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. 95A00105
MESABI BITUMINOUS, INC.,	)	
Respondent.	)	Judge Robert L. Barton, Jr.
	)	

PREHEARING CONFERENCE REPORT AND ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION
(September 29, 1995)

I. *Introduction*

A telephonic prehearing conference (PHC) was held in this case on September 27, 1995. During the conference I heard oral argument on the Complainant's Motion for Summary Decision. This report summarizes the matters discussed and the rulings rendered during the PHC.

The one-count Complaint filed on June 29, 1995 by the Immigration and Naturalization Service (INS) asserts that Respondent failed to properly complete Section 2 of the Employment Eligibility Verification Form (Form I-9) for eighteen named individuals in violation of the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a(a)(1)(B). Complainant requests that a civil money penalty of $5,940.00 be assessed against Respondent for these violations.

Respondent's Answer, filed on July 14, 1995, asserts that it denies "any willful noncompliance," and that the suggested penalty will place a severe financial hardship on Respondent's firm.

On August 21, 1995, Complainant filed the Motion for Summary Decision at issue during the prehearing conference. Complainant

asserts that no genuine issues of material fact exist as to Respondent's liability for the eighteen alleged violations or as to the amount of the civil money penalty to be assessed. Attached to Complainant's motion, and relied on therein, are an affidavit by INS Special Agent Frank K. Unger (Unger), and copies of the 18 Forms I-9 in question.

On September 8, 1995, Respondent filed a letter pleading which reiterates the denial in the Answer and states that "[a]ll I-9 Forms were submitted with copies of [Drivers] Licenses and Social Security Cards."

Complainant was represented in the PHC by Terry Louie, Esquire. Mr. Louie left during the PHC and INS was represented by Special Agent Unger and Supervising Special Agent Larry Olsen (Olsen). Respondent was represented by Jerry Nemanich (Nemanich), President of Mesabi Bituminous, Inc., with Respondent's Office Manager Linda Gulbranson (Gulbranson) also appearing.

II. *Motion for Summary Decision*

OCAHO Rules authorize the administrative law judge (ALJ) to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. United States v. Davis Nursery, Inc., 4 OCAHO 694 at 8 (1994) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985)). Failure to meet this burden invites summary decision in the moving party's favor.

A. Liability Determined

Title 8 U.S.C. § 1324a(a)(1)(B) makes it unlawful for an employer to "hire for employment in the United States an individual without com-

plying with" the employment verification system requirements at 8 U.S.C. § 1324a(b).

In order to prove the allegations of count one, Complainant must show that Respondent hired the individuals named therein for employment in the United States after November 6, 1986, failing to properly complete Section 2 of the Forms I-9 for these individuals. United States v. Burns and Intra-Continental Enterprises, 5 OCAHO 759, at 10 (1995). OCAHO case law demonstrates that substantial compliance may be an affirmative defense to paperwork violations like those alleged in the Complaint here. United States v. Northern Michigan Fruit Company, 4 OCAHO 667, at 14 (1994) citing United States v. J.J.L.C., Inc. t/a Richfield Caterers and/or Richfield Regency, 1 OCAHO 154 (1990), reconsideration denied, 1 OCAHO 170 (1990), aff'd 1 OCAHO 184 (1990); United States v. San Ysidro Ranch, 1 OCAHO 183 (1990).

To show that it substantially complied with IRCA's paperwork requirements an employer needs to demonstrate (1) use of an INS Form I-9 to determine an employee's identity and employment eligibility; (2) the employer's (or its agent's) signature is on Section 2 under penalty of perjury; (3) the employee's signature is on Section 1; (4) an indication in Section 1 by a check mark or some other means attesting under penalty of perjury that the employee is either a citizen or national of the United States, a Lawful Permanent Resident, or an alien authorized to work until a specified date; and (5) there is some type of information or reference to a document either spelled out or attached in either Section 2 list A, or list B and C. Northern Michigan Fruit Company, 4 OCAHO 667, at 17.

During the PHC, Respondent admitted that the 18 Forms I-9 attached to Complainant's Motion for Summary Decision were the Forms I-9 submitted by mail to INS in compliance with INS's March 16, 1995 Notice of Inspection and also admitted that the 18 Forms I-9 are from current and former employees hired after November 6, 1986. Respondent again asserted that copies of drivers licenses and social security cards were attached to these Forms I-9.

Complainant stated that it did not receive copies of these identification documents, and that even if such documents were attached to the Forms I-9 this would not constitute substantial compliance with 8 U.S.C. § 1324a as Respondent did not fill out Section 2 or sign the attestation box in Section 2 as required for a showing of substantial compliance.

For the purpose of adjudicating Complainant's Motion for Summary Decision I must consider factual allegations in the light most favorable to Respondent. Therefore, for purposes of deciding the Motion for Summary Decision, I presume that the identification documents were attached to the 18 Forms I-9. However, OCAHO case law demonstrates that this is not considered substantial compliance with the requirements of IRCA and that the attaching of documents to a Form I-9 without completing Section 2, including an employer's signature and attestation under the penalty of perjury, does constitute a violation of 8 U.S.C. § 1324a. See Northern Michigan Fruit Company, 4 OCAHO 667; J.J.L.C., Inc., 1 OCAHO 154; United States v. Citizens Utilities Co., Inc., 1 OCAHO 161 (1990).

Accordingly, Complainant's Motion for Summary Decision is granted as to the issue of Respondent's liability for violations of 8 U.S.C. § 1324a(a)(1)(B) for the 18 named individuals in Count I of the Complaint.

B. Ruling on Civil Money Penalty Held in Abeyance

Complainant's Motion for Summary Decision also asserts that there is no genuine issue as to any material fact regarding the civil money penalty for the 18 violations. Complainant relies on the Declaration of Frank K. Unger to demonstrate that it has considered all of the five statutory factors for mitigating the penalty set forth at 8 U.S.C. § 1324a(e)(5) in its assessment of a civil money penalty of $330.00 per violation, for a total civil money penalty of $5,940.00. These five factors are: the size of Respondent's business, the good faith of the employer, the seriousness of the violations, whether the individuals involved are unauthorized aliens, and the history of previous violations.

Unger's Declaration refers to a Memorandum he prepared which is dated April 17, 1995, and captioned "Rationale for Fine Amount Assessed Against Mesabi Bituminous" (Memorandum). This Memorandum was also included with the Motion for Summary Decision. Unger stated in this Memorandum, and reiterated during the PHC, that Complainant concedes that Respondent is not a large business, that the individuals involved are not unauthorized aliens, and that Respondent has no history of previous violations. However, Complainant asserts that Respondent did not exercise good faith and that the violations were serious and, accordingly, requests an increased penalty from the statutory minimum of $100.00 per violation to $330.00 per violation.

OCAHO case law demonstrates that the mere fact of paperwork violations is insufficient to show a lack of good faith for penalty purposes. See e.g., United States v. Minaco Fashions, Inc., 3 OCAHO 587 (1993); United States v. Valladares, 2 OCAHO 316 (1991). Rather, to demonstrate a lack of good faith, the Complainant must present some evidence of "culpable behavior beyond mere failure of compliance" on Respondent's part. Minaco Fashions, 3 OCAHO 587, at 7. In a recent decision, the Chief Administrative Hearing Officer (CAHO) stressed that culpable behavior beyond noncompliance is required for a finding of lack of good faith. United States v. Karnival Fashion, Inc., 5 OCAHO 783, at 3 (1995). The CAHO illustrates such culpable behavior by explaining:

> A lack of good faith has routinely been found where the complainant has shown prior educational visits to respondent's place of business by officials of the INS or the Department of Labor in which respondent's responsibilities under IRCA are explained and informational materials are provided. See United States v. Giannini Landscaping, Inc., 3 OCAHO 573, at 8-9 (1993); See also United States v. Task Force Security, Inc., 4 OCAHO 625, at 7 (1994). In addition, the INS has been successful in arguing a lack of good faith under other circumstances. See United States v. Primera Enters. Inc., 4 OCAHO 692, at 4 (1994) (finding of lack of good faith for failure to cooperate in INS investigation); See also United States v. Enrique Reyes, 4 OCAHO 592 (1994) (finding a lack of good faith for paperwork violations after INS had previously apprehended an undocumented alien upon the premises).

Id. at 2-3.

Complainant asserts that Respondent did not demonstrate good faith because it did not properly complete the Forms I-9 despite knowledge of IRCA's requirements. Complainant states that Respondent knew of its employment verification requirements because "[t]hey were visited in 1993 by the Department of Labor." Memorandum at ¶2. During the PHC, Unger stated that he did not know the identity of the individual from the Department of Labor who visited Respondent in 1993. He further expressed his "hope" that the individual from the Department of Labor left with Respondent an Employer's Handbook explaining employment eligibility verification requirements and a telephone number to call if Respondent had questions. Unger also stated that his file indicates that the Department of Labor provided Respondent publications regarding the employment verification requirements.

During the PHC, Gulbranson stated that she was present for the visit by the individual from the Department of Labor. She states that she does not recall the individual's name, but that one man came one time to Respondent's business location, spent a short amount of time discussing Forms I-9 and only provided a copy of the Form I-9, not a telephone number or a handbook. Thus, the parties disagree as to the extent of education and publications provided by the Department of

Labor at the 1993 visit. At the present time the record does not demonstrate a lack of good faith by Respondent.

I will hold in abeyance the portion of Complainant's Motion for Summary Decision relating to the appropriate amount for the civil money penalty in accordance with the time frame discussed below.

III. *Other Matters Discussed*

In addition to the Motion for Summary Decision, other matters discussed and rulings made during the PHC include:

(1) The Complaint is hereby amended to correct a mistake in the citation to IRCA in Count I after paragraph C to read: "WHEREFORE, it is charged that the Respondent is in violation of Sec. 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1324a(a)(1)(B), . . ."

(2) Respondent was instructed that any documents served on the Court must also be served on Complainant's counsel.

(3) As the parties indicated that they were amenable to settlement in this matter, I invited them to make a good faith effort to negotiate a reasonable settlement as to the amount of the civil money penalty. The parties agreed to discuss settlement via telephone on September 28, 1995. Complainant was instructed to file a written statement on or before October 11, 1995 advising the Court of the status of the case and whether it appears settlement is possible.

(4) If settlement is not achieved, and summary decision is not rendered on the issue of penalty, the parties may present evidence, including testimony, on the issue of good faith or other issues relating to penalty. Complainant bears the burden of justifying its requested penalty. However, Respondent may wish to present evidence on penalty as well, including its asserted inability to pay a civil penalty.

(5) A hearing site was discussed at the PHC. Respondent requested that any hearing be held in Virginia, Minnesota, whereas Complainant requested Bloomington, Minnesota. I did not set the hearing site at the PHC. If the case is not settled, I will select a hearing site after considering the location of witnesses and other relevant factors.

If any party objects to any part of this Report on the ground that it does not accurately reflect the ruling at the Conference, such objections shall be filed and served within ten days of the service date of this Report. Such objections shall not merely be requests for reconsideration. Rather they should be filed only if this Report does not accurately reflect the ruling made at the PHC and shall state what the party contends the ruling was.

ROBERT L. BARTON, JR.
Administrative Law Judge