In the Matter of:

RHONDA L. INGRAM, **ARB CASE NO. 04-090**

COMPLAINANT, **ALJ CASE NO. 02-ERA-27**

v. **DATE: March 31, 2005**

SHELLY & SANDS, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Rhonda L. Ingram, Pro se, ***Indianapolis, Indiana***

For the Respondent:
James D. Masur, II, Esq., ***Locke Reynolds, LLP, Indianapolis, Indiana***

FINAL DECISION AND ORDER DISMISSING APPEAL

The Complainant, Rhonda L. Ingram, filed a complaint alleging that her employer, the Respondent, Shelly & Sands, Inc. (SSI), retaliated against her in violation of the Energy Reorganization Act (ERA).[1] The Administrative Review Board must

[1] 42 U.S.C.A. § 5851 (West 1995). The ERA provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA)(42 U.S.C.A. § 2011 et seq. (West 2003)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists, or participates in a proceeding under the ERA or AEA]." 42 U.S.C.A. § 5851(a)(1).

decide whether to dismiss Ingram's complaint for failure to prosecute given that she failed to file a brief in support of her petition for review to the Board pursuant to the Board's scheduling order and failed to timely respond to the Board's order requiring her to show cause why her complaint should not be dismissed because she failed to file a brief as ordered.

BACKGROUND

A Department of Labor Administrative Law Judge (ALJ) recommended that Ingram's complaint be dismissed.[2] The ALJ found that Ingram had engaged in protected activity on two occasions. First, he found that Ingram engaged in protected activity when she informed a co-worker that she would notify the Nuclear Regulatory Commission (NRC) that a nuclear gauge she used in density testing of asphalt on the Interstate 65 highway project[3] was damaged when a car struck it, unless her employer reported the incident to the NRC within ninety days.[4] The ALJ also found that Ingram's complaint to the NRC hotline that her employer had not properly repaired the nuclear gauge was protected.[5] But the ALJ found that Ingram failed to establish that the SSI manager who terminated her employment knew that she had engaged in these protected activities.[6] He also found that Ingram failed to establish that she suffered an adverse employment action because she did not demonstrate that SSI had job openings available for which she was suited in April 2001, when she inquired as to the availability of further employment. Nor did she establish that SSI blacklisted her.[7] Accordingly, the ALJ found that Ingram had failed to carry her burden of establishing that SSI retaliated against her in violation of the ERA's whistleblower protection provisions.

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[2] Recommended Decision and Order (ALJ Apr. 13, 2004) (R. D. & O.). To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he or she engaged in activity protected under the ERA, that his or her employer knew about the activity and took adverse action against him or her, and that his or her protected activity contributed to the adverse action. *See Kester v. Carolina Power & Light Co*., ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 7-8 (ARB Sept. 30, 2003).

[3] Mar-Zane, Inc., the asphalt division and wholly owned subsidiary of SSI, employed Ingram. R. D. & O. at 6. Licenses for the ownership and operation of nuclear gauges are obtained from the Nuclear Regulatory Commission. *Id.* Mar-Zane was licensed through its parent company, SSI. *Id.*

[4] Recommended Decision and Order, slip op. at 24 (ALJ Apr. 13, 2004).

[5] *Id.*

[6] Recommended Decision and Order (R. D. & O.) at 25-26.

[7] *Id.* at 28.

Ingram timely petitioned the Board to review the ALJ's R. D. & O.[8] On April 30, 2004, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule. The Board ordered Ingram to file her opening brief in support of her petition for review on or before May 27, 2004. Ingram signed the domestic return receipt acknowledging that she had received this Order on May 12, 2004. But Ingram failed to file an opening brief or to request additional time to file the brief.

On June 25, 2004, SSI filed a letter with the Board in which it stated that the Board should dismiss Ingram's appeal because Ingram failed to file a brief in response to the Board's briefing order. Ingram did not respond to SSI's letter.

Accordingly, the Board issued an Order to Show Cause in which it informed Ingram that it had previously dismissed the appeal of a complainant who did not file a brief in response to the Board's briefing order.[9] The Board ordered Ingram to explain to the Board why the Board should not dismiss her appeal because she had failed to file a brief in support of her petition for review as provided in the Board's April 30, 2004 briefing order. Pursuant to the Order, Ingram's response was due no later than February 1, 2005.

Ingram did not file a response to the Board's order by the due date. On March 3, 2005, the Board received a letter from Ingram. Although the letter was dated January 21, 2005, it was postmarked February 15, 2005. The only explanation Ingram offered for her failure to file a brief was, "I don't know what a brief is, long as know how to file one." Ingram offered no explanation for her failure to respond on time to the Board's order to show cause.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review an ALJ's recommended decision in cases arising under the ERA.[10]

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the

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[8] 29 C.F.R. § 24.8.

[9] *See, e.g., McQuade v. Oak Ridge Operations Office*, ARB No. 02-087 (Oct. 18, 2002); *Pickett v. TVA*, ARB No. 02-076 (Oct. 9, 2002).

[10] Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. § 24.8(a)(2004).

whistleblower statutes. The ARB engages in a de novo review of the recommended decision.[11]

DISCUSSION

The Board's authority to effectively manage its affairs, including the authority to require compliance with Board briefing orders, is necessary to "achieve orderly and expeditious disposition of cases."[12] This Board has authority to issue sanctions, including dismissal, for a party's failure to comply with the Board's orders and briefing requirements. *See Blodgett v. TVEC*, ARB No. 03-043, ALJ No. 2003-CAA-7 (ARB March 19, 2003) (dismissing complaint for failure to comply with briefing order); *cf.* Fed. R. App. P. 31(c) (allowing dismissal as sanction for failure to file a conforming brief); Fed R. App. P. 41(b) (permitting courts to dismiss a complaint for failure to comply with court orders).

Considering that Ingram is proceeding in this appeal without representation by counsel, this Board is willing to extend to her a degree of latitude in complying with the Board's procedural requirements. This latitude, however, is not without bounds. Ingram states that she did not file a brief in compliance with the Board's order because she did not know what a brief is or how to file it. But Ingram could have contacted the Board to ask for further guidance. She did not do so. She also failed to file a response to the Board's Order to Show Cause by its due date. Although the Board is cognizant of Ingram's pro se status, this status does not confer upon Ingram the right to simply disregard those orders that she does not understand without at least attempting to obtain further clarification.

The Board recognizes that dismissal of an appeal for failure to file a conforming brief is a very serious sanction and one not to be taken lightly. Accordingly, the Board considered the lesser sanction of construing Ingram's petition for review as a brief and requiring SSI to reply only to those arguments set forth in Ingram's petition. But after careful consideration, the Board has concluded that it would serve no purpose to require SSI to respond to the points raised in the petition for review because, as discussed below, the petition provides no support for Ingram's contention that the ALJ erred in finding that she failed to establish that SSI retaliated against her in violation of the whistleblower protection provisions at issue here.

First, the ALJ found that Ingram's complaint should be dismissed because she failed to establish that the SSI manager who terminated her employment knew that she

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[11] *See* 5 U.S.C.A. § 557(b) (West 1996).

[12] *Link v. Wabash*, 370 U.S. 626, 630–31 (1962).

had engaged in protected activity.[13] Ingram neither disputes nor addresses this finding in her petition for review. Thus we find no basis to reject the ALJ's finding.

Second, the ALJ found that Ingram failed to establish that she suffered an adverse employment action because she did not demonstrate that SSI had job openings available for which she was suited in April 2001 and she failed to establish that SSI blacklisted her.[14] Again, Ingram does not dispute nor discuss the ALJ's finding that she failed to establish job openings for which she was suited in April 2001.

Addressing the blacklisting allegation, the ALJ found in his R. D. & O., "Complainant has not been able to find work in that industry since her employment ended with SSI. Her testimony suggested a belief that she is being blacklisted. She offers no specific acts of evidence to support this allegation that she is being blacklisted by SSI."[15] In *Pickett v. Tennessee Valley Auth.*,[16] the Board held that to prove the existence of blacklisting, a complainant must provide direct or circumstantial evidence that a specific act of blacklisting occurred. The ALJ concluded that because "Complainant has not provided evidence of specific acts of blacklisting or any evidence in support, I cannot find that Complainant is a victim of blacklisting."[17]

In her Petition for Review, Ingram states, "I have not been able to obtain employment in road work. I and my union Business Agents seem to agree that I was blackballed." Although ALJs have some responsibility to help pro se litigants by liberally interpreting their complaints and holding them to lesser standards than legal counsel in procedural matters, a pro se litigant's burden of proving the elements necessary to sustain a retaliation complaint is no less than a represented party's burden.[18] Accordingly, this unsupported allegation is insufficient to compel the Board to reject the ALJ's finding that Ingram failed to establish that SSI blacklisted her in violation of the ERA.[19]

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[13] Recommended Decision and Order (R. D. & O.) at 25-26.

[14] *Id.* at 28.

[15] *Id.*

[16] ARB Nos. 02-056, 02-059, ALJ No. 2001-CAA-18, slip op. at 8 (ARB Nov. 28, 2003).

[17] R. D. & O. at 28.

[18] *Young v. Schlumberger Oil Field Services*, ARB No. 00-75, ALJ No. 200-STA-28, slip op. at 9 (ARB Feb. 28. 2003).

[19] Ingram also alleges in her Petition for Review that SSI retaliated against her because she reported an incident of sexual harassment. The ALJ did not address this allegation. But

Accordingly, after determining that a lesser sanction is not warranted in this case, we **DISMISS** Ingram's complaint because she has failed to file a timely brief in support of her petition for review and has failed to timely respond to the Board's Order to Show Cause.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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regardless whether Ingram presented this allegation to the ALJ or is raising it for the first time on appeal, the ERA's whistleblower provisions do not cover complaints of retaliation resulting from sexual harassment. *Bauer v. United States Enrichment Corp.*, ARB No. 01-056, ALJ No. 2001-Era-9 (ARB May 30, 2003).