

BEFORE THE IOWA DEPARTMENT OF REVENUE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF

RICHARD J. KEPROS
673 Bolton Manor Road
Springville, IA 52336

v.

IOWA DEPARTMENT OF REVENUE

INDIVIDUAL INCOME TAX

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**DIRECTOR'S FINAL ORDER ON
REVIEW**

Docket No.: 20IDR0048
Rev. Docket No.: 2017-200-2-0224

FACTS AND PROCEDURAL SUMMARY

On February 26, 2021, an administrative law judge ("ALJ") filed an Order in the above-captioned matter dismissing Richard J. Kepros's appeal of an assessment against him in response to a motion for sanction of dismissal filed by the Iowa Department of Revenue ("Department"). Mr. Kepros appealed the order to the Director of the Iowa Department of Revenue ("Director") on March 29.¹

Mr. Kepros's appeal included written arguments as well as his intent to file a "more thorough type document with[in] the next week" to replace the initially filed appeal. On April 8, the Department filed a motion for scheduling order requesting the Director issue a scheduling order to inform Mr. Kepros when his intended "more thorough" filing would be due and allow the Department to respond to that filing rather than his initial one. On July 21, a copy of Mr. Kepros's motion to the Iowa Supreme Court on unrelated matters was received, in which he requested these unrelated

¹ Appeal was mailed and postmarked on March 29, 2021 and was received and docketed on April 2.

matters serve as a basis for continuing the above-entitled case and pausing collection action.² This motion was denied.³

On August 19, the Director issued a Notice of Director's Review of Proposed Decision and Briefing Schedule to the parties, setting briefing deadlines for each party and setting the time for the Director's Review for November 15. Mr. Kepros's initial brief was received on September 20.⁴ Assistant Attorney General Hristo Chaprazov filed written arguments on behalf of the Department on October 18.

On October 20, the Director received an Emergency Request for Rescheduling of Director's Review from Mr. Kepros requesting a continuance based on his health and other matters. The Director granted the request and continued the Director's Review until December 15 and permitted Mr. Kepros to file his reply brief by December 8. In granting the request, all parties were cautioned that this would be the only rescheduling that would be permitted given that "ample time has already been given in this matter and the issues before the director are limited to only the issues contained in the record made before the ALJ." Mr. Kepros's reply brief was received on December 15.⁵ The Director commenced his review of the above-captioned matter on December 15.

ANALYSIS

Discovery Requests

First, in his initial brief, Mr. Kepros broadly objects to the Department's discovery requests. Iowa Administrative Code rule 701—7.17(5)"a" (2021)⁶ provides "[a]fter commencement of contested case proceedings, appropriate motions may be filed by any party with the presiding officer when facts requiring such motion come to the

² The motion was received by the clerk of the supreme court on June 24.

³ The motion was denied on July 19.

⁴ The brief was postmarked September 17.

⁵ The brief was postmarked December 14.

⁶ Now codified at Iowa Administrative Code rule 701—7.19(5)"a".

knowledge of the party. All motions shall state the relief sought and the grounds upon which the motions are based.” Further, any “motions filed by the parties subsequent to the commencement of a contested case proceeding shall be determined by the presiding officer.” *Id.* at r. 701—7.17(5)“f”.⁷ Additionally, “[a]ll decisions and orders in a contested case proceeding shall be based solely on the legal bases and arguments presented by the parties.” *Id.* at r. 701—7.17(8)“b”.⁸

In the ALJ’s dismissal order, there are no findings or orders related to any objections to the discovery requests nor is there any mention that this issue was even raised before or during the February 15 hearing. Instead, the order provides that Mr. Kepros represented that he thought he would have the responses to the requests completed within one week.

Additionally,

[o]n an appeal from, review of, or application for rehearing concerning the presiding officer’s order, the director has all the power which the director would initially have had in making the decision; however, the director will consider only those issues or selected issues presented at the hearing before the presiding officer or any issues of fact or law raised independently by the presiding officer, including the propriety of and the authority for raising issues. The parties will be notified of those issues which will be considered by the director.

Id. at r. 701—7.17(8)“d”.⁹ In the August 19 Notice of Director’s Review of Proposed Decision and Briefing Schedule, the parties were notified that the review would be “limited to [the] consideration of the issues contained in the record made before the [ALJ].” Given that the issue of objections to the discovery requests was not before the ALJ, Mr. Kepros’s objection is DENIED.

⁷ Now codified at Iowa Administrative Code rule 701—7.8(4) (“Motions filed with the administrative law judge will be ruled on by the administrative law judge.”).

⁸ Now codified at Iowa Administrative Code rule 701—7.19(8)“b”.

⁹ Now codified at Iowa Administrative Code rule 701—7.19(8)“d”.

Iowa Rule of Civil Procedure 1.502

Mr. Kepros also argues that the ALJ was required to deny the Department's motion for sanctions for failing to comply with Iowa Rule of Civil Procedure 1.502. He asserts the Department failed to attach copies of the discovery requests and any insufficient response to its motion for sanctions under rule 1.517 as required by rule 1.502. Rule 1.502 provides that "[a]ny motion under rule 1.517 attacking the sufficiency of a response to a discovery request must have a copy of the request and response attached or the motion *may* be denied." (emphasis added).

In the present matter, again there is no indication in the record that Mr. Kepros objected and attacked the sufficiency of the Department's sanction motion under rule 1.502 to the ALJ either prior to or during the February 15 hearing. Further, even if the Department had failed to comply with rule 1.502, Mr. Kepros's argument that rule 1.502 required the ALJ to deny the Department's motion is in error. As identified above, the language of rule 1.502 contains the word "may" when describing the possible consequence of a denial of a motion for noncompliance with the rule ("the motion may be denied."). The use of the "word 'may' . . . vest[ed] the [ALJ] with discretion." *Becher v. State*, 957 N.W.2d 710, 714 (Iowa 2021). "[M]ay' authorizes but does not require. 'May' is permissive, not mandatory." *Fishel v. Redenbaugh*, 939 N.W.2d 660, 663 (Iowa Ct. App. 2019). See Iowa Code § 4.1(30) (comparing the definitions of "may" with "shall" and "must"). Accordingly, given the issue of the sufficiency of the Department's motion under rule 1.502 was not presented or considered in the ALJ's dismissal order, Mr. Kepros's objection is DENIED.

Failure to Comply with Discovery Requests

Finally, Mr. Kepros makes several arguments relating to his inability to answer the Department's discovery requests, including the derecho storm which hit the state in August 2020, health-related issues, and other legal matters he had or currently has, and that because of these issues, the ALJ erred in dismissing his appeal.

"[D]iscovery rules are designed to promote the orderly and timely administration of justice." *Wagner v. Miller*, 555 N.W.2d 246, 250 (Iowa Ct. App. 1996). "A trial should be a search for the truth, and our rules of discovery are an avenue to achieving that goal. The discovery process seeks to make a trial into 'a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 386 (Iowa 2012) (quoting *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 311 (Iowa 2009)). In order to obtain that timely administration of justice "[a] variety of discovery methods exist under our rules for a party to gather such information from another party" including written interrogatories, requests for admission, and requests for documents. *Id.*; see generally Iowa Rules of Civil Procedure division V (Discovery and Inspection).

Whether dismissal is a proper sanction depends upon the circumstances of each particular case as the "[i]mposition of discovery sanctions . . . is discretionary." *Krugman v. Palmer Coll. of Chiropractic*, 422 N.W.2d 470, 473 (Iowa 1988) (quoting *Suckow v. Boone State Bank & Trust Co.*, 314 N.W.2d 421, 425 (Iowa 1982)). "Dismissal is a drastic measure that should not be ordered absent willfulness, fault, or bad faith. The fact sanctions less drastic than dismissal are available to the trial court does not" mean there was an abuse of discretion. *Wagner*, 555 N.W.2d at 249. Iowa Rule of Civil Procedure 1.517 "expressly authorizes a court to dismiss an action as a sanction for

failing to comply with [a] discovery order." *Id.* (quoting *Postma v. Sioux Center News*, 393 N.W.2d 314 (Iowa 1986)); see also Iowa Admin. Code r. 701—7.11(2)¹⁰.

Before imposing a dismissal, a court "must find that a refusal to comply was the result of willfulness, fault, or bad faith. Usually such a sanction is limited to those situations when a party has violated a district court's order." *Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988). However, there is no rule that a

court may *never* impose sanctions of dismissal or default on a [taxpayer] unless the [taxpayer] has willfully or in bad faith failed to comply with discovery orders of the court. Such an absolute rule would conflict with the well-established rule that [taxpayers] are responsible for [their] actions . . . and in appropriate circumstances dismissal or default may be visited upon them because of [their] actions.

Id. at 241. Additionally, before dismissal,

fundamental fairness should require a district court . . . hold a hearing . . . to determine whether [other remedies would be a] more just and effective sanction. Dismissal . . . should be the rare judicial act. [I]f appropriate, impose on the [party not complying with discovery] sanctions less extreme than dismissal or default, unless it is shown that the [party not complying with discovery] is deliberately or in bad faith failing to comply with the court's order.

Id. at 240–41.

Here, while noting that Mr. Kepros had not specifically violated an order by the ALJ, the ALJ found that despite granting Mr. Kepros multiple extensions of time, Mr. Kepros failed to respond to the discovery requests that had been served and pending for seven and one-half months at the time of the February 15 hearing. Further, the ALJ's multiple previous orders granting extensions of time included warnings that Mr. Kepros's continued failure to respond to the Department's discovery requests could result in the imposition of sanctions against him. The ALJ also noted Mr. Kepros had represented at the February 15 hearing that he would have his discovery responses completed within

¹⁰ Now codified at Iowa Administrative Code r. 701—7.12(6).

one week, but at the time of the ALJ's order dated February 26, Mr. Kepros had still failed to provide any responses.

The ALJ found Mr. Kepros's "noncompliance [was] due to willfulness, fault, or bad faith" stating

While the tribunal is mindful of the [Mr. Kepros's] obligations on his farm, at this point it has been seven and one-half months since [the Department] served discovery requests. The requests are minimal. [Mr. Kepros] has had sufficient time to respond in the prior seven months and has chosen not to. That constitutes willfulness, fault, or bad faith.

Based upon these findings, the ALJ concluded dismissal was the appropriate sanction.

Iowa Administrative Code rule 701—7.17(8)"g"¹¹ provides that "[a] decision by the director may reverse or modify any finding of fact if a preponderance of the evidence will support a determination to reverse or modify such a finding of fact, or may reverse or modify any conclusion of law that the director finds to be in error."

In this matter, a preponderance of the evidence does not support reversing or modifying any findings of fact or conclusions of law. The ALJ made a finding that Mr. Kepros's noncompliance was due to willfulness, fault, or bad faith and determined dismissal was the appropriate sanction only after providing Mr. Kepros ample time, including multiple extensions, to answer the Department's discovery, multiple notices that continued noncompliance could result in sanctions including dismissal, and providing a hearing to determine if dismissal was the appropriate sanction.

Additionally, despite Mr. Kepros's reply brief being postmarked on December 14 and received on December 15, the reply brief was read and reviewed to give Mr. Kepros the opportunity to fully provide his arguments in this case. The brief contains a reiteration of previous arguments, including many misstatements of law and information

¹¹ Now codified at Iowa Administrative Code rule 701—7.19(8)"g".

entirely unrelated to the present matter. He again asks for more time to respond to the Department's discovery requests from July 2020 and provides unconvincing excuses as to why he did not respond in the nearly one and a half years since the discovery requests were first sent to him. Mr. Kepros also makes allegations about statements or comments he claims Department's counsel, Mr. Chaprazov, made to him during the pendency of the case before the ALJ. No credibility is given to these statements since there is nothing in the record showing that Mr. Kepros presented these allegations to the ALJ at any point during the time the case was before the ALJ. Mr. Kepros's reply brief serves to lend support to the ALJ's finding that Mr. Kepros's "noncompliance is due to willfulness, fault, or bad faith."

Accordingly, Mr. Kepros's arguments that the ALJ erred in dismissing his appeal are DENIED.

ORDER

IT IS THEREFORE ORDERED that the Administrative Law Judge's Order dismissing Mr. Kepros's appeal on the above-caption matter is AFFIRMED.

Issued at Des Moines, Iowa on this 10 day of January, 2022.

IOWA DEPARTMENT OF REVENUE

BY 

Kraig Paulsen, Director

CERTIFICATE OF SERVICE

I certify that on this 10th day of January, 2022, I caused a true and correct copy of the Director's Final Order On Review to be delivered or forwarded by U.S. Mail to the following person(s):

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