



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Field Office

Washington, DC 20007

TTY
FAX

_____) EEOC No.
Complainant,) Agency No.
)
v.)
)
Acting Director,)
)
Agency,) Date: January 15, 2009
Agency.)

INTERIM DECISION

On July 2, 2007, the Complainant filed a hearing request with respect to Agency Complaint No. 07-003, which was filed on December 28, 2006. On August 31, 2007, this office issued an Order Directing Agency to Produce Complaint File. That Order states, in relevant part, "The agency is ordered, within fifteen (15) days from receipt of this Order, to provide this office a copy of the complete complaint file, including the report of investigation, for the above-referenced complaint If the agency cannot provide the complaint file within fifteen (15) days, it must show good cause in writing to the Administrative Judge." The Order states further that the Agency could be sanctioned in the event it "fails to provide the requested materials within fifteen (15) days from the date of receipt of this Order or to show good cause why it has not done so"

On September 24, 2007, the Agency forwarded an incomplete complaint file insofar as it did not contain a copy of the report of investigation (ROI). As a result, on September 26, 2007, the undersigned issued an Order to Complete Investigation which gave the Agency 45 days from its receipt of the Order to complete the investigation. On December 3, 2007, which was nearly 70 days after that Order was issued, the Agency requested an extension of time to complete the investigation. The undersigned did not issue a ruling on that request, but on January 14, 2008, the Agency submitted a letter stating that, after it submitted the extension request, it determined

that most of the issues in the complaint should be dismissed. In this regard, the Agency issued a final agency decision (FAD) on January 8, 2008, in which it dismissed most of the complaint and advised that the new issues the Complainant had raised for purposes of amendment in March 2007 should be referred for EEO counseling. On January 15, 2008, the undersigned issued an Order to Rescind Final Agency Decision insofar as an agency, after a complainant has properly requested a hearing, is precluded from dismissing the complaint. By letter dated January 28, 2008, the Agency rescinded the FAD and accepted all of the dismissed issues for processing.

The Agency did not thereafter submit an ROI, and on July 17, 2008, the undersigned issued an Order to Show Cause requiring the Agency, within 10 days of its receipt of the Order, to show cause why it had failed to comply with both the August 31 and September 26, 2007, Orders and produce a completed ROI. On July 24, 2008, the Agency submitted a copy of the ROI, and on August 1, 2008, it provided a response to the Order to Show Cause.

The Agency, in its response, attributes the delay in producing the ROI to three factors. First, it cites the Complainant's conduct, noting that his "various efforts to amend his complaint and his contumacious conduct in dealing with the Investigator substantially frustrated the processing of his complaint." Agency's Response at 3. Regarding the latter reason, the Agency states that the Complainant "refused to return the Investigator's calls and when he ultimately communicated with the Investigator, he indicated that he would not allow the investigation to go forward." *Id.* Finally, the Agency states that its "EEO Office had one vacancy and underwent a transition in its leadership. Procuring the services of a contract Investigator also added time to the processing of this case." *Id.*

ANALYSIS

When a complainant or agency fails to comply with an Administrative Judge's order, the Administrative Judge may take action against the non-complying party pursuant to 29 C.F.R. § 1614.109(f)(3), up to and including issuing a decision in favor of the opposing party. *See* 29 C.F.R. § 109(f)(3)(iv). A showing that the non-complying party acted in bad faith is not required. *See Cornell v. Dep't of Veterans Affairs*, EEOC Appeal No. 01974476 (November 24, 1998). Furthermore, sanctions must be tailored to appropriately address the underlying conduct of the party being sanctioned. *See Hale v. Dep't of Justice*, EEOC Appeal No. 01A03341

(December 8, 2000). A sanction may be used to deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. *Id.*

Where appropriate, an Administrative Judge may, as a sanction: (i) draw an adverse inference that the requested information, or the testimony of the requested witnesses, would have reflected unfavorably on the party refusing to provide the requested information; (ii) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) exclude other evidence offered by the party failing to produce the requested information or witness; (iv) issue a decision fully or partially in favor of the opposing party; or (v) take such other actions as appropriate. 29 C.F.R. § 1614.109(f)(3). "Other actions" may include dismissal pursuant to 29 C.F.R. §§ 1614.107(a)(7), and 1614.109(b), or it may include other sanctions designed to address the facts presented in a particular case.

