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

United States of America, Complainant v. Citizens Utilities Co., Inc., Telephone Division Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100211.

# DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND GRANTING COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION ON RESPONDENT'S THIRD AFFIRMATIVE DEFENSE

E. MILTON FROSBURG, Administrative Law Judge

Appearances: SCOTT M. JEFFERIES, Esquire, for Immigration and Naturalization Service

NATHAN R. NIEMUTH, Esquire

WILLIAM T. LYNAM, Esquire, for Respondent

## Procedural History and Statement of Relevant Facts

On March 28, 1989, the United States of America, Immigration and Naturalization Service, served a Notice of Intent to Fine on Citizens Utilities Company, Inc., Telephone Division. The Notice of Intent to Fine alleged twenty-one violations of Section 274A(a)(1)(B) of the Immigration and Nationality Act (the Act) for failure to properly complete Section 2 of the I-9 Form. In a letter dated March 29, 1989, Respondent, through its Human Resources Manager, John P. Rifakes, requested a hearing before an administrative law judge.

The United States of America, through its Attorney Scott M. Jefferies, filed a Complaint incorporating the allegations in the Notice of Intent to Fine against Respondent on April 27, 1989. On May 2, 1989, the Office of the Chief Administrative Hearing Officer issued a Notice of Hearing on Complaint Regarding Unlawful Employ-

ment, assigning me as the administrative law judge in the case and setting the hearing date and place for August 22, 1989, at Kingman, Arizona.

Respondent, through its representative Rifakes, answered the Complaint on May 9, 1989, specifically admitting or denying each allegation and setting forth two affirmative defenses. The first affirmative defense alleges that Respondent complied with Section 274A(a)(1)(B) of the Act by copying the documents presented by the applicants for purposes of complying with the verification requirements of the law. See, Section 274A(b)(4) of the Act. Respondent's second affirmative defense alleges Complainant's failure to comply with retention and inspection requirements. See, 8 C.F.R. 274a.2(b)(2)(ii).

On May 11, 1989, I issued an Order Directing Procedures for Prehearing, and on June 13, 1989, I issued an Order Directing Procedures for a Prehearing Telephonic Conference to be held on July 11, 1989. A second prehearing telephonic conference was ordered for July 25, 1989.

On July 12, 1989, Respondent submitted its Motion for Leave to File and First Amended Answer to Notice of Intent to Fine and Complaint. The amended answer contained a third affirmative defense related to the ``citation period'' of the Act. See, Section 274A(i)(2). On July 18, 1989, Complainant submitted its response in opposition to Respondent's Motion. On July 24, 1989, I issued an Order to Show Cause Why Complainant's Request in Opposition to Respondent's Motion for Leave to File an Amended Answer Should Not Be Granted.

Respondent's Reply to my Order to Show Cause was submitted by Attorney Nathan R. Niemuth on August 3, 1989, thereby changing Citizens Utilities from a pro se to a represented respondent. On August 10, 1989, William T. Lynam, Esquire, submitted a letter of appearance advising that he would also represent Respondent.

On August 14, 1989, I ordered the hearing date continued indefinitely. On August 18, 1989, I granted Respondent time to file facts supporting its third affirmative defense. On September 25, 1989, I accepted Respondent's Amended Answer. On September 26, 1989, a third prehearing telephonic conference was ordered for October 4, 1989.

On October 26, 1989, Complainant submitted its Motion for Partial Summary Decision with supporting documents, on the grounds that no genuine issue of material fact exists as to Respondent's third affirmative defense and that Complainant is entitled to a Partial Summary Decision as a matter of law. On October 30, 1989, Respondent submitted its Motion for Partial Summary Decision,

with supporting affidavit and memorandum, requesting a dismissal of eighteen of the alleged violations on the grounds that there is no genuine issue as to any material fact and Citizens is entitled to a partial summary decision as a matter of law.

Respondent submitted a Response in Opposition to Complainant's Motion for Partial Summary Decision on November 10, 1989.

There is no disagreement as to the fact that the I-9 Forms for eighteen of the twenty-one individuals named in Count I of the Complaint were completed during the 6-month public information period and the 12-month first citation period of the legislation. The issue to be resolved is whether a civil money penalty can be assessed for paperwork violations which occurred during the public information period or the citation period and which remained unknown to the INS until after those grace periods had ended.

Upon a full consideration of the pleadings, affidavits and exhibits submitted, I find that no genuine issue of any material fact exists and that the Complainant is entitled to partial summary decision as a matter of law.

Legal Standards for a Motion for Summary Decision

The federal regulations applicable to this proceeding, set out at 28 C.F.R. Section 68, authorize an administrative law judge to ``enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.'' See, 28 C.F.R. Section 68.36 (1988).

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). A material fact is one which controls the outcome of the litigation. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986).

When the issue to be decided in the case is an issue of law, summary judgment may also be granted. See, 10A Wright and Miller, Section 2725, at 79.

Legal Analysis Supporting Decision to Grant Motion

It is not disputed that the INS did not become aware of the Respondent's Violations of the employment verification provisions of the Act until the INS made its first inspection of Respondent's I-9

Forms on February 14, 1989, more than eight (8) months after the citation period ended.

The dispute centers on the interpretation to be given to Section 274A(i)(1) and (2) of the Act which reads, in pertinent part:

> (i) Effective Dates--
>
> (1) 6-Month Public Information Period.--During the six-month period beginning on the first day of the first month after the date of the enactment of this section--
>
> (A) the Attorney General, in cooperation with the Secretaries of Agriculture, Commerce, Health and Human Services, Labor, and the Treasury and the Administrator of the Small Business Administration, shall disseminate forms and information to employers, employment agencies, and organizations representing employees and provide for public education respecting the requirements of this section, and
>
> (B) the Attorney General shall not conduct any proceeding, nor issue any order, under this section on the basis of any violation alleged to have occurred during the period.
>
> (2) 12-Month First Citation Period.--In the case of a person or entity, in the first instance in which the Attorney General has reason to believe that the person or entity may have violated subsection (a) during the subsequent 12 month period, the Attorney General shall provide a citation to the person or entity indicating that such a violation or violations may have occurred and shall not conduct any proceeding, nor issue any order, under this section on the basis of such alleged violation or violations.

Respondent's interpretation of the statutory language is that no enforcement action may be taken at any time with respect to violations occurring during the information period, and that only a citation may be issued for first violations occurring during the citation period, regardless of when the violations are discovered by the INS.

In other words, Respondent believes that the sole question in determining whether the INS may do nothing, whether it may issue only a citation, or whether it may seek monetary penalties for an initial violation, is to ask when the violation occurred. On the contrary, the INS would ask only when the INS learned of the violation. To support its position, Respondent cites 8 C.F.R. Section 274a.9(c), an INS regulation, which states, in pertinent part:

> (c) Citation and notice of intent to fine. If after investigation the Service determines that a person or entity has violated section 274A of the Act for the first time during the citation period (June 1, 1987 through May 31, 1988) the Service shall issue a citation. If after investigation the Service determines that a person or entity has violated section 274A of the Act for the second time during the citation period or for the first time after May 31, 1988, the proceeding to assess administrative penalties under section 274A of the Act is commenced by the Service by issuing a Notice of Intent to Fine On Form I-763. . . .

Respondent claims this regulatory language supports its position because it provides that (1) only a citation is to be issued for first

violations occurring during the June 1, 1987 through May 31, 1988 citation period, and (2) it is only with respect to second violations occurring during that period, or first violations occurring after that period, that the INS may seek civil monetary penalties.

Respondent illustrates its argument by a comparison of two employers, both of whom commit the same paperwork violation during the citation period, but only one of whom receives a citation during that period. The employer receiving the citation is made aware of the nature of the deficiencies giving rise to the violation and has an opportunity to correct such deficiencies without being fined by the INS. The other employer, however, is subject to a fine the first time it is made aware of its deficiencies simply because the INS did not review the employer's records until after the expiration of the citation period. Respondent argues that Congress would not intend such an inequitable result.

Nonetheless, I am not entirely persuaded that the result is inequitable. Not every employer could have been visited by the INS during the citation period. Moreover, employers found to be in violation for a second time during the citation could have been, and were, penalized.

Additionally, Respondent cites legislative history which is applicable to the issue, but it fails to rule out a contrary interpretation of the statute:

> the citation ``is intended to serve as a personal notification to an offending employer as to the existence of a Federal prohibition of the employment of undocumented aliens, as well as a warning as to the penalties that will be applied in the event of further violations.''
>
> See, H.R. Rep. No. 682, 99th Cong., 2d Session, pt. 1, at 58, reprinted in 1986 U.S. Code Cong. and Admin. News 5649, 5662.

Nothing in the above quoted legislative history appears to be inconsistent with the position that the INS must know of the violation within the citation period in order for a citation to be issued. It merely describes the intent of the citation.

Complainant's position, on the other hand, is supported by prior Executive Office of Immigration Review decisions. Complainant's interpretation focuses on the date when the Attorney General (or his delegate, the INS) has reason to believe that a violation has occurred. Accordingly, Complainant bases its argument on the undisputed fact that the INS did not have reason to believe that Citizens had violated the employer sanctions provisions of IRCA until February 14, 1989, well after the close of the citation period.

