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

ALEJANDRA AVILA, Charging Party, and UNITED STATES OF AMERICA, Complainants, v. SELECT TEMPORARIES, INC., D/B/A SELECT PERSONNEL SERVICES, Respondent	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 01B00050 Judge Robert L. Barton, Jr.

ORDER REGARDING COMPLAINANT'S MOTION TO COMPEL

(*April 12, 2002*)

I. INTRODUCTION

On March 28, 2002, Complainant United States of America (Complainant) filed a motion to compel Select Temporaries, Inc., d/b/a Select Personnel Services (Respondent) to fully answer Complainant's First Set of Interrogatories and Complainant's First Request for Production of Documents. On April 8, 2002, Respondent filed its opposition to the motion to compel. Because I find that Complainant has not complied with Rule 68.23(b)(4) of the Office of the Chief Administrative Hearing Officer (OCAHO) rules of practice, or with my February 28, 2002, Order Governing Prehearing Procedures (OGPP), I am holding the motion to compel in abeyance until Complainant complies with the requirements of Rule 68.23 and the OGPP.

II BACKGROUND

On March 27, 2001, Complainant filed a Complaint with OCAHO alleging that Respondent violated 8 U.S.C. §§ 1324b(a)(5) and (6). On May 4, 2001, Respondent filed its Answer to the Complaint.

Complainant served its First Set of Interrogatories and its First Request for Production of Documents upon Respondent on November 7, 2001. Respondent served its responses to these discovery requests on December 18, 2001. Respondent's responses objected to portions of both discovery requests on various grounds. In a letter dated January 17, 2002, Complainant notified Respondent that it considered Respondent's responses to Complainant's First Set of Interrogatories and First Request for Production of Documents to be deficient. Complainant explained that the purpose of the letter was to "resolve this discovery dispute informally, before seeking action by the Administrative Law Judge." C. Mot., Exhibit 3. On January 23, 2002, Respondent replied to Complainant's objection that the discovery provided was deficient. Prefacing its responses to Complainant's objections, Respondent's January 23 letter states, "[i]n the further spirit of cooperation and *in an attempt to resolve your objections*, as to each objection noted, our responses are as follows . . . ." Id., Exhibit 4 (emphasis added). The Respondent's January 23 letter expounds upon and explains in further detail its original objections to Complainant's discovery, and also supplements some of the original discovery Respondent had provided. Compare id. with R. Opp., Exhibits B and C (providing Respondent's original responses). There is no indication in the record that Complainant ever undertook any further efforts in the next two months to resolve the discovery dispute.

Instead, on March 28, 2002, Complainant filed a Motion to Compel Discovery with the Court. Complainant seeks an order forcing Respondent to "fully answer Complainant's First Set of Interrogatories and Complainant's First Request for Production of Documents served on Respondent by the Special Counsel on December 18, 2000." C. Mot. at 1. The Court is only aware of discovery requests that were served upon Respondent on November 7, 2001, and, indeed, the exhibits attached in support of Complainant's motion only document discovery requests served on November 7, 2001. See id., Exhibits 1 and 2.

On April 8, 2002, Respondent filed a brief opposing the Motion to Compel Discovery. The Respondent's brief focuses on the merits of its objections to the contested discovery, but does not address the "good faith conferment" requirement found at 28 C.F.R. § 68.23(b)(4) (2001). Because I find that Complainant did not satisfy this "good faith conferment" requirement prior to filing its Motion to Compel Discovery, I shall not address the merits of the Complainant's motion or Respondent's reply brief.

III. APPLICABLE STANDARDS

The scope of inquiry during discovery extends to any relevant information that is not privileged. 28 C.F.R. § 68.18(b) (2001). In the discovery context, relevancy "'has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, an issue that is or may be in the case.'" United States v. Ro, 1 OCAHO no. 265, 1700, at 1702 (1990), 1990

WL 512118, at *1-2 (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)).

If a party fails to respond adequately to a discovery request, or objects to the request, or fails to permit inspection as requested, the discovering party may move to compel a response or an inspection. 28 C.F.R. § 68.23(a) (2000). In proceedings before OCAHO Judges, motions to compel must set forth and include:

> (1) The nature of the questions or request;
> (2) The response or objections of the party upon whom the request was served;
> (3) Arguments in support of the motion; and
> (4) A certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge.

28 C.F.R. § 68.23(b) (2001).

Although OCAHO has its own procedural rules for proceedings arising under its jurisdiction, it is well-settled that OCAHO Judges may refer to analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding contested issues. See United States v. Westheimer Wash Corp. d/b/a Bubbles Car Wash, 7 OCAHO no. 989, 1042, at 1044 (1998), 1998 WL 745996, at *2. Section 68.23 of the OCAHO procedural rules is almost identical to Federal Rule of Civil Procedure 37(a)(2)(B), which provides for motions to compel responses to discovery requests in cases before the federal district courts. Consequently, Rule 37 and federal case law interpreting it are useful in deciding whether a motion to compel should be granted under the OCAHO rules. See generally Westheimer Wash Corp., 7 OCAHO no. 989, at 1044.

IV. ANALYSIS

As previously stated, motions to compel in OCAHO proceedings are *prima facie* valid only if they are accompanied by "[a] certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge." 28 C.F.R. § 68.23(b)(4) (2001). Whether a movant has made an attempt to confer in good faith depends upon the specific facts of the case. Therefore, the following discussion examines the adequacy of Complainant's good faith efforts to confer with Respondent before filing its Motion to Compel Discovery.

As an initial matter, I first address the statements Complainant makes regarding its attempts at "good faith conferment." Complainant's motion asserts that it attempted to confer with Respondent regarding the requested discovery before the filing of the motion. C. Mot. at 2. In support of this statement, Complainant's motion explains that, "[o]n January 17, 2002, Complainant sent counsel for Respondent a letter reminding him that Respondent's responses were past due and requesting that they be submitted to Complainant by January 29, 2002." Id. As previously stated, however, Complainant's Janauary 17 letter actually stated that, "[Respondent's] responses to the Complainant's First Set of Interrogatories and First Request for Production of Documents . . . are deficient," C. Mot., Exhibit 3, not that they were overdue.

Complainant states in its motion to compel that "[o]n January 23, 2002, Complainant received a letter from Respondent's counsel again with incomplete answers to the interrogatories and request for production of documents." C. Mot at 2. However, Respondent's January 23, 2002, letter expounds upon, and explains in further detail, Respondent's original objections to Complainant's discovery. Accordingly, Respondent's January 23 letter seems more like a genuine first step toward resolution of the dispute, rather than just "incomplete answers."

The motion to compel does not document any further attempts at conferment. It is supported, however, by a "Certification of Attempt to Confer" in which Complainant's counsel certifies that, "as detailed in the attached Motion to Compel Discovery, I attempted to confer with Respondent's counsel prior to filing said motion, but was unsuccessful in having Respondent comply." C. Mot. Therefore, it appears that Complainant's good faith effort at conferment prior to filing its Motion to Compel Discovery amounts to just one letter "attempt[ing] to resolve [the] discovery dispute informally, before seeking action by the Administrative Law Judge." Id., Exhibit 3. Moreover, Complainant has failed to respond to Respondent's January 23 letter "attempting to resolve [Complainant's] objections." Id., Exhibit 4.

In United States of America v. Allen Holdings, Inc., 9 OCAHO no. 1059 (2000), 2000 WL 33113959, I observed that OCAHO case law had not yet elucidated the specific requirements of the "certification of good faith conferment" provision found in the OCAHO Rules of Practice and Procedure at 28 C.F.R. § 68.23(b)(4). Id. at 7. For persuasive guidance, I looked to federal district court case law delineating the scope of the analogous certification requirement of Federal Rule of Civil Procedure 37(a)(2)(B). Id. Finding this district court case law useful, but not authoritative, I explained that "'good faith conferment' contemplates an honest and civil exchange of views, an absolute rejection of deceptive or fraudulent practices, and above all an authentic desire to obtain discoverable information without court involvement." Id. at 8. The issue is whether Complainant satisfied this standard prior to filing the Motion to Compel Discovery in the present case. I find that Complainant did not.

In Allen Holdings, Respondent asserted that Complainant had failed to comply with the "good faith conferment requirement" found at 28 C.F.R. § 68.23(b)(4), but in that case I rejected Respondent's contention. The facts in Allen Holdings, however, were very different from the instant case. In Allen Holdings, counsel for Complainant not only sent a letter to Respondent's counsel, but she made several telephone calls and had a 90-minute personal conference with Respondent's attorneys. Moreover, when the parties failed to resolve all the disputed issues, Complainant's counsel sought another meeting with Respondent's counsel. When Respondent's counsel failed to respond to the request for another meeting, only then did Complainant file the motion to compel. When it did file the motion to compel in Allen Holdings, Complainant filed a six page "Certificate of Conference" detailing all the steps it had taken attempting to resolve the discovery dispute without judicial intervention. Thus, in Allen Holdings, the movant provided the Court with (1) a detailed description of the multiple steps taken to avoid judicial intervention and (2) specific detail of what was actually discussed. With this information, I was able to determine the adequacy and sincerity of Complainant's attempts at good faith conferment. Id. at 7.

The decisions of the district courts in the Ninth Circuit also are instructive. In Shuffle Master, Inc. v. Progressive Games, Inc.,170 F.R.D. 166 (D. Nev. 1996), the district court denied a motion to compel where counsel for the movant failed to provide a detailed certification of conference and failed to confer in person with opposing counsel. In Shuffle Master, the court found that a motion to compel would be "facially valid" under Federal Rule of Civil Procedure 37(a)(2)(B) only if it satisfied two conditions. First, the motion must contain an actual certification document that adequately sets forth "essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties." Id. at 171. Second, the court determined that the movant must show actual "performance" of its good faith conferment obligations. Id. According to the court, the "conferment" requirement would be satisfied only if the parties engaged in, or attempted to engage in, an actual two-way communication, either in person or by telephone, in which "both parties presented the merits of their respective positions and meaningfully assessed the relative strengths of each." Id. at 172. Moreover, the court concluded that to act in "good faith," the parties had to manifest "honesty [of] purpose to meaningfully discuss the discovery dispute, freedom from intention to defraud or abuse the discovery process, and faithfulness to one's obligation to secure information without court action." Id. at 171. Only when the movant persuades the court that "informal negotiations reached an impasse on a substantive issue in dispute," would the court deign to intervene in a discovery dispute. Id. at 172.

While I find Shuffle Master to provide a useful framework, I do not agree with its inflexible conclusion that the conferment requirement can be satisfied *only* if the parties engaged in, or attempted to

engage in, actual two-way communication in person or by telephone. Certainly, neither Rule 37 of the Federal Rules of Civil procedure nor 28 C.F.R. § 68.23 explicitly require that the parties confer in person or by telephone. I recognize that in certain limited cases a written exchange might be adequate to satisfy the conferment requirement, but that such cases are probably the exception rather than the rule. One such exception might be where one party clearly manifests its refusal, either explicitly or implicitly, to participate in any attempts at conferment. Normally, however, I expect that a telephone or personal conference is appropriate.

Two other district court cases arising in the Ninth Circuit are similarly persuasive. In Van Westrienen v. Americontinental Collection Corp., 189 F.R.D. 440 (D. Or. 1999), the district court held that the plaintiff/movant failed to comply with its obligation to make a good faith effort to resolve the discovery dispute before filing a motion to compel. In Van Westrienen, the plaintiff considered the defendant's discovery responses unacceptable, and indicated its intention to file a motion to compel discovery. Id. at 441. In response, the defendant wrote plaintiff a letter indicating that "some issues potentially could be resolved prior to filing a motion to compel." Id. Instead of further conferring with the defendants, the plaintiff's response was to file a motion to compel discovery. The plaintiff's motion to compel was denied, and the court ordered the parties to meet and confer to resolve the dispute. Id. at 441-42. Similarly, in Soto v. City of Concord, 162 F.R.D. 603, 623 (N.D. Cal. 1995) the district court denied a motion to compel where counsel for the movant had attempted to satisfy the good-faith conferment requirement by sending a single letter to opposing counsel. There are decisions by federal district courts in other circuits that are in accord. See, e.g., Williams v. Board of County Comissioners, 192 F.R.D. 698 (D. Kan. 2000) (a reasonable effort to confer means more than mailing a letter to opposing counsel); Contacom v. Seaboard Corp., 189 F.R.D. 456 (D. Kan. 1999) (to satisfy the conference requirement, it is not enough to re-demand the discovery; the parties must discuss the objections and make genuine efforts to resolve the disputes).

Whether a movant has made a good faith effort to resolve the discovery dispute without court intervention depends on the facts of each case. Given the facts before me, I conclude that neither a "good faith conferment" or a good faith attempt to confer took place prior to the filing of the Motion to Compel Discovery. Applying Allen Holdings, and the district court case law, I find that one letter from Complainant to Respondent, and Complainant's failure to respond to a reply letter that announced Respondent's desire to discuss the discovery dispute, does not evidence an authentic desire to obtain discoverable information without court involvement. I note in particular that in the last paragraph of Respondent's January 23, 2002, letter Respondent's counsel asked why Complainant needed the additional information and what Complainant found incomplete in the boxes of documents provided to Complainant in November 2000. However, rather than construing that as an invitation for further discussion, Complainant apparently did not confer any further with Respondent. Instead, it waited for two months and then filed a motion to compel.

Unlike in Allen Holdings, the movant in this case has not demonstrated any efforts to verbally

discuss the discovery dispute with the other side. Whereas the movant in Allen Holdings conferenced with Respondent's attorney for 90 minutes and tried to set up another conference, the movant here does not indicate that any conferences have been held or even proposed. Moreover, Complainant failed to respond, either verbally or in writing, to Respondent's January 23, 2002, letter that invited further discussion. Complainant's efforts in this case do not even come close to the movant's efforts in Allen Holdings.

Complainant's "Certification of Attempt to Confer" also is deficient because it does not comply with my Order Governing Prehearing Procedures issued on February 28, 2002 (approximately one month before the Motion to Compel Discovery was filed). In that order, I stated that when filing a motion to compel, the movant's certification of good faith conferment "shall recite (a) the date, time, and place of the discovery conference, the names of all persons participating therein, and the matters discussed during the conference, or (b) a party's attempts to hold such a conference without success." Order Governing Prehearing Procedures at 5. As previously explained, Complainant's "Certification of Attempt to Confer" does not address either option, presumably because such activities never took place. I further note that in a prior case involving Complainant, I provided further guidance on what a certification of good faith conferment should include. In United States v. Swift & Company, OCAHO Case No. 01B00026, I ordered that if the parties could not resolve their discovery dispute without judicial intervention, that the subsequent certification of good faith conferment regarding the discovery dispute should include "the date, time and duration of the conference, whether the conference was in person or by telephone, the names of the persons participating in the conference, the specific matters discussed during the conference, and what issues and discovery requests remain unresolved." Id., Second Prehearing Conference Report at 2 (August 7, 2001) (unpublished). Although this order was not published, Complainant is aware of the order since it is a party to this case.

I am not impressed with the adequacy or sincerity of Complainant's attempts at good faith conferment prior to filing the Motion to Compel Discovery. Neither the substance nor the procedure of the good faith conferment requirement has been met. Accordingly, I am holding Complainant's Motion to Compel Discovery in abeyance pending a personal face to face meeting between counsel for the parties in which a good faith conferment regarding these discovery disputes shall take place. While it is not my intention to require a face to face meeting in every case, the fact that counsel for both parties have business offices in Washington, D.C., mitigates in favor of a face to face meeting in this case. While I am only ordering one such meeting, I encourage the parties to engage in further meetings or telephone conferences if they appear to be fruitful. As a caveat, I would note that I do not expect the parties to continue to confer if they reach a genuine impasse. However, I do expect a good faith effort by both parties.

Complainant's counsel bears the burden of attempting to arrange the initial meeting, but I expect Respondent's counsel to be receptive and cooperative in setting up such a meeting. I reiterate that I expect both counsel will work in good faith to insure that there is an honest and civil exchange of views regarding the discovery dispute in a conscientious attempt to secure information without judicial action.

Not later than May 3, 2002, the parties are ordered to file a "Joint Certification of Good Faith Conferment" (Joint Certification) regarding their efforts to resolve the discovery dispute without judicial intervention. In lieu of filing the Joint Certification, if the discovery dispute has been resolved in its entirety, Complainant shall file a pleading withdrawing the motion to compel. Assuming that the dispute has not been entirely resolved, the parties shall include in the Joint Certification the date, time, and duration of the conference(s), the names of the persons participating in the conference, the specific discovery requests discussed during the conference, and what issues and discovery requests remain unresolved.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE