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

April 19, 2004

YAMING SHEN,)
Complainant,)
) 8 U.S.C. § 1324b Proceeding
v.) OCAHO Case No. 05B00002
)
DEFENSE LANGUAGE INSTITUTE,)
Respondent.)
)

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Yaming Shen, a citizen of the United States, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that the Defense Language Institute (DLI or the Institute) discriminated against her by not renewing her appointment as a language instructor and that it also retaliated against her, all of which she says was done in violation of the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2004). A Notice of Hearing was mailed to the Institute on December 9, 2004. The return receipt card indicates that service was made on December 17, 2004. The Defense Language Institute made a timely request for an extension of time until February 4, 2005 in which to answer, which was granted over Shen's objection.

On February 18, 2005 in the absence of an answer I issued an Order to Show Cause directing the Institute to show cause by March 4, 2005 why an entry of default should not be made. The Defense Language Institute made a timely response to that order by filing a Motion to Dismiss/Response to Order to Show Cause. Shen filed a timely opposition to the motion together with a declaration. Both parties submitted exhibits.

II. THE MOTION

The Institute's motion reflects that its correct name is the U.S. Army Defense Language Institute

Foreign Language Center (DLIFLC), and that it is a Department of Defense entity which provides foreign language instruction to serve the needs of the United States Military. The Institute accordingly argues that as a federal agency no default may be entered against it, and that the case must be dismissed for lack of subject matter jurisdiction on the ground that the United States has not waived sovereign immunity under the provisions of 8 U.S.C. § 1324b.

Shen's response did not dispute the Institute's status as a component of the Department of Defense or her own status as a federal civilian employee. Rather, she contended that on the authority of *Roginsky v. Dep't of Defense*, 3 OCAHO no. 415, 196 (1992)[1] (*Roginsky I*) and *Roginsky v. Dep't of Defense*, 3 OCAHO no. 426, 278 (1992) (*Roginsky II*), sovereign immunity is not available to shield the Institute from suit under § 1324b. She requested the immediate issuance of a default judgment based on the fact that no timely answer had been filed, or, in the alternative, asked for an extension of time in which to submit additional responses to support her opposition to the Institute's motion.

In support of the motion, the Institute offered exhibits RXA) U.S. Office of Personnel Management (OPM) Standard Form 50-B, effective April 19, 1999; RXB) OPM Standard Form 50-B, effective April 19, 2000; RXC) OPM Standard Form 50-B, effective April 8, 2001; RXD) OPM Standard Form 50-B, effective April 25, 2002; RXE) OPM Standard Form 50-B, effective May 23, 2003; RXF) OPM Standard Form 50-B, effective June 25, 2004; and RXG) a letter from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to Shen dated August 2, 2004.

Exhibits accompanying Shen's opposition to the motion include CXA) 2 pages captioned respectively Objective Rating Definitions and Overall Performance Rating Definitions; CXB)[2] DA Form 7222, Senior System Civilian Evaluation Report dated October 30, 1999 (5 pages); CXC) DA Form 7222, Senior System Civilian Evaluation Report dated November 10, 2003 (4 pages); CXD) a letter from Harry C. Olsen dated August 24, 2001 and addressed to whom it may

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[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO" or on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

[2] Some of the designations on Shen's exhibits have apparently been cut off at the bottom of the page. Exhibits B, C, D, and G do not contain visible identifications.

concern; CXE) three e-mails dated September 5, 2003; CXF) pages 278, 281, 287-89, and 291 of the decision in *Roginsky II* (1992); CXG) pages 196-197 of the decision in *Roginsky I*; CXH) OPM Standard Form 50-B effective June 25, 2004 (a duplicate of RXF); CXI) pages 8-9 of Defense Language Institute Foreign Language Center Reg. 690-1; CXJ) OPM Standard Form 50-B effective May 23, 2003 (a duplicate of RXE); CXK) page 7 of Defense Language Institute Foreign Language Center Reg. 690-1; and CXL) the last page of DLI's motion.

III. DISCUSSION

The exhibits reflect and the parties agree that Shen was a federal civilian employee appointed to successive one year terms and that her appointment was not renewed after the expiration of the most recent term ending on June 25, 2004. Shen correctly points out that in 1993 OCAHO case law held that Congress intended to waive sovereign immunity under § 1324b, *Roginsky I* and *Roginsky II*, so that federal entities were then considered amenable to proceedings under that statute. *See also Mir v. Fed. Bureau of Prisons*, 3 OCAHO no. 510, 1073, 1083 (1993). A few early OCAHO cases also entertained complaints against federal agencies without explicit resolution of the federal sovereign immunity issue. *See Wockenfuss v. Bureau of Prisons*, 5 OCAHO no. 767, 373 (1995) (case dismissed for lack of a timely charge); *Parkin-Forrest v. Veterans Admin.*, 3 OCAHO no. 516, 1115 (1993) (complaint dismissed on other grounds). However, two federal circuits subsequently held that federal agencies are not amenable to suit under § 1324b, including the circuit in which this case arises. *General Dynamics Corp. v. United States*, 49 F.3d 1384, 1386-87 (9th Cir. 1995); *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 508-10 (10th Cir. 1994).

Both *Hensel* and *General Dynamics* found that the provisions of 8 U.S.C. § 1324b contained no language which could plausibly be read as a waiver of federal sovereign immunity. OCAHO cases arising since *Hensel* and *General Dynamics* have followed those decisions and now uniformly hold that the federal government and its agencies are immune from proceedings under § 1324b. *Ruan v. United States Navy*, 8 OCAHO no. 1046, 714 (2000); *Chung v. Fed. Bureau of Prisons*, 6 OCAHO no. 881, 629 (1996); *Kasathko v. Internal Revenue Serv.*, 6 OCAHO no. 840, 176 (1996); *Kupferberg v. Univ. of Oklahoma Health Sciences Ctr.*, 4 OCAHO no. 709, 1056 (1994) (Oklahoma City Veterans Affairs Medical Center protected by sovereign immunity); no OCAHO case since 1995 has held otherwise. Thus *Roginsky* is no longer good law in the circuit in which this case arises and the Institute's motion to dismiss must be granted.

Shen's request for a default judgment or for additional time in which to submit further responses in opposition will accordingly be denied. There is no dispute that the Institute is a federal agency. The governing law of the circuit squarely holds that 8 U.S.C. § 1324b contains no waiver of sovereign immunity and I am not at liberty to ignore this precedent. There is thus no evidence Shen could gather and no argument she could make that would alter the conclusion that sovereign immunity protects the Defense Language Institute from this proceeding.

IV. FINDINGS OF FACT

1. Yaming Shen is a citizen of the United States.

2. The U.S. Army Defense Language Institute Foreign Language Center (DLIFLC) is a Department of Defense entity which provides foreign language instruction to serve the needs of the United States Military.

3. Yaming Shen was employed by the Defense Language Institute Foreign Language Center as a federal civilian employee appointed to successive one year terms during the period from April 19, 1999 until June 25, 2004.

4. Yaming Shen's appointment as a federal civilian employee of the Defense Language Institute Foreign Language Center was not renewed after the expiration of the term ending on June 25, 2004.

5. On July 15, 2004 Yaming Shen filed a charge with the Office of the Special Counsel for Immigration-Related Unfair Employment Practices alleging that the Defense Language Institute discriminated against her on the basis of her United States citizenship.

6. The Office of the Special Counsel for Immigration-Related Unfair Employment Practices sent Yaming Shen a letter dated August 2, 2004 notifying her that she had the right to file a complaint with the Office of the Chief Administrative Hearing Officer within 90 days of her receipt of the letter.

7. Yaming Shen filed a complaint with the Office of the Chief Administrative Hearing Officer on November 2, 2004.

V. CONCLUSIONS OF LAW

1. Yaming Shen is a protected individual within the meaning of 8 U.S.C. § 1324b(a)(3)(B).

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. Circuit precedent establishes that the United States did not waive its sovereign immunity in 8 U.S.C § 1324b. *General Dynamics Corp. v. United States*, 49 F.3d 1384, 1386-87 (9th Cir. 1995).

4. Federal sovereign immunity protects the Defense Language Institute Foreign Language Center, a component of the United States Department of Defense, from proceedings under

8 U.S.C. § 1324b.

5. The Defense Language Institute Foreign Language Center is not an entity within the coverage of 8 U.S.C. § 1324b(a)(1) and the complaint must accordingly be dismissed.

ORDER

For the reasons more fully stated herein, the complaint is dismissed.

SO ORDERED.

Dated and entered this 19th day of April, 2005.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.