

OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

Philip Taylor)	
)	
Appellant,)	
)	
v.)	Case Number: 10-SN-31 (CFD)
)	
United States Senate Budget Committee,)	
)	
Appellee.)	
)	

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

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors (“Board”) pursuant to a petition for review filed by Philip Taylor (“Appellant”), from a decision arising from allegations that he violated the confidentiality requirements of the Congressional Accountability Act (“Act”). Hearing Officer Susan Winfield issued a Decision finding that Appellant knowingly violated the Act’s confidentiality requirements, and subsequently issued an Order awarding the Office of the United States Senate Budget Committee (“Appellee”) expenses incurred by it in redressing the improper disclosures and enjoining Appellant from making further disclosures. Appellant seeks review of the Decision and Order of Hearing Officer Winfield. For the reasons set forth below, we dismiss the appeal.

I. Background

Appellant, a covered employee within the meaning of Section 101 (2 U.S.C. 1301) of the Act entered, on a *pro se* basis, confidential counseling and mediation under the CAA on a claim of race discrimination. At the outset of mediation, Appellant signed the Office’s Mediation and Confidentiality Agreement, agreeing not to disclose “any communications, statements, or documents prepared for the mediation.” Appellant does not dispute that, while in the mediation process, he disclosed to non-parties comments made during mediation by participants for Appellee.

Upon learning of the disclosures, on February 12, 2010 and in subsequent filings, Appellee alleged that Appellant’s disclosures violated the confidentiality required by Section 416 of the Act (2 U.S.C. 1416), and the Office’s Mediation Agreement. In these filings, Appellee requested that Appellant’s race discrimination claim be dismissed with prejudice, that monetary sanctions

be imposed against him, and that the Executive Director take steps to “stop Mr. Taylor from making any further disclosures relating to counseling and mediation in this matter.” This breach of confidentiality issue was assigned to Hearing Officer Winfield, who conducted proceedings under Proc. Rule §1.07(e).

At a March 24, 2010 hearing before Hearing Officer Winfield in the confidentiality proceedings, Appellee presented evidence that Appellant had disclosed to non-parties comments and statements obtained during confidential mediation. Appellant expressly declined to attend the proceedings; consequently, he did not rebut the evidence presented nor in any way seek to defend his actions.

On March 29, 2010, still proceeding *pro se*, Appellant filed a complaint under Section 405 of the CAA based on his race discrimination claim. That complaint was assigned to Hearing Officer Warren King for disposition.

On April 6, 2010, Hearing Officer Winfield issued a decision and order in the confidentiality proceedings, holding that Appellant knowingly violated the confidentiality requirements of the CAA and issued an order granting Appellee’s request for expenses and attorney’s fees incurred in challenging the breaches of confidentiality and directing that Appellee submit its statement of expenses, including attorney’s fees. She further enjoined Appellant from making further disclosures of confidential information. Hearing Officer Winfield did not grant Appellee’s request that the underlying race discrimination claim be dismissed.

On April 14, 2010, Appellee filed a motion before Hearing Officer King to dismiss the Section 405 race discrimination complaint, based on the same allegations presented to Hearing Officer Winfield that Appellant had breached confidentiality. No other sanctions were requested in the motion. Attached to the motion was a copy of Hearing Officer Winfield’s decision and order of April 6, 2010. In a letter dated April 23, 2010, Appellant requested withdrawal of his race discrimination complaint. Appellee did not oppose Appellant’s request for withdrawal or request that Hearing Officer King defer ruling on Appellant’s request until after Hearing Officer Winfield had issued her final order on the amount of fees. On April 27, 2010, Hearing Officer King issued an Order approving the withdrawal of the complaint and did not award any costs or fees. The April 27 Order was not appealed and became final, thereby terminating the race discrimination proceedings under Section 405 of the CAA.

On May 3, 2010, Hearing Officer Winfield ordered that Appellant pay the Committee a specified amount for attorney fees and costs associated with pursuing the alleged breaches of confidentiality. On May 5, 2010, the Office of Compliance notified the parties that Hearing Officer Winfield’s Decisions and Orders of April 6, 2010 and May 3, 2010 had been entered into the records of the Office on May 3, 2010 as a final decision.

On June 3, 2010, Appellant filed the instant petition for review of Hearing Officer Winfield’s Decisions and Orders awarding sanctions for the breach of confidentiality. Appellee timely filed a responsive brief that challenged Appellant’s petition for review as untimely and requested that the Board affirm the decision of the Hearing Officer.

II. Timeliness of Petition for Review - Jurisdiction

Appellee contends that the Petition for Review filed on June 3, 2010 is untimely; consequently, we must decide whether we have jurisdiction to decide this appeal before proceeding. See, *e.g.*, *Britton v. Office of the Architect of the Capitol*, 01-AC-346 (CV, FM, RP) (February 2, 2004).

Hearing Officer Winfield's decisions and orders awarding sanctions for the breach of confidentiality were issued pursuant to Proc. Rule §1.07(e). Under this Rule, the sanctions decisions and orders "shall be subject to review on appeal of the final decision of the Hearing Officer under section 406 of the Act."¹ To decide whether the Petition for Review is timely, we must therefore first decide when "the final decision of the Hearing Officer under section 406 of the Act" was issued and entered.

Our review of the record shows that the "final decision of the Hearing Officer under section 406 of the Act" was issued and entered into the records of the Office on April 27, 2010 when Hearing Officer King decided to accept the Complainant's withdrawal request and issued an order approving the withdrawal without awarding any costs or sanctions. Under section 406(a) of the CAA, "[a]ny party aggrieved by the decision of a hearing officer under section 405(g) of this title may file a petition for review by the Board not later than 30 days after entry of the decision in the records of the Office." Section 405 of the CAA describes proceedings that commence when the covered employee files a complaint with the Office under section 405(a) and ends when the hearing officer appointed to "consider the complaint" filed by the covered employee issues a final decision and order under section 405(g). These were the race discrimination proceedings before Hearing Officer King.

Under Proc. Rule §5.03(f), the submission of a withdrawal request does not terminate the case unless it is approved by the Hearing Officer; however, if the Hearing Officer approves the withdrawal request, he or she has made a final decision that terminates all proceedings under section 405. Here, Appellee failed to object to terminating the CAA §405 proceedings with an order approving the withdrawal request and made no attempt to preserve any potential monetary award by requesting that Hearing Officer King defer his ruling until after Hearing Officer Winfield issued an order on the amount of expenses and fees she was awarding Appellee. Having heard no objection, Hearing Officer King entered a decision and order approving the withdrawal on April 27, 2010. Because Hearing Officer King's decision was not appealed to the Board, it became the final decision of the Office. CAA §405(g) and Proc. Rule §7.16(d).

¹ Appeals from sanctions ordered for breach of confidentiality under our Procedural Rules and the CAA are limited. Thus, the only provision under Proc. Rule §1.07(e)(4) for review of an order awarding reasonable expenses, including attorney fees caused by the violation, is an appeal of the final decision under CAA §406. Section 406(a) provides that a party aggrieved by the decision of a hearing officer in proceedings conducted pursuant to CAA §405 may file a petition for review by the Board no later than 30 days after entry of the hearing officer's decision in the records of the Office. A §405 proceeding is one respecting complaints filed by covered employees alleging violations of laws incorporated by the CAA. As discussed in the text, the final decision in this §405 proceeding was Hearing Officer King's order of April 27 approving Appellant's withdrawal of his complaint, thereby terminating the §405 proceeding. That order did not award any expenses, including attorney fees, as part of his §405 order. Hearing Officer Winfield's final order awarding expenses and fees in the collateral sanctions proceeding did not issue until May 3. Inasmuch as there was no §405 proceeding extant at that time, there was no basis for an appeal under the CAA or the OOC Procedural Rules.

Accordingly, that final decision terminated the complaint proceeding and thus precluded any further action by Hearing Officer Winfield in the ancillary Proc. Rule 1.07(e) sanction proceedings as well as any appeal rights Appellant might have to contest a monetary sanctions award under CAA §406 and Proc. Rule §1.07(e).² Because Hearing Officer Winfield's April 6 and May 3 decisions and orders regarding sanctions were not entered into the records of the Office until May 3, 2010, after the termination of the section 405 proceeding, they were void *ab initio*, thus rendering moot this appeal.³

III. Importance of Confidentiality

Sanctions may be necessary to protect the integrity of the dispute resolution process contemplated by the Act. In this respect, under the Procedural Rules, the Office and its Hearing Officers have the power to control and supervise proceedings conducted under Sections 402, 403 and 405 of the Act, and may rely on this power to impose appropriate sanctions for a breach of the Act's confidentiality requirements. This authority to impose sanctions must be exercised with restraint and discretion, and only as needed to preserve the integrity of the proceedings.⁴

Although we have determined that Hearing Officer Winfield's decisions and orders regarding sanctions are invalid, we wish to make it clear that we do not in any way approve of the Appellant's conduct. Confidentiality plays a significant role in safeguarding the integrity of the dispute resolution process contemplated by the Act, and encourages the parties to promptly and fairly resolve their disputes.

In holding that Appellant violated confidentiality, Hearing Officer Winfield relied on the plain language of the Act, the Procedural Rules, and the Office of Compliance Mediation and Confidentiality Agreement signed by the parties. Section 416 of the Act expresses clearly Congress' intent that all mediation be strictly confidential.⁵ The Office's Procedural Rules support strict confidentiality in counseling and mediation and prohibit participants in the

² Proc. Rule § 1.07(e) limits Board review of sanctions decisions to appeals of the final decision of the Hearing Officer under CAA §406 because the only Hearing Officer decisions authorized by the CAA are those under CAA § 405(g). For this reason, Proc. Rule §1.07(e) requires that orders and decisions regarding sanctions be incorporated into the final order under §405(g) to be valid and enforceable under the CAA.

³ Furthermore, because Hearing Officer Winfield's sanctions decisions and orders were entered after the final decision issued under section 405 and hence were invalid, they should not have been entered in the records of the Office under §405(g) of the CAA or Proc. Rule §7.16(b). Accordingly, even though the Petition for Review filed on June 3, 2010 is untimely under CAA, §406(a) because it was not filed within thirty days of the final decision of April 27, 2010, it is well established that agencies have the inherent authority to correct errors in an adjudication. *American Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145, 79 S.Ct. 170, 3 L.Ed.2d 172 (1958); *Howard Sober, Inc. v. ICC*, 628 F.2d 36, 41-42 (D.C.Cir.1980); *United States v. Civil Aeronautics Bd.*, 510 F.2d 769, 772-76 (D.C.Cir.1975); *City of Long Beach v. Department of Energy*, 754 F.2d 379, 387-88 (Temp. Emer. Ct.App.1985) (recognizing this inherent authority when clear statutory authority is lacking). We also note that, under the CAA, we must ultimately decide whether a decision will be enforced, regardless of whether that decision has been appealed. CAA §407(a)(2). In the interest of administrative efficiency and to provide guidance to both the Office and the parties, we have therefore decided to determine the validity of Hearing Officer Winfield's decisions and orders regarding sanctions and to further clarify our decision.

⁴ *Cf. Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 2132 (1991).

⁵ Section 416(a) of the Act requires that all counseling shall be "strictly confidential," except that the Office and a covered employee may agree to notify the employing office of the allegations." Section 416(b) provides that "All mediation shall be strictly confidential." (emphasis added)

confidential proceedings from disclosing to non-participants information learned in those proceedings.⁶ In addition, the Office's Mediation and Confidentiality Agreement signed by the parties contains an acknowledgment of the confidentiality requirements of the Act. The record reveals that Appellant disclosed to non-parties statements made by representatives of Appellee during confidential mediation, thus violating confidentiality under the Act.

Appellant's conduct was a flagrant violation of the Act's confidentiality requirements, and sanctions therefore were necessary. However, because of the procedural posture of this matter, we are unable to reach the question of what sanctions would be appropriate in this case. We do note, however, that Appellant's race discrimination case has been dismissed and given the expiration of the statute of limitations under the CAA, it cannot be revived. In sum, Hearing Officer Winfield ordered the sanctions after Hearing Officer King had already approved Appellant's withdrawal of his race discrimination claim without awarding costs or sanctions. For the reasons stated earlier, this is not in accordance with Proc. Rule §1.07(e). We therefore conclude that, under our procedural rules, the termination of Appellant's race discrimination claim appropriately resolved the matter before us and that the imposition of the additional sanctions by Hearing Officer Winfield was not consistent with required procedures.⁷

ORDER

For the reasons stated above, the Board hereby dismisses the appeal.⁸

It is so ORDERED.

Issued, Washington, D.C. on February 14, 2012.

⁶ Section 1.06 (a) and (b) of the OOC Procedural Rules states: "In accord with section 416 of the Act, it is the policy of the Office to maintain, to the fullest extent possible, the confidentiality of the proceedings and of the participants in proceedings conducted under sections 402, 403, 405 and 406 of the Act and these rules. At the time that any individual, employing office or party, including a designated representative, becomes a participant in counseling under section 402, mediation under section 403, the complaint and hearing process under section 405, or an appeal to the Board under section 406 of the Act, or any related proceeding, the Office will advise the participant of the confidentiality requirements of section 416 of the Act and these rules and that sanctions may be imposed for a violation of those requirements." See also Section 2.04 (a) that provides that "Mediation is a process in which employees, employing offices, and their representatives...meet...with a neutral trained to assist them in resolving their disputes....the mediation process, whether or not a resolution is reached, *is strictly confidential*, pursuant to section 416 of the Act."

⁷ The Board previously has noted that "...dismissal may, on certain occasions, serve as an ultimate sanction, aimed at punishing abuses of the system and deterring future misconduct." *Ann Rollins v. the Office of the Clerk of the House of Representatives*, 03-HS-105 (CV, AG) (December 23, 2004); citing *Shea v. Donohoe Const. Co., Inc.*, 795 F.2d 1071, 1074 (D.C. Cir. 1986). Here, after Hearing Officer Winfield sanctioned Appellant for breach of confidentiality, Appellant withdrew his complaint with the approval of Hearing Officer King, thus terminating his case, the functional equivalent of a dismissal on the merits that cannot be revived.

⁸ Because we have determined that we do not have jurisdiction to reach the merits of this appeal, we need not decide whether, and under what circumstances (if any), monetary sanctions or the type of permanent injunctive relief ordered by Hearing Officer Winfield can be awarded to an employing office under the CAA. We believe that this issue is best addressed through future rulemaking.