Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
American Federation of Government Employees, Local 1403, AFL-CIO,	)	
Complainant,	)	PERB Case No. 06-U-01
v.	)	
	)	Opinion No. 973
District of Columbia Office of the Attorney General,	)	
	)	**Motion to Vacate**
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case:

On May 27, 2008, the American Federation of Government Employees, Local 1403 ("AFGE" or "Union") and the District of Columbia Office of the Attorney General ("OAG") filed a document styled "Joint Motion To Vacate Decision In Light Of Settlement" ("Motion"). In the Motion the parties are requesting that Slip Opinion Number 935 issued by the Board on March 10, 2008, be vacated. In Slip Opinion Number 935 the Board found that the OAG violated the Comprehensive Merit Personnel Act ("CMPA"). As remedy for the violation, the Board ordered the OAG to: (1) cease and desist from violating the CMPA; (2) expunge all records of the referral of the name of the Union's president to the ethics committee; and (3) post a notice informing employees that the OAG was in violation of the CMPA. (See Slip Op. No. 935 at pgs. 10-11).

The parties' Motion is before the Board for disposition.

II. Discussion

AFGE filed an unfair labor practice complaint with the Public Employee Relations Board ("PERB" or "the Board") alleging that the OAG violated the CMPA by taking certain actions against Union President Steve Anderson. Specifically, AFGE alleged that the OAG violated

D.C. Code §1-617.04(a) (1), (2) and (3) by: (a) issuing Steve Anderson an admonition and reprimand; and (b) referring his name to the internal OAG ethics committee. On March 10, 2008, the Board issued Slip Opinion Number 935, wherein the Board found that the OAG violated the CMPA. As remedy for the violation, the Board ordered the OAG to: (1) cease and desist from violating the CMPA; (2) expunge all records of the referral of the name of the Union's president to the ethics committee; and (3) post a notice informing employees that the OAG was in violation of the CMPA. (See Slip Op. No. 935 at pgs. 10-11).

On May 27, 2008, the parties submitted their Motion. The parties assert that they "are eager to enter into a settlement in this matter whereby they agree that OAG will be relieved of its obligation to post the required notice as ordered by PERB if OAG vacates and expunges all of the adverse actions taken against Steve Anderson - the admonition, the referral to the ethics committee, and the reprimand upheld by PERB. The parties [state that they] believe this is an equitable settlement in the best interest of all concerned in this case. The parties' agreement to settle under these terms is contingent on PERB vacating its decision that the OAG acted illegally here and on the Union's agreement that it will not move to enforce the decision." (Motion at p. 2). Without citing any authority, the parties are requesting that the Board vacate its decision, claiming that the Board's decision is "fact specific" and "does not resolve any unsettled issues of law of general interest to the public." (Motion at p. 2).

In *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the Supreme Court established the principle that parties cannot, except in extraordinary circumstances, vacate court decisions through settlement. There, the Court held that when a dispute becomes moot because of settlement after a court has issued an award, courts should not vacate the opinion except under rare cases because vacatur is an "extraordinary remedy." *Id.* at 25-26. The Court explained that "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 26. Thus, permitting parties to voluntarily vacate opinions amounts to permitting a "refined form of collateral attack on the judgment" and "disturb[s] the orderly operation of the federal judicial system." *Id.* Even where both parties agreed that vacatur of the opinion was fair and in both parties' interest, the Court refused to vacate the lower court's opinion. *Id.* at 28.

The District of Columbia Court of Appeals has adopted the Supreme Court's holding in *Bancorp*. See *Udebiuwa v. Dist. of Columbia Bd. of Medicine*, 818 A.2d 160 (D.C. 2003). There, a doctor appealed a decision of the Board of Medicine to discipline him for engaging in an inappropriate social and sexual relationship with a former psychiatric patient. *Id.* at 161. The Board of Medicine relied on a judgment rendered against the doctor in a medical malpractice action as conclusive proof of his misconduct. The doctor claimed that the decision the Board of Medicine relied on should have been vacated pursuant to an agreement of the parties. *Id.* The Court of Appeals held that the settlement by the parties did not entitle the parties to have the

court vacate the judgment at the parties' request. *Id.* at 162. Following *Bancorp*, the Court of Appeals held that, "the equities ordinarily disfavor vacatur even if the losing party bargained for it, because the public interest typically outweighs the private interests involved." *Id.* "The public interest also is served by encouraging parties to settle before rather than after trial by deterring those litigants who 'may think it worthwhile to roll the dice rather than settle in the [trial] court . . . if, but only if, an unfavorable outcome can be washed away by a settlement related vacatur.'" *Id.* at 163.

Furthermore, several federal agencies have also imported *Bancorp*'s rationale for refusing to vacate agency decisions because of a post-decision settlement between the parties. The Merit Systems Protection Board ("MSPB"), International Trade Commission ("ITC"), Patent and Trademark Office ("PTO"), the General Services Board of Contract Appeals ("GSBCA"), and the Federal Energy Regulatory Commission ("FERC"), among others, have all found that a post-decision settlement is not, in and of itself, a reason to vacate an agency decision.

FERC, for instance, found that while the Supreme Court's decision does not control, "the Commission has sought guidance from the courts and has followed this approach when faced with such requests" for vacatur. *Town of Neligh, Nebraska v. Kinder Morgan Interstate Gas Transmission, L.L.C.*, 94 FERC P 61,075, 2001 WL 63066 (F.E.R.C.). Similarly, the GSBCA rejected the parties' contention that vacatur would be consistent with *Bancorp* because, although vacating the decision would encourage settlement in that particular case, it may deter early settlement in other instances. *Computer Data Systems, Inc. v. Department of Energy*, GSBCA No. 12824-P-REM, 12824-P-REM, 1995 WL 254197 (G.S.B.C.A. Mar. 23, 1995). Along these lines, the ITC found that the "Commission policy and the public interest would be ill-served if it were to vacate the entire Initial Determination solely for the purpose of facilitating the parties' settlement." U. S. International Trade Commission Investigation No 337-TA-429, in the Matter of Certain Bar Clamps, Bar Clamp Pads, and Related Packaging Display, and Other Materials, Comments of the Administrative Law Judge (2001). Analogizing to federal court decisions, ITC refused to vacate the decision below. *Id.* Finally, the MSPB, like other agencies, has "determined that the parties' settlement of what remains of their dispute is not a ground for vacating the decision," and, as a result, denied the parties' motion to vacate. *Heining v. General Services Admin.*, 66 M.S.P.R. 571, 573 (M.S.P.B. Feb 21, 1995). In sum, federal agencies have routinely accepted the rationale put forth by the Supreme Court in *Bancorp*.

In view of the above, it is clear that in deciding whether to vacate an opinion because of a post-opinion settlement between the parties, the courts and other tribunals are only amenable to such a vacatur in extraordinary circumstances. Furthermore, as noted by the District of Columbia Court of Appeals in *Udebiuwa,* the settlement of the parties does not entitle the parties to vacate the judgment at their request. *Id.* at 162. Even if both parties agree to settlement and believe it to be in their best interest, such an agreement does not ordinarily justify the vacatur of a tribunal's decision. *Id.*

"While 'exceptional circumstances may conceivably counsel' granting a motion for vacatur at the behest of settling parties, . . . no such circumstances were presented in the case at bar." *Id.* at 166. Specifically, in the present case, the parties "note[d] that [the Board's] decision is fact-specific to this case and does not resolve any unsettled issues of law of general interest to the public." (Motion at p. 2.) While this tangentially addresses one of the reasons courts typically refuse to vacate in these circumstances (value of the opinion to the legal community), the parties have not demonstrated that: (1) their interpretation of the legal issues is accurate; or (2) the absence of unsettled issues of law, without more, justifies vacatur. Nor does the Motion address any of the other concerns raised by the courts regarding the vacatur of opinions. Furthermore, under *Bancorp and Udebiuwa*, the parties must demonstrate that the unusual circumstances that would justify vacatur are present. Thus, the parties need to show that either the policies implicated by *Bancorp* or its progeny are not at issue, or that some other existent interest countervails the public's interest in retaining the decision beyond the parties' interest in settlement. As the District of Columbia Court of Appeals stated:

> One important reason that the judgment of a [tribunal] is "valuable to the legal community as a whole," . . . is that it may have "preclusive benefits for third parties" under the doctrine of offensive nonmutual collateral estoppel. . . . "if parties want to avoid *stare decisis* and preclusive effects, they need only settle before the [tribunal] renders a decision." . . . We appreciate that the recipient of an otherwise satisfactory post-trial settlement offer that is conditioned on vacating the judgment may be quite amenable to that condition, and will feel aggrieved if a desirable settlement is stymied by the rule against routine grants of vacatur in such circumstances. "The interests of litigants in general, however, lie with the orderly operation of a system of justice, one in which the conclusions of litigation are recorded and thus preserved for the future, one in which slightly higher costs in today's case may reduce the trouble encountered by litigants tomorrow. . . . *Id.* at 164-166.

We note that in the present case the Respondent could have appealed the Board's March 10, 2008 Decision and Order to the District of Columbia Superior Court. However, the Respondent waived that right by choosing not to appeal. As the Court of Appeals noted in *Udebiuwa,*

> Vacatur. . . is an extraordinary remedy that is reserved for exceptional situations, as where the losing party is frustrated from obtaining appellate review because the judgement is rendered moot

> by circumstances beyond that party's control. "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal. . . thereby surrendering his claim to the equitable remedy of vacatur."

Id. at 162.

> To allow a party who steps off the statutory path [of seeking appellate relief from an adverse judgment] to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would - quite apart from any considerations of fairness to the parties - disturb the orderly operation of the. . . system.

Id. at 163.

In view of the above, we find that this case does not involve the kind of exceptional circumstances required to vacate the Board's Decision and Order. Therefore, we deny the parties' "Joint Motion To Vacate Decision In Light Of Settlement."

ORDER

IT IS HEREBY ORDERED THAT:

1. The "Joint Motion To Vacate Decision In Light of Settlement" filed by the American Federation of Government Employees, Local 1403 and the District of Columbia Office of the Attorney General, is denied.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D. C.

August 21, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 06-U-01 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of August 2009.

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