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

United States of America, Complainant v. Edith Fine, Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100363.

ORDER DENYING RESPONDENT'S MOTION TO QUASH THE COMPLAINT AND PERMITTING ANSWER WITHIN A TIME CERTAIN

Pursuant to authority delegated by the Attorney General of the United States, the Immigration and Naturalization Service (INS) has assessed civil money penalties against respondent for alleged violations of section 101 of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. That assessment, in the form of a notice of intent to fine (NIF), dated May 31, 1989, consistent with IRCA, advised respondent that in lieu of paying the assessment it was entitled, upon request, to a hearing before an administrative law judge. Respondent made such a request by letter dated June 26, 1989. [All references to filings by respondent in this Order, whether before the INS or this Office, are to documents received over the signature of counsel.]

By complaint dated July 20, 1989, containing as exhibits both the NIF and request for hearing, INS initiated this proceeding. This Office issued its notice of hearing dated August 1, 1989, advising that the case was assigned to me and that an answer would be timely if filed within thirty days after receipt. Instead of an answer, respondent on September 5 filed a motion to quash the complaint (bearing a certificate of service dated August 30, 1989); previously, by motion (service of which was certified to on August 18, 1989) for enlargement of time, respondent had asked that her response be permitted to be mailed as late as August 30, 1989.

A motion to quash a complaint is not a pleading customary to administrative adjudication. I do, however, treat respondent's motion as in effect authorized by Rule 12 of the Federal Rules of Civil Procedure (FRCP), applicable to proceedings before me by authority of 28 C.F.R. § 68.1.

Respondent's motion in effect recites that her counsel having expressed to INS his concern that an investigatory subpoena previously issued by complainant was unlawfully issued and having directed her not to respond renders the NIF and the subsequent complaint unlawful. Having considered respondent's motion and complainant's September 8, 1989 response, I deny the motion.

I do not reach the question whether the subpoena mentioned by respondent was valid. I do note, however, that nothing contained in the authorities cited by respondent in support of her motion suggests that an enforcement agency may not properly maintain a civil cause of action premised on an alleged statutory violation the investigation of which it had sought to achieve by administrative subpoena. Even assuming the INS lacked authority to issue and obtain compliance with its subpoena, I am unaware of authority or reason which would vitiate the complaint.

Respondent has failed to articulate the premise for her challenge to the subpoena. Initially, the challenge was stated in terms of her counsel's inability on February 2, 1989, when he advised INS he had instructed her not to comply, to ``determine . . . if the Notice of Inspection and subpoena were lawfully issued.'' Moreover, the authorities relied on in her motion are, as pointed out in response by INS, beside the point. A subpoena is not such a search as invoked concern over warrantless searches in Marshall v. Barlow's, Inc., 436 U.S. 307, 56 L. Ed. 2d. 305 (1978), although dicta in See v. City of Seattle, 387 U.S. 541 (1967) suggests Fourth Amendment limitations applicable to administrative subpoenas. Patently, Brock v. Emerson Electric Company, 834 F.2d 994 (11th Cir. 1987) turned not on whether the enforcement agency's subpoena was valid but on the agency's failure to proceed by subpoena. Compare Donovan v. Lone Steer, Inc., 464 U.S. 408, 104 S. Ct. 769 (1984), and McLaughlin v. A.B. Chance Company, 842 F.2d 724 (4th Cir. 1988).

Nor did respondent pursue her challenge to the subpoena. See In re INS Subpoena of Gilbert Ramirez Dated March 15, 1989, Misc. No. TY-89-00023 (E.D. Tex. March 23, 1989) (Parker, J.), appeal pending, U.S. v. Ramirez, No. 89-2506 (5th Cir., filed June 22, 1989) Compare U.S. v. Moore, order in response to petitioner's motion for reconsideration of February 10, 1989 order, C.A. No. 89-89-A (E.D. Va. March 10, 1989) (Bryant, J.). Rather respondent asks that the putative invalidity of the subpoena be found to insulate her from any enforcement action. For the reasons suggested above, I do not agree.

The motion having been denied, consistent with FRCP 12(a), an answer by respondent will be timely if filed not later than Tuesday, October 3, 1989.

SO ORDERED.

Dated this 20th day of September, 1989.

MARVIN H. MORSE
Administrative Law Judge