



In the Matter of:

WILLIAM MICHAEL CUNNINGHAM,

ARB CASE NO. 04-078

COMPLAINANT,

ALJ CASE NO. 2004-SOX-14

v.

DATE: April 21, 2005

WASHINGTON GAS LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William Michael Cunningham, *pro se*, Minneapolis, Minnesota

For the Respondent:

Beverly J. Burke, Esq., Washington Gas Light Company, Washington, D.C.

FINAL DECISION AND ORDER

William Michael Cunningham filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Washington Gas Light Company terminated his employment in violation of Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX),¹ and its implementing regulations.² The Board

¹ 18 U.S.C.A. § 1514A (West Supp. 2003).

² 29 C.F.R. Part 1980 (2004).

must determine whether to dismiss Cunningham's appeal since he failed to file an initial brief with Administrative Review Board in support of his petition for review and failed to respond to the Board's Order to Show Cause. Because Cunningham has not complied with the Board's orders either by timely filing a brief or explaining his failure to do so, we conclude that he has failed to prosecute his case.

BACKGROUND

Between March and August 1999, Washington Gas Light Company employed Cunningham as its Director of Investor Relations.³ In August 1999, Cunningham "left the company ... upon being terminated by the CFO."⁴ Congress enacted SOX on July 30, 2002,⁵ almost three years after Washington Gas terminated Cunningham's employment.

On November 10, 2003, Cunningham filed his whistleblower complaint with OSHA.⁶ OSHA investigated Cunningham's complaint and concluded that it was untimely. Cunningham appealed OSHA's finding to the Office of Administrative Law Judges.⁷ On December 24, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Notice of Hearing that also directed the parties to show cause why the ALJ should not dismiss the complaint as untimely.⁸

³ Complaint at 1.

⁴ Complaint at 2.

⁵ Title VIII of Sarbanes-Oxley is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation. 68 FR 31864 (May 28, 2003).

⁶ Complaint at 1-2.

⁷ See 29 C.F.R. § 1980.106 (a).

⁸ Notice of Hearing at 1.

Cunningham responded to the Notice by stating that “there are genuine issues of material fact precluding summary judgment.”⁹ Cunningham’s response did not address the issue of timeliness. Washington Gas argued that the claim should be dismissed as untimely and because “the Complainant has filed a claim under a statute that did not exist at the time of the circumstances that gives rise to his allegations.”¹⁰ The ALJ subsequently issued his Recommended Decision & Order (R. D. & O.) finding that the complaint should be dismissed because Cunningham had failed to file his complaint within ninety days of the date of Washington Gas’s alleged unlawful retaliation. Cunningham filed a Petition for Review of the R. D. & O. with the Administrative Review Board on April 8, 2004.¹¹

On April 9, 2004, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule, pursuant to which Cunningham’s opening brief was due on or before May 10, 2004. Cunningham filed neither his brief, nor a request for an extension of time in which to file it. Accordingly, the Board issued an Order to Show Cause requiring Cunningham to explain to the Board no later than March 31, 2005, why the Board should not dismiss his appeal because he had failed to prosecute it. In recognition of Cunningham’s pro se status, the Board’s order provided, “If Cunningham intended to rely upon his petition for review as his opening brief, Cunningham must so inform the Board and serve a copy on counsel for Washington Gas Light Company.”

Cunningham signed a certified mail receipt indicating that he received the Board’s Show Cause Order on March 23, 2005. But he has failed to file any response to the Show Cause Order. Therefore, the Board must determine whether it should dismiss Cunningham’s appeal because he has failed to file an initial brief in support of the appeal as provided in the Board’s Notice of Appeal and Briefing Order and failed to reply to the Board’s Show Cause Order requiring him to explain why he failed to timely file his brief.

DISCUSSION

The Board’s authority to effectively manage its affairs, including the authority to require compliance with Board briefing orders, is necessary to “achieve orderly and

⁹ Complainant’s Response to Request for Showing Why the Claim Should Not Be Dismissed (Response) at 2.

¹⁰ Response of Respondent Washington Gas Light Company to Order to Show Cause Why Petition Should Not Be Dismissed at 1.

¹¹ See 29 C.F.R. § 1980.110(a). The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX. Secretary’s Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002).

expeditious disposition of cases.”¹² This Board has authority to issue sanctions, including dismissal, for a party’s failure to comply with the Board’s orders and briefing requirements.¹³

Considering that Cunningham is proceeding in this appeal without representation by counsel, this Board is willing to extend to him a degree of latitude in complying with the Board’s procedural requirements.¹⁴ This latitude, however, is not without bounds. Recognizing that dismissal of an appeal for failure to file a conforming brief is a very serious sanction and one not to be taken lightly, the Board indicated in its Show Cause Order that if Cunningham wished to rely upon his petition for review as his opening brief he should so inform the Board and serve a copy on Washington Gas. Cunningham failed to do so. Regardless of Cunningham’s pro se status, we must remain impartial and we may not litigate his appeal for him.¹⁵ Because Cunningham has failed to file an opening brief in response to our briefing order and he has failed to respond to our order to explain his failure to timely file or to indicate his intention to rely upon his petition for review, we conclude that Cunningham has failed to prosecute his case. Accordingly, we **DISMISS** his appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹² *Link v. Wabash*, 370 U.S. 626, 630-31 (1962).

¹³ *See Mastrianna v. Northeast Utilities Corp.*, ARB No. 99-012, ALJ No. 98-ERA-33, (Sept. 13, 2000)(complaint dismissed because complainant failed to adequately explain his failure to comply with the Board’s briefing schedule); *cf.* Fed. R. App. P. 31(c) (allowing dismissal as sanction for failure to file a conforming brief); Fed R. App. P. 41(b) (permitting courts to dismiss a complaint for failure to comply with court orders).

¹⁴ *See Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9 (ARB Feb. 28, 2003).

¹⁵ *Accord Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983)(“At least where a litigant is seeking a monetary award, we do not believe pro se status necessarily justifies special consideration. . . . While such a pro se litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance.”).