

OFFICE OF COMPLIANCE
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| Office of the Architect of the Capitol, |) | |
| Appellant, |) | |
| |) | Case Numbers: 11-AC-138 (CV, RP) |
| v. |) | 11-AC-129 (CV, DA, RP) |
| |) | |
| Ana Cienfuegos, |) | |
| 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 two petitions for review filed by the Office of the Architect of the Capitol (“AOC” or “Appellant”). Ana Cienfuegos (“Cienfuegos” or “Appellee”) filed two complaints against AOC alleging various forms of discrimination and retaliation. Those claims were ultimately dismissed on the merits, but during the course of the litigation, both Cienfuegos and AOC complained of alleged breaches of confidentiality by the opposing party. AOC seeks review of the Hearing Officer’s September 24, 2012 order holding that AOC breached confidentiality and awarding attorney’s fees and back pay to Cienfuegos, in amounts to be determined later; part of his July 30, 2013 order holding that Cienfuegos breached confidentiality but declining to award attorney’s fees to AOC; and his April 25, 2014 order awarding attorney’s fees to Cienfuegos in the claimed amount of \$5,148.00.

For the reasons set forth below, we reverse the Hearing Officer’s decision finding a breach of confidentiality and awarding back pay and attorney’s fees to Cienfuegos, and we vacate the attorney’s fee award, but we affirm the Hearing Officer’s decision not to award attorney’s fees to AOC.

I. Background

In April 2012, Cienfuegos filed two Complaints that were joined into a single administrative proceeding. Cienfuegos alleged that she suffered from discrimination based on her race, national origin, disability, and gender, as well as retaliation and sexual harassment, while employed by AOC as a custodial employee. The Hearing Officer eventually dismissed her claims for failure to establish any unlawful employment action, and that dismissal has not been appealed.

On May 24, 2012, AOC attorney John C. Ward took Cienfuegos's deposition in the administrative proceeding. In the course of that deposition, Cienfuegos testified that she had been terminated from a previous job. Ward subsequently obtained public records from a state court system that corroborated Cienfuegos's testimony. Ward shared the information with his client, and on June 6, 2012, AOC sent Cienfuegos a letter terminating her employment. The letter stated that the decision to terminate her was based on the information AOC had recently discovered regarding her previous termination, and the fact that she had not included her position with that employer on her AOC job application. The letter gave Cienfuegos ten days to challenge the decision, but she did not respond.

On July 9, 2012, the OOC received a letter from Cienfuegos's attorney, alleging that AOC had violated the confidentiality provisions contained in section 1.07 of the Procedural Rules. The letter alleged that Ward improperly conveyed confidential information, and that AOC used that confidential information for an improper purpose when it terminated Cienfuegos's employment. A hearing was held regarding the alleged breach of confidentiality, and the Hearing Officer issued his ruling on September 24, 2012. The Hearing Officer imposed sanctions on AOC, concluding that AOC first learned of Cienfuegos's prior discharge at her deposition, that the termination was based solely on that information, and that the termination did not fall within any of the permitted uses of confidential information under the Procedural Rules. He awarded Cienfuegos attorney's fees, as well as back wages "from the date of her termination to the date she files a Complaint with the Office of Compliance over her termination; or raises the matter in another legal proceeding[.]"

Cienfuegos subsequently filed a complaint in the United States District Court for the District of Columbia, alleging that AOC had wrongfully terminated her. On June 20, 2013, AOC complained to the OOC that Cienfuegos and her attorney had themselves violated the confidentiality provisions in the Procedural Rules, by including a declaration from the OOC administrative proceeding as an exhibit to the federal court complaint. Following another hearing, the Hearing Officer ruled in AOC's favor, finding that the declaration "constitutes a participant-provided document within the meaning of §1.07(d), and that Complainant breached confidentiality by attaching it to her judicial complaint." He described this disclosure as "inexcusable." However, he chose not to impose sanctions on Cienfuegos, explaining that "Inasmuch as the court complaint is integrally related to these pending administrative matters Complainant's use of the [name deleted] declaration can hardly be viewed as willful or a patent affront to the Confidentiality requirements." Instead, the Hearing Officer "admonished" the parties and put them "on notice that any subsequently [sic] breach, as the circumstances may warrant, will be subject to harsher sanctions."

Cienfuegos's underlying claims were dismissed on March 6, 2014. On April 25, 2014, the Hearing Officer issued an award of \$5,148.00 in attorney's fees to Cienfuegos. These appeals followed.

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 Board reviews *de novo* the legal conclusions that led to the Hearing Officer's determinations. *Katsouros v. Office of the Architect of the Capitol*, Case Nos. 07-AC-48 (DA, RP), 09-AC-10 (DA, FM, RP), 2011 WL 332311, at *3 (Jan. 21, 2011).

III. Analysis

AOC challenges the Hearing Officer's finding that it committed a breach of confidentiality, as well as his decision to award attorney's fees and back pay to Cienfuegos. AOC also challenges the Hearing Officer's decision not to award attorney's fees to AOC for Cienfuegos's own breach of confidentiality. For the reasons that follow, we reverse the 2012 Order and vacate the award of attorney's fees to Cienfuegos, but we will not disturb the 2013 Order regarding Cienfuegos's breach of confidentiality.

AOC Did Not Breach Confidentiality

Section 416 of the CAA provides that, with exceptions not applicable here, "all proceedings and deliberations of hearing officers and the Board, including any related records, shall be confidential." 2 U.S.C. § 1416(c). Section 1.07(b) of the Procedural Rules provides:

Unless specifically authorized by the provisions of the CAA or by order of the Board, the Hearing Officer or a court, or by the procedural rules of the Office, no participant in counseling, mediation or other proceedings made confidential under section 416 of the CAA ("confidential proceedings") may disclose the contents or records of those proceedings to any person or entity. Nothing in these rules prohibits a bona fide representative of a party under section 1.05 from engaging in communications with that party for the purpose of participation in the proceedings, provided that such disclosure is not made in the presence of individuals not reasonably necessary to the representative's representation of that party. Moreover, nothing in these rules prohibits a party or its representative from disclosing information obtained in confidential proceedings for the limited purposes of investigating claims, ensuring compliance with the Act or preparing its prosecution or defense, to the extent that such disclosure is reasonably necessary to accomplish the aforementioned purposes and provided that the party making the

disclosure takes all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintain the confidentiality of such information.

Section 1.07(c) defines “Participant” as “any individual or party, including a designated representative, that 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 which is expressly or by necessity deemed confidential under the Act or these rules.”

The Hearing Officer held that Ward and AOC violated these provisions when Ward disclosed to his client information he learned in Cienfuegos’s deposition. This holding was erroneous, for two reasons.

First, the Procedural Rules state that “Nothing in these rules prohibits a bona fide representative of a party under section 1.05 from engaging in communications with that party for the purpose of participation in the proceedings, provided that such disclosure is not made in the presence of individuals not reasonably necessary to the representative’s representation of that party.” AOC was a party to this case and a participant in the hearing process under section 405, and Ward was a bona fide representative of AOC. The deposition was taken as discovery for the case in which Ward was representing AOC, and the Procedural Rules do not restrict an attorney’s ability to discuss with his client information that is learned through discovery in the client’s case, provided that the discussion does not take place “in the presence of individuals not reasonably necessary” to the attorney’s representation of the client. There is no allegation or evidence that any such individuals were present in this case.

Second, section 1.07(d) of the Procedural Rules states that a participant in OOC proceedings “is free to disclose facts and other information obtained from any source outside of the confidential proceedings.” The record evidence indicates that the day after the deposition, Ward obtained an official public record from a state court regarding Cienfuegos. The Hearing Officer found that AOC “only knew to seek public records regarding [Cienfuegos’s] prior employment because of her deposition testimony.” However, the Procedural Rules, as written, do not limit a participant’s ability to use information that was previously available to the public simply because the information was first brought to the participant’s attention during confidential proceedings.

Because AOC did not violate the confidentiality provisions in our Procedural Rules, sanctions against AOC were inappropriate. We therefore reverse the Hearing Officer’s award of attorney’s fees and back pay to Cienfuegos.¹

¹ Even if AOC had breached the confidentiality provisions, back pay would not have been an available sanction for such a violation. As the Federal Circuit has held, “the Back Pay Act ‘is merely derivative in application; it is not itself a jurisdictional statute.’ Unless some other provision of law commands payment of money to the employee for the ‘unjustified or unwarranted personnel action,’ the Back Pay Act is inapplicable.” *Spagnola v. Stockman*, 732

The Hearing Officer Did Not Err in Declining to Award Attorney's Fees to AOC

In his 2013 Order, the Hearing Officer held that Cienfuegos and her attorney had violated the confidentiality provisions of the Procedural Rules by attaching a declaration she had submitted in the OOC's administrative proceeding in this case to her complaint in District Court. That holding has not been challenged. We express no opinion on whether Cienfuegos breached confidentiality by attaching a declaration she had submitted in the OOC's administrative proceeding in this case to her complaint in District Court. Cienfuegos did not appeal that determination and it is not before us.

Despite finding that Cienfuegos breached confidentiality and stating that the breach was "inexcusable," the Hearing Officer declined to award attorney's fees to AOC, but instead sanctioned Cienfuegos and her attorney by barring them from relying on the disclosed document in this proceeding, admonishing them, and warning that harsher sanctions would apply if they breached confidentiality again. Although AOC argues that the Hearing Officer did not justify this decision, the 2013 Order does include the Hearing Officers' reasoning:

I have pointed out that this alleged confidentiality breach appears to be a case of first impression. Complainant was not on plain notice that she was inhibited by the CAA Confidentiality provision in how she could state her claim in her district court complaint. Inasmuch as the court complaint is integrally related to these pending administrative matters Complainant's use of the [name deleted] declaration can hardly be viewed as willful or a patent affront to the Confidentiality requirements. ... In view of the extenuating factors cited above I do not find it appropriate to award attorney fees and expenses to Respondent.

The Procedural Rules in section 1.07(e)(4) require the Hearing Officer to award reasonable expenses, including attorney's fees, "unless the Hearing Officer finds that the failure was substantially justified *or that other circumstances make an award of expenses unjust*" (emphasis added). The Hearing Officer did explain why he felt that the circumstances of Cienfuegos's breach made an award of expenses and attorney's fees to AOC unjust.

AOC argues that this decision is unfair in light of the fact that the Hearing Officer had already awarded attorney's fees to Cienfuegos for AOC's alleged breach, even though that too was arguably "a case of first impression." However, the 2013 Order itself does not contain any clear errors of law, abuse of discretion, or other grounds for reversal.

F.2d 908, 912 (Fed. Cir. 1984) (quoting *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983)). All of Cienfuegos' claims under Title VII and the ADA were dismissed by the Hearing Officer, and the CAA itself does not independently entitle an employee to back pay absent a violation of one of the money-mandating statutes it applies.

ORDER

For the foregoing reasons, pursuant to section 406(e) of the CAA and section 8.01(d) of the Procedural Rules, the Board sets aside the Hearing Officer's September 24, 2012 Ruling on Complainant's Confidentiality Breach Claim Against Respondent, as it is not consistent with law. The Board reverses the Hearing Officer's ruling that AOC breached the confidentiality provisions of the OOC Procedural Rules, and vacates the April 25, 2014 Order Awarding Complainant Attorney's Fees for Respondent's Confidentiality Breach. The Hearing Officer's July 30, 2013 Ruling on Respondent's Confidentiality Breach Claim Against Complainant and Her Counsel is affirmed.

It is so ORDERED.

Issued, Washington, DC, December 11, 2014