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

PORFIRIO SPERANDIO, Complainant, v. UNITED PARCEL SERVICE, INC., Respondent.	))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2021B00025

Appearances: Porfirio Sperandio, pro se, Complainant
Patrick Shen, Esq., Daniel Brown, Esq., and K. Edward Raleigh, Esq., for Respondent

ORDER DENYING COMPLAINANT'S MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

I. PROCEDURAL HISTORY

On December 7, 2021, the Court issued an Order Setting Prehearing Conference and General Litigation Order (General Litigation Order) in which it described the rules for motion practice. Of note, the Court instructed that "[b]efore seeking a hearing on any motion, it shall be incumbent on the party desiring the hearing on the motion to meet and confer with the opposing party in a good faith effort to narrow the areas of disagreement." General Litigation Order 4.

On January 10, 2022, Complainant filed Complainant's Motion for Sanctions for Spoliation of Evidence (Motion for Sanctions). In response, Respondent filed its Opposition to Complainant's Motion for Sanctions for Spoliation of Evidence (Opposition) on January 13, 2022. On January 14, 2022, Complainant filed Complainant's Response to Respondent Opposition to Motion for Sanction in Spoliation of Evidence (Reply).

II. GOOD FAITH MEET AND CONFER

Generally, a party's representation is sufficient to establish the good faith meet and confer; however, in a good faith meet and confer, the parties must engage in discussions about how to resolve the contested issue without the Court's intervention. *See* A.S. v. Amazon Web Servs. Inc., 14 OCAHO 1381m, 7 (2021) (finding that the parties met and confer in good faith

after engaging in numerous discussions).[1] At base, the movant must show that they identified to the nonmoving party the issue or concern which (if left unaddressed) may prompt an appeal to the court. These discussions need not be unduly extensive, and they need not occur over any particular medium. However, they should be sufficient for the parties to fully and frankly air their disagreements and to seek a resolution without the court's intervention.

Respondent objects that Complainant has failed to honor the meet and confer requirement. The Court is inclined to agree. Complainant asserts in his motion that "the parties conferred by email and correspondence from January 4th, 2022 to January 10th, 2022, but did not resolve the matter." Mot. Sanctions 1 n.1. However, Complainant does not attach a copy of the conferral emails or other correspondence to his motion. Respondent's submission appears to include the missing documents — in them, Complainant levels several accusations against Respondent about it allegedly sending "malicious emails," or emails attempting by subterfuge to "forcefully … get into my belongings w/o my will." Respondent Opp'n. Ex. D, E. But notably, in none of this correspondence does Complainant perform the basic obligation of a meet and confer — seeking a resolution of the dispute without the court's intervention. Missing from this correspondence is Complainant's invitation to engage in further discussion with Respondent, a request for clarification on the issues Complainant has raised, and a statement informing Respondent that Complainant intends to raise the issue with the Court if it cannot obtain a satisfactory resolution from informal discussions.

Insofar as Complainant has failed to engage in a meet and confer prior to the filing of this motion for spoliation, the Court DENIES the motion.

III. SPOLIATION OF EVIDENCE

While a failure to comply with the meet and confer requirements alone justifies denial of the motion, the Court will also address the substantive question raised concerning the alleged spoliation of evidence.

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Graff v. Baja Marine Corp., 310 F. App'x 298, 301 (11th Cir. 2009) (quoting West v. Goodyear

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)). Evidence is defined as "[s]omething (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact." United States v. Trainor, 376 F.3d 1325, 1331 (11th Cir. 2004) (quoting Black's Law Dictionary 576 (7th ed.1999)).

"[S]anctions for spoliation of evidence are appropriate 'only when the absence of that evidence is predicated on bad faith . . . . "Mere negligence" in losing or destroying the records is not enough[.]'" Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1280 (M.D. Fla. 2009) (quoting Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir.1997)). The Federal Rules of Civil Procedure provides a list of permissible sanctions courts may impose "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery[.]" Fed. R. Civ. P. 37 (e); *see generally* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by [OCAHO's] rules . . . .").

Complainant requests the Court impose sanctions on Respondent and its counsel for spoliation of evidence. Mot. Sanctions 1. He alleges that on January 4, 2022, he "received an **email** from [Respondent's counsel's firm] containing **malicious software**. . . . Google, Inc[.] put out an alarming note advising [he] not click on these files." Id. at 2. Complainant "did not open the files attached to the email fearing for the integrity of his **evidences** for this proceedings." Id. That same day, Complainant brought this issue to the attention of Respondent's counsel, who did not respond. Id. Then on January 10, 2022, Complainant "noticed the email containing the malicious encrypted codes had **disappeared** from his Googles **listing of his** personal email[.]" Id.

Complainant's arguments concerning spoliation of evidence appear to relate to the January 4 email, the attachments to the email, and the mysterious disappearance of the email from his email account. Complainant provides a screenshot of the email; it contains Mr. Raleigh's Notice of Appearance (NOA) and E-filing Registration Form.[2] Mot. Sanctions 8. The Google warning simply urges caution when opening the message because it "contains one or

[2] Complainant notes that when Respondent filed the NOA with the Court, Respondent failed to copy him on the email. Reply 2. As the Court noted in Sperandio v. United Parcel Serv., Inc., 15 OCAHO no. 1400a, 3 (2022), when e-filing, "the filing party must copy the opposing party on the email to the Court containing the filing so as to comply with the simultaneous filing requirement of Chapter 3.7(d)(3) of the OCAHO Practice Manual." Respondent should have copied Complainant on the email to the Court containing the NOA. However, the Court is assured Respondent sent Complainant the NOA because the certificate of service on the NOA indicates that Complainant was emailed the filing that same day. Moreover, Complainant provided the email from Respondent containing the NOA and E-Filing Registration Form. Mot. Sanctions 8. Accordingly, no additional action on the part of the Court is necessary.

more encrypted attachments that can't be scanned for viruses." Id. The email adds: "[a]void downloading them unless you know the sender and are confident that this email is legitimate." Id.

The Court cannot discern any spoliation of evidence. It appears that Complainant misunderstood the generic email warning about encryption. The exhibits Complainant provided in his motion do not establish that Respondent's counsel sent Complainant "malicious code." Moreover, the email and exhibits do not constitute evidence. An email with a NOA and e-filing registration form does not "tend[] to prove or disprove the existence of an alleged fact" regarding the complaint of alleged unfair immigration-related employment practices; it relates only to Respondent's representation in this matter. Therefore, there was no evidence that could have been spoliated.

Finally, Respondent did not violate Rule 37(e). The the NOA and e-filing registration form do not constitute "electronically stored information that should have been preserved in the anticipation or conduct of litigation[.]" Even assuming that those documents should have been preserved, they were not destroyed such that they "cannot be restored or replaced." Among the many options available to the parties to restore or replace the NOA and e-filing form, the simplest might be for Respondent to resend the forms without the encryption.

Complainant's Motion for Sanctions is therefore DENIED.

SO ORDERED.

ENTERED:

_____
Honorable John A. Henderson
Administrative Law Judge

DATE: March 25, 2022