In the Matter of:

KENNETH POLI, **ARB CASE NO. 11-051**

COMPLAINANT, **ALJ CASE NO. 2011-SOX-027**

v. **DATE: August 31, 2012**

JACOBS ENGINEERING GROUP, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kenneth Poli, *pro* se, Darien, Connecticut

For the Respondent:
Marion F. Walker, Esq.; *Ford & Harrison, LLP*, Birmingham, Alabama

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Paul M. Igasaki, *Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (the "Act" or "SOX")(Thomson/West 2010), and its

implementing regulations found at 29 C.F.R. Part 1980 (2010).[1] Kenneth Poli filed a complaint with the Occupational Safety and Health Administration (OSHA) on March 24, 2010, alleging that his employer, Jacobs Engineering Group, Inc., (Jacobs) violated the SOX when it subjected him to harassment, placed him on extended leave, and terminated his employment. OSHA dismissed the complaint, finding that Poli did not show that he engaged in protected activity. Poli filed a timely objection to the Secretary's findings on February 22, 2011, with the Office of Administrative Law Judges. On motion for summary decision, the Administrative Law Judge (ALJ) dismissed Poli's complaint as untimely because it was not filed within 90 days of the October 27, 2009 letter Jacobs sent to Poli informing him that he was placed on Company Convenience Leave. Upon review, we conclude that the ALJ's determination that the SOX statute of limitations was triggered by the October 27, 2009 letter is incorrect as a matter of law. Accordingly, we reverse the ALJ's Order Granting Respondent's Motion for Summary Decision and Dismissing the Complaint (the Order) and remand for further proceedings.

BACKGROUND

The central facts pertaining to the timeliness of Poli's SOX complaint are uncontested and taken from pleadings, affidavits, and exhibits filed before the ALJ.

Poli began working for Jacobs as a project engineer in April 2006. In May 2008, he was assigned to work on Jacobs' project at the Rockland County Psychiatric Center Project, where his duties included screening change orders and reporting any irregularities to his supervisor. In the fall of 2008, Poli reported to his manager, Curtis Casey, that there were some issues with the billing practices of a subcontractor on behalf of the Dormitory Authority State of New York (DASNY). Resp. Ex. A. Casey disagreed that there was an issue, and Poli contacted Casey's supervisor. As he did not receive support from Jacobs' management, Poli contacted the DASNY Field Representative directly. *Id.*

On October 26, 2009, Poli received a letter informing him that he was being placed on Company Convenience Leave (CCL), effective November 2, 2009, with an anticipated return-to-work date of January 2, 2010. Resp. Ex. E at 121. The letter stated in pertinent part:

> When your Company Convenience Leave ends, every reasonable effort will be made to return you to the same position, if it is available, or to an equivalent position for which you are qualified. However, the Company cannot guarantee reinstatement in all cases. If after your leave expires you do

[1] SOX has been amended since Poli filed his complaint. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010). The amendment does not affect our decision. Moreover, we have not considered any evidence that was not properly before the ALJ, and reject Poli's motion to submit new evidence to the ARB. *See Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 1997-ERA-056 (ARB Feb. 2, 1999).

> not return to work, the Company will assume you have resigned from your position.

Id. Poli responded stating that if Jacobs did not return him to work at the end of the CCL, he would not voluntarily resign. Order at 3, citing Resp. Ex. E at 123. A revised letter was sent to Poli on October 27, 2009, explaining the possibilities that existed for employees who are put in CCL:

> [They] can be called back to work, find another job outside of Jacobs, find another job within Jacobs[,] or be involuntary [sic] terminated. If you find another job outside of Jacobs, you will then voluntarily resign from Jacobs. If you find another job within Jacobs, you will be returned from leave as an active employee. If no assignment is identified within the CCL period, you will be involuntarily terminated from Jacobs.

Order at 3, citing Resp. Ex. E at 123.

During the CCL period, Poli unsuccessfully attempted to secure a position within Jacobs and pursued positions with other companies. Cl. Mot. Ex. 11. On January 5, 2010, Poli's attorney sent a letter to Jacobs, attempting to clarify Poli's employment status. In response, an employee in Human Resources contacted the division vice-president to ask if there was a position available for Poli. Jacobs sent Poli a letter dated January 5, 2010, informing him that "at this time there was no position available. Effective January 4, 2010, you will be laid off." Order at 4; Cl. Opp. Ex. C.

Poli filed a SOX complaint with OSHA by letter dated March 24, 2010, contending that as a result of his protected activity he faced immediate harassment,[2] was placed on Company Convenience Leave on October 26, 2009, and was terminated on January 5, 2010.

