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

March 23, 2023

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| ZAJI OBATALA ZAJRADHARA,<br>Complainant,<br><br>v.<br><br>RANNI'S CORPORATION,<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | 8 U.S.C. § 1324b Proceeding<br>OCAHO Case No. 2022B00020 |

Appearances: Zaji Obatala Zajradhara, pro se Complainant
Colin Thompson, Esq., for Respondent

ORDER – CLARIFYING COMPLAINANT'S PREHEARING SUBMISSIONS

## I. BACKGROUND

On October 19, 2022, the Court issued an Order for Individual Status Reports and Prehearing Statements. The parties filed prehearings submissions on December 18, 2022 (Complainant) and December 16, 2022 (Respondent). On February 1, 2023, the Court issued an Order that, inter alia, acknowledged receipt of prehearing submissions from the parties, and informed the parties that this case was advancing toward a hearing.[1]

On January 30, 2023, Complainant filed a "Notice to the Court: to All Judge in the Below Stated Matters of Non-Cooperation Regarding the Following Court Motion: RANNIS# 2022B00020" (Noncooperation Notice). On February 20, 2023, Complainant filed his "Response to Status Report and Prehearing Statement."

This Order addresses the Noncooperation Notice and the parties' prehearing submissions. It further sets forth guidance on what must be presented at hearing and how it may be presented.

## II. COMPLAINANT'S NONCOOPERATION NOTICE

[1] Respondent filed its Prehearing Statement on December 16, 2022. Complainant filed a submission on December 18, 2022, that, in part, addressed proposed witnesses and exhibits.

In his Noncooperation Notice, Complainant states he "repeatedly reached out to the legal counsel," but counsel "refused to respond and or cooperate by any [stretch] of the imagination." Noncooperation Notice 1. He is "at a loss at how to proceed," and requests the Court's "intervention." *Id.* The Notice incorporates an email to opposing counsel, under the title "Re: Follow Up; Acknowledgements Settlement Positions and Discoveries: LBC/Aljeric/Rannis//3rd follow-up." *Id.* at 2–3. In the email, Complainant references a settlement offer and his request for "[a]ll JVAs applied for any CW-1 workers retained, date of CW-1 visa application, date of e-verify signatures[.]" *Id.* at 3.

The Court construes the Noncooperation Notice as an untimely discovery motion. As outlined in the Court's February 1, 2023 Order, the discovery window closed on July 29, 2022. With discovery closed, the Court will not consider motions related to discovery. Feb. 1, 2023 Order ¶ 2 (citing the Court's August 31, 2022 Order). Accordingly, to the extent this Notice is an untimely discovery motion, it is DENIED. *See Zajradhara v. Ranni's Corp.*, 16 OCAHO no. 1426a, 6–7 (2022).[2]

## III. PARTIES' PREHEARING SUBMISSIONS

### A. Complainant

#### 1. December 18, 2022 Submission[3]

The Court liberally construes Complainant's December 18, 2022 submission to address the issues of the case, along with potential witnesses and evidence. *See Monty v. USA2GO Quick Stores*, 16 OCAHO no. 1443a, 2 (2022) (citations omitted).

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[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the 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 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.

[3] To the extent that Complainant's prehearing submissions seek discovery relief, the Court will construe those requests as untimely discovery motions which are DENIED as untimely.

Complainant asserts Respondent "falsified their CW-1 forms," C's Dec. PHS 2, to "keep and maintain non-U.S. citizen workers, in violation of . . . 8 U.S.C. 1324b," *id.* at 21. Specifically, Complainant believes that Respondent "discriminated against [him] and other 'qualified U.S. workers' in order to newly hire, transfer / re-hire non-U.S. citizen workers[.]" *Id.* Complainant claims Respondent discriminated against him by not selecting him for an "administrative manager" position, despite Complainant's status as "fully qualified," because "Respondent had 'no good faith intentions' of hiring an American citizen." *See id.* at 22, 31 (pointing to the alleged selection of a CW-1 visa worker for the job).

