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

United States of America, Complainant v. Law Officer of Manulkin, Glaser, and Bennett, Respondent; 8 USC § 1324a Proceeding; Case No. 89100307.

ORDER STAYING RULING ON MOTION TO DISMISS FOR SELECTIVE ENFORCEMENT AND DIRECTING FURTHER DISCOVERY

On September 12, 1989, Respondent filed with this office a Motion to Dismiss the Complaint because of alleged Selective Prosecution.[1]

On October 29, 1989, Complainant filed with this office its response to Respondents' motions.

Respondent states in its Motion that Gary H. Manulkin, a partner in Respondent law firm, ``is a high profile attorney who has participated in a large number of proceedings as an adversary on behalf of aliens.'' Respondent alleges that Mr. Manulkin has been ``the target of unlawful surveillance in conjunction with litigation against officers and employees of complainant for his adversarial representation of aliens.'' Respondent argues that the case at bar would not have been initiated, but for Mr. Manulkin's adversarial representation of aliens against Complainant INS.[2]

Respondent concedes that, without extensive discovery, it cannot prove that there has been selective enforcement in this case.

Complainant argues that an administrative law judge (``ALJ'') lacks jurisdiction to dismiss a Complaint for selective enforcement. Complainant further argues that ``selective prosecution'' is a criminal law concept which has no place in a proceeding to assess civil penalties.

[1]Though the parties frame their arguments using the term ``selective prosecution,'' I prefer, in these administrative proceedings, the term selective enforcement. See e.g., 2 K. Davis, Administrative Law Treatise, section 9 (1979).

[2]In support of its Motion, Respondent has attached a detailed affidavit as sworn to by Gary H. Manulkin, Esq.

Complainant further argues that neither the Board of Immigration Appeals nor an immigration judge can review the exercise of prosecutorial discretion to issue an Order to Show Cause, an INS procedure that is necessary to initiate deportation proceedings. Complainant further argues that an immigration judge and an ALJ, who may be assigned duties in accordance with 8 U.S.C. § 1324a, both derive their authority from Section 103 of the Act, 8 U.S.C. § 103. Complainant further states that the scope of an immigration judge's authority is set out at 8 CFR § 242.8, and the authority of an administrative law judge is specified at 8 CFR § 68.25.

Complainant argues that nowhere in the law or regulations is an ALJ granted the authority to question the District Director's decision to commence a proceeding by issuing a Notice of Intent to Fine. Complainant further argues that since an immigration judge's authority and jurisdiction is limited, an administrative law judge has similar limitations. Finally, Complainant argues that the proper forum to determine whether or not there has been selective prosecution in this case is before a U.S. District Court.

Complainant's arguments that I do not have jurisdiction or authority to review the District Director's decision to issue a notice of intent to fine and to hear and decide the issue of whether there has been selective prosecution, misinterprets the applicable statutes, regulations and case law conferring jurisdiction on an ALJ to hear and decide matters relating to prehearing proceedings including the constitutional rights of Respondents.

The powers and responsibilities of ALJ are defined in the Administrative Procedure Act (``APA'') and in the enabling acts and procedural rules of the Department of Justice. See, APA, 5 U.S.C. §§ 551-559, 701-706, 1305, 1306, 3105, 3344, 5372 and 7521 (1976 and Supp. IV. 1980), originally enacted as ch. 324, 60 Stat. 237 (1946); see also, 8 C.F.R. § 68.25. An ALJ's powers, duties, and status have been considered on several occasions by the federal courts. See, Butz v. Economou, 438 U.S. 478 (1978); Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953); Riss and Coi. v. United States, 341 U.S. 907 (1951); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973).

As was stated in Butz v. Economou, supra, at 513:

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within his framework is `functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.

Complainant's attempt to equate ALJs with immigration judges is also misplaced. Immigration judges are not appointed pursuant to the APA, nor must their hearings be conducted pursuant to the Act. See Ex parte Wong So Wan, 82 F. Supp. 60 (D.C. Cal. 1948). The rules and regulations that control these proceedings are separate and distinct from those that govern immigration cases. It is, therefore, my view that the rules and regulations that may limit the jurisdiction or authority of immigration judges to review the authority of the District Director to institute deportation proceedings do not apply to an ALJ in cases involving employer sanctions cases.

The regulations governing employment sanction cases do provide for the filing of pre-hearing motions. See, 28 C.F.R. § 68.7. They do not limit the nature or scope of what motions may be filed by a party nor the jurisdiction of an OCAHO ALJ.

The regulations governing these proceedings also provide that an ``ALJ shall have all powers necessary to the conduct of fair and impartial hearings including . . . tak(ing) any action authorized by the Administrative Procedure Act.'' See 28 C.F.R. § 68.25(a)(6). The APA does provide that an ALJ may ``dispose of procedural requests or similar matters'' and does not limit the scope and authority of an ALJ to hear and decide any matters relating to the constitutional rights of a Respondent . . . .'' See, 5 U.S.C. § 5569(c)(7). Moreover, there are federal cases which hold that an ALJ may, in certain circumstances, consider constitutional issues.
See e.g., Meredith v. FCC, 809 F.2d 863 (D.C. Cir. 1987).

Thus, it is my view, that the regulations do permit and, indeed, require an ALJ in employment sanction cases to decide issues involving the constitutional rights of a Respondent, including, inter alia, motions to dismiss for selective enforcement.

Complainant's argument that a U.S. District Court is the proper forum to decide the issue of whether or not there has been selective enforcement in this case is also without merit. I do not know how a federal district court could obtain jurisdiction of this matter since neither the statute nor the regulations include the U.S. District Court in any of the procedural steps to determine the merits of a employment sanction case.[3]

Complainant also argues that ``selective prosecution'' is a criminal law concept and does not apply to an administrative proceeding. Complainant's argument is an attempt to make a distinction

[3]Under the regulations governing these proceedings, the only jurisdiction which the U.S. District Courts have is to enforce an order to testify by or a subpoena issued pursuant to 28 C.F.R § 68.21(c).

on the constitutional limitations applicable to criminal prosecutors from that applicable to administrative prosecutors. The federal courts, however, do not recognize this distinction.

Although it is well established that administrative prosecutors have wide discretion as to whether or whom to sue, the Supreme Court has recognized that there are limitations on the ``partisanship of administrative prosecutors,'' and has made it clear that in appropriate circumstances ``traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator where motivated by improper factors or were otherwise contrary to law.'' See, Marshall v. Jerrico Inc., supra, at 249 (1986), citing, Dunlap v.Bachowski, 421 U.S. 560, 567, n. 7, 568-574 (1975); Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939); see also, Presinzano v. Hoffman-La Roche, Inc. 726 F.2d 105, 110 (3rd Cir. 1984).[4]

In Presinzano, the Third Circuit took the position that:

> prosecutorial decision is . . . at most, subject to limited review under the `arbitrary and capricious' standard of section 706 of the APA. (citations omitted) The relevant inquiry . . . is `whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' '' [5] Id. at 110, citing, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S. Ct. 814, 823 (1971).

While it is clear that the court in Presinzano is talking about judicial review of agency action, I consider the standards derived from such analyses to be most instructive on how I, as an ALJ, should assess the merits of legal arguments regarding the issue of selective enforcement. See also, Encyclopedia Britannica, Inc. v. Federal Trade Commission, 605 F.2d 964, 974 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980).

In Britannica, for example, the Seventh Circuit stated that, if the Federal Trade Commission ``elects to litigate against similarly situated competitors . . . it cannot place one competitor at a competitive disadvantage by arbitrarily treating one violator differently

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[4]In an earlier case limiting the prosecutorial discretion of an administrative prosecutor, the Supreme Court has said that the Federal Trade Commission's ``discretionary determination'' to prosecute ``should not be overturned in the absence of a patent abuse of discretion.'' See, Moog Industries v. FTC, 355 U.S. 411, 414 (1958) (emphasis added); see also, 2 K. Davis, Administrative Law Treatise, § 9.7, at 252 (1979).

[5]Although the court in its interpretation of section 706 of the APA recognized limitations on agency review under the standard of ``arbitrary, capricious abuse of discretion,'' it should be noted that there are numerous other grounds set forth in section 706 limiting agency action including actions ``not in accordance with law''; and, ``contrary to constitutional right, power, privilege or immunity.'' See, APA 5 U.S.C. § 706(2) (A) and (B).

from another,'' Id., citing, Garrett v. F.C.C., 513 F.2d 1056 (D.C. Cir. 1975). Moreover,

> [t]he Commission's orders are to serve a remedial and not a punitive function, . . . the Commission may not issue orders which would arbitrarily destroy one of the many violators in the market . . . . It is the responsibility of the Commission to perform a `reasonable evaluation' of the competitive situation to ascertain whether a particular order would be contrary to the purpose of the laws sought to be enforced.'' Id. citing, L.G. Balfour Co. v. F.T.C., 442 F.2d 1, at 24 (1971).

The Seventh Circuit goes on to hold that a claim of ``discriminatory enforcement'' must be established by showing ``not only that competitors were treated differently, but that no rational relation exists to support the differential treatment.'' Id. (emphasis added) See also, Wayte v. U.S., 470 U.S. 598, 608, 105 S. Ct. 1524, 1531 (1985) (claims of selective prosecution are to be judged under ordinary equal protection standards).

Since the case law clearly prohibits an administrative prosecutor from making an enforcement decision motivated by improper motives, it is my view that the INS cannot selectively enforce IRCA in a way that results in discriminatory enforcement against similarly-situated employers. Id.

Having determined that case law supports the application of selective enforcement principles to administrative proceedings, I turn now to case law analyses which discuss in more detail the procedures necessary to determine whether or not there actually has been selective prosecution, i.e. enforcement. See e.g., U.S. v. Aguilar, 871 F.2d 1436, 1474 (9th Cir. 1989) (``To establish impermissible selective prosecution, a defendant must show that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive.'' Id., citing, United States v. Lee, 786 F.2d 951 (9th Cir. 1986)).

