COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Rochester Bituminous Products, Inc., **Michael P. Todesca**, **Albert M. Todesca**, and **Thomas N. Russo**,
Petitioners,

v.

Office of the Attorney General, Fair Labor Division,
Respondent.

No. LB-22-5

Dated: May 9, 2023

ORDER ON MOTION TO VACATE DISMISSAL

I

The evidentiary hearing in this matter was scheduled by agreement for September 2022. At the parties' request, the hearing was postponed to November 2022. It was postponed a second time, to February 2023, when it became apparent that the division was not ready to try the case on schedule.

The hearing was calendared for four days. One week before the hearing, the parties were due to file prehearing memoranda. They did not do so. They also did not seek an extension or file other papers.

In response to an order requiring the parties to rectify and justify their omissions, they reported that they had agreed on a settlement "in principle." The division stated that the parties were "comfortable requesting that the hearing be cancelled." The petitioners wrote more guardedly that "[p]erhaps continuing the hearing . . . would be reasonable."

An order dated February 3, 2023 denied the petitioners' halfhearted request for a third continuance, cancelled the hearing, and stated that the hearing would "not be recalendared except in the event of extraordinary circumstances, not to include failure by the parties to obtain

approvals for their agreement in principle." The order authorized the parties to move for reconsideration only upon certifying that they would be prepared to try the case on the existing schedule.

The February 3, 2023 order afforded the parties 45 days to file a proposed judgment. They did not do so. The appeal was then formally dismissed based on mootness and failure to prosecute.

On April 24, 2023, the petitioners moved unopposed to vacate the dismissal. They reported that the parties now disagree about the terms that their final, written settlement agreement should include. They asserted that the division is "leveraging" the appeal's nonpendency to strengthen its bargaining position. The petitioners requested an additional period to finalize and file a proposed judgment, with a July 2023 hearing to follow if necessary.

II

An order of dismissal is an appealable "final decision." G.L. c. 30A, § 14. *See* G.L. c. 7, § 4H, 9th para. Such a decision may be vacated on a motion for "rehearing" or "reconsideration." G.L. c. 30A, § 14(1); 801 C.M.R. § 1.01(7)(*l*). Under the governing regulations, such a motion "must identify a clerical or mechanical error in the decision or a significant factor the . . . Presiding Officer may have overlooked in deciding the case." 801 C.M.R. § 1.01(7)(*l*).

It is clear as day that the motion to vacate does not satisfy this standard. The February 3, 2023 order discussed the possibility that the parties' negotiations might go awry. The order cautioned the parties that the appeal would not be revived in that scenario. The motion's gravamen—that the parties' negotiations have faltered—is thus not a factor that prior orders "overlooked." 801 C.M.R. § 1.01(7)(*l*).

To the extent that vacatur of the dismissal would be permissible, it would not be most appropriate. DALA's statutory mandate is "to provide speedy and fair disposition of all appeals." G.L. c. 7, § 4H, 2d para. Numerous cases compete for DALA's bandwidth. Like the judicial courts, DALA would disserve its mission if it were to permit litigants "to postpone trial indefinitely." *Fillippini v. Ristaino*, 585 F.2d 1163, 1167 (1st Cir. 1978). It is natural for tribunals to chaperone litigants' settlement negotiations as cases advances toward "adjudicatory proceedings." G.L. c. 7, § 4H, 1st para. But unlimited patience toward such negotiations would come "at the expense of [the tribunal], its schedule . . . the other parties, and the orderly administration of justice." *United States v. Mitchell*, 777 F.2d 248, 258 (5th Cir. 1985). *See Commonwealth v. Fernandez*, 480 Mass. 334, 341 (2018).

An evidentiary hearing is not "fair" unless the parties have been afforded sufficient time to prepare for it. *See Ott v. Board of Registration in Med.*, 276 Mass. 566, 573-74 (1931). The hearing scheduled for February 2023 satisfied this requirement. It came five months and two postponements after the dates that the parties originally had proposed. The parties did not suggest in February 2023 that their trial preparations were incomplete. A third postponement thus would not have been warranted. And a tribunal's broad discretion to deny continuances in the interests of justice and economy would evaporate if parties could forgo non-continued trials only to later revive their cases and seek new trial dates. *See generally Fernandez*, 480 Mass. at 341; *Ott*, 276 Mass. at 573-74; *Commonwealth v. Chavis*, 415 Mass. 703, 712 (1993); *Commonwealth v. Haas*, 398 Mass. 806, 814 (1986); *Commonwealth v. Wright*, 11 Mass. App. Ct. 276, 278-79 (1981).

Upon the arrival of the February 2023 hearing dates, the petitioners faced a choice. On the one hand, they could litigate the merits of their appeal. DALA had reserved for that purpose

four days of hearing-room availability and four days of a magistrate's time. On the other hand, the petitioners could forgo the opportunity to conduct a hearing and hope for a better result through an agreed-upon settlement. The February 3, 2023 order presently these options starkly. The petitioners opted for the settlement process. That choice was legally permissible, very possibly reasonable, and certainly knowing. The petitioners' buyers' remorse is not a proper basis for reviving their appeal.

If the foregoing considerations were not enough, even the motion to vacate does not necessarily indicate that the petitioners now wish to try their case. The motion's objectives revolve around recalibrating the parties' measures of leverage for purposes of further negotiations. Neither the motion nor the parties' prior conduct provide reason to believe that, come July, the parties would be ready for a hearing, file the requisite prehearing papers, or even alert the tribunal in the event that a settlement has been reached.[1] Neither the speediness component nor the fairness component of DALA's mandate counsels in favor of additional proceedings in this appeal.

The petitioners are not necessarily without options. When they relinquished their opportunity to conduct an evidentiary hearing, they did so for the purpose of pursuing a settlement. That course remains open to them. *See United States v. Cejas*, No. 03-cv-1720, 2005 WL 272960, at *2 (D. Conn. Feb. 3, 2005). Principles of both private and public law may constrain the division to negotiate fairly toward an appropriate final agreement. And depending on the circumstances, not-yet-executed preliminary agreements may themselves bind the parties. *See Duff v. McKay*, 89 Mass. App. Ct. 538, 543-46 (2016); *Targus Grp. Int'l, Inc. v. Sherman*, 76

[1] This order refrains from cataloguing the assortment of missed deadlines and other failures of diligence that have characterized this appeal.

Mass. App. Ct. 421, 429 (2010); *Stembel v. Gutierrez*, No. 06-cv-127, 2008 WL 11509684, at *2 (D. Md. Aug. 21, 2008). In any event, the parties have not sought to give the force of a DALA decision to any preliminary or final agreement. Such agreements and any accompanying negotiations thus exceed the scope of this non-pending appeal.

III

In view of the foregoing, it is hereby ORDERED that the petitioners' unopposed motion to vacate dismissal is DENIED.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate