

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2009 MSPB 95**

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Docket No. CH-0752-08-0336-I-1

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**Sharon S. Simon,**

**Appellant,**

**v.**

**Department of Commerce,**

**Agency.**

June 5, 2009

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Joseph E. Blandford, Jr., Esquire, Louisville, Kentucky, for the appellant.

Melissa L. Creech, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has asked the Board to review the decision of the administrative judge (AJ) sustaining her removal. We GRANT the petition for review (PFR) under [5 C.F.R. § 1201.115](#), AFFIRM the initial decision (ID) AS MODIFIED by this Opinion and Order, and STILL SUSTAIN the removal action.

**BACKGROUND**

¶2 The appellant was removed from the position of Statistical Clerk, GG-1531-04, at the U.S. Census Bureau National Processing Center in Jeffersonville, Indiana, effective January 8, 2008. Initial Appeal File (IAF), Tab 8, Subtab 4a at 1, 8. She was charged with (1) failure to follow instructions (two specifications),

(2) inappropriate conduct (six specifications), and (3) unauthorized absence from the workplace and failure to follow proper procedures (three specifications). *Id.* at 1, Subtab 4c. She appealed to the Board, and after a hearing, the AJ affirmed the agency's decision. IAF, Tabs 1, 30. The AJ sustained both specifications of the first charge; specifications 1, 3, 4, 5, and 6 of the second charge; and specifications 1 and 3 of the third charge. *Id.* at 2-15. The AJ also found that the action promotes the efficiency of the service and that the penalty of removal is reasonable. *Id.* at 15-19. The AJ did not address the appellant's affirmative defenses of sex discrimination, retaliation for protected equal employment opportunity (EEO) activity, and harmful error. IAF, Tabs 1, 4, 30.

¶3 The appellant has filed a PFR. PFR File (PFRF), Tabs 1, 3. The agency has filed a response in opposition. PFRF, Tab 4.

#### ANALYSIS

¶4 The appellant's sole issue raised in the PFR is that the AJ did not allow her to present evidence or call witnesses relevant to her retaliation claim. She asserts that, had this evidence been presented, the AJ would have reached a different conclusion. PFRF, Tabs 1, 3. In her appeal, she alleged that the agency discriminated against her based on sex, retaliated against her for a previous EEO complaint, failed to consider her evidence when deciding to remove her, and "waited too long" after issuing its proposal notice to make the final removal decision.<sup>1</sup> IAF, Tab 1 at 7-8. The AJ issued an order advising the appellant of her burden and elements of proof regarding her affirmative defenses on February 11, 2008. IAF, Tab 4. The AJ ordered the appellant to submit evidence or identify information applicable to the EEO issues and all other affirmative defenses within fifteen days. *Id.* at 2-4.

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<sup>1</sup> The appellant also claimed that the agency "had insufficient proof" to justify her removal, IAF, Tab 1 at 6; however, this argument goes to the merits of the agency's removal case and cannot be considered an affirmative defense.

¶5 The agency's interrogatories and requests for production were served on the appellant on February 3, 2008. IAF, Tab 9, the agency's motion to compel, ¶ 1. The appellant's responses were due on April 3, 2008, after the agency agreed to extend the deadline for the responses. *Id.*, ¶ 2. When it extended the deadline, the agency warned that it would file a motion to compel discovery if the appellant failed to meet the new deadline. *Id.* & Ex. 2. On April 4, 2008, the agency filed its motion to compel. IAF, Tab 9. On April 14, 2008, the AJ ordered the appellant to provide her discovery responses by no later than April 24, 2008. IAF, Tab 10. No responses were forthcoming. On April 21, 2008, the appellant, however, moved to continue the hearing,<sup>2</sup> IAF, Tab 11, and on April 24, 2008, she moved to suspend the appeal for thirty days, IAF, Tab 13.

¶6 On April 24, 2008, the agency moved to dismiss the appeal for failure to prosecute, or in the alternative, for the imposition of sanctions due to the appellant's failure to comply with the AJ's order to compel discovery. IAF, Tab 14. The agency asked the AJ to draw an adverse inference against the appellant, or in the alternative, to reject any submissions that she might make regarding her affirmative defenses. *Id.* at 1. The agency asserted that it had been prejudiced by the appellant's failure to respond to its discovery requests, compounded by her failure to respond to the AJ's February 11, 2008 affirmative defense order. *Id.* at 2-3.

¶7 On April 28, 2008, the AJ issued an order suspending case processing for thirty days. IAF, Tab 15. On June 6, 2008, after case processing resumed on May 24, 2008, *id.*, the agency renewed its motion to dismiss the appeal, or in the alternative, for the imposition of sanctions, IAF, Tab 16. The appellant submitted her discovery responses on June 9, 2008. IAF, Tabs 17, 18.

