**In the Matter of:**

**COLEEN L. POWERS,**

**COMPLAINANT,**

**v.**

**PINNACLE AIRLINES, INC.,**

**RESPONDENT.**

**ARB CASE NO. 06-078**

**ALJ CASE NOS. 2006-AIR-004**
**2006-AIR-005**

**DATE: January 30, 2008**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Coleen L. Powers, *pro se,* Memphis, Tennessee**

***For the Respondent:***
**Timothy S. Bland, *Ford & Harrison*, Memphis, Tennessee**

## ORDER DENYING COMPLAINANT'S MOTION FOR RECONSIDERATION

On June 28, 2007, the Administrative Review Board issued a Final Decision and Order (F. D. & O.) in this case arising under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[1] The F. D. & O. dismissed Powers's AIR 21 complaint because Powers failed to file

[1] 49 U.S.C.A. § 42121 (West 2005 Supp.). AIR 21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. 29 C.F.R. § 1979.101 (2007). Air carriers, contractors and their subcontractors are prohibited from discharging or "otherwise discriminat[ing] against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the

a brief in conformance with the Board's briefing order after the Board gave Powers ample opportunities to file a conforming brief and unequivocally warned her of the consequences of her refusal to do so.

On August 5, 2007, Powers filed "COMPLAINANTS'/FORMER CREWMEMBER POWERS' Objections to US DOL Agency ARB unlawful, erroneous, and prejudicial June 28, 2007 "Final Order and Decision" (*Received on or about July 02, 2007 via Certified Mail*) With Former Crewmember Powers' Accompanying Motion to Reconsider and VACATE This Prejudicial, Arbitrary Agency Order and for Entry of an AMENDED Order" (Motion for Reconsideration). Accordingly, on August 23, 2007, the Board issued an Order permitting the Respondent, Pinnacle Airlines, Inc., to respond to Powers's motion. Powers then filed "Objections to the Prejudicial and Arbitrary Agency Order Filed August 23, 2007 By ARB Agency General Counsel, Ms. Janet Dunlop, in ARB Case No. 06-078 and Complainants' Accompanying August 31, 2007 Motion to Vacate This Prejudicial August 23, 2007 Order (w/ att. EX A, identified as Complts' Aug 30, 2007 certified mail service copy of 8/23/07 order)." Pinnacle filed its Response to Powers's Motion on September 7, 2007. In turn, Powers filed, "Rebuttal Reply to the Untimely Sept. 10, 2007 "Response" of Named Person Pinnacle to Complainants August 5, 2007 Objections and Motion for Reconsideration of the Unlawful, Prejudicial June 28, 2007 Order and For Entry of an Amended Order."

Subsequent to filing her Motion for Reconsideration with the Board, Powers filed a Petition for Review with the United States Court of Appeals for the Sixth Circuit (No. 07-4125). Because the Board had not yet ruled on Powers's Motion when she filed her petition for review with the court of appeals, the Department of Labor filed a motion with the court to suspend the briefing schedule until the Board acted upon the pending motion. The court granted the Department's motion. Accordingly, we consider here Powers's motion for reconsideration.

## DISCUSSION

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.[2] As an initial matter, we reject Powers's argument that permitting Pinnacle to respond to

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employee)," engaged in the air carrier safety-related activities the statute covers. 49 U.S.C.A. § 42121(a); 29 C.F.R. § 1979.102(a).

[2] *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-023, slip op. at 2-6 (ARB Nov. 20, 1998); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006, slip op. at 1 (ARB Feb. 17, 2005). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

her Motion for Reconsideration is "favorably prejudicial" to Pinnacle or violates public policy or any law and accordingly, we **DENY** her motion to vacate our order permitting Pinnacle to file a response.

Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure.[3] Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[4] A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position that may prove more successful.[5] Likewise, issues not presented in initial briefs or during oral argument are not appropriate subjects for rehearing.[6] But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome.[7] In considering a motion for reconsideration, the Board has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[[8]]

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[3] *See generally* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3986.1 (West 2006).

[4] Fed. R. App. P. 40(a)(2).

[5] *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

[6] *Utahns for Better Transp. v. United States Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993).

[7] *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989).

[8] *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 03-LCA-004, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-184; ALJ Nos. 2002-CAA-005, 2003-ERA-010, slip op. at 2 (ARB May 17, 2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 03-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.*, ARB No 04-120, ALJ No. 2004 SOX-054, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No.

Upon review of Powers's motion we conclude that she has failed to meet any of the provisions of the Board's four-part test for reconsideration. Instead Powers's motion consists of a rehashing of arguments the Board has already considered and rejected and allegations not material to the basis for the Board's F. D. & O. Accordingly, we **DENY** Powers's motions in their entirety.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

**DAVID G. DYE**
**Administrative Appeals Judge**

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2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior,* ARB No. 03-040, ALJ No. 2001-LCA-003, slip op. at 3 (ARB Oct. 24, 2005).