

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

BRENDA BAILLARGEON :
 :
 v. : C.A. No. 07-271S
 :
 DRUG ENFORCEMENT :
 ADMINISTRATION :

MEMORANDUM AND ORDER

Pending before the Court for determination (28 U.S.C. § 636(b)(1)(A); LR Cv 72(a)) is Defendant DEA’s Motion for a Protective Order precluding and/or limiting the testimony of DEA officials, Susan Ashcraft, Thomas Pasquarello and Tom Nuse.¹ (Document No. 67). Plaintiff objects. (Document No. 70). A hearing was held on September 14, 2010. The parties each filed a supplemental memorandum of law following the hearing. (Document Nos. 81 and 83). For the following reasons, Defendant’s Motion for a Protective Order is GRANTED in part and DENIED in part.

Background

This case started out as a seven-count Complaint alleging that the DEA and its employees and agents violated the Constitution and other federal and state laws when the revocation of Plaintiff’s “security” clearance by the DEA allegedly resulted in the loss of her job as an Asset Forfeiture Specialist with Forfeiture Support Associates (“FSA”), a private Government contractor engaged by the DEA. The revocation apparently came on the heels of a time and attendance

¹ The parties have agreed to depose Mr. Nuse telephonically and have agreed to the scope of his examination. In addition, Plaintiff has withdrawn her request to depose Mr. Pasquarello. Thus, the DEA’s requests for a protective order as to Mr. Pasquarello and Mr. Nuse are moot.

investigation by the DEA. Following two rulings by Judge Smith on Rule 12 dispositive motions filed by Defendants, Plaintiff's case has been narrowed down to a single claim against the DEA. See Baillargeon v. DEA, 638 F. Supp. 2d 235 (D.R.I. 2009) and Baillargeon v. DEA, No. 07-271S, 2010 WL 1490839 (D.R.I. April 12, 2010). In particular, the sole remaining count is a claim for injunctive relief only as to the DEA for the alleged violation of Plaintiff's right to procedural due process in depriving her of the right to follow her chosen profession. See Baillargeon, 638 F. Supp. 2d at 244.

Discussion

In this Motion, the DEA argues that the deposition of Ashcraft is precluded by the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701, et seq., because an administrative record pertaining to the time and attendance investigation already exists. The DEA filed a redacted "administrative record" of such investigation on September 22, 2010 accompanied by a privilege and redaction log. Alternatively, the DEA argues that, should the Court require the deposition of Ashcraft, it should be limited in scope and conducted at her "principal place of business" in Arlington, Virginia.

Under Fed. R. Civ. P. 26(c), the Court may, for "good cause" shown by the moving party, make any order which justice requires "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." This includes an order, as requested by Defendant in this case, "forbidding" the discovery or "inquiry into certain matters." See Fed. R. Civ. P. 26(c)(1). A party moving for a protective order under Fed. R. Civ. P. 26(c) must set forth "particular" facts to establish "good cause" for the order. Anderson v. Cryovac, Inc., 805 F.2d 1, 7-8 (1st Cir. 1986). "Prohibiting the taking of depositions is an extraordinary measure" requiring the moving party to meet a "heavy burden" of showing justifying circumstances. Prozina Shipping Co., Ltd. v. Thirty-

Four Automobiles, 179 F.R.D. 41, 48 (D. Mass. 1998). Such requests are “rarely granted.” Bucher v. Richardson Hosp. Auth., 160 F.R.D. 88, 92 (N.D. Tex. 1994); see also Jennings v. Family Mgmt., 201 F.R.D. 272, 275 (D.D.C. 2001).

“The APA provides for judicial review of the final actions taken by federal agencies.” Baillargeon v. DEA, 638 F. Supp. 2d 235, 242 (D.R.I. 2009). This includes “claims that an agency has violated the United States Constitution.” Id. (citing 5 U.S.C. § 706(2)(B)). The DEA accurately points out that the scope of review in an APA action is “generally limited to the administrative record compiled by the agency.” See, e.g., Cousins v. Dole, 674 F. Supp. 360, 363 (D.Me. 1987). In other words, the Court reviews the legality of agency action “based solely on the record before the agency at the time it made its decision.” Apex Constr. Co., Inc. v. United States, 719 F. Supp. 1144, 1147 (D. Mass. 1989).