¶8 On July 30, 2008, the AJ issued an order and notice of rescheduled hearing and prehearing conference. IAF, Tab 19. The AJ ordered the parties to submit

<sup>2</sup> The appellant's attorney averred that he had to represent a client at a criminal trial that would begin the day after the date of the scheduled hearing. IAF, Tab 11. The agency indicated that it had no objection to the continuance. IAF, Tab 12.

prehearing submissions by August 11, 2008, and scheduled the telephonic prehearing conference for August 15, 2008. *Id.* at 1-2. The date of the hearing was set for September 5, 2008, pursuant to the agency's request for a continuance. IAF, Tabs 20, 22. The agency submitted its prehearing submissions timely. IAF, Tab 23. On August 15, 2008, after the appellant and her representative failed to be available for the telephonic prehearing conference, the agency again moved to dismiss the case for failure to prosecute, or in the alternative, for the AJ to impose sanctions. IAF, Tab 24 at 1-2.

¶9 On August 18, 2008, the AJ issued a warning of her intent to dismiss the appeal for want of prosecution. IAF, Tab 25. She noted that the appellant had failed to comply with three different orders. *Id.* at 2. The AJ stated that she would dismiss the appeal for want of prosecution if the appellant was not available to participate in a telephonic prehearing conference on August 25, 2008. *Id.* at 2-3. On August 25, 2008, the appellant filed a motion to allow the late filing of her prehearing submissions and requested that the AJ deny the agency's motion to dismiss the appeal or for the imposition of sanctions. IAF, Tabs 26-27.

¶10 On August 25, 2008, the appellant's representative attended the second telephonic prehearing conference. IAF, Tab 28. At this conference, the AJ ruled that the appellant's affirmative defenses were waived because of her failure to respond timely to the February 11, 2008 affirmative defense order.<sup>3</sup> *Id.* at 1. The AJ denied some of the appellant's requested witnesses because their testimony would not be relevant, and the appellant withdrew the request for certain other witnesses. *Id.* at 2-3. The appellant did not file any objections to the prehearing conference summary.

¶11 An AJ has the authority to impose sanctions for failure to follow the Board's regulations or failure to respond to the AJ's orders. *Robinson v. Department of Veterans Affairs*, [94 M.S.P.R. 509](#), ¶ 10 (2003); [5 C.F.R. § 1201.43](#). The AJ should not resort to the imposition of sanctions unless

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<sup>3</sup> The AJ used the term "waived," though in reality, she was imposing a sanction.

necessary to serve the ends of justice. *Robinson*, [94 M.S.P.R. 509](#), ¶ 10; [5 C.F.R. § 1201.43](#). The Board will not ordinarily disturb an AJ's determination to impose a sanction unless it is shown that the AJ abused his discretion or that his erroneous ruling adversely affected a party's substantive rights. *E.g.*, *Johnson v. Department of the Treasury*, [108 M.S.P.R. 592](#), ¶ 17 (2008). The Board's regulations allow an AJ to impose sanctions for failure to comply with an order, failure to prosecute or defend an appeal, or failure to make a timely filing. [5 C.F.R. § 1201.43](#). When a party fails to comply with an order, the AJ, in his sound discretion, may: (1) draw an inference in favor of the requesting party with regard to the information sought; (2) prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information; (3) permit the requesting party to introduce secondary evidence concerning the information sought; and (4) eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order. [5 C.F.R. § 1201.43\(a\)](#). The AJ's authority to impose sanctions "covers, but is not limited to," the circumstances specifically set forth in section 1201.43. 5 C.F.R. § 1201.43; *see also Wagner v. Department of Homeland Security*, [105 M.S.P.R. 67](#), ¶ 9 (2007) (upholding AJ's striking of appellant's affirmative defense of racial discrimination because the appellant failed to comply with order to respond to interrogatories relating to the defense).

¶12 The AJ's frustration with the appellant is understandable. The appellant never responded to the February 11, 2008 order regarding her affirmative defenses, and this is the order upon which the AJ's sanction was based.<sup>4</sup> IAF, Tab 28 at 1 n.1. The appellant eventually submitted the information requested by

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<sup>4</sup> The AJ also could have imposed sanctions based upon the appellant's untimely responses to orders. *See* [5 C.F.R. § 1201.43\(c\)](#). The appellant failed to submit her discovery responses, which were due on April 3, 2008, until June 9, 2008. IAF, Tab 9, the agency's motion to compel, ¶ 2, Tabs 17-18. She also failed to submit her prehearing submissions in a timely fashion. IAF, Tabs 19, 26-27.

the agency during discovery, though her filing was many weeks late, but she compounded her failure to comply with the AJ's affirmative defense order by also failing to comply with the AJ's April 14, 2008 order compelling her to submit discovery responses by April 24, 2008.<sup>5</sup> IAF, Tab 10. She eventually submitted her discovery responses on June 9, 2008, but only after the agency renewed its earlier motion for sanctions on June 6, 2008. IAF, Tabs 14, 16.

¶13 Further, there is little to mitigate the appellant's failures. The appellant has been represented by counsel throughout the appeal since the initial filing. IAF, Tab 1 at 3, 9; *cf. Miles v. Department of Veterans Affairs*, [84 M.S.P.R. 418](#), ¶ 9 (1999) (finding that a pro se appellant's nominally untimely filing of her prehearing submissions did not warrant sanctions). She claimed that her failures were caused by her counsel's "conflicting court appearances and inadvertence," as her attorney is a sole practitioner. IAF, Tab 26 at 1. The Board has long held that an appellant is responsible for the errors of her chosen representative. *E.g., Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981). Although her representative explained that he had believed that the deadlines for discovery were also suspended during the thirty-day suspension of the appeal, IAF, Tab 17, her discovery responses were already untimely when case processing was suspended on April 24, 2008, IAF, Tabs 10, 15. The case processing suspension ended on May 24, 2008, IAF, Tab 15, and the appellant failed to submit her responses until June 9, 2008, IAF, Tabs 17-18. Thus, sanctions were clearly appropriate here as necessary to serve the ends of justice.

¶14 Nevertheless, the AJ went too far in striking the appellant's affirmative defenses. The AJ might have achieved the same result within the explicit provisions of the regulation by simply barring the appellant from presenting any evidence supporting her affirmative defenses. *See* [5 C.F.R. § 1201.43\(a\)\(2\)](#) (when a party fails to comply with an order, the AJ may "[p]rohibit the party

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<sup>5</sup> The appellant also failed to obey the AJ's July 30, 2008 order regarding prehearing submissions and the first telephonic prehearing conference. IAF, Tab 19.

failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information”). The AJ, in fact, would not have been required to impose sanctions to bar the appellant from presenting evidence. It is well-settled that when an appellant fails to come forward with factual allegations which, taken as true, support an inference that the agency’s action was pretextual, “the AJ is not required to permit the appellant to attempt to prove his allegations at an evidentiary hearing.” *Redd v. U.S. Postal Service*, [101 M.S.P.R. 182](#), ¶ 13 (2006). In the absence of any evidence supporting the appellant’s affirmative defenses, the AJ could have simply denied those defenses as unproven. In the alternative, the AJ might have drawn an inference in favor of the agency with regard to the information that the agency sought. *See Roth v. Department of Transportation*, [54 M.S.P.R. 172](#), 175-76 (1992), *aff’d*, 988 F.2d 130 (Fed. Cir. 1993) (Table); 5 C.F.R. § 1201.43(a)(1).

¶15 Either action would have been within the AJ’s discretion as necessary to serve the ends of justice. The sanction imposed by the AJ is problematic because the appellant clearly asserted her affirmative defenses, even if in summary fashion, IAF, Tab 1 at 7-8, and she never expressed any intent to withdraw these defenses. The agency, in its original and renewed motions for sanctions, did not suggest the extreme sanction that the AJ imposed. Instead, the agency asked that the AJ “draw adverse inferences in favor of the Agency [and] . . . reject any submissions which Appellant may make in response to the MSPB’s Order and Notice of Hearing and Prehearing Conference of February 8, 2008.” IAF, Tab 14 at 1, 5-7; *see* IAF, Tab 24 at 4-6. Additionally, the appellant’s representative did respond to the acknowledgment order, IAF, Tab 6, and did file motions to continue the hearing and to suspend the case for a thirty-day period, IAF, Tabs 11, 13. Thus, we find that the AJ abused her discretion by imposing the sanction of waiver of the appellant’s affirmative defenses. However, because the appellant never presented any factual allegations which, if taken as true, support the

affirmative defenses that she alleged, despite multiple opportunities to do so, we find that the AJ was not required to permit the appellant to attempt to prove her allegations at the hearing. *See Redd*, [101 M.S.P.R. 182](#), ¶ 13. Therefore, we find that the appellant failed to meet her burden of proof regarding those defenses.

¶16 Our examination of the record does not reveal any other error in the AJ's interpretation of any statute or regulation, and the appellant has not offered any new and material evidence on review. *See* [5 C.F.R. § 1201.115\(d\)](#). Accordingly, we sustain the agency's removal action.

#### ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

#### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

#### Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) ([5 U.S.C. § 7702\(b\)\(1\)](#)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 19848  
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

### Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* [5 U.S.C. § 7703\(b\)\(2\)](#). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

### Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.