



In the Matter of:

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,**

ARB CASE NO. 14-088

ALJ CASE NO. 2010-OFC-006

PLAINTIFF,

DATE: August 28, 2014

v.

**D&S CONSTRUCTION OF
PINEVILLE, INC.,**

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**Paul M. Igasaki, *Chief Administrative Appeals Judge*; and Luis A. Corchado,
*Administrative Appeals Judge***

FINAL ADMINISTRATIVE ORDER

On March 8, 2013, a Department of Labor Administrative Law Judge issued a Recommended Decision and Order Granting Plaintiff's Motion for Default Judgment (R. D. & O.) in this case arising under Executive Order 11246, as amended by Executive Order 11375 and Executive Order 12086 (43 Fed. Reg. 46501)(Executive Order) and its implementing regulations at 41 C.F.R. Chapter 60 (2013).¹ Plaintiff moved for a default

¹ The Executive order and regulations prohibit employment discrimination by government contractors based on race, color, religion, sex, or national origin. Under Section 202 of the Executive Order, federal contractors must take affirmative action to ensure that discrimination does not occur and to treat applicants and employees during hiring and employment without regard to their race, color, religion, sex, or national origin. R. D. & O. at 1. Plaintiff's complaint alleged that Defendant

violated the Executive Order and its implementing regulations by fostering a racially hostile work environment at its Fort Steward worksite. Specifically, it alleged that top-ranking officials of the Defendant "singled out African-American employees for continuous and pervasive racial slurs and

judgment because the Plaintiff was unable to contact the Defendant to determine if the Defendant had obtained new counsel after the ALJ granted Defendant's former counsel leave to withdraw. The ALJ sent a notice to the Defendant advising it of the nature of the motion "including the statement that '[f]ailing to respond to the motion could mean that that the motion would be granted and the case would be over.'"² The ALJ stated that a response would be due no later than 20 days from the date of the order.³ Defendant failed to file a response to the Plaintiff's motion for a default judgment.

Citing F.R.C.P. 55(a),⁴ the ALJ granted Plaintiff's motion.⁵ Attached to the R. D. & O. were a Notice of Appeal Rights and a Service Sheet certifying that on March 8, 2013, the R. D. & O. was served on D&S Construction, 2080 Mendel Rivers Road, St. Stephens, SC 29479.⁶

The Executive Order's implementing regulations provide that the ALJ shall recommend findings, conclusions and a decision within a reasonable time after filing of the briefs and that these recommendations shall be certified, with the record to the Administrative Review Board.⁷ The regulations further provide that within 14 days after the parties receive the recommended findings, conclusions, and decision, any party may file exceptions to the recommendations and a party may file a response to the exceptions within 14 days after receiving the exceptions. All exceptions and responses must be filed

epithets, racial insults, and racist jokes" thereby altering the conditions of African-American employees' employment and creating an abusive working environment. Further the complaint alleged, the Defendant had no internal complaint procedure to effectively address allegations of harassment.

R. D. & O. at 2.

² R. D. & O. at 2.

³ *Id.*

⁴ The ALJ noted that the procedural rules for administrative proceedings such as these do not specifically provide for default judgments. However, the regulations do provide that "[i]n the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure." D. & O. at 2 (*quoting* 41 C.F.R. § 60-30.1).

⁵ R. D. & O. at 3.

⁶ On June 26, 2012, the ALJ mailed his Order Granting Counsel for the Defendant's Motion to Withdraw to this address. The Defendant received the Order and signed for it on June 28, 2012. R. D. & O. at 2.

⁷ 41 C.F.R. § 60-30.27.

with the Administrative Review Board.⁸ After the period for filing exceptions has expired, the Board “shall make a final Administrative decision, which shall be the final Administrative order, on the basis of the record.”^[9] Furthermore,

[i]f the Administrative Review Board, . . . concludes that the defendant has violated the Executive Order, the equal opportunity clause, or the regulations, an Administrative order shall be issued enjoining the violations, and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative order shall result in the immediate cancellation, termination and suspension of the respondent’s contracts and/or debarment of the respondent from further contracts.^[10]

DISCUSSION

Seventeen months have passed since the ALJ issued his R. D. & O. Neither Plaintiff, nor Defendant, has filed exceptions with the Board.¹¹ The ALJ’s R. D. & O. contains a certification that it was served on Defendant at its last known address, an address at which Defendant had previously accepted mail from the ALJ. Further, there is no evidence in the record that the R. D. & O. was returned as undeliverable or that Defendant provided any alternative address for service of orders from the ALJ. Accordingly, we find that the period for filing exceptions has expired.¹²

We review an ALJ’s order granting a default judgment under an abuse of discretion standard.¹³ Here, the Defendant did not respond to Plaintiff’s motion for a

⁸ 41 C.F.R. § 60-30.28.

⁹ 41 C.F.R. § 60-30.29.

¹⁰ 41 C.F.R. § 60-30.30.

¹¹ The Board received the ALJ’s R. D. & O. and the case record on August 11, 2014.

¹² *Accord Lupyan v. Corinthian Colleges, Inc.*, ___F.3d ___, 2014 WL 3824309, *7 (3d Cir. 2014)(“Under the mailbox rule, if a letter ‘properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed . . . that it reached its destination at the regular time, and was received by the person to whom it was addressed.’” (citations omitted).

¹³ *Administrator, Wage & Hour Div. v. Moonwalks for Fun, Inc.*, ARB no. 13-027, ALJ No. 2012-CLA-008, slip op. at 3-4 (ARB May 19, 2014).

default judgment after the ALJ issued an order explaining the consequences of a failure to do so and gave Defendant sufficient time to reply. The ALJ served the order on Defendant's last known address and there is no indication in the record that the order was returned as undeliverable or that Defendant made any attempt to contact the ALJ between May 31, 2012, when its counsel requested permission to withdraw until March 8, 2013, when the ALJ issued the R. D. & O. Accordingly, we find that the ALJ did not abuse his discretion in granting Plaintiff's motion for default judgment.

By defaulting, Defendant has failed to exercise its opportunity to oppose the Plaintiff's complaint that it violated the Executive Order. Accordingly, finding no evidence to the contrary, we issue this final administrative order finding that Defendant has violated the Executive Order and affirming the relief ordered by the ALJ in his March 8, 2013 R. D. & O.¹⁴

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

¹⁴ R. D. & O. at 3 (Order).