

# **Ruth Baskerville v. U.S. General Accounting Office**

**Docket No. 93-02**

**Date of Decision: April 20, 1994**

**Cite as: Baskerville v. GAO (en banc) (4/20/94)**

**Before: Personnel Appeals Board, en banc (Alan S. Rosenthal, Chair; Nancy A. McBride, Vice Chair; Leroy D. Clark, Harriet Davidson and Paul A. Weinstein, Members)**

**Reconsideration**

**Standards of Review**

**Failure to Prosecute**

**Dismissal**

## **DECISION ON MOTION FOR RECONSIDERATION**

This case is before the Personnel Appeals Board en banc on petitioner's motion to reopen and reconsider the initial decision of the Administrative Judge, dated November 10, 1993, denying petitioner's motion for reconsideration and affirming the dismissal with prejudice for failure to prosecute.

## **BACKGROUND**

On March 3, 1993, petitioner filed a petition for review challenging her removal and alleging that respondent discharged her in retaliation for engaging in various protected activities. She further charged that respondent engaged in a course of conduct that prevented her from overcoming a substance abuse problem.

On March 12, 1993, counsel for respondent initially scheduled petitioner's deposition for March 23, 1993. Petitioner cancelled this deposition and at least five other scheduled depositions. On April 20, 1993, the Administrative Judge warned the petitioner that her failure to appear at a deposition might result in sanctions pursuant to 4 C.F.R. §28.24. Petitioner disregarded the Administrative Judge's order to appear at a deposition on May 13, 1993 and did not participate in any deposition during the pendency of this proceeding.

Petitioner similarly ignored respondent's requests for answers to interrogatories and for production of documents. She did not respond to any of respondent's three motions to compel discovery.

On May 13, 1993, respondent filed a motion to dismiss the proceeding for failure to prosecute. Petitioner failed to submit any response to the motion by the date set forth in the Administrative Judge's Order dated May 21, 1993. Accordingly, on June 3, 1993, the Administrative Judge dismissed the petition for failure to prosecute.<sup>1</sup>

On June 15, 1993, petitioner filed a motion for reconsideration claiming that she had been unavailable to assist her counsel from the last week in May until June 14, 1993, due to emotional problems. Without prior notification or justification, counsel for petitioner failed to appear at the oral argument on respondent's motion to dismiss for failure to prosecute. On July 20, 1993, the Administrative Judge issued an initial decision, again dismissing the petition with prejudice for lack of prosecution.

On August 19, 1993, petitioner filed a second motion for reconsideration, claiming that her previous failure to respond to discovery requests was the by-product of her inability to assist her attorney in the prosecution of her claim. She alleged that she was then able to participate in her case and comply with discovery requests. The Board remanded the matter to the Administrative Judge for consideration of the new matters set forth in the motion papers.

In a second initial decision, dated November 10, 1993, the Administrative Judge found that there was no evidence of incapacity to justify petitioner's prior failure to prosecute. She further found that there was no evidence to support petitioner's claim that she was then able to assist counsel. Accordingly, there was no justification to reverse the dismissal.

On December 9, 1993, petitioner filed a third motion for reconsideration, now under review. Petitioner seeks reversal of the dismissal on the basis of the following assertions:

- 1) Petitioner's inability to document her incapacity to assist counsel resulted from her refusal to have contact with anyone, including her attorney, and to participate in any medical or psychological treatment; and
- 2) Petitioner has complied with respondent's discovery requests. The parties' recent inability to schedule petitioner's deposition was the result of respondent's failure to respond to her counsel's phone messages.

The respondent denies knowledge of any attempts by petitioner's counsel to schedule discovery. In her affidavit, counsel for respondent states that petitioner's responses to the interrogatories were unsigned and incomplete. Despite a representation from petitioner's counsel that he would forward a signed original to the respondent, nothing was forthcoming.

## **ANALYSIS**

Although the Board reserves the right to exercise broad review of initial decisions, see 4 C.F.R. §28.87(g), it generally will not reverse a dismissal for failure to prosecute unless it is arbitrary, capricious, an abuse of discretion or otherwise not consistent with law. The Board will first determine whether the Administrative Judge abused her discretion in sustaining her prior dismissal of the petition for failure to prosecute.

The Board's regulations provide the Administrative Judge with the authority to impose sanctions, including dismissal of an action with prejudice, for failure to prosecute, as necessary to serve the ends of justice. See 4 C.F.R. §§ 28.22 (b)(10) and 28.24 (b). The choice of sanctions is within the sound discretion of the Administrative Judge. See Roth v. Dept. of Transportation, 54 M.S.P.R. 172, 175 (1992). Dismissal is warranted where a party has not demonstrated due diligence in the prosecution of an appeal, Bomate v. Ford Motor Co., 761 F.2d 713, 714 (D.C. Cir. 1985), or failed to respond to Board orders. See Ahlberg v. Department of Health and Human Services, 804 F.2d 1238 (Fed. Cir. 1986), cert. denied 482 U.S. 913, 107 S. Ct. 3183, 98 L.Ed. 672 (1987).

In the initial decision, dated November 10, 1993, the Administrative Judge cited petitioner's pattern of non-cooperation, delay, inattentiveness and willful disregard of Board orders. Petitioner ignored numerous discovery requests even after the Administrative Judge had extended the deadline due to her lack of cooperation. She failed to respond to three motions to compel discovery. She failed to submit a timely response to respondent's motion to dismiss for failure to prosecute. Counsel for petitioner failed to appear at oral argument on petitioner's own motion to reconsider the dismissal without any explanation for his absence. This course of conduct clearly demonstrates a lack of due diligence which would justify a dismissal.

Petitioner's inaction was further compounded by her unexplained failure to comply with the Administrative Judge's order directing her to appear at a deposition. This order was properly issued pursuant to 4 C.F.R. §28.43. The Administrative Judge appropriately warned petitioner that her failure to appear for the deposition could result in sanctions under 4 C.F.R. §28.24, which include dismissal with prejudice. The warning did not spur the petitioner into action. Petitioner's clear disregard for the Board's authority provides additional support for a dismissal with prejudice.

The Administrative Judge considered the arguments set forth in petitioner's second motion for reconsideration. She found that the record was devoid of any evidence of petitioner's incapacity to justify her prior failure to prosecute. There was no showing of petitioner's present ability to assist her attorney in pursuing her claim. Accordingly, the Administrative Judge concluded that there was no justification for reversing the dismissal. The Board finds no abuse of discretion and concurs in this result.

The Board will next determine whether petitioner has established grounds for overturning the dismissal in her third petition for reconsideration. The petitioner is trying to overcome the deficiencies in her second motion for reconsideration by now claiming that she was unable to document her inability to assist counsel due to her refusal to seek medical treatment and to have contact with her attorney.

Board regulations provide that, in determining whether some action other than the affirmance of the initial decision is required, the Board will also consider whether there is new and material evidence available that, despite due diligence, was not available when the record was closed. See 4 C.F.R. §28.87(g)(1). As in the case of her two previous motions for reconsideration, petitioner failed to submit any affidavits from herself, her attorney or a professional who treated her or any other evidence to substantiate her claims. Accordingly, there is no new evidence for the Board to consider. The Board is satisfied that petitioner has been provided with ample opportunity to come forward with evidence of a prior inability to assist her counsel and a present capacity and intent to pursue her case. An additional opportunity would not serve the ends of justice.

Petitioner's contention that she has satisfied respondent's discovery requests is not relevant at this juncture because the case has already been dismissed. Petitioner cannot unilaterally decide to participate in discovery four months after the dismissal of her case and then use these belated efforts and respondent's purported lack of cooperation as a justification for a reversal of the dismissal.<sup>2</sup> Based on the foregoing, the Board finds that there is no factual or legal basis to reverse the dismissal and to open the case for further proceedings.

## **CONCLUSION**

The decision of the Administrative Judge in this matter is hereby AFFIRMED.

**Notes**

1. The Administrative Judge's memorandum and order, dated June 3, 1993, were not deemed to constitute an "initial decision."
2. It should be noted that petitioner's claims were not supported by any evidence and were disputed by counsel for respondent. Due to the status of the case, respondent was under no obligation to respond to petitioner's requests to schedule a deposition, had they been received by respondent.