

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

June 30, 1995

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324c Proceeding
) OCAHO Case No. 95C00009
ALBERTO NORIEGA-PEREZ,)
Respondent.)
_____)

ERRATA

The Order Staying Complainant's Motion for Sanctions and Motion for Summary Decision issued on June 28, 1995, is amended in the following manner.

Page 1 of that order states, "On June 13, 1995, complainant filed another letter pleading . . ." This is hereby amended to read, "On June 13, 1995, respondent filed another letter pleading . . ."

JOSEPH E. MCGUIRE
Administrative Law Judge

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Complainant,)
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v.) 8 U.S.C. 1324c Proceeding
) OCAHO Case No. 95C00009
ALBERTO NORIEGA-PEREZ,)
Respondent.)
_____)

ORDER STAYING COMPLAINANT'S MOTION FOR SANCTIONS
AND MOTION FOR SUMMARY DECISION

On April 7, 1995, complainant forwarded to respondent discovery requests consisting of a Request for Admissions, Complainant's First Set of Interrogatories and Request to Produce. Respondent did not respond to these requests in a timely manner.

On May 19, 1995, complainant filed a pleading captioned Motion to Compel Discovery.

On May 30, 1995, complainant filed a Motion for Continuance of Hearing Date and a Motion for Summary Decision.

On May 31, 1995, complainant's Motion to Compel Discovery and its Motion for Continuance were granted. Respondent was ordered to respond to complainant's discovery requests within ten (10) days of his acknowledged receipt of that Order.

On June 5, 1995, respondent filed a letter pleading in which he asserted that he was unable to "prepare for a hearing, or to make my defense, or to complete interrogatories (sic.), due to my mental condition where I am suffering major mental illness." In support of this contention respondent furnished a physician's letter which advises that respondent has been diagnosed with "major depression."

On June 13, 1995, complainant filed another letter pleading, dated June 9, 1995, in which he stated, "[t]he respondents (sic.) answer to each and everyone (sic.) of the Government (sic.) questions in its interlagatories (sic.) and request to produce is the exercising of my 5th Amendment right against self incrimination."

On June 26, 1995, complainant filed its Motion for Sanctions in which it moved:

in accordance with 28 C.F.R. Section 68.23(c) of the federal regulations, complainant requests the following sanctions:

- 1) Infer and conclude that the admissions, documents, or other evidence would have been adverse to the non-complying party; and
- 2) Rule that for the purposes of the proceedings the matters concerning which the order was issued be taken as established adversely to the non-complying party.

Complainant further asserts that respondent's June 9, 1995 letter/motion suggests that he is able to prepare and proceed with this case despite his earlier asserted medical condition. Specifically, complainant states that the letter pleading illustrates that he is aware of the charges against him, and his ability to comply with discovery requests.

Respondent's letter indicates his understanding of the charges against him. Specifically, respondent answers each interrogatory and request for production by invoking his Fifth Amendment privilege against self-incrimination.

The applicable procedural rule containing the general provisions applicable to discovery in this proceeding provides in pertinent part that:

Unless otherwise limited by order of the Administrative Law Judge in accordance with these rules, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter.

28 C.F.R. § 68.18(b).

This Rule is similar to Rule 26(b)(1) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), which limits discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action."

"A claim of privilege may be made by objection to a question asked at a deposition or by serving an objection to an interrogatory, a request for production, or a request for admission." 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2016 (1994). However, the party seeking to avoid complying with a discovery request by asserting such privilege has the burden of demonstrating the existence of that privilege. See United States v. Sam Y. Ro d/b/a Daruma Japanese Restaurant, 1 OCAHO 265, at 3 (1990) citing Rosenberg v. John-Mansville Corp., 85 F.R.D. 292 (E.D. Pa. 1980).

Accordingly, since respondent is asserting his Fifth Amendment privilege against self-incrimination, he has the burden of showing that the privilege exists and it is permissible to defer a ruling upon whether a privilege exists until the factual picture in which the privilege is claimed has been clearly developed. United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor, 4 OCAHO 644, at 6 (1994) (citations omitted).

The procedural rules applicable to this proceeding are those codified at 28 C.F.R. Part 68 and those rules do not provide guidance in describing the required information which is to be furnished in a privilege claim. Those rules, however, do provide that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules. . . ." 28 C.F.R. § 68.1.

Therefore, it is in order to utilize Fed. R. Civ. P. 26(b)(5) as a guideline in determining what information is required. In pertinent part, that Rule provides:

When a party withholds information . . . by claiming that it is privileged, . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or the protection.

Fed. R. Civ. P. 26(b)(5).

The Fifth Amendment privilege against self-incrimination may be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444 (1972). However, when a party asserts "the privilege against self-incrimination in pretrial discovery matters which could have criminal overtones, he or she may not make a blanket refusal to answer all questions, but must respond to every question, raising the privilege

in each instance the party determines necessary." United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor, 4 OCAHO 644, at 8-9 (1994) quoting National Life Insurance Co. v. Hartford Accident and Indemnity Co., 615 F.2d 595 (3rd Cir. 1980).

Respondent's responses to all of complainant's discovery requests consist of a single sentence statement, in which respondent has simply refused to answer based upon his Fifth Amendment privilege against self-incrimination. Respondent has failed to state with any particularity his precise objections to these discovery requests.

Accordingly, because respondent has not provided the required information which will determine whether his claim of Fifth Amendment privilege should be granted, namely, precisely how these requested discovery replies will incriminate him, a ruling on those objections will be stayed until respondent files the required detailed responses which comply with the provisions of Fed. R. Civ. P. 26(B)(1).

In that connection, and in consideration of respondent's pro se status, respondent is hereby ordered to file those responses on or before July 18, 1995, addressing each discovery request to which he objects, and specifically setting forth the reasons why a responsive answer to each request would have a tendency to incriminate him. In the event that respondent fails to respond in a timely manner, complainant's Motion for Sanctions will be granted and sanctions will be ordered from among those enumerated at 28 C.F.R. § 68.23(c).

Complainant's Motion for Summary Decision will be addressed following the entry of a ruling on its Motion for Sanctions.

JOSEPH E. MCGUIRE
Administrative Law Judge