



**Issue Date: 02 June 2016**

**Case No.: 2016-SOX-00013**

*In the Matter of:*

**BRUCE NORTELL,**  
*Complainant,*

v.

**NORTH CENTRAL COLLEGE,**  
*Respondent.*

**ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION AND  
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND  
DISMISSING COMPLAINT**

This case arises under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A ("SOX" or the "Act"). The Act and its implementing regulations at 29 C.F.R. Part 1980 protect employees who blow the whistle on violations of U.S. Security and Exchange Commission ("SEC") rules and regulation and other laws aimed at preventing fraud against shareholders.

Procedural History

Bruce Nortell ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") on September 14, 2015, alleging that he was wrongfully terminated from his employment at North Central College ("Respondent" or "College") in retaliation for reporting fraudulent conduct in relation to the Respondent's charitable gift annuity and donation accounting practices. On October 26, 2015, OSHA sent Complainant its findings dismissing the claim. OSHA found that the Respondent was not covered under the Act because it did not have a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("SEA") nor was it required to file reports under section 15(d) of the SEA. On November 23, 2015, the Complainant timely filed an objection to OSHA's findings and requested a hearing before the Office of Administrative Law Judges.

On May 9, 2016, the Complainant filed a Motion for Summary Decision (“Cl. Mot.”).<sup>1</sup> Claimant’s motion argues that he is a covered employee under SOX because the Respondent has issued securities that require registration under the SEA, and that because the Respondent never filed a response to the Complaint or to the Secretary’s Findings he is entitled to a summary decision in his favor. On May 19, 2016, the Respondent filed a Memorandum of Law in Opposition to Complainant Bruce Nortell’s Motion for Summary Decision (“Resp. Memo.”) arguing that the Complainant failed to establish he was entitled to Summary Decision as he could not prove that the College was subject to Section 806 of SOX.

On May 13, 2016, the Respondent filed its own Motion for Summary Decision (“Resp. Mot.”) arguing that it was not a Covered Employer under the Act as it did not have a class of securities registered under Section 12 of the SEA and was it required to file reports under section 15(d) of the SEA. In support of its Motion, the College submitted affidavits from Paul Loscheider, Rick Spencer, and Joseph C. Toris. On May 25, 2016, the Complainant filed his Reply to Respondent’s Motion for Summary Decision (“Cl. Reply”)<sup>2</sup> arguing that the Respondent was required to register its securities because it did not meet the charitable exemption provided for in the regulations. In support of his reply, the Complainant submitted his affidavit.<sup>3</sup>

#### Finding of Undisputed Facts

The Respondent is a co-educational, liberal arts college located in Naperville, Illinois. (Loscheider Aff. ¶ 2). Since 1940, the Respondent has been a tax exempt organization under section 501(c)(3) of the Internal Revenue Code. (*Id* at ¶ 4; Loscheider Aff. Exhibit A). Troy Hammond has served as the President of the College since January 1, 2013. (Loscheider Aff. ¶ 12). Paul Loscheider is the College’s Vice President of Business Affairs. (Loscheider Aff. ¶ 1). Rick Spencer is the Vice President for Institutional Advancement. (Spencer Aff. ¶ 2). The Complainant was employed with the Respondent as its Director of Planned Giving since July 1988. (Loscheider Aff. ¶ 8). As Director of Planned Giving, the Complainant worked with gifts made to the College as part of a donor’s overall financial and/or estate planning, which may have included dealing with donations of cash, stocks, bonds, real estate, life insurance, will bequests, charitable gift annuities and charitable trusts. (Loscheider Aff. ¶ 9).

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<sup>1</sup> The Complainant did not number the pages of his motion but he did number the paragraphs. The exhibits submitted by the Complainant with his Motion are captioned as “Cl. Ex.” followed by the page number.

<sup>2</sup> Again, the Complainant did not number the pages of his motion but he did number the paragraphs.

<sup>3</sup> I am mindful of my obligation to pro se litigants that requires me to “construe complaints and papers filed by pro se litigants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 4 (ARB Jan, 31, 2011). The Board has held that before ruling on a motion for summary decision an ALJ should ensure that a pro se litigant understands the language of the rules and the effects of affidavits on the pleading by issuing a statement with appropriate notice to the Complainant. *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 7-8 (ARB Sept. 2, 2011). Here, the Complainant is a licensed attorney, who has demonstrated a general understanding of administrative litigation and has submitted timely filings and responses to Respondent’s filings, including objections to Respondent’s proposed exhibits and witness list and a Prehearing Statement. He has submitted an affidavit in support of his position. I find that the Complainant is sufficiently aware of the rules and effects of a motion for summary decision and that he has had a reasonable opportunity to construct an appropriate response.

On or about November 20, 2014, the Complainant sent a memorandum to Mr. Loscheider and other employees in which he stated that Illinois law required the College have a two million dollar balance to pay out gift annuities and that he could find “no reliable information of evidence that the College [was] currently in compliance with the \$2 million fund balance requirement” and that to process new gift annuity transactions without proper funds would be a “material omission” under Illinois Law. (Loscheider Aff. Exhibit B; Cl. Ex. C-21; C-22). On or about December 5, 2014, Mr. Loscheider sent an e-mail to the Complainant in response to his memorandum noting that the College had over \$152 million in unrestricted funds and was in compliance with Illinois Law. (Loscheider Aff. Exhibit C).

On or about July 1, 2015, the Complainant sent a “Planned Giving Report” memorandum to Mr. Spencer and President Hammond in which he summarized the fundraising “highlights” for the 2014-2015 fiscal year. (Spencer Aff. Exhibit H; Cl. Ex. C-14 – C-18). In a section entitled “Deferred Gifts Established, Supplemented, or Accounted” the Claimant noted that “such items can only be regarded as estimates as they may lapse, be adeemed, or otherwise fail” and so “cannot be relied on for any Campaign purposes or for the issuance of any securities or other debt instruments by the College.” (*Id.*).

Also on or about July 1, 2015, the Complainant sent a memorandum entitled “Not So Brilliant” to Mr. Spencer and other employees regarding the College’s “A Brilliant Future” fundraising campaign. (Spencer Aff. Exhibit A; Cl. Ex. C-23). In the memorandum the Complainant stated that a scholarship fund had been left off the scholarship list in the campaign material and that the failure to include it was “serious” and “display[ed] no sense of stewardship.” (Spencer Aff. Exhibit A; Cl. Ex. C-23). The Complainant concluded with “[n]o wonder [the College] is treated with such skepticism by so many potential contributors.” (Spencer Aff. Exhibit A; Cl. Ex. C-23).

In response to the Complainant’s July 1, 2015 correspondence, on July 1, 2015 and July 6, 2015 Mr. Spencer attempted to arrange a meeting with the Complainant. (Spencer Aff. ¶ 11 and ¶13; Spencer Aff. Exhibits C & D; Cl. Ex. C-24). On July 8, 2015, the Complainant sent Mr. Spencer an e-mail stating he stopped by Mr. Spencer’s office twice but that Mr. Spencer was not in his office and concluded that the matter had “already been covered in writing.” (Spencer Aff. ¶ 14; Spencer Aff. Exhibit E). On July 10, 2015, Mr. Spencer scheduled a meeting with the Complainant for July 13, 2015, and advised the Complainant that “[n]o other meeting should stop you from being at this meeting.” (Spencer Aff. ¶ 17; Spencer Aff. Exhibit E). On July 13, 2015, the Complainant e-mailed Mr. Spencer stating that the matter had been “fully covered in writing” and that if Mr. Spencer had “anything further to add on this or other matters, it should also be in writing.” (Spencer Aff. ¶ 18; Spencer Aff. Exhibit F; Cl. Ex. C-25).

On July 16, 2015, the Complainant’s employment with the College was terminated. (Spencer Aff. ¶ 19). In a letter dated July 16, 2015, Mr. Spencer wrote that the “content and tone” of the Complainant’s July 1, 2015 ‘Planned Giving Report’ and ‘Not So Brilliant’ memoranda were of “serious concern” and that multiple attempts to meet in person to discuss these concerns were made but that the Complainant “refused to attend any of the meetings” and

that “effective immediately, your employment with North Central College has been terminated.” (Spencer Aff. ¶ 20-21; Spencer Aff. Exhibit G; Cl. Ex. C-33).

On July 17, 2015, Human Resources sent a letter to the Complainant asking for the return of any College property in the Complainant’s possession and reminding him that information entrusted to him as an employee constituted trade secrets, including “information relating to the College’s donors or alumni, the College’s business operations and methods, or the College’s finances.” (Loscheider Aff. ¶ 30-31; Loscheider Aff. Exhibit E; Cl. Ex. C-127 – C-128). On August 10, 2015, Human Resources sent the Complainant a second letter seeking return of College property and again reminding him that “much of the information that was entrusted to you in your possession constitutes the College’s trade secrets.” (Loscheider Aff. ¶ 33; Loscheider Aff. Exhibit F; Cl. Ex. C-129). On August 18, 2015, the Complainant responded to these letters stating “[t]o the best of my knowledge, information and belief, the [College] has no trade secrets.” (Loscheider Aff. ¶ 34; Loscheider Aff. Exhibit G; Cl. Ex. C-130 – C-131).

#### Standards for Summary Decision

Summary decision is appropriate when the pleadings, affidavits, material obtained by discovery or otherwise or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. §18.72. In response, the non-moving party must support an assertion that a fact cannot be or is genuinely disputed by citing to “particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or by showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” 29 C.F.R. § 18.72(c)(1). In deciding a motion for summary decision, the fact finder must view the facts in the light most favorable to the non-moving party. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994). The moving party bears the burden of proof, though the opposing party “may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

#### Discussion and Applicable Law

The Complainant argues that because the Respondent never filed a response to the Complaint or to his objections to the Secretary’s Findings he is entitled to a summary decision in his favor, citing to 29 U.S.C. § 18.5<sup>4</sup> and FRCP 12(a) in support. However, the Complainant’s reliance on the above rules is misplaced, as discrimination complaints under SOX are expressly governed by the rules set forth in 29 C.F.R. Part 1980. Nothing in 29 C.F.R. Part 1980 requires the Respondent to file a response either to the initial OSHA complaint or the request for a

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<sup>4</sup> The section of 29 U.C.S. that the Complainant relies on, § 18.5, was part of an older version of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges. However, the current version of the rules went into effect on May 19, 2015, at which time 29 U.S.C. § 18.5 was removed. (See 80 F.R.S. 28768 and 28785, May 19, 2015). The new Rules do not address whether parties are required to file answers to complaints filed against them.

hearing. 29 C.F.R. §§ 1980.104(a), (c), 1980.106(a), (b). Thus, the Respondent does not waive its right to contest the Complainant's allegations or seek summary judgment because it has not filed an answer. *Brady v. Direct Mail Management, Inc.* ARB No. 06-044, ALJ No. 2006-SOX-16 (ARB Mar. 26, 2008); *Jordan v. Sprint Nextel Corp.* 2006-SOX-41 (ALJ Mar. 14, 2006). Here, the Complainant is not entitled to summary decision based on any perceived procedural deficiency. The parties' substantive arguments will therefore be addressed.

Section 806 of the Act, 18 U.S.C. § 1514A(a), and 29 C.F.R. § 1980.102 prohibit a company with either a class of securities registered under Section 12 of the SEA or that is required to file reports under Section 15(d) of the SEA from discharging, demoting, suspending, threatening, harassing, or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged in any lawful act to provide information, caused information to be provided, or otherwise assisted in an investigation, regarding any conduct the employee reasonably believed constitutes a violation of 18 U.S.C. §§ 1341 (fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of congress, or a person with supervisory authority over the employee.

The Respondent argues that it is entitled to summary decision because it is not a covered entity under SOX whistleblower provisions as it does not have a class of securities registered under Section 12 of the SEA of 1934, has not effected a transaction in a security on a national securities exchange and is not required to file reports under Section 15(d) of the SEA of 1934. (Resp. Mot. at 6-8). The Complainant argues that he is covered under the whistleblower provisions, first because "the Sarbanes-Oxley Act (SOX) makes clear, **all** corporations . . . cannot retaliate against employee whistleblowers," (Cl. Reply ¶ 5 (emphasis in original)), and second because the Respondent does not meet the exemptions provided to charitable or educational organizations in the regulations as it is not operated exclusively for a charitable purpose and its net benefits inure to individuals and thus it is required to register its securities. (Cl. Mot. ¶ 22-26; Cl. Reply ¶ 4).

Federal securities laws have always exempted charitable, educational, religious, or otherwise benevolent organizations, and the securities issued by these organizations, from registration requirements. Under Section 12 of the SEA it is unlawful for "any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange." 15 U.S.C. §78l(a). Explicitly exempted from the provisions of Section 12 is:

[a]ny security of an issuer organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual . . .

15 U.S.C. §78l(g)(2)(d).

Section 15(d) of the SEA requires the filing of supplementary reports for any security for which an issuer is required to file a registration statement under the 1933 Securities Act. 15 U.S.C. §78o(d). Expressly exempted from the definition of securities covered by the 1933 Securities Act is:

[a]ny security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private shareholder or individual. . .

15 U.S.C. §77c(a)(4).

The Courts and the Administrative Review Board have held that the whistleblower provisions of SOX do not protect all employees of all corporations, but rather that the protection only extends to employees of publicly traded companies required to register securities under the SEA. *See e.g. Tubman v. Biomerieux, Inc.* 2007 U.S. Dist. LEXIS 18883 (M.D. N.C., Mar. 13, 2007) (holding that whistleblower protections under SOX only apply to publically traded companies); *Fleszar v Am. Med. Ass’n*, ARB Nos. 07-091, 08-061, ALJ Nos. 2007-SOX-30, 2008-SOX-06 (ARB Mar. 31, 2009) (holding that the AMA is a not-for-profit company that does not issue securities that are registered under Section 12 or file reports under Section 15(d) and is therefore not subject to the whistleblower protection provision in SOX); *Paz v. Mary’s Center for Maternal & Child Care*, ARB No. 06-031, ALJ 2006-SOX-07 (ARB Nov. 30, 2007) (holding that a non-profit corporation was not a publicly traded company and thus not a covered respondent under SOX); *Judith v. Magnolia Plumbing Co., Inc.*, 2005-SOX-99 and 100 (ALJ Sept. 20, 2005) (rejecting the Complainant’s argument that SOX should apply because the Respondent had numerous contracts with municipal and federal governments and that public policy to protect whistleblowers should allow all complaints to proceed under SOX and holding that “[i]f a company is not publicly traded, the Act simply does not apply.”)

Here, the record does not establish that the College has ever been required to register a class of securities under section 12 of the SEA Act or to file a report under section 15(d) of the SEA. The record clearly indicates that the Respondent is a not-for-profit, private organization and Paul Loscheider, the College’s Vice President of Business Affairs, has affirmed that the Respondent has never effected any transaction in any security on a national securities exchange and has never registered a class of securities under Section 12 of the SEA. (Loscheider Aff. ¶ 5-6). In his Response to the Respondent’s Affidavit of Paul Loscheider, the Complainant states that he “disputed” this but provided no facts or other evidence to support his assertion. In order to survive a motion for summary decision, the Complainant “may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 447 U.S. at 248. In his response, the Complainant has provided no evidence to show that the Respondent has ever registered securities under Section 12 or otherwise effected transactions of securities on a national securities exchange.

The case law makes it clear that, contrary to the Complainant’s position, not all corporations fall under the provisions established by SOX. Here, the record shows that the Respondent is a private organization that has never publically traded a class of securities on a

national securities exchange. The Respondent is not an organization covered under Section 12 of the SEA and the Complainant is unable to avail himself of SOX whistleblower provisions simply because he was an employee of an incorporated entity.

The Complainant argues that Respondent must register any securities it issues as it does not qualify for the exemptions available to charitable organizations. Determining whether an organization meets the exemption requires a two-part test, namely 1) the organization must be organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and 2) no part of the net earnings of the organization can inure to the benefit of any person, private shareholder or individual. *Calderón-Serra v. Wilmington Trust Co.*, 715 F.3d 14, 18 (1<sup>st</sup> Cir. 2013).

With regard to the first prong, it is the purpose for which the note-issuing organization exists that determines if the organization is entitled to the exception. *Calderón-Serra* 715 F.3d at 18. Here, the Respondent was organized for the purpose of providing a college or graduate level education to its students. (Loscheider Aff. ¶ 1-2). The Complainant provides no evidence that the College does not, in fact, educate or otherwise provide educational opportunities to the students enrolled there. Rather the Complainant argues that the College is not operated exclusively for charitable purposes because it has trade secrets and so must be involved in the business of trade. (Cl. Mot.; Cl. Ex. C-04-05; Cl. Reply ¶ 10).

The Complainant's argument is unsupported in several ways. The Complainant states several times that the Respondent does not have trade secrets. (Loscheider Aff. Exhibit G; Cl. Ex. C-05; C-130-131). Thus, the Complainant's own filings are counter to the argument he is attempting to make. If, as the Complainant states, the Respondent has no trade secrets, then there is nothing to support his belief that the College is engaged in trade for commercial value or profit such that it would no longer be entitled to the exemptions under the regulations. More importantly, the Complainant offers no legal authority to support his assertion that a company with trade secrets is automatically a for-profit organization engaged in trade.

Even assuming *arguendo* that the College has trade secrets, as the Respondent notes in its Motion for Summary Decision, there is no law that requires a trade secret be used to generate profits. (Resp. Mot. at 15-16). Here, the information regarding the College's donors and other charitable contributors and business or fundraising operations or methods has intrinsic value to the college as it seeks to raise ongoing and future funds. However, that information, by itself, does not show that the College is a for-profit institution or that it is not organized for an educational purpose. Thus, I am not convinced by the Complainant's argument that because the Respondent has trade secrets it must engage in, or operate for, a non-educational purpose, or that it is in any other way operated for a pecuniary or commercial purpose.

With regard to the second prong, the Complainant argues the Respondent does not qualify for the charitable exemption because part of its net earnings inure to the benefit of individuals. Specifically the Complainant argues that the President and Vice Presidents receive part of the college's net earnings and/or profit in the form of bonuses. (Cl. Mot. ¶26). The Complainant also argues that Board of Trustee members receive part of the college's net

earnings and/or profit from a “kick-back” scheme or fraudulently receive contracts for goods and services. (Cl. Mot. ¶19; ¶26).

Again, the Complainant fails to provide evidence to support his assertion that the College’s President and Vice Presidents receive bonuses or any other “special” compensation. The evidence demonstrates that when the College paid out special compensation in the form of a bonus pool such compensation was awarded to administrative or hourly employees, not given to the College’s President and Vice Presidents. (*See* Toris Aff. Exhibit C; Loscheider Aff. ¶ 26-29). There is no other evidence to show that the President and Vice Presidents receive any compensation apart from their annual salaries. (Cl. Ex. C-54D – C-54E). Similarly, the Complainant presents no evidence to support his assertion that Board members were receiving “kick-backs;” although the evidence shows that at times the College purchased goods or services from vendors whose principals or employees were members of the Board of Trustee’s. (C. Ex. C-53 – C-54A).

There is little case law that discusses the “net earnings” language in 15 U.S.C. § 77c(a)(4); however, discussions on whether an organization qualifies for tax-exempt status provide some guidance on the issue. Courts have held that an organization is allowed to incur ordinary and necessary expenditures, including the payment of reasonable salaries, in its operations without losing its tax exempt status under 501(c)(3). (*See, e.g., The Founding Church of Scientology v. United States*, 188 Ct. Cl. 490, 412 F.2d 1197, 1200 (U.S. Ct. Cl. 1969); *Fraternal Medical Specialist Services, Inc. v. Commissioner*, 1984 Tax Ct. Memo 29 (U.S. Tax Ct., 12, 1948); *Birmingham Business College, Inc. v. Commissioner*, 276 F.2d 476, 481 (5<sup>th</sup> Cir. 1960); *Church of Scientology v. Commissioner*, 823 F.2d 1310, 1315 (9<sup>th</sup> Cir., 1987)). Recognizing that charitable organizations must engage in some business in order to fulfill their purposes, Courts have also held that organizations may purchase or sell goods or services for a fair price or reasonable market value without losing their tax exempt status. (*See e.g. Va. Mason Hosp. Ass’n.*, 9 Wn.2d 284 at 295-300 (finding that payment of principle and reasonable interest on mortgage bonds to bondholders is not a device in which “net earnings” were inured to individuals); *Church of Scientology*, 823 F.2d at 1317 (stating that a church may pay an author reasonable compensation in the form of literary royalties for his work)).

Applying those principles in this case, it is undisputed that the Respondent has been granted tax-exempt status under section 501(c)(3). (*Id* at ¶ 4; Loscheider Aff. Exhibit A). In order to qualify for 501(c)(3) tax-exempt status a corporation must similarly establish 1) that it is organized and operated exclusively for a charitable or educational purposes and 2) that no part of its net earnings inure to the benefit of any private shareholder or individual. 26. U.S.C. §§501(a); 501(c)(3). Thus, by obtaining tax-exempt status from the IRS the Respondent has demonstrated that it has met the same requirements the Complainant is attempting to prove it does not meet, namely that it operated exclusively for an educational purpose and that no net earnings inure to the benefit of any particular individuals.

In the course of its operations the Respondent incurred ordinary and necessary expenditures in its operations, such as paying salaries to the President and Vice Presidents. The Complainant presents no evidence that the salaries paid are excessive or unreasonable. Instead the evidence demonstrates that a Compensation Committee works with the College’s Human Resources department and consults outside auditors and sources to determine reasonable salaries,

which are then approved by the Board. (Cl. Ex. C-54D – C-54E). Additionally in the course of its business, the Respondent purchased goods or services. Although some of those business transactions took place with vendors whose employees or principals sit on the College’s Board of Trustee’s, there is no evidence to suggest that the College at any time paid more than the fair-market value for services or a reasonable price for the goods obtained so as to inure any net benefit, directly or indirectly, to an individual related to the College. As noted in its financial statement, the College has a Conflict of Interest Policy which requires Trustees to disclose any business relations with the college. (C. Ex. C-53 – C-54A). Further, the expenditures are competitively bid when applicable. (*Id.*).

For the reasons discussed above, I find that the Complainant has provided no evidence, outside of his unsupported assertions, that the Respondent is not entitled to the charitable exemptions in the regulations. Given the Respondent’s long-standing 501(c)(3) status, I find the Complainant’s arguments unpersuasive and that the Respondent has established that it is entitled to the charitable organization exception under 15 U.S.C. § 77c(a)(4). Thus, the Respondent is exempted from registering under Section 15(d) of the SEA and the Complainant is unable to avail himself of SOX whistleblower provisions.

Additionally, the Complainant argues the Respondent is not able to avail itself of the charitable organization exception because the College pays a commission or other special compensation to employees like himself. (Cl. Mot. ¶ 23; Cl. Ex. C-04). This argument appears to be based on language that was added to the SEA by the Philanthropy Protection Act of 1995 (“Philanthropy Act”). Pub. L. No. 104-62, 109 Stat. 682 (codified in scattered sections of 15 U.S.C.). The Philanthropy Act amended sections of the SEAs of 1933 and 1934 and the Investment Company Act of 1940 (codified at 15 U.S.C. §80a *et. seq.*) by providing more specific exemptions for charitable organizations. Under the Philanthropy Act:

a charitable organization . . . or any trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person’s employment or duties with such organization, shall not be deemed to be a “broker”, “dealer”, “municipal securities broker”, “municipal securities dealer”, “government securities broker”, or “government securities dealer” for purposes of this chapter solely because such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of –

- (A) such a charitable organization;
- (B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)];
- (C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)], or the settlors (or potential settlors) or beneficiaries of any such trust or other instrument.

15 U.S.C. § 78c(e)(1).

This exemption is limited by language which states that is it not available to a charitable organization unless each person who solicits donations on behalf of the organization is “engaged in the overall fund raising activities of a charitable organization and receives *no commission or other special compensation based on the number of donations collected for the fund.*” 15 U.S.C. § 78c(e)(2) (emphasis added).

The Complainant relies on the case of *Warfield v. Alaniz*, 569 F.3d 1015 (9<sup>th</sup> Cir. 2008), which he states stands for the proposition that “[i]nvestment contracts involving commissions or special compensation are securities that must be registered.” (Cl. Mot. ¶ 23). The Complainant’s reliance on *Warfield* is misplaced. In *Warfield*, agents for a broker foundation sold charitable gift annuities that the foundation claimed were not subject to regulation under the Securities Act of 1933. (*Warfield*, 569 F.3d at 1019). In deciding whether the agents and the foundation were required to register as brokers, the Court held that the agents were not exempt from registration because they received commissions specifically for their sale of the gift annuities. (*Id.* at 1027).

Here, the record does establish that the Complainant, as a person who solicited donations on behalf of the College, ever received a commission or other special compensation that was specifically dependent or based on the number or amount of donations he was able to procure. Rather, the evidence of record demonstrates the when College paid out “special compensation” in the form of a bonus pool, it was awarded to administrative or hourly employees who showed “outstanding” dedication to the College’s success. (*See* Toris Aff. Exhibit C; Loscheider Aff. ¶ 26-29). Many recipients of this bonus had no job duties connected to the College’s fundraising practices and whether or not an employee secured or solicited a gift or annuity did not factor into whether or not the employee received a bonus. (Loscheider Aff. ¶ 27-28). It also appears that there were years when no gift annuities were established where the Complainant still received a bonus. (Loscheider Aff. ¶ 28). Thus, I find that there is no evidence in the record to establish that the bonuses awarded to college employees had any relation to the number of donations they solicited or to the fundraising that they engaged in. As the Complainant has offered no evidence that he or any other employee received special compensation based solely on his ability to solicit donations, I find his argument that the College is not entitled to the registration exemption unpersuasive.

Aside from arguing that the Respondent is not entitled to the exemptions in the regulations, the Complainant posits several arguments in an attempt to show that he is covered. The Complainant argues that he is entitled to whistleblower protection because the Respondent has agreed to be subject to all SOX provisions. (Cl. Mot. ¶18-19; Cl. Ex. C-06). The Respondent argues that attempts by the College to be more transparent with regard to their financial actions after the passage of the SOX regulation does not automatically mean that they are bound by all provisions in SOX. (Resp. Mot. At 8-10; Cl. Ex. R-0396 – R-399; R-0407). The Complainant’s argument is without merit or support. As discussed above, the whistleblower provisions of SOX only apply to companies with either a class of securities registered under Section 12 of the SEA or that are required to file reports under Section 15(d) of the SEA. 18 U.S.C. § 1514A(a). The SOX regulation makes no attempt to extend its protection to any corporation that takes steps or

implements policies intended to demonstrate financial and accounting transparency and integrity. The Complainant has not cited to any court that has ever interpreted the regulations thusly and I decline to do so now. The fact that the College recognized that portions of the SOX regulations could also be adopted by a not-for-profit corporation does not mean that it is therefore bound by the whistleblower provisions in the statute.

Finally, the Complainant argues that he is entitled to SOX whistleblower protection because he is an attorney and the Supreme Court in *Lawson v. FRM*, 571 U.S. \_\_\_, 134 S. Ct. 1158 (2014) held that “[a]ttorneys are mandated reporters under SOX and are protected ‘from retaliation by their employers for complying with the Act’s reporting requirements’ whether or not they are employed by a ‘public company.’” (Complainant’s Memorandum of Points and Authorities ¶3, citing *Lawson*, 571 U.S. at 1170-1171). The Complainant’s reliance on *Lawson* to provide him coverage under SOX is unpersuasive and is based on a convoluted interpretation of the Court’s holding. In *Lawson* the Court addressed the issue of whether or not employees of privately-held firms who contract and subcontract to provide services to public companies are covered under SOX’s whistleblower provisions. *Lawson*, 571 U.S. at 1161. Recognizing that outside professionals, such as attorneys or accountants, are often vitally important to the detection and reporting of fraud, the Supreme Court held that Section 1514A(a) applies to employees of private companies that contract to provide services to publicly traded companies. *Id.* at 1170-1171. The holding in *Lawson* does not extend whistleblower protection to all lawyers simply because they are lawyers, as the Complainant seems to be arguing. Further, unlike the plaintiffs in *Lawson*, the Complainant was not an employee of a privately-held entity who contracted to provide services to a publicly traded company, but rather solely an employee of a not-for-profit private corporation. Thus, the Court’s holding in *Lawson* does not extend coverage of SOX whistleblower provisions to provide protection to the Complainant.

### Conclusion

In order for the Complainant to prevail on his Motion for Summary Decision he must first prove that he is a covered employee under the SOX whistleblower regulations. In considering the factual assertions of the parties and their arguments, I find that the Respondent is a not-for-profit, private organization that has not registered securities under Section 12 of the SEA of 1934 and is not required to file reports under Section 15(d) of the SEA of 1934. Consequently, I find the Respondent does not fall under either specific category subject to the whistleblower provisions at Section 806. To the extent the Respondent issues non-publicly traded securities, I find it is not required to register such securities because it is a not-for-profit charitable organization under the regulations solely engaged in an educational purpose. Since the Respondent is not a publicly traded company or a company with registered securities, the Complainant is not an employee entitled to SOX whistleblower protection under 18 U.S.C. §1514A(a).

## **ORDER**

Accordingly, the Complainant's Motion for Summary Decision is **DENIED** and the Respondent's Motion for Summary Decision is **GRANTED** and this claim is hereby **DISMISSED**. The hearing scheduled for June 13, 2016 is **CANCELLED**<sup>5</sup>.

**SO ORDERED.**

LARRY A. TEMIN  
ADMINISTRATIVE LAW JUDGE

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

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<sup>5</sup> Both parties have filed objections to the other party's proposed exhibits and witness list, and Complainant has requested the issuance of a subpoena for the hearing. These are rendered moot by this Order and need not be ruled on.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).