

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

November 28, 1995

JORGE PUGLIESE,)
Complainant,)
)
v.) 8 U.S.C. 1324b Proceeding
) OCAHO Case No. 95B00075
AUTO-GRAFICA CORP.,)
Respondent.)
_____)

ORDER PARTIALLY GRANTING COMPLAINANTS MOTION TO COMPEL DISCOVERY AND DENYING COMPLAINANT'S MOTIONS TO COMPEL RESPONDENT, ALTERNATELY, TO WAIVE ITS RIGHT TO APPEAR AND CONTEST THE ALLEGATIONS, TO REHIRE COMPLAINANT WITH BACK PAY, TO INDEMNIFY COMPLAINANT, TO EXPLAIN DELAY IN ANSWERING PAST INTERROGATORIES, AND TO PAY COMPLAINANT DUE MONIES

Procedural History

On July 27, 1995, the pro se complainant filed a pleading captioned Motion to Compel Respondent to Immediately Answer Interrogatory and Motion to Postpone Prehearing Telephonic Conference. In that unopposed pleading, complainant requested that the an order be issued compelling the respondent to immediately answer complainant's interrogatories and to postpone the August 9, 1995, telephonic prehearing conference, in order to give complainant an opportunity to adequately prepare for that conference based upon respondent's anticipated responses.

On August 9, 1995, this Office received a copy of Respondent's Answers to Complainant's Interrogatories, dated June 24, 1995.

On August 17, 1995, complainant filed a second multi-part motion to compel, captioned A) Motion to Postpone Prehearing Telephonic Conference; B) Motion to Compel the Respondent to Waive His Right to Appear and Contest the Allegation; C) Motion to Compel Respondent to Rehire Complainant with Back Pay; D) Motion to Compel

Respondent to Indemnify Complainant; E) Motion to Compel Respondent to Explain Delay in Answering Past Interrogatory; F) Motion to Compel Respondent to Answer Missing Interrogatories; G) Motion to Compel Respondent to Pay Complainant Due Monies.

On September 5, 1995, complainant filed an uncaptioned pleading which detailed his goals for the prehearing telephonic conference scheduled for September 6, 1995.

On September 29, 1995, complainant filed a second pleading captioned Interrogatories along with a Motion to Postpone a Hearing Scheduled for November 15, 1995 Until More Discovery is Performed, Respondent Responds All [sic] the Missing Questions, and Submits the Requested Documents. In addition to again requesting the undersigned to compel discovery, that motion also protested the designation of New York City as the hearing site, indicating that it "would mean an overwhelming, unaffordable expense for Complainant." Complainant's Sept. 29, 1995 Mot. at 1.

On October 10, 1995, respondent filed Respondent's Answer to Complainant's Motion to Postpone a Hearing Scheduled for November 15, 1995. In that pleading, respondent averred that "Respondent will incur four or five times the inconvenience and expense as the Complainant if the hearing is held at a location other than in New York or New Jersey" and requested that the hearing site not be changed. Resp't's Oct. 10, 1995 Mot. at 1. Respondent further stated that, while it did not "strongly object to a postponement of the hearing to a date later than November 15, 1995," rescheduling might prove difficult given the amount of time its officers and employees were engaged in travel outside of the United States. Id. at 1-2.

On November 11, 1995, complainant filed a pleading captioned Motion to Compel Respondent to Answer the Interrogatories Sent on September 25, 1995, and Received, with Evidence, on October 2, 1995 and Motion to Postpone a Telephonic Pre-Hearing Conference Scheduled for November 15, 1995, Until More Discovery is Performed, Respondent Answers All the Missing Questions, and Submits the Requested Documents.

Complainant's August 17, 1995 Motion

On August 17, 1995, complainant filed with this Office a multi-part motion to compel, captioned A) Motion to Postpone Prehearing Telephonic Conference; B) Motion to Compel the Respondent to Waive

His Right to Appear and Contest the Allegation; C) Motion to Compel Respondent to Rehire Complainant with Back Pay; D) Motion to Compel Respondent to Indemnify Complainant; E) Motion to Compel Respondent to Explain Delay in Answering Past Interrogatory; F) Motion to Compel Respondent to Answer Missing Interrogatories; G) Motion to Compel Respondent to Pay Complainant Due Monies.

Part A of that motion, the Motion to Postpone Prehearing Telephonic Conference, has since been rendered moot.

Part B, the Motion to Compel the Respondent to Waive His Right to Appear and Contest the Allegation; Part C, the Motion to Compel Respondent to Rehire Complainant with Back Pay; Part D, the Motion to Compel Respondent to Indemnify Complainant; Part E, the Motion to Compel Respondent to Explain Delay in Answering Past Interrogatory; and Part G, the Motion to Compel Respondent to Pay Complainant Due Monies, all contain assertions which lack support.

In addition, the pertinent procedural rules, as well as the Federal Rules of Civil Procedure, which are to be relied upon in any situation not provided for or controlled by OCAHO's rules, simply do not cover those areas described in complainant's multi-part motion. 28 C.F.R. § 68.1. Accordingly, absent additional support for these motions, they are at best untimely at this stage of the proceeding, and, at worst, simply motions which are not well taken. *See* 28 C.F.R. § 68.23 (listing various appropriate sanctions for failure to comply with discovery requests); *Id.* § 68.37 (allowing parties to voluntarily waive, in writing, their right to appear before an administrative law judge or to present evidence) (emphasis added). Accordingly, parts B through E and part G of complainant's August 17, 1995 multi-part motion are hereby denied.

Part F, the Motion to Compel Respondent to Answer Missing Interrogatories, however, is properly before this Office and will be ruled upon. In support of his Motion to Compel Respondent to Answer Missing Interrogatories, complainant indicated "[t]hat the partially answered interrogatories were received on August 7, 1995, eleven days late. Of the eighty five (85) interrogatories, thirty nine (39) were not answered." Complainant's Aug. 17, 1995 Mot. at 3. Complainant further stated:

I am demanding true answers to all the interrogatories submitted or the Respondent to admit guilt. . . . That includes the wrong or incomplete answers to interrogatories No. 8 (look for another excuse, this is not valid), No. 14 and 15 (the information can be obtained), No. 21 thru 38 (this shows retaliation and animosity against the Claimant),

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No. 40, No. 42 thru 45, No. 51 and 52 (I am enclosing another copy of the allegedly missing previous "Attachment O"), No. 54 thru 56, No. 63 and 64, No. 69 thru 72 and 75 thru 77 (show evidence of Mr. Toma's Form I-9 was forged), No. 78 (show Auto-Grafica consistently and constantly hiring aliens illegally), No. 79 thru 82 (missing).

Furthermore, I am enclosing some of my answers to a previous Respondent's interrogatories, for the Respondent's comments now . . .

Id. at 4.

Complainant contends that respondent's answers to those 45 listed interrogatories, as opposed to 35 by his reckoning, are "wrong or incomplete." While a contention that the other party's answers are "wrong" is not a proper basis for objection, a party may object to a discovery reply based upon the inadequacy of such a reply. The pertinent procedural rule provides:

[I]f a . . . party upon whom a discovery request is made pursuant to §§ 68.18 through 68.22, fails to respond adequately or objects to the request . . . the discovering party may move the Administrative Law Judge for an order compelling a response . . . Unless the objecting party sustains his or her burden of showing that the objection is justified, the Administrative Law Judge may order that an answer be served.

28 C.F.R. § 68.23(a).

Accordingly, the respondent is hereby ordered to either (1) provide adequate responses or (2) further justify its specific and detailed objections to those 45 interrogatories listed as "incomplete" in complainant's August 17, 1995 motion. Failure to do so may result in the imposition of one or more of those sanctions listed at 28 C.F.R. § 68.23(c).

In that same August 17, 1995 Motion, complainant further requests that respondent address what he refers to as "answers to a previous Respondent's interrogatories," which consist of four (4) paragraphs of varying lengths, followed by spaces labeled "Respondent's comment:".

The pertinent rules governing discovery provide that "[p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things, or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions." 28 C.F.R. § 68.18; see also 28 C.F.R. §§ 68.19-23.

None of those four (4) paragraphs identified as "answers" by complainant specifically directs a question to respondent. Thus, they cannot be classified as proper interrogatories. Rather, each paragraph consists of a combination of several different allegations/statements made by complainant in response to respondent's interrogatories, followed by a request that respondent "comment" upon them. As such, they do not constitute proper, separately set forth requests for admission as contemplated by the rules. See 28 C.F.R. § 68.21; Fed. R. Civ. P. 36 (requiring that "[e]ach matter of which an admission is requested shall be separately set forth").

Accordingly, because complainant's four (4) "answers" which ask for "respondent's comments" do not fall within any of the discovery methods recognized by the rules, they are improper and respondent is therefore under no duty to respond to that portion of complainant's August 17, 1995 Motion.

Complainant's September 29, 1995 and November 10, 1995 Motions

On September 29, 1995, complainant filed a pleading captioned Motion to Postpone a Hearing Scheduled for November 15, 1995 Until More Discovery is Performed, Respondent Responds All [sic] the Missing Questions, and Submits the Requested Documents. Complainant basically repeats those requests in a November 10, 1995 Motion to Compel Respondent to Answer the Interrogatories Sent on September 25, 1995, and Received, with Evidence, on October 2, 1995 and Motion to Postpone a Telephonic Pre-Hearing Conference Scheduled for November 15, 1995, Until More Discovery is Performed, Respondent Answers All the Missing Questions, and Submits the Requested Documents.

In support of his motions, which request that respondent be compelled to answer complainant's pending discovery requests, complainant provided this Office with a copy of those interrogatories.

Within those 24 "interrogatories," complainant essentially repeats several of his earlier queries which have been dealt with previously as part of this order's ruling on complainant's August 17, 1995 Motion. Accordingly, as to those interrogatories numbered one (1) through 19, respondent is hereby ordered to either (1) provide adequate responses or (2) justify its specific and detailed objections to those interrogatories. In the event that respondent fails to fully comply with the provisions of this Order, appropriate sanctions will be imposed, in accordance with the provisions of 28 C.F.R. Section 68.23(c).

As to those "interrogatories" numbered 20 through 24, in which complainant again combines several allegations/statements which do not properly request answers to questions nor responses to requests for separately set forth admissions, and as such do not fall within any of the discovery methods recognized by the rules, they are also being found to be improper and respondent is under no duty to respond to those specific "interrogatories."

Further, complainant's request that the pre-hearing telephonic conference scheduled for November 15, 1995, be postponed until further discovery is performed, has been rendered moot due to the recent government furlough, from November 14-19, which caused the cancellation of that pre-hearing conference.

Without deciding on the propriety of the designated New York City hearing location at this time, respondent is hereby ordered to provide written answers to all proper discovery requests propounded by complainant, and to provide complainant with copies of all properly requested documents. Respondent is further ordered to file these discovery replies no later than Monday, December 18, 1995. In the event that respondent fails to fully comply with the provisions of this order, appropriate sanctions will be imposed, as provided for at 28 C.F.R. Section 68.23(c).

Upon completion of the discovery activities, a telephonic prehearing conference will be scheduled for the purpose of selecting the earliest mutually convenient hearing date in New York City, which is the most convenient hearing situs for the parties and witnesses.

JOSEPH E. MCGUIRE
Administrative Law Judge