In Aguilar, the Ninth Circuit held that the so-called ``Sanctuary Movement'' appellants had failed to make even a prima facie showing to support their claim of selective prosecution.

> Appellants must demonstrate as a prerequisite to an evidentiary hearing that similarly situated persons are generally not prosecuted for the same conduct. United States v. Wilson, 639 F.2d 500, 503 (9th Cir. 1981). This first prong of the selective prosecution prima facie showing insures that the government has at least conducted selective prosecutions; if similarly persons are being prosecuted then appellants fail to make the required showing. Id. at 1474.[6]

[6]The criminal cases which discuss selective prosecution provide a detailed analyses of what constitutes a prima facie showing of improper factors necessary to merit an evidentiary hearing on the issue. See e.g., United States v. Berrigan, 482 F.2d 171, 181 (3d Cir. 1973); United States v. Union Nacional de Trabajadores, 576 F.2d 388, 395 (1st Cir. 1978); United States v. Wallace, 578 F.2d 735, 740 (8th Cir.), cert. denied,

439 U.S. 898 (1978); United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974); United States v. Barrios, 501 F.2d 1207, 1211 (2nd Cir. 1974). See United States v. Falk, 479 F.2d 616, 620-21 (7th Cir. 1973) (en banc); United States v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972). One very important reason for requiring such a prima facie showing is ``to minimize the intrusion on the prosecutorial function and still enable a defendant to make a threshold showing of discriminatory prosecution.'' See, U.S. v. Torquato, 602 F.2d 564 (3rd Cir. 1979).

In addition, the Ninth Circuit has held that a criminal defendant is usually entitled to an evidentiary hearing on his claim of discriminatory prosecution ``when enough facts are alleged to take the question past the frivolous stage.'' United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974), aff'd after remand, 527 F.2d 937 (1975), cert. denied, 426 U.S. 952 (1976).

Applying these standards to the allegations of selective enforcement in the case at bar, it is my view that Respondent has not alleged facts in its motion sufficient to demonstrate that similarly-situated employers are generally not charged with violating Title 8 United States Code § 1324a. Respondent, therefore, has not demonstrated the necessary prerequisite for an evidentiary hearing. See, Aguilar, supra, at 1474.

Respondent states in its motion, however, that it cannot prove a selective prosecution without further discovery. Accordingly, the next question to decide is whether or not Respondent has submitted enough facts in its motion to warrant further discovery in support of its allegations of selective enforcement.

In support of its discovery requests, Respondent states in its affidavit that one of its lawyers is a high profile attorney who has been involved in defending illegal aliens, has been the target of unlawful surveillance, is a high profile immigrant's rights activist, and is charged with employing one authorized alien who is now in lawful status.

In turn, Complainant argues that Respondent has not made enough of threshold showing to warrant discovery for purposes of proving selective enforcement. See, United States v. Ness, 652 F.2d 890, 892 (9th Cir. 1981), cert denied, 454 U.S. 1126 (1981). but cf., U.S. v. Kerley, 787 F.2d 1147, 1150 (7th Cir. 1986) (establishes a lower threshold for discovery than for an evidentiary hearing).

Though the law is not settled in this area, it is my view that Respondent's argument, at the very least, presents an important issue of first impression and, at this early a stage in the proceeding, without having considered in detail the government's side of the case, arguably suggests an instance of governmental vindictiveness against an active immigration law advocate. See e.g., U.S. v. Borque, 541 F.2d 290 (1st Cir. 1976) (``While recent cases have dealt

with prosecutions instituted in retaliation for defendant's exercise of constitutional rights, see e.g., U.S. v. Steele, 461 F.2d 1148 (9th Cir. 1972), personal vindictiveness on the part of the prosecutor or the responsible member of the administrative agency recommending prosecution would also sustain a charge of discrimination. See generally, Moss v. Horning, 314 F.2d 89 (2nd Cir. 1963).''); See also, United States v. Wiley, 503 F.2d 106 (8th Cir. 1974); and, United States v. DeMichael, 692 F.2d 1059 (7th Cir. 1982) (``. . . vindictive prosecution . . . is ordinarily used to describe a prosecution which is vindictive in the normal sense of the word, resulting from specific animus or ill will. . . .'').

Although I am concerned that discovery of the government's files to determine whether there is evidence of selective enforcement is highly intrusive, I am satisfied that Respondent has made enough of a minimal showing to permit Respondent to develop its discovery on inquiries narrowly relevant to this specific question regarding a prima facie showing of selective enforcement.

Accordingly, based upon the foregoing discussion, I will stay a ruling on Respondent's Motion to Dismiss for Selective Enforcement until after completion of discovery and/or an evidentiary hearing. After discovery has been completed, Respondent is directed to submit a supplemental legal memorandum in support of its Motion to Dismiss for Selective Prosecution. Complainant will be given five (5) days to respond to Respondent's memorandum of law.

SO ORDERED: This 27th day of October, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge