



**In the Matter of:**

**DAVID WELCH,**

**ARB CASE NO. 06-062**

**COMPLAINANT,**

**ALJ CASE NO. 2003-SOX-15**

**v.**

**DATE: March 31, 2006**

**CARDINAL BANKSHARES CORPORATION,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**ORDER**

**BACKGROUND**

David E. Welch filed a whistleblower complaint with the United States Department of Labor alleging that his employer, Cardinal Bankshares Corp., violated the employee protection section of the Sarbanes-Oxley Act of 2002 (SOX or the Act).<sup>1</sup> After an evidentiary hearing, a United States Department of Labor Administrative Law Judge (ALJ) issued a document entitled Recommended Decision and Order (R. D. & O.) on January 28, 2004, wherein he concluded that Cardinal had violated SOX. The ALJ ordered Cardinal to reinstate Welch but did not make a final determination on the amount of damages Cardinal owed to Welch. Instead, he indicated that the record would remain open for thirty days to allow Welch to produce evidence upon which an award of back pay could be calculated and permitted Cardinal to respond to any evidentiary submission within fifteen days from the date it received Welch's evidence.<sup>2</sup> Attached to the R. D. &

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<sup>1</sup> 18 U.S.C.A. § 1514A (West Supp. 2005). The regulations implementing SOX are found at 29 C.F.R. Part 1980 (2005).

<sup>2</sup> A successful SOX whistleblower is entitled to reinstatement, back pay with interest, and compensation for special damages, including costs, expert witness fees, and reasonable attorney fees. 18 U.S.C.A. § 1514A(c).

O. was a “Notice of Appeal Rights” which advised Cardinal that the R. D. & O. would become the Secretary of Labor’s final decision unless it filed a petition for review with the Administrative Review Board (ARB or the Board) within ten days of the date of the R. D. & O.<sup>3</sup>

On February 3, 2004, the ALJ issued an Erratum. The ALJ stated that the inclusion of the Notice of Appeal Rights in the R. D. & O. was inadvertent and that the R. D. & O. was not intended to be a final appealable order since the ALJ had not yet calculated the back wages and interest due to Welch. Accordingly, the ALJ ordered that the paragraph captioned “Notice of Appeal Rights” be deleted from the R. D. & O.

Even so, on February 5, 2004, Cardinal filed a petition for review with the Board. But the Board found that the ALJ’s R. D. & O. did not fully dispose of Welch’s complaint since it had reserved the damages issue for further adjudication. Therefore, Cardinal’s petition was an interlocutory appeal. And since it did not fall within the collateral appeal exception of the finality rule, the Board dismissed the petition.<sup>4</sup>

Thereafter, on February 15, 2005, the ALJ issued a Supplemental Recommended Decision and Order (S. R. D. & O.). He ordered Cardinal to pay Welch back wages, special damages, attorney fees and expenses, and interest on back wages. He also, again, ordered Cardinal to reinstate Welch. The S. R. D. & O. also contained the “Notice of Appeal Rights.” Cardinal timely filed a petition for review on or about February 24, 2005. On March 1, 2005, the Board accepted Cardinal’s petition and issued an order establishing a briefing schedule. Cardinal’s petition for review is pending before the Board.

Then, on September 13, 2005, Welch requested that the United States District Court for the Western District of Virginia, Roanoke Division, issue a preliminary injunction enforcing the ALJ’s reinstatement order.<sup>5</sup> Cardinal moved to dismiss on the grounds that the ALJ’s S. D. R. & O. was not an enforceable order because it “merely recommended” that Welch be reinstated. Welch argued that the S. R. D. & O. was an enforceable order and that Cardinal’s remedy was to request that the ARB stay the order

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<sup>3</sup> The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under SOX to the Administrative Review Board. Secretary’s Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

<sup>4</sup> *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 03-SOX-15, slip op. at 3, 6 (ARB May 13, 2004).

<sup>5</sup> See 29 C.F.R. § 1980.113 (“Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.”).

of reinstatement.<sup>6</sup> The court found that since the February 15, 2005 S. R. D. & O. “recommended” that Cardinal reinstate Welch, “it was not clear that Cardinal actually had been ordered to reinstate the plaintiff” and thus “Cardinal had insufficient notice that it should have moved to stay the order.” Therefore, the court dismissed Welch’s request to enforce reinstatement because an order to reinstate him did not exist.<sup>7</sup>

Three weeks later, after Welch moved to amend the district court’s earlier opinion, the court wrote that it “intended to communicate in its earlier opinion its concern that it is inappropriate to enforce the preliminary reinstatement order without Cardinal having had the opportunity to seek to obtain a stay from the ARB. The court remains convinced that plaintiff’s position to the contrary, and his arguments in support of immediate reinstatement, are unavailing.” Nevertheless, the court proposed a compromise:

If the ARB agrees [that the S. D. R. & O. in fact ordered Cardinal to reinstate Welch], and if the ARB will now entertain a motion to stay the effect of the preliminary order of reinstatement, the court’s earlier memorandum opinion shall be read to indicate that the court’s order is without prejudice to any new motion to enforce the preliminary order of reinstatement should the ARB deny a stay on the merits.[<sup>8</sup>]

As a result, Welch’s Motion For Expedited Order Confirming Preliminary Order Of Reinstatement Has Issued is now before us. Welch asks us to find that the February 15, 2005 S. R. D. & O. ordered reinstatement and grant Cardinal ten days to apply for a stay of the order to reinstate. Cardinal opposes the motion.

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<sup>6</sup> If a timely petition for review is filed . . . the decision of the administrative law judge will become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case has been accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board, *unless the Board grants a motion to stay the order.*

29 C.F.R. § 1980.110(b) (emphasis added).

<sup>7</sup> *Welch v. Cardinal Bankshares Corp.*, Civil Action No. 7:05CV00546 (W.D. Va.) (Memorandum Opinion, Jan. 4, 2006).

<sup>8</sup> *Welch v. Cardinal Bankshares Corp.*, Civil Action No. 7:05CV00546, at 4-5 (W.D. Va.) (Memorandum Opinion, Jan. 26, 2006).

## DISCUSSION

As an initial matter, we will clarify some terminology. The ALJ's S. R. D. & O. ordered Cardinal to reinstate Welch. The parties and the district court characterize this order as a "preliminary order of reinstatement." The SOX regulations authorize the Occupational Safety and Health Administration (OSHA) to investigate whether a SOX complaint has merit.<sup>9</sup> If, after investigating, OSHA concludes that the employer violated the Act, it issues findings to that effect and accompanies the findings with a "preliminary order" which must include all relief necessary, including reinstatement, to make the employee whole.<sup>10</sup>

Here, of course, we deal with the ALJ's (supplemental) decision and order, not OSHA's findings and "preliminary order." The SOX regulation pertaining to the ALJ's decision and order does not use the term "preliminary order" or "preliminary order of reinstatement."<sup>11</sup> But, in describing the ARB's role in reviewing an ALJ's decision, the regulation states that if the Board accepts a petition for review, "the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a *preliminary order of reinstatement* will be effective while review is conducted by the Board, unless the Board grants a motion to stay the order."<sup>12</sup> Therefore, by implication, an ALJ's decision to reinstate is a "preliminary order of reinstatement."

Next, we hold that the ALJ's January 28, 2004 R. D. & O. and the February 15, 2005 S. R. D. & O., together, constitute the ALJ's decision and order.<sup>13</sup> Moreover, this

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<sup>9</sup> 29 C.F.R. § 1980.104.

<sup>10</sup> 29 C.F.R. § 1980.105.

<sup>11</sup> See, e.g. 29 C.F.R. § 1980.109(b) ("If the administrative law judge concludes that the party charged has violated the law, the *order* will provide all relief necessary to make the employee whole, including reinstatement . . .") (emphasis added); 29 C.F.R. § 1980.109(c) ("Any administrative law judge's *decision* requiring reinstatement . . . will be effective immediately . . .") (emphasis added).

<sup>12</sup> 29 C.F.R. § 1980.110(b) (emphasis added).

<sup>13</sup> Department of Labor ALJs are specifically authorized to issue *recommended* decisions and orders when deciding SOX cases. See 29 C.F.R. § 1980.107(a) ("Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, part 18 of title 29 of the Code of Federal Regulations."). Those rules of practice and procedure governing Department of Labor ALJs provide that "[u]nless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act, 5 U.S.C. 554." 29 C.F.R. § 18.26 (1998). The APA authorizes ALJs to issue *recommended* decisions. See 5 U.S.C.A. § 554(d) ("The employee

decision contains a “preliminary order of reinstatement.”<sup>14</sup> The applicable SOX regulations dictate that an ALJ’s decision requiring reinstatement is effective when the employer receives the decision and will not be stayed unless the Board grants a motion to stay the reinstatement.<sup>15</sup>

Even so, unusual circumstances surround this case. Furthermore, Cardinal’s arguments against Welch’s motion have no merit. And, of course, we are mindful of the district court’s findings and its suggestion. Therefore, it is **ORDERED** that the ALJ’s February 15, 2005 preliminary order of reinstatement is in effect but that Cardinal will have ten days from the date it receives this Order to move this Board, pursuant to 29 C.F.R. § 1980.110(b), to stay the effect of the preliminary order of reinstatement.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

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[i.e. ALJ] who presides at the reception of evidence pursuant to section 556 of this title shall make the *recommended decision* or initial decision required by section 557 of this title. . . .”) (emphasis added); 5 U.S.C.A. § 557(c) (“Before a *recommended*, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees . . . All decisions, including initial, *recommended*, and tentative decisions, are a part of the record . . . .”) (emphasis added).

<sup>14</sup> “Based on the foregoing findings of fact and conclusions of law, it is HEREBY RECOMMENDED that Respondent, Cardinal Bankshares Corporation, be ORDERED to: Reinstate Complainant David Welch as the Chief Financial Officer of Cardinal Bankshares Corporation with the same seniority, status, and benefits he would have had but for Respondent’s unlawful discrimination.” *Welch v. Cardinal Bankshares Corp.*, ALJ No. 2003-SOX-15, slip op. at 25 (Supplemental Recommended Decision and Order, Feb. 15, 2005).

<sup>15</sup> See 29 C.F.R. §§ 1980.109(c), 1980.110(b).