

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

September 17, 1992

IN RE INVESTIGATION OF )  
 ) OCAHO Investigatory  
CAROLINA EMPLOYERS ) Subpoena No. 92-2-00087  
ASSOCIATION, INC. )  
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ORDER DENYING MOTION TO REVOKE  
OCAHO INVESTIGATORY SUBPOENA

On June 19, 1992, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) directed correspondence to Charles Kelso, Esquire, counsel of record for Carolina Employers Association, Inc. (CEA), in which it requested that CEA supply responses to nine (9) inquiries by July 13, 1992. CEA failed to do so.

On July 23, 1992, OSC requested that the undersigned issue OCAHO Investigatory Subpoena No. 92-2-00087, in which CEA was commanded to provide copies of specified documents to OSC concerning the same nine (9) requests, and to have done so by 5 p.m. on August 4, 1992. That subpoena was delivered to CEA on the following date, July 24, 1992.

On August 10, 1992, CEA filed the pending Motion to Revoke Subpoena, urging that the OSC investigatory subpoena at issue must be revoked for the reason that OSC lacks subject matter jurisdiction over the H-2A violations of the Immigration and Nationality Act (INA) which OSC is investigating, because the H-2A provisions of INA apply to temporary foreign agricultural workers over which and whom the Department of Labor (DOL) has exclusive investigative jurisdiction. CEA also contends that the H-2A 50% rule violations for which it has been cited by DOL, and for which CEA has paid a \$500 civil penalty, do not constitute unfair immigration-related employment practices over which, it concedes, OSC does have exclusive enforcement jurisdiction.

On August 19, 1992, OSC filed a Memorandum in Opposition to Petitioner's Motion to Quash and Request to Permit Enforcement of Subpoena. In that pleading, OSC advises that on May 13, 1992, it began an investigation of CEA's employment practices namely, whether CEA discriminates against work-authorized individuals, in favor of H-2A visa holders, in connection with CEA's hiring/ recruitment of H-2A visa holders. On June 2, 1992, OSC notified CEA of that investigation and requested certain information concerning CEA's hiring/recruitment practices to which CEA responded on June 16, 1992. On June 19, 1992, OSC requested additional information, which CEA failed to provide. Subsequently, on July 23, 1992, OSC requested the subpoena at issue.

In its memorandum in opposition, OSC asserted that the subpoena in question is proper under that standard concerning the issuance of an administrative subpoena announced in EEOC v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986). In addition, OSC asserted that the objections raised by petitioner in its motion namely, that OSC does not have the authority to investigate petitioner's hiring/recruitment practices, petitioner's assertion that OSC should provide it with the allegations underlying OSC's investigation, and petitioner's suggestions to narrow the subpoena, are without merit.

On September 2, 1992, petitioner filed its Reply Memorandum in Support of Motion to Revoke Subpoena in which it asserted that OSC has failed to establish a proper jurisdictional basis for its investigation, alleged that OSC was attempting to exceed its investigative authority, and contended that OSC's refusal to provide information concerning its investigation had prevented a prompt resolution of this dispute.

On September 4, 1992, OSC filed its Memorandum in Response to Petitioner's Reply Memorandum, in which it asserted that petitioner had misstated the law with respect to the proper analysis of a subpoena enforcement action, reiterating that the three-pronged Maryland Cup test is the proper legal analysis to use in determining whether an administrative subpoena should be enforced.

OSC correctly asserts that Maryland Cup provides the test to be used in determining the propriety of the administrative subpoena in question. The three-pronged test in Maryland Cup requires the agency seeking the information to show that:

1. The subpoena is within the agency's authority.
2. The agency has satisfied statutory requirements of due process.

3. The information sought is relevant and material to the investigation.

Maryland Cup, 785 F.2d at 475. Once the agency makes this showing, the court must enforce the subpoena unless the party being investigated demonstrates that the subpoena is unduly burdensome. Id. at 476.

The Immigration Reform and Control Act of 1986 (IRCA) provides that the Special Counsel may initiate and conduct investigations respecting unfair immigration-related employment practices. 8 U.S.C. §1324b(d)(1). IRCA establishes that it is an "unfair immigration-related employment practice" to discriminate against any authorized individual with respect to hiring, recruitment or referral for a fee, for employment or discharging from employment because of that individual's national origin or citizenship status. 8 U.S.C. §1324b(a)(1).

In conducting investigations, the Special Counsel and the administrative law judge shall have reasonable access to examine evidence of any person or entity being investigated. In order to gain access to evidence, the administrative law judge may, by subpoena, compel the production of evidence of any person or entity being investigated. 8 U.S.C. §1324b(f)(2). The subpoena in question was issued by the undersigned pursuant to that authority at the request of OSC in the course of its investigation of unfair immigration-related employment practices allegedly committed by petitioner. Accordingly, the subpoena at issue is within OSC's investigative authority.

OSC has also demonstrated that it has satisfied the statutory requirements of due process required to obtain the information it seeks. As noted earlier, in conducting investigations into alleged unfair immigration-related employment practices, OSC is entitled to reasonable access to examine evidence of any person or entity being investigated. Id. On June 19, 1992, OSC requested by letter the information sought in the subpoena at issue. When that information was not forthcoming, OSC sought and obtained the subpoena in question according to the provisions of IRCA, id., and the pertinent regulation, 28 C.F.R. §68.25. That subpoena was properly served on July 24, 1992. Petitioner has been granted the opportunity for administrative review of the subpoena in question in this proceeding, as permitted in the implementing regulations, 28 C.F.R. §68.25(c). Consequently, OSC has complied with the due process requirements of IRCA and its implementing regulations, satisfying the second

condition of the Maryland Cup test. See Maryland Cup, 785 F.2d at 476.

Finally, OSC must establish that the information it seeks is relevant to its investigation of petitioner's hiring and/or recruitment practices.

In the subpoena at issue, OSC seeks the following nine items:

1. Copies of all documents that relate or refer to the grower members of the Carolina Employer's Association in 1992.
2. Copies of all documents submitted by petitioner to the Department of Labor to obtain labor certifications for 1992.
3. Copies of documents submitted by petitioner to INS to obtain H-2A visas for 1992.
4. Copies of all documents which petitioner has provided to its members on how to comply with laws that are a condition of participation in the H-2A program.
5. Copies of all documents which relate or refer to each individual referred by the North Carolina Employment Security Commission in 1992.
6. Copies of all documents, including but not limited to audio tape recordings, which relate or refer to interviews conducted in 1992 by petitioner with individuals seeking employment and/or referred for employment.
7. Copies of all I-9s collected by petitioner in 1992.
8. Copies of all documents which relate or refer to each individual brought into the United States on an H2A visa with the cooperation or assistance of petitioner in 1992.
9. Copies of all documents provided to the Department of Labor in its investigation of petitioner with respect to Mr. Sylverio Lozano.

The Supreme Court, in the course of determining the investigatory authority of the EEOC, the investigatory authority of which parallels that of OSC, ruled that while the EEOC is entitled access only to "relevant" information, the term "relevant" had been construed to afford the EEOC "access to virtually any material that might cast light on the allegations against the employer." EEOC v. Shell Oil Co., 466 U.S. 54, 68-69, 104 S.Ct. 1621, 1631 (1984). As the Court of Appeals for the District of Columbia Circuit explained in FTC v. Texaco, Inc., 555 F.2d 862 (1977), cert. denied 431 U.S. 974 (1977), "the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation." Id. at 874.

Under this standard, each item sought by OSC in its subpoena requests is relevant to its investigation of petitioner's alleged unfair immigration-related employment practices. As OSC explains in its memorandum in opposition to petitioner's motion, its investigation focuses upon petitioner's employment practices with respect to the hiring and/or recruitment of authorized individuals and whether any discrimination is occurring. The subpoena requests are relevant to identification of petitioner's work force and applicant pool by citizenship status, to the time period in which any potential violations might have occurred, to the type, pay, and length of employment of those individuals hired, the petitioner and its recruitment practices, or to the identity of the the growers who are members of petitioner association. All of these requests, in turn, are relevant to the asserted purpose of OSC's investigation.

Because all of the items in the subpoena are relevant to OSC's investigation of alleged unfair immigration-related employment practices, the subpoena has met the final condition in the Maryland Cup test. Accordingly, the subpoena in question is proper and should be enforced unless the petitioner shows that the subpoena is unduly burdensome, which petitioner has not done.

Petitioner's other objections to enforcement of the subpoena will now be addressed.

Petitioner also charges that OSC is exceeding its authority in investigating alleged H-2A violations, which, petitioner contends, are the exclusive province of DOL.

OSC countered this objection by averring that it is not investigating H-2A violations and points out that petitioner's assertion that the fact that petitioner's hiring and recruitment process is controlled in part by DOL's H-2A regulations does not limit OSC's investigatory authority under IRCA.

Petitioner's argument is without merit. Under IRCA, OSC is tasked with investigating allegations of unfair immigration-related employment discrimination. 8 U.S.C. §1324b(d). It is true, as petitioner asserts, that the OSC's investigatory jurisdiction is not unlimited, and that IRCA specifically exempts from the definition of "unfair immigration-related employment practice" discrimination which is based upon citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines

to be essential for an employer to do business with an agency or department of the Federal, State or local government. 8 U.S.C. §1324b(a)(2)(C). Because these factual scenarios are inapplicable under the facts at issue, that argumentation does not constitute a valid objection to enforcement of the OSC subpoena under consideration.

It has been held that a subpoena enforcement proceeding is not the proper setting in which to challenge the agency's determination of the scope of administrative regulations. EEOC v. Ocean City Police Dept., 820 F.2d 1378, 1379 (4th Cir. 1987). Any questions concerning the coverage of the statute and the possible defenses available to the party investigated are left for judicial review of whatever administrative action the agency eventually brings. EEOC v. Children's Hospital, 719 F.2d 1426, 1429 (9th Cir. 1983). Unless the evidence sought by an administrative subpoena is plainly incompetent or irrelevant to any lawful agency purpose, it is the duty of the court to order the production of evidence for the agency's consideration. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509, 87 L.Ed. 424, 429 (1943).

Further, in subpoena enforcement proceedings, reviewing courts should look only to the jurisdiction of the agency to conduct such an investigation. EEOC v. American Efirm Mills, 964 F.2d 300 (4th Cir. 1992). As noted earlier, OSC has jurisdiction to investigate unfair immigration-related employment practices, for which purpose OSC requested the subpoena in question. Therefore, the subpoena at issue may not be invalidated on jurisdictional grounds.

Petitioner also asserts that OSC should be instructed to state and provide petitioner with some facts concerning the nature of the alleged violations on which petitioner might evaluate any demand for information and challenge jurisdiction if appropriate.

There are potentially three (3) areas of OSC investigations under IRCA. A person alleging that he or she is adversely affected by an unfair immigration-related employment practice (or a person acting on that individual's behalf) may file a charge concerning that practice or violation with the OSC, which OSC must then investigate. 8 U.S.C. §1324b(b)(1). In addition, an officer of the Service may file a charge with the OSC alleging that an unfair immigration-related employment practice has occurred or is occurring, which OSC must then investigate. Id. In both of these situations, the Special Counsel must serve a notice of the charge on the person or entity involved within 10 days of filing. Id.

In the third setting, OSC may, on its own initiative, conduct investigations respecting unfair immigration-related employment practices. 8 U.S.C. § 1324b(d)(1). There is no provision requiring OSC to serve notice of the investigation on the person or entity involved when OSC, as here, investigates allegations of unfair immigration-related employment practices on its own initiative. Consequently, petitioner is in error in asserting that OSC should be instructed to disclose the nature of the allegations being investigated as a condition precedent to obtaining the information and documents being sought.

As noted earlier, the provisions of IRCA clearly disclose that Congress charged OSC with the authority to investigate allegations of unfair immigration-related employment practices. In carrying out its duties under IRCA, OSC is entitled to reasonable access to examine evidence of any person or entity being investigated. In order to enable OSC access to evidence, IRCA grants authority to the administrative law judges to compel the production of evidence by subpoena. On July 23, 1992, at the request of OSC, the undersigned issued an administrative subpoena calling for the production of evidence from petitioner, which then and presently is the subject of an investigation into allegations of unfair immigration-related employment practices.

Petitioner, in its Motion to Revoke Subpoena, challenged the administrative subpoena issued on July 23, 1992, and moved that it be revoked, on grounds that the alleged violations the petitioner assumes are subject of OSC's investigation are outside the OSC's jurisdiction, and on grounds that if there are other bases for OSC's investigation, OSC should be required to state those bases, and restrict the demands made in the subpoena accordingly.

However, jurisdiction is not a basis for invalidating the subpoena in question and OSC is under no obligation to provide notice to petitioner as a party that is the subject of a current investigation, of the alleged violations being investigated.

OSC has established that the administrative subpoena in question is proper, by demonstrating that it has satisfied the three conditions established by the Fourth Circuit for enforcement of an administrative subpoena, namely, that the subpoena is within the authority of OSC, that OSC has satisfied statutory requirements of due process, and that the information sought is relevant and material to OSC's investigation. Because petitioner has failed to demonstrate that the subpoena

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is unduly burdensome, the provisions of that subpoena must be enforced.

Accordingly, petitioner's Motion to Revoke OCAHO Investigatory Subpoena No. 92-2-0087 is hereby denied.

In the event that petitioner fails to comply with those requests set forth in OCAHO Investigatory Subpoena No. 92-2-0087, OSC is hereby authorized, in accordance with the provisions of 8 U.S.C. §1324b(f)(2), to seek enforcement of this administrative subpoena in the appropriate United States District Court.

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JOSEPH E. MCGUIRE  
Administrative Law Judge