

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

ROBERT PAUL HEATH,)	
)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
v.)	
)	OCAHO Case No. 2021B00015
AMERITECH GLOBAL,)	
)	
Respondent.)	
_____)	

Appearances: Robert Heath, pro se, Complainant
Rishi Agrawal, Esq., for Respondent

ORDER ON COMPLAINANT’S COMMUNICATIONS TO THE COURT

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b. Robert Heath filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 28, 2021, alleging that Respondent, Ameritech Global, discriminated against him based on his citizenship status and national origin.

Counsel for Respondent entered an appearance in this matter on March 24, 2021. On April 18, 2021, Respondent filed a Motion to Dismiss for Failure to Comply with 28 C.F.R. § 68.4(c). On April 26, 2021, the Court entered an Order on Electronic Filing, allowing the parties to participate in the Court’s electronic filing pilot program. The Court then set a briefing schedule on Respondent’s motion to dismiss, giving Complainant a date by which to file a response and Respondent a date by which to file a reply. On April 26, 2021, Complainant filed its Motion to Oppose Respondent’s Motion to Dismiss for Failure to Comply with 28 C.F.R. § 68.4(c). On June 10, 2021, Complainant filed Complainant’s Supplement to Motion to Oppose Respondent’s Motion to Dismiss for Failure to Comply with 28 C.F.R. § 68.4(c). Complainant filed a Motion for Status Request on September 5, 2021. Both parties’ motions remain pending before the Court.

On April 8, 2022, and again on April 18, 2022, Complainant called the Court and spoke with an OCAHO staff member. During those telephone calls, Complainant informed staff that he experienced an emergency. Respondent was not included in Complainant's telephone calls to OCAHO, and Complainant did not indicate whether he planned to disclose the communications to Respondent.

II. LEGAL STANDARDS

OCAHO's Rules of Practice and Procedure for Administrative Hearings, being the provisions contained in 28 C.F.R. part 68 (2022),¹ prohibit *ex parte* communications with the Court. 28 C.F.R. § 68.36(a). OCAHO precedent counsels in favor of disclosing *ex parte* contacts, as does the Administrative Procedure Act. *See Tingling v. City of Richmond*, 13 OCAHO no. 1324b, 2-3 (2021)² (disclosing the complainant's *ex parte* motion to the respondent in the interests of fairness and the opportunity to be heard); *see also* 5 U.S.C. § 557(d)(1)(C) (stating that the public record of a proceeding should include the substance of any *ex parte* communications). If a party engages in any prohibited *ex parte* communications, the Court may impose an appropriate sanction or sanctions. *See* 28 C.F.R. § 68.36(b) (authorizing sanctions, including but not limited to, a party or participant's "exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication.").

OCAHO's rules provide an exception for a party's communications to the Court for "the sole purpose of scheduling hearings, or requesting extensions of time."

¹ OCAHO's rules are available on OCAHO's homepage on the United States Department of Justice's website. *See* <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations>.

² Citations to OCAHO precedents reflect the volume number and the case number of the particular decision. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

28 C.F.R. § 68.36(a). The Court will not treat such communications as prohibited ex parte contacts on the condition that “all other parties shall be notified of such request by the requesting party and be given an opportunity to respond thereto.” *Id.* This is because notice and an opportunity to be heard are essential to procedural due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). Indeed, when analyzing potential prejudice arising from ex parte contacts, United States Courts of Appeals have focused on notice and the opposing party’s opportunity to be heard. *See, e.g., Simer v. Rios*, 661 F.2d 655, 679-81 (7th Cir. 1981) (finding plaintiffs’ due process rights were not violated by ex parte contacts where the contacts were made a matter of record and the plaintiffs had an opportunity to respond before the district court made a decision).³

III. DISCUSSION

Here, Complainant called the Court twice and spoke with the Court’s staff. The purpose of those telephone calls was to inform the Court of Complainant’s emergency. During the calls, Complainant was neither seeking legal advice from the Court nor seeking to discuss the motions pending before the Court in this case. Given these facts, the Court will construe the communications as being for the purpose of general scheduling in this matter.⁴ *See* 28 C.F.R. § 68.36(a).

Despite this, Complainant has run afoul of OCAHO’s rules in that, to the Court’s knowledge, he did not give Respondent notice of his communications in accordance with 28 C.F.R. § 68.36(a). Therefore, the Court now notifies Respondent of the nature and substance of Complainant’s communications to the Court. Further, the Court will afford Respondent an opportunity to be heard and allow it to file a

³ The Seventh Circuit Court of Appeals is the federal judicial circuit in which this case arises because the violations are alleged to have occurred there and the employer resides or transacts business there. *See* 28 C.F.R. § 68.57. As such, its precedent provides instructive guidance.

⁴ Even if Complainant’s communications are more properly considered to be prohibited ex parte communications, the remedies are the same: notice through disclosure on the record and an opportunity for Respondent to be heard. *See Tingling*, 13 OCAHO no. 1324b, at 3 (disclosing ex parte communications and giving the parties an opportunity to review them and comment upon them); *see also* 5 U.S.C. § 557(d)(1)(C)(ii) (stating that the substance of prohibited oral communications should be placed on the record in writing).

response with the Court regarding Complainant's communications. *See Tingling*, 13 OCAHO no. 1324b, at 3 (giving the respondent fourteen days to supplement its filings after being put on notice of the complainant's ex parte motion through the court's order).

Given Complainant's emergency, the Court further directs the parties to file a status report with the Court no later than thirty days from the date of this Order.

IV. ORDERS

IT IS SO ORDERED that, within fourteen days of the date of this Order, Respondent, Ameritech Global, may file with the Court any response it deems necessary and appropriate regarding Complainant's communications to the Court. This filing is optional.

IT IS FURTHER ORDERED that the parties shall file a status report with the Court within thirty days of the date of this Order.

SO ORDERED.

Dated and entered on June 1, 2022.

Honorable Carol A. Bell
Administrative Law Judge