



**In the Matter of:**

**DAVID WINDHAUSER,**

**ARB CASE NO. 05-127**

**COMPLAINANT,**

**ALJ CASE NO. 2005-SOX-017**

**v.**

**DATE: October 31, 2007**

**TRANE, AN OPERATING DIVISION  
OF AMERICAN STANDARD, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearance:**

***For the Respondent:***

**Frank C. Morris, Jr., Esq., Brian Steinbach, Esq., *Epstein Becker & Green, P.C.*,  
Washington, D.C.**

**FINAL DECISION AND ORDER VACATING MONETARY SANCTIONS**

The Respondent, Trane, terminated the Complainant, David Windhauser's, employment on November 12, 2003. Thereafter, on February 6, 2004, Windhauser filed a complaint with the Department of Labor, Occupational Safety and Health Administration (OSHA) alleging a violation of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (SOX), 18 U.S.C.A. 1514A (West 2007).

On November 15, 2004, OSHA issued its findings and a preliminary order of reinstatement. Trane, on December 14, 2004, filed a motion objecting to the findings and requesting a stay of the Assistant Secretary's preliminary order of reinstatement. The Assistant Secretary and the Complainant filed motions opposing Trane's motion to stay the order of reinstatement.

A Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order denying Trane's motion to stay the order of reinstatement on February 11, 2005. On February 22, 2005, Trane filed a petition for review of the order denying the motion to stay with the Administrative Review Board (ARB or Board). Because the ALJ had not issued his final recommended decision and order on the merits of the case, Trane's request that the Board review the order denying its motion for a stay was an interlocutory appeal. On April 29th, the ALJ approved the parties' settlement and requested briefs on the consequences of Trane's refusal to comply with the preliminary order of reinstatement. Trane, Windhauser, and the Assistant Secretary for OSHA responded to the ALJ's request for briefs on sanctions.

The ALJ, on June 1, 2005, issued an order imposing monetary sanctions against Trane and dismissed the case.<sup>1</sup> On June 15, 2005, Trane petitioned the Board to review the ALJ's imposition of monetary sanctions against Trane for failing to reinstate Windhauser pursuant to the preliminary order of reinstatement.

## DISCUSSION

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under the SOX to the Board.<sup>2</sup> The sole issue before the Board is whether the ALJ erred by imposing monetary sanctions against Trane for failing to reinstate Windhauser.

The ALJ reasoned (without citation to any statute or case precedent) that a reading of the SOX statute that allows only district court enforcement of the reinstatement order, notwithstanding a denial of a request to stay the preliminary order of reinstatement, "is absurd on its face."<sup>3</sup> The ALJ noted that the statute automatically stays all other remedies including payment of back wages upon filing a request for hearing but requires immediate reinstatement despite a request for a hearing (unless a stay of that preliminary order of reinstatement is specifically granted). The ALJ reasoned that a narrow reading allowing only district court enforcement effectively gives a respondent a "passive stay" despite the preliminary order of reinstatement and the denial of a stay of that preliminary order. Thus, the ALJ concluded that "[u]pon stay denial, the unsuccessful movant is left, as from the date of the order of reinstatement, with the same, ongoing obligation to reinstate."<sup>4</sup> Furthermore, the ALJ stated:

To not impose some administrative sanction to discourage this casual, astounding, and very nearly arrogant defiance of the law,

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<sup>1</sup> Thereafter, the Board ruled the interlocutory appeal moot on August 31, 2005.

<sup>2</sup> Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>3</sup> R. D. & O. at 1.

<sup>4</sup> R. D. & O. at 1.

presumably on advice of counsel, would mean to acquiesce in that absurdity, and ignore the clear Congressional intent to seriously protect and enforce the public interest where an initial investigation discloses a wrongful discharge of a would-be whistleblower, by requiring immediate reinstatement to the job.<sup>5</sup>

The ALJ held “[t]he statute’s grant of authority to an Administrative Law Judge to deny a motion to stay reinstatement, perforce, inherently grants authority to preserve the integrity of that denial through imposition of administrative sanctions.”<sup>6</sup> The ALJ ruled “that a meaningful and forceful response to such intransigence is necessary to preserve the integrity of and implement such Congressional intent.”<sup>7</sup> Thus, the ALJ awarded Windhauser a pro rata portion of his salary and expected bonus for the months from the preliminary order of reinstatement to the settlement of the case.<sup>8</sup>

Trane argued before the ALJ that only the federal district court could provide a remedy for Trane’s refusal to reinstate Windhauser.<sup>9</sup> Trane argues before the Board that there is nothing in the SOX statute, SOX regulations or DOL’s Rules of Practice granting power to impose monetary sanctions.<sup>10</sup> Thus, Trane argues that the ALJ had no authority to impose monetary sanctions and that any enforcement remedies are reserved for the federal district court to impose.<sup>11</sup> We agree with Trane.

The Board has held that the Secretary, absent statutory authority, has no power to impose monetary sanctions.<sup>12</sup> The Administrative Procedure Act, § 558(b) provides that “[a] sanction

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<sup>5</sup> R. D. & O. at 2.

<sup>6</sup> R. D. & O. at 2.

<sup>7</sup> R. D. & O. at 2 (footnote omitted).

<sup>8</sup> R. D. & O. at 2 n.5.

<sup>9</sup> The Assistant Secretary made similar arguments in its brief before the Board in Trane’s interlocutory appeal, ARB No. 05-061.

<sup>10</sup> Brief at 17, 18.

<sup>11</sup> Brief at 14-15.

<sup>12</sup> See *Watson v. Elec. Data Sys. Corp.*, ARB Nos. 04-023, 029, 050, ALJ Nos. 2004-LCA-009, 2003-LCA-030, slip op. at 7 (ARB May 31, 2005) (Board does not have authority to impose monetary sanctions); *Malpass v. Gen. Elec. Co.*, 1885-ERA-038, -039, slip op. at 11 (Sec’y Mar. 1, 1994) (federal rules of civil procedure do not give the Secretary the authority to impose sanctions and penalties if not otherwise authorized by law); cf. *Puckett v. Tenn. Valley Auth.*, ARB No. 03-024, ALJ No. 2002-ERA-015, slip op. at 5 (ARB June 25, 2004) (ARB affirms as in accordance with law the ALJ’s dismissal of the case because the complainant’s attorney refused to comply with a scheduling order); *Somerson v. Mail Contractors of Am.*, ARB No. 02-057, ALJ Nos. 2002-STA-

may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.”<sup>13</sup> The Rules of Practice for ALJs provides for sanctions against parties failing to comply with discovery or an order.<sup>14</sup> But none of these administrative sanctions contemplate monetary sanctions. Furthermore, in the case of failure to comply with an ALJ’s subpoena or order, the Rules of Practice specifically indicate that enforcement should proceed in the federal district court for the appropriate remedies.<sup>15</sup>

In *Malpass v. Gen. Electric Co.*,<sup>16</sup> the ALJ was asked to impose attorney fees and costs as sanctions against the complainants for failing to comply with discovery. The ALJ refused, stating such an action would have a chilling effect on whistleblowers. The respondent appealed the ALJ’s denial of monetary sanctions. The Secretary commented that had the case been in district court, the court would have authority to impose sanctions on the complainant’s refusal to comply with discovery under Federal Rules of Civil Procedure, but doubted the Secretary’s ability to fashion monetary sanctions “beyond an order controlling the hearing and proceedings before the Secretary (e.g., refusal to permit a party to testify, taking certain facts to be established, barring an attorney from participation, or dismissal of the matter.)”<sup>17</sup> The Secretary discarded the ALJ’s argument that the authority to impose sanctions derived from 28 U.S.C. § 1927 (1988) and from the Federal Rules, incorporated by reference in the Rules of Practice at 29 C.F.R. § 18.29(a). The Secretary observed that “the incorporation of the Federal Rules in 29 C.F.R. § 18.29 is for purposes of procedure and case management to fill in any gaps where no specific provision in the Rules of Practice is applicable. [The Federal Rules do] not give the Secretary the authority directly to impose sanctions and penalties if not otherwise authorized by law.”<sup>18</sup> In *Malpass* the Secretary rejected the argument that monetary sanctions are within the discretion of the ALJ.

More recently, in *Lebo v. Piedmont-Hawthorne*, an AIR 21 case, the complainant moved the Board to convert an order of reinstatement, with which the respondent did not comply, into a

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018,-019, slip op. at 10 (ARB Nov. 25, 2003) (complainant’s conduct was blatantly contumacious and warranted dismissal of the case).

<sup>13</sup> 5 U.S.C.A. § 558(b) (West 2007); see *Am. Bus. Ass’n v. Slater*, 231 F.3d 1, 6-7 (D.C. Cir. 2000) (concluding that the Department of Transportation lacks the power to award monetary sanctions absent clear congressional authority).

<sup>14</sup> Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18.6(d)(2) (2006).

<sup>15</sup> Rules of Practice §§ 18.24(d); 18.29(b).

<sup>16</sup> 1985-ERA-038, -039, slip op. at 11 (Sec’y Mar. 1, 1994).

<sup>17</sup> *Malpass*, slip op. at 11.

<sup>18</sup> *Malpass*, slip op. at 11.

sanction award of front pay. The Board held that the remedy for failure to reinstate does not rest with the Board but instead with the district court.<sup>19</sup> Indeed, the implementing SOX regulation provides:

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.<sup>20</sup>

Therefore, we conclude that the Secretary, and thus the ALJ, did not have the authority to impose monetary sanctions, and that any enforcement actions for failure to reinstate are, by statute, in the jurisdiction of the federal district courts. Thus, the ALJ erred in penalizing Trane with monetary sanctions for refusing to reinstate Windhauser.

#### **CONCLUSION**

We conclude that the ALJ did not have jurisdiction or authority to impose monetary sanctions and thus **VACATE** the ALJ's recommended award of monetary sanctions in the amount of \$70,800.

**SO ORDERED.**

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

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

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<sup>19</sup> *Lebo v. Piedmont-Hawthorne*, ARB No. 04-020, ALJ No. 2003-AIR 025, slip op. at 6-7 (ARB Aug. 30, 2005). The SOX statute incorporates the AIR21 procedural rules. 18 U.S.C.A. § 1514A(b)(2)(A) (Action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.).

<sup>20</sup> 29 C.F.R. § 1980.113 (2007).