In the Matter of:

THOMAS CHILDS,	**ARB CASE NO. 14-043**
COMPLAINANT,	**ALJ CASE NO. 2013-CFP-004**
v.	**DATE: October 29, 2015**
SENTE MORTGAGE,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
    Thomas Childs, *pro se*, **Arlington, Texas**

For the Respondent:
    Thomas A. Nesbitt, Esq. and Rachel L. Noffke, Esq.; *Deshazo & Nesbitt L.L.P.,* **Austin, Texas**

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge;* **Joanne Royce,** *Administrative Appeals Judge;* **and Luis A. Corchado,** *Administrative Appeals Judge.*

FINAL DECISION AND ORDER

        This case arises under the Consumer Financial Protection Act (CFPA), 12 U.S.C.A. § 5567(a) (Thomson Reuters 2014), as implemented by regulations codified at 29 C.F.R. Part 1985 (2014).   Thomas Childs filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his former employer, Sente Mortgage, terminated his employment in violation of the CFTA. OSHA dismissed the complaint on August 14, 2013. Childs objected and requested a hearing with the Office of Administrative Law Judges. After an evidentiary hearing, an Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.)

dismissing the claim on February 27, 2014. Childs petitions for review, challenging the ALJ's dismissal of the claim. We affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB) the authority to issue final agency decisions under the CFPA and its implementing regulations at 29 C.F.R. Part 1985.[1] The ARB reviews the ALJ's factual findings for substantial evidence and conclusions of law de novo.[2]

BACKGROUND

The facts referred to in this decision are based on the parties' stipulations, the few findings of fact the ALJ made, reasonable inferences from those findings,[3] and uncontroverted evidence of record. Childs began his employment with Respondent on May 2, 2012, with the acknowledgment that Respondent would sponsor the reinstatement of his mortgage broker license. The Texas Department of Savings and Mortgage Lending reactivated his license on May 24, 2012. Respondent informed Childs by e-mail on August 28, 2012, that it was placing him on a performance improvement plan (PIP), and he signed the PIP on September 7, 2012. On September 18, 2012, Childs attempted to retract his acknowledgement of the PIP and requested that Respondent create a new position for him that was not based on a commission for his compensation. Childs did not meet the PIP's production requirements, and Respondent terminated his employment on September 25, 2012.

DISCUSSION

The CFPA provides for employee protection from retaliation because the employee has engaged in protected activity pertaining to the offering or provision of consumer financial products or services. This is a comprehensive act that enumerates eighteen federal consumer financial laws that are to be implemented and enforced by the Consumer Financial Protection

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[1] Secretary's Order No. 2-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69,378; 69,379 (Nov. 16, 2012); 29 C.F.R. § 1985.110(a).

[2] 29 C.F.R. § 1985.110(b); *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 2 (ARB Nov. 5, 2013).

[3] *See Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (reasonable inferences may be drawn by an appellate body reviewing a trial or hearing court's findings of fact); *see also Jackson v. Comm'r,* 864 F.2d 1521, 1524 (10th Cir. 1989) (citations omitted).

Board (CFPB or the Board).[4] In addition, the act protects a covered employee's activity relating to any provision of law that is subject to the jurisdiction of the Board.[5] To establish a violation under the CFPA, a complainant must demonstrate that his protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint.[6] Relief may not be ordered if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the alleged contribution of the protected activity.[7] The ALJ reviewed the evidence of record, considered the parties' positions, and concluded that Childs failed to establish that he engaged in protected activity under the Act. Therefore, we limit our discussion to whether Complainant met his burden on this issue.

The ALJ found that Childs made inquiries regarding his duties but did not allege violations or refuse to participate in any "activity, policy, practice or assigned task" that he reasonably perceived to be a violation of a law subject to the CFPB. Initially, the ALJ considered Childs's contention that he refused to act as a mortgage banker before his license was activated as it would violate the Secure and Fair Enforcement for Mortgage Lending Act (SAFE).[8] The ALJ concluded that Childs "did not show any violation of SAFE nor did he show any action by Mr. Hardman which could be reasonably perceived to be violations of SAFE."[9] While we agree that the proper inquiry is not whether there was an actual violation of SAFE, the ALJ also found that Childs made inquiries about his role as an unlicensed broker, but did not object to a policy that he reasonably believed violated a provision of law that was subject to the jurisdiction of the CFPB.[10] The ALJ noted that the parties stipulated that the employer provided a written copy of the company's policy regarding Complainant's duties and restrictions during the period prior to activation of his license, and advised Complainant he would be terminated for violating the restrictions.[11] Moreover, the ALJ implicitly rejects Childs's testimony that he raised concerns regarding exceeding the allowable duties to Sente on numerous occasions. Complainant submitted an e-mail dated May 22, 2012, in which he raised concerns about enforcement of SAFE he had witnessed at a previous employer, but he did not relate these

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[4]   12 U.S.C.A. § 5481(12).

[5]   12 U.S.C.A. § 5567(a)(1).

[6]   12 U.S.C.A. § 5567(c)(3).

[7]   *Id.*

[8]   12 U.S.C.A § 5103. (Thomson Reuters 2008).   SAFE is one of the enumerated acts enforceable under the CFPA. *See* 12 U.S.C.A. § 5481(12).

[9]   D. & O. at 14.

[10]   *Id.* at 13.

[11]   *Id.* at 2-3; Resp. Ex. A.

concerns to perceived violations at Sente. Cl. Ex. 2-2. We affirm the ALJ's finding that Childs failed to prove that he engaged in protected activity under SAFE by a preponderance of the evidence, as it is supported by substantial evidence.

The ALJ also considered Childs's contention that he raised concerns regarding violations of the Real Estate Settlement Procedures Act (RESPA), which proscribes the payment of commissions or profit distribution to unlicensed employees.[12] There is no credited evidence that Childs "objected" to the referral fees paid between employees, nor complained about alleged violations of the commission splitting by other employees. Thus, although Childs may have made inquiries regarding the sharing of commissions and referral fees, we also affirm the ALJ's finding that Childs did not object to a policy that he reasonably believed to be a violation of law, and thus failed to prove that he engaged in protected activity under RESPA by a preponderance of the evidence, as it is supported by substantial evidence.

Lastly, Childs contended that he reported concerns regarding violations of the Telemarketing and Consumer Fraud and Abuse Prevention Act,[13] which was amended in 2011 to be enforced by the CFPB with respect to the offering or provision of a consumer financial product or service.[14] A rule promulgated to enforce this Act prohibits a telemarketer from initiating any outbound telephone call to a person when his or her number is on the "do not call" registry maintained by the Federal Trade Commission.[15] The ALJ acknowledged that Childs raised questions about the legality of so-called "cold calls," but found that Childs was told it was his responsibility to access the registry and ensure his compliance. Moreover, the ALJ found that Sente maintained an internal database to record customers that did not wish to be contacted, but that Childs chose not to access either the national registry or the internal registry to ensure compliance. Thus, the ALJ found that Childs did not establish that he refused to participate in an assigned task that would violate the Do Not Call Registry or related rules or laws.[16] We infer from the totality of the ALJ's findings and conclusions that he did not credit Childs's allegations that he raised concerns about violations of the CFPA or laws under the jurisdiction of the CFPB, or refused to participate in an activity that violated these laws. Once he began his employment with Sente, Childs asked for information regarding the application of the law, but did not raise concerns about violations of the law. Thus, we affirm the ALJ's finding that Childs did not establish protected activity under the CFPA by a preponderance of the evidence as it is supported by substantial evidence.

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[12] RESPA is one of the enumerated acts enforceable under the CFPA. 12 U.S.C.A. § 2601, *et seq*; 12 U.S.C.A. § 5481(12).

[13] 15 U.S.C.A. § 6101-6108 (Thomson Reuters 2014).

[14] 15 U.S.C.A. § 6105(d).

[15] 15 U.S.C.A. § 6151 (Thomson Reuters 2003); 16 C.F.R. § 310.4 (Thomson Reuters 2011).

[16] D. & O. at 16.

CONCLUSION

Accordingly, for the foregoing reasons, the Board **AFFIRMS** the ALJ's decision on the issue of protected activity and thus **AFFIRMS** the dismissal of the complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI,
Chief Administrative Appeals Judge

JOANNE ROYCE,
Administrative Appeals Judge