

IN THE UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

04-3014

JAMES C. KING,
Petitioner,

vs.

DEPARTMENT OF THE TREASURY,
Respondent

Petition for Review of the Merit System
Protection Board in DA 1221010225-W-1

PETITION FOR HEARING EN BANC

Dated: JUNE 23, 2004

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CERTIFICATE OF INTEREST

Counsel for the Petitioner certifies the following:

1. The full name of the every party represented by me is:

James C. King, Petitioner

2. The name of the real party in interest represented by me is:

James C. King, Petitioner

3. All parent corporations and any publicly held companies that own 10%
or more of the stock of the party or amicus curiae represented by me are:

NONE

4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

NONE

Dated: June 23, 2004

Ronald H. Tonkin

STATEMENT OF COUNSEL

I, Ronald H. Tonkin, attorney for the petitioner, James C. King express a belief based upon a reasoned and studied professional judgement, that this appeal involves serious administrative implications and questions of exceptional importance:

1. Whether the failure of an Administrative Judge of the Merit Systems Protection Board abuses his discretion in failing to impose sanctions for the willful refusal of an agency representative to produce a report of investigation and then excuses a witness from testifying about the report of investigation after he states that the witness would be excused because he was imposing sanctions¹ against the agency for the failure to produce the report of investigation or permit the witness to testify.

The failure of the panel to address and thus avoid deciding an important issue

¹The sanctions the AJ stated that he was imposing were that (1) petitioner was a whistleblower and (2) petitioner was retaliated against. [Appendix 93-94]

should be addressed and decided by the Court en banc. It appears that this case is one of first impression not only in this circuit but in other circuits which have decision making functions over administrative bodies.

RONALD H. TONKIN
Attorney for Petitioner

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PETITION FOR HEARING EN BANC
(FRAP 35)

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner filed his individual right of action (IRA) whistleblower appeal on January 16, 2001. Hearings were conducted in June 2001. The Initial Decision denied Petitioner's request for corrective action on October 31, 2002 (one year and four months after the record was closed). [See Appendix 10].

This is an appeal from the Final Order of the Merit System Protection Board (MSPB) dated September 22, 2003. The Final Order denied Petitioner's Petition for Review. [See Appendix 109].

On October 31, 2003 Administrative Judge Daniel Madden Turbitt rendered his Initial Decision [See Appendix 10] in which he denied Petitioner's Petition for Corrected Action pursuant to 5 U.S.C. 1221 (a).

Petitioner filed his Petition for Review with the Board on December 2, 2002. The Board denied Petitioner's Petition for Review in a two paragraph Final Order which did not address any of the Petitioner's points of error on September 22, 2003.

Petitioner filed his Petition for Review with this Court on October 7, 2003. Petitioner received the index of documents from the Board on December 1, 2003.

On June 9, 2004 the panel heard oral argument which centered around whether the AJ stated he would impose sanctions or that he might impose sanctions². On June 14, 2004 judgment was entered without an opinion.

B. Statement of Facts

In the afternoon session of the hearing conducted on June 6, 2001, Senior Special Agent Lauren Cremin (assigned to the Office of Internal Affairs) was called as a witness for Petitioner. [Appendix 52]. The agency's representative, M. Bennett Courey, refused to permit her to testify and objected to the production of a Report of Investigation (ROI) involving Mr. Sheridan's failure to report an attempted bribery which was the subject matter of Petitioner's disclosure to the Office of Internal Affairs. [Appendix 57-58, 64-65]. Mr. Courey was ordered to produce to Petitioner a copy of the Report of Investigation involving the whistleblowing. [Appendix 74-75]. When he refused on privacy grounds, the AJ ordered him to give Petitioner a redacted copy of the Report of Investigation ruling that the Report of Investigation did not involve the Privacy Act and held that Ms. Cremin could testify and the agency must produce the ROI redacted or unredacted. [Appendix 75-77]. Again the agency refused to produce the ROI. Petitioner argued that the refusal to produce the ROI

²As noted on pages 93-94 of the Appendix, the AJ stated that he was drawing adverse inferences regarding Mr. King was a whistleblower and that he was retaliated against.

should result in sanctions. The AJ again held that the Privacy Act objection and relevancy objection were overruled. [Appendix 80]. The agency then made an oral motion for an interlocutory appeal in order to have the full Board rule on the privacy issue . [Appendix 81-84]. This motion was denied by the AJ. It was at this time late in the afternoon hours that the AJ excused Ms. Cremin from any further testimony and advised that he would draw adverse inferences against the agency for its refusal to comply with his order to produce the ROI and as a result thereof excused Ms. Cremin from returning the next day to testify. [Appendix 93-96].

