In the Matter of:

ED HENRICH,	**ARB CASE NO. 05-030**
COMPLAINANT,	**ALJ CASE NO. 04-SOX-51**
v.	**DATE: May 30, 2007**
ECOLAB, INC.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kurt C. Banowsky, Esq., ***Banowksy, Betz & Levine, Dallas, Texas***

For the Respondent:
James D. Jordan, Esq., Nancy J. Bush, Esq., ***Munsch, Hardt, Kopf & Harr P.C., Dallas, Texas***

ORDER DENYING RECONSIDERATION

On June 29, 2006, we issued a Final Decision and Order (F. D. & O.) affirming an ALJ's decision that Ecolab, Inc. did not violate the employee protection provision of the Sarbanes-Oxley Act[1] by terminating Ed Henrich's employment. On August 28, 2006, the 60th day after we issued our decision, Henrich filed a Motion for Reconsideration (Petition) requesting that we reconsider.[2] Ecolab, having been permitted to respond,

[1] Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, codified at 18 U.S.C.A. § 1514A (West Supp. 2005). Implementing regulations are at 29 C.F.R. Part 1980 (2006).

[2] Henrich filed by facsimile transmittal on August 28, 2006. The Board permits this manner of filing for purposes of establishing the date of filing. *See also* 29 C.F.R. §

argued that the Petition was untimely and that our decision was correct. Ecolab's Brief in Response to Complainant's Motion for Reconsideration at 2, 3-9. We conclude that Henrich's petition was untimely and that, in any case, it does not demonstrate that reconsideration is warranted.

Before discussing the reasons for these two conclusions, we analyze our authority to reconsider decisions made pursuant to the Sarbanes-Oxley Act (SOX or the Act).[3]

I. Authority to Reconsider SOX decisions

The Administrative Review Board (ARB or Board) has inherent authority to reconsider its decisions, so long as that authority has not been limited by a statute or regulatory provision.[4] Because "[t]he question of reconsideration authority can be answered only with specific reference to the statute(s) underlying the challenged decision,"[5] we must examine the SOX to determine whether it limits our reconsideration authority.

We must specifically consider whether anything in the SOX or its implementing regulations explicitly limits reconsideration, and whether our reconsideration would "interfere with, delay or otherwise adversely affect accomplishment of the Act's . . . purposes and goals." *Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112 and 122A, ALJ No. 1986-ERA-23, slip op. at 3 (ARB Nov. 20, 1998).[6] Because the SOX and its

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1980.103(d) (For complaints filed with DOL, "[t]he date of the . . . facsimile transmittal . . . will be considered to be the date of filing."). Whether or not facsimile transmittal is used, the Board requires litigants to file by mail an original and four copies. Henrich complied with this requirement. The Board received Henrich's mailed Petition on September 6, 2006.

[3] The Board has not yet undertaken this analysis. *See Getman v. Sw. Secs., Inc.*, ARB No. 04-459, ALJ No. 2003-SOX-8 (ARB Mar. 7, 2006) (denying reconsideration); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Apr. 4, 2006) (same).

[4] *See Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112 and 122A, ALJ No. 1986-ERA-23, slip op. at 2-5 (ARB Nov. 20, 1998) (concluding that Energy Reorganization Act (ERA) did not limit Board's inherent authority to reconsider ERA decisions).

[5] *Leveille v. N.Y. Air Nat'l Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4, slip op. at 2 (ARB May 16, 2000).

[6] In previous decisions, we have used this analysis in examining whether we could reconsider decisions arising under the ERA, the Davis-Bacon Act (DBA), and six environmental statutes. *See Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 98-164, ALJ No. 1996-DBA-33, slip op. at 5 (ARB June 8, 2001) (examining DBA "to determine whether reconsideration would adversely affect [the Act's] enforcement provisions or statutory purposes"); *Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3, slip op. at 2-3 (ARB Nov. 24, 1998)("[T]he general enforcement authority of the three environmental statutes at issue here [the Clean Air Act, the Toxic Substances Control Act,

implementing regulations are silent with respect to the Board's reconsideration authority, we proceed directly to the second question.

Congress passed the SOX in 2002 "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." H.R. REP. No. 107-610, at 69 (2002) (Conf. Rep.). In order to facilitate the purposes of the SOX, Congress included as Section 806 of the Act an employee protection provision designed to prevent reprisal against employees who provide information about SOX violations.[7] Primary authority to administer and enforce the SOX is shared by the Commissioner of the Securities and Exchange Commission (SEC) and the Public Company Accounting Oversight Board (PCAOB).[8] The Department of Labor (DOL) administers complaints brought under Section 806.

Section 806 is solely an employee protection provision. It does not grant to DOL any authority to determine whether an employer has violated any other provision of the Act. It also does not provide for an employer to suffer any related consequences from having been found by DOL to have violated Section 806. For example, the DOL is not required to notify the SEC, the PCAOB, or any other governmental entity when it has determined that an employer has violated this section of the Act, and no other governmental entity is required to debar, disqualify or otherwise punish an employer who

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and the Solid Waste Disposal Act] is assigned to the Administrator of the Environmental Protection Agency; . . . the Administrator's enforcement role operates separate and apart from the Secretary of Labor's employee protection function; and . . . reconsideration of the Board's order in this case would not impact adversely the Administrator's administration of the environmental statutes."); *Leveille*, slip op. at 4 (concluding Board had authority to reconsider decisions made under Safe Drinking Water Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act, because such "reconsideration . . . would not have an adverse impact upon the [EPA] Administrator's administration of [these three statutes]"); *Macktal*, slip op. at 4-5 (Reconsideration "would not interfere with or adversely affect the general enforcement provisions of the [Energy Reorganization] Act . . . . [or] the goals of the whistleblower provision itself.").

[7] *See* 18 U.S.C.A. § 1514A(b) (codifying Section 806); 29 C.F.R. §§ 1980.103 to 1980.111 (establishing procedures for administrative enforcement of Section 806); *see also* 148 CONG. REC. S7418-01 (Section 806 intended to "encourage" employees to come forward with information); *cf. Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (whistleblower provisions of Clean Air Act and ERA "are intended to encourage employees to aid in the enforcement of these statutes").

[8] *See* 15 U.S.C.A. §§ 7202 (treating SOX violations as violations of the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a et seq.(West 2006)), and giving regulatory and enforcement authority to SEC Commissioner); 7211 (establishing PCAOB); 7215 (West 2006)(giving PCAOB investigative and disciplinary authority over registered public accounting firms).

is found by DOL to have violated the Act.[9] Thus, the DOL's role under the SOX does not overlap with the investigatory or administrative roles of the SEC or the PCAOB. For this reason, our reconsideration of any orders we issue pursuant to Section 806 would not interfere with or adversely affect the SOX's other enforcement mechanisms.

Moreover, based upon our experience rendering whistleblower decisions, we conclude that reconsideration of SOX whistleblower decisions would not adversely affect DOL's enforcement of Section 806. We conclude that our reconsideration of SOX decisions would not adversely affect accomplishment of SOX's purposes and goals, and thus the SOX does not limit our inherent authority to reconsider decisions we make under Section 806 of the SOX.

II. Timeliness

In response to Ecolab's contention that his Petition was untimely, Henrich makes three arguments. We dispose of two quickly, and address the third in more detail.

Henrich first argues that his petition was timely because the Board previously has found timely not only a petition filed 53 days after the Board's decision issued, but also a petition filed 176 days afterwards. Reply at 1 (citing *Getman v. Sw. Secs., Inc.*, ARB No. 04-459, ALJ No. 2003-SOX-8 (ARB Mar. 7, 2006) (53 days) and *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Apr. 4, 2006) (176 days)). Henrich is mistaken. The Board denied reconsideration in both instances. *See Halpern*, slip op. at 3; *Getman*, slip op. at 2. The Board's decision to omit discussing the timeliness of those two petitions does not demonstrate that those petitions were timely.

Henrich next argues that his motion was timely because he filed it "within the 60 day time frame of when the FDO [Final Decision and Order] is deemed to be final." Reply at 1. Henrich cites no authority for this argument, and we are unsure of his meaning. It is possible that Henrich intended to suggest that the petition was timely because he filed it before the end of the 60-day period during which he was permitted to seek review of our decision by a United States circuit court of appeals.[10] We have considered this suggestion, but reject it. Insofar as Henrich is suggesting that his reconsideration request was timely because our decision was not yet final, such a suggestion is misplaced. Our decision in his case already was final when he filed his

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[9] *Compare Thomas & Sons*, slip op. at 3-4 (expressing concern that reconsideration might complicate Department's duty to provide to Comptroller General names of companies determined to have violated the DBA).

[10] *See* 18 U.S.C.A. § 1514A(b)(2)(A) (providing that SOX complaints "shall be governed under the rules and procedures set forth in section 42121(b) of Title 49"); 49 U.S.C.A. § 42121(b)(4)(A) (West Supp. 2006) (providing 60-day period within which to seek review of decisions the Board makes pursuant to 49 U.S.C.A. § 42121); 29 C.F.R. § 1980.112(a) (providing 60-day period within which to appeal SOX decisions to circuit court).

petition.[11] The existence of a deadline for appeal did not keep our decision non-final until that deadline has passed; rather, the time limitation for an appeal began to run only after we issued our "final" decision.[12] If Henrich instead is suggesting that his reconsideration request was timely because the time for appeal had not yet run, the suggestion lacks foundation. There is no such provision in 29 C.F.R. § 1980.112(a), and we are not aware of such a provision in any of the other regulatory provisions implementing the SOX or any analogous statute. Federal court practice also fails to support such a suggestion. The time limitations for filing appeals from federal courts are significantly longer than the time limits for the filing of a Rule 59(e) motion or a petition for appellate rehearing, and significantly shorter than the time limits allowed for a Rule 60(b) motion.[13]

Henrich's third argument is that his motion was "timely and reasonable." Reply at 1 (citing *Macktal*, slip op. at 3). We understand this statement to convey an argument, based upon our discussion in *Macktal*, that Henrich's motion was timely because it was filed within a "reasonable time" after our decision issued. *See Macktal*, slip op. at 3, 5 (ARB can reconsider final ERA decisions if reconsideration was requested within a "reasonable" time after decision was made). Implicit in this argument are two contentions: that the Board applies a "reasonable time" standard when determining the

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[11] *See* 29 C.F.R. § 1980.112(a) (appeal permitted "[w]ithin 60 days *after* the issuance of a *final* order by the Board") (emphasis added); *see also* 29 C.F.R. § 1980.110(c) (referring to "final decision of the Board"). The filing of a petition for reconsideration may make a Board decision no longer final, *cf., e.g.*, FED. R. APP. P. 4(a)(4)(A)(iv), (vi); SUP. CT. R. 13.3, but our decision is final at least unless and until such a request is filed.

[12] An ARB SOX decision thus differs from an ALJ decision, which is not final when issued but becomes final if no appeal is sought. *See* 29 C.F.R. § 1980.110(a) ("The decision of the [ALJ] will *become* the final order of the Secretary unless . . . a petition for review is timely filed.") (emphasis added).

[13] A petition seeking rehearing by a federal circuit court generally must be filed no later than 14 days after entry of the judgment. *See* FED. R. APP. P. 40(a) (providing 14-day deadline, extended to 45 days for cases in which the United States is a party). Yet a petition for certiorari to the United States Supreme Court may be filed for a full 90 days after the entry of the judgment. *See* SUP. CT. R. 13.1. Similarly, a Rule 59(e) motion, asking a district court to alter or amend its judgment, must be filed within 10 days after the entry of judgment. *See* FED. R. CIV. P. 59(e). Yet an appeal to federal circuit court may be filed for at least "30 days after the judgment or order appealed from is entered," and up to 194 days in certain circumstances. *See* FED. R. APP. P. 4(a)(1)(A) (30 days); 4(a)(1)(B) (60 days when United States is a party); 4(a)(6) (ALJ may reopen appeal for a maximum of 14 days, if request is made no more than 180 days after entry of judgment). In contrast, a Rule 60(b) motion seeking relief from a district court's judgment may be brought within any reasonable time – up to a full year or longer – even when an appeal from that same judgment must be brought within a mere 30 days. *See* FED. R. CIV. P. 60(b).

timeliness of a petition for reconsideration, and that Henrich's petition was filed within a reasonable time. We discuss each contention in turn.

A. Does the Board apply a "reasonable time" standard when determining whether a petition for reconsideration was timely?

Our reconsideration authority derives from our inherent authority as an agency engaged in adjudicatory decision-making. *See Macktal*, slip op. at 2-4. When statutory or regulatory authority is not to the contrary, an agency can exercise its inherent reconsideration authority when the request is made "within a reasonable time." *Macktal*, slip op. at 2-3 (citing federal cases). So unless some other standard applies to reconsideration of SOX decisions, or we or our predecessors have adopted a different standard for determining timeliness of reconsideration petitions, we must apply a "reasonable time" standard when determining the timeliness of Henrich's petition.

As we discussed in section I, the SOX and its implementing regulations do not address the Board's inherent authority to reconsider SOX decisions. The Secretary's order delegating authority to the Board to hear SOX cases also does not address reconsideration.[14] Thus neither the SOX and its implementing regulations, nor the Secretary's Order, have altered the default "reasonable time" standard for determining the timeliness of a petition for reconsideration of a SOX decision.

Three other potential sources of timeliness standards merit discussion: the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (ALJ procedural rules), the two sets of rules of procedure for federal district and circuit courts in the Article III system (Article III procedural rules), and previous decisions of the Board and its predecessors.

ALJ procedural rules

The ALJ procedural rules provide that the "Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1(a) (2006). Thus ALJs – who are subject to the ALJ procedural rules, including the injunction to refer to the Rules of Civil Procedure when necessary – must observe the timeliness provisions in those Rules, and we should review ALJ decisions for compliance with those provisions.[15]

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[14] *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272-64,273 (Oct. 17, 2002).

[15] As we do. *See, e.g., Prime Roofing, Inc.*, WAB No. 92-15 (July 16, 1993) (affirming ALJ decision to deny motion for new trial because motion did not conform to timeliness and substantive requirements in Federal Rules of Civil Procedure 59(e) and 60(b)).

But the ALJ procedural rules do not govern the Board's decisions about reconsideration. The ALJ procedural rules apply to "adjudicatory proceedings before the Office of Administrative Law Judges." *See* 29 C.F.R. § 18.1(a). The Office of Administrative Law Judges consists of "administrative law judges," defined as those judges appointed pursuant to 5 U.S.C.A. § 3105 (West 1996). *See* 29 C.F.R. § 18.2(b). Board Members are not appointed pursuant to 5 U.S.C.A. § 3105 but instead are designated by the Secretary pursuant to Section 5 of Secretary's Order 1-2002. *See* 67 Fed. Reg. at 64,273. Moreover, the Board is not a part of the Office of Administrative Law Judges, but rather is an appellate body reviewing that office's decisions.

The ALJ procedural rules also "may be applicable" to "other Presiding Officers." *See* 29 C.F.R. § 18.2(c). "Presiding Officers" is not defined in the ALJ Procedural Rules, but its placement in the same sentence as the reference to the Administrative Procedure Act indicates that it refers to the "presiding employees" discussed in 5 U.S.C.A. (West 1996) §§ 556 and 557 – i.e., those employees who "preside at the taking of the evidence" during a "hearing." 5 U.S.C.A. § 556(b). But the Board does not conduct evidentiary hearings in deciding SOX appeals. We decide such appeals based upon the record compiled by the ALJ.[16] Therefore, the Board is not a Presiding Officer and the ALJ procedural rules do not govern our reconsideration decisions.

Article III procedural rules

The Board, which is responsible for making final decisions for DOL, is an agency rather than a federal court. Article III procedural rules govern proceedings before federal district and circuit courts.[17] Thus, Article III procedural rules neither grant authority to the Board nor govern the Board's actions.[18]

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[16] *See* 29 C.F.R. §§ 18.54 (record generally closes at the close of the hearing except as provided by the ALJ), 18.59 (ALJ sends complete, closed record to reviewing authority), 1980.110(b) (in reviewing ALJ SOX decisions, Board uses substantial evidence standard); *see also* United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 71-75 (1947) (comparing role and powers of "hearing examiners" (here, DOL ALJs) in taking evidence before making initial or recommended decision, with role and powers of "agency heads" (here, the Board) in deciding "appeals . . . from rulings of hearing officers").

[17] The Federal Rules of Civil Procedure govern proceedings before federal district courts, and the Federal Rules of Appellate Procedure govern proceedings before the federal circuit courts. *See* FED. R. CIV. P. 1 (Federal Rules of Civil Procedure "govern the procedure in the United States district courts"); FED. R. APP. P. 1(a)(1) (Federal Rules of Appellate Procedure "govern procedure in the United States courts of appeals").

[18] The Board and its predecessors have recognized as much. *See, e.g.*, *Macktal*, slip op. at 4 n.4 (reaffirming conclusion in *Bartlik v. Tenn. Valley Auth.*, 1988-ERA-15, slip op. at 2 (Sec'y July 16, 1993) that Federal Rules of Civil Procedure "are not themselves a grant of substantive authority"); *Varnadore v. Oak Ridge Nat'l Lab.*, ARB No. 99-121, ALJ Nos.

Previous decisions of the Board or its predecessors

Although the ALJ and Article III procedural rules do not themselves bind the Board, the Board has the power to adopt any part of these rules and thereby subject itself to them. But a survey of our past cases shows that the Board has not done so, nor has it replaced the reasonable time standard by adopting any other standard for determining the timeliness of reconsideration petitions.

(a) ALJ procedural rules, section 18.1

We are not aware of any decisions in which the Board or its predecessors have adopted the injunction, in section 18.1 of the ALJ procedural rules, requiring recourse to the Federal Rules of Civil Procedure in any situation not covered by the ALJ procedural rules. This is hardly surprising. Adopting that injunction would require the Board always to follow all the Federal Rules of *Civil* Procedure in situations where the ALJ rules are silent. But those rules focus upon procedures for trials and fact-finding, functions that the Board generally does not perform. As we and our predecessors often have noted, the Board is an appellate body. We review ALJ decisions for error; we do not simply sit as a second-tier fact-finder. Adopting the entire Federal Rules of Civil Procedure would prevent the Board from exercising the greater authority it possesses as the decision-maker for the Department of Labor. Such adoption also would likely prevent the Board from finding guidance in the Federal Rules of Appellate Procedure, even though those rules often are more tailored for the situations encountered during appellate review.

(b) Article III procedural rules

While the Board and its predecessors often have turned to Article III procedural rules for useful guidance,[19] we are not aware of any case in which the Board or its

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1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-ERA-1, slip op. at 6 (ARB July 14, 2000) ("We doubt that [Federal Rule of Civil Procedure] Rule 60(b), which was drafted by federal courts for use in the federal court system, may be applied in an executive branch administrative adjudication to reopen and reconsider a case . . . which has been fully and finally decided by the Sixth Circuit Court of Appeals and not remanded by that Court . . . ."); *Bartlik*, slip op. at 3-4 (noting that Federal Rules of Civil Procedure do not themselves grant reconsideration authority to the Board); *see also Knox v. U.S. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-CAA-3, slip op. at 2-3 (Oct. 24, 2005) (analogizing to both Federal Rules of Civil Procedure, and Federal Rules of Appellate Procedure, without indicating that Board was bound by or had adopted timeliness rules in either).

[19] *See, e.g., Caimano v. Brink's, Inc.*, ARB No. 97-041, ALJ No. 1995-STA-4, slip op. at 3 n.4 (ARB Jan. 22, 1997) ("When the pertinent statute and implementing regulations are silent in regard to a procedural issue, we look to the Federal Rules of Civil Procedure for guidance in reaching a result that will be fair to the parties and serve the purpose of the

predecessors have adopted any of the various time limits set forth in the Article III procedural rules. Most decisions that refer to those rules either state specifically that those rules serve as guidance, or treat the rules as guidance – for example, citing the rules while at the same time indicating that the Board has the power to diverge from them.[20]

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statute."); *DeFord v. Tenn. Valley Auth.*, 1981-ERA-1, slip op. at 2 (Sec'y Aug. 16, 1984) ("I will look to other areas of law for guidance. One principal source, of course, is the Federal Rules of Civil Procedure, which have often been incorporated in rules of practice for administrative proceedings (*see, e.g.*, 29 C.F.R. [§] 18.1, 41 C.F.R. [§] 60-30.1 (1982).")

[20] *See Hasan v. Sys. Energy Res.*, 1989-ERA-36 (Sec'y Mar. 10, 1994) (noting that reconsideration request did not meet either timeliness or substantive requirements of Rule 60(b), Secretary nonetheless also noted both that proffered evidence was not relevant, and that "there is no other possible basis upon which [Secretary] might grant Hasan's request"); *Confederated Salish and Kootenai Tribes*, 1982-CTA-107/235, slip op. at 2 n.6 (Sec'y Nov. 16, 1992) (although "neither the CETA nor its implementing regulations provide for reconsideration, it has been considered appropriate to grant reconsideration where a request complies with Rule 59(e) of the Federal Rules of Civil Procedure"); *Spearman v. Roadway Express*, 1992-STA-1 (Sec'y Oct. 27, 1992) (turning for "guidance" to Federal Rule of Civil Procedure 59(e), and finding untimely under that rule a motion mailed August 26, seeking reconsideration of a judgment entered August 5 and received August 11); *U.S. Dep't of Labor v. Bergen County, N.J.*, 1983-CTA-334, slip op. at 2 (Sec'y Aug. 31, 1992) (stating that where neither statute nor its implementing regulations address reconsideration, "it is appropriate to look to the Federal Rules of Civil Procedure for guidance"); *Monahan*, 1987-SCA-32 (Dep. Sec'y Mar. 23, 1992) (granting reconsideration even though parties "failed to request timely reconsideration," because Secretary was "apprised of changed circumstances within the applicable time frame" [set forth in "Rule 59(e)"] *and* "[i]t is always within the discretion of an agency to relax or modify its procedural rules when the ends of justice require"); *Military Sealift Command*, 1986-SCA-OM-1 (Sec'y Oct. 23, 1991) (noting that seeking "guidance" from Federal Rules of Civil Procedure is "sometimes" appropriate; finding untimely a motion for reconsideration filed more than three months after decision issued, where motion was filed after expiration of Rule 59(e)'s 10-day limit *and* "MSC has offered no reason for the delay in filing"); *see also Administrator, Wage & Hour Div. v. Elderkin*, ARB Nos. 99-033 and 048, ALJ No. 1995-CLA-31 (ARB Oct. 21, 2003) (referring to Rule 59's ten-day limit in denying a motion for a new trial brought almost three years after Board's affirmance, but nonetheless analyzing proffered new evidence and concluding that it would not change outcome); *Young v. CBI Servs., Inc.*, 1988-ERA-8, slip op. at 3 & n.1 (Sec'y Dec. 8, 1992) (Secretary "assume[d] without deciding that Rule 60(b)(6) relief is available in administrative proceedings," and denied litigant's request to reopen record on ground that litigant failed to meet standards in Rule 60(b)). *But see U.S. Dep't of Labor v. Utah Rural Dev. Corp.*, 1983-CTA-211, slip op. at 2 (Sec'y Oct. 15, 1986) (rejecting respondent's argument that motion for reconsideration was untimely on basis that motion "was served within the requisite 10 days from the entry of the ALJ's decision" and citing, without discussion, Federal Rule of Civil Procedure 59(e)). The Secretary later cited *Utah Rural Dev. Corp.* only for the proposition that the Federal Rules of Civil Procedure offer "guidance." *See Bergen County*, slip op. at 2 (citing *Utah Rural Dev. Corp.* as support for proposition that Federal Rules of Civil Procedure offer "guidance"); *Spearman*, slip op. at 1

In a 2001 decision, the Board specifically considered "what time limits apply to [a] motion for reconsideration" under the Davis-Bacon Act. *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 98-164, ALJ No. 1996-DBA-33, slip op. at 2 (ARB June 8, 2001).[21] In that case, the Wage & Hour Administrator argued that the Board should apply a fourteen-day time limit rather than the ten-day time limit previously used by the Deputy Secretary. *Id.*, slip op. at 3. But the Board ultimately did not alter or restrict the baseline reasonable time standard,[22] and none of the Board's subsequent reconsideration decisions have discussed or adopted any other standard for timeliness.[23] Therefore, we conclude that the Board has not adopted the timeliness provisions in either the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure.

(citing *Bergen County* as support for same proposition); *Confederated Salish and Kootenai Tribes*, slip op. at 2 n.6 (same). Therefore, it is unlikely that *Utah Rural Dev. Corp.* was intended as an adoption of that particular Federal rule. Even if it was, however, the Secretary later retreated from any such adoption.

[21] The Board's decision to discuss what limits might be appropriate demonstrates the Board's understanding that no prior decision had adopted any specific limitation period applying to all petitions for reconsideration.

[22] The Board determined that the petition was untimely in any case because the petitioner had not filed it until "more than five months after" the issuance of the decision. *See Thomas & Sons*, slip op. at 5-6.

[23] *See, e.g., Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-4, slip op. at 2 (ARB July 24, 2006) (discussing merits, but not timeliness, of petition for reconsideration filed 58 days after decision issued); *Rockefeller v. U.S. Dep't of Energy, Carlsbad Area Office*, ARB No. 03-048, ALJ No. 2002-CAA-5, slip op. at 2-3 (ARB May 17, 2006) (same); *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-47, slip op. at 2 (Dec. 12, 2005) (same, four, five, and seven months); *Knox v. U.S. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-CAA-3, slip op. at 2-3 (ARB Oct. 24, 2005) (same, approximately ten months); *Saporito v. Fla. Power & Light Co.*, ARB No. 04-079, ALJ Nos. 1989-ERA-7 and 17, slip op. at 2 (ARB Dec. 17, 2004) (discussing implications of res judicata doctrine on petition for reconsideration filed six years after decision, without discussing timeliness); *N.M. Nat'l Elec. Contractors Ass'n*, ARB No. 03-020, slip op. at 2-6 (ARB Oct. 19, 2004) (discussing merits of reconsideration petition with reference to "analogous" substantive requirements of Federal Rule of Appellate Procedure 40 and Federal Rules of Civil Procedure 59(e) and 60(b), but not adopting either substantive or timeliness requirements of any of those rules; omitting discussion of timeliness of petition for reconsideration filed 49 days after decision issued); *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 2 (ARB July 10, 2003) (discussing merits, but not timeliness, of petition for reconsideration filed 92 days after decision issued).

(c) Other timeliness standards

We are not aware of any decision in which the Board or its predecessors have replaced the baseline "reasonable time" standard with any other timeliness standard.

In five instances in 1992 where it dismissed a case as moot, the Board of Service Contract Appeals (one of this Board's predecessors) specified that it would consider petitions for reconsideration if such petitions were filed during a 30-day period.[24] But these specifications were limited to those five instances, and we are not aware of other decisions that specified a similar time period.

Subsequently, the Secretary (whose prior decisions this Board must follow or specifically overrule, *see* Secretary's Order 1-2002, 67 Fed. Reg. at 64,273) once provided a complainant with one year to seek re-opening.[25] Again, however, that instruction was explicitly limited to the particular case, and we are not aware of any other decision containing a similar instruction.

We conclude that the Board's predecessors did not adopt any timeliness standard to replace the baseline reasonable time standard. We further conclude that we should apply this reasonable time standard to Henrich's Petition.

B. What length of time is "reasonable"?

The Board and its predecessors have not previously explicated in detail what considerations are relevant in determining whether an elapsed length of time was "reasonable." But the Board's decision in *Thomas & Sons* indicates that the Board does follow a definite approach in so determining.

Thomas & Sons noted the Administrator's argument that the Board should apply a fourteen-day time limit rather than the ten-day limit previously applied, and further noted that the petitioner had filed its motion for reconsideration "more than five months" after the decision issued. The Board then stated as follows:

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[24] *See Canteen Food & Vending Serv.*, BSCA No. 92-34, slip op. at 3 (Nov. 30, 1992) (in dismissing for mootness, Board noted that because dismissal was sua sponte, "for good cause shown, any party or interested person may seek the Board's reconsideration of this dismissal within thirty days of the date of this decision"); *Rams Specialized Sec. Serv., Inc.*, BSCA No. 92-25, slip op. at 2 (Sept. 23, 1992) (same); *Porshia Alexander of America, Inc.*, BSCA No. 92-20, slip op. at 3 (Aug. 26, 1992) (same); *Meldick Servs., Inc.*, BSCA No. 92-19 (Aug. 26, 1992) (same): *Northern Va. Serv. Corp.*, BSCA No. 92-18 (Aug. 26, 1992) (same).

[25] *See Guity v. Tenn. Valley Auth.*, 1990-ERA-10 (Sec'y Jan. 4, 1994) (inherent agency authority allowed Secretary to provide one-year period during which re-opening could be sought, after which dismissal without prejudice would convert to dismissal with prejudice).

> No new evidence or changed circumstances have been raised by Thomas & Sons in support of their request, which essentially raises the same argument that was considered and squarely rejected by the Board in our prior decision. Moreover, no good cause has been shown for the delay. We therefore find that the request is untimely.

Slip op. at 6. *Thomas & Sons* thus appeared to use a three-part approach to determining timeliness. The Board first examined the length of time between the decision's issuance and the filing of the petition for reconsideration. Having determined that the petitioner had "delay[ed]" beyond the normal time limit, the Board next examined the nature of the arguments raised by the petitioner to determine whether those arguments were of the type that justify appellate rehearing, or were Rule 60(b)-type arguments.[26] The Board determined that the petitioner did not raise "new evidence" or "changed circumstances" – both of which are Rule 60(b)-type arguments – and therefore determined that five months was, presumptively, unreasonably long. The Board then examined whether the petitioner had "good cause" for the delay. After the Board determined that good cause had not been shown, the Board concluded that the petition was untimely.

Previous decisions of the Board and its predecessors appear to follow this same three-part approach. In almost all of its decisions granting reconsideration from a final order, the Board has noted that the petitioner sought reconsideration shortly after the Board issued its decision.[27] Similarly, the Board's predecessors have presumed that a

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[26] Footnotes 30 and 31 discuss the distinction between arguments that might justify appellate rehearing, and Rule 60(b)-type arguments.

[27] *See Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, ALJ No. 2004-LCA-36, slip op. at 2 (ARB May 9, 2007) (granting reconsideration where petition was filed within ten days); *Leveille*, slip op. at 4 (same, "promptly" and within ten days); *Jones*, slip op. at 1 (same, "within a few days"); *Macktal*, slip op. at 5 (same, "immediately"); *OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 1987-OFC-20, slip op. at 1 (ARB Dec. 12, 1996) (same, six days). In the exception, *N.M. Nat'l Elec. Contractors Ass'n*, the party seeking reconsideration was an agency of the federal government. *See* slip op. at 2. The panel did not characterize, in any manner, the length of time (49 days) that had elapsed between the issuance of the panel decision and the filing of the petition.

Some of the Board's recent decisions are perhaps not entirely clear about whether the Board was denying reconsideration or instead was granting reconsideration but declining to change the decision. *See Cummings*, slip op. at 1-2 (ARB Dec. 12, 2005) (containing text phrase "on reconsideration," but with header "Second Order Denying Reconsideration"); *Belt v. U.S. Enrichment Corp.*, ARB No. 02-117, ALJ No. 2001-ERA-19, slip op. at 1-2 (ARB June 25, 2004) (containing text phrase "upon reconsideration," but with header "Order Denying Reconsideration"); *Blodgett v. Tenn. Dep't of Env't & Conservation*, ARB No. 03-138, ALJ No. 2003-CAA-15, slip op. at 3 (ARB June 9, 2004) (containing text phrase "on reconsideration" but also stating that "Blodgett provides no reason why the Board should reconsider"); *Kelly v. Lambda Research, Inc.*, ARB No. 02-075, ALJ No. 2000-ERA-35, slip

petition filed within ten days would be timely and have granted reconsideration to

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op. at 1-2 (ARB May 6, 2004) (containing text phrase "upon reconsideration," but with header "Order Denying Reconsideration"); *Blodgett v. Tenn. Dep't of Env't & Conservation*, ARB No. 03-043, ALJ No. 2003-CAA-7, slip op. at 1-2 (ARB Apr. 29, 2004) (containing text phrase "upon reconsideration," but containing header "Order Denying Motion to Reconsider and Vacate Final Decision"); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-6, slip op. at 1, 4 (ARB Feb. 17, 2005) (stating that "[W]e have considered Powers's arguments in support of her Motion, but find no reason to depart from our original decision," but headed "Denying Complainant's Motion for Reconsdieration [sic – misspelling in original]" and further stating that "we DENY Powers's motion to reconsider our Final Decision and Order.")

In each of these decisions, however, the Board explained why the petitioner's arguments for reconsideration did not meet various screening criteria and thus did not warrant reconsideration. *See Cummings*, slip op. at 2 (ARB Dec. 12, 2005) (explaining that pro se petitioner's new evidence would not change outcome and therefore was not material, and that arguments had already been "considered and rejected" and therefore the panel "w[ould] not address them again"); *Belt*, slip op. at 2-3 (explaining that Belt's new evidence was not newly discovered, that the panel had not overlooked but indeed had quoted from the piece of evidence Belt argued had been overlooked, and that Belt's other arguments were "irrelevant"); *Blodgett*, slip op. at 3 (ARB June 9, 2004) (explaining that Blodgett's argument that the Eleventh Amendment did not bar his complaint was "irrelevant" in that it did not take issue with the panel's procedural reason for dismissing his complaint); *Kelly*, slip op. at 2 (explaining that although Kelly sought reconsideration on the basis that the witness had committed fraud, his arguments in support of this assertion merely "repeated the . . . charges and accusations he made in his original appeal briefs" and thus did not persuade the panel that reconsideration was appropriate); *Blodgett*, slip op. at 2 (ARB Apr. 29, 2004) (explaining that Blodgett's argument that the Board had overlooked his brief rested on an erroneous premise, because the brief to which he referred had in fact been filed in a different case); *Powers*, slip op. at 2-3 (explaining that pro se petitioner Powers had relied upon an erroneous factual premise, had made an irrelevant contention, had requested that the Board perform a duty that was in fact hers, and had erroneously asserted that the Board did not have authority to impose page limits when in fact it did have such authority).

Moreover, only two of these decisions characterized in any way the elapsed time between the issuance of the decision and the filing of the petition. The first characterized a period of twelve days as "short." *See Blodgett*, slip op. at 2 (ARB Apr. 29, 2004). The second decision characterized a motion filed 56 days after the Board's decision as having been filed "soon after the Board issued its decision." *Blodgett*, slip op. at 3 (ARB June 9, 2004). Elsewhere in that decision, however, the panel noted that the petitioner had based its petition upon a Supreme Court case decided upon the same day that the petition was filed; thus, it appears likely that the decision after which the petition was "soon" filed was the Supreme Court's, rather than the Board's. *See id.*, slip op. at 2-3. Even if the panel did not misspeak, this one exception was issued by a two-member panel, and therefore does not indicate that the Board intended to change its views.

petitions filed beyond that limit only where the petition provided a reason why delay should be overlooked.[28] When the Board and its predecessors have relied upon

[28] *See McCuistion v. Tenn. Valley Auth.*, 1989-ERA-6, slip op. at 1 (Sec'y Sept. 22, 1994) (granting reconsideration of and vacating, on basis of petition filed July 22, 1994, decision issued June 3, 1994, where "the parties jointly moved for reconsideration in light of their previous settlement reached and approved in related Case No. [19]90-ERA-44"); *Nat'l Cancer Inst.*, BSCA No. 93-10, slip op. at 1-2, 4 (Dec. 30, 1993) (affirming decision made over four years previously, BSCA "treats [its] review of this matter as a question of reconsideration – albeit later than would be entertained in the ordinary course of events – of the Deputy Secretary's decision . . . given the unique facts of this case, where there is a question of statutory coverage and a prime contractor has alleged that it had no notice of the administrative proceedings"); *Monahan*, slip op. at 2 (considering reconsideration petition filed after ten-day limit contained in Federal Rule of Civil Procedure 59(e), where Secretary had been notified of relevant change in circumstance within ten-day limit); *Haubold v. Grand Island Express, Inc.*, 1990-STA-10, slip op. at 1-2 (Sec'y Aug. 2, 1990) (granting reconsideration of order denying reopening of the record, upon basis of pro se petition filed 28 days after decision issued); *Colonial Realty, Inc.*, WAB No. 87-37, slip op. at 10 (Sept. 20, 1989) (granting reconsideration petition filed 61 days after decision issued, where Administrator's motion "brought into question the veracity" of the other party at oral argument); *Maestas*, 1982-SCA-9 (Under Sec'y July 31, 1986) (granting reconsideration of and reversing ALJ's final decision, which had not been appealed, based upon petition filed more than seven months after ALJ's decision became final, where petitioner had responded to Government's original complaint but had not, for reasons explained in the petition, responded to Government's amended complaint filed 18 months after Government's original complaint); *Menlo Serv. Corp.*, No. SCA-876-883, 1983 WL 189815 (Sec'y Mar. 9, 1983) (considering merits, but not timeliness, of petition for reconsideration filed seventeen months after decision issued, where "U.S. District Court for the Northern District of California in Menlo Service Corporation, et al., No C-81-1516 SW" also had sought reconsideration of the decision); *Carabetta Enters., Inc.*, WAB Nos. 74-04 and 74-04A, slip op. at 7-8 (Jan. 30, 1976) (after twice denying reconsideration of January 1975 order "declining further jurisdiction," Board after receiving further information from litigant then granted reconsideration of that order); *Litton Bionetics, Inc.*, WAB No. 74-05 (II), slip op. at 2 (June 24, 1975) (evaluating merits of Solicitor of Labor's motion for reconsideration filed 46 days after decision issued, thereby "overlooki[ing] procrastination," while noting that "Board could, perhaps should, dismiss [] motion as highly dilatory in a case in which the Labor Department has no excuse to be dilatory" and that "in future decisions the Board will not take as lenient an approach to unreasonable unexplained delays by the Labor Department"); *see also Saporito v. Fla. Power & Light Co.*, 1989-ERA-7 and 17, slip op. at 1-2 (OAA Sept. 12, 1994) (ordering response to petition for reconsideration filed 48 days after decision issued, where Chairman of Nuclear Regulatory Commission (NRC) also had written to express view and petitioner had raised "important issues of the interplay between the employee protection provision of the ERA and [NRC] regulations"). *But see Executive Suite Servs., Inc.*, BSCA No. 92-26, slip op. at 2 (Apr. 28, 1993) (in rejecting petition for reconsideration, Board noted that it does "entertain and rule upon timely reconsideration requests filed by the parties. *See, e.g., Crimson Enters., Inc.*, BSCA No. 92-08 (Jan. 20, 1993)," but remained silent on whether Crimson's request, filed three months after Board's decision, had itself been timely).

untimeliness to reject petitions for reconsideration, in all but one instance the decision indicated that the petitioner had failed to provide "good cause," an "excuse," or a "reason" for the failure to file more quickly.[29]

In sum, the Board and its predecessors have presumed a petition timely when the petition was filed within a short time after the decision. The Board and its predecessors also have granted reconsideration where a petition, though filed after a longer period, raised Rule 60(b)-type grounds or showed "good cause" for the delay. Finally, the Board and its predecessors have rejected as untimely those petitions filed more than a short time after the decision, when such petitions have neither raised Rule 60(b)-type arguments nor shown good cause for delay.

The approach of the Board and its predecessors is consistent with the Article III system's treatment of petitions for reconsideration. Under the Article III procedural rules, a party has a very short time to seek *rehearing* – i.e., an alteration in the judgment, generally based upon factual, procedural, or legal error (including conflict with precedent or failure to recognize a change in the controlling law or regulation), or exceptional circumstances.[30] A party has a much longer and more individualized time period to seek

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[29] *See Vogt v. Atlas Tours, Ltd.*, 1994-STA-1, slip op. at 1-2 (ARB Sept. 25, 1996) (declining "in the interest of finality and fairness" to reconsider decision issued June 24, 1996, where complainant's opening brief, construed as petition for reconsideration, was not received until September 13, 1996 *and* complainant "provided no excuse . . . for not requesting a further extension of time prior to the . . . due date"); *Hasan*, slip op. at 1-3 (questioning authority to consider petition for reconsideration filed after U.S. Court of Appeals had affirmed Secretary's findings; finding reconsideration request untimely under Rule 60(b), and evidence "irrelevant," in any case; and concluding that "[t]here is no other possible basis upon which [petition for reconsideration] might be granted"); *Military Sealift Command*, slip op. at 1 (finding untimely a petition for reconsideration filed more than three months after the decision issued, where motion was filed after expiration of ten-day limit in "Rule 59(e)" *and* MSC "offered no reason for the delay in filing"); *ATCO Constr., Inc.*, WAB No. 86-01 (Jan. 29, 1987) (petition untimely when party had been "on notice and elected not to be a party to th[e] appeal for almost a year" before ultimately attempting to enter the case via its petition for reconsideration). *Spearman*, the exception, cited *Bergen County* to support its conclusion that a petition filed 21 days after decision issued, and 15 days after it was received, was untimely because a petition "must" be filed within Rule 59(e)'s ten-day limit. *Spearman*, slip op. at 1. But because *Spearman* also acknowledged that *Bergen County* had used that ten-day rule only as "guidance," it seems likely that the petitioner had failed to show good cause for the delay.

[30] The Federal Rules of Appellate Procedure generally require that a petition for reconsideration be filed within 14 days after the decision issues. *See* FED. R. APP. P. 35 (en banc rehearing), 40 (panel rehearing). The 14-day deadline is extended to 45 days for cases in which the United States is a party, and can be extended in other cases by local rule or specific order. *Id.* A petition for rehearing must specify at least one "point of law or fact that . . . *the court* has overlooked or misapprehended," indicate that the panel decision conflicts

relief from a judgment using one of the grounds listed in Rule 60(b),[31] but a party cannot seek such relief based upon the contention that there was "an error of legal reasoning."[32] Indeed, "[t]he ground for setting aside a judgment under Rule 60(b) must be something that could not have been used to obtain a reversal by means of a direct appeal."[33]

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with a previously-decided case that binds the panel (i.e., a prior decision of the Supreme Court or of the circuit in which the panel sits), or show that the panel decision involves a question of exceptional importance. *Id.* Similarly, a petition for rehearing of a Supreme Court decision generally must be filed within 25 days after entry of the judgment, although the Supreme Court Rules authorize orders that extend that time limit. *See* SUP. CT. R. 44.1. A petition seeking rehearing of a merits decision may rely upon any ground; a petition seeking rehearing of a denial of a writ must demonstrate "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented." *Id.* at 44.2.

[31] A party may petition for relief from a district court's decision within a "reasonable time" – up to a full year or longer – if the petition is grounded upon circumstances described in Federal Rule of Civil Procedure 60(b). *See* FED. R. CIV. P. 60(b). But the grounds justifying a Rule 60(b) petition for *relief from* a judgment are quite different from those justifying a petition seeking to *alter* that judgment. The first and third Rule 60(b) grounds stem from errors or misconduct by a *party*. *See* FED. R. CIV. P. 60(b)(1) (permitting court to relieve party from judgment "for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect" by petitioner), 60(b)(3) (permitting relief for "(3) fraud . . . misrepresentation, or other misconduct of an adverse party"). The second and fifth grounds allow relief from the judgment based upon incidents that occur *after* the entry of judgment. *See* FED. R. CIV. P. 60(b)(2) (permitting relief for "(2) newly discovered evidence"); 60(b)(5) (permitting relief when "(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application"). The fourth ground allows relief because the judgment never was valid in the first place. *See* FED. R. CIV. P. 60(b)(4) (permitting relief where "(4) the judgment is void"). Finally, Rule 60(b)'s catch-all ground permits relief when "there is a reason justifying relief," FED. R. CIV. P. 60(b)(6) – but few if any grounds for *rehearing* can justify *relief*. *See* 11 WRIGHT, MILLER & KANE, § 2863 (Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment.").

[32] *See Ward v. Kennard*, 133 F. Supp. 2d 54, 62-63 (D.D.C. 2001) (surveying circuits and noting that First, Second, Third, Fourth, Seventh, Eighth, and D.C. Circuits either bar Rule 60(b) challenges based upon alleged legal error, or permit such challenges only "when the district court based its legal reasoning on case law that it had failed to realize had recently been overturned," while only Ninth Circuit permits parties to use Rule 60(b) motions to challenge alleged legal errors).

[33] *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800-801 (7th Cir. 2000) (explaining that while Rule 60(b) permits several different grounds for collateral attack on a final judgment, "[t]he common thread is that [the "grounds for a Rule 60(b) motion"] are grounds that could not, in the circumstances, have been presented in a direct appeal").

Therefore, we see no reason not to apply this three-part approach in determining whether Henrich's petition was timely.

C. Henrich's Petition

In keeping with the approach outlined in the previous section, we first address whether Henrich's Petition was filed within a "short time." We then discuss the grounds upon which Henrich relied. Finally, we address whether Henrich showed good cause for any delay.

Did Henrich file his Petition within a short time after the decision?

Henrich filed his Petition on the 60th day after we issued our decision. In response to Ecolab's contention that Henrich's Petition was untimely, we must determine whether under our precedent 60 days is a "short" time. We conclude that it is not. With one exception, the Board and its predecessors have characterized as "short" only time periods of twelve days or less.[34] It is possible that the Board would consider as short a period of 14 or even 30 days.[35] But we need not decide the outer limit of a short time in order to conclude that 60 days is not, within our understanding of that term, short.

Because Henrich did not file within a short time, his Petition was untimely unless he raised Rule 60(b)-type grounds, or showed good cause for his delay.

Did Henrich raise Rule 60(b)-type grounds for reconsideration?

Henrich argues that the Board made the following errors: (1) we "ignored" and "misconstrued" evidence in the record showing that Henrich had refused to write off inventory and thus engaged in protected activity, Petition at 7, even though this evidence was supported and clarified by Henrich's deposition, Petition at 8; (2) we failed to weigh the evidence properly and thus erroneously determined that substantial evidence supported the ALJ's determinations that Henrich was not credible and the Ecolab managers were, Petition at 13-19, 27-28, and the ALJ's finding that Henrich had not proven causation, Petition at 19-27 (arguing that (i) Henrich did prove that Zillmer was biased and had improperly influenced decisionmakers, Petition at 19-20, 26-27; and (ii) Henrich's protected activity regarding the labor-cost reports was sufficiently proximate to his termination to show causation because the reports' "financial impact was not evident to Upper Management until three months before Henrich's termination," Petition at 2, 24-26); and (3) we erred in concluding that the ALJ had applied the proper legal standard,

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[34] The exception appears to have been a misstatement. See footnote 27, *supra*.

[35] *See Thomas & Sons*, slip op. at 3-5 (discussing whether to adopt 14-day time limit); *Porshia Alexander of America, Inc.*, slip op. at 3 (allowing 30-day period within which petitions for reconsideration would be accepted).

Petition at 29-30, and in failing to apply the mixed-motive analysis that is required when some degree of causation has been proven, Petition at 20-24.

All but the first of Henrich's arguments raise *rehearing*-type grounds rather than Rule 60(b)-type grounds. That first argument relies in part upon Henrich's deposition, which was not part of the record. Thus, it appears to incorporate a Rule 60(b)-type ground. In another circumstance, we might have considered whether Henrich had sought to introduce this evidence within a reasonable time. But there is no point in undertaking such an analysis in this case, because the evidence to which Henrich refers is his own deposition – which certainly cannot count as "newly discovered" under Rule 60(b), or as "new and material evidence . . . which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54. (Because the evidence was not newly discovered and thus could not be admitted, Henrich's argument that Ecolab would not suffer prejudice by the admission of this evidence is thus irrelevant.)

Henrich's other arguments are rehearing-type arguments, which – as we discuss above – do not themselves justify a delay in filing a petition for reconsideration. Therefore, we proceed to examine whether Henrich showed good cause for his delay.

Did Henrich show good cause for his delay?

In attempting to justify his delay, Henrich offered three reasons. Reply at 1. We discussed the first two (past practice, and filing within the time for appeal) earlier. As our earlier discussion should make clear, these two reasons do not demonstrate good cause for Henrich's delay. Rather than explaining why Henrich filed later than he should have done, those two reasons merely indicate that he believed he would suffer no penalty if he did not file within a short time. But Henrich's own belief that a longer period was reasonable does not excuse his delay.

Henrich's remaining argument is that Ecolab would not be prejudiced by our granting his motion for reconsideration. Reply at 1. But even if prejudice to the opposing party may be taken into account in determining the timeliness of a motion for reconsideration, and even assuming that Henrich is correct is asserting that Ecolab would not suffer prejudice from any decision to grant reconsideration, a lack of prejudice does not itself constitute a good reason for delay.

None of Henrich's three reasons justify his delay. Therefore, we conclude that Henrich has not shown good cause for his delay.

III. Screening

Even if Henrich's petition had been timely, we would have rejected it because it does not demonstrate that our decision should be reconsidered.

In analyzing whether it is appropriate to reconsider a decision, the Board and its predecessors have been guided by federal court practice.[36] Like the federal courts, the Board will reconsider its decisions only when a petitioner has demonstrated that he clears one or more of the standard screening hurdles used in the federal courts. The Board and its predecessors have summarized these screening hurdles in multiple ways.[37] Several recent decisions have employed a formulation first articulated in *Knox*.[38] This formulation (which does not purport to list all reasons for reconsideration[39]) does not

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[36] *See, e.g., Ndiaye*, slip op. at 2 (noting that "[m]oving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure"); *Knox*, slip op. at 3 (noting that "we have adopted principles federal courts employ in deciding requests for reconsideration"); *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-47, slip op. at 2-3 (ARB June 30, 2005) (discussing Federal Rules of Civil Procedure 59 and 60, and Federal Rule of Appellate Procedure 40); *U.S. Dep't of Energy, Richland, Wash. Office*, ARB No. 03-016, slip op. at 2-3 (Oct. 6, 2004) (same); *Prime Roofing*, slip op. at 6-7 (taking guidance from Federal Rules of Civil Procedure 59 and 60 in determining whether evidence warranted new trial); *DeFord*, slip op. at 2 (taking guidance from Rules 59 and 60(b) in determining whether evidence warranted reconsideration); *see also Caimano*, slip op. at 2 (noting federal court precedent providing that settlement may justify vacating decision under Rule 60(b)); *Young v. CBI Servs., Inc.*, slip op. at 2-3 (taking guidance from Rule 60(b) principles in denying reopening of record); *Hasan v. Nuclear Power Servs.*, 1986-ERA-24, slip op. at 5-6 (Sec'y June 26, 1991) (taking guidance from Rule 60(b) in analyzing motion for new trial). Because *Knox* does not cite to any particular prior decision in which such principles were "adopted," and our own review has not revealed such a decision, it appears that *Knox*'s statement that such principles had been "adopted" was intended to as a shorthand description of the general practice, in decisions of both the Board and its predecessors, of determining whether to grant reconsideration requests by using screening tests similar to those used in federal courts.

[37] *See, e.g., Knox*, slip op. at 3 (listing four circumstances that may justify reconsideration); *Fla. Dep't of Labor & Employment Sec. v. DOL*, 1992-JTP-17, slip op. at 1 (Sec'y Jan. 20, 1995) (noting that reconsideration is appropriate "to correct manifest errors of law or fact or to present newly discovered evidence"); *Saporito v. Fla. Power & Light Co.*, 1989-ERA-7, 17 (Sec'y Feb. 16, 1995) (same); *Laborers' Dist. Council*, WAB No. 1992-11, slip op. at 3-4 (Apr. 29, 1993) (assessing whether petition showed that WAB decision was "contrary to the Department's regulations and Board precedent"); *Bartlik*, slip op. at 2 (assessing whether petition showed that decision "erred in any material respect"); *Litton Bionetics, Inc.*, WAB No. 1974-05 (II), slip op. at 6 (June 24, 1975) (assessing whether petitioner's arguments were of "substantial importance" and "would justify reversal").

[38] *See Chelladurai*, slip op. at 2; *Rockefeller*, slip op. at 2; *Saban v. Knudsen*, ARB No. 03-143, ALJ No. 2003-PSI-1, slip op. at 2 (ARB May 17, 2006); *Halpern*, slip op. at 2; *Getman*, slip op. at 1-2; *Cummings*, slip op. at 2 (ARB Dec. 12, 2005).

[39] *See Knox*, slip op. at 3 (circumstances justifying reconsideration "*include*" those listed) (emphasis added).

include, in its list of circumstances justifying reconsideration, several circumstances specified as sufficient in past decisions.[40] The parties do not ask us to revise this formulation, however, and we need not here reconcile it with the various other formulations and applications of the screening criteria because Henrich's arguments do not clear any of the screening hurdles (however formulated) and thus do not demonstrate that reconsideration is warranted.

Henrich's first argument relies upon portions of his own deposition that are not in the record. Because this evidence was in Henrich's possession at the time of the hearing, and he presents no unusual circumstances or other good reason why it was not submitted, it is not appropriate for us to consider it now. "A party that has not presented known facts helpful to its cause when it had the opportunity cannot ordinarily avail itself of Rule 60(b) after it has received an adverse judgment."[41]

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[40] *Compare Knox* (omitting from list errors stemming from, e.g., misunderstood facts or failure to follow precedent) *with, e.g., Stephenson v. NASA*, 1994-TSC-5, slip op. at 2 (ARB Apr. 7, 1997) (granting reconsideration with respect to "purported discrepancy between our decision and certain administrative precedent"); *OFCCP v. Keebler Co.*, 1987-OFC-20, slip op. at 1-2 (ARB Dec. 12, 1996) (granting reconsideration where decision did not apply controlling regulation that became effective after briefs were filed, but before decision issued); *Polgar v. Fla. Stage Lines*, 1994-STA-46, slip op. at 1 (Sec'y June 5, 1995) (modifying decision's calculation of weekly earnings to include only weeks that Polgar actually worked); *Stephenson*, slip op. at 1 (Sec'y Sept. 12, 1995) (granting reconsideration where, as explained in subsequent order of remand, *see Stephenson*, slip op. at 3 (Sec'y Sept. 28, 1995), original decision had analyzed motion as 12(b)(1) motion when it should have analyzed it as 12(b)(6) motion); *Bishop d/b/a Safeway Moving & Storage*, BSCA No. 92-12, 1993 WL 832145 at *1 (Feb. 23, 1993) (granting reconsideration where BSCA had performed "duplicative" calculation in determining back wages due); and *Metro. Atlanta Rapid Transit Auth.* WAB No. 1975-05, slip op. at 5 (Oct. 16, 1975) (granting reconsideration to address arguments that decision was inconsistent with precedent).

[41] *Young v. CBI Servs.*, slip op. at 3 (denying request to reopen record premised upon evidence that counsel chose to withhold at hearing) (quoting *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980)); *see also Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1032 (7th Cir. 1997) ("The insuperable difficulty for the plaintiff is that a motion to alter the judgment may not be based on evidence that was available when the district court judge took the motion for summary judgment under advisement but that was not presented then"); *Moolenar v. Gov't of the Virgin Islands*, 822 F.2d 1342, 1346-48 (3d. Cir. 1987) (vacating district court judgment granting new trial, because "fail[ure] to present evidence which was available to [plaintiffs] from the outset" was not a circumstance justifying Rule 60(b) relief); *Varnadore v. Oak Ridge Nat'l Lab.*, ARB No. 98-119, ALJ No. 1992-CAA-2, 5, 1993-CAA-1, 2; 1994-CAA-2, slip op. at 2-3 (ARB May 14, 1998) (denying request for reopening of record premised upon evidence that came into party's possession prior to final decision, but was not submitted until after final decision); *DeFord*, slip op. at 3 (denying complainant's request for remand for presentation of additional evidence on "estimated future medical expenses," where complainant could have presented such evidence at hearing).

Henrich's other arguments for reconsideration boil down to the assertion that in several instances we failed to agree with his positions on appeal: we did not weigh the evidence as he would have liked, and we did not then apply the rule of law that would have applied had we weighed the evidence differently. Prior decisions agree that arguments clearly rejected by the panel generally do not justify reconsideration.[42] While the reasoning in some prior decisions may appear inconsistent in certain respects,[43] those seeming inconsistencies need not concern us unduly. *Young v. Schlumberger* and *New Mexico* cannot stand for the proposition that new arguments are never acceptable reasons for reconsideration, because only a new argument can take specific issue with a decision that is not yet written when the original appellate briefs are filed. Similarly, decisions such as *Getman*, *DOE Richland*, and *Wagerle* cannot mean that arguments once considered cannot again be considered, because re-consideration of a previously rejected argument is the very exercise we undertake once we have determined that reconsideration is appropriate. What is clear is that before we will reconsider an argument, we must be convinced that there is reason to do so. As our prior decisions have made clear, in order to convince us the party seeking reconsideration must clear one or more of the standard screening hurdles by showing, through arguments specifically discussing our decision, why reconsideration of that decision is warranted.

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[42] *See, e.g., Rockefeller*, slip op. at 2 (denying reconsideration request premised upon contentions that "merely reiterate arguments Rockefeller made in his appeal to the Board and which we rejected."); *Institutional & Envtl. Mgmt.*, 1988-CBV-4, 1989 WL 549924 at *1 (Dep'y Sec'y July 10, 1989) ("I have given careful consideration to the . . . motion . . . , and I am not persuaded that reconsideration is appropriate. In essence, the . . . motion reargues the question . . . which was presented and decided previously."); *Cycle Bldg. Maint.*, 1983-SCA-90, slip op. at 1 n.2 (Sec'y May 31, 1989) (denying reconsideration because "the points raised in the request to reopen were raised in the original [appeal], and were considered, and . . . rejected in the Final Decision and Order"); *U.S. Dep't of Labor v. Le-Gals, Inc.*, 1986-SCA-30, slip op. at 2 (Dep. Sec'y Oct. 9, 1987) (denying reconsideration where petitioner's "assertions . . . were considered in [the] final decision"); *CRC Dev. Corp.*, WAB No. 77-01, slip op. at 2 (Jan. 23, 1978) (denying reconsideration on two points where "discussions of both petitioner's assertions were contained in the Board's decision").

[43] *Compare, e.g., N.M. Nat'l Elec. Contractors Ass'n*, slip op. at 4 (declining to consider argument that was not raised in petitioner's original appellate brief) *and Young v. Schlumberger Oil Field Servs.*, slip op. at 1-2 (ARB May 1, 2003) (denying reconsideration because "Complainant raises the issue for the first time, without any explanation for the delay, after we have rendered a final decision") *with Getman*, slip op. at 2 (denying reconsideration because Getman's contentions "merely reiterate points raised in her original appeal and which the Board rejected"), *U.S. Dep't of Energy, Richland, Wash. Office*, slip op. at 4 (denying reconsideration request because petitioner "either did make or could have made all of its present arguments in its Brief [in the original appeal]"); and *Wagerle v. Hosp. of the Univ. of Pa.*, 1993-ERA-1, slip op. at 1 (Sec'y June 19, 1995) (denying reconsideration because petitioner "has not . . . made any new arguments").

Henrich does not do so. Except for the argument we rejected above, he provides no argument as to why he might clear any hurdle, other than his assertion that we repeatedly erred in failing to weigh the evidence in the manner that he desired. This assertion cannot succeed because it does not explain why reconsideration is warranted; it neither identifies which hurdle Henrich believes he is jumping, nor explains why he has cleared it.

Henrich's petition uses terms associated with various hurdles, but does not use them properly. For example, he argues that we "expressly ignored" evidence showing that Ecolab's managers were not credible, Petition at 2, but what he means is that, despite his arguments on appeal, we did not disagree with the ALJ's determinations that those statements were credible and that Henrich's were not. (We know this is what he means, because he later states his position to be that we "improperly discounted," "erroneously misconstrued," and "erred in weighing" the evidence. Petition at 4, 6, 13.)

Henrich also argues that we "ignored" or "failed to consider" several arguments that, in fact, we either considered or expressly explained why we did not,[44] and he makes

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[44] Henrich first argues that we "failed to consider the temporal proximity of Henrich's report," Petition at 2, 24-26 (explaining that "the actual knowledge and financial impact of Henrich's report was not evident to Upper Management until three months before Henrich's termination"), but our decision specifically addressed this theory. *See* F. D. & O. at 22. Thus Henrich's real concern is not that we ignored this theory, but that we did not find it as probative as he would have liked. Such a concern does not warrant rehearing.

Henrich next argues that we "failed to reconcile inconsistent testimony regarding inventory practices." Petition at 13. But Henrich admits that his initial brief also asked us to take up this job, and that we instead agreed with the ALJ that it was unnecessary. (We explained that "[r]esolving the disputed evidence . . . became unnecessary once the ALJ concluded that Henrich did not report his concerns about these practices." F. D. & O. at 19-20.) So Henrich's real contention here is that we did not do something that we needed to do only if we disagreed with the ALJ's credibility determinations. This contention does not demonstrate that rehearing is warranted.

Henrich then argues that we "improperly ignored evidence that Zillmer improperly influenced the decisionmakers." Petition at 19. But our decision stated that "[b]ecause Henrich did not prove that Zillmer had retaliatory animus, we need not determine whether Zillmer's influence on the investigation was significant enough to indicate that any such animus was a contributing factor in the termination decision." F. D. & O. at 23 n.22. So Henrich's real concern is with our conclusion that he failed to prove that Zillmer had retaliatory animus. And although Henrich argues that the "inconsistent testimony regarding inventory practices . . . provide[s] further evidence of Zillmer's retaliatory state of mind," Petition at 13, this argument fails to grapple with our further statement, *see* F. D. & O. at 21, that such evidence could not demonstrate that Zillmer had *retaliatory* animus against Henrich because it did not suggest any connection between Henrich's protected activities and any negative feelings Zillmer may have had toward Henrich. Finally, although Henrich also

several other arguments that also appear to reflect a misunderstanding of our decision.[45] None of these arguments come near to clearing any of the hurdles that must be cleared before reconsideration is warranted.

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argues that "[b]y ignoring this evidence, the Board denies Henrich his right to use the falsity of the respondent's explanation as evidence of discrimination," Petition at 26, this argument depends upon the assumption – incorrect, as we have just explained – that we "ignored" this evidence. It is clear that Henrich's real concern is not that we ignored evidence, but that we drew a different conclusion from it. This concern does not show that rehearing is warranted.

Similarly, Henrich argues that the Board erred in concluding that Henrich did not prove one of the essential elements of his claim, because in Henrich's view "the evidence clearly establishes" causation. Petition at 21. But again, although Henrich takes issue with our general treatment of the evidence, he does not point to any evidence that was overlooked or misunderstood, let alone evidence significant enough to (potentially) alter the outcome.

[45] Henrich argues that our decision to credit the ALJ's credibility determinations was "improper" because we relied upon the ALJ's "conclusory statements of credibility." Petition at 27. In fact, however, we upheld the ALJ's credibility determinations because we determined that they were supported by substantial evidence. *See* F. D. & O. at 12-14 & n.14.

Similarly, Henrich argues that we "misconstrue[d]" Henrich's testimony, leading us to "erroneously conclude that Henrich is not consistent, and therefore, not credible." Petition at 28. In fact, however, we affirmed the ALJ's determination (that Henrich was not credible in alleging that he had expressed his concerns about inventory accounting practices) because it was supported by substantial evidence. In discussing Henrich's testimony, which Henrich had offered in support of his contention that the ALJ's determination was not supported by substantial evidence, we noted that the testimony provided "no details" about when Henrich might have expressed such concerns, and that the testimony was inconsistent. (When first asked if he had expressed his concerns to anyone, Henrich did not indicate that he had. When next asked, he indicated that he had expressed them to "Carol," "Bob," and "Roger." F. D. & O. at 12 n.15.) Based upon these two considerations, we determined that the testimony was not itself sufficiently clear to undercut the ALJ's determination. *Id.* Therefore, even if we now agreed with Henrich's contention that the two portions of testimony we quoted were consistent (which we do not), our previous determination that they were inconsistent played such a small role in our decision to credit the ALJ's credibility determinations that an alteration in our view would not warrant reconsideration.

Finally, Henrich argues that we applied the wrong legal standard by "requiring Henrich to prove that his report of the labor-cost accounting practice was 'the' reason for the termination." Petition at 30. But Henrich offers as the basis for this view only two contentions that our decision rejected – namely, his belief that his report "most certainly would motivate Zillmer to retaliate" and his disagreement with the conclusion that the Ecolab executives' decision could not be understood as a hostile reaction to the exposure of illegal behavior. *Id.* at 29-30. Because our decision expressly acknowledges and applies the correct standard, Henrich's unsupported assertion to the contrary cannot justify reconsideration.

Henrich does argue that we erred in stating that he did "not argue that the ALJ erred in crediting Zillmer's, rather than Henrich's, account of their lunch meeting," and he cites to portions of his pleadings from which he believes this argument implicitly arises. Petition at 10-11. We do not believe this argument fairly arises from those portions of his pleadings, but even if it does, Henrich did not allege that he told Zillmer in that lunch meeting that he was refusing to write off the inventory. Indeed, Henrich admits that the write-off request was not made until after that meeting. *See* Petition at 11 (noting that request was "[m]ere days" after the lunch meeting). Therefore, regardless which account of the lunch meeting was credited, that lunch meeting could not serve as evidence that Henrich *refused* to write off the inventory.

In short, Henrich argues that we made errors in judgment when assessing whether substantial evidence supported the ALJ's findings and credibility determinations, but he does not demonstrate that there are any material errors of law, fact, or process; any changed circumstances warranting relief under Rule 60(b); or any of the other circumstances that have warranted reconsideration under our precedent. Therefore, we conclude that Henrich has not shown that reconsideration is warranted.

CONCLUSION

Because Henrich did not file within a short time, raise Rule 60(b)-type grounds, or show good cause for his delay, his petition for reconsideration was untimely. Even had it been timely, his petition failed to show that he met any of the screening criteria for reconsideration, and thus reconsideration was not warranted. The request for reconsideration is **DENIED**.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge