

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

UNITED STATES OF AMERICA, )  
Complainant, )  
 )  
v. ) 8 U.S.C. §1324a Proceeding  
 ) Case No. 92A00131  
NEVADA LIFESTYLES, INC. )  
DBA: COMMERCIAL DRAPERY )  
CLEANERS, )  
Respondent. )  
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ORDER

(November 13, 1992)

1. During the October 19, 1992 telephonic prehearing conference, Respondent agreed to provide its witness list to Complainant not later than October 26. The agreement was confirmed by the report and order dated October 22, 1992.

2. On October 29, 1992, Complainant filed a motion of the same date for sanctions. The motion recited that Respondent had failed to provide its witness list by the agreed date. Complainant contended that Respondent's failure should preclude it from calling as witnesses any but three individuals previously identified.

3. On October 30, 1992, I issued an order directing Respondent to respond to Complainant's motion for sanctions, unless the October 26, witness list deadline had already been satisfied.<sup>1</sup>

4. On November 5, 1992, Respondent filed a subpoena request with a witness list attached. Respondent certified that its witness list had been mailed to Complainant on November 2.

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<sup>1</sup> The second paragraph of the October 30, 1992 order incorrectly ascribed to Complainant the October 26 obligation; patently, as is clear from the first paragraph and the remaining text of the second, the October 26 obligation referred to Respondent's undertaking to deliver its witness list by that date.

5. On November 9, I issued an order rejecting Respondent's request as insufficiently documented. I invited Respondent to resubmit its list with:

(a) an address for each prospective witness and

(b) a "short explanation of each individual's nexus with the facts at issue in this case."

I cautioned that I will not subpoena public officials absent a clear showing of their "specific knowledge regarding factual aspects of this case." I also noted that a majority of the names on the list appear to be individuals alleged to have been employees at the time of Complainant's inspection and cautioned against introduction of cumulative evidence.

6. On November 9, Complainant filed a second motion for sanctions. Essentially, Complainant claims that Respondent's responses to interrogatories and requests for admission are so evasive, unresponsive and false, and its response to requests for production nonexistent, as to constitute a de facto failure to respond.

7. On November 10, 1992, Respondent filed a Request for Sanctions and a Motion to Continue. The request condemns counsel for Complainant. Respondent claims, in effect, that in derogation of counsel certifying that he mailed his motion to Respondent on October 29, counsel in fact did not do so until November 2. Respondent supports its claim by submitting a copy of the wrapper in which its copy of the October 29 motion was enclosed, bearing a postmark of November 2. Respondent's motion for indefinite continuation of the dates previously set for the evidentiary hearing asserts:

(a) that because the judge granted Complainant's request for a protective order against certain discovery, "Respondent has been forced to" initiate a Freedom of Information Act (FOIA) request to obtain the desired information absent which "Respondent is not prepared to present" its defense;

(b) that three days, i.e., December 2 through 4, allotted for hearing is insufficient, and cannot be extended; "the A.L.J. is informed of the Respondent's [sic] marriage on Dec. 6, 1992 and the honeymoon thereafter," and Respondent must present a volume of witnesses.

8. In the interests of efficiency, without awaiting responses to the pending pleadings, this order disposes of the motions of both parties.

(a) I deny Complainant's motions for sanctions. Albeit a week late, Respondent did deliver its witness list to Complainant. Complainant's characterization of Respondent's shortcomings of the discovery responses are not far from the mark. Nevertheless, at least in a mechanical sense, Respondent did comply with the October 22, 1992 order on discovery. Granted that Respondent's conduct is vexatious, the discovery posture is not ripe for sanctions.

(b) I deny Respondent's motion for sanctions. A November 2, 1992 postmark does not impeach a December 29, 1992 certificate of mail service. I am not prepared to find that a certification of mailing on Friday, the 29th, is necessarily inconsistent with a metering of postage on Monday, the 2nd. Even if it were, Respondent is not disadvantaged. After receipt of Complainant's motion, Respondent had ample time to file a response in lieu of filing the present motion. Furthermore in light of today's denial of Complainant's underlying motion, Respondent has not been prejudiced.

(c) I deny Respondent's motion for a continuance for two reasons.

(i) Three days is ample time for this employer sanctions evidentiary hearing implicating only paperwork violations. Respondent accurately characterizes its witness list as voluminous. As implied by the November 9 order, however, I do not anticipate as many witnesses at the evidentiary hearing as appear on that list. Also, three of those prospective witnesses appear to be included among the individuals for whom Complainant has requested subpoenas to issue. Depending in part on Respondent's response to the November 9 order, I am confident that it will not be necessary to take testimony of all the individuals named as employees in the complaint. I do not anticipate that the named public officials will testify. See Order, November 9, 1992.

(ii) The reasons for granting Complainant a protective order against certain discovery by Respondent are discussed at pages 23-24 of the October 16, 1992 Order Denying Cross Motions for Summary Decision and Granting in Part Complainant's Motion to Strike Affirmative Defenses. As that order explained, at 24, "[N]one of Respondent's affirmative defenses, which might arguably have made relevant Respondent's broad inquiry, survives." I held also that the requests for production were excessive in scope, over-broad, burdensome and in breach of privileges against disclosure. I did not hold that appropriate discovery was barred.

9. Nothing contained in Respondent's motion for a continuance requires a different conclusion as to Respondent's discovery initiative. Respondent's recital of the reason for the FOIA request, i.e., that the judge foreclosed certain discovery, provides a per se reason for denying the continuance. The case at issue before me is one of factual disputes, and their consequences in law. Respondent has not shown that the disputes turn on matters as to which discovery has been frustrated. Reference to FOIA is unavailing to Respondent. There is no showing that the merits of Respondent's defense in the case before me depends on the fruits of its FOIA request, whatever they may be. What is immaterial or irrelevant if obtained through discovery does not become material or relevant if obtained pursuant to FOIA. Here, where the administrative law judge rules adversely to the requesting party on the materiality of the matters on discovery sought, no principle of administrative adjudication suggests the need to abate the evidentiary hearing pending the results of a FOIA request.

10. After this Order was drafted, Complainant filed a response to Respondent's motion for continuance and a response to Respondent's request for sanctions. Both filings, which take exception to Respondent's claims, are consistent with the terms of this Order.

11. As agreed at the October 19 prehearing conference, by which time both parties had received the October 16 order, the following schedule is in effect:

On November 19, 1992, at 3:30 p.m., EST the parties and the bench will reconvene for the third prehearing conference.

The evidentiary hearing will commence on December 2, 1992, continuing through December 4, 1992, as necessary. Unless notified to the contrary, the hearing will be held at City of Henderson, Council Chambers, 240 Water Street, Henderson, Nevada 89015.

The hearing will begin at 9:00 a.m. each day, concluding at 5:00 p.m. except that because that facility is only available until 3:30 p.m. on December 3, the hearing schedule will be modified accordingly.

12. At the start of the evidentiary hearing, each party shall tender two copies of all proposed documentary exhibits to the bench, a third copy to the other party. Each party shall accompany each copy of its exhibits with an index. Complainant's exhibits shall be listed in numerical order, Respondent's in alphabetical order.

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**SO ORDERED.**

Dated and entered this 13th day of November 1992.

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MARVIN H. MORSE  
Administrative Law Judge