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

August 10, 2023

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

Appearances: John C. Wigglesworth, Esq., for Complainant
Kevin Lashus, Esq., for Respondent

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER VACATING THE ADMINISTRATIVE LAW JUDGE'S ORDER ON PENALTIES, REMANDING FOR FURTHER PROCEEDINGS, AND REPRIMANDING COUNSEL

I. BACKGROUND AND PROCEDURAL HISTORY

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

Respondent failed to file an answer to the complaint, as required by 28 C.F.R. § 68.9(a). The ALJ issued an Order to Show Cause, ordering the Respondent to submit a filing showing good cause for its failure to timely file an answer and to file an answer in accordance with 28 C.F.R. § 68.9(c). *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416 (2022) ("*Koy I*").[1] The

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents

ALJ warned the Respondent that a failure to file an answer and to show good cause for failing to file a timely answer could result in the entry of default judgment against the Respondent. *Id.* at 3. Nevertheless, Respondent failed to respond to the ALJ's Order to Show Cause.

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

However, the ALJ also found that there was insufficient evidence in the record to determine whether the penalty sought by the Complainant in its complaint was "reasonable." *Id.* at 5. The ALJ noted that the record was silent as to when the violations occurred, a fact that was necessary to determine the applicable range of potential civil penalties. *Id.* at 6. Because of this lack of evidence, the ALJ noted that "Complainant presently cannot meet its burden of proving penalties." *Id.* Accordingly, the ALJ invited the parties to provide supplemental filings related to penalties, specifically reminding the Complainant of its burden to provide evidence related to the aggravation of the penalty based on the statutory factors, *id.* at 5, and evidence as to when the violations occurred, *id.* at 6. The ALJ set a deadline of July 1, 2022, for the supplemental filings, and cautioned that "[f]ailure to timely provide a submission constitutes a waiver of a [party's] right to be heard on penalties." *Id.*

Neither party submitted any additional filings related to penalties by the July 1, 2022 deadline. Given the lack of supplemental filings, on February 16, 2023, the ALJ issued an order entitled "Notice & Opportunity to Be Heard on Non-Statutory Penalty Factor (Lack of Prosecutorial Interest & Insufficiently Developed Record)." *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416b (2023) ("*Koy III*"). In that order, the ALJ noted the parties' failure to submit supplemental filings on penalties by the July 1, 2022 deadline and further observed that the only filing OCAHO had received from either party up to that time was the complaint. *Id.* at 2. After again noting the Complainant's burden of proof with respect to penalties, the ALJ observed that the Complainant had "declined to build a sufficient record despite its obligation to do so," and further noted Complainant's particular failure to provide either evidence or argument as to when the Count II violations occurred, despite the ALJ previously identifying this deficiency in the order entering default judgment.[2] *See id.* at 3. In light of this "lack of participation," the ALJ concluded that the case was "of little prosecutorial interest to Complainant." *Id.* at 4. The ALJ also stated that she was considering "how such a lack of interest by the proponent, along with the insufficiently developed record, should factor into the penalty assessment as a matter of equity." *Id.* The ALJ permitted the parties to submit filings related to that potential penalty factor within fourteen days of the date of the Notice. *Id.*

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subsequent to Volume 8, where the decision has not been 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. OCAHO published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on OCAHO's website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions#PubDecOrders.

[2] More specifically, the ALJ noted that "[t]imeliness verification failures, such as those alleged at Count II, are 'frozen in time.' *See United States v. T-Ray Constr. Co.*, 13 OCAHO no. 1346, 7 (2020) (citations omitted). The date of hire is therefore critical to assessing penalties in timeliness violations." *Koy III*, 16 OCAHO no. 1416b, at 3 n.8.

Almost three months later, on May 9, 2023, Complainant filed a Motion to Accept Late Filing, which included information responsive to the ALJ's June 2022 invitation to provide supplemental evidence related to penalties. The Motion to Accept Late Filing was accompanied by a Motion to Approve Consent Findings, [3] which contained proposed consent findings, a draft order approving the consent findings, and a putative settlement agreement signed by both parties over a year earlier. [4]

On June 1, 2023, the ALJ denied the Complainant's Motion to Accept Late Filing and denied the parties' Motion to Approve Consent Findings. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416c (2023) ("*Koy IV*"). With respect to the Motion to Accept Late Filing, the ALJ found that the Complainant did not demonstrate good cause for the eleven-month delay in submitting its evidence related to penalties. *See id.* at 5-6. Accordingly, the ALJ denied the Complainant's motion and thereby rejected the accompanying evidence. *See id.* at 6.

With respect to the Motion to Approve Consent Findings and attached settlement agreement, the ALJ noted that OCAHO's rules provide that upon submission of an agreement containing consent findings, the ALJ "may, if satisfied with its timeliness, form, and substance, accept such agreement by entering a decision and order based upon the agreed findings." *Id.* (quoting 28 C.F.R. § 68.14(c)). However, the ALJ explained that she was "not satisfied with the timeliness and substance of the proposed consent findings" in this case. *Id.* On the question of timeliness, the ALJ observed that the parties' submission came over a year after the parties executed the settlement agreement. *Id.* The ALJ also asserted that there were "serious substantive issues" with the proposed consent findings, which caused her to reject them. *Id.* Specifically, the ALJ found that the consent findings "ignore[d] the findings of fact already made in the Court's June 8, 2022 order wherein it established liability by way of default." *Id.* at 7. Additionally, the ALJ noted that "the consent findings are based on a settlement agreement that the Court cannot approve" due to a particular term in the agreement that was inconsistent with 8 U.S.C. § 1324a. *Id.* The particular term at issue was paragraph 7 of the agreement, which stated that upon execution of the settlement agreement, DHS would issue a final order which would constitute a "final and unappealable order." *Id.* The ALJ concluded the order by noting that a final order on penalties would be forthcoming. *Id.* at 9.

The ALJ issued an Order on Penalties on July 12, 2023. In it, the ALJ analyzed the five statutory factors enumerated in 8 U.S.C. § 1324a(e)(5), as well as the previously-noticed non-statutory factor related to the lack of prosecutorial interest and an insufficiently developed record. *See* Order on Penalties, 4-7. With respect to the five statutory factors, the ALJ found most factors to be neutral, but found it appropriate to aggravate the penalty to varying degrees based on the seriousness of the violations. *Id.* at 4-6. The ALJ also found that the lack of prosecutorial interest and the resulting insufficiently-developed record was a significant mitigating factor. *Id.* at 6-7.

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

[4] As discussed in more detail *infra* Part V.B, the settlement agreement submitted by Complainant does not precisely track the regulatory conception of a settlement agreement in 28 C.F.R. § 68.14(a)(1) because it did not include consent findings within it; instead, the consent findings were submitted as a separate document. To avoid confusion, all references to a settlement agreement in the instant order refer to the document submitted by Complainant labeled as a settlement agreement. As necessary, the undersigned will use the term "regulatory settlement agreement" to denote the type of agreement contemplated by 28 C.F.R. § 68.14(a)(1) and to differentiate it from the settlement agreement submitted by Complainant.

In ultimately setting the civil penalties, the ALJ noted that the violations alleged in Count I (failure to prepare or present Forms I-9) were continuing violations; therefore, the ALJ determined the penalty amount based on the inflation-adjusted penalty ranges for violations occurring after November 2, 2015. *See id.* at 8; *cf.* 28 C.F.R. § 68.52(c)(8); 28 C.F.R. § 85.5. With respect to the Count II violations (failure to timely prepare Forms I-9), the ALJ noted again that "[t]he date of hire is critical to evaluating the Count II violations," and found that "Complainant did not timely provide evidence or argument as to when these violations occurred." Order on Penalties at 8. The ALJ concluded that she would "not speculate on the employees' dates of hire in determining the penalty range for Count II," and determined that the "Complainant should not receive the benefit of a higher penalty range when it has failed to meet its burden as the proponent in this case." *Id.* Therefore, the ALJ found that she could rely only on "the proposition that the employees at issue were hired after November 6, 1986" as pled in the complaint; thus, she applied the original, non-inflation-adjusted penalty range set forth in 8 U.S.C. § 1324a(e)(5) and, accordingly, set the penalties for the Count II violations at the non-inflation-adjusted statutory minimum of $100 per violation. *Id.* at 9.

On July 18, 2023, the undersigned issued a Notification of Administrative Review, identifying three issues to be reviewed: (1) "whether the ALJ's imposition of a $100 penalty per violation in Count II was appropriately supported," *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416d, 5 (2023) ("*Koy V*"); (2) "whether the ALJ's decision to enter a default judgment as to liability against Respondent, bifurcate proceedings, and treat DHS's lack of participation as a non-statutory, equitable penalty-calculation factor was appropriate," *id*. at 7; and (3) whether the ALJ's denial of the parties' Motion to Approve Consent Findings and rejection of their settlement agreement were appropriate determinations, *id.* at 9.

The Notification of Administrative Review also set a deadline of August 2, 2023, for the parties to file briefs or other written statements related to the administrative review. *Id.* at 9. Complainant filed a brief on administrative review. Respondent did not file anything in response to the Notification of Administrative Review.

For the reasons stated below, the ALJ's Order on Penalties will be VACATED, and the case will be REMANDED for further proceedings consistent with this order.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer ("CAHO") has discretionary authority to review an ALJ's final order in cases under 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). A party may also 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). 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 "should 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 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. COMPLAINANT'S BRIEF

Complainant filed a Brief on OCAHO Administrative Review ("C's Brief"), primarily addressing the issues on review pertaining to the amount of the penalty for the Count II violations and the ALJ's denial of the parties' Motion to Approve Consent Findings.

On the amount of the penalty for the Count II violations, the Complainant's brief asserts that all of the violations at issue occurred after November 2, 2015; thus, penalties were sought by DHS according to the inflation-adjusted ranges contained in 28 C.F.R. § 85.5. C's Brief at 2. Complainant also noted that it provided evidence to the ALJ in its Motion to Accept Late Filing showing the dates of hire—and, therefore, implicitly showing the violation dates—for the employees at issue in Count II. *See id.* at 3. Complainant also referred to the public record information noted by the undersigned in the Notification of Administrative Review which indicated that the Respondent did not begin operating until 2011. *Id.* Therefore, Complainant asserted that "[n]o timeline supports the ALJ's reduction below the statute's authorized amounts" and that "[t]he ALJ's punitive reduction is unauthorized, inequitable, unprecedented, and inconsistent." *Id.*

With respect to the ALJ's denial of the parties' Motion to Approve Consent Findings, Complainant's Brief begins by noting the "strong judicial policy favoring the resolution of disputes through settlement." *Id.* at 4. Noting that the ALJ rejected the parties' request for consent findings based both on the timeliness and substance of the filings, Complainant first addressed the issue of timeliness. Complainant reiterated that counsel of record was on unexpectedly-extended military leave, and, thus, that the ALJ's orders were mistakenly delivered by DHS staff to Complainant's counsel's desk during his absence. *Id.* at 4-5. Complainant also asserted that counsel promptly responded to the ALJ's orders after he first became aware of them in April 2023. *Id.* at 5. Although Complainant admits that these events "do not excuse [DHS's] late response," Complainant nevertheless argues that they "should have been given some weight in the court's decision." *Id.* Thus, Complainant requests that the CAHO "find that there were extraordinary, extenuating circumstances that were significant factors in [DHS's] late response to the court's orders and approve the consent findings and the parties['] agreed upon settlement." *Id.*

Turning to the ALJ's rejection of the consent findings based upon their substance, the Complainant argues that the proposed consent findings and order complied with the requirements of 28 C.F.R. § 68.14. *Id.* at 6. Complainant also argues that, contrary to the ALJ's finding that the proposed consent findings ignored her prior findings of fact, the proposed consent findings "did

not ignore the court's ruling but agreed with it." *Id.* As to the language in the settlement agreement to which the ALJ objected, the Complainant argues that the agreement was drafted before the parties were aware that a "complaint was before [OCAHO]." *Id.* at 7.[5] Accordingly, the agreement was drafted with the expectation that the final order in the matter would be issued by DHS. *See id.* Complainant further noted that the order DHS uses when a settlement agreement is reached "would merely be redundant to the court's order." *Id.* at 8. Additionally, with respect to both of the ALJ's objections to the substance of the consent findings and settlement agreement, Complainant argues that the ALJ could have directed the parties to amend the language in either document rather than rejecting the agreement outright. *See id.* at 6, 8. Ultimately, the Complainant requests that the undersigned vacate the ALJ's order and approve the parties' consent findings and associated settlement agreement. *Id.* at 9.

IV. CONDUCT OF RESPONDENT AND RESPONDENT'S COUNSEL

Before turning to the merits of the administrative review, the conduct of Respondent and its counsel in this case warrants some comment. Respondent's counsel is an attorney of record in this case by virtue of having filed the request for hearing with DHS. *See Koy I*, 16 OCAHO no. 1416, at 1 n.1; 28 C.F.R. § 68.33(f). As I noted previously, the performance of Respondent and its counsel "has fallen well below what is expected in this forum." *Koy V*, 16 OCAHO no. 1416d, at 3. To date in this case, Respondent failed to file an answer, as required by 28 C.F.R. § 68.9(a);[6] failed to respond to an Order to Show Cause issued by the ALJ, thereby opening itself up to a default judgment or a finding of dismissal based on abandonment, *see Koy I*, 16 OCAHO no. 1416; *Koy II*, 16 OCAHO no. 1416a; failed to file any supplemental documents or arguments related to penalties even after the ALJ invited the parties to do so, *see Koy III*, 16 OCAHO no. 1416b; and,

[5] Complainant's wording in its Brief is carelessly inaccurate on this point; it clearly knew a complaint in this case was before OCAHO as of February 2022 when Respondent signed the settlement agreement because it had itself filed the complaint with OCAHO on January 10, 2022! Nevertheless, this misstatement is of a piece of Complainant's overall assessment of the parties' handling of this case, namely that it has been essentially one long miscommunication because the parties agreed to a settlement before they—allegedly, *see infra* note 6—received the NOCA. Although the dates of the parties' signatures on the settlement agreement support Complainant's assertions to a point, they do not explain why Complainant did not file a motion to dismiss the complaint as soon as the settlement agreement was approved in April 2022 or why Complainant took no action at all between April and August 2022 to conclude the case when the "alternative trial counsel" for Complainant was still allegedly monitoring the case. They also neither explain nor excuse Complainant's failure to monitor the case—and timely respond to the ALJ's order in February 2023, *Koy III*, 16 OCAHO no. 1416b—between August 2022 and May 2023. To the extent any of these issues are relevant for the ALJ's ultimate determination on remand, she may resolve them accordingly.

[6] In its brief on administrative review, Complainant asserts that it conferred with Respondent's counsel and represents that as of March of 2022, neither Complainant nor Respondent had received a NOCA from OCAHO. C's Brief at 4. If true, that could explain Respondent's failure to file a timely answer. However, as the ALJ noted in her Order to Show Cause, certified mail tracking information on the U.S. Postal Service's website indicates that the NOCA was received by the Respondent on January 15, 2022, and by Respondent's counsel on January 18, 2022. *See Koy I*, 16 OCAHO no. 1416, at 2 & n.3. Neither Complainant nor Respondent has addressed this finding by the ALJ or offered information to contradict the evidence of proper service noted by the ALJ. Nevertheless, the ALJ may inquire into this issue further on remand if she finds it appropriate to do so. Similarly, Respondent's counsel appears to have changed addresses at some point after the complaint was filed, but he failed to notify OCAHO of his new address. Rather, OCAHO apparently gleaned it based on the parties' proposed consent findings filed in May 2023. All subsequent OCAHO decisions have been mailed to his new address—and all orders in this case have been served on Respondent whose address has not changed during these proceedings and who, presumably, apprised its counsel of those orders—yet he has still elected not to file anything with OCAHO in this matter. Again, the ALJ may address this issue further, if appropriate, on remand.

failed to file a brief on administrative review, despite the undersigned's admonition in the Notification of Administrative Review that both parties were expected to "fully develop their positions and arguments during [the] administrative review," *Koy V*, 16 OCAHO no. 1416d, at 9 (quoting *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, 5 (2023)). Indeed, except for the Motion to Approve Consent Findings, which could be construed as a joint motion from both parties, *see id.* at 2 n.1, Respondent and Respondent's counsel have utterly failed to participate in this case or communicate with OCAHO in any way in the approximately nineteen months that the case has been pending, despite explicit warnings about the potential consequences of that lack of participation, *see, e.g.*, *Koy I*, 16 OCAHO no. 1416, at 2-3 (noting that default judgment may be entered if respondent failed to file an answer and show good cause for its previous failure to file a timely answer).

OCAHO's rules provide that "[a]ll persons appearing in proceedings before an [ALJ] are expected to act with integrity, and in an ethical manner." 28 C.F.R. § 68.35(a). The rules further provide that an ALJ may exclude from proceedings a party or its representative for, among other things, "refusal to comply with directions" or "refusal to adhere to reasonable standard of orderly and ethical conduct." 28 C.F.R. § 68.35(b). Indeed, "OCAHO adjudicators have not hesitated to exclude attorneys or representatives, even sua sponte, under appropriate circumstances." *Izquierdo v. Victoria Nursing & Rehab. Ctr.*, 10 OCAHO no. 1131, 3 (2009). Although OCAHO adjudicators may not impose monetary sanctions on attorneys or representatives for misconduct in OCAHO proceedings, *see Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1104, 2 (2004), they may publicly reprimand counsel for unethical, unprofessional, or otherwise objectionable conduct, *see, e.g.*, *Hsieh v. PMC-Sierra Inc.*, 9 OCAHO no. 1100, 41 (2003) (issuing written reprimand to counsel for unprofessional, "if not unethical," conduct); *United States v. La. Crane Co.*, 11 OCAHO no. 1246, 3, 14-15 (2015) (issuing a written reprimand to respondent's counsel for plagiarizing parts of a Position Statement and for failing to provide appropriate support for its arguments).[7]

OCAHO looks to the ethics rules of the appropriate state bar to determine whether an attorney has committed an ethical violation. *See La. Crane Co.*, 11 OCAHO no. 1246 at 3-4 (citing *Santiglia*, 9 OCAHO no. 1104, at 5). Respondent's counsel is located in Texas, represents a client based there, and is licensed to practice in that state. *See* Find A Lawyer, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=197915 (last visited August 10, 2023) (reflecting that Respondent's counsel is a member of the State Bar of Texas with an address identical to that provided in the proposed consent findings filed in May 2023). Accordingly, the Texas Disciplinary Rules of Professional Conduct may provide guidance to OCAHO in determining whether Respondent's counsel has ethically discharged his duties in this case. Rule

[7] Ethical violations or professional misconduct may also warrant referral to appropriate state bar disciplinary authorities through the Department's Office of Professional Responsibility ("OPR"). *See* 28 C.F.R. § 0.39a(a)(9); *see also* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-4.340, https://www.justice.gov/jm/jm-1-4000-standards-conduct#1-4.340 (updated 2018) ("Allegations that non-Department attorneys or judges have committed misconduct shall be reported to OPR to determine whether to refer the allegation to appropriate disciplinary authorities."); EOIR Policy Memorandum 19-06, *Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct*, 4-5 (Dec. 18, 2018), https://www.justice.gov/eoir/reference-materials/OOD1906/download (discussing the process for considering allegations of professional misconduct in OCAHO proceedings and possible referral to OPR). However, that referral process is separate from and beyond the scope of OCAHO proceedings.

1.01 of the Texas Disciplinary Rules of Professional Conduct provides as follows: "(b) In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients." TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.01 (STATE BAR OF TEX. 2022); *cf.* MODEL RULES OF PRO. CONDUCT R. 1.3 (AM. BAR ASS'N 2023) ("A lawyer shall act with reasonable diligence and promptness in representing a client."). Respondent's counsel's repeated failure to participate in this action on his client's behalf and his repeated failure to respond to orders or invitations to file issued by OCAHO adjudicators fall well short of the applicable standards of ethical and professional conduct.

On administrative review, the undersigned exercises "all the powers which [an ALJ] would have in making the initial decision . . . ." 5 U.S.C. § 557(b). Thus, the undersigned may sanction misconduct using the same methods accorded to an ALJ, including issuing a written reprimand or exclusion from further proceedings pursuant to 28 C.F.R. § 68.35(b). *See also* EOIR Policy Memorandum 19-06, *Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct*, 4 (Dec. 18, 2018), https://www.justice.gov/eoir/reference-materials/OOD1906/download ("Whenever a party, witness, or representative fails to meet his or her professional obligations, the ALJ, Chief ALJ, or CAHO may issue appropriate sanctions."),.

At present, the deficient performance of Respondent's counsel warrants some censure. Even accounting for the alleged, but unsubstantiated, confusion over the timing of the settlement agreement, *see supra* notes 5-6; *but see United States v. Jabil Cir., Inc.*, 10 OCAHO no. 1146, 3 (2012) (noting that the conduct of settlement negotiations between parties "does not excuse them from complying with an ALJ's order[s]"), and the possibility of misdirected mail—to counsel but not to Respondent—due to counsel's change of address, *see supra* note 6, there is still no apparent explanation for the silence of Respondent's counsel throughout the entirety of the instant proceeding, including during this administrative review. Moreover, Respondent's counsel has previously been subject to a reprimand for his conduct in OCAHO proceedings, *see La. Crane Co.*, 11 OCAHO no. 1246, at 3, 14-15, and thus, should have been aware of both OCAHO procedural requirements and its standards of conduct for representatives. Accordingly, after considering all of the relevant facts surrounding the performance of Respondent's counsel and his prior history before OCAHO, I find that a written reprimand is appropriate based on his conduct in this case, and this decision stands as such a reprimand. Further, nothing in this decision should be construed as limiting the ALJ's authority to impose a further sanction authorized by law, including exclusion pursuant to 28 C.F.R. § 68.35(b), if the conduct of Respondent's counsel continues to fall below what is expected in this forum.[8]

V. DISCUSSION

In the Notification of Administrative Review, the undersigned identified three issues to be reviewed. The first issue was "whether the ALJ's imposition of a $100 penalty per violation in

[8] The performance of Complainant and its counsel have also fallen below expectations in this matter, *see generally Koy IV*, 16 OCAHO no. 1416c, at 5-6, and on remand, both parties and both counsels "are expected to act with integrity, and in an ethical manner," 28 C.F.R. § 68.35(a), consistent with OCAHO's expectations and all applicable professional responsibility obligations.

Count II was appropriately supported." *Koy V*, 16 OCAHO no. 1416d, at 5.[9] The second issue was "whether the ALJ's decision to enter a default judgment as to liability against Respondent, bifurcate proceedings, and treat DHS's lack of participation as a non-statutory, equitable penalty-calculation factor was appropriate." *Id.* at 7. The third issue was whether it was appropriate for the ALJ to deny the parties' Motion to Approve Consent Findings and reject their settlement agreement in light of the "strong judicial policy favoring the resolution of disputes through settlement." *Id.* at 9 (quoting *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)).

As discussed further below, I find that the ALJ's imposition of a $100 penalty per violation for the Count II violations cannot be affirmed because such a penalty is applicable only to violations occurring before March 15, 1999, *see* 28 C.F.R. § 68.52(c)(5), and Respondent's company did not exist in any form prior to 2003. Thus, any violations for failing to timely prepare Forms I-9 could not have occurred prior to that time, and the ALJ's penalty level of $100 per violation falls below the minimum penalty of any applicable penalty range for the violations at issue. Additionally, the ALJ's rejection of the parties' consent findings and settlement agreement cannot be affirmed because two of the ALJ's bases for that rejection are legally unsupported—and, to some extent, also factually unsupported—and it is not clear from the record whether the remaining third basis is sufficient to support the rejection in light of longstanding federal court and OCAHO policy favoring settlement of civil cases over litigation. Accordingly, the ALJ's Order on Penalties will be vacated, and the case will be remanded to the ALJ for further proceedings consistent with this order.[10]

A. Determination of Civil Money Penalties for the Count II Violations

Count II of the complaint alleged that Respondent hired twenty-nine individuals for employment after November 6, 1986, and failed to timely prepare Forms I-9 for each of those employees. Compl. 3-4. Unlike some other types of Form I-9 violations, failure to timely prepare violations are not considered "continuing" violations, but rather are "'frozen in time' at the point when the employer does not properly complete an I-9 form by the date required[.]" *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470, 3 (2022). Employers must ensure that new hires complete Section 1 of the Form I-9 at the time of hire and must complete Section 2 of the Form I-9 within three business days of the date of hire. *See* 8 C.F.R. § 274a.2(b)(1)(i)-(ii). Accordingly, a failure to timely prepare violation occurs either on the first business day after hiring (in the case of failure to complete Section 1) or on the fourth business day after hiring (in the case of failure to complete Section 2). *See Edgemont Grp., LLC*, 17 OCAHO no. 1470, at 3. As the ALJ correctly pointed out in multiple orders, the date of hire is therefore crucial to determine when "failure to timely prepare" violations occurred. *See Koy III*, 16 OCAHO no. 1416b, at 3 n.8; Order on

[9] The undersigned did not review the ALJ's penalty determinations as to Count I of the complaint, neither party challenged those determinations, and there is no facially apparent error in them. Nevertheless, as the undersigned is vacating the ALJ's entire Order on Penalties, the ALJ may choose to revisit those determinations if appropriate.

[10] Because I find both of these issues warrant vacatur of the ALJ's Order on Penalties and remand, they are dispositive of the administrative review. Thus, I need not—and do not—reach any other issues noted for possible review, including, *inter alia*, whether an ALJ should find a request for hearing abandoned or enter a default judgment and bifurcate proceedings when a respondent fails to file an answer, whether an ALJ is authorized under applicable law to enter a default judgment *sua sponte*, and how to address a complainant's lack of participation in a case arising under 8 U.S.C. § 1324a. *See Koy V*, 16 OCAHO no. 1416d, at 3 n.3 (informing the parties that, "should the review of one issue prove dispositive, the undersigned need not reach other issues on review."). Accordingly, if appropriate, the ALJ may revisit any of these issues on remand.

Penalties at 8.

The date when the violations occurred is, in turn, critical to determine the appropriate range of civil money penalties for violations for failure to timely prepare Forms I-9. If the violations occurred before March 15, 1999, the minimum penalty per violation would be $100 and the maximum penalty would be $1,000. *See* 28 C.F.R. § 68.52(c)(5). If the violations occurred on or after March 15, 1999, but on or before November 2, 2015, the minimum penalty per violation would be $110 and the maximum penalty would be $1,100. *See* 28 C.F.R. § 68.52(c)(5), (8). If the violations occurred after November 2, 2015, the applicable civil penalty range would be one of the ranges set forth in 28 C.F.R. § 85.5. *See* 28 C.F.R. § 68.52(c)(8).[11]

In the instant case, none of the documents admitted into evidence by the ALJ contained information regarding the specific dates of hire for the employees at issue in Count II of the Complaint.[12] Accordingly, the ALJ determined that she could rely only on the proposition that those employees were hired after November 6, 1986, as alleged in the Complaint. *See* Order on Penalties at 9; *see also* Compl. at 4. As a result, the ALJ concluded that the "unmodified statutory range from § 1324a applies," Order on Penalties at 9, a range which applies only if the violations occurred before March 15, 1999, *see* 28 C.F.R. § 68.52(c)(5).

However, as noted in the Notification of Administrative Review, publicly-available information indicates that Respondent's underlying corporate entity was not established until 2003 and that Respondent's current business incarnation did not begin operating until 2011. *See Koy V*, 16 OCAHO no. 1416d, at 4 (citing several public websites—including an official state government website—reflecting information regarding when Koy Chinese and Sushi Restaurant and its underlying corporate entity, New Century Inc., began operations). In the Notification of Administrative Review, I notified the parties "that I may take official notice of Respondent's underlying corporate entity, its corporate inception date, and its dates of operation during my review," and afforded the parties "an opportunity to show the contrary in their filings during that review." *Id.* at 4 n.5. Complainant, in its brief, did not dispute the information regarding Respondent's inception date; rather, Complainant agreed with the publicly-available information highlighted in the Notification of Administrative Review. *See* C's Brief at 3 ("As the CAHO already noted, as a matter of public record the respondent did not begin operating as a business

[11] For violations occurring after November 2, 2015, the date of assessment of the penalty is also relevant in determining the appropriate range of civil penalties. The date of assessment is not defined by statute or regulation, and recent OCAHO caselaw has suggested multiple potential dates could qualify without definitely resolving the issue. *See Edgemont Grp., LLC*, 17 OCAHO no. 1470b (2023) (order by the CAHO remanding a case to the Chief ALJ "to address the issue of the appropriate date of assessment" for 8 U.S.C. § 1324a violations); *see also United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470c (2023) (order by the ALJ inviting additional briefing on remand on the question of "what date of assessment should be used to calculate the inflation-adjusted penalty ranges" for violations occurring after November 2, 2015). To the extent that the date of assessment becomes relevant upon remand, the ALJ may consider that question consistent with recent caselaw.

[12] Complainant's Motion to Accept Late Filing contained copies of the Forms I-9 in question, many of which include the dates of hire for the employees at issue in Count II. However, the ALJ denied that motion, and as a result, refused to consider the evidence attached to it, which may have been relevant to establishing when the Count II violations occurred. *See Koy IV*, 16 OCAHO no. 1416c, at 6; *cf.* Order on Penalties at 8 ("Complainant did not *timely* provide evidence or argument as to when [the Count II] violations occurred." (emphasis added)). Although the undersigned is not disturbing the ALJ's decision to deny the Motion to Accept Late Filing and, thus, to exclude the evidence submitted with that Motion, nothing prevents the ALJ from reconsidering her approach to that Motion and its supporting documents upon remand.

until 2011."). Respondent did not file a brief or any other document on administrative review, and, thus, did not demonstrate any "contrary" fact that would make taking official notice inappropriate. Therefore, in accordance with 28 C.F.R. § 68.41, 5 U.S.C. § 556(e), and 5 U.S.C. § 557(b), I take official notice of the facts that Respondent began its operations in 2011 and that its underlying corporate entity was established in 2003.

With these facts established, the failure to timely prepare violations at issue in Count II could not have occurred until at least 2003, if not 2011.[13] Thus, the ALJ's tacit determination that they occurred prior to March 15, 1999, is necessarily erroneous. Further, given those facts, the minimum possible penalty for each such violation would be at least $110. *See* 28 C.F.R. § 68.52(c)(5) (providing that, for violations that occurred on or after March 15, 1999, the penalty is "not less than $110" for each violation); *see also supra* note 11 (recognizing that the minimum possible penalty may be adjusted further, depending on the date of assessment, if the violations occurred after November 2, 2015). OCAHO does not have authority to mitigate a civil money penalty for violations of 8 U.S.C. § 1324a below the applicable minimum range. *See United States v. Applied Comput. Tech*., 2 OCAHO no. 367, 524, 529 (1991) (noting that the law "does not provide the option of waiving the penalty [for violations of 8 U.S.C. § 1324a] or of imposing a fine of less than [the applicable minimum] per violation found"). Accordingly, as the ALJ's imposition of a $100 penalty per Count II violation falls below any potentially-applicable minimum penalty range, it was legally incorrect and warrants vacatur.

B. Denial of the Parties' Motion to Approve Consent Findings and Rejection of the Parties' Settlement Agreement

As an initial point, Complainant's Brief suggests some confusion as to OCAHO procedures parties should employ to obtain dismissal of their case once they reach a settlement.[14] Thus, some clarification of OCAHO's procedures for dismissals due to settlements may be helpful to better analyze the ALJ's decision in this case. When the parties in a case before OCAHO have reached a settlement agreement, OCAHO's rules of practice and procedure provide two avenues for the

[13] I do not determine whether 2003 or 2011 is the earliest possible date of the violations in Count II or the specific date of the violations in Count II. Rather, the ALJ may make those determinations in the first instance on remand if they become relevant.

[14] For example, Complainant's Brief faults the ALJ for considering the settlement agreement and consent findings as "one conjoined document" and asserts that the law makes clear they are "separate documents." C's Br. at 6. However, if the parties in this case sought dismissal pursuant to 28 C.F.R. § 68.14(a)(1)—and it appears they did because only that provision utilizes consent findings—that regulation makes clear that the relevant settlement agreement "contain[s] consent findings" and certainly does not suggest they are separate documents. 28 C.F.R. § 68.14(a)(1)(i). Similarly, Complainant's argument that they are separate because "the settlement agreement does not have to be filed . . . unless ordered by the court," C's Brief at 6, applies only to dismissals sought pursuant to 28 C.F.R. § 68.14(a)(2) and, thus, is inapposite to what the parties appear to have been trying to do. In short, due either to sloppiness or confusion, by submitting a settlement agreement and consent findings separately, the parties did not perfect a request for dismissal under either 28 C.F.R. § 68.14(a)(1) or (2), leaving the ALJ in an unnecessarily awkward position trying to analyze the parties' submission. *See Koy V*, 16 OCAHO no. 1416d, at 7 n. 11 (explaining potential issues related to the filing of a separate settlement agreement and consent findings). As a result, the ALJ may have erred by considering Complainant's settlement agreement as part of the regulatory settlement agreement under 28 C.F.R. § 68.14(a)(1) because it did not contain consent findings and by not considering solely the consent findings as the regulatory settlement agreement. *See id.* I need not resolve that issue definitively, however, because there are other bases for vacating the ALJ's Order on Penalties. Nevertheless, if appropriate, the ALJ may revisit on remand whether the parties' proposed consent findings should be treated as the sole document constituting a regulatory settlement agreement for purposes of 28 C.F.R. § 68.14(a)(1).

parties to seek dismissal of their case based upon that settlement agreement. Option one allows the parties to submit to the presiding ALJ their agreement containing consent findings, along with a proposed decision and order. 28 C.F.R. § 68.14(a)(1). If the parties choose option one, OCAHO's rules list several provisions that an agreement containing consent findings (and the accompanying proposed decision and order) must contain. *See* 28 C.F.R. § 68.14(b). If the parties submit an agreement containing consent findings and a proposed decision and order, the ALJ "may, if satisfied with its timeliness, form, and substance, accept such agreement by entering a decision and order based upon the agreed findings. In his or her discretion, the [ALJ] may conduct a hearing to determine the fairness of the agreement, consent findings, and proposed decision and order." 28 C.F.R. § 68.14(c). Option two permits the parties to "[n]otify the Administrative Law Judge that the parties have reached a full settlement and have agreed to dismissal of the action." 28 C.F.R. § 68.14(a)(2). If the parties choose this option, dismissal of the action is "subject to the approval of the [ALJ], who may require the filing of the settlement agreement." *Id.*

In the instant case, the parties submitted a Motion to Approve Consent Findings, a copy of their putative settlement agreement, and a separate document containing the consent findings to which they had agreed. Therefore, it appears that the parties sought dismissal under 28 C.F.R. § 68.14(a)(1). *But see supra* note 14. The ALJ treated both Complainant's settlement agreement and the proposed consent findings as tantamount to a regulatory settlement agreement under 28 C.F.R. § 68.14(a)(1)(i) but rejected it for three reasons. First, the ALJ determined that the submission was "not timely," observing that the filing came "over a year after the parties executed [the] settlement agreement." *Koy IV*, 16 OCAHO no. 1416c, at 6. Nevertheless, the ALJ noted that if the timing were the only issue, she "would carefully weigh this deficiency against 'strong judicial policy favoring the resolution of disputes through settlement.'" *Id.* (quoting *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982)). However, the ALJ also identified "more serious substantive issues" with the filing that caused her to reject the consent findings. *Id.* The first substantive issue identified by the ALJ was that "[t]he consent findings submitted by the parties ignore the findings of fact already made in the Court's June 8, 2022 order wherein it established liability by way of default." *Id.* at 7. Finally, the ALJ found that "the consent findings are based on a settlement agreement that the Court cannot approve." *Id.* Specifically, the ALJ objected to a term in paragraph 7 of the settlement agreement which stated, in pertinent part, that "upon execution of the Agreement, [DHS] will issue a Final Order (Form I-764) in this Action, which is a final and unappealable order pursuant to [8 U.S.C. § 1324a(e)(3)(B)]." *Id.* The ALJ objected to this provision because, in her reading of the statute, once a hearing is requested and a proceeding before OCAHO has begun, "the authority to issue Final Orders rests exclusively with OCAHO." *Id.* at 7-8.

After review, the undersigned has determined that the ALJ's conclusions as to both the second and third issues are not legally supported—nor are they fully factually supported by the record—and, thus, require vacatur of the Order on Penalties and remand. On the first substantive issue identified by the ALJ—whether the consent findings ignored the findings of fact made by the ALJ in the order entering default judgment—Complainant argues in its brief that "[t]he proposed consent findings did not ignore the court's ruling but agreed with it." C's Brief at 6. Complainant points out that, in the consent findings, "[t]he respondent admitted to liability entirely in agreement with the court's prior findings of fact." *Id.* Indeed, as Complainant argues in its brief, *see id.*, the ALJ did not identify any specific deficiencies or inconsistencies between the language of the consent findings and the findings of fact previously made by the ALJ, *see Koy IV*, 16

OCAHO no. 1416c, at 7, and upon review, I also cannot identify any. Moreover, as noted in the Notification of Administrative Review, the ALJ's order entering default judgment on liability, which contained the findings of fact at issue, was an interlocutory order; thus, the ALJ retained authority to reconsider that decision and potentially alter any of those findings. *See Koy V*, 16 OCAHO no. 1416d, at 8 (citing *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381l, 5 (2021)). Therefore, it appears as though nothing in the parties' consent findings would have required the ALJ to "disturb [her previous] findings of fact," *Koy IV*, 16 OCAHO no. 1416c, at 7, and even if they did, the ALJ retained authority to change those findings if necessary, *see Koy V*, 16 OCAHO no. 1416d, at 8. Consequently, the ALJ's conclusion that the consent findings ignored the findings of fact made in the order entering default judgment is not supported by the record. Moreover, even if it were, the legal significance of that conclusion is minimal because the ALJ retained authority to revisit those findings of fact, even in the absence of new evidence. In either case, the ALJ's perception that the parties' consent findings did not address her previous findings of fact was an insufficient reason for rejecting those proposed findings and the parties' regulatory settlement agreement.

Regarding the second substantive issue identified by the ALJ—that the settlement agreement contained a particular term that the ALJ could not approve—Complainant argues in its brief that "[t]he language in the settlement agreement does not render it invalid." C's Brief at 7. Complainant first explains that at the time the settlement agreement was entered into, "the parties were unaware that the complaint was before the court." *Id.*; *but see supra* note 5 (noting that Complainant clearly knew a complaint had been filed because it filed the complaint almost a month before Respondent signed the settlement agreement). As a result, the agreement was drafted based on an order to be issued by DHS. C's Brief at 7. Complainant further explains that the order referred to in paragraph 7 of the settlement agreement is "a financial package memorandum" that "would merely be redundant to the court's order." *Id.* at 8. As noted in the Notification of Administrative Review—and as acknowledged by the Complainant in its brief—OCAHO has previously determined that the "final orders" issued by DHS at the conclusion of OCAHO proceedings are "merely cumulative or repetitive and [without] any independent legal effect as a discrete order separate and apart from [the ALJ's] decision." *Koy V*, 16 OCAHO no. 1416d, at 8 (quoting *United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271d, 2 n.3 (2017)). Furthermore, the parties' proposed consent findings themselves "clearly contemplate that the ALJ, rather than DHS, would issue a final, unappealable order, notwithstanding the arguably contradictory language in the settlement agreement." *Id.*; *see also* C's Brief at 8 ("In this case, the parties clearly contemplated the respondent's compliance with the court's order per the requested consent findings, not [a DHS] order."). In short, although the ALJ was undoubtedly correct that only OCAHO can issue a final order once a case has been filed with it, *see Koy IV*, 16 OCAHO no. 1416c, at 7-8, neither the proposed consent findings nor Complainant's actual legal position argues otherwise. Rather, the relevant language in the settlement agreement appears to have been the product of an alleged misunderstanding regarding the status of the case before OCAHO, *see supra* note 5; C's Brief at 7, and in any event, Complainant acknowledges that any penalties imposed would be done through an OCAHO order, not an order issued by DHS. C's Brief at 8. Accordingly, although the undersigned is sympathetic to the ALJ's concerns about the language at issue in the settlement agreement, in light of the overall record, those concerns are not a sufficient legal basis

to reject the parties' consent findings and settlement agreement.[15]

The third reason given by the ALJ for rejecting the parties' consent findings and settlement agreement—their untimely submission—is amply supported by the record. *See Koy IV*, 16 OCAHO no. 1416c, at 4 (noting that the settlement agreement was submitted over a year after it was executed). Moreover, untimeliness is an appropriate consideration by an ALJ in deciding whether to accept a regulatory settlement agreement and enter an order of dismissal. *See* 28 C.F.R. § 68.14(c) (identifying "timeliness" as one of the factors the ALJ can consider in determining whether to accept a settlement agreement containing consent findings). Standing alone, however, it is not clear that the degree of untimeliness in this case outweighs the well-established judicial policy preference in favor of settlement agreements over litigation, as the ALJ herself acknowledged. *See Koy IV*, 16 OCAHO no. 1416c, at 6 ("If timing were the only issue, the Court would carefully weight this deficiency against 'strong judicial policy favoring the resolution of disputes through settlement'" (quoting *Parker*, 667 F.2d at 1209)); *see also Bass v. Phx. Seadrill/78, Ltd*., 749 F.2d 1154, 1164 (5th Cir. 1985) (noting that "public policy favors voluntary settlements which obviate the need for expensive and time-consuming litigation"); *S. v. Neiman Marcus Grp.*, 13 OCAHO no. 1323, 4 (2019) ("'Public policy favors the enforceability of settlement agreements and the concomitant avoidance of litigation.'" (quoting *United States v. Cal. Mantel, Inc.,* 10 OCAHO no. 1168, 8 (2013))). The ALJ did not definitively balance the parties' untimeliness against the policy favoring settlements because of the presence of two additional factors discussed above; however, as I have determined that those other two reasons for rejecting the parties' consent findings and settlement agreement are legally insufficient, the ALJ's decision cannot be affirmed without such balancing. Accordingly, it remains for the ALJ on remand to conduct that balancing and to determine whether untimeliness—or any other factors contained in the record[16]—still warrants rejection of the parties' consent findings and settlement agreement.

VI. CONCLUSION

The ALJ's imposition of a $100 penalty for each of the Count II violations cannot be affirmed in light of officially-noticed facts now in the record. Further, two of the bases for her rejection of the parties' consent findings and settlement agreement were erroneous, and it is not clear from the record whether the remaining basis—or any other factor—is sufficient to outweigh the strong public policy favoring settlement of civil cases. Although the undersigned possesses *de novo* review authority, the statutory time constraint for reviewing ALJ decisions, 8 U.S.C. § 1324a(e)(7), Complainant's limited participation and Respondent's complete lack of participation

[15] As noted in the Notification of Administrative Review, "to the extent that the ALJ was dissatisfied with the substance of the settlement agreement, she could have conducted a hearing on it with the parties, *see* 28 C.F.R. § 68.14(c)." *Koy V*, 16 OCAHO no. 1416d, at 9. Complainant similarly argues that "the ALJ could have required the parties to edit the language in the settlement agreement." C's Brief at 8. The record does not reflect whether the ALJ considered those options, and if so, why she elected not to pursue them. Upon remand, if the ALJ remains dissatisfied with any of the terms of the settlement agreement and associated consent findings, she is unquestionably authorized to hold a hearing with the parties related to the fairness of the agreement. *See* 28 C.F.R. § 68.14(c).

[16] To accept a regulatory settlement agreement under 28 C.F.R. § 68.14(a)(1), an ALJ must be satisfied with its timeliness, form, and substance. 28 C.F.R. § 68.14(c). Thus, other potential issues may preclude the ALJ from accepting the parties' consent findings and settlement agreement, and nothing in the instant decision should be read to prohibit the ALJ from raising any appropriate concerns as to form or substance on remand. Additionally, because Respondent's counsel signed the Motion to Approve Consent Findings, any decision by the ALJ to exclude him from further proceedings, *see supra* Part IV, may also bear on whether to accept those findings.

in this case, and the need to potentially reconsider multiple prior procedural decisions all indicate that the most prudent course of action is to vacate the ALJ's Order on Penalties and remand for further proceedings. *See Edgemont Grp., LLC*, 17 OCAHO no. 1470b, at 11-12. I express no opinion on the ultimate resolution of this case on remand, and the ALJ is free to revisit any or all of her options on remand—*e.g.*, finding the request for hearing abandoned, maintaining a default judgment on liability and imposing penalties based on the evidence of record, or accepting the parties' settlement agreement and entering an order of dismissal—consistent with this order, applicable law, and the record. Accordingly, for the reasons set forth above, the ALJ's Order on Penalties is hereby VACATED, and the case is REMANDED for further proceedings consistent with this order.

James McHenry
Chief Administrative Hearing Officer