U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOSEPH TRACANNA,

COMPLAINANT,

v.

ARCTIC SLOPE INSPECTION SERVICE (ASIS),

RESPONDENT.

ARB CASE NO. 97-123

ALJ CASE NO. 97-WPC-1

DATE: November 6, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND REMAND ORDER

This case arises under the employee protection provisions of the Water Pollution Control Act, 33 U.S.C. §1367, the Toxic Substances Control Act, 15 U.S.C. §2622, the Clean Air Act, 42 U.S.C. §7622, and the Solid Waste Disposal Act, 42 U.S.C. §6971 (1988) (collectively, "the whistleblower provisions"). Complainant, Joseph Tracanna, filed a complaint in August 1995 alleging that Respondent, Arctic Slope Inspection Service (ASIS), violated the whistleblower provisions when it harassed and intimidated him during his employment with ASIS, including subjecting him to unnecessary medical examinations, pay cuts, demotions, and discrimination in hiring and recall.

In January 1997, the District Director of the Wage and Hour Division of the Department of Labor issued a finding that ASIS had violated the whistleblower provisions.[1] ASIS promptly sought a hearing before an Administrative Law Judge (ALJ). Prior to holding a hearing, the ALJ recommended dismissing the complaint because of Tracanna's "pattern of refusing to cooperate in the discovery process, refusing to comply with any lawful discovery, and refus[ing] to comply with discovery orders of the ALJ." Recommended Decision and Order (R. D. and O.) at 2. We disagree with the recommendation and remand the case to the ALJ for further proceedings.

[1] The Wage and Hour Division apparently lost the complaint and did not begin to investigate it until some ten months after it was filed.

PROCEDURAL HISTORY

Upon receiving the request for a hearing, the ALJ set by order a deadline for completing discovery, submitting pre-trial statements, and exchanging copies of documents to be offered in evidence. Feb. 19, 1997 Pre-trial Order at 1. The ALJ also warned that failure to comply fully with the pre-trial requirements would "subject the offending party to the exclusion of evidence at trial and such other sanctions as may be deemed appropriate," and set the hearing for July 1997. *Id*. at 2.

ASIS submitted interrogatories, requests for admissions, and a request for production of documents to which Tracanna's responses were due thirty days after service, or on April 28, 1997. *See* 29 C.F.R. §18.18(b) (interrogatories), §18.19(d) (request for production of documents), and §18.20(b) (request for admissions). Meanwhile, on April 23, ASIS moved for summary decision on the ground that the complaint was not timely filed.[2] After receiving Tracanna's response, the ALJ denied the motion because there was a genuine issue of material fact concerning timeliness. May 19, 1997 Order Denying Summary Decision.

Tracanna, who appears *pro se*, did not timely respond to the discovery requests or seek additional time to respond. Consequently, on May 22, 1997, ASIS moved to compel responses and for an order deeming each request for admission to be admitted. The ALJ ordered Tracanna, by June 6, to answer the discovery requests and to show cause why the requests for admissions should not be deemed admitted. Tracanna did not timely respond.

During this time period Tracanna was actively pursuing his case. He filed a request with the Department of Labor pursuant to the Freedom of Information Act (FOIA) seeking records that would help him prepare for the scheduled hearing. June 2, 1997 letter from Tracanna to Gordon Wilson. On June 6, Tracanna submitted to ASIS interrogatories and a request for production of documents. The parties also were engaged in settlement negotiations that did not conclude successfully. *See* June 3, 1997 letter from Gregory Youngmun to Tracanna and June 9, 1997 letter from Tracanna to Youngmun.

Four days after the expiration of the deadline for showing cause, the ALJ issued an order stating that all of ASIS' requests for admission were deemed admitted. June 10, 1997 Order. Two days later, on June 12, ASIS moved for additional sanctions for failure to reply to the discovery requests. The following day, the ALJ granted the motion.[3] June 13, 1997 Order for

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[2] The four whistleblower provisions at issue provide that a complaint be filed within 30 days of the violation.

[3] Since ASIS asked for the sanctions by a motion, Tracanna should have had the opportunity to submit a response. *See* 29 C.F.R. §18.6(b) (1997): "Within ten (10) days after a motion is served, or within such other period as the administrative law judge may fix, any party to the (continued...)

Sanctions. The judge ordered that the evidence requested in ASIS' interrogatories was deemed adverse to Tracanna and barred Tracanna (1) from relying upon testimony of any witness not identified in discovery responses, including expert witnesses, and (2) from introducing documents or other evidence he failed to produce. *Id.* Finally, the ALJ ordered that Tracanna may not object to the introduction and use of secondary evidence to show what the withheld admissions, testimony, documents or other evidence may have shown. *Id.*

On the day he received the Order for Sanctions, Tracanna wrote a letter to the ALJ, explaining that he "had a difficult time getting an attorney in Anchorage, AK to take this case" and that he had received no advice when he asked the ALJ's office for help. June 18, 1997 letter from Tracanna to ALJ. Tracanna concluded that the sanctions "appear to eliminate my case" and asked whether an appeal was possible. *Id.* The ALJ treated Tracanna's letter as a motion for reconsideration of the Order for Sanctions and denied it. June 19, 1997 Order Denying Motion for Reconsideration.

Previously, ASIS had issued a notice of taking Tracanna's deposition. Tracanna was unavailable on the date chosen by ASIS and arranged for his deposition to be taken a few days later. June 13, 1997 letter from Tracanna to Gregory Youngmun, Ex. D. to Motion to Dismiss. On the day of the rescheduled deposition, Tracanna telephoned ASIS' counsel and stated he would not make himself available for the deposition. Youngmun Affidavit (Aff)., Ex. F to Motion to Dismiss. A few days later, ASIS moved to dismiss the complaint with prejudice because Tracanna failed to comply with discovery requests, with the scheduled deposition, and with the ALJ's orders, and the ALJ issued a show cause order to Tracanna regarding the motion.

Prior to the expiration of the time for Tracanna's response to the show cause order, ASIS moved for summary decision on the grounds that the complaint was untimely, that Tracanna could not establish a *prima facie* case, and that the alleged adverse actions were motivated by legitimate reasons.

Tracanna submitted a response to the ALJ's show cause order in which he apologized for not responding quickly enough to orders and discovery requests. July 2, 1997 letter from Tracanna to ALJ. He stated: "Based on your Order for Sanctions . . . and Order Denying Motion for Reconsideration . . . because of untimeliness, it appears the merits of my case [have] been superseded by process requirements." *Id.*

The ALJ dismissed the complaint because:

> Complainant has demonstrated a pattern of refusing to cooperate in the discovery process, refusing to comply with any lawful discovery, and refus[ing] to comply with discovery orders . . . . Such dilatory behavior and non-compliance has

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[3](...continued)
proceeding may file an answer in support or in opposition to the motion . . . ."

> prejudiced Respondent and its counsel is unable to prepare for trial. It has interfered and precluded any compliance with the Pre-trial order . . . for the orderly scheduling of the case for trial. Complainant is personally responsible for all of the foregoing as he represents himself and from correspondence and other documentation appears to be an intelligent, literate, and capable person with the capacity to represent himself. Finally, sanctions less severe than dismissal were previously imposed despite the Respondent's prior request for dismissal and have been ineffective.

R. D. and O. at 2. The ALJ did not mention or dispose of the motion for summary decision.

DISCUSSION

Citing *Malpass, et al. v. General Electric Co.,* Case No. 85-ERA-39, Sec. Final Dec. and Ord., Mar. 1, 1994, slip op. at 16, the ALJ analyzed four factors in determining whether dismissal was warranted:

> (1) Complainant's degree of personal responsibility; (2) the amount of prejudice to the Respondent; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal.

In *Malpass*, the Secretary of Labor adopted the ALJ's recommendation to dismiss where the complainants' counsel "engaged in delaying tactics without justification," did not respond to discovery requests and did not appear for depositions or for the hearing. Slip op. at 4, 18-19. Also, in *Billings v. Tennessee Valley Authority*, Case Nos. 89-ERA-16 et al., Sec. Final Dec. and Ord., July 29, 1992, slip op. at 3, *aff'd*, 25 F.3d 1050 (6th Cir. 1994) (table), the Secretary stated that "[d]ismissal with prejudice is warranted only where there is a clear record of delay or contumacious conduct and a lesser sanction would not better serve the interests of justice," and dismissed the case because of "an unmistakable pattern of contumacious conduct." *Id.*, slip op. at 5.[4]

We agree with analyzing the merits of the dismissal motion according to the *Malpass* factors. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1269-1261 (9th Cir. 1992) (listing a similar set of factors in determining whether to dismiss a case for failure to comply with a court order).[5]

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[4] Likewise, in *Avery v. B & W Commercial Nuclear Fuel Plant*, Case No. 91-ERA-89, Sec. Final Order of Dismissal, Oct. 21, 1991, slip op. at 2, the Secretary adopted the ALJ's dismissal recommendation where the *pro se* complainant inexplicably failed to appear at the hearing and did not respond to the ALJ's show cause order.

[5] Decisions of the Ninth Circuit are controlling in this case, which arose in Alaska.

The facts of this case are quite different from those in which the Secretary found a consistent pattern of contumacious conduct. Here, there is no "drawn out history of deliberately proceeding in a dilatory fashion" on Tracanna's part. Rather, he timely responded to several of the ALJ's show cause orders, although he did not timely respond to the order regarding sanctions for failure to answer discovery. Tracanna should have requested additional time to answer discovery, but he is appearing *pro se*.[6] We note that first requests to extend the time to respond to discovery routinely are granted.

Tracanna did not simply fail to appear for his scheduled deposition. Rather, he telephoned counsel for ASIS to explain that he understood the ALJ's sanctions orders to mean that he no longer had a case and that appearing at a deposition would be a waste of everyone's time. Tracanna was correct in believing that the sanctions previously imposed by the ALJ effectively prevented him from presenting any case whatsoever.

Nor was Tracanna simply hiding behind a layman's ignorance of the legal procedures involved. Contrary to the ALJ's conclusion that Tracanna simply chose to represent himself, R. D. and O. at 1, Tracanna explained:

> The issue of representing myself without counsel is not just by choice. In Anchorage, Alaska, where the Headquarters of the major oil companies and ASIS are located, it is difficult at best to find a law firm or attorney to represent you against these giants. A typical response is, "we have a
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> conflict," or "we are not taking any new cases." It appears the local attorneys have been hired away.

Id.

Notwithstanding the fact that he had to proceed *pro se*, Tracanna actively participated and sought the information he needed to prove his case. During the time that Tracanna was supposed to have been preparing a response to the show cause order concerning ASIS' requests for admissions, he filed a FOIA request to obtain the documents in the Department of Labor's

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[6] The Federal Rules of Civil Procedure require parties to seek resolution of discovery disputes prior to filing a motion to compel discovery. Fed. R. Civ. P. 37(a)(2)(A): "The motion [to compel disclosure or discovery] must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." The Department's rules governing proceedings before ALJs do not contain a similar requirement. *See* 29 C.F.R. §18.21. As a practical matter, we encourage parties to make a good faith attempt to resolve discovery disputes without the intervention of an ALJ. Had ASIS proceeded in this fashion and established a record of Tracanna's failing to respond to informal attempts to resolve the discovery dispute, it would have constituted much stronger evidence of "deliberately proceeding in a dilatory fashion." *Malpass*, slip op. at 16.

investigative file, submitted interrogatories and a request for production of documents to ASIS, and also engaged in settlement discussions.

We find that Tracanna cooperated to a significant extent in his case, albeit without recognizing the risk of a severe penalty for not responding timely to ASIS' discovery requests and a related show cause order. We find no prejudice to ASIS from permitting the case to proceed. Although two years have elapsed since the filing of the complaint (August 1995), a large portion of that time was not due to any fault of Tracanna's. *See* n.1 above. ASIS has not argued, let alone demonstrated, that it will not be able to prepare a defense if the case proceeds.

Finally, we disagree with the ALJ's view that dismissal is warranted because "sanctions less severe than dismissal . . . have been ineffective." R. D. and O. at 2. The ALJ's sanctions orders were so effective that they caused Tracanna not to appear for his deposition because he rightly believed it would be useless to do so. We are confident that Tracanna now understands the severity of potential consequences for not complying with discovery requests and orders. We also note that Tracanna's actions in failing to comply with discovery requests and orders to date most certainly would be relevant to the ALJ's analysis of any renewed motion to dismiss filed in response to a future missed deadline.

Only six weeks elapsed between the time Tracanna first missed a discovery deadline, April 28, 1997, to the time that his case was eviscerated, on June 13, 1997. During that time, Tracanna was actively pursuing other aspects of his case. Thus, ASIS has not shown the "drawn out history of deliberately proceeding in a dilatory fashion," *Malpass*, slip op. at 16, necessary to dismiss this case.

Taken together, the order deeming the request for admissions to be admitted and the order for sanctions effectively will prevent Tracanna from being able to make a case. *See* ASIS Motion for Summary Decision, submitted June 25, 1997, at p. 7-8 (arguing that the genuine issue of material fact that led the ALJ to deny ASIS' earlier motion for summary decision has been resolved by one of the admissions deemed admitted under the ALJ's order). We strike those orders. Upon remand, the ALJ shall afford both parties the opportunity to respond to outstanding discovery requests and to engage in other appropriate discovery. The ALJ thereafter

shall permit ASIS to renew its motion for summary decision, and shall afford Tracanna time to respond to the renewed motion, if any. The complaint is REMANDED to the ALJ for further proceedings consistent with this Order.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member