BEFORE THE
DEPARTMENT OF SOCIAL SERVICES
STATE OF CALIFORNIA

In the Matter of the Accusation: Against: EARLEAN GOLSTON dba GOLSTON'S MANOR 4201 4th Avenue Sacramento, CA 95817 dba GOLSTON'S MANOR #2 3920 2ND Avenue Sacramento, CA 95817 JURYLEAN FLETCHER 4201 4TH Avenue Sacramento, CA 95817 Respondents.	)	Case No. 7096031001-A & C OAH Case No. N1997060462 **ORDER ON MOTION TO COMPEL DISCOVERY** 99 CDSS 12

Stephen J. Smith, Presiding Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 5, 1997.

Barbara O'Hearn, Senior Staff Counsel, and Jean Fletcher, Senior Staff Counsel represented the Department of Social Services, State of California.

Steven C. Bailey, Attorney at Law, represented all named respondents.

FINDINGS OF FACT

I

The Accusation in this matter was filed on May 29, 1997. A Request for Discovery pursuant to Government Code section 11507.6 was served upon respondents by the Department on the same date. A Notice of Defense was filed June 6, 1997. On a date not proved but shortly after the filing of the Notice of Defense, counsel for respondents filed a Request for Discovery with the Department. A First Amended Accusation was filed August 25, 1997. There is no pending issue regarding the filing of the First Amended Accusation.

II

Counsel for the Department sent counsel for respondents a Demand for Discovery dated July 15, 1997, pointing out that she had received no discovery from him despite her filing the Request for Discovery. She warned that his failure to produce discovery could result in her filing a Motion to Compel Discovery. She suggested the parties exchange witness lists in anticipation of an Order from the Office of Administrative Hearings to attend a Prehearing Conference on August 15, 1997.

III

The parties entered into a written Stipulation Regarding Prehearing Conference dated July 25, 1997. The stipulation sought to extend the deadlines set forth in the Office of Administrative Hearings' Order to attend the Prehearing Conference on August 15, 1997, and make certain filings and disclosures in advance of that date. The parties agreed in the Stipulation that on August 15, 1997, they "shall file with the Sacramento Office of administrative Hearings and serve on the other party" the name of each witness expected to be called at hearing with a brief statement of the expected content of the witness' expected testimony, to file and serve upon the other party by August 14, 1997 a list of all documentary exhibits the party expects to present at the hearing, a description of all physical and demonstrative evidence expected to be used, and to provide in discovery by August 14, 1997, any listed exhibits not produced already in discovery. Although the provision conflicts with an earlier provision in the Stipulation, the parties agreed to furnish each other a "preliminary witness list, including the name, address and phone number of any proposed witness, and identifying the witness (e.g. Licensing program analyst.)"

Respondents' counsel filed a Prehearing Conference Statement on August 5, 1997. This statement contained a short list of witnesses and brief descriptions of proposed testimony for each. Respondent disclosed Margaret Mason as a witness and described what her expected testimony might be, but offered no information at all regarding how this witness might be reached. Respondent disclosed a prospective witness, "Ann", a facility housekeeper, last name unknown. No information was provided regarding how this witness might be reached. The other three witnesses disclosed were the respondents or family members.

Respondents' Prehearing Conference Statement states, with regard to documentary evidence and discovery. "The respondent is currently searching for documents relevant to the case. As of (sic) the documents are secured they will be provided in discovery." No discovery was furnished with respondents' Prehearing Conference Statement.

Respondents' counsel furnished no discovery on August 14, 1997, as agreed in the July 25, 1997, Stipulation. No additional witness or exhibit disclosures were made on this date. The Department's counsel made at least two telephonic requests between August 5 and the August 15 Prehearing Conference to respondents' counsel requesting discovery and any additional witness or exhibit disclosures.

IV

The Prehearing Conference was held as scheduled on August 15, 1997, in anticipation of the commencement of the evidentiary hearing on September 8, 1997. Respondents' counsel furnished no discovery at the Prehearing Conference, nor did he disclose any additional witnesses or exhibits beyond those disclosed in his Prehearing Conference Statement. The Department's counsel objected to what she perceived as respondents' counsel's willful refusal to furnish discovery and fully disclose all potential witnesses and proposed exhibits. Judge Wagner, conducting the Prehearing Conference, ordered discovery to be produced and all witnesses and evidence proposed to be disclosed.

A discussion occurred regarding compliance dates for the discovery order and any supplementation of witness and exhibit lists. The Department's counsel pointed out that respondents' counsel's proposed compliance date of August 29, 1997, would be inadequate for her, because the holiday weekend followed and she would have little opportunity to read and evaluate any material disclosed since she was scheduled to be out-of-town on September 2, 1997. If discovery and supplements were provided August 29 or later, she would be unable to see the material until at least September 3, only three work days before the commencement of the trial. She pointed out that if the material was furnished to her on or before August 28, she would have one workday, August 29, the Friday before the holiday weekend, to evaluate the material and attempt to contact witnesses disclosed. She also pointed out that a continuance to evaluate any new disclosures would be extremely prejudicial from the Department's point of view, since the facility is still operating, and the Department considers the clients living in the facility to continue to be at risk, for the reasons set forth in the Accusation and First Amended Accusation.

Judge Wagner verbally ordered discovery and supplemental witness and exhibit lists, if any, to be furnished on or before the close of business of August 28, 1997. In the context of the discussions at the Prehearing Conference and this order, "furnished by the close of business" meant the material must be delivered and arrive at the recipient's place of business by the close of business August 28, 1997.

V

Judge John D. Wagner issued a Prehearing Conference Order on August 18, 1997. Item 2 of the Prehearing Conference Order states as follows, "All parties shall provide discovery pursuant to section 11507.6 of the Government Code on or before August 28, 1997. Witness names shall include their addresses and phone numbers where they can be reached, if known."

VI

On August 28, 1997, counsel for respondents mailed via first class mail an, "Updated Witness List and List of Documents", and approximately 10-15 pages of documentary discovery. The mailing arrived at the Department on September 2, 1997. The parties agree the discovery furnished contained nothing so significant as to materially change the posture of the

case. Counsel for respondents explained at the hearing on this motion that he chose first class mail because he felt it an "appropriate" means of delivery, and elected not to transmit the small amount of material by facsimile or ship by Federal Express because it, "was too cumbersome", but at a different point agreed that there were approximately ten pages of documents in addition to a two page supplemental witness and exhibit list to be transmitted.

The updated witness list provided by respondents' counsel contains a telephone number for witness Margaret Mason. "Ann" does not appear, but a new witness, Elisabeth Odom, is disclosed, with a telephone number. Another new witness, Mary Brocu, address and phone unknown, is disclosed as well. There is no description of who Elizabeth Odom or Mary Brocu might be or what their connection to the case is.

Counsel for respondents advised during the hearing on this motion that "Ann" and Elisabeth Odom are the same person, but acknowledged that a reader of his supplemental witness list would have no way of knowing that by examining the submissions he has made. Counsel was unable to identify who Ms. Brocu is, what her capacity or relationship to the case might be, or where she might be located during the hearing. He thought she might be a witness representing the Regional Center, but he could not confirm it.

Respondents' supplemental witness and exhibit list also discloses an intention to call as witnesses the custodians of the records for Terminix International and Protection One Alarm Services. Counsel advised during the hearing that after the Prehearing Conference, he called these companies to obtain documents regarding pest control work done and smoke alarm service done at respondents' facilities in response to charges in the Accusations. He received a computer print out from Alarm One that needs a custodian witness to interpret its entries for the trial Judges' benefit, and nothing from Terminix.

Counsel acknowledged during the hearing on this motion that to date, he has not served a subpoena duces tecum on either organization seeking either records or the attendance of the custodian. He promised to furnish any records obtained as soon as he receives them, but could not offer any information regarding when that might occur. It was clear that counsel intends to produce any documents and the custodians late in the hearing, and expects the Department's counsel to review and respond to anything produced at that time, or agree to a continuance in order to have an opportunity to review and evaluate any information produced.

Counsel for respondents represented during the hearing on this motion to produce that the Department now has copies of all discovery in his possession. He indicated he has asked his clients to search their records again, to see if they can find any more records or documents that might be relevant to the case, and that he would furnish copies to the Department if and when they located anything of relevance to the case. He represented that almost all of the discovery he has furnished has come from his clients' records. His appraisal is that the case is not document intensive from either side.

VII

The Department's counsel, in the process of interviewing a prospective witness, discovered that there had been an audit of the facilities beginning May 28, 1996, which ended with an exit interview on January 15, 1997. The Department's counsel discovered that an audit report had been prepared. She obtained a copy of the report with its back-up material, which apparently consists mainly of calculator tapes, and furnished it to counsel for respondent via Federal Express overnight mail on September 3, 1997, received September 4, 1997. It cannot be determined whether any respondent had received a copy of the audit report at the exit interview or at any other time, or any of the back-up material. It is believed, but no one present during the hearing is certain that, at least one respondent attended the exit interview, during which the audit findings were discussed.

VIII

The Department's counsel has requested in a declaration under penalty of perjury an Order that respondent's counsel pay the sum of $1,297.20 for attorney's fees and costs in the bringing of this motion and for her efforts to obtain discovery after it had been ordered in the Prehearing Conference Order. The declarations made under penalty of perjury submitted by the Department's counsel in support of her motion set forth detail concerning attorneys' fees and costs sought.

DETERMINATION OF ISSUES

I

Government Code section 11507.7 permits an aggrieved party contending its opponent has failed or refused to provide discovery to move to compel discovery before an Administrative Law Judge of the Office of Administrative Hearings. The moving party is to specify the discovery sought and shy it is discoverable.

Counsel for respondent has represented during this hearing on the Department's motion to compel discovery that he furnished all the discovery then in his possession to counsel for the Department in his August 28, 1997 mailing, which supplemented his witness disclosures in his August 5 Prehearing Conference Statement. It is apparent that counsel does not preclude and in fact anticipates the possibility of obtaining and attempting to produce additional witnesses and discoverable material on several fronts. He has solicited his clients to look for more records and documents. He is about to serve subpoenas duces tecum upon two business entities. He does not preclude the possibility of locating additional witnesses. It is this possibility that additional documents or witnesses might be discovered, or that documents or the identity of witnesses might be withheld and offered at the last minute that sparked the making of the motion to compel.

Under the circumstances set forth above, the motion is well taken and is granted.

II

The Department's motion seeks evidentiary and monetary sanctions for failure to abide by the terms of the August 15, 1997 Prehearing Conference Order, issued in writing on August 18, 1997, regarding additional witnesses, exhibits and discovery. The motion seeks to exclude all witnesses and documents disclosed in the August 28 mailed supplemental disclosure, to exclude inadequate or incomplete disclosures made at the Prehearing Conference, and to bar any later discovered witnesses or evidence.

Government Code section 11455 10(e) states, "A person is subject to the contempt sanction for any of the following in an adjudicative proceeding before an agency....(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer..."

Counsel for respondent has failed to comply with the portion of the Prehearing Conference Order regarding discovery and the disclosure of additional witnesses and exhibits without substantial justification. As set forth in the Findings, counsel was ordered to provide any supplement to his witness and documentary disclosures and any and all discovery on or before August 28, 1997. He failed to do so. The purpose for the selection of the August 28 compliance date was well known to respondents' counsel, to accommodate the Department's counsel's request to have one workday before the long holiday weekend to review and react to any disclosures. Counsel selected a means of delivery calculated both to create the impression of arguable compliance with the disclosure order and intended to insure that the disclosure would not be delivered to the Department's counsel until after the long holiday weekend. This superficial and attempted technical compliance with the Order designedly subverted its intention. Counsel dismissed as unimportant these failures because there is "no prejudice" to the Department in his disclosure of witnesses, exhibits and the furnishing of discovery at his own pace rather than in compliance with the order.

Counsel's explanations regarding why he declined to fax, overnight mail or have personally delivered the short distance to the Department the discovery and supplemental disclosures to the Department are manifestly unpersuasive. Counsel selected regular mail as the means for delivery without any reasonable expectation that the material would be in the Department's counsels' hands on or before August 28, 1997. He blamed the mail service for any delay in delivery. Under these circumstances, counsel failed to furnish discovery and the supplemental witness and exhibit list " on or before August 28, 1997".

Therefore, respondent's counsel violated, without substantial justification, a lawful order of the presiding officer, to wit, the Prehearing Conference Order, and failed, without substantial justification, to comply with a discovery request, to wit, the Department's discovery request, followed by the Stipulation and the Prehearing Conference Order, each failure constituting a contempt within the meaning of Government Code section 11455.10(e).

Counsel for respondent contends there has been no prejudice to the Department that the materials have been furnished "3 or 4 days late." He points out the discovery is minimal and not of any substantial significance upon the case. Even if there were some element of disadvantage to the Department, he contends a continuance is the appropriate remedy.

Counsel's contention reflects his exclusive point of view and appraisal of the case. It completely ignores and treats as unworthy of serious consideration the Department's perception of great prejudice engendered to its case if a continuance is granted as a result of counsel's failure to comply with the discovery request, his own Stipulation and the Prehearing Conference Order. Yet counsel's failures to comply with the Prehearing Conference Order and his entire "I'll do it when I get to it" approach to discovery in this matter make such a continuance likely if limitations are not imposed. To do otherwise places the Department into a dilemma of prejudice regardless of how it proceeds, for when late discovery or witnesses are produced, the Department must elect either the prejudice of a continuance, delaying the case to its prejudice, or going forward without an adequate opportunity to prepare and respond to late produced witnesses or evidence. If a continuance is the only appropriate remedy for a willful failure to make timely disclosure and compliance with a discovery request and a Prehearing Conference Order, and a contention of "no prejudice" lies because a continuance is always available to prepare and respond, the party perceiving a need to proceed to trial timely will invariably be faced with the extremely prejudicial dilemma described above. A remedy of a continuance would reward and endorse the behavior. Respondents' counsel's contentions are entirely lacking in merit.

The appropriate remedy for circumstances as those proved in this matter are a combination of evidentiary limitations and preclusions, and an award of costs, if later determined to be appropriate following a hearing upon the Department's declaration under penalty of perjury seeking attorney's fees and costs. The remedy is fashioned to fit the violations and provide appropriate relief to the aggrieved party.

ORDER

The Motion to Compel is GRANTED.

Respondents' production of documents and supplemental witness and exhibit list is untimely and violated the oral Prehearing Conference Order of August 15, 1997 and the written Prehearing Conference Order of August 19, 1997.

1. No documents or exhibits produced or disclosed by respondent by mail on August 28, 1997 may be offered in evidence or to explain, supplement or refresh recollection or otherwise be used in conjunction with any witness' testimony absent a stipulation by the Department.

2. Witnesses Elizabeth Odom, aka "Ann" and Mary Brocu are excluded as untimely and/or incompletely and inadequately disclosed. These witnesses may not be called by respondent.

3. Terauchi Golston is excluded as a witness in this matter, unless respondents show cause satisfactory to the trial judge that there has been provided to the Department an adequate opportunity to contact this person and take a statement, if the person consents to be interviewed. Such cause does not now exist, in that respondents disclosed the witness' name, but have never disclosed a telephone number or an address where the witness might be contacted, and did not disclose that the witness could be contacted through one or more of the respondents. Absent such showing of good cause by respondents why respondents have failed or refused to provide a contact telephone number or address, and have failed to disclose that Terauchi Golston may be contacted through respondents, which is not apparent from either of respondents' witness lists, Terauchi Golston is excluded.

4. Custodians of records from Terminix and Protection One Alarm Services, and any documents produced from either of these entities as a result of subpoenas duces tecum, as enumerated in respondents' August 28, 1997 witness and exhibit list, are excluded as untimely disclosed. Documents have not yet been subpoenaed, and absent a stipulation of the Department to the contrary, documents produced pursuant to these untimely served subpoenas will not be permitted to be offered in evidence or used in any manner in these proceedings.

5. Later discovered and produced documents, records and things from respondents' own records or files are excluded, absent a stipulation of the Department to the contrary, or a showing of compelling good cause why the document or record in question was not produced in a timely fashion. The mere assertion that the document or record was not located until now will not suffice to meet this standard of compelling good cause.

6. Respondents' witness Margaret Mason may testify.

7. No witness not disclosed to date, as limited by the foregoing, may testify, absent a stipulation of the parties or a showing of compelling good cause why the witness was not identified and disclosed earlier. Lack of time to prepare and identify witnesses, or failure to pursue identification of witnesses will not satisfy this standard. All witnesses and evidence not already identified and disclosed are prima facie excluded.

8. The issue of the extent the Department's audit report and supporting materials may be used in evidence by the Department is reserved for the trial judge. He or she may determine to what extent the documents were furnished timely, and to what extent, if any, one or more of the respondents have already seen them.

9. Respondent's counsel is ORDERED TO SHOW CAUSE pursuant to the authority of Title 1, California Code of Regulations section 1040 why attorney's fees and costs in the amount set forth in the Department's declaration under penalty of perjury should not be

awarded the Department. A hearing on this ORDER TO SHOW CAUSE will be scheduled at a time convenient to the parties and the Presiding Administrative Law Judge during the pendency of the trial on the merits.

BEFORE THE
DEPARTMENT OF SOCIAL SERVICES
STATE OF CALIFORNIA

In the Matter of the Accusation Against: EARLEAN GOLSTON dba GOLSTON'S MANOR Sacramento, CA 98517 dba GOLSTON'S MANOR #2 3920 2nd Avenue Sacramento, CA 95817 JURYLEAN FLETCHER 4201 4th Avenue Sacramento, CA 95817 Respondents.	)	Case No. 709631001-A-C OAH Case No. N-1997060462 ORDER ON MOTION TO COMPEL DISCOVERY (RECONSIDERATION) AND ATTORNEY'S FEES

Stephen J. Smith, Presiding Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 18, 1997.

Barbara O'Hearn, Senior Staff Counsel, represented the Department of Social Services, State of California.

Steven C. Bailey, Attorney at Law, represented all named respondents.

FINDINGS OF FACT

I

An Order deciding the Department of Social Services' motion to compel discovery was issued by the Presiding Administrative Law Judge on September 8, 1997. The Order granted the Department's motion, compelled discovery, found respondents' counsel in contempt for willful failures to respond to the Prehearing Conference and other orders, but reserved the issue of whether attorney's fees and costs should be awarded to the Department for its efforts in pursuit of discovery and for being required to bring the motion to compel.

Counsel for respondents filed a Motion for Reconsideration of the Order referenced above on September 15, 1997. The Department filed an opposition to the Motion for Reconsideration on September 17, 1997. The Department not only opposed any modification or reversal of the previously issued Order, it sought additional attorney's fees and costs for the expense of being required to respond to the motion. This hearing followed, on the record and in open court. The evidentiary hearing upon the Accusation is continuing and as of the date of the issuance

of this Order, is still not completed.

Additional witnesses and documents have been disclosed and offered by both parties during the evidentiary hearing and after the entry of the September 8, 1997, Order to Compel, which imposed limited evidentiary sanctions upon respondents for repeated violations of discovery and the Prehearing Conference Order. Respondents have attempted to offer two witnesses not disclosed until September 15, 1997, and more than 50 pages of documents obtained from respondents' files between September 10, 1997, and September 15, 1997, and first discovered to the Department's counsel just before this hearing on September 18, 1997. The Department has offered additional discovery as well. The admissibility of all additional witnesses and documents discovered and offered after the September 8, 1997, Order (hereafter "the Order") have been argued before and ruled upon by the Administrative Law Judge hearing the evidentiary hearing, on the record and in open court. Jurisdiction remains in him to admit or bar evidence and witnesses as he determines is just and appropriate under the circumstances and upon offers of proof.

Clarification of some of the language of the September 8, 1997, Order of the Presiding Administrative Law Judge was provided during the hearing of this Motion for Reconsideration, in order to assist the parties in ascertaining the intent of some provisions of the Order. For the sake of additional clarity, the clarifications are incorporated here, and the slight modifications to the previous Order made on the record on September 18, 1997, during the hearing of this motion are repeated in this Order.

II

The Order of September 8, 1997, is and was intended to be bilateral, applying to both parties. Attempts to introduce evidence or witnesses disclosed or discovered to the other party after the discovery cutoff set forth in the Prehearing Conference Order of Judge Wagner and the September 8, 1997, Order are subject to being barred absent offers of proof demonstrating compelling good cause why the evidence or witness was not disclosed or discovered in accordance with these Orders, unless the parties stipulate otherwise. "Compelling good cause" relates to due diligence, and means that the evidence or witness was not known or discovered by the party offering it at the time of the deadlines set forth in the previous Orders, and could not have been known at that time with the exercise of reasonable diligence. The Orders were never designed to bar evidence or witnesses discovered as the result of legitimate surprise or rebuttal of new matter offered during trial, but was designed to bar evidence produced late as the result of the failure of reasonable diligence and intentional "foot dragging," "sandbagging," or the employment of tactical delay. Evidence and witnesses produced well into the trial that could have and should have been produced in accordance with the previous Orders were to be barred unless the parties stipulate to have the evidence received, or the trial judge, in his discretion upon what he

determines to be a sufficient offer of proof, determines the interests of justice requires otherwise.

III

Respondents' counsel's failure to provide discovery in accordance with the Prehearing Conference Order and the stipulation modifying the Notice of Mandatory Prehearing and Settlement Conference was willful. The failures were employed for the purpose of tactical delay and to compel the Department to face the dilemma of either being required to respond to undisclosed evidence and witnesses produced late in its case or well into the defense case, without the opportunity to prepare, investigate and respond, or to seek a continuance in order to prepare and respond, an option counsel for respondents knew the Department considered extremely prejudicial to its case and thus unlikely to seek.

IV

Counsel for respondents contends the evidentiary sanctions imposed by the September 8, 1997, order are punitive and therefore inappropriate because the Department has not been prejudiced by his late discovery that he acknowledges violated the Prehearing Conference Order. He contends his clients will be seriously prejudiced if the order stands, because he will be unable to offer the two witnesses and several documents he has just produced that are relevant to the defense.

The contentions miss the mark. Counsel does not accept the Department's view of the seriousness of the case or its reluctance to accept delay in order to cope with counsel's approach to discovery and the disclosure of witnesses and evidence. The Department considers the case serious, and delay very prejudicial because respondents continue in operation, placing clients in what the Department considers harm's way, and that there is need for the expeditious adjudication of the charges. The contention ignores the fact that any evidence or witness may be called, even those not disclosed by deadline imposed by the Prehearing Conference Order, provided a persuasive offer of proof can be made to the administrative law judge hearing the case that the witness or evidence should be permitted despite a failure to timely disclose it and the Order's exclusionary provisions.

The Department took the Prehearing Conference Order seriously and made significant efforts to comply with it. Counsel for respondents did not, and now seek to avoid the limitations it imposed by brushing off as unimportant the Department's concerns of prejudice that would result from delay if a continuance is the only available remedy available to it to evaluate untimely produced witnesses and exhibits late into the trial, when there is no good reason why those witnesses and documents were not disclosed much earlier, when the previous orders required it, and when the Department did so.

Respondents' counsel's claim of prejudice if the order is enforced is entirely unsupported. He points to no defense or issue that would be lost absent the ability to call any witness or exhibit excluded by the Order, and does not identify how any piece of evidence or any particular witness that might be barred causes any meaningful hindrance or significantly harms respondents' defense presentation. Respondents' counsel's contentions of substantial prejudice are, at this point, entirely speculative.

V

Attorney's fees required to be spent by the two counsel for the Department working on this case were submitted in declaration form. The Department also sought additional attorney's fees for being required to respond to the Motion for Reconsideration, and for the costs of the administrative law judge to hear and decide the motions. Judicial notice is taken of the fact that the costs of administrative law judge services, at the rate of $135 per hour, are charged to the Department for the adjudication of all matters related to this case, including these motions. The Department's counsel made a presentation at the hearing that its attorney's fees are billed to the Department at the rate of $98 per hour, rather than the $93 per hour figure stated in the declarations.

Ten hours of attorney time is a reasonable amount of time for the pursuit of discovery and the making of the Motion to Compel, as well as the making of the written and oral response to the Motion for Reconsideration. The presiding administrative law judge's time to read, research, decide and write Orders to resolve these matters is approximately eight hours. Respondent's counsel shall share this cost with the Department.

DETERMINATION OF ISSUES

I

Counsel for respondents contends the Order of September 8, 1997, granting the motion to compel discovery and imposing evidentiary sanctions, is punitive and therefore impermissible. "Discovery sanctions cannot be imposed to punish the offending party or to bestow an unwarranted 'windfall' on the adversary." Deyo v. Kilbourne (1984) 155 Cal.App. 482, 489. Marriage of Economu (1990) 224 Cal.App. 3d 1466, 1475. "The power of the trial court to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious or whimsical action. There must be a failure to comply with a valid discovery order, and the failure must be willful." Marriage of Economu (1990) 224 Cal.App. 3d 1466, 1475, Do It Urself Moving and Storage, Inc. v. Brown, Leifer, Slatkin and Berne (1992) 7 Cal.App.4th 27, 36. "Discovery sanctions 'should be appropriate to the derelictions, and should not exceed that which is required to protect the interests of the party entitled to the discovery.'" Id. "Contrary to plaintiff's [respondents' counsel's] assertion, the trial court's evidentiary sanction was

attempting to tailor the sanction to the harm caused by the withheld discovery.'" Do It Urself Moving and Storage, Inc. v. Brown, Leifer, Slatkin and Berne (1992) 7 Cal.App.4th 27, 36, and citations.

The evidentiary sanctions imposed by the September 8, 1997, Order are neither punitive nor do they bestow an unwarranted windfall upon the Department. The sanctions do prevent abuse of the discovery process and bar respondents' counsel from taking advantage of intentionally dilatory tactics to force the Department to delay its case or have little opportunity to respond effectively to witnesses and evidence that are disclosed at counsel's tactical convenience and advantage, rather than in conformity with the previous orders regarding discovery.

At the time of the entry of the Order, respondents were able to call the several witnesses they had disclosed, as well as offer exhibits they had disclosed, as well as those offered by the Department relevant to their defense. There was and is no showing that respondents have been barred from presenting an effective defense to any particular allegation in the Accusation by the sanctions, nor even that they have been barred from addressing any issue. Counsel's contentions of prejudice are vague and do not demonstrate any specific preclusion to the defense as a result of any exclusion resulting from the Order. Evidentiary sanctions with a great deal more potential for prejudice to the sanctioned party were upheld in Johnson v. Pratt and Whitney Canada, Inc. (1994) 28 Cal.App.4th 613, at 626-627 (entire defense on liability precluded), or issue and evidence preclusions such as those in Economu and Do It Urself, both Supra.

Respondents' counsel's contention that the sanctions were punitive because the Department suffered no prejudice by his discovery and disclosure tactics has no merit. The Department "...did not have a burden of showing that they were prejudiced by plaintiff's [respondents' counsel's] conduct. As the moving parties, defendants [the Department] were only required to demonstrate plaintiffs' willful failure to comply with discovery." Do It Urself, supra, at p. 37. "Moreover, imposition of a lesser sanction would have permitted plaintiffs [respondents' counsel] to benefit from their stalling tactics." Id.

II

Title 1, California Code of Regulations section 1040 states, in pertinent part:

> "(a) The ALJ may order ... a party's representative ... to pay reasonable expenses, including attorney's fees, incurred by another party as a result of ... tactics ... solely intended to cause unnecessary delay.

> "(1) 'Actions or tactics' include, but are not limited to, ... the failure to comply with a discovery request ... or the failure to comply with a lawful order of the ALJ."

Respondents' counsel's failures to comply with the request for discovery, the stipulation pertaining to disclosure of witnesses and exhibits, and the Prehearing Conference order of Judge Wagner were willful and were for the purpose of causing unnecessary delay, as set forth in the Findings above and in those of the September 8, 1997 Order. Counsel is still attempting to offer witnesses and exhibits not disclosed until well after the service of the September 8 exclusion Order. Counsel's failures to comply were persistent, repeated and endeavored to provide a tactical leveling of a perceived advantage on the part of the Department in the prosecution of the case. As a result, the September 8, 1997, Order found respondents' counsel in contempt for failure to comply with the previous Orders.

Under the circumstances set forth here and in the September 8 Order, the aware of reasonable attorney's fees and shared costs of administrative law judge services is imminently reasonable and an appropriate remedy for the conduct set forth above. The relative nature of the pursuit of discovery and in the making and opposing of the motions, to wit, its ease or complexity, the relative blameworthiness of respondents' counsel's conduct (certainly far less than that sanctioned so severely in the Pratt and Whitney Canada case above), as well as the relative prejudice to the Department for the failures to comply have been all been weighed and considered in both imposing the evidentiary sanctions affirmed as modified here, as well as in the amount of attorney's fees awarded.

ORDER

The Order of September 8, 1997, granting the Motion to Compel and ordering evidentiary sanctions is AFFIRMED AS MODIFIED ABOVE.

Counsel for respondents, Steven C. Bailey, shall pay to the Department of Social Services the sum of $980 for attorney's fees and $540 for administrative law judge costs, within 15 days of the date this Order is signed. The costs and attorney's fees award shall be paid by counsel personally, and not by any or all of the respondents.