



In the Matter of:

JOHN NIXON,

ARB CASE NO. 05-066

COMPLAINANT,

ALJ CASE NO. 2005-SOX-001

v.

DATE: September 28, 2007

**STEWART & STEVENSON SERVICES,
INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John Nixon, *pro se*, San Antonio, Texas

For the Respondent:

M. Carter Crow, *Fulbright & Jaworski L.L.P.*, Houston, Texas

FINAL DECISION AND ORDER

The Complainant, John Nixon (Nixon), alleges that the Respondent, Stewart & Stevenson Services, Inc. (Respondent), violated the whistleblower protection provision of the Sarbanes-Oxley Act of 2002 (SOX)¹ and its implementing regulations² when the Respondent terminated his employment because he had previously engaged in activity that the SOX protects against discriminatory adverse action. A United States Department of Labor (DOL) Administrative Law Judge (ALJ) found that there was no genuine issue of material fact as to whether Nixon engaged in protected activity. Therefore, the ALJ

¹ 18 U.S.C.A. § 1514A (West 2002).

² 29 C.F.R. Part 1980 (2007).

granted the Respondent's Motion for Summary Decision. The ALJ also denied Nixon's Motion for Voluntary Dismissal. We concur with the ALJ's decision granting Summary Decision.

BACKGROUND

Nixon began working for Stewart & Stevenson Tactical Vehicle Systems, L.P, a division of Stewart & Stevenson, in September 2003 in Sealy, Texas. Stewart & Stevenson is a federal defense contractor that manufactures military vehicles and equipment at its Sealy facility. The Respondent hired Nixon as the environmental manager for the Sealy facility. The Respondent created Nixon's position to identify environmental compliance issues, facilitate environmental compliance, and help the Respondent achieve "ISO14001 certification," an environmental compliance standard. Nixon reported to Richard L. Botkin (Botkin), Vice President of Human Resources. Nixon was also to maintain close communication with Gary Elkin (Elkin), Director of Environmental, Health and Safety and (as of January 30, 2004) Business Practices, to update him on environmental compliance issues.

On January 30, 2004, Elkin notified the Texas Commission on Environmental Quality (Texas Commission) that the Respondent would conduct an environmental audit of its Sealy facility starting on or about February 2, 2004.³ Elkin asserted that Section 10(g) of the Texas Environmental, Health and Safety Privilege Act provided immunity for violations of environmental laws voluntarily disclosed as a result of a compliance audit.⁴ Elkin subsequently notified the Texas Commission, on February 24, 2004, of the Respondent's discovery during the course of the audit that the sludge emanating from the waste water system had been previously improperly classified as non-hazardous and would be reclassified as hazardous waste and handled and disposed of accordingly.

Botkin and Elkin experienced problems with Nixon's work performance. According to Botkin, "Nixon's job difficulties began soon after he was hired."⁵ Botkin and Elkin met with Nixon in early February 2004 to address these problems.⁶ Botkin put Nixon on a performance improvement plan on February 18, 2004, for failure to adequately perform his job.⁷ Under the plan, Nixon's performance would be monitored

³ Complainant's Abbreviated Amended Answer to Respondent's Motion for Summary Decision, Attachment A.

⁴ *Id.*

⁵ Declaration of Richard Botkin at 2.

⁶ *Id.* at 2.

⁷ Declaration of Richard Botkin, Exhibit A.

for 30 days and then evaluated.⁸ As part of this plan, Botkin required that Nixon submit to Botkin a list of current projects with goals and timetables for completion, meet with Botkin daily, communicate any absences from work to Botkin, and improve his working relationships with co-workers, managers, and supervisors, especially in the Maintenance Department.⁹ Botkin indicated that Nixon was not authorized to contact any outside vendor or agency, including law firms, consultants, and federal, state, county or city agencies, without prior approval from Botkin or Elkin.¹⁰ Botkin further indicated that Nixon's failure to improve his performance would result in disciplinary action, which could include termination of employment.¹¹

On March 15, 2004, Nixon e-mailed to Botkin and others his findings resulting from the audit he conducted, which identified deficiencies in the waste management program at the Sealy facility. Nixon suggested that certain management groups facilitate the necessary changes, and indicated that audit findings from the water and air exposure/emissions programs were forthcoming. Nixon added that Richard Kroger, the Respondent's General Counsel, could explain their "existing immunity status with the state."

That same day, Nixon e-mailed to Steve Hackbarth (Hackbarth), Vice President and Divisional Comptroller, a list of Texas Environmental Laws and Penalties. Nixon wrote, "Steve, this is an fyi on the structure of penalties and fees, if and when ever leveled [sic]. I would think our legal department would assume the lead if these ever come into play. Legal is leading us on the immunity situation, as well."¹²

Again that same day, Nixon sent Hackbarth two additional e-mails to which he attached information about Security and Exchange Commission (SEC) regulations, including the text of SEC Regulation S-K, item 103, 17 C.F.R. § 229.103 requiring company disclosure of certain legal proceedings.

On March 29, 2004, Botkin met with Nixon to discuss his job performance which Botkin determined had not improved. Botkin told Nixon that he must improve his working relationships. Botkin reported Nixon's performance problems to Steve Hines (Hines), the Respondent's Executive Vice President of Human Resources. On April 8, 2004, Hines discussed with Nixon Botkin's negative assessment of Nixon's job

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant's Abbreviated Amended Answer to Respondent's Motion for Summary Decision, Attachment D.

performance.¹³ Hines and Nixon met again on April 12 and discussed a possible severance package in the event that Nixon left his job with the Respondent.¹⁴

Two days later, on the morning of April 14, 2004, security guards observed, and surveillance cameras photographed, Nixon leaving the Sealy facility with a stack of documents. Nixon did not return to work that day and security was placed on alert.¹⁵ The next day, security guards again observed, and surveillance cameras photographed, Nixon taking a stack of documents from the facility. Security personnel stopped Nixon and prevented him from taking the documents from the premises.

When Nixon next returned to the Sealy facility on April 19, 2004, security personnel escorted him to Botkin's office.¹⁶ Botkin told Nixon that he could not remove documents from the facility without permission and reminded him that he had signed a confidentiality agreement.¹⁷ Botkin asked Nixon to return any company documents he had taken.¹⁸ Nixon later returned with a stack of company documents.¹⁹ According to the Respondent, the documents that Nixon had taken were proprietary and confidential and Nixon had violated the confidentiality agreement he had signed with the Respondent by taking these documents from the Sealy facility without permission.²⁰ The Respondent terminated Nixon's employment on April 20, 2004, for, according to the Respondent, poor performance and removal of proprietary and confidential documents from the Sealy facility without authorization.²¹

Nixon filed a complaint with the Occupational Safety and Health Administration (OSHA) on July 15, 2004. Nixon alleged in his Complaint that the Respondent terminated his employment in retaliation for having previously engaged in activity that

¹³ Complaint at 3.

¹⁴ *Id.*

¹⁵ Respondent's Brief in Support of Motion for Summary Decision at 4.

¹⁶ Declaration of Richard Botkin at 2.

¹⁷ *Id.*

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 3.

²⁰ Respondent's Brief in Support of Motion for Summary Decision at 2, 4, and at Exhibit 1, Declaration of Steve Hines at 2.

²¹ Respondent's Brief in Support of Motion for Summary Decision at 1, 4, and at Exhibit 1, Declaration of Steve Hines at 2.

the SOX protects. Nixon asserted that on March 15, 2004, he provided information to Botkin and other officers and managers that showed violations of environmental laws, which he reasonably believed would result in legal proceedings and financial penalties which, in turn, would invoke reporting requirements mandated by the SEC. OSHA investigated the Complaint and found that the Respondent would have terminated Nixon's employment regardless of any protected activity. Nixon requested a hearing before a DOL ALJ.

After an extended period of discovery, the Respondent filed a Motion for Summary Decision and argued that no genuine issue of material fact existed as to whether Nixon engaged in protected activity. Nixon opposed the Respondent's motion, arguing that he had engaged in protected activity when on March 15, 2004, he forwarded to Botkin and other managers information that he reasonably believed showed the Respondent's failure to comply with SEC Regulation S-K item 103, 17 C.F.R. § 229.103.²² That regulation requires publicly-traded corporations to report certain pending environmental legal proceedings or such proceedings known to be contemplated by governmental authorities. Nixon later amended his Complaint to include an allegation that the Respondent engaged in mail fraud in violation of 18 U.S.C.A. § 1341 by falsely claiming immunity from environmental penalties in five letters to the Texas Commission.

