

[REDACTED]
Complainant,

v.

Jeh Johnson, Secretary
U.S. Department of Homeland Security,
Agency

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)
) EEOC No. [REDACTED]
) Agency No. [REDACTED]
)
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) Date: October 13, 2016
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The United States Secret Service (Agency or Secret Service) through its designated representative, opposes Complainant's Motion to Show Cause Why Sanctions Should Not Be Imposed for Spoliation *[sic]* of Evidence (Motion). As is described in more detail below, Complainant's Motion is unfounded. There has been no spoliation of evidence in the instant Complaint. Accordingly, there is no basis to impose sanctions.

On August 24, 2016, the Agency produced Supplemental Discovery Responses pursuant to the Court's Order dated August 10, 2016. The audio recording of Complainant's polygraph examination was among the items produced by the Agency on August 24, 2016. As is described in the attached affidavit of Special Agent (SA) Ellen Ripperger, the audio recording produced on August 24, 2016, is the complete and unaltered copy of the requested record created and maintained by the Agency.

On September 18, 2014, SA Ripperger recorded the polygraph examination of Mr. [REDACTED] using a microphone that plugs into her Secret Service laptop computer. Exhibit 1. After she recorded the preamble to Mr. [REDACTED] examination, SA Ripperger unplugged the

microphone from the laptop so that she could listen to the preamble and confirm that the recording functioned properly. After she listened to the preamble (which was audible), SA Ripperger plugged the microphone back into her laptop to record Mr. [REDACTED] examination. Throughout the September 18, 2014, polygraph examination of Mr. [REDACTED] the display screen on SA Ripperger's laptop monitor indicated that the audio recording software was functioning properly. SA Ripperger checked her laptop monitor several times during the polygraph examination of Mr. [REDACTED] to confirm that the audio recording was functioning. Id.

After Mr. [REDACTED] polygraph examination, the original digital file of the audio recording has remained on SA Ripperger's Secret Service laptop computer, along with every other audio recording of applicant polygraph examinations that she has conducted.¹ After Mr. [REDACTED] polygraph examination, a digital copy of the audio recording has remained in the shared drive of the Forensic Services Division (FSD), according to FSD routine practice. SA Ripperger has never destroyed or altered any audio recording of a polygraph examination, including the audio recording of Mr. [REDACTED] examination. The copy of the audio recording provided to Mr. [REDACTED] in response to his discovery request is an accurate and complete copy of the original audio recording of his polygraph examination. The Agency does not generate written transcripts of polygraph examinations.

LEGAL STANDARD

Based on the applicable legal standards, there is no basis for the Court to impose sanctions on the Secret Service, as the Agency's actions do not rise to the level of misconduct or spoliation. Federal courts maintain inherent powers "to protect their integrity and prevent abuses of the judicial process" Shepherd v. Am. Broad. Companies, Inc., 62 F.3d 1469, 1474 (D.C. Cir. 1995). "The [Court's] inherent power encompasses the power to sanction attorney or party

¹ The Agency does not record or maintain audio files for criminal polygraph examinations.

misconduct.” *Id.* (collecting cases). Punitive sanctions, such as “fines, awards of attorneys’ fees and expenses, [and] contempt citations,” require a district court to find *clear and convincing* evidence of misconduct. *Id.* at 1478; see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). In contrast, issue-related sanctions, such as “drawing adverse evidentiary inferences or precluding the admission of evidence,” may be imposed “whenever a *preponderance of the evidence* establishes that a party’s misconduct has tainted the evidentiary resolution of the issue.” *Id.* at 1475, 1478 (emphasis added). “Before exercising its inherent power to award sanctions, the [C]ourt must make an explicit finding that the target of the sanctions acted in bad faith.” *Alexander v. FBI*, 541 F.Supp.2d 274, 304 (D.D.C. 2008).

If spoliation occurs, an issue-related sanction, such as an adverse inference, is warranted only when (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a ‘culpable state of mind;’ and (3) the evidence that was destroyed or altered was ‘relevant’ to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defense of the party that sought it. *Clemmons v. Academy for Educational Development*, — F.Supp.3d --, 2014 WL 4851739 (D.D.C. 2014); *Shepherd*, 62 F.3d at 1478; *Chen v. D.C.*, 839 F.Supp.2d 7, 12–13 (D.D.C. 2011); *Mazloun v. D.C. Metro. Police Dep’t*, 530 F.Supp.2d 282, 291 (D.D.C. 2008); see also *Sova v. Peace Corps*, EEOC Appeal No. 0120110359 (2013) (“We find that Complainant failed to establish that the Agency destroyed any documentation relevant to this case. Accordingly, we find that the AJ appropriately dismissed Complainant’s request for sanctions against the Agency.”).

ARGUMENT

Spoliation has not occurred in the instant case. Spoliation requires, at a minimum, that a party has lost, destroyed, or altered a record. See e.g., *Let’s Level the Playing Field*, Bell and

Koesel, 29 *Ariz. St. L.J.* 769, 771 (1997) (“Spoliation of evidence is the destruction, significant alteration, or non-preservation of evidence that is relevant to pending or future litigation.”). All of the cases cited in Complainant’s Motion address either negligently or intentionally lost or destroyed records. In the instant case, the Agency did not lose or destroy any record. In response to this Court’s Order dated August 10, 2016, the Agency provided copies of charts, graphs, questions, data, and reports of the Complainant’s polygraph examination, and the three audio files that comprise the recording of his polygraph examination. All of the provided documents are true and accurate copies of the original records maintained by the Agency in the format in which they are stored. See Exhibits 2, 3, & 4 (audio files).

I. Description of the Requested Audio Files of September 18, 2014

Complainant’s Motion and unsigned affidavit do not accurately describe the contents of two of the three audio recordings provided by the Agency.² Complainant’s affidavit does accurately describe the first audio file, which consists of Special Agent Ripperger’s introduction to the polygraph examination. See Complainant’s Exhibit A at ¶3; Agency Exhibit 1 (Ripperger Affidavit) and 2 (audio file 1). In sections of the second and third audio files, however, conversation can clearly be discerned at a high enough volume or using headphones. Agency Exhibits 3 & 4. From approximately 40 minutes through 58 minutes in the first audio recording, the conversation is largely comprehensible. At 42 minutes, Mr. [REDACTED] can be heard discussing his educational background. Exhibit 2. At 50 minutes, he can be heard explaining why he applied for the position at the Secret Service and comparing it with his former employment at Pfizer. At

² Mr. [REDACTED] unsigned affidavit is also incorrect about the length of his polygraph examination. The Polygraph Report indicates that his exam began at “0940” and ended at “1320.” See Exhibit 5. 1320 is military time for 1:20pm, not 3:20pm as stated in his affidavit. His examination lasted approximately 3 hours and 40 minutes, not 5 hours and 40 minutes. Accordingly, the audio file of 3:24:26 accounts for the entire duration of his examination, excluding his 20-minute break. See also Exhibits 2, 3, and 4 (digital time stamps indicate that the first recording was completed at 9:31am and the last recording was completed at 1:20pm on September 18, 2014)

53:30 Mr. [REDACTED] can be heard answering the question of what was the worst thing he ever did. Id. at 53:30 (“when I was a kid I shot a squirrel.”). From 55 minutes through 58 minutes, SA Ripperger can be heard describing the polygraph examination and explaining that Mr. [REDACTED] nervousness would not affect the examination. At one hour and 12 minutes (1:12) Mr. [REDACTED] can be heard answering a series of questions about which number he had just written. At 1:14 minutes, SA Ripperger can be heard providing instructions to Mr. [REDACTED] to which he responds “OK.” Id.

At 1:16 minutes, SA Ripperger can be heard explaining that she will begin asking Mr. [REDACTED] questions about his security clearance application. From 1:17 minutes through 1:20 minutes, SA Ripperger can be heard quickly, calmly, and professionally asking Mr. [REDACTED] whether he had committed any of a list of criminal activities, including assault, child pornography, solicitation of prostitution, impersonation of a police officer, embezzlement, or fraud. Id. Beginning at 1:22 minutes, SA Ripperger can be heard explaining that she will begin asking Mr. [REDACTED] about use of illegal substances. Contrary to Mr. [REDACTED] unsigned affidavit attached to the Motion, the discernable conversation at the end of the second audio file clearly indicates that the examination is concluding. At 1:15:30 of the second audio file, SA Ripperger can be heard explaining the next steps in the process (“But if you don’t hear anything before then...”). Exhibit 3. At 1:15:10 Mr. [REDACTED] response can be partially heard (“Well, I’m also looking forward to...”). Id.

The Agency does not dispute that the audio recording of Complainant’s polygraph examination is partially defective. As is discussed in greater detail below, however, Complainant has not presented any evidence that the defects in the audio files are the result of intentional or negligent spoliation. On the contrary, the available evidence indicates that the partially defective

audio files are the original recordings of his polygraph examination. Furthermore, to the extent that his polygraph examination is discernable, it does not support Complainant's assertions that the examiner was unprofessional or hostile toward him.

II. Sanctions Are Not Warranted Because No Spoliation Has Occurred.

Complainant's Motion for Sanctions for Spoliation of Evidence should be denied, because no spoliation of evidence has occurred.³ Unlike the interview notes at issue in Grosdidier v. Governors, 709 F.3d 19 (D.C. Cir., 2013), the audio recording at issue in the instant case was neither destroyed nor lost. Without destruction, loss, or alteration of any evidence, spoliation has not occurred. A party claiming spoliation bears the burden to prove, at a minimum: (1) that the relevant evidence existed; (2) that it was within the ability of the opposing party to produce it; and (3) that it was not produced due to the actions of the opposing party. Friends for All Children, Inc., et al. v. Lockheed Aircraft Corp. and United States, 587 F. Supp. 180189 (D.D.C. 1984). The party claiming spoliation must establish that the relevant evidence actually existed, not that it possibly or likely existed. Rude v. The Dancing Crab at Washington Harbour, L.P., 245 F.R.D. 18, 22-23 (D.D.C. 2007) (a party could not be sanctioned for failure to produce security camera recording where movant established that security cameras existed and were functioning, but did not prove that footage was successfully recorded).

