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

United States of America, Complainant vs. Nu Look Cleaners of Pembroke Pines, Inc., Respondent; 8 U.S.C. § 1324a Proceeding; Case No. 89100162.

FINAL ORDER DENYING RESPONDENT'S REQUEST TO STRIKE FINDINGS OF INFERENCE OR TO GIVE THEM NO WEIGHT, GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING WITH MODIFICATION COMPLAINANT'S RENEWED MOTION FOR SANCTIONS

I. Complainant's Motion for Summary or Default Judgment

A. Statement

1. The instant complaint, issued on March 29, 1989, and received by respondent's counsel, Joel Stewart, on April 10, 1989, alleges that in violation of 8 U.S.C. § 1324a(a)(1)(A), respondent, after November 6, 1989, hired for employment in the United States Sherida Allen, knowing she was an alien not lawfully admitted for permanent residence or was not authorized by the Immigration and Nationality Act or the Attorney General to accept employment; or, alternatively, that in violation of 8 U.S.C. § 1324a(a)(2), respondent, after November 6, 1986, continued to employ her in the United States knowing she was an alien not lawfully admitted for permanent residence or was not authorized by the Act or the Attorney General to accept employment; as to this alleged violation, the complaint requested by way of relief a cease-and-desist order and a civil penalty of $1,000. The complaint further alleges that in violation of 8 U.S.C. § 1324a(a)(1)(B), respondent, after November 6, 1986, failed to properly verify Mrs. Allen on a verification form I-9; as to this alleged violation, the complaint requests by way of relief a civil penalty of $500. The foregoing allegations are denied in an undated answer, signed on respondent's behalf by attorney Stewart, which was mailed to me in an envelope postmarked May 2, 1989, and received by my office on May 5, 1989.

2. On April 17, 1990, complainant filed a motion for a finding of inference on the basis of respondent's failure to comply with a subpoena duces tecum dated September 13, 1989. The subpoena in question requires respondent to produce, for all employees hired after November 6, 1986, all original immigration form I-9 documents; all payroll records such as pay check stubs and/or receipts; all timecards, sign in attendance sheets, and/or any other related documents; and records relating to contributions for social security and for unemployment compensation, federal income tax withholdings, all job applications, and all W-2 and W-4 forms. Over date of April 27, 1990, attorney Stewart filed on respondent's behalf an opposition to this motion.

3. On July 20, 1990, I issued an order which stated, in part:

. . . as to the documents called for in the September 13, 1989, subpoena, I make the following findings of inference:

A. That if produced, such documents would have shown that after November 6, 1986, respondent hired Sherida Allen for employment, and continued to employ her, in the United States knowing before hiring her and at all times thereafter that she was an alien not lawfully admitted for permanent resident or was not authorized by the Immigration and Nationality Act, as amended, or the Attorney General to accept employment; and

b. That if produced, such documents would have shown that respondent, after November 6, 1986, failed to properly verify Sherida Allen on a verification form I-9.

4. Over date of August 6, 1990, complainant filed a motion for summary judgment against respondent pursuant to 28 CFR § 68.36 and Rule 56 of the Federal Rules of Civil Procedure.[1]

5. Over date of September 4, 1990, an opposition to this motion was filed by attorney Stewart on respondent's behalf. In this same document, he requested that I strike the findings of inference in my order of July 20, 1990, or, alternatively, give no weight to said findings.

B. Analysis

1. The alleged violations

28 CFR § 68.21 provides, in part:

[1]In the alternative, complainant requested a finding that respondent's failure to comply with orders issued by me on January 29 and March 1, 1990, requiring compliance with the September 13, 1989, subpoena constitutes a default calling for the issuance of a final order against respondent pursuant to Rule 37(b)(1)(C) of the FRCP and the applicable agency rules. (Complainant cited ``28 CFR 69.19(5).'' Inferentially, complaint meant to cite 28 CFR § 68.21(c) of the rules in effect since November 1989.)

If a party or an officer or agent of a party fails to comply with an order, including, but not limited to, an order for . . . the production of documents . . . or any other order of the Administrative Law Judge, the Administrative Law Judge, for the purposes of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

* * * * * * *

(5) Rule . . . that a decision of the proceeding be rendered against the noncomplying party . . .

This rule tracks Rule 37(b)(2) of the Federal Rules of Civil Procedure, and, furthermore, 28 CFR § 68.1 provides that the FRCP ``shall be used as a general guideline in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation.'' Accordingly, I regard as applicable to the instant motion the cases which hold that Rule 37(b)(2) of the FRCP empowers the court to issue summary judgment on the basis of findings of inference properly made, if such findings are dispositive of the action. McMullen v. Travelers Insurance Co., 278 F.2d 834 (9th Cir. 1960), cert. denied 364 U.S. 672 (1960); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 18-19, 31 (D.C.E.D. Pa. 1970), affd. 438 F.2d 1187 (3d Cir. 1971); Kahn v. Secretary of Health, Education, and Welfare, 53 F.R.D. 241 (D.C. Mass. 1971); see also, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), reversing 531 F.2d 1188 (3d Cir. 1976), reversing 63 F.R.D. 641, 654-657 (D.C.E.D. Pa. 1974); Roadway Express Co. v. Piper, 447 U.S. 752, 763 (1980).

As respondent does not appear to dispute, the findings of inference which I made on July 20, 1990, are dispositive, in complainant's favor, of all material issues created by the complaint and answer in the instant case. However, complainant's motion for summary judgment is opposed, in attorney Stewart's September 1990 response to my August 1990 order to show cause, partly on the basis of an April 27, 1990, affidavit by Anthony M. Allen, Sherida Allen's husband, and on ``information which is public record'' but not otherwise described in the response. For the reasons set forth on pp. 20-21 and 24 of my July 20, 1990, order, Mr. Allen's affidavit is found insufficient to warrant any of the relief sought by attorney Stewart (namely, dismissal of the motion for summary judgment, striking the findings of inference, or giving no weight thereto). To the extent attorney Stewart's ``public-record'' contention may be based on the documents described on pages 20-21 of

my July 20, 1990, order, that contention is rejected for the reasons there stated; to the extent that such contention may be based on other documents, it is rejected on the ground that they are not described with sufficient particularity.

Respondent's opposition to complainant's motion rests mostly on a September 4, 1990, affidavit from Mrs. Allen alleging that she was treated in an abusive manner on September 30, 1988, when she was taken into custody by agents of the Immigration and Naturalization Service (``the INS'') and gave the sworn statement which partly led to the issuance of the notice of intent to fine. Allegations that she had been abused were initially made to me in documents sent to me by attorney Stewart over date of September 16, 1989, which included a document containing allegations of abuse signed by attorney Stewart on October 3, 1988, and submitted on that date to the INS district office.[2] Over date of November 28, 1989, respondent's motion to dismiss the complaint was denied partly on the following grounds (see rhetorical paragraph II, p. 2):

> . . . The contention that [Mrs.] Allen's sworn statement was the result of abuse by INS special agents Walter Smith and David Levering is supported solely by the representations of Joel Stewart (attorney for both respondent and [Mrs.] Allen) [which] do not include any representations by Stewart that he has any personal knowledge of these events. Furthermore, complainant has submitted affidavits by Smith and Levering which contradict the foregoing representations by Stewart.

On November 7, 1989, Mrs. Allen appeared before Immigration Judge Daniel Meisner for a continued deportation hearing, at which she was represented by attorney Stewart. At this hearing, Mrs. Allen was charged by the INS with being deportable for remaining in the United States beyond October 26, 1987, the time permitted by her visa, without authority from the INS, and for working for ``Nu Look Cleaners, Inc., d/b/a Nu Look Cleaners'' in violation of her immigration status. During that hearing, attorney Stewart admitted such allegations on her behalf (such an admission is, of course, not binding on respondent here). My file fails to show whether any contention was made during that hearing that Mrs. Allen had been abused when taken into custody by INS agents on September 30, 1988.[3] On the basis of the concessions made by attorney Stewart, Judge Meisner found her to be deport-

---

[2]The file fails to show what disciplinary or other action, if any, was taken by the INS in response to this document.

[3]A ``record of deportable alien'' form I-213, prepared by INS special agent Walter Smith on September 30, 1988, states, inter alia, that she had a husband and three children in the United States, ``all B-2 overstays.'' An April 1990 affidavit by her husband, Anthony M. Allen, indicated that both Mr. and Mrs. Allen had been in the United States since 1985.

able, and in lieu of entering an order of deportation, granted her the privilege of leaving the United States voluntarily on or before November 7, 1990, or any extensions granted by the district director of the INS. This decision was not appealed and became a final order.

The sworn statement signed by Mrs. Allen on September 4, 1990, and attached to respondent's response bearing that same date, is the first and only statement submitted to me by respondent, as to the events on September 30, 1988, from anyone who had first-hand knowledge of such events. The portions thereof specifically referred to in respondent's response aver (1) that after being taken into custody on September 30, 1988, she was transported to INS headquarters with her hands handcuffed behind her back; (2) that after reaching INS headquarters, she was handcuffed to her chair; (3) that as the questioning began, INS agent Smith said, ``Don't say that you weren't working there because I saw you;'' (4) that when she talked with her attorney by telephone, Smith said ``Make it short and sweet'' and stood by her side, listening to her conversation with her attorney; (5) that she ``feared that [the INS agents] had discretion to keep her in custody or to request bail, and that they had discretion to determine the amount of bail''; and (6) that she ''was terrified by her captors.'' [4] Mrs. Allen's sworn statement concludes with the following statement:

> My answers were entirely involuntary, and had I been given the opportunity to truly decide whether to give a statement, I would have refused to give a statement. Furthermore, I would not have given the answers which I gave if I had not been compelled to give them by Agent Smith. Therefore I renounced and deny the statement in its entirety.

Attorney Stewart does not appear to claim that any constitutional rights possessed by respondent were invaded when on September 30, 1988, INS agents entered an area of respondent's dry-cleaning establishment where customers were expected to enter in order to drop off or pick up their personal cleaning. See Lewis v. United

[4]Attorney Stewart's ``response'' further alleges that ''her captors and their fellow agents . . . visibly displayed guns about their shoulders and waists throughout the entire questioning procedure.'' The only reference to firearms in her sworn statement is the claim that when she leaned over to get her handbag on one side of the counter (to obtain her driver's license, which the agents had asked her to produce), INS agent Levering, who was on the other side of the counter, put his hand on his revolver, which was about his waist. The October 1989 statements sworn to by INS agents Walter Smith and Levering, filed in response to attorney Stewart's September 16, 1989, allegations to me about the events on September 30, 1988, state that after she was taken into custody, her purse was checked for possible weapons. In addition, Mr. Smith's affidavit denies telling her that her conversation with her attorney was to be ``short and sweet.''

States, 385 U.S. 206, 211, 87 S.Ct. 424, 427 (1966); Dow Chemical Co. v. U.S., 476 U.S. 227, 238, 106 S.Ct. 1819, 1826 (1986). Nor does attorney Stewart appear to contend that the agents' presence became a violation of respondent's own constitutional rights when one of the agents used respondent's telephone to check on Mrs. Allen's driver's license (according to her September 1990 affidavit) or her visa classification (according to the agents' October 10, 1989, affidavits). See U.S. v. Alewelt, 532 F.2d 1165 (7th Cir. 1976), cert. denied 429 U.S. 840 (1976). However, attorney Stewart appears to contend that the complaint should be dismissed because (1) it incorporates a notice of intent to fine which was issued partly on the basis of the sworn statement given by Mrs. Allen to an INS agent on September 30, 1988, and (2) her September 4, 1990, affidavit contains allegations which, if true, would allegedly show that her September 1988 sworn statement was given during a contact with the INS agents in the course of which her rights were invaded. This contention is rejected, on the ground that any rights which may have been invaded by the INS agents were the rights of Mrs. Allen, and not the rights of respondent. See U.S. v. Sims, 845 F.2d 1564, 1568 (11th Cir. 1988), rehearing denied 854 F.2d 1326 (11th Cir. 1988), cert. denied 109 S.Ct. 395; U.S. v. Fredericks, 586 F.2d 470, 480-481 (11th Cir. 1978) (Florida case). Assuming arguendo that a different result might be reached on a showing of gross misconduct which infringed her rights alone, the allegations set forth in Mrs. Allen's September 4, 1990, sworn statement cannot fairly be so described. Cf. Fredericks, supra, 586 F.2d at 481.[5]

Attorney Stewart further contends that in any event, my findings of inference made on July 20, 1990, should be stricken or given no weight because (1) in making such findings, I allegedly ``noted that Sherida Allen had made a voluntary statement to INS investigators'' on September 30, 1988 (see page 1 of respondent's response of September 4, 1990, to my order to show cause) and (2) her September 1990 affidavit, if true, allegedly shows that her September 1988 statement was given under circumstances which rendered in untrustworthy.[6] This contention is rejected, on the ground that I made no findings as to whether Mrs. Allen's September 1988 sworn

[5]The reservations expressed in Fredericks, a criminal case, were based partly upon the ``distinct possibility that the jurors . . . will fail to take into account the increased likelihood that the statements are unreliable'' when ``extracted from a nondefendant by extreme coercion and inquisitional tactics.'' As discussed infra, my findings of inference in the instant case do not depend on Mrs. Allen's September 30, 1988, sworn statement.

[6]At one point, attorney Stewart misstates the date of my findings as July 30, 1990.

statement was voluntary or not, and did not base my findings of inference on any factual assertions therein. More specifically: Rhetorical paragraph 2 of that July 1990 order describes her September 1988 statement as containing certain ``assertions.'' Rhetorical paragraph 17 of that July 1990 order contains a paragraph beginning with the words, ``Laying to one side respondent's unsupported (and contradicted by affidavit [referring] to the INS agents' October 1989 affidavits]) allegations regarding the INS' treatment of Sherida Allen,'' and the following statement ``I need not and do not consider whether a different result would be warranted by a showing that [Mrs.] Allen's statement was obtained in the manner claimed by respondent . . .''; as noted above, at that time the only support for such allegations consisted of representations from attorney Stewart, who has never claimed to have seen any of the incidents in question. Paragraph A of my ``Analysis'' in this order states at page 20 that her sworn statement merely played a part in creating a ``genuine factual issue'' as to when she began working for respondent, and at page 24 that the unproduced documents under subpoena could have cast significant light on the accuracy of the April 1990 sworn statement of her husband Anthony (that between April 1985 and May 1989 he alone had been her employer and been paid for her services) in view of her September 1988 sworn statement that respondent was her employer and she was sometimes paid by checks which she cashed. Paragraph B states at page 22 that the inferences drawn in that order ``could be reasonably based on an improper failure by [respondent, which I found] to provide the subpoenaed documents,'' before going on to say that ``such proposed inferences gain some support'' from both Mrs. Allen's September 1988 sworn statement and from an application for alien employment certification filed by respondent in June or July 1988. As I believe to be apparent from my July 20, 1990, order as a whole, my findings of inference did not assume the trustworthiness of Mrs. Allen's September 1988 sworn statement.

For the foregoing reasons, I hereby deny respondent's request of September 4, 1990, to strike the findings of inference set forth in my order dated July 20, 1990, and respondent's alternative request to give no weight to said findings. Also, for the foregoing reasons, I hereby grant, as to the allegations that respondent has violated 8 U.S.C. § 1324a(a)(1)(A), complainant's motion for summary judgment, and deny respondent's request to dismiss that motion. See U.S. v. $239,500 in Currency, 764 F.2d 771, 773 (11th Cir. 1985).

2. The order requested in the complaint

My finding that respondent violated 8 U.S.C. § 1324a(a)(1)(A) by hiring Sherida Allen requires the issuance of a cease-and-desist order. In addition, such a finding requires the issuance of an order compelling respondent to pay a civil penalty of not less than $250 and not more than $2,000. 8 U.S.C. § 1324a(e)(4)(A), 8 CFR § 274a.10(b)(1), 28 CFR § 68.50(c)(2)(i)(A). My finding that respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to properly verify her, requires the issuance of an order compelling respondent to pay a civil penalty of not less than $100 and not more than $1,000. In connection with the latter (``paperwork'') violation, in determining the size of the civil penalty due consideration is to be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations. 8 U.S.C. § 1324a(3)(5), 8 CFR § 274.a10b(2), 28 CFR § 68.50(c)(2)(iv).

As to respondent's unlawful employment of Mrs. Allen, the requested $1,000 civil penalty falls well within the statutory limits, and respondent has asserted no mitigating circumstances with regard to the size of the civil penalty. Accordingly, I find the requested $1,000 civil penalty to be appropriate. See U.S. v. Y.E.S. Industries, OCAHO Case No. 88100070, p. 13 (July 16, 1990).

As to respondent's unlawful failure to verify Mrs. Allen, the requested $500 civil penalty falls well within the statutory limits. As to the mitigating factors set forth in 8 U.S.C. § 1324a(e)(5), 8 CFR § 274a.10(b)(2), 28 CFR § 68.50(c)(2)(iv), I have examined the file on the basis of the standards set forth in U.S. v. Acevedo, OCAHO Case No. 89100397, pp 3-6 (October 12, 1989). The civil penalty requested is lees than the civil penalty which would be assessed under Acevedo. More specifically: Respondent has taken the position, in effect that my file contains no evidence regarding the size of its work force.[7] Respondent has supplied a sworn statement from Anthony Allen dated April 1990, averring that as of 1985, respondent was engaged in the business of purchasing equipment and spare parts for export; that respondent opened a laundry in June 1986; and that respondent opened its dry cleaning store (where the INS took Mrs. Allen into custody) in May 1987. As to respondent's good faith, respondent has presented no evidence, except in at-

[7]As previously noted, in September 1990 respondent filed a September 1990 sworn statement by Mrs. Allen that she ``renounce[s] and den[ies] the [September 1988] statement in its entirety.'' That September 1988 statement averred that about 3 people worked at her employment.

tempted support of its claim that respondent never employed Mrs. Allen after November 6, 1986. As to the seriousness of the violation, respondent has been found (according to my finding of inference) not to have prepared any I-9 form for Mrs. Allen. Further, it has been found (according to my finding of inference) that Mrs. Allen was in fact an unauthorized alien, and that respondent knew of her status at all material times. Accordingly, I find the requested $500 civil penalty to be appropriate. Complainant has not specifically requested, as to the unlawful employment allegations, an order under 8 U.S.C. § 1324a(e)(4)(B)(i), 8 CFR § 274.a10(b)(1)(ii), 28 CFR § 68.50(c)(2)(ii), permitting the issuance of an order requiring an offending respondent to adhere to the statutory paperwork requirements for 3 years. Because respondent has sold the dry cleaning establishment where Mrs. Allen worked, I find such an order to be unnecessary. Although respondent may perhaps still be operating other businesses, the file fails to show whether they were operated independently of the dry-cleaning establishment. I note the following provisions of 8 U.S.C. § 1324a(e)(4); see also, 8 CFR § 274a.(10)(b)(2):

> 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 entity.

In making this analysis, I have given no weight to a memorandum dated October 26, 1988, from Ellen Convy, Assistant District Director for Investigations, to Perry Rivkind, District Director. This memorandum states that its subject is ``Rationale for the Fine Recommended in the Case NU Look Cleaners of Pembroke Pines,'' and is attached as Exhibit A to complainant's motion for summary judgment/renewed motion for sanctions submitted on August 7, 1990. This memorandum does no more than purport to recite the ``substance of the regulation,'' and aver that ``guidance was obtained'' therefrom in determining the amount of the fine. The memorandum does not even summarize the factual assumptions on which the recommendation was based, let alone the weight given to such factual assumptions.[8]

II. Complainant's Motion for Sanctions

A. Statement

1. Over date of August 6, 1990, complainant filed a motion requesting that respondent and its attorney, Joel Stewart, be required, jointly and severally, to pay ``reasonable expenses including

[8]This memorandum cites 8 CFR § 274a.10(b)(2) as ``8 C.F.R. Section .10(b)(2).''

attorney's fees under Rule 11 and Rule 37(b)(2) of the Federal Rules of Civil Procedure and 28 CFR § 68.21(c).''

2. Over date of September 4, 1990, respondent, through attorney Stewart, sought dismissal of this motion.

B. Analysis

Respondent does not question complainant's contention that the portions of the FRCP and the CFR cited by complainant empower me to issue, in an appropriate case, an order requiring a respondent and its attorney, jointly and severally, to pay complainant reasonable expenses and attorney's fees. U.S. v. Arnold, OCAHO Case No. 88100172, pp 13-20 (December 29, 1989). Further, respondent does not question the reasonableness of the claimed hourly rates, or of the time attached by complainant to the activities for which expenses are sought, or of the claimed miscellaneous expenses. Moreover, respondent does not question complainant's at least implied representation that the expenses of such activities were incurred because of certain specified conduct by respondent and/or attorney Stewart. However, respondent challenges complainant's assertion that such conduct violated Rule 11 and/or Rule 37(b)(2).

1. Complainant's September 15, 1989, request for admissions, and the documents subsequently filed in connection with that request, are described and discussed in my July 20, 1990, order. See rhetorical paragraphs 1, 13, 18, 20 and 30-33 of that order (on pages 1-2, 7-8, 11, and 16-18), and pages 24-25. For reasons set forth on pp. 24-25 of my July 20 order, I find that by signing the December 11, 1989, response to request for admission, which response does not state that the attached copy of Form 750 is a true copy of an application filed by respondent with an appropriate Federal agency, attorney Stewart acted for the purposes of harassment and causing unnecessary delay, and violated Rule 11 of the FRCP. Respondent's September 4, 1990, response to my order to show cause dated August 13, 1990, states that as of December 11, 1989, attorney Stewart could not confirm the accuracy of the attached copy of Form 750 because respondent did not have means to compare the copy with the original. However, attorney Stewart does not claim that either he or respondent failed to take the normal business precaution of photocopying the original form before filing it with an appropriate Federal agency in mid-1988, and thereafter keeping the photocopy in his and/or respondent's own records. Furthermore, on January 20, 1989, 8 months before complainant's request for admissions, the Employment and Training Administration of the United States Department of Labor forwarded to attorney Stewart a final determination on the application for labor certification, which de-

termination stated, inter alia, ``Form 750 has been certified and is enclosed with the supporting documents. All enclosures should be submitted to the Immigration and Naturalization Service District Office for consideration of alien's application for adjustment of status . . . or with your petition.'' Attorney Stewart makes no claim that the enclosure was neither the original Form 750 or a true copy; or that he discarded this enclosure, or submitted it to his client or to the INS, without retaining a photocopy. Further, attorney Stewart makes no claim that he asked complainant's attorney (whose office is in the same metropolitan area as attorney Stewart's office) to show him the original, or made any effort to find the original, during the period of about 3 months between the request for admissions and attorney Stewart's response. Finally, attorney Stewart's March 13, 1990, motion to dismiss the complaint relied on the photocopy attached to the request for admission; his September 4, 1990, response to my August 13, 1990, order to show cause constitutes further indication that the accuracy of the photocopy was known to him well before he so stated in his letter to me dated May 9, 1990;[9] and he has never explained why he was allegedly unaware of the accuracy of the photocopy when he filed his December 11, 1989, response to request for admissions.[10] I note

[9]This September 4 response states at page 4, ``Respondent determined on . . . May 9, 1990, the concession should be made;'' describes this ``concession'' as a ``courtesy to the complainant;'' and attributes his decision to make it to ``respect for this honorable court to assist this court in the administration of its duties and to clarify the enormous amount of confusion which had developed from the issue of the 750 Form.'' This ``confusion'' would have been clarified a good deal earlier if attorney Stewart had decided a good deal earlier to display ``courtesy'' and ``respect.''

[10]Respondent obviously knew the identity of the Federal agency with which respondent filed the original Form 750 in mid-1988, knew at least after January 1989 that the application had been processed by the Department of Labor, and knew whether respondent had submitted to the INS the material forwarded to attorney Stewart in January 1989 by the Department of Labor. Nonetheless, respondent contends that I should have ``chastened'' complainant's counsel for (1) his alleged erroneous representation, in his September 15, 1989, request for admission, that the original Form 750 was in the files of the INS; and (2) his allegedly erroneous representation, in a letter to me dated November 21, 1989 (with a courtesy copy to attorney Stewart) that the original was in the possession of the Department of Labor. Which government agency had possession of the original at any particular time has no materiality to this proceeding, and custody of the original document may have changed (not necessarily to the knowledge of complainant's counsel, and perhaps to the knowledge of respondent) during the pendency of this proceeding. Moreover, complainant's request for admissions does not unambiguously state that the original is in INS files. Respondent's further contention that complainant filed a ``totally frivolous and inappropriate motion on March 15, 1990, alleging that respondent's counsel should be disqualified'' (see pp. 5-6 of respondent's response dated Septem

that if genuine and filed with an appropriate Federal agency, this document would resolve in complainant's favor the issue, presented by the complaint and answer, of whether respondent knew Mrs. Allen's nonimmigrant status and that she was not authorized to work.

2. The events which lead up to respondent's below-described motion dated September 16, 1989, are set forth under Roman numeral III, pages 2-6, of my November 28, 1989, order with respect to that motion. For the reasons stated in that order, I find that by signing the September 16 motion_which is material part included a motion to rescind a September 13, 1989, subpoena and for an order directing that no further subpoenas be issued_attorney Stewart acted for the purposes of harassment and causing unnecessary delay, and violated Rule 11 of the FRCP. These portions of attorney Stewart's motion were based on the contention that the issuance of the September 13, 1989, subpoena constituted harassment. However, his harassment allegation was grounded on the issuance of two prior subpoenas (containing the same language descriptive of the requested material) with which respondent had failed to comply. I note that the company records called for by the September 13, 1989, subpoena were critical to a determination of highly material factual issues presented by the pleadings_namely, whether Mrs. Allen began to work for respondent after November 6, 1986, and whether respondent had verified her on an I-9 form.

3. My January 29, 1990, order, requiring respondent to comply with subpoena forthwith, set forth events bearing on attorney Stewart's filing of the following statement dated December 11, 1989, in connection with the same September 13, 1989, subpoena which had been the subject of his unsuccessful September 16, 1989, motion to rescind on the ground that its issuance constituted harassment of respondent: ``The person or entity named in the Subpoena does not appear to be a party to this suit and, as I do not represent the person or entity named in said Subpoena, I can not provide a response to the Complainant.'' For the reasons stated in that order, I find that in signing that statement, attorney Stewart acted

---

ber 4, 1990) is rejected for the reasons set forth in my July 26, 1990, order requiring complainant to clarify, and my September 14, 1990, order granting without prejudice complainant's motion for leave to withdraw complainant's motion to disqualify. Complainant's motion_which was filed after attorney Stewart's response to complainant's request for admission but before he admitted that the document referred to in the request was a true copy of an application for labor certification filed by respondent with an appropriate Federal agency_was based partly on complainant's then expectation of calling attorney Stewart as a witness to testify that the original document was prepared by him.

for the purposes of harassment and causing unnecessary delay, and violated Rule 11 of the FRCP.

The file fails to show that before the issuance on January 29, 1990, of this first order by me which respondent failed to obey, any person connected with respondent, other than attorney Stewart, had any connection with his violations of rule 11. Moreover, at all relevant times prior to January 29, 1990, attorney Stewart's motion to revoke the September 13, 1989, subpoena was pending before me. Accordingly, attorney Stewart alone will be required to pay the claimed reasonable attorney's and clerk's expenses for the period prior to that date_namely, $160.01.[11]

However, as to the claimed reasonable expenses after the issuance of the first disobeyed order to comply with the September 13 subpoena, attorney Stewart and respondent will be held jointly and severally liable. Although it was Stewart alone whose conduct violated Rule 11, and he attached his violative signatures prior to January 29, 1990, both attorney Stewart and his respondent client are answerable under Rule 37(b)(2) of the FRCP for reasonable expenses incurred after that date, because respondent disobeyed the orders to comply with the September 13, 1989, subpoena, and that subpoena was the subject of documents signed by attorney Stewart in violation of Rule 11. In addition, because as to the ``Miscellaneous expenses (photocopying, mailing, supplies, etc.)'' the claim does not differentiate between pre-order and post-order expenses, and because most of the claimed hourly expenses are directed to post-order dates, this joint and several liability will include all of the claimed ``miscellaneous expenses.'' Accordingly, attorney Stewart and respondent will be required, jointly and severally, to pay claimed reasonable expenses totalling $624.29.[12]

III. Ultimate Findings of Fact and Conclusions of Law

1. After November 6, 1986, respondent, in violation of 8 U.S.C. § 1324a(1)(A), hired Sherida Allen for employment, and continued to employ her, in the United States knowing before hiring her and at all times thereafter that she was an alien not lawfully admitted for permanent residence or was not authorized by the Immigration and Nationality Act, as amended, or the Attorney General to accept employment.

[11]That is, 6 attorney's hours at $20.41 an hour (a total of $122.46) and 5 clerk's hours at $7.51 an hour (a total of $37.55).

[12]That is, 23.5 attorney's hours at $20.21 an hour (a total of $479.64), 15 clerk's hours at $7.51 an hour (a total of $112.65), and $50 for ``miscellaneous expenses.''

2. After November 6, 1986, respondent, in violation of 8 U.S.C. § 1324a(a)(1)(B), failed to properly verify Sherida Allen on a verification form I-9.

IV. Order

It is hereby ordered that:

1. Respondent shall pay a civil money penalty of $1,000.00 for its violations in connection with the employment of Sherida Allen.

2. Respondent shall pay a civil money penalty of $500.00 for its violation in connection with the verification of Sherida Allen.

3. Respondent shall cease and desist from violation of the prohibitions against hiring unauthorized aliens, in violation of Section 274A(a)(1)(A) of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(1)(A).

4. Respondent and Joel Stewart, respondent's attorney, shall jointly and severally reimburse complainant for reasonable expenses, totalling $642.29, incurred in prosecuting this suit.

5. Joel Stewart shall reimburse complainant for reasonable expenses, totalling $160.01, incurred in prosecuting this suit.

Respondent's request of September 4, 1990, to (1) dismiss the motion for summary judgment; (2) dismiss the motion for sanctions; and (3) strike the findings of inference in my order of July 20, 1990, or, alternatively, give no weight to such findings, is denied.

Pursuant to 8 U.S.C. § 1324a(e)(7) and as provided in 28 CFR § 68.51, this Decision and Order shall become the final decision and order of the Attorney General unless within thirty (30) days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

Dated: November 5, 1990.

NANCY M. SHERMAN
National Labor Relations Board
Division of Administrative Law Judges
Hamilton Building-Suite 1122
1375 K Street, Northwest
Washington, DC 20005-3307

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

United States of America, Complainant vs. Nu Look Cleaners of Pembroke Pines, Inc. Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100162.

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

I. SYNOPSIS OF PROCEEDING

On March 30, 1989, the United States of America, by and through its agency, the Immigration and Naturalization Service, (hereinafter complainant) filed a Complaint against the respondent, Nu Look Cleaners of Pembroke Pines, Inc. (hereinafter respondent).

The Complaint charged that the respondent was in violation of Section 274A(a)(1)(A) of the Immigration and Nationality Act (hereinafter INA), 8 U.S.C. § 1324a(a)(1)(A), which prohibits, after November 6, 1986, a person or entity to hire, for employment in the United States, an alien, knowing the alien is unauthorized for employment in the United States. Alternatively, the Complaint charged that the respondent was in violation of Section 274A(a)(2) of the INA, 8 U.S.C. § 1324a(a)(2), which renders it unlawful, after November 6, 1986, for a person or other entity to continue to employ an alien, knowing that the person was an unauthorized alien with respect to employment in the United States. The complainant requested that an Administrative Law Judge (hereinafter ALJ) impose a civil money penalty against the respondent in the amount of $1,000.00 for the alleged violation. The complainant also requested a cease and desist order be issued against the respondent for the alleged continuing violation.

In addition, the Complaint charged that the respondent violated § 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B), which prohibits, after November 6, 1986, hiring a person without complying with the employment eligibility verification system set forth therein.

Specifically, the Complaint alleged that the respondent did not complete an employment eligibility verification form (Form I-9) with respect to the alleged employee. The complainant requested a civil money penalty be imposed against the respondent in the amount of $500.00 for this alleged violation.

A Notice of Hearing and Complaint was served on the respondent on April 10, 1989, assigning this matter to the Honorable Nancy M. Sherman, Administrative Law Judge. On May 12, 1989, the respondent, by and through its attorney, answered the Complaint and specifically denied the allegations set out therein.

On June 9, 1989, the complainant served the respondent with interrogatories. Question 1 of these interrogatories asked the respondent whether the alleged employee was or had been employed by respondent at any time since November 6, 1986. The respondent, through its corporate secretary, denied having ever employed the alleged employee. Respondent subsequently filed a motion for summary judgment dated July 31, 1989, which was denied by the ALJ on September 14, 1989.

The complainant filed a motion in support of subpoena and an accompanying subpoena duces tecum which was signed by the ALJ September 13, 1989. The subpoena commanded the respondent and its attorney to appear before the complainant and to produce all Form I-9 documents, all payroll records, all time cards, all sign in attendance sheets, all records relating to contributions for social security, unemployment compensation, federal income tax withholdings, job applications, and W-2 and W-4 forms.

On September 15, 1989, complainant served on respondent a ``Request for Admission''. The complainant asked the respondent to admit that a Government Form ETA 750 (hereinafter Form 750), an application for labor certification, filed by the respondent on behalf of the alleged employee, was ``an accurate, true and complete representation of the original documents and was photocopied from the original documents.'' The request also asked respondent to admit that the following statements were true:

> (a) That respondent did not present form I-9 for [the alleged employee] during the I-9 inspections conducted by the Immigration Service on October 7, 1988 and on October 20, 1988.
>
> (b) That respondent filed Government Form 750 Application for Labor Certification, attached hereto as Exhibit 1A on behalf of [the alleged employee].

After the ALJ granted an extension of time, the respondent replied to the request for admissions. Respondent asserted that it could not truthfully admit or deny, for lack of information or knowledge, the identification of documents listed in paragraph one.

Additionally, the respondent denied the truth of statement (a) and stated that it could not deny or admit the truth of statement (b).

On September 16, 1989, respondent served on complainant, a motion entitled, ``Alternative Motions: Motion to Dismiss, Motion for Protective Order, Motion for Enlargement of Time''. In this motion, the respondent asked alternatively or cumulatively that ``Case No. 89100162 against the Respondent be [d]ismissed'', that the motion for summary judgment be granted (referring to respondent's July 31, 1989 motion), that the subpoena duces tecum dated September 13, 1989, be rescinded and that no further subpoenas be issued, and that an enlargement of time be given to the respondent to file objections to the complainant's motions and subpoena. The ALJ had previously denied, on September 14, 1989, respondent's motion for summary judgment. As for the remaining requests of the respondent's September 16, 1989, motion, the ALJ, by order dated November 28, 1989, denied the motion to dismiss, denied the motion for protective order, and granted an enlargement of time.

On December 11, 1989, counsel for respondent filed an untitled statement which appears to be an objection to the September 13, 1989, subpoena. The apparent basis for the objection is an ostensibly incorrect address for the respondent on the face of the subpoena. Respondent's counsel further claimed that the entity named in the subpoena was not a party to this suit and was not represented by him.

The ALJ responded by letter to counsel's December 11, 1989, letter, stating that his objection seemed contradictory, as counsel had previously filed a motion for the subpoena's rescission on behalf of the entity which counsel later stated he did not represent. By letter dated January 2, 1990, respondent's attorney again reiterated his previous objections to the subpoena. Subsequently, the ALJ entered an order dated January 29, 1990, entitled, ``Order Requiring Respondent to Comply With Subpoena Forthwith''.

The complainant, by motion dated January 18, 1990, moved to compel compliance with the September 13, 1989, subpoena and also moved for sanctions, including the payment of reasonable attorney's fees, under Rule 11 and Rule 37(b)(2) of the Federal Rules of Civil Procedure (hereinafter FRCP). The ALJ did not receive this motion until January 29, 1990, the same day she signed the ``Order Requiring Respondent to Comply With Subpoena Forthwith''. By order dated March 1, 1990, the ALJ issued an ``Order Regarding Complainant's January 18, 1990, Motion to Compel and for Sanctions''. The ALJ ordered the respondent to comply with the September 13, 1989, subpoena within 15 days. The order further stated,

that if the respondent failed to comply, then pursuant to 28 C.F.R. § 68.21[1] and Rule 37(b) of the FRCP, the ALJ would infer that such documents would have shown that the respondent hired the alleged employee knowing that the person was unauthorized to accept employment in the United States, and that the respondent failed to verify the employment eligibility of the alleged employee on a Form I-9.

On April 17, 1990, the complainant filed a ``Motion for Finding of Inference in Accordance with This Honorable Court's March 1, 1990, Order Regarding Complainant's January 18, 1990 Motion to Compel and for Sanctions''. After various motions by both parties, (including a motion to dismiss by respondent) the ALJ issued on July 20, 1990, an ``Order Denying Respondent's Motion to Dismiss Dated March 13, 1990, and Granting Complainant's Motion for Finding of Inference Dated April 17, 1990''. On August 8, 1990, the complainant moved for summary judgment and renewed the motion for sanctions.

On November 5, 1990, the ALJ issued the ``Final Order Denying Respondent's Request to Strike Findings of Inference or to Give Them No Weight, Granting Complainant's Motion for Summary Judgment, and Granting With Modification Complainant's Renewed Motion for Sanctions'' (hereinafter Decision and Order).

On November 16, 1990, the respondent timely filed a request for administrative review with this office pursuant to 28 C.F.R. § 68.51(a). The complainant responded by filing a reply, received by this office on November 28, 1990.

II. THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

The Decision and Order granted the complainant's motion for summary judgment. The ALJ based the decision on the premise that Rule 37(b)(2) of the FRCP empowers the ALJ to grant summary judgment on the basis of findings of inference properly made, if such findings are dispositive of the action. The ALJ determined that the findings of inference from the July 20, 1990, order were dispositive, and therefore issued a summary judgment. Decision and Order at 3.

The Decision and Order also rejected the respondent's motion to strike the findings of inference, or to give them no weight. The ALJ rejected the respondent's assertion that the findings of infer-

[1]Rules of Practice and Procedure for Administrative Hearings, 54 Fed. Reg. 48593 (1989) (to be codified at 28 C.F.R. Part 68) (hereinafter cited as 28 C.F.R. § 68).

ence were based upon the trustworthiness of a September 1988 sworn statement by the alleged employee. Decision and Order at 6.

Also granted in the Decision and Order was complainant's request for reasonable expenses including attorney's fees under Rule 11 and Rule 37(b)(2) of the FRCP and 28 C.F.R. § 68.21(c). The ALJ granted expenses and attorney's fees to the complainant because the ALJ concluded that in signing the response to the request for admissions, which did not admit that the Form 750 was a true copy of an application filed by the respondent with an appropriate Federal agency, respondent's counsel acted for the purposes of harassment and unnecessary delay. Decision and Order at 8. The ALJ also found that when respondent's attorney signed the September 16, 1989, motion to rescind the subpoena, and the December 11, 1989, statement in which counsel claimed that he did not represent the entity named in the subpoena, counsel acted for the purposes of harassment and unnecessary delay and therefore violated Rule 11 of the FRCP. Decision and Order at 10. The ALJ ordered respondent and respondent's attorney to jointly and severally reimburse the complainant for reasonable expenses and attorney's fees in the amount of $642.29, while ordering respondent's attorney to pay $160.01 in attorney's fees. Decision and Order at 10-11.

III. RESPONDENT'S REQUEST FOR ADMINISTRATIVE REVIEW

In its November 16, 1990, request for review (hereinafter Request), the respondent argues that a summary decision should not be granted where a genuine issue of material fact exists. The respondent contends that affidavits filed in this case show that a genuine issue of fact existed. Request at 1. The respondent next asserts that the decision of the agency should be based on substantial evidence. Id. The respondent asserts that the evidence in this case is not reliable, because the statements made by the alleged employee were made under coercion and later repudiated by the alleged employee. Id. Finally, the respondent apparently contends that the ALJ erred in imposing Rule 11 sanctions when concluding that the Respondent failed to admit that a labor certification was a true copy of an original document on file with the INS. Request at 2.

IV. REVIEW AUTHORITY OF THE OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Section 274A(e)(7) of the INA, 8 U.S.C. § 1324a(e)(7), and 28 C.F.R. § 68.51(a) provide for administrative review of an ALJ's decision and order. Section 68.51(a) of 28 C.F.R. provides in pertinent part that:

> . . . [W]ithin thirty (30) days from the date of the decision, the Chief Administrative Hearing Officer may issue an order which adopts, affirms, modifies or vacates that Administrative Law Judge's order.
>
> (1) The order of the Chief Administrative Hearing Officer shall become the final order of the Attorney General.

The scope of administrative review by the Chief Administrative Hearing Officer (hereinafter CAHO) of ALJs' decisions and orders is set forth in the Administrative Procedure Act. On administrative appeal, ``the agency has all the powers which it would have in making the initial decision''. 5 U.S.C. § 557(b). The Ninth Circuit, in Mester Manufacturing Co. v. INS, 879 F.2d 561, 565 (9th Cir. 1989), held that the CAHO properly applied a de novo standard of review to the ALJ's decision. Equally important, the Ninth Circuit in Maka v. INS, 904 F.2d 1351, 1355 (9th Cir. 1990) followed the reasoning in Mester by affirming the CAHO's authority to apply the de novo standard of review.

V. DISCUSSION

a. Summary Judgment

1. The Administrative Law Judge's Findings of Inferences.

The regulations at 28 C.F.R. § 68.21 set forth the remedial actions an ALJ may take when a party fails to comply with an order regarding discovery. Section 68.21(c)(1) provides in pertinent part that:

> (c) If a party or an officer or agent of a party fails to comply with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or responding to requests for admissions, or any other order of the Administrative Law Judge, the Administrative Law Judge, . . . may take such action in regard thereto as is just, including but not limited to the following.
>
> (1) Infer and conclude that the admissions, testimony, documents or other evidence would have been adverse to the non-complying party.

The ALJ issued a subpoena duces tecum on September 13, 1990. The respondent did not comply with the subpoena, and the ALJ subsequently issued an ``Order Requiring Respondent to Comply With Subpoena Forthwith'' on January 29, 1990. When the respondent still refused to comply with the subpoena, the ALJ issued an ``Order Regarding Complainant's January 18, 1990, Motion to Compel and for Sanctions'' (hereinafter March 1, 1990, Order). In this order, the ALJ stated that the respondent had 15 days to comply with the subpoena. March 1, 1990, Order at 2. If the respondent did not comply, then pursuant to 28 C.F.R. § 68.21 and Rule 37(b) of the FRCP, the following inferences were to be made:

> A. That if produced, such documents would have shown that after November 6, 1986, respondent hired [the alleged employee] for employment, and continued to
>
> employ her, in the United States knowing before hiring her and at all times

> thereafter that she was an alien not lawfully admitted for permanent residence or was not authorized by the Immigration and Nationality Act, as amended, or the Attorney General to accept employment; and
>
> B. That if produced, such documents would have shown that the respondent, after November 6, 1986, failed to properly verify [the alleged employee] on a verification form I-9.

March 1, 1990, Order at 2.

Respondent failed to comply within 15 days and on July 20, 1990, the ALJ issued an ``Order Denying Respondent's Motion to Dismiss Dated March 13, 1990, and Granting Complainant's Motion for Finding of Inference Dated April 17, 1990'' (hereinafter July 20, 1990, Order). In this Order, the ALJ granted the motion for finding of inferences to the complainant, citing Section 68.21(c)(1). July 20, 1990, Order at 21.

2. The Administrative Law Judge's Finding of Inferences Based Upon Non-Compliance with the Subpoena.

It is apparent that the July 20, 1990, order, specifically, the finding of inferences, were based upon the respondent's failure to comply with the September 13, 1989, subpoena. However, the ALJ cited to 28 C.F.R. § 68.21 is entitled, ``Motions to compel response to discovery; sanctions''. As such, this provision provides sanctions for a failure to respond to discovery orders. 28 C.F.R. § 68.21.

The applicable language in the INA regarding subpoenas, contained in Section 274A(e)(2), provides that upon refusal to obey a subpoena, the appropriate district court may issue an order requiring compliance with the subpoena. 8 U.S.C. § 1324a(e)(2). This language demonstrates that ALJ's were never intended to have the authority to enforce subpoenas and therefore, the ALJ's finding of inferences based upon non-compliance was improper.

Moreover, 28 C.F.R. § 68.21(c)(6) states that in the case of the failure to comply with a subpoena, the ALJ may take the action provided in 28 C.F.R. § 68.23(e). Section 68.23(e) provides that an ALJ may, where authorized by law, apply through counsel to the appropriate district court for an order requiring compliance with the order or subpoena. 28 C.F.R. § 68.23(e). Therefore, these two sections taken together demonstrate that Section 68.21 should not be used for a sanction of inference in cases where there is non-compliance with a subpoena. Section 68.23 specifically delineates the procedure the ALJ may follow when a party fails to comply with a subpoena. Furthermore, if the complainant's January 18, 1990, Motion to Compel and for Sanctions and the ALJ's subsequent orders regarding this motion were based upon a failure to respond to the request for admissions, then proper authority would exist for

the use of Section 68.21.[2] Neither the ALJ nor the complainant suggested 28 C.F.R. § 68.23(e) or Section 274A(e)(2) of the INA as a means of requiring the respondent to comply with the subpoena, which would have been the appropriate procedure. The ALJ's granting of the motion for summary judgment was based upon the findings of inference. Because the findings of inference were improperly made, a genuine issue of material fact exists. Therefore, the granting of summary judgment is incorrect.

b. Sanctions

1. The Administrative Law Judge's Decision and Order

As stated, the ALJ sanctioned the respondent's attorney, by assessing attorney's fees, for ``harassment and causing unnecessary delay.'' The ALJ ordered respondent's attorney to reimburse the complainant $160.01 for reasonable expenses incurred because of his misconduct. Decision and Order at 8, 11. In addition, the ALJ ordered the respondent and the respondent's attorney to pay, jointly and severally, $642.29 to complainant, also for reasonable expenses incurred. In assessing these sanctions, the ALJ relied on Rules 11 and 37 of the FRCP. Pursuant to 28 C.F.R. § 68.1, the FRCP shall be used as a general guideline in any situation not provided for by the Rules. However, I conclude that the circumstances of this case did not warrant the use of the FRCP.

2. Background

An administrative agency may establish qualifications for attorneys practicing before it. Koden v. United States Department of Justice, 564 F.2d 288, 233 (7th Cir. 1977). This necessarily includes the power to establish rules for admission to practice before the agency and rules of conduct while engaged in such practice. The Seventh Circuit in Koden, citing Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926), stated that ``an agency empowered to prescribe its own rules has the implied power to determine who can practice before it.'' Koden at 564 F.2d 233. A concomitant agency power is the power to impose sanctions for violations of these rules, such as barring an attorney from practicing before an agency. However, in the absence of specific statutory or regulatory authority, an ALJ has no inherent authority to impose such sanctions. ``[B]efore an agency institutes a proceeding barring an attorney from practice before it, the agency must have acted pursuant

[2]It is clear from a reading of Section 68.21 as a whole that the reference in Section 68.21(c) to actions which an ALJ may take for failure to comply with ``an order,'' is a reference to an order compelling a response to a discovery request made pursuant to Sections 68.16 through 68.20. 28 C.F.R. § 68.21(a).

to the legislative power to prescribe rules and must, in fact, have promul[g]ated rules of admission, practice, and discipline.'' J. Stein, G. Mitchell, B. Mezines, Administrative Law, § 42.01[1], at 42-5 (1990).

The U.S. District Court for the District of Columbia addressed this issue in Camp v. Herzog, 104 F. Supp. 134. (D. D.C. 1952). In Camp, the National Labor Relations Board (NLRB) issued an order which barred an attorney from practicing before it because of the attorney's misconduct. The District Court, in vacating the NLRB order, concluded that because the NLRB had failed to prescribe rules of admission or enrollment for persons appearing before it, the NLRB lacked the authority to discipline the attorney. Id. at 138. ``Had the [NLRB promulgated such a rule], there would be no question as to its power to discipline anyone so admitted for conduct no in keeping with the requirements for admission or enrollments.'' Id. The District Court went on to state that ``until the [NLRB] adopts an appropriate rule, which it certainly has the power to do so, . . . no person will be precluded from being represented by any person of his choice.'' Id. at 139. The NLRB was thereby prevented from sanctioning an attorney because the agency did not first promulgate the appropriate rules.

The previously cited Rules of Practice and Procedure (hereinafter Rules) were promulgated by the Attorney General for cases arising under Sections 274A and 274B of the INA, 8 U.S.C. §§ 1324a and 1324b, pursuant to regulatory authority granted in Section 103(a) of the INA, 8 U.S.C. § 1103(a). The Attorney General has delegated the authority for administering these cases to the Office of the Chief Administrative Hearing Officer.

3. The Authority of an ALJ to Issue Monetary Sanctions

The only reference in the Rules to standards of conduct for attorneys is contained in Section 68.31(b)(4), which reads as follows:

> Qualifications of attorneys. An attorney at law who is admitted to practice before the federal courts or before the highest court of any state, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Administrative Law Judges. An attorney's own representation that he/she is in good standing before any such courts shall be sufficient proof thereof, unless otherwise ordered by the Administrative Law Judge.

Neither this subsection, nor any other in the Rules, establishes rules of conduct for attorneys or authorizes a system of punishment for attorneys cited for misconduct.

As previously stated, the Rules set out, at Section 68.21, sanctions which may be assessed against a party who fails to properly comply with an order relating to discovery. For instance, an ALJ may rule that the ``matter or matters concerning which an order

was issued be taken as established adversely to the non-complying party.'' 28 C.F.R. § 68.21(c)(2). However, all of the sanctions enumerated in Section 68.21 relate to how an administrative law judge may rule on certain pleadings. They do not include the imposition of monetary sanctions. Therefore, because the Rules do not provide guidelines for attorney conduct or penalties for misconduct, the ALJ had no authority to impose sanctions against the respondent and the respondent's attorney beyond the numerous procedural sanctions listed in Section 68.21(c) of the Rules.

In light of the foregoing discussion, we need not reach the question of whether an agency could authorize, by regulation, monetary sanctions for misconduct by attorneys in the course of litigation. However, we note that virtually every agency which has prescribed rules of conduct for attorneys has allowed only for the assessment on non-monetary sanctions. For example, the Federal Communications Commission's regulations list censure, suspension, and disbarment of attorneys as sanctions which may be imposed against attorneys. 47 C.F.R. § 1.14. The Securities and Exchange Commission is another agency which prescribes rules of conduct, listing suspension and disbarment as possible sanctions; no mention is made of monetary sanctions in these regulations. 17 C.F.R. § 201.2.

As noted earlier, Section 68.1 of the Rules calls for the use of the FRCP in situations ``not provided for or controlled by'' the Rules. However, the Rules clearly do provide for and control actions to be taken for failure to comply with discovery orders [§ 68.21)c)] and subpoenas [§ 68.23]. Moreover, Section 68.1 only invokes the FRCP for use ``as a general guideline'' to supplement the procedural Rules as needed, it does not purport to clothe ALJs with substantive powers, such as those granted U.S. District Court judges in Rule 11 and Rule 37(b)(2) of the FRCP.

The Attorney General and this agency have not promulgated rules of conduct for attorneys or representatives. At the present time, neither the CAHO, nor any ALJ adjudicating cases under Sections 274A and 274B of the INA, has the authority to sanction an attorney for misconduct.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have conducted a review of the Administrative Law Judge's Decision and Order. The documents identified in the record, and arguments presented by counsel, as contained in the record, have been carefully considered, and I find the following:

> (1) Where the statute and regulations set out the method for enforcement of a subpoena, the ALJ has no authority to enforce a subpoena in any other manner. Therefore, the finding of inferences by the ALJ in enforcing the subpoena were improperly made.

(2) Because the finding of inferences was improperly made, a genuine issue of material fact exists and the ALJ's granting of the motion for summary judgment is incorrect.

(3) Given the absence of specific statutory or regulatory authority, the ALJ erred in imposing sanctions against respondent and respondent's attorney as a punitive measure for misconduct.

ACCORDINGLY,

Pursuant to 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.51, the Decision and Order of the Administrative Law Judge is hereby vacated.

SO ORDERED: This 5th day of December, 1990.

JACK E. PERKINS
Chief Administrative Hearing Officer