

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. 94A00081  
PERFORMANCE PRINTING )  
CORPORATION, )  
Respondent. )  
\_\_\_\_\_ )

ORDER  
(July 11, 1995)

I. *Procedural History*

On April 18, 1994, the Immigration and Naturalization Service (INS or Complainant) filed a five-count Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Performance Printing Corporation (Performance or Respondent) violated the paperwork provisions of 8 U.S.C. § 1324a. The Complaint includes an underlying Notice of Intent to Fine (NIF) issued on December 24, 1993 and served on December 30, 1993 by INS upon Respondent.

On April 21, 1994, the Chief Administrative Hearing Officer (CAHO) assigned this case to Administrative Law Judge (ALJ) Robert B. Schneider, and OCAHO issued its Notice of Hearing which included a copy of the Complaint to Respondent.

Count I alleges that Respondent failed to make available for inspection the employment eligibility verification forms (Forms I-9) of 69 named individuals. Complainant seeks a civil money penalty of \$23,130.00 for these alleged violations.

Count II alleges that Respondent failed to ensure that four named individuals properly completed section 1 of the Form I-9, for a civil money penalty of \$1,280.00.

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Count III alleges that Respondent failed to properly complete section 2 of the Forms I-9 for 38 named individuals, for a civil money penalty of \$9,820.00.

Count IV alleges that Respondent failed to complete section 2 of the Form I-9 for one named individual within three business days of hire, for a civil money penalty of \$230.00.

Count V alleges that Respondent failed to ensure that 21 named individuals properly completed section 1 of the Form I-9 and failed to properly complete section 2, for a civil money penalty of \$4,680.00.

Complainant asks for a total civil money penalty of \$39,140.00.

Complainant filed a Motion to Amend the Complaint on May 5, 1994, to increase the civil money penalty for Count V to reflect three (3) individuals named in Count V of the Complaint who were mistakenly not included in the civil money penalty calculation.

Respondent filed its Answer on May 25, 1994, denying all allegations of the Complaint, and any violation of 8 U.S.C. § 1324a.

On September 2, 1994, the parties filed certain stipulations; Respondent filed a Motion for Summary Decision.

On September 6, 1994, ALJ Schneider continued the hearing previously scheduled for September 26, 1994, until decision on Respondent's Motion (Resp. MSD).

On September 15, 1994, Complainant filed a second Motion to Amend Complaint, to remove one individual from Count III of the Complaint and decrease the civil money penalty accordingly. Concurrently, Complainant filed a Motion for Partial Summary Decision (Counts II-V) (Cplt. MSD) and its Response Opposing Respondent's Motion for Partial Summary Decision (Count I) (Cplt. Response). On September 27, 1994, Respondent filed its reply to the motion (Resp. Response).

On November 2, 1994, ALJ Schneider conducted a telephonic prehearing conference with counsel for the parties. As confirmed by the ALJ's November 2, 1994 Order, the conference discussed the pending motions and reflects discussion of settlement negotiations. Ruling on the motions was deferred pending the possibility of settlement.

The parties filed letters regarding their positions on settlement on November 21, 1994 and December 1, 1994.

On February 7, 1995, the CAHO reassigned this case to me.

On April 10, 1995, I issued an Order Requesting Status Report as to the progress of settlement negotiations.

On May 1, 1995, the parties filed a joint status report which clearly reflects an impasse.

## II. Facts

### A. Uncontested Facts as Stipulated

On June 2, 1993, Complainant's agents obtained consent from Performance officials to speak to employees at Performance Packaging and Fulfillment, a unit of Respondent. Respondent fully cooperated with INS during this worksite investigation.

On June 16, 1993, Complainant issued a Notice of Inspection to Respondent demanding Respondent's employment eligibility verification forms (Forms I-9) for employees of Packaging and Fulfillment. Respondent consented to the I-9 inspection.

On July 21, 1993, Respondent, by Counsel, participated in the I-9 inspection, conducted by INS at the INS office in Dallas, Texas. Complainant found 63 defective Forms I-9 during this inspection (which form the basis for Counts II through V).

All persons named in the Complaint were employees of Respondent hired after November 6, 1986.

On March 22, 1994, Respondent, through Counsel, provided Complainant, by mail, the Forms I-9 for 55 of the 69 individuals named in Count I.

### B. Contested Facts

The parties contest whether the Forms I-9 of the 69 individuals named in Count I of the Complaint were made available to INS at the time of the inspection.

Respondent alleges it "made available to INS Agents Ligon and Canei all the [Forms I-9] available for employees of Performance Packaging at the compliance audit/inspection conducted by these Agents at the INS offices in Dallas on July 21, 1993." Resp. MSD at 3.

Complainant disputes that the Respondent made available Forms I-9 for all employees named in Count I. Specifically, Respondent was asked to make available the I-9s for all current employees, but failed to present I-9s for many individuals shown on its payroll list. Cplt. Response at 2. Complainant states that Respondent indicated that I-9s for former employees were available for review in a car outside. Id. The INS agents decided not to review these forms as they were only investigating I-9s of current employees.<sup>1</sup> Id.

### III. Discussion

#### A. Complainant's Motions to Amend Complaint Granted

Respondent has not taken issue with Complainant's two Motions to Amend Complaint, filed May 5, 1994 and September 15, 1994. They are granted.

As a result of the May 5, 1994 Motion to Amend, the civil money penalty sought for Count V is \$5,370.00 (\$410.00 for violations listed in paragraphs A-1 through A-3 in the Complaint, and \$230.00 for violations listed in paragraphs A-4 through A-21). Reflecting this change, the proposed total civil money penalty becomes \$39,830.00.

As a result of the September 15, 1994 Motion to Amend Complaint, Count III of the Complaint is amended to remove the violation involving Maria C. Romero (as listed at paragraph A-31 in Count III of the Complaint). This amendment reduces the Count III civil money penalty to \$9,590.00. The total requested penalty becomes \$39,600.00.

#### B. Motions for Summary Decision

OCAHO rules of practice and procedure authorize an ALJ to dispose of cases, as appropriate, upon motions for summary decision. 28 C.F.R. § 68.38(c).<sup>2</sup> An ALJ "may enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise,

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<sup>1</sup> Complainant apparently elected to examine the Forms I-9 only for current employees despite the requirement that employers retain I-9s of individuals they hire and make them available for inspection for "three years after the date of such hiring, or one year after the date the individual's employment is terminated, whichever is later." 8 U.S.C. § 1324a(b)(3)(B)(i) and (ii).

<sup>2</sup> Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. § 68].

or matters officially noticed . . ." show that there is "no genuine issue as to any material fact." Id. A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

In determining whether a fact is material, any uncertainty must be considered in a light most favorable to the non-moving party. Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 587 (1986). The burden of proving that there is no genuine issue of material fact rests on the moving party. Once the movant meets its initial burden, however, the burden shifts to the non-moving party to come forward with evidentiary materials designating specific facts which show that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

#### 1. Respondent's Motion for Summary Decision Denied

Respondent's motion seeks dismissal of the Complaint and the NIF on the basis that the NIF that was issued "almost six months after the INS inspection" and, as such, was untimely, prejudicing Respondent's defense of this action "by the unnecessary and unjustified delay of Complainant." In the alternative, Respondent seeks summary decision as to Count I of the Complaint, asserting that it "fails to state a claim upon which relief can be granted and should be dismissed in its entirety because Respondent fully complied with the paperwork requirements of the Act; i.e. -- Respondent made all Form I-9s available for inspection as requested." Resp. MSD at 6. Respondent also asserts that the civil money penalties sought by INS are excessive. Respondent attached four exhibits to its Motion: (1) the June 16, 1993 INS Notice of Inspection; (2) Complainant's Answers to Respondent's Interrogatories; (3) an affidavit of W. Alan Kostel (Kostel), counsel for Respondent dated September 1, 1994; and (4) a March 2, 1994 letter from Respondent to Complainant.

The June 16, 1993 Notice of Inspection demanded production of "any and all Forms 1099; employment applications; current employee list; any and all time cards; wage and hour receipts and any and all [Forms I-9] for the period November 6, 1986 to date."

The Kostel affidavit states:

5. With regard to Count I and the 69 employees/violations references therein, on July 21, 1993, at the inspection by INS, for Respondent the undersigned made available every Form I-9 in Respondent's possession to INS agents Lynn Ligon and John Canei for inspection and/or copying. However, INS agents Ligon and Canei inspected only a total of 80 I-9 Forms from the hundreds (in 2 full boxes) I made available and,

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thereby, by their own actions failed to inspect the I-9 Forms for the employees referenced in Count I.

6. [O]n March 2, 1994, the undersigned counsel for Respondent provided Complainant the I-9 Forms for 55 of the 69 employees specified in Count I.

13. INS agents Ligon and Canei inspected only a total of 80 I-9 Forms from all the I-9 forms requested and made available by Respondent at the compliance audit/inspection.  
...

14. INS agents Ligon and Canei acknowledged that more than 80 I-9 forms were made available for inspection and copying by Respondent at the compliance audit/inspection. . . . However, the agents indicated that they did not wish to inspect any additional Form I-9s. . . .

16. Complainant's Notice of Intent to Fine was served on Respondent on December 30, 1993, almost six (6) months after the inspection conducted on July 21, 1993.

As reflected in the stipulations between the parties and the March 2, 1994 letter, Respondent provided Forms I-9 for 55 of the 69 individuals named in Count I on March 2, 1994.

In opposition to Respondent's motion, Complainant asserts that there is a genuine issue of material fact as to whether Respondent made all Count I Forms I-9 available for inspection. INS included with its motion agent Lynn Ligon's (Ligon) affidavit dated July 13, 1994 which states:

I conducted a Form I-9 inspection of Performance Printing Corporation on July 21, 1993. On that date, the company's attorney, Mr. Alan Kostel, appeared for the inspection. As requested in our Notice of Inspection, Mr. Kostel brought with him a number of Form I-9s, a Payroll list for the week of 7/4/93 to 7/11/93, and articles of incorporation for Performance Printing Corporation. Mr. Kostel presented for my review the Form I-9s for the current employees on the employee roster. Upon review of the Form I-9s, it was determined that almost all of them were improperly completed. It was also determined that there were no I-9s for a large number of the employees listed on the Payroll list.

Towards the end of the inspection, Mr. Kostel indicated that he had some Form I-9s for past employees of Performance Printing Corporation located in his car. In consultation with Special Agent John Canei and Supervisory Special Agent Richard Phillips, it was decided that we would not inspect the Form I-9s for past employees.

Respondent's request that the entire Complaint and NIF be dismissed as untimely is unfounded. There is no statutory requirement that § 1324a complaints be served within a specified amount of time. See United States v. Central Nebraska Packing, Inc., First Prehearing Conference Report and Order, 4 OCAHO 714, at 2 (December 5, 1994).

There is no regulatory requirement or other authority to suggest there is any requirement to control the time span between service of the NIF and filing of the complaint. Here, the time span addressed is that between the date of inspection and the date of the NIF. In this circumstance, no less than in Central Nebraska, I do not find that INS erred as a matter of law by failing to take the next step in less time than it actually did. Respondent's assertions it was prejudiced by the six month "delay" between the inspection and the NIF is not supported by any claim of prejudice as the result of the supposed delay.

Upon resolving a motion for summary decision I am obliged to consider facts in dispute in a light most favorable to the non-moving party. Complainant's opposition to Respondent's motion and the Ligon affidavit demonstrate that there is a genuine issue of material fact as to whether Respondent provided for inspection the Forms I-9 for the 69 employees listed under Count I. This genuine issue of material fact renders summary decision inappropriate. Respondent's motion is denied.

Judgment on the appropriateness of the civil money penalty, the other issue raised by Respondent's motion, is reserved, pending resolution of Respondent's liability for Count I.

2. Complainant's Motion for Partial Summary Decision Granted as to Liability

Complainant's Motion for Partial Summary Decision seeks decision on Respondent's liability for the violations charged in Counts II - V. Complainant does not ask for summary decision as to the amount of the civil money penalty requested.

Respondent conceded liability as to Counts II-V in the November 2, 1994 telephonic prehearing conference before ALJ Schneider, as confirmed by the November 2, 1994 Order, i.e.:

Respondent's counsel . . . admitted liability for Counts II through V, while contesting Complainant's proposed civil penalty for these violations.

Order at 1 (November 2, 1994).

Replying to Complainant's Motion for Partial Summary Decision, Respondent again asserts that the amount of the civil money penalty is excessive, but does not contest liability for the alleged violations.

In addition, the parties' factual stipulations filed September 2, 1994 establish all elements of the charges in Counts II - V: all persons listed in the counts were Respondent's employees hired after November 6, 1986; Respondent admits that the I-9s of the 63 individuals in Counts II - V are defective; and copies of all Forms I-9 at issue are attached to the stipulations to show the defects alleged in Counts II - V.

Based on the admission of liability and factual stipulations, I conclude that there is no genuine issue of material fact remaining for trial as to Respondent's liability for the violations charged in Counts II - V. Accordingly, this order finds Respondent liable for the violations charged in Counts II through V of the Complaint.

IV. *Remaining Issues*

Remaining to be resolved is Respondent's liability for the violations charged in Count I and the appropriateness of the civil penalty amounts requested for all counts. The parties are encouraged to continue pursuing settlement. If, by August 11, 1995, the parties do not inform my office that settlement has been reached, a telephonic prehearing conference will be scheduled to discuss the remaining issues and, as appropriate, schedule an evidentiary hearing.

**SO ORDERED.**

Dated and entered this 11th day of July, 1995.

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MARVIN H. MORSE  
Administrative Law Judge