Complainant's Motion relies on speculation that a different version of the audio recording of his polygraph examination was in the possession of the Agency and was lost or destroyed. The only support he presents for this speculation is a Quality Control Review form that indicates his examination was recorded. Complainant's Motion, Exhibit C. As stated above, Complainant's examination was recorded. That recording has been provided to Complainant. Complainant did

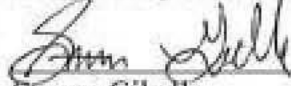
³ To the extent that Complainant's Motion is interpreted as a Motion for Sanctions on grounds other than spoliation, the Agency requests the opportunity to provide further briefing on any alternative theory. At present, the Agency is not aware of any alternative theory that could serve as grounds for sanctions.

not seek or provide any evidence that would support his speculation that the individual who created the Quality Control Review form possessed a different version of the audio file than the one provided to Complainant.⁴ Complainant has not provided any evidence in support of his speculation that the Agency lost or destroyed evidence, or is “acting in bad faith,” by producing the audio file and explaining that its flaws are attributable to an equipment problem during the recording process. Furthermore, the Agency’s explanation is consistent with the digital date and time stamps embedded in the audio files produced in discovery, which indicate that the records were created on September 18, 2014, at 0931, 1149, and 1320 respectively, and have not been modified since.⁵ Exhibits 2, 3, & 4.

CONCLUSION

For the reasons provided above, Complainant’s Motion to Show Cause Why Sanctions Should Not Be Imposed for Spoliation of Evidence should be denied.

Respectfully submitted,



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United States Secret Service

⁴ Complainant did not seek any discovery into the issue of spoliation before filing this Motion. No depositions have yet been taken by either party, and no written discovery was sought on the subject. Accordingly, Complainant’s Motion would be premature even if it had merit, which it does not.

⁵ If the Court finds that sanctions are warranted, despite the absence of spoliation, the Agency requests the opportunity to provide further briefing as to the appropriate form of any sanctions.

CERTIFICATE OF SERVICE

I certify that the attached document entitled "Agency's Opposition to Complainant's Motion to Show Cause" was sent on this day by electronic mail to:

[REDACTED]
[REDACTED]outlook.com

Tom Gagliardo
Tomgagliardo@gmail.com

Antoinette Eates
Antoinette.Eates@EEOC.Gov

10/13/16
Date



Steven Giballa
Agency Representative
United States Secret Service

Exhibit 1


AFFIDAVIT OF SPECIAL AGENT ELLEN RIPPERGER

In accordance with the provisions of 28 U.S.C. § 1746, I, Ellen Ripperger, make the following unsworn declaration, under penalty of perjury:

1. I have been employed by the United States Secret Service (Secret Service or Agency) as a GS-1811 (special agent criminal investigator) since May 19, 2002.
2. I have been a certified polygraph examiner in the Secret Service Forensic Services division since March 27, 2013.
3. On September 18, 2014, I administered the polygraph examination of Complainant [REDACTED]
4. On September 18, 2014, I recorded the polygraph examination of Mr. [REDACTED] using a microphone that plugs into my Secret Service laptop computer.
5. After I recorded the preamble to Mr. [REDACTED] examination, I unplugged the microphone from the laptop so that I could listen to the introduction. This is my usual practice, and I do this to verify that the audio recording software is functioning properly.
6. After I listened to the preamble, I plugged the microphone back into my laptop to record Mr. [REDACTED] examination.
7. Throughout the September 18, 2014, polygraph examination of Mr. [REDACTED] the display screen on my laptop monitor indicated that the audio recording software was functioning properly.
8. I checked my laptop monitor several times during the polygraph examination of Mr. [REDACTED] to confirm that the audio recording was functioning.
9. Because my laptop indicated that the audio recording software was functioning properly, I did not stop the examination to listen to the recording, aside from when I listened to the preamble. This is my usual practice when conducting polygraph examinations.
10. After Mr. [REDACTED] polygraph examination, the original digital file of the audio recording has remained on my Secret Service laptop computer, which is standard practice for the Forensics Services Division (FSD).
11. After Mr. [REDACTED] polygraph examination, a digital copy of the audio recording has remained in the shared drive of the FSD, which is standard practice for the FSD.
12. I have never destroyed or altered any audio recording of a polygraph examination, including the audio recording of Mr. [REDACTED] examination.
13. The copy of the audio recording provided to Mr. [REDACTED] in response to his Complaint is an accurate and complete copy of the original audio recording of his polygraph examination.

14. I do not typically listen to the audio recordings of polygraph examinations after I have conducted them, unless the subject of the examination made a relevant admission that I want to review.
15. Mr. [REDACTED] did not make any relevant admissions during his examination. Accordingly, I did not listen to the audio recording after his examination was complete until I searched for documents in response to his Complaint.
16. Two other audio recordings of polygraph examinations that I conducted around the date of September 18, 2014 had similar deficiencies as the recording of Mr. [REDACTED] examination due to what appears to have been a microphone malfunction.

I declare under the penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.



Ellen Ripperger

Executed on 13th, of October, 2016
(Day) (Month)