



Issue Date: 09 August 2005

CASE NO.: 2003-SOX-15

In the Matter of:

DAVID E. WELCH,
Complainant,

v.

CARDINAL BANKSHARES CORPORATION,
Respondent.

**ORDER DENYING MOTION FOR
ORDER TO SHOW CAUSE**

On August 5, 2005, Complainant David E. Welch, through counsel, filed a motion seeking an order to show cause why administrative monetary sanctions should not be imposed by me upon Respondent Cardinal Bankshares Corporation in the above-captioned matter. For the reasons stated below, the motion will be denied.

This case arises under the whistleblower provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A (“Sarbanes-Oxley”). On January 28, 2004, I issued a recommended decision and order finding that Respondent had retaliated against Complainant for engaging in activity protected by Sarbanes-Oxley and, *inter alia*, ordered the parties to submit evidence and argument with respect to the computation of damages in this case. Thereafter, following a substantial hiatus caused by Respondent’s improvident appeals of my interlocutory decision on liability, I issued a supplemental recommended decision and order on February 15, 2005 awarding Complainant damages, fees and costs. In pertinent part, that order required that Respondent reinstate Complainant as the Chief Financial Officer of Cardinal Bankshares Corporation with the same seniority, status, and benefits he would have had but for Respondent’s unlawful discrimination.¹

¹ Complainant incorrectly asserts in his motion that Respondent was ordered to reinstate him to his former position as Chief Financial Officer in January 2004 when I determined that Cardinal Bankshares had violated Sarbanes-Oxley. As the ARB correctly noted in its order dismissing Respondent’s petition for review, my January 28, 2004 recommended decision and order was not a preliminary order of reinstatement. *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-15 (ARB May 13, 2004), slip op. at 5, n.4, citing *McNeill v. Crane Nuclear*, ARB No. 02-002, ALJ No. 2001-ERA-003 (ARB Dec. 20, 2002).

Complainant states that he is now, and has been since this case began, ready, willing, and able to return to work in his former capacity as Respondent's Chief Financial Officer. He further states that Cardinal Bankshares has not complied with my order of reinstatement nor has it sought a stay of that order pending review of my decision by the Administrative Review Board. He therefore asks that Respondent be ordered to show cause why monetary sanctions should not be imposed for its failure to comply with the order of reinstatement. Alternatively, he asks that Cardinal Bankshares be ordered to pay monetary sanctions in an amount deemed appropriate under the facts and circumstances of this case.

Applicable regulations provide, in pertinent part, as follows:

(b) If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the employee whole, including reinstatement of the complainant to that person's former position with the seniority status that the complainant would have had but for the discrimination

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge's decision requiring reinstatement . . . will be effective immediately upon receipt of the decision by the named person, and may not be stayed. All other portions of the judge's order will be effective ten business days after the date of the decision, unless a timely petition for review has been filed with the Administrative Review Board.

29 C.F.R. § 1980.109(b)-(c) (2004). *See also* 29 C.F.R. § 1980.110(b) (2004) ("a preliminary order of reinstatement will be effective while review is conducted by the [Administrative Review] Board.")² The regulations further provide:

Whenever any person has failed to comply with a preliminary order of reinstatement, 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.

² The interim regulation governing decisions and orders of the Administrative Review Board contained in the 2004 Code of Federal Regulations was slightly amended in the Secretary's final rule. *See* Final Rule, 29 CFR Part 1980, 69 Fed. Reg. 52103 (Aug. 24, 2004). The final rule adds to the above-quoted language "unless the Board grants a motion to stay the order." *Id.* at 52116. The preamble to that rule notes that:

As with Sec. 1980.106(b)(1) [the section addressing a preliminary order of reinstatement issued by OSHA], Sec. 1980.110(b) of this rule has been changed to provide that in the exceptional case, the Board may grant a motion to stay a preliminary order of reinstatement that otherwise will be effective while review is conducted by the Board. As explained above, however, OSHA believes that a stay of a preliminary reinstatement order would only be appropriate where the named person can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public.

69 Fed. Reg. 52111. As noted above, no motion for stay has, according to Complainant, been filed by Respondent with the Board.

29 C.F.R. § 1980.113 (2004). These regulations clearly provide that an order of reinstatement issued by an administrative law judge may not be stayed, except upon motion to the Administrative Review Board, and that the enforcement of an order of reinstatement must be pursued by instituting a civil action in United States district court filed by the Secretary or the person on whose behalf the order was issued.³ Therefore,

IT IS HEREBY ORDERED that Complainant's motion for order to show cause and/or for imposition of monetary sanctions is DENIED.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

³ While Complainant has cited *Windhauser v. Trane*, 2005-SOX-00017 (Jun. 1, 2005) (Order) as support for his motion to impose monetary sanctions, that order is neither binding nor persuasive authority in this case. I believe the procedures outlined in the above-referenced regulations, and followed in, for example, *Bechtel v. Competitive Technologies, Inc.*, No. Civ.3:05CV629AVC (D.Conn. May 13, 2005) (case below 2005-SOX-33), http://www.oalj.dol.gov/public/wblower/decsn/3_05_629.pdf, are the only avenue now open to Complainant for obtaining the relief he seeks.