

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

LEONID NAGINSKY,)
Complainant,)
)
v.) 8 U.S.C. § 1324b Proceeding
) Case No. 93B00087
DEPARTMENT OF DEFENSE and)
EG&G DYNATREND, INC.,)
Respondents.)
_____)

ORDER GRANTING MOTION TO WITHDRAW AND
COMPLAINANT'S MOTION FOR CONTINUANCE
(August 31, 1995)

On August 25, 1995, counsel and the judge held a last telephonic pre-hearing conference preparatory to the rescheduled evidentiary phase of the hearing which was to be held in Boston, Massachusetts, on September 6-7, 1995. On August 29, 1995, Complainant's attorney, Edward J. O'Connell (O'Connell), filed a motion by which he seeks to withdraw as counsel. The motion recites "that there has arisen a significant and irreconcilable difference of opinion between client and counsel as to the Complainant's theory of his case and the means of proving same." O'Connell further explains that due to this difference of opinion he is "unable to prepare a case sufficient for presentation."

On August 30, 1995, by facsimile transmission, Complainant filed a Motion for a Continuance. Complainant recites that on August 29, 1995 he "was served with the letter (sic) from [O'Connell] . . . stating that he decided to withdraw from representation of the Complainant's case." Complainant requested a continuance "for at least 60 days so that Complainant has adequate time to put together his case for the hearing." Specifically, Complainant states that the need for adequate time to "receive all records from his former counsel and to study them in order to make a decision whether Complainant has enough evidence

to back up his legal position," and "to seek new defense counsel to represent his interests."

I am assured by O'Connell that he has provided his client's materials to Complainant. Neither Complainant nor Respondents' counsel object to either the Motion for Withdrawal or the continuance of the pending evidentiary hearing.

OCAHO rules of practice and procedure (Rules) make clear that withdrawal is subject to judicial scrutiny, and that the judge is empowered to grant or deny a request to withdraw. Title 28 C.F.R. § 68.33(c)¹ provides:

Withdrawal or substitution of an attorney may be permitted by the Administrative Law Judge upon written motion.

While the Rules are silent as to factors to consider in determining whether to grant an attorney's motion to withdraw, OCAHO caselaw establishes that counsel are generally required to remain in a proceeding where service of process on the principals is otherwise ineffective or frustrated. See e.g., United States v. Flores-Martinez, 4 OCAHO 647 at 3 (1994) (Order); United States v. K & M Fashions, 3 OCAHO 411 (1992); United States v. NuLook Cleaners of Pembroke Pines, 1 OCAHO 284 (1991). However, counsel was permitted to withdraw where the judge accepted her undertaking that she could not effectively perform attorney responsibilities because she and her client did not agree on the course of action to follow in presenting a defense. United States v. Boatright, 3 OCAHO 589 (1993) (Sixth Prehearing Conference Report and Order).

Each of the cases cited above where counsel was not permitted to withdraw presented a situation where the attorney of record was the only individual available to accept service. The principle disfavoring withdrawal of counsel in such cases is not applicable to the case at hand. Here, Complainant, who initiated this proceeding pro se, is available to receive service of process. Indeed, the gravamen of the O'Connell motion is consistent with Boatright, where disagreement between a party and counsel was found sufficient to permit withdrawal. Accordingly, the Motion to Withdraw is granted.

¹ See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41, 243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

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Initially, I advised the parties that the request for a continuance was denied. Upon further consideration, I have today advised, as this Order confirms, that I grant Complainant's motion for a continuance for the reasons it recited. The evidentiary hearing scheduled for September 6 and 7, 1995, is postponed pending further order.

As agreed by the parties in separate telephonic discussions, a telephonic prehearing conference is scheduled for November 8, 1995, at 10:00 a.m., for the purpose of discussing the posture of the case at that juncture and, as appropriate, scheduling trial dates. In the interim, counsel for Respondents are at liberty to discuss the case directly with Complainant while he is unrepresented. Motion practice may go forward as in the regular course. Complainant is cautioned that this case will go forward in accord with this order whether or when he obtains substitute counsel.

SO ORDERED.

Dated and entered this 31st day of August, 1995.

MARVIN H. MORSE
Administrative Law Judge