



In the Matter of:

BRUNO CORTEZ,

ARB CASE NO. 07-061

COMPLAINANT,

ALJ CASE NO. 2007-STA-023

v.

DATE: November 29, 2007

SYSCO FOOD SERVICES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**FINAL DECISION AND ORDER GRANTING COMPLAINANT'S REQUEST TO
WITHDRAW HIS OBJECTIONS TO SECRETARY'S FINDINGS**

The Complainant, Bruno Cortez, filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), alleging that the Respondent, Sysco Food Services, violated the employee protection provisions of section 405 of the Surface Transportation Assistance Act (STAA)¹ and its implementing regulations² when Sysco terminated his employment because he complained that Sysco improperly loaded its trailers leading to unsafe driving conditions. OSHA investigated the complaint and found it to have no merit (Secretary's preliminary findings). Cortez objected and requested a hearing by a Department of Labor Administrative Law Judge (ALJ).³

¹ 49 U.S.C.A. § 31105 (West 2007). The STAA has been amended since Cortez filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amended provisions are applicable to this complaint because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

² 29 C.F.R. Part 1978 (2007).

³ See 29 C.F.R. § 1978.105(a).

The ALJ to whom the case had been assigned issued a Notice of Assignment and Hearing. Shortly thereafter Cortez, through counsel, wrote to the Chief Docket Clerk, Office of Administrative Law Judges confirming his decision to withdraw his request for a hearing and stating that he understood that as a result, OSHA's findings would become the final decision on his complaint.⁴

On March 8, 2007, the ALJ issued a Recommended Order – Dismissal of Claim (R. O.). The ALJ acknowledged Cortez's withdrawal of his request for a hearing. The ALJ noted that pursuant to 29 C.F.R. § 1978.111(c), "a complainant may file a written withdrawal of objections to the Secretary's preliminary findings with an Administrative Law Judge at any time before the findings or order becomes final. Thus where a complainant seeks to withdraw his or her complaint, the [c]omplainant's request is construed as a withdrawal of objections to the Secretary[s] preliminary findings." Accordingly, the ALJ recommended that the hearing be cancelled, the Secretary's findings be reinstated, and the matter be dismissed.

The ALJ forwarded the file and his recommended decision to the Administrative Review Board for review and to issue a final agency decision pursuant to the STAA's automatic review provisions.⁵ The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.⁶ When reviewing STAA cases, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence in the record considered as a whole.⁷ In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision"⁸ Therefore, the Board reviews the ALJ's legal conclusions de novo.⁹

The Board issued a Notice of Review and Briefing Schedule reminding the parties of their right to file briefs with the Board in support of or in opposition to the ALJ's

⁴ Letter from David R. Joe, Esq. to Chief Docket Clerk, Office of Administrative Law Judges dated Mar. 5, 2007.

⁵ See 49 U.S.C.A. § 31105(b)(2)(C); 29 C.F.R. § 1978.109(c)(1).

⁶ Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

⁷ 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

⁸ 5 U.S.C.A. § 557(b) (West 1996).

⁹ See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

recommended order within thirty days of the date on which the ALJ issued it.¹⁰ Sysco filed a response stating that it did not intend to file a brief in support of or in opposition to the ALJ's R. O.¹¹

The STAA's implementing regulations provide:

At any time before the findings or order become final, a party may withdraw his objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board, United States Department of Labor. The judge or the Administrative Review Board, United States Department of Labor, as the case may be, shall affirm any portion of the findings or preliminary order with respect to which the objection was withdrawn.^{12]}

Before the Board issued a final decision in this case, Cortez filed a written withdrawal of his objections to the Secretary's initial findings. Accordingly, we **GRANT** his request to withdraw his objections to the Secretary's preliminary findings and **AFFIRM** those findings denying his complaint as provided in 29 C.F.R. § 1978.111(c).

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹⁰ See 29 C.F.R. § 1978.109(a).

¹¹ Letter from Noe J. Saucedo, Esq. to Administrative Review Board dated Apr. 27, 2007.

¹² 29 C.F.R. § 1978.111(c).