On January 11, 2011, OSHA dismissed Poli's complaint on the grounds that he failed to establish that he engaged in an activity protected by SOX. Resp. Ex. C. On February 22, 2011, Poli objected to the Secretary's findings and requested a hearing with the Office of Administrative Law Judges. Following cross-motions for summary judgment, the ALJ on April 29, 2011, entered an order granting summary decision in favor of the Respondent, and dismissed the complaint as untimely.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under SOX. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). We review an ALJ's grant of summary decision de novo. *Levi v. Anheuser Busch*

[2] Specifically, Poli stated that he was assigned menial jobs, denied tuition reimbursement, denied relocation expenses, denied overtime, and his performance appraisal was downgraded.

Cos., Inc., ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, -108; 2007-SOX-055; slip. op. at 6 (ARB Apr. 20, 2008). The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Id*. Thus, pursuant to 29 C.F.R. §18.40(d)(2011), the ALJ may issue summary decision if "there is no genuine issue as to any material fact and that a party is entitled to summary decision." *Id*.

We view the record on the whole in the light most favorable to the non-moving party, and then determine whether there are any genuine issues of material fact and whether the movant established that it was entitled to judgment as a matter of law. *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 5-6 (ARB Nov. 20, 2009).

DISCUSSION

SOX Section 1514A(a) provides whistleblower protection for employees of publicly-traded companies who report certain acts that they reasonably believe to be unlawful. 18 U.S.C.A. §1514(A)(a). To prevail in a SOX proceeding, an employee must prove by a preponderance of the evidence that he: (1) "engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against . . . him; and (3) the protected activity was a contributing factor in the adverse personnel action." *Sylvester v. Paraxel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011). If the employee proves these elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of the [protected] behavior." 29 C.F.R. § 1980.104(c); *see also Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4th Cir. 2008); *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-476 (5th Cir. 2008).

When Poli filed his complaint, an employee alleging retaliation under SOX was required to file the complaint with OSHA "not later than 90 days after the date on which the violation occurred." 18 U.S.C.A. § 1514A(b)(2)(D).[3] The OSHA regulations specified at the time that:

> [w]ithin 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant) an employee who believes that he or she has been discriminated against in violation of the Act may file . . . a complaint alleging discrimination . . . .

[3] Sections 922(b) and (c) of the Dodd-Frank Act, P.L. 111-203 (July 21, 2010), amended Section 806 of SOX, 18 U.S.C.A. § 1514A, to lengthen the time for filing a complaint to 180 days. The extended time period is not, however, applicable to this case.

29 C.F.R. § 1980.103(d).[4]

The statute of limitations in whistleblower cases, including 18 U.S.C.A. § 1514A(b)(2)(D), begins to run when an employee receives "final, definitive and unequivocal notice of an adverse employment decision." *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 6 (ARB Apr. 30, 2009); *Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111, -128; ALJ No. 1997-ERA-053, slip op. at 40-41 (ARB Apr. 30, 2001), citing *Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful), and *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). "The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of the violation." *Overall*, ARB Nos. 98-111, -128; slip op. at 40. "Final" and "definitive" notice is a "communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change." *Snyder*, ARB No. 09-008, slip op. at 6; *see also Halpern v. XL Capital Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005). Unequivocal notice is a "communication that is not ambiguous, i.e., free of misleading possibilities." *Id*; *see also Halpern*, ARB No. 04-120, slip op. 3; *cf. Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer's intent to discharge complainant). "Complaints that employment termination resulted from discrimination can present widely varying circumstances" and "the application of the[se] general principles . . . necessarily must be made on a case-by-case basis." *Ricks*, 449 U.S. at 258 n.9.

Applying these principles here, we conclude that the ALJ erred in finding that the October 27, 2009 letter from Jacobs to Poli triggered the start of the 90-day statute of limitations period for Poli to file his SOX complaint alleging retaliatory termination. Given the facts in this case, we do not agree with the ALJ that the October letter gave Poli "final, definitive, and unequivocal" notice of his termination.

The ALJ relied on analyses in two cases to support her determination that the October 2007 letter triggered the 90-day statute of limitation: *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1998), and *Rollins v. American Airlines*, ARB No. 04-140, ALJ No 2004-AIR-009 (ARB Apr. 3, 2007). These cases, however, are factually distinguishable from the case before us and thus do not drive its determination. Indeed, the complainant in *English* was subjected to disciplinary action that barred her from further work in controlled areas and placed her on indefinite temporary assignment in a warehouse. After a review of the charges against the complainant, the employer notified her on May 15, 1984, that her temporary assignment was reduced to 90 days, during which time she could search for and bid on available positions

[4] *See also* 69 Fed. Reg. 52106 (Aug. 24, 2004) ("In other words, the limitations period [that is, the 90 days] commences once the employee is aware or reasonably should be aware of the employer's decision.").

elsewhere in the facility, but if she had not secured a suitable permanent position by the end of her temporary assignment, she would be laid off. Based on those facts, the court of appeals determined that the May 15 letter triggered the statute of limitations.

In *Rollins*, the employer issued complainant a Career Decision Day (CDD) Advisory letter on October 17, 2002. The CDD Advisory offered Rollins his choice of the following: (1) sign a Letter of Commitment agreeing to comply with American's rules and regulations, including satisfactory work performance and personal conduct, and accept reassignment to another unit as a production supervisor; (2) voluntarily resign with transitional benefits and agree not to exercise any grievance rights; or (3) accept termination of employment with grievance options. Rollins informed American on October 22, 2002, that he would not agree to any of the options offered in the CDD Advisory. On that same date Rollins received a Final Advisory letter from American's Managing Director stating, "On Tuesday, October 22, 2002, you advised me that you would not accept any of the options offered to you. As this is your decision, you are hereby terminated from your employment with American Airlines effective immediately." The ARB held that the possibility that Rollins could have avoided the effects of the CDD Advisory by resigning voluntarily or accepting employment in another division does not negate the effect of the CDD Advisory's notification of American's intention to terminate Rollins's employment.

Analyzing *English* and *Rollins* under the facts in this case, the ALJ determined that the October 26, 2009 letter was final and unequivocal notice that if no position was identified for him at Jacobs within the CCL period, he would be terminated, similar to the circumstances in *English* and *Rollins*. However, contrary to the ALJ's finding, Poli was not told that his employment would be terminated unless he was able to obtain a position on another Jacobs' project. Rather, the CCL letter stated that "every reasonable effort will be made to return you to the same position, if it is available, or to an equivalent position for which you are qualified."

CCL is a procedure for the benefit of the employer to allow a leave of absence for "eligible employees who are temporarily without billable work." Cl. Reply Ex. B. The company policy states (as did the CCL letter to the Complainant) that reasonable efforts will be made to return the employee to the same position, if it is available, or to a similar available position. If the employee cannot be returned to active status upon the end of the CCL, the employee's employment will be terminated. Provisions are made for the continuation of benefits during the leave. Employees can use paid time-off (PTO) during the leave of absence, and the employee continues to accrue PTO during the first four weeks of leave. Moreover, an employee can request advanced PTO to use during the leave of absence.

Unlike in *English* and *Rollins*, Poli received a letter that was described in the company policy as being based on the lack of billable work, and was not due to disciplinary action. The first sentence in the original letter, and the revised letter the next day, indicates that there is an anticipated return-to-work date of January 2, 2010. The letter explains the continued receipt of benefits and allows for a request for advanced paid time-off. In addition, the letter states that every reasonable effort will be made to return Poli to the same position he held before the leave of absence. The letter does state that the company cannot

guarantee reinstatement in all cases, but this does not imbue the letter with the same degree of finality evidenced in *English* and *Rollins*. The ALJ found that any ambiguity in the CCL letters was eliminated by the e-mail exchange on October 27, 2009. However, this exchange only clarifies the company policy that if the Complainant is not returned to work at the end of the leave of absence, he will be involuntarily terminated. The CCL letter outlines a plan to provide for the continuation of employee benefits and states a projected date of return, and the subsequent e-mail exchange does not state unequivocally that the Complainant was or would be terminated. We thus conclude that the October 27, 2009 CCL letter was insufficient to begin the statute of limitations period, and accordingly find that the 90-day statute of limitations on Poli's SOX complaint began to run on January 5, 2010, the date he received unequivocal notice of his termination. As it is undisputed that Poli filed his OSHA complaint on March 24, 2010, we hold that his complaint alleging retaliatory termination was timely filed, and remand the case to the ALJ for disposition on the merits.

CONCLUSION

The SOX's 90-day statute of limitations period applicable when Poli filed his complaint with OSHA began to run on January 5, 2010, and thus Poli's complaint of retaliatory termination filed on March 24, 2010, was timely. Accordingly, we **REVERSE** the ALJ's ruling that Poli's retaliatory termination complaint was time-barred, and **REMAND** this case to the ALJ for further proceedings.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge