UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER: August 29, 2016

CBCA 5299

SYLVAN B. ORR,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Sylvan B. Orr, pro se, Idaho Falls, ID.

Daniel B. Rosenbluth, Office of the General Counsel, Department of Agriculture, Golden, CO, counsel for Respondent.

LESTER, Board Judge.

ORDER

On April 9, 2013, the United States Forest Service (Forest Service) awarded appellant, Sylvan B. Orr, an "Incident Blanket Purchase Agreement" (I-BPA) through which Mr. Orr could receive orders to provide weed washing units in Regions 2 and 4 (Rocky Mountain and Intermountain Regions). In August 2015, Mr. Orr received an order to provide a weed washing unit for the Bobcat fire in Salmon, Idaho. On April 26, 2016, Mr. Orr filed an appeal with the Board under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), of a contracting officer's decision dated March 18, 2016. In that decision, the

contracting officer denied Mr. Orr's request for payment of monies (beyond those already paid) that Mr. Orr allegedly incurred in performing work under the Bobcat fire order and, further, for payment of damages for the Forest Service's failure to issue an order assigning him to a different incident, the Elevenmile fire.

Along with the notice of appeal that the Board received from Mr. Orr on April 26, 2016, was a notice of appearance from Mr. Orr's son, Arlyn Orr, indicating that Arlyn Orr would serve as the "representative" for Sylvan Orr in this appeal. Although Sylvan Orr signed the notice of appeal and the complaint that were filed with the Board, other documents, including a request that the Board authorize discovery and a response to the Government's answer, were signed only by Arlyn Orr. Further, although Sylvan Orr participated in the second telephonic conference with the Board, only Arlyn Orr participated in the first telephonic conference – Sylvan Orr was not present at that time. During the two status conferences that the Board held with the parties in this appeal on July 29 and August 22, 2016, it became clear that Arlyn Orr, who spoke at length during both conferences, worked on the contract at issue here and is very familiar with the grounds of Sylvan Orr's claim. Further, it appears that it is likely that Arlyn Orr would be a fact witness in his father's appeal.

Rule 5 of the Board's rules provides that an individual who has filed an appeal in a case arising under the CDA is entitled to represent himself or herself pro se in an appeal before the Board and does not have to hire an attorney:

> Any appellant, petitioner, or applicant may appear before the Board by an attorney-at-law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia. *An individual appellant, petitioner, or applicant may appear in his or her own behalf*; a corporation, trust, or association may appear by one of its officers; and a partnership may appear by one of its members.

48 CFR 6101.5(a)(1) (2015) (emphasis added). The right to self-representation in civil cases, although not constitutionally protected, "is a right of high standing," as "'[t]he Founders believed that self-representation was a basic right of a free people.'" *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982) (quoting *Faretta v. California*, 422 U.S. 806, 830 n.39 (1975)). Board Rule 5 ensures that an individual who cannot afford an attorney or who simply would prefer to represent himself may pursue an appeal before the Board.

This leniency in allowing individual appellants in CDA cases to avoid hiring attorneys does not extend to allowing them to bring non-attorney representatives into their appeals. As one of our predecessor boards, the General Services Board of Contract Appeals

(GSBCA), recognized when interpreting a similar rule, "[t]he individual party is not permitted under this rule to retain a non-party, non-attorney to participate in proceedings before the Board." *Texas Carbon Ribbon, Inc.*, GSBCA 9905-P, 89-2 BCA ¶ 21,654, at 108,932. This rule precluding representation of an individual by a non-lawyer comports with the practice in most federal courts. *See, e.g.*, *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987) ("Although a non-attorney may appear *in propria persona* in his own behalf, that privilege is personal to him."); *Lewis v. Lenc-Smith Manufacturing Co.*, 784 F.2d 829, 830 (7th Cir. 1986) ("it is clear that an individual may appear in the federal courts only *pro se* or through counsel," not through a third-party non-lawyer); *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) ("federal courts have consistently rejected attempts at third-party lay representation"); Federal Circuit Rule 47.3(a) ("An individual (not a corporation, partnership, organization, or other legal entity) may choose to be represented by counsel or to represent himself or herself pro se, but may not be represented by a nonattorney."). Absent a tribunal rule to the contrary, the preclusion against lay representation of an individual extends to immediate family members. *See, e.g.*, *Powerserve International, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir. 2001) (non-attorney daughter could not serve as her father's representative); *Georgiades v. Martin-Trigona*, 729 F.2d 831, 834 (D.C. Cir. 1984) (son of plaintiff, who was not a member of any bar, could not represent his mother in court); *Speed v. Bank of New York*, No. 14-3425, 2014 WL 6473420, at *2 (N.D. Tex. Nov. 18, 2014) (non-lawyer wife could not represent husband).[1]

One of the purposes of the rule precluding lay representation (outside of the pro se's right to self-representation) is to provide a ground, stemming from the ethical responsibilities imposed on licensed attorneys, for believing "that the representative's character, knowledge and training are equal to the responsibility" of representing another party. *Herrera-Venegas*, 681 F.2d at 42. The lay advocate is not tasked with the ethical responsibilities placed upon lawyers. *Clauson v. Town of West Springfield*, No. 99-30134, 2000 WL 251740, at *2 (D. Mass. Feb. 3, 2000). As a result, the tribunal cannot be assured that, among other things, a litigant represented by a non-lawyer, even if the non-lawyer is a family member, is fully aware of the positions being taken upon his or her behalf (given that the lay advocate has no

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[1] Unlike our rules and those of many federal courts, the Rules of the Court of Federal Claims (CFC) permit "[a]n individual who is not an attorney [to] represent . . . a member of one's immediate family." CFC Rule 83.1(a)(3); *see Kogan v. United States*, 107 Fed. Cl. 707, 708 (2012) (permitting plaintiff's non-attorney wife to represent him in a case). "By statute, each court of the United States has authority to craft rules which govern pro se appearances." *Strick v. United States*, No. 92-5085, 1993 WL 51817, at *2 (Fed. Cir. March 2, 1993) (citing 28 U.S.C. § 1654 (1988)). We have not elected to adopt the type of rule that the CFC has adopted.

ethical obligation to ensure such understanding). Further, absent the pro se litigant's signature on his or her own pleadings and personal participation in conferences with or proceedings before the tribunal, it is unclear whether the litigant, if he or she disclaims knowledge of what the lay advocate did, would or should be bound by the lay advocate's decisions or the tribunal's ultimate merits ruling. *See, e.g.*, *Williams v. United States*, 477 F. App'x 9, 11 (3d Cir. 2012) (vacating judgment on father's claim where non-lawyer daughter was improperly allowed to represent him in trial court); *Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876, 883 (3d Cir. 1991) (vacating judgment against children whose non-lawyer parent was improperly allowed to represent them below). These factors all support precluding an individual from being represented by a non-attorney in proceedings before the Board.

Even if the Board were inclined in a particular case to permit an immediate family member to serve as individual's lay representative, it would seem inappropriate to do so where, as here, the lay representative is also likely to serve as a fact witness. Generally, with limited exceptions, an attorney is not permitted to serve both as an advocate for his client and as a fact witness in the same case. *See, e.g.*, *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704, 712 (6th Cir. 1982); *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 872 F. Supp. 1346, 1380 (E.D. Pa. 1994). That is because an advocate's role is inconsistent with that of a witness. *Hickman v. Taylor*, 329 U.S. 495, 517 (1947 (Jackson, J., concurring). For the same reasons, it seems inappropriate to permit a lay representative to serve as both an advocate and a fact witness in a trial proceeding. *Georgiades*, 729 F.2d at 834 n.7.

The limitation on lay representation does not preclude Sylvan Orr from seeking advice regarding and assistance in these appeals from Arlyn Orr or from any other person that he chooses. It "simply mean[s] that while appellants are unrepresented by counsel, they must take legal responsibility for, and must themselves sign all papers filed [with] this [Board] relative to their own case or cases." *Herrera-Venegas*, 681 F.2d at 42; *see Speed v. America's Wholesale Lender*, No. 14-3425, 2014 WL 6487291, at *1 (N.D. Tex. Nov. 19, 2014) (requiring plaintiff personally to sign all pleadings, motions, and papers even if being assisted by lay representative). The Board retains the authority to permit the appellant "to proceed with a lay assistant" and to permit that lay assistant orally to assist the appellant in presenting his case in status conferences and arguments. *Turner v. American Bar Ass'n*, 407 F. Supp. 451, 478 (N.D. Tex. 1975), *aff'd sub nom. Taylor v. Montgomery*, 539 F.2d 715 (7th Cir. 1976), & *Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976). We have already exercised that authority here and will continue to allow Arlyn Orr to assist his father in this appeal. Nevertheless, all further pleadings in this appeal must be signed by the actual appellant, Sylvan Orr, and any further oral communications with the Board must be in the presence and with the approval of Sylvan Orr.

For the foregoing reasons, we cannot give effect to Arlyn Orr's notice of appearance as Sylvan Orr's corporate representative, but will permit Arlyn Orr to assist his father in further proceedings in this appeal so long as Sylvan Orr signs all future pleadings, motions, and papers and personally is present at any future conferences or hearings.

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HAROLD D. LESTER, JR.
Board Judge