



IN THE MATTER OF:

DANIEL BROCHU,

ARB CASE NO. 2022-0066

COMPLAINANT,

ALJ CASE NO. 2022-ERA-00004

ALJ TIMOTHY J. MCGRATH

v.

DATE: September 19, 2023

**DOMINION ENERGY NUCLEAR
CONNECTICUT, INC.,**

RESPONDENT.

Appearances:

For the Complainant:

Samuel M. Nassetta, Esq.; *Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.*; New London, Connecticut

For the Respondent:

Scott D. Clausen, Esq. and Lewis M. Csedrik, Esq.; *Morgan, Lewis & Bockius LLP*; Washington, District of Columbia

Before PUST and WARREN, Administrative Appeals Judges

**DECISION AND ORDER APPROVING SETTLEMENT AND
DISMISSING CASE WITH PREJUDICE**

PER CURIAM:

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), as amended.¹ Daniel Brochu (Complainant) filed a complaint alleging that Dominion Energy Nuclear Connecticut, Inc. (Respondent)

¹ 42 U.S.C. § 5851, as implemented by the regulations at 29 C.F.R. Part 24 (2023).

retaliated against him and violated the ERA.² On September 8, 2022, a United States Department of Labor Administrative Law Judge (ALJ) issued an Order Denying Complaint for Failure to Timely File. On September 22, 2022, Complainant filed a Petition for Review of the ALJ's decision with the Administrative Review Board (Board or ARB).

On July 18, 2023, Complainant filed with the Board a Motion to Withdraw Appeal (Motion). After taking administrative notice of a publicly available settlement filing, which the Board was not certain involved the present claim,³ and in accordance with the regulatory requirement that any ERA claim settlement be reviewed and approved by the Board,⁴ the Board issued an Order to Submit Settlement Agreement (Order) on July 28, 2023. In this Order, the Board required Complainant to, within thirty (30) days, "file a certification that this matter has not been resolved by a settlement or, in the alternative, file an unredacted copy of any settlement agreement related to this claim for consideration by the Board."⁵ The Board did not receive the ordered certification or settlement agreement by the due date. The Board then issued an Order to Show Cause on September 7, 2023, directing the parties to explain why the Board should not sanction the parties and their legal representatives, deny Complainant's Motion for failing to comply with the Board's Order, and issue a decision on the merits of the appeal, with corresponding legal effect.⁶

On September 11, 2023, Complainant's counsel filed a Response to Order to Show Cause, requesting that the Board not issue sanctions based on his failure to comply with the Order because he "was on trial when the [Order] was issued . . . [and it] slipped through the cracks and the deadline to submit the filing did not end up on his calendar."⁷ Complainant's counsel also submitted a partially executed copy of a Confidential Agreement of Settlement and Release (Agreement) signed only by Complainant.

On September 14, 2023, Respondent filed Dominion Energy Nuclear Connecticut, Inc.'s Response to the Order to Show Cause Dated September 7, 2023, stating that the Board should refrain from sanctioning Respondent and its counsel because the Order did not require Respondent to take any action with respect to the

² Order Denying Complaint for Failure to Timely File at 1.

³ See Joint Motion for Referral to Magistrate Judge for Purposes of Settlement Conference, Civil Action No. 3:22-cv-01639-MPS (D. Conn. May 5, 2023).

⁴ 29 C.F.R § 24.111(c).

⁵ Order to Submit Settlement Agreement at 2-3.

⁶ Order to Show Cause at 2.

⁷ Complainant's Response to Order to Show Cause (Comp. Res.) at 1.

Agreement but instead required only Complainant to make the necessary filing.⁸ Respondent submitted a fully executed copy of the Agreement.⁹ Upon examining Complainant's Motion to Withdraw Appeal, the fully executed copy of the Agreement, and the filed responses, it appears that the parties request the Board's approval of the Agreement and dismissal of the action with prejudice.

The ERA's implementing regulations provide, "[i]f a case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB."¹⁰ The provision also specifies that, "[i]f the objections are withdrawn because of settlement under the Energy Reorganization Act, . . . the settlement must be submitted for approval in accordance with paragraph (d) of this section."¹¹ The regulations at paragraph (d)(2) state that if the parties agree to a settlement, the settlement must be approved by the ARB and "[a] copy of the settlement must be filed with the . . . ARB"¹²

The Agreement encompasses the settlement of the current, pending case before the Board as well as claims filed in other forums as specified in the Agreement and pled under laws other than the ERA. The Board's authority over settlement agreements is limited to statutes within the Board's jurisdiction as defined by the applicable delegation of authority.¹³ Therefore, we have restricted our review of the Agreement to ascertaining whether its terms fairly, adequately, and reasonably settle this ERA case over which we have jurisdiction.¹⁴

The Agreement contains a confidentiality clause, pursuant to which Respondent requests its terms remain confidential and asserts pre-disclosure

⁸ Dominion Energy Nuclear Connecticut, Inc.'s Response to the Order to Show Cause Dated September 7, 2023 (Resp. Res.) at 1.

⁹ *Id.*, Exhibit (Ex.) A.

¹⁰ 29 C.F.R. § 24.111(c).

¹¹ *Id.*

¹² *Id.* § 24.111(d)(2).

¹³ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); *Clem v. Comput. Scis. Corp.*, ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 2 (ARB May 16, 2022) (citation omitted).

¹⁴ *Clem*, ARB No. 2020-0025, slip op. at 2 (citing *Ladd v. Babcock & Wilcox Conversion Servs.*, ARB Nos. 2017-0019, -0020, -0065, ALJ Nos. 2013-ERA-00010, 2016-ERA-00005, slip op. at 2-3 (ARB June 19, 2018)).

notification rights under 29 C.F.R. § 70.26.¹⁵ Respondent contends that the Agreement contains “confidential commercial or financial information exempt from public disclosure under [the Freedom of Information Act (FOIA)] Exemption 4” and its disclosure would be prejudicial to Respondent’s ability to negotiate in potential future litigation.¹⁶

The parties’ submissions, including the Agreement, are part of the record and subject to the FOIA.¹⁷ “The FOIA requires federal agencies to disclose requested records unless they are exempt from disclosure under the Act.”¹⁸ In the absence of a FOIA request, it is premature and would be inappropriate for the Board to determine whether any exemption is applicable.¹⁹ If a FOIA request is received for this particular Agreement, the Department of Labor will follow the proper procedures for responding to FOIA requests.²⁰

Furthermore, if the confidentiality clause was interpreted to preclude Complainant from communicating with federal or state enforcement agencies concerning alleged violations of law, it would violate public policy, as it would contain an unacceptable “gag provision.”²¹ The clause includes language that Complainant shall not disclose the Agreement’s terms to third parties “except that [sic] to his accountants, auditors, spouse/partner, and counsel, and in response to a subpoena, search warrant, or any other lawful request of any state or federal agency or court, or as otherwise required by law.”²² We construe such language as allowing Complainant, either voluntarily or pursuant to an order or subpoena, to

¹⁵ Resp. Res. at 3.

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 552.

¹⁸ *Rew v. CSX Transp. Inc.*, ARB Nos. 2021-0042, -0058, ALJ No. 2019-FRS-00073, slip op. at 3 (ARB Nov. 2, 2021) (citing *Ware v. BNSF Ry. Co.*, ARB No. 2014-0044, ALJ No. 2013-FRS-00028, slip op. at 3 (ARB June 24, 2014)).

¹⁹ *Hendrix v. CSX Transp., Inc.*, ARB No. 2023-0033, ALJ No. 2020-FRS-00076, slip op. at 3 (ARB July 13, 2023) (citing *Bettner v. Crete Carrier Corp.*, ARB No. 2007-0093, ALJ No. 2007-STA-00033, slip op. 3 n.11 (ARB Sept. 27, 2007) (discussing premature FOIA exemption requests and determinations concerning settlement agreements)).

²⁰ 29 C.F.R. Part 70 (2023). Pursuant to 29 C.F.R. § 70.26(b), submitters may, in good-faith, designate portions of their submissions as containing confidential commercial information, which they consider to be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). Because the parties have designated the Agreement as containing confidential commercial information, the Board will treat the Agreement as subject to the pre-disclosure procedures in 29 C.F.R. § 70.26.

²¹ *Clem*, ARB No. 2020-0025, slip op. at 3 n.4 (citing *Helgeson v. Soo Line R.R. Co.*, ARB No. 2019-0054, ALJ No. 2016-FRS-00084, slip op. at 3 (ARB Jan. 13, 2021)).

²² Resp. Res., Ex. A at 4, ¶ 5.

communicate with, or provide information to, state and federal authorities about suspected violations of law involving Respondent. This is further evidenced in the Agreement's cooperation clause, which specifies that Complainant may testify truthfully during any investigation, provide information to the government, engage in future activities protected by whistleblower statutes, and raise any nuclear safety concern, workplace safety concern, or any concern about legal or ethical management of Respondent to the appropriate state or federal agency.²³

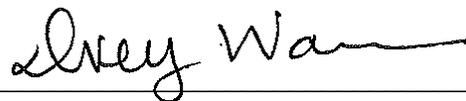
The Agreement also provides that it shall be governed by the laws of the state of Connecticut. We construe this "Choice of Law" provision as not limiting the authority of the Secretary of Labor, the Board, or any federal court with regard to any issue arising under the ERA, which authority shall be governed in all respects by the laws and regulations of the United States.²⁴

The Board concludes that the Agreement is fair, adequate, and reasonable, and does not contravene the public interest. Accordingly, we **APPROVE** the Agreement and **DISMISS** the complaint with prejudice.

SO ORDERED.



TAMMY L. PUST
Administrative Appeals Judge



IVEY S. WARREN
Administrative Appeals Judge

²³ *Id.* at 4-5, ¶ 7.

²⁴ *Clem*, ARB No. 2020-0025, slip op. at 3 (citing *Simon v. Exelon Nuclear Sec.*, ARB Nos. 2013-0095, -0096, ALJ No. 2010-ERA-00007, slip op. at 2 (ARB Nov. 22, 2013)).