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

January 8, 1993

IN RE INVESTIGATION OF	)	
FLORIDA AZALEA SPECIALIST	)	OCAHO Investigatory Subpoena No. 92-2-00123

ORDER DENYING MOTION TO QUASH, ORDER DENYING MOTION FOR ORAL ARGUMENT AND CHANGE OF VENUE AND ORDER GRANTING REQUEST TO PERMIT ENFORCEMENT OF SUBPOENA

On November 12, 1992, at the request of the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), the undersigned issued OCAHO Investigatory Subpoena No. 92-2-00123, which was delivered to Frank P. Riggs, Esquire, as agent for Florida Azalea Specialist (petitioner) on November 13, 1992.

By the terms of the written instructions set forth in that subpoena and its attachment, petitioner Specialist was directed to produce certain information and documents concerning petitioner's refusal to hire one Ms. Polanco. Florida Azalea was to have provided the requested information and documents to OSC by the close of business on Friday, November 27, 1992.

On November 16, 1992, petitioner filed the motion at issue, in which it seeks to revoke OCAHO Investigatory Subpoena No. 92-2-00123 on eight separate grounds.

On December 8. 1992, OSC filed its Memorandum in Opposition to Petitioner's Motion to Quash and Request to Permit Enforcement of Subpoena. OSC, asserting therein that it would not be able to deter-mine whether or not to bring a complaint based on the charge without

the information and documents sought in the subpoena in question, requested that petitioner's motion be denied and that the undersigned authorize the Special Counsel to seek enforcement of the subpoena.

On December 14, 1992, petitioner filed a Motion for Oral Argument and Change of Venue, in which it requested oral argument before consideration of OSC's request to permit enforcement of the subpoena, in Tampa, Florida.

On December 14, 1992, a phone conference between the undersigned and counsel for the parties was held as scheduled. At that time petitioner's counsel agreed to file a memorandum supporting its motion to quash by January 4, 1993. Thereafter, on December 28, 1992, petitioner's counsel filed a letter, in which he implied that he would not be submitting that memorandum.

The scope of review given to administrative subpoenas is necessarily limited because of the government's "interest in the expeditious investigation of possible unlawful activity." FTC v. Texaco, Inc., 555 F.2d 862, 872 (D.C. Cir. 1977), cert. denied, 431 U.S. 974 (1977). See Federal Election Comm'n v. Lance, 617 F.2d 365, 368 (5th Cir. 1980). See also Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509, 87 L.Ed. 424, 429, 63 S.Ct. 339 (1943) (it is the duty of the court to enforce administrative subpoena where "evidence sought by subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties"). As the Supreme Court has noted, the investigatory power of the administrative agency:

> is analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion the law is being violated, or even because it wants assurance that it is not...

Morton Salt, 338 U.S. at 652, 94 L.Ed. at 411.

The standards governing the enforceability of an administrative subpoena are well established. An administrative subpoena should be enforced if:

(1) The purpose of the investigation is within the statutory authority of the agency;

(2) The information sought is reasonably relevant to the inquiry; and

(3) Procedural requirements have been observed.

United States v. Powell, 379 U.S. 48, 57-58, 13 L.Ed.2d 112, 119, 85 S.Ct. 48 (1964); United States v. Morton, 338 U.S. 632, 652-53, 94 L.Ed. 403, 416, 70 S.Ct. 357 (1950); EEOC v. Maryland Cup Corp., 785 F.2d 471, 475 (4th Cir. 1985); EEOC v. Children's Hosp. Medical Ctr. of N. California, 719 F.2d 1426, 1428 (9th Cir. 1983); Federal Election Comm'n v. Larouche Campaign, 644 F.Supp. 120 (S.D.N.Y. 1986), aff'd 817 F.2d 233 (2d Cir. 1987); EEOC v. Delaware State Police, 618 F.Supp. 451, 452-53 (D.Del. 1985); In re Investigation of Carolina Employers Ass'n., 3 OCAHO 455, at 2 (9/17/92); In re Investigation of Florida Rural Legal Servs. v. Immokalee Agric. Workers, 3 OCAHO 437 at 6 (6/15/92). See also EEOC v. Tempel Steel Co., 814 F.2d 482, 485 (7th Cir. 1987); United States v. Westinghouse Corp., 788 F.2d 164, 166 (3d Cir. 1986); Federal Election Commission v. Florida for Kennedy Committee, 681 F.2d 1281, 1284 (11th Cir. 1982). See generally United States v. McAnlis, 721 F.2d 334, 336 (11th Cir. 1983); Matter of Newton, 718 F.2d 1015, 1018-19 (11th Cir. 1983) (tax summons enforcement proceedings).

The investigation for which the subpoena in question was sought stems from a charge filed by Carmen Polanco with OSC on October 15, 1992, alleging discrimination in employment based on Ms. Polanco's national origin, in violation of IRCA, 8 U.S.C. §1324b. (Memorandum in Opposition, 1) OSC is tasked under the pertinent provisions of IRCA to investigate charges of unfair immigration related employment practices. 8 U.S.C. §§1324b(c)(2), 1324b(d)(1). See Immokalee Agric. Workers, 3 OCAHO 437, at 7. Clearly, the purpose of the investigation is within the statutory authority of the agency.

The information sought in the subpoena must also be relevant to the inquiry in order for the subpoena to be enforced. The term "relevant" in the employment discrimination context, has been construed to include "virtually any material that might cast light on the allegations against the employer. Carolina Employers, 3 OCAHO 455, at 4 (quot-ing EEOC v. Shell Oil Co., 466 U.S. 54, 68-69, 104 S. Ct. 1621, 1631 (1984). See also Texaco, 555 F.2d at 874 ("the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation").

The first subpoena request, for a description of petitioner's corporate and organizational structure, and for the number of persons employed by petitioner on the date of the alleged discriminatory act, is relevant to the applicability of IRCA and the jurisdiction of forum over the charge. See 8 U.S.C. §§1324b(a), 1324b(b)(2).

The second through seventh and fourteenth subpoena requests are directly relevant to the charge and to the circumstances surrounding petitioner's alleged refusal to hire the charging party. The eighth through thirteenth are subpoena requests are relevant to petitioner's employment practices with respect to the hiring and/or recruitment of authorized individuals and to whether petitioner is engaging in discri-minatory practices. See Carolina Employers, 3 OCAHO 455, at 5. All of the subpoena requests are relevant to the asserted purpose of OSC's investigation. See id.

Finally, the procedural requirements for enforcement of the subpoena in question have been satisfied.

OSC commenced its investigation, as required by statute, upon receipt of a charge from the charging party. 8 U.S.C. §1324b(f)(2), 28 C.F.R. §68.25(a). Petitioner has not alleged, nor is there evidence to show, that service was not accomplished as required under section 68.25(a) of Title 28. The subpoena as issued conforms with the content requirements as set forth in the procedural regulations. 28 C.F.R. §68.25(b).

Therefore, the subpoena in question is valid and enforceable. Accord-ingly, the subpoena must be enforced unless petitioner demonstrates that it is "unduly burdensome." Maryland Cup, 785 F.2d at 475; Children's Hosp., 719 F.2d at 1428; Carolina Employers, 3 OCAHO 455, at 5.

This standard is not easily met. In order to demonstrate that an administrative subpoena is unduly burdensome, petitioner must show that "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." FTC v. Jim Walter Corp., 651 F.2d 251, 258 (5th Cir. Unit A 1981) (quoting FTC v. Rockefeller, 591 F.2d 182, 190 (2d Cir. 1979)). See also Maryland Cup, 785 F.2d at 477; Texaco, 555 F.2d at 882. Although petitioner asserts in two separate paragraphs of its motion to quash that compliance would be burdensome, it fails to offer evidence to prove that fact. Accordingly, petitioner's objection fails.

Petitioner also raised several specific objections to the enforcement of the subpoena in question which were not addressed in the foregoing.

First, petitioner objected to issuance of the subpoena on the ground that there is no entity known as "Florida Azalea Specialists", asserting

that the appellation "Florida Azalea Specialists" is used by Joseph King, Donna King and David King in conducting their horticulture business. This contention is wholly contradictory.

As a second objection, petitioner contended that the undersigned is part of the prosecuting office and as such, unqualified to determine the merits of a case in which that office is a party. Petitioner's contention is in error. Under IRCA, Congress authorized the establishment of a system, 8 U.S.C. §1324b, through which individuals who believe that they have been discriminated against on the basis of citizenship or national origin may bring charges before a newly-established Office of Special Counsel for Unfair Immigration Related Unfair Employment Practices (OSC). OSC is authorized to file complaints brought under section 1324b before administrative law judges specially designated by the Attorney General as having had special training in the area of employment discrimination. 8 U.S.C. §1324b(e)(2). See Romo v. Todd Corp., 1 OCAHO 25 (5/13/88).

OSC is obligated to investigate each charge it receives. 8 U.S.C. §1324b(d)(1). In order to enable OSC to perform its investigatory duties, Congress provided that OSC was to have reasonable access to examine evidence of any person or entity being investigated in conduc-ting investigations and hearings under the unfair immigration- related employment practices provisions of IRCA. 8 U.S.C. §1324b(f)(2). To guarantee OSC access to this evidence, Congress in turn granted the administrative law judges the authority to compel the attendance of witnesses and the production of evidence by subpoena. Id.

The subpoena in question, OCAHO Investigative Subpoena No. 92-2-00123, was issued pursuant to authority granted under IRCA to the undersigned, 8 U.S.C. §1324b(f)(2), and in accordance with the applicable procedural regulations, 28 CFR §68.25(a). See generally In re Investigation of Carolina Employers Ass'n, Inc., 3 OCAHO 455 (9/17/92). Accordingly, petitioner's second contention is without merit.

Petitioner also contends that OSC requested the subpoena in question in spite of the fact that petitioner requested that OSC file a complaint, demanding that the subpoena be quashed, and that OSC be ordered to either file a complaint or "cease harassment" of petitioner.

The filing of a complaint is not a necessary precursor to the issuance of this administrative subpoena. 28 C.F.R. §68.25(a); 8 U.S.C. §1324b(f)(2). Under IRCA, OSC has 120 days from the filing of a

charge to determine whether there is reasonable cause to believe that the charge is true, and to determine whether to file a complaint with respect to the charge with this Office. 8 U.S.C. §1324b(d)(1). Towards that end, OSC is granted "reasonable access to examine evidence of any person or entity being investigated." 8 U.S.C. §1324b(f)(2). See Immokalee Agric. Workers, 3 OCAHO 437, at 7.

It would be an abuse of discretion for OSC to file a complaint with respect to a charge without first determining, as required by IRCA, whether the charge was true. In addition, this Office does not have authority to order OSC to file a complaint. OSC is well within its authority in seeking the subpoena in question before filing a complaint in this matter, and the relief sought by petitioner cannot be granted.

Petitioner also contends that the subpoena in question violates the fifth amendment of the United States Constitution in that it requires self- incrimination and the fourteenth amendment in that it violates fundamental concepts of due process.

It should first be noted that the fourteenth amendment is not applicable to the actions of either OSC or the undersigned in their official capacities. The fourteenth amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . .

U.S. Const. amend. XIV, §1. The reference to "State" in the amendment refers to the several states, as opposed to the federal government of the United States. District of Columbia v. Carter, 409 U.S. 418, 424 (1972) ('...actions of the Federal Government and its officers are beyond the purview of the (14th) Amendment...'). See generally J. Nowak, R. Rotunda & J. Young, Constitutional Law § 12 (3rd ed. 1986). OSC is an office within the executive branch of the federal government.

The fifth amendment, however, is applicable to both OSC and the undersigned. The fifth amendment provides, in pertinent part:

> No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. . .

U.S. Const. amend. V. This privilege, however, is available to natural persons only, and cannot be invoked on the part of corporations or other organizations. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778, n. 14 (1978); United States v. Widow Brown's Inn, 3 OCAHO 399 (1/15/92). While the privilege protects the individual from compelled production of his personal effects and documents, Boyd v. United States, 116 U.S. 616 (1886), it will not enable an individual to avoid producing the records of a collective entity that he holds in a representative capacity, even if the records might incriminate him personally. Bellis v. United States, 417 U.S. 85, 88 (1973). This is true even if the entity is an unincorporated organization. Id. at 89; United States v. White 322 U.S. 694, 699 (1944). Therefore, petitioner's assertion of the privilege does not invalidate the subpoena in question.

Petitioner is correct in its assertion that due process must be satisfied in order to enforce the administrative subpoena in question. See Maryland Cup, 765 F.2d at 475. However, due process has been satisfied in this matter. The subpoena was properly issued by the undersigned in accord with IRCA and the applicable procedural regulations. Moreover, petitioner has been given the opportunity to appeal subpoena, pursuant to the procedural regulations. 28 C.F.R. §68.25(c). Id. at 476. Therefore, petitioner's due process argument is without merit.

Petitioner also alleges that the undersigned "has no authority to issue a subpoena except for a hearing." Petitioner's contention is in direct opposition to the terms of the statute, 8 U.S.C. §1324b(f)(2), and of the procedural regulations governing proceedings in this forum, 28 C.F.R. §68.25(a).

A similar argument construing a similar statutory provision was rejected by the court in United States v. McDonald Chevrolet & Oldsmobile, 514 F. Supp. 83 (N.D. Ga. 1981). As the court there noted:

> (T)he court cannot agree that Congress intended to require the agency to conduct an administrative hearing every time information was sought through a subpoena.... At this stage of the investigation, the (agency) is merely trying to determine whether a violation has occurred; if charges are pressed, the respondent will have ample opportunity to contest the agency's accusations.

Id. at 87-88. See also Genuine Parts v. FTC, 445 F.2d 1382, 1388 (5th Cir. 1971) ("There are grave policy considerations that militate against allowing the process of administrative investigation to become

adversary in nature, even after it becomes specific and particularized.").

Petitioner next asserts that Special Counsel is obligated to establish regional offices, in accord with 8 U.S.C. §1324b(c)(4). That section provides: "The Special Counsel, in accordance with the regulations of the Attorney General, shall establish such regional offices as may be necessary to carry out his duties." Notwithstanding the validity of petitioner's interpretation of this provision, petitioner fails to demonstrate how the provision entitles it to the relief it seeks.

Accordingly, petitioner's Motion to Quash OCAHO Investigative Subpoena No. 92-2-00123 is hereby denied, and respondent's request to permit enforcement of subpoena is granted.

Petitioner's motion for oral argument on OSC's request to permit enforcement of the subpoena is also denied. In general, motions filed with this Office are considered without oral argument. The procedural regulation governing motions and requests provides, in pertinent part: "No oral argument will be heard on motions unless the Administrative Law Judge otherwise directs." 28 C.F.R. §68.11(c). Oral argument is particularly disfavored in this context, because, by statute, OSC must conduct its investigation within an extremely brief timeframe. See 8 U.S.C. §1324b(d).

In the event that petitioner fails to comply with those requests set forth in OCAHO Investigatory Subpoena No. 92-2-00123, OSC is hereby authorized, in accordance with the provisions of 8 U.S.C. §1324b(f)(2), to seek enforcement of this administrative subpoena in the appropriate United States District Court.

JOSEPH E. MCGUIRE
Administrative Law Judge