Complainant further asserts his non-selection was a "means of overt retaliation," *id.* at 31, because he filed "both local and federal complaints" against Respondent, and "attempted to alert the CNMI Government/CNMI Dept of Labor [DOL] of this compan[y]'s obvious visa fraud." *Id.* at 2.

Complainant identifies a Jerome Pollisco as a potential witness. *See id.* at 2, 22 (identifying Pollisco as the person who submitted a Form ETA-9142C). Complainant also identifies a "Mr. Songsong," along with two DOJ-IER employees, as potential witnesses. *See id.* at 6, 16.

Complainant identifies the news article "28% of NMI employers in compliance with labor reporting," as potentially relevant to his case. *See id.* at 2–3. Complainant also identifies emails discussing Job Vacancy Announcements (JVAs), and the JVAs themselves, as relevant evidence. *See id.* at 6–31.

2. February 20, 2023 Submission

Complainant's February 20, 2023 submission addressed: issues presented, possibility of settlement, proposed stipulations, presentation of case (witnesses, exhibits, time required); and other matters.

As to the issues presented in this case, Complainant states Respondent "commit[ed] CW-1 visa fraud . . . to deny myself and other qualified American citizens employment" by posting "illegal" JVAs. *See* C's Feb. PHS 1–2. According to Complainant, Respondent has posted "illegal" JVAs and "misleading attestation form[s]" to hire or retain non-U.S. citizen employees. *Id.* at 1.

Complainant also states he "has been trying for years to expose this company," and filed an "IER/DOJ complaint" to which the "company simply didn't respond." *Id.*

Complainant represents that Respondent has been uncooperative in settlement negotiations. *Id.* at 2. Complainant proposes the stipulation that he is qualified for the position, based on his resume and years of experience. *Id.*

Complainant indicates that he seeks to cross-examine a Jerome Pollisco, Shielyna Sanarez, and Kraig Church. *Id.* Complainant also lists James Ulloa (of the CNMI Department of Labor) as a proposed witness, if the Court "grants [him] a subpoena."[4] *Id.* Complainant also references two DOJ-IER employees as being potentially relevant to his case. *Id.* at 1. However, he did not identify these individuals as proposed witnesses. Complainant posits that witness testimony will cover falsification of CW-1 visa documents by Respondent, and Complainant's filing of federal and local complaints against Respondent on account of visa fraud. *Id.*

Complainant's proposed exhibit list includes: JVAs attributed to Respondent; "documents showing that [Complainant] has filed previous federal charges against the company… [and] email exhibits," including an email about his medications; a screenshot; the CNMI Workforce Act; and the "CNMI Public [Law], regarding American preference in hiring." *Id.* at 2.

Complainant estimates that it will take him "a few days, plus 30 hours" to present his case. *Id.*

As to other matters, Complainant states that Respondent has yet to provide him discovery related to "attestation statements," CW-1 via documents, and "all previous JVAs as applied for[.]" *Id.* Complainant also states that he may need to submit information regarding alleged "drug purchasing activities" by one of Respondent's witnesses. *Id.*

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[4] 28 C.F.R. § 68.25 permits the administrative law judge (ALJ) to issue subpoenas upon a party's request. *Zajradhara v. GIG Partners*, 14 OCAHO no. 1363, 3 (2020). As explained in *Zajradhara v. HDH Co.*, 16 OCAHO no. 1417b, 2 (2022):

> OCAHO['s] rules require that the "subpoena identify the person or things to subpoenaed, the person to who it is returnable and the place, date, and time at which it is returnable." § 68.25(b). When a non-party is subpoenaed, "the requestor of the subpoena must give notice to all parties." *Id.* (stating that receipt of the subpoena or a copy of the subpoena constitutes "notice"). The party serving a subpoena must ensure that the date to respond to the subpoena is at least ten days after the date the subpoenaed party receives the subpoena. § 68.25(c). "[S]ince granting the issuance of a requested subpoena is discretionary, the [ALJ] make[s] an appropriate decision after reviewing the requesting party's showing of general relevance and reasonable scope of the evidence sought." *Heath v. ASTA CRS, Inc.*, 14 OCAHO no. 1385c, 2 (2021) (internal citation omitted); *see also* § 68.24(a).

*See also id.* at 5 (noting how CNMI/mainland United States mail processing affects subpoenas).

### B. Respondent

1. December 16, 2022 Submission

Respondent's December 16, 2022 submission addressed: issues presented, possibility of settlement, proposed stipulations, and presentation of case (witnesses, exhibits, time required).

According to Respondent, "[t]he primary issue presented is whether Complainant can present sufficient evidence to support his allegations." R's PHS 1. Respondent states that "no meaningful settlement negotiations have taken place," and that "[t]here are no proposed stipulations or admissions of fact." *Id.* at 1.

Respondent's preliminary witnesses list includes a Jerome Pollisco, Shielyna Sanchez, and Kraig Church, and lists their contact information as "c/o Colin M. Thompson Law, LLC."[5] *Id.* at 1–2. "Ranni's will testify that it acted in good faith toward the Complainant and did not discriminate unlawfully." *Id.* at 2.

Respondent identifies one proposed exhibit, Exhibit R-1, "Job Vacancy Announcement 21-04-89228." *Id.* Respondent estimates it will take four hours to present its case. *Id.* at 2.

## IV. CLARIFICATION ON COMPLAINANT'S PREHEARING SUBMISSIONS

The Court's February 1, 2023 Order advised that the anticipated hearing is "the opportunity for the parties to submit oral evidence (witness testimony) and documentary evidence (exhibits in the record)." Feb. 1, 2023 Order ¶ 3. The Court further explained that "Complainant, who bears the burden of proof on the claims alleged in the Complaint, followed by an opportunity for the Respondent to present evidence, and concluding with an opportunity for the complainant to submit rebuttal evidence." *Id.* (citation omitted).

Upon review of the parties' prehearing submissions, bearing in mind the Complainant's pro se status, and the Court's desire for an efficient hearing,[6] the Court notes the following matters below.

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[5] Nonetheless, Respondent's counsel should be prepared to responsively make these individuals available for interview or contact in preparation for hearing.

[6] *See* 28 C.F.R. § 68.1 ("[OCAHO] proceedings shall be conducted expeditiously[.]"); § 68.32 ("Hearings shall proceed with all reasonable speed, insofar as practicable[.]").

Complainant provides two distinct allegations: a non-selection allegation (national origin and citizenship) and a retaliation allegation. Complainant must have evidence for each element of these distinct allegations to prevail. Complainant cannot meet his burden of proof on his § 1324b claims by argument or evidence pertaining to CW-1 visa fraud alone,[7] or CNMI DOL labor practices alone.[8] *See Zajradhara v. Ranni's Corp.*, 16 OCAHO no. 1426a, 4 (2022).

**A. Non-Selection Allegation (8 U.S.C. § 1324b(a)(1))**

1. Complainant must provide preponderant evidence[9] of his citizenship and national origin status. 8 U.S.C. §§ 1324b(a)(1)(A),(B).

2. The record contains sufficient evidence by way of the Answer that Respondent has between 4 and 14 employees.[10]

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[7] "While OCAHO has subject-matter jurisdiction to hear a claim of visa fraud, such a claim must be brought by the Government." *Montalvo v. Kering Americas, Inc.*, 14 OCAHO no. 1350, 3 (2020). OCAHO precedent also holds that document fraud cases under 8 U.S.C. § 1324c are to be brought by the Government. *Id.* at 4.

[8] Processes administered by Departments of Labor (federal, state, or territorial) are outside the jurisdiction of this tribunal. *See, e.g.*, *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 8 (2021) ("To the extent Respondent has framed the issue at hand as a referendum on its DOL [process] and whether [that] process imposes certain obligations on employers, the Court will defer to the Department of Labor.").

[9] "To prove an element by a preponderance of the evidence simply means to prove that something is more likely than not . . . [it also] means the greater weight of the evidence. [That] refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents." *Burden of Proof – Preponderance of Evidence*, U.S. DIST. COURT VT., https://www.vtd.uscourts.gov/sites/vtd/files/BURDEN%20OF%20PROOF%20-%20PREPONDERANCE%20OF%20EVIDENCE.pdf (last visited Mar. 22, 2023); *see also Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[10] Respondent admitted that it employed 4 employees in April 2022, and did not challenge that it employed less than 3 or more than 14 employees. Answer 1.

OCAHO has subject matter jurisdiction for claims based upon citizenship status if the employer employs more than 3 employees. *See United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 6–7 (2021) (citing 8 U.S.C. §§ 1324b(a)(1)(B), 1324b(a)(2)(A)). For claims based upon national origin, OCAHO has subject matter jurisdiction if the employer employs between 4 and 14 workers.

3. Complainant must provide preponderant evidence of the existence of the position referenced in the Complaint, his application to that position, and his non-selection for that position.

4. Complainant must provide preponderant evidence to demonstrate the reason he was not selected for the position was "because of" his citizenship status or national origin. 8 U.S.C. § 1324b(a)(1).[11]

**B. Retaliation on Account of INA 274B Protective Activity (8 U.S.C. § 1324b(a)(5))**

1. Complainant must provide preponderant evidence that he engaged in an activity protected by 8 U.S.C. § 1324b(a)(5).[12]

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*See Sinha v. Infosys*, 14 OCAHO no. 1373, 2–3 (2020); 8 U.S.C. §§ 1324b(a)(1)(A), 1324b(a)(2)(B). The party invoking jurisdiction has the burden to establish that OCAHO has subject matter jurisdiction. *Sinha*, 14 OCAHO no. 1373, at 2 (citation omitted).

[11] 8 U.S.C. § 1324b(a)(1) provides that "[i]t is an unfair immigration-related employment practice for a person or entity to discriminate against any individual . . . with respect to hiring, or recruitment or referral for a fee . . . ***because of*** such individual's national origin or in the case of a protected individual . . . ***because of*** such individual's citizenship status" (emphases added).

[12] "Employers are prohibited from intimidating or retaliating 'against any individual for the purpose of interfering with any right or privilege secured *under this section* or because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this section*.'" *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381d, 9 (2021) (quoting 8 U.S.C. § 1324b(a)(5)).

8 U.S.C. § 1324b(a)(5) "requires the triggering activity to be 'under this section,' and thus, it must relate [to] 'the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment[.]'" *Id.* at 10 (citing 8 U.S.C. § 1324b(a)(1)).

Complainant cannot advance a successful retaliation by identifying a protected activity covered by a different statute. *See, e.g.*, *id.* at 10–12 (citations omitted) (distinguishing activities that are protected 'under this section,' and activities that are outside this tribunal's purview).

A general statement or evidence of "both local and federal complaints" against Respondent, which "attempted to alert the CNMI Government/[DOL] of this compan[y]'s obvious visa fraud" will be

2. Complainant must provide preponderant evidence that Respondent was aware of Complainant's protected activity.[13]

3. Complainant must provide preponderant evidence that he suffered an adverse employment action, or was otherwise retaliated against by Respondent.[14]

4. Complainant must provide preponderant evidence of the casual link between the protected activity and the retaliation by Respondent.[15]

**C. Damages for Alleged INA 274B Violations (8 U.S.C. § 1324b(g)(2)(B))**

1. Complainant must provide preponderant evidence to support his calculation of "lost wages"[16] on account of Respondent's alleged actions.[17]

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insufficient to meet the evidentiary standard for this element; however, engagement with DOJ IER may be covered by the retaliation provision. *See, e.g.*, *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 17–18 (2014).

[13] "To establish causation, the complainant must show that the decision-maker ***knew*** of the employee's protected activity." *Sivasankar v. Strategic Staffing Sols.*, 14 OCAHO no. 1354, 5 (citing *Sefic v. Marconi Wireless*, 9 OCAHO no. 1125, 17 (2007) (emphasis added).

[14] 8 U.S.C. § 1324b(a)(5) provides that is an "unfair immigration-related practice for a person or other entity to intimidate, threaten, coerce, or retaliate against any individual[,]" on account of that individual's engagement in a protected activity.

[15] As explained in *Gig Partners*, 14 OCAHO no. 1363, at 8 (internal citations and quotations omitted, with emphasis added):

> The causal link between the protected activity and the respondent's employment decision or intimidating, threatening, or coercive behavior must rise to the level of **'but for' causation** . . . in order to find that retaliation occurred, there must be some reason to believe that ***but for the protected activity, the adverse employment decision would not have taken place.***

[16] *See* Unfair Immigration-Related Employment Practices Form (Form EOIR-58), i.e, OCAHO Complaint Form, available at https://www.justice.gov/eoir/page/file/1156276/download.

[17] 8 U.S.C. § 1324b(g)(2)(B)(iii) directs that the ALJ, inter alia, may order a respondent "to hire individuals directly and adversely affected, with or without back pay." *See also* § 1324b(g)(2)(C)

2. Complainant must provide preponderant evidence[18] on the propriety of "back pay"[19] and/or "front pay."[20]

**D. Proving INA 274B Allegations**

Complainant must prove elements and damages by preponderant evidence. As is explained in greater detail at footnote 9, preponderant evidence means to prove that something is more likely than not. To prove a fact by preponderant evidence, a party can use direct or circumstantial evidence, and can utilize exhibits (documents) or credible witness testimony.

1. Direct and Circumstantial Evidence

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(providing limitation on back pay remedy)."Although damages do not need to be proven with mathematical certainty, there needs to be a reasonable basis for the amount[.]" *Ogunrinu v. Law Res.*, 13 OCAHO no. 1332j, 19 (2021) (citation omitted).

In calculating back pay, the ALJ weighs "the appropriate time period, the items to be included in the gross award, and the amounts by which an award may be reduced." *Lake Constr. & Dev. Corp.*, 7 OCAHO no. 964, 632, 696 (1997); *see United States v. Lasa Marketing Firms*, 1 OCAHO no. 141, 950, 974 (1990) (citation omitted). Back pay is reduced by any "interim earnings or amounts earnable with reasonable diligence by the [discriminatee]." 8 U.S.C. § 1324b(g)(2)(C).

In calculating front pay, the ALJ bears in mind the remedy is "ordinarily appropriate only in lieu of job placement," and "is necessary only so long as the discriminatee must wait for the next available opening." *See Iron Workers Local 455*, 7 OCAHO no. 964, at 704 (internal citation omitted) (noting that the remedy is "immediate consideration for employment or front pay, but not both," as that would be an "impermissible double recovery").

[18] If the complainant proves the allegations by a preponderance of the evidence, then "the types of monetary awards an ALJ may award is limited to back pay, front pay, attorney's fees[.]" *Ogunrinu v. Law Res.*, 13 OCAHO no. 1332h, at 17; *see* 8 U.S.C. § 1324b(g)(2)(B), "Notably, such awards are discretionary." *Ogunrinu*, 13 OCAHO no. 1332j, at 19 (citing *Iron Workers Local 455*, 7 OCAHO no. 964, at 696 (citing 8 U.S.C. § 1324b(g)(2)(B)).

[19] *See* OCAHO Complaint Form.

[20] *See* Compl. 11 (handwritten notation that "I am seeking back pay and/or front pay for (1 Year) or the duration of the foreign visa of the employee").

The complainant may use direct evidence[21] or circumstantial evidence[22] to prove discrimination in hiring under 8 U.S.C. § 1324b(a)(1). *See United States v. Diversified Tech. & Servs. of Va., Inc.*, 9 OCAHO no. 1095, 13 (2003) (citing *United Sates Postal Serv. Bd. of Governors v. Aikens*, 560 U.S. 711 n.3 (1983)).

2. Witnesses (Testimonial Evidence)

Complainant identifies three witnesses he seeks to cross-examine. C's Feb. PHS 1–2. Complainant also identifies multiple individuals who have potentially relevant information to his case. *See id.*; C's Dec. PHS 6, 16.

**Complainant must provide an updated witness list**, that includes all proposed witnesses he intends to call. For each named witness, Complainant must give a summary of that person's testimony, and how that testimony is relevant either to his non-selection or retaliation claim.

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[21] "Direct evidence is evidence that proves that fact at issue without the aid of any inference or presumption." *Breda*, 10 OCAHO no. 1202, at 13 (citing *Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 11 (2003)).

"Direct evidence . . . ordinarily means that there is either a facially discriminatory statement or policy, or an unambiguous admission that the actual protected characteristic was considered and affected the decision." *United States v. Diversified Tech. & Servs. of Ga., Inc.*, 9 OCAHO no. 1095, 21 (2003) (citations omitted); *see Ogunrinu v. Law Res.*, 13 OCAHO no. 1332j, 9 (2021) (citation omitted) (noting the focus is on "the intentions of the decision maker – whether that person chose to engage in discriminatory acts because of the protected basis.").

If the complainant makes this showing, the burden shifts to the respondent to give a legitimate, non-discriminatory reason for the challenged employment action. *Ogunrinu*, 13 OCAHO no. 1332j, at 10–11 (citation omitted). If the respondent does so, the burden shifts back to the complainant to show the reason is pretextual. *Gonzalez-Hernandez v. Ariz. Family Health P'ship*, 11 OCAHO no. 1254, 8 (2015) (citations omitted). In other words, the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies.

[22] For circumstantial evidence, the complainant must present evidence that "1) an individual engaged in conduct protected by 8 U.S.C. § 1324b, 2) the employer was aware of the individual's protected conduct, 3) the individual suffered an adverse employment action, and 4) there was a causal connection between the protected activity and the adverse action." *R.O. v. Crossmark, Inc.*, 11 OCAHO no. 1236, 6 (2014) (citations omitted). The *McDonnell Douglas* burden-shifting framework, explained above, applies.

3. Exhibits (Documentary Evidence)

Complainant identifies proposed exhibits as: JVAs attributed to Respondent; "documents showing that [Complainant] has filed previous federal charges against the company"; "email exhibits," including an email about his medications; a screenshot; the CNMI Workforce Act; and the "CNMI Public [Law], regarding American preference in hiring." C's Feb. PHS 2.

**Complainant must now provide an updated list of exhibits.** Complainant should not submit the exhibits themselves. For each exhibit, Complainant must briefly explain its contents, and how that document is relevant either to his non-selection or retaliation claim.

## V. CONCLUSION

The Court **ORDERS** Complainant to submit a filing that clarifies his prehearing submissions, based on the notes above, no later than April 28, 2023.

The Court **FURTHER ORDERS** the parties to state any known periods of unavailability in June and July 2023.

The Court reminds Complainant that calls (and voicemails) to the Court that discuss substantive case issues are prohibited ex parte communication. *Zajradhara v. Ranni's Corp.*, 16 OCAHO no. 1426c, 1–2 (2023); *see* 28 C.F.R. § 68.36.

SO ORDERED.

Dated and entered on March 23, 2023.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge