In the Matter of:

MARC HALPERN, **ARB CASE NO. 04-120**

COMPLAINANT, **ALJ CASE NO. 2004-SOX-00054**

v. **DATE: April 4, 2006**

XL CAPITAL, LTD.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Marc Halpern, ***pro se, Exton, Pennsylvania***

For the Respondent:
Christopher Lowe, Esq., ***Seyfarth Shaw LLP, New York, New York***

ORDER DENYING RECONSIDERATION

On August 31, 2005, the Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) in this case arising under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations found at 29 C.F.R. Part 1980 (2005). We held that Halpern's complaint was not timely filed and that he had not established a basis for tolling the time for filing. F. D. & O. at 6. On February 23, 2006, Halpern filed a "Petition for Review Consideration" (Petition) requesting that the Board reconsider its ruling and grant his request for relief.

In his Petition, Halpern states that:

> the ARB failed to acknowledge the violations of perjured testimony and the resulting retaliation against the Complainant by the Respondent during the State of Pennsylvania Unemployment Hearing held on April 22, 2004 … This petition specifically takes exception to the findings that the complaint was untimely filed. Exception is taken to the discussion points of determination of the statute of limitations beginning date as well as the inference that a collateral review of an employment process had occurred or had some relation to an employment decision as well as direct retaliation to unjustly prevent unemployment benefits. The ARB failed to address these violations and the dates of their occurrence in their decision.

Petition at 1. Halpern's contention is that XL Capital's testimony during proceedings before the Pennsylvania Department of Labor and Industry Board of Review constituted a new adverse action under the SOX, and therefore the limitations period governing his complaint began to run on the date of that testimony. We do not agree.

The ARB is authorized to reconsider earlier decisions. *Knox v. United States Dep't of Interior*, ARB No. 03-040, ALJ No. 2001-CAA-3, slip op. at 2 (ARB Oct. 24, 2005). As we said in *Knox*, the Board has adopted principles federal courts employ in deciding requests for reconsideration. We will reconsider our decisions under similar limited circumstances, which include: (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. *Id.* at 3, citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *Weinstock v. Wilk*, 2004 WL 367618, at *1 (D. Conn. Feb. 25, 2004); *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 582-586 (D. Ariz. 2003).

By arguing that we "failed to acknowledge" XL Capital's testimony to the Pennsylvania Department of Labor and Industry, Halpern attempts to invoke the fourth circumstance under which we will reconsider a final decision, "failure to consider material facts presented to the court before its decision." Halpern's argument regarding XL Capital's testimony was before us when we rendered our decision. Complainant's Initial Brief at 3 (XL Capital "created a fictitious scenario" in describing its reasons for terminating his employment); Complainant's Initial Brief at 14 (XL Capital falsely accused him of "willful misconduct in order to prevent unemployment benefits."). Although we did not specifically acknowledge Halpern's argument, we considered it before we rendered our decision. We ruled that Halpern's whistleblower complaint arose

on January 8, 2004, when XL Capital terminated his employment. F. D. & O. at 4. Subsequent reiteration of the decision, such as XL Capital's testimony to the Pennsylvania Department of Labor and Industry, does not constitute a new adverse action. *Cf. Lever v. Northwestern Univ.*, 979 F.2d 552, 556 (7th Cir. 1992) ("An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination…"); *Persik v. Manpower, Inc.*, 85 Fed. Appx. 127, 131 (10th Cir. 2003) (letter informing employee that employer stood by its decision to terminate his employment did not constitute a new act of discrimination). We therefore did not fail to consider material facts prior to our decision to dismiss Halpern's complaint.

Accordingly, Halpern's Petition is **DENIED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge