U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

MICHAEL D. LEAR,

COMPLAINANT,

v.

GFL ENVIRONMENTAL,

RESPONDENTS.

ARB CASE NO. 2024-0045

ALJ CASE NO. 2023-STA-00061
ALJ MONICA MARKLEY

DATE: May 19, 2025

Appearances:

For the Complainant:
Michael D. Lear; *Pro Se*; Covington, Georgia

***For the Respondent*:**
Lehoan T. Pham, Esq. and Karen M. Charlson, Esq.; *Littler Mendelson, P.C.*; Minneapolis, Minnesota

Before JOHNSON, Chief Administrative Appeals Judge, THOMPSON and KAPLAN, Administrative Appeals Judges; Judge Kaplan, *concurring*

DECISION AND ORDER

JOHNSON, Chief Administrative Appeals Judge:

This case arises from a complaint filed by Michael D. Lear (Complainant) against his employer, GFL Environmental (Respondent), alleging retaliation in violation of the whistleblower protections of the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations.[1] Complainant appeals Administrative Law Judge (ALJ) Monica Markley's May 7, 2024 Order of Dismissal and Order Cancelling Hearing (Order of Dismissal), which dismissed his complaint

[1] 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2024).

with prejudice due to his repeated failure to follow discovery orders and his intentional refusal to produce hearing exhibits despite the ALJ's explicit warning that that failure could result in dismissal. Complainant further appeals the denial of his request for reconsideration. Finding the ALJ did not abuse her discretion in dismissing the complaint, and that Complainant met none of the requirements for reconsideration, we affirm.

BACKGROUND

On December 20, 2022, Complainant, who is self-represented, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging Respondent retaliated against him for reporting a broken step on a truck at the job site and alleging other unidentified "safety issues" with Respondent's trucks.[2] On June 14, 2023, OSHA dismissed his complaint, finding "it was unable to conclude" reasonable cause existed to establish Respondent violated the STAA.[3]

Complainant timely requested a hearing before the Office of Administrative Law Judges (OALJ).[4] Before the assigned ALJ entered a scheduling order in this case, Complainant served numerous discovery requests upon Respondent. Between July 2023 and January 2024, Complainant served over one hundred requests for admission in six separate pleadings.[5] Despite the limited nature of this dispute, Complainant sought, for example, admissions regarding "promoting public awareness about proper waste disposal,"[6] the use of "GPS tracking and data analysis,"[7] and "optimiz[ing] efficiency and prevent[ing] overloading."[8]

Complainant, at the same time, refused to timely provide his own discovery responses. On December 8, 2023, the ALJ issued a Notice of Hearing and Scheduling Order, which set a formal hearing for April 10-12, 2024.[9] The Hearing

---

2 *See* December 20, 2022 OSHA complaint. Complainant asserted that Respondent terminated his employment because he notified management about a broken back step on a garbage truck on which he stood to conduct his duties, as well as "other safety issues with trucks" in the months leading up to his termination. *Id.*

3 *See* June 14, 2023 OSHA determination letter. OSHA indicated that Complainant had requested that OSHA stop the investigation and issue a determination based on the information gathered thus far in the investigation. *Id.*

4 Notice of Docketing.

5 Exs. E, F, G, J, K, I, M.

6 Ex. M at 13.

7 *Id*. at 16.

8 *Id*. at 15.

9 Order of Dismissal at 1.

Order instructed the parties that discovery would close on February 20, 2024, fifty days before the first day of the formal hearing.[10] On December 18, 2023, Respondent served Complainant with one set of Interrogatories and Requests for Production.[11] Complainant then requested—and Respondent's counsel granted—an extension to respond.[12]

Complainant's eventual responses, however, were plainly deficient. During Complainant's deposition, Respondent learned that Complainant possessed and failed to produce numerous responsive documents.[13] In a series of emails between February 12–14, Respondent provided Complainant with a list of eleven areas of production that it had requested Complainant supplement, including, for example, audio recordings relating to Complainant's employment, text messages between Complainant and his managers, and documents filed with the Georgia Department of Labor.[14] Respondent also requested that Complainant voluntarily execute authorization forms for his personnel and tax return records.[15]

On February 16, 2024, having been unable to amicably resolve these disputes, Respondent filed a Motion for Protective Order and Motion for a Continuance seeking to prevent Complainant from serving any more discovery requests and extending the time for Respondent to complete discovery.[16] Respondent asserted that it had produced as much as it reasonably could in response to Complainant's discovery requests, that Complainant had the necessary information to prosecute his case at trial, and that any further requests for production would be burdensome and unnecessary.[17] Respondent also requested that the court reschedule the hearing date and extend the non-expired deadlines in order to allow more time to obtain discovery from Complainant.[18] Complainant, in response, maintained that the hearing should proceed without delay, notwithstanding his lack of production.[19]

---

10 *Id.*

11 Ex. T.

12 Ex. V at 1.

13 Order of Dismissal at 1.

14 Ex. Y.

15 *Id.*

16 Memorandum of Law in Support of Respondent's Motion for Protective Order and Motion for Continuance.

17 *Id.* at 18.

18 *Id.* at 20-22.

19 Memorandum of Law in Opposition to Petitioner's Motion for Protective Order.

On March 4, 2024, the ALJ issued an order rescheduling the hearing to late May.[20] The order compelled the production of documents, determining that Complainant had not produced "numerous documents that are responsive to [Respondent's] document requests" and ordering production by March 18, 2024.[21] The ALJ also instructed the parties to "mark and exchange exhibits and exhibit lists with each other" and to "identify expert witnesses and exchange witness lists with each other" no later than April 29, 2024.[22] The ALJ explicitly warned of the consequences of failure to comply with the order—which included dismissal of the complaint.[23]

Despite this warning, Complainant did not provide responsive documents, choosing instead to file a 233-page Motion to Disqualify Respondent's counsel.[24] In that motion, Complainant (without basis) contended that throughout the discovery process Respondent's counsel had "engaged in a pattern of conduct designed to mislead the Court and obstruct discovery."[25] The ALJ on March 25, 2024, denied the motion.[26]

On March 29, 2024, Respondent filed a Motion to Enforce the Discovery Order and for Discovery Sanctions.[27] It explained that while Complainant had provided some supplemental documents, he still had not complied with many of the basic directives of the March 4, 2024 order compelling production.[28] Respondent further contended that Complainant's motion to disqualify was frivolous and compounded the delay.[29] It argued that Complainant's overall conduct, in particular his withholding of audio recordings in separated and native format, had caused "severe prejudice" to its ability to defend its case.[30]

---

20 Order of Dismissal at 2. The ALJ also issued an Order Granting Motion for Protective Order on March 4, 2024. *See* Order Granting Motion for Protective Order.

21 Order Rescheduling Hearing and Compelling Production at 1.

22 Order of Dismissal at 2.

23 Order Rescheduling Hearing and Compelling Production at 4.

24 Order of Dismissal at 2.

25 Motion to Disqualify Lehoan T. Pham (Hahn) at 4.

26 Order of Dismissal at 2.

27 *Id.*; *see* Memorandum of Law in Support of Motion to Enforce the Discovery Order and for Discovery Sanctions at 1-2.

28 Memorandum of Law in Support of Motion to Enforce the Discovery Order and for Discovery Sanctions at 11-15.

29 *Id.* at 13-15, 24.

30 *Id.*

On April 30, 2024, the ALJ held a hearing on pending motions.[31] She determined Complainant violated her discovery order by not producing certain documents or authorizations for personal records and tax returns.[32] Significantly, she struck Complainant's claim for back pay as a consequence—opting to not yet dismiss the entire action.[33] She further ordered Complainant to file a list of the audio recordings in his possession by 12:00 p.m. on May 1, 2024, and to file a letter by 12:00 p.m. on May 2, 2024, listing which recordings had been provided to Respondent and which remained outstanding.[34] The ALJ additionally instructed Complainant to file his exhibit and witness lists by May 6, 2024.[35]

Complainant did not comply, and Respondent again argued to the ALJ that this additional failure to comply with her orders "prejudiced [its] ability to adequately prepare for trial."[36] The ALJ in response issued what would be her final Order to Show Cause.[37] She instructed Complainant to explain by May 6, 2024, why sanctions should not be imposed for his willful refusal to complete discovery and to serve by May 3, 2024, his past-due exhibits, exhibit list, witness list, and list of audio recordings.[38]

In a May 3, 2024 letter to the ALJ, Complainant acknowledged he was aware of the deadlines, but maintained that Respondent's conduct somehow made it difficult "to proceed with the discovery process in an efficient manner."[39] And he chose not to further explain his failure.[40] Complainant then filed a letter on May 6, 2024, listing the audio recordings in his possession.[41] Respondent noted, however, that the recordings had been produced in a confusing format, making it difficult and

---

31 Order of Dismissal at 3.

32 *Id.*

33 *Id.*

34 *Id.* At the April 30, 2024 hearing, Complainant confirmed he was able to file the list of audio recordings by May 1, 2024, at 12:00 p.m. Tr. at 14-15.

35 Tr. at 53.

36 Order of Dismissal at 3.

37 *Id.* at 4.

38 *Id.* At the April 30, 2024 hearing, the ALJ told Complainant his "exhibit or witness lists are due on May 6th." Tr. at 53. The May 2, 2024 Order to Show Cause ordered Complainant to file his overdue "exhibits, exhibit list, and witness list by 12:00 p.m. on May 3, 2024. Order to Show Cause at 2. Nonetheless, Complainant did not file exhibits, an exhibit list or a witness list by May 3 or May 6, 2024. *See infra* p. 6.

39 Order of Dismissal at 4.

40 *Id.*

41 *Id.* at 5.

time-consuming to verify them.[42] Respondent also filed a Reservation of Objections and noted that Complainant still had not served his exhibits, exhibit list, and witness list.[43]

On May 7, 2024, the ALJ dismissed Complainant's claim with prejudice.[44] The ALJ determined that, in addition to his numerous dilatory actions, Complainant had violated two very specific discovery orders: the March 4, 2024 Order Rescheduling Hearing and Compelling Production and the May 2, 2024 Order to Show Cause.[45] She further explained that Complainant had not established any "excusable basis for his failures" and that dismissal of the complaint was a necessary sanction "due to Complainant's repeated instances of contumacious conduct."[46]

The ALJ readily acknowledged that dismissal was an extreme sanction and thus explained that she considered several factors before using dismissal as a last resort.[47] First, she determined that Complainant's "obstructive behavior [had] severely prejudiced Respondent."[48] The ALJ noted that Respondent was completely unable to prepare for an already rescheduled hearing due to Complainant's failure to produce his trial disclosures.[49]

The ALJ also stressed that Complainant acted intentionally and not with mere negligence.[50] Complainant, for example, failed to file the list of audio recordings after he was instructed to do so during the April 30, 2024 hearing and in the May 2, 2024 Order to Show Cause—despite explicitly acknowledging his awareness of the deadlines.[51] And even when he belatedly produced the recordings, the ALJ pointed out he had changed the names, which unnecessarily complicated the purpose of providing the list in the first place.[52]

---

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*.

46 *Id*.

47 *Id*.

48 *Id*. at 6.

49 *Id*. at 5-6.

50 *Id* at 6.

51 *Id*.

52 *Id*.

The ALJ further admonished that Complainant failed to produce his exhibits, exhibit lists, and witness lists in preparation for the rescheduled May 2024 hearing and that, instead of providing his trial disclosures to Respondent, Complainant "used his Response to the *Order to Show Cause* to blame Respondent for his own failures to abide by this tribunal's orders."[53] The ALJ therefore concluded that "Complainant's failures stem from a stubborn refusal to cooperate with bringing this case to hearing."[54] She thus concluded Complainant "interfered with the judicial process . . . and [did so] willingly and in bad faith."[55]

Furthermore, the ALJ reasoned that Complainant did so under the specific warning of sanctions. Both the March 4, 2024 Order Rescheduling Hearing and Compelling Production and May 2, 2024 Order to Show Cause informed Complainant that he faced sanctions—including dismissal—for continued noncompliance.[56] In explaining why dismissal was the only effective sanction left after already dismissing Complainant's claim for back wages, the ALJ reasoned that further excluding his trial exhibits would produce an "absurd result of requiring Respondent (and this tribunal) to expend time and resources on a formal hearing at which Complainant cannot present evidence."[57] The ALJ, therefore, found that there simply was no other alternative "than to dismiss his complaint due to his obstruction and repeated failures to follow Orders."[58]

