

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

November 21, 1994

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324c Proceeding
) OCAHO Case No. 94C00128
DAVID SEGURA-SATARAY,)
Respondent.)
_____)

ORDER STAYING COMPLAINANT'S MOTION TO COMPEL

On October 4, 1994, complainant initiated its discovery activities by propounding 20 written interrogatories to respondent.

On October 14, 1994, complainant also served upon respondent 23 written requests for admission.

On October 26, 1994, respondent filed his replies and objected to those five (5) interrogatories numbered 11, 13, 15, 16, and 17, as well as those nine (9) requests for admissions numbered 4, 10-14, and 17-19 based upon his Fifth Amendment privilege against self-incrimination.

On November 7, 1994, complainant filed a pleading captioned Motion to Compel Answers to Complainant's First Set of Interrogatories and Request for Admissions to Respondent, in which it requested the following relief:

1. That the answers and responses heretofore submitted by respondent to Interrogatories numbered 11, 13, 15, 16, 17, and Requests for Admissions numbered 4, 10, 11, 12, 13, 14, 17, 18 and 19, be deemed incomplete and insufficient.

2. That an order be entered compelling the respondent to respond to the interrogatories within a reasonable period of time.
3. That an order be entered compelling the respondent to respond to the Request for Admissions within a reasonable period of time.
4. That an order be entered directing the respondent to comply with the provisions of the pertinent procedural rule pertaining to admissions, 28 C.F.R. § 68.21.
5. That an order be entered granting such other and further relief as deemed appropriate.

The applicable procedural rule containing the general provisions applicable to discovery in this proceeding provides in pertinent part that:

Unless otherwise limited by order of the Administrative Law Judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.

28 C.F.R. § 68.18(b). This Rule is similar to Rule 26(b)(1) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), which limits discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action."

"A claim of privilege may be made by objection to a question asked at a deposition or by serving an objection to an interrogatory, a request for production, or a request for admission." 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2016 (1994). However, the party seeking to avoid complying with a discovery request by asserting such privilege has the burden of demonstrating the existence of that privilege. See United States v. Sam Y. Ro d/b/a Daruma Japanese Restaurant, 1 OCAHO 265, at 3 (11/8/90) (citing Rosenberg v. John-Mansville Corp., 85 F.R.D. 292 (E.D. Pa. 1980)).

Accordingly, since respondent is asserting his Fifth Amendment privilege against self-incrimination, he has the burden of showing that the privilege exists and it is permissible to defer a ruling upon whether a privilege exists until the factual picture in which the privilege is claimed has been clearly developed. United States v. Maria Elizondo

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Garza, d/b/a Garza Farm Labor, 4 OCAHO 644, at 6 (6/7/94) (citations omitted).

The procedural rules applicable to this proceeding are those codified at 28 C.F.R. Part 68 and those rules do not provide guidance in describing the required information which is to be furnished in a privilege claim. Those rules, however, do provide that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules. . . ." 28 C.F.R. § 68.1.

Therefore, it is in order to utilize Rule 26(b)(5) Fed. R. Civ. P. as a guideline in determining what information is required. In pertinent part, that Rule provides:

When a party withholds information . . . by claiming that it is privileged, . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or the protection.

Fed. R. Civ. P. 26(b)(5).

The Fifth Amendment privilege against self-incrimination may be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444 (1972). However, when a party asserts "the privilege against self-incrimination in pretrial discovery matters which could have criminal overtones, he or she may not make a blanket refusal to answer all questions, but must respond to every question, raising the privilege in each instance the party determines necessary." United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor, 4 OCAHO 644, at 8-9 (6/7/94) (quoting National Life Insurance Co. v. Hartford Accident and Indemnity Co., 615 F.2d 595 (3rd Cir. 1980)).

Respondent's responses to complainant's interrogatories numbered 11, 13, 15, 16, 17, as well as those requests for admissions numbered 4, 10, 11, 12, 13, 14, 17, 18 and 19, are comprised of single sentence statements, in which respondent has simply refused to answer based upon his Fifth Amendment privilege against self-incrimination. Complainant has correctly noted that respondent has failed to state with any particularity his precise objections to these discovery requests.

Accordingly, because respondent has not provided the required information which will determine whether his claim of Fifth Amend-

ment privilege should be granted namely, precisely how these requested discovery replies will incriminate him, a ruling on those objections will be stayed until respondent files his detailed responses which comply with the provisions of Rule 26(B)(1) Fed. R. Civ. P.

In that connection, respondent is hereby ordered to file those responses within 15 days of his acknowledged receipt of this Order, addressing each discovery request to which he objects, and specifically setting forth the reasons why a responsive answer to each request would have a tendency to incriminate him. In the event that respondent fails to respond within that 15-day period, complainant's Motion to Compel will be granted and sanctions will be ordered from among those enumerated at 28 C.F.R. § 68.23(c).

JOSEPH E. MCGUIRE
Administrative Law Judge