Here, Plaintiff described her only remaining claim (Count I) as “address[ing] the basic constitutional principles of notice and opportunity to be heard.” (Document No. 26 at pp. 1-2). The DEA also focuses, in this Motion, on the fact that Plaintiff is mounting a procedural, and not a substantive, challenge.² However, at the same time, the DEA seeks to confine discovery to an “administrative record” developed in the context of the substantive decision to revoke Plaintiff’s security clearance.

The administrative record consists primarily of the anonymous complaint regarding Plaintiff, documents initiating the investigation, a memorandum summarizing the investigatory interviews conducted (including Plaintiff’s interview), Plaintiff’s 2004 time sheets, a summary analysis of those

² In opposing Defendants’ Motion to Dismiss, Plaintiff previously made clear to the Court that she is “challenging the procedures in connection with the revocation of her security clearance, not the substantive decision” and that the determination to revoke “is of no consequence to [her] claims.” (Document No. 26 at pp. 5, 13).

time sheets, a summary of Plaintiff's in/out swipes on the building security system where she worked, some post-interview correspondence from Plaintiff about her work schedule, and documentation of the final decision and closure of the investigation. While some of those documents are relevant to the process afforded Plaintiff, most are not, and the "administrative record" as a whole offers only limited insight into the issue of procedural due process. Thus, under the circumstances of this case, it does not make sense to limit discovery to the investigation documents produced by the DEA as the "administrative record" and preclude Plaintiff from taking Ms. Ashcraft's deposition.

Having rejected the DEA's request to preclude Ms. Ashcraft's deposition, the Court now turns to the issues of scope and location of such deposition. Pursuant to 28 C.F.R. § 16.23(c), Plaintiff provided to Defendant the following summary of the testimony sought from Ms. Ashcraft:

1. The basis for the revocation of Plaintiff's security clearance, including, but not limited to purported time and attendance issues;
2. Defendant's investigation of Plaintiff's purported time and attendance issues;
3. Defendant's procedures for similar investigations;
4. Defendant's notice to Plaintiff of the charges against Plaintiff;
5. Plaintiff's level of security clearance.

(Document No. 67-2 at p. 2).³ The DEA counters with the following as a proposed scope of inquiry:

- a. The basis for the revocation of Plaintiff's "security clearance;"

³ Plaintiff's summary as to Ms. Ashcraft is prefaced with the statement that "a summary of the testimony sought includes, but is not limited to" the listed topics and thus the proposed scope is technically not limited at all in subject matter.

- b. The process that Plaintiff received as to the time and attendance investigation and not the substance of the investigation;
- c. If there are any procedures that govern the investigation of contractor personnel for misconduct allegations;
- d. Defendant's notice to Plaintiff as to the time and attendance issues; and
- e. Whether Plaintiff had a security clearance and if so, whether she had a confidential, secret, or top secret security clearance.

(Document No. 67 at p. 13).

In view of the fact that Plaintiff's only remaining claim is one alleging a violation of her right to procedural due process and her previously articulated position that the substantive decision to revoke is of "no consequence" to that claim, the DEA's proposed scope of inquiry is more in line with the appropriate scope of discovery for such a claim under Fed. R. Civ. P. 26(b)(1). Accordingly, the deposition of Ms. Ashcraft is generally limited in scope to the DEA's proposed areas of inquiry as set forth above.

Finally, the parties dispute the location of the deposition. The DEA argues that Ms. Ashcraft should be deposed in Arlington, Virginia where she works. Plaintiff concedes that a defendant's employees are generally deposed at their principal place of business. However, she argues that a balancing of the relative equities call for the deposition to be conducted in Rhode Island. For instance, Plaintiff notes that the attorneys of record on both sides would have to travel from Rhode Island to Virginia and that she is presently unemployed and certainly less able than the DEA to incur travel expenses for the deposition. Alternatively, pursuant to Fed. R. Civ. P. 30(b)(4), Plaintiff argues that the deposition be conducted via telephone. Since the parties have already agreed to

conduct at least two depositions telephonically (including Mr. Nuse who also works in Arlington, Virginia), Plaintiff's alternative request for leave to conduct Ms. Ashcraft's deposition telephonically is reasonable and is granted pursuant to Fed. R. Civ. P. 30(b)(4).

Accordingly, for the foregoing reasons, Defendant's Motion for Protective Order (Document No. 67) is GRANTED in part and DENIED in part as provided herein.

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
October 5, 2010