



In the Matter of:

MICHAEL J. NOVICK,

ARB CASE NO. 2021-0024

COMPLAINANT,

ALJ CASE NO. 2020-SOX-00026

v.

DATE: July 16, 2021

MORGAN STANLEY SMITH BARNEY,  
LLC; MORGAN STANLEY SMITH  
BARNEY FA NOTES HOLDINGS, LLC,

RESPONDENTS.

Appearances:

*For the Complainant:*

Michael J. Novick; *pro se*; Las Vegas, Nevada

*For the Respondent:*

Margaret G. Maraschino, Esq.; *Munger, Tolles & Olson LLC*; Los Angeles, California

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Stephen M. Godek, *Administrative Appeals Judges*

## DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act ("SOX"), and its implementing regulations.<sup>1</sup>

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<sup>1</sup> 18 U.S.C. §1514A (2010); 29 C.F.R. Part 1980 (2020).

Michael Novick (“Novick” or “Complainant”) filed a complaint alleging that Respondent retaliated against him in violation of SOX’s whistleblower protection provisions. The Administrative Law Judge (“ALJ”) issued an order granting Respondent’s motion for summary decision. Complainant appealed to the Administrative Review Board (“ARB” or “the Board”). For the reasons that follow, we dismiss Novick’s complaint.

### **BACKGROUND**

Complainant worked as a financial advisor beginning in 1984 with Dean Witter, which merged with Morgan Stanley in 1997. In 2008, he left to work with Smith Barney’s Citi Family Office division, which was acquired by Morgan Stanley in 2009. Complainant continued to work for Morgan Stanley Smith Barney, LLC (“Respondent”) until he was fired on October 15, 2014.

On January 9, 2015, Respondent brought an action against Complainant through arbitration for the unpaid balance of two promissory notes executed during his employment. Complainant then brought a counterclaim, alleging that Respondent retaliated against him for engaging in protected activity in violation of SOX. The arbitrators ultimately found in favor of Respondent on all claims.

On April 10, 2015, Complainant filed a concurrent whistleblower claim with OSHA. On March 12, 2020, OSHA dismissed the complaint. Complainant appealed to OALJ and requested a hearing on the merits. On October 13, 2020, Respondent filed a motion for summary decision. The ALJ granted the motion on March 15, 2021.

On March 29, 2021, Complainant filed a petition for review with the Board. On April 2, 2021, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule, which required that Complainant file his opening brief within 28 days. On April 27, 2021, Complainant requested an extension. The Board granted the motion and ordered him to file an opening brief on or before May 20, 2021.

Complainant failed to timely file his opening brief. On June 9, 2021, the Board issued an Order to Show Cause allowing Complainant until June 18, 2021, to

explain why this appeal should not be dismissed for failure to prosecute the claim. Complainant filed a response to the Order to Show Cause. On June 22, 2021, he then filed his opening brief.

On June 25, 2021, Respondent filed a motion to strike Complainant's untimely brief and dismiss his appeal. Complainant filed a response on July 6, 2021.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to issue agency decisions under the Sarbanes-Oxley Act ("SOX") to the Board.<sup>2</sup> The Board reviews an ALJ's determinations on procedural issues under an abuse of discretion standard.<sup>3</sup>

### DISCUSSION

Complainant contends his appeal should not be dismissed because dismissal is a harsh remedy to be utilized only in extreme situations, there is a strong policy of deciding cases on their merits, and he ultimately filed a brief. He explained that it took him longer than he expected to write his brief because it is the first brief he has written. He also discussed his inability to retain counsel after his previous counsel withdrew in 2017 due to an illness.

The Board has the inherent power to dismiss a case for failure to prosecute in an effort to control its docket and to promote the efficient disposition of its cases.<sup>4</sup>

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<sup>2</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

<sup>3</sup> *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-0001 (ARB June 15, 2012).

<sup>4</sup> *Lewman v. Ken Brick Masonry Supply*, ARB No. 2007-0015, ALJ No. 2006-STA-00018 (ARB Oct. 31, 2007).

The Board may also dismiss a complaint in a case in which the complainant does not adequately explain his failure to comply with the Board's briefing schedule.<sup>5</sup>

The initial deadline to file an opening brief was on April 30, 2020. The Board granted Complainant's request for an extension and ordered him to file an opening brief on or before May 20, 2021. However, Complainant did not file his brief until more than a month later on June 22, 2021. While he provided the Board with some explanation of his difficulties, he has not provided good cause to excuse his failure to timely file his brief. Notably, he demonstrated his understanding of how to request an extension when he requested such an extension on April 27, 2021. Despite this knowledge, he did not request another extension. In addition, he also did not seek leave from the Board to file a late brief. Therefore, we conclude that Complainant's appeal should be dismissed for failure to timely prosecute his action before the Board.

### CONCLUSION

Accordingly, we **GRANT** Respondent's motion and **DISMISS** Novick's complaint.

**SO ORDERED.**

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<sup>5</sup> *Steffenhagen v. Securitas Sverige, AR, et al.*, ARB No. 2003-0139, ALJ No. 2003-SOX-00024 (ARB Jan. 13, 2004).