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

IN RE INVESTIGATION OF	
	8 U.S.C. § 1324b Proceeding
CHARGE OF ESTELA REYES-MARTINON	OCAHO Inv. Subpoena 20S00080
v.	Judge Robert L. Barton, Jr.
SWIFT AND COMPANY	

ORDER GRANTING IN PART AND DENYING IN PART SPECIAL COUNSEL'S APPLICATION FOR INVESTIGATORY SUBPOENA

(*July 12, 2000*)

I. INTRODUCTION

In support of its application for an investigatory subpoena against Swift and Company (Swift), the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) contends that Judges within the Office of the Chief Administrative Hearing Officer (OCAHO) have authority to issue subpoenas compelling a person or entity being investigated to answer interrogatories or create evidence that does not already exist in documentary form. OSC argues that the investigatory provisions of 8 U.S.C. § 1324b contain language similar to that employed in both Title VII of the Civil Rights Act (Title VII) and the National Labor Relations Act (NLRA), which have been interpreted by federal courts to empower the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB), respectively, to compel production of both information and documents. OSC finds support for its position in prior decisions of OCAHO Judges. Finally, OSC relies on its general enforcement authority as a basis for the requested subpoena.

In response, Swift argues that 8 U.S.C. § 1324b and its implementing regulations do not authorize OCAHO Judges to issue subpoenas that compel answers to interrogatories. According to Swift, OCAHO Judges are only permitted to issue subpoenas that compel the production of physical objects in the possession and under the control of the investigated entity. Swift also believes that the case law cited by OSC in its brief is either non-binding or inapposite.

Having fully examined the statutory, regulatory and decisional authority at issue, I conclude that I have no authority to issue a subpoena requiring answers to interrogatories or the creation of documents or other things not yet in existence. Thus, OSC's application for an administrative subpoena is denied with respect to Specifications Numbered 1-7 and 9-20, inclusive, and is granted with respect to Specifications Numbered 8, 21, and 22 only. OSC is granted leave to file a revised subpoena application that complies with this ORDER.

II. BACKGROUND

Pursuant to 8 U.S.C. §§ 1324b(d)(1) and 1324b(f)(2), on June 5, 2000, OSC applied for the issuance of an investigatory subpoena directed to Gerald M. Wachter, Vice President and Plant Manager for Swift. A copy of the requested subpoena and specifications is attached to this Order. The subpoena, which consists of twenty-two (22) discrete specifications, seeks information as to the recruitment, hiring, and employment eligibility verifications policies of Swift. Except for Specifications Numbered 8, 21, and 22, all the specifications seek answers to interrogatories, either in whole or in part. In an Order dated June 7, 2000, I declined to issue the requested subpoena and expressed "serious reservations" regarding my authority to compel answers to interrogatories by means of a subpoena duces tecum. In that same Order, I invited both OSC and Swift to file briefs addressing the question of "whether I am authorized ... to issue an investigatory subpoena, pursuant to 8 U.S.C. § 1324b(f)(2), that compels answers to interrogatories." OSC filed its brief on June 22, 2000, and Swift, after receiving an extension of time, filed a brief in response on July 11, 2000.

III. THE ARGUMENTS OF THE PARTIES

A. OSC's Brief

OSC's principal argument is that the investigatory power delineated by 8 U.S.C. § 1324b(f)(2) and its accompanying regulations "parallels" or "mimics" that granted to EEOC. OSC Brief at 3-5, 10-12. According to case law cited in OSC's brief, EEOC possesses authority to issue broad investigatory subpoenas like the one at issue here. Id. at 8-10. OSC also cites OCAHO case law supporting its view that OSC's investigatory power should be understood to parallel that of EEOC. Id. at 5-7. In addition to the major premise described above, OSC makes two alternative arguments. First, OSC asserts that, regardless of whether the investigatory authority described by 8 U.S.C. § 1324b(f)(2) parallels that exercised by EEOC and NLRB, that power should nonetheless be construed broadly. Id. at 12-13. Second, OSC opines that, in the absence of authority

to obtain subpoenas requiring answers to interrogatories, "[OSC's] administrative function and its investigation of this particular matter will be severely impaired." Id. at 11, 12, 14.

B. Swift's Brief

In its brief, Swift argues that the language of 8 U.S.C. § 1324b and OCAHO regulations do not authorize Judges to issue subpoenas that require answers to interrogatories. Swift Brief at 1-10. Specifically, Swift points out that the OCAHO regulation authorizing the issuance of investigatory subpoenas, see 28 C.F.R. § 68.25(a), is limited in scope to requests for production of physical things already in existence at the time the subpoena is issued. Id. at 3-6. Moreover, Swift challenges the precedential value of the prior OCAHO case law approving OSC investigatory subpoenas that required answers to interrogatories or the creation of evidence not yet in existence. Id. at 10. Swift also argues that the Title VII case law cited by OSC is inapposite to the instant case because Congress granted EEOC broader investigatory powers than OSC. Id. at 11-12. Finally, Swift contends that OSC's own regulations do not authorize the issuance of investigatory subpoenas that compel answers to interrogatories. Id. at 12-13.

IV. ANALYSIS

OSC is correct in asserting that EEOC possesses authority to issue broad investigatory subpoenas. See, e.g., 42 U.S.C. § 2000e-9 (2000); 29 C.F.R. § 1601.16(a) (2000); Univ. of Pennsylvania v. EEOC, 493 U.S. 182, 191-92 (1990); EEOC v. Maryland Cup Corp., 785 F.2d 471, 479 (4th Cir. 1986); EEOC v. Citicorp Diners Club, 985 F.2d 1036, 1039 (10th Cir. 1993). Thus, if OSC is correct in asserting that its own investigatory powers are functionally coextensive with those of EEOC, Title VII case law may authorize my issuance of the requested subpoena. However, an analysis of the applicable statutes and regulations reveals to my satisfaction that OSC's investigatory power, and OCAHO's subpoena authority, is not as broad as that enjoyed by EEOC. Indeed, I conclude that my subpoena authority is not broad enough to permit me to issue a subpoena requiring answers to interrogatories or the creation of evidence not yet in existence. Therefore, OSC's application for an administrative subpoena is DENIED to the extent that it seeks answers to interrogatories or the creation of documents not yet in existence.

A. Statutory Authority to Issue Investigatory Subpoenas

Any inquiry regarding the scope of OSC's investigatory authority must begin with an examination of the relevant statutory language. After careful consideration, I conclude that the language of 8 U.S.C. § 1324b does not authorize OCAHO Judges to issue subpoenas requiring answers to interrogatories or the creation of evidence not yet in existence. Moreover, after examining relevant provisions of Title VII, I conclude that the investigatory power granted to OSC and OCAHO is narrower than that granted to EEOC. As a result, the Title VII case law cited by OSC is inapposite.

1. 8 U.S.C. § 1324b Does Not Authorize the Issuance of Subpoenas that Compel Answers to Interrogatories or Creation of Evidence Not Yet in Existence

8 U.S.C. § 1324b(d)(1), which describes OSC's general investigatory authority, reads, in pertinent part, as follows:

> The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether nor not to bring a complaint with respect to the charge before an administrative law judge.

This provision is supplemented by 8 U.S.C. § 1324b(f)(2), which reads, in pertinent part, as follows:

> In conducting investigations and hearings under this subsection and in accordance with regulations of the Attorney General, the Special Counsel and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated. The administrative law judges by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing....

The language of 8 U.S.C. § 1324b(f)(2) neither expressly authorizes nor expressly forbids the issuance of subpoenas that seek to compel a person or entity to answer interrogatories or create documents not already in existence. Instead, the provision merely grants OCAHO Judges the general discretionary power to issue subpoenas compelling the production of "evidence," and requires that any OSC investigation or OCAHO subpoena be undertaken "in accordance with regulations of the Attorney General." In short, 8 U.S.C. § 1324b(f)(2) articulates a general mandate and authorizes the Attorney General to put flesh on the bones by means of regulation. Section IV.B. of this Order discusses the precise scope of the regulations implementing 8 U.S.C. § 1324b.

The indeterminate language of 8 U.S.C. § 1324b(f)(2) supports the conclusion that OCAHO is not authorized to issue subpoenas compelling an investigated entity to answer interrogatories. Typically, when Congress desires that an administrative agency have the power to compel answers to interrogatories, it grants such power in express terms. For example, Congress often gives agencies authority to issue "civil investigative demands" (CID's), which permit the agencies to compel investigated persons or entities to provide answers to interrogatories. See, e.g., 31 U.S.C. § 3733(a)(1)(B) (giving the Justice Department authority to issue CID's that require answers to interrogatories during investigations under the False Claims Act); 15 U.S.C. § 1312(a) (giving the Justice Department authority to issue CID's that require answers to interrogatories during

investigations under the Antitrust laws); 15 U.S.C. § 57b-1(c)(1) (giving the Federal Trade Commission (FTC) authority to issue CID's that require answers to interrogatories during investigations of unfair or deceptive trade practices); 49 U.S.C. § 30166(g)(1)(A) (giving the National Highway Traffic Safety Administration (NHTSA) authority to issue "special orders" that require car manufacturers to provide answers to interrogatories during investigations under the motor vehicle safety laws). Each of the CID's discussed above have been described by federal courts as a species of administrative subpoena. See, e.g., United States v. Markwood, 48 F.3d 969, 976 (6th Cir. 1995) (holding that "a false claims CID is, at its essence, a subpoena"); United States v. Witmer, 835 F. Supp. 208, 212 (M.D. Pa. 1993), aff'd, 30 F.3d 1489 (3d Cir. 1994) (same); FTC v. Invention Submission Corp., 965 F.2d 1086, 1087 (D.C. Cir. 1992) (assuming that a CID, issued by the FTC pursuant to 15 U.S.C. § 57b-1(c)(1), is an "administrative subpoena"), cert. denied, 507 U.S. 910 (1993); United States v. Firestone Tire and Rubber Co., 455 F. Supp. 1072, 1075 (D.D.C. 1978) (holding that NHTSA "special orders" are "akin to administrative subpoenas"). When Congress wishes to vest agencies with authority to issue subpoenas requiring answers to interrogatories, it knows how to do so. The fact that Congress declined to do so when it created OSC and OCAHO persuades me that I should be highly circumspect about inferring the existence of powers not expressly granted, particularly when it is my own powers that would be broadened by such an inference.

2. Title VII Grants EEOC Broader Investigatory Powers than Those Granted to OSC and OCAHO by 8 U.S.C. § 1324b

One OCAHO Judge has expressed the view that the provisions governing the investigatory powers of EEOC are "more narrowly drawn than 8 U.S.C. § 1324b(f)(2)." In re Investigation of Strano Farms, 3 OCAHO no. 521, 1217, 1222 (1993). I disagree.

42 U.S.C. § 2000e-5(b) directs EEOC to investigate all charges of unfair employment practices and determine whether reasonable cause exists to believe that the charge is true. Moreover, in conducting its investigations, EEOC is advised to "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." See 42 U.S.C. 2000e-5(b). By contrast, 8 U.S.C. § 1324b(d)(1), supra at 4, sets a firm 120-day time frame for OSC's reasonable cause investigation. See United States v. Workrite Uniform Company, Inc., 5 OCAHO no. 736, 107, 111-114 (1995), 1995 WL 325247, *3-5. The variance in language between Title VII and 8 U.S.C. § 1324b clearly indicates that OSC's investigatory mandate is more restricted than that of EEOC; OSC is commanded to conclude its investigation within 120 days of its receipt of a charge while EEOC is merely advised to do so.

The statutory provision governing the specific investigatory authority of EEOC is also broader than the analogous provision of 8 U.S.C. § 1324b. The Title VII provision reads as follows:

> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative

> shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

42 U.S.C.A. § 2000e-8 (2000). In addition, 42 U.S.C. § 2000e-9 grants EEOC's the same investigatory subpoena that is granted to NLRB under 29 U.S.C. § 161. As applied to EEOC, 29 U.S.C. § 161(1) states that, "[t]he [EEOC], or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas [sic] requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application...."

Thus, unlike 8 U.S.C. § 1324b(f)(2), supra at 4, which gives OSC and OCAHO reasonable access to "evidence," Title VII gives EEOC a right of access to "any evidence." Congress' use of the adjective "any" in the Title VII provisions is of great grammatical consequence because it makes the reference of the noun "evidence" more precise; specifically, it indicates that EEOC should have access to the maximum available quantum of the investigated party's "evidence." By contrast, 8 U.S.C. § 1324b(f)(2) contains the express limitation that any investigation or subpoena must be "in accordance with the regulations of the Attorney General." Thus, the Attorney General–and not OSC or OCAHO–is given the power to define, by regulation, what shall constitute "reasonable access" and "evidence." While EEOC's jurisdiction is also articulated through regulation, it is EEOC itself, and not some exogenous authority (such as the Attorney General), that approves Title VII's implementing regulations.

I conclude that significant, albeit subtle, contrasts in language between Title VII and 8 U.S.C. § 1324b reflect Congress's intention that OSC and OCAHO operate within a more circumscribed regulatory environment than EEOC. As a result, I also conclude that the EEOC case law cited in OSC's brief is inapposite to the instant proceeding. If Congress had wished EEOC and OSC to possess the same powers, Congress could have drafted legislation indicating that OSC's and OCAHO's investigatory authority should be defined by reference to specific Title VII provisions. However, Congress declined to do so. Instead, Congress chose to articulate OSC's and OCAHO's authority in general terms, and gave the Attorney General discretion to implement the specifics by means of regulation. Accordingly, this Order now proceeds to discuss the implications of the Attorney General's regulations implementing 8 U.S.C. § 1324b.

B. Regulatory Authority to Issue Investigatory Subpoenas

As previously established, 8 U.S.C. § 1324b(f)(2) requires that OSC investigations be "in accordance with the regulations of the Attorney General." Separate regulations have been issued governing the authority of OSC and OCAHO. OSC's regulations appear at 28 C.F.R. § 44, while OCAHO's regulations are set forth at 28 C.F.R. § 68. OSC's regulations are silent with respect to

OCAHO's authority to issue subpoenas. By contrast, OCAHO regulations contain an explicit provision setting forth the scope of a Judge's subpoena authority.

1. OSC Regulations

Like Title VII itself, EEOC regulations grant that agency power to issue its own investigatory subpoenas. See 29 C.F.R. § 1601.16(a). However, OSC regulations say nothing about the issuance of investigatory subpoenas. In 1987, shortly after OSC and OCAHO were created, proposed procedural rules were issued for each agency. Among the proposed OSC rules was a provision, nearly identical to the EEOC rule set forth at 29 C.F.R. § 1601.16(a), which authorized OCAHO Judges to issue subpoenas. See 52 Fed. Reg. 9274, 9279 (March 23, 1987) (proposed rule 28 C.F.R. 44.307). Significantly, however, this proposed rule was deleted from the final version of the OSC rules because there already existed a proposed OCAHO regulation dealing with the issuance of subpoenas.

See 52 Fed. Reg. 44972, 44973 (November 24, 1987). Consequently, while OSC rules empower OSC to conduct "investigations," OCAHO regulations govern the subpoena authority of OCAHO Judges.

The OSC regulation dealing with the agency's investigatory authority reads as follows:

> (a) The Special Counsel may propound interrogatories, requests for production of documents, and requests for admissions.
>
> (b) The Special Counsel shall have reasonable access to examine the evidence of any person or entity being investigated. The respondent shall permit access by the Special Counsel during normal business hours to such of its books, records, accounts, and other sources of information, as the Special Counsel may deem pertinent to ascertain compliance with this part.

See 28 C.F.R. § 44.302. OSC notes that 28 C.F.R. § 44.302(a) specifically empowers it to propound interrogatories, and maintains that this authority is not limited to the post-complaint phase of an enforcement action. OSC Brief at 11. According to OSC, its power to propound interrogatories necessarily implies the existence of a power to compel a respondent to answer. Id. Without the authority to obtain answers to interrogatories by means of an investigatory subpoena, OSC argues that the mandatory language of 28 C.F.R. § 44.302(a) will be nullified, and "the authority of the Special Counsel to propound interrogatories during the investigation phase would rest solely upon the cooperation of a respondent." Id. Additionally, OSC asserts that while 28 C.F.R. § 44.302(b) does not expressly authorize it to propound interrogatories as part of a request for an investigatory subpoena, it certainly does not preclude the agency from doing so. Id. at 12. To OSC, the mandatory language of 28 C.F.R. § 44.302(b), which compels respondents to comply with OSC's requests for evidence, logically encompasses such evidence as would be gathered through the means described in 28 C.F.R. § 44.302(a), such as the production of documents or interrogatories. Id. at 11.

While OSC argues that it is authorized by regulation to propound interrogatories, as well as requests for production of documents and requests for admissions, I categorically reject the proposition that OSC regulations can, by inference, give OCAHO Judges broader subpoena authority than that given by OCAHO's own regulations. Like EEOC, OSC has authority to propound interrogatories; unlike EEOC, however, OSC has no authority to require answers to those interrogatories by issuance of a subpoena. That OSC may be inconvenienced by the limitations on OCAHO's subpoena authority is not sufficient justification for pretending that such limitations do not exist.

2. OCAHO Regulations

The OCAHO procedural regulations are referred to as the Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of

Unlawful Employment of Aliens, Unfair Immigration-Related Employment Practices, and Document Fraud (OCAHO Rules of Practice). The subpoena authority of OCAHO Judges is delineated by 28 C.F.R. § 68.25, which reads, in pertinent part, as follows:

> An Administrative Law Judge, upon his or her own initiative or upon request of an individual or entity before a complaint is filed or by a party once a complaint has been filed, may issue subpoenas as authorized by statute, either prior to or subsequent to the filing of a complaint. Such subpoena may require attendance and testimony of witnesses and production of things including, but not limited to, papers, books, documents, records, correspondence, or tangible things in their possession and under their control and access to such things for the purposes of examination and copying.

28 C.F.R. § 68.25(a). The first sentence of this provision was placed in the final rule in order "to clarify the Administrative Law Judges' statutory power to issue subpoenas for investigatory purposes prior to and subsequent to the filing of a complaint." See 54 Fed. Reg. 48593, 48595 (November 24, 1989). The second sentence, which provides a non-exhaustive list of "things" that must be produced in response to a subpoena, does not authorize OCAHO Judges to issue subpoenas that compel answers to interrogatories or require respondents to create documents not yet in existence.

OSC argues that the second sentence of 28 C.F.R. § 68.25(a) merely provides OCAHO Judges with "examples of the scope of their subpoena authority" rather than "restricting the [Judge's] authority." OSC Brief at 10. I do not agree. It is true that the phrase "but not limited to" suggests that 28 C.F.R. § 68.25(a) is not to be construed as setting forth an exhaustive list of "things" that may be subpoenaed. Nonetheless, it is clear from the regulation's emphasis on the production of "things," or "tangible things" in the "possession or under [the] control" of the person or entity being investigated, that OCAHO's subpoena authority is confined to compelling the production of items that have an identifiable, objective, physical existence at the time of the application. In this sense, 28 C.F.R. § 68.25(a) bears a striking resemblance to Federal Rule of Civil Procedure 45(a)(1)(C), which authorizes United States District Court Judges to issue subpoenas requiring production of "books, documents or tangible things" in the "possession, custody or control" of the person or entity being subpoenaed. Subjective mental impressions, conclusions, and answers to questions are not "tangible things." Cf. Mackey v. IBP, Inc., 167 F.R.D. 186, 200 (D. Kan. 1996) (stating in another context that "[i]nterrogatories, by their nature, do not seek documents or tangible things."); Insituform Technologies, Inc. v. Cat Contracting, Inc., 168 F.R.D. 630, 633 (N.D. Ill. 1996) (concluding that "Rule 45 appears to contemplate that a non-party may be required to produce records that already exist and are under the non-party's control, but does not contemplate that a non-party will be forced to create documents that do not exist.").

Moreover, the language of 28 C.F.R. § 68.25(a) is very similar to that employed in 28 C.F.R. § 68.20(a)(1), one of OCAHO's post-complaint discovery rules, which permits the requesting party

to inspect "documents or things ... in the possession, custody or control of the party upon whom the request is served." This rule, which governs only requests for production, is distinct from 28 C.F.R. § 68.19, which authorizes parties to propound interrogatories after an OCAHO complaint has been filed. The similarity in language between 28 C.F.R. § 68.20(a) and 28 C.F.R. § 68.25(a), both of which are elements of the same regulatory framework, tends to indicate that the two provisions are similar in scope.

Finally, the conclusion that OCAHO subpoena authority extends only to the production of physical objects is also supported by the emphasis in 28 C.F.R. § 68.25(a) on "examination and copying." When persons or entities answer interrogatories, they do not merely make their answers available for "examination and copying;" instead, they must reflect on the questions asked, compose a written response based on their mental impressions, and send the written response back to the requesting party. There is no suggestion in the language of the regulation that a person or entity being investigated has an obligation, in response to a subpoena, to create items–such as answers to interrogatories–for examination and copying. Indeed, in EEOC v. Maryland Cup Corp., 785 F.2d 471, 479 (4th Cir. 1986), one of the Title VII cases cited in OSC's brief, the Court noted that Congress' use of the words "examination" and "copying" in the pre-1972 version of Title VII "impl[ied] that the EEOC's right of access then extended only to existing documents," rather than to documents created in response to an interrogatory. Id. at 478.

In sum, I conclude that the subpoena authority of OCAHO Judges is delineated by 28 C.F.R. § 68.25(a). Moreover, I fully agree with Swift's argument that OCAHO subpoena authority extends only "to the production of things (like papers, books, documents, records, and correspondence) in Swift's possession and under their [sic] control for the purpose of examination and copying." Swift Brief at 9. Thus, I conclude that 28 C.F.R. § 68.25(a) does not authorize a Judge to issue a subpoena compelling an investigated entity to answer interrogatories or create documents not yet in existence.

C. Relevant Case Law Construing 8 U.S.C. § 1324b

1. United States Court of Appeals Decisions

As both OSC and Swift have acknowledged, the United States Court of Appeals for the Eleventh Circuit is the only federal appeals court to have adjudicated a case involving the investigatory powers of OSC and OCAHO. See United States v. Florida Azalea Specialists, 19 F.3d 620 (11th Cir. 1994). In Florida Azalea Specialists, an entity being investigated by OSC challenged the authority of OCAHO Judges to issue pre-complaint subpoenas upon application by OSC. Id.
at 622. On the basis of the language of 8 U.S.C. § 1324b(f)(2), the Eleventh Circuit concluded that OCAHO had clear statutory authority to issue investigatory subpoenas upon request by OSC. Id. at 623-24.

The Florida Azalea Specialists Court was not confronted with the issue of whether an OCAHO investigatory subpoena could require answers to interrogatories or the creation of documents not yet in existence; indeed, there is no indication that the entity being investigated in Florida Azalea Specialists objected to the subpoena on that ground. Instead, the Florida Azalea Specialists Court was faced with a challenge to the very existence of OCAHO's investigatory subpoena power. I agree wholeheartedly with the Eleventh Circuit's judgment that OCAHO possesses investigatory subpoena power; however, that judgment does little to advance my analysis as to the scope of that power. Therefore, I conclude that Florida Azalea Specialists is inapposite in this proceeding.

2. OCAHO Decisions

In my Order dated June 7, 2000, I cited, and OSC has discussed in its brief, past OCAHO cases in which Judges have denied petitions to quash or modify investigatory subpoenas that required answers to interrogatories or the creation of documents not yet in existence. In its response brief, Swift argues that "decisions of other OCAHO judges are not binding on this administrative law judge" and that "the specific language of the statute and the rule of practice governing [subpoenas] shows that those decisions are in error." I greatly respect the views of my colleagues, and carefully review their decisions; however, while such rulings are persuasive precedents, I agree with Swift that the ruling of another OCAHO Judge does not constitute binding authority, and where that ruling appears to be contrary to law, I must decline to follow it.

In carefully reviewing the prior OCAHO decisions cited by OSC, I find that most of them do not address the specific issue presented by this proceeding; i.e., the authority of OCAHO Judges to issue subpoenas compelling answers to interrogatories or creation of evidence not yet in existence. Instead, those cases generally involved motions to quash subpoenas on grounds of burdensomeness, irrelevance, or issues other than the subject of this Order. See, e.g., In re Investigation of Hyatt Regency Lake Tahoe, 5 OCAHO no. 751, 238 (1995), 1995 WL 421698; In re Investigation of Florida Rural Legal Services v. Immokalee Agricultural Workers I.D., Inc., 3 OCAHO no. 437, 440 (1992), 1992 WL 535574; In re Investigation of Florida Azalea Specialist, 3 OCAHO no. 523, 1252 (1993), 1993 WL 403261; In re Investigation of Carolina Employers Assn., 3 OCAHO no. 455, 605 (1992), 1992 WL 535611; In re Investigation of Modern Maintenance Company, Inc., 2 OCAHO no. 359, 476 (1991); 1991 WL 531870. This Order does not concern those issues and does not call into question OCAHO's basic power to issue investigatory subpoenas; as Florida Azalea Specialists held, that power undoubtedly exists. However, I conclude that OCAHO's subpoena power is circumscribed by the limiting language of 28 C.F.R. § 68.25(a).

In another OCAHO case cited by OSC, the Judge's discussion of the scope of OCAHO subpoena authority was clearly dicta because the Judge had already denied the investigated entity's motion to quash on grounds of untimeliness. See In Re Investigation of Seafarers Int'l Union, 3 OCAHO no. 498, 999, 1000 (1993); 1993 WL 404298. Thus, only one published OCAHO opinion has actually decided the merits of this issue as a rule of decision. See In re Investigation of Strano

Farms, 3 OCAHO no. 521, 1217 (1993), 1993 WL 403799. For the reasons discussed below, I decline to follow Strano Farms.

In Strano Farms, the Judge explicitly held that "the fact that the evidence sought in the subpoena at issue does not currently exist in documentary form does not invalidate the subpoena in question." 3 OCAHO at 1223. However, the Judge in Strano Farms never discussed the limitations on his subpoena authority imposed by 28 C.F.R. § 68.25. Instead, the Judge cited the broader language of 28 C.F.R. § 68.18, which addresses the scope of post-complaint discovery in actions before OCAHO Judges. The Judge justified his citation of a post-complaint discovery rule (rather than the rule dealing with subpoenas) by invoking the Supreme Court's dictum, in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 216 (1946), that an agency's "'investigative function ... is essentially the same as the ... court's in issuing other pretrial orders for the discovery of evidence....'" 3 OCAHO at 1222. Unfortunately, Strano Farms deletes a significant portion of the relevant passage from Walling. The entire quote reads as follows:

> [an agency's] investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority....

Walling, 327 U.S. at 216 (underscoring added). The Judge in Strano Farms failed to inquire as to whether 28 C.F.R. § 68.25 authorized the issuance of the subpoena in that proceeding. Had the Judge conducted such an inquiry, he may well have concluded that such a subpoena was "in excess of his statutory authority." However, as it stands, Strano Farms is directly contradictory to my judgment in this proceeding, and cannot be distinguished on the facts. Therefore, to the extent that Strano Farms stands for the proposition that OCAHO Judges may issue subpoenas requiring answers to interrogatories or the creation of evidence not yet in existence, I specifically reject it and decline to follow its holding.

Likewise, in Seafarers Int'l Union, the Judge stated in dicta that an OCAHO investigatory subpoena was not unduly burdensome, even with respect to the production of evidence "that does not presently exist in documentary form." 3 OCAHO at 1001. The decision further stated that the role of the court is sharply limited in an investigatory subpoena enforcement proceeding, and that administrative subpoenas are subject only to limited judicial review. Id. Although the decision in Seafarers Int'l Union never discussed 28 C.F.R. § 68.25, the decision clearly assumed that OCAHO possessed statutory authority to issue the requested subpoena in the first instance. However, if the OCAHO Rules of Practice do not authorize the issuance of a subpoena seeking to compel answers to interrogatories, the fact that the subpoena seeks relevant information, or is not burdensome, cannot validate the subpoena.

Moreover, the Judge's decision in Seafarers Int'l Union proceeded as if OCAHO's decision to issue the requested subpoena was on appeal to some higher authority, thus necessitating "limited judicial review." While that approach may be appropriate when a federal court is reviewing a subpoena issued by an administrative agency, I would submit that a deferential standard of review is not appropriate when the petition challenges the judge's own subpoena. Indeed, when a petition to quash a subpoena is filed pursuant to 28 C.F.R. § 68.25(c), the petition is reviewed by the same Judge who issued it. Thus, there is no reason to apply the judicial bromide that only limited review is warranted. Rather, the situation is similar to that under Rule 45 of the Federal Rules of Civil Procedure governing the issuance of subpoenas by a United States District Court Judge. When a District Court Judge issues a subpoena, any motion to quash is filed with the same Judge who issued the subpoena. See FRCP 45(c)(3)(A). In that instance, a judge should not apply a deferential standard of review to his own prior decision to issue the subpoena.

D. OSC Retains Significant Investigatory Powers

In the conclusion of its brief, OSC asserts that the requested subpoena seeks information critical to its investigation, and that without such evidence, the Special Counsel will be unable to carry out his statutory mandate.

I believe that OSC overstates the impact on its investigatory powers of a rule forbidding the issuance of subpoenas compelling answers to interrogatories. As I review the 22 specifications of the requested subpoena, I observe that most, if not all, could easily be redrafted to request the production of documents providing the requested information. For example, Specification Numbered 3 asks Swift to describe the job requirements for general production workers, including the amount of prior work experience that is necessary. This specification could easily be redrafted to request production of documents, for inspection and copying, that describe the job requirements for general production workers, including the amount of prior work experience that is necessary. Indeed, each of the specifications could be similarly redrafted to request production of documents that contain the information sought in the specification. If the subpoena request were redrafted to request production of documents or other tangible things, then I would be authorized to issue the subpoena pursuant to 28 C.F.R. § 68.25(a).

Furthermore, although neither the Judge nor OSC can compel a recipient of the subpoena to answer interrogatories or to create documents not in existence, it would be permissible to allow the latter as an option. For example, the recipient might well conclude that producing documents containing the requested information would be more burdensome than answering interrogatories. The instructions accompanying the subpoena could give the option to the recipient to provide narrative answers rather than providing documents. The key point is that the choice would be left to the recipient, who can either comply voluntarily with OSC's request for answers to interrogatories or be compelled by subpoena to produce documents that provide the same information. My conclusion that investigated parties may often prefer to cooperate with an OSC request for answers to interrogatories in order to avoid the laborious process of searching for documents seems to be

vindicated by the facts of this very proceeding. Attached to Swift's brief is a copy of its responses to OSC's initial request for information. Despite the fact that most of OSC's requests for information are framed as interrogatories, Swift chose to answer many (although not all) of the questions voluntarily.

V. CONCLUSION

In conclusion, I lack the authority under 8 U.S.C. § 1324b(f)(2) and 28 C.F.R. § 68.25(a) to issue a subpoena requiring answers to interrogatories or creation of evidence not yet in existence. Rather, my subpoena authority extends only to requiring oral testimony and the production of things, for purposes of examination and copying, in the investigated party's possession or under its control. Consequently, OSC's present application for an administrative subpoena is granted in part and denied in part. Specifically, the application for subpoena is denied with respect to Specifications numbered 1-7 and 9-20, inclusive, and is granted with respect to Specifications Numbered 8, 21, and 22. OSC is given leave to refile a revised subpoena application, in a form that complies with this Order, for my review and signature.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE