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

IN RE CHARGE OF	)	
JAIME GIRON	)	
UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	CASE NO. 90200307
HARRIS RANCH BEEF COMPANY,	)	
Respondent.	)	
	)	

ORDER GRANTING IN PART RESPONDENT'S MOTION FOR PROTECTIVE ORDER

I. *Procedural History*

This proceeding was initiated by the filing of a Complaint on October 9, 1990, by the Office of Special Counsel (hereinafter "Complainant") charging Respondent, Harris Ranch Beef Company, with violating 8 U.S.C. section 1324b of the Immigration and Nationality Act ("the Act") for alleged discrimination with respect to hiring against Jaime Giron on the basis of his citizenship status.

On October 24, 1990, Respondent filed its Answer, generally denying the allegations in the Complaint.

Thereafter, pursuant to my Order Directing Pre-Hearing Procedures, issued on October 25, 1990, and 28 C.F.R. § 68.23, four subpoenas for discovery depositions were issued upon the written applications of Complainant, as well as two subpoenas for discovery documents alone, that is, without requesting their production in conjunction with a deposition.

A subpoena for discovery documents alone was also issued upon the written application of Respondent.

On February 15, 1991, Respondent filed a Motion for Protective Order, seeking an "order requiring Complainant to properly notice all parties when a subpoena is issued by the Administrative Law Judge." Respondent based its motion on "the due process clause of the Fifth Amendment, Rules of Practice and Procedure for this Court, [and] 28 C.F.R. Part 68 . . . ."

In its Motion for Protective Order, Respondent addresses two concerns it has regarding the notice it has or has not received from Complainant when a subpoena has been issued upon Complainant's application. First, Respondent is concerned that, when a subpoena for deposition is issued, t is not receiving from Complainant the timely written notice it is entitled to under 28 C.F.R. §68.20(b). Second, Respondent is concerned that, when a subpoena for discovery documents alone is issued to a nonparty, the Complainant's failure to provide Respondent notice of the subpoena deprives Respondent of the right to move, pursuant to 28 C.F.R. § 68.16(c), for a protective order, thus violating Respondent's Fifth Amendment due process rights.

Respondent illustrates its concerns by stating, in part, that (1) although Complainant telephonically notified Respondent on January 25, 1991, that Complainant would be taking the deposition of Randy Carson on February 11, 1991, Respondent did not receive written notification of the deposition until February 4, 1991, less than ten (10) days prior to the deposition; and (2) since it received no notice of the subpoena issued on January 25, 1991, to Turner Security Systems for documents alone, Respondent was denied the opportunity to seek a protective order under 28 C.F.R. § 68.16(c).

Complainant filed its Response to Second Motion for Protective Order on February 27, 1991. In its Response, Complainant sets forth the following three (3) reasons why Respondent's Motion for Protective Order should be denied: (1) Respondent's motion violates this court's Order Directing Pre-Hearing Procedures, issued on October 25, 1990, since Respondent failed to include in its motion a written statement indicating that it "has conferred, or made reasonable effort to confer, with opposing counsel or party regarding the requested matter prior to the filing of the motion"; (2) Respondent's statement that its Fifth Amendment due process rights will be violated if, due to lack of notice, it is denied the opportu-

nity to seek a protective order under 28 C.F.R. § 68.16(c) is insufficient to establish the "good cause" required by 28 C.F.R. 68.16(c); and (3) Respondent lacks standing to challenge a subpoena duces tecum issued to a nonparty.

II. *Legal Analysis*

A. *Technical Noncompliance with Order Directing Pre-Hearing Procedures*

As indicated above, Complainant's first argument in support of denying Respondent's Motion for Protective Order is that Respondent has failed to comply with the court's Order Directing Pre-Hearing Procedures. As will be explained below, I do not find this argument to be persuasive.

Complainant correctly points out in its Response that this court's Order Directing Pre-Hearing Procedures states, in part, that:

> [T]he administrative law judge will not review any discovery motion unless counsel or the moving party has stated in writing that it has conferred, or made reasonable effort to confer, with opposing counsel or regarding the requested matter prior to the filing of the motion.

Complainant is also correct in noting that Respondent's Motion lacks such a written statement. However, Complainant is incorrect in stating that this technical failure, alone, is a sufficient basis for denying Respondent's Motion for Protective Order.

The requirement that a party seeking the court's review of a discovery motion provide a written statement that it has conferred, or made a reasonable effort to confer, with opposing counsel or party regarding the requested matter prior to the filing of the motion is intended to facilitate discovery and the prompt resolution of the case by encouraging the parties to resolve discovery problems themselves, without the intervention of the court. This intention is served where there is some indication that the moving party has tried to resolve its discovery problems with opposing counsel prior to seeking the assistance of the court, even though the moving party failed to detail its efforts in a written statement. The requirement of a written statement is a means to an end, not an end in itself.

In its Response, Complainant, itself, states that, "[o]n February 11, 1991, Counsel for the United States and Counsel for Harris Ranch

Beef did in fact confer regarding this matter." This statement by Complainant provides the necessary indication that Respondent has attempted to resolve its discovery problem with Complainant prior to seeking the court's intervention.

Further, although Complainant suggests in its Response that the parties' discussion on February 11, 1991, resolved this matter, Respondent's subsequent Motion clearly suggests otherwise. If Respondent believes that its previous efforts to resolve this matter without the court's assistance have been unsuccessful, Respondent should not be denied the assistance of the court simply because it failed to comply with a technical writing requirement. Therefore, I find that Respondent's Motion for Protective Order should not be denied on the ground that Respondent failed to comply with a technical writing requirement set forth in my Order Directing Pre-Hearing Procedures.

B. *Respondent May Have Standing to Challenge a Subpoena Issued to a Nonparty*

Complainant also argues in its Response to Second Motion for Protective Order that Respondent lacks standing to challenge a subpoena duces tecum issued to a nonparty. It is my view that, due to the nature of the relief sought by Respondent in its Motion for Protective Order, this argument is without merit.

In support of its argument that Respondent lacks standing to challenge a subpoena issued to a nonparty, Complainant first cites 28 C.F.R. § 68.23(d), apparently for the proposition that, under our regulations, only the person served with a discovery subpoena may challenge the subpoena. 28 C.F.R. § 68.23(d) does permit "any person served with a subpoena" to challenge the subpoena. However, the fact that this particular regulation refers only to "any person served" does not mean that a party may never challenge the subpoena, as well.

First, 28 C.F.R. § 68.23(d) does not expressly deny a party the right to challenge a subpoena issued to a nonparty. Second, there is a regulation which permits a party to challenge discovery sought by the opposing party; this regulation is 28 C.F.R. § 68.16(c). As previously stated, 28 C.F.R. § 68.16(c) permits both a party and the person from whom discovery is sought to move for a protective order. 28 C.F.R. §§ 68.23(d) and 68.16(c) should not be read in isolation of one another. As with the Federal Rules of Civil

Procedure ("FRCP"), the discovery regulations constitute an integrated mechanism, and thus they must be read "in pari materia." See C. Wright & A. Miller, 9 Federal Practice and Procedure section 2452 (1971). Reading these regulations together, it is reasonable, in my view, to infer that our regulations permit a party to challenge, by way of motion for protective order, a subpoena for discovery issued to a nonparty if the party claims a personal right or privilege in the discovery sought.

Complainant also cites Dart Industries, Inc. v. Liquid Nitrogen Processing Corp., 50 F.R.D. 286, 291 (D.C. Del. 1970), in support of its "no standing" argument, apparently for the rule that a party has no standing to challenge a subpoena issued to one who is not a party. See also Norris Mfg. Co. v. R.E. Darling Co., 29 F.R.D. 1 (D.C. Md. 1961). The rule cited by Complainant is correct; however, there is an exception to this general rule, which Complainant fails to mention. That exception is a party that claims some personal right or privilege with regard to the documents sought. See Norris Mfg. Co., supra; and Dart Industries, supra. Thus, a party may indeed have standing to challenge a subpoena issued to a nonparty.

Respondent seeks by its Motion a protective order which would enable it to challenge the issuance of future subpoenas. Since Respondent may, indeed have standing to challenge a future subpoena issued to a nonparty, I find that Respondent's Motion for Protective Order is neither frivolous or unreasonable.

C. *Respondent's Motion Demonstrates the Good Cause Necessary for a Protective Order to Issue Under 28 C.F.R. Section 68.16(c)*

Complainant's remaining argument is that Respondent's statement that it will be denied its Fifth Amendment due process rights if the prospective relief it seeks is not granted is "conclusionary," and therefore insufficient to establish the good cause necessary for the issuance of a protective order under 28 C.F.R. § 68.16(c). I disagree.

Complainant is correct in noting that, under 28 C.F.R. § 68.16(c), the administrative law judge may issue a protective order upon the motion of a party or the person from whom discovery is sought, and for good cause shown. Complainant is, however, incorrect in concluding that Respondent has failed to make a sufficient showing of good cause.

Respondent does not merely state that it will suffer a deprivation of its Fifth Amendment due process rights if the relief it seeks is not granted. Instead, Respondent supports its statement by detailing the problems it has previously encountered as a result of the notice it did, and did not, receive from Complainant upon the issuance of subpoenas. For example, Respondent explains that, as a result of the lack of notice of the subpoena duces tecum issued to Turner Security Systems, it was deprived of the opportunity to move for a protective order because it was unable to determine whether it had a personal right or privilege in the documents sought.

Furthermore, since a party has standing to challenge a subpoena issued to a nonparty if it claims a personal right or privilege in the documents sought, as discussed supra, it is my view that a party will, under most circumstances, be denied due process if it is unable to utilize the protective measures set forth in 28 C.F.R. § 68.16(c) because, due to lack of proper notice, it is unable to determine whether it has a personal right or privilege in the documents sought.

For the aforementioned reasons, I find that Respondent has established the good cause necessary for the issuance of a protective order under 28 C.F.R. § 68.16(c).

D. *Proper Notice of Discovery Subpoenas*

Having found that Respondent's Motion for Protective Order is proper, I must now determine whether, under our regulations, I may grant Respondent the relief it seeks in its Motion. As previously stated, Respondent seeks an order directing Complainant to properly notice all parties when any subpoena is issued by the court.

1. *Proper Notice of a Subpoena for a Discovery Deposition*

Our regulations require that "[a]ny party desiring to take the deposition of a witness shall give notice in writing to the witness and all other parties . . . ." 28 C.F.R. § 68.20(b) (emphasis added). Therefore, notice clearly must be given to all parties of subpoenas for discovery depositions.

This requirement of notice does not appear to be questioned; however, the parties' pleadings seem to suggest that there is some question as to what is proper notice of a subpoena for deposition. Since our regulations adequately answer this question, I will simply

refer the parties, once again, to the appropriate section of the regulations, and direct them to carefully adhere to the notice requirements set forth in that section in the future.

As previously noted, it is 28 C.F.R. § 68.20(b) which sets forth the requirements of proper notice for a deposition. Those requirements are that (1) "not less than ten (10) days" notice must be given; and (2) the notice must be in writing. 28 C.F.R. section 68.20(b).

2. *Proper Notice of a Subpoena for Discovery Documents Issued to a Nonparty*

The second, and more important, concern raised by Respondent in its Motion for Protective Order is that, due to a lack of notice of subpoenas for discovery documents alone issued to nonparties, it will be denied the opportunity to utilize the protective measures set forth in 28 C.F.R. § 68.16(c). It is this concern which prompts Respondent to request an order directing Complainant to properly notice all parties of all subpoenas issued.

Unlike the question of notice of subpoenas for discovery depositions, our regulations provide no clear answer to the question of notice of subpoenas for discovery documents. Therefore, I will carefully analyze our regulations, analogous sections of the Federal Rules of Civil Procedure ("FRCP"), and pertinent case law to determine whether, under our regulations, notice must generally be provided to all parties of subpoenas for discovery documents.

The section of our regulations specifically addressing subpoenas, 28 C.F.R. § 68.23, provides, in pertinent part, that

> an Administrative Law Judge may issue subpoenas as authorized by statute or law, . . .upon the written application of a party requiring attendance and testimony of witnesses and production of things . . .

There is no mention of notice in the section. However, it is interesting to note that the section does not separate, either grammatically or formally, an application for a subpoena for attendance and testimony (i.e. for deposition) and an application for a subpoena for production of things (i.e. documents). Thus, it could reasonably be inferred that the drafters intended that, generally, a subpoena for production of things is to be made in connection with a request for attendance and testimony. Such an intention might explain why no mention of notice is made in this section. If a subpoena for production of things was generally made in connection with a request for

testimony (i.e. a deposition), all parties would have to be properly noticed.

Further supporting the inference that the drafters of our regulations intended that subpoenas for production generally be made in connection with depositions is the fact that the regulation addressing the production of documents, things, and inspection of land, 28 C.F.R. § 68.18, limits requests for production to the parties. Specifically, section 68.18(a) states, in part, that "[a]ny party may serve on any other party a request . . . ." (emphasis added) There is obviously no notice problem where requests for documents alone may be made only on the parties. It is my view that sections 68.18 and 68.23 should be read together because, as stated previously, our discovery regulations must be read "in pari materia." See C. Wright and A. Miller, 9 Federal Practice and Procedure section 2451 (1971).

The case law interpreting Rule 45 of the FRCP, the rule addressing subpoenas, also supports the aforementioned inference.[1] Under Rule 45, subpoenas for production of documents are, in form, dealt with separately from subpoenas for attendance of witnesses.[2] However, the majority hold that Rule 45 does not authorize the service of a subpoena duces tecum on a nonparty for the purposes of discovery, in the absence of the taking of a deposition; thus, such a subpoena is irregular and must be quashed. See Newmark v. Abeel, 106 F. Supp. 758 (D.C. N.Y. 1952); McLean v. Prudential S.S. Co., 36 F.R.D. 421 (D.C. Va. 1965); Dart Indus., Inc. v. Liquid Nitrogen Proc. Corp., 50 F.R.D. 286, 291 (D.C. Del. 1970); Turner v. Parsons, 596 F. Supp. 185 (E.D. Pa. 1984); Bowers v. Buchanan, 110 F.R.D. 405 (S.D. W. Va. 1986).

The court in Bowers explained that one reason for the rule that subpoenas duces tecum be issued in connection with a deposition is the potential for abuse of the subpoena. "A procedure which

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[1] Under 28 C.F.R. § 68.1, as amended, an Administrative Law Judge may use the FRCP "as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or any other applicable statute, executive order, or regulation."

[2] Rule 45 provides, in part, that (a) "[e]very subpoena shall . . . command each person to whom it is directed to attend and give testimony at a time and place therein specified"; and (b) "[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein." (emphasis added)

allowed parties to send out subpoena duces tecum at will could result in a form of one-sided discovery. In this vein, the requirement that a notice of deposition be filed prior to issuance of a deposition subpoena duces tecum serves as a break on runaway use of the instrument.

The case law interpreting our regulations takes a slightly different approach to the problem of notice of a subpoena for documents alone issued to a nonparty. Rather than ensuring that notice is provided by requiring that the subpoena for documents be made in connection with a deposition, the Administrative Law Judge in Aguilera v. Castle Valley Sales, Inc., OCAHO Case No. 902000143 (Order Confirming Pre-Hearing Conference) (Nov. 30, 1990) simply found that fair play demands that all parties be notified as to subpoenas issued. The result of this approach is similar to the one requiring that subpoenas for documents be issued in connection with a deposition, notice to all parties of subpoenas issued to assure fairness.

Based on the foregoing, it is my view that, under our regulations, subpoenas for discovery documents should generally be issued in connection with a deposition. However, in the further interests of fairness and judicial economy, subpoenas for discovery documents alone may be issued to nonparties upon a showing by the applicant that all parties will be properly noticed of the subpoena. Notice will be proper if it is consistent with the notice required in 28 C.F.R. § 68.20(b) for depositions. By this order, I leave open the possibility that a subpoena for discovery documents alone may be issued without notice upon a proper showing, i.e. exigent circumstances and/or the rights of the opposing parties' will unlikely be prejudiced.

ACCORDINGLY, Complainant is hereby ORDERED to properly notice all parties of any subpoena issued by the Administrative Law Judge, unless Complainant makes a proper showing for an exception in its application for subpoena.

SO ORDERED, this 7th day of March, 1991, at San Diego, California

ROBERT B. SCHNEIDER
Administrative Law Judge