

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

August 16, 2013

**IN RE INVESTIGATION OF:** )  
 )  
NHS HUMAN SERVICES ) OCAHO Investigatory Subpoena  
 ) No. 13S00069  
\_\_\_\_\_ )

ORDER AUTHORIZING OSC TO SEEK ENFORCEMENT OF SUBPOENA

I. PROCEDURAL HISTORY

On May 8, 2013 the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) requested the issuance of a subpoena directing Northwestern Human Services a/k/a NHS Human Services and its affiliate Parkside Recovery to mail certain documents to it by May 24, 2013 in connection with its investigation of a charge filed by Marie Cherasard on February 14, 2013. I issued OCAHO Subpoena 13S00069 that same day, and returned it to OSC for service on the company. The subpoena directed, inter alia, that copies of all the I-9 forms completed or reverified by the Company (including any of its agents) within the Company's Eastern Region on or after April 1, 2012, together with copies of any supporting documents or other attachments, be mailed to OSC on or before May 24, 2013.

Presently pending is OSC's motion to enforce the subpoena and toll the complaint filing period, filed on August 12, 2013.

II. BACKGROUND INFORMATION

OSC's memorandum in support of its motion states that the agency received a charge of discrimination against the respondent, a large health and human services provider with facilities in several states, on February 14, 2013. The charge was filed by Marie Cherasard, who alleged that she was terminated from her job at the company's Parkside Recovery facility in Philadelphia, Pennsylvania on November 20, 2012 because of her citizenship status. She also alleged that the company engaged in document abuse. OSC says that after the company's repeated delays in complying with its document requests, OSC sought the instant subpoena which it served on the company on May 10, 2013. On May 28, 2012, OSC received documents, including

approximately 639 I-9 forms dating back to April 1, 2012, among which were two I-9s from the Parkside Recovery facility.

OSC says it thereafter interviewed the respondent's corporate employees, and in the process of doing so learned in July 2013 that the Parkside facility hired a significant number of employees on an annual basis and that the two I-9 forms produced from the Parkside facility did not represent complete production of the subpoenaed forms. Despite the respondent's agreement to produce the outstanding forms expeditiously, these forms have still not been produced. Because the Parkside facility is the one where Cherasard was employed and from which she was terminated, the company's failure to produce the documents has interfered with OSC's ability to assess the merits of her claim and to make a reasonable cause determination. OSC therefore seeks enforcement of the subpoena and tolling of the filing period until October 31, 2013, or 75 days after the respondent complies with the subpoena, whichever is later.

The motion was accompanied by the declaration of Alexandra A. Vince, Equal Opportunity Specialist (EOS). The declaration details the efforts OSC made to obtain information before the subpoena was requested, the receipt of the subpoena by the respondent on May 10, 2013, and the production and correspondence that ensued. In addition, the declaration explains the course of events leading to OSC's learning that a significant number of I-9s for the Parkside facility had not been produced, the attempts to obtain them, the respondent's promises, and the lack of production. The declaration says further that the complaint filing deadline is September 16, 2013, and that the respondent's pattern of delays and failure to respond to requests has materially and adversely impacted Vince's ability to complete the investigation.

### III. STANDARDS APPLICABLE TO ADMINISTRATIVE SUBPOENAS

OCAHO rules<sup>1</sup> provide that a person served with a subpoena who intends not to comply with it has ten days after service of the subpoena in which to file a petition to revoke or modify it. 28 C.F.R. § 68.25(c). The petition must identify each portion of the subpoena with which the recipient does not intend to comply, and state the grounds upon which petitioner relies. *Id.* The "Instructions" portion of the subpoena form itself provides a clear notice to the recipient that "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." In the event of contumacy or refusal to obey a subpoena, an appropriate district court of the United States may upon application<sup>2</sup> issue an order requiring

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<sup>1</sup> Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2012).

<sup>2</sup> Implementation of § 1324b(f)(2) made clear early in the administration of § 1324b

compliance with it, and failure to obey such an order may be punished as a contempt. 8 U.S.C. § 1324b(f)(2).

It is long established that the requirements for enforcement of an administrative subpoena are minimal. *Cf. United States v. Westinghouse Electric Corp.*, 788 F.2d 164, 166 (3rd Cir. 1986). An administrative subpoena will ordinarily be enforceable if: 1) the investigation is within the statutory authority of the agency, 2) the subpoena is not too indefinite, and 3) the information sought is reasonably relevant to the charge under investigation. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see also EEOC v. Univ. of Pa.*, 850 F.2d 969, 981 (3rd Cir. 1988), *aff'd*, 493 U.S. 182 (1990). If it is shown that those three criteria have been met, the subpoena will be enforced unless the party being investigated proves that the inquiry is unreasonable because it is overbroad or unduly burdensome. *See EEOC v. Children's Hosp. Med. Ctr.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), *overruled on other grounds by United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108 (9th Cir. 2012); *cf. Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 217 (1946).

#### IV. DISCUSSION AND ANALYSIS

The date of service of the subpoena was May 10, 2013, so a petition to revoke or modify it would have been due on or before May 20, 2013. The respondents have accordingly forfeited their opportunity to challenge the subpoena and will not be heard to interpose objections at this late date. *See, e.g., In re Investigation of Hyatt Regency Lake Tahoe*, 5 OCAHO no. 751, 238, 239-40 (1995)<sup>3</sup>; *In re Investigation of Seafarers Int'l Union*, 3 OCAHO no. 498, 999, 1000 (1993); *In re Investigation of Modern Maint. Co., Inc.*, 2 OCAHO no. 359, 476, 476-77 (1991). I conclude that the inquiry is broadly within the authority of the agency, that the demand is not

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adjudicative processes that the requesting party, and not the administrative law judge, would make the application to the appropriate district court. *See In re Investigation of Chan's Apparel*, 1 OCAHO no. 1 (1988).

<sup>3</sup> Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

too indefinite, that the information sought is reasonably relevant to the charge under investigation, and that the subpoena should be enforced.

This is a proceeding in aid of OSC's investigative authority under 8 U.S.C. § 1324b, and not an adjudicative proceeding subject to 28 C.F.R. § 68.11(b) of the rules of practice and procedure which provide a party to an adjudicative proceeding the opportunity to respond to a motion within ten days. This order is accordingly issued on OSC's unilateral application without prior notice to the respondents and without the opportunity for a response. *See In re Investigation of Wal-Mart Stores, Inc.*, 5 OCAHO no. 754, 264, 265 (1995); *Chan's Apparel*, 1 OCAHO no. 1, 1 at 1-2.

As explained in *In re Investigation of Tropicana Casino & Resort*, 9 OCAHO no. 1060 4-5 (2000), moreover, I-9 forms are not just ordinary business records, they are records that employers are obligated by law to maintain and to present to appropriate agencies for examination upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii). Any refusal or delay in presenting the forms may violate the retention requirements in section 274A(b)(3); these forms should accordingly have been presented without delay upon three days' notice and without the necessity of a subpoena.

It is well established, as OSC points out, that there is ample support in the case law allowing equitable relief from deadlines when the specific facts warrant it, including circumstances where an employer resists OSC's attempts to investigate charges of discrimination. *See, e.g., In re Investigation of Conoco*, 8 OCAHO no. 1048, 728, 736-37 (2000); *EEOC v. Gladioux Refinery, Inc.*, 631 F. Supp. 927, 935-36 (N.D. Ind. 1986); *EEOC v. City of Memphis*, 581 F. Supp. 179, 182 (W.D. Tenn. 1983). If it were otherwise, respondents would be encouraged to stonewall rather than cooperate in an investigation. The subpoena called for delivery of the documents on or before May 24, 2013, at which time OSC still had 114 days remaining before its complaint filing date of September 16, 2013.

## ORDER

OSC is hereby authorized without further request to seek enforcement of subpoena no. 13S00069 in the appropriate United States District Court in Pennsylvania. In the event a complaint is filed as a result of this investigation, the filing period will be equitably tolled as appropriate based on a more fully developed record. Nothing in this order affects any time limitation imposed upon the charging party by statute or regulation.

SO ORDERED.

Dated and entered this 16th day of August, 2013.

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Ellen K. Thomas  
Administrative Law Judge