



In the Matter of:

WILLIAM J. McCLOSKEY,

ARB CASE NO. 06-033

COMPLAINANT,

ALJ CASE NO. 2005-SOX-093

v.

DATE: March 26, 2008

AMERIQUEST MORTGAGE COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William J. McCloskey, *pro se*, Philadelphia, Pennsylvania

For the Respondent:

Laura P. Worsinger, *Buchalter Nemer*, Los Angeles, California

ORDER DENYING COMPLAINANT'S MOTION FOR RECONSIDERATION

On February 29, 2008, the Administrative Review Board (ARB or Board) issued an Order of Remand in this case arising under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).¹ The Board vacated the Administrative Law Judge's (ALJ) decision and remanded McCloskey's complaint because there was no record evidence that the ALJ and McCloskey had properly served documents on

¹ 18 U.S.C.A. § 1514A (West Supp. 2005). Regulations implementing the SOX are found at 29 C.F.R. Part 1980 (2007).

Ameriquest in accordance with 29 C.F.R. § 18.3(d), by mailing the documents to an individual, partner, officer of the corporation, or to an attorney of record.

On March 4, 2008, McCloskey filed a motion requesting that the Board vacate its Order of Remand. We treat this motion as a motion for reconsideration of the Board's February 29 Order of Remand.

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 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

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. 1986-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).

³ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 06-078, ALJ Nos. 2006-AIR-004, 2006-AIR-005, slip op. at 3 (ARB Jan. 30, 2008).

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).

after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[⁸]

Upon review of McCloskey's motion we conclude that he has failed to meet any of the provisions of the Board's four-part test for reconsideration. Instead his 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 Order of Remand. Accordingly, we **DENY** McCloskey's motion in its entirety.

SO ORDERED.

DAVID G. DYE
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁸ *Powers, supra*; *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-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. 2003-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. 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).