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

July 18, 2023

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2022A00015
KOY CHINESE & SUSHI RESTAURANT, Respondent.	)	

NOTIFICATION OF ADMINISTRATIVE REVIEW

I. BACKGROUND AND PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. The United States Department of Homeland Security, Immigration and Customs Enforcement ("DHS" or "Complainant") filed a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") against the Respondent on January 10, 2022, charging Respondent with two counts of violating 8 U.S.C. § 1324a. Count I of the complaint alleged that the Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present Employment Eligibility Verification Forms ("Forms I-9") for nine employees. Count II of the complaint alleged that the Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by failing to timely prepare Forms I-9 for twenty-nine employees. The complaint sought a civil money penalty of $1,882.90 for each of the thirty-eight alleged violations, for a total civil penalty of $71,550.20. The case was assigned to Administrative Law Judge ("ALJ") Andrea Carroll-Tipton.

Respondent failed to file an answer to the complaint, as required by 28 C.F.R. § 68.9(a). Accordingly, the ALJ issued an Order to Show Cause, ordering the Respondent to submit a filing showing good cause for its failure to timely file an answer and to file an answer in accordance with 28 C.F.R. § 68.9(c). *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416 (2022). Respondent failed to comply with the ALJ's Order to Show Cause.

As a result, the ALJ issued an order entering default judgment *sua sponte* on liability. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416a (2022) ("*Koy II*"). In that order, the ALJ found that "Respondent's failure to file an answer constitute[d] a waiver of its right to appear and contest the allegations of the complaint," *id.* at 4, and therefore accepted the factual allegations pled in the complaint as true and as sufficient to establish liability for all thirty-eight alleged violations, *see id.* at 4-5.

However, the ALJ also found that there was insufficient evidence in the record to determine whether the penalty sought by the Complainant was "reasonable." *Id.* at 5. The ALJ also specifically noted that the record was silent as to when the violations occurred, a fact that was crucial to determining the applicable range of civil penalties. *Id.* at 6. Because of this lack of evidence, the ALJ noted that "Complainant presently cannot meet its burden of proving

penalties." *Id.* Accordingly, the ALJ invited the parties to provide supplemental filings related to penalties, specifically reminding Complainant of its burden to provide evidence related to the aggravation of the penalty based on the statutory factors, *id.* at 5, and evidence as to when the violations occurred, *id.* at 6. The ALJ set a deadline of July 1, 2022, for these supplemental filings, and cautioned that "[f]ailure to timely provide a submission constitutes a waiver of a [party's] right to be heard on penalties." *Id.*

Neither party submitted any additional filings related to penalties by the July 1, 2022 deadline—or for many months thereafter. On February 16, 2023, the ALJ issued an order entitled "Notice & Opportunity to Be Heard on Non-Statutory Penalty Factor (Lack of Prosecutorial Interest & Insufficiently Developed Record)." *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416b (2023) ("*Koy III*"). In that order, the ALJ noted the parties' failure to submit supplemental filings on penalties by the July 1, 2022 deadline and further observed that the only filing OCAHO had received from either party up to that time was the Complaint. *Id.* at 2. After again noting the Complainant's burden of proof with respect to penalties, the ALJ observed that the Complainant had "declined to build a sufficient record despite its obligation to do so," and further noted Complainant's particular failure to provide either evidence or argument as to when the Count II violations occurred, despite the ALJ previously identifying this deficiency in the order entering default judgment. *See id.* at 3. In light of this "lack of participation," the ALJ concluded that the case was "of little prosecutorial interest to Complainant." *Id.* at 4. The ALJ also stated that she was considering "how such a lack of interest by the proponent, along with the insufficiently developed record, should factor into the penalty assessment as a matter of equity." *Id.* Having not previously identified to the parties this non-statutory factor as a potential consideration in the penalty analysis, the ALJ informed the parties of that prospect and permitted them to submit filings related to that issue within fourteen days of the date of the Notice. *Id.*

On May 9, 2023, Complainant filed a Motion to Accept Late Filing, which included information responsive to the ALJ's June 2022 invitation to provide supplemental evidence related to penalties. The Motion to Accept Late Filing also included a Motion to Approve Consent Findings, which contained proposed consent findings, a draft order approving the consent findings, and a settlement agreement signed by both parties over a year earlier.[1] By order dated June 1, 2023, the ALJ denied the Complainant's Motion to Accept Late Filing and denied the parties' Motion to Approve Consent Findings. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416c (2023) ("*Koy IV*"). With respect to the Motion to Accept Late Filing, the ALJ concluded that the Complainant did not demonstrate good cause for the eleven-month delay in submitting its evidence related to penalties. *See id.* at 6. With respect to the Motion to Approve Consent Findings and attached settlement agreement, the ALJ explained that she was "not satisfied with the timeliness and substance of the proposed consent findings," *id.*, noting further that "the consent findings are based on a settlement agreement that the Court cannot approve" due to a particular term in the agreement that was inconsistent with 8 U.S.C. § 1324a, *id.* at 7-8. The ALJ concluded the order by noting that a final order on penalties was forthcoming. *Id.* at 9.

The ALJ issued an Order on Penalties on July 12, 2023. In it, the ALJ analyzed the five statutory factors enumerated in 8 U.S.C. § 1324a(e)(5), as well as the previously-noticed non-statutory factor related to the lack of prosecutorial interest and an insufficiently developed record. *See* Order on Penalties, 4-7. In ultimately setting the civil penalties, the ALJ noted that the violations alleged in Count I, failure to prepare or present Forms I-9, were continuing violations;

[1] Both parties signed the Motion to Approve Consent Findings in April 2023, indicating that it was, in effect, a joint motion, even though it was not captioned as such.

therefore, she determined the penalty amount based on the inflation-adjusted penalty ranges for violations occurring after November 2, 2015. *Id.* at 8; *cf.* 28 C.F.R. § 68.52(c)(8); 28 C.F.R. § 85.5.

With respect to the Count II violations, failure to timely prepare Forms I-9, the ALJ noted again that "[t]he date of hire is critical to evaluating the Count II violations," and found that "Complainant did not timely provide evidence or argument as to when these violations occurred." Order on Penalties at 8. The ALJ concluded that she would "not speculate on the employees' dates of hire in determining the penalty range for Count II," and determined that the "Complainant should not receive the benefit of a higher penalty range when it has failed to meet its burden as the proponent in this case." *Id.* Therefore, the ALJ found that she could rely only on "the proposition that the employees at issue were hired after November 6, 1986" as pled in the complaint; thus, she applied the original, non-inflation-adjusted penalty range set forth in 8 U.S.C. § 1324a(e)(5) and, accordingly, set the penalties for the Count II violations at the statutory minimum of $100 per violation. *Id.* at 9.

II. STATEMENT OF ISSUES TO BE REVIEWED

Both parties in this matter are represented by counsel. Yet, neither party has effectively participated in this proceeding, *see* Order on Penalties at 6-7, nn. 9-10 (noting that both parties have declined to participate in this matter), and the performance of both the parties and their counsel has fallen well below what is expected in this forum, *see* 28 C.F.R. § 68.35 ("All persons appearing in proceedings before an [ALJ] are expected to act with integrity, and in an ethical manner."); *cf.* MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2023) ("A lawyer shall act with reasonable diligence and promptness in representing a client."). As a result, after over eighteen months of proceedings, the only document currently in the evidentiary record is the complaint and its attached exhibits.[2] The ALJ's frustration with the parties' conduct, which is clearly reflected in multiple decisions in this case, is amply justified by the record. Nevertheless—and notwithstanding the parties' apparent disinterest in the case—the undersigned is obligated to ensure the ALJ's Order on Penalties, including the earlier, predicate decisions on which it is based, comports with the record and applicable law. To that end, the undersigned has identified the following three issues for review stemming from that decision.[3]

First, the ALJ imposed a civil money penalty in Count II of $100 per violation. Order on Penalties at 8-9. However, that minimum applies only to violations which occurred before March 15, 1999. 28 C.F.R. § 68.52(c)(5). Thus, to impose that penalty, the ALJ necessarily had to determine that the violations alleged in Count II occurred prior to that date. Respondent did not raise a statute of limitations defense and, thus, waived any such defense. *See United States v. Cityproof Corp.*, 15 OCAHO no. 1392a, 11 (2022) ("Failure to raise the statute of limitations results in its waiver, and a judge may not raise it sua sponte."). Similarly, Respondent also did not raise a *laches* defense and, thus, waived any claim to such a defense. *See United States v. Ojeil*, 7

[2] To be clear, the administrative record contains Complainant's Motion to Accept Late Filing (which includes various documents and a Motion to Accept Consent Findings), as well as the multiple ALJ orders in this case. *See* 5 U.S.C. § 556(e) ("The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . ."), § 557(c) (flush language) ("All decisions, including initial, recommended, and tentative decisions, are a part of the record . . ."). However, because the ALJ denied both the Motion to Accept Late Filing and the Motion to Accept Consent Findings, none of the documents attached to those motions were admitted into evidence.

[3] Apart from the issues noted herein, the undersigned is not reviewing any other issues related to the ALJ's decision. Further, should the review of one issue prove dispositive, the undersigned need not reach other issues on review.

OCAHO no. 984, 982, 987 (1998) (noting that "by not raising affirmative defenses of cure, time bar or *laches*, [a respondent] waive[s] them"). Further, *laches* is generally unavailable as a defense against the United States, which includes Complainant. *See United States v. LFW Dairy Corp*., 10 OCAHO no. 1129, 8 (2009). Thus, Respondent has no apparent untimeliness defense *per se* to an allegation that the violations in Count II were committed prior to March 15, 1999. Nevertheless, imposing a penalty for violations that occurred—as a putative conclusion of fact and law, if not also one of reality[4]—almost 23 years before a complaint was filed raises significant due process and fundamental fairness concerns that the ALJ's decision does not address. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard *at a meaningful time* and in a meaningful manner." (emphasis added) (quotations omitted)); *Ojeil*, 7 OCAHO no. 984, at 986 (noting that a four-year delay in filing a complaint under 8 U.S.C. § 1324a "raises significant concerns," particularly where a respondent may have already corrected the timeliness violations at issue). Like all administrative adjudicators, OCAHO adjudicators have an inherent obligation to ensure due process and fundamental fairness are observed in all cases, and the law does not require OCAHO adjudicators "to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

Moreover, publicly-available information indicates that Respondent's underlying corporate entity is New Century Inc. and that New Century Inc. was not established until 2003. *See Taxable Entity Search Results*, TEX. COMPTROLLER OF PUB. ACCTS., https://mycpa.cpa.state.tx.us/coa/ (type "New Century Inc." in the "Entity Name" search box; then click "Search"; then click "Details" on the resulting page) (last visited July 18, 2023) (reflecting a corporate registration date of New Century Inc. with the Texas Secretary of State of August 7, 2003, and a mailing address identical to that of Respondent as reflected in the complaint); *see also New Century Inc.*, OPENCORPORATES, https://opencorporates.com/companies/us_tx/0800233014 (last visited July 18, 2023) (reflecting a corporate registration date of New Century Inc. with the Texas Secretary of State of August 7, 2003, a registered mailing address identical to that of Respondent as reflected in the complaint, and a listing of Respondent's current business name, Koy Chinese & Sushi, as an alternative corporate name). Additional publicly-available information also indicates that Respondent did not begin operating in its current business incarnation until 2011. *See* Zara Flores, *Kyle-based restaurant Koy Chinese and Sushi serving up dual authentic cuisines*, CMTY. IMPACT (Nov. 11, 2021, 6:04 PM), https://communityimpact.com/austin/san-marcos-buda-kyle/dining/2021/11/11/kyle-based-restaurant-koy-chinese-and-sushi-serving-up-dual-authentic-cuisines/ (noting that Respondent began operating in 2011). Respondent's corporate identity, corporate inception date, and dates of operation are all matters of public record, reflect information maintained in government records, and have not been disputed or had their accuracy questioned by either party; accordingly, they are matters appropriately subject to official notice. *See* 28 C.F.R. § 68.41[5]; *see also Funk v. Stryker Corp*., 631 F.3d 777, 783 (5th Cir. 2011)

[4] Documents submitted by Complainant but excluded from evidence by the ALJ may indicate the dates of the violations in Count II. To the extent the ALJ's decision to exclude those documents becomes relevant, it is subsumed within this issue for review.

[5] On administrative review, the undersigned exercises "all the powers which [an ALJ] would have in making the initial decision . . . ." 5 U.S.C. § 557(b). Thus, the undersigned may take official notice of a material fact consistent with 28 C.F.R. § 68.41. Accordingly, this Notification of Administrative Review also serves as notice to the parties that I may take official notice of Respondent's underlying corporate entity, its corporate inception date, and its dates of operation during my review and that the parties will have an opportunity to show the contrary in their filings during that review. *See* 28 C.F.R. § 68.41; *accord* 5 U.S.C. § 556(e) ("When an agency decision rests on official notice of a material fact

(holding that it is appropriate to take "judicial notice of publicly-available documents . . . which were matters of public record directly relevant to the issue at hand").[6] Consequently, there is inherently some tension in the ALJ's finding that Respondent committed violations of 8 U.S.C. § 1324a(a)(1)(B) before March 15, 1999, and the facts that Respondent's underlying corporate entity did not exist until 2003 and Respondent's current business did not begin operating until 2011. Accordingly, the undersigned will review whether the ALJ's imposition of a $100 penalty per violation in Count II was appropriately supported.

Second, based on Respondent's failure to respond to the complaint or otherwise participate in the case, the ALJ chose to enter a default judgment on liability and bifurcate the issue of penalties in this case, *see Koy II*, 16 OCAHO no. 1416a, at 5, rather than either finding Respondent's request for a hearing abandoned and dismissing the complaint (thereby rendering DHS's original Notice of Intent to Fine ("NIF") a final order) or entering a default judgment against Respondent as to both liability and penalties. Similarly, based on Complainant's failure to participate in the case after filing the complaint, the ALJ chose to treat its "lack of prosecutorial interest" as a non-statutory factor in determining the appropriate civil money penalty, *see Koy III*, 16 OCAHO no. 1416b, at 3-4 (noting Complainant's lack of participation even after the ALJ identified relevant deficiencies), rather than finding that DHS had abandoned the complaint and dismissing it. The ALJ's decision is silent as to why she chose a particular course of action over the possible alternatives.

OCAHO regulations note that the failure of a respondent to file an answer may lead to a default judgment against it. 28 C.F.R. § 68.9(b). The entry of a default judgment is subject to the discretion of the ALJ. *Id*. ("The [ALJ] *may* enter a judgment by default." (emphasis added)). A different OCAHO regulation advises that "[a] complaint or a request for hearing may be dismissed upon its abandonment by the party or parties who filed it." 28 C.F.R. § 68.37(b). It further suggests that a finding of abandonment is mandatory in certain circumstances: "[a] party *shall be deemed* to have abandoned a complaint or a request for hearing if," *inter alia*, it or its representative "fails to respond to orders issued by the [ALJ]." 28 C.F.R. § 68.37(b)(1) (emphasis added). In cases where a respondent has stopped participating in the case, particularly where a respondent neither files an answer nor responds to an order to show cause, OCAHO cases have taken two distinct approaches. In one line of cases, an ALJ has simply found the respondent's request for hearing abandoned and dismissed the complaint, leaving the NIF as the final order. *See*, *e.g.*, *United States v. Milwhite, Inc*., 17 OCAHO no. 1469a, 2 (2023); *accord United States v. Cordin Co.,* 10 OCAHO no. 1162, 1, 4 (2012) (holding that it was "entirely appropriate" for an ALJ to conclude that a respondent abandons a request for hearing under 28 C.F.R. § 68.37(b) when the respondent neither filed an answer nor responded to an order to show cause). This line of cases, which runs from OCAHO's first published decision not involving a subpoena, *see United States v. S. Masonry Fencing Co.,* 1 OCAHO no. 4, 9, 11-12 (1988), effectively treats a respondent's abandonment of a request for hearing as a default judgment on both liability and the penalty amount. *See generally United States v. Hui*, 3 OCAHO no. 479, 826, 828-29 (1992) (collecting cases); *accord United States v. Hosung Cleaning Corp*., 4 OCAHO no. 681, 776, 777 (1994) (noting that "OCAHO caselaw demonstrates that failure to respond to an order to show cause triggers a judgment of

not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.").

[6] Because this case arises in Texas, the undersigned applies the law of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"). *See* 28 C.F.R. § 68.56.

default, equivalent to dismissal of the employer's request for hearing").[7] An alternate line of cases, which the ALJ in the instant case appears to have followed[8] and which also dates back to OCAHO's early years, treats a respondent's failure to file an answer as a default judgment only as to liability and bifurcates the issue of the civil money penalty for additional proceedings. *See*, *e.g.*, *United States v. Cruz*, 3 OCAHO no. 453, 595, 596-98 (1992) (relying on Federal Rule of Civil Procedure 55(b)(2) to find a respondent is entitled to submit evidence on the civil money penalty even after a default judgment on liability has been entered). OCAHO caselaw has not attempted to reconcile these two approaches or to definitively determine whether one or both is the appropriate approach under the law.[9]

Additionally, a complainant who fails to respond to an ALJ's orders is subject to having the complaint dismissed for abandonment under 28 C.F.R. § 68.37(b)(1). *See, e.g., Caltzoncin v. GSM Insurors-Glass, Sorenson & McDavid*, 12 OCAHO no. 1287, 3 (2016) ("[Complainant] has abandoned his complaint with respect to the citizenship status and national origin claims as he has failed to respond to my Order to Show Cause."). Although the undersigned is unaware of any published OCAHO decision in which DHS (or its predecessor, the Immigration and Naturalization Service) was found to have abandoned a complaint pursuant to 28 C.F.R. § 68.37(b)(1), nothing in that regulation prohibits its application to cases arising under 8 U.S.C. § 1324a. *Cf. United States v. Jabil Cir., Inc.*, 10 OCAHO no. 1146, 3 (2012) (tacitly acknowledging that DHS could be at risk of being found to have abandoned a complaint under 28 C.F.R. § 68.37(b)(1) due to a failure to respond to an ALJ's order, but nevertheless vacating the ALJ's abandonment finding "due to extraordinary, extenuating circumstances presented by the specific facts in [that] case").[10] Rather

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[7] OCAHO caselaw has not always clearly distinguished between an abandoned request for hearing under 28 C.F.R. § 68.37(b)(1) and a default judgment as to both liability and penalties under 28 C.F.R. § 68.9(b), and it is not clear that there is a practical distinction. *See Hosung Cleaning Corp*., 4 OCAHO no. 68, at 777. To the extent that a distinction between the two procedural mechanisms becomes relevant, it is subsumed within this issue for review.

[8] In electing to bifurcate the issue of penalties following the entry of a default judgment on liability, the ALJ relied on a prior ALJ decision in *United States v. Eriksmoen Cottages, Ltd*., 14 OCAHO no. 1355 (2020), and a case cited therein. *See Koy II*, 16 OCAHO no. 1416a, at 5. However, the ALJ in *Eriksmoen Cottages* elected to bifurcate the issues of liability and penalties in May 2020 following a partial grant of summary decision and to allow the parties to make supplemental filings because of disruptions wrought by the then-roaring COVID-19 pandemic which arose after the parties' filings related to summary decision. 14 OCAHO no. 1355, at 8. Consequently, that decision is factually and procedurally distinguishable from the circumstances of the instant case and, thus, somewhat inapposite. Nevertheless, the ALJ's decision to bifurcate the issues in the instant case is supported by prior OCAHO caselaw, *e.g*., *Cruz*, 3 OCAHO no. 453, at 598.

[9] The undersigned notes a possible ancillary question related to the ALJ's use of a default judgment *sua sponte* in the instant case. OCAHO regulations lack a specific rule related to defaults and default judgments similar to Federal Rule of Civil Procedure 55. Nevertheless, OCAHO looks to the Federal Rules of Civil Procedure as "general guideline" in situations not covered by its own regulations or other relevant sources of law. 28 C.F.R. § 68.1. The entry of a default judgment under Federal Rule of Civil Procedure 55 is a two-step process—*i.e.,* the entry of a default under paragraph (a) and the subsequent entry of a default judgment under paragraph (b)—and the second step also involves two possible methods; however, the ultimate entry of a default judgment contemplates a motion by a party. *See* FED. R. CIV. P. 55(b) (requiring either a "plaintiff's request" for entry of default judgment by a clerk or a party's application to the court for a default judgment). In other words, Federal Rule of Civil Procedure 55 does not specifically authorize the entry of a default judgment *sua sponte*, though federal judges may possess an inherent authority to enter such a judgment in egregious circumstances. *See Sourcecorp Inc. v. Croney*, 412 F. App'x 455, 458 (3d Cir. 2011) (noting that "some courts of appeals have held that, at least under egregious circumstances, district courts may enter default judgments *sua sponte* . . . ."). To the extent that a question of an ALJ's authority to issue a default judgment *sua sponte* becomes necessary to address, it is subsumed within this second issue for review.

[10] Although the underlying ALJ decision in *Jabil Circuit, Inc*. did find DHS abandoned a complaint, that decision was unpublished and subsequently vacated by the CAHO, 10 OCAHO no. 1146 at 3. Thus, there does not appear to have been a published OCAHO decision applying 28 C.F.R. § 68.37(b)(1) to DHS in a case arising under 8 U.S.C. § 1324a. The lack of any published OCAHO decision addressing this question is perhaps unsurprising because of the heretofore

than finding Complainant's lack of participation to constitute abandonment of the complaint pursuant to 28 C.F.R. § 68.37(b)(1), the ALJ instead addressed it as a non-statutory, equitable factor in calculating a civil money penalty against Respondent. Order on Penalties at 6-7. However, the ALJ did not address why she made that choice, and both the novelty of that decision and the lack of prior caselaw addressing such a situation makes it worth examining on review.

OCAHO regulations and caselaw are silent as to situations in which *both* parties have effectively abandoned a case, likely because such a scenario has been too implausible to even contemplate. Nevertheless, that is precisely the scenario faced by the ALJ in the instant case. Based on the parties' conduct, the ALJ faced at least three options for resolving this case: dismissing the request for hearing as abandoned and/or entering a default judgment against respondent as to liability and penalties, dismissing the complaint as abandoned, or entering a default judgment as to liability and bifurcating the issue of penalties. She chose the third option; however, in light of the dearth of caselaw addressing the particular scenario presented by this case (*i.e.*, the failure of both parties to participate), the split in caselaw over how to address a respondent's failure to participate in a case, and a lack of published caselaw regarding how to treat Complainant's lack of participation in a case, it is not clear that option was the correct one—though it is not clear that it was necessarily incorrect either. Accordingly, the undersigned will review whether the ALJ's decision to enter a default judgment as to liability against Respondent, bifurcate proceedings, and treat DHS's lack of participation as a non-statutory, equitable penalty-calculation factor was appropriate.

Third, the ALJ rejected the parties' settlement agreement and denied their Motion for Consent Findings. *See Koy IV*, 16 OCAHO no. 1416c, at 6-8. OCAHO regulations provide two methods for dismissal of a case based on a settlement between the parties. 28 C.F.R. § 68.14. The parties may submit a settlement agreement containing[11] consent findings and a proposed decision and order to the ALJ. 28 C.F.R. § 68.14(a)(1). The agreement containing consent findings must also provide four specific items, including "[a] waiver of any right to challenge or contest the validity of the [ALJ's decision]." 28 C.F.R. § 68.14(b). The agreement is subject to the approval of the ALJ who must be satisfied with its "timeliness, form, and substance" and may conduct a hearing on its fairness. 28 C.F.R. § 68.14(c). Alternatively, the parties may notify the ALJ that they have reached a full settlement and agreed to dismissal. 28 C.F.R. § 68.14(a)(2). Dismissal of the action through this method is also subject to ALJ approval, and the ALJ may require the filing of the settlement agreement.[12] *Id*.

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general unlikelihood that Complainant would simply abandon a case. *See* Order on Penalties at 7 (commenting on the "unique and unprecedented procedural facts in this case" related to Complainant's lack of participation).

[11] OCAHO regulations contemplate that a settlement agreement under 28 C.F.R. § 68.14(a)(1) will contain consent findings, rather than the agreement and the consent findings being two, separate documents as the parties submitted them in the instant case. Thus, it is not clear that the ALJ should have even considered the document submitted by the parties labeled as a "settlement agreement," rather than treating the consent findings as the sum of the parties' agreement. To the extent that distinction becomes relevant, it is subsumed within this issue for review.

[12] Technically, even if an ALJ requires filing of a settlement agreement, dismissal through this method requires ALJ approval only of the dismissal and not of the settlement agreement *per se*. 28 C.F.R. § 68.14(a)(2). However, the regulation does not preclude ALJ review of the settlement agreement. *See United States v. Torres Mexican Food, Inc.*, 4 OCAHO no. 596, 88, 89 (1994) (noting that 28 C.F.R. § 68.14(a)(2) does not require ALJ review of a settlement agreement but does not prohibit such review either). Moreover, for many years, OCAHO's general practice was to require the parties to submit a copy of their settlement agreement for review before dismissing the action 28 C.F.R. § 68.14(a)(2). *See, e.g., United States v. La Parisienne Bakery, LLC*, 15 OCAHO no. 1390, 2 (2021) ("The Court requires that the parties submit a copy of their settlement agreement alongside the motion to dismiss."). More recently, ALJs have adopted divergent approaches to reviewing settlement agreements before dismissing a case under that

Because the parties submitted a settlement agreement, consent findings, and a proposed order to the ALJ, it appears they sought dismissal under 28 C.F.R. § 68.14(a)(1). The ALJ provided three reasons for rejecting the settlement agreement: the untimeliness of the submission, the parties' failure to address the findings of fact in the previously-entered default judgment on liability in *Koy II*, and the inclusion of a term in the settlement agreement indicating that Complainant would issue a final, unappealable order upon execution of the agreement. *Koy IV*, 16 OCAHO no. 1416c, at 6-8. However, all three reasons rest on unsteady legal foundations. For instance, as the ALJ noted, the Fifth Circuit maintains a "strong judicial policy favoring the resolution of disputes through settlement." *Id*. at 6 (quoting *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)). That policy significantly mitigates—though, perhaps, does not completely absolve, *see* 28 C.F.R. § 68.14(c) (requiring ALJ satisfaction with the timeliness of a settlement agreement)—the approximately one-year delay in submitting the settlement agreement, as the ALJ appears to have tacitly acknowledged. *Koy IV*, 16 OCAHO no. 1416c, at 6 ("If timing were the only issue, the [ALJ] would carefully weigh this deficiency against [the Fifth Circuit's policy]"). Additionally, the legal import of the parties' failure to address the prior default judgment factual findings in their settlement agreement is unclear because the ALJ retained authority to reconsider that decision even in the absence of new information or arguments. *See A.S. v. Amazon Web Servs., Inc*., 14 OCAHO no. 1381l, 5 (2021) (discussing an ALJ's authority to reconsider interlocutory decisions). Thus, the ALJ was not necessarily bound by either those prior findings or the prior default judgment and could have relied on the parties' consent findings to revisit them. Finally, OCAHO has previously discussed Complainant's practice of issuing its own "final orders" at the conclusion of OCAHO proceedings and found such orders to be "merely cumulative or repetitive and [without] any independent legal effect as a discrete order separate and apart from [the ALJ's] decision." *United States v. Frimmel Mgmt*., *LLC*, 12 OCAHO no. 1271d, 2 n.3 (2017). Thus, the inclusion of a term in the settlement agreement indicating that Complainant would issue such an order—one which appears to be, at most, a ministerial or recordkeeping act to facilitate compliance with the ALJ's final order if necessary—may not have been a sufficient basis to reject that agreement.[13]

Further, the parties' inclusion of proposed consent findings, which were separate from the settlement agreement and track the requirements of 28 C.F.R § 68.14(b), clearly contemplate that the ALJ, rather than DHS, would issue a final, unappealable order, notwithstanding the arguably contradictory language in the settlement agreement. Thus, it is also not clear that the parties' intent

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regulation, albeit with little explanation as to why one approach is taken over the other. *Compare, e.g., Graham v. Ameriflight*, 18 OCAHO no. 1482, 1 n.1 (2023) ("While the Court may require the filing of a settlement agreement, it declines to do so here."), *with United States v. Chinese Back Rub*, 17 OCAHO no. 1452, 1 (2022) ("After reviewing the Motion to Dismiss and the executed settlement agreement, the Court finds that dismissal is appropriate in this case."); *cf. Garcia v. Can-Am Electric, LLC*, 15 OCAHO no. 1401, 1, 3 (2021) (dismissing a case without reviewing the settlement agreement even after ordering the parties to submit it). Nevertheless, because the parties in the instant case sought dismissal under 28 C.F.R. § 68.14(a)(1), caselaw applying 28 C.F.R. § 68.14(a)(2) is inapposite to this review.

[13] The undersigned notes that Complainant has routinely included similar language in settlement agreements filed with OCAHO that have previously been approved by ALJs, but that the specific formulation of the language sometimes varies. For example, Complainant has often included language to the effect that upon both the execution of the settlement agreement *and* the issuance of a final order by the ALJ consistent with that agreement, it will issue its own final order. That formulation is more legally accurate than the confusing language included in the proposed settlement agreement in the instant case which omitted any reference to the ALJ's issuance of a final order. *See Koy IV*, 16 OCAHO no. 1416c, at 7-8. In any event, a more consistent and precise approach to settlement agreements by Complainant would assist ALJ review of dismissal requests under 28 C.F.R. § 68.14.

was accurately captured by the ALJ's analysis of the Motion to Approve Consent Findings. *See also supra* note 11 (discussing the possibility of confusion by submitting consent findings separate from a settlement agreement in contravention of 28 C.F.R. § 68.14(a)(1)). Further, to the extent that the ALJ was dissatisfied with the substance of the settlement agreement, she could have conducted a hearing on it with the parties, *see* 28 C.F.R § 68.14(c); however, she elected not to do so for reasons that are not contained in the record.

In short, the ALJ's denial of the parties Motion to Approve Consent Findings and her rejection of their settlement agreement raise a host of legal questions, particularly in light of the Fifth Circuit's "strong judicial policy favoring the resolution of disputes through settlement." *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). Accordingly, the undersigned will also review the appropriateness of those determinations.

III. CONCLUSION

This administrative review will be conducted in accordance with the provisions of 28 C.F.R. § 68.54(b)-(d). Accordingly, within twenty-one days of the date of entry of the ALJ's order, the parties may submit briefs or other written statements addressing the issues presented above. *See* 28 C.F.R. § 68.54(b)(1). The deadline for submitting such briefs or other written statements is **August 2, 2023**. The parties are reminded that all briefs and other filings related to administrative review must be filed and served by expedited delivery, in accordance with the provisions of 28 C.F.R. § 68.54(c) and § 68.6(c). The parties are further reminded that the undersigned "ordinarily expects both parties to fully develop their positions and arguments during an administrative review." *See United States v. El Paso Paper Box, Inc*., 17 OCAHO no. 1451b, 5 (2023). Thus, although the failure to file a brief may not necessarily warrant an adverse legal action on review, *see id*., it may nevertheless bear on the issue of abandonment under 28 C.F.R. § 68.37(b) which is one of the issues being reviewed.

James McHenry
Chief Administrative Hearing Officer