



Issue Date: 25 February 2008

Case No.: **2007-SOX-00051**

In the Matter of:

**MICHAEL PULASKI,
Complainant,**

v.

**NRG ENERGY, INC.,
DAVID CRANE, ROBERT FLEXON,
DENISE WILSON, AND
MICHAEL R. BRAMNICK,
Respondents.**

**DECISION AND ORDER GRANTING COMPLAINANT'S REQUEST FOR
WITHDRAWAL OF HIS CLAIM AND
DISMISSING THE COMPLAINT WITH PREJUDICE**

The above-captioned matter arises under the employee protection provisions of Title VIII of the Sarbanes-Oxley Act of 2002 (the "Act" or "SOX"), Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Public Law 107-204, codified at 18 U.S.C. § 1514A. Actions brought under these statutes are governed by the rules set forth in 29 C.F.R. Part 1980, as well as the general procedural rules set forth in 29 C.F.R. Part 18. Complainant filed a complaint on October 26, 2006, alleging that Respondents passed him over for promotion and terminated his employment in violation of SOX. On May 18, 2007, Complainant filed objections to the Secretary's April 16, 2007, Findings and Order, and requested a hearing before the Office of Administrative Law Judges ("OALJ").

On June 18, 2007, I held a pre-hearing telephone conference to discuss pre-hearing matters and to schedule the hearing. Complainant was represented by counsel,¹ and Respondents were represented by Mr. Michael Canavan. During the call, deadlines for discovery and dispositive motions were established and the hearing was set for January 15, 2008, through January 18, 2008, in Trenton, New Jersey. On June 26, 2007, I issued a Notice of Hearing and Memorandum of Conference Call. The

¹ On September 13, 2007, I issued an order granting counsel for Complainant's August 3, 2007, Motion to Be Relieved as Counsel. Complainant is currently *pro se*.

Notice contained the scheduling order determined by the parties during the June 18, 2007, call.

I held a second conference call with Complainant and counsel for Respondents on November 6, 2007, to address discovery issues and pending motions. On January 8, 2008, I issued an order memorializing the conference call and revising the discovery and motion practice schedule and the hearing dates. The January 8, 2008, order also addressed Complainant's intention to withdraw his complaint as expressed in letters received on December 13 and 19, 2007. In the order, I found that Complainant's request to withdraw his complaint was too unclear to ensure that Complainant was making a knowing withdrawal or that he was aware of the possible consequences. The order directed Complainant either to provide sufficient documentation showing that he had filed his complaint in federal district court or to submit a request for waiver in accordance with 29 C.F.R. § 1980.111(c). The order stated that Complainant's request for waiver must demonstrate an understanding that withdrawal of this complaint would render the Secretary's findings unopposed and final and that any subsequent federal SOX complaint he might later attempt to file against Respondents related to his employment would be barred as untimely. The order also stated that if Complainant did not take either of the two options to withdraw, he would remain fully engaged in this case.

In a letter received January 24, 2008, Complainant responded to the January 8, 2008, order by stating, in pertinent part:

As outline in [the January 8, 2008 order] I am submitting this request for waiver in accordance with 29 C.F.R. § 1980.111(c), and I understand that this request will make the Secretary's findings unopposed and final. I also understand that that [sic] any subsequent federal SOX complaint I may latter [sic] attempt to file with regards to my employment with NRG would be barred as untimely.

As correctly cited in his January 24, 2008, letter, Complainant may withdraw his objections to the Secretary's Findings under 29 C.F.R. § 1980.111(c). This section provides the following:

At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether the withdrawal will be approved.

Complainant's request to withdraw his complaint is timely as the findings and order have not been issued by the undersigned in this matter. In addition, Complainant's request is made knowingly because he clearly states the consequences of withdrawal. Therefore, I find Complainant's request for withdrawal to be in accordance with 29 C.F.R. § 1980.111(c).

Respondents' counsel did not file objections to Complainant's request to withdraw his complaint. However, in a letter received January 29, 2008, Respondents requested that any order granting withdrawal contain "a provision requiring [Complainant] to turn over all e-mails (whether in electronic or paper form), documents, computer files and any other item in his possession that is related to his former employment with NRG." Respondents asserted that Complainant's failure to comply with discovery prevented Respondents from determining what NRG materials Complainant possesses. According to Respondents, Complainant had no right to retain NRG property.

In a letter submitted February 5, 2008, Complainant responded to Respondents' allegations as to NRG property. Complainant argued that Respondents have provided no proof that the materials in Complainant's possession are NRG's property. Complainant indicated his belief that the materials at issue evidence potential federal crimes and his intention to retain the materials in the event of a future investigation. Complainant also expressed his intention to turn over the information to regulatory authorities. Finally, Complainant argued that Respondents' request to turn over the originals, and not copies, of the disputed materials is beyond the proper scope of discovery.

Respondents submitted a letter on February 13, 2008, in reply to Complainant's February 5, 2008, letter. Respondents again argued that Complainant is in unlawful possession of NRG property and requested a conference call to address the issue.

After careful consideration of the arguments of the parties concerning the NRG-related materials allegedly in Complainant's possession, I find that OALJ is not the proper forum for determining whether the disputed materials are NRG's property or are improperly retained by Complainant. Since I have found that Complainant has submitted a knowing, voluntary, and timely withdrawal of his controversy to the Secretary's findings – and I am granting his request for this withdrawal -- there is no longer an obligation to provide discovery in this case. My approval of this withdrawal terminates my jurisdiction over this matter. Furthermore, this case concerned whether Complainant was retaliated against in violation of SOX and not whether Complainant improperly or illegally retained property belonging to his employer. Respondents may seek remedies for any violation of an employment contract or for theft of property in the proper state forum. Therefore, Respondents' request for any provision or order relating to the return of NRG materials is denied.

In consideration of the above factors, I grant Complainant's request to withdraw his claim.²

² The dismissal of Complainant's complaint renders moot Respondents' pending Motion to Dismiss, filed October 4, 2007.

ORDER

It is hereby ordered that Complainant's request to withdraw his complaint is GRANTED and the above-captioned complaint is DISMISSED WITH PREJUDICE.

A

WILLIAM S. COLWELL
Associate Chief Judge

Washington, D.C.
WSC:rg

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 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. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).