In this case, although the Complainant filed his formal complaint on December 28, 2006, it was not until July 24, 2008, *i.e.*, 574 days later, that the Agency produced a copy of the ROI. It is undisputed that the Agency, insofar as it did not submit an ROI in response to either the August 31 or September 26, 2007, Orders, failed to comply with both Orders. In considering the Agency's response to the July 17, 2008 Order to Show Cause, I find the reasons set forth to be both vague and unpersuasive. First, although the Agency cites the Complainant's alleged "contumacious conduct," the only cited misconduct involves the Complainant's interactions, or lack thereof, with the investigator. What is apparent, however, is that the Agency did not begin its investigation until March 18, 2008, which was nearly 450 days after the Complainant filed his complaint. As such, the Complainant's interactions with the investigator were not responsible for most of the delay.

Second, the Agency cites the transitions within its EEO office. Not only did it not provide any specifics regarding these transitions, but the Commission specifically rejected such a defense in *Lomax v. Dep't of Veterans Affairs*, EEOC Appeal No. 0720070039 (October 2, 2007), stating, "The agency's internal situation cannot be used as a defense to its failure to comply with the Commission's regulations."¹

¹ I also note that, in *Lomax*, the agency provided more specifics regarding its internal situation.

Finally, the Agency cites the fact that the Complainant amended his complaint. EEOC Management Directive 110 (MD-110) provides that, when a complaint is amended, the 180-day "deadline is adjusted so that the agency must complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint." MD-110 at 5-12. In this case, the Complainant's complaint was amended on multiple occasions, the last being on March 23, 2007. Therefore, and pursuant to MD-110, the Agency had an additional 180 days from that date, *i.e.*, September 19, 2007, to complete the investigation. As noted, however, the Agency, as of that date, had yet to even accept the complaint for processing and did not begin its investigation until six months thereafter.

Based on the foregoing, I find that the Agency has not shown good cause for the delay in the production of the ROI. As discussed, the July 17, 2008 Order to Show Cause stated that the failure to show good cause would result in appropriate sanctions. Accordingly, I find that the imposition of sanctions is warranted.

In considering an appropriate sanction, I note that the ultimate production of an ROI does not eliminate the consideration of a default judgment against the Agency. In this regard, in *Lomax*, the Commission affirmed an Administrative Judge's issuance of a default judgment where the agency was unable to show good cause for a delay of approximately 17 days between its production of the complaint file, without an ROI, and the actual ROI.² Similarly, in *Reading v. Dep't of Veterans Affairs*, EEOC Appeal No. 07A40125 (October 12, 2006), the Commission affirmed an Administrative Judge's issuance of a default judgment when the agency failed to show good cause for producing only a partial ROI. The issuance of the default judgment in *Reading* occurred approximately 57 days after the Agency, in response to the Order Directing Agency to Produce Complaint File, produced the partial ROI.

In considering both *Lomax* and *Reading*, I do not view them as mandating, in situations involving delays of similar length, the entry of default judgments. Rather, I find these decisions should be viewed as upholding the principle that Administrative Judges have broad discretion with respect to the hearings process. The delays in *Lomax* and *Reading* were 17 and 57 days, respectively. In contrast, the delay in this case was considerably more substantial. The

² Arriving at an exact number of days is complicated by the fact that the Order Directing Agency to Produce Complaint File issued in *Lomax* was issued in response to a premature hearing request.

magnitude of that delay is best appreciated when considered in the context of the language set forth in the original Order Directing Agency to Produce Complaint File. That Order, as described at the outset, states that the Agency would be subject to sanctions if it did not produce the complaint file, to include an ROI, within 15 days of its receipt of that Order. Assuming that the Agency, as a result of the amendments, had until September 19, 2007, to complete its investigation, it still did not produce an ROI until more than 300 days thereafter. As was stated in *Lomax*, "The Commission has the inherent power to protect its administrative processes from abuse by any party and must ensure that agencies and complainants follow its regulations." I find that the Agency's delay, for which it has not shown good cause, constitutes an egregious abuse of this process. Accordingly, I find that, as a sanction, entrance of a default judgment in the Complainant's favor is appropriate.

Accordingly, because the exact nature of the relief in this case is unclear, the Complainant is ORDERED, within 30 days of his receipt of this Order, to provide a statement regarding what he believes constitutes full relief with respect to his complaint.³ This statement shall include, if relevant, the compensatory damages he is requesting. The Agency will have 30 days from its receipt of that statement in which to file a response.

It is so ORDERED.

For the Commission:

Supervisory Administrative Judge

³This Interim Decision on liability does not trigger the Agency's 40-day deadline for issuing a final order. Notice of that deadline will be set forth when a Decision is issued with respect to both liability and damages.