



**In the Matter of:**

**BORIS GALINSKY,**  
**COMPLAINANT,**

**ARB CASE NO. 08-014**

**ALJ CASE NO. 2007-SOX-076**

**v.**

**DATE: January 13, 2010**

**BANK OF AMERICA, CORP.,**  
**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Boris Galinsky, *pro se*, Summit, New Jersey**

***For the Respondent:***

**Valecia M. McDowell, Esq., *Moore & Van Allen, PLLC*, Charlotte, North Carolina**

**ORDER OF REMAND**

Boris Galinsky complained that Bank of America, Corp., violated the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (the SOX), 18 U.S.C.A. § 1514A (West Supp. 2008), when it demoted him after he engaged in protected activity. After the Occupational Safety and Health Administration (OSHA) dismissed Galinsky's complaint, the Administrative Law Judge (ALJ) assigned to the case issued an Order Directing Parties to Show Cause Whether Jurisdiction Stands under the Sarbanes-Oxley Act of 2002 (Show Cause Order). Specifically, the order directed Galinsky, who was appearing *pro se*,

to provide in writing . . . a detailed explanation of how the Act applies to the allegations underlying his complaint. Complainant

must clearly and specifically explain the actions alleged in his complaint that constitute violations of the Act, a rule or regulation of the SEC, or any provision of Federal law **relating to fraud against shareholders.**

Show Cause Order at 1 (emphasis in original). The Show Cause Order also directed the Bank of America “to address the issues raised in this Order by written submission or a dispositive motion, due contemporaneously with that of the Complainant.” *Id.* at 1-2.

Galinsky responded to the Show Cause Order with a four-page statement of his position. The Bank of America responded with a 23-page memorandum, affidavits, and exhibits. The ALJ sua sponte treated the Bank’s response as a motion for summary decision under 29 C.F.R. § 18.40. She granted judgment for the Bank, in part on the ground that “*Complainant Did Not Adduce Sufficient Evidence That He Engaged in SOX-Protected Activity.*” [Recommended] Decision and Order Granting Respondent’s Motion for Summary Judgment; Dismissing the Complaint and Declining to Issue Sanctions (R. D. & O.; emphasis and capitals in original) at 10.

Galinsky argues in his petition for review to the Administrative Review Board (ARB) that he

complied with the [show cause] order . . . with specific information and explanations. Since the order did not request so, Complainant did not include any evidence in his response. . . . Complainant was not informed of the judge’s decision to view Respondent’s Response as a motion for summary judgment prior to her issuing a summary judgment, nor was he requested to amend his statements and present evidence.

Complainant [sic] Petition for Review at 8.

## DISCUSSION

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. Secretary’s Order No. 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a). We review errors of law de novo. *Robinson v. Morgan Stanley*, ARB No. 07-070, ALJ No. 2005-SOX-044 (ARB Jan. 11, 2010).

In *Hooker v. Washington Savannah River Co.*, ARB No. 03-036, ALJ No. 2001-ERA-016 (Aug. 26, 2004), the Board adopted federal precedent that requires a judge to give a pro se complainant “fair notice” of the requirements of the summary judgment rule, and the right to file affidavits or “other responsive materials” when confronted with a respondent’s motion for summary decision. Slip op. at 9.

In the matter before us, the ALJ directed Galinsky to provide a “detailed explanation” of his claim, but did not specifically require him to adduce evidence. When the Bank did produce affidavits and other evidence, the ALJ failed to give Galinsky fair notice of his need to respond in kind with affidavits or “other responsive materials.” Instead, the ALJ treated the Bank’s response to the Show Cause Order as a motion for summary decision, which she granted on the ground that Galinsky “did not adduce sufficient evidence that he engaged in SOX-protected activity.” We accept Galinsky’s argument that this procedure constituted prejudicial error.

Although we express no opinion on the merits of Galinsky’s claim, we **REVERSE** the ALJ’s recommended decision granting summary decision, and **REMAND** the case for further proceedings consistent with this opinion.

**SO ORDERED.**

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

**WAYNE C. BEYER**  
**Administrative Appeals Judge**