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ISSUE DATE: 02 AUGUST 2010

OALJ CASE №: 2009-SOX-00029

OSHA CASE №: 8-0740-08-006

In the Matter of:

JOHN H. MALLORY,
Complainant,

vs.

JPMORGAN CHASE & CO. and
JPMORGAN CHASE BANK, N. A.,
Respondents.

ORDER SETTING POST-TRIAL HEARING, DENYING CERTIFICATION UNDER 29 C.F.R. § 18.29(B), AND CLARIFYING STANDARD FOR DISMISSAL UNDER 29 C.F.R. § 18.6(D)(2) AND 29 C.F.R. § 18.29(A)

The Complainant and the Respondents (JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A., hereinafter the Bank), participated in a telephonic post-trial conference on Tuesday, July 27, 2010, to discuss and schedule a hearing in Denver on a motion for sanctions the Bank filed. Using the alias of Dr. Thomas Jones, the Complainant sent emails to the Bank while the case was pending in which he claimed that his direct supervisor, one of the Bank's key witnesses, had admitted to perjury. The supervisor never said that to the Complainant, or so far as the evidence shows, to anyone. The emails also included documents that were subject to a protective order entered in this case. The Complainant's authorship of the emails was established in an order dated June 25, 2010.[1]

During the conference, the parties discussed:

1. whether sending the emails bears on to the outcome of this matter;

2. whether an additional hearing on the subject of the Complainant's masquerading emails should be set, the identities of the witness who

[1] Order Establishing Complainant's Authorship of E-Mails, Denying the Admission of the Complainant's Deposition, Returning Sealed Psychological Evaluation and Setting Agenda for Post-Hearing Conference, 1.

would testify, and what discovery should be done before any hearing convened;

3. whether the Complainant's conduct could be certified to the U.S. District Court in Denver under C.F.R. § 18.29(b) for that court to impose sanctions; and

4. what standard applies in considering whether to grant the Bank's motion to dismiss the claim for misconduct, one of the sanctions potentially available here under 29 C.F.R. § 18.6(d)(2) and 29 C.F.R. § 18.29(a).

Another day of hearing is required for the parties to fully present their positions on the sanctions motion. Neither the Sarbanes-Oxley Act nor the rules of this forum authorize certification of the Complainant's acts to the U.S. District Court for the District of Colorado. This order also clarifies the legal standard that will be applied to the Bank's motion to dismiss the employment protection claim for the Complainant's misconduct.

I. Post-Trial Hearing for Additional Testimony

A post-trial hearing will be held to take proof bearing on the "Dr. Jones" emails, the Bank's response to what they alleged, and what motivated the Complainant to send them. The hearing will convene at 9:00 a.m. local time on October 5, 2010, at the U.S. Bankruptcy Court at 721 19th Street, Denver, Colo. 80202-2508. Following the hearing, the Bank will have 14 days after it receives the hearing transcript to file its post hearing brief on its sanctions motion. The Complainant may answer 14 days after the Bank's brief is served, and the Bank may reply within 10 days after the Reply is served. Unless dismissal is granted, the parties will have 30 days from the date of the disposition of the sanctions motion to submit simultaneously proposed findings of fact and conclusions of law on Sarbanes-Oxley Act claim for employment protection. The timing and dates for these briefs might be modified after the hearing.

II. Certification to the U.S. District Court under 29 C.F.R. § 18.29(b)

The Bank has moved to certify the Complainant's actions to the U.S. District Court for the District of Colorado under 29 C.F.R. § 18.29(b), to impose sanctions for misconduct that are beyond an administrative law judge's power. The Complainant contends § 18.29(b) is inapplicable because neither the Sarbanes-Oxley (SOX) employment protection provision for whistleblowers,[2] nor any other part of the SOX statute, nor the portion of the AIR 21 statute SOX incorporates by reference[3]

[2] 18 U.S.C. § 1514A.

[3] 49 U.S.C. § 42121(b).

empower district courts to impose the sanctions the Bank seeks. Three decisions that have involved administrative law judges, the Administrative Review Board, and district courts appear to support the Bank's position; a closer review of them shows the district court is not the proper forum to address the misconduct.

