Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Joshua Ranjit Inc. d/b/a 7-Eleven 10326
Docket No. A-16-133
Decision No. 2758
January 6, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Joshua Ranjit Inc. d/b/a 7-Eleven 10326 (Respondent) appealed an Administrative Law Judge's (ALJ) Order of Default and Initial Decision assessing a $500 civil money penalty (CMP) against Respondent. *Joshua Ranjit Inc. d/b/a 7-Eleven 10326*, FDA Docket No. FDA-2015-H-4251 (2016) (ALJ Decision). The Center for Tobacco Products (CTP) of the Food and Drug Administration (FDA) filed a Complaint seeking a $500 CMP against Respondent for selling tobacco products to minors and for failing to verify the purchasers' age through means of photo identification, in violation of federal statutes and regulations. Respondent filed an Answer to the Complaint but subsequently did not respond to the ALJ's procedural orders. The ALJ issued an Order to Show Cause why default judgment should not be entered in favor of CTP. Respondent did not submit a response to that order. As a sanction for Respondent's failure to respond to the Order to Show Cause, the ALJ struck Respondent's Answer to the Complaint and entered default judgment against Respondent. Respondent timely appealed the ALJ Decision to the Board.

For the reasons explained below, we conclude that the ALJ did not abuse his discretion in striking Respondent's Answer and entering default judgment in favor of CTP as a sanction for Respondent's failure to respond to the ALJ's Order. Accordingly, we sustain the ALJ Decision.

I. Applicable Law

The Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, prohibits the "misbranding" of a tobacco product held for sale after shipment in interstate commerce and authorizes the FDA to impose CMPs against any person who intentionally violates that prohibition. 21 U.S.C. §§ 331(k), 333(f)(9). A tobacco product is misbranded if distributed or offered for sale in any state in violation of regulations issued under the Act. 21 U.S.C. § 387c(a)(7)(B). The Act directed the Secretary to establish the CTP within the FDA and authorized the Secretary to issue regulations restricting the sale and distribution of tobacco products. 21 U.S.C. §§ 387a(e), 387f(d).

The regulations provide that a retailer, among other things: 1) may not "sell cigarettes or smokeless tobacco to any person younger than 18 years of age"; and 2) must "verify by means of photographic identification containing the bearer's date of birth that no person purchasing the product is younger than 18 years of age" except that "[n]o such verification is required for any person over the age of 26[.]" 21 C.F.R. § 1140.14(a), (b)(1), (2).[1] The Act and regulations specify the maximum CMP amounts that may be imposed based on the number of violations a retailer has committed and the period of time in which the violations occurred.[2] 21 U.S.C. § 333 note; 21 C.F.R. § 17.2.

CTP initiates a case by serving an administrative complaint on the retailer (respondent) and filing a copy of the complaint with the FDA Division of Dockets Management. 21 C.F.R. §§ 17.3, 17.5, 17.7. The complaint specifies, among other things, the respondent's alleged violations and the assessed penalties. 21 C.F.R. § 17.5. In order to challenge the allegations and penalties, a respondent may request a hearing before a "presiding officer," who is an ALJ, by filing an answer to the complaint within 30 days of service of the complaint or may request, within that period, an extension of time to file the answer. 21 C.F.R. §§ 17.3(c), 17.9. The ALJ must "conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made." 21 C.F.R. § 17.19(a). The ALJ's "initial decision" becomes the final FDA decision unless a party timely appeals the initial decision to the Board. 21 C.F.R. §§ 17.45, 17.47.

II. Case Background[3]

The CTP filed a Complaint dated November 23, 2015 against Respondent, seeking a $500 CMP for three alleged violations of the Act and regulations within a 24-month period. Administrative Record (AR) 1. The Complaint alleged that Respondent owned an establishment at 10843 North 56th Street, Tampa, Florida, 33617. According to the Complaint, on August 9, 2015, at approximately 2:35 p.m., an FDA-commissioned inspector documented that an employee of Respondent sold tobacco products to a minor,

[1] This decision cites to the regulations in effect when the violations alleged in the November 23, 2015 Complaint occurred, unless noted otherwise.

[2] During the relevant period, 21 U.S.C. § 333 and section 17.2 of the regulations set out two parallel CMP schedules, with lower CMPs assessed against a retailer who had an "approved training program." 21 U.S.C. § 333 note; 21 C.F.R. § 17.2. The FDA stated in CMP guidance documents, however, that it would use the lower schedule for all retailers until it developed regulations establishing standards for training programs. Guidance for Industry and FDA Staff – Civil Money Penalties and No-Tobacco-Sale Orders for Tobacco Retailers Responses to Frequently Asked Questions at 13 (May 2015) (FDA Guidance) http://www.fda.gov/downloads/TobaccoProducts/Labeling /RulesRegulationsGuidance/UCM447310.pdf.

[3] The factual information presented in this section is undisputed and is taken from the ALJ Decision and the administrative case record before the ALJ. It is not intended to serve as new findings or substitute for any findings in the ALJ Decision.

in violation of 21 C.F.R. § 1140.14(a), and failed to verify the age of a person purchasing tobacco products by means of photographic identification in violation of 21 C.F.R. § 1140.14(b)(1). *Id.* at 2-3. The Complaint also alleged that, on February 26, 2015, CTP issued a Warning Letter to Respondent stating that an employee of Respondent had sold tobacco products to a minor on January 5, 2015, in violation of 21 C.F.R. § 1140.14(a), and failed to verify the age of the person purchasing tobacco products by means of photographic identification in violation of 21 C.F.R. § 1140.14(b)(1). *Id.* at 3.

By letter dated December 6, 2015, Respondent submitted an Answer to the Complaint, denying the alleged charges. AR 3. Respondent's representative stated that he checked the store's schedule for August 9, 2015 and found that "none of [the] employees who worked on that date and time fits the description on the complaints." *Id.* [4] He also asserted that "[i]t is a Standard Operating Procedure in my company that employees wear a name tag." *Id.* In addition, Respondent's representative stated that he did not previously receive an FDA Warning Letter of prior violations. *Id.*

On April 18, 2016, the ALJ issued a Procedural Order in which he identified a hearing venue, established a hearing date, and set deadlines for discovery and the parties' prehearing and posthearing submissions. AR 4. On April 25, 2016, CTP filed a motion for the ALJ to reconsider his Procedural Order on the ground that deadlines and procedures in the Order were inconsistent with the regulations. AR 6.

On May 11, 2016, the ALJ granted CTP's motion and issued a revised Procedural Order. AR 7. The May 11 Order, among other things, directed the parties to consult with one another and submit to the ALJ no later than May 27, 2016 a Case Management Order identifying a mutually agreeable date and place for the hearing as well as mutually agreeable deadlines for procedural actions. *Id*. at 3. On May 27, 2016, CTP filed with the ALJ and served Respondent with a completed Case Management Order with CTP's proposed hearing date and other deadlines, stating that it had "called Respondent in an effort to reach mutually agreeable dates for the Case Management Order but was not able to reach Respondent." AR 8, at 1.

[4] The Complaint does not describe or name the employee who allegedly sold cigarettes to a minor. According to CTP, Respondent's Answer may be referring to a Notice of Compliance Check Inspection, which CTP routinely "sends to the business within a few days of the alleged violation." CTP Br. at 3, n.2. CTP's brief states that a Notice of Compliance Check includes a description of the sales clerks. *Id.* We do not address the merits of this or any other contention in Respondent's Answer because, as we explain later, Respondent did not comply with the ALJ's procedural orders and the ALJ did not abuse his discretion in sanctioning Respondent by striking its Answer.

On May 31, 2016, the ALJ issued an Order to Show Cause stating that Respondent had failed to comply with the regulations governing hearings because it did not respond to either of the ALJ's Procedural Orders or CTP's Motion for Reconsideration. AR 9. The ALJ noted that the May 11, 2016 Order that was mailed to Respondent at the address identified in the complaint was returned, marked "UNK, Refused," "Return to Sender Attempted Not Known, Unable to Forward." [5] AR 9, at 2. The Order to Show Cause continued, "Given Respondent's failure to comply with the rules and our Orders, the administrative record shows *prima facie* documentation that the Complainant is entitled to the relief set forth in the Complaint." *Id.* The Order established a deadline of June 24, 2016 for Respondent to show cause why a judgment of default based on the Complaint allegations and CMP should not be entered. *Id.*

The ALJ subsequently entered into the administrative record a "Proof of Service of Order to Show Cause" and signed certified mail receipt showing that the Order was served on Respondent at the address identified in the Complaint. AR 11. Although the date stamp on the certified mail receipt is illegible, a search for the tracking number (7011 1150 0002 2587 1054) on the United States Postal Service's website shows that the article was delivered to Respondent's front desk or reception area on June 6, 2016 at 10:44 a.m.

Respondent did not submit a response to the Order to Show Cause, and on July 22, 2016, nearly two months after issuing the Order, the ALJ issued the Order of Default and Initial Decision, striking Respondent's Answer, entering default judgment and imposing a $500 CMP against Respondent. AR 14.

[5] The Service List for the May 11, 2016 Order shows that the ALJ sent it to Respondent's business address of record by Certified Mail #7011 1150 0002 2587 0644. A search for that tracking number on the United States Postal Service's website shows that the item was "Refused" on May 16, 2016 and marked "Addressee Unknown" on May 18, 2016. The ALJ stated that since the May 11 Order "was mailed to Respondent's business address, Respondent is presumed to have received the [Order] and to be on notice of the requirements therein." *Id.* The common law recognizes, and Federal courts have held, that where an article is properly mailed, there exists a rebuttable presumption that the item is received by the addressee. *See, e.g., In re Farris*, 365 F. App'x 198, 199-200 (11th Cir. 2010). In the case of the ALJ's May 11, 2016 Procedural Order, the presumption of receipt was rebutted because the document was returned. We find that the ALJ's error in relying on the presumption of receipt was harmless, however, because the apparent refusal of Respondent's representative or any of Respondent's employees to accept the mailed document reasonably could be considered a refusal to comply with the Order or failure by Respondent to defend the action. Furthermore, as discussed above, although the Order to Show Cause provided Respondent an additional opportunity to show that it intended to defend the action and notice that if it did not respond, CTP would be "entitled to the relief set forth in the Complaint," Respondent did not avail itself of that opportunity. AR 9, at 2.

III. Discussion

A. The ALJ sanctioned Respondent based on 21 C.F.R. §§ 17.35 and 17.11.

An ALJ may sanction a party for failing to comply with an order or failing to prosecute or defend an action, among other things. 21 C.F.R. § 17.35(a). Any sanction must "reasonably relate to the severity and nature of the failure or misconduct." *Id.* at § 17.35(b). In this case, the ALJ struck Respondent's answer and entered default judgment in favor of CTP as a sanction for Respondent's failure to respond to the ALJ's orders. The ALJ imposed the sanction after providing Respondent an opportunity to show cause why default judgment should not be entered and notifying Respondent that if it did not show cause, CTP would be "entitled to the relief set forth in the Complaint." AR 9, at 2. The ALJ found that Respondent had failed to respond to the order to show cause. ALJ Decision at 3-4. Following Petitioner's failure to respond to the order, the ALJ found Respondent "in default," concluded that Respondent had waived its right to a hearing, and struck the Respondent's Answer from the record. *Id*.

Section 17.11 of the regulations, "Default upon failure to file an answer," provides that if a respondent does not file an answer, the ALJ "shall assume the facts alleged in the complaint to be true," and "issue an initial decision … imposing: (1) The maximum amount of penalties provided for by law for the violations alleged; or (2) The amount asked for in the complaint, whichever amount is smaller." 21 C.F.R. § 17.11(a). Striking an answer leaves a respondent in the position of a respondent that has not answered a complaint. *KKNJ, Inc. d/b/a Tobacco Hut 12*, DAB No. 2678, at 10, n.7 (2016). The ALJ thus treated the allegations set out in the FDA complaint as proven and proceeded to apply the relevant law to those facts.

We address first Respondent's argument to us that its failure to respond to the order to show cause within the required time should be excused, and find Respondent's position to be without merit. Having determined that Respondent failed to comply with the ALJ's order without justification, we then address whether the sanction imposed by the ALJ was within his discretion.

B. We reject Respondent's argument that its failure to respond to the order to show cause should be excused.

In Respondent's August 15, 2016 appeal to the Board, Respondent's representative states with regard to its failure to timely respond to the Order to Show Cause:

> I understand and believe that they send me a letter on Order to Show Cause last May 31, 2016. But, unfortunately, my employees failed to inform me about it. I was out of the country on those dates due to family matter, and was not able to check the mails when I get back. When, I found it out it is too late already.

Notice of Appeal. Respondent's representative thus concedes, and the record shows, that an employee at Respondent's address of record signed the delivery receipt for the Order. AR 11. Respondent's representative asserts however, that his employees failed to tell him about the Order. Respondent's representative further states that the owner did not timely respond to the Order because he was out of the country and therefore was not able personally to go through the mail until he returned, after the deadline for responding to the Order had passed.

Even if these assertions are true, they do not justify Respondent's noncompliance with the ALJ's order. No circumstances beyond Respondent's control prevented it from timely responding to the ALJ's Order to Show Cause. The employees' failure to notify Respondent's representative about the Order amounts to no more than neglect by Respondent's staff. Respondent could have appointed an individual to be responsible for monitoring incoming mail or trained its staff to recognize and report important documents received through the mail or could have instituted a system guaranteed to ensure that important documents were brought promptly to the attention of Respondent's management. We do not find that the inability of staff to comprehend the significance of the Order and Respondent's representative's inability personally to open and read Respondent's mail constitute adequate reasons for failing to respond timely to the Order.

C. The standard of review on the imposition of a sanction is whether the ALJ committed an abuse of discretion.

We note that section 17.11(c) and (d) provides for an ALJ to reopen a default decision entered after no answer is timely filed, if the respondent, within 30 days, demonstrates "extraordinary circumstances." In this case, however, the issue did not involve failure to timely file an answer and, in any event, Ranjit sought no reopening.[6] In such situations, we review whether entry of default was an appropriate response under the circumstances of the noncompliance under the standard the Board typically applies to reviewing an ALJ's discretionary action.

The ALJ in sanctioning Respondent relied on the regulation stating that "[t]he presiding officer [i.e., the ALJ] may sanction a person, including any party or counsel" for failing to comply with an order or failing to prosecute or defend an action, among other things.

[6] We note that in promulgating section 17.11, the FDA stated that the "determination of whether to set aside a default judgment is an administrative matter that is better suited for initial review by the presiding officer [i.e., the ALJ], and which would be subject to appeal to the DAB." 60 Fed. Reg. 38,612, 38,617 (July 27, 1995). In this case, however, the ALJ notified Respondent of its right to appeal the Initial Decision to the Board pursuant to 21 C.F.R. § 17.47 but did not advise Respondent of its opportunity to request the ALJ to reopen the Initial Decision pursuant to 21 C.F.R. § 17.11. Because Respondent's appeal is now properly before the Board and because the Respondent has not requested remand, we address the substance of Respondent's contentions relating to its failure to timely respond to the ALJ's Order to Show Cause rather than further prolong the proceedings by remanding to allow additional time for Respondent to seek reopening.

21 C.F.R. § 17.35, cited at ALJ Decision at 4. "Any such sanction . . . shall reasonably relate to the severity and nature of the failure or misconduct." 21 C.F.R. § 17.35. The Board has held that the language of the regulation, stating that that an ALJ "may" impose sanctions, provides for an exercise of discretion and is reviewable as such. *Retail LLC d/b/a Super Buy Rite*, DAB No. 2660, at 9-10 (2015). This is consistent with the intention of the sanction provision as originally propounded, as the FDA explained:

> FDA cannot anticipate all types of misbehavior and misconduct that could give rise to sanctions. Further, FDA cannot anticipate what sanctions may be appropriate for particular conduct in a particular situation. The presiding officer must have discretion in this area, and §17.35 is consistent with the discretion that may be delegated to the presiding officer under the APA (5 U.S.C. 556(c)).

60 Fed. Reg. 38,612, at 38,620 (July 27, 1995). Therefore, the standard of review on the imposition of a sanction is whether the ALJ abused his discretion. *T and M United Corporation d/b/a BP Shop*, DAB No. 2705, at 10-12 (2016); DAB No. 2660, at 9-10.