Judge Turbitt: Okay. Ms. Cremin, I am not going to force you to testify to anything which will subject you to liability. The agency has been on notice that I am either drawing an adverse inference or adverse inferences because of its failure to comply with my order regarding documents. We've already said that this witness's testimony is ancillary to my order regarding that. So what I am going to do at this point is, instead of entertaining the objections that I'm— that I'm sure you're to ask, Mr. Tonkin, regarding this, Ms. Cremin, *I'm going to excuse you as a witness and I will use your testimony. I will – I will draw from what I expected you to testify about this report of investigation and draw an, you know, an adverse inference against the agency and for Mr. King in the – in – regarding the burden of proofs he needs to make toward proving that he was a whistleblower and that he was retaliated against.*

The proceedings were adjourned at 6:30 p.m. until the next day. The next day Petitioner objected to the taking of any agency testimony or introduce any evidence as a sanction for failure to produce the Report of Investigation (ROI). [Appendix

108]. However, the AJ overruled Petitioner's objections and permitted the agency to take one of its witnesses (Bonnie Tischler, Assistant Commissioner of Customs) out of order and then permitted the agency to introduce the testimony of seven additional witnesses. The agency again reurged the privacy issue with a two page letter to the AJ dated June 7, 2001 asking the AJ to reconsider his ruling on sanctions. The AJ again denied the agency's request stating **"I have decided to impose the sanctions. And specifically sanctions of an adverse inference are supported by the Board's case law."** [Appendix 107]. The agency moved for a continuation of the hearing in order to file a motion with the U.S. District Court for the District of Columbia on the privacy issue which request was also denied.

It is with this background that Petitioner maintained throughout his appeal and continues to maintain in this Court that the Board (AJ) committed error on the sanction issue which deprived him of the right to produce evidence in support of his whistleblowing appeal. It is also interesting to note that with all this background and legal maneuvering by the agency on the sanction issue, the AJ did not mention the privacy or sanction issue in his Initial Decision. [Appendix 10].

The Petitioner in his appeal to the MSPB maintained that the AJ abused his discretion in not imposing sanctions. Petitioner was denied substantive rights; the AJ failed to mention or consider the sanction issue; the AJ failed to permit a witness

(Cremin) for Petitioner to testify; the AJ failed to find for Petitioner who proved his case by preponderant evidence; the AJ erred in finding that Petitioner's disclosures were not protected disclosures; and the AJ erred in finding that the protected disclosures were not a contributing factor in the personnel actions taken against Petitioner. Any reasonable person could conclude that Petitioner's disclosure was a contributing factor in the adverse personnel decisions made against Petitioner. *Clark v. Department of the Army*, 997 F.2d 1466, 1469 (Fed.Cir.1993)

ARGUMENT

A. The Board Abused its Discretion in its Failure to Impose Sanctions Against the Agency for its Refusal to Produce the Report of Investigation Which was a Critical Document as Ordered by the Board (AJ) to Support Petitioner's Whistleblowing Claim and Abused its Discretion by Denying a Critical and Essential Witness to Testify at the Hearing Because as the AJ stated he would Impose Sanctions.

The panel in merely rendering a one page "Judgment" without an opinion avoided making a decision which is not only important to petitioner, but to all litigants who appear before the Merit Systems Protections Board. Someday, somewhere in the federal judiciary a judicial body will have to wrestle with the issue presented which appears to be one of first impression.

The facts regarding the failure to sanction the agency are set forth above. The AJ in stating that he would sanction the agency cited MSPB case law [*McGrath v.*

Department of the Army, 83 MSPR 48 (1999); *Montgomery v. Department of the Army*, 80 MSPR. (1998); *Eakes v. Department of Justice*, 18 MSPR 328 (1083)] in support of his reasons for imposing sanctions against the agency [Appendix 106-107]. The AJ stated “***[t]he agency has informed the Board that it does not intend to release redacted copies of these documents. I respectfully disagree with the agency’s decision. And based on that, I have decided to impose sanctions. And specifically the sanctions of an adverse inference are supported by the Board’s case law***” [Appendix 107]. However, the AJ did not impose sanctions at the hearing and denied Petitioner’s request that the agency not be permitted to introduce any evidence. Counsel stated in his objection “***I would object to the testimony of Ms. Tischler and any other witness brought on by the agency, and that should be part of the sanctions, they should not be able to do indirectly what they should have done directly by producing these documents. I think any testimony should not be permitted from these witnesses.***” The AJ denied the objection. [Appendix 108].

Initially, the Board (AJ) committed error in its failure to make findings of fact and conclusions of law regarding the sanction issue. In *Wobschall* at 584 the Board - in an exact factual situation as that in the case at bar held - “he-[AJ] did not mention or consider the agency’s request for sanctions, and the agency’s petition renews its request for the imposition for sanctions against the appellant. The administrative

judge's omission in this regard was error". Also see *Holsapple v. Office of Personnel Management*, 35 MSPR 558, 661(1987).

The Board has held that failure to produce subpoenaed investigative reports to the presiding official for *in camera* inspection which was critical to an employee's appeal can result in sanctions against the agency. *Puhar v. Department of Justice*, 30 M.S.P.R. 204, 205-206 (1986).

The AJ cited *Montgomery* in support of his decision to impose sanctions. *Montgomery* stated, "The AJ determined that it was necessary for the materials to be produced for in camera inspection and so ordered. The [orders] were not issued precipitously. Rather they were issued after a lengthy period of time for the agency to comply with the earlier orders and agreements [at 438]..... In sum, the agency, although afforded an unduly long period to comply with the AJ's Orders to submit materials necessary to the appellant's case, has failed to furnish the major portions of the material. An AJ may impose sanctions to preserve the ends of justice and absent a showing of abuse of discretion, an AJ's determinations regarding sanctions will not be reversed [at 441-442]... Thus, the granting of sanctions in the form of drawing inferences in favor of the appellant with regard to the information sought is appropriate under 5 C.F.R. 1201.43(a)(1)" [at 442].

The Board has stated in *Sheffield v. Office of Personnel Management*, 39

MSPR 507, 510 (1989) “[h]owever, the Board has not hesitated to impose sanctions where an administrative judge has failed to do so when an Agency willfully and flagrantly disobeys a legitimate discovery order of the administrative judge.” *Sheffield* cited *Fuller v. Department of the Treasury*, 9 MSPR 294, 10 MSPR 13, 15-16 (1982) wherein it was held that the administrative judge abused his discretion in adjudicating an appeal without imposing the appellant’s requested sanction, where the agency failed comply with a legitimate discovery order of the administrative judge.

In the case at bar it is clear that the AJ properly decided to impose sanctions, but failed to do so when he made his final decision. This was error. This Court should hold that the Board abused its discretion in failing to impose sanctions against the agency and should further hold that negative inferences should be imposed for the failure to permit the agency witness-Cremin-to testify and the failure to produce the Report of Investigation. Additionally, the agency should not have been permitted to introduce the testimony of witnesses and documentary evidence in defense of Petitioner’s whistleblowing appeal. In other words the Board should have entered an order finding for Petitioner on his whistleblowing appeal because he should have imposed sanctions as he said he would which would have proven petitioner’s case.

The issue presented in this case is of great importance to bar for it will resolve

the questions (1) whether an agency can with impunity refuse to comply with an Administrative Judge's order and (2) whether an Administrative Judge after stating that he would impose sanction excuses a witness who would testify to the essential elements of the whistleblowing case and then ignores his own rulings on sanctions and ultimately finds for the agency stating that petitioner has not proven his case.

CONCLUSION

The errors committed by the Board (AJ) in the case at bar were substantial and denied Petitioner substantive rights which requires this Court to order the following relief:

1. Reverse the Final Order of the Board;
2. Direct the Board to reverse the Initial Decision;
3. Direct the Board to enter a "death penalty" sanction against the Agency;
4. Order the Board to enter an order granting Petitioner's request for corrective action as prayed for by Petitioner;
5. Direct the Board to assess attorneys fees and costs against the Agency.
6. Order the agency to pay attorneys fees and costs for prosecuting the appeal.

Dated: June 23, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that in accordance with Federal Rules of Appellate Procedure that this petition complies with the type-volume limitation as word and line count of Word Perfect 11 and that the number of words is 2877 and the number of lines of monospaced type is 411.

Ronald H. Tonkin

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon Kenneth D. Woodrow and David M. Cohen, Department of Justice, 1100 L Street, N.W., Washington, D.C. 20530 and the Office of Personnel Management June 23, 2004 by U.S. Mail.

Ronald H. Tonkin

