UNITED STATES
THE OFFICE OF COMPLIANCE

Gloria Halcomb,	)	
	)	
Complainant	)	
v.	)	
	)	**Case. No. 03-SN-45**
The Association & Executive Board of the Committee of Correspondents Radio and Television Press Gallery of the U.S. Senate,	)	
	)	
Employing Office.	)	
	)	

DECISION

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens, Alan V. Friedman, Roberta L. Holzwarth, and Barbara Childs Wallace, Members.

This matter comes again before the Board pursuant to the Congressional Accountability Act of 1995 ("Act"or "CAA"), as the result of the Complainant's appeal of the Hearing Officer's November 22, 2004 "Order Denying Motion to Recuse and Dismissing the Complaint with Prejudice." The Hearing Officer's dismissal of this administrative Complaint was premised upon the application of principles of collateral estoppel.

Complainant Gloria Halcomb was dismissed by Gallery Director Larry Janezich from her position as a Media Relations Coordinator in the United States Senate Radio and TV Gallery after sixteen years of employment. Thereafter Complainant filed twin claims of discrimination alleging race discrimination, hostile work environment, and retaliation for actions protected by the Congressional Accountability Act of 1995 ("Act" or "CAA"). One claim named the Office of the United States Senate Sergeant at Arms as the employing office, and the other claim named "the Association Executive Board of the Committee of Correspondents Radio and Television Gallery of the U.S. Senate" as the employing office. In her pleadings in both matters, Complainant generally asserted that the two were joint employers or that one served as the agent of the other.

This appeal concerns the dismissal of Complainant's case against the Association and Board. Previously, Complainant's other claim against the Senate Sergeant at Arms was dismissed after a full hearing on the merits. This Board recently sustained the Hearing Officer's dismissal of *Halcomb v The Office of the U.S. Senate Sergeant at Arms*, Case No. 03-SN-29.

Pursuant to section 406(c) of the Act, 2 U.S.C. 1406(c),

> The Board shall set aside a decision of the hearing officer if the Board determines that the decision was -
>
> > (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
> > (2) not made consistent with required procedures; or
> > (3)unsupported by substantial evidence.

Procedural History

The administrative Complaint in this matter was filed by Complainant against "the Association and Board of the Radio and Television Correspondents" on July 9, 2003. The Complaint includes the following allegations:

> Through a series of filed complaints (both oral and written - both administrative and judicial) the complainant has informed the respondent, that it - (the Board) - in direct collaboration with the USS [United States Senate] was administering, managing, and controlling a work environment that was hostile to all employees and general and specifically to her - and totally infested with discriminatory and harassment behavior and such behavior was overt, egregious, intentional and invidious. This behavior was being tolerated by the Board's pay-agent and co-employer - the Office of the Senate Sergeant at Arms (SAA) of the U.S. Senate. . . .
>
> The perpetrating employee is Larry Janezich (white male) - the Director of the Senate Radio and Television Gallery and the direct supervisor of the complainant. Janezich, intentionally fostered, enabled and maintained a severely punitive hostile work environment, and used both discrete and overt acts of retaliation and intimidation [as well as the supervisory power vested in him by the respondent] - to maintain the intentionally biased atmosphere.
>
> The "controlling" Executive Board - and it's [sic] [co-employer - pay agent (the Office of the Sergeant at Arms) . . .] was expressly informed and aware of the nature of the unlawful behavior and yet - took no particular explicit action to assure that the biased behavior and hostile atmosphere was terminated, thereby intentionally enabling, and enhancing Janezich's ability to discriminate and perpetrate the hostile environment.
>
> On May 21st 2003 Janezich terminated the complainants' employment. . . .
>
> The respondent - Board and its co-employer SAA form a [sic] employing office under section 201 Congressional Accountability Act 2 U.S.C. 1301 et seq. of CAA rules and are in violation of Title VII of the Civil Rights Act . . . .

Administrative Complaint in *Halcomb v. The Association and Board of the Radio and Television Correspondents,* Case No. 03-SN-45.

