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

THOMAS J. DEVLIN,	)	
	)	
Appellant,	)	
	)	
	)	
	)	**Case Number: 06-AC-20 (RP)**
OFFICE OF THE ARCHITECT OF THE CAPITOL,	)	
	)	
Appellee.	)	
	)	
	)	

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

DECISION OF THE BOARD OF DIRECTORS

This case is before the Board of Directors ("Board") through a petition for review filed by Thomas J. Devlin ("Petitioner" or "Devlin"). Devlin filed a claim of retaliation against the Office of the Architect of the Capitol ("AOC" or "Respondent"), alleging violation of Section 207(a) of the Congressional Accountability Act ("CAA") when he was not selected for a vacant position for which he applied. The hearing officer dismissed the complaint on the day of the hearing, as Petitioner refused to present any evidence in support of his complaint. For the reasons set forth below, the Board affirms the decision of the hearing officer.

I. Background

In 2005, Petitioner applied for the position of Building Services Supervisor with the AOC. On June 20, 2005, Petitioner learned that he was rated "qualified" but not "highly qualified" for the position, and his application was not forwarded to the selecting committee for further consideration. Another candidate was selected for the position, and Devlin initiated a claim with the Office of Compliance ("Office") for the non-selection, alleging hostile work environment and retaliation.

On the day of the hearing on Petitioner's complaint, the hearing officer denied the Petitioner's request for certain discovery. The hearing officer viewed these documents *in camera* and determined that the material contained therein was neither relevant to Petitioner's claims, nor would it lead to relevant evidence in Petitioner's claims. Based on the hearing officer's discovery ruling, Petitioner refused to call witnesses or put on any evidence at the hearing, and the hearing officer dismissed the complaint.

Petitioner timely filed a petition for review, alleging that the hearing officer abused her discretion by dismissing his claim for lack of prosecution. In addition, Petitioner alleged that the hearing officer abused her discretion by denying his aforementioned discovery request. Specifically, Petitioner argued that the hearing officer erroneously substituted her judgment for his by addressing an issue of relevancy by means of an *in camera* inspection of the documents requested.

II. Standard of Review

The Board's standard of review for appeals from a hearing officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (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. 2 U.S.C. §1406(c). The Petitioner in this case argues that the hearing officer's decision was an abuse of discretion. The Board's review of the legal conclusions that led to the hearing officer's determination is *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

III. Analysis

The Petitioner's Complaint was Properly Dismissed for Lack of Prosecution

Petitioner claimed that his complaint should not have been dismissed for lack of prosecution, as the hearing officer rendered him unable to proceed when she denied his discovery request. Petitioner claimed that denying the Petitioner the requested information and then dismissing his claim because he did not proceed without it was an abuse of the hearing officer's discretion.

Typically, in determining whether to dismiss a case for want of prosecution, a trier of fact will weigh "the court's need to manage its own docket, the public interest in expeditious resolution of litigation, and the risk of prejudice to the defendants against the policy favoring disposition of cases on their merits and the availability of less drastic sanctions." *See Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984)(dismissal not abuse of discretion where all factors were considered and plaintiff was unresponsive to orders of court). *See Also Marshall v. Sielaff*, 492 F.2d 917, 918 (3rd Cir. 1974)(courts must be given discretion to dismiss cases for lack of prosecution so that courts can manage its own affairs; procedural history of case is one consideration in determining whether court's dismissal of claim is abuse of discretion).

Considering the above factors, dismissal of Petitioner's claim was appropriate. Petitioner failed

to proceed with his claim and did not offer any evidence to the hearing officer. He neither made an offer of proof as to the need for the denied discovery, nor did he make any type of evidentiary showing that would have assisted the hearing officer in deciding on action other than dismissal. The Petitioner's refusal to proceed gave the hearing officer no alternative other than dismissal.

In *Marshall v. Sielaff*, 492 F.2d 917 (3rd Cir. 1974), the Third Circuit addressed a situation wherein the plaintiff gave the judge no alternative but to dismiss the case. The *Marshall* plaintiff, a prison inmate, was granted in part and denied in part, a writ of *habeas corpus* for the presentation of certain inmate witnesses at his trial. The day of trial, the plaintiff filed a motion for reconsideration, and indicated the importance of the witnesses whose presence was denied. Plaintiff was represented by counsel, who informed the judge that despite counsel's advice to the plaintiff, plaintiff refused to proceed without the witnesses. The judge denied the motion to reconsider and granted the defendant's motion to dismiss for failure to prosecute. On appeal, the Third Circuit held that the plaintiff's refusal to call witnesses "left the district judge no choice" but to dismiss the case for want of prosecution. *Marshall*, 492 F.2d at 919.

Here, Petitioner directly failed to present any evidence in support of his claim. Petitioner made his intentions clear that he wanted to present his issues to the Board of Directors and that he did not wish to proceed any further before the hearing officer. After indicating his refusal to call any witnesses, the following dialogue ensued:

> HEARING OFFICER: From the moment the case was filed, you have been looking for a case through the records that I just declined to give you, which is why - - if I'm not misreading you, which is why you can't present any witnesses, because you don't have anything to ask them.
>
> MR. LEIB [Petitioner's Counsel]: No, ma'am. It's because there are certain legal issues that must be decided by the Board of Directors.

Transcript of Proceedings, August 16, 2006, p.115. Throughout the proceedings, the hearing officer repeatedly asked Petitioner to present some evidence in support of his claim, and Petitioner repeatedly refused. As such, the Petitioner's actions did not allow the hearing officer to dispose of the case on the merits. It is clear from the record that Petitioner did not proceed with his claim, not because he could not present evidence, but because he wanted to present his claim to the Board of Directors.

In addition, there was no sanction less drastic or more appropriate given the circumstances. This case involves the direct refusal of the Petitioner to proceed with his claim because he disagreed with the hearing officer's ruling. Such refusal is properly met with the sanction of dismissal, and such order of the hearing officer is not an abuse of discretion. *See Ruocco v. C.I.R.*, 346 F.3d 223 (1st Cir. 2003)(no abuse of dismissal for lack of prosecution where plaintiff refused to present evidence in support of her claim).

The Board will not Review the Piecemeal Discovery Issue

Petitioner challenges the hearing officer's ruling on certain of his discovery requests, and claims

that her *in camera* inspection of the requested documents was an abuse of discretion. Petitioner alleges that the hearing officer's *in camera* inspection improperly substituted her judgment for his and resulted in her denial of his request for certain documents. Petitioner included in his petition for review his challenge to the hearing officer's *in camera* inspection as well as her ultimate discovery ruling and asks this Board to rule on the hearing officer's discovery ruling. In so doing, Petitioner has brought forth a challenge to an interlocutory ruling.

Typically, interlocutory rulings will merge with the final judgment and become reviewable. However, under the theory of piecemeal litigation and appeals, an exception to this rule may apply where a party refuses to proceed because of an adverse ruling and then presents the adverse ruling as an issue before the reviewing body. *See Ash v. Cvetkov*, 739 F.2d 493 (9th Cir. 1984)(merger rule of final judgment not applicable where plaintiff fails to proceed at trial); *Marshall v. Sielaff*, 492 F.2d 917 (3rd Cir. 1974)(no review of interlocutory ruling where plaintiff refused to present evidence at trial); *Hughley v. Eaton Corp*., 572 F.2d 556, 557 (6th Cir. 1978)(interlocutory ruling did not merge with final judgment for review on appeal where district court dismissed case for failure to prosecute); *Dubose v. Minnesota*, 893 F.2d 169, 171 (8th Cir. 1990)(dismissal of action for failure to prosecute bars review of interlocutory rulings); *John's Insulation, Inc. v. L. Addison and Assoc., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998)(review of the merits of an interlocutory order is beyond the scope of an appeal for dismissal for lack of prosecution); *Shannon v. General Electric Company*, 186 F.3d 186, 192-3 (2nd Cir. 1999)(interlocutory order did not merge into final judgment where claims dismissed for failure to prosecute).

The Ninth Circuit has addressed this issue in *Ash v. Cvetkov*, 739 F.2d 493 (9th Cir. 1984). In *Ash*, the plaintiff received prior default judgments against the defendants. The district court subsequently quashed the judgments and entered an order to show cause as to why the case should not be dismissed. The plaintiff filed direct appeals of the district court's rulings, as opposed to filing interlocutory appeals with the district court, only to have the circuit court deny the appeals since they were interlocutory and not directly appealable. Plaintiff failed to appear for the order to show cause hearing, and the court dismissed the claims for want of prosecution. The plaintiff appealed the dismissal and raised as claims the interlocutory ruling of the district court quashing the prior judgments.

The *Ash* court noted that typically interlocutory rulings merge with the final judgment and become reviewable on appeal. However, the 9th Circuit refused to apply this general rule in *Ash* and did not address the interlocutory ruling, reasoning that:

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened . . . To review the district Court's refusal . . . is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Ash, at 497, *citing Huey v. Teledyne, Inc.,* 608 F.2d 1234, 1240 (9th Cir. 1979). Thus, the *Ash* court applied an exception to the merger rule and declined to review the interlocutory rulings by the district court. The *Ash* court further reasoned that it would be unwise to encourage litigants to refuse to participate by allowing appellate review of otherwise unreviewable decisions.

The issue in *Ash* is similar to the issue presented to the Board. Petitioner received an adverse ruling from the hearing officer and refused to proceed with the hearing. Although Petitioner was present at the hearing, unlike the plaintiff in *Ash*, he still refused to present any evidence because of the hearing officer's ruling. Akin to the Ninth Circuit's rationale in *Ash*, the Board will not address the interlocutory issue of the hearing officer's denial of Petitioner's discovery, as such review would constitute piecemeal litigation and encourage litigants, such as Petitioner, to refuse to proceed before a hearing officer, only to present issues before the Board which otherwise would be unreviewable.

Petitioner would have perfected his appeal on this issue had he presented his evidence to the hearing officer, awaited her decision, and filed his petition for review at that time, as the Third Circuit noted in *Marshall v. Sielaff*, *supra*. As mentioned above, the *Marshall* plaintiff challenged the judge's partial grant of a writ of *habeas corpus* for the presentation of certain inmate witnesses at trial. Plaintiff was represented by counsel, who informed the judge that, despite counsel's advice to the plaintiff, plaintiff refused to proceed without the witnesses. The judge denied the motion to reconsider and granted the defendant's motion to dismiss for failure to prosecute.

On appeal to the Third Circuit, the plaintiff in *Marshall* presented as issues the dismissal of his claim as well as the denial of the writ of *habeas corpus*. The Third Circuit noted that the trial court had granted two of the five writs, and plaintiff could have presented evidence on his claim. If he had succeeded, there would have been no issue on the denial of the other writs. If he had been unsuccessful, the interlocutory ruling would have merged with the final judgment, and all rulings would have been reviewable before the Third Circuit. The appellate court upheld the dismissal for lack of prosecution, and refused to address the substantive issue of the denial of the writ. The Court reasoned that the policy against piecemeal litigation prevented it from addressing the substantive issue.

As in *Marshall*, the Petitioner was granted certain interrogatories and production of documents (and witnesses were available to Petitioner during depositions as well as at the hearing), and Petitioner was denied certain ones as well. As in *Marshall*, Petitioner refused to proceed on the day of the hearing, due to the hearing officer's adverse discovery ruling. Consequently, Petitioner deprived the Board of a complete record for review with his refusal to proceed.

For the Board to review the hearing officer's denial of Petitioner's access to the requested discovery documents under these facts is "to invite the inundation" of the Board's docket with "requests for review of interlocutory orders and to undermine the ability of [the hearing officers] to achieve orderly and expeditious disposition of cases." *Marshall*, 492 F.2d at 919. Petitioner

had options to address the hearing officer's adverse discovery ruling: he could have filed a Rule 7.13 motion with the hearing officer[1], and he could have presented his evidence before the hearing officer. Had Petitioner been successful, as the Third Circuit reasoned in *Marshall*, there would have been no issue for Petitioner to present to the Board. Had Petitioner been unsuccessful, the hearing officer's discovery ruling would have merged with the final judgment and all rulings would have been properly reviewed by the Board. Petitioner failed to proceed, however. He intentionally refused to put on evidence, and such action is discouraged by this Board as it is discouraged by the Circuits.[2]

The Respondent's AVUE Exhibit is Improperly before the Board

Attached to its brief in opposition to the petition for review, Respondent included approximately six pages of documents describing the AVUE system. The documents appear to have been downloaded on December 5, 2006, from an AVUE website.[3] Petitioner objects to the Respondent's inclusion of the documents with its brief, as the documents were never presented to Petitioner during discovery, nor were they made part of Respondent's exhibit list or included in the record in any way.

Respondent argues that AVUE and its procedures were discussed during pre-hearing conferences and were made part of the record in that respect. Respondent claims that Petitioner's refusal to proceed on the day of the hearing is the reason that the attachments were not made part of the record.[4] Respondent suggests that the attachments are mere "illustrations" and are "readily available" on the internet.

Respondent's arguments do not address the fact that the documents presented by the AOC on review to the Board were never made part of the hearing record. The documents, which the AOC concedes to be "readily available," should have been properly made part of the record prior to their submission to the Board. These documents were not in evidence, were never seen by the Petitioner or considered by the hearing officer, and are improperly before the Board on review. The Petitioner's motion to strike the attachments is granted.

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office of Compliance Procedural Rules, the Board affirms the hearing officer's dismissal of

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[1] Rule 7.13 of the Office of Compliance Procedural Rules provides a mechanism similar to an interlocutory appeal, whereby Petitioner (with approval of the hearing officer) could have brought this issue to the Board of Directors without refusing to present evidence on his case.

[2] Because the Board has determined that the hearing officer's ruling regarding discovery is beyond the scope of this appeal, the Board does not address the possibility that the hearing officer's discovery ruling was erroneous.

[3] The URL and date appear at the bottom of each page of the attachment.

[4] Respondent did not elaborate on this point.

Petitioner's complaint of retaliation and hostile work environment for failure to prosecute.

It is so ORDERED.

Issued, Washington, D.C.
April 25, 2007

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Appellant,	)	
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Appellee.	)	
	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing *Decision of the Board of Directors* was served to the parties by first-class mail at the addresses below on the 25th of April, 2007:

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Respectfully submitted,

/s/ Selviana B. Bates
Selviana B. Bates
Hearing Clerk