The two contrasting interpretations of the statute and the regulations presented by Complainant and Respondent call for a determination by the administrative law judge. It is well accepted that

statutory or regulatory language which has been interpreted and consistently applied in previous cases within an agency should continue unless a change of course in policy is justified. This is so because an agency must not be arbitrary or capricious in its interpretation of statutes and regulations. See, e.g., National Audubon Society v. Hester, 627 F. Supp. 1419, reversed 791 F.2d 210, 253, U.S. App. D.C. 39, issued 801 F.2d 405, 255 U.S. App. D.C. 191. Lehigh Valley Farmers v. Block, 640 F. Supp. 1497, affirmed 829 F.2d 409.

Complainant's interpretation is supported by prior statutory interpretation in earlier IRCA cases and, although Respondent's argument is not without merit, I do not find that a change in course is sufficiently justified based upon Respondent's argument.

In support of Complainant's position that the legislation requires me to focus on when the INS learned of the violation, rather than when the violation occurred, it offers the case of U.S. v. New El Rey Sausage Company, Inc., IRCA Case No. 88100080, July 7, 1989, (Schneider, J.) in which an OCAHO ALJ found that the INS had a reasonable belief, before May 31, 1988, that the employer may have violated the employer sanctions provision of IRCA in regard to two paperwork violations and, therefore, was under a mandatory obligation to issue a citation. There was no question as to whether the paperwork violation in New El Rey occurred within the citation period, because it clearly did. The question asked by the ALJ was when the INS had knowledge of the violation, not when the violation occurred. The ALJ dismissed the paperwork violation charge made by the INS on July 1, 1988, on the basis that the INS was aware of, or had reason to believe a violation may have occurred, on April 1, 1988.

In support of Complainant's continuing violation argument, in which Complainant argues that the eighteen I-9 Forms initially prepared during the public information and citation periods were in violation not only at the time of preparation of the forms but also at the time they were discovered during the inspection by INS, Complainant offers the case of U.S. v. Big Bear Market, IRCA Case No. 88100038, March 30, 1989, (Morse, J.). In Big Bear, another OCAHO ALJ suggests that the obligation to comply with the paperwork verification requirements of the Act is a continuous obligation:

> ``In my judgment, it does not matter, whether within or after the citation period, how many times an employer is charged with a paperwork violation as to a particular individual. The obligation to comply being continuous, liability for noncompliance is continuous also. . . .''

See, Big Bear Market, supra, at page 19.

And finally, it appears that summary decisions made by OCAHO and non-OCAHO ALJ's were based upon the Complainant's interpretation of the statutory language. See e.g., U.S. v. Ralph Sanchez, Labor Contractor, IRCA Case No. 88100131, May 24, 1989, (Robbins, J.), in which the hiring date for five of the individuals listed was May 3, 1988, a date within the citation period, and penalties were assessed for failure to prepare Forms I-9.

Accordingly, I do not find that a change in OCAHO policy is sufficiently justified based upon Respondent's argument.

## Findings of Fact, Conclusions of Law, and Order

I have considered the pleadings, memoranda, supporting documents and affidavit submitted in support of the Motions for Summary Decision. Accordingly, and in addition to the findings and conclusions already mentioned, I make the following findings of fact, and conclusions of law:

1. As previously found and discussed, I find that Respondent is not entitled to a summary decision as a matter of law and Respondent's Motion for Partial Summary Decision is hereby denied.

2. As previously found and discussed, I determine that no genuine issues as to any material facts have been shown to exist with respect to Respondent's affirmative defense based upon the public information and citation periods of the legislation and hereby grant Complainant's Motion for Partial Summary Decision, thereby making that defense unavailable to the Respondent.

3. I am aware that two affirmative defenses remain in Respondent's pleadings which are not disposed of by this summary decision. Those remaining affirmative defenses may be resolved by the parties either by evidentiary hearing or by motions for summary decision. The hearing date which has been continued indefinitely may be rescheduled, if need be.

4. Pursuant to 8 U.S.C. Section 1324a(e)(6), and as provided in 28 C.F.R. Section 68.52, this Decision and Order shall become the final decision and order of the Attorney General as to Respondent's third affirmative defense unless, within thirty (30) days from this date, the Chief Administrative Hearing Officer shall have modified or vacated it.

**IT IS SO ORDERED:** This 5th day of December, 1989, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
Executive Office of Immigration Review
Office of the Administrative Law Judge
950 Sixth Avenue
Suite 401
San Diego, California 92101
(619) 557-6179