



Issue Date: 27 January 2010

OALJ Case No.: 2009-SOX-00054
OSHA File No.: 2-4173-07-024

In the Matter of

LEVAN SURGULADZE,
Complainant,

v.

UBS INVESTMENT BANK,
Respondent.

ORDER OF DISMISSAL

Background

On June 24, 2009, the Office of Administrative Law Judges (OALJ) received a filing from the attorney for Levan Surguladze entitled “Appeal of Constructive Denial by Assistant Secretary Of Labor of SOX Whistleblower Complaint and Request for hearing in UBS Investment Bank/Surguladze/2-4173-07-024.” This filing alleged that the Regional Administrator for the New York office of the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) had failed to timely issue a final determination in regard to Mr. Surguladze’s Sarbanes-Oxley Act whistleblower complaint, initially filed in April 2007 and amended in November 2007. Thus, the Complainant sought a hearing before an administrative law judge on the theory of constructive denial of the complaint by OSHA.

The matter was docketed on June 26, 2009 for the limited purpose of determining whether grounds exist for a finding that a constructive denial of the Complainant’s complaint due to delay in the OSHA investigation compels docketing of the matter for a hearing on the merits before an administrative law judge. On July 30, 2009, the matter was held in abeyance because of assurances from the Regional Administrator that a priority had been placed on completion of the OSHA investigation. Subsequent status reports on August 31, 2009, September 29, 2009 and November 4, 2009 indicated that progress toward completion of the investigation had been made. The Complainant has not, to date, renewed his request for an immediate hearing before OALJ.

On January 8, 2010, noting that I had not received any further information on the status of the matter since November 4, 2009, I issued an order directing a status report on the progress of the OSHA investigation. I noted that given the circumstances, I was inclined to dismiss the instant matter without prejudice.

On January 12, 2010, the Regional Administrator filed a report stating that the regional office had completed its investigation and that the matter was pending review by the OSHA national office. No other party filed a report.

Discussion

In *Love v. United States Environmental Protection Agency*, 2008-CAA-5 (Aug. 27, 2008), I found that the relevant statutory and regulatory schemes clearly contemplate an investigation and determination by OSHA prior to a hearing before an ALJ in a whistleblower case. I found that the docketing of a whistleblower case before OALJ for hearing prior to OSHA's issuance of a determination is an extraordinary procedure, and therefore, restraint must be exercised when considering a claim of constructive denial.

Moreover, the instant matter arises under the Sarbanes-Oxley Act whistleblower provision. That provision includes a potential remedy for undue delay by the Department of Labor in the form of filing a complaint in the appropriate federal district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint. *See* 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114.

Based on the Regional Administrator's recent report that the regional office has completed its investigation, it appears that issuance of the Secretary's findings in this matter is imminent. Approximately seven months have passed since the Complainant sought a ruling of constructive denial of the complaint. To date, the Complainant has been content to have OALJ monitor the progress of the OSHA investigation¹ rather than renew his request for an immediate ALJ hearing.

Based on these circumstances, the Complainant's request for docketing of this matter for a hearing is **DENIED** without prejudice.

SO ORDERED.

A

JOHN M. VITTON
Chief Administrative Law Judge

¹ OALJ's relationship with OSHA in whistleblower proceedings is adjudicatory rather than supervisory. My requests for status reports were only intended to inform my decision whether to grant the request for a finding of a constructive denial. Those requests should not be viewed as a procedure for OALJ to direct the progress of an OSHA investigation.