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

May 3, 2024

UNITED STATES OF AMERICA, Complainant, v. A&D MAINTENANCE LEASING AND REPAIRS, INC., Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2024A00027

NOTIFICATION OF ADMINISTRATIVE REVIEW

I. BACKGROUND AND PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. The United States Department of Homeland Security ("DHS" or "Complainant") filed a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") against the Respondent on December 27, 2023. The complaint and Notice of Intent to Fine ("NIF") allege that the Respondent violated 8 U.S.C. § 1324a by failing to prepare and/or present employment eligibility verification forms ("Forms I-9") for nineteen individuals and failing to ensure proper completion of Forms I-9 for six other individuals. The case was assigned to Administrative Law Judge ("ALJ") John Henderson.

The Respondent did not file an answer to the complaint but, on March 19, 2024, filed a motion to dismiss the complaint and a memorandum in support, arguing that no violations of 8 U.S.C. § 1324a occurred and that the claims were beyond the statute of limitations. On April 29, 2024, Complainant filed an opposition to the Respondent's motion to dismiss.

On April 30, 2024, ALJ Henderson *sua sponte* issued an Order of Dismissal,[1] dismissing the complaint and finding that it "does not meet the regulatory requirements in 28 C.F.R. § 68.7(c) and is facially deficient" because it did not include a copy of the Respondent's request for a hearing before OCAHO. Order of Dismissal at 2; *see also* 28 C.F.R. § 68.7(c) (providing that all complaints filed with OCAHO under 8 U.S.C. § 1324a must be accompanied by both the NIF and the request for hearing). As ALJ Henderson noted, although the Complainant alleged in the complaint that the Respondent timely requested a hearing and the Respondent similarly asserted in its memorandum in support of its motion to dismiss that it timely requested a hearing, a copy of the request for hearing

[1] Although the Respondent filed a motion to dismiss, the ALJ dismissed the complaint on a ground not raised by the Respondent's motion and expressly denied the Respondent's motion to dismiss as moot. *See* Order of Dismissal at 3. Therefore, the dismissal is appropriately characterized as a *sua sponte* dismissal.

was not attached to the complaint and was not included elsewhere in the record. Order of Dismissal at 2. Accordingly, the ALJ dismissed the complaint without prejudice, though he noted that the Complainant could re-file the complaint "with this deficiency remedied, in compliance with the appropriate regulatory requirements, as appropriate." *Id.*

II. STATEMENT OF ISSUES TO BE REVIEWED

The ALJ *sua sponte* dismissed the complaint due to Complainant's failure to include a copy of Respondent's request for hearing, did so notwithstanding Respondent's acknowledgement that it did, in fact, request a hearing, *see* Resp't's Mem. of Law at 5, and did so without affording Complainant notice and an opportunity to respond prior to dismissal. The ALJ did not specify a basis for the dismissal beyond a regulatory violation of 28 C.F.R. § 68.7(c) by Complainant, and the legal theory underlying the dismissal for that violation is not immediately apparent. Although the undersigned can conceive of several possible legal theories for the dismissal, each one raises problematic questions, and none appears fully supported by the record or applicable law.

For instance, agencies are generally required to follow their own regulations, *see, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954) (holding that "as long as [applicable] regulations remain operative," an agency may not "sidestep" them), and the Administrative Procedure Act ("APA") explicitly authorizes federal courts to, *inter alia*, "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law," 5 U.S.C. § 706(2), (2)(D). Thus, the ALJ's decision could be read as one rooted in the commands of the Supreme Court and the APA for an agency to follow applicable regulations. However, not all regulatory violations require invalidation of the underlying agency action. Indeed, a failure to follow procedural rules designed for the benefit of the agency in conducting its business—rather than to confer procedural benefits on individuals subject to agency action—does not necessarily invalidate the agency action absent a showing of prejudice. *See, e.g., Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39 (1970) (holding that violations of regulations which are "mere aids to the exercise of an agency's [authority]" are generally not actionable absent a showing of prejudice). In a more contemporary formulation, if an agency's regulation does not affect a fundamental right derived from the Constitution or a federal statute, then a violation of that regulation will only invalidate the agency action if there is a showing of prejudice; however, where the regulation implicates fundamental rights derived from the Constitution or federal statutes, a violation of that regulation does not require a showing of prejudice in order to invalidate the agency action. *See, e.g., United States v. Schiller*, 81 F.4th 64, 71 & n.7 (2d Cir. 2023).[2] In the instant case, it is not clear that the regulation at issue, 28 C.F.R. § 68.7(c), was designed to confer procedural benefits on parties in OCAHO proceedings—rather than to benefit OCAHO's ability to adjudicate cases—or that it implicates fundamental Constitutional or statutory rights. Moreover, the record appears largely devoid of any evidence—or even assertions—of prejudice based on that violation, particularly in light of both Respondent's acknowledgment that

[2] Although circuit courts have taken "diverse approaches to reconciling the tension between *American Farm Lines* and *Accardi*," *see Leslie v. Att'y Gen. of the U.S.*, 611 F.3d 171, 177 (3d Cir. 2010) (collecting cases) (italics added), the instant case arises within the jurisdiction of the U.S. Court of Appeals for the Second Circuit. Thus, the undersigned is bound by decisions of that Circuit and, accordingly, applies any analytical frameworks developed by that Circuit in considering agency regulatory violations. *See* 28 C.F.R. § 68.56; *United States v. Allen Holdings, Inc*., 9 OCAHO no. 1059, 5 (2000) (noting that relevant case law from the appropriate federal circuit in which a case under 8 U.S.C. § 1324a arises constitutes "binding authority" that must be applied in OCAHO proceedings).

it filed a request for hearing, *see* Resp't's Mem. of Law at 5, and its decision not to raise the issue of a violation of 28 C.F.R. § 68.7(c) in its motion to dismiss. Consequently, it is unclear whether that violation, by itself, is sufficient to invalidate the proceeding and dismiss the complaint.

Turning to other possible theories, OCAHO regulations do authorize *sua sponte* dismissal of a complaint for failure to state a claim upon which relief may be granted. *See* 28 C.F.R. § 68.10(b). However, "in the prehearing phase . . . , the [ALJ] shall not dismiss a complaint in its entirety for failure to state a claim upon which relief may be granted, upon his or her own motion, without affording the complainant an opportunity to show cause why the complaint should not be dismissed." *Id*. The ALJ's decision does not cite 28 C.F.R. § 68.10(b) as the basis for dismissal or otherwise address the merits of the complaint to suggest it does not state a claim upon which relief may be granted. *See* Order of Dismissal at 2. Moreover, the ALJ did not follow the antecedent procedures in 28 C.F.R. § 68.10(b) required to *sua sponte* dismiss a complaint on that basis. Accordingly, it does not appear that 28 C.F.R. § 68.10 provides a viable basis to dismiss the complaint.

OCAHO caselaw also authorizes *sua sponte* dismissals of complaints in other limited circumstances, such as an inability to effectuate service of a complaint, *see e.g., United States v. Rios-Villatoro*, 14 OCAHO no. 1364 (2020) (dismissing a complaint *sua sponte* due to an inability of OCAHO or DHS to serve a complaint), or a lack of subject-matter jurisdiction, *see, e.g.*, *Windsor v. Landeen*, 12 OCAHO no. 1294, 7-8 (2016) (dismissing a complaint *sua sponte* due to a lack of subject-matter jurisdiction).[3] Further, in these circumstances, OCAHO's general practice has been to provide notice and an opportunity for the party adversely affected to respond or otherwise address the issue before dismissing the complaint. *See, e.g., Rios-Villatoro*, 14 OCAHO no. 1364, at 1 (detailing a prior request to the complainant to effectuate service prior to dismissal); *Windsor*, 12 OCAHO no. 1294, at 3 (noting the prior issuance of an Order to Show Cause regarding the issue of subject-matter jurisdiction). In the instant case, service of the complaint is not at issue, so that does not appear to be a viable basis for dismissal. It is also not readily apparent that a violation of 28 C.F.R. § 68.7(c) implicates an issue of OCAHO's subject-matter jurisdiction. Moreover, the ALJ did not rely explicitly on either of these bases for dismissal, nor did the ALJ follow OCAHO's practice in such situations of providing notice and an opportunity to respond before dismissal. Thus, it is not clear that either situation would reflect an appropriate basis for the dismissal of the complaint in this case.

OCAHO ALJs possess "all appropriate powers necessary to conduct fair and impartial hearings," 28 C.F.R. § 68.28(a), including the power to "[t]ake other appropriate measures necessary . . . to discharge the duties of the office," 28 C.F.R. § 68.28(a)(8).[4] Although that authority

[3] There may also be other atypical situations in which *sua sponte* dismissal is appropriate. *Cf. Arizona v. California*, 530 U.S. 392, 412 (2000) (noting "'if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised [because] [t]his result is fully consistent with the policies underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.'" (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting) (italics added))); *Fitzgerald v. First E. Seventh St. Tenants Corp*., 221 F.3d 362, 363-64 (2d Cir. 2000) (noting a federal court's inherent authority to *sua sponte* dismiss "frivolous or malicious" complaints). To the extent that any other unusual situation for *sua sponte* dismissal is implicated by the ALJ's decision, it is subsumed within the issues subject to administrative review.

[4] OCAHO ALJs also possess authority to "[e]xercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Attorney General as are necessary and appropriate therefore." 28 C.F.R. §

supports an ALJ's general authority to regulate the adjudication of cases before them—*e.g.*, by authorizing an ALJ to require parties to participate in electronic filing due to significant logistical difficulties associated with the parties' locations—it is not clear that "other appropriate measures" extends to the dismissal of the complaint in these circumstances. Indeed, in the instant case, the ALJ, in essence, raised an arguable affirmative defense *sua sponte* and then used that defense to dismiss the complaint. However, OCAHO generally follows the principle of party presentation which is common to nearly all adversarial legal or adjudicatory proceedings in the United States. *See*, *e.g.*, *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (describing the principle of party presentation as one in which the parties present their cases and judges act as "neutral arbiters" of only the issues raised by the parties). Thus, as adjudicators conducting "fair and impartial hearings," 28 C.F.R. § 68.28(a), and adhering to the principle of party presentation, OCAHO ALJs are generally prohibited from raising affirmative defenses to a complaint *sua sponte*, and defenses that are not raised are either waived or forfeited. *See, e.g., 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*." (italics added)). To be sure, "[t]he party presentation principle is supple, not ironclad," *Sineneng-Smith*, 590 U.S. at 376, and there are circumstances—including those discussed, *supra*—in which *sua sponte* action by an ALJ to dismiss a complaint may be appropriate. In the absence of a clearer legal theory underlying the ALJ's decision, however, it is not immediately apparent that such circumstances were present in the instant case or that the generalized language in 28 C.F.R. § 68.28 could override the default application of the party presentation principle. In short, even after considering multiple potential theories, the legal basis for the ALJ's decision remains unclear and does not appear fully supported either by OCAHO's regulations or caselaw or by another source of authority.

Furthermore, even if the ALJ possessed authority to *sua sponte* dismiss a complaint in the circumstances of the instant case, his decision to proceed without first providing Complainant notice and an opportunity to respond raises its own, separate questions of appropriateness.[5] *See Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 82 (2d Cir. 2018) ("We have held that dismissing a case without an opportunity to be heard is, at a minimum, bad practice in numerous contexts and is reversible error in others."); *Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999) ("Unless it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective, we believe it is bad practice for a district court to dismiss without affording a plaintiff the opportunity to be heard in opposition."); *see also Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 36 (1st Cir. 2001) ("The type of *sua sponte* dismissal here at issue—a dismissal on the court's own

68.28(a)(7). However, there does not appear to be an express delegation from the Attorney General to OCAHO ALJs—in the form of a rulemaking or otherwise—of the power to dismiss complaints in the circumstances presented in the instant case. Moreover, because the Attorney General is not vested with the functions of ALJs in the first instance, *see* 28 U.S.C. § 509(1), it is unclear what authority an ALJ could exercise under this provision. OCAHO ALJs also possess authority "to take any action authorized by the [APA]." 28 C.F.R. § 68.28(a)(6). However, there is no apparent action authorized by the APA that directly addresses the circumstances of the dismissal of the complaint in this case, apart from a general authority to "regulate the course of the hearing," 5 U.S.C. § 556(c)(5). Thus, it is not clear that these bases of ALJ authority provide a foundation for the dismissal of the complaint. Nevertheless, to the extent these provisions are relevant considerations, their applicability is also subsumed within the issues subject to administrative review.

[5] The undersigned recognizes that there is a legally significant difference between an adjudicator's authority to act *sua sponte* (*i.e.*, on the adjudicator's own motion) and an adjudicator's authority to act "spontaneously" (*i.e.*, to act immediately without affording notice or an opportunity to be heard). *See Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir. 1999) (discussing this difference). Both issues are implicated in the instant case, and both are subsumed within this administrative review.

initiative, without affording the plaintiff either notice or an opportunity to be heard—is disfavored in federal practice." (italics added)); *cf. Day v. McDonough*, 547 U.S. 198, 210 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.").

To be sure, there may be some situations where *sua sponte* dismissal without notice is appropriate. *See, e.g., Catzin*, 899 F.3d at 82 (noting a lack of subject-matter jurisdiction as a potential basis for a *sua sponte* dismissal without notice); *cf. Gonzalez-Gonzalez*, 257 F.3d at 37 (noting that "of course . . . [not] every *sua sponte* dismissal entered without prior notice to the plaintiff automatically must be reversed" (italics added)). Even in such circumstances, however, courts have required "unmistakabl[e] [clarity]" before approving such dismissals. *See*, *e.g*., *Snider*, 199 F.3d at 113. Thus, in light of both the general disfavor accorded *sua sponte* dismissals without notice and OCAHO's particular practice of providing notice and an opportunity to respond prior to a *sua sponte* dismissal—even in circumstances evincing a clear lack of subject-matter jurisdiction in which, arguably, notice is not required—the lack of notice to Complainant in the instant case appears difficult to support.[6]

In sum, the ALJ's Order of Dismissal raises a host of legal questions whose answers are not clearly discernible and which call into question the overall appropriateness of that Order. Consequently, the undersigned will review the legal viability of the ALJ's decision to *sua sponte* dismiss the complaint without providing notice to the Complainant and an opportunity to respond, including the various related considerations discussed above. Apart from the issues noted herein, however, the undersigned is not reviewing any other issues related to the ALJ's decision.[7] Further, should the review of one issue prove dispositive, the undersigned need not reach other issues on review.[8]

III. CONCLUSION

[6] This difficulty is amplified by the ALJ's invitation for Complainant to simply refile the complaint with the request for hearing attached. *See* Order of Dismissal at 2. Because the Order of Dismissal suggests the defect in the complaint is remediable, it is not clear what purpose is served by dismissing the complaint altogether and requiring it to be re-filed, rather than simply providing Complainant notice and an opportunity to remedy that violation while the proceeding is ongoing. *Cf*. 28 C.F.R. § 68.9(e) (authorizing an ALJ to allow appropriate amendments to complaints to facilitate resolution of cases on the merits). Refiling a complaint and re-starting a case from inception imposes time and resource costs on both the parties and on OCAHO, and such costs should generally be borne only when legally necessary.

[7] For example, the undersigned is not reviewing the ALJ's decision regarding the substitution of counsel for Complainant, *see* Order of Dismissal at 1 n.1, and will, accordingly, recognize Complainant's substituted counsel as its counsel of record for purposes of this review.

[8] OCAHO expects all parties—as well as any amicus curiae, *see* 28 C.F.R. § 68.17—to adhere to all applicable regulations. *See*, *e.g*., *United States v. Tempo Plastic Co.,* 8 OCAHO no. 1010, 206, 216 (1998) (reiterating that "[a]ll parties are required to follow the Rules of Practice and Procedure [*i.e.*, OCAHO's regulations in 28 C.F.R. part 68]"); *cf. United States v. Bhattacharya*, 14 OCAHO no. 1380b, 5 n.5 (2021) ("Accordingly, all parties with cases before OCAHO, regardless of representation, are reminded that compliance with OCAHO's rules of procedure is expected in all cases."). Complainant clearly violated one of those regulations, 28 C.F.R. § 68.7(c), in the instant case. *See* Order of Dismissal at 2. Nothing in this Notification should be construed as condoning or encouraging anything less than full compliance with OCAHO's rules of procedure. Nevertheless, OCAHO adjudicators have accepted pleadings which did not comport with regulatory requirements in other cases without an immediate sanction for noncompliance, *see*, *e.g*., *United States v. Facebook, Inc*., 14 OCAHO no. 1386, 1-2 (2021) (accepting a motion that did not comply with 28 C.F.R. § 68.7(a) while ordering future compliance with OCAHO regulations), and the central question in the instant case is ultimately whether the sanction of dismissal without notice was appropriate and legally supported in light of the nature of the regulatory violation at issue.

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 **May 21, 2024.** Parties must file and serve their briefs 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).

James McHenry
Chief Administrative Hearing Officer