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

LEONID NAGINSKY, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding Case No. 93B00087
DEPARTMENT OF DEFENSE and EG&G DYNATREND, INC., Respondents.	)	

ORDER
(October 31, 1995)

On August 31, 1995, I granted counsel for Complainant's motion to withdraw as attorney of record. Naginsky v. DOD and EG&G, 5 OCAHO 795 (1995) (Order Granting Motion to Withdraw and Complainant's Motion for Continuance). This Order disposes of subsequent pleadings which address discovery and production of witnesses at hearing.

1. Complainant's Motion for a Protective Order and Sanctions against the Department of Defense (DOD) and EG&G Dynatrend, Inc. (EG&G)

a. Protective Order

On October 4, 1995, Complainant, pro se, filed a Motion for a Protective Order and Sanctions against both Respondents (Complainant's Motion). Complainant argues that DOD and EG&G "destroyed documents relevant to this proceeding and failed to make diligent efforts to produce documents which are the subject of the pending hearing. . . ." Cplt. Motion at 1. Specifically, "Complainant

asserts that his security file and personnel file both are already altered and most of documents vital to the hearing are destroyed, removed, or substituted by unsigned exerts [sic]." Id. at 2. Complainant alleges that "[b]oth Respondents refused to answer main questions using as an excuse the absence of records and characterizing the search needed to locate requested records as 'unreasonably burdensome and oppressive.'" Id. Therefore, "[b]ased on the entire record Complainant requests . . . [an] order that [sic] and all of its [Respondents'] components and contractors shall cease and desist destroying documents relevant to this action. . . ." Id. at 5.

Arguing that a protective order is necessary in this case, Naginsky relies on Roginsky v. DOD, OCAHO Case No. 90200168 (June 10, 1991) (unpublished). Complainant's reliance is, however, misplaced. Roginsky granted the complainant's request for a protective order on the grounds that DOD "failed to defend against the allegations of the destruction of relevant documents in this proceeding . . . [forcing the inference] that the allegations are true." Id. at 3.

Unlike Roginsky, in the case at hand DOD responded to Complainant's Motion by a filing on October 13, 1995[1] which opposes the request for a protective order. DOD asserts that the only document in its possession pertaining to Complainant's denial of a security clearance was a National Agency Questionnaire (NAQ), as to which

> there is no specific reason to retain a hard copy in a particular case, . . . [and which] is routinely destroyed and DoD retains only a computer record that a request for clearance had been received on a particular date and what action was taken. In the instant case, there is no dispute that a request for security clearance was received by DoD and was denied based on the requirements of the then existent 5/10 year rule. That information and record was long ago provided to Complainant.

DOD's Response at 2.

In light of DOD's denial of Naginsky's allegations and its assertion that it has provided all documentary information available pertaining to him, this case does not follow the Roginsky model. Complainant proffers no predicate for the extraordinary claim that DOD or EG&G destroyed and/or altered relevant evidence. Such assertion, without more, does not suggest a protective order is necessary or appropriate. Complainant's Motion for a protective order is denied.

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[1] On October 18, 1995, Complainant filed an Opposition to DOD's Responses to (1) Complainant's Motion for Protective Order and Sanctions; (2) Interrogatories Propounded by Complainant and, (3) Complainant's Request for Documents.

b. Sanctions

Again relying on Roginsky, Complainant requests a wide range of sanctions against Respondents, to include both injunctive as well as monetary sanctions. Significantly, upon granting Roginsky's request for a protective order, questioning whether an administrative law judge is empowered "to impose fees or costs upon a party except as authorized by 8 U.S.C. § 1324b(h)" I withheld monetary sanctions. Roginsky, supra at 5. The non-monetary sanction imposed upon DOD in Roginsky was the requirement to submit substantially the same information it was obliged to supply to the district court in a related case upon a finding that DOD had destroyed certain documents. Here, no such predicate finding or demand has been ordered by this or any other tribunal. Accordingly, I deny Complainant's request for sanctions.

The issue in this case is whether Complainant was discharged as the proximate result of application of the 5/10 rule, and if so, determination of the measure of his loss of earnings. The demands by Complainant do not assist in that resolution.

2. Complainant's Request for Subpoenas Duces Tecum

On October 9, 1995, by facsimile transmission, Complainant filed subpoena requests for two individuals: (1) John M. Kucharski, president of EG&G, and (2) DOD's Director of the Defense Investigative Service (DIS), and other DOD officials knowledgeable about documents claimed by Naginsky to have been destroyed. Also by facsimile transmission, on October 13, 1995, EG&G filed an Opposition to Complainant's request to subpoena Kucharski; the Opposition included a affidavit from John A. Shetterly, Esq., counsel for EG&G. DOD filed its Opposition to the entire request for subpoenas on October 20, 1995. In addition, on October 25, 1995, Complainant filed an Answer to EG&G's Opposition to the subpoena.

OCAHO caselaw focusing on motions to quash subpoena requests generally involves cases instigated by the Office of Special Counsel (OSC). See, e.g., In Re Investigation of Strano Farms, 3 OCAHO 521 (1993) (Order Denying Petition to Revoke Subpoena and Granting in part Request to Permit Enforcement of Subpoena); In Re Investigation of Carolina Employers Association, Inc., 3 OCAHO 455 (1992) (Order Denying Motion to Revoke OCAHO Investigatory Subpoena). The following three factors, in addition to considerations of undue burden, have been applied in determinations as to whether to enforce OSC's administrative subpoena requests:

> (1) The purpose of the investigation is within the statutory authority of the agency;
> (2) The information sought is reasonably relevant to the inquiry;
> (3) Procedural requirements have been observed.

In Re Investigation of Strano Farms, 3 OCAHO 521 at 2 (citations omitted). As OSC is not involved in this case, the first factor is irrelevant and only the latter two factors need be discussed here.

In measuring relevancy, OCAHO case law holds that "[t]he term 'relevant' has been construed in the employment discrimination context to include 'virtually any material that might cast light on the allegations against the employer.'" In Re Investigation of Strano Farms, 3 OCAHO 521 at 2 (citing In Re Investigation of Carolina Employers Ass'n., 3 OCAHO 455 at 2 (1992)).

Notwithstanding this broad standard for assessing relevancy, Respondent, in its Opposition to the request,[2] correctly refers to the fact that the parties have previously agreed that the only remaining issues in this case are

> (1) whether application of the 5/10 Rule to Complainant was the proximate cause of his termination, and (2) the extent, if any, of Complainant's damages as a result of his denial of a security clearance under the 5/10 Rule.

Naginsky v. DOD and EG&G, Fifth Prehearing Conference Report and Order at 1 (1995) (unpublished). Therefore, any witnesses subpoenaed by Complainant reasonably must be expected to be able to provide pertinent information regarding whether the 5/10 Rule harmed Naginsky and if so, how much damage he suffered.

Complainant asserts that Kucharski "will be able to provide information" related to

> Complainant's business proposal for new projects in the former Soviet Union prepared in 1990 at the request of the Company President Mr. John M. Kucharski, but intercepted by Complainant supervisors; which caused the Complainant's subsequent termination of employment with EG&G. The Complainant lost his opportunity to work for the Company in Russia and as a result suffered a substantial monetary damages.

Complainant's Request at 1.

In response, EG&G states that "Kucharski has no knowledge whatsoever . . . whether imposition of the 5/10 Rule in denying the

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[2] EG&G's Opposition at 1.

Complainant a security clearance caused him financial harm . . . [and] requiring Mr. Kucharski to appear at the Hearing would impose an undue burden;" as EG&G President, Chief Executive Officer (CEO) and Chairman of the Board of Directors, Kucharski is said to have no personal knowledge concerning matters at issue in this case. Opposition at 1; Affidavit of Shetterly at 2.

The argument that it would be an inconvenience and burden to force Kucharski to testify at hearing is not alone critical to the question whether to issue such subpoena. More importantly, as the President and CEO of an enterprise as large as EG&G, absent a persuasive showing to the contrary, I accept as reasonable that Kucharski is not likely to be familiar with "day-to-day operations" at EG&G and, as recited in Shetterly's affidavit, is not at all familiar with Naginsky's case or work history. Moreover, the very recitation by Complainant of the likely testimony of Kucharski defeats his claim of relevance, as it is at best speculative, related to prospective work in Russia with no suggestion of a nexus to loss of work as the result of the 5/10 rule. In the event, however, that this case goes to an evidentiary hearing, I will expect EG&G to provide a witness with knowledge of general policies and decision-making at EG&G, prepared to testify as to whether Complainant was or was not given particular work assignments and/or not promoted due to application of the 5/10 Rule. Of course, even if Complainant was discriminated against by virtue of the 5/10 rule, in order to prevail under § 1324b, Complainant must prove that the discrimination culminated in his termination; employment discrimination per se is not enough. See 8 U.S.C. § 1324b(a)(1).

Complainant asserts that the subpoena for the individual who was the Director, DIS, at the time he was denied a security clearance, and for other DOD personnel is necessary because

> violations of security clearance procedures in 1987-1991, resulted in the Complainant's 'badge of disloyalty' for 4 extra years, and . . . caused the Complainant's removal from major DOD projects. Complainant requests that DOD identifies [sic] the name of the Director of the Defense Investigative Service or other DOD officials who had knowledge of the contents of the destroyed documents, how the information contained in the destroyed documents may be obtained through alternative means or other sources. . . .

Cplt. Request for Subpoena at 1-2.

DOD asserts that "[i]n essence, whatever Complainant is seeking by his motions, it is not a suit for provable damages but, rather, an attempt to have DOD admit that it improperly implemented the 5/10 year rule, a fact not denied by DOD." DOD Response at 2.

DOD is correct that Complainant's subpoena request is not relevant to the issue of whether he was harmed by application of the 5/10 Rule and if so, whether he suffered damages. It is undisputed that DOD applied the 5/10 Rule to Naginsky; DOD admits to denying him a security clearance in 1987. Whether Complainant was harmed by said application and suffered damages is an issue of fact deriving from what discriminatory actions, if any, were taken **by EG&G**, as a result of denial of Naginsky's security clearance by virtue of the 5/10 rule. DOD's action effectively denied Naginsky's security clearance but there is no issue before me implicating any role by DOD in Naginsky's so-called "badge of disloyalty," except to the extent of unemployment consequences, if any, proximately caused by application of the Rule. Accordingly, I reject Naginsky's subpoena request for DOD officials to be relevant to the only issues in this case. The subpoena request is denied.

3. Complainant's Discovery Requests

On October 13, 1995, DOD filed two Motions to Quash discovery requests propounded by Complainant.[3] Specifically, DOD objects to Complainant's September 19, 1995 request for documents, and September 18, 1995 interrogatories.[4] DOD's motions to quash are premature as no motion to compel has been filed by Complainant. At this point, DOD is free, on well-settled principles, either to respond to the discovery requests or to object and, refuse to answer. Thereafter, Complainant, as "the discovering party may move the Administrative Law Judge for an order compelling a response or inspection in accordance with the request." 28 C.F.R. § 68.23(a). In turn, "[u]nless the objecting party sustains his or her burden of showing that the

[3] Although DOD captions its pleadings as "responses" to Complainant's request, I take them to be motions in that they request "the court quash Complainant's . . ." motions.

[4] Since assuming responsibility for his own representation, Naginsky has made copious filings, including many superfluous documents. These include, for instance, Complainant's discovery requests to Respondents. As a general rule, the parties should not provide copies to the Judge of either discovery requests or responses unless a request for relief is made. In that case, the underlying discovery request should accompany the request for relief. Prior to any request for relief, however, the parties are expected to make a reasonable effort to confer inter se concerning matters in dispute. The postponement of the previously scheduled evidentiary hearing was occasioned by the withdrawal of counsel for Complainant, and provision of an opportunity for him to obtain substitute counsel, and was not predicated on the need for additional discovery or further proceedings.

objection is justified, the Administrative Law Judge may order that an answer be served." Id.

4. DOD's Request for an Order

DOD's Response to Complainant's Motion for a Protective Order and Sanctions concludes with the following request:

> It should also be noted that, despite a number of requests by Respondents and orders by the court to provide evidence as to dollar amounts that could be established in some way, Complainant has consistently declined to do so. We ask again that Complainant be directed to do so promptly or have his Complainant [sic] dismissed without a hearing.

DOD Response at 3.

DOD's "motion," which may have been overlooked by Complainant, in effect asks that Complainant demonstrate how he suffered a pecuniary loss from application of the 5/10 Rule. This Order directs Complainant to file and serve on all parties a document which provides evidence, whether demonstrative or in the form of expected testimony to explain his pecuniary loss from application of the 5/10 Rule to him. In addition, Complainant is ordered to file an outline of how he plans to prove damages in the event it is proven that he was harmed by the 5/10 Rule. Complainant's filing will be considered timely if filed no later than November 7, 1995.

I disagree with the suggestion in Complainant's Opposition to DOD's Response, filed October 18, 1995, that he needs the discovery outlined in that filing in order to "estimate damages" occasioned by the 5/10 Rule. He claims that delay by DOD in its acknowledgment that the 5/10 Rule was invoked is a factor in measuring the impact of its application to him. I am not persuaded that when DOD acknowledged that the Rule was applied is relevant as distinct from measuring the impact, if any, as and from the date it was applied.

As previously scheduled, a telephonic prehearing conference will be held at 10:00 a.m., EST, on November 8, 1995.

SO ORDERED.

Dated and entered this 31st day of October, 1995.

MARVIN H. MORSE
Administrative Law Judge