

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

September 13, 1995

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

ORDER GRANTING COMPLAINANT'S MOTION FOR SANCTIONS

On May 19, 1995, complainant, acting by and through the Immigration and Naturalization Service (INS), filed a pleading captioned Motion to Compel Discovery, in which it requested that the undersigned issue an order compelling respondent to answer complainant's Request for Admissions, First Set of Interrogatories and Request to Produce Documents.

In support of its Motion to Compel, complainant asserts that on April 7, 1995, complainant initiated its discovery by forwarding to respondent discovery requests consisting of a Request for Admissions, Complainant's First Set of Interrogatories and Request to Produce.

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 a pleading captioned Complainant Motion for Sanctions, in which it requested the undersigned to grant the following sanctions, in accordance with 28 C.F.R. Section 68.23(c):

- 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.

On June 28, 1995, the undersigned issued an Order Staying Complainant's Motion for Sanctions and Motion for Summary Decision, in which respondent was ordered to file responses to all of complainant's discovery requests by July 18, 1995. In particular, respondent was ordered to address each discovery request to which he objected, specifically setting forth the reasons why a responsive answer to each request would have a tendency to incriminate him. Respondent was advised that in the event that he failed to respond in a timely manner, complainant's Motion for Sanctions would be granted and sanctions would be ordered from among those enumerated at 28 C.F.R. § 68.23(c).

On July 18, 1995, respondent filed answers to complainant's discovery requests. However, respondent chose to only partially comply with the undersigned's June 28, 1995 Order by failing to respond to any of complainant's Request for Admissions.

Because respondent has failed to respond to complainant's Request for Admissions in a timely manner, and also because of his failure to comply with the undersigned's June 28, 1995 Order, complainant's Motion for Sanctions is granted, in accordance with the provisions of 28 C.F.R. section 68.21(b).

Accordingly, each matter of which an admission was requested in complainant's Request for Admissions is deemed admitted.

In addition, respondent has failed to state with any particularity his precise objections to Complainant's First Set of Interrogatories and Request to Produce.

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).

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 again 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 September 29, 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 to this Order, further appropriate sanctions will be ordered from among those enumerated at 28 C.F.R. § 68.23(c).

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JOSEPH E. MCGUIRE  
Administrative Law Judge