The ALJ found that when Nixon provided information to Botkin in March 2004 regarding the disclosure requirements of 17 C.F.R. § 229.103, there was no evidence of pending environmental litigation or of a known environmental proceeding contemplated by governmental authorities that would have triggered the Respondent's duty to disclose.²³ The ALJ stated that Nixon's belief that "government agencies would soon be contemplating proceedings is not the same thing as a belief that they actually were contemplating proceedings."²⁴ The ALJ thus determined that Nixon did not provide evidence that he reasonably believed the Respondent violated the disclosure requirements of 17 C.F.R. § 229.103. With regard to the mail fraud claim under 18 U.S.C.A. § 1341, the ALJ also found that Nixon provided no evidence that the letters were part of a "scheme or artifice to defraud, or for obtaining money or property," as required by 18 U.S.C.A. § 1341, and that there was no evidence that Nixon, prior to his April 2004 termination, considered the Respondent's conduct to constitute mail fraud.²⁵ Therefore, the ALJ concluded that there was no genuine issue of material fact that Nixon had engaged in protected activity and determined that the Respondent was entitled to summary decision and dismissal of Nixon's Complaint. The ALJ also denied Nixon's

²² ALJ's [Recommended] Decision and Order (D. & O.) at 4.

²³ *Id.* at 13.

²⁴ *Id.* at 13.

²⁵ *Id.* at 15.

motion for voluntary dismissal of his complaint.²⁶ Nixon petitioned the Administrative Review Board (the Board) for review of the ALJ's D. & O. The Board issued a Notice of Appeal and Order Establishing Briefing Schedule on March 9, 2005.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX.²⁷ We review a decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.²⁸ The standard for granting summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is similar to that found in Federal Rule of Civil Procedure 56, which governs summary judgment in the federal courts. Accordingly, summary judgment is appropriate if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.²⁹ The determination of whether facts are material is based on the substantive law upon which each claim is based.³⁰ A genuine issue of a material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."³¹

We view the evidence in the light most favorable to Nixon, the non-moving party, and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.³² To prevail on a motion for summary decision, the Respondent, the moving party, must show that Nixon failed to make a showing sufficient to establish the existence of an element essential to his SOX case, and on which

²⁶ On February 2, 2005, Nixon notified the ALJ that he intended to bring a de novo action in federal district court as the DOL had not made a final decision in his case within 180 days of filing his complaint with OSHA. *See* 29 C.F.R. § 1980.114. It appears that Nixon believed that he also needed to withdraw his complaint in the DOL proceeding before he could file de novo in the district court. There is no such requirement.

²⁷ Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

²⁸ 29 C.F.R. § 18.40 (2006).

²⁹ Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.40(d); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

³⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

³¹ *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

³² *Id.* at 255.

he bears the burden of proof at trial.³³ Accordingly, the Respondent may prevail on its motion by pointing to the absence of evidence proffered by Nixon on the issue of material fact as to whether the Complainant engaged in activity protected by the SOX.³⁴

Furthermore, a party opposing a motion for summary decision may not rest upon the mere allegations or denials of its pleadings but must set forth specific facts which could support a finding that there is a genuine issue of fact for hearing.³⁵ Where the record taken as a whole could not lead a rational trier of fact to find for Nixon, there is no genuine issue for trial.³⁶ Nixon must come forward with sufficient rebuttal evidence to show that if the case went to trial, the jury would find in his favor.³⁷ We find that Nixon has not put forth facts sufficient to support a finding that there is a genuine issue of material fact.

DISCUSSION

A. The Legal Standard

Title VIII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the SOX's whistleblower provision, protects employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934³⁸ and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934³⁹ or any officer, employee, contractor, subcontractor, or agent of such companies because the employee provided information to the employer, a Federal agency, or Congress which the employee reasonably believes constitutes a violation of 18 U.S.C. sections 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any

³³ *Celotex*, 477 U.S. at 322.

³⁴ *Id.*

³⁵ 29 C.F.R. § 18.40(c); *see Anderson*, 477 U.S. at 252.

³⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (footnote omitted).

³⁷ *Hasan v. Southern Co., Inc.*, ARB No. 04-040, ALJ No. 03-ERA-032, slip op. at 4 (ARB Mar. 29, 2005)(mere speculation about how the employer might have become aware of complainant's protected activity is not sufficient rebuttal evidence).

³⁸ 15 U.S.C.A. § 781 (Thompson/West 2007).

³⁹ 15 U.S.C.A. § 780(d) (Thompson/West 2007).

provision of Federal law relating to fraud against shareholders.⁴⁰ In addition, SOX protects employees against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation.⁴¹

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).⁴² Accordingly, to prevail on his SOX claim, Nixon must prove by a preponderance of the evidence that: (1) he engaged in activity or conduct that the SOX protects; (2) the Respondent knew about this activity; (3) the Respondent took adverse personnel action against him; and (4) the protected activity was a contributing factor in the adverse personnel action.⁴³ The Respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.⁴⁴

B. Respondent's Motion for Summary Decision

Nixon's Arguments

Nixon seeks review of the ALJ's decision to grant the Respondent's Motion for Summary Decision. Nixon, however, does not specifically argue that the ALJ erred in determining that there was no genuine issue of material fact with respect to Nixon's providing information regarding conduct he reasonably believed to be a violation of SEC Regulation S-K item 103, 17 C.F.R. § 229.103. Nixon merely asserts, without supporting argument, that he engaged in protected activity by "reporting additional audit findings linking Security [and] Exchange Commission regulations requiring agency disclosures" and that the Respondent discriminated against him in violation of the SOX when it fired him "shortly" thereafter.⁴⁵ Nixon has failed to argue the legal significance of this alleged

⁴⁰ 18 U.S.C.A. § 1514A.

⁴¹ *Id.*

⁴² 49 U.S.C.A. § 42121 (West Supp. 2005); 18 U.S.C.A. § 1514A(b)(2)(C).

⁴³ *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 8 (ARB July 29, 2005); *see* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iii)-(iv); *cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a).

⁴⁴ *Getman*, slip op. at 8; *see* 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv); *cf.* 29 C.F.R. § 1980.104(c).

⁴⁵ Complainant's Brief at 4.

error in his brief to the Board and, generally, the Board will not consider an issue that a party has not raised or briefed and will consider any argument thereon waived.⁴⁶

In his Petition for Review, Nixon asserts three new claims of fraud under 17 C.F.R. §§ 229.101, 229.303 and 17 C.F.R. § 240.10b-5.⁴⁷ Nixon did not raise these three claims before the ALJ in response to the Respondent's Motion for Summary Decision.⁴⁸ Under our well-established precedent, we decline to consider arguments that a party raises for the first time on appeal.⁴⁹

Consequently, Nixon's only argument on appeal is that the ALJ improperly defined "fraud" in finding that the Respondent's letters to the Texas Commission did not constitute mail fraud under 18 U.S.C. § 1341.

Nixon's Alleged Protected Activity: 18 U.S.C. § 1341

The SOX prohibits retaliation against an employee who provides information to a Federal regulatory agency or person with supervisory authority over the employee which the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.⁵⁰ Whether a whistleblower's belief is reasonable depends on the knowledge available to a reasonable person in the same circumstances and with the employee's same training and experience.⁵¹

⁴⁶ See *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-007, slip op. at 8 (ARB, Sept. 29, 2006); see also *Walker v. American Airlines*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 17 (ARB Mar. 30, 2007); *United States ex. rel. Verdone v. Circuit Court for Taylor County*, 73 F.3d 669, 673 (7th Cir. 1995)(per curiam)(even pro se litigants must file a legal argument with some supporting authority).

⁴⁷ Petition for Review, at 1-3.

⁴⁸ Complainant's January 11, 2005 "Multi-Purpose Document;" Complainant's January 18, 2005 "Notification of Delay of Interrogatories, and Motion to Dismiss Respondent's Motion for Summary Decision;" Complainant's January 23, 2005 "Abbreviated Amended Answer to Respondent's Motion for Summary Decision;" Complainant's February 7, 2005 "Additional Claims."

⁴⁹ *Harris v. Allstates Freight Sys.*, ARB No. 05-146, ALJ No. 2004-STA-017, slip op. at 3 (ARB Dec. 29, 2005); *Farmer v. Alaska Dep't of Trans. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-011, slip op. at 6 (ARB Dec. 17, 2004); *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 00-ERA-036, slip op. at 6 n.3 (ARB Mar. 25, 2003).

⁵⁰ See 18 U.S.C.A. § 1514A.

⁵¹ See *Stockdill v. Catalytic Indus. Maint. Co., Inc.*, No. 90-ERA-043, 1996 WL 171409 at *1 (Sec'y Jan. 24, 1996); *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No.

To support its Motion for Summary Decision, the Respondent has the burden to establish the absence of evidence to support Nixon's case under the SOX. Nixon must demonstrate that he engaged in SOX-protected activity prior to his April 2004 termination. To bring himself under the whistleblower protection of the SOX, Nixon must establish that he provided information regarding the Respondent's conduct that he reasonably believed constituted mail, wire, radio, TV, bank, or securities fraud, or violated any SEC rule or regulation, or any provision of Federal law relating to fraud against shareholders.⁵²

In his brief to us, Nixon, citing part of the definition of "fraud" contained in BLACK'S LAW DICTIONARY 594 (5th ed. 1979), relies on a definition of fraud different than the meaning of that term as developed in the case law interpreting section 1341.⁵³ That statute involves a "scheme or artifice to defraud, or for obtaining money or property." Nixon does not allege that the Respondent engaged in a "scheme or artifice to defraud, or to obtain money or property." Rather, Nixon argues that the Respondent, through Elkin's January 30, 2004 letter to the Texas Commission claiming immunity from penalties for violations of environmental laws voluntarily disclosed as a result of a compliance audit, tried to evade any potential liability for penalties. According to Nixon, the Respondent had discovered environmental violations *prior to* its audit which rendered it ineligible for immunity from any ensuing penalty and thus, the claim of immunity was false.

For the purpose of our summary decision analysis, we accept as true Nixon's assertion that the Respondent discovered these environmental violations prior to, rather than during, the course of the audit it commenced in February 2004. This fact would render the Respondent ineligible for immunity from any ensuing penalty or fee. Nixon has submitted several letters that the Respondent sent to the Texas Commission. However, only the January 30, 2004 and February 24, 2004 letters from Elkin to the Texas Commission preceded Nixon's April 20, 2004 termination and can constitute evidence of protected activity. We accept as true Nixon's assertion that Elkin sent these two letters knowing that they contained false information. Nixon, however, has submitted no evidence to show that he engaged in protected activity in connection with his mail fraud claim.

We explained in *Getman* that to qualify as protected activity, an employee must actually communicate a concern that the employer's conduct constitutes one of the

1993-ERA-006, slip op. at 27 (ARB July 14, 2000), *appeal dismissed sub nom.*, *Exxon Chems. Ams. v. Chao*, 298 F.3d 464 (5th Cir. 2002).

⁵² *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115, ALJ Nos. 2004-SOX-20, 2004-SOX-036, slip op. at 14 (ARB June 2, 2006).

⁵³ See note 58, *infra*.

enumerated violations.⁵⁴ Under the SOX, Nixon must show that before his April 20, 2004 termination, he provided information to a “a Federal regulatory or law enforcement agency,” “any member of Congress or any committee of Congress,” or to a “person with supervisory authority” over him, which he “reasonably believes to constitute a violation of section 1341”⁵⁵ Yet, the first time Nixon claimed mail fraud under 18 U.S.C. § 1341 was in his February 7, 2005 Brief to the ALJ. To the extent that Nixon argues that he generally asserted fraud in his Complaint, his argument is unavailing. In determining whether Nixon engaged in protected activity, the relevant inquiry is not what he alleged in his Complaint but what he actually communicated to the Respondent prior to his April 20, 2004 termination.⁵⁶ Nixon proffered no evidence to the ALJ or to us showing that he provided information to the Respondent before his April 20, 2004 termination, which he reasonably believed showed that the Respondent engaged in mail fraud by virtue of Elkin’s January 30, 2004 and February 24, 2004 letters to the Texas Commission. We agree with the ALJ that, “Moreover, no evidence in the record exists that indicates that at the time, Complainant considered Respondent’s conduct to constitute the offense of federal mail fraud. The first mention of the mail fraud statute was in his last filing in response to (and days after) a conference call during which I asked if there was any other basis for his claim beyond the SEC rule violation.”⁵⁷

Relying on *Cleveland v. United States*,⁵⁸ the ALJ further notes that because the offense of mail fraud under 18 U.S.C. § 1341 requires a “scheme or artifice to defraud, or for obtaining money or property,” that provision is limited in scope to the protection of property rights. Nixon does not allege that the Respondent engaged in any conduct to defraud the Texas Commission of any property or to obtain any money or property from the Texas Commission. The Respondent’s claim of immunity from the imposition of penalties does not involve any property of the Texas Commission and does not constitute mail fraud under 18 U.S.C. § 1341 according to the ALJ.⁵⁹ While all of this may be true, the SOX does not require that an employee provide information about an actual violation of Section 1341 to be protected. Rather, the employee only has to show that he reasonably believed that there was a violation and conveyed that belief to his employer. However, we find this to be harmless error because, as noted above, the ALJ correctly

⁵⁴ *Getman*, slip op. at 18.

⁵⁵ 18 U.S.C.A. §1541A.

⁵⁶ *Platone v. FLYi, Inc.*, ALJ No. 03-SOX-027, ARB No. 04-154, slip op. at 17 (ARB Sept. 29, 2006).

⁵⁷ D. & O. at 15.

⁵⁸ 532 U.S. 12, 19 (2000).

⁵⁹ *See Ward v. United States*, 845 F.2d 1459, 1462 (7th Cir. 1988) (potential fines imposed by a judge are not a property right under the mail fraud statute.)

found that the record contained no evidence that Nixon actually communicated his section 1341 concerns to the Respondent prior to his April 2004 termination.

Based on this record, we agree with the ALJ's finding that there is no genuine issue of fact as to whether Nixon provided sufficient information to establish, prior to his termination, that he reasonably believed the Respondent engaged in mail fraud in violation of 18 U.S.C. § 1341. Therefore, no genuine issue of fact exists as to protected activity, a necessary element of Nixon's claim.

C. Complainant's Submission of New Evidence to the Board

Nixon filed with the Board an excerpt from the Texas Commission's January 2006 Administrative Enforcement Report and requested the Board to consider it in resolving this appeal. In response, the Board directed Nixon to establish that the proffered evidence meets the requirements for accepting new evidence under 29 C.F.R. § 18.54(c). That regulation provides that once the ALJ closes the record, "no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record."⁶⁰ The Board ordinarily relies upon this standard in determining whether to consider new evidence, i.e., any evidence that is submitted after the ALJ has closed the record. Absent a showing that the proffered evidence is "new and material evidence [that] has become available which was not readily available prior to the close of the record," the Board will not consider the new evidence.⁶¹

In response to the Board's order, Nixon argues that the new evidence, showing that the Texas Commission assessed a \$94,489.00 penalty against Stewart & Stevenson Tactical Vehicle Systems, LP in January 2006, proves that "legal proceedings did occur" and, consequently, supports his case.⁶² We disagree.

We have held that the evidence of record shows that there is no genuine issue of fact that Nixon engaged in protected activity. The fact that what Nixon anticipated would happen did happen, namely that the Texas Commission did assess a penalty against the Respondent for environmental violations, does not retroactively make any activity Nixon engaged in prior to his termination activity protected under the SOX. Thus, we find that the new evidence is not material. Accordingly, we do not consider it.

⁶⁰ 29 C.F.R. § 18.54(c).

⁶¹ September 13, 2006 Order at 1.

⁶² September 28, 2006 Pleading at 2.

CONCLUSION

Nixon has not presented sufficient evidence to create a genuine issue of fact that he engaged in SOX-protected activity. Accordingly, we **GRANT** the Respondent's Motion for Summary Decision and **DENY** the Complaint.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge