



**In the Matter of:**

**MICHAEL DAVIS,**

**ARB CASE NO. 08-114**

**COMPLAINANT,**

**ALJ CASE NO. 2006-SOX-017**

**v.**

**DATE: September 29, 2008**

**THE HOME DEPOT, INCORPORATED,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER DISMISSING  
PETITION FOR REVIEW**

**BACKGROUND**

On June 27, 2008, a Department of Labor Administrative Law Judge (ALJ) certified facts to the District Court for the District of Columbia, pursuant to 29 C.F.R. § 18.29(b)(2008),<sup>1</sup> in this case arising under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of

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<sup>1</sup> This regulation provides in pertinent part:

If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, . . . refuses to appear after having been subpoenaed, . . . the administrative law judge responsible for the adjudication, where authorized by statute or law, may certify the facts to the Federal district court having jurisdiction in the place in which her or she is sitting to request appropriate remedies.

29 C.F.R. § 18.29(b).

the Sarbanes-Oxley Act (SOX).<sup>2</sup> The essence of these facts is that the ALJ had issued a subpoena to compel Alan Wells, a former Home Depot employee, to testify at a hearing and he failed to appear. The ALJ requested the court “to compel Mr. Wells’s attendance and testimony before this tribunal and [to] take appropriate action, as if the trial of this case had occurred before the United States District Court.”<sup>3</sup>

In response to the ALJ’s Order Certifying Facts, the United States Department of Labor’s Assistant Secretary for Occupational Safety and Health filed with this Board: 1) a Motion to Intervene as a Party for the Purpose of Petitioning for Review of an Administrative Law Judge’s Order Certifying Facts to the District Court and 2) a Petition for Review of an Administrative Law Judge’s Order Certifying Facts to the United States District Court for the District of Columbia and Request for a Briefing Order.

On July 17, 2008, Chief Judge Lamberth of the United States District Court for the District of Columbia wrote a letter to the ALJ refusing to accept her order and questioning her authority to file the order with the court without the participation of the United States Attorney’s Office or the Department of Justice.<sup>4</sup> The ALJ replied in a letter dated July 22, 2008, that she believed the Judge’s interpretation to be incorrect but that in any event, because the Assistant Secretary had sought to intervene in the proceeding before the Department of Labor for the purpose of seeking interlocutory review of her order, she would await the Board’s decision and after reviewing it and upon “appropriate consultation, determine whether resubmission of the Order is appropriate.”<sup>5</sup>

The Board issued an Order Permitting Response to Motion of the Assistant Secretary to Intervene as a Party, which allowed the Complainant, Michael Davis, and the Respondent, Home Depot, to respond to the Assistant Secretary’s motion to intervene and the Assistant Secretary to reply to any response. At that time, the Board had not received either the Chief Judge’s letter refusing to accept the ALJ’s order or the ALJ’s response indicating that she

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<sup>2</sup> 18 U.S.C.A. § 1514(A)(West 2007). SOX’s section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law. The SOX’s implementing regulations are found at 29 C.F.R. Part 1980 (2007).

<sup>3</sup> Order Certifying Facts to the United States District Court for the District of Columbia at 3 (June 27, 2008).

<sup>4</sup> Letter from Chief Judge Royce C. Lamberth to the ALJ, dated July 17, 2008.

<sup>5</sup> Letter from the ALJ to Chief Judge Lamberth, dated July 22, 2008.

was awaiting the Board's decision before deciding whether to resubmit her order.

On July 22, 2008, the ALJ issued an Order Granting Motion of the Assistant Secretary to Intervene as a Party for the Purpose of Petitioning for Review of an Administrative Law Judge's Order Certifying Facts to the District Court. She issued this order, even though the Assistant Secretary had filed the motion with the Board, because she concluded that the Assistant Secretary should have filed the motion with her since the only proceedings in the case were pending before her. She ultimately decided that 29 C.F.R. § 1980.108(a)(1)<sup>6</sup> compelled her to grant the Assistant Secretary's motion to intervene. On July 25, 2008, Davis filed an opposition to the ALJ's Order permitting intervention, asserting among other points that the ALJ had not given him sufficient time to respond to the motion to intervene before granting it.

On August 11, 2008, Davis filed a response with the Board opposing the Assistant Secretary's Motion to Intervene. Home Depot did not file a response and the Assistant Secretary did not file a reply.

## DISCUSSION

As an initial matter, although the ALJ's decision to rule on a matter that was pending before the Board is unquestionably irregular, after reviewing the Assistant Secretary's and the Complainant's pleadings in this matter and the applicable regulations, we agree that the Assistant Secretary should have filed his Motion to Intervene with the ALJ because the only proceedings in the case were pending before her. We also agree that given the unequivocal language of 29 C.F.R. § 1980.108(a)(1), i.e., "at any time at any stage," the ALJ correctly determined that the Assistant Secretary has the right to intervene in this case. Obviously, at this juncture it would serve no useful purpose to remand the case to the ALJ to allow her to rule again on the motion to intervene. Thus, we will consider the Motion to Intervene to have been properly granted for purposes of this litigation.

However, there is, in fact, no issue remaining before us to adjudicate, even assuming for purposes of this case that interlocutory review of the ALJ's certification

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<sup>6</sup> This regulation provides:

At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as *amicus curiae* **at any time at any stage** of the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge . . . .

29 C.F.R. § 1980.108(a)(1) (emphasis added).

order would be proper. Judge Lamberth's refusal to file the ALJ's certification order and the ALJ's decision not to refile it have left the Board with no justiciable issue to decide.<sup>7</sup> Accordingly, we **DISMISS** the Associate Solicitor's petition for review.

**SO ORDERED.**

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

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

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

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<sup>7</sup> *Accord Lane v. Roadway Express, Inc.*, ARB No. 03-006, ALJ No. 2002-STA-038, slip op. at 3 (ARB Feb. 27, 2004) (“although administrative proceedings are not bound by the constitutional requirement of a ‘case or controversy,’ the Board has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot”); *Migliore v. Rhode Island Dep’t of Envtl. Mgmt.*, ARB No. 99-118, ALJ Nos. 1998-SWD-003, 1999-SWD-001, 1999-SWD-002, slip op. at 4 (ARB July 11, 2003) (“the policy concerns that militate against the rendering of advisory opinions in Article III courts are also relevant to the question of whether the Board should issue [an order]”).