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

June 13, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 95C00155
ISRAEL VELASQUEZ-TABIR, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

The complaint in this case alleges that Respondent knowingly used, attempted to use, and possessed a forged, counterfeited, altered, and falsely made Alien Registration Receipt Card (Form I–151) A 034 621 489 bearing the name Isrrael (sic) Velasquez after November 29, 1990, for the purpose of satisfying a requirement of the Immigration and Nationality Act, as amended, 8 U.S.C. §1324c (INA). Respondent's answer denied the material allegations of the complaint and set forth affirmative defenses based upon violations of his constitutional rights under the Fourth and Fifth Amendments.

On March 8, 1996, I issued an order striking the affirmative defenses for failure to comply with OCAHO rules of practice and procedure,[1] in that the defenses were not supported by a statement of facts as required by the rules. I granted leave to amend to state defenses in compliance with 28 C.F.R. §68.9(c)(2), which requires a statement of facts.

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. §68 (1995).

Respondent filed an amended answer, together with an affidavit, setting forth two defenses, again raising issues of alleged violations of his rights under the Fourth and Fifth Amendments, but more fully elaborating the factual bases upon which they are premised. On April 10, 1996, Complainant moved again to strike the defenses on the grounds of legal and factual insufficiency. There has been no response to this motion and it is ripe for ruling.

I. *Lack of Notice of Legal Rights*

I previously struck the first defense for noncompliance with OCAHO rules in that it did not contain a statement of the facts supporting the defense as is required by 28 C.F.R. §68.9(c)(2). Respondent's amended answer states in support of his Fifth Amendment defense that he does not speak, read, or write English, and that he was arrested at work on June 22, 1994 and served with an Order to Show Cause (OSC) initiating deportation proceedings. The next day he was served with a Notice of Intent to Fine (NIF) which he did not understand and which failed to advise him of his rights.

In an affidavit filed with the answer he states further that after his arrest he was questioned by INS agents and did not know he had a right to consult an attorney before answering questions. He asked if he could see an attorney and was told he had to answer the questions first. He answered the questions and also signed an unidentified document because he was told he had to. The specific questions he answered are not set forth, nor is the document he signed described any further, and there is no allegation that the questions or document relate to this proceeding.

Respondent cites *Walters v. Reno,* C 94–1204C, ___F. Supp.___ (W.D. Wash. March 13, 1996) for the proposition that "[t]he unconstitutionality of the NIF has already been decided in favor of similarly situated persons by the U.S. District Court in Seattle." Further, he states that he was able to exercise his rights to a hearing only because he obtained legal representation through his union.

The class certified in *Walters* consisted of:

> All non-citizens who have or will become subject to a final order under Section 274C of the Immigration and Nationality Act because they received forms that did not adequately advise them of their rights, of the consequences of waiving their rights, or of the consequences of failing to request a hearing.

For purposes of ruling on the motion to strike, I take as true all the factual assertions in the asserted defense. Even drawing all reasonable inferences in his favor, Respondent has not brought himself within the *Walters* class by this pleading. While he is a person who may become subject to a final order, and arguably a person who received forms which failed adequately to advise him of his rights, there is no factual basis from which it could be inferred that he is a person who would become subject to an order *because* he received the flawed forms. The class in *Walters* consists of persons who failed to request a hearing, or who signed waivers of the right to hearing and thereby became susceptible to an automatic finding without the opportunity for a particularized inquiry provided by a hearing. Respondent is thus not similarly situated to the *Walters* class. While he signed an unidentified document, it clearly was not a waiver of hearing.

The remedy provided to members of the *Walters* class, moreover, was not an immunity from document fraud proceedings, but the opportunity to seek reopening of their cases in order to have a hearing. Respondent has no need of this remedy because he is not similarly situated: he did not waive his right to a hearing, he timely requested a hearing, he is represented by counsel, and he has notice of the consequences of this action. I cannot find that he suffered any prejudice from the alleged defective notice, nor has Respondent articulated any facts which would support a finding of prejudice. While Respondent states he was arrested and interrogated without the opportunity to consult an attorney, he nowhere states what questions he answered or what document he signed or how his statements or the document he signed might have prejudiced him in this matter. The Fifth Circuit has long held that proof of a denial of due process in administrative proceedings requires a showing of substantial prejudice. *Ka Fung Chang v. INS*, 634 F.2d 248, 258 (5th Cir. 1981), *United States v. Lorber*, 630 F.2d 335, 337–38 (5th Cir. 1980), *Arthur Murray Studio of Washington v. FTC,* 458 F.2d 622, 624 (5th Cir. 1972).

Respondent further cites *United States v. Law Offices of Manulkin*, *Glaser and Bennett,* 1 OCAHO 100 (1989), in support of his position that the Fifth Amendment may provide an affirmative defense in this case. In *Manulkin*, the respondent posed an important issue of first impression when he claimed a defense based on selective enforcement, and filed an affidavit alleging the following facts: one of the respondent's firm's lawyers, a high profile attorney and immigrants' rights activist who defends illegal aliens, was claimed to be the target of unlawful surveillance, and had been

charged with hiring an illegal alien. It was suggested that there was evidence the prosecution was based on government vindictiveness in retaliation for the lawyer's adversarial representation of aliens. *Manulkin held* that these facts constituted enough of a minimal showing to permit respondent to conduct discovery on the specific question of the circumstances surrounding respondent's selection for enforcement. *Manulkin* does not stand for the broad proposition that an allegation of a Fifth Amendment violation without some specific allegation of substantial prejudice can state a defense.

Respondent asserts that INS "illegalities" violate his Fifth (sic) Amendment right to counsel and to proper notice. With respect to the alleged violations of Respondent's right to counsel, I begin by stating the obvious: there is no Sixth (or Fifth) Amendment right to counsel in civil administrative proceedings. *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987), *Prichard-Ciriza v. INS,* 978 F.2d 219, 222 (5th Cir. 1992). OCAHO regulations grant a right to counsel at no expense to the government, 28 C.F.R. §68.33(b), but the right is not constitutionally required. The Fifth Circuit has stated that a right to counsel may arise if the absence of counsel would violate due process. *Campos-Asencio*, 822 F.2d at 509. As stated, however, in order to state such a claim, a particularized allegation of substantial prejudice would be required.

The facts as pleaded do not state a defense.

II. *Illegal Search and Seizure*

I previously struck this asserted defense on two grounds: 1) that the Fourth Amendment exclusionary rule, assuming it to apply,[2] is not an affirmative defense but rather a basis upon which to move *in limine* to exclude particular items of unlawfully-obtained evidence, and 2) that a challenge to the search of someone else's premises requires a particularized showing of some possessory or proprietary

[2] The Supreme Court has never specifically decided whether illegal aliens are entitled to Fourth Amendment protection, *United States v. Verdugo-Urguidez,* 494 U.S. 259, 272 (1990), but "[a]s a general rule, the exclusionary rule does not attach to civil or administrative proceeding." *In Re Establishment Inspection of Hern Iron Works,* 881 F.2d 722, 729 (9th Cir. 1989), citing *INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984) and *United States v. Janis,* 428 U.S. 433, 447 (1976). The Ninth Circuit has applied the exclusionary rule in a deportation hearing when the constitutional violation was found to be "egregious." *Orhorhaghe v. INS,* 38 F.3d 488, 493 (9th Cir. 1994), *Gonzales-Rivera v. INS,* 22 F.3d 1441, 1448 (9th Cir. 1994).

interests to support any claim of a legitimate expectation of privacy. For the same reasons, I strike these defenses again.

Respondent has still failed to articulate a factual basis for any expectation of privacy in his employer's premises.

In *Martinez v. Nygaard*, 831 F.2d 822, 825–26 (9th Cir. 1987), the Ninth Circuit held:

> To establish standing to challenge the search warrant, Martinez and the other workers must show that the warrant violated their personal rights, not merely the rights of Murakami's owners or managers. To make this showing, plaintiffs must prove they had a legitimate expectation of privacy in the area searched or the things seized.
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> . . .
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> In *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed. 2d 1154 (1968), the Court found that a union official had a legitimate expectation of privacy in an office he shared with several other officials. The office had a door, and except for union higher-ups and fellow occupants, the official was able to exclude others.
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> . . .
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> In this case, plaintiffs worked in a large two-room shed that contained 75 people. Unlike the defendant in *Mancusi,* the workers had no private space in any part of the building, and no authority to exclude others. They had no possessory interest in the place searched or things seized, and no right to exclude others from the premises. Thus, plaintiffs had no reasonable expectation of privacy in their workplace.

Similarly, in *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court approved a finding that Dr. Ortega, a physician-psychiatrist, had a legitimate expectation of privacy in the desk and file cabinets in his office where he had occupied the office for 17 years and the employer-hospital had no regulation or policy prohibiting the storing of personal papers and effects in one's desk or file cabinets. Those particular factual circumstances gave rise to his reasonable expectations. No such facts have been stated here.

Respondent cites *Jones v. United States*, 362 U.S. 257 (1960), in support of his position that one can have an interest in a place other than one's home sufficient to give rise to Fourth Amendment rights. As a generalized proposition of law, the statement is unexceptional; applied to the facts in *Jones,* the outcome under current law would differ. *Jones* held that where the crime charged was a possessory offense, a person legitimately on the premises had automatic standing

to challenge a search of those premises. *Jones* was expressly overruled in *United States v. Salvucci*, 448 U.S. 83 (1980), wherein the Court rejected the "automatic standing" rule, and held that the Respondent had no standing to challenge a search of his mother's apartment because the benefit of the exclusionary rule was limited to persons whose *own* Fourth Amendment rights were implicated in the search.

The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. *Alderman v. United States*, 394 U.S. 165 (1969). This is a principle to which the Court has returned periodically since *Alderman*, with similar results. *Rakas v. Illinois*, 439 U.S. 128 (1978), *United States v. Payner* 447 U.S. 727 (1980), *United States v. Padilla*, 508 U.S. 77 (1993).

The fact that one may have protectible interest in places other than one's home does not establish that one need not articulate what that interest is when the premises at issue belong to another. It is well settled that an owner or operator of a business has a reasonable expectation of privacy in commercial property although the expectation may be less than what would be expected in a home. *Donovan v. Dewey,* 452 U.S. 594, 598–99 (1981). Because Fourth Amendment rights are personal rights, however, it is far from settled what legitimate expectation of privacy an employee can have in workplace premises in which he lacks a possessory or proprietary interest. For this reason, claims of privacy interests in a workplace setting must necessarily be evaluated on a case-by-case basis because they are dependent upon the specific facts involved. Respondent here has not articulated facts which would support any inference of a legitimate expectation of privacy in his employer's premises.

Respondent's amended defense further states that the warrant for his arrest was obtained as a result of collusion between INS and his employer, Texas Arai, in retaliation for his participation in the formation of a union, which retaliation is a violation of the National Labor Relations Act (NLRA). Respondent's affidavit further asserts he was arrested just a few days after the NLRB ruled in favor of the union.

Under factually similar circumstances, the Supreme Court, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), held that an employer violated §§8(a)(1) and 8(a)3 of the NLRA, 29 U.S.C. §§158(a)(1) and (3), when it reported several undocumented employees to INS in retaliation for engaging in union activity. As a result, the employees were arrested and deported.

For purposes of ruling on this motion, I take as true all the factual allegations of the defense as pleaded. I will assume, *arguendo*, the continuing validity of the holding in *Sure—Tan,* [3] and accept that Texas Arai committed an unlawful employment practice in violation of §§8(a)(1) and/or 8(a)(3) of the NLRA. Drawing all reasonable inferences in Respondent's favor, I find no inferences which would give rise to application of the exclusionary rule, first, because INS is not Respondent's employer and therefore cannot itself have violated his NLRA protected rights to unionize, and second, because a violation of §8(a)(1) or §8(a)(3) of the NLRA would not call for invocation of the exclusionary rule in any event. The exclusionary rule was judicially created to deter improper police conduct in breach of Fourth Amendment rights, not to punish violations of regulatory statutes or agency rules. It prohibits the introduction in criminal proceedings against citizens or aliens alike of evidence gathered in violation of the Fouth Amendment. It is not a remedy for violation of labor laws or other regulatory statutes. *Cf. United States v. Edgar*, 82 F.3d 499, 510 (1st Cir. 1996) (suppression of evidence is not a remedy for violation of the Fair Credit Reporting Act), *United States v. Kington,* 801 F.2d 733, 737 (5th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987) (suppression of evidence obtained in violation of the Right to Financial Privacy Act not contemplated by Congress), *accord, United States v. Whitty*, 688 F.Supp. 48, 59–60 (D. Me. 1988), *United States v. Caceres*, 440 U.S. 741, 751–53 (1979) (evidence obtained in violation of an IRS regulation need not be suppressed.).

[3] One of the grounds for the result in *Sure-Tan* was the fact that it was not at that time unlawful for an employer to hire an illegal alien. Since the passage of IRCA in 1986, that is no longer the case. Although *Sure-Tan* has not been overruled, its authority may have been eroded. Lower courts continue to hold, however, that illegal aliens are protected by labor statutes, at least as to obtaining pay for work already performed. *See, e.g., EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (Title VII), *Patel v. Quality Inn South,* 846 F.2d 700 (11th Cir. 1988) *cert. denied,* 489 U.S. 1011 (1989) (FLSA), *Local 512, Warehouse and Office Worker's Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (NLRA).

Complainant's Motion to Strike is granted as to both defenses. This Order is not intended to and does not in any manner impair Respondent's right upon a particularized showing of prejudice to object to specific items of proffered evidence.

SO ORDERED:

Dated and entered this 13th day of June, 1996.

ELLEN K. THOMAS
Administrative Law Judge