In the Matter of:

SCOTT McMANUS,

COMPLAINANT,

v.

TETRA TECH CONSTR. INC. and TETRA TECH INC.,

RESPONDENTS.

ARB NO. 16-063

ALJ NO. 2016-SOX-012

DATE: December 19, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
R. Scott Oswald, Esq.; John T. Harrington, Esq.; *The Employment Law Group, P.C.*, Washington, District of Columbia

For the Respondents:
Daniel J. Tyukody, Esq.; Adil M. Khan, Esq.; *Greenberg Traurig, LLP*, Los Angeles, California

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Tanya L. Goldman, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A (Thomson Reuters 2016), and its implementing regulations at 29 C.F.R. Part 1980 (2016). Scott McManus filed a complaint with the Occupational Safety and Health Administration (OSHA) against his former employer, Tetra Tech Construction Inc. (Tetra

Tech), claiming that he had reported SOX violations to Tetra Tech and that Tetra Tech then fired him in retaliation, thereby violating SOX's whistleblower provisions. OSHA determined that McManus's claim was untimely filed. McManus requested a hearing, and the Administrative Law Judge (ALJ) assigned to the case likewise ruled that McManus's complaint filed on August 5, 2015, was untimely filed. McManus appealed to the Administrative Review Board (ARB or Board), and we affirm the ALJ's order.[1]

DISCUSSION[2]

McManus worked at Tetra Tech's Gloversville Office in New York. In July 2014, Tetra Tech decided to reorganize operations, including a decision to close and relocate the Gloversville Office to Houston, Texas. Decision and Order (D. & O.) at 3. McManus was aware of this decision.

On October 7, 2014, McManus complained to Tetra Tech about accounting practices that he perceived were deficient and did not meet SEC compliance standards. McManus alleges that management retaliated against him when, shortly after the communication, senior Tetra Tech personnel told McManus that he had no future at Tetra Tech. *Id.* at 5. The next day, Tetra Tech's President and CEO, along with the Executive Vice President and CFO, apologized to McManus for the prior communication and said that he did have a future with the company.

Steve Ruffing was in charge of winding down operations at the Gloversville Office. On December 19, 2014, Ruffing asked McManus for a copy of his resume, which McManus provided. Ruffing terminated McManus's employment on January 27, 2015, telling McManus that the termination would be effective in one week. Ruffing explained that he had looked for opportunities for McManus within the reorganized corporation but had found none. Ruffing commented that Tetra Tech had been thinking about terminating McManus's employment since the fall of 2014. McManus asked about his bonus and received about 50% of what he had expected. McManus's termination was not effective one week after notice. The actual effective date for McManus's termination was on March 18, 2015, when the Gloversville Office closed. McManus performed little work during the gap of approximately fifty days. *Id.* at 7.

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[1] The ARB has jurisdiction pursuant to Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012); 29 C.F.R. § 1980.110. The ARB reviews the ALJ's legal conclusions de novo. *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006). We review factual findings under the substantial evidence standard. 29 C.F.R. § 1980.110; *Henrich v. Ecolab, Inc*., ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (noting that the ARB will uphold an ALJ's factual finding where supported by substantial evidence "even if there is also substantial evidence for the other party, and even if we would justifiably have made a different choice had the matter been before us de novo.")).

[2] We take our background facts from the ALJ's opinion.

McManus filed his SOX complaint with OSHA on August 5, 2015, which was received on August 6, 2015. Before the ALJ, Tetra Tech moved to dismiss McManus's complaint. Tetra Tech argued that his termination was final on January 27, 2015, and not the date that the Gloversville Office was closed. McManus countered that the date that Tetra Tech terminated his employment, and the date that started SOX's 180-day clock, was March 18, 2015. According to McManus, this was the date that he had "final, definitive, and unequivocal" notice of his termination.

The ALJ determined that the January 27, 2015 notice was sufficiently "final, definitive, and unequivocal" to an objectively reasonable person so as to trigger SOX's limitations period. D. & O. at 2, 11. The ALJ concluded that the period from notice until effective date, roughly fifty days, was winding down time. *Id.* at 10.

McManus appealed the ALJ's dismissal to the ARB, arguing, as he did before the ALJ, that Tetra Tech had changed its course on several business decisions before the termination notice and thus McManus was justified in thinking that his termination was also an undecided point. McManus's theory is that the January 27, 2015 notice was equivocal because prior to that time, Tetra Tech had walked back plans for the Gloversville office as well as plans for other units. In addition, senior management had informed him in October 2014 that he did not have a future with the company, but the next day, the President and the CFO informed him that he did have a future with the company. McManus Br. at 7.

We affirm the ALJ's dismissal. SOX's whistleblower provision has a 180-day statute of limitations: "An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation." 18 U.S.C.A. § 1514A(b)(2)(D). SOX's 180-day filing period begins to run on the date that the complainant receives a "final, definitive, and unequivocal notice of the adverse employment action." *Rollins v. Am. Airlines*, ARB No. 04-140, ALJ No 2004-AIR-009, slip op. at 3 (ARB Apr. 3, 2007). Final and definitive notice means communication that is decisive or conclusive, leaving no room for further action, discussion, or change. Unequivocal means unambiguous. *Kaufman v. U.S. Envtl. Prot. Agency*, ARB No. 10-018, ALJ No. 2002-CAA-022, slip op. at 3 (ARB Nov. 30, 2011). It is not the date that the termination or adverse act is felt or takes effect which starts the clock. Rather, it is the date that the employee has final, definitive, and unequivocal notice of the adverse action. *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-055 (ARB Apr. 30, 2009); *see also Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 8 (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 apparent).

Ruffing, McManus's supervisor, told McManus on January 27, 2015, that his employment was terminated and that the termination would be effective in about a week. Although McManus's actual termination was not until March 18, 2015, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a course of action for employment discrimination." *Ricks*, 449 U.S. at 257. McManus has not offered any facts following his termination on January 27, 2015, suggesting that Ruffing's notice did not reflect a

final decision by Tetra Tech or that it was still being reviewed or considered. Tetra Tech's prior modification of major business decisions, such as which offices or divisions open or close does not affect Ruffing's final termination notice. We also agree with the ALJ that McManus's termination notice was not equivocal because senior personnel had contemplated firing him in October 2014, but the President and CFO countermanded that decision the next day. Accordingly, we affirm the ALJ's finding that an objectively reasonable person would have understood that the termination notice received on January 27, 2015 was sufficiently "final, definitive, and unequivocal" so as to trigger the running of the limitations period for filing a SOX complaint. D. & O. at 11.

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order is **AFFIRMED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

TANYA L. GOLDMAN
Administrative Appeals Judge