ADRIANA KOECK **ARB CASE NO. 08-068**

COMPLAINANT, **ALJ CASE NO. 2007-SOX-073**

v. **DATE: August 28, 2008**

GENERAL ELECTRIC CONSUMER AND INDUSTRIAL, et. al.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Emily Brittain Read, Esq., *Bernabei & Wachtel, PLLC,* Washington, District of Columbia[1]

For the Respondent:
Sarah E. Bouchard, Esq., Anne E. Marinez, Esq., Angeli Murthy, Esq.; *Morgan, Lewis & Bockius LLP,* Philadelphia, Pennsylvania

FINAL DECISION AND ORDER OF DISMISSAL

On April 23, 2007, the Complainant, Adriana Koeck, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration alleging that her employer, General Electric Consumer & Industrial, had retaliated against her in violation of the whistleblower protection provisions of the Sarbanes-Oxley

[1] After Attorney Read briefed this case, Koeck terminated Bernabei & Wachtel as her counsel as of August 9, 2008. No substitution of counsel has been filed.

Act of 2002 (SOX).[2] On March 13, 2008, a Department of Labor Administrative Law Judge issued a Recommended Summary Decision and Order Dismissing Complaint. Koeck filed a petition for review with the Administrative Review Board on March 21, 2008.[3]

On July 11, 2008, the Board received a letter from Koeck's counsel indicating that "she intends to bring an action in federal court, as authorized by 29 C.F.R. § 1980.114(a), for de novo review of the claim currently pending before the Board." If the Board has not issued a final decision within 180 days of the date on which the complainant filed the complaint and there is no showing that the complainant has acted in bad faith to delay the proceedings, the complainant may bring an action at law or equity for de novo review in the appropriate United States district court, which will have jurisdiction over the action without regard to the amount in controversy.[4] Accordingly, in response to Koeck's letter, we ordered the parties to show cause why the Board should not dismiss Koeck's appeal pursuant to 29 C.F.R. § 1980.114.

Koeck responded urging us to dismiss her case in accordance with 29 C.F.R. § 1980.114. G. E. initially argued that we should stay our decision for 50 days pending an attempt to mediate the case and, in the alternative, because, if mediation was unsuccessful, it intended to move the district court to dismiss Koeck's complaint on the grounds of collateral estoppel or return the case to the Board for decision. G. E. did not argue, however, that "the complainant has acted in bad faith to delay the proceedings," the only grounds the regulations provide for denying dismissal under the regulation. G. E. subsequently argued that the Board should dismiss Koeck's complaint because she admitted in a malpractice suit against her former attorneys that they had failed to timely file her SOX complaint. However, Koeck's filing of a de novo complaint in district court has deprived the Board of jurisdiction to rule on the merits of her claim. Accordingly, we **DISMISS** Koeck's appeal.

G. E. has also filed a Motion for Protective Order to Seal the Proceedings. Koeck argues that given the removal of her case to district court, the Board does not have jurisdiction to rule on G. E.'s motion. The action in district court is de novo. Accordingly, the file compiled in the proceedings before the Department of Labor remains in the custody of the Board and is not part of the case proceeding before the district court. It is a federal record over which the Board has control. Therefore, we

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[2] 18 U.S.C.A. § 1514A (West 2002).

[3] The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX. Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a)(2006).

[4] 18 U.S.C.A. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114. As is the usual case, by the time the Board received the petition for review, the 180-day period for deciding the case had already expired.

reject Koeck's argument that we do not have jurisdiction to decide whether to grant G. E.'s motion.

The Board and the Secretary of Labor have routinely held that that there is no authority permitting the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure pursuant to the Freedom of Information Act,[5] unless the record qualifies for an exemption to such disclosure.[6] Moreover, the Board cannot guarantee confidentiality before it has received a FOIA request to release a document because an agency "'promise of confidentiality [cannot] in and of itself defeat the right of disclosure'"[7] G. E. urges the Board to depart from its established case law, arguing that although OSHA permits attorneys to rely upon evidence subject to the attorney-client privilege to support their whistleblower complaints against their employers, "a careful balancing of interests is necessary when such disclosures are made."[8] However, the Secretary in *Debose* specifically addressed the argument that he was free to recognize his own extra-statutory FOIA exemptions for good cause:

> It is clear . . . that the exemptions in the FOIA are "exclusive," *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973), because the FOIA itself states that it "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in [the Act]." 5 U.S.C. § 552(c). The exemptions are to be narrowly construed, and agencies cannot expand the exemptions through broad regulations. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). If documents do not fall within an exemption, agencies may not justify withholding on the grounds that disclosure "would do more harm than good," *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429 (4th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974), or that the disclosed documents could be misinterpreted, *Getman v. NLRB*, 450 F.2d 670, 680 (D.C. Cir. 1971).[9]

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[5] 5 U.S.C.A. § 552 (West 1996).

[6] *See e.g., McDowell v. Doyon Drilling Servs.*, ARB No. 97-053, ALJ No. 1996-TSC-008 (ARB May, 19, 1997); *Debose v. Carolina Power & Light Co.*, 1992-ERA-014, 1994 WL 897419 (Sec'y Feb. 7, 1994).

[7] *Debose*, 1994 WL 897419 at 3 (citations omitted).

[8] Respondent's Reply Memorandum of Law in Further Support of Motion for Protective Order to Seal the Proceedings at 2.

[9] 1994 WL 897419 at 2.

Therefore, no matter how compelling we might find the policy arguments for protection, the Board can not guarantee confidentiality in advance of a FOIA request for record documents and only then, if the party requesting that information be withheld demonstrates a statutory exemption under which those documents fall. Accordingly, we must reject G. E.'s invitation to create an exclusion from FOIA for the attorney-client privileged information included in this case record.

Nevertheless, as the Secretary observed in *Debose*, the Department of Labor regulations implementing the FOIA provide that submitters of information may designate **specific information** (as opposed to an entire case record) as confidential commercial information to be handled as provided in those regulations.[10] The regulations provide that the Department may so designate information that the submitter claims could reasonably be expected to cause substantial competitive harm.[11] If a submitter perfects a claim of confidentiality, the Department of Labor will notify the submitter promptly if it receives a request for the information; will give the submitter a reasonable period of time to object to the disclosure; will notify the submitter if it decides to disclose the information; and will also notify the submitter if it decides to withhold the information, and the requestor files suit to compel disclosure.[12]

Finally, on August 11, 2008, Koeck's counsel filed a Motion to Withdraw the Law Firm of Bernabei & Wachtel, PLLC as Counsel for Complainant. In support of the Motion, counsel avers that as of August 9, 2008, Koeck has "terminated Bernabei & Wachtel as her counsel." Accordingly, we **GRANT** the Motion.

CONCLUSION

Because Koeck has exercised her right to remove her SOX case to district court pursuant to 29 C.F.R. § 1980.114, and G. E. has not established that the complainant has acted in bad faith to delay the proceedings, we **DISMISS** Koeck's SOX appeal.

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[10] 29 C.F.R. § 26(b) (2006).

[11] *Id.* The regulations further provide that the designation request must be in writing and whenever possible, the submitter shall support the claim of confidentiality with a statement or certification by the submitter's officer or authorized representative that the identified information in question is, in fact, confidential commercial or financial information and that this information has not been disclosed to the public. *Id.* G. E. has not yet submitted such a request to the Board.

[12] 29 C.F.R. § 70.26(c)-(i).

Furthermore in accordance with the FOIA and the Board's long-standing precedent, we **DENY** G. E.'s Motion for Protective Order to Seal the Proceedings.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge