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

United States of America, Complainant vs. Felipe, Inc. Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100151.

AFFIRMATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER

The Honorable Robert B. Schneider, the Administrative Law Judge assigned to this case by the Chief Administrative Hearing Officer, issued an order entitled ``Order for Civil Money Penalty for Paperwork Violations'' on October 11, 1989. On October 27, 1989, the Administrative Law Judge issued an amendment to the original Order, entitled ``Errata,'' changing the caption of the Order of October 11 to ``Decision and Order for Civil Money Penalty for Paperwork Violations.'' In this Errata, the Administrative Law Judge also added language regarding when the Decision and Order becomes the final Decision and Order of the Attorney General. On October 31, 1989, Judge Schneider issued ``Errata II,'' again changing the caption of the original order to read ``Final Decision and Order'' and modifying the time period for filing a request for administrative review. Judge Schneider also added language which disposed of Count I (knowingly hired violation) through a stipulation agreement and ordered the Respondent to cease and desist from any further violations of 8 U.S.C. § 1324a.

Pursuant to Title 8, United States Code, Section 1324a(e)(7) and 28 C.F.R. 68.51, the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Order and in accordance with 28 C.F.R. 68.51, affirms the Administrative Law Judge's Final Decision and Order.

SYNOPSIS OF PROCEEDING

On March 20, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service

(hereinafter the INS) filed a Complaint against the Respondent, Felipe, Inc. (hereinafter Felipe), with the Office of the Chief Administrative Hearing Officer (hereinafter OCAHO). The INS charged Felipe with violations of the Immigration Reform and Control Act of 1986 (hereinafter IRCA). The INS alleged one violation of the provisions of Title 8, United States Code, Section 1324a, for knowingly hiring or, in the alternative, continuing to employ an unauthorized alien (Count I). The INS also alleged eight violations of the IRCA for failing to prepare employment eligibility verification forms (Forms I-9) and/or failure to make the forms available for inspection (Count II).

On March 23, 1989, the Chief Administrative Hearing Officer assigned this matter to the Administrative Law Judge.

On April 24, 1989 the Respondent, through its Counsel, filed an Answer to the Complaint, wherein Respondent denied the allegation in Count I and either denied or asserted a defense to the allegations in Count II.

On July 31, 1989, the parties jointly filed a ``Motion to Approve Consent Findings,'' containing a stipulation, with the Administrative Law Judge. Among the provisions of the stipulation, the Respondent admitted all allegations set forth in Counts I and II; specifically, Respondent admitted that it knowingly hired an alien not authorized for employment in the United States and that it failed to properly prepare and complete the Forms I-9 for eight employees. The Respondent agreed to cease and desist from any further violations of § 274A(a)(1)(A) [§ 1324a(a)(1)(A)] of the IRCA. The parties also agreed that a Final Order based upon the stipulation be issued by the Administrative Law Judge and that this Order have the same force and effect as an Order made after a full hearing.

On August 1, 1989, the Administrative Law Judge issued an ``Order Granting Joint Motion to Approve Consent Findings and Denying Complainant's Motion for Summary Decision.'' The Judge's Order fully incorporated the ``stipulation,'' (characterizing it as a ``settlement agreement with consent findings.'') and ordered the following:

1. That the stipulated motion to approve consent findings is granted;

2. That this Decision and Order has the same force and effect as a decision and order after a full administrative hearing;

3. That the entire record on which this Decision and Order is based consists solely of the Complaint, the Notice of Hearing and the ``Stipulation'' duly executed by the parties;

4. That the parties have waived any right to challenge or contest the validity of this Decision and Order;

5. That the hearing previously scheduled is cancelled; and

6. That a hearing regarding the issue of a civil money penalty will be disposed of through the filing of briefs with the Administrative Law Judge.

Following submission of briefs regarding the mitigation of the civil money penalty, the Administrative Law Judge issued his Order for Civil Money Penalty for Paperwork Violations, dated October 11, 1989. After reviewing said briefs and applying the five factors to be given ``due consideration'' [pursuant to 8 U.S.C. § 1324a(e)(5)], the Administrative Law Judge concluded that Respondent was entitled to some mitigation. He therefore ordered Respondent to pay a civil money penalty of $3,680.00.

Errata I and Errata II were issued October 27, 1989 and October 31, 1989, respectively. Among other changes previously outlined, Errata I and Errata II altered the time period for filing a request for administrative review, which would now begin on October 31, 1989.

On November 7, 1989, the Respondent filed a request for administrative review, asking the Chief Administrative Hearing Officer to review the Administrative Law Judge's Final Decision and Order and reduce the amount of the civil money penalty.

RESPONDENT'S CONTENTIONS

In its request for review, Respondent takes exception to the Judge's use of a ``rigid mathematical formula.'' Respondent contends that each factor should not be given equal weight when mitigating the penalty. Instead, Respondent contends that a formula or framework where the ``size of the business'' is applied to the other four factors should be used. The ``size of the business'' would therefore play a much greater role than the other factors. Additionally, Respondent questions the Administrative Law Judge's use of an $800 minimum fine as a ``baseline.'' Respondent argues that there is no justification for starting with this amount. Finally, Respondent requests that the Chief Administrative Hearing Officer reduce the civil penalty to the statutory minimum for each violation, based on the size of Respondent's business and the effect it would have on future operations.

COMPLAINANT'S CONTENTIONS

On November 14, 1989, the INS filed a brief in response to the request for review, entitled ``Complainant's Response Brief to Respondent's Request and Argument for Review.'' Complainant's first contention is that the IRCA mandates a $100 minimum penalty for each violation of 8 U.S.C. § 1324a(b). Secondly, the Complainant contends that the five statutory factors be given equal weight when

considering the mitigation of civil penalties. Complainant states that the ``size of the business'' factor should not be considered more important than any of the other four factors.

The Complainant also argues that the ``size of the business'' factor should not take into consideration the business's ability to pay or the business's profitability. Complainant further states that neither profitability nor the ability to pay is mentioned in the statute as a factor and therefore should not be a part of the civil penalty equation at all. Finally, Complainant contends that there was no error when the Administrative Law Judge used a mathematical formula to determine the amount of the civil money penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. 8 U.S.C. § 1324a(e)(5) Mandates a Minimum Penalty of $100 for Each Paperwork Violation.

The $800 ``baseline'' used by the Administrative Law Judge and contested by the Respondent is in conformity with the language of the statute. The IRCA states that a party found in violation of subsection (a)(1)(B) shall be required to pay a civil money penalty of not less than $100 and not more than $1,000. 8 U.S.C. § 1324a(e)(5). An Administrative Law Judge is not permitted to deviate from or ignore these statutory guidelines. The Administrative Law Judge in this case has acted in conformity with the statute. Final Decision and Order at 4-14. The Respondent stipulated there were eight paperwork violations and therefore the absolute minimum penalty the Administrative Law Judge could assess was $100 per violation. Accordingly, the Administrative Law Judge started his formula for the violations at $800 (8 x $100).

B. The Administrative Law Judge Did Not Err in Weighing Equally the Five Factors to be Given Due Consideration.

In the Final Decision and Order, the Administrative Law Judge determined that the five statutory factors to be given due consideration in computing a civil money penalty are equally important. Final Decision and Order at 5. These factors are set out in 8 U.S.C. § 1324a(e)(5), which provides:

> With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil money penalty in an amount not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

This statutory provision does not indicate that any one factor be given greater weight than another. In fact, as the Seventh Circuit

stated in Zemon Concrete Corporation v. Occupational Safety and Health Review Commission, 683 F.2d 176 (7th Cir. 1982), if a ``100% reduction was permitted for any one statutory factor, the purpose of the Act would be frustrated.'' Id. at 181. In the Zemon case, the Act referred to was the Occupational Safety and Health Act of 1970 (hereinafter the OSHA). Like the OSHA, the IRCA was not enacted to punish employers, but rather to encourage employers to improve the workplace through compliance. The imposition of civil money penalties are therefore used to assist in the enforcement of the IRCA.

The Zemon court also stated that abuse of discretion by an Administrative Law Judge could be shown if the decision does not take the statutory criteria into account. Id. at 181. The Administrative Law Judge in this case followed the statutory criteria. Final Decision and Order at 4-14. He weighed each of the factors to be given due consideration and used a reasonable and prudent formula for computing the penalty.

C. The Administrative Law Judge Did Not Err in Using a Business's Ability to Pay to Compute the Civil Money Penalty.

The Complainant contends that because the IRCA did not include a business's ability to pay as one of the factors, Congress did not intend it to be considered. Complainant cites Spencer Livestock Commission Company v. Department of Agriculture, 841 F.2d 1451 (9th Cir. 1988), as saying: ``Where Congress chooses to include a factor in one statute providing for a civil penalty but omits it from another such statute, the court need not consider that factor in imposing a civil penalty under the latter statute.'' Complainant's Response Brief at 8. Complainant is mistaken in this interpretation of case law. In Spencer, the Ninth Circuit was reviewing a Department of Agriculture decision which had assessed $30,000 in civil money penalties. In its decision, the Court reasoned that ``since Congress chose to include the language in one provision and omit it from the other, it did not require the factors to be considered as to the latter.'' Id. at 1457. In other words, the Court would not allow the factors of one provision of a statute to be applied to another provision of the same statute (Packers and Stockyards Act).

The Complainant in the present case asks that the Chief Administrative Hearing Officer apply the same logic to provisions of completely different statutes, i.e. the Packers and Stockyards Act and the IRCA. The Chief Administrative Hearing Officer will not do so. Whether Congress purposefully omitted ``ability to pay'' from the statutory considerations is not evident from the Congressional History. In fact, the Chief Administrative Hearing Officer is unaware

of any explanatory language regarding subsection (e)(5). This apparent silence necessitates the interpretation of the IRCA by the Administrative Law Judges, who must then apply this interpretation to each individual case.

The complainant has also contended that the ``size of the business'' factor should not contain the business's ability to pay as a subfactor and cites Sellersburg Stone Company v. Federal Mine Safety and Health Commission, 736 F.2d 1147 (7th Cir. 1984), for persuasiveness. In Sellersburg, the Seventh Circuit found that the Administrative Law Judge had ``accurately considered the evidence pertaining to each criterion.'' Id. at 1153. To determine the size of the business, the Administrative Law Judge in Sellersburg had used production totals and number of employees as subfactors. Id. at 1152. Under the Mine Safety and Health Act, the ability to pay [it is referred to as the ``ability to stay in business,'' 30 U.S.C. § 815(b)(1)(B)] is a separate and distinct factor. In the Final Decision and Order in this case, the Administrative Law Judge used six subfactors in determining the size of the business. These subfactors were: (1) business revenue or income, (2) amount of payroll, (3) number of salaried employees, (4) nature of ownership, (5) length of time in business, and (6) nature and scope of business facilities. By choosing the subfactors to be applied, the Adminstrative Law Judge has appropriately interpreted the IRCA. Accordingly, the Chief Administrative Hearing Officer concludes the use of these subfactors to be acceptable and therefore finds no abuse of discretion.

D. Use of a Mathematical Formula When Calculating the Mitigation of Civil Money Penalties is Proper in Accordance with 8 U.S.C. § 1324a(3)(5).

The Administrative Law Judge has, in his discretion, chosen to implement a mathematical formula in order to assess civil money penalties for Respondent's eight paperwork violations.

The Administrative Law Judge's mathematical formula addresses and gives due consideration to each of the factors required by the statute. Mathematical formulas have been implemented by other agencies in assessing penalties and have subsequently been upheld by the United States Court of Appeals for the Seventh Circuit. For example, in Zemon, the court considered the four factors provided for in 29 U.S.C. § 666(i) when it assessed penalties for violations of the Occupational Safety and Health Act. ``The Secretary's determination that the standard reduction for good faith would be 20% is thus reasonable and consistent with the Act.'' 638 F.2d at 181. In Sellersburg, the court discussed the method by

which the Secretary of Labor assessed penalties for violations of the Mine Safety and Health Act. ``In proposing penalties, the Secretary must consider six criteria listed in 30 U.S.C. § 815(b)(1)(B) (1982), [footnote omitted]. Applying these criteria, the Secretary assigns penalty points and then converts the points into proposed penalty amounts, pursuant to the Mine Safety and Health Act regulations. See 30 C.F.R. § 100.3 (1980), [footnote omitted].'' 736 F.2d at 1151.

Although the Administrative Law Judge's approach is the most structured put forth thus far, it is in accordance with the statutory language and the Chief Administrative Hearing Officer holds this method acceptable. This is not to indicate that the Administrative Law Judge's mathematical approach is the sole criteria and method to be used when determining the proper civil money penalty for paperwork violations. It is however, of the utmost concern of this agency that the five factors mandated by the statute be given due consideration by an Administrative Law Judge when determining a civil money penalty.

ACCORDINGLY,

The Chief Administrative Hearing Officer has conducted a review of the Administrative Law Judge's Decision and Order. The briefs filed by both parties and the record as a whole have been carefully considered, and the Chief Administrative Hearing Officer finds the following:

1. The Administrative Law Judge followed the statutory mandate by penalizing the Respondent a minimum of $100 for each violation.

2. The Administrative Law Judge satisfactorily interpreted the statutory language when he considered the five factors of 8 U.S.C. § 1324a(e)(5) in determining the amount of the civil money penalty.

3. The Administrative Law Judge's use of a mathematical formula in figuring the amount of the civil money penalty is acceptable. The formula was well thought out and reasoned and in no way did the Judge act in an arbitrary or capricious manner. However, while the Administrative Law Judge's formula is acceptable, it does not preclude another separate and distinct formula or system from being considered acceptable.

SO ORDERED.

Dated November 29, 1989.

RONALD J. VINCOLI
Acting Chief Administrative Hearing Officer