



**In the Matter of:**

**LINDA GASS,**

**ARB CASE NO. 03-093**

**COMPLAINANT,**

**ALJ CASE NO. 00-CAA-22**

**v.**

**DATE: January 29, 2004**

**LOCKHEED MARTIN ENERGY SYSTEMS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Edward Slavin, Jr., Esq., St. Augustine, Florida**

*For the Respondent:*

**Robert M. Stivers, Esq., O'Neil, Parker & Williamson, Knoxville, Tennessee**

## **FINAL ORDER DISMISSING PETITION FOR REVIEW**

### **BACKGROUND**

This case arose when the Complainant, Linda Gass, filed a complaint that her employer Respondent Lockheed Martin Energy Systems, Inc. (LMES) retaliated against her in violation of the whistleblower protection provisions of a number of environmental statutes.<sup>1</sup> A Department of Labor Administrative Law Judge (ALJ) conducted a hearing, and on April 29, 2003, issued a Recommended Decision and Order Granting Motion for Summary Judgment (R. D. & O.) dismissing Gass's complaint on the grounds that she failed to timely file it.

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<sup>1</sup> These statutes include: the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); and the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995).

Gass filed a “Petition for Review” with the Administrative Review Board requesting the Board to review the R. D. & O. In response, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule permitting Gass to file an opening brief in opposition to the R. D. & O. on or before June 9, 2003.

Gass failed to file a brief in accordance with the Board’s Order. On June 20, 2003, the Board received via facsimile a letter from Gass requesting the Board to modify its briefing schedule.<sup>2</sup> Although the Board had repeatedly admonished the Complainant’s counsel that “requests for the Board to take action must be in the form of a motion with an appropriate caption, including the Board’s docket number,”<sup>3</sup> Gass’s motion did not include the Board’s docket number. Given the Complainant’s counsel’s repeated, obdurate noncompliance with the Board’s requirement for proper filing, the Board refused to accept the proffered documents.

Because Gass had failed to file an opening brief in compliance with the Board’s briefing order, the Board issued an Order on July 11, 2003, requiring Gass to show cause no later than July 28, 2003, why the Board should not dismiss her Petition for Review for failure to prosecute her case. On July 2, 2003, Gass filed a motion requesting an enlargement of time until August 23, 2003, to file the response. On August 11, 2003, the Board issued an order granting Gass’s motion.

On August 15, 2003, Gass filed a second Motion for Enlargement of Time requesting an additional 45 days to respond to the Show Cause Order. The Board granted the motion and issued an order stating that Gass’s response was due on or before October 7, 2003.

On October 6, 2003, Gass filed a third Motion for Enlargement of Time requesting an additional thirty days to respond to the Board’s Order. The Board granted the motion, giving Gass until November 6, 2003, to file the response. However, the Board warned Gass that barring proof of exceptional circumstances, further requests for extensions would not be granted and the appeal would become subject to dismissal for failure to prosecute the case.

Gass failed to file a response to the Show Cause Order. On January 6, 2004, Gass sent a copy of a letter addressed to her counsel terminating “our relationship” to the Board.

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<sup>2</sup> The Board received the original document on June 25, 2003.

<sup>3</sup> See, e.g., *Erickson v. United States Env’tl. Prot. Agency*, ARB Nos. 03-02, 03, 04, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ARB Oct.17, 2002).

## DISCUSSION

Courts possess the “inherent power” to dismiss a case for lack of prosecution. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). This power is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 630-631. In *Mastrianna v. Northeast Utilities Corp.*, ARB No. 99-012, ALJ No. 98-ERA-33, (Sept. 13, 2000), the Board dismissed a complaint in a case in which the complainant failed to adequately explain his failure to comply with the Board’s briefing schedule. The Board explained that it has the inherent power to dismiss a case for want of prosecution in an effort to control its docket and to promote the efficient disposition of its cases. Slip op. at 2.

Although offered ample opportunities to do so, Gass has failed to file a response to the Board’s Order to Show Cause why her case should not be dismissed for failure to prosecute. The Board clearly informed Gass in its third order granting an enlargement of time that the Board would grant no further enlargements unless she established that there were exceptional circumstances that would support granting an additional enlargement, and that failure to comply with the Board’s order could result in dismissal of her case for failure to prosecute. Nevertheless, Gass ignored the Board’s order and again failed to file a response. Furthermore, Gass’s counsel was well aware of the consequences of the failure to respond to an Order to Show Cause. *Slavin v. Office of Administrative Law Judges*, ARB No. 03-077, ALJ No. 03-CAA-12 (ARB Aug. 22, 2003)(case brought by Gass’s counsel dismissed for failure to prosecute when counsel failed to file an opening brief as provided in Board’s briefing order and to respond to Board’s order to Show Cause).

Furthermore, when filing an untimely request for a stay of the briefing schedule, Gass’s counsel once again failed to comply with the Board’s filing requirements even though he was well aware from previous experience that such failure would result in the Board’s refusal to accept the documents. *See e.g., Erickson v. United States Env’tl. Prot. Agency*, ARB Nos. 03-02, 03, 04, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ARB Oct.17, 2002).

While we recognize that Gass is not personally responsible for the failure of her attorney to timely file a brief and to respond to the Order to Show Cause:

Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec’y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have “notice of all fact, notice of which can be charged upon the attorney.” *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).<sup>4</sup>

*Gass v. United States Dep’t of Energy*, ARB No. 03-035, ALJ No. 02-CAA-2, slip op. at 7 (Jan. 14, 2004).

Accordingly, finding that Gass has failed to prosecute her case, we **DISMISS** her complaint.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

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<sup>4</sup> The Court did note, however, “[I]f an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice.” 370 U.S. at 634 n.10.