

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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EDNA D. ANDERSON

v.

DAVID M. BEACH

CFTC Docket No 05-
OPINION AND ORDER

Complainant Edna D. Anderson (“Anderson”) appeals from an Administrative Law Judge’s (“ALJ”) Initial Decision on Remand that dismissed her complaint for failure of proof. Respondent David M. Beach (“Beach”) did not respond. For the reasons discussed below, we find that the ALJ abused his discretion, vacate the decision, and remand and reassign this case.

BACKGROUND

Anderson, proceeding *pro se*, filed a reparations complaint in 2005 against Beach, her broker, and Peregrine Financial Group, Inc. (“Peregrine”).¹ Beach filed a *pro se* answer denying liability. In March, 2006, the ALJ notified the parties that a hearing would be held in May 2006 and directed them to submit: (1) a notice of intent to participate; (2) a final list of witnesses each party intended to present (“including the party if it intends to testify on its own behalf”); (3) “the direct testimony of each witness (other than hostile witnesses and party opponents) that the party intends to present as part of its case-in-chief (including the party’s direct testimony if the party intends to testify on its own behalf) set forth in documentary form by affidavit, interrogatory or other document;” (4) copies of all other documents to be received in evidence; and (5) “a prehearing memorandum setting forth a detailed discussion of all issues of fact and law that are material to the hearing.” Order and Notice of Hearing at 1-3 (internal footnotes omitted).

¹ Anderson and Peregrine settled and, on April 25, 2006, Peregrine was dismissed.

In April 2006 the ALJ issued a Show Cause Order, in which he stated that neither Anderson nor Beach filed the hearing-related documents that he had specified and concluded that their “apparent violations of our order raise the issue of whether and in what manner they should be sanctioned.” Show Cause Order at 2. In May 2006, Anderson submitted a document she titled Direct Testimony of Edna D. Anderson (“Direct Testimony”), setting forth the course of dealings between the parties. Beach did not respond to the Show Cause Order.

On May 16, 2006, the ALJ issued an Order of Dismissal, finding that Anderson’s “prehearing submission fell a good deal short of our requirements” and that both parties had “willfully violated the Notice of Hearing” by “fail[ing] to submit the documents required . . . in a timely fashion.” Order of Dismissal at 3 n.8 and 4. As sanctions, the ALJ precluded both parties from introducing any evidence, thereby effectively disposing of the proceeding because the sanctions made it impossible for Anderson to meet her burden of proof. *Id.* at 4-5. Accordingly, he dismissed the complaint. Anderson retained counsel and appealed.

In December 2006, we found that Anderson’s Direct Testimony “substantially met the requirements of the prehearing order” and that “[t]he sanction of dismissal was facially excessive and an abuse of the ALJ’s discretion.” *Anderson v. Beach*, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,382 at 58,722 (CFTC Dec. 21, 2006). Consequently, we vacated the Order of Dismissal “in its entirety” and remanded the case to the ALJ with instructions to “schedule a hearing with reasonable promptness and afford complainant an opportunity to establish her claims,” and Beach “a fair opportunity to defend.” *Id.* (internal citation omitted).

On remand, the ALJ held a hearing in New Orleans on February 21, 2007, at which Anderson, her attorney and Beach appeared. The ALJ announced that Beach was precluded from introducing any evidence but would be allowed to make an opening statement. The ALJ,

however, never called upon Beach to do so. He limited Anderson's case-in-chief to her above-described Direct Testimony; she was allowed to verify it. The ALJ denied her attorney's request that she be allowed to present oral testimony. He then dismissed Anderson as a witness without offering Beach the opportunity to cross-examine her. Anderson's attorney sought to move her complaint into evidence but the ALJ refused to accept it. The ALJ concluded the hearing after instructing the parties about filing post-hearing briefs. No closing arguments were allowed.

In her post-hearing brief, Anderson pointed out that her written Direct Testimony was prepared while she was still acting *pro se*. She stated that she believed she would be allowed to testify about the allegations set forth in her sworn complaint and asked the ALJ to consider her complaint as evidence. Beach did not submit a post-hearing brief.

On April 24, 2007, the ALJ issued his Initial Decision on Remand, dismissing Anderson's case again. *Anderson v. Beach*, 2007 WL 1214696 (CFTC Apr. 24, 2007) ("I.D. on Remand"). He noted that the case had been remanded because "in the Commission's eyes," Anderson "did enough . . . to preserve her right to a hearing." *Id.* at *1. He then stated: "However, she preserved the right to introduce so little evidence that she failed to make a *prima facie* showing that Beach violated the Commodity Exchange Act or Commission regulations." *Id.* Specifically, he faulted her Direct Testimony for failing to incorporate by reference specific documents in the manner that he had instructed. *Id.* at *3 n.7, and observed that "Anderson rests her case on material that she did not introduce into evidence, her complaint." *Id.* at n.17. He also faulted Anderson for not stating clearly the laws that Beach allegedly violated. *Id.* at n.18. Finding Anderson's Direct Testimony insufficient to establish her claims, and having refused to treat her complaint as evidence or allowed her to testify, the ALJ dismissed her claim.

On appeal after remand, Anderson argues that the ALJ's decision "to not allow [her] to

submit any evidence other than her Direct Testimony contradicts the Commission's December 21, 2006 Opinion and Order, which specifically ordered the judge to 'schedule a hearing with reasonable promptness affording complainant an opportunity to establish her claims.'" Br. at 7. Anderson argues that she should have been allowed to testify at the hearing based on her "uncontroverted allegation in her sworn Complaint that Mr. Beach told her she would earn \$1,000 per month . . . [and that he] did not say what type of investment this was," allegations that she contends "establish a *prima facie* case of fraudulent misrepresentation and failure to disclose." Br. at 8.

Anderson also asserts that since Beach failed to respond to any of the ALJ's orders, and did not dispute the order precluding him from submitting evidence, her allegations should be taken as true and a judgment should have been entered in her favor. Anderson argues further that extensive documentary proof of damages is not necessary because it is undisputed that she transferred \$50,000 from one of her annuities to a Peregrine account and that she received \$8,059.93 back. Anderson requests the opportunity to testify and asks that the case be remanded to another presiding officer.

DISCUSSION

On remand, the ALJ convened a hearing, but precluded the parties from testifying or submitting evidence. He thereby deprived them of a meaningful hearing, ignoring the letter and spirit of the remand order and Commission precedent. An oral hearing, with the opportunity for oral testimony and cross-examination, is the *sine qua non* of proceedings heard by an ALJ.²

² Reparations complaints involving claims exceeding \$30,000 are heard before ALJs and are governed by Subpart E of the Commission's Reparation Rules. *See* 17 C.F.R. §§ 12.300-12.315. Claims for lesser amounts, where the size of the claim may not warrant the cost of an oral hearing, are decided as summary proceedings by Commission Judgment Officers and may be decided solely on paper records. *See generally* Subpart B of the Reparation Rules, 17 C.F.R. §§ 12.200-12.210. Nevertheless, recognizing the importance of oral testimony and cross-examination, the

Furthermore, the Commission expressly has rejected the wholesale use of affidavits as a replacement for oral testimony. In *Boring v. Apache Trading Corporation*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,380 at 39,281-82 (CFTC Aug. 27, 1992) the Commission held:

It is undisputed that Rule 12.312 contemplates the use of affidavits in lieu of oral testimony in limited circumstances. In our view, however, the oral hearing mandated by Rule 12.312 would have little meaning if the hearing were easily transformed into a trial by affidavit. . . . Thus, an ALJ abuses his discretion if, in the absence of special circumstances established on the record, he permits a party to substitute an affidavit (or a similar hearsay declaration) for oral testimony on material issues of fact.

See also Haekal v. Refco, Inc., [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,262 at 50,573 (CFTC Sept. 29, 2000) (internal citations omitted):

Commission Rule 12.311 authorizes a presiding officer to resolve a reparations complaint without an oral hearing when “the documentary proof and other tangible forms of proof submitted by the parties are sufficient to permit resolution of some or all of the factual issues in a proceeding without the need for oral testimony.” [Commission] precedent recognizes that this simplified procedure is only appropriate when the documentary evidence is “‘so convincing or persuasive’ that credibility can be readily determined without an oral hearing.”

With rare exceptions, disputes of material fact in a reparations case adjudicated by an ALJ should be resolved at an oral hearing at which parties actually testify. *Boring*, ¶ 25,380 at 39,281.

The ALJ dismissed Anderson’s claim because her written Direct Testimony “lacks any specific description of what Beach said to induce her trading with Peregrine” and does not “establish[] facts that would support the inference that Beach had a cognizable disclosure duty that he violated.” I.D. on Remand at *2. The Commission, however, never contemplated that reparations claims heard by an ALJ would be established or defended wholly via written direct

Reparation Rules provide that hearings by telephone or in person may be held in summary Subpart B proceedings when “necessary and appropriate.” 17 C.F.R. § 12.209(a).

testimony. Any gaps in Anderson's prehearing statement could and should have been dealt with at the hearing. Our remand order, citing Commission precedent, expressly noted that "[i]n cases involving *pro se* litigants, it is appropriate for a presiding officer to take an active role in highlighting relevant issues and fully developing the factual record." *Anderson*, ¶ 30,382 at 58,721, quoting *Lehoczky v. Gerald, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L Rep. (CCH) ¶ 26,441 at 42,920-21 (CFTC June 12, 1995). The ALJ did exactly the opposite, using the "hearing" as a vehicle to silence the parties and enforce his unnecessarily rigorous prehearing order.

No meaningful hearing occurs when parties are precluded from presenting oral testimony and engaging in cross-examination. *Boring*, ¶ 25,380 at 39,277; *Radden v. Futures Trading Group, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L Rep. (CCH) ¶ 26,281 at 42,425 (CFTC Dec. 12, 1994) (reserving sanctions that "amount to a deprivation of a decision on the merits . . . for flagrant abuses where a party has acted in bad faith"), quoting *Marlow v. Oppenheimer Rouse Futures, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L Rep. (CCH) ¶ 23,904 at 34,212 (CFTC Sept. 9, 1987). The ALJ thus abused his discretion by refusing to allow the parties to testify and cross-examine each other. The ALJ further abused his discretion in requiring the parties to incorporate their initial pleadings into evidence by reference in prehearing submissions, a formality that is not required by the Commission's reparations rules.

As a matter of general guidance regarding the conduct of reparations proceedings, we note that almost from its inception, the Commission has emphasized that the reparations forum is informal and parties are not to be subjected to strict rules found in the courts. *Sommer v. Conticommodity Services, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L Rep. (CCH) ¶ 24,244 at 35,106 (CFTC May 20, 1988) ("Congress[] inten[ded] that the reparations program

provide a more flexible and informal forum than that available in court.”). In *Cook v. Monex International, Ltd.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,532 at 30,295 (CFTC Mar. 19, 1985) the Commission stated:

Congress designed the reparation procedure to provide a forum through which persons could seek relief in the event they had been wronged by conduct of industry professionals, often analogous to the forum provided by a small claims court. As remedial legislation, the reparations procedure should be liberally interpreted to effectuate that congressional purpose.

(Citations to legislative history omitted.) Finding that the complexities and formalities of district court litigation were not involved in the reparations program, the Commission stated elsewhere:

Congress enacted the reparations provisions to provide a forum analogous to a small claims court for resolution of a private party’s claim against an industry professional . . . “these informal procedures were intended to supplement than supplant the implied judicial remedy.” House and Senate leaders described reparations as “new customer protection features” which were “not intended to interfere with the courts.”

Nelson v. Chilcott Commodities Corp., [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,934 at 28,033 (CFTC Dec. 12, 1983) (citations omitted). Moreover, “to remain inexpensive, the reparations forum must, at a minimum, remain hospitable to the participation of *pro se* parties. As a result, we have recognized that allowances must be made for *pro se* status in interpreting and applying procedural requirements.” *Hall v. Diversified Trading Systems, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 at 41,751 (CFTC July 7, 1994) (citation omitted).

Our December 2006 remand order could not have been clearer. It vacated the ALJ’s Order of Dismissal in its entirety and required that a hearing be held to provide the parties with a meaningful opportunity to present their respective claims and defenses. Because the ALJ disregarded our instructions, the parties have not yet had their day in court. Since the ALJ has by his actions made clear that he will not afford the parties a meaningful hearing, we remand this

case a second time and reassign it to the Commission's other administrative law judge.

In re Nikkhab, [2005-2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,044 (CFTC Mar. 25, 2005)(when an ALJ did not comply with instructions on two prior remands, Commission declined to remand again and ordered the parties to submit evidence directly to the Commission); *In re Siegel Trading Company, Inc.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,527 at 22,184 (CFTC Dec. 16, 1977)(remanding and reassigning).

CONCLUSION

Based on the foregoing, we find and hold that the ALJ abused his discretion by failing to allow the parties to present oral testimony and engage in cross-examination, and by failing to treat the parties' sworn pleadings as evidence. The case is remanded and reassigned to the Commission's other administrative law judge with instructions to hold a further hearing.

IT IS SO ORDERED.

By the Commission (Acting Chairman LUKKEN and Commissioners DUNN, SOMMERS and CHILTON).



David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 14, 2008