



In the Matter of:

CHARLES D. CANTERBURY

ARB CASE NO. 03-135

v.

**ADMINISTRATOR,
WAGE AND HOUR DIVISION
U.S. DEPARTMENT OF LABOR,**

ALJ CASE NO. 02-SCA-11

DATE: December 29, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Charles D. Canterbury, pro se

For Respondent Administrator, Wage and Hour Division:

Carol Arnold, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Solicitor, U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C.A. §§ 351-358 (West 1994) and the regulations at 29 C.F.R. Parts 4 and 8 (2004). Charles D. Canterbury (Canterbury) seeks review of an Administrative Law Judge's Decision and Order (D. & O.) granting summary judgment to the Administrator, Wage and Hour Division (Administrator). The Administrator charged Canterbury with failing to pay required prevailing wages and with record keeping violations. Canterbury twice failed to respond to the Administrator's discovery requests. The Administrative Law Judge (ALJ) imposed sanctions on Canterbury, deeming the discovery requests admitted. Based on the un rebutted record, the ALJ found

Canterbury liable for back wages and ordered his debarment from government contracting. After considering the record, we conclude that the ALJ acted within the scope of his discretion and accordingly deny Canterbury's Petition for Review.

BACKGROUND

The SCA and its implementing regulations require federal service contractors to pay prevailing wages that the Secretary of Labor predetermines for their contracts. During the course of an SCA labor standards compliance review, a Wage and Hour Division investigator determined that Canterbury was a service contractor subject to the Act; employed service employees who were due required SCA prevailing wages but failed to properly compensate them; and failed to make and maintain accurate records of wages paid and hours worked. The Administrator commenced the administrative hearing procedure below, alleging that Canterbury committed the foregoing alleged violations and seeking back wages and Canterbury's debarment from doing business with the Federal government for a period of three years.

Canterbury failed to comply with the Administrator's first discovery requests for interrogatories, admissions, and production of items for more than six months. Prior to the scheduled administrative hearing, the Administrator requested the ALJ to deem as fact all requests for admission and enter summary judgment against Canterbury. Canterbury opposed the request on the ground that he mistakenly believed his attorney had filed the responses prior to withdrawing from the case. The ALJ denied the Administrator's request "based on Respondent's [Canterbury's] *pro se* status, the Department's failure to file a Motion to Compel Discovery, and the Department's failure to contact Respondent to obtain his responses to its discovery requests." D. & O at 2.

The Administrator then requested the ALJ to reconsider that decision but the ALJ declined to grant the request and again notified Canterbury of the need to respond to the Administrator's requests. And the ALJ informed Canterbury of the possible sanctions for failure to comply, including entry of judgment against him. Canterbury again failed to comply with the ALJ's order to respond to the Administrator's discovery requests.

Once more the Administrator filed a motion requesting that the ALJ deem admitted all the requests for admissions and to infer that Canterbury's answers to discovery requests were adverse to Canterbury. Because Canterbury again failed to comply with discovery requirements, the ALJ this time imposed sanctions against Canterbury and granted the Administrator's request to deem the unanswered discovery requests as admitted and therefore taken as established adversely to the non-complying party, Canterbury. There then being no undisputed facts, the ALJ entered summary judgment against Canterbury.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction over this Petition for Review pursuant to 29 C.F.R. § 8.1(b). In rendering its decisions, “the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning such matters.” 29 C.F.R. § 8.1(c). The Board’s review of an ALJ’s decision under the SCA is an appellate proceeding. The Board modifies and sets aside an ALJ’s findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. §§ 8.1(d), 8.9(b); see *Dantran, Inc. v. United States Dep’t of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). But the Board reviews conclusions of law de novo. *SuperVan, Inc.*, ARB No. 00-008, ALJ No. 94-SCA-14, slip op. at 3 (ARB Sept. 30, 2002), *United Kleenist Org. Corp. and Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002).

DISCUSSION

As the trier of fact and law, an ALJ must be allowed a reasonable degree of latitude and discretion in directing the orderly conduct of SCA administrative proceedings. And this includes the ability to impose sanctions against contumacious parties who refuse to comply with the ALJ’s orders and established hearing procedures. The Office of Administrative Law Judges’ Rules of Practice authorize an ALJ to impose sanctions for failure to comply with discovery requests and orders, including establishment as fact those matters not answered in discovery. 29 C.F.R. § 18.6(d)(2)(ii)(2004). This regulation also authorizes an ALJ to enter a decision against the non-complying party. 29 C.F.R. § 18.6(d)(2)(v).

We have previously affirmed the use of sanctions and entry of judgment against a pro se party who failed to comply with an ALJ’s discovery orders. *Supervan, Inc.* slip op. at 5, 8 (ALJ’s entry of default judgments pursuant to 29 C.F.R. § 18.6(d)(2)(v) affirmed by Board against pro se party who failed to comply with discovery requests and orders). As the Board of Service Contract Appeals (our predecessor agency prior to 1996) noted in an analogous situation: “[i]f an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissals or default judgments must be available when parties flagrantly fail to comply.” *Cynthia E. Aiken*, BSCA No. 92-06, slip op. at 4 (July 31, 1992). See also *Tri-Way Sec. and Escort Serv.*, BSCA No. 92-05, slip op. at 3-4 (July 31, 1992). As in *Supervan, Inc.*, we concur with the BSCA’s reasoning and conclude that the *Aiken* rationale should be applied to all situations involving flagrant non-compliance with discovery requests and orders, such as presented by Canterbury’s recalcitrance in this case. “To hold otherwise would render the discovery process meaningless and vitiate an ALJ’s duty to conclude cases fairly and expeditiously.” *Supervan*, slip op. at 6.

We recognize that Canterbury is appearing pro se in this proceeding and that a certain degree of latitude should be afforded such unrepresented parties. *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 19 (ARB Jan. 30, 2004).

But ALJs and this Board must be able to impose appropriate sanctions even against pro se parties when they fail to comply with the orders and procedures in the administrative process. A pro se party may not be allowed “to avoid the risks of failure that attend his decision to forgo expert assistance.” *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000) (quoting *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983)). Here, the ALJ was more than generous in allowing Canterbury additional time and opportunity to comply the Administrator’s discovery requests. We conclude that imposing sanctions and entering summary judgment was within the scope of discretion necessary for the orderly conduct of the proceeding.

Before us, Canterbury alleges that he did file a response to the Administrator’s request for interrogatories and submitted a copy of the purported reply. However, the submission is not dated or signed, bears no indication that it was ever served on the Administrator, and there is no record of such a reply in the ALJ’s record. Also, this document does not address the failure to comply with the Administrator’s request for admissions. In short, the record does not support a finding that Canterbury ever complied with the Administrator’s discovery requests or the ALJ’s orders.

On this record, the ALJ appropriately entered summary judgment against Canterbury. An ALJ may grant summary judgment “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 C.F.R. § 18.40(d). *Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 98-087, ALJ No. 1997-SDW-7, slip op. at 4 (ARB Mar. 30, 2000) (summary judgment standard in Safe Drinking Water Act case). The ALJ rules governing summary decision in whistleblower cases are the same as the standard for granting summary judgment under the analogous Fed. R. Civ. P. 56(e) and are equally applicable to summary judgment in SCA administrative proceedings. A moving party must establish that there is no material issue of fact and that it is entitled to prevail as a matter of law. *Anderson*, slip op. at 4 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). After several opportunities, Canterbury failed to present any evidence to counter the Administrator’s pleadings and discovery requests. Therefore the ALJ acted reasonably in sanctioning Canterbury and adopting the adversely inferred answers as fact. Accordingly, the Administrator met the burden of proof on a motion for summary judgment. Since Canterbury failed to demonstrate that there was any genuine material fact, the ALJ properly entered summary judgment.

CONCLUSION

For the foregoing reasons, we **DENY** the Petition for Review and **AFFIRM** the ALJ’s D. & O. of July 8, 2003. The United States Postal Service shall release the \$10,796.48 withheld from Canterbury to the Secretary of Labor in partial satisfaction of Canterbury’s SCA back wage liability. Under this Final Decision and Order, Canterbury

remains personally liable for the repayment of the remaining SCA back wages in the amount of \$15,005.32. In addition Canterbury shall be placed on the ineligibility list pursuant to section 5(a) of the Service Contract Act, 41 U.S.C.A. § 354(a).

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge