

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

EDNA D. ANDERSON

v.

DAVID M. BEACH

CFTC Docket No. 05-1058

OPINION AND ORDER

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Complainant Edna D. Anderson (“Anderson”) appeals from the Administrative Law Judge’s (“ALJ”) order dismissing her complaint with prejudice for “willfully violat[ing]” the ALJ’s prehearing order. We find that the ALJ abused his discretion and accordingly vacate his order of dismissal. We remand this matter to the ALJ with instructions to schedule a hearing and afford complainant an opportunity to be heard.

BACKGROUND

Complainant, proceeding pro se, filed a reparations complaint in 2005 against David M. Beach (“Beach”) and Peregrine Financial Group, Inc. (“Peregrine”), alleging “inappropriate investment, misrepresentation, nondisclosure [and] churning,” and claiming \$50,000 in damages. On March 17, 2006, the ALJ issued an “Order and Notice of Hearing,” informing the parties that a hearing would be held on May 23, 2006 and directing the parties to submit certain documents “on or before April 17, 2006,” to wit:

- (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.” *See* Order and Notice of Hearing at 2-3 (internal footnotes omitted).

The order advised parties that failure to attend the hearing would be deemed a waiver of the opportunity to be heard and advised further that “[f]ailure to attend the hearing or comply with this order may also subject a party to other consequences such as dismissal of the complaint or issuance of a default order as appropriate.” *Id.* at 4. On April 18, 2006, the ALJ issued an order granting Peregrine’s motion to stay its obligation to comply with the order because it expected to settle with Anderson. The order also stated, “[a]s for the other parties (and claims), the Notice of Hearing remains in effect.”¹

On April 24, 2006, the ALJ issued a Show Cause Order, in which he observed, “it seems that neither Anderson nor respondent David M. Beach filed the hearing-related documents that we specified in the Notice of Hearing,” 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. He ordered Anderson and Beach to “show cause, on or before May 5, 2006, why they should not be barred from presenting evidence at (and otherwise participating in) the oral hearing and/or sanctioned in some other manner.” *Id.* (footnote omitted).

¹ Anderson’s claims against Peregrine were dismissed on April 25, 2006, upon the parties’ settlement.

On May 1, 2006, the Office of Proceedings received from Anderson a two-page, single-spaced document headed, "Direct Testimony of Edna D. Anderson," setting forth the course of dealings between the parties.² The document began, "David Beach and I have different versions of what happened to my investments," and concluded: "Since it boils down to my word against David Beach's words . . . I trust that the most plausible version will be received most favorably." Beach did not respond to the ALJ's Show Cause Order.

On May 16, 2006, the ALJ issued an Order of Dismissal, finding that "Anderson and Beach willfully violated the Notice of Hearing" by "fail[ing] to submit the documents required . . . in a timely fashion." Order of Dismissal at 4. He also found that "neither party took advantage of the opportunity [afforded by the Show Cause Order] to make an excuse for or otherwise explain its misbehavior." *Id.* He noted that "Anderson's belated prehearing submission fell a good deal short of our requirements even if she did not intend to introduce any documents other than her declaration at the hearing." *Id.* at 3, n.8.

The ALJ held that Anderson and Beach "are precluded from introducing testimonial or documentary evidence at the oral hearing in this matter. These sanctions effectively dispose of this proceeding because they make it impossible for Anderson to meet the burden of proving her entitlement to an award of damages." *Id.* at 4-5. Accordingly, he dismissed the complaint.

Anderson, now represented by counsel, filed a timely notice of appeal on June 5, 2006. Her brief offers no explanation for not meeting the deadline established in the ALJ's prehearing order, other than to state that she was engaged in settlement negotiations with Peregrine at the time, and reached an agreement in principle on April 17, 2006, the same day on which documents were due under the prehearing order. Anderson argues that "the Show Cause Order essentially extended that deadline until May 5, 2006." App. Br. at 6.

² Anderson filed her declaration on May 1, 2006, and filed an amended declaration on May 4, 2006.

Anderson argues further that her declaration meets all of the requirements of the prehearing order in that it: “(1) clearly indicates her intent to proceed with the hearing that was scheduled to take place on May 23, 2006; (2) identifies herself as the only witness she intends to present at the hearing; (3) provides the direct testimony of the only non-hostile witness; and (4) constitutes a prehearing memorandum that sets forth ‘a detailed discussion of all issues of fact and law that are material to the hearing.’” *Id.* at 7.

Complainant describes the ALJ’s disposal of the case as “draconian” and “unfair,” and contrary to a United States Supreme Court holding that submissions by pro se litigants “should be held to less stringent standards than formal pleadings drafted by lawyers.” *Id.* at 9, citing *Haines v. Kerner*, 404 U.S. 519 (1972). No answering brief was filed by Beach.

DISCUSSION

The reparations forum deals leniently with pro se litigants. “[A]llowances 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)(vacating an order of dismissal as an “excessive” sanction for a pro se complainant who failed to meet a deadline for amending her complaint, failed to comply with respondent’s discovery requests, and filed no response to respondent’s motion to dismiss). See *Sanchez v. Crown*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,183 at 57,726 (CFTC Jan. 18, 2006)(acknowledging that “the leeway afforded pro se complainants” warranted naming a respondent against whom charges ultimately were dismissed); *Lehoczky v. Gerald, Inc.*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,441 at 42,920-21 (CFTC June 12, 1995) (“In 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.”); *Ricci*

v. Commonwealth Financial Group, Inc., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,917 at 44,443 (CFTC Dec. 20, 1996)(citing *Lehoczky*).

The sanction of dismissal was facially excessive and an abuse of the ALJ's discretion. Both parties missed the initial deadline. Anderson filed a timely response to the ALJ's Show Cause Order that substantially met the requirements of the prehearing order.

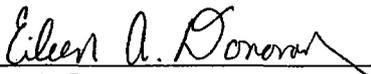
Our precedent also recognizes the need to balance the leeway afforded pro se complainants against a "respondent's constitutionally-protected right to notice of the charges against him and a fair opportunity to defend." *Marvin v. First Nat'l Monetary Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,046 at 37,910 (CFTC Apr. 17, 1991). In the circumstances of this case, Beach suffers no prejudice if this case goes forward.

CONCLUSION

For the foregoing reasons, the ALJ's Order of Dismissal is vacated in its entirety and the case is remanded to him. The ALJ shall schedule a hearing with reasonable promptness affording complainant an opportunity to establish her claims.

IT IS SO ORDERED.

By the Commission (Chairman JEFFERY and Commissioners LUKKEN and DUNN; Commissioner HATFIELD not participating).



Eileen A. Donovan
Acting Secretary of the Commission
Commodity Futures Trading Commission

Dated: December 21, 2006