

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

June 12, 2013

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 12A00040
	)	
SILVERADO STAGES, INC.,	)	
Respondent.	)	
_____	)	

DENIAL OF REQUEST FOR ADMINISTRATIVE REVIEW

Appearances: Kristin Piepmeier, Esq.  
 for Complainant

Daniel M. McGee, Esq.  
 for Respondent

I. PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a two-count complaint against Silverado Stages, Inc. (Silverado or Respondent) in March, 2012. Count I alleged that Respondent failed to prepare or present Employment Eligibility Verification Forms (I-9) for twenty-eight employees, or failed to ensure that the forms were properly completed. Count II alleged that Respondent failed to properly complete the employer verification section of the Form I-9 for one employee. The original complaint sought penalties in the amount of \$770 for each of the twenty-nine alleged violations. Respondent filed an answer contesting both the alleged violations and the penalties assessed.

ICE later amended its complaint, dismissing twelve of the allegations and moving three of them from Count I to Count II. ICE also reduced the penalties requested to \$440 for each alleged violation. The amended complaint therefore sought penalties in the total amount of \$7,480 for seventeen alleged violations.

In February, 2013, ICE filed a motion for summary decision, arguing that no genuine issue of material fact existed as to liability for the alleged violations or as to the appropriate

amount of the civil penalty for each violation. Silverado, through counsel, filed a timely opposition to the motion for summary decision, contesting the characterization of the violations as substantive rather than technical or procedural and contesting the amount of the fines assessed.

On May 13, 2013, Administrative Law Judge (ALJ) Ellen K. Thomas issued a Final Decision and Order finding Silverado liable for the alleged violations, finding the penalty amount reasonable in light of the statutory parameters and factors and the record as a whole, and finding no compelling reason to disturb ICE's penalty assessment. Silverado was directed to pay a civil money penalty in the amount of \$7,480 (\$440 for each violation).

## II. REQUEST FOR REVIEW

On May 24, 2013, the Office of the Chief Administrative Hearing Officer (OCAHO) received Respondent's Request for Administrative Review via facsimile transmission. Although the request for review had a certificate of service attached, the date of service on the certificate of service was different than the transmission date on the facsimile. In addition, the certificate of service failed to indicate the manner of service. The request for review did not contest liability for the violations; rather, it simply challenged the reasonableness of the amount of the civil penalties ordered. For the reasons stated below, the request for administrative review is denied.

### A. Requirements for Administrative Review

The Chief Administrative Hearing Officer (CAHO) may issue an order modifying or vacating a decision by the ALJ in employer sanctions cases within thirty days of the date of the ALJ's final decision and order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1). A party seeking review by the CAHO may file a request for review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). Because of the brief, fixed time within which the CAHO must modify or vacate the ALJ's decision, the regulations require that all requests for review, briefs, and other documents related to administrative review be filed and served by expedited service, in accordance with 28 C.F.R. § 68.6(c). *See* 28 C.F.R. § 68.54(c). Section 68.6(c) provides that pleadings and briefs may be filed by facsimile "only to toll the running of a time limit." When parties submit filings by facsimile, they must forward all original, signed pleadings and other documents concurrently with the facsimile transmission. 28 C.F.R. § 68.6(c).

For all documents filed with OCAHO, including requests for administrative review, the person serving the document must "certify to the manner and date of service." 28 C.F.R. § 68.6(a). When documents are filed by facsimile, the certificate of service must specifically include "a certification that service on the opposing party has also been made by facsimile or same-day hand delivery, or, if service by facsimile cannot be made, a certification that the document has been served instead by overnight delivery service." 28 C.F.R. § 68.6(c).

### B. Respondent's Request for Review Was Untimely, Improperly Filed, and Included a Deficient Certificate of Service

The Final Decision and Order in this case was issued by the ALJ on May 13, 2013. Because the regulations grant the parties ten days from the date of entry of the ALJ's order to file a request for review, the deadline for filing a request for review in this case was May 23, 2013. Respondent's Request for Administrative Review was dated May 23, 2013, and the certificate of

service indicated that the request had been served on the opposing party and OCAHO on that same day. However, the facsimile filing with OCAHO was received and had a facsimile transmission date of May 24, 2013. This failure to file in a timely manner and the delay in effecting service raise several issues, which in combination with defective filing and a deficient certificate of service, has resulted in this denial of Respondent's request for review.

### 1. Timeliness

As previously mentioned, parties are given ten days from the date of entry of the ALJ's final decision and order to request administrative review by the CAHO. 28 C.F.R. § 68.54(a)(1). Although Respondent's Request for Administrative Review was dated May 23, the tenth day after the ALJ's final order, it was not actually sent to (and received by) OCAHO until May 24, according to the transmission date stamp on the top of the facsimile. The fact that the request for review was not actually filed with OCAHO until May 24 makes it untimely. The ten-day time limit for requesting review was included in OCAHO's procedural regulations because it was "necessary to provide for an orderly consideration of the parties' submissions" within the statutorily-mandated thirty-day review period. 64 Fed. Reg. 7,066, 7,072 (Feb. 12, 1999). Moreover, since the regulations also impose a deadline for all parties to file briefs or other documents related to administrative review within twenty-one days of the date of the final ALJ order, it is imperative that requests for review be filed and served in a timely manner in order to give the opposing party in the case sufficient time to respond to the request. *See* 28 C.F.R. § 68.54(b). Therefore, requests for review that are filed and served more than ten days after the date of the ALJ's order risk being rejected as untimely.

### 2. Incorrect date on the certificate of service

However, timeliness is not the only – or most troubling – issue with the Respondent's Request for Administrative Review. The certificate of service presents two additional issues. First, Respondent's counsel attests on the certificate of service that he served the request for review on the opposing party's counsel and OCAHO on May 23. However, this is not the date the request was filed with and served on OCAHO. Furthermore, the certificate of service does not indicate the manner in which it was served on the opposing party in the case.

OCAHO's regulations require that all certificates of service specify "the manner and date of service." 28 C.F.R. § 68.6(a). The certificate of service accompanying Respondent's Request for Administrative Review fails to certify the manner of service and inaccurately attests to the date of filing and service. The date on the certificate of service is contradicted by the actual date on which filing and service was made. It is unclear whether this discrepancy was inadvertent or purposeful. Additionally, in this case, the difference between the two dates is legally significant – if the document had been filed and served by the appropriate expedited methods on May 23, as the certificate of service attests, it would have been a timely request for review under OCAHO's regulations. *See* 28 C.F.R. § 68.54(a)(1). However, since it was not actually filed (and apparently served) until May 24, it is untimely.

Although most certificates of service are taken at face value, *see Lewis v. Ogden Services*, 2 OCAHO no. 384, 704, 705 (1991), when the actual date of service demonstrably differs from the date on which the party asserts that he or she served the document, the actual date of service will control. *See id.* A proper filing requires the date on the certificate of service

to match the date of execution of service on the opposing party and the filing with OCAHO. *See* 28 C.F.R. § 68.6(a). The latest that an opposing party can conceivably receive service of a timely request for the review of an ALJ order is one day following receipt of the pleading by OCAHO (and only under limited circumstances). *See* 28 C.F.R. § 68.6(c) (if a party files a document by facsimile and cannot serve that document by facsimile or same-day hand delivery on the opposing party, the party may serve the document via overnight delivery service). The latest that OCAHO can receive a timely request for the review of an ALJ's final order is within ten days of the entry of the final ALJ order. *See* 28 C.F.R. § 68.54(a)(1). Consequently, although an opposing party could conceivably receive a request for review outside the ten-day window for requesting administrative review, such a request must be filed with (received by) OCAHO within ten days of the ALJ's final order. Therefore, parties and attorneys must ensure that their certificates of service are accurate and that service and filing are effectuated on the date avowed on the certificate of service, especially where, as here, the date disparity differentiates between a timely and untimely request, and deprives the opposing party of its full time to respond to the request for review.

### 3. Failure to certify the manner of service

The certificate of service presents additional problems beyond the inaccurate service date. The certificate does not indicate the manner in which the request for review was served, as required by the regulations. *See* 28 C.F.R. § 68.6(a). All certificates of service must specify the manner in which the filing was served, and this information is particularly important where, as here, an expedited method of service is required by the regulations. *See* 28 C.F.R. §§ 68.6(c), 68.54(c). Respondent's certificate of service does not tell us anything about the manner or speed with which the request for review was sent to ICE. Accordingly, this office has no way to know whether ICE received it in a timely manner and had sufficient time to prepare and submit a brief in opposition to the request for review.<sup>1</sup> Furthermore, when parties file a document with OCAHO by facsimile or other expedited delivery method, it is imperative that expedited service also be made on the opposing party. *In re Investigation of Conoco*, 8 OCAHO no. 1048, 729, 730 (2000). Failure to certify that the appropriate method of service was used may lead to rejection of a request for review or another document filed in connection with administrative review. *Sellaro v. Elektra Records*, 3 OCAHO no. 461, 660, 663 (1992).

### 4. Failure to concurrently forward signed, original filing

The regulations also require that when a document is filed by facsimile, the party or his or her representative must concurrently forward a signed, original version to OCAHO. 28 C.F.R. § 68.6(c). In this case, OCAHO never received the signed, original request for review from Respondent.

## III. CONCLUSION

Administrative adjudication requires an orderly and informed participation by the parties. *United States v. Erlina Fashions, Inc.*, 4 OCAHO no. 656, 586, 589 (1994). Parties and attorneys are expected to comply with OCAHO's procedural regulations set out at 28 C.F.R. part 68. Particularly in the context of requests for administrative review, which must be evaluated and

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<sup>1</sup> OCAHO did not receive a brief or other filing from ICE related to the request for review.

acted upon by the opposing party and by the CAHO within strict, tight time deadlines, adherence to the filing deadlines and expedited service requirements is of the utmost importance. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54. Although parties who appear before OCAHO pro se are not expected to be as familiar with the procedural requirements in OCAHO cases, attorneys are held to a higher standard and must take care to comply with the requirements in the regulations. *Cf. Holguin v. Dona Ana Fashions*, 4 OCAHO no. 605, 142, 146 (indicating that compassion for a party's pro se status may be grounds for leniency in enforcing OCAHO's procedural requirements, but only when procedural failures by the pro se party do not obstruct the "orderly and informed participation" of the parties in the case).

The failure of Respondent's counsel to comply with the procedural regulations governing filing by facsimile, when combined with the untimeliness of the filing, the incorrect date on the certificate of service, and the failure of the certificate of service to specify the manner in which it was served, leads me to deny Respondent's Request for Administrative Review.<sup>2</sup> Under OCAHO regulations, the ALJ's order becomes the final agency order 60 days after the date of the ALJ's final decision and order, unless the CAHO modifies, vacates, or remands the order. 28 C.F.R. § 68.52(g). Because I have denied Respondent's Request for Administrative Review and have thus declined to modify or vacate the ALJ's order, the Final Decision and Order will become the final agency order 60 days after its issuance by the ALJ. A person or entity adversely affected by a final agency order may file a petition for review of the final agency order in the appropriate United States Circuit Court of Appeals within 45 days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

It is SO ORDERED, dated and entered this 12th day of June, 2013.

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Robin M. Stutman  
Chief Administrative Hearing Officer

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<sup>2</sup> Assuming arguendo that the request for review had been properly filed and served and the certificate of service had met the regulatory requirements, I would nevertheless decline to modify the ALJ's penalty assessment in this case. Five factors must be considered when assessing civil money penalties: (1) the size of the business; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether or not the individuals involved were authorized aliens; and (5) the history of previous violations by the employer. § 1324(a)(e)(5); *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 4 (2010). Considering these factors under a reasonableness standard, the ALJ may consider any relevant mitigating factors presented by the Respondent, along with any other relevant information from the record. *United States v. Alberto Noriega-Perez*, 6 OCAHO no. 859, 369-70 (1996). While all factors must be considered, consideration of those factors does not require the ALJ to ultimately aggravate or mitigate the penalty based on a single factor. *See United States v. Chef Rayko, Inc.*, 5 OCAHO no. 803, 652 (1995). Rather, it is sufficient that the factors considered together yield a reasonable penalty. *See id.* Furthermore, the ALJ may defer to ICE's assessment of the penalty factors that are supported by the record. *DJ Drywall, Inc.*, 10 OCAHO no. 1136, at 4. Here, the ALJ considered the statutory factors and the record as a whole and found ICE's penalty assessment to be within the statutory parameters and reasonable. Similarly, in light of the Respondent's size, the nature of the violations, and the fact that ICE had already substantially reduced the requested penalty for each violation from its original demand in the Notice of Intent to Fine and initial complaint to less than the mid-range of penalties, I would also find that the penalties sought in this case are reasonable, and would not disturb the ALJ's civil penalty assessment.