In the Order of Default and Initial Decision, the ALJ stated, "By filing an Answer Respondent consented to the jurisdiction of this forum." ALJ Decision at 3. The ALJ further determined, however, that Respondent subsequently "waived its right to a hearing" by failing to respond to the May 31, 2016 Order to Show Cause, which was properly served on Respondent. ALJ Decision at 2-3. As a sanction for Respondent's failure to respond to the Order, the ALJ struck Respondent's Answer pursuant to 21 C.F.R. § 17.35 and determined Respondent to be in default. *Id.* at 4. The "Impact of Respondent's Default," the ALJ explained, was that he "must assume as true all factual allegations in the complaint," and impose "the maximum amount of penalties provided for by law for the violations" or "the amount asked for in the complaint, whichever is smaller." *Id.* at 7-8. Thus, the ALJ determined that Respondent committed the violations identified in the Complaint and imposed the $500 CMP, the maximum amount provided by law for the violations and the same amount asked for in the Complaint. *Id*. at 9-11.

Under an "abuse of discretion" standard, "the reviewer may not simply substitute his or her judgment for that of the person exercising discretion." *Vincent Baratta, M.D.*, DAB 1172, at 9 n.5 (1990). Instead, the reviewing body considers only whether the decision maker has articulated a reasonable basis for the decision under review. *River East Econ. Revitalization Corp.* DAB No. 2087, at 9 (2007) (in applying an abuse of discretion standard, the Board "will not substitute our judgment" for that of the agency rendering the challenged decision and will "instead ask only whether the agency has articulated a reasonable basis for its decision, not whether it was the only reasonable decision"). As noted, the regulation requires that any sanction must "reasonably relate to the severity and nature of the failure or misconduct." 21 C.F.R. § 17.35(b).

D. The sanction imposed was within the ALJ's discretion.

For the following reasons, we conclude that the ALJ acted within his authority under the regulations and did not abuse his discretion in striking Respondent's Answer as a sanction for Respondent's failure to respond to the ALJ's orders.

Despite seeking another opportunity to put forward the merits of its defense, Respondent has not questioned the ALJ's power to impose a sanction. Indeed, the applicable regulations expressly provide broad sanction authority to the ALJ in FDA proceedings as follows:

> § 17.35 Sanctions.
>
> (a) The presiding officer **may sanction** a person, including **any party** or counsel for:
> (1) **Failing to comply with an order, subpoena, rule, or procedure governing the proceeding**;
> (2) Failing to prosecute or defend an action; or
> (3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.
> (b) **Any such sanction, including, but not limited to, those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct**.
> (c) When a party fails to comply with a discovery order, including discovery and subpoena provisions of this part, the presiding officer may:
> (1) Draw an inference in favor of the requesting party with regard to the information sought;
> (2) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and
> (3) Strike any part of the pleadings or other submissions of the party failing to comply with such request.
> (d) The presiding officer may exclude from participation in the hearing any legal counsel, party, or witness who refuses to obey an order of the presiding officer. In the case of repeated refusal, the presiding officer may grant judgment to the opposing party.
> (e) If a party fails to prosecute or defend an action under this part after service of a notice of hearing, the presiding officer may dismiss the action or may issue an initial decision imposing penalties and assessments. . . .

21 C.F.R. § 17.35 (emphasis added).

The regulation does not limit or enumerate the range of sanctions available to an ALJ in the situation where a party fails to respond to or comply with orders; it simply states that the sanctions include "but are not limited to" those prescribed in the succeeding sections for discovery failures, contumacious conduct at the hearing, or failure to defend or prosecute. *Id*. § 17.35(b). Any sanction imposed, however, must "reasonably relate to the severity and nature" of the conduct sanctioned. The sanction which the ALJ chose to impose here was to strike a submission of the offending party.[7]

In the preamble to these regulations, FDA rejected comments suggesting that the ALJ sanction authority was too expansive:

> A comment argued that the sanctions listed in §17.35 are too harsh and that financial penalties might be more appropriate than the loss of the right to defend against or prosecute a civil money penalty claim.
>
> FDA disagrees. The sanctions imposed in §17.35 are similar to sanctions available under Rule 37 of the "Federal Rules of Civil Procedure," as well as under the Program Fraud Civil Remedies regulations of EPA and HHS, and are a justifiable means of compelling the parties to adhere to the orders and rulings of the presiding officer. As in a proceeding before a judge in Federal court, a party's recalcitrance in disobeying a presiding officer's order in an administrative hearing should not be tolerated. **The wide range of sanctions listed in §17.35 provide flexibility for the presiding officer who might be presented with a party's failure to comply with an order through refusal or neglect**.

60 Fed. Reg. 38,612, at 38,620. As the preamble notes, sanctions are also available in appropriate circumstances in other kinds of cases. In federal healthcare program fraud cases, the statute permits an ALJ to impose sanctions on a party "for failing to comply with an order or procedure," including "striking pleadings, in whole or in part," or "entering a default judgment," so long as the sanction chosen reasonably relates to the failure. 42 U.S.C. 1320a–7a(c)(4). The HHS Inspector General's regulation for administrative hearings in such cases (to which the preamble refers as similar to the FDA sanction regulation) provides that an ALJ may sanction a party "for failing to comply with an order or procedure," among other bases. 42 C.F.R. § 1005.14(a). The sanction imposed "will reasonably relate" to the failure and "may include" –

[7] We note that section 17.35(c)(3) expressly authorizes an ALJ to strike a pleading or submission of a party that fails to comply with a discovery order. As we note above, we do not read this express authorization in the context of discovery noncompliance as precluding an ALJ from striking the submission of a party for other types of misconduct. In other words, we read this provision of section 17.35(c)(3) as prescriptive in one context but not limiting or prohibitive in other contexts where sanctions are otherwise appropriate.

> (1) In the case of refusal to provide or permit discovery under the terms of this part, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established;
> (2) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;
> (3) **Striking pleadings, in whole or in part**;
> (4) Staying the proceedings;
> (5) Dismissal of the action;
> (6) **Entering a decision by default**; and
> (7) Refusing to consider any motion or other action that is not filed in a timely manner.

Id. (emphasis added). Based on the preamble language and on the language of the program fraud sanction regulations which were cited as a similar model, we conclude that FDA intended that the range of possible sanctions for failure to comply with ALJ orders includes striking a pleading or submission, even where, as in the present case, that results in the entry of a decision by default because the sanctioned party no longer has a defense on the record. The regulation constrains the ALJ, however, to select only a sanction which is reasonably related to the severity and nature of the conduct involved.

We note that, in non-FDA cases, the Board has regularly upheld an ALJ's authority to take action "to sanction noncompliance with his orders" where the record supported an ALJ finding a party "to have repeatedly and intentionally failed to comply with requirements set out in his prehearing order." *Guardian Care Nursing & Rehab. Ctr.*, DAB No. 2260, at 15 (2009) (nursing home CMP case in which CMS was subject to sanction), quoting *Royal Manor*, DAB No. 1990, at 14 (2005) (rulings imposing procedural sanctions on appellant in CMS CMP case upheld); *see also Hi-Tech Home Health*, DAB No. 2105 (2007) (upholding dismissal where lesser sanctions failed to elicit compliance with ALJ rulings and case procedures); *but see Osceola Nursing & Rehab. Ctr.*, DAB No. 1708 (1999) (dismissal was within ALJ authority but was an abuse of discretion based on the particular facts of the case). As the Board stated in *Guardian*, our "inquiry does not end . . .with finding" that the ALJ had authority to impose a sanction, including a sanction of the type imposed, because we must also ask whether the sanction chosen is reasonably related to the particular circumstances of the matter. DAB No. 2260, at 18.

In this case, given Respondent's silence after the ALJ issued the April 18, 2016 Procedural Order and Respondent's apparent refusal to accept service of the ALJ's May 11, 2016 Procedural Order, the ALJ reasonably ordered Respondent to show cause why default judgment should not be entered in favor of CTP and gave notice that absent a response, the allegations in the Complaint would be accepted and CTP would be entitled

to the relief set forth in the Complaint. [8] In light of Respondent's further failure to comply with the Order to Show Cause despite having been put on notice of the potential consequences, the ALJ decision to strike Respondent's Answer was a reasonable exercise of his discretion. The resulting issuance of an initial default decision was not an excessive consequence since it flowed from Respondent's own failures to make the necessary arrangements to comply with the orders of the tribunal. We conclude that the sanction imposed by the ALJ thus "reasonably related to the severity and nature" of Respondent's failures.

Conclusion

For the reasons explained above, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member

[8] We note that the ALJ might have elected to proceed under section 17.35(a)(2) and (e) and treated Respondent's failures to accept service and to respond to the show cause order as indicating a failure to defend the action, and, on that basis, proceeded to issue an initial decision imposing the penalties. The effect from Respondent's viewpoint would have been the same – an initial decision issued in default of a defense.