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

JACOB ROGINSKY, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding Case No. 90200168
DEPARTMENT OF DEFENSE,	)	
and	)	
CENTER FOR NAVAL ANALYSES, Respondents.	)	

SECOND PREHEARING CONFERENCE REPORT AND ORDER
(March 8, 1991)

I. *Introduction*

By Order dated January 14, 1991 a second prehearing conference was held on March 5, 1991. Because a court reporter was present and a transcript is pending, this Report and Order will be limited to a summary of the issues discussed, rulings made, and the schedule established during the conference.

II. *Appearances*

Jeffrey Sheldon, Esq. entered an appearance on behalf of Complainant. Without objection, Dan Sutherland from the Office of Special Counsel (OSC) participated in the conference discussion.

III. *Issues Addressed*

A. Citizenship Jurisdiction

Having considered the extensive memoranda submitted by the parties in response to my Order of January 14, 1991, I find and

conclude that the alleged discrimination by Respondents essentially is based on and implicates Complainant's citizenship status and not his Soviet national origin. To the extent national origin may be implicated, an administrative law judge is not thereby deprived of 8 U.S.C. §1324b jurisdiction over citizenship discrimination allegations. Moreover, I may also have national origin jurisdiction as a result of the national security exception to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §20000e-2(g). See 8 U.S.C. §1324b(a)(2)(B).

B. DoD's Affirmative Defense of Sovereign Immunity

Upon my overruling Complainant's Motion to Strike Respondent Department of Defense's (DoD's) affirmative defense of sovereign immunity, Complainant's counsel suggested that it might be "counterproductive" to continue discovery if the bench ultimately concludes that sovereign immunity shields Respondent DoD from liability. Counsel for DoD stated that he has been awaiting reconsideration of an opinion on this issue by the Office of Legal Counsel (OLC), but agreed that it was now timely to address the question.

On consideration of the foregoing, it was agreed that memoranda would be submitted by Complainant and DoD as to whether Section 102 of the Immigration Reform and Control Act of 1986, as codified at 8 U.S.C. §1324b, enacts liability for unfair immigration-related employment practices by government departments and agencies, specifically the Department of Defense. As agreed, memoranda are to be filed not later than Friday, April 5, 1991. Optional reply memoranda will be timely if filed not later than Friday, April 19, 1991

OSC is invited to file a memorandum and is expected to submit a filing not later than Friday, March 8, 1991 as to whether it intends to file an amicus curiae memorandum on this issue.

The bench and the parties acknowledged that DoD and OSC addressed this issue previously in the memoranda submitted to OLC, copies of which are attached as exhibits to DoD's Motion for a Stay of Further Proceedings filed July 10, 1990.

C. Discovery Issues

In response to Complainant's request to produce documents and subsequent motion to compel production of documents, the Department of Defense objects to production of certain documents on the

basis that the documents requested are not reasonably calculated to lead to the discovery of admissible evidence. The OCAHO scope of discovery rule at 28 C.F.R. §68.16(b) does not include the final sentence of Rule 26(b) of the Federal Rules of Civil Procedure, that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." I find, however, that the OCAHO rule, not being inconsistent with the federal rule, is available as authority. See 28 C.F.R. §68.1. As a result, the test to be applied is the normative one available under the Federal Rules. In that light, DoD will be expected to reevaluate its objections presently stated to Complainant's discovery requests.

Respondent DoD specifically contests disclosure of documents contained in personnel files. DoD asserts that such disclosure would violate the Privacy Act, 5 U.S.C. §552a. Complainant contends that the personnel files at issue are not "records" within the meaning of the Privacy Act and are therefore covered by the Freedom of Information Act (FOIA), 5 U.S.C. §552, specifically exemption 6. Upon reflection, I disagree. Applications for government employment are records within the meaning of the Privacy Act. White v. United States Civil Service Commission, 589 F.2d 713 (D.C. Cir. 1978). The information about individuals who applied with or who were hired by the Department of Defense contained within personnel files is private information which is free from unwarranted intrusion. See Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980).

DoD submits that it would abide with disclosure pursuant to a protective order issued by a "court of competent jurisdiction." 5 U.S.C. §552a(b)(11). I conclude that the role of an administrative law judge in a title 8 U.S.C. §1324b proceeding in its statutorily unique setting is functionally equivalent to that of a case before a federal district court. Accordingly, I find that an administrative law judge may issue a protective order as a court of competent jurisdiction for the purposes of disclosure of documents under the Privacy Act. Counsel for Respondent DoD may make an appropriate filing if he finds authority to the contrary.

IV. *Summary of Rulings*

A. Respondent Center for Naval Analyses' (CNA's) Motion to Dismiss for lack of subject matter jurisdiction is denied. It appears that a genuine issue of material fact exists as to the date of Complain-

ant's application, when in fact the interview selection and hiring decision by CNA was made, not just its communication to Complainant, and whether, and to what extent, the regulation was a factor in making that decision.

B. Complainant's Motion to Strike Respondent Department of Defense's Affirmative Defense of Sovereign Immunity is overruled, as discussed above.

C. Complainant's Motion to Compel Production of Documents from Respondent Department of Defense:

Requests 5, 6, 7 and 8: Granted, as discussed above, for the years 1987 and forward. Requests 5, 6, and 7 granted as to positions requiring scientific and engineering background.

Request 9: Granted.

Request 10: Counsel for DoD agreed that it would comply with the request on the condition that Complainant obtain a waiver of the privacy statement from the signatories of the documents. Otherwise, the request is denied.

Request 11: Counsel for DoD represented that he has complied with the request and will produce the documents to Complainant.

Request 14: Denied.

Request 15: Granted.

Request 16: Granted to the extent that DoD is expected to comply on a best efforts basis.

V. *Schedule*

As agreed, the following schedule was established:

(1) A third prehearing conference will be held at 10:00 a.m., EDT, on Wednesday, May 1, 1991 at the Executive Office for Immigration Review, Sky Tower, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041.

(2) An evidentiary hearing, previously scheduled to begin at the same location on Monday, June 17, 1991 is rescheduled to begin at the same location on Tuesday, August 13, 1991. Two weeks are anticipated as sufficient duration to conduct the hearing.

As applicable, paragraphs 7 through 10 of my December 12, 1990 Order remain in effect as if fully repeated here.

SO ORDERED.

Dated this 8th day of March, 1991.

MARVIN H. MORSE
Administrative Law Judge