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 31 May 2005

In the Matter of
Jason Wayne Holcombe
Complainant

v. Case Numbers: 2004 AIR 00025

2004 AIR 00038

Pinnacle Airlines
Respondent

PROPOSED ORDER OF DISMISSAL

This case came to hearing November 30 to December 3, 2004 in Minneapolis pursuant to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 1997) and the implementing regulations at 29 C.F.R. Part 1979 (2003) and in accordance with 29 C.F.R. Part 18 of the Rules of Practice and Procedure of the Office of Administrative Law Judges.

I had been advised by the parties that the case had settled. On May 4, 2005 I received a Motion to Enforce Settlement. Complainant was Ordered to respond to this Motion by May 25, 2005. He was specifically advised: "Failure to [respond] may result in granting the pending Motion." However, he did not respond.

The statute states in pertinent part:

> At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

49 U.S.C. § 42121(b)(3)(A).

29 CFR § 1979.111(d)(2) sets forth:

> Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement shall be filed with the administrative law judge or the Board, as the case may be.

29 CFR § 1979.111(e) sets forth:

> Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board, shall constitute the final order of the Secretary and may be enforced pursuant to § 1979.113.

The Motion accurately set forth that post hearing the parties requested additional time to discuss settlement. On April 6, 2005, the Parties filed a Joint Motion representing that a settlement had been reached.

Respondent states in the Motion to Enforce that Complainant had the opportunity over the course of several weeks to comment on and suggest revisions to a written version of the settlement agreement. It asserts that Mr. Holcombe suggested "minor modifications" on April 7 (to the payment schedule) and telecopied additional comments on the tax treatment of certain payments on April 8, 2005. With the transmission on the tax treatment, he also attached an unsigned letter of resignation and request to withdraw his AIR 21 actions with prejudice. I am told that Mr. Holcombe telecopied written comments with minor revisions on the settlement agreement on April 22. 2005. Respondent avers that it accepted and entered these changes into the typed settlement agreement and returned a "clean" draft to Mr. Holcombe on the same date. I am advised that the final typed version tendered to Mr. Holcombe accepted all of the final revisions proposed in handwriting by Mr. Holcombe.

Respondent stated:

> The parties reached accord on both the essential and even the specific terms of the Agreement. Should there be any disagreement on this fact, a copy of the final written instrument, as well as the comments submitted by Mr. Holcombe, can be made available under seal to the Court.

See Motion.

I am advised that on the morning of April 25, 2005, Complainant was contacted to ascertain whether he had signed and sent the Agreement. "At that point, and for the very first time since the parties appeared before the Settlement Judge, Mr. Holcombe suddenly responded that he did not wish to settle the matter after all. He acknowledged that the written instrument had accurately reflected the Agreement between the parties."

29 CFR § 18.16 sets forth as follows:

> (2) If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:
>
> > (i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;
> >
> > (ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;
> >
> > (iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;
> >
> > (iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.
> >
> > (v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be

> stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

The underlined material is emphasized.

Respondent argues that the oral agreement is sufficient to constitute settlement before the Department of Labor. Respondent directs me to ***Tankersley v. Triple Crown Services***, 92-STA-0008 (ALJ June 14, 1994), an oral settlement agreement, recanted by the complainant before it was reduced to writing was deemed enforceable. I am advised that when a complainant knowingly and voluntarily consents to settlement, if the settlement otherwise conforms to the law, a party is bound by although there is a subsequent change of mind. The ***Tankersley*** ALJ decision is not precedent, however, in ***Tankersley v. Triple Crown Services, Inc***., Case No. 92-STA-8 (Sec., 1994) the Administrative Review Board in affirming the oral settlement stated: "complainant did not ever deny that he gave his attorney authority to settle this matter 'for what he could get'; it was just that he, complainant, felt he should have settled for more than $10,000".

However, where an oral agreement is presented for approval, the record clearly must reflect all material terms of the settlement and evidence an unequivocal declaration by the parties that they have agreed to those terms. ***Hasan v. Nuclear Power Services, Inc***., Case No. 86-ERA-24 (Sec., 1991), slip op. at 8 (under analogous employee protection provision of Energy Reorganization Act). This standard has been met in other cases by admission into evidence of documentation of an agreement signed by the complainant or by reaffirmance of an agreement by the complainant in open court. In ***Macktal v. Brown & Root, Inc***., 86-ERA-23 (Sec'y, 1990)***,*** for example, the complainant admitted in an affidavit that he initially had agreed to an oral settlement reached by his attorneys, that he had signed two versions of a general release and that he had accepted his share of the proceeds provided under the agreement. The court stated: "Given these indications of consent, we cannot conclude that the Secretary's finding of consent is an abuse of discretion." 923 F.2d at 1157 (Energy Reorganization Act). I note that in ***Chao v. Alpine, Inc***., No. 04-102-P-H (D. Me. September 20, 2004) a United States District Court enforced settlement of an STAA whistleblower action, holding that execution of a formal settlement agreement is not a prerequisite to a binding settlement.

Because Complainant failed to object to the Motion to Enforce Settlement, pursuant to 29 CFR § 18.16, I accept the facts regarding settlement. These facts show that Complainant "acknowledged that the written instrument had accurately reflected the Agreement between the parties." I accept that there was an oral agreement, but alternatively, I accept that the written document is also enforceable.

I am also requested to grant Respondent additional legal fees and costs in order to enforce tie Agreement. 29 C.F.R. § 1979.109 (b), which states in part,

> If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

However, I decline to do so, as a justiciable issue was outstanding and I find that the complaint was not frivolous and the Complainant's actions do not rise to bad faith.

I am advised that the parties request that the settlement agreement remain confidential consistent with the Freedom of Information Act and the Privacy Act. The parties should note that the Administrative Review Board has repeatedly held with respect to confidentiality provisions

in settlement agreements that the Freedom of Information Act, 5 U.S.C.A. §552, "requires agencies to disclose requested documents unless they are exempt from disclosure. . . ." ***Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services***, ARB Case No. 96-141; ALJ Case Nos. 1996-TSC-5 and 6 (ARB June 24, 1996), slip op. at 2-3. The ARB and the Secretary of Labor have held that records in whistleblower cases "are agency records which the agency must make available for public inspection and copying under the FOIA. In the event a member of the public requests the opportunity to inspect and copy the record of this case, the Department of Labor must respond to that request 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." ***Seater v. Southern California Edison Co.***, 95-ERA-13 (ARB Mar. 27, 1997); ***Corder v. Bechtel Energy Corp.,*** 1988-ERA-9 (Sec'y Feb. 9, 1994).

After reviewing the terms of the settlement, I find the terms of settlement agreement are fair, adequate, and constitute a reasonable settlement of the complaints before me. I also find that it adequately protects the public interest. Pursuant to 29 CFR §18.9, there is no reason to reject Motion, and therefore a dismissal with prejudice is recommended.

RECOMMENDED ORDER

IT IS HEREBY ORDERED:

1. The Motion to Enforce Settlement Agreement and the request for Order of Dismissal with Prejudice as to All Claims is ***APPROVED*** with respect to the claims designated 2004-AIR-00025, and 2004 AIR 00038.
2. These claims are ***DISMISSED***.
3. Respondent's request for attorney's fees and costs is ***DENIED***.

SO ORDERED

A

DANIEL F. SOLOMON
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal you must file a petition for review (Petition) within ***ten business days*** of the date of the administrative law judge's decision with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; the Assistant Secretary, Occupational Safety and Health Administration; and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a)