

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

IN RE INVESTIGATION OF)
FLORIDA RURAL LEGAL)
SERVICES,)
Charging Party,)
)
v.) OCAHO Subpoena
) No. 92-2-00058
IMMOKALEE AGRICULTURAL)
WORKERS,)
I.D., INC.)
Respondent.)
_____)

ORDER DENYING PETITION TO QUASH SUBPOENA
AND DENYING PETITION FOR AUTHORITY TO
SEEK ENFORCEMENT
 (May 15, 1992)

On April 28, 1992, I issued an investigatory subpoena upon request of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The subpoena stated, *inter alia*, that the place, date and time of production would "be agreed upon by counsel." The subpoena was addressed to Immokalee Agricultural Workers I.D., Inc. (Respondent). By Petition dated May 13, 1992, filed May 14, Respondent, by counsel, asks that the subpoena be quashed or revoked.

Reciting several grounds for relief, Respondent's Petition is accompanied by a Memorandum with three attached exhibits. Exhibit 2 is a February 5, 1992 letter to OSC from Respondent's counsel to OSC. By that letter, counsel requested an opinion as to the lawfulness of Respondent's practices as described by counsel in the request. Exhibit 1 is a letter dated March 16, 1992 from OSC to Respondent. That letter recites that on March 6, 1992 OSC accepted a charge of employment discrimination filed by Florida Rural Legal Services, Inc. OSC demanded certain information in aid of its investigation of the charge. Exhibit 3 is an April 13, 1992 letter from Respondent's counsel to OSC in response to the March 16 letter from OSC.

Respondent's Petition challenges the subpoena on the grounds that it "does not comport with" OCAHO regulations, was improperly served, requests irrelevant materials and would impose an undue burden upon Respondent. Respondent's Memorandum recites that its Petition is filed to protect its "right to object to enforcement of the subpoena and its right to insist upon adequate notice of the charge."

The Memorandum recites that counsel for Respondent was informed that the OSC attorney assigned to the investigation "would be out of her office until May 11." He received this information in a letter which transmitted a courtesy copy of the subpoena to him. Respondent's Memorandum also suggests that the lawyers had been in the process of negotiating a compromise. Respondent was to provide the Forms I-9 requested by the subpoena, but would not be obligated to identify its shareholders "until and unless OSC determines that there is cause to believe that discrimination occurred." Respondent also conditioned the compromise on obtaining more explicit notice of the discrimination charge. Respondent argues that because OSC intends to take depositions promptly after an on-site inspection, such notice is needed by Respondent's counsel to prepare its witnesses.

By Petition filed May 15, 1992, OSC asks that the administrative law judge authorize OSC to petition the district court to obtain enforcement of the subpoena. 8 U.S.C. 1324b(f)(2). OSC alleges that by letter dated May 14, 1992 Respondent's counsel advised "that Respondent did not intend to comply with the subpoena." OSC claims also that Respondent's Petition "was both untimely and not filed properly." OSC contends that the "the documents sought" are critical to the determination whether the charge is true and whether to file a complaint, specifying that the violation alleged is that of over documentation, *i.e.*, requiring production of "additional documents than those required by 8 U.S.C. §1324a(b)."

Respondent's Petition is not untimely. The course of dealings between the attorneys provides a sound basis for exercise of discretion to afford Respondent more than the minimal ten days after service of a subpoena in which to petition for revocation or modification. 28 C.F.R. §68.25(c).

In the usual course, I have not hesitated to issue the form of order requested by OSC where a respondent fails to comply with a subpoena. 28 C.F.R. §68.25(d) (1991) (erroneously cited by OSC as §68.23). I will not do so here where no contumacy or refusal is implicated in that

failure to obey the subpoena. The ongoing discussion between counsel as recited in Respondent's pleadings is not mentioned by OSC despite its acknowledgment of Respondent's Petition. The posture of Respondent reflected by that recitation vis a vis OSC provides no basis for concluding that judicial intervention is essential at this time. Most importantly, a subpoena which by its terms depends upon agreement between counsel for the place, date and time of production is not enforceable. As drawn, the subpoena is simply not susceptible to an order of authorization to seek enforcement. Accordingly, OSC's Petition is overruled.

In denying OSC's Petition, I do not agree with Respondent that the rules of practice and procedure require that the subpoena be addressed to counsel, bear a certificate of service or otherwise comply with requirements applicable to parties to a hearing. Rather, subpoena practice is controlled by 28 C.F.R. 68.25. (1991). However, the dialogue between counsel described by Respondent's pleadings, confirmed in part by exhibits 2 and 3 to its memorandum and not denied by OSC, suggests that OSC might have proceeded more prudentially. At a minimum, the better practice would have been to advise Respondent's counsel of the impending subpoena. Instead, OSC notified counsel concurrently but by slower means of communication than that utilized for service of the subpoena directly upon Respondent.

For the same reason that the subpoena as drawn cannot properly serve as the basis for an order of authorization, neither can it prejudice Respondent. Accordingly, Respondent's Petition is overruled.

In view of the result of this Order I do not reach the issue raised by Respondent of adequacy of the Notice of the Charge, 8 U.S.C. §1324b(b)(1), but note that in any event the Notice was not submitted to the bench.

SO ORDERED.

Dated and entered this 15th day of May 1992.

MARVIN H. MORSE
Administrative Law Judge