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
	)	Case No. 90100230
FURR'S/BISHOP'S CAFETERIAS, A LIMITED PARTNERSHIP, d/b/a "Furr's Cafeterias," Respondent.	)	

ACTION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER
AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND ORDER

On July 27, 1990, a complaint was filed by the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter complainant), against Furr's/Bishop's Cafeterias, a limited partnership (hereinafter respondent). The complaint was filed with the Office of the Chief Administrative Hearing Officer, which served the complaint and the notice of hearing on the parties and assigned the matter to the Honorable Frederick C. Herzog, Administrative Law Judge (hereinafter ALJ).

The complaint alleged in three counts that the respondent violated the Immigration Reform and Control Act of 1986. Count One charged that the respondent hired two individuals after November 6, 1986, knowing they were unauthorized for employment in the United States (hereinafter knowingly hired violations), in violation of 8 U.S.C. §1324a(a)(1)(A). Count Two alleged alternatively that the respondent unlawfully continued to employ the two individuals, in violation of 8 U.S.C. §1324a(a)(2). Count Three charged that the respondent failed to comply with the employment eligibility verification requirements of IRCA in violation of 8 U.S.C. §1324a(a)(1)(B).

On April 22, 1991, the parties filed a Joint Statement of the Case and Stipulated Facts (hereinafter Joint Statement). On May 3, 1991, the parties filed a Supplement to Joint Statement of the Case and Stipulated Facts. These documents indicate that respondent has admitted liability for Counts One and Three while complainant has withdrawn the allegations contained in Count Two. The parties have also stipulated to a fine of $12,000 for the violations. The Joint Statement also maintains that the only remaining issue in this matter is whether the fine for the two knowingly hired violations in Count One should be assessed pursuant to 8 U.S.C. §1324a(e)(4)(A)(ii), i.e., whether the respondent is an ". . . entity previously subject to one order under [§1324a(e)] . . ." and thus subject to the second, and higher, level fine set forth in that subsection. Joint Statement at 3.

The parties agreed to waive a hearing and following the presentation of briefs as to the remaining issue, the ALJ issued a Final Decision and Order, dated May 22, 1991. In the Final Decision and Order, the ALJ held that the respondent was liable for a second level violation under 8 U.S.C. §1324a(e)(4)(A)(ii). Final Decision and Order at 6.

On June 3, 1991, the respondent timely filed a request for administrative review with the Chief Administrative Hearing Officer, pursuant to 28 C.F.R. §68.51(a). The complainant responded by filing a reply, received by this office on June 10, 1991.

ACCORDINGLY,

The Chief Administrative Hearing Officer has conducted a review of the ALJ's Final Decision and Order of May 22, 1991. The documents identified herein and the record as a whole have been carefully considered. Pursuant to 8 U.S.C. §1324a(e)(7) and 28 C.F.R. 68.51, the Chief Administrative Hearing Officer hereby affirms the Administrative Law Judge's Final Decision and Order. Note that pursuant to 8 U.S.C. §1324a(e)(7), the ALJ's Final Decision and Order becomes the final agency decision and order of the Attorney General on June 21, 1991.

Affirmed this 19th day of June, 1991.

JACK E. PERKINS
Chief Administrative Hearing Officer

UNITED STATES DEPARTMENT OF JUSTICE
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UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324a Proceeding
	)	OCAHO CASE No. 90100230
FURR'S/BISHOP'S CAFETERIAS, A LIMITED PARTNERSHIP, d/b/a "FURR'S CAFETERIAS", Respondent.	)	

DECISION AND ORDER

PROCEDURAL HISTORY

Complainant United States of America filed a Complaint Regarding Unlawful Employment against Respondent Furr's/Bishop's Cafeterias. A Limited Partnership, d/b/a "Furr's Cafeterias", on July 27, 1990.

The Complaint alleged Respondent has violated the Immigration Reform and Control Act of 1986 (IRCA) in three counts. In the first count, Complainant alleges Respondent hired two employees while knowing they were not authorized to work in the United States in violation of 8 U.S.C. §1324a(a)(1)(A). Count two of the Complaint alleges that, in the alternative to count one, Respondent violated 8 U.S.C. §1324a(a)(2) by continuing the employment of the same two employees after it learned they were not authorized for employment in the United States. In count three, it is further alleged that Respondent has violated IRCA by failing to comply with IRCA's employment eligibility verification requirements contained at 8 U.S.C. §1324a(b).

On April 22, 1991, the parties herein filed a Joint Statement of the Case and Stipulated Facts. On May 3, 1991, the parties filed a Supplemental to Joint Statement of the Case and Stipulated Facts. These documents indicate Complainant has withdrawn the allegations contained in count two of the Complaint. Respondent has in turn admitted liability on counts one and three of the Complaint. Moreover,

the parties have stipulated to an agreed fine of Twelve Thousand Dollars ($12,000.00) for the violations.

The only remaining issue in this case concerns whether the fine for the two instances of "knowing hire" violation should be assessed as a "second level" fine in accordance with 8 U.S.C. §1324a(e)(4)(A)(ii).

On May 3, 1991, Complainant filed its Brief on Remaining Legal Issue with this tribunal. Subsequently, on May 8, 1991, Respondent timely filed its Memorandum Brief which also address the sole remaining issue. Both parties also submitted Reply Briefs.

STATEMENT OF RELEVANT FACTS

The parties have stipulated to numerous facts which address the remaining legal issue in this case. Such stipulated facts will be recited here.

Respondent is a Delaware limited partnership formed in September 1987. Respondent controls 99% of the partnership interest in subsidiary "Operating Partnerships" (which consist of Cafeteria Operators L.P. and Furr's/Bishop's Specialty Group, L.P.). Respondent is the real party in interest for purposes of this case.

Operating Partnerships owns and operates 155 cafeterias and restaurants located in the western United States. Those restaurants which are located in the state of Kansas are owned and operated by Respondent's subsidiary, "Cafeteria Operators L.P.". The central office for Respondent as well as its subsidiary, is located at 6901 Quaker Avenue, Lubbock, Texas. Among other functions, the central office is responsible for the management of personnel and employee relations.

Cafeterias owned and operated by Operating Partnerships are grouped by geographic regions and supervised by regional management teams. Cafeteria #259, [which is the subject of this case], and Cafeteria #198 are located in the same geographical region. Therefore, both cafeterias are under the supervision of the same regional directors whose office is located at 7818 State Avenue, Kansas City, Kansas, 66112. Cafeteria #151 is located in another region, which has offices located at 1340 S. Havana, Aurora, Colorado 80012 and at 2206 E. Pikes Peak Ave., Colorado Springs, Colorado 80909.

On August 15, 1988, Respondent was ordered to pay $5,100.00 penalty for IRCA violations which occurred at Cafeteria #198. On

June 13, 1988, Respondent was also ordered to pay a $3,900.00 monetary penalty for IRCA violations occurring at Cafeteria #151. The Notices of Intent to Fine for both of the aforementioned cases were served upon the Respondent on May 3, 1988.

Each individual cafeteria also has a management structure that usually consists of a general manager, a food and beverage manager and several associate managers. The general managers for the individual cafeterias are responsible for day-to-day operations.

Respondent's Vice President for Personnel and Employee Relations is Richard J. Cohen. His office is located at Respondent's central office in Lubbock, Texas.

Among other duties, Cohen represents Respondent in relation to IRCA compliance proceedings. Cohen has also issued written guidelines regarding IRCA compliance to all management personnel through Respondent's Field Management Manual. Respondent's guidelines assign the responsibility for IRCA compliance to each of the cafeterias' general managers. However, if higher level management become aware of the employment of unauthorized aliens by its cafeterias, it has the authority to terminate such unauthorized employees. The Operating Partnerships may further discipline the managers of individual cafeterias for IRCA violations involving monetary penalties. For example, the general manager of the cafeteria involved in INS case No. KAN-86-274A-12 was required to reimburse the Operating Partnerships for the IRCA money penalty. The INS has also conducted company-wide education workshops for management personnel of the Operating Partnerships.

While each of the general managers of the individual cafeterias is responsible for the recruitment and hire of non-management personnel, he or she is required to conform the cafeteria's employment practices to the guidelines of the Field Management Manual. The Field Management Manual, which set forth Respondent's policies and guidelines, is issued by Respondent's Personnel Office located at the central office.

THE REMAINING LEGAL ISSUE

In their respective briefs, the parties agree that the central question that is relevant for the resolution of the remaining legal issue in this case concerns the interpretation that should be accorded to the term "person or entity" under IRCA.

8 U.S.C. §1324a(e)(4)(A) requires this tribunal to issue an order which would compel "a person or an entity" to cease and desist from "knowing hire" and "continuing employment" violations where such violations have been found to exist. Subsection (ii) of the aforementioned paragraph further requires this tribunal to impose a civil money penalty between $2,000 and $5,000 for each instance of unauthorized employment by an "...entity previously subject to one order under this paragraph;..."

An "entity" which violates IRCA's unlawful employment provisions for the first time is subject only to a "first level fine," which ranges between $250 and $2,000. However the same statutory paragraph limits the definition of "a person or entity" under IRCA for purposes of assessing a "second Level fine".

8 U.S.C. §1324a(e)(4) states:

> "In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity."

Congress' intent for including the above limitation is clearly revealed by the relevant legislative history. IRCA is the first legislation which imposes the duty to verify employment eligibility upon employers. In order to ensure employers' compliance with IRCA's new burdens, Congress provided for differing fine levels as a coercive compliance mechanism. If an employer repeatedly violates IRCA, it can be subject to progressively stiffer fines culminating in possible criminal liabilities. See H.R. Rep. No. 682, 99th Cong., 2nd Sess., pt.1 at 59 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News at 5650, 5663. The purpose for the fine structure is therefore obviously designed to secure employers' diligence and compliance with their IRCA responsibilities.

However, Congress foresaw that where an employer is composed of distinct and separate subdivisions, imposition of progressive fines on the parent company will not necessarily enhance compliance and diligence by the subdivisions. In consideration of this, Congress provided for the "person and entity" limitation in 8 U.S.C. §1324a(e)(4). However, the House Judiciary Committee, in its report in the IRCA bill, took pains to emphasize that the "person and entity" limitation applies "...only to those situations where the subdivisions of the corporation or entity do their own hiring and recruiting for employment completely independent and irrespective of the other subdiv-

isions." (emphasis added) H.R. Rep. No. 682, 99th Cong., 2nd Sess., pt.1 at 60 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News at 5664. This qualification is easily understood with reference to the policy for the progressive fine structure. Where subdivisions recruit and hire under the common direction of the parent entity, the imposition of progressive fines obviously may enhance the parent's diligence in securing IRCA compliance by the subsidiaries under its control. In light of the above, it is evident that IRCA's limitation on the definition of "person or entity" is restricted to situations where the parent entity has little control over the hiring and employment practices of its subsidiaries.

Based upon the above discussion, an analysis of the present case demonstrates Respondent cannot claim the "person or entity" limitation provided by 8 U.S.C. §1324a(e)(4).

Initially, it is clear that Respondent, through its central office, dictates general employment policies to all the individual cafeterias through the Field Management Manual. In fact, the parties have stipulated that Respondent's personnel officer has promulgated specific rules to secure IRCA compliance by the field cafeterias during the hiring process. These practices unequivocally indicate Respondent exercised a significant degree of "control" over hiring procedures by the individual cafeterias. The statute is clear that only where subsidiaries are completely independent of common control can the parent corporation raise the "person or entity" limitation as a defense to second level fines. Respondent thus cannot escape second level fines in this case.

Other evidence also support the imposition of second level fines against the instant Respondent. The cafeteria involved here, as well as another cafeteria for which Respondent has previously been fined by the INS, both belong to the same subsidiary of Respondent (i.e. Operating Partnership, L.P.). In fact, the two cafeterias are under the same Regional Management Team which has the power to countermand hiring decisions made by the general managers of the individual cafeterias. This leads to the conclusion that, even if Respondent cannot be liable for second level fines where its two subsidiaries separately violated IRCA, this nevertheless will not insulate it in this case since the subsidiary which is involved here has already engaged in prior instances of IRCA violations.

Respondent argues that since each of its cafeterias conduct its own hiring, and since IRCA intended to penalize only unlawful hiring

practices, the cafeterias should be considered as distinct entities. Respondent thus concludes that IRCA violations by different cafeterias should be treated as violations by separate entities for fine characterization purposes. This argument is without merit. Respondent's argument has plainly ignored the fact that IRCA's penalty provisions are intended to secure employers' compliance with the statute. In order to accomplish this purpose, IRCA penalties target those who have power to control the hiring process. It is also in consideration of this purpose that IRCA refuses to aggregate violations upon the same parent employer where its subsidiaries make hiring decisions in complete independence. Respondent's argument that the imposition of second level fines in this case will serve to discourage employers from exercising IRCA supervision over its subsidiaries also is without merit.

Respondent's cafeterias clearly do not hire in complete independence. In fact, each cafeteria's hiring procedure is subject to scrutiny by several levels of Respondent's management. The cafeterias' employment procedures are further subject to the procedural guidelines promulgated by the central office. In view of such factual circumstances, Respondent clearly is not entitled to "first level fines" in this case. To hold in Respondent's favor on this issue would, in fact, undermine or thwart Congress' purpose for providing the progressive penalty scheme contained in IRCA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the above discussions, and in consideration of the parties' stipulations, I find:

A. That Respondent violated 8 U.S.C. §1324a(a)(1)(A) when it hired two individuals for employment in the United States after November 6, 1986 while knowing they were not authorized for such employment. The two individuals are:

1. Bartolo Molina-Benitez, a/k/a Claudio Molina-Benitez; and,
2. Mireya Hernandez-Lozano.

B. That Respondent violated 8 U.S.C. §1324a(a)(1)(B) when it failed to comply with the employment eligibility verification provisions contained at 8 U.S.C. §1324a(b) with respect to fifteen of its employees. The fifteen employees are:

1. Bartolo Molina-Benitez, a/k/a Claudio Molina-Benitez;
2. Mireya Hernandez-Lozano;
3. Alejandro Aboytes;

4. Juventino Cruz;
5. Miguel Garcia;
6. Pablo M. Garcia;
7. Hipolito Gomez;
8. Jennifer Howell;
9. Carl E. McRoy;
10. Darlene Meyer;
11. Jesus Prado-Zaragoza;
12. Mary Richey;
13. Lorie Rubadeu;
14. Ramon Salgado-Aponte; and,
15. Florentino Valladares.

C. That the penalty imposed against the Respondent in the instant proceeding shall constitute "second level fines" in accordance with 8 U.S.C. §1324a(e)(4)(A)(ii).

ORDER

IT IS HEREBY ORDERED that:

1. Respondent Furr's/Bishop's Cafeterias, A Limited Partnership, d/b/a "Furr's Cafeterias" shall cease and desist from any further violations of 8 U.S.C. §1324(a)(1)(A).

2. Respondent shall comply with the employment eligibility verification requirements of 8 U.S.C. §1324a(b) with respect to individuals hired by insisting upon the presentation of properly completed I-9 Forms and by retaining then for a period of three years.

3. Respondent shall pay a second level civil money penalty in the amount of Twelve Thousand Dollars ($12,000.00) for the instant violations. "Second level fines" is the penalty defined by 8 U.S.C. §1324a(e)(4)(ii).

4. The hearing heretofore postponed indefinitely be, and hereby is, canceled.

FREDERICK C. HERZOG
Administrative Law Judge

Dated: May 22, 1991