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

May 23, 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

Appearances: John G. Poppe, for Complainant
Saul Zabell, Esq., for Respondent[1]

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER MODIFYING THE ADMINISTRATIVE LAW JUDGE'S ORDER OF DISMISSAL AND REMANDING THE CASE FOR FURTHER PROCEEDINGS

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 ("DHS" or "Complainant") filed a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") against the Respondent on December 27, 2023, alleging 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 individuals. The complaint as filed with OCAHO was accompanied by a copy of the Notice

[1] The undersigned notes that the original Notice of Case Assignment ("NOCA") in this case listed the same address for service for both the Respondent and the Respondent's counsel. *See* Notice of Case Assignment for Complaint Alleging Unlawful Employment at 6. However, the complaint identified different addresses for the Respondent compared to the Respondent's counsel. *See* Compl. at 5. Service of a complaint is considered effective upon receipt by either the partner or officer of a corporate party or by the "attorney or representative of record of a party[.]" 28 C.F.R. § 68.3. Accordingly, because the complaint and NOCA were properly served on Respondent's counsel, service of the complaint was effectuated in this case notwithstanding the apparent initial failure to send a copy directly to the Respondent itself. *Cf. United States v. TX Pollo Feliz LLC*, 18 OCAHO no. 1503, 2-3 (2023) (noting that "the regulation does not require [that] both Respondent and counsel receive the complaint to calculate the answer deadline" and further finding that "the regulation contemplates the prospect of service on either a party or their representative"). Nevertheless, OCAHO will endeavor to serve copies of all future orders on both Respondent and Respondent's counsel at their respective addresses and has updated the associated certificate of service accordingly.

of Intent to Fine ("NIF") previously issued to the Respondent by DHS but did not include a copy of the Respondent's request for a hearing respecting the alleged violations. The case was assigned to Administrative Law Judge ("ALJ") John Henderson.

Respondent did not file an answer to the complaint but, instead, on March 19, 2024, filed a motion to dismiss the complaint and a memorandum of law in support of the motion. Respondent's motion to dismiss argued that no violations had occurred and that the claims were barred by the statute of limitations. On April 29, 2024, Complainant filed an opposition to Respondent's motion to dismiss, addressing Respondent's arguments regarding the alleged violations and the applicability of the statute of limitations. Notably, in their respective filings, neither party raised or addressed the fact that the request for hearing was not attached to the complaint.

On April 30, 2024, ALJ Henderson issued a *sua sponte* Order of Dismissal,[2] dismissing the complaint on the ground that it "does not meet the regulatory requirements in 28 C.F.R. § 68.7(c) and is facially deficient" because the complaint did not include a copy of the Respondent's request for a hearing before OCAHO. Order of Dismissal at 2. As ALJ Henderson noted in his Order of Dismissal, 28 C.F.R. § 68.7(c) provides that complaints filed pursuant to 8 U.S.C. § 1324a must include both a copy of the NIF and a copy of the Respondent's request for hearing. *Id.* Although the Complainant alleged in the complaint that the Respondent timely requested a hearing, and although the Respondent's memorandum in support of its motion to dismiss similarly asserted that the Respondent timely requested a hearing, a copy of the request for hearing was not attached to the complaint and was not included anywhere else in the record. *Id.* Accordingly, ALJ Henderson dismissed the complaint without prejudice, noting that Complainant could re-file the complaint "with this deficiency remedied, in compliance with the appropriate regulatory requirements, as appropriate." *Id.* The record does not indicate that the parties were previously provided notice of this potential ground for dismissal, nor were they given an opportunity to respond prior to issuance of the Order of Dismissal.

On May 3, 2024, the undersigned issued a Notification of Administrative Review, providing that the Chief Administrative Hearing Officer ("CAHO") would "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[.]" *United States v. A&D Maint. Leasing & Repairs, Inc*. 19 OCAHO no. 1568, 5 (2024). The Notification provided that the parties could file briefs related to the administrative review by May 21, 2024. *Id.* at 6. Respondent filed a brief, albeit an untimely one. *See infra* note 4. Complainant did not file a brief by the deadline or by the date of this decision.

For the reasons stated below, the undersigned will modify the ALJ's Order of Dismissal and will remand the case for further proceedings consistent with this order.

II. JURISDICTION AND STANDARD OF REVIEW

The CAHO has discretionary authority to review an ALJ's final order in cases arising under

[2] As stated in the Notification of Administrative Review, "[a]lthough 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." *United States v. A&D Maint. Leasing & Repairs, Inc*. 19 OCAHO no. 1568, 1, n.1 (2024).

8 U.S.C. § 1324a. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(a). Under OCAHO's rules, the CAHO may review an ALJ's final order on his or her own initiative by issuing a notification of administrative review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(2). Alternatively, a party may file a written request for administrative review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). If administrative review is timely noticed or requested, the CAHO may enter an order that modifies or vacates the ALJ's order or remands the case for further proceedings within thirty days of the date of entry of the ALJ's order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

Under the Administrative Procedure Act ("APA"), which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final orders issued by an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990).[3] In conducting an administrative review, "the CAHO exercises independent judgment and discretion free from ideological or institutional pressure." *United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 3 (2023). The CAHO reviews both questions of law and fact *de novo* but will "accord some degree of consideration" to an ALJ's findings of fact, "depending on the particular circumstances of the case under review." *United States v. Fasakin*, 14 OCAHO no. 1375b, 4 (2021). In conducting an administrative review, "the CAHO must ensure that the ALJ's overall decision is well-reasoned, based on the whole record[,] . . . free from errors of law, and supported by or in accordance with reliable, probative, and substantial evidence contained in the record." *Id.* at 5.

III. BRIEFING[4]

[3] In its Memorandum in Support of the ALJ's Order to Dismiss ("Respondent's Brief" or "Resp't's Br."), Respondent asserts that the undersigned should review the ALJ's Order of Dismissal under an abuse of discretion standard. Resp't's Br. at 2-3. However, as presented by Respondent, that standard of review applies to federal court review of agency action, not to internal administrative agency review. Indeed, both the APA and federal courts have made clear that administrative review by the CAHO occurs under a *de novo* standard. *See, e.g., Maka*, 904 F.2d at 1356 ("The [APA] authorizes the agency to decide all issues *de novo*." (italics added)); *accord Mester Mfg. Co*, 900 F.2d at 203-04 (rejecting an argument that the CAHO should have applied an abuse of discretion standard rather than a *de novo* one in reviewing an ALJ decision). In any event, because the relevant facts are undisputed and the undersigned is reviewing only a legal determination, Respondent's argument ultimately posits a distinction without a difference because an error of law is inherently an abuse of discretion, and even in federal court, the two standards collapse into one another when reviewing a legal conclusion. *Cf. United States v. Hasan*, 586 F.3d 161, 168 (2d Cir. 2009) ("Put differently, a district court necessarily 'abuses its discretion' if it makes an error of law. In this way, review for 'abuse of discretion' and *de novo* review are not entirely distinct concepts, but rather, review for abuse of discretion incorporates, among other things, *de novo* review of district court rulings of law." (italics added)).

[4] The parties were invited to file briefs related to this administrative review by May 21, 2024. On May 21, OCAHO received by email a "courtesy copy" of a memorandum of law from the Respondent in support of the ALJ's Order of Dismissal. The body of the email accompanying this document indicated that a hard copy would follow via overnight delivery. As of the date of this decision, OCAHO has not received the hard copy. As this is not an e-filing case, the parties are limited to the methods of filing allowed by 28 C.F.R. §§ 68.54(c) and 68.6(c). Moreover, documents are generally not considered filed until they are received by OCAHO. *See* 28 C.F.R. § 68.8(b). Although OCAHO's rules allow parties to file by facsimile in order to toll the running of a time limit, *see* 28 C.F.R. § 68.6(c), filing a courtesy copy by email (in

Respondent's Brief generally argues that the ALJ's Order of Dismissal "was proper and should be affirmed." Resp't's Br. at 1. Respondent argues that the ALJ's Order of Dismissal "cannot be found to have been an abuse of [the ALJ's] discretion," and therefore should be affirmed. *Id.* at 4. Respondent further asserts that the failure to include the request for hearing in the complaint "is equivalent to defective service, because Complainant never served Respondent with the requisite documents,"[5] *id.* at 5, and therefore dismissal was authorized in accordance with previous OCAHO cases dismissing complaints without prejudice where service was not properly effectuated, *id.* at 4 (citing *United States v. Rios-Villatoro*, 14 OCAHO no. 1364 (2020)). Respondent also argues that Respondent will be prejudiced if the undersigned overturns the ALJ's order because, as the ALJ alluded to, *see* Order of Dismissal at 2 n.2, Respondent failed to file a timely answer to the complaint in this matter, *see* Resp't's Br. at 5. Furthermore, Respondent points out that its motion to dismiss was denied by the ALJ as moot, *see* Order of Dismissal at 3, and that the combined operation of these two facts would effectively deny Respondent "the opportunity to rebut the allegations contained within the Complaint" should the ALJ's dismissal be overturned, Resp't's Br. at 5. Therefore, the Respondent urges that the ALJ's decision should, "in the interest of justice and fairness," be upheld. *Id.*

Despite being the party adversely affected by the ALJ's *sua sponte* dismissal, Complainant failed to file a timely brief related to this administrative review. As the undersigned has previously discussed, briefs "serve multiple important purposes during an administrative review," *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, 5 (2023), including allowing the CAHO to determine whether relevant issues were raised before the ALJ "in order to properly consider those issues on review," *id.* Although "there is no regulatory requirement for parties to submit briefs during an administrative review by the CAHO[,] . . . the CAHO ordinarily expects both parties to fully develop their positions and arguments during an administrative review." *Id.* Complainant's "failure to file a brief not only makes it more difficult to conduct the review by leaving the reviewer 'adrift' in discerning the [Complainant's] positions and arguments, but it also indicates a disconcerting lack of interest in the case that is disrespectful to both the tribunal and the opposing party." *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470b, 4 (2023) (citation omitted). Complainant's participation in this case has fallen below OCAHO's professional expectations so far, and if its representation continues at its current level, further action or sanctions may be warranted.

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a case not enrolled in electronic filing) does not operate to toll the deadline in a similar manner. Accordingly, although the undersigned appreciates the Respondent's efforts to file its brief by the established deadline (including the submission of a courtesy copy by email), Respondent's brief was—technically—untimely filed. Nevertheless, because OCAHO adjudicators "have some discretion to accept non-conforming pleadings in appropriate circumstances," *United States v. Bhattacharya*, 14 OCAHO no. 1380b, 3 n.3 (2021), the undersigned has accepted and fully considered the brief despite its untimely nature.

[5] The undersigned notes that the request for hearing that was missing from the complaint is a document that was originally prepared and submitted *by the Respondent* to DHS prior to the commencement of the instant proceeding. Therefore, if such request for hearing exists, the Respondent would presumably already possess a copy of that document, having prepared and sent it in the first instance. At the least, Respondent is presumably aware of whether it did, in fact, request a hearing on the NIF. Consequently, any claims of prejudice to Respondent for the violation of 28 C.F.R. § 68.7(c) are both unpersuasive, *see infra* Part IV.B, and insufficient to warrant dismissal of the complaint, notwithstanding Respondent's assertion that such a violation is tantamount to defective service, *cf. United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 10-11 (2000) ("Where an employer actually receives the NIF and files a timely request for hearing, the employer has no valid grounds to seek dismissal of the Complaint on the basis of technical defects in service.").

IV. DISCUSSION

As outlined in the Notification of Administrative Review, assessing the propriety of the ALJ's *sua sponte* dismissal in this case requires an evaluation of two related legal questions. *See generally A&D Maint.*, 19 OCAHO no. 1568, at 2-5. First, does an OCAHO ALJ have the authority to *sua sponte* dismiss a complaint for failure to comply with 28 C.F.R. § 68.7(c)? Second, assuming an OCAHO ALJ does possess that authority, was it appropriate for the ALJ to *sua sponte* dismiss the complaint in this matter without providing the Complainant notice and an opportunity to respond prior to the dismissal? Before turning to those questions directly, however, it is important to first clarify certain key background principles.

A. Background Principles

Federal law provides that persons or entities alleged to have violated 8 U.S.C. § 1324a shall be provided a hearing respecting the violation upon request. *See* 8 U.S.C. § 1324a(e)(3)(A). Regulations of DHS, which investigates and prosecutes alleged violations of § 1324a, provide that upon conclusion of DHS's investigation, DHS may issue a NIF to the alleged violator. *See* 8 C.F.R. § 274a.9(b). The NIF will contain information regarding the alleged violations and the amount of the penalty that DHS seeks to impose. *See* 8 C.F.R. § 274a.9(d)(1). If a respondent wishes to contest a NIF, it must file with DHS, within thirty days of service of the NIF, a written request for a hearing before an ALJ. *See* 8 C.F.R. § 274a.9(e). If a respondent does not timely request a hearing, DHS "shall issue a final order from which there is no appeal." 8 C.F.R. § 274a.9(f). More pointedly, "[i]f the respondent does not file a [timely] request for a hearing in writing . . . the final order issued by DHS shall not be subject to a hearing before an administrative law judge under 28 CFR part 68." 8 C.F.R. § 1274a.9(f). In other words, if a respondent does not timely file a request for hearing with DHS, OCAHO jurisdiction cannot be triggered, and a respondent is not entitled to a hearing. Thus, a NIF and a timely request for a hearing are conditions precedent to an OCAHO proceeding in cases under 8 U.S.C. § 1324a. Accordingly, OCAHO's Rules of Practice and Procedure, 28 C.F.R. Part 68, require that all complaints filed pursuant to 8 U.S.C. § 1324a "be accompanied by a copy of the Notice of Intent to Fine and Request for Hearing." 28 C.F.R. § 68.7(c). This requirement was added to OCAHO's rules in 1989 "to allow [OCAHO] to confirm proper jurisdiction." *See* Rules of Practice and Procedure for Administrative Hearings Before Administrative Law Judges in Cases Involving Allegations of Unlawful Employment of Aliens and Unfair Immigration-Related Employment Practices ("Rules of Practice and Procedure for Administrative Hearings"), 54 Fed. Reg. 48,593, 48,594 (Nov. 24, 1989) (codified at 28 C.F.R. pt. 68 (1990)).

Importantly, as these provisions make clear, there is a crucial distinction between the *original* request for hearing itself, which is filed with DHS, and the *copy* of that request which must be attached to the subsequent complaint filed with OCAHO. The original request for hearing itself triggers OCAHO jurisdiction, *see* 8 U.S.C. § 1324a(e)(3)(A); 8 C.F.R. §§ 274a.9(e), 1274a.9(e), whereas the attachment of a copy of it to the complaint merely helps to "confirm" jurisdiction. *See* Rules of Practice and Procedure for Administrative Hearings, 54 Fed. Reg. at 48,594. In other words, the copy required by 28 C.F.R. § 68.7(c) is not a jurisdictional prerequisite *per se*; rather, it aids in confirming that jurisdiction already exists.[6]

[6] Admittedly, the need for a copy of the request for hearing for cases brought under 8 U.S.C. § 1324a to confirm jurisdiction as required by 28 C.F.R. § 68.7(c) is unclear. DHS does not file a complaint unless a respondent has timely

The request for hearing also serves two additional functions wholly unrelated to jurisdiction. First, it provides details about the respondent's attorney if one has been retained and, if it contains certain information, functions as a notice of appearance for that attorney before OCAHO. 28 C.F.R. § 68.33(f). Third, it may "but is not required to" contain a "respon[se] to each allegation listed in the [NIF]." 8 C.F.R. §§ 274a.9(e), 1274a.9(e). Both of these functions aid OCAHO in the efficient processing of a case, and the first also provides a convenience to a respondent's attorney by not requiring a separate notice of appearance once a complaint has been filed; however, neither function implicates any aspect of OCAHO's jurisdiction.

In the absence of a jurisdiction-conferring dimension to the copy of the request for hearing required by 28 C.F.R. § 68.7(c), that requirement is best understood as a nonjurisdictional claim-processing rule. A claim-processing rule is one "which 'seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" *Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1849 (2019) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). Courts have recognized "an array of [nonjurisdictional] mandatory claim-processing rules and other preconditions to relief," *see id*. at 1849-50 (collecting cases), and OCAHO, too, has been reluctant—but not wholly unwilling, *see, e.g., United States v. Facebook, Inc*., 14 OCAHO no. 1386b, 7 (2021) (finding that the exceptions in 8 U.S.C. § 1324b(a)(2) are jurisdictional in nature)—to label certain definitional or procedural rules as "jurisdictional" absent a clear statement to that effect, *see, e.g., United States v. Mar-Jac Poultry*, *Inc*., 10 OCAHO no. 1148, 7 (2012) ("Definitional or procedural limitations on the scope of a statute, such as employee numerosity or satisfaction of conditions precedent, should accordingly not be treated as jurisdictional in nature absent a clear statement to the contrary. . . . [I]t is not necessary to find that every failure of a litigant to establish some threshold fact equates to an ouster of jurisdiction.").[7] Further, "[u]nlike jurisdictional limits, though, mandatory claim-processing rules are subject to waiver and forfeiture by a litigant." *McIntosh v. United States*, 601 U.S. 330, 337 (2024). Accordingly, to the extent that a party may be entitled to some relief based on a violation of 28 C.F.R. § 68.7(c), that entitlement may

requested a hearing, and the undersigned is unaware of any case in recent memory in which DHS, or its predecessor, the Immigration and Naturalization Service, filed a complaint asking for a hearing even though a respondent had not timely requested one. In other words, the simple fact that DHS filed a complaint is usually clear proof that a respondent requested a hearing; otherwise, DHS would have simply issued a final order pursuant to 8 C.F.R. § 274a.9(f). The questionable purpose of 28 C.F.R. § 68.7(c)'s application to cases arising under 8 U.S.C. § 1324a aside, an OCAHO ALJ possesses clear authority to determine if he or she has subject-matter jurisdiction in a particular case and is obligated to inquire about jurisdiction when it is uncertain. *See, e.g., Sinha v. Infosys*, 14 OCAHO no. 1373, 1 (2020) ("[An OCAHO ALJ] has both the authority, and the duty, to determine *sua sponte* if it has subject matter jurisdiction."). Moreover, parties cannot waive jurisdiction, nor can they manufacture it by consent, such as by agreeing that a request for hearing was filed when one was not actually filed. *See, e.g., Hendrickson v. GTE Commc'n Sys. Corp*., 1997 WL 562109, *3 (OCAHO 1997) ("Parties cannot waive jurisdiction, nor can they confer jurisdiction by consent."). Thus, to the extent that there remains a question as to whether Respondent, in fact, requested a hearing in this case, nothing in the instant decision prohibits the presiding ALJ on remand from inquiring further as to the existence of a request for hearing in order to satisfy himself that jurisdiction exists.

[7] The undersigned recognizes the tension between the conclusions reached by different ALJs in *Mar-Jac Poultry* and *Facebook*—both of whom were interpreting the same Supreme Court case, *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514-16 (2006), which held that the numerosity threshold of employers with fifteen or more employees for application of Title VII of the Civil Rights Act of 1964 was not a jurisdictional prerequisite to hearing a suit brought under that law—regarding whether OCAHO's numerosity requirements in 8 U.S.C. § 1324b(a)(2)(A) and (B) are jurisdictional or not. However, the instant case provides no occasion to resolve that tension, and the undersigned expresses no view on that issue.

be forfeited or waived if not timely raised.[8] With this background in mind, the undersigned now turns to the two primary questions for consideration on review.

B. Authority of OCAHO ALJs to *Sua Sponte* Dismiss a Complaint for Failure to Comply with 28 C.F.R. § 68.7(c)

Despite diligent review, the undersigned has been unable to locate any previous published OCAHO decision addressing the appropriateness of an order of dismissal—*sua sponte* or otherwise—based on a violation of 28 C.F.R. § 68.7(c), and neither the Order of Dismissal nor the parties cited one. In the absence of such case law, the first question to consider is whether any theory supports a conclusion that OCAHO ALJs have the authority to *sua sponte* dismiss complaints for failure to comply with 28 C.F.R. § 68.7(c). *See A&D Maint.*, 19 OCAHO no. 1568, at 2 (noting that "[t]he ALJ did not specify a basis for the dismissal beyond a regulatory violation of 28 C.F.R. § 68.7(c) by Complainant," but there are "several possible legal theories for the dismissal" to be considered). Although multiple arguable theories warrant serious consideration, none is ultimately persuasive or legally supported based on the facts and procedural posture of the instant case.

For example, OCAHO's rules do authorize *sua sponte* dismissal of a complaint in a few specific circumstances. 28 C.F.R. § 68.10(b) authorizes an ALJ to dismiss a complaint for failure to state a claim upon which relief can be granted upon his or her own motion, subject to certain conditions. 28 C.F.R. § 68.37(b) also authorizes an ALJ to dismiss a complaint or request for hearing as abandoned in certain circumstances, without requiring a motion from either party. However, the ALJ invoked neither regulation in dismissing the complaint, *see* Order of Dismissal at 2, and neither rule supports the dismissal in this case.

Regarding 28 C.F.R. § 68.10(b), "the only question to be addressed in considering a motion to dismiss for failure to state a claim is whether the complaint is facially sufficient to permit the case to proceed further." *Mar-Jac Poultry*, 10 OCAHO no. 1148, at 9. In the instant case, there is no suggestion that the substance of the complaint is facially insufficient or that it does not contain the required information in 28 C.F.R. § 68.7(b). At most, the failure to attach the request for hearing is a technical defect in the presentation of the complaint which does not go to the substance of the claim and which would not warrant dismissal for failure to state a claim. *See Arfons v. E.I. Du Pont De Nemours & Co*., 261 F.2d 434, 435 (2d Cir. 1958) ("It is now well established that dismissals for mere technical defects or ambiguities in pleadings are not favored. Thus, we cannot affirm the granting of this motion [to dismiss for failure to state a claim] if under any reasonable reading, the complaint states a claim upon which relief can be granted."); *cf. Zankel v. United States*, 921 F.2d 432, 436 (2d Cir. 1990) (observing that a "technical defect" in service of a complaint does not warrant

[8] Although numerous federal courts have held that mandatory claim-processing rules can be subject to equitable exceptions, *see, e.g., Paese v. Hartford Life & Accident Ins. Co*., 449 F.3d 435, 443 (2d Cir. 2006) (noting that claim-processing rules are subject to "equitable considerations"), the Supreme Court has "reserved whether mandatory claim-processing rules may be subject to equitable exceptions," *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.3 (2017). Similarly, unless a binding circuit precedent requires otherwise, OCAHO has not taken a position on whether enforcement of its claim-processing rules are subject to equitable exceptions. Moreover, whether OCAHO, as a statutorily-created administrative agency, possesses *any* equitable authority remains an open question. *See United States v. Corrales-Hernandez*, 17 OCAHO no. 1454d, 4 n.6 (2023). Because neither party has raised any equity-based arguments and the record reveals no apparent equitable considerations, I need not—and do not—decide the extent, if any, of OCAHO's equitable authority in the instant case.

dismissal "in every case").

Moreover, under 28 C.F.R. § 68.10(b), an 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." 28 C.F.R. § 68.10(b). In this case, the ALJ does not appear to have provided the Complainant an opportunity to show cause why the complaint should not be dismissed on these particular grounds, and, thus, the complaint could not properly be dismissed pursuant to 28 C.F.R. § 68.10(b). *Cf. Patel v. USCIS Bos.*, 14 OCAHO no. 1353, 3-5 (2020) (outlining specific deficiencies in the complaint and ordering the complainant to "show cause why her claims . . . should not be dismissed for failure to state a claim upon which relief can be granted," in accordance with 28 C.F.R. § 68.10(b)). Consequently, 28 C.F.R. § 68.10(b) does not provide a viable legal basis for the ALJ to have dismissed the complaint in this case.

28 C.F.R. § 68.37(b) allows an ALJ, without motion from either party, to dismiss a complaint based on abandonment if: (1) a party or its representative "fails to respond to orders issued by the [ALJ]," 28 C.F.R. § 68.37(b)(1); or (2) neither the party nor its representative "appears at the time and place fixed for the hearing" without good cause shown, 28 C.F.R. § 68.37(b)(2). Again, neither circumstance is present in the instant case. The ALJ's Order of Dismissal appears to have been the first order issued by the ALJ in this case; accordingly, neither party has yet failed to respond to an order issued by the ALJ. Furthermore, no hearings have been set in the case, so neither party nor its representatives could have failed to appear at such a hearing. Therefore, 28 C.F.R. § 68.37(b) also does not provide a valid legal basis for dismissing the complaint in this case. Overall, the ALJ's *sua sponte* dismissal in this case does not appear to find support in any of OCAHO's rules that specifically authorize such a dismissal.

OCAHO ALJs have also dismissed complaints *sua sponte* in other limited circumstances not specifically provided for in OCAHO's rules, sometimes referencing the Federal Rules of Civil Procedure in doing so. *E.g.*, *Windsor v. Landeen,* 12 OCAHO no. 1294, 4 (2016) (looking to Rule 12(h)(3) of the Federal Rules of Civil Procedure for guidance when considering dismissal for lack of subject-matter jurisdiction). For instance, OCAHO ALJs have dismissed complaints *sua sponte* when those complaints cannot be effectively served. *See, e.g.*, *United States v. Rios-Villatoro*, 14 OCAHO no. 1364 (2020). However, there is no question in the instant case that Respondent was served with the complaint.

OCAHO ALJs have also dismissed complaints *sua sponte* for lack of subject-matter jurisdiction. *See, e.g.*, *Windsor*, 12 OCAHO no. 1294. Indeed, abundant OCAHO case law has found that the issue of subject-matter jurisdiction may be raised *sua sponte* by OCAHO ALJs, *see, e.g.*, *Wangperawong v. Meta Platforms, Inc.*, 18 OCAHO no. 1510b, 2 (2024), and have similarly found that ALJs in fact have a duty to determine *sua sponte* if OCAHO has subject-matter jurisdiction, *see, e.g.*, *Heath v. Ancile, Inc.*, 15 OCAHO no. 1411, 2 (2022). However, the ALJ's Order of Dismissal does not expressly cite the issue of subject-matter jurisdiction as the basis for the *sua sponte* dismissal. *See* Order of Dismissal at 2. Moreover, as discussed in Part IV.A, *supra*, the attachment requirement in 28 C.F.R. § 68.7(c) is not a jurisdictional prerequisite; rather, it is a claim-processing rule and, thus, does not provide a basis for a *sua sponte* dismissal based on jurisdiction. Furthermore, even if it were jurisdictional, OCAHO case law has established a consistent practice of providing the

parties with notice of the potential lack of subject-matter jurisdiction and an opportunity to submit additional information related to the issue prior to dismissing a complaint in whole or in part based on lack of subject-matter jurisdiction. *See, e.g.*, *Zajradhara v. Jin Joo Corp.*, 19 OCAHO no. 1554, 3 (2024); *Wangperawong*, 18 OCAHO no. 1510b, at 2; *Patel*, 14 OCAHO no. 1353, at 4; *Kim v. Getz*, 12 OCAHO no. 1279, 2 (2016). The ALJ did not provide the parties notice and an opportunity to respond prior to dismissal in this case; thus, even if the violation of 28 C.F.R. § 68.7(c) were a putative jurisdictional defect, the *sua sponte* dismissal here was not consistent with OCAHO case law.

Beyond OCAHO, *sua sponte* dismissals by federal courts have occasionally been found to be appropriate in other limited circumstances, often based on a court's inherent authority to regulate proceedings before it. *See, e.g.*, *Mallard v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 307-08 (1989) ("Section 1915(d), for example, authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision."); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." (italics added)); *Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir. 1999) ("Both the Supreme Court and the Second Circuit have long held that courts may dismiss actions on their own motion in a broad range of circumstances where they are not explicitly authorized to do so by statute or rule."). As a statutorily-created administrative agency, OCAHO does not have the same "inherent" authority as an Article III federal court. Nevertheless, OCAHO's rules do vest ALJs with "all appropriate powers necessary to conduct fair and impartial hearings," 28 C.F.R. § 68.28(a), including the authority to "[i]ssue decisions and orders," 28 C.F.R. § 68.28(a)(5), and the authority to "[t]ake other appropriate measures necessary to enable [them] to discharge the duties of the office," 28 C.F.R. § 68.28(a)(8). This authority allows ALJs generally to regulate the handling of cases before them—*e.g.*, to require parties to participate in electronic filing in certain circumstances even if they have not submitted an e-filing registration form, *see Zajradhara v. Kang Corp*., 19 OCAHO no. 1555 (2024) (converting a case to one requiring electronic filing absent any objection from the parties due to "significant delays inherent with mail filing" between Virginia and Saipan)—but it is also circumscribed by principles of fairness and impartiality, *see* 28 C.F.R. § 68.28(a). Thus, authorizing an ALJ to raise issues *sua sponte* may "erod[e] the principle of party presentation so basic to our system of adjudication." *Arizona v. California*, 530 U.S. 392, 413 (2000); *see also United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation."); *accord Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988) ("*Sua sponte* dismissals, especially those entered without notice, also deviate from the traditions of the adversarial system by making the judge a proponent rather than an independent entity." (internal quotations omitted)).

As discussed in the Notification of Administrative Review, "OCAHO generally follows the principle of party presentation which is common to nearly all adversarial legal or adjudicatory proceedings in the United States." *A&D Maint.*, 19 OCAHO no. 1568 at 4; *see also Sineneng-Smith*, 590 U.S. at 375 (describing the principle of party presentation as one in which the parties present their cases and judges act as "neutral arbiter[s]" of only the issues raised by the parties). To that end, OCAHO ALJs are generally not authorized to raise affirmative defenses to a complaint *sua sponte*, and defenses that are not raised by a respondent 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)).

Violations of nonjurisdictional claim-processing rules, such as 28 C.F.R. § 68.7(c), are generally treated as affirmative defenses which must be raised by a party or are waived or forfeited. *See, e.g., Payne v. Peninsula Sch. Dist*., 653 F.3d 863, 867 (9th Cir. 2011) (discussing "a spate of Supreme Court cases clarifying the difference between provisions limiting . . . subject matter jurisdiction, which cannot be waived and must be pled in the complaint, and 'claims processing provisions,' which must be pled as an affirmative defense or forfeited"), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014); *cf. United States v. Mitchell*, 518 F.3d 740, 745 (10th Cir. 2008) ("[*Kontrick v. Ryan*, 540 U.S. 443 (2004) and *Eberhart v. United States*, 546 U.S. 12 (2005)] generally indicate, however, that claim-processing rules must be raised by the parties. . . . [A]s courts generally may not raise affirmative defenses *sua sponte*, *Kontrick* may imply courts cannot raise time bars in claim-processing federal rules.").[9] In the instant case, it was the ALJ—and not the Respondent—who raised the issue of 28 C.F.R. § 68.7(c). Moreover, Respondent expressly conceded that it had requested a hearing, effectively waiving or forfeiting the issue of the violation of that regulatory provision as a defense. *See* Resp't's Mem. of Law in Support of Resp't's Mot. to Dismiss at 5 ("Thereafter, Respondent timely requested a hearing pursuant to 8 U.S.C. § 1324(a)(e)(3) [sic], and a subsequent complaint was filed against Respondent on December 27, 2023."). Consequently, the ALJ's *sua sponte* invocation of a potential affirmative defense that had been waived or forfeited[10] by Respondent, who is represented by competent counsel, violated the party presentation principle and, thus, cannot serve as a viable basis for dismissal of the complaint.

Finally, the ALJ's dismissal, arguably, could flow from the principle that agencies are generally required to follow their own regulations. *See, e.g.*, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (objecting to the agency's "alleged failure to exercise its own discretion, contrary to existing valid regulations"). Further, the APA authorizes federal courts to set aside agency action that is undertaken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Under this line of reasoning, OCAHO's failure to enforce compliance with 28 C.F.R. § 68.7(c) could—in theory—be grounds for setting aside any subsequent OCAHO decision in this

[9] Courts have recognized a narrow exception to this general rule in situations involving "special circumstances" or "when the issue implicates the court's power to protect its own important institutional interests." *Mitchell*, 518 F.3d at 749-50 ("Ours is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses. A narrow exception may exist, however, when the issue implicates the court's power to protect its own important institutional interests. . . . Together, these cases suggest that when a rule implicates judicial interests beyond those of the parties, it may be appropriate for a court to invoke the rule *sua sponte* in order to protect those interests."). In such circumstances, a court may appropriately raise an affirmative defense *sua sponte*; however, no special circumstances nor important institutional interests are implicated by a violation of 28 C.F.R. § 68.7(c)—nor have any been alleged by Respondent or are otherwise apparent from the record—and, thus, that exception is inapplicable to the present case.

[10] "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "[T]here is [also] a hybrid situation ('waiver by conduct') that combines elements of waiver and forfeiture." *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995). Respondent's action in expressly acknowledging that it timely requested a hearing at the least forfeited any defense based on a violation of 28 C.F.R. § 68.7(c), but it may have also waived it as well. However, I need not determine conclusively whether Respondent's action is best understood as a waiver, forfeiture, or waiver by conduct—and both litigants and judges often confuse these concepts—as the result would be the same regardless of the categorization.

matter. However, federal courts, including the Supreme Court, have made clear that failures to comply with agency regulations do not always require wholesale invalidation of the underlying proceeding, and have accorded agencies some flexibility in the operation of their procedural rules. *See, e.g.*, *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) ("[T]here is no reason to exempt this case from the general principle that [it] is always within the discretion of . . . an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." (internal quotations omitted)). Indeed, the Second Circuit[11] has found that, "[a]lthough an agency's failure to follow its own regulations or procedures can require its action to be invalidated, our precedent requires a showing of prejudice to the rights protected where the subject regulation 'does not affect fundamental rights derived from the Constitution or a federal statute.'" *United States v. Schiller*, 81 F.4th 64, 71 (2d Cir. 2023) (quoting *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993)).

Here, the regulation at issue does not affect fundamental rights derived from either the Constitution or a federal statute; rather, the function of the subject regulation, 28 C.F.R. § 68.7(c), is either to aid OCAHO in efficiently processing the case or to provide a convenience to a respondent's attorney. *See supra* Part IV.A. Therefore, invalidation of the underlying action on these grounds would require a showing of prejudice to the rights of the parties. *See Schiller*, 81 F.4th at 71; *accord Am. Farm Lines*, 397 U.S. at 539 ("Thus there is no reason to exempt this case from the general principle that it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." (cleaned up)). The ALJ's Order of Dismissal does not identify any prejudice to the rights of the parties from the Complainant's failure to satisfy the requirements of 28 C.F.R. § 68.7(c), and the undersigned cannot identify any such prejudice from the record.

To be sure, Respondent asserts in its brief on administrative review that it would be prejudiced were the ALJ's order to be overturned, arguing that because Respondent failed to file a timely answer and because the ALJ dismissed the Respondent's motion to dismiss as moot in light of the overall dismissal of the complaint, the Respondent "would be denied the opportunity to rebut the allegations contained within the Complaint" if the ALJ's order is not upheld. Resp't's Br. at 5. However, Respondent's argument incorrectly conflates prejudice resulting from a violation of 28 C.F.R. § 68.7(c), which it has not alleged in any concrete form, with the natural consequences of any remand order following appellate review, which are neutral in the eyes of the appellate tribunal but may colloquially be seen as "prejudicial" to the party which did not prevail. Furthermore, Respondent's assertions of prejudice misapprehend the nature of the undersigned's decision. An order reversing the dismissal of the complaint would also necessarily render the Respondent's motion to dismiss no longer moot, effectively reinstating it as an active filing in the case. Regarding the Respondent's failure to file a timely answer in the underlying proceedings, that issue is not before the undersigned. Thus, I express no opinion on it and leave the issue to the presiding ALJ to address on remand in the first instance, if appropriate, though I do note that late-filed answers may be accepted by OCAHO ALJs upon a showing of good cause for the untimely filing, *see, e.g.*, *Lowden, Jr. v. Ann Arbor Elec.*

[11] This case arises within the jurisdiction of the U.S. Court of Appeals for the Second Circuit; accordingly, the undersigned is bound by decisions of that Circuit. *See* 28 C.F.R. § 68.56; *United States v. Allen Holdings, Inc.*, 9 OCAHO no. 1059, 5 (2000).

JATC, 18 OCAHO no. 1490a, 2 (2024) (finding sufficient good cause for a late-filed answer where the respondent "incorrectly assumed a motion to dismiss would delay the answer filing deadline," acknowledged its error, and promptly sought leave to file an answer). Moreover, any prejudice suffered by Respondent based on its failure to file a timely answer to the complaint, in violation of 28 C.F.R. § 68.9(a), results solely from that failure and is not fairly traceable to the Complainant's failure to satisfy the requirements of 28 C.F.R. § 68.7(c). Put more succinctly, any negative consequences flowing from Respondent's own failure to comply with OCAHO's regulations cannot reasonably be attributed to the Complainant's failure to attach a copy of the request for hearing in this instance. Accordingly, this theory, too, does not provide a valid legal basis to warrant *sua sponte* dismissal in the instant case. *Cf. Schiller*, 81 F.4th at 71-72 ("We agree with the district court's assessment that the government's breach of [the regulations at issue] in this particular case constituted nothing more than a technical, non-prejudicial error on the part of the government. As a result, defendants' claim that the . . . violation of the agency's regulation bars this collection action fails." (internal quotations and citations omitted)).

In sum, after canvassing a number of possible theories[12] to validate the ALJ's Order of Dismissal, the undersigned reaches the ineluctable conclusion that Complainant's technical failure to comply with 28 C.F.R. § 68.7(c) in this case is not a legally sufficient ground to warrant *sua sponte* dismissal of the complaint, especially in light of the nonjurisdictional nature of that regulation, Respondent's forfeiture of any defense based on a violation of that regulation, and the lack of a showing of any prejudice to Respondent due to the violation. Accordingly, the ALJ's *sua sponte* dismissal in this case was not adequately supported by OCAHO's regulations, OCAHO or federal court precedent, or any other applicable source of authority, and, therefore, cannot be affirmed on the record before me.

C. Authority of OCAHO ALJs to *Sua Sponte* Dismiss a Complaint Without Providing the Parties Notice and an Opportunity to Respond

Assuming, *arguendo*, that the presiding ALJ had the authority to *sua sponte* dismiss a complaint for failure to satisfy 28 C.F.R. § 68.7(c) based on the facts of the instant case, I would nevertheless be constrained to vacate the ALJ's dismissal because he did not provide the Complainant with notice and an opportunity to respond to that potential course of action prior to ordering dismissal. "No principle is more fundamental to our system of judicial administration than that a person is entitled to notice before adverse judicial action is taken against him." *Lugo v. Keane*, 15 F.3d 29, 30 (2d Cir. 1994) (per curiam). Furthermore, "notice and an opportunity to be heard are essential to procedural due process," *Heath v. Ameritech Glob.*, 16 OCAHO no. 1435, 3 (2022), and "adequate notice helps the court secure a just determination." *Schlesinger Inv. P'ship v. Fluor Corp.*, 671 F.2d 739, 742 (2d Cir. 1982). In accordance with these principles, prior OCAHO cases have typically provided parties with notice and an opportunity to respond prior to dismissing a case *sua sponte*. *See, e.g.*, *Rios-Villatoro*, 14 OCAHO no. 1364 (noting that the complainant had been provided an

[12] The undersigned previously raised the possibility of other, albeit "atypical," possible bases for the ALJ's *sua sponte* dismissal, *see A&D Maint.*, 19 OCAHO no. 1568, at 3 n.3, but none of those are applicable to the instant case. Moreover, Respondent did not advance any possible basis not already subsumed within this administrative review. Thus, the undersigned is unaware of any legal theory sufficient to support the ALJ's *sua sponte* dismissal based on the specific facts and procedural posture of Respondent's case.

opportunity to attempt to effectuate service of the complaint prior to dismissal); *Patel v. USCIS Bos.*, 14 OCAHO no. 1353a (2020) (dismissing the complaint only after providing the complainant notice and an opportunity to show cause why the complaint should not be dismissed); *see also Zajradhara v. Costa World Corp.*, 19 OCAHO no. 1546, 2-3 (2024) (identifying potential jurisdictional and other defects in the complaint and providing the complainant an opportunity to show cause why the complaint should not be dismissed based on those defects).[13] Indeed, OCAHO ALJs have refrained from *sua sponte* dismissal even where the claims advanced were patently frivolous. *See, e.g.*, *Hamilton v. Recorder*, 7 OCAHO no. 968, 750, 755 (1997) (noting that "this case would have been promptly dismissed *sua sponte*," but for the relevant circuit court's "distaste for the imposition of summary disposition" in similar matters, even though the complaint "derive[d] from an indisputably meritless theory" and was, therefore, frivolous (italics added)).

Furthermore, the Second Circuit has held that "dismissing a case without an opportunity to be heard is, at a minimum, bad practice in numerous contexts and is reversible errors in others." *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 82 (2d Cir. 2018). Although conceding that "in certain circumstances a *sua sponte* dismissal 'may be appropriate,' . . . these circumstances require that 'it is unmistakably clear that the court lacks jurisdiction . . . .'" *Id.* (first quoting *Perez*, 849 F.2d at 797, then quoting *Snider*, 199 F.3d at 113). As the Second Circuit has explained, providing affected parties notice and an opportunity to be heard before an action is taken has several important functions. First, it "plays an important role in establishing the fairness and reliability of the order." *Snider*, 199 F.3d at 113. Furthermore, "[i]t avoids the risk that the court may overlook valid answers to its perception of defects" in a party's case. *Id.* Finally, *sua sponte* dismissals without notice "may tend to produce the very effect they seek to avoid—a waste of judicial resources—by leading to appeals and remands." *Perez*, 849 F.2d at 797. Accordingly, the Second Circuit has often reversed decisions of the lower courts where judges *sua sponte* dismissed cases or claims without providing the affected party or parties notice and an opportunity to respond. *See Catzin*, 899 F.3d 77; *Snider*, 199 F.3d 108; *Lugo*, 15 F.3d 29; *Perez*, 849 F.2d 793;[14] *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1364-65 (2d Cir. 1985) (remanding the case "to allow the plaintiffs an opportunity to show whether they are entitled to injunctive relief" where the district court judge "did not explain or even discuss why he dismissed *sua sponte* the claims for injunctive relief"); *Schlesinger Inv. P'ship*, 671 F.2d 739; *Lewis v. State of N.Y.*, 547 F.2d 4 (2d Cir. 1976).[15]

[13] Relatedly, even when acting in response to a motion and not *sua sponte*, OCAHO case law has also required that the adversely affected party be given adequate time to respond before a case may be dismissed. *See, e.g.*, *United States v. Tenampa Ballroom*, 1 OCAHO no. 34, 181 (1988) (order by the CAHO vacating the ALJ's judgment by default because the judgment was issued "prior to the expiration of Respondent's time for filing an answer to the [m]otion [for default judgment]").

[14] Notably, even if the undersigned were to accept Respondent's argument that the ALJ's order should be reviewed only for an abuse of discretion, *see supra* note 3, the court in *Perez*, 849 F.2d at 798, expressly found that it was "an abuse of discretion to dismiss [the suits at issue] without giving the plaintiffs an opportunity to amend their complaints" to conform to the specific requirements for such complaints. Accordingly, whether the order of dismissal is reviewed *de novo* or for an abuse of discretion, it does not find favor in relevant caselaw.

[15] Other circuits have held similarly. *See, e.g.*, *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 39 (1st Cir. 2001) (finding that although the claims at issue "invite[d] skepticism," the court could not say "that they reveal[ed] a patently meritless claim," and therefore "the district court's *sua sponte* order for dismissal cannot endure" (italics added)); *Ho v. Russi*, 45 F.4th 1083, 1087 (9th Cir. 2022) (finding that "[t]he district court erred by not providing [the plaintiff] an opportunity to argue supplemental jurisdiction before dismissing his claim," and accordingly reversing and remanding the district court's order for further proceedings); *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411, 415 (7th Cir. 1986) (noting that "[a]t least four circuits do not permit *sua sponte* dismissals without notice and an opportunity to be

The Complainant's failure to attach a copy of the Respondent's request for hearing to the complaint in violation of 28 C.F.R. § 68.7(c) was not previously noted or discussed by either party in their filings or by the ALJ prior to the issuance of the Order of Dismissal. Moreover, the undersigned could not locate any previous published OCAHO case law providing that the failure to attach required documents to the complaint mandates dismissal without notice and an opportunity to correct that failure. Indeed, to the extent that OCAHO case law exists on that general issue, it appears to point in the opposite direction. *See, e.g.*, *United States v. Fresco Produce, Inc.*, 19 OCAHO no. 1530, 1 (2024) ("While Complainant stated in the complaint that it served Respondent with a [NIF] . . . , it did not attach a copy of the NIF to the complaint. . . . The Court ordered Complainant to file a copy of the NIF with proof of service on the Respondent . . . ."); *United States v. PJ's of Texas, Inc.*, 18 OCAHO no. 1524a, 4 (2024) (noting that the ALJ directed the complainant to file "a copy of the complete NIF that it served on the Respondent . . . , including attachment(s)," which was evidently not included with the original complaint). Therefore, the Complainant had not been provided notice—either through motion by the Respondent, an order by the ALJ, or a body of previous case law—of the potential adverse action of dismissal and an opportunity to respond prior to that action being taken. Consequently, such a dismissal runs contrary to the balance of applicable law. *E.g.*, *Day v. McDonough*, 547 U.S. 1988, 210 (2006) ("[B]efore acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."); *Catzin*, 899 F.3d at 83 ("In general, a district court's failure to provide an opportunity to be heard prior to a *sua sponte* dismissal . . . is, by itself, grounds for reversal." (internal quotations omitted)). Accordingly, against this background of both OCAHO precedent and relevant circuit court precedent, the undersigned concludes that—even if the ALJ had possessed authority to *sua sponte* dismiss the complaint due to a violation of 28 C.F.R. § 68.7(c)—it was an error to do so in this case without providing the Complainant notice and an opportunity to respond prior to dismissal.[16]

D. Clarification of the Scope of This Order

For the reasons set forth above, the undersigned has determined that the ALJ's Order of Dismissal was legally erroneous in both substance and procedure; accordingly, the balance of it must

heard" and citing to cases in the First, Sixth, Ninth, and Eleventh Circuits), *overruled on other grounds by Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487 (7th Cir. 1996).

[16] This error is particularly salient in light of the ALJ's tacit acknowledgement that the deficiency in the complaint is remediable. *See* Order of Dismissal at 2 (inviting the Complainant to re-file the complaint "with this deficiency remedied, in compliance with the appropriate regulatory requirements"); *cf. Perez*, 849 F.2d at 798 ("It was also an abuse of discretion to dismiss the suits against the police officers in their official capacities without giving the plaintiffs an opportunity to amend their complaints to conform to the requirements for an official capacity suit."). In such a circumstance, as in *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d at 86, "[t]he record yields no clarity as to how judicial economy, convenience, fairness, or comity might be served" by requiring the parties to expend additional resources re-litigating the case anew rather than, for example, ordering or inviting appropriate amendments or supplements to the complaint. Moreover, because the filing of a complaint with OCAHO ends the running of the statute of limitations in 28 U.S.C. § 2462 for violations of 8 U.S.C. § 1324a, *see United States v. Curran Eng'g Co*., 7 OCAHO no. 975, 874, 885-93 (1997), unnecessarily requiring the re-filing of a complaint invites the raising of potential statute-of-limitations issues and additional litigation, particularly in cases such as the instant one where the applicability of the statute of limitations is already at issue. *Cf. Smith v. Spizzirri*, No. 22-1218, 2024 WL 2193872, at *3 n.3 (2024) (noting potential statute-of-limitations problems when a party is required to re-file a complaint). In short, "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." *A&D Maint.*, 19 OCAHO no. 1568, at 5, n.6.

be vacated. However, because this administrative review has covered a broad spectrum of legal theories in reviewing the ALJ's Order of Dismissal, it is important to clarify issues that this decision does *not* reach. First, this case does not present a situation in which a respondent files a motion to dismiss based on a violation of 28 C.F.R. § 68.7(c)—rather than an ALJ raising the issue *sua sponte*—and, after giving the complainant an opportunity to respond, the ALJ grants the motion and dismisses the complaint. Similarly, this case does not present a situation in which an ALJ orders a complainant to file the request for hearing to comply with 28 C.F.R. § 68.7(c), the complainant does not respond to the ALJ order, and the ALJ dismisses the complaint due to abandonment pursuant to 28 C.F.R. § 68.37(b)(1). Therefore, nothing in the instant decision should be construed as a definitive resolution of the legal appropriateness of either of those two scenarios.

Similarly, this case does not involve a *pro se* respondent, and the instant decision does not address whether that distinction would change the applicability of the party presentation principle.[17] *Cf. Sineneng-Smith*, 590 U.S. at 376 (noting that "[t]he party presentation principle is supple, not ironclad" and "[t]here are no doubt circumstances in which a modest initiating role for a court is appropriate"); *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) ("To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights.")

Further, this Order does not categorically prohibit the issuance of an order of dismissal *sua sponte*; to the contrary, as discussed in more detail in part IV.B, *supra*, OCAHO regulations and case law expressly provide for such dismissals in a myriad of situations. Relatedly, this Order also does not categorically prohibit the issuance of an order of dismissal *sua sponte* without providing notice and an opportunity for the parties to respond. Although providing notice and an opportunity to respond when contemplating a *sua sponte* dismissal is, at the least, a best practice—and is required in some contexts, *see, e.g.*, 28 C.F.R. § 68.10(b)—there may be limited circumstances in which such a dismissal is legally appropriate, particularly in cases where it is indisputably clear that OCAHO lacks jurisdiction over the case. *See A&D Maint.*, 19 OCAHO no. 1568, at 5; *see also Catzin*, 899 F.3d at 82-83 (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)). However, such cases are expected to be rare.

Additionally, this Order does not reach multiple issues raised by Respondent which were not part of the administrative review. For instance, the undersigned takes no position on the merits of Respondent's motion to dismiss, which has been effectively reinstated. I further take no position on the appropriateness of any consequences for Respondent's failure to timely file an answer to the complaint. And, although Respondent's request for attorney fees pursuant to 28 C.F.R. § 68.52(c)(9), *see* Resp't's Notice of Mot. at 1, is premature in light of the disposition of this administrative review, the undersigned takes no position on whether attorney fees would be appropriate if Respondent ultimately is the prevailing party. All of these issues are left to the presiding ALJ to address in the first instance, if appropriate.

[17] To be clear, even if the decisionmaking calculus regarding the party presentation principle would change in the case of a *pro se* respondent, that change would still not necessarily support a dismissal without affording the complainant notice and an opportunity to respond.

Finally, as mentioned in the Notification of Administrative Review, *A&D Maint.*, 19 OCAHO no. 1568, at 5, n.8, Complainant clearly violated 28 C.F.R. § 68.7(c). Although I have determined upon administrative review that the violation could not support a *sua sponte* dismissal of the complaint without notice and an opportunity to respond, nothing in my decision should be construed as condoning such violations or as a blanket determination that such violations can never support dismissal of a complaint in all situations. Indeed, "all parties with cases before OCAHO . . . are reminded that compliance with OCAHO's rules of procedure is expected in all cases," *United States v. Bhattacharya*, 14 OCAHO no. 1380b, 5 n.5 (2021), and that expectation continues to govern both the parties in this case and the parties in future cases before OCAHO.

V. ORDERS

For the foregoing reasons, the ALJ's Order of Dismissal is hereby MODIFIED, viz:

The entirety of the ALJ's Order of Dismissal, except footnote 1, is VACATED.

Accordingly, the portion of the ALJ's Order of Dismissal granting the Complainant's motion to substitute counsel is AFFIRMED. The portion of the ALJ's Order of Dismissal dismissing the complaint is VACATED. The portion of the ALJ's Order of Dismissal denying as moot the Respondent's Motion to Dismiss is VACATED. This case is hereby REMANDED for further proceedings consistent with this order.

SO ORDERED.

James McHenry
Chief Administrative Hearing Officer