UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In The Matter Of:	)	
	)	
	)	
WYOMING TECHNICAL INSTITUTE	)	**Docket No. RCRA (3008) VIII-95-10**
	)	
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	)	
Respondent	)	
	)	

ORDER DENYING RESPONDENT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT

On June 26, 1997, Respondent, Wyoming Technical Institute, filed a Motion To Enforce Settlement Agreement and a Memorandum in Support of its Motion. Respondent asserts that on April 7, 1997, it made a written settlement offer to counsel for the Environmental Protection Agency (EPA), to settle the above-stated proceeding. Respondent's offer included a plan to implement a Supplemental Environmental Project (SEP) "in lieu of the monetary penalty". (Respondent's Exhibit B).[(1)]

On April 30, 1997, counsel for EPA submitted a Status Report to the undersigned Administrative Law Judge informing him that the "Parties have reached terms for settlement in this matter" (Respondent's Exhibit C). This was apparently the first communication Respondent had received from EPA since the April 7th settlement offer. Upon subsequent telephonic communication, counsel for EPA orally confirmed that EPA had "accepted" Respondent's offer to settle. Based on this information, counsel for Respondent informed his client that the "case was settled".

Thereafter, on June 5, 1997, counsel for EPA sent a letter to Respondent stating she had "erred" in settling the case, by failing, in fact, to have reviewed Respondent's written settlement offer and relying instead on earlier negotiation-related materials. Upon realizing her "mistake", counsel for EPA

informed Respondent of terms which settlement could be proposed to the Regional Administrator.

It is Respondent's position that the EPA is now attempting to repudiate its "settlement agreement" and insist that Respondent pay a monetary penalty of $9,743 in addition to performing the SEP. Respondent avers that EPA's new demands are contrary to and materially different from the terms of the agreement made by the parties.

Respondent seeks to enforce the alleged settlement agreement on the basis of contract law in that a settlement agreement is simply a "kind of contract". Brockman v.Sweetwater County School Dist. No. 1, 826 F. Supp. 1328, 1331 (D. Wyo. 1993). Respondent argues that a settlement agreement exists in this case and like other contracts, comes into being when timely acceptance of an offer is communicated to the offeror. Wyoming Saw Mills, Inc. V. Morris, 756 P.2d 774, 775 (Wyo. 1988). As performance of the agreement was to occur in Wyoming and the contract was made in Wyoming, Respondent asserts Wyoming law should apply. Dobbs v. Chevron USA, Inc., 39 F.3d 1064 (10th Cir. 1994). In support of its argument, Respondent cites case authorities which set forth familiar principles of contract law.

In its response to the Motion, filed July 24, 1997, Complainant, EPA, denies that a settlement agreement came into being or that the EPA attorney who may have entered into an agreement had the authority to bind the Complainant to a settlement. On analysis, Complainant's position is better reasoned.[(2)] As discussed below, Respondent's Motion fails on two legally distinct grounds.

First, the undersigned is aware that oral settlement agreements are generally deemed to be binding and enforceable but notes the recognized EXCEPTION to this rule where settlement agreements are required by statute or court rule to be in writing. See, Consolidated Aluminum Corporation, 9 OSHC 1144 (BNA); 1980 OSHD P.25,069 (CCH); 1980 OSAHRC LEXIS 25; OSHRC Docket No. 77-1091 (December 19, 1980), citing Bruce Realty Co. of Florida v. Berger, 327 F.Supp. 507 (S.D.N.Y. 1971) at n.18; See also, 15A Am Jur 2d, Compromise and Settlement, Sections 10, 17.

Here, Section 22.18 (b) and (c), of the Consolidated Rules of Practice, 40 CFR Section 22.18 (b) and (c), provide:

(b) Consent agreement. The parties shall forward a written consent agreement and proposed consent order to the Regional Administrator whenever settlement or compromise is

proposed....The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) Consent order. No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Regional Administrator. .... (Emphasis supplied).

The Consolidated Rules of Practice, which govern these proceedings are clear. It is undisputed that there exists no signed consent agreement as expressly required above. Neither EPA's oral telephonic "acceptance", nor the statement contained in the April 30th Status Report serve to satisfy these mandated requirements. Absent a signed consent agreement, there exists no consent order and thus, no opportunity for the Regional Administrator to approve any proposed settlement of the case.

The conclusion that the alleged settlement agreement is not enforceable unless approved by the Regional Administrator in writing and signed by the parties, places this proceeding clearly within the established exception of the general rule noted above.

Second, even were it assumed that Respondent introduced clear and convincing evidence of an negotiated settlement agreement, if proved, would fall short of binding the United States Government. Generally, the Government is not bound by agreements of its agents acting beyond the scope of their authority. Empire-Detroit Steel v. OSHRC, 579 F2d 378, 383 (6th Cir. 1978). To adopt Respondent's argument would therefore necessitate, by law, a concomitant conclusion that EPA counsel acted beyond the scope of her authority.

In Empire, the Court, in precluding enforcement of an oral agreement mistakenly approved by the Government's attorney, held: "We are cited to no statutory, regulation or other authority that would authorize a [Government] attorney.....to enter into a binding compromise by means of a telephone conversation without formalizing the compromize by a written agreement". Such is the case here. EPA's April 30th Status Report merely notes that "the parties have reached terms for settlement in this matter". The language thus fails to rise to the level of the "written agreement" contemplated in Empire and Part 22.18 of the Rules, by failing to set forth either the required signatures or "any and all terms" under which the parties agreed to settle.

Here, EPA counsel did not have the authority, either actual or apparent, to bind the Complainant to any type of settlement. The Regional Administrator for Region VIII was delegated the authority to negotiate and sign consent agreements on behalf of EPA on May 11, 1994 (EPA Exhibit A). This authority was further delegated to the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice on December 20, 1996 (EPA Exhibit B). At no time was EPA counsel ever delegated the authority to enter into a binding agreement on behalf of the Administrator, and by law, she was prohibited from doing so on the sole basis of her oral and written statements to Respondent.

While the undersigned might sympathize with the frustration felt by Respondent in having the "settlement", negotiated over a long period of time and so close to being a reality, fall through, it is held that no settlement was in fact, reached, as the necessary approvals, mandated by 40 CFR Sections 22.18 (b) and (c), had not been obtained.

ACCORDINGLY, no final settlement agreement exists to enforce; the proper administrative procedures for entering into a binding settlement agreement have not yet been performed; and EPA counsel who may have consented to settle the case, did not have the authority to bind the United States to an enforceable settlement agreement.

ORDERED: Respondent's Motion To Enforce Settlement Agreement is therefore DENIED. The liability and penalty phase in this matter shall proceed, pursuant to Order Scheduling Hearing of July 11, 1997.

Stephen J. McGuire

Administrative Law Judge

Dated: July 29, 1997

Washington, D.C.

1. Respondent's April 7th settlement offer was preceded by an initial settlement conference on September 11, 1995 and an earlier proposal dated March 19, 1996, wherein Respondent sought to implement the SEP project in lieu of a penalty assessment.

2. It is unnecessary to address Complainant's collateral argument that even should a settlement agreement be found to

exist, EPA would be entitled to withdraw its approval based on a lack of authority of its attorney to give assent. See, United States v. Beebe, 180 U.S. 343, at 353-354 (1901).