IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LEROY S. ROBINSON, JR. Appellant,	)	
v.	)	Vet. App. No 15-715
ROBERT A. McDONALD, Secretary of Veterans Affairs, Appellee**.**	)	

APPELLANT'S OPPOSED MOTION FOR AN ORDER IMPOSING SANCTIONS FOR CONTEMPT OF COURT

Pursuant to U.S. Vet. App. R. 27(a) and 38 U.S.C. §7265(a), the Appellant respectfully moves this Honorable Court to issue an Order imposing monetary sanctions for contempt of Court. A separate motion requesting a Court Order finding the Secretary in Contempt of Court has been filed contemporaneously with this motion.

Pursuant to R. 27, counsels for the Secretary, Jesse Greenstein, Esq. and Thomas Sullivan, Esq. were contacted regarding the filing of this motion. The Secretary's Counsel has indicated that the Secretary is **opposed** to this motion and that he will be filing written opposition.

Brief Statement of Pertinent Facts

Both parties filed memorandums of law on March 4, 2016. In addition, several amici curiae entered an appearance and filed memorandums of law on

select issues pursuant to the requests of the Court.

The Court heard oral argument on March 29, 2016. Both parties and three amici curiae participated in the oral argument. The oral argument was focused on this Court's Rule 10(d), as well as 1) Title 36 of the Code of Federal Regulations, 2) Title 44 of the United States Code, 3) the Federal Records Act, 4) the Records Disposal Act, 5) the National Archives and Records Administration (NARA), and 6) the General Records Schedules on record retention and records disposal requirements of the National Archives.[1]

The Court issued a July 14, 2016 per curiam Order which directed the Secretary to comply commencing within 15 days of the date of the Order. The Secretary failed to timely comply with that Order. To date, he has continuously failed to comply with the Order directing that Appellant's paper file be produced for inspection.

Argument

This Court clearly has the power to enforce its Orders and to punish parties

[1] There was little to no argument on U.S.C. Title 38 at this oral argument. In order to facilitate the Court's inquiries, Counsel and certain amici were required to become experts on, at least, two entirely new areas of law contained in titles 36 C.F.R. & 44 U.S.C. To the extent that the briefing was not exclusive to Rule 10, appellant's counsel and amici provided special and unique services for the benefit of **all** veterans via this case, by their contributions to the Court in compliance with its Court-ordered inquiries.. The research and briefing on the issues are well outside the sphere and context of veteran's law.

who disobey those lawful orders. The power of federal courts to punish contempt of its orders "is thought to be an inherent and integral element of its power and has deep historical roots See *Wright, et. al., Federal Practice and Procedure*, 2960 at 366 (2nd ed. 1995). See also e.g. *Ex parte Robinson*, 86 U.S. (19 Wall) 505, 510 (1874).

In addition, the Court's statutory contempt authority arises under 38 USC §7265. Section 7265(a)(3) is relevant to this case, and provides:

> The Court shall have power to punish by fine or imprisonment such contempt of its authority as –
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> (3) disobedience or resistance to its lawful writ, process, order, rule decree, or command.

Federal courts also have the inherent power to sanction misconduct. *Jones v. Derwinski*, 1 Vet. App. 596, 606 (1991), quoting Section 7265 and adding that, "Even if Congress had not chosen to convey express authority to punish for contempt, this Court would have the power to sanction those who abuse the judicial process under the "inherent power of the federal courts[,]" citing for support *Chambers v. NASCO,* 501 U.S. 32, 33, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); and, citing *Anderson*, 6 Wheat. at 227, 5 L.Ed. at 248 for the proposition that, "courts of justice are . . . vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful

mandates".

Should the Court be so inclined to issue sanctions, this will not the first time that a panel of this Court has been compelled to issue sanctions. In a Per Curiam Order in the matter of *Adamski v. Derwinski*, 2 Vet. App. 46, 48 (1991), the panel ordered sanctions against the Secretary upon a finding that the Secretary had both disobeyed and resisted its Order. The panel further ruled as follows:

> .
> Continued delay and procrastination on the part of the Secretary has resulted in additional expenditure of resources by both the Court and appellant. The Secretary has failed to comply with the Court's December 4, 1991, order. Such failure is not an isolated occurrence as evidenced by several recent orders issued by this Court. The Court has the power to impose sanctions on the Secretary pursuant to 38 U.S.C. § 7265(a)(3) (formerly § 4065(a)(3)). *See Jones and Snyder v. Derwinski,* 1 Vet.App. 596, 605–08 (1991).

Type of Sanction

In considering the imposition of sanctions for contempt of court, the Court must consider the type of sanction. The type of sanction to impose lies in what the Court seeks to accomplish by imposing the sanction.

There is a distinction between civil contempt sanctions and criminal contempt sanctions. In *Spindelfabrik Suessen-Schurr v. Schubert & Salzer*

Maschinenfabrik, 903 F.2d. 1568, 1578 (Fed. Cir. 1990), the Court defines the difference in the two types of sanctions. That Court found that a civil contempt sanction "is remedial for the benefit of the claimant,." A criminal contempt sentence "is punitive to vindicate the authority of the court.: *Id*. That Court further found as follows:

> The ability of the contemnor to avoid the sanction by complying with the court order is an important factor in determining whether a contempt adjudication is *1579 civil or criminal. "[T]he judgement for civil contempt is conditional in nature and can be terminated if the contemnor purges himself of the contempt." *De Parcq v. United States Dist. Ct. for S. Dist. of Iowa,* 235 F.2d 692, 699 (8th Cir.1956). A coercive penalty is forward-looking and "terminable if the contemnor purges himself of the contempt...." *Windsor Power,* 530 F.2d at 316.
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> On the other hand, because criminal contempt is intended to vindicate the authority of the court, it cannot be purged by any act of the contemnor. *Nye v. United States,* 313 U.S. 33, 43, 61 S.Ct. 810, 813, 85 L.Ed. 1172 (1941); *Carbon Fuel Co.,* 517 F.2d at 1349. "It is 'unconditional, since it penalizes yesterday's defiance rather than seeking to coerce tomorrow's compliance. It cannot be ended or shortened by any act by defendant.' " *Carbon Fuel Co.,* 517 F.2d at 1349 (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure* 585, § 2960). *See also Shillitani v. United States,* 384 U.S. 364, 371, 86 S.Ct. 1531, 1536, 16 L.Ed.2d 622 (1966).

Id., 903 F.2d 1568, 1578–79 (Fed. Cir. 1990)

As the record reveals in this case, Appellant contends that there is plenty of sanctionable activity to go around. First, the Secretary has not yet complied with this Court's Orders. Thus, a civil contempt Order should follow in an effort to

"coerce" the Secretary to comply. Second, since the Secretary has openly and notoriously failed and/or refused to comply, on several different fronts, with the Court's Orders, criminal contempt sanctions are also in order to vindicate the authority of the court.

The Secretary needs to be reminded that he may not simply disagree and flagrantly defy and/or ignore the Orders of the Court. The Secretary needs to know that his behavior, demonstrably tantamount to a simple "shrug of the shoulders", is not countenanced. The Court should, therefore, consider both civil and criminal penalties against the Secretary.

Indeed, the content of General Counsel's pleadings - in particular his August 17, 2016 motion for leave to file out of time a response to the July 14, 2016 Court Order - seems to goad the Court on the issue of sanctions. He arrogantly asserts that "under the law sanctions are not appropriate." [2]. In the motion, he further inflames the situation by emphasizing the holdings in *Harvey*[3], which, incidently, describes what factors may need to be satisfied for only civil contempt sanctions (as opposed to criminal sanctions).

Further, the Secretary appears to "talk out of both sides of his mouth". At pages 3-4 of his motion, he explains that it is "...Far less clear and ambiguous...the impact that making the paper source documents in this case available for review would have upon the Secretary's appellate rights." Then, in the next paragraph he states that the Secretary "had obtained and [was] in the process of preparing Appellant's paper source documents for production in compliance with the Court's [July 14, 2016] Order.

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[2] Secretary's motion, page 1.

[3] *Harvey v. Shinseki*, 24 Vet. App. 284 (2011). The *Harvey* case, however, is not the only game in town. See *Adamski v. Derwinski*, supra.

On one hand, the GC outwardly expresses his concern about the "impact" that disclosing the file would have on his appeal rights, while at the same time, attempts to convince the Court that he is "in the process of complying". At no point does the Secretary explain how simply "assembling" these documents satisfy the ultimate requirement to actually furnish them to Appellant on or before July 29, 2016. Moreover, the Secretary failed to timely file a July 29, 2016 notice "explaining himself", had there been something to explain.

Suggested Sanctions to Be Imposed

The facts and circumstances supporting 1)an order holding the Secretary in contempt of Court and 2) an order imposing both civil and criminal sanctions are set forth in Appellant's simultaneously filed motion for an Order of Contempt, and those facts and circumstances are incorporated herein.

Currently, the Court is considering whether to impose sanctions against the Secretary due to his failure to timely comply with the Court's July 14, 2016 Order. (See August 10, 2016 Order).

The Appellant suggests that both civil and criminal sanctions be imposed. The Secretary should be subject to civil contempt for his continued failure to comply with the July 14, 2016 Court Order. A civil contempt sanction should be set and should remain in place to serve to "coerce" compliance in the future. Criminal contempt sanctions are also in order due to the Secretary's flagrant and notorious actions in the past, in order to vindicate the authority of the court.

Appellant proposes the following as sanctions:

1. Order that the Secretary pay counsel fees to Appellant's Counsel and to all Amici Curiae for all their legal services to date, at a reasonable market attorney rate for their specific locality.

This Court should be mindful of the fact that this case, to date, **has not at all,** involved veterans benefits or veterans law. As such, the EAJA regulations should not apply here because the issues before the court clearly have nothing to do with veterans law. In fact, this case benefits all veterans in our nation, not just Mr Robinson. As such, there are no equal access to justice issues which have been litigated thus far. Since counsel and amici curiae's work necessitated extraordinary services by requiring them to become experts on non-veteran related issues which, ultimately, has benefitted all veterans, the Secretary should be required to compensate all counsel for their efforts at the regular attorney market rate for their locality.

To date, Appellant's Council has expended well in excess of 200 hours on this matter, including performing extensive research on records disposal and retention laws and drafting a multi-issue memorandum of law with approximately 800 pages of exhibits on the briefing issues requested by the Court. Neither of these necessary expenditures of time involved veteran's law nor has that time been dedicated to Mr. Robinson's case in chief. This case is still in the initial records dispute stage. Yet Counsel and the Amici have been required to perform special research, file special briefs and prepare for an oral argument on issues which have nothing to do with veteran's law. These counsel's efforts have served to benefit every veteran in this nation. These are extraordinary factors resulting from unprecedented circumstances, which call for unprecedented and special consideration by this Court.

To date, this case has not involved equal access to justice for Mr. Robinson. Instead, the case has been about challenging an Injustice to veterans, occasioned by the Secretary's attempt to destroy permanent personal records of our nations veterans. The case is centered upon government misconduct and

the effect of that misconduct on all veterans.

In *Harvey v. Shinseki*, 24 Vet App. 284 (2011), the Court rejected counsel's request to order that the Secretary pay Counsel fees at the a regular market attorney rate. The Court found that neither petitioner nor the amicus curiae presented a compelling reason why they should be compensated at rates higher than what are common for proceedings before this Court. Appellant respectfully contends that the background of this case presents compelling circumstances for this Court to award market rate attorney fees for both Appellant's counsel as well as the Amicus Curiae. Moreover, the issues in the *Harvey* case were personal to the veteran because it involved a delay in calculating and processing a back benefit. The issues before the Court here are global as they affect all veterans.

Counsel urges an award of interim fees for all counsel. The case should be restored to regular EAJA status when the Secretary decides to comply with the Court's Order and the case is allowed to move forward.

2. Order the Secretary to pay a monetary sanction in the nature of fines, counsel fees and costs in amount of $2,500.00 to penalize the Secretary for setting up a "straw-man" appointment where there was no file to review.

Although there are several instances here which should warrant criminal sanctions, this particular incident stands out. The Secretary set up an August 30, 2016 appointment with Appellant's Counsel to examine paper documents. But the Secretary failed to produce the file on that date, causing harm to Appellant, his counsel and the Court. This is a flagrant action which warrants criminal sanctions. Appellant suggests a fine of $2,500.00 in fees and costs. Appellant suggests that the Court also impose the same civil penalty amount as a coercive sanction going forward, in the event the Secretary persists in his failure to comply.

3. Order the Secretary to pay a Court fine for flagrant disobedience of a Court Order in an amount to be determined by this Court.

As a matter of law, the Court may impose a "fine" or "imprisonment" where a party is in contempt of its authority as a result of "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." 38 U.S.C. § 7265. *Harvey*, Id.at 287. The Secretary, by his actions has shown that he has a "disregard for the importance of compliance with a Court Order". Id. at 289.

WHEREFORE, Appellant respectfully moves the Court for an Order imposing the suggested monetary sanctions for contempt of court, and for such other, further and different relief as to this Court is just, proper and equitable.

Respectfully submitted,

/s/ Tara R. Goffney. Esq.,

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