

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant v. Lee Moyle, Owner, d.b.a. Moyle Mink Farm, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100286.

ORDER GRANTING COMPLAINANT'S DISCOVERY MOTION IN PART AND DENYING COMPLAINANT'S DISCOVERY MOTION IN PART

On October 2, 1989, the Complainant in the above-entitled case, by and through its Attorney, Robin L. Henrie, filed a motion requesting the Administrative Law Judge to enter an Order deeming Complainant's Requests for Admission to be admitted pursuant to 28 C.F.R. Section 68.17(b) due to Respondent's failure to respond to the discovery request in a timely manner.

28 C.F.R. Section 68.17(b) states in pertinent part: Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves on the requesting party:

(1) A written statement denying specifically the relevant matters of which an admission is requested. . . .

(d) Any matter admitted under this section is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. (emphasis added).

On October 5, 1989, in response to Complainant's Motion, I issued an Order to Show Cause Why Complainant's Requests for Admission Not Be Admitted. On October 10, 1989, I received the following documents, dated as shown:

Response to Request for Admissions: signed and dated by Lee Moyle, Respondent, on October 2, 1989, signed and dated by Gustav Rosenheim, Attorney for Respondent, on October 4, 1989. (Notarized)

Answers to Interrogatories and Requests to Produce: signed and dated by Lee Moyle on October 2, 1989, and by Gustav Rosenheim on October 5, 1989. (Notarized)

Motion in Opposition to Motion for Order of ALJ Re: Admissions: signed and dated by Gustav Rosenheim on October 4, 1989.

Affidavit of Gustav A. Rosenheim: signed and dated by Gustav Rosenheim on October 5, 1989.
(Notarized)

Respondent's Motion in Opposition and supporting Affidavit indicate that forty one days passed from Complainant's service of the discovery documents on August 24, 1989, until the responses were served by Respondent on October 4, 1989. These dates clearly exceed the thirty days permitted by the regulations and place Respondent's responses outside of the additional five days added pursuant to 28 C.F.R. Section 68.5(d). I note, however, that Respondent did not receive the discovery requests until August 28, Complainant thereby having utilized four of the five mailing days permitted.

In response to my Order to Show Cause, Respondent asserts it was necessary to look for certain information before Respondent could admit or deny the admissions, and that Respondent made a good faith effort to meet the thirty day discovery deadline. Respondent requests that I use the discretion granted me by the regulations at 28 C.F.R. Section 68.17(b) to lengthen the time period for responses and not deem all of the admissions to be admitted on a mere technicality. Respondent requests that the case be determined on the merits.

I would have preferred that Respondent had made his request for expansion of time to file prior to the expiration of the deadline and Respondent's Attorney is admonished to comply with 28 C.F.R. Section 68 et seq. in the future. Nonetheless, I will grant Respondent's request made in opposition to Complainant's Motion and partially deny Complainant's Motion for the following reasons:

This is a case in which no allegations of knowingly hiring an unauthorized alien, or failure to prepare a form I-9, are made. The Complaint consists of one Count, in which Respondent is charged with the failure to properly complete the form I-9 for twenty (21) employees. During the pre-hearing telephonic conference on September 26, 1989, in which Complainant's Attorney was assisted by co-counsel, both parties assured me that they were in settlement posture and that discovery was continuing. On the basis that good faith settlement negotiations were being conducted, I Ordered the hearing scheduled for October 17, 1989, to be continued indefinitely.

Additionally, in my Order Directing Procedures for Pre-hearing dated July 27, 1989, at item 4.c, entitled Discovery Motions, it is plainly stated that the ALJ will not entertain any discovery motion unless counsel or the moving party has stated in writing that it has conferred, or made reasonable effort to confer with the opposing counsel or party regarding the requested matter prior to the filing

of the motion. Complainant's October 2, 1989 Motion for Order of ALJ re: Admissions contains no such statement.

Moreover, upon careful review of Respondent's submitted responses to Complainant's request for admissions, I find that the three items denied by Respondent, Admissions number 9, 12 and 13, relate to the three remaining affirmative defenses in Respondent's Answer to the Complaint. (Respondent's affirmative defense of good faith was stricken by my Order of August 22, 1989, made pursuant to Complainant's Motion to Strike.) The remaining defenses asserted illegal seizure of documents, improper service of a subpoena duces tecum, and lack of probable cause. Without passing judgment on the merits of the defenses, I believe them to be made in good faith. Therefore, I find it inequitable to cause Respondent's denials of the three admissions to be considered as admitted on a mere technicality.

ACCORDINGLY:

Complainant's Motion is hereby granted in part and numbers 1, 2, 3, 4, 5, 6, 7, 8, and 11 of Complainant's Request for Admissions are deemed admitted. Complainant is invited to proceed with appropriate motions on the basis of those admissions. In partial denial of Complainant's Motion, Admissions numbered 9, 10, and 13 are deemed denied.

IT IS SO ORDERED: This 19th day of October, 1989, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
Executive Office for Immigration Review
Office of the Administrative Law Judge
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