

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

JACOB ROGINSKY,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) Case No. 90200168
DEPARTMENT OF DEFENSE,)
)
and)
)
CENTER FOR NAVAL ANALYSES,)
Respondents.)
)
JACOB ROGINSKY,)
Complainant,)
)
UNITED STATES)
DEPARTMENT OF JUSTICE)
OFFICE OF SPECIAL COUNSEL)
FOR IMMIGRATION RELATED)
UNFAIR EMPLOYMENT)
PRACTICES)
Intervenor,)
)
v.)
)
DEPARTMENT OF DEFENSE,)
Respondent.)
_____)

ORDER
(June 10, 1991)

This Order addresses: (I) Complainant's motion for a protective order and sanctions against respondent Department of Defense (DoD); (II) Office of Special Counsel's (OSC's) motion to intervene and complaint in intervention; and (III) revision of the schedule agreed to by the bench and the parties recited in the May 6, 1991 Third Prehearing Conference Report and Order.

I. Complainant's Motion for a Protective Order and Sanctions

A. Procedural Summary

1. On May 24, 1991 Dr. Roginsky (Complainant) filed a Motion for Protective Order and Sanctions with a memorandum in support against respondent United States Department of Defense (DoD). Complainant files his motion pursuant to 28 C.F.R. §§ 68.21 and 68.26. Complainant's motion alleges that DOD destroyed documents relevant to this proceeding and failed to make diligent efforts to produce documents which were the subject of the Second Prehearing Conference Report and Order, dated March 8, 1991.

2. Specifically, Complainant contends that in November, 1990, about the time he served his initial discovery request, the Naval Research Laboratory (NRL) destroyed all its files dated before November 1988 that relate to rejected job applications at that laboratory. Complainant asserts that employment records at NRL have been routinely purged throughout the pendency of this litigation.

3. Complainant also has requested documents relating to his security investigation in 1988 and his complaints to NRL EEO officials during 1988. DoD still has not produced these documents. Complainant asserts that "[t]hese documents (assuming the DoD has not destroyed them as well) would be vital to the June 17, 1991 hearing addressing the issue of timeliness in Complainant's charges of discrimination."

4. DoD has not responded to Complainant's allegations in this motion. 28 C.F.R. §§68.9(b); 68.7 (c)(2).

5. On May 31, 1991 Complainant filed a copy of a May 20, 1991 order issued by Judge Hogan in Roginsky v. Cheney, Civil Action No. 90-0025 (D.D.C.) which granted in part Roginsky's motion for a protective order in that proceeding and ordered that the DoD and "all of its components and contractors shall cease and desist destroying documents relevant to (that) action . . . and . . . within 10 days of the date of (that) Order, (DoD) shall file a report to the Court"

B. Discussion

1. Motion for Protective Order

The first question presented is whether an administrative law judge may issue a protective order pursuant to 28 C.F.R. §§68.21 and 68.26 to prevent the further destruction of documents by respondent DoD.

Section 68.21(c) of title 28 C.F.R. provides for sanctions which may be imposed by an administrative law judge for the failure of a party, officer or agent of party, to comply with a discovery order. At section 68.21(c)(7), the judge is authorized to make and enter a protective order in ruling on a motion made pursuant to this section, "such as he/she is authorized to enter on a motion made pursuant to §68.40."

Section 68.40(a) informs as to the authority of the judge to issue a protective order as "may be consistent with the objective of protecting privileged communications and of protecting data and other material the disclosure of which would unreasonably prejudice a party, witness, or third party." The thrust of this section is to protect a party from the "undue disclosure of classified or sensitive matter." 28 C.F.R. §68.40(b). Similarly, 28 C.F.R. §68.16(c) permits an administrative law judge to enter a protective order, if good cause is shown, upon motion by a party or person from whom discovery is sought because of, *inter alia*, harassment, undue burden or expense. Neither of these sections provide for a protective order to prevent further destruction of relevant documents.

The administrative law judge has the authority, "[w]here applicable, [to] take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts . . .," and "[d]o all other things necessary to enable him/her to discharge the duties of the office." 28 C.F.R. §68.26(a)(8)-(9). The judge "may . . . take such action . . . as is just, including but not limited to the . . ." seven enumerated sanctions for failure to respond to discovery. 28 C.F.R. §68.21(c).

There is no express authority in either the federal rules of civil procedure or in the OCAHO regulations which permit protective orders to be issued to prevent the destruction of documents. *See, e.g.*, Fed. R. Civ. P. 26(c); 37. Complainant requests that an order be issued to prevent Respondent DoD from further destruction of relevant documents. The use of the term protective order in part 68 of title 28 C.F.R. does not appear to contemplate the order sought here. 28 C.F.R. §68.21(c)(7). However characterized, the remedy sought is unambiguous.

The judge's authority to "do all things necessary to enable him to discharge the duties of the office," includes the duty to ensure the

integrity of the proceeding. 28 C.F.R. §68.26(a)(9). The destruction of relevant documents clearly impugns such integrity.

DoD has failed to defend against the allegations of the destruction of relevant documents in this proceeding. I, therefore, infer that the allegations are true. Destruction of documents arguably relevant to an ongoing administrative adjudication is egregious conduct. "[T]he relevance of and resulting prejudice from destruction of documents cannot be clearly ascertained because the documents no longer exist." Alexander v. National Farmers Organization, 687 F.2d 1173, 1205 (8th Cir. 1982), cert. denied, 461 U.S. 937 (1983). See, e.g., Synanon Church v. United States, 820 F.2d 428 (D.C. Cir. 1987); Brown v. Marsh, 713 F.Supp. 20 (D.D.C. 1989). Accordingly, this Order directs DoD to cease and desist from further destruction of relevant documents.

Without objection by DoD, I grant Complainant's "motion for a protective order" and order that DOD and all of its components and contractors shall cease and desist destroying documents relevant to this action, including, but not limited to all applications or inquiries made by persons similarly situated to Complainant, about employment or fellowships within the DoD or its components or contractors for the time periods stated in the Second Prehearing Conference Report and Order dated March 8, 1991, and all other documents, internal notes or memoranda, etc. relating to those applications and/or inquiries.

Adherence to this cease and desist order is an obligation of the parties. Absent accommodation between them, Complainant may seek enforcement as appropriate. 28 C.F.R. §68.26(b). See also 8 U.S.C. §1324b(f)(2).*

2. Sanctions

Complainant asks also that some of the sanctions listed in 28 C.F.R. §68.21(c) be imposed on DoD for failure to comply with a discovery order:

* As a practical matter, the May 20, 1991 cease and desist order in Roginsky v. Cheney appears to embrace the requests for discovery made in this proceeding. Complainant may well conclude, on reflection, that the order in that case is sufficient for his needs in this one.

If a party or an officer or agent of a party fails to comply with an order, for the production of documents, the Administrative Law Judge, for the purposes of permitting resolution of the relevant [sic] issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

- (1) Infer and conclude that the documents, or other evidence would have been adverse to the non-complying party;
- (2) Rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;
- (3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon . . . documents or other evidence, in support of or in opposition to any claim or defense;

* * *

Such sanctions have been imposed against parties in IRCA proceedings. See, e.g., U.S. v. Scandia, OCAHO Case No. 90100229 (1/25/91) (Order); U.S. v. Nu Look Cleaners of Pembroke Pines, OCAHO Case No. 89100162 (11/5/90), vacated by CAHO (12/5/90); U.S. v. Manca Imports, OCAHO Case No. 90100203 (11/19/90).

In addition, Complainant requests an order that DoD "shall reimburse . . . double the attorneys fees and costs associated with (1) the preparation of the Motion for Protective Order and Sanctions, (2) the preparation of the Motion to Compel Production of documents requested on November 19, 1990, and (3) any subsequent pleadings arising out of or relating to this issue (see Rule 37(b)(2), Federal Rules of Civil Procedure. . .)." Also, Complainant requests double the attorneys fees and costs associated with any future discovery directed to efforts to reconstruct the information contained in the destroyed records.

OCAHO caselaw does not make absolutely clear whether the administrative law judge may impose sanctions in addition to those described in Part 68 of 28 C.F.R. In U.S. v. Nu Look Cleaners of Pembroke Pines, OCAHO Case No. 89100162 (11/5/90), vacated by CAHO (12/5/90), the Chief Administrative Hearing Officer (CAHO) held, inter alia, that the judge lacked authority to impose monetary

sanctions under the Federal Rule of Civil Procedure 11 and 37. Nu Look, however, did not expressly overrule U.S. v. Arnold, OCAHO Case No. 88100172 (12/29/89), where the judge had imposed attorneys fees and costs against the attorney and respondent as sanctions under the Federal Rule of Civil Procedure 37. Even without the guidance provided by CAHO's decision in Nu Look, I have substantial doubts that an administrative law judge has power to impose fees or costs upon a party except as authorized by 8 U.S.C. §1324b(h). Until a prevailing party is identified, such an award is premature.

It will assist the bench in further structuring this proceeding, and as well in reaching inferences and conclusions under 28 C.F.R. §68.21(c), to obtain from DoD substantially the same submission as it is obliged to submit to the district court in Roginsky v. Cheney. Accordingly, DoD shall submit within ten days after receipt of this order a response which provides the following:

- a. an identification of the categories of relevant documents that have been destroyed to date;
- b. an identification of the dates of relevant documents that have been destroyed and the dates of destruction;
- c. an explanation of why relevant documents were not preserved and why this destruction of documents occurred; provide copies of controlling records retention regulations;
- d. an identification of all DoD officials who had knowledge of the contents of the relevant documents that have been destroyed;
- e. a suggestion as to how the information contained in the destroyed documents may be obtained through alternative means to other sources; and
- f. a report on the measures taken to inform all DoD components and contractors of the contents of this Order.

II. OSC'S Motion to Intervene and Complaint In Intervention

Pursuant to 28 C.F.R. §68.13, and consistent with the May 6, 1991 order, OSC filed on May 31, 1991 its Motion to Intervene as a party in this action. OSC filed also a Complaint in Intervention.

OSC alleges that DoD violated the prohibition against unfair immigration related employment discrimination, Section 102 of the Immigration Reform and Control Act (IRCA) of 1986, 8 U.S.C. §1324b, when it refused to grant Dr. Roginsky a postdoctoral fellowship with the Naval Research Laboratory (NRL) in the spring and summer of 1988. Respondent Center for Naval Analyses (CNA) is not mentioned in the Complaint in Intervention, and will monitor the discovery process to determine whether it might have such an interest in other allegations contained in the Roginsky Complaint.

I conclude that OSC has a legitimate interest in this proceeding, that its participation will not unduly delay the outcome and is likely to contribute materially to the proper disposition of this proceeding.

OSC recites that there is no objection to its intervention by DoD or Roginsky. Accordingly, the motion to intervene is granted.

The OSC Complaint in Intervention is deemed filed as of the date of this Order. DoD shall have thirty (30) days after receiving a copy of this Order, by certified mail, enclosing the Complaint in Intervention, to file its answer in accordance with 28 C.F.R. §68.8(a).

III. Schedule

By order dated May 6, 1991, Complainant agreed to advise the bench not later than May 22, 1991 as to whether it intended to dismiss respondent CNA. I have received no such filing.

Accordingly, as agreed during the Third Prehearing Conference, and confirmed in the May 6, order, the evidentiary hearing originally scheduled to begin August 13, 1991 is canceled. The evidentiary hearing will begin on September 10, 1991.

In light of the rulings on the recent motions filed by Complainant and OSC contained in this Order, and the proximity of the June 17, 1991 evidentiary hearing on timeliness, an emergency telephonic prehearing conference is appropriate in preparation for that hearing. I will be available at the following dates and times:

- a. Tuesday June 11, 1991 from 2:30 p.m.-4:00 p.m.;
- b. Wednesday, June 12, 1991 from 10:30 a.m.-11:30 a.m., 2:30 p.m.-4:00 p.m., and

2 OCAHO 341

c. Thursday, June 13, 1991 from 9:00 a.m.-11:00 a.m..

The parties are expected to contact my staff as soon as possible and advise as to their availability during those times for an emergency conference.

The emergency conference will address the matters to be taken up at the June 17 hearing and will address also the issues discussed in this Order.

SO ORDERED.

Dated this 10th day of June, 1991.

MARVIN H. MORSE
Administrative Law Judge