On May 8, 2024, Complainant sought reconsideration.[59] Complainant argued that dismissal of his claim was an "extreme abuse of discretion" and that the ALJ was biased against him.[60] He asserted that he had not acted "willfully or knowingly obstructed," but that he had participated "above and beyond the normal" and worked diligently.[61] Complainant requested that the ALJ modify the Order of

---

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 6-7.

57 *Id.* at 7.

58 *Id.* Although the Order of Dismissal does not explicitly state that the ALJ considered the amount of interference with the judicial process, we note that the Order contains ample evidence of the negative impact of Complainant's failures to comply with discovery and other requests necessary to efficiently resolve the litigation of his case.

59 Order Denying Complainant's Request for Reconsideration of Order of Dismissal (Order Denying Reconsideration) at 1.

60 *Id.* at 1.

61 *Id.*

Dismissal and impose a lesser sanction of excluding Complainant's exhibits and witnesses as a sanction.[62]

On May 10, 2024, the ALJ issued an Order Denying Reconsideration.[63] She explained that reconsideration is "granted only in rare circumstances, such as where the court failed to consider evidence or binding authority."[64] The ALJ determined that Complainant had not pointed to any "controlling decisions or data that this tribunal overlooked."[65]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.[66] The Board reviews an ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.[67]

On appeal, Complainant argues the ALJ abused her discretion in dismissing his complaint with prejudice as well as the underlying merits of his claim. Respondent, in turn, argues that the ALJ's Order of Dismissal was in accordance with law and that Complainant failed to meet his burden to establish the ALJ abused her discretion in denying reconsideration. We agree with Respondent.

DISCUSSION

The Department of Labor's Rules of Practice and Procedure for hearings before the OALJ permit an ALJ to issue sanctions against parties for failing to comply with a judge's discovery order, including "[d]ismissing the proceeding in whole or in part."[68] The OALJ Rules also provide that ALJs may "take any appropriate action authorized by the [Federal Rules of Civil Procedure]" in exercising "all powers necessary to conduct fair and impartial proceedings."[69] Under Rule 37(b) of the Federal Rules of Civil Procedure (FRCP), a court may order

---

62 *Id.* at 1-2.

63 *Id.* at 1.

64 *Id.* at 2.

65 *Id.*

66 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020)

67 *Miller v. Rhino, Inc.* ARB No. 2024-0002, ALJ No. 2021-STA-00041, slip op. at 6 (ARB July 18, 2024) (citations omitted).

68 29 C.F.R. § 18.57(b)(1)(v).

69 29 C.F.R. § 18.12(b)(10).

dismissal of "the action or proceeding in whole or in part" for a party's failure "to obey an order to provide or permit discovery."[70]

The discovery sanctions of dismissals and default judgments are recognized as an exercise of the inherent authority of ALJs to manage the orderly and expeditious disposition of their cases.[71] While the Board reviews discovery sanctions pursuant to the OALJ Rules and the FRCP under an abuse of discretion standard,[72] ALJs still "must exercise this power cautiously . . . and should take care in fashioning sanctions for conduct that abuses the judicial process."[73] And given the finality of a sanction for default or dismissal, ALJs must be particularly cautious: dismissal "deserves closer scrutiny within the abuse-of-discretion framework."[74]

Although the regulations themselves do not specifically provide any criteria to consider prior to imposing those sanctions, the Board has held that an ALJ should consider several factors when determining whether they are warranted under 29 C.F.R. § 18.57(b)(1)(vi):

> (1) the prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action [or default judgment] could be a sanction for failure

---

[70] Fed. R. Civ. P. 37(b)(2)(A)(v).

[71] *Jenkins v. EPA,* ARB No. 2015-0046, ALJ No. 2011-CAA-00003, slip op. at 8 (ARB Mar. 1, 2018); *see Link v. Wabash R. R. Co.,* 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

[72] *Jenkins,* ARB No. 2015-0046, slip op. at 7 (citation omitted).

[73] *Pfeifer v. AM Retail Grp., Inc.,* ARB No. 2023-0009, ALJ No. 2021-SOX-00030, slip op. at 3-4 (ARB Mar. 22, 2023) (citation omitted).

[74] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Global Horizons Manpower, Inc.,* ARB No. 2009-0016, ALJ No. 2008-TAE-00003, slip op. at 11 (ARB Dec. 21, 2010); *see also Jenkins,* ARB No. 2015-0046, slip op. at 10 (quoting *Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv.,* 776 F.3d 1, 4 (D.C. Cir. 2015) (noting that "where a lower court's order of dismissal or default as a discovery sanction is under review, the review 'is more thorough' because the 'drastic' sanction 'deprives a party completely of its day in court.'")).

> to cooperate or noncompliance, and (5) whether the efficacy of lesser sanctions [was] considered.[75]

Notably, the Board has recognized "that the factors do not create a rigid test but are simply criteria for the court to consider."[76] It follows then, that under the particular circumstances of any case, any one factor may take on more (or less) significance than the others. The Board has made clear, however, that dismissal cannot be utilized to punish a party for failure to cooperate in discovery if the failure stems from mere negligence; it must be the product of "willfulness, bad faith, or fault."[77]

Additionally, in acknowledging "the substantial similarity" of the OALJ Rules governing discovery and those of the FRCP, the Board has also looked to federal case law in reviewing whether the discovery sanction of a default judgment was an abuse of ALJ discretion under FRCP 37.[78]

The Eleventh Circuit, which has appellate jurisdiction over this case, has placed particular emphasis on limiting the "severe" discovery sanction of dismissal to instances where "(1) a party's failure to comply with a court order is a result of

---

75 *Miller*, ARB No. 2024-0002, slip op. at 7 (citing *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Deepali Co., LLC,* ARB No. 2021-0028, ALJ No. 2017-DBA-00022, slip op. at 4 (ARB Sept. 20, 2021); *see also Manoharan v. HCL America, Inc*., ARB. No. 2021-0060, ALJ Nos. 2018-LCA-00029, 2021-LCA-00009, slip op. at 14-15, 15 n.87 (ARB Apr. 14, 2022) (("These factors 'do not create a rigid test.'") (quoting *Howick v. Campbell-Ewald Co.*, ARB Nos. 2003-0156 and 2004-0065, ALJ Nos. 2003-STA-00006 and 2004-STA-00007, slip op. at 8 (ARB Nov. 30, 2004).

76 *Howick*, ARB Nos. 2003-0156, 2004-0065, slip op. at 8.

77 *Global Horizons Manpower, Inc.,* ARB No. 2009-0016, slip op. at 11 (citation omitted). The ARB has additionally clarified that where parties are represented, and where "'fault' has any meaning not subsumed in 'willfulness' and 'bad faith,' it must at least cover gross negligence amounting to a 'total dereliction of professional responsibility' even though not a conscious disregard of a court's orders." *Jenkins,* ARB No. 2015-0046, slip op. at 11 (citation omitted).

78 *Jenkins,* ARB No. 2015-0046, slip op. at 8.

willfulness or bad faith[79]; and (2) the district court finds that lesser sanctions would not suffice."[80] It has also found dismissal all the more fitting when the willfully non-compliant party significantly thwarts the opposing party's ability to effectively litigate the case and was warned of potential dismissal.[81]

A leading treatise notes that while FRCP 37[82] provides the factfinder "broad discretion" to impose "flexible, selective, and plural" sanctions for discovery violations,[83] "courts should make the punishment fit the crime" and "take care not to impose a drastic sanction that will prevent adjudication of a case on its merits except on a clear showing that this course is required."[84] It further notes that circuits are "somewhat divergent in their formulations of the criteria," with one circuit designating four factors to consider and another designating five, and that "[i]nevitably, firm rules about imposition of discovery sanctions will be rare . . . ."[85]

Given the difficulty in balancing the need to administer an orderly hearing process against a party's access to fair adjudication of a claim's merits, as well as

---

79 *See Cox v. Am. Cast Iron Pipe Co.,* 784 F.2d 1546, 1556 (11th Cir. 1986) ("The decision to dismiss a claim, like the decision to enter a default judgment, ought to be a last resort—ordered only if noncompliance with discovery orders is due to willful or bad faith disregard for those orders.") (citations omitted); *see also Maus v. Ennis,* 513 F. App'x 872, 878 (11th Cir. 2013) (in which the Eleventh Circuit concluded that "the district court did not abuse its discretion when it imposed a default judgment" based on the pro se defendant's "disrespectful conduct and his refusal to participate in discovery"); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993) (citation omitted) ("a default judgment sanction requires a willful or bad faith failure to obey a discovery order.") (citing *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers,* 357 U.S. 197, 212 (1958)).

80 *Lyle v. BASF Chemistry, Inc.*, 802 F. App'x 479, 482 (11th Cir. 2020) (citing *Malautea*, 987 F.2d at 1542). The violation of a discovery order caused by "simple negligence, misunderstanding, or inability to comply" will thus not justify dismissal. *In re Southeast Banking Corp.,* 204 F.3d 1322, 1332 (11th Cir. 2000) (quoting *Malautea*, 987 F.2d at 1542); *see also EEOC v. Troy State Univ.,* 693 F.2d 1353, 1357 (11th Cir. 1982) ("A party's simple negligence or other action grounded in a misunderstanding of a court order does not warrant dismissal.") (citation omitted).

81 *Lyons v. O'Quinn*, 746 F. App'x 898, 902 (11th Cir. 2018).

82 "If a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders" including "dismissing the action or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(v); *see* 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2284 (3d ed. Supp. April 2022).

83 WRIGHT, *supra,* § 2284.

84 *Id*.

the widely varying and often complex fact patterns, it is no surprise the cases cannot be reduced to easy analysis or formulaic response. It is clear, however, that the Board and the circuits obligate the factfinder to conduct a careful examination of the appropriateness of sanctioning parties for discovery violations via dismissal or default judgment befitting the unique circumstances of the case.

The ALJ Did Not Abuse Her Discretion by Dismissing the Complaint

Bearing in mind that under the abuse of discretion standard, it is not our role to second guess the ALJ's conclusions absent clear errors or an impermissible procedural decision,[86] we conclude that the ALJ's Order of Dismissal is consistent with ARB and Eleventh Circuit case authority. While the ALJ's Order of Dismissal does not methodically track step by step the various discretionary criteria from the case law, it is clear from her overall analysis, as discussed above, that she considered the relevant standards under the OALJ Rules[87] and the Eleventh Circuit[88] and applied them to the facts in dismissing the complaint.

The ALJ applied the first factor considered in a review of discovery sanctions in prior Board cases ("prejudice to the other party"). She explained that Complainant had prejudiced Respondent's ability to "properly prepare for the formal hearing" by "refusing to serve his exhibits, exhibit list, and witness list" in violation of two orders.[89] She also specified Complainant's re-titling of overdue audio recordings prior to supplying them to Respondent impaired Respondent's ability to ascertain which recordings remained outstanding in preparation for a hearing on the merits.[90] As such, the ALJ adequately considered how Complainant's non-compliance prejudiced Respondent in support of dismissal.

---

86 "An ALJ abuses their discretion if they: (1) base the decision on an error of law or use the wrong legal standard; (2) base their decision on a clearly erroneous factual finding; or (3) reach a conclusion that, though not necessarily the product of a legal error of a clearly erroneous finding, cannot be located within the range of permissible decisions." *Xia v. Lina T. Ramey & Assoc., Inc.*, ARB No. 2023-0046, ALJ No. 2022-LCA-00013, slip op. at 7-8 (ARB Oct. 7, 2024) (citation omitted).

87 *Miller,* ARB No. 2024-0002, slip op. at 6-7 (citing the OALJ Rules at 29 C.F.R. § 18.57(b)(1)(vi) and the factors the Board has held apply when determining whether a default judgment or dismissal under 29 C.F.R. § 18.57(b)(1)(vi)).

88 *Lyle,* 802 F. App'x at 482.

89 Order of Dismissal at 6. *Miller,* ARB No. 2024-0002, slip op. at 7 (the ALJ should "consider prejudice to the other party" in determining whether sanctions are warranted under 29 C.F.R. § 18.57(b)(1)(vi)); *see also Jenkins,* ARB No. 2015-0046, slip op. at 12 (sanctions, including dismissal, are warranted when a party's failure to obey a discovery order "impairs the opponent's ability to determine the factual merits of the party's claim.") (citations omitted).

90 Order of Dismissal at 6.

The second factor the Board has considered—"the amount of interference with the judicial process,"[91]—was also given sufficient consideration by the ALJ. Her Order of Dismissal clarified that her finding was based on the "obstruction and interference with the progress of this case," necessitating rescheduling the hearing, a motion hearing, and the issuance of orders compelling discovery.[92]

The ALJ's analysis particularly focused on the third factor applied in both the Board and Eleventh Circuit precedent, "the culpability, willfulness, bad faith or fault of the litigant."[93] She found Complainant's "stubborn refusal to cooperate" was "willful and done in bad faith."[94] She based her finding not only on Complainant's disregard for the March 4, 2024 and May 2, 2024 orders to produce discovery, but on his decisions to respond to the discovery orders with irrelevant accusations against Respondent, in lieu of explaining his failures as ordered.[95] Even holding Complainant's responses to the discovery orders to a less stringent standard in view of his pro se status,[96] we note their level of detail, communication of clear aims, and inclusion of some discovery, albeit in improper format.[97] They support the ALJ's conclusion Complainant demonstrated a capacity for compliance yet a deliberate

---

91 *Miller,* ARB No. 2024-0002, slip op. at 7.

92 Order of Dismissal at 5-6. *Miller*, ARB No. 2024-0002, slip op. at 7 ("the amount of interference in the judicial process" should be considered in deciding whether to impose sanctions). The Eleventh Circuit similarly limits default to instances where "a party demonstrates a flagrant disregard for the court and the discovery process." *Aztec Steel Co. v. Fla. Steel Corp.,* 691 F.2d 480, 481 (11th Cir. 1982).

93 *Miller,* ARB No. 2024-0002, slip op. at 7; *see Lyle,* 802 F. App'x at 482.

94 Order of Dismissal at 5-6. The third among five considerations set out by the Board is "the culpability, willfulness, bad faith or fault of the litigant." *Miller,* ARB No. 2024-0002, slip op. at 7.

95 Order of Dismissal at 6.

96 Self-represented litigants are "afforded certain latitudes," but are "not excused from the rules of practice and procedure." *Jeanty v. Lily Transp. Corp.,* ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020) (citations omitted); *see also Maus,* 513 F. App'x at 878 ("[W]hile the pleadings of *pro se* litigants are held to a less stringent standard than pleadings drafted by attorneys, *pro se* litigants still must comply with procedural rules" and can be subject to sanctions for failing to comply with court orders.) (citations omitted).

97 *See* Complainant's April 12, 2024 Response to Memorandum of Law In Support of The Motion to Enforce the Discovery Order, and for Discovery Sanctions" (containing transcribed texts between Complainant and Respondent, and YouTube links to audio recordings); *see also* May 3, 2024 letter response to Order to Show Cause requesting a protective order prohibiting Respondent from "overloading me with work," "engaging in any further attempts to obstruct discovery," and "seeking rulings against me."

disregard for the discovery process. The ALJ thus properly concluded Complainant's non-compliance was willful and in bad faith.

Furthermore, the ALJ weighed the fourth factor previously applied in Board cases, "whether the party was warned in advance that dismissal of the action [or default judgment] could be a sanction for failure to cooperate or noncompliance."[98] The ALJ discussed Complainant's continued refusal to come into compliance even after her two orders "put [him] on notice that he would be sanctioned for continued noncompliance."[99]

The ALJ additionally evaluated the fifth factor considered by both the Board and the Eleventh Circuit—"whether the efficacy of lesser sanctions [was] considered."[100] She explained that excluding Complainant's exhibits and witnesses would "produce an absurd result of requiring Respondent (and this tribunal) to expend time and resources on a formal hearing at which Complainant cannot present evidence."[101]

The ALJ thus satisfactorily analyzed facts showing Complainant's willful noncompliance prejudiced Respondent and interfered with the judicial process despite clear warning of the possibility of dismissal, and for which a lesser sanction would have been ineffective. As such, although we need not impose a precise blueprint for the ALJ's analysis as explained above, we find the ALJ did not abuse her discretion by dismissing Complainant's STAA complaint.

---

98 *Miller*, ARB No. 2024-0002, slip op. at 7.

99 Order of Dismissal at 6.

100 An ALJ should consider "the efficacy of lesser sanctions" in determining the appropriateness of sanctioning a party via dismissal. *Miller*, ARB No. 2024-0002, slip op. at 7. In contrast to the Order of Dismissal here, the ALJ in *Miller* was found to have erred in not addressing whether lesser sanctions would have been effective before issuing a default judgment in the amount of $322,940.60 as a discovery sanction. *Id.*, slip op. at 9-10.

101 Order of Dismissal at 7. The ALJ had already imposed a lesser sanction by striking Complainant's claim for back pay on April 30, 2024, yet this sanction failed to induce his compliance. *Id.* at 3.

Finally, we find the ALJ did not abuse her discretion in denying Complainant's motion for reconsideration. The ALJ noted that "'reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'"[102] Under this (or indeed under any other reconsideration standard), we affirm the ALJ's determination that Complainant failed to establish any grounds for reconsideration. There is no indication the ALJ overlooked controlling law or evidence "that might reasonably be expected to alter" her conclusion the sanction of dismissal was warranted here.[103]

For the foregoing reasons, we **AFFIRM** the ALJ's dismissal of the complaint due to Complainant's failure to comply with discovery orders.

SO ORDERED.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

KAPLAN, Administrative Appeals Judge, concurring:

"The first duty of society is justice."[104]

Litigation is not a modern gladiatorial contest or blood sport. It is a serious endeavor to explore if a wrong has occurred and, if so, how to remedy it.

I agree with the disposition and reasoning in the majority opinion above. Complainant in this case was clearly obstreperous and obdurate in withholding evidence, accusing opposing counsel in a 233-page Motion to Disqualify him of "engaging in a pattern of conduct designed to mislead the court and obstruct discovery," and later the judge, of bias. I firmly believe that the ALJ in this case engaged in the appropriate analysis of Complainant's non-compliance and acted

---

[102] Order Denying Complainant's Request for Reconsideration of Order of Dismissal at 2 (citing *Shrader v. CSX Transp., Inc.* 70 F.3d 255, 257 (2nd Cir. 1995)).

[103] *Shrader,* 70 F.3d at 257.

[104] Commonly attributed to Alexander Hamilton.

well within her discretion to dismiss the case with prejudice. I write to suggest additional steps that the Office of Administrative Law Judges (OALJ) may take in the attempt to avoid such contumacious behavior in future.

Trial preparation is a mix of tedium and instability, as exhibits, checklists, outlines and live witnesses are identified while ensuring discovery obligations are fulfilled. During this process, an individual who pursues pro se representation will be able to consider the strengths and weaknesses of their case, identify key legal arguments and objectives, and determine the evidence and witnesses necessary to support their position. If during that process the person discovers that they cannot provide proof of their claim, they can make a principled decision and request to withdraw the claim without embarrassment or penalty.[105]

The OALJ could provide pro se parties with basic, clear instructions on the rules and requirements in the discovery process as an attachment to the Notice of Hearing and Prehearing Order (in this case, the Notice of Hearing and Scheduling Order). Such instructions would explain, in readily understandable terms, which information is discoverable, and which regulations specifically allow for the discoverability of that information.

In addition to warning self-represented litigants of the possibility of dismissal for non-compliance, providing such instructions from the outset of the hearing process could serve as a useful, time-saving, and preventative measure for all parties and the OALJ. It may also disabuse otherwise aggressive parties of the notion that wasting the ALJ's time by withholding evidence in the discovery phase will advance their claims.

ELLIOT M. KAPLAN
Administrative Appeals Judge

---

105 *See* 29 C.F.R. § 1978.111(c).