In the Matter of:

DAVID WELCH,

COMPLAINANT,

v.

CARDINAL BANKSHARES CORP.,

RESPONDENT.

ARB CASE NO. 06-062

ALJ CASE NO. 2003-SOX-15

DATE: June 9, 2006

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DENYING STAY

David E. Welch filed a whistleblower complaint with the United States Department of Labor alleging that his employer, Cardinal Bankshares Corp., violated the employee protection section of the Sarbanes-Oxley Act of 2002 (SOX or the Act).[1] After an evidentiary hearing, a United States Department of Labor Administrative Law Judge (ALJ) issued a document entitled Recommended Decision and Order (R. D. & O.) on January 28, 2004, wherein he concluded that Cardinal had violated the SOX. Thereafter, on February 15, 2005, the ALJ issued a Supplemental Recommended Decision and Order (S. R. D. & O.), ordering Cardinal to pay Welch back wages, special damages, attorney fees and expenses, and interest on back wages. He also ordered Cardinal to reinstate Welch.[2] Cardinal timely filed a petition for review of the R. D. & O. on or about

[1] 18 U.S.C.A. § 1514A (West Supp. 2005). The regulations implementing SOX are found at 29 C.F.R. Part 1980 (2005).

[2] A successful SOX whistleblower is entitled to reinstatement, back pay with interest, and compensation for special damages, including costs, expert witness fees, and reasonable attorney fees. 18 U.S.C.A. § 1514A(c).

February 24, 2005, which is pending before the Administrative Review Board.[3] Now Cardinal has filed a Motion for Stay of Preliminary Order of Reinstatement. Welch opposes the motion.

BACKGROUND

On September 13, 2005, Welch requested that the United States District Court for the Western District of Virginia, Roanoke Division, issue a preliminary injunction enforcing the ALJ's reinstatement order.[4] Ultimately, the court determined "that it is inappropriate to enforce the preliminary reinstatement order without Cardinal having had the opportunity to seek to obtain a stay from the ARB."[5]

As a result, Welch filed a Motion For Expedited Order Confirming Preliminary Order Of Reinstatement Has Issued with the Board. Welch asked the Board to find that the ALJ had ordered reinstatement and to grant Cardinal ten days to apply for a stay of the order to reinstate. On March 31, 2006, the Board issued an Order holding that pursuant to 29 C.F.R. § 1980.110(b), by implication, an ALJ's decision to reinstate is a "preliminary order of reinstatement."[6] *Welch v. Cardinal Bankshares Corp.*, ARB No.

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[3] The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the SOX to the Administrative Review Board. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

[4] *See* 29 C.F.R. § 1980.113 ("Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.").

[5] *Welch v. Cardinal Bankshares Corp.*, Civil Action No. 7:05CV00546, at 4 (W.D. Va.) (Memorandum Opinion, Jan. 26, 2006).

[6] In describing the ARB's role in reviewing an ALJ's decision, the regulation states that if the Board accepts a petition for review:

> [T]he decision of the administrative law judge will become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case has been accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a *preliminary order of reinstatement* will be effective while review is conducted by the Board, *unless the Board grants a motion to stay the order*.

29 C.F.R. § 1980.110(b) (emphasis added).

04-054, ALJ No. 03-SOX-15, slip op. at 4 (ARB May 13, 2004). Thus, the Board held that the ALJ's decision and order contains a "preliminary order of reinstatement."[7] *Welch*, ARB No. 04-054, slip op. at 5.[8] Because the applicable SOX regulations dictate that an ALJ's decision requiring reinstatement is effective when the employer receives the decision and will not be stayed unless the Board grants a motion to stay the reinstatement,[9] the Board ordered that the ALJ's February 15, 2005 preliminary order of reinstatement is in effect but that Cardinal had ten days from the date it received the Order to move the Board, pursuant to 29 C.F.R. § 1980.110(b), to stay the effect of the preliminary order of reinstatement. *Id.*

On April 17, 2006, Cardinal filed a timely Motion for Stay of Preliminary Order of Reinstatement. Welch has responded, opposing the motion.

DISCUSSION

A "preliminary order of reinstatement will be effective while review is conducted by the Board, unless the Board grants a motion to stay the order." 29 C.F.R. § 1980.110(b). Cardinal has filed a motion to stay the ALJ's preliminary order of reinstatement. In comments accompanying the promulgation of section 1980.110(b), however, the Occupational Safety and Health Administration (OSHA) stated that only "in

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[7] "Based on the foregoing findings of fact and conclusions of law, it is HEREBY RECOMMENDED that Respondent, Cardinal Bankshares Corporation, be ORDERED to: Reinstate Complainant David Welch as the Chief Financial Officer of Cardinal Bankshares Corporation with the same seniority, status, and benefits he would have had but for Respondent's unlawful discrimination." *Welch v. Cardinal Bankshares Corp.*, ALJ No. 2003-SOX-15, slip op. at 25 (Supplemental Recommended Decision and Order, Feb. 15, 2005).

[8] Cardinal, relying on the Board's holdings in *McNeil v. Crane Nuclear*, ARB No. 02-002, ALJ No. 2001-ERA-003 (ARB Dec. 20, 2002) and *Youngblood v. Von Roll America, Inc.*, ARB No. 03-082, ALJ Nos. 2002-WPC-3, 2002-WPC-3 through 6 (ARB Apr. 30, 2003), contends that a preliminary order of reinstatement is effective only if the ALJ issues a separately designated and explicit preliminary order. Notwithstanding the United States District Court noting the Board's previous citing to *McNeil* "with approval" in this case, *see Welch.*, Civil Action No. 7:05CV00546, slip op. at 5 n.2 (Memorandum Opinion, Jan. 26, 2006), *citing Welch*, ARB No. 04-054, slip op. at 6 n.4 (ARB May 13, 2004), Cardinal's contention is misplaced. Both *McNeil* and *Youngblood* involve cases arising under the Energy Reorganization Act, the implementing regulations of which require ALJs to issue a separate preliminary order providing relief in addition to their recommended decision finding that the complaint has merit. *See* 29 C.F.R. § 24.7(c)(2) (2005). The regulations implementing the SOX, at issue in this case, do not contain any such requirement.

[9] *See* 29 C.F.R. §§ 1980.109(c), 1980.110(b).

the *exceptional* case" may the Board grant a motion to stay a preliminary order of reinstatement and that it "would only be appropriate where the [moving party] can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public." 69 Fed Reg. 52109, 52111 (Aug. 24, 2004) (emphasis added). Even more telling, the comments accompanying the promulgation of 29 C.F.R. § 1980.105 regarding the issuance of preliminary orders note that "Congress intended that employees be temporarily reinstated to their positions" and that "the purpose of interim relief, to provide a meritorious complainant with a speedy remedy and avoid a chill on whistleblowing activity, would be frustrated if reinstatement did not become effective until after the administrative adjudication was completed." 69 Fed Reg. 52109.[10]

In essence, OSHA's comments mirror the four-part test applied by the Board to determine when agency action should be stayed. *See Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-55, slip op. at 2 (ARB May 12, 2006); *McCafferty v. Centerior Energy*, No. 96-ERA-6, slip op. at 2 (ARB Oct. 16, 1996) (arising under the Energy Reorganization Act), applying the criteria set forth in *State of Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987). The four factors the Board considers in determining whether to stay its own actions are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants the stay; and (4) the public interest in granting a stay. *Celebrezze*, 812 F.2d at 290. Cardinal fails to meet these criteria.

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[10] The comments accompanying the promulgation of section 1980.105 at 69 Fed. Reg. 52109 belie the United States District Court's stated belief in this case that Welch's "arguments in support of immediate reinstatement . . . are unavailing" and that "it would be unfair to require Cardinal to reinstate [Welch] on an interlocutory basis," *see Welch*, Civil Action No. 7:05CV00546, slip op. at 4, 6 (Memorandum Opinion, Jan. 26, 2006).

In addition, although we note that the United States Court of Appeals for the Second Circuit has recently held that a United States District Court should not have enforced a preliminary order of reinstatement in *Bechtel v. Technologies Inc.*, F.3d , No. 05-2404-cv (2d Cir., May 1, 2006), that case involved the issuance of a preliminary order before the ALJ held an evidentiary hearing or issued a decision and order on the merits of the case. The facts in this case are distinguishable to the extent that the ALJ has held an evidentiary hearing and the ALJ has issued a decision and order on the merits based on the evidentiary record that the parties developed.

Cardinal also is misguided in arguing that the Board should defer ruling on its motion for a stay and instead issue a decision on the merits, citing the Board's holding in *Madonia v. Dominick's Finer Food, Inc.*, ARB No. 99-001, ALJ No. 98-STA-2 (ARB Jan. 29, 1999). Contrary to Cardinal's characterization of our opinion in *Madonia*, the Board did not hold that a reinstatement order was null and void in that case because it had issued a decision on the merits, but merely because the Board had vacated the ALJ's recommended decision and order and remanded the case for reconsideration of the case in light of newly-discovered evidence.

1. Cardinal fails to establish the likelihood that it will prevail on the merits

Welch was Cardinal's chief financial officer (CFO). In the form of memorandums, an e-mail and at meetings, the ALJ found that Welch engaged in protected activity when he reported to Cardinal management that entries on its financial statements had been improperly recorded with the effect of inflating Cardinal's reported income, that Welch's access to outside auditors had been restricted, and that Cardinal's internal controls were inadequate because too many employees without appropriate expertise were making entries without Welch's knowledge or approval. R. D. & O. at 53-61. The ALJ further found that Cardinal management knew of Welch's protected activities as they had received his memorandum and the meeting minutes indicate they were aware of his allegations. R. D. & O. at 61. In light of Cardinal suspending and then firing Welch within a relatively brief period after engaging in protected activity, the ALJ thereby found the requisite causal relationship between Welch's protected activity and the suspension and termination of his employment. R. D. & O. at 61-65.

Cardinal sought to defend its decision to fire Welch on the ground that he refused to meet with its Audit Committee investigators without his personal attorney. But the ALJ found that it was Cardinal's intention to create a situation so that Welch would not attend a meeting with the Audit Committee to use that act as a pretext or justification for terminating his employment. Accordingly, the ALJ found that Welch prevailed on the evidence that he was fired for engaging in protected activity. R. D. & O. at 65-70.

In its motion, Cardinal argues that there is a likelihood that it will succeed on the merits. Specifically, Cardinal argues it will prevail because: 1) the SOX does not give Welch, as a corporate officer, the right to have a personal attorney present during the Audit Committee meeting; 2) the ALJ improperly found that Cardinal's reason for terminating Welch was pretextual; 3) Welch could not have reasonably believed that he raised any issues that would constitute violations of the federal securities laws; 4) and the ALJ erred in ordering reinstatement as a remedy as after acquired evidence establishes legitimate reasons for terminating Welch.

Cardinal notes in its motion for a stay the arguments raised in its appeal regarding the ALJ's findings that the Board will ultimately address in its decision on the merits. It provides no reasons why it is likely to succeed on appeal, however, especially in light of the ALJ's finding, after a full evidentiary hearing and the development of a complete evidentiary record by the parties, that the evidence establishes that Welch was fired for engaging in protected activity. The ALJ's reasoning, while subject to further review, is on its face sound and we decline to adopt Cardinal's arguments as a basis for finding that Cardinal will prevail on the merits.

Although Cardinal argues that reinstatement is not an appropriate remedy because "after acquired evidence" establishes other legitimate reasons for terminating Welch, any such evidence was not before the ALJ. When deciding whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative

Law Judges, 29 C.F.R. Part 18 (2005), which provides that "[o]nce the record is closed, 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." 29 C.F.R. § 18.34(c); *see e.g., Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 6-7 (ARB Jan. 31, 2001) (regarding the comparable whistleblower protection provisions under the environmental whistleblower acts). Cardinal has not made such a showing.

In any event, whether Cardinal believes after acquired evidence establishes other legitimate reasons for terminating Welch, thereby making reinstatement inappropriate, it is not relevant to the fact that Welch is nevertheless entitled to some remedy in light of the ALJ's finding that Welch was fired for engaging in protected activity. For example, front pay – money for future lost compensation as a result of discrimination – can be an appropriate substitute for reinstatement in such circumstances. *See Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-5, slip op. at 11 (ARB June 30, 2003)(regarding environmental whistleblower protection provisions); *Clifton v. United Parcel Serv.*, ARB No. 97-045, ALJ No. 94-STA-0016, slip op. at 2 (ARB May 14, 1997)(regarding whistleblower protection provisions under the Surface Transportation Assistance Act). Indeed, under the SOX regulations, "in appropriate circumstances, in lieu of preliminary reinstatement," "economic reinstatement" may be ordered, whereby the complainant may "receive the same pay and benefits that he received prior to his termination, but not actually return to work." 69 Fed. Reg. at 52108, 52109. Ultimately, however, Cardinal has not established that it is likely to succeed on appeal.

2. Cardinal not likely to be irreparably harmed

We next consider whether Cardinal would be irreparably harmed if we do not grant a stay. Cardinal asserts on behalf of its motion for a stay that it would suffer irreparable harm from Welch's "preliminary" reinstatement as its CFO, as errors by a CFO in whom Cardinal's Board of Directors have no confidence "could lead" to "being at risk for personal liability" for the directors. In addition, Cardinal contends that it would be forced to remove its current CFO.

However, any alleged irreparable harm "must be actual and not theoretical" and must be "certain to occur." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Cardinal's assertion of a "risk" that "could" occur fails to meet this standard. Moreover, while the ALJ's order of reinstatement might be "preliminary," it was issued after a full evidentiary hearing and the development of a complete evidentiary record by the parties and still is "effective" while review is conducted by the Board. 29 C.F.R. § 1980.110(b); 69 Fed. Reg. at 52109, 52111.

In addition, Cardinal need not necessarily reinstate Welch as the CFO, but can productively use Welch's skills while his case is being litigated by a "variety of other means." *See Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 90-ERA-30, slip op. at 6 (ARB Apr. 20, 2001) (arising under the Energy Reorganization

Act); *see also Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-34 (ARB June 11, 1997)(*Dutkiewicz I)* (arising under the Surface Transportation Assistance Act). Again, front pay or "economic reinstatement" can also be an appropriate substitute for reinstatement, *see Moder, supra; Clifton, supra*; 69 Fed. Reg. at 52108, 52109. Thus, Cardinal has failed to show that it would suffer irreparable harm if we deny a stay.

3. Prospect that Welch will be harmed

Cardinal contends that because Welch did "not timely seek reinstatement" following the issuance of the ALJ's R. D. & O., he cannot claim any harm if he is not now reinstated. Moreover, Cardinal notes that the CFO job is no longer vacant and there is no comparable position available for Welch.

Contrary to Cardinal's contention, there was no need for Welch to seek reinstatement as the ALJ's preliminary order of reinstatement is "effective" while review is conducted by the Board. 29 C.F.R. § 1980.110(b); 69 Fed. Reg. at 52109, 52111. Moreover, any further delay would defeat "the purpose of interim relief, to provide a meritorious complainant with a *speedy* remedy," *see* 69 Fed Reg. 52109 (emphasis added). Furthermore, we anticipate that Cardinal can productively use Welch's skills while his case is being litigated by a "variety of other means," *see Hobby, supra*; *see also Dutkiewicz I, supra*, or provide "economic reinstatement" at a minimum, *see* 69 Fed. Reg. at 52108, 52109.

Cardinal terminated Welch's employment on October 1, 2002. The ALJ recommended reinstatement, back pay and other relief. Welch has waited more than three and one-half years to have his pay and benefits restored. He may continue to suffer harm.

4. Public interest does not favor stay

Finally, Cardinal contends that it is in the public's interest and one of the purposes of the SOX to strengthen the ability of Audit Committees to investigate accounting fraud. Cardinal asserts that forcing it to reinstate Welch would defeat such a purpose and the public interest.

As we have said with respect to reinstatement, "[t]he public interest militates against a stay." *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-34, slip op. at 3 (ARB Sept. 23, 1997)(*Dutkiewicz II)* (both Congress and the Department of Labor have determined that reinstatement should have immediate effect). Similarly, the comments accompanying the promulgation of 29 C.F.R. § 1980.105 regarding the issuance of preliminary orders state that "the purpose of interim relief, to . . . avoid a chill on whistleblowing activity, would be frustrated if reinstatement did not become effective until after the administrative adjudication was completed." 69

Fed. Reg. 52109. Thus, we find and conclude that granting Cardinal's motion to stay reinstatement in this case would not serve the public interest.

In short, Cardinal's Motion to Stay is **DENIED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge