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April 16, 2015

**CHRO No. 1310478 - Commission on Human Rights and Opportunities, ex rel., Shanteema Pallet, Complainant v. Oral Care Dental Group II, LLC, Respondent**

**Ruling on Complainant's Motion for Order Denying Respondent's Motion to Quash Subpoena Issued by Complainant's Counsel or Alternatively, Motion for Referee to Issue Subpoena Duces Tecum, dated February 10, 2015; Commission's Motion for Referee Subpoena, dated February 10, 2015, and Respondent's Motion to Quash and/or Protective Order re: Deposition Subpoena, dated January 8, 2015**

The complainant seeks to obtain from a cellular telephone provider ("provider") the personal cell phone records of an employee of the respondent. That employee is alleged to have supervised the complainant and to have sexually harassed her. Specifically, the complainant seeks to obtain copies of text messages sent to her by the supervisor after failing to retain copies of the messages.

Complainant's counsel issued a subpoena, pursuant to the authority granted in section 51-85, to the provider, and the respondent, on January 8, 2015, filed with this tribunal a motion to quash the subpoena. (That subpoena has never been filed with the Office of Public Hearings ("OPH").) On January 20, 2015, the commission on human rights and opportunities ("commission") filed an objection to respondent's motion to quash.

After a status conference to discuss the issues raised in connection with the subpoena and the motion to quash, on January 20, 2015, the undersigned issued an order that authorized the complainant and the commission until February 10, 2015, "to file a request that is within the authority of this tribunal to act upon." The order stated that "[t]o the extent, that such a filing is made, the respondent has until March 3, 2015 to respond."

On February 10, 2015, the complainant filed a motion for order denying respondent's motion to quash subpoena or, in the alternative, a motion for the referee to issue a subpoena duces tecum. The same day, the commission filed a motion for referee subpoena. These motions, collectively, referenced sections 4-177b, 46a-54(9), 46a-57(d), and 46a-87(a), as well as Regulation 46a-54-83a, to support their arguments that a human rights referee has the legal authority to issue subpoenas in connection with its adjudication of contested case proceedings within its jurisdiction. The complainant's motion also raised issues regarding the duty of a respondent to preserve evidence once it has notice of a contested case proceeding and cites to various the Practice Book rules that govern the use of subpoenas in superior court cases to support its position.

On March 3, 2015, the respondent filed its response memorandum. The respondent directly addressed a number of the issues raised in the commission's and the complainant's respective

motions, and states that in requesting the undersigned to issue a subpoena, "both commission counsel and complainant ask the Referee to trust their judgment of what should be produced." (Reflecting respondent's assertion regarding trust, the undersigned notes that, although the complainant and commission ask this tribunal to issue a subpoena to the provider, there are no allegations that the supervisor sent any text messages, including those of an inappropriate nature, to the complainant in the affidavit of discriminatory conduct filed with the CHRO or the amended complaint filed with Office of Public Hearings. The undersigned has been asked to issue a subpoena based solely on the representations by complainant's counsel that text messages were sent to his client.)

Section 51-85 states, in pertinent part, that "[e]ach attorney-at-law admitted to practice within the state, while in good standing, shall be a commissioner of the Superior Court and, in such capacity, may, within the state, sign writs and subpoenas .... Each such attorney may also issue subpoenas to compel the attendance of witnesses and subpoenas duces tecum in administrative proceedings. If, in any administrative proceeding, any person disobeys such subpoena, or having appeared in obedience thereto, refuses to answer any proper or pertinent question or refuses to produce any books, papers or documents pursuant thereto, application may be made to the Superior Court or any judge thereof for an order compelling obedience." (Emphasis added.) This power was given to attorneys, in 1977, with the passage of PA 77-386, An Act Concerning the Issuance of Subpoenas in Administrative Hearings.

Section 51-85 authorizes an attorney to obtain evidence that he or she believes material and relevant based on information received from a client and any additional inquiry that the attorney conducts to establish its claims and/or defenses, but that may not be obtainable through the limited discovery mechanisms available under the section 4-177c of the Connecticut Uniform Administrative Procedures Act ("UAPA") and the regulations that govern a given administrative proceeding.<sup>1</sup> In fact, the subpoena in dispute in this case, was issued by complainant's counsel in accordance with this provision.

The UAPA was enacted by the Connecticut legislature, in 1971, with the passage of PA 71-854, An Act Concerning the Adoption of a Uniform Model State Administrative Procedures Act. PA 71-854 did not authorize a presiding officer to subpoena witnesses and require the production of records, physical evidence, papers and documents to any hearing. The legislature granted that authority to presiding officers in 1988, eleven years after attorneys received it. See section 15 of PA 88-317, An Act Concerning Amendments to the Uniform Administrative Procedures Act. (A review of the legislative history of PA 88-371, however, does not reveal what the legislature intended when it enacted this provision.)

Human rights referees are authorized, inter alia, to conduct hearings and settlement discussions on affidavits of discriminatory conduct that are sent to the OPH by the commission.

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<sup>1</sup> Section 4-177c(a) states, in pertinent part, that "[i]n a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes ...."

Sections 46a-57 and 46a-84.<sup>2</sup> These hearings are contested case proceedings, and are adjudicated, in accordance with the UAPA. Although sections 46a-57(d) and sections 46a-54(9) ostensibly authorize a human rights referee to “subpoena witness[es] and compel their attendance” at hearings, in fact, a human rights referee’s legal authority to issue a subpoena in a contested case proceeding is created by section 4-177b.<sup>3</sup>

Section 4-177b states,

In a contested case, the presiding officer may administer oaths, take testimony under oath relative to the case, subpoena witnesses and require the production of records, physical evidence, papers and documents to any hearing held in the case. If any person disobeys the subpoena or, having appeared, refuses to answer any question put to him or to produce any records, physical evidence, papers and documents requested by the presiding officer, the agency may apply to the superior court of the judicial district of Hartford or for the judicial district in which the person resides, or to any judge of that court if it is not in session, setting forth the disobedience to the subpoena of refusal to answer or produce, and the court or judge shall cite the person to appear before the court or judge to show cause why the records, physical evidence, papers and documents should not be produced or why a question put to him should not be answered. Nothing in this section shall be construed to limit the authority of the agency or any party as otherwise allowed by law.

Delineating the bounds of a human rights referee’s subpoena authority requires consideration of sections 4-176e and 4-189 of the UAPA. Section 4-176e states, in relevant part, that “[e]xcept as otherwise required by the general statutes, a hearing in an agency proceeding may be held before (1) one or more hearing officers, provided no individual who has personally carried out the function of an investigator in a contested case may serve as a hearing officer in that case ....” Section 4-189 of the UAPA states that “[a]ny provision in the general statutes that are inconsistent with the provisions of this chapter are repealed, provided nothing contained in this chapter shall be deemed to repeal provisions in the general statutes that provide for the confidentiality of records.”

Although the UAPA authorizes a referee to issue subpoenas, it does not allow a presiding officer to represent the interests of any party in a contested case. In a proceeding before a human

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<sup>2</sup> Human rights referees are also authorized to hear whistleblower retaliation claims filed directly with the Chief Human Rights Referee pursuant to section 4-61dd. Those proceedings are also governed by the UAPA.

<sup>3</sup> Section 46a-57(d) states, in pertinent part, “[w]hen serving as a presiding officer as provided in section 46a-84, each human rights referee ... shall have the same subpoena powers as are granted to commissioners by subdivision (9) of section 46a-54.” Today, subdivision (9) of section 46a-54 remains virtually identical to section 3 of the 1947 public act, number 171, that authorized the “inter-racial commission,” to, inter alia, “hold hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of persons under oath and require the production for examination of any books and papers relating to any matter under investigation or in question.”

rights referee, prior to the presentation of evidence, the referee only possesses the limited information about the case that is alleged in the affidavit of illegal discrimination (i.e., complaint) and any amendments thereto that had been filed with the commission for investigation, pursuant to section 46a-82, and that are subsequently sent to the OPH for a de novo contested case proceeding, in accordance with section 46a-84 (either after being (1) certified to OPH after a reasonable cause finding or (2) sent to OPH by the pursuant to the commission's early legal intervention process without a reasonable cause finding).

Section 4-176e precludes a presiding officer from conducting the type of investigation necessary to form a rational basis from which to craft and issue a subpoena on behalf of a party to an administrative proceeding. Given the subpoena authority granted to attorneys in administrative proceedings, and the section 4-176e prohibition against an individual acting as an investigator and presiding officer in the same contested case, the legislature could not have intended that a presiding officer subpoena authority require it to (1) conduct an inquiry to determine whether a party's request to the officer to issue a subpoena is appropriate under the circumstances of the case, (2) issue the subpoena on behalf of a party, and (3) thereafter, adjudicate the case.

I, therefore, deny both the commission's motion for referee subpoena, and the complainant's motion requesting that the undersigned issue a subpoena duces tecum on her behalf. Of course, the complainant and commission may exercise the rights provided under section 51-85. To the extent that the provider declines to comply with the subpoena issued by complainant's counsel, "application may be made to the Superior Court or any judge thereof for an order compelling obedience." Lastly, I decline to rule on the respondent's motion to quash the complainant's section 51-85 subpoena because it has not been established that there exists any legal authority for me to do so.

So ordered.

Dated this 16th day of April 2015.



Alvin R. Wilson, Jr.  
Presiding Human Rights Referee

c:

- Mariusz Kurzyna, Esq. – via email only
- David L. Gussak, Esq. – via email only
- Robin Kinstler-Fox, Esq. – via email only

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