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

February 29, 2000

In re Investigation of Conoco, Inc. 8 U.S.C. § 1324b Proceeding
OCAHO Investigative
Subpoena No. 20S00035

ERRATUM

In my Order Denying Conoco's Motion to Quash Subpoena and Granting OSC's Request for Authorization to Seek its Enforcement issued on February 16, 2000, the third line in footnote 6 on page 7 is hereby corrected to read:

The 210 days thus elapsed for the first charge on February 14, 2000.

SO ORDERED
Dated and entered this 29th day of February, 2000.

Ellen K. Thomas
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
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February 16, 2000

In re Investigation of Conoco, Inc. 8 U.S.C. § 1324b Proceeding
OCAHO Investigative
Subpoena No. 20S00035 [1]

ORDER DENYING CONOCO'S MOTION TO QUASH SUBPOENA AND GRANTING OSC'S REQUEST FOR AUTHORIZATION TO SEEK ITS ENFORCEMENT

I. *PROCEDURAL HISTORY*

On December 21, 1999 the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) requested the issuance of an administrative subpoena directing the respondent Conoco, Inc. to mail certain information and documents to it by January 14, 2000 in connection with its investigation of two charges alleging that Conoco engaged in immigration related unfair employment practices. OCAHO Investigative Subpoena No. 20S00035 was issued that same day by Administrative Law Judge Joseph E. McGuire (ret.), and returned to OSC for service on the respondent. The subpoena sought five items, consisting of: 1) personnel files for six named individuals, 2) documents Conoco had exchanged with INS and the Department of Labor to obtain visas for five named individuals, 3) I–9 Forms for two individuals, 4) documents contained in an electronic folder regarding selection of employees for severance during Conoco's 1999 restructuring process, and 5) an Excel spreadsheet regarding the outcome of the 1999 severance decisions.

On January 18, 2000 by facsimile transmission, Conoco sent to this office a Motion to Quash Subpoena, a memorandum in support thereof, and attachments. The accompanying certificate of service states that a copy was mailed that day to the Office

[1] Some of the documents filed in this matter refer to the number 20500035; the correct identifier is 20S00035.

of Special Counsel. Because of Judge McGuire's intervening retirement, the matter was reassigned to me; however the mailed copy of the Motion to Quash was not received in this office until January 28, 2000.

On February 8, 2000 OSC made a telephone inquiry to OCAHO's case management office as to the appropriate destination for filings in this matter in light of Judge McGuire's retirement, at which time it was learned that OSC was wholly unaware of and had not received a copy of Conoco's Motion to Quash and accompanying materials. The case management office then faxed copies of Conoco's submissions to OSC. On February 10, 2000 OSC filed a Memorandum in Opposition to Motion to Quash Subpoena and Request for Authorization to Seek Enforcement of Subpoena, with attachments. On February 15, 2000 Conoco filed its "Memorandum in Response to United States' Memorandum of Opposition to Conoco's Motion to Quash Subpoena and Opposition to United States' Request for Authorization to Seek Enforcement of Subpoena" accompanied by various attachments.

II. *THE MOTION TO QUASH*

A. *Applicable Rule for Facsimile Transmissions*

Rules[2] governing OCAHO proceedings provide for the use of facsimile transmissions only to toll the running of a time limit. 28 C.F.R. § 68.6(c). That rule further provides that all original signed pleadings and other documents must include in the certificate of service a certification that service on the opposing party has also been made by facsimile or by same-day hand delivery, or, if service by facsimile or same-day hand delivery cannot be made, a certification that the document has been served instead by overnight delivery service. *Id.* Originals must be forwarded concurrently. *Id.*

It is evident that this rule has been disregarded in significant respects in connection with Conoco's motion to quash. First, the only purpose for facsimile transmissions is to toll the running of a limitations period; this function is impossible where the period of limitations has already run before the transmission even occurs. Second, facsimile transmission is acceptable only 1) where the originals are concurrently transmitted, and 2) where the certificate

[2] 28 C.F.R. Part 68 (1999)

shows that the opposing party has also been served by facsimile, by same-day hand delivery or by overnight delivery. The certificate accompanying the fax transmissions here purports instead to show that the documents were mailed to the opposing party on January 18, 2000, not faxed, hand delivered or overnighted. OSC denied receipt of these documents from Conoco at any time by any manner of service; the documents were then faxed from OCAHO to OSC on February 8, 2000.

Facsimile transmissions must comply with the applicable rule in order to be effective. This means that originals must be mailed concurrently and that the certificate must show that the other party was also served by fax or by same day hand delivery. If this is not possible, then overnight service must be used. This purpose of this rule is to ensure basic fairness and due process to an opposing party. It is simply unacceptable to fax material to this office without showing similar expedited service to the other party. Fax transmissions which fail to comply with the rule will be treated as a nullity and the effective filing dates for such documents will be the date of receipt of the mailed original in this office. Here that date would be January 28, 2000.

B. *Applicable Rule for Petition to Revoke or Modify a Subpoena*

The rules further provide that any person served with a subpoena issued by an Administrative Law Judge who intends not to comply with it shall, within ten (10) days after the date of service of the subpoena upon such person or within such other time the Administrative Law Judge deems appropriate, petition the Administrative Law Judge to revoke or modify the subpoena. 28 C.F.R. § 68.25(c). The subpoena form itself contains the specific warning:

> NOTICE TO RECIPIENT: If you do not intend to comply with this request you must petition the Administrative Law Judge who signed the subpoena to revoke or modify the subpoena within ten (10) days after the date of service of the subpoena. *See* 28 C.F.R. § 68.25. [3]

Attachments to OSC's memorandum show that the date of service of the subpoena on Conoco was December 27, 1999 via Federal Express (FedEx), so that a petition to revoke or modify would

[3] That rule also provides that a copy of the petition shall be served on all parties. Where a complaint has not been filed in the matter, a copy of the petition is to be served on the individual or entity that requested the subpoena, in this case, OSC. *Id.*

have been due on January 6, 2000. Even were the fax date of January 18, 2000 to be regarded as the filing date, the motion would still be 12 days late. The mailed transmission is 22 days late. OCAHO cases have routinely denied late petitions to revoke subpoenas, *see, e.g, In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO 751, at 239–40 (1995)[4] (petition 4 days late), *In re Investigation of Seafarers International Union*, 3 OCAHO 498, at 1000 (1993) (petition 8 days late), and there is no reason to make an exception here. The motion to quash will accordingly be denied.

III. *OSC's REQUEST FOR AUTHORIZATION TO SEEK ENFORCEMENT*

I have reviewed the subpoena and am satisfied that it should be enforced. It is long established that the requirements for enforcement of an administrative subpoena are minimal. *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999). The scope of review to be applied to administrative subpoenas has been described by the courts in a variety of formulations, *Burlington N. R.R. Co. v. Office of Inspector General R.R. Retirement Bd.*, 983 F.2d 631, 637- 38 & n.2 (5th Cir. 1993), with the most consistent factors being that the purpose of the investigation is within the statutory authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant to the inquiry. *See, e.g., NLRB v. Line*, 50 F.3d 311, 314 (5th Cir. 1995) (citing *United States v. Morton Salt Co.*, 338 U.S. 632. 652–53 (1950)). *See also Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 329 (5th Cir. 1997). Review is exceedingly limited and is to be handled summarily. *In re Office of Inspector General, Railroad Retirement Board*, 933 F.2d 276, 277 (5th Cir. 1991) (quoting *In re EEOC*, 709 F.2d 392 (5th Cir. 1983).

[4] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States,* and Volumes 3 through 7, *Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States,* reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

A. *The Nature of Conoco's Objections*

Conoco's motion did not challenge the validity of the charges or the authority of OSC to conduct the investigation. Rather, it initially asserted that it had already responded to items 1, 2 and 3,

> . . . with the exception of documents requested on Larry Standlee, an employee with Conoco Canada Limited in Calgary, Alberta, Canada. Movant seeks only to quash items 4 and 5 of the subpoena.

Conoco thus offered at that point no explanation or justification for its failure to produce Standlee's personnel file other than its own unilateral decision to withhold it. In its February 15, 2000 submission, however, Conoco raised new objections, asserting that the request for information about Larry Standlee

> is not only precluded by the doctrine of extraterritoriality and outside the authority of the Office of Special Counsel, but prejudicial, inaccurate, and irrelevant to the investigation by Special Counsel as well.

Item 1 in the subpoena requested the personnel files of six individuals, one of whom was Larry Standlee, identified as a United States citizen geologist terminated from an assignment in Calgary, who had earlier worked in IIC where one of the charging parties worked. The fact that Standlee's last posting prior to his termination may have been in Canada does not render his personnel file, evidently maintained in Houston, beyond the reach of a subpoena.

OSC's submission also alleged that in addition to the documents pertaining to Larry Standlee, Item 2 of the subpoena was not fully complied with either in that documents relating to Keith James[5] were not produced. Correspondence between the parties indicates that some other information was sent on January 17, 2000, at which time it was represented by Conoco that "[d]ocuments concerning Keith James will be sent under separate cover." It does not appear that these documents were ever forthcoming. Conoco's new submission objects to producing information about Keith James, which it had previously indicated would be sent under separate cover. Conoco's new objection, that James' experience, skills, education and training are not comparable to

[5] Item 2 in the subpoena sought personnel and immigration documents relating to five individuals, one of whom was Keith James, who worked in the same area as one of the charging parties. Keith James was also named in Item 1.

that of the charging parties, is both untimely and conclusory. It evidently seeks to substitute for OSC's investigation its own conclusions as to the merits of the case it hypothesizes that OSC will seek to make. Because Conoco's motion to quash the subpoena challenged only Items 4 and 5, however, its failure to have complied fully by now with Items 1 and 2 is totally without justification.

Conoco's initial objections to Items 4 and 5 asserted that these two requests are overbroad, unduly burdensome, beyond the authority of OSC, not relevant and prejudicial. No affidavit testimony regarding the alleged burden accompanied Conoco's submission. Its memorandum, however, stated that Conoco has 16,000 employees in 40 countries worldwide, that U.S. law has no effect in foreign jurisdictions, and that the request is "so broad and encompassing that Conoco could not possibly respond appropriately." It states further that responding would require "immeasurable time and resources from persons around the world over whom U.S. law has no force and effect."

OSC's submission indicates that John Swann, Conoco's Manager of Finding Skills Management, informed them at an interview on November 4, 1999 that a meeting was held the previous January in Houston, Texas, attended by about 13 of Conoco's Skills Managers who had previously submitted recommendations about personnel to be severed in the 1999 reorganization. Swann indicated in the interview that most of the information was in e-mail form in an electronic folder, and that an Excel spreadsheet was created by him containing the record of the actual decisions made. The challenged items in the subpoena request:

> Item 4. "All documents in the electronic folder maintained by John Swann regarding selection of employees for severance during the 1999 restructuring process, including but not limited to lists or spreadsheets submitted by managers prior to the January 28–31, 1999, selection meeting.
>
> Item 5. "The Excel spreadsheet maintained by John Swann regarding the final outcome of the 1999 severance decisions worldwide (who and where)."

Conoco has not provided an adequate explanation as to why "immeasurable time" or "resources from persons around the world" would be required in order to produce two electronic files which are in the possession and under the control of John Swann in Houston, Texas. The items requested appear to be quite specific, neither indefinite nor overly broad. I am not persuaded that the burden of printing two electronic files is "too encompassing" for

Conoco to make an appropriate response. In order to demonstrate that a subpoena is unduly burdensome, a respondent must show that compliance would threaten disruption or hinder normal business operations. *In re Investigation of Florida Azalea Specialists*, 3 OCAHO 523, at 1255 (1993), enforcement *aff'd* 19 F.3d 620 (11th Cir. 1994). Conoco's generalized and unsupported claims of undue burden make no such showing.

Neither do I credit that the production of information available in electronic files in Houston, Texas, poses issues of extra-territorial jurisdiction. Conoco now suggests in attachments to its February 15 filing that some of the termination decisions were made overseas, while OSC's submission suggests that the decisions were made in the United States based on recommendations some of which came from overseas. Investigation will show which is the more accurate characterization.

With respect to relevance, it must be noted that relevance in the context of an investigatory subpoena is given an exceedingly generous construction. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68–69 (1984) (EEOC afforded "access to virtually any material that might cast light on the allegations against the employer," and is determined in terms of the investigation rather than in terms of evidentiary relevance. *Id*). Although Conoco expresses concerns about the prejudicial "use" of the information, the issue here is not what "use" OSC may later make of it, but whether OSC is entitled to obtain it in an administrative investigation. The purpose of an investigative subpoena is to discover and procure evidence in order to make a determination, not necessarily to prove the pending charge. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 191 (1990). The charges here allege citizenship discrimination in connection with the severance of certain employees during a company reorganization. The investigation properly encompasses questions about the scope of the reorganization, how the selections for severance were made and by whom, who was selected to be severed, and who was not selected.

B. *OSC's Investigatory Process*

By law, OSC has 120 days in which to conduct an investigation and determine whether or not there is reasonable cause to believe the charge is true and whether or not to exercise its exclusive right to file a complaint. 8 U.S.C. § 1324b(d)(1). If OSC has not filed a complaint by the 120th day, it is obliged to advise the

charging party of his or her right to file a complaint within 90 days thereafter. OSC retains the right to continue the investigation or file its own complaint during the 90 day period. 8 U.S.C. § 1324b(d)(2). The precise nature of the 120 (or 210) day investigatory period has not been fully elaborated in OCAHO jurisprudence. While it has been analogized to a statute of limitations, *United States v. Workrite Unif. Co.*, 5 OCAHO 755, at 268–72 (1995), *Hernandez v. Farley Candy Co.*, 5 OCAHO 765, at 369 (1995), it has also been described as no more than a template for the agency to achieve efficient charge processing, *United States v. Agripac, Inc.*, 8 OCAHO 1028, at 10 (1999). *Cf. Brock v. Pierce County*, 476 U.S. 253, 265 (1986) (purpose of 120 day investigatory period is "to spur Secretary to action, not to limit the scope of his authority").

Because it is evident that this investigation cannot possibly be concluded prior to expiration of 210 days as to the first of the subject charges[6] and that the time will expire very shortly with respect to the other, it is necessary to make clear that Conoco should not regard expiration of the period as providing justification for further resistance to compliance with the subpoena. Running out the clock will not provide an excuse for three reasons. First, the authority of OSC to conduct an investigation is not dependent upon the existence of a charge. OSC is fully authorized to conduct investigations on its own initiative, even in the absence of a charge. 8 U.S.C. § 1324b(d)(1). Second, courts have not hesitated under similar circumstances to toll the running of a statutory period in aid of an administrative investigation where a respondent has resisted providing the needed information. *See, e.g., Donovan v. District 1199, New York Health and Hosp. Care Employees*, 760 F.2d 440, 441–42 (2nd Cir. 1985); *EEOC v. Gladieux Refinery, Inc.* 631 F. Supp. 927, 935–36 (N.D. Ind.1986)[7]; *EEOC v. City of Memphis*, 581 F. Supp. 179, 182 (W.D. Tenn. 1983). Any other result would have the unwelcome effect of killing an investigation at the threshold of inquiry, encouraging other respondents to stonewall, rather than cooperate in, an investigation. *Cf. Oklahoma*

[6] The memorandum accompanying Conoco's motion to quash indicate that the first of the subject charges was filed on July 19, 1999 and the second on August 12, 1999. The 210 days thus elapsed for the first charge on February 14, 1999.

[7] *Gladieux* and *Memphis* arise under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et sequitur. The question does not arise under Title VII because it is clear on the highest authority that the time frames set out in 42 U.S.C. § 2000e–5(f)(1) for administrative charge processing impose no temporal limitation on EEOC's authority. *Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355, 361 (1977).

Press Publ'g Co. v. Walling, 327 U.S. 186, 213 (1946). Only if the subject of an investigation is able to derive no advantage from procrastination will cooperation be the rule and not the exception. Third, courts have long held as well that a party may not defeat an agency's authority to investigate by raising a claim that might be a defense if the agency subsequently decides to file a complaint. *See, e.g., EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 309 (7th Cir. 1981).

It is unnecessary to address at this stage the length of any appropriate tolling period. OSC may well conclude at the close of its investigation that no further action is necessary. It is sufficient for today simply to caution Conoco that relief from compliance with the subpoena is not to be had by further delay.

IV. *ORDER*

Conocos's motion to quash OCAHO Investigative Subpoena No. 20S00035 is hereby denied. The request of OSC for authorization to seek enforcement is granted as to Items 1, 2, 4 and 5 of the subpoena, and OSC is hereby authorized to seek enforcement of OCAHO Investigative Subpoena No 20S00035 in the United States District Court for the Southern District of Texas, Houston Division, pursuant to 8 U.S.C. § 1324b(f)(2) and 28 C.F.R. § 68.25(e).

SO ORDERED
Dated and entered this 16th day of February, 2000.

Ellen K. Thomas
Administrative Law Judge