

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

UNITED STATES OF AMERICA)	
Complainant)	
)	
v.)	8 U.S.C. §1324a Proceeding
)	OCAHO Case No. 90100092
SIZZLER RESTAURANTS)	
INTERNATIONAL, INC.)	
Respondent)	
_____)	

ORDER DENYING RULING UPON DISPUTE
ABOUT MEANING OF SETTLEMENT AGREEMENT

The Complainant issued a Notice of Intent to Fine against Respondent on January 26, 1990. Respondent timely filed a request for hearing before an administrative law judge on February 13, 1990. In due course, Complainant filed a Complaint Regarding Unlawful Employment against the Respondent in this matter on March 5, 1990.

On March 7, 1990, the Office of Chief Administrative Law Judge designated the undersigned as the presiding judge in this case.

On November 5, 1990, the parties to this case filed a Joint Motion to Dismiss Proceedings. This Motion was premised on the fact that the parties have agreed to a Settlement Agreement. In the Joint Motion, the parties sought dismissal of the complaint, and Respondent withdrew, by waiver, its previous request for hearing pursuant to 28 C.F.R. §68.12(a)(2).

On November 6, 1990, this Court issued a final Order Approving Settlement Agreement and Dismissing Case. In this Order, the Court

granted the parties' joint dismissal motion in accordance with the provisions of 28 C.F.R. §68.12 and 68.35.

28 C.F.R. §§68.12, 68.35 allow for dismissal of the action after the parties have agreed to a full settlement.

Currently, the parties are in dispute regarding the meaning of several terms contained in their Settlement Agreement. They have filed letters with this Court, seeking a determination of the meaning of their settlement agreement. It appears that additional motions and/or letters may be filed with this Court.

The Court is of the opinion that this dispute presents an issue as to whether or not the Court has authority to entertain further proceedings in this action despite the issuance of a final order dismissing the instant action pursuant to the parties' entry into a settlement agreement during November, 1990.

First of all, the Court notes that Respondent may be able to file a Motion to Vacate the Final Dismissal Order in this case pursuant to Rule 61(b) of the Federal Rules of Civil Procedure in an IRCA proceeding. The decision regarding such a motion is within the administrative law judge's discretion.

Second, the Court notes that the Immigration Reform and Control Act of 1986 ("IRCA") provides that the Attorney General must afford an individual a hearing conducted pursuant to 5 U.S.C. §554 before he can impose any civil penalties, or cease and desist orders, upon such individual for "knowing hire," "continuing hire," and "paperwork" violations. 8 U.S.C. §1324a(e)(3).

However, IRCA's statutory provisions require a hearing before an administrative law judge only in those instances where an individual requests such a hearing within 30 days after receiving notice of the Attorney General's intent to impose a civil fine upon him. In 8 U.S.C. §1324a(e)(3)(B), it is stated that where no hearing on liability is requested by an individual, the Attorney General's imposition of civil monetary penalties shall constitute a final and unappealable order.

From the above, it is clear that an administrative law judge has power to hear an IRCA case only where the responding party has properly requested an administrative hearing. In addition, the administrative law judge must also qualify as a "presiding

administrative law judge" under the relevant federal regulations before he can hear or decide a particular case.

Federal regulations which implement IRCA define the necessary qualifications of an administrative law judge who is eligible to become the presiding administrative law judge in an IRCA proceeding. 28 C.F.R. §68. In particular, 28 C.F.R. §68.24 states that an IRCA administrative law judge must have been previously appointed under the provisions of 5 U.S.C. §3105 and assigned to the Department of Justice. An administrative law judge who satisfies the above qualifications can become the actual presiding administrative law judge in an IRCA matter only after he or she is so designated by the Chief Administrative Hearing Officer. 28 C.F.R. §68.24.

But even where, in accordance with the above rules, an administrative law judge has been properly designated the presiding administrative law judge over an IRCA proceeding, he retains such powers only as necessary for the conduct of an IRCA hearing. See 28 C.F.R. §68.26(a). Therefore, it would appear that once an administrative law judge approves the dismissal of an IRCA action pursuant to 28 C.F.R. §§68.12(a)(2) and 68.35(a), that administrative law judge loses any further authority over the case. This is because there is no longer any pending hearing in the case. The right to a hearing was waived, and the court's final order of dismissal was predicated upon that waiver.

Furthermore, although the regulatory provision providing for dismissal of IRCA proceedings resembles in many ways Rule 41(a) [voluntary dismissal] of the Federal Rules of Civil Procedure, the relevant federal regulations provide no method by which parties may move to vacate a previous dismissal order. Hence it would seem that an IRCA administrative law judge loses any jurisdiction over the matter after the issuance of a dismissal order.

However, 28 C.F.R. §68.1 has also stated that "The Rules of Civil Procedure for the District Courts of the United States shall be used as a general guideline in any situation not provided for or controlled by these (federal regulatory) rules, or by any statute, executive order or regulation."

Under the F.R.C.P., parties may seek to vacate a court's final dismissal order by using the procedure set out in Rule 60(b). See 5 Moore's Federal Practice ¶41.17, 41-227-41-431. Since federal regulations governing IRCA do not contain any express provisions allowing for motions to vacate, it would thus appear that F.R.C.P. Rule

61(b) may be applicable as a guideline, should Respondent seek to vacate the final dismissal order.

The application of Rule 61(b), in vacating a court's final dismissal order, is within the sound discretion of the court. *Id.* Therefore, Respondent cannot be guaranteed an opportunity to proceed further in this action before this Court.

Summarizing, while an administrative law judge has no absolute authority over an IRCA matter after the issuance of a final order dismissing that proceeding, it would appear that the parties may nonetheless move the Office of the Chief Administrative Hearing Officer for the redesignation of the administrative law judge as the "presiding judge," or move the administrative law judge to vacate the final dismissal order by using Rule 60(b) of the Federal Rules of Civil Procedure.

ACCORDINGLY, it is the determination and ORDER of this Court that this Court is currently without power to act upon or determine the merits of the dispute between the parties unless and until the parties, or one of them, has/have presented an appropriate Motion, and thereby caused this Court to be designated as the "presiding administrative law judge" in this matter; and that pending such Motion and designation this Court should properly refer all further correspondence and pleadings to the office of the Chief Administrative Law Judge.

The Court ORDERS THAT this matter be considered closed unless and until further notice from the Office of the Chief Administrative Hearing Officer is received, designating this Court once again as the "presiding administrative law judge."

SO ORDERED.

FREDERICK C. HERZOG
Administrative Law Judge

Dated: May 14, 1991