



**In the Matter of:**

**DINAH R. GUNTHER**

**ARB CASE NO. 15-074**

**COMPLAINANT,**

**ALJ CASE NO. 2010-SOX-049**

**v.**

**DATE: August 20, 2015**

**DELTEK, INCORPORATED,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Stephen M. Kohn, Esq.; Kohn, Kohn & Colapinto, LLP; Washington, District of Columbia**

*For the Respondent:*

**Charles B. Wayne, Esq; DLA Piper LLP (US), Washington, District of Columbia**

*For the Assistant Secretary for Occupational Safety and Health:*

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Megan E. Guenther, Esq.; and Dean A. Romhilt, Esq.; U.S. Department of Labor, Office of the Solicitor, Washington, District of Columbia**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge**

**ORDER DENYING MOTIONS FOR PARTIAL STAY OF FINAL DECISION  
AND LEAVE TO POST A SUPERSEDEAS BOND**

On June 10, 2015, the Administrative Review Board (ARB) received Respondent Deltek, Incorporated's (Deltek) Motions For (1) Partial Stay of Final Decision and (2) Leave to Post a Supersedeas Bond in this case arising 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 (SOX or Act), as amended, and implementing regulations. 18 U.S.C.A § 1514A (Thomson/West Supp. 2015) (SOX); 29 C.F.R. Part 1980 (2014). Complainant Gunther filed a response, urging denial of the motions, and the Associate Secretary for Occupational Safety and Health (Associate Secretary) filed a statement regarding the motions. For the following reasons, Deltek's motions are denied.

## BACKGROUND

On July 31, 2012, the ALJ issued a decision on the merits finding Deltek violated SOX's whistleblower protection provisions.<sup>1</sup> She subsequently issued a supplemental decision awarding monetary and injunctive relief to Gunther.<sup>2</sup> The ARB affirmed both the liability order and the relief ordered (with modification) on November 26, 2014.<sup>3</sup> Following this decision, Complainant moved for reconsideration and clarification on December 2, 2014. On January 16, 2015, the ARB issued an order clarifying its decision and denying reconsideration. While the motion was pending, Deltek petitioned the U.S. Court of Appeals for the Fourth Circuit for review of the ARB's decision on December 30, 2014. Deltek did not seek a stay of decision prior to its appeal to the Fourth Circuit.

After the Fourth Circuit accepted the appeal, Deltek petitioned the court for a stay of decision and leave to post a supersedeas bond. Gunther responded, urging the court to deny the stay on the grounds that Deltek did not initially request the ARB to stay its decision as required by Rule 18 of the Federal Rules of Appellate Procedure and that Deltek did not establish the requisites for such a stay. In response to Deltek's motion, the Associate Secretary advised the Court of Appeals that (1) Deltek had not met its burden under FRAP 18(a)(2)(A) of showing that it was impracticable to first file its motion with the ARB,<sup>4</sup> and (2) the Associate Secretary did not object to the requested stay, if Deltek posted the supersedeas bond, given that the relief the ARB ordered did not include significant injunctive relief, such as reinstatement, and was almost

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<sup>1</sup> *Gunther v. Deltek, Inc.*, 2010-SOX-049.

<sup>2</sup> *Gunther v. Deltek, Inc.*, 2010-SOX-049 (June 5, 2013).

<sup>3</sup> *Gunther v. Deltek, Inc.*, ARB Nos. 13-068, -069; ALJ No. 2010-SOX-049.

<sup>4</sup> Rule 18 of the Federal Rules of Appellate Procedure requires that a petitioner must ordinarily move first before the agency for a stay pending review of its decision or order. Fed. Rule App. P. 18(a)(1).

exclusively monetary in nature. The Fourth Circuit replied *in toto*: “Upon review of submissions relative to the motion for stay, the court denies the motion.” *Deltek v. Department of Labor*, No. 14-2415 (4th Cir. June 3, 2015)(unpub.).

## DISCUSSION

In its motion before the ARB, Deltek contends that it has already expunged Gunther’s records and provided a neutral job reference. Thus, it contends the motion to stay is almost exclusively directed to an order for monetary relief, the type of relief protected by the posting of a bond on appeal, and as such, Gunther will not be prejudiced if the motions are granted. Gunther responds, urging the Board to deny the motion because the ARB no longer has jurisdiction in this case; the Fourth Circuit has already addressed the motion and it was denied; and Deltek failed to establish that it qualified for a stay under the facts of this case.<sup>5</sup>

Deltek failed to move for a stay of the ARB’s judgement and for leave to post a supersedeas bond prior to filing its petition for review with the Fourth Circuit Court of Appeals. The filing of its petition for review with the Fourth Circuit divested the ARB of jurisdiction over the case.<sup>6</sup> The motion for a stay of decision must be made to the ARB prior to the filing of a petition for review in the court of appeals, as the ARB’s jurisdiction divests at that point. Accordingly, the Board is without authority to entertain Deltek’s motion.<sup>7</sup>

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<sup>5</sup> The Associate Secretary has responded without taking a position on whether the Board has jurisdiction to hear the current motion, and states that the Associate Secretary’s “lack of objection to a stay before the Fourth Circuit does not mean that Deltek is entitled to a stay if this Board concludes otherwise.”

<sup>6</sup> *Wells v. Kansas Gas & Elec. Co.*, No. 1985-ERA-022 (Sec’y June 28, 1991).

<sup>7</sup> Even if we had jurisdiction, the law-of-the-case doctrine would preclude us from granting the requested relief. The law-of-the-case doctrine holds generally that the same issue presented a second time in the same case should have the same result. More specifically, the mandate rule, considered a branch of the law-of-the-case doctrine, obliges a lower court to honor the decision of higher courts within the judicial hierarchy. See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Mun’y of San Juan*, 773 F.3d 1, 10 (1st Cir. 2014). In general, the mandate rule will apply unless “(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice.” *North Mississippi Communc’ns, Inc. v. Johns*, 951 F.2d 652, 656 (5th Cir. 1992). Here, the parties fully briefed the motion for stay before the Fourth Circuit and the appellate court reviewed those submissions and denied the stay. Deltek has demonstrated no new evidence, intervening law, or manifest injustice to justify our reexamination of the issue already litigated before the Fourth Circuit.

**CONCLUSION**

Accordingly, Deltek's motions for partial stay of final decision and leave to post a supersedeas bond are **DENIED**.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**