An administrative law judge who certifies a matter ought to do more than recount facts and drop the problem on a district court's doorstep. Any certification ought to suggest a remedy, but I doubt a district court could do anything. The Bank points to § 18.29(b) of the rules of this forum as the authority to certify facts. The regulation says:

> "[i]f any person in proceedings before an adjudication officer disobeys or resists any lawful order or process . . .the administrative law judge responsible for the adjudication, *where authorized by statute or law*, may certify the facts to the Federal District Court having jurisdiction . . . to request appropriate remedies."[4] (emphasis supplied)

This regulation is procedural—it implements a certification some other statute authorizes. But the motion papers identify no statute the regulation would implement here. The statute the certification regulation implements most often, although not exclusively, is § 27(b) of the Longshore and Harbor Workers' Compensation Act.[5]

The Bank first argues the decision in *Windhauser v. Trane*[6] shows the Board expressly or implicitly approved when an administrative law judge (ALJ) certified a matter to the U.S. District Court for sanctions without any specific "authoriz[ation] by statute or law."[7] This assertion misunderstands the facts, procedural posture, and the holding in the case. The employer in *Windhauser* disregarded the preliminary order for reinstatement the Assistant Secretary entered after the OSHA completed its investigation of a Sarbanes-Oxley discrimination complaint, but before any trial-type hearing was held. Thereafter it obdurately refused to obey the reinstatement order after the ALJ turned down its motion for a stay.[8] Faced with the employer's contumacious disregard of its obligation to reinstate the employee, the ALJ fined the employer.[9] The ALJ concluded the SOX statute did not

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[4] 29 C.F.R. § 18.29(b).

[5] 33 U.S.C. § 927; s*ee, e.g.*, *A–Z International v. Phillips*, 179 F.3d 1187 (9th Cir. 1999).

[6] ARB Case No. 05-127, ALJ Case No. 2005-SOX-00017, slip op. at 1 (ARB Oct. 31, 2007)

[7] *Windhauser* was one of the cases the Bank's counsel cited in the July 27, 2010, telephonic Post-Trial hearing as supporting the Respondent's position.

[8] *Windhauser*, ARB Case No. 05-127, at 2.

[9] *Id.*

require the employee to go to district court to enforce the employer's duty to reinstate before he fined the employer for its intransigence.[10]

The "sole issue before the Board [was] whether the ALJ erred by imposing monetary sanctions against [the employer] for failing to reinstate [the complainant]."[11] The Board overturned the fine, relying on a number of earlier decisions that concluded the Secretary imposes monetary sanctions only when statutes specifically authorize them.[12] But the reinstatement order was enforceable. The Board pointed out both § 18.29(b) and the implementing SOX regulation[13] recognize the district court, not the Secretary or the Department's ALJ, is the entity authorized to force the employer to comply with the Secretary's reinstatement order.[14]

More than regulations are involved. The text of the SOX statute assigns the district courts to enforce whatever relief the Secretary grants. The assignment is oblique, for the SOX Act's the whistleblower protection provision incorporates the procedures established in a separate whistleblower protection statute that relates to air carrier safety, the AIR 21 Act.[15] AIR 21 explicitly assigns the enforcement of Secretarial orders to district courts.[16] That enforcement régime therefore applies to the enforcement of Secretarial orders in Sarbanes-Oxley whistleblower protection litigation too.[17] The ALJ in *Windhauser* should have certified the matter to the district court to force the employer to obey the reinstatement order, rather than impose an unauthorized fine.

The district courts enforce just two types of relief in the Secretary's SOX adjudications: any preliminary reinstatement orders and the final order. District courts are not tasked with general supervision of the Secretary's adjudications, by enforcing discovery obligations or punishing a party's violations of an ALJ's protective order.

The Bank next claims *Sommerson v. Mail Contractors of America*,[18] supports its position that the district court can impose sanctions for misconduct in a proceeding before an ALJ. At first blush, the decision lends credence to that

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[10] *Id.* 2–3.

[11] *Id.* at 1.

[12] *Id.* at 3–5.

[13] 29 C.F.R. § 1980.113.

[14] *Windhauser*, ARB Case No. 05-127, at 3–4.

[15] 49 U.S.C. § 42121.

[16] 49 U.S.C. § 42121(b)(6)(A).

[17] 18 U.S.C. § 1514A(b)(2(A).

[18] ARB Case No. 03-055, ALJ Case No. 02-STA-044, 2003 WL 22855212, at *1 (ARB Nov. 25, 2003).

conclusion, but on a closer reading the case is distinguishable. *Sommerson* was a whistleblower protection claim a truck driver brought against his employer under the Surface Transportation Assistance Act (STAA).[19] The employer moved for a protective order after the employee anonymously sent threatening emails to the employer's lawyer and to witnesses, and set up websites directed at them, which the employer claimed was an attempt to intimidate and coerce the witnesses.[20] The ALJ learned the U.S. District Court for the Middle District of Florida previously had issued a consent decree in other litigation as a result of the employee's unacceptable conduct an earlier proceeding before the Office of Administrative Law Judges, and the conduct the employer complained about appeared to violate the district court's decree.[21] The ALJ entered an Order to Show Cause why the truck driver's complaint shouldn't be dismissed for misconduct, and certified the issue to the district court to impose sanctions for the employee's violation of the district court's earlier order.[22] Because the truck driver's response ignored the substance of the Order to Show Cause, the ALJ dismissed the complaint and certified the conduct to the district court.[23]

When the Board considered the automatic appeal that arises in STAA matters, it upheld the ALJ's decision.[24] The Board did refer to a portion of the ALJ's Recommended Decision and Order that mentioned 29 C.F.R. § 18.29(b)'s certification language,[25] but neither the ALJ nor the Board addressed the jurisdiction of district courts under § 18.29(b), nor did either rely upon the regulations to reach their conclusions. The U.S. District Court already had jurisdiction to impose sanctions, because the truck driver's misconduct violated that court's own consent decree. Nothing of the sort is involved here.

The Bank also believes *Childers v. Carolina Power and Light Co.*,[26] supports to its position. In *Childers* the Board ruled that ALJs may issue subpoenas in environmental whistleblower claims brought under 42 U.S.C. § 5851, even though the statute does not expressly grant subpoena power.[27] No certification to a district court was involved.

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at *1–*2.

[23] *Id.* at *2.

[24] *Id.* at *3.

[25] *Id.* at *2.

[26] ARB Case No. 98-077, ALJ Case No. 97-ERA-32, slip op. at 1 (ARB Dec. 29, 2000).

[27] *Id.* at 5.

The Board concluded administrative subpoenas are essential tools in the adjudicative role of administrative agencies.[28] It declined to apply the "express authorization rule" because do so would thwart the rule's purpose.[29] "Express authorization' is a judge-made concept employed when application of traditional rules of statutory interpretation would result in highly unusual departures from important legal norms."[30] The Board thoroughly discussed the purpose behind the express authorization rule; the judicial and legislative history of the legislative subpoena; and how its history differed from, and was not tied to, contempt powers. It also emphasized that requiring explicit statutory text to authorize an ALJ to issue a subpoena would lead to a ridiculous contradiction, since the Supreme Court already had determined administrative agencies had the power to issue warrants and ALJs had the power to order witnesses to appear.[31]

A procedural regulation that allows referrals to the district court "where authorized by statute or law," implies something broader than if the regulation limited referrals to those authorized "by statute." This distinction supports the Board's decision in *Childers* that treats subpoena power as something implied in the authority to conduct hearings, *i.e.,* something authorized by law even if not by the words of a statute. But no legal principle permits a government agency or private litigant to file an action in district court based on an inference. Aside from the Department of Justice, few federal agencies may initiate suits in the district courts. The Secretary's authority to go directly to district court to enforce preliminary reinstatement orders and final orders entered on complaints made under the AIR 21[32] and SOX[33] statutes is rooted in statutory text, not inference. Equally specific statutory authority is needed to take a sanctions matter to district court.

The Bank also relies on language the Board used in *Childers,* as it explained why legislative subpoenas don't require an explicit statutory authorization—that there is a difference between the terms "authorized by law" and "authorized by explicit statutory text." The former, as used in the Administrative Procedure Act (APA), has other legally significant purposes: to limit an agency's efforts to expand its adjudicatory authority beyond what Congress granted.[34] The Board explained

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[28] *Id.* at 5.

[29] *Id.* at 5–6.

[30] *Id.* at 7.

[31] *Id.* at 8–14.

[32] 49 U.S.C. § 42121(b)(5) (" . . .[T]he Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order.").

[33] 18 U.S.C. § 1514A(b)(2(A) ("An action under [18 U.S.C. § 1514A](1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.").

[34] The ARB explained:

> "Authorized by law" is clearly not the same as "authorized by explicit statutory text." Nor do the words "law" and "statute" represent

why orders to appear (which no party doubted the ALJ could issue) and subpoenas had the same legal effect. It discussed § 18.29(a) and (b) contextually, suggesting neither subsection required an explicit statutory provision invoking it.[35] The Board assumed ALJs had power under those regulations without looking to the underlying statutory authorizations.[36] Section 18.29(b) includes the phrase "where authorized by statute or law," but doesn't mention authorization "by explicit statutory text."[37] The Board's analysis of similar language in the APA might suggest § 18.29(b) itself authorizes orphan certifications, *viz.,* those made with no statutory basis that rely on the regulation alone. That interpretation of § 18.29(b) reads the words "where authorized by statute or law," out of the regulation—or treats them as surplusage—in contravention of principles of statutory construction and interpretation as one district court has noted. *See* discussion of *Jackson v. Smedema Trucking, Inc.*, *infra*. Additionally, the Board's discussion in *Childers* is dicta; the Board's discussion of § 18.29(b) is merely illustrative.

Drawing such a dramatic conclusion—that *Childers* demonstrates the Board would approve certifications under § 18.29(b) that lack any statutory authorization—is untenable.

Few decisions address an administrative law judge's certification authority directly. As the Complainant points out, one district court recently emphasized that the phrase "where authorized by statute or law" in § 18.29(b) "[p]resumably . . . does not mean 'authorized by this regulation.' If that were the case, there would be no reason to include the phrase in the regulation."[38] That administrative law judge had relied on § 18.29(b) to certify Rule 11 violations that occurred during the adjudication of a whistleblower protection claim a long-haul trucker had filed under the STAA.[39] The district court declined to act, because no party could point to a statute that authorized the Secretary of Labor to certify misconduct during the

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> interchangeable concepts. BLACK'S LAW DICTIONARY 889, 1420 (7th ed. 1999). And the term "law" most emphatically cannot stand in for "express statutory text," as the Seventh Circuit has pointed out: "[t]he APA requirement of legal authorization does not clearly require Express [sic] statutory authority. * * * [S]tricter standards requiring express legislative authorization have only been applied to novel assertions of agency power." *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060, 1066–67 (7th Cir. 1978).
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> *Id.* at 13.

[35] *Id.* at 14.

[36] *See id.*

[37] 29 C.F.R. § 18.29(b).

[38] *Jackson v. Smedema Trucking, Inc.*, 536 F. Supp. 2d 1009, 1010 (W.D. Wis. 2008). This is precisely the problem with the Bank's expansive reading of *Childers* as discussed above.

[39] *Id.* at 1009.

course of STAA adjudications to the district courts for punishment. All they could find was a narrowly drawn provision that gave the district courts jurisdiction to decide the merits of STAA claims if the Secretary of Labor failed to decide them promptly.[40]

The decision from the Western District of Wisconsin isn't controlling precedent,[41] but illustrates the central problem with the Bank's request: neither § 806 of the Sarbanes-Oxley Act, nor the sections of the AIR 21 Act that § 806 incorporates, permit an administrative law judge to certify cases to a district court on any of the grounds listed in 29 C.F.R. § 18.29(b).[42]

Congress does explicitly grant presiding officials in the Department of Labor authority to certify contumacious conduct during agency adjudications to the U.S. District Court for a remedy. Then § 18.29(b) applies.[43] An example is § 27(b)[44] of the Longshore and Harbor Workers' Compensation Act (Longshore Act) that provides:

> If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner or Board shall certify the facts to the district court having jurisdiction . . . which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the

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[40] *Id.* at 1010.

[41] *RLJCS Enterprises, Inc. v. Professional Benefit Trust Multiple Employer Welfare Benefit Plan and Trust*, 487 F.3d 494, 499 (7th Cir. 2007) ("[D]ecisions of district judges have no authoritative effect."); *Hart v. Massanari,* 266 F.3d 1155, 1163 (9th Cir. 2001) ("[M]ost decisions of the federal courts are not viewed as binding precedent. No trial court decisions are . . . .").

[42] *See* 18 U.S.C. § 1514A (section 806 of the Sarbanes-Oxley Act), which incorporates portions of the AIR 21 Act [49 U.S.C. § 42121(b)] by reference.

[43] *A–Z International v. Phillips*, 179 F.3d 1187 (9th Cir. 1999) (*Phillips* I); *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4, 8 (BRB 2003).

[44] 33 U.S.C. § 927(b).

> doing of the forbidden act had occurred with reference to the process of or in the presence of the court.[45]

The language of 29 C.F.R. § 18.29(b) nearly quotes this statute. Certifications to the district courts in Longshore Act adjudications are "authorized by statute or law." Not so with SOX. Research has revealed no analogous certification provision, nor has the Bank pointed to any statute that § 18.29(b) would implement.

Federal courts have interpreted statutes that do authorize certifications under § 18.29(b) narrowly. Returning to the example of the Longshore Act, the Ninth Circuit has held that § 27 of that Act empowers district courts to accept only certifications of the kind the statute describes. In *A–Z International v. Phillips* (*Phillips II*),[46] the ALJ found the claimant had received disability payments pursuant to one of the Longshore Act's extensions[47] by filing a fraudulent claim. The ALJ certified these facts to the district court and recommended several monetary sanctions.[48] The employer included the certification with the complaint it filed against the claimant in district court, and sought a default judgment when the claimant failed to respond.[49] After the district court dismissed the complaint with prejudice because it found no contempt was involved, the employer appealed to the Ninth Circuit.[50] Emphasizing that federal courts have jurisdiction only when it is affirmatively granted,[51] the Ninth Circuit raised on its own the jurisdictional issue whether § 27 authorized a district court to punish the filing of a fraudulent claim. The ALJ thought the fraudulent filing qualified as a "disobedience to lawful process" that the district court could remedy.[52] After discussing statutory construction, legislative history, and plain meaning, the Ninth Circuit concluded § 27 didn't reach the filing of a fraudulent claim, so the district court should have dismissed the complaint for lack of subject matter jurisdiction.[53]

This appellate decision suggests that even where a statute permits certifications, the relief available in district court is closely tied to what Congress

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[45] *Id.*

[46] 323 F.3d 1141, 1143 (9th Cir. 2003).

[47] The Outer Continental Shelf Lands Act extends the benefits of the Longshore Act to those who are neither stevedores nor harbor workers. 43 U.S.C. §§ 1331–1356.

[48] The sanctions the ALJ suggested that the district court require the claimant to repay the disability compensation benefits he'd gotten, the value of medical care he'd received, plus pay the employer's attorneys' fees and costs. *Id.* at 1144.

[49] *Id.*

[50] *Id.* at 1144–45.

[51] *Id.* at 1145 (relying on *Stevedoring Servs. of Am., Inc. v. Eggert*, 953 F.2d 552, 554 (9th Cir. 1992)).

[52] *Id.* at 1146.

[53] *Id.* at 1147.

authorized. An administrative agency can't enlarge the jurisdiction of the Article III courts with an expansive regulation that authorizes the courts to assist agency adjudicators by lending their coercive powers in ways Congress never permitted.

In no case the Bank cited, including *Childers*, did the Board address the jurisdictional requirements of § 18.29(b). As the district judge in *Jackson v. Smedema Trucking* pointed out, administrative agencies have no power to create or expand jurisdiction for Article III courts, a power reserved to Congress.[54] I can find no case to date in which an Article III court considered and concluded that Congress gave the courts jurisdiction to remedy misconduct that occurred course of an adjudication unless a specific statute granted that jurisdiction. Other than *Jackson v. Smedema Trucking, Inc.*, and cases certified under § 18.29(b) pursuant to 33 U.S.C. § 927(b) (§ 27 of the Longshore Act), the only federal court case specifically discussing 29 C.F.R. § 18.29(b) is *In re Willy*, a Fifth Circuit environmental whistleblower case involving the enforcement of a discovery order.[55] The Fifth Circuit declined to decide whether certification under 29 C.F.R. § 18.29(b) required underlying statutory authorization.

> [The complainant] has concluded, however, that no statute confers jurisdiction upon the United States District Courts to review and enforce administrative discovery orders of the sort presented by this case. While the Secretary does not dispute this claim, [the respondent] states that, "at least some of these statutes may authorize a district court to consider the Petitioner's claim." If so, the claim might be presented to the district court, but, for the present, we assume, without deciding, that the provision of the regulation authorizing resort to the district courts is inapplicable and that the district courts lack jurisdiction to resolve the privilege claims asserted by Coastal.[56]

In summary, the Bank may be able to show that the Complainant violated a "lawful" protective order. That would seem to support a certification to the district court to punish the misconduct, using 29 C.F.R. § 18.29(b). But on closer analysis, the regulation isn't enough. The Bank relies on dicta and distinguishable cases. The Complainant has articulated a cogent reason why I should not certify this case to the U.S. District Court to impose the sanctions the Bank seeks: I have no statutory

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[54] *Jackson v. Smedema Trucking, Inc.*, 532 F. Supp. 2d 1099, 1010 (2008) (citing *Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc.*, 552 U.S. 148, 164–65 (2008)).

[55] 831 F.2d 545, 549 (5th Cir. 1987).

[56] *Id.* (citing 29 C.F.R. § 18.29(b))(footnotes omitted).

basis to send the matter to district court. The Bank's motion to certify cannot be granted, no matter what it may prove at the reconvened hearing in Denver.

III. Dismissal Under 29 C.F.R. § 18.6(d)(2) and 29 C.F.R. § 18.29(a)

The Bank moved to dismiss this whistleblower protection claim under the broad powers delegated to administrative law judges in 29 C.F.R. § 18.29(a). They rely on 29 C.F.R. § 18.6(d)(2) too, that authorizes an administrative law judge to "[r]ule . . . that a decision of the proceeding be entered against" a party who defies an order.[57] The sanctions that § 18.6 describes, in context, are ones imposed for violating discovery orders. Arguably a protective order is a type of discovery order the regulation could reach. While I will not decide the Bank's motion until this issue had been heard and briefed, the legal standard that applies to the motion is identifiable. The parties agree, after reviewing the pertinent case law, that the Board applies a five-factor test to evaluate whether a sanction as severe as dismissal is appropriate. The test considers:

> (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the party, (4) whether the party was warned in advance that dismissal of the action could be ordered as a sanction, and (5) the efficacy of lesser sanctions.[58]

This case arises in the Tenth Circuit. The Tenth Circuit employs an almost identical five-factor test.[59] Therefore, I will apply the five-factor test when evaluating the Bank's request for dismissal.

So Ordered.

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[57] 29 C.F.R. § 18.6(d)(2)(v). See the argument at Respondents' Supplemental Motion at 8.

[58] Respondents' Supplemental Motion at 9 (citing *Howick v. Campbell-Elwald Co.*, ARB Case Nos. 03-156, 04-065, ALJ Case Nos. 2003-STA-00006, 2004-STA-00007, slip op. at 8 (ARB Nov. 30, 2004)).

[59] *E.g.*, *Garcia v. Berkshire Life Ins. Co. of America*, 569 F.3d 1174, 1179 (10th Cir. 2009) ("While recognizing that there is no rigid test for determining when such a sanction is appropriate, we have suggested that a district court ought to evaluate five factors before imposing a dismissal sanction: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions.") (citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920–21 (10th Cir. 1992)).

William Dorsey
ADMINISTRATIVE LAW JUDGE

San Francisco, California