



**In the Matter of:**

**COLEEN L. POWERS,**

**ARB CASE NO. 05-022**

**COMPLAINANT,**

**ALJ CASE NO. 2004-AIR-32**

**v.**

**DATE: January 31, 2006**

**PINNACLE AIRLINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

***Coleen L. Powers, pro se, Memphis, Tennessee***

***For the Respondent:***

***Doug Hall, Esq., Baker & Hostetler LLP, Washington, D.C.***

**FINAL DECISION AND ORDER**

The Petitioner, Coleen L. Powers, has filed a complaint against the Respondent, Pinnacle Airlines, Inc.,<sup>1</sup> alleging that the Respondent retaliated against her in violation of

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<sup>1</sup> In documents filed with the Department of Labor Administrative Law Judge (ALJ), whose decision is on appeal in this case, and with the Administrative Review Board, Powers listed "et al." as additional unspecified complainants and Phil Trenary, President & CEO, Pinnacle Airlines, Inc., d/b/a/ Northwest AirlinK; Ms. Kim Monroe, Human Resources, Pinnacle Airlines, Inc., d/b/a/ Northwest AirlinK; PACE Local 5-0772; PACE Local 5-0772 Acting President, Ms. Teresa Brents; PACE Region 7 Vice President, Mr. Lloyd Walters; Pinnacle Airlines, Inc., In-Flight Director, Mr. Ted Davies; Mr. Phil Reed, VP In-Flight & Marketing & Sales@ Pinnacle Airlines, Inc., d/b/a/ Northwest AirlinK As a Contractor via an Airline Service Agreement with Northwest Airlines Corporation (NWAC) and Northwest

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the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).<sup>2</sup> On November 16, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order Denying the Complainant's Claim (R. D. & O.). The ALJ found that dismissal of Powers's complaint was appropriate because, after several opportunities to comply, she had failed to file adequate responses to Pinnacle's interrogatories and filed no response to its discovery requests. We must determine whether Powers's refusal to comply with the ALJ's orders merited the admittedly severe penalty of denial of her complaint. Finding that the ALJ gave Powers more than adequate opportunities to comply with her orders and that Powers was well aware of the consequences of her obdurate refusal to comply, we affirm the ALJ's R. D. & O.

### BACKGROUND

Coleen Powers, a flight attendant, expressed an interest in February and March 2004 in several promotion opportunities at Pinnacle. Pinnacle informed her that she was not eligible for these positions because a Pinnacle employment policy precluded consideration of an employee for promotion who had received a written discipline in his or her personnel file within the past year. In response, Powers filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Pinnacle had retaliated against her in violation of AIR 21's whistleblower protection

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Airlines, Inc.; NWAC; NWA, Inc.; Piper Rudnick, LLP; Doug Hall; Pinnacle Airlines Corporation of Tennessee; Pinnacle Airlines Corporation {"PNCL"}; Northwest Airlines, Inc.; Mesaba Airlines, d/b/a/ Northwest Airlink; Mesaba Holdings Inc., {MAIR}; Pinnacle Airlines Inc., d/b/a/ Northwest Airlink, as a Contractor for NWAC and Northwest Airlines, Inc.; Ms. Alice G. Pennington, VP, Pinnacle Human Resources & PNCL Owner; et al. as respondents. In a Status Order dated August 25, 2004, the ALJ found that the only proper complainant in this case is Powers and the only proper respondent is Pinnacle Airlines, Inc., her employer. Accordingly, the ALJ warned Powers that any documents that listed parties other than Powers and Pinnacle would be returned to her unread. Given our disposition of this case below, it is not necessary for us to review the ALJ's Status Order.

<sup>2</sup> 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 (2005). 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 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).

provisions.<sup>3</sup> OSHA found no merit to Powers's complaint and she requested a hearing by a Department of Labor Administrative Law Judge.<sup>4</sup>

The ALJ scheduled a hearing for November 17-18, 2004. Pinnacle served its document requests and interrogatories on Powers on August 25, 2004.<sup>5</sup> When Powers had not served her responses by September 29, 2004, Pinnacle's counsel e-mailed her about the status of her responses.<sup>6</sup> Powers replied that she refused to respond to discovery because of issues she had with Pinnacle's discovery responses.<sup>7</sup>

Pinnacle filed a Motion to Compel.<sup>8</sup> The ALJ reviewed Pinnacle's interrogatories and document requests and found that they were "narrowly focused on obtaining the information and documents that support the Complainant's allegations, as well as any damages she may seek."<sup>9</sup> The ALJ stated that Pinnacle was entitled to know the basis for Powers's claims and the nature of and basis for the damages Powers seeks.<sup>10</sup> The ALJ noted that Powers had not responded to Pinnacle's discovery requests, nor had she filed any objections with Pinnacle's counsel or the ALJ.<sup>11</sup>

The ALJ reminded Powers that this was not the first time that the ALJ had called into question her refusal to cooperate with discovery. In one previous case it was necessary for the ALJ to issue an Order compelling Powers to fully respond to discovery<sup>12</sup> and the ALJ dismissed another case involving Powers for her failure to cooperate in the discovery process.<sup>13</sup> The ALJ concluded that Powers "is well aware of

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<sup>3</sup> 29 C.F.R. § 1979.103(a).

<sup>4</sup> 29 C.F.R. § 1979.106(a).

<sup>5</sup> Order Granting Motion to Compel at 1 (Oct. 20, 2004) (OGMC).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Powers v. Pinnacle Airlines Inc.*, 2003-AIR-12 (May 6, 2003).

<sup>13</sup> *Powers v. Pinnacle Airlines Inc.*, 2004-AIR-06 (April 29, 2004).

her obligation to participate and cooperate in the discovery process, and the consequences of her failure to do so.”<sup>14</sup> Accordingly, the ALJ directed Powers to respond to Pinnacle’s document requests and interrogatories no later than close of business on October 27, 2004.<sup>15</sup>

On October 25, 2004, the ALJ issued an Order Cancelling Hearing. The ALJ found that Powers had failed to demonstrate good cause for postponing the hearing. But in the alternative, Powers requested voluntary dismissal of her complaint, and the ALJ wanted to assure herself that Powers understood that any dismissal would be with prejudice. Accordingly, she ordered Powers to advise the ALJ no later than close of business on November 1, 2004, as to whether she wished to withdraw her complaint and if so, the reasons for the withdrawal.<sup>16</sup> The ALJ also ordered the parties to file any motions dealing with the sufficiency of discovery responses by close of business on November 12, 2004.<sup>17</sup>

On November 3, 2004, Pinnacle filed its “Respondent Pinnacle Airlines’ Motion to Dismiss for Failure to Comply with the Court’s Orders.”<sup>18</sup> On November 12, 2004, Powers filed her “Complainants’ Reply & Opposition to Named Persons’ Motion Received Via US Mail on November 8, 2004 and Reply and Concerns to ALJ October 25, 2004 Order.”<sup>19</sup> On that same date, by facsimile, Powers filed a copy of “Ms. Powers’ Replies to Doug Hall’s First Set of Interrogatories” and Pinnacle filed its “Respondent Pinnacle Airlines’ Further Motion to Dismiss For Failure to Comply With Discovery.”<sup>20</sup>

The ALJ responded to these Motions in her R. D. & O. Initially she concluded that Powers no longer desired to withdraw her complaint if the withdrawal would be with prejudice.<sup>21</sup> Next the ALJ considered Pinnacle’s motion to dismiss Powers’s claim because she failed to cooperate in discovery. The ALJ found that as of November 3,

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<sup>14</sup> OGMC at 2.

<sup>15</sup> *Id.*

<sup>16</sup> Order Cancelling Hearing at 3.

<sup>17</sup> *Id.*

<sup>18</sup> R. D. & O. at 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2.

2004, Powers had failed to file any response to Pinnacle’s discovery requests. She noted that Powers argued that documents she filed with the ALJ on October 17, 2004, are responsive to the discovery requests.<sup>22</sup> The ALJ indicated that a review of the file shows that on October 17, 2004, Powers filed, by facsimile, her “Complainants’ Motion for Continuance of Hearing & Modification of Pre-Hearing Order; & Reply, Objections, & Motion to Strike Named Persons’ & Pinnacles’ Premature/Bad Faith October 5, 2004 Motion” and that on October 21, 2004, Powers filed this same pleading by mail, along with a “stack of documents, approximately four inches thick, designated as CX 400 through 404.”<sup>23</sup> The ALJ stated that these documents included some of the pleadings in this case, but otherwise appeared to have no relevance to the specific issues in her claim.<sup>24</sup>

Pinnacle argued to the ALJ that in addition to being untimely, Powers’s response to its discovery requests was insufficient.<sup>25</sup> The ALJ agreed.<sup>26</sup> She concluded that Powers provided no response to Pinnacle’s request for documents and that her response to Pinnacle’s interrogatories did not provide Pinnacle “with information directly relevant to the basis for her claims and request for damages, but essentially requires the Respondent to comb through hundreds of pages of documents, many of which have no relevance to this case, and attempt to guess the basis for the Complainant’s claims and request for damages.”<sup>27</sup> For example, the ALJ stated

In response to a request to identify each person likely to have discoverable information relating to the facts of her claims, as well as the subjects of such information, the Complainant merely cited to the voluminous documents she submitted to this Court on October 21, 2004. In response to a question asking her to identify all communications with any government agency relating to her claims, the Complainant again cited to these documents, as well as the “computers” of numerous employees of Pinnacle. Again rather than answering

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

specific questions about promotional opportunities she alleges she was denied, the Complainant cited to various pleadings, exhibits, and other documents, without actually addressing the questions posed. She did not provide any calculation for the damages she requested, nor did she indicate the knowledge or information possessed by the persons she identified as involved in computing damages.[<sup>28</sup>]

The ALJ noted that in her Order granting Pinnacle’s motion to compel, she had found that Pinnacle’s requests were narrowly focused in an attempt to obtain information and documents directly relevant to the basis of Powers’s claims and request for damages and that she ordered Powers to respond to these requests.”<sup>29</sup> The ALJ concluded that Powers had “chosen to ignore this Order, and instead has provided a woefully inadequate response to the request for interrogatories, and no response to the request for documents.”<sup>30</sup>

Powers’s only substantive response to Pinnacle’s motion for dismissal for refusal to cooperate in discovery was her statement that Pinnacle had willfully and falsely misrepresented to the ALJ that “[a]fter receiving no response, Pinnacle filed a motion to compel on October 5, 2004.”<sup>31</sup> The ALJ found this response unavailing because Powers did not provide any response to Pinnacle’s discovery requests until November 12, 2004.<sup>32</sup> Powers also argued that her Exhibits CX 400 through 404 were “certainly responsive” to Pinnacle’s discovery requests, but as indicated above the ALJ found that Powers’s response to Pinnacle’s interrogatories was essentially a “non-response” and that she did not respond at all to the documents request.<sup>33</sup> Accordingly, the ALJ concluded that, as provided by 29 C.F.R. § 18.6(2)(v),<sup>34</sup> “based on the Complainant’s failure to cooperate in

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<sup>28</sup> *Id.* at 2-3.

<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> This regulation provides:

If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an

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discovery, and her failure to comply with my Orders directing her to do so, her complaint for relief under AIR 21 is denied.”<sup>35</sup>

Powers appealed the ALJ’s R. D. & O. to the Administrative Review Board.<sup>36</sup> The Board issued a Notice of Appeal and Order Establishing Briefing Schedule. In response, Powers filed an Initial Brief, Pinnacle filed a Reply to Complainant’s Brief and Powers filed a Rebuttal Brief.

On May 5, 2005, Powers filed a Notice of Intent to File Consolidated Complaint in Federal District Court Pursuant to 29 C.F.R. 1980.114(a) and (b), which purported to include this case.

### STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under AIR 21 to the Administrative Review Board.<sup>37</sup> Although Powers has indicated her intent to file a consolidated complaint pursuant to 29 C.F.R. § 1980.114(a), (b) in district court, we conclude that we nevertheless retain jurisdiction of this case. The cited regulation provides:

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order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following: . . . .

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> 29 C.F.R. § 1978.110(a).

<sup>37</sup> Secretary’s Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. § 1979.110(a).

(a) If the Board has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.

(b) Fifteen days in advance of filing a complaint in federal court, a complainant must file with the administrative law judge or the Board, depending upon where the proceeding is pending, a notice of his or her intention to file such a complaint. The notice must be served upon all parties to the proceeding. If the Assistant Secretary is not a party, a copy of the notice must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.<sup>38</sup>

This regulation applies only to complaints filed pursuant to the Sarbanes-Oxley Act of 2002 (SOX).<sup>39</sup> AIR 21 does not have a corresponding regulation. The ALJ did not interpret Powers's complaint as requesting relief under the SOX because she did not allege that any of the entities listed in her complaint "took any action against her in retaliation for reporting activity on their part that she reasonably believed violated the mail, wire, bank, or securities fraud statutes."<sup>40</sup> The ALJ concluded that she had not

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<sup>38</sup> 29 C.F.R. § 1980.114(a), (b)(2005).

<sup>39</sup> 18 U.S.C.A. § 1514A (West 2002). Title VIII of Sarbanes-Oxley is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected 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. 68 FR 31864 (May 28, 2003).

<sup>40</sup> Status Order (Aug. 25, 2004) at 3.

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stated a claim for relief under the SOX.<sup>41</sup> Powers did not cite to the SOX in her initial complaint. But she did state, “All named persons retaliated against Ms. Powers for her reports and attempted reports of named persons’ violations of Public Securities laws, and FAA safety and security regulation violations . . . .”<sup>42</sup> She also claimed, “[a]ll named persons . . . are all liable and in violation of the “Prohibited Acts” of 29 C.F.R. Part 1979 [the AIR 21 regulations], 29 CFR Part 1980 [the SOX regulations], and 29 CFR Part 24 [the environmental and nuclear whistleblower regulations].”<sup>43</sup> OSHA investigated Powers’s complaint as arising solely under AIR 21.<sup>44</sup> In any event, regardless of whether the district court assumes jurisdiction of any SOX claims that Powers raised in this case, the court does not have jurisdiction to consider the AIR 21 claims. Accordingly, we retain jurisdiction to dispose of Powers’s AIR 21 claims.

Under the Administrative Procedure Act, the ARB, as the Secretary’s designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB reviews the ALJ’s recommended decision de novo.<sup>45</sup> The Board is not bound by an ALJ’s findings of fact and conclusions of law because the recommended decision is advisory in nature.<sup>46</sup> An ALJ’s findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight.<sup>47</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> Complaint (June 15, 2004) at 3.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> Letter to Chief Administrative Law Judge, John Vittone from Billy D. Bright Regional Supervisory Investigator, July 7, 2004.

<sup>45</sup> See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

<sup>46</sup> See Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) (“the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself”). See generally *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ’s findings and conclusions); *Mattes v. United States Dep’t of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ’s decision).

<sup>47</sup> *Universal Camera*, 340 U.S. at 492-497; *Pogue v. United States Dep’t of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

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## DISCUSSION

The issue before the Board for determination is whether the ALJ abused her discretion in denying Powers's complaint on the grounds that she failed to adequately respond to Pinnacle's interrogatories and request for documents. Powers failed to address this issue in her initial brief. When Pinnacle argued that such failure to address the issue was a sufficient basis upon which to dismiss her appeal,<sup>48</sup> Powers replied that she had responded to Pinnacle's document requests on October 17/18, 2004, and provided "many" of the documents it requested.<sup>49</sup> She also stated that she "informally" attempted to resolve the discovery issues raised by Pinnacle's Motion to Compel and that she did not "blatantly" refuse to comply with any discovery order; her other commitments kept her from doing so.<sup>50</sup>

These are essentially the same arguments that the ALJ found unpersuasive in issuing her R. D. & O. and Powers has failed to establish any basis for holding that the ALJ's determination that Powers's response to Pinnacle's interrogatories was essentially a non-response and that Powers failed to provide any of the documents requested was incorrect. Powers does not dispute the ALJ's finding that her response to Pinnacle's interrogatories did not provide Pinnacle "with information directly relevant to the basis for her claims and request for damages, but essentially requires the Respondent to comb through hundreds of pages of documents, many of which have no relevance to this case, and attempt to guess the basis for the Complainant's claims and request for damages."<sup>51</sup> Nor did she specifically rebut any of the ALJ's examples of responses the ALJ found to be non-responsive.<sup>52</sup> While Powers argues that, contrary to the ALJ's finding, she provided "many" of the documents Pinnacle requested, she does not even identify one such document, much less "many." Finally, while she now claims that she was unable to comply because of her various commitments, these commitments, identified in her October 17, 2004 Motion for Continuance of Hearing, all were scheduled to occur almost

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<sup>48</sup> *Accord Development Resources, Inc.*, ARB No. 02-046, slip op. at 5 (Apr. 11, 2002).

<sup>49</sup> Complainant's rebuttal brief at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Supra* at 5, R. D. & O. at 2-3.

a month or more after her responses to interrogatories and discovery were due,<sup>53</sup> so they provide no justification for her failure to timely respond to Pinnacle's requests.

The ALJ's procedural regulations provide that an ALJ may deny the complaint of any party who refuses to comply with an order directing a party to respond to interrogatories or to produce documents.<sup>54</sup> Powers was given adequate opportunity to comply with the ALJ's order and she well knew the consequences of failing to comply with such order.<sup>55</sup> In *Supervan, Inc.*,<sup>56</sup> the Board held

As the BSCA noted in *Aiken*, “[i]f an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply.” . . . The *Aiken* rationale must be applied to all situations involving flagrant non-compliance with discovery requests and orders. To hold otherwise would render the discovery process meaningless and vitiate an ALJ's duty to conclude cases fairly and expeditiously.<sup>57</sup>

Powers's briefs to the Board fail to provide the Board with any basis for departing from the ALJ's R. D. & O. Accordingly, we **AFFIRM** the ALJ's R. D. & O. and **DISMISS** her complaint.<sup>58</sup>

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<sup>53</sup> Complainant's Motion for Continuance of Hearing & Modification of Pre hearing Order; & Reply, Objections & *Motion to Strike* Named Persons' Pinnacles' [sic] Premature and Bad Faith October 5, 2004 Motions at 5. Powers averred that she had a “major preliminary hearing” on November 9, 2004; unidentified “civic commitments” on November 5-6, 2004; “mandatory recurrent DOT and OSHA training” on November 2 and 3, 2004, and career enhancement training from October 26, 2004 through October 31, 2004, “out-of-state.”

<sup>54</sup> 29 C.F.R. § 18.6(2)(v).

<sup>55</sup> OGMC at 2.

<sup>56</sup> ARB No. 00-008, ALJ No. 94-SCA-14 (Sept. 30, 2004).

<sup>57</sup> Slip op. at 6, citing *Cynthia E. Aiken*, BSCA No. 92-06 (July 31, 1992).

<sup>58</sup> We note that Powers, in her reply brief, requests the Board to strike Pinnacle's brief because it includes footnotes that are not in 12-point font. The Board's briefing order does not specifically address footnote font size and the Board itself uses an 11.5 font size for its footnotes as opposed to the 12-point font size it uses for the body of its decisions.

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Pinnacle, in the conclusion of its brief “requests that the Board find that Powers’s complaint was frivolous and brought in bad faith, and that she should pay Pinnacle an attorney’s fee of \$1000. See 29 C.F.R. 1979.110(e).”<sup>59</sup> The regulation upon which Pinnacle relies provides,

If the Board determines that the named person has not violated the law, an order shall be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney’s fee, not exceeding \$1000.<sup>60</sup>

To prevail on its request, Pinnacle must demonstrate that Powers’s complaint lacks an arguable basis in either law or fact.<sup>61</sup> Pinnacle’s brief does not address this requirement. Accordingly, we **DENY** its request.<sup>62</sup>

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

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

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Nevertheless, the Board would not countenance any attempt to subvert the Board’s page limit for briefs through the use of an inordinate number of undersized footnotes. In this case, had Powers objected to the use of the undersized footnotes prior to filing her rebuttal brief, we might have returned the brief to Pinnacle and given it the opportunity to file a conforming brief. Nevertheless, even if we had struck Pinnacle’s brief outright as Powers requested, the outcome of this case would have been no different because, as held above, Powers failed to even address the question at issue in this case in her opening brief and has provided the Board with no basis for departing from the ALJ’s R. D. & O.

<sup>59</sup> Respondent’s Reply Brief at 29.

<sup>60</sup> 29 C.F.R. § 1979.110(e).

<sup>61</sup> *Allison v. Delta Air Lines, Inc.*, ARB No. 03-150, ALJ No. 2003-AIR-00014, slip op. at 6 (ARB Sept. 30, 2004).

<sup>62</sup> *Accord Development Resources, Inc.*, slip op. at 5.