

Katz, Lawrence D.,)	CASE NO. 96-N-1765
)	
Appellant,)	(REAL PROPERTY TAX)
)	
vs.)	ORDER
)	
Cuyahoga County Board of)	(Requiring Appellant
Revision, Cuyahoga County)	to Show Cause)
Auditor and the Warrensville)	
Heights Board of Education,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant	- Daniel S. Siegel Fred Siegel Co., L.P.A. Suite 2700 1900 East Ninth Street Cleveland, Ohio 44114-3499 FAX (216) 241-1006
For the County Appellees	- Stephanie Tubbs Jones Cuyahoga County Prosecuting Attorney By: Gregory B. Rowinski Assistant Prosecuting Attorney Courts Tower-Eighth Floor 1200 Ontario Street Cleveland, Ohio 44113 FAX (216) 443-7602
For the Appellee Warrensville Heights Board of Education	- Timothy J. Armstrong Armstrong, Mitchell & Damiani 1725 The Midland Building 101 Prospect Avenue, West Cleveland, Ohio 44115-1091 FAX (216) 566-0064

Entered: November 21, 1997

The above-captioned appeal is now considered by the Board of Tax Appeals in order to determine whether the parties have fully complied with an Order previously issued on October 10, 1997 and, if not, the appropriate course of action to be taken by this Board. In order to address this matter, it is

appropriate to briefly review the procedural history of this appeal.

The statutory transcript certified to this Board by the Cuyahoga County Auditor ("Auditor") reveals that on March 17, 1995, appellant, proceeding on his behalf, filed with the Cuyahoga County Board of Revision ("BOR") a complaint requesting a decrease in the value assigned certain real property for tax year 1994. The subject property was identified as being comprised of four parcels whose primary use was a commercial building. The owner sought a reduction of \$60,330 in the taxable value assigned these parcels. On May 17, 1995, a "counter-complaint" was filed with the BOR on behalf of the appellee Warrensville Heights Board of Education ("BOE") in which it was requested that the value of the subject property remained unchanged. On July 19, 1996, the law firm of Fred Siegel Co. entered an appearance with the BOR on appellant's behalf.

At the hearing subsequently conducted by the BOR, neither party presented any witnesses to substantiate their claims of value. Instead, appellant's attorney presented a packet of materials, referred to as "the owner's description and opinion of value," by virtue of which it was suggested, in counsel's cover letter, that a decrease of \$60,990 was justified. Counsel for the BOE initially submitted a copy of property record cards and later provided his own packet of materials referred to as "comparable sales data." On November 15, 1996, the BOR mailed its decision to the parties indicating

that the subject property's taxable value would neither be increased nor decreased.

On December 11, 1996, counsel for appellant filed an appeal with this Board in which it was again claimed that the subject property's taxable value should be reduced by \$60,990.¹ On January 2, 1997, counsel for the BOE entered an appearance in the appeal. By letter of this Board dated July 25, 1997, the parties were advised that the matter was scheduled for an evidentiary hearing which was to proceed on October 9, 1997.

On September 26, 1997, less than fourteen days prior to hearing, counsel for appellant filed with this Board the following request:

"We hereby request a continuance in the above caption case which is set on 10/9/97 at 9:00 AM.

"The reason for the continuance is that our appraiser needs additional time to complete his report.

"We will notify the Board shortly of a date certain on which we would request this matter be rescheduled.

"Thank you for your cooperation in this matter."

¹In the notice of appeal there was also an allegation made that the common level of assessment utilized was incorrect. But, see, Columbus Bd. of Edn. v. J.C. Penney Properties, Inc. (1984), 11 Ohio St. 3d 203; J.C. Penney Properties, Inc. v. Franklin Cty. Bd. of Revision (Aug. 27, Franklin App. Nos. 91AP-872, et seq., unreported.

On September 30, 1997, the BOE's counsel filed an objection to the continuance request, stating in part as follows:

"Civ. R. 26 requires a party to seasonably update discovery response regarding the identity of any expert witness to be called to testify. In discovery responses received on Feb. 20, 1997, the taxpayer stated that no expert had been identified at that time, but that they would promptly disclose the identity of any expert witness when such was identified. The School Board never received any disclosure that an expert had been retained in this matter."

On October 10, 1997, this Board issued an Order in which there was an acknowledgement that appellant's counsel's failure to advise opposing counsel of the identity of its expert witness may have been in derogation of this Board's Rules of Practice and Procedure and the Ohio Rules of Civil Procedure:

"In order to advance the free exchange of information, the Civil Rules are to be construed as an aid and not an impediment to the search for truth. *** As regards the present matter, Civ. R. 26 (E)(1)(b) requires that a party who has responded to discovery seasonably update the identity of any expert witness 'expected to be called.' We read appellant's reference to its appraiser needing time to prepare for trial to suggest the expectation that appellant intends, at least at this time, to offer the appraiser's opinion before this Board. When appellant engaged the appraiser for this purpose, it was then under an obligation to inform the BOE of the expert's identity." Id. at 3-4.

Nevertheless, in an effort to resolve the parties' discovery dispute and to ensure that this Board received evidence which would assist us in the discharge of our statutory duties, the evidentiary hearing was rescheduled to proceed on January 8, 1998, with the following conditions being imposed:

"(a) Appellant must file with this Board, and with counsel for all opposing parties, a prehearing statement which identifies its appraiser(s) and the value opined by such appraiser(s). This statement must be filed within FOURTEEN (14) days of the issuance of this Order;

"(b) The Warrensville Heights Board of Education must file with this Board, and with counsel for all opposing parties, a prehearing statement which identifies its appraiser(s) and the value opined by such appraiser(s). This statement must be filed within THIRTY (30) days of the issuance of this Order;

"(c) Each party must file, no later than FOURTEEN (14) days prior to the scheduled hearing, a statement containing the identity of all witnesses which it intends to call at the hearing. This statement must be filed with both the Board and counsel for the opposing parties;

"(d) Each party is further ordered to exchange, no later than FOURTEEN (14) days prior to the scheduled hearing, the written appraisal reports of any expert witnesses upon which it intends to rely, as well as any other document each intends to introduce into evidence."

Despite the clarity of the preceding Order, on November 4, 1997, counsel for the BOE filed a "Notice of Non-

Compliance with Discovery Order and Motion for Sanctions" which provides as follows:

"On October 10, 1997, this Board issued an Order in this matter requiring the Taxpayer to file a prehearing statement with the Board and with counsel for Appellee, Warrensville Heights Board of Education (School Board) which identifies its appraiser and the value opined by such appraiser. The Board ordered the Taxpayer to file its prehearing statement by October 24, 1997.

"Counsel for Appellee, School Board advises the Board that the School Board has not received the prehearing statement as ordered by the Board as of October 31, 1997.

"The School Board moves the Board for an Order to set a hearing, pursuant to OAC 5717-1-14(A) and (B) to determine an appropriate sanction for non-compliance with the Board's Order."

Although two days beyond the period prescribed by this Board's October 10, 1997 Order, on November 12, 1997, the BOE's counsel filed a prehearing statement to the following effect:

"Since the Taxpayer has failed to respond to the Board's Interim Order dated October 10, 1997, the Warrensville Heights Board of Education has determined that it will not present expert appraisal evidence in this matter."

Consistent with the representations of the BOE's counsel, appellant's counsel has filed with this Board neither an identification of witnesses nor a prehearing statement.

This is the posture in which this appeal is now considered by this Board.

Discovery disputes before this Board are not new. For example, in Independence Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (Sep. 2, 1994), B.T.A. Case No. 94-A-106, unreported, this Board commented upon the use, and apparent abuse, of discovery before the Board of Tax Appeals:

"The fact that we are required, yet again, to address a motion to compel discovery warrants the comment that the Rules [of Civil Procedure] relating to discovery were intended to operate extra-judicially, guiding the mutual cooperation of counsel in their pretrial preparation. As a result, the filing of a motion to compel discovery should be the exception, not the rule. However, a review of the Board's docket reveals that it has become a matter of custom for many counsel to file such motions in virtually every pending appeal." Id. at 4.

Citing Civ. R. 37(E), the Board noted that such abusive practices are not unique before the Board of Tax Appeals. Specifically, this rule, which became effective July 1, 1994, provides:

"Before filing a motion authorized by this rule, the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought. The motion shall be accompanied by a statement reciting efforts made to resolve the matter in accordance with this section." (Emphasis added.)

The Staff Notes to Civ. 37 explain the purpose for this amendment:

"The 1994 amendment adds a division requiring attorneys, unrepresented parties, or persons to confer before bringing disputes to the attention of the trial court. The purpose of the amendment is to endorse and enforce the view that, in general, discovery is self-regulating and should require court intervention only as a last resort."

Ohio Adm. Code 5717-1-11, the Board's rule regarding discovery, is a reaffirmation that the process should take place without the need for this Board's involvement. It is expected that counsel will cooperate and mutually exchange discoverable information and seek assistance from this Board only where absolutely necessary. However, on those occasions, which should be rare, where the free exchange of discoverable information fails, this Board may become involved. Such was the case in the present appeal when this Board went so far as to prescribe, by Order, the precise manner in which the parties would be permitted to bring themselves into compliance with our discovery rules. It appears that appellant's counsel has failed to avail himself of this opportunity.

This Board is not alone in its frustration in dealing with potential misconduct of attorneys during the discovery process. Indeed, in Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St.3d 254 the Supreme Court of Ohio commented upon a growing trend among attorneys to ignore proper discovery procedures, with the following admonition:

"In this case, we are asked to review several determinations made by the trial court which were reversed by the court of appeals. In passing upon the assigned errors, however, we could not help but notice that this case presents a glaring example of the lack of professionalism increasingly exhibited by some lawyers. We, therefore, take this opportunity to warn the practicing bar that we will not tolerate such behavior. While both plaintiff and defense counsel have an ethical obligation to zealously represent their clients, they must do so within the bounds of the law. Appellees' law firm failed to do this. The discovery rules adopted by this court were cavalierly ignored. Appellees' complaints about lack of a fair trial fall on deaf ears. If they were denied a fair trial, it was because of their own attorneys' actions. They must now live with the consequences.

"The discovery rules give the trial court great latitude in crafting sanctions to fit discovery abuses. A reviewing court's responsibility is merely to review these rulings for an abuse of discretion. ***" Id. at 256.

Ohio Adm. Code 5717-1-14 sets forth a wide variety of sanctions available when a party fails to comply with an order of this Board or fails to adhere to any of the rules set forth within Ohio Adm. Code Chap. 5717. Included among those sanctions are the following:

"(1) the dismissal of the appeal;

"(2) the prohibition against introducing matters into evidence in support of certain specifications of error or other parts of the notice of appeal;

"(3) the prohibition against introducing designated matters into evidence;

"(4) the prohibition against introducing expert opinion and testimony into evidence;

"(5) the denial or suspension of appearing and qualifying as an expert witness in designated matters before the board;

"(6) the denial or suspension of the right of any person to appear or practice before the board;

"(7) the payment of reasonable expenses caused by the failure to obey an order including attorney fees, and costs incurred by the board from the disobedient party or attorney advising such party;

"(8) the judicial relief provided by sections 5703.03 and 5703.031 of the Revised Code."

A party, particularly one represented by counsel, should be well aware of the sanctions which may be imposed by choosing simply to ignore a discovery request or an order of a tribunal requiring the exchange of information. See, e.g., Jones v. Murphy (1984), 12 Ohio St.3d 84 (holding that even absent an order compelling discovery, expert testimony may be excluded as a sanction for an intentional violation of Civ. R. 26(E)(1)(b)); Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged (1984), 15 Ohio St.3d 44 (holding exclusion of expert's testimony is equally appropriate for intentional violation of a local rule of court requiring expert witnesses' reports to be exchanged sixty days prior to trial); Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83 (holding that trial court did not abuse its discretion when it excluded a surprise expert witness even though the failure to disclose the identity of such witness may have resulted from neglect, a change in trial

strategy or inadvertence); Shumaker v. Oliver B. Cannon & Sons, Inc. (1986), 28 Ohio St.3d 367 (holding that the testimony of an expert witness should have been excluded when a responding party failed to supplement its responses to interrogatories regarding the witness' anticipated testimony); Wright v. Structo, Div. of Eljir Mfg., Inc. (1993), 88 Ohio App.3d 239 (holding that trial court did not abuse its discretion in excluding the testimony of an expert witness, as well as other evidence sought to be introduced, when a party failed to respond to various discovery requests); Warren Local Schools Bd. of Edn. v. Washington Cty. Bd. of Revision (June 3, 1994), B.T.A. No. 92-H-1000, unreported (excluding testimony and written appraisal report of an appraiser who was not identified in supplemental answers to interrogatories as an expert expected to be called at hearing); Westover Village LTD v. Hamilton Cty. Bd. of Revision (Nov. 24, 1995), B.T.A. No. 95-M-345, unreported (precluding a party who failed to respond to discovery from presenting any evidence at hearing regarding the subject property and reserving for later consideration the imposition of monetary sanctions).

As the Supreme Court did in Nakoff, supra, counsel are advised that conduct of the type exhibited in this case will not be condoned by this Board. Such conduct delays the orderly disposition of pending appeals, causes parties to incur additional, unwarranted costs and wastes the resources of this Board. Counsel's apparent disregard for this Board's October 10, 1997 Order warrants action by this Board. However, caution

must be exercised so as to ensure that the sanction imposed is justified by the misconduct exhibited.

As previously indicated, there are a wide variety of sanctions available where a party or its counsel ignore an Order of this Board. Although not technically a sanction, yet another remedy is that set forth in R.C. 5717.01:

"The board of tax appeals may order the appeal to be heard on the record and the evidence certified to it by the county board of revision, or it may order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper." (Emphasis added.)

Under the circumstances of this appeal, it appears it may be appropriate to order the present appeal heard solely upon the record made by the parties before the BOR. Accordingly, it is now the Order of the Board of Tax Appeals that appellant show cause why his appeal should not be heard on the record and the evidence which has been previously certified to this Board by the county board of revision. Said response shall be filed within fourteen days of the issuance of this Order. Any other party wishing to file a statement in this regard may do so within the same period. ohiosearchkeybta