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

United States of America, Complainant v. Redwood Office Products, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 90100169.

ORDER DENYING COMPLAINANT'S MOTION TO DISMISS

A. Procedural History

On June 14, 1990, Complainant filed a Motion to Dismiss the Complaint for lack of subject matter jurisdiction because Respondent allegedly failed to request a hearing before an Administrative Law Judge (``ALJ'') within thirty (30) days of being served with a Notice of Intent to Fine.

On June 22, 1990, Respondent filed a detailed ``Memorandum in Opposition to Complainant's Motion to Dismiss'' arguing, inter alia, that Respondent did communicate its desire for a hearing through a letter dated April 16, 1990. For the reasons more fully set forth below, I agree with Respondent and deny Complainant's Motion to Dismiss.

B. Legal Analysis

On March 30, 1990 Respondent, who, at that point, was acting in a pro se capacity, was served with a copy of the Notice of Intent to Fine.

After issuance of the Notice of Intent to Fine, the pro se Respondent replied by a letter dated April 16, 1990 to the Immigration and Naturalization Service, San Francisco, California. The letter states the following:

> Where the I.N.S. has determined that Redwood Office Products has employed non U.S. citizens, I can understand and accept a penalty for that offense; all others I cannot accept. Therefore, I do contest the fine in the amount of $18,150.00, and would like to meet with you in order to assess the correct penalty. In your deliberations of this matter, I'm sure that you will take into consideration the fact that we have worked very openly and effectively with you to assist you in carrying our your charter. (emphasis added)

Through counsel, which was subsequently retained, Respondent argues that the language in the letter constitutes a ``request for a hearing'' within the meaning of the statutory and regulatory re-

quirements of IRCA. I agree, and am frankly disappointed to note that Complainant has tried to quash a heretofore pro se Respondent's most fundamental due process right to a hearing before an Administrative Law Judge by relying on the dubious theory that a Respondent is only entitled to a hearing if it uses the formal words ``request a hearing.''

8 U.S.C. section 1324a (e)(3) states that:

> Before imposing an order described in paragraph (4) or (5) against a person or entity under this subsection for a violation of subsection (a), the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation. (emphasis added)

8 C.F.R. section 274a.9(d)(1) states that:

> If a respondent contests the issuance of a Notice of Intent to Fine, he or she must file with the INS, within thirty days of the service of the Notice of Intent to Fine, a written request for a hearing before an Administrative Law Judge.

It is certainly clear that the statutory section and regulation cited above do not specify the exact language or form that must be used by Respondent to request a hearing. They specify only that the request be in writing and that it be received by the INS within 30 days of service of the NIF. The fact that Respondent's April 16th letter does not contain the words ``request a hearing'' does not in and of itself dispose of the issue of whether or not Respondent requested a hearing within the time-frame required by law. Rather, the question is whether Respondent's desire to exercise its right to a hearing was reasonably communicated to INS by the April 16th letter. It is beyond me how Complainant's counsel could fail to exercise a common sense reading of Respondent's desire to contest allegations in the Notice of Intent to Fine.

It is my view that the only fair reading of the letter is that it constitutes a request for a hearing, and did reasonably communicate Respondent's desire for a hearing within the requirements of the code and regulations. Respondent's disagreement with and refusal to accede to the proposed action of INS is evident throughout the letter. For example, in the first paragraph Mr. Galpine states that he was ``shocked'' by the amount of the fine. In the third paragraph he states his opinion that the INS should not take the proposed action. Finally, in the fourth paragraph, he states that he ``cannot accept'' a fine for anything other than employing aliens, and that ``(t)heretofore, I do contest the fine in the amount of $18,150.00.'' (emphasis added) The letter clearly states Respondent's intention to exercise its right to oppose the INS proposed action.

Although the letter does not use the word ``hearing,'' it clearly implies that Respondent desires one because the only way to ``con-

test'' the proposed action of the INS is through a hearing before an ALJ. See 8 C.F.R. section 274a.9(d)(1). Indeed, the word ``contest'' appears on the printed NIF form (Form I-763) used by INS to refer to the procedure to oppose the proposed action of the INS. Mr. Galpine's use of the term ``contest'' mirrors the INS' own NIF boilerplate language, and the attempt by Complainant to reduce a Respondent's right to a hearing as necessitating the literal use of the words ``request a hearing'' in the case at bar would be fundamentally unfair. Complainant's effort to exploit the language of the pro se Respondent's sincere letter is certainly disturbing to me, and is even more surprising when read in light of the obvious inconsistency of Complainant's having filed a Complaint in this proceeding, subsequent to its receipt of Respondent's letter and prior to its five page Motion to Dismiss.[1]

For the foregoing reasons, Complainant's Motion to Dismiss is hereby DENIED.

SO ORDERED: This 6th day of July, 1990, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

[1]It appears from the Complaint dated May 16, 1990, although Mr. Newman's letter of the same date is to the contrary, that the INS did originally treat Mr. Galpine's letter as a request for a hearing insofar as paragraph A of the prayer asks for the assignment of ``an Administrative Law Judge to preside at a hearing as soon as possible.'' Moreover, the filing by INS of the Complaint, instead of issuing a final and unappealable order suggests to me that the INS waived any objection to the form of Respondent's request for a hearing.