United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. ALUMINUM SHAPES, LLC, Respondent.	OSHRC Docket Nos. 17-0646 & 17-1380

ORDER DENYING REPONDENT'S MOTION FOR SANCTIONS

Aluminum Shapes, LLC (Respondent) filed a Motion for Sanctions (Motion) on June 3, 2019, alleging that the Secretary of Labor (Secretary), by and through his counsel, attempted to contact current and former employees of Respondent it considers to be "represented persons" under Rule 4.2 (often referred to as the "no-contact" rule) of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules). Specifically, Respondent moves this court to impose sanctions on the Secretary pursuant to Rule 101 of the Occupational Safety and Health Review Commission Rules of Procedure (Commission Rules). 29 C.F.R. § 2200.101.[1] Resp't Mot. at 1. The Secretary timely filed his opposition to Respondent's Motion. Subsequently, Respondent filed a reply.

[1] Commission Rule 101, in pertinent part, provides:
Sanctions. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or the Judge, the party may be declared to be in default either on the initiative of the Commission or the Judge, after having been afforded an opportunity to show cause why the party should not be declared to be in default, or on the motion of a party. Subsequently, the Commission or the Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.
29 C.F.R. § 2200.101(a).

Notwithstanding Respondent's characterization of the alleged offense by the Secretary as an ethical violation, the undersigned finds the controversy here to be, principally, a discovery dispute. More importantly, neither party has "clean hands" in this dispute. So, for the reasons that follow, Respondent's Motion for Sanctions is DENIED.

Background

On May 29, 2019, Counsel for the Secretary sent a letter to current and former Aluminum Shapes employees. Resp't Mot. at 1. Counsel for the Secretary contends that he "sent a targeted mailing only to certain employees believed to be rank-and-file non-managerial employees." Sec'y Opp'n at 2. During a phone conference hosted by the undersigned to discuss Respondent's Motion, Counsel for Aluminum Shapes advised that Counsel for the Secretary also contacted a current employee of Respondent, by phone, and left a voicemail. According to Counsel for the Secretary, the attempted phone contact was made "on the well-grounded belief that he could not be a member of management because he had previously identified himself to OSHA as a union shop steward." *Id.* at 3. At the time of these events, this case was in litigation and a hearing was scheduled though it was suspended to allow the undersigned to consider lengthy, dispositive cross-motions filed by the parties.

Discussion

Discovery Dispute

By Order dated December 26, 2018, the undersigned granted the parties' Joint Motion to Extend Discovery Deadlines. The extension allowed for depositions of fact witnesses to continue into February 2019.[2] Beyond February 2019, only discovery regarding expert witnesses was allowed. No further discovery extensions were sought or granted. Yet, on or

[2] The original discovery schedule concluded all discovery involving fact witnesses in December 2018.

about May 29, 2019, Counsel for the Secretary engaged in further discovery of fact witnesses by sending a letter to current and former employees of Respondent inquiring about facts related to issues to be litigated in these cases. This was a violation of the court's Order.

Prior to sending the letter of inquiry that gave rise to this dispute, the Secretary propounded written discovery to Respondent in the form of interrogatories. Among the interrogatories submitted to Respondent, the Secretary asked the following:

> Identify all employees, including but not limited to supervisors and managers, who have worked for Aluminum Shapes at any time from January 1, 2015 through the present. For each employee identified, provide the following information:
>
> a. Name
> b. Address
> c. Telephone number(s)
> d. Job Title(s)
> e. Dates of employment (i.e. start and end dates)

Respondent provided the following "non-responsive" response to the interrogatory:

> Respondent objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving that objection, see all individuals identified in the Complainant's investigation material forming the basis for the citations, along with all individuals identified in the documentation produced by Respondent.

The Secretary contends that "[h]ad Respondent not refused to provide such a list, he would have been able to check Respondent's list against the Secretary's mailing list to confirm that no employees identified by Respondent as current managers or supervisors were inadvertently included on the mailing list." Sec'y Opp'n at 4. Respondent argues that the Secretary's interrogatory "does not determine who is represented by counsel." Resp't Reply at 10. I find that a response to the Secretary's interrogatory would have shed some light on which employees would be considered "represented persons" for purposes of the no-contact rule. In any case, Page 2, paragraph no. 4 of the undersigned's Notice of Hearing, Scheduling Order and Special

Notices (dated June 22, 2018) put the parties on notice that "boilerplate objections are prohibited." More specifically, the Order stated: Objections to interrogatories shall be stated with particularity. Boilerplate objections (e.g. objections without a basis, such as "overbroad, irrelevant, burdensome, not reasonably calculated to identify admissible evidence") and evasive answers, will be treated as a failure to answer pursuant to Fed. R. Civ. P. 37(a)(4). Therefore, Respondent's answer to the Secretary's interrogatory constitutes a violation of the court's Order. After receiving Respondent's "non-responsive" response, the Secretary did not seek a pre-motion conference with the court to get a resolution, nor did he file a motion to compel in accordance with paragraph 3 of the court's June 22, 2018 Order. Instead, the Secretary took matters into his own hands and proceeded with fact witness discovery beyond the set discovery deadline which gave rise to this dispute.

