

**OFFICE OF COMPLIANCE**  
**LA 200, John Adams Building, 110 Second Street, S.E.**  
**Washington, DC 20540-1999**

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**RICHARD DUNCAN,** )  
 )  
 **Appellant,** )  
 )  
 **v.** )  
 )  
 **OFFICE OF THE ARCHITECT** )  
 **OF THE CAPITOL,** )  
 )  
 **Appellee.** )  
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 )  
 )

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**Case Number: 02-AC-59(RP)**

**Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens; Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.**

**ORDER DENYING REQUEST FOR RECONSIDERATION**

On September 19, 2006, the Board of Directors (“Board”) issued a Decision and Order (“Decision”) in the above-captioned case, affirming the hearing officer’s dismissal of Counts II and III. The majority, with one member dissenting, affirmed the hearing officer’s finding of insufficient evidence to support Count I’s claim of retaliation. On October 13, 2006, Richard Duncan (“Duncan” or “Petitioner”) filed a Request for Reconsideration of the Board’s Decision. On October 19, 2006, the Office of the Architect of the Capitol (“AOC” or “Respondent”) filed a motion in opposition to Petitioner’s request, asking the Board to strike the petition.<sup>1</sup> After a full review of the pleadings, the Board denies both the request to strike the motion, as well as the request to reconsider.

**I. Background**

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<sup>1</sup> Although the Board of Directors did not request that a responsive pleading be filed by the AOC, the Board will address the issues raised in the AOC’s motion. *See Rule 8.02 of the Office of Compliance Procedural Rules.*

Duncan filed a claim against the AOC, alleging three counts of retaliation resulting from his refusal to remove his hard hat. The AOC filed a motion to dismiss the complaint, which Hearing Officer Sylvia Bacon granted.<sup>2</sup> On petition for review, the Board reversed the hearing officer and remanded the case for further proceedings.

Subsequent to the remand, a hearing was held on all three counts, and Hearing Officer Bacon issued a judgment for the AOC on all counts. Petitioner filed a petition for review, and the AOC filed a response. On September 19, 2006, the Board issued its, affirming the hearing officer's dismissal of Counts II and III. The majority also affirmed the hearing officer's finding of insufficient evidence to support Count I's claim of retaliation. One Board member dissented from this ruling.

## **II. Standard of Review**

Section 8.02 of the Office of Compliance Procedural Rules states that a party may move for reconsideration of a Board decision where the party can establish that the Board has "overlooked or misapprehended points of law or fact."

## **III. Discussion**

*The Board appropriately granted Petitioner's Motion for Enlargement of Time to file a Motion for Reconsideration.*

Pursuant to Section 8.02 (entitled "Reconsideration") of the Office of Compliance Procedural Rules ("Rules"), Petitioner's motion to reconsider was due to be filed 15 days after service of the Board's final decision, making the motion due October 6, 2006.<sup>3</sup> Petitioner's request for an enlargement of time to file the motion for reconsideration was filed October 4, 2006 and granted by the Board, through the Office of Compliance's Acting Executive Director, on October 6, 2006.<sup>4</sup>

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<sup>2</sup> The hearing officer determined that there was no individual cause of action in OSHA matters.

<sup>3</sup> Although the Board's decision was issued on September 19, 2006, Counsel for Petitioner received actual service of the decision on September 21, 2006.

<sup>4</sup> Section 8.01 of the Office of Compliance Procedural Rules allows the Board of Directors to delegate to the Executive Director the authority to determine requests for extension.

Approximately two weeks after the motion was granted, Respondent's counsel filed a motion in opposition to the motion for an enlargement of time<sup>5</sup>, arguing that the Rules do not allow an extension for filing a motion to reconsider. Counsel for Respondent argued that where the Rules contemplate such extensions, procedures for granting extension requests are specifically added to the Rules.<sup>6</sup> Counsel argued that because no such language was added to Section 8.02 for motions for reconsideration, there was no authority to grant Petitioner's motion for enlargement of time, making his motion for reconsideration untimely filed.

The Board previously has addressed the issue of timely submission of pleadings. In *Gloria Halcomb v. Radio and Television Press Gallery of the U. S. Senate*, 03-SN-45 (April 20, 2005), Petitioner Halcomb's brief in support of her petition for review was submitted untimely. In determining whether to strike Halcomb's brief, the Board considered the principle established by the Supreme Court in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970):

It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.

*Halcomb*, p.7, quoting *American Farm Lines v. Black Ball Freight Service*, 397 U.S. at 539. The Board noted that Section 9.07(b) of the Procedural Rules allows the Board to waive any rule within that part "for good cause shown if application of the rule is not required by law." *Halcomb* at 7, citing *Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 645, fn. 6 (Fed. Cir. 1996).

Here, the ends of justice required that the Board grant Petitioner's motion for enlargement of time. Petitioner requested only a one week extension in filing his motion and provided good and sufficient cause in support of his request. Petitioner also stated that Respondent would not be prejudiced by the request, as Respondent was not required to respond to the motion unless ordered by the Board. In its response to Petitioner's request, Respondent made no mention of how Petitioner's request for enlargement of time prejudiced Respondent. Such rule not being required by law, the Board appropriately waived any perceived restrictions in Section 8.02 to allow Petitioner an enlargement of time.

*Petitioner fails to meet the standard of review for a motion to reconsider.*

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<sup>5</sup> Counsel for Respondent asserts that she did not receive the Board's order granting the enlargement of time until sometime after the opposition and motion to strike were filed.

<sup>6</sup> Sections 8.01(b)(1) and (b)(2) include the language, "Unless otherwise ordered by the Board" when addressing the time requirements for the filing of a brief supporting a petition for review, as well as the response brief.

The Board notes the standard on review for motions to reconsider, as stated in §8.02 of the Procedural Rules -- that the Board overlooked or misapprehended points of law or fact -- is a higher standard than that on a petition for review. The Board's standard of review for appeals from a hearing officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c).

In Petitioner's motion to reconsider, he fails to present any arguments to meet his burden under the higher standard in Section 8.02 for motions to reconsider. In his motion, Petitioner asserts that the Board has misapprehended law, but his supporting arguments do not establish any misapprehension. Petitioner's arguments presented in his motion misconstrue legal theories and misapply pertinent case law. Petitioner's motion does not establish the Board's "misapprehension" of law or fact which might lead the Board reconsider its September 19, 2006 Decision. Petitioner's motion is denied.

## **ORDER**

Pursuant to §8.02 of the Office of Compliance Procedural Rules, the Board DENIES the Office of the Architect of the Capitol's motion to strike Petitioner's request for reconsideration, as the Board appropriately granted Petitioner's requested enlargement of time. The Board DENIES the Petitioner's motion to reconsider, as he has failed to establish that the Board has "overlooked or misapprehended points of law or fact."

It is so ORDERED.

Issued, Washington, DC  
January 17, 2007

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## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing *Order Denying Request for Reconsideration* was issued and provided to the parties via first-class mail on 17<sup>th</sup> of January, 2007. The parties received actual service on the dates below:

**FOR ANTICIPATED PICK UP ON JANUARY 19, 2007**

Jeffrey Leib, Esq.  
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**FOR PICK UP ON JANUARY 17, 2007**

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Respectfully Submitted,

Selviana B. Bates  
Hearing Clerk