

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. C9B030076

Hearing Officer—Andrew H. Perkins

ORDER DISMISSING AFFIRMATIVE DEFENSE

In various pleadings, the Respondent asserts that this disciplinary proceeding must be dismissed under the The Sarbanes-Oxley Act of 2002, Public Law 107-204, 116 Stat. 745 (the “Act”). The Respondent contends that he is a protected “whistleblower” under the Act and that NASD improperly instituted this disciplinary proceeding to retaliate against him for his whistle blowing activity.

The Hearing Officer dismisses this affirmative defense because, as a matter of law, the Act does not create an affirmative defense to a disciplinary proceeding brought by NASD, a self-regulatory organization under the Securities Exchange Act of 1934 (the “Exchange Act”).

Discussion

The Act was signed into law on July 30, 2002, in reaction to a number of recent well-publicized corporate scandals. In general terms, the Act is a sweeping piece of reform legislation covering the governance of public corporations. Among its provisions are two that establish protections against retaliation by public companies and their officers, managers, and other agents, against employees who “blow the whistle” on securities law and other violations. Section

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806 of the Act (codified as 18 U.S.C. § 1514A) creates a right of civil action in federal court that protects whistleblowers against retaliation in securities fraud cases. Section 1107 (codified as 18 U.S.C. § 1513(e)) provides for criminal penalties for retaliation against informants. Neither provision provides the Respondent with an affirmative defense to this proceeding.

I. Civil Remedies under Section 806

Section 806 applies to any company with a class of securities registered under Section 12 of the Exchange Act, 15 U.S.C. § 78a *et seq.*, or that is required to file reports under Section 15(d) of the Exchange Act, as well as to that company's officers, employees, contractors, subcontractors, and agents (collectively, the "Covered Persons"). Section 806 prohibits Covered Persons from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in terms and conditions of employment for lawfully assisting in an investigation of activity that the employee reasonably believes is a violation of any (i) federal law prohibiting mail fraud, bank fraud, securities fraud, or fraud by wire, radio, or television; (ii) rule or regulation of the Securities and Exchange Commission ("SEC"); or (iii) federal law relating to fraud against shareholders. To be protected, the investigation must be conducted by (i) a federal regulatory or law enforcement agency; (ii) any Member of Congress or committee of Congress; (iii) a person with supervisory responsibility over the employee; or (iv) such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.

Section 806 further prohibits Covered Persons from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee for filing, causing to be filed, testifying at, participating in, or otherwise assisting in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of any (i)

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federal law prohibiting mail fraud, bank fraud, securities fraud, or fraud by wire, radio, or television; (ii) rule or regulation of the SEC; or (iii) federal law relating to fraud against shareholders.

To seek redress for violations of Section 806, an employee must first file a complaint with the Labor Department within 90 days of the alleged violation.¹ The filing and handling of the complaint is governed by 49 U.S.C. § 42121(b), which, among other things, empowers the Labor Department to investigate and conduct a hearing regarding complaints of retaliation, as well as to issue a final decision providing the whistleblower-employee with an appropriate remedy or denying the complaint. If the Labor Department does not issue a final decision within 180 days of the filing of the complaint, the employee has the right to file a private civil action in federal court.

Assuming that Section 806 would otherwise apply to the facts the Respondent raises in his pleadings, his remedy is to file a complaint with the Labor Department. The Respondent may not plead Section 806 of the Act to request dismissal of this disciplinary proceeding.

II. Criminal Penalties under Section 1107

Section 1107 of the Act (codified as 18 U.S.C. § 1513(e)) creates criminal penalties for retaliation against informants, including employees. Section 1107 provides for imprisonment and a fine upon the conviction of anyone who knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to any federal offense.

¹ The employee should file the complaint with the Occupational Safety and Health Agency area director. (29 C.F.R. § 1980.103.)

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Section 1107 is a criminal statute; thus, appropriate criminal authorities must prosecute alleged violations of this section of the Act. Congress did not provide for private remedies for violations of Section 1107. Accordingly, the Respondent cannot rely on Section 1107 as an affirmative defense to this proceeding.

Order

For the foregoing reasons, the Hearing Officer dismisses the Respondent's affirmative defenses based upon the Sarbanes-Oxley Act of 2002. Consequently, the Respondent shall be prohibited from introducing evidence at the hearing in support of this defense.

IT IS SO ORDERED.

Andrew H. Perkins
Hearing Officer

June 22, 2004