By their actions, both parties have violated an Order of this court and would be subject to sanctions under Rule 101 of the Commission Rules. Yet, Respondent comes now and petitions the undersigned to sanction the Secretary without acknowledgment of its own misconduct. The undersigned finds that neither party has clean hands in this dispute. However, sanctions are not the best way to resolve this matter.

Alleged Violation of ABA Model Rule 4.2

Rule 4.2 of the ABA Model Rules states:

"[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Annotated Model Rules of Professional Conduct (7th Ed.). Government attorneys are required to comply with the rules of ethical conduct of the court before which a particular case is pending. 28 C.F.R. § 77.4(a).

Rule 104 of the Occupational Safety and Health Review Commission Rules of Procedure states: [a]ll representatives appearing before the Commission and its Judges shall comply with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association. 29 C.F.R. § 2200.104.

Under the ABA Model Rules and rulings in jurisdictions that have adopted a version of the no-contact rule, "knowledge" that a person is represented for purposes of Rule 4.2 can generally be actual or constructive in that it may be "inferred from the circumstances."[3] *See, e.g. Jorgensen v. Taco Bell Corp.*, 58 Cal Rptr. 2d 178 (Ct. App. 1996) (rejecting argument that because lawyer for potential plaintiff in a suit against corporation knew corporation had in-house counsel, he should have known employee he interviewed was represented). Here, the Secretary

[3] Although not applied here, it is important to note that the State of New Jersey, where Respondent has its headquarters, has adopted its own version of the no-contact rule. The District of Columbia, where either party is permitted to file an appeal, has also adopted its own version of the no-contact rule. Both jurisdictions require the element of "knowledge", although, in New Jersey, "knowledge" can be actual or constructive.

Rule 4.2 of the New Jersey Disciplinary Rules of Professional Conduct states in relevant part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

Rule 4.2 of the District of Columbia Rules of Professional Conduct states in relevant part:

> (a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

asserts that he only sent letters to "certain employees believed to be rank-and-file non managerial employees." Sec'y Opp'n at 2. Additionally, the introductory letter sent by the Secretary to current and former employees of Respondent makes clear that the sender, Counsel for the Secretary, does not know if the recipient is a "represented person" or member of Respondent's "litigation control group." Sec'y Opp'n at Ex. A. Regarding the employee contacted by phone, the Secretary reasonably believed that he was a "rank and file non-managerial employee" based on his own representation of himself as a union shop steward. *Id*. at 3. In fact, the employee is listed as a shop steward on the current collective bargaining agreement with Teamsters Local 107. *Id*. at Ex. A, pg. 24. The circumstances surrounding the letters of inquiry and the phone call and voicemail left for one employee reveal that the Secretary had no knowledge, actual or constructive, that any of the employees he attempted to contact were "represented" pursuant to Rule 4.2 Indeed, the wording of the Secretary's letter indicates that his counsel does not want to speak to employees who could be considered "represented" under Rule 4.2. The letter states "[i]f you are currently employed at Aluminum Shapes, please disregard this letter as the Department of Labor is not seeking to communicate with you." Resp't Mot. for Sanctions at Ex. A, pg. 2. The letter goes on to state, "[i]f you are a former manager or supervisor no longer employed by Aluminum Shapes, you may contact us if you choose to disavow representation by Aluminum Shapes' attorneys in this matter." *Id.*

According to Black's Law Dictionary (Garner, 2009), the spirit of the law represents its "general meaning or purpose, as opposed to its literal content," namely, the intention of the law. The purpose of this rule is to: (1) protect a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the same matter; and (2) prevent interference with the client-lawyer relationship; and (3) prevent

uncounseled disclosure of information related to such representation. Annotated Model Rules of Professional Conduct, Comment 1 (7th Ed.). The facts here do not indicate that the Secretary was in any way attempting to interfere with the attorney-client relationship between Respondent and its current/former employees. Nor do the facts show that the Secretary's counsel was attempting to seek discovery of information that is otherwise protected from disclosure.

The Commission has held that *ex parte* communications between opposing counsel and an organization's employee are prohibited only if the employee is a person: "[1] who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or [2] whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." *Lanzo Constr. Co., Inc.,* 20 BNA OSHC 1641 (No. 97-1821, 2004). Respondent relies heavily on the *Lanzo* decision in making its argument that the Secretary violated Rule 4.2 and should be sanctioned. Resp't Reply at 3-4. In *Lanzo*, the Commission was confronted with contacts between the Secretary's attorney and an employee of Respondent as well as contacts between the OSHA compliance officer and the same employee all after the notice of contest was filed and without the consent and prior knowledge of Lanzo's attorney. *Lanzo* at 1642-43. In reaching its decision, the Commission relied on the revised version of the ABA Model Rules, which stated:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization [1] who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or [2] whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rules of Professional Conduct, Rule 4.2, Comment 7 (2002).

The Commission held that the Secretary's contacts with Lanzo's employee were not prohibited under the first prong of comment 7 to Rule 4.2 because the employee had no managerial

responsibility and there was no evidence to indicate the employee regularly consulted with Lanzo's attorney regarding the matter or had the authority to obligate Lanzo in the matter. 20 BNA OSHC at 1645. Regarding the second prong of comment 7, the Commission did not make a finding that the contacted employee's act or omission in connection with the matter could have been imputed to the organization for purposes of civil or criminal liability, but rather concluded that the judge did not actually impute the employee's act to Lanzo for the purpose of civil liability under the Act and therefore the second prong was not violated. *Id.*

Courts across the country are divided on the application of Rule 4.2—particularly as it relates to informal discovery. For example, one court rejected a party's argument for application of the no-contact rules to its current employees on the grounds that such broad interpretation would transform the rule from one of ethics to "a rule of political and economic power that shelters organizations" from the legitimate and less costly pursuit of factual information through informal discovery. *See Weider Sports Equip. v. Fitness First, Inc.*, 912 F. Supp. 502, 508 (D. Utah 1996). In *Lang v Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995), the court utilized parts of various tests used by other courts but ultimately applied a balancing test that weighed "the Plaintiff's need for informal discovery and Defendant's need for effective legal counsel" to decide which current and former employees were subject to the no-contact rule. 888 F. Supp. at 1145.

In this case, Respondent argues that all employees, including rank-and-file employees, whose acts or omissions in connection with the pending action may be imputed to Aluminum Shapes, are protected from *ex parte* communication. Resp't Reply at 3. By this interpretation, the Secretary would not be able to communicate with any employee of an employer without authorization from the employer's counsel. Such an application of Rule 4.2 is unreasonable

because it is impossible to determine which employees are "represented persons" without a threshold inquiry by the Secretary in the absence of prior designation by Respondent's Counsel. In *Lanzo*, the Commission declined to interpret Rule 4.2 so broadly.[4] 20 BNA OSHC at 1645-46. The undersigned rejects Respondent's broad application of Rule 4.2 to prevent all current and former employees from being contacted without its approval. For the aforementioned reasons, I find that the Secretary's May 29th inquiry was untimely. However, in this instance, it did not run afoul of Commission Rule 104 because it did not violate the letter or the spirit of Rule 4.2 of the ABA Model Rules. 29 C.F.R. §2200.104.

ORDER

Respondent's Motion for Sanctions is DENIED and the parties are hereby ORDERED to do the following:

1. The Secretary shall provide a copy of the list of Aluminum Shapes employees (current and former) to whom a copy of the letter of inquiry was sent save the name(s) of employee(s) that would vitiate the informant's privilege.
2. After receiving the Secretary's list, Respondent shall provide the names of those employees to whom the letter of inquiry was sent who meet the definition of "represented persons" under ABA Model Rule 4.2.
3. Thereafter, the parties shall meet and confer to resolve any issues regarding the status of an employee on the Secretary's list.
4. The Secretary may not engage in further fact witness discovery without leave of the court.

[4] Even if the "litigation control group" test used by the State of New Jersey was applied, it would be unclear which of the employees were members of the group without a threshold inquiry. *See Michaels v. Woodland*, 988 F. Supp. 468, 473-74 (D.N.J. 1997) (allowing plaintiff's counsel to contact current and former nurses employed by defendant in medical malpractice action because none of the employees were members of the litigation control group and none had consented to legal representation by defense counsel).

SO ORDERED.

/s/Keith E. Bell
Hon. Keith E. Bell
Judge, OSHRC

Dated: September 9, 2019
Washington, D.C.