The Complaint against the Sergeant at Arms

On December 18, 2003, Complainant filed another administrative Complaint in *Gloria Halcomb v. Office of the U.S. Senate Sergeant at Arms*, Case No. 03-SN-29. That Complaint consists of a one page Office of Compliance "Complaint" form. In the space provided for a complainant to "set forth a clear and concise statement of the conduct being challenged, including the dates of the conduct, the names and titles of the individuals involved, an explanation of why you believe the challenged conduct constitutes a violation of the Act . . . ," Complainant stated: "See Attachment."

That attachment to the short form Complaint in Case No. 03-SN-29 is a copy of the administrative Complaint previously filed in this matter, together with "Complainant's Combined Motion to Join Claims and Set the Combined Claim for Adjudication by a Hearing Officer," and a memorandum captioned in this matter in support of the Motion. No factual allegations are attached to Complainant's short form administrative Complaint in the *Sergeant at Arms* case, except those in the administrative Complaint and supporting Memorandum originally filed in this case. The factual and legal allegations in the two Complaints are essentially identical. Consequently, the Executive Director of the Office of Compliance issued an "Order for Joinder of Cases"on December 29, 2003 pursuant to section 7.06(a)(2) and (b) of the Office's Procedural Rules.

On February 3, 2004, after argument by the parties, the Hearing Officer issued an Order dismissing this Complaint against the Association and Board on jurisdictional grounds. In his February 3 Order, the Hearing Officer determined that "Respondent is not among the offices identified in the Act as employing offices. 2 U.S.C. 1301(9)." However, because the factual allegations in this case are attached to the Complaint in the *Sergeant at Arms* case, the allegations survived the dismissal of this case as the factual predicate for the *Sergeant at Arms* Complaint. The litigation of the *Sergeant at Arms* case went forward.

The First Appeal of this Case

The Hearing Officer's February 3, 2004 Order dismissing this case was appealed by Complainant to the Board. On June 4, 2004, the Board vacated the Hearing Officer's dismissal, and remanded the matter to the Hearing Officer with instructions that:

> the Hearing Officer . . . permit the Complainant an opportunity to prove her claim that the Respondent constitutes an employing office as described in section 101(9)(C) of the Act. We have not reached any conclusion as to whether the Respondent could constitute an employing office under the Act. We hold only that the Hearing Officer should permit limited discovery on the issue. Once this discovery is completed, Respondent may

reassert its position through a dispositive motion.

Board's *Decision and Order* in Case No. 03-SN-45 of June 4, 2004.

The *Sergeant at Arms* case is heard while this case is stayed.

While this matter was pending before the Board in 2004, the companion case, *Gloria Halcomb v. Office of the U.S. Senate Sergeant at Arms*, Case No. 03-SN-29, proceeded before the same Hearing Officer on the claims originally pleaded in this case, but attached to the *Sergeant at Arms* short form Complaint.

Shortly after the Board's June 4, 2004 remand of this matter to the Hearing Officer, the parties to this matter filed a Consent Motion with the Hearing Officer to postpone the pre-hearing conference and stay proceedings in this matter until after a decision was issued in *Halcomb v. Office of the U.S. Senate Sergeant at Arms,* Case No. 03-SN-29. Complainant voluntarily relinquished the opportunity immediately to proceed with the Board ordered "limited discovery" on the issue whether the Respondent in this case - The Executive Committee of the Radio-Television Correspondents' Galleries, and the Radio-Television Correspondents' Association - is an "employing office" under the Act.

The *Sergeant at Arms* case engendered a seven day hearing on the merits, during which Complainant presented 13 witnesses, including six members of the Association or its Executive Committee. On October 14, 2004, the Hearing Officer issued a 43 page Decision in the *Sergeant at Arms* case which concluded that "complainant has failed to prove her claims (1) that respondent treated her in a disparate fashion from similarly situated white employees, or (2) that she was terminated in retaliation for engaging in activity protected by the CAA . . . ."

The issues of collateral estoppel and recusal

Also On October 14, 2004, the Hearing Officer issued an Order in which he directed the parties to address the question "why the instant case should not be dismissed on collateral estoppel grounds." Order of Hearing Officer of October 14, 2004 in Case. No. 03-SN-45.

By responsive Memorandum of November 2, 2004, Complainant asserted again that: ". . . [A]ll parties may agree to the relatedness of the (2) respondent parties . . . ." (3rd page). In a pleading putatively submitted to the Board in this case on November 30, 2004, Complainant further asserted that "On June 18, 2003 Halcomb filed a [sic] OC [Office of Compliance] complaint alleging the Executive Committee was her co-employer - and as liable as the SAA [Sergeant at Arms] under the CAA." "Complaint's [sic] Brief in Support of Petition for Interlocutory Review" of November 30, 2004 in Case No. 03-SN-45, p. 2, fn 1.

On November 3, 2004 Complainant filed in this case "Complainant's Motion Requesting

the Hearing Officer Recuse Himself from the Instant Issue and Allow the Director to Appoint a Different Hearing Officer to hear the Remand Issue." In that motion, the Complainant argued that the employer status of the Association and Executive Committee must be determined as a threshold issue, and that the Hearing Officer was biased against Complainant because "The HO has . . . reached a personal conclusion as to the validity of the complainant's argument in a closely related case."(page 2).

On November 22, 2004, the Hearing Officer issued the "Order Denying Motion to Recuse and Dismissing the Complaint With Prejudice" which gives rise to this appeal.

Appeal of the *Sergeant at Arms* matter.

Complainant has also appealed the Hearing Officer's Decision in the *Sergeant at Arms* case to this Board. This Board issued a Decision in that case on March 18, 2005, in which we determined that:

> At the hearing, the Hearing Officer dismissed Complainant Halcomb's claim of hostile work environment discrimination because that allegation was based upon the lack of hygiene of a co-worker, a circumstance which we agree does not constitute an actionable hostile work environment claim. As the Hearing Officer determined, "the Congressional Accountability Act does not protect employees from coworkers who have poor hygiene. . . . The impact of that falls equally on everybody in the office."
>
> We also agree with the Hearing Officer's determination that the Complainant has not established employment discrimination based on race, or retaliatory termination based upon activity protected by section 207(a) of the Congressional Accountability Act of 1995, 2 U.S.C. 1317(a), for the reasons set out in his Decision.

Board Decision in *Halcomb v Office of the U.S. Senate Sergeant at Arms,* Case No. 03-SN-29, March 18, 2005. The Hearing Officer's comprehensive Decision in the *Sergeant at Arms* case is attached and incorporated by reference in the Board's Decision in that case.

Processing of this Appeal

Complainant filed a timely appeal of this matter on December 15, 2004. Complainant's "Brief in Support of Petition for Review" was filed on January 18, 2005. On January 18, 2005, Complainant also filed a motion to "Reinstate and Move Its Stricken Brief and Exhibits filed in Support of Case No. 03-SN-29 and Permission to Refile them as Exhibit A in the Instant Case." On January 25, 2005, Respondent Association and Executive Board moved to "Dismiss and/or Strike 'Complainant's Petition for Review' and to "Dismiss and/or Strike 'Complainant's Motion to Reinstate . . ." etc. Complainant replied by submission of January 31, 2005.

By Order of February 9, 2005, this Board denied Complainant's motion to submit the

brief and exhibits from the *Sergeant at Arms* case 03-SN-29 in this case, reserved any decision regarding Respondent's motion to dismiss or strike Complainant's Petition for Review, and set out a briefing schedule for the parties to argue any issues arising from the Respondent's motion to dismiss or strike the Petition.

Respondent has not asserted that the Petition for Review in this matter is untimely. However, Respondent does argue that the submission of Complainant's supporting brief was untimely. Complainant's March 7, 2005 reply to Respondent's argument regarding the untimely filing of Complainant's Brief in Support of her Petition fails to address the timeliness issue, but continues to focus on the Complainant's arguments regarding the merits of the Hearing Officer's dismissal of this case.

DISCUSSION

Complainant's Untimely Brief

Complainant's Brief in Support of her Petition was hand delivered by Complainant's representative to the Office of Compliance on January 18, 2005. The accompanying Certificate of Service represents that the pleading was also hand delivered to counsel for Respondent on that date. The Procedural Rules of the Office of Compliance state at section 8.01(b)(1):

> Unless otherwise ordered by the Board, within 21 days following the filing of a petition for review to the Board, the appellant shall file and serve a supporting brief in accordance with section 9.01 of these rules.

The Board issued no order varying the 21 day filing requirement in this case, nor was a variance sought by Complainant. Section 1.03(b) of the Procedural Rules sets out the methodology for counting time periods under the Rules, including that all time periods are calendar days unless otherwise noted. As Complainant's Petition was filed with the Office on December 15, 2004, the stipulated period of 21 days ended on January 5, 2005. Pursuant to the Office's Rules, Complainant's Brief in Support was filed 13 days late.

Complainant has clearly been aware of the 21 day time limit in the Rules for filing her supporting brief. In the *Sergeant at Arms* case, 03-SN-29, Complainant filed a motion for an extension of time to file her Brief in Support of her Petition, which motion was granted by order of this Board in that case on November 24, 2004. However, Complainant did not file her brief in the *Sergeant at Arms* case within the time frame set out in the Board's November 24, 2004 Order. Therefore, by Order of January 14, 2005, this Board issued an Order Striking Appellant's Briefs in the *Sergeant at Arms* case.

The Board has the authority to adopt Procedural Rules governing the processing of administrative hearings and appeals to this Board, as mandated by section 303 of the CAA, 2

USC 1383. The Federal Circuit has reiterated in *Brownlee v. Dyncorp,* 349 F.3d 1343 (Fed. Cir. 2003), "As the Supreme Court noted in *United States v. Mead Corp.,* 533 US 218 . . . (2001), 'a very good indicator of delegation meriting Chevron treatment [giving deference to agency rules] [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations for which deference is claimed." In this regard, *see also, e.g. Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 US 837 (1984); *Household Credit Services v. Pfennig,* ___ US ___, 124 S.Ct. 1741 (2004); and *NTN Bearing Corp. Of America et al v. United States,* 368 F.3d 1369 (Fed. Cir., 2004). That express authorization is set forth in CAA section 303.

In *American Farm Lines v. Black Ball Freight Service,* 397 US 532, at 539 (1970), the Supreme Court established the principle that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *See also, e.g. Colorado Environmental Coalition v. Wenker,* 353 F.3d 1221 (10th Cir., 2004); and *City of Fremont v. FERC,* 336 F.3d 910 (9th Cir. 2003). Under section 9.07(b) of the Procedural Rules, "[t]he Board or a Hearing Officer may waive a procedural rule contained in the Part for good cause shown if application of the rule is not required by law."

In discussing the authority for waiver of procedural rules in a comparable context, the Federal Circuit has noted: "The timeliness provisions of the MSPB are, thus, comparable to the rules and orders of this court setting times for filing motions, briefs, petitions for rehearing, and the like, which may be waived by the court. *See American Farm Lines* . . . [supra]." *Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 645, fn. 6 (Fed. Cir. 1996). In *Hamilton*, the Circuit further noted that "we conclude that the Board may *sua sponte* raise the issue of timeliness." *Ibid.*

Since the briefing time limits at issue here are not "required" by the "black letter" text of the CAA, and the authority to waive has been set out in the Rules themselves, the Board clearly has the authority to waive the application of section 8.01(b)(1) of the Procedural Rules. Consequently, the question before the Board is whether "good cause" for a waiver (section 9.07(b)) has been shown with regard to Complainant's late filing of her Brief in Support.

Despite being provided the opportunity to offer an explanation for the late filing, Complainant has failed to address that issue in any of her submissions in this matter. There being no explanation offered by the Complainant for her failure to follow the rule, there is no basis for this Board to consider waiver of section 8.01(b)(1) of the Procedural Rules. The Board therefore does not waive the procedural requirement in this matter.

The Board next must determine what the sanction will be for Complainant's failure to file timely. The Respondent urges that the Complainant's underlying Petition for Review be dismissed or struck. The Board denies the Motion of the Respondent to Dismiss or Strike the

Petition in this matter. Under the circumstances of this case, the Board will sanction the Complainant by striking in its entirety the Complainant's Brief in Support filed on January 18, 2005. The Board will neither review nor consider the Brief in Support.

We proceed to review the dismissal of this case upon the record and the submissions of the parties which have not been struck.

Collateral Estoppel

This Board has previously recognized the applicability of the principles of issue preclusion and collateral estoppel in matters coming before the Office of Compliance. In *Bajbor v. Office of the Architect of the Capitol,* Case. No. 01-AC-377 (2003), we observed that "under the doctrine of collateral estoppel . . . , the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." (In *Bajbor* the same issues were presented under a different cause of action. In this case, the Board is presented with the same causes of action and a different respondent.) *See also, Solomon v. Office of the Architect of the Capitol,* Case No. 03-AC-28 (2004), ("The Hearing Officer concluded that the Complainant's retaliation claim herein was barred by the doctrine of claim preclusion, in essence, because it arose and was addressed in the Complainant's earlier case . . . .")

In his Order Denying Motion to Recuse and Dismissing the Complaint with Prejudice, the Hearing Officer held:

> Complainant had a full opportunity to prove claims of discrimination and retaliation by Mr. Janezich, but, after seven days of hearing and testimony by twenty witnesses, she failed. Thus, it matters not whether the Association and Board were also employers of the complainant along with SAA. The claim that complainant was the victim of unlawful discrimination and retaliation by Mr. Janezich has been actually and necessarily tried and determined adversely to her. It is immaterial whether Mr. Janezich was acting as the agent of one employing office or two. Complainant has simply failed to prove that his actions constitute violations of the CAA which could subject <u>any</u> employing office to liability.
>
> Complainant had the necessary incentive to present at the first hearing her evidence concerning alleged CAA violations by Janezich, and she did so. She has not asserted that she has additional material evidence to present on that subject, nor provided any justification for why such evidence was not presented during the seven day hearing already conducted.

Order of November 22, 2004, p. 6. The absolute propriety of the Hearing Officer's findings in this regard is buttressed by the fact that the administrative Complaint in the *Sergeant at Arms* case was the Complaint in this case attached to a short form.

Indeed, the text of both Complainant's administrative Complaints, and the record made in

the hearing of the *Sergeant at Arms* case, all are premised upon the same core allegation:

> The "controlling" Executive Board - and it's [sic] [co-employer - pay agent (the Office of the Sergeant at Arms) . . .] was expressly informed and aware of the nature of the unlawful behavior and yet - took no particular explicit action to assure that the biased behavior and hostile atmosphere was terminated, thereby intentionally enabling, and enhancing Janezich's ability to discriminate and perpetrate the hostile environment.
>
> On May 21st 2003 Janezich terminated the complainant's employment. . . .

This alleged "biased behavior and hostile atmosphere," whether tolerated by the Sergeant at Arms, the Association or both, "enhanc[ed] Janezich's ability to discriminate and perpetrate . . . ."

Indeed, Complainant herself sought to resubmit in this case all her arguments in the *Sergeant at Arms* case. Review of the record of the hearing in the *Sergeant at Arms* case reveals a full, even exhaustive, opportunity afforded by the Hearing Officer to Complainant to develop evidence of the involvement of the Association and its agents as well as the Office of the Sergeant at Arms in the course of her employment, discipline, and termination by Larry Janezich.

Furthermore, Complainant voluntarily relinquished the opportunity to proceed to discovery and determination of the Association's status as an "employing office" until *after* the final decision was issued in the *Sergeant at Arms* case. Complainant's argument that determination of the employer status of the Association is a necessary condition precedent to the determination of the application of collateral estoppel stands in stark contradiction to Complainant's stance prior to the issuance of a final decision in the *Sergeant at Arms* case.

In *Banner v. U.S.,* 238 F3d 1348, 1354 (Fed. Cir. 2001), the Federal Circuit reiterated the four part test for determining collateral estoppel or issue preclusion in the context of administrative tribunals:

> The doctrine of collateral estoppel, or issue preclusion, serves to bar the revisiting of issues that have already been litigated by the same parties or their privies based on the same cause of action. *See Jet, Inc. v. Sewage Aeration Sys.,* 223 F3d 1360, 1365-66 (Fed. Cir. 2000). Collateral estoppel requires four factors: (1) the issues are identical to those in a prior proceeding, (2) the issues were actually litigated, (3) the determination of the issues was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues. *Id.*

See also, Thomas v. General Services Administration, 794 F2d 661, 664 (Fed. Cir. 1986); *Graybill v U.S. Postal Service,* 782 F2d 1567, 1571 (Fed. Cir. 1986); *Otherson v. Department of Justice,* 711 F2d 267 (D.C. Cir 1983); *Chisholm v. Defense Logistics Agency*, 656 F2d 42 (3d Cir. 1981); and *Mother's Restaurant, Inc. v. Mama's Pizza, Inc,* 723 F2d 1566, 1569 . . . (Fed. Cir. 1983); and cases cited in this Board's decision in *Bajbor*, *supra*.

Here the Complainant: (1) sought to litigate the same factual and legal issues as those presented in the *Sergeant at Arms* case regarding the propriety of her termination ; (2) fully litigated those issues in the *Sergeant at Arms* case; (3) those issues were the ultimate issues upon which Complainant sought to overturn her termination; and (4) Complainant and her representative were given wide latitude to elicit testimony and documentary evidence in support of their position regarding those issues. In addition, Complainant effectively asserted that the Respondents in both cases are, in fact, "privies" ("any of the persons having mutual . . . relationship to the same right . . . ," *Webster's Third New International Dictionary*.)

Thus, we are presented here with a textbook effort to avoid the appropriate application of collateral estoppel and issue preclusion:

> A party precluded from relitigating an issue with an opposing party, . . . is also precluded from doing so with another person unless the fact that lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.

Section 29, *Restatement of the Law: Judgments, 2nd.* Complainant had a full and fair opportunity to litigate all her claims regarding her termination by Mr. Janezich. The "other circumstances" which might afford a party to relitigate the same issue include: applicability of a different administrative regulatory scheme, better procedural rights, inability to obtain appellate review of the initial determination, a change in the applicable law, a different standard of proof, or a compelling public interest. *See,* Sections 28 and 29, *Restatement of the Law: Judgments, 2nd.* None of the exceptional considerations referenced in the *Restatement* is present here. The substantive and procedural context for this case is identical to that in the *Sergeant at Arms* case. There is no basis to vary from the application of the four part *Banner* test.

The Board agrees with the Hearing Officer that resolution of the issue of "employing office" status of the Respondent Association and Board is not an "ultimate issue" influencing the application of collateral estoppel in this matter. Whether Janezich was an agent of the Sergeant at Arms, the Association, or both, the two administrative complaints alleged the same treatment of Complainant at the hands of Gallery Director Larry Janezich.

Therefore, the Board affirms the Hearing Officer's dismissal of the administrative Complaint in this matter. The Complainant is collaterally estopped and precluded from re-litigating the issues contesting her termination which were fully tried and decided on the merits in *Halcomb v Office of the U.S. Senate Sergeant at Arms,* Case No. 03-SN-29.

Alleged Bias of the Hearing Officer

As we mentioned, shortly after the Hearing Officer issued the Decision dismissing the *Sergeant at Arms* case on the merits, the Complainant filed a motion requesting that the Hearing Officer recuse himself from this case. The gravamen of Complainant's motion for the recusal of

the Hearing Officer was the fact that "he has reached a personal conclusion as to the validity of the complainant's argument in a closely related case." (Complainant's Motion Requesting the Hearing Officer Recuse Himself, November 3, 2004, p. 2.) In denying that motion, the Hearing Officer concluded:

> Complainant's assertion of personal bias on the part of the Hearing Officer is unsupported and without merit. In fact, being conscious that complainant's representative is not an attorney, the Hearing Officer has been particularly solicitous of her rights in this matter, has granted every one of her several motions for extension of time and has denied two motions filed by SAA for sanctions against her and her representative. I bear absolutely no ill will toward either Ms. Halcomb or Mr. Taylor. I simply determined that they had not proven their case. It is well settled that a decision to reject the claims or arguments of a party as unsupported by the law or facts of record does not constitute bias of a judge or hearing officer.

Order Denying Motion to Recuse and Dismissing the Complaint With Prejudice, November 22, 2004, pp. 4-5.

In *Bieber v. Dept. of Army*, 287 F3d 1358, 1362 (Fed. Cir. 2002), the Federal Circuit applied the teaching of the Supreme Court in *Liteky v. U.S.,* 510 U.S. 540 (1994) to issues of bias on the part of an administrative decision maker:

> In *Liteky*, the Supreme Court recognized that a showing of 'deep-seated . . . antagonism' toward a party is necessary for a successful bias or partiality motion under the federal judicial recusal statute, 28 U.S.C. 455 (1994), where the motion is based on the judge's conduct in the course of the proceeding:
>
> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Liteky,* 510 U.S. at 555 . . . .
>
> To be sure, *Liteky* concerned judicial bias in the context of recusal, and here neither the federal judicial recusal statute nor the recusal statute specifically governing administrative judges, 5 U.S.C. 556(b), applies . . . . Nonetheless, we think that the same standard, requiring a showing of 'a deep-seated favoritism or antagonism that would make fair judgment impossible,' must govern . . . .

See also NEC Corp. v. U.S., 151 F3d 1361 (Fed. Cir. 1998).

There is absolutely no evidence that the Hearing Officer exhibited "a deep-seated antagonism" either in the *Sergeant at Arms* matter, or in this matter. The Board has previously affirmed the Hearing Officer's decision in the *Sergeant at Arms* case, and the Complainant

asserted no claim of bias on the Hearing Officer's part in her appeal of that matter.

In this case, the Hearing Officer's initial decision finding that the Association and Board are not an "employing office" under the CAA was vacated by the Board and remanded for further evidence. An *ipso facto* claim of administrative bias because of an adverse remand to the trier of fact was reviewed by the Supreme Court more than 50 years ago in *NLRB v. Donnelly Manufacturing Co.,* 330 U.S. 219, 236-7 (1947). There, Justice Frankfurter, writing for the Court concluded:

> Certainly it is not the rule of judicial administration, that, statutory requirements apart, . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.

See also, e.g. Louisiana Assn. Of Indep. Producers v. FERC, 958 F2d 1115 (DC Cir. 1992); *Marine Shale Processors, Inc. v. U.S. EPA,* 81 F3d 1385 (5th Cir. 1996); and *Waterbury Hotel Mgmt. v. NLRB*, 314 F3d 650 (DC Cir. 2003).

There is no basis for a finding of "automatic" bias because the Hearing Officer's initial dismissal of this case on jurisdictional grounds was vacated and remanded. Neither is the appropriate application of principles of collateral estoppel in the wake of an earlier remand evidence of bias.

Complainant's assertion before the Hearing Officer that the determination whether the Association and Board is an "employing office" under the CAA was required before collateral estoppel could be reached was properly rejected for the reasons stated by the Hearing Officer: " It is immaterial whether Mr. Janezich was acting as the agent of one employing office or two. Complainant has simply failed to prove that his actions constitute violations of the CAA which could subject <u>any</u> employing office to liability." Complainant's voluntary agreement to delay the employer status determination until after the decision in the *Sergeant at Arms* case renders any argument of bias in the Hearing Officer's observance of the parties' wishes hollow indeed.

Review of the record in this case reveals no evidence of *any* antagonism against Complainant on the part of the Hearing Officer, "deep-seated" or not. Therefore, the Board affirms the Hearing Officer's rejection of the Complainant's request that he be recused for bias.

ORDER

Pursuant to section 406(e) of the Act, 2 U.S.C. 1406(e), and section 8.01(d) of the Procedural Rules of the Office of Compliance, the Board of Directors **AFFIRMS** the Hearing Officer's November 22, 2004 "Order Denying Motion to Recuse and Dismissing the Complaint with Prejudice."

It is so ordered.

Issued, Washington, D.C., April 20, 2005.

CERTIFICATE OF SERVICE

I, the undersigned employee of the Office of Compliance, certify that the foregoing *Decision of the Board of Directors* was served by first-class mail, postage-prepaid, and transmitted by facsimile of the cover letter and first page of the Decision to Lawrence Z. Lorber, Esq.

Sam E. Taylor, Esq
P.O. Box 15370
Washington, D.C. 20003

Employee Representative
For Pick Up on 4/20/05

Lawrence Z. Lorber, Esq.
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Signed in Washington, D.C. this 20th day of April, 2005.

_____
Selviana B. Bates
Office of Compliance