



MICHAEL ZAHARA,

ARB CASE NO. 08-020

COMPLAINANT,

ALJ CASE NO. 2006-SOX-130

v.

DATE: March 7, 2008

SLM CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard Segerblom, Esq., Las Vegas, Nevada

For the Respondent:

**Kristina C. Hammond, Orrick, Herrington & Sutcliffe LLP, New York,
New York**

FINAL DECISION AND ORDER DISMISSING APPEAL

BACKGROUND

The Complainant, Michael Zahara, filed a discrimination complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act (SOX).¹ Zahara alleged that his employer, the Respondent, SLM Corporation, violated the SOX whistleblower protection provision by retaliating against him because he engaged in protected activity.

¹ 18 U.S.C.A. § 1514A (West Supp. 2006).

Zahara's complaint was assigned to a United States Department of Labor Administrative Law Judge (ALJ) for a hearing. On November 1, 2007, the ALJ issued a Decision and Order of Dismissal Granting Respondent's Third Motion to Dismiss and Order Canceling Hearing (D. & O.).² As grounds for this D. & O., the ALJ explained,

Because complainant has violated my express orders, and because those violations are flagrant, repeated, and prejudicial to Respondent, I find it just to dismiss complainant's complaint pursuant to [29 C.F.R.] subsection 18.6(d)(2)(v). [Additionally] I find that complainant's repeated failure to comply with my orders and deadlines is causing undue delay to the orderly and expeditious disposition of this case and others pending in my docket. I also dismiss the claim under my inherent authority to do so in order to manage and control my docket.³

Zahara appealed the ALJ's D. & O. to the Administrative Review Board,⁴ and the Board issued an order setting a briefing schedule for the parties. Under the terms of the briefing order Zahara's opening brief was due on January 7, 2008. The Briefing Order provided, "If the Complainant fails to file the initial brief on time, the Board may dismiss the complainant's appeal." The Order was sent certified mail to Zahara at his then current address on file, the address indicated on the D. & O.'s service sheet, and to Zahara's counsel of record in the Department of Labor proceedings, Richard Segerblom, Esq. E. Washington signed for Segerblom's copy of the Order on December 10, 2007, and returned the certified mail receipt to the Board. Neither the certified mail receipt nor the Order sent to Zahara was returned to the Board.

Zahara neither filed a brief, nor requested an enlargement of time in which to do so by the January 7 due date. On February 5, 2008, SLM filed a motion to dismiss on the grounds that Zahara had failed to comply with the Board's briefing order. Accordingly, we ordered Zahara to show cause on or before February 19, 2008, why this appeal should not be dismissed for failure to timely file an opening brief and permitted SLM to file a reply to Zahara's response.

On February 19th, on Zahara's instructions, Segerblom faxed a copy of an e-mail to the Board from Zahara in response to the Show Cause Order. The e-mail stated, "I was unaware of a request from your office to provide additional information, or briefing

² *Zahara v. SLM Corp.*, ALJ No. 2006-SOX-130.

³ D. & O. at 5-6.

⁴ The Administrative Review Board has jurisdiction to decide Zahara's appeal. *See* Secretary's Order 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.

regarding my case. I moved into a different unit in December and have not received any correspondence from you despite a USPS forward.” SLM replied to this response stating, “This four-sentence, unsigned and unsworn ‘response’ is woefully insufficient to respond to the Order, and therefore, Complainant’s appeal should be dismissed with prejudice[.]” We agree.

DISCUSSION

Courts possess the “inherent power” to dismiss a case for lack of prosecution.⁵ This power is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”⁶ In *Mastrianna v. Northeast Utilis. Corp.*,⁷ the Board dismissed a complaint in a case in which the complainant failed to adequately explain his failure to comply with the Board’s briefing schedule. The Board explained that it has the inherent power to dismiss a case for want of prosecution in an effort to control its docket and to promote the efficient disposition of its cases.⁸

In response to the Order to show Cause, Zahara states that he was unaware of the necessity to file a brief and that he had not received any mail from the Board since he moved in December. This response is insufficient for a number of reasons. Even if Zahara did not receive the briefing order, his counsel did. Notice to counsel constitutes notice to a party. As the Supreme Court held in *Link v. Wabash R.R. Co.*, “[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all fact, notice of which can be charged upon the attorney.’”⁹ Counsel for Zahara was informed of the consequences of Zahara’s failure to timely file an opening brief. Nevertheless counsel neither filed a brief or a timely request for an enlargement of time in which to do so, and he has provided no explanation whatsoever for his failure to file an opening brief as ordered. Furthermore, it was Zahara’s obligation to inform the Board of his change of address. Failure to do so demonstrates a lack of due diligence. Finally, Zahara does not explain how he timely received notice of the Board’s Order to Show

⁵ *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962).

⁶ *Id.* at 630-631.

⁷ ARB No. 99-012, ALJ No. 1998-ERA-033 (Sept. 13, 2000).

⁸ *Id.*, slip op. at 2. *Accord Muggleston v. EG & G Def. Materials*, ARB No. 04-060, ALJ No. 2002-SDW-004, slip op. at 2 (ARB June 30, 2004); *Blodgett v. Tenn, Dep’t of Env’t & Conservation*, ARB No. 03-043, ALJ N. 2003-CAA-007, slip op. at 2 (ARB Mar. 19, 2004).

⁹ 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

Cause, but failed to receive notice of the briefing order. Therefore, Zahara has failed to establish good cause for his failure to comply with the Board's order to file an opening brief in this case. Accordingly, we **DISMISS** his appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge