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

IN RE INVESTIGATION OF	)
	) OCAHO Subpoena Nos.
NORFOLK PUBLIC SCHOOLS	) 94-2-00015
	)

ORDER GRANTING IN PART AND DENYING IN PART PETITIONS TO MODIFY SUBPOENA

(March 31, 1994)

MARVIN H. MORSE, Administrative Law Judge

I. *Procedural Background*

On March 11, 1994, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC), on a format provided by the Office of the Chief Administrative Hearing Officer (OCAHO), filed a request for issuance of a subpoena "In Re Investigation of Norfolk Public Schools" (NPS). 8 U.S.C. §1324b(f)(2). The subpoena was addressed to Daniel R. Hagemeister, Deputy City Attorney, Norfolk, Virginia. An attachment to the subpoena, captioned "Information and Document Request" (Request), specified documents which NPS was directed to provide by mail to OSC.

On March 11, 1994, I issued the subpoena as requested. On March 25, 1994, Norfolk filed a letter-pleading which argues on behalf of and transmits two Petitions to Modify Subpoena, one on behalf of NPS, the second on behalf of a named individual, Arline Thornton (Thornton).

Norfolk objects that the subpoena is overbroad in that at Request #1 OSC demands a detailed statement explaining NPS' position regarding the allegations contained in the charge of Mrs. Bongiorno-Johnson (Johnson), as described in a letter referenced in the subpoena. Attaching to its petition the referenced letter from OSC to NPS, dated March 1, 1994, NPS contends that the excerpted "descriptive language

of the charge" is "inadequate and insufficient and hinders the petitioner in its effort to prepare a proper response." The charge as excerpted recites that on January 31, 1994, Johnson was unlawfully denied employment because of document abuse, i.e, she alleges that NPS requested to see a stamped U.S. passport as proof of employment eligibility.

In context of not having seen the entire Johnson charging document, NPS claims that Request #2, which asks for personal data about the individual hired in lieu of Johnson (presumably, Thornton), including at Request #2(b) a statement of the reasons for that hiring decision, is irrelevant and "suggests that the Office of Special Counsel is actually investigating a change (sic) much broader than what is disclosed in the letter of March 1."

Continuing the same theme, NPS objects also to Request #3 which seeks "**all** documents supporting or relating to your written response." Lastly, NPS objects to the demand of Request #6(b) that it provide all Immigration and Naturalization Service Forms I-9 from and after September 1, 1993, as unreasonable and beyond OSC power.

The Thornton petition addresses only Request #2(a). Thornton wants to avoid production to OSC of the submissions she filed with NPS in support of her application for employment. She contends that they are irrelevant to an investigation into Johnson's allegations about which she knows nothing, and that compelled production would violate her constitutional right to privacy.

On March 30, 1994, OSC filed a Memorandum in Opposition which emphasizes its statutory duty to investigate charges of unfair immigration-related employment practices, 8 U.S.C. §§1324b(c)(2) and 1324b(d)(1), in effectuation of which OSC is entitled to "reasonable access to examine evidence of any person or entity being investigated." 8 U.S.C. §1324b(f)(2). OSC notes also that administrative law judges "by subpoena may compel the attendance of witnesses and the production of evidence at any designated place or hearing." Id.

Citing Supreme Court and other federal cases, OSC contends that the measure of relevance in administrative subpoena enforcement actions is broad. OSC argues that the NPS subpoena practice and procedure satisfies all the requirements of process that are due. OSC asserts that the notice provided to NPS in the March 1, 1994 excerpt from the charge provides sufficient notice. OSC states that it has informally provided NPS with additional information which identifies who, where

and when NPS employees allegedly committed the prohibited conduct on which the investigation turns. OSC relies also on In re Florida Rural Legal Services v. Imakolee Agricultural Workers, 3 OCAHO 437 (6/15/92) at 10-12 where, as here, the excerpt from charge was held sufficient notice to defeat. Finally, OSC recites that its policy is not to make public the text of a charge unless and until a complaint is filed.

II. *Discussion*

Except as provided below, the petitions are overruled. OSC has the better part of the argument with respect to validity, relevance of data requested and scope of the subpoena. See, generally, In re Valley Crest Tree Company, Inc., 3 OCAHO 579 (11/26/93); In re Seafarers International Union, 3 OCAHO 498 (3/19/93). Upon receipt of the March 1, 1994 letter, NPS was reasonably on notice of all it needed to know to respond rationally to the subpoena. The very specificity of the OSC inquiries insulates them from NPS' blunderbuss attack, e.g., to describe the position for which Johnson applied, and whether she was qualified for selection.

I cannot agree with NPS that "it is unreasonable for OSC to seek documents in support of a written response where the Special Counsel's withholding of document (sic) effectively thwarts Norfolk's preparation of a response." As I have held in response to a similar challenge,

> Henson asserts a claim of right to a copy of the charge which initiated the investigation, conceding that OSC did provide a "paraphrased synopsis." I am unaware of any predicate for Henson's claim to a constitutional "requirement" that it be afforded the charging document.

In re Henson Aviation, Inc., 3 OCAHO 488 (2/18/93).

I adopt here the suggestion in Henson that "[A]s a matter of comity, however, OSC should consider providing a redacted copy [of the OSC charge] which obliterates that textual matter which OSC determines should be kept confidential. Id.

I reject also the suggestion by NPS that something sinister is afoot. Although I detect no sign of such intent in the inquiries at hand, OSC has authority on its own initiative to expand its investigation into Johnson's allegations. See 8 U.S.C. §1324b(d)(1). Its inquiry into I-9 practices for the period September 1, 1993 to March 1, 1994 is relevant.

Specifically, OSC is authorized to investigate NPS practices with respect to hiring decisions which may have resulted in an unlawful

failure to consider Johnson's application for employment, as for example because she could not or would not accede to the demand to produce a passport. In that context it is appropriate for OSC to inquire into the selection process by which another candidate was selected, and to compare the credentials of the competitor selected. See U.S. v. Mesa Airlines, 1 OCAHO 74 (7/24/89), Mesa Airlines v. United States, appeal dismissed, 951 F.2d 1186 (10th Cir. 1991).

I am sensitive to the privacy concerns implicit in the Thornton petition, but dubious of her standing to intrude into a dispute between OSC and the employer to which she submitted materials in support of her employment application. It is obvious that NPS is in the public sector, no less than is OSC. Neither Thornton nor NPS has cited me to, nor am I aware of, any inhibition in law to amenability of NPS employee applicant files to the reach of another public institution's solemn process. Nevertheless, in an effort to avoid disgorging personal data not necessarily critical to OSC's investigation, NPS may satisfy the subpoena as to Request #1(a) with respect to Thornton as follows:

(a). NPS will identify with particularity each item within the scope and intendment of Request #2(a) that it does not otherwise provide to OSC, accompanied by a statement of the reason it withholds that document.

(b). In response to the procedure at (a), OSC may make a written request for a particular document, to which NPS must accede, but may identify to OSC those portions it proposes be redacted, proposals which I will expect OSC reasonably to honor.

Except as provided above, all objections set out in the petitions to modify are denied.

SO ORDERED. Dated and entered this 31st day of March, 1994

MARVIN H. MORSE
Administrative Law Judge