

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

UNITED STATES OF AMERICA,)	
)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	
)	OCAHO Case No. 2023A00070
FRESCO PRODUCE, INC.,)	
)	
Respondent.)	
_____)	

Appearances: Ariel Chino, Esq., for Complainant
Robert H. Crane, Esq., for Respondent

ORDER MEMORIALIZING INITIAL PREHEARING CONFERENCE

I. PROCEDURAL HISTORY

On June 23, 2023, Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, Fresco Produce, Inc., violated the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. While Complainant stated in the complaint that it served Respondent with a Notice of Intent to Fine Pursuant to Section 274A of the INA (NIF) on June 29, 2021, *id.* ¶ 3, it did not attach a copy of the NIF to the complaint. Respondent, through counsel, filed an answer on July 28, 2023.

On January 25, 2024, the Court issued an Order Requiring Filing of Notice of Intent to Fine and Prehearing Statements and Scheduling Initial Prehearing Conference. The Court ordered Complainant to file a copy of the NIF with proof of its service on Respondent by February 1, 2024. *See* Order Requiring Filing Notice Intent Fine & Prehr’g Statements & Scheduling Initial Prehr’g Conf. 6. The Court ordered the parties to make their initial disclosures and to file written prehearing

statements of position by February 15, 2024. *Id.* at 8. Lastly, the Court scheduled an initial prehearing conference in this matter on February 21, 2024. *Id.*

Complainant filed a Notice of Filing of the Notice of Intent to Fine on February 13, 2024. The attached NIF indicated service on the Respondent on June 29, 2021, and Complainant attached a certificate of service certifying service of the NIF on Respondent's counsel by mail on February 6, 2024. Neither party filed a prehearing statement by the Court's deadline of February 15, 2024.

On February 20, 2024, the parties filed a Joint Motion for and Consent to Referral to Settlement Officer Program. The parties moved the Court to refer the case to a settlement officer and "expressly consent[ed] to participation in the Settlement Officer Program and agree[d] to engage in settlement negotiations in good faith." Joint Mot. Consent Referral Settlement Officer Program 1.

On February 21, 2024, the Court conducted the initial telephonic prehearing conference pursuant to 28 C.F.R. § 68.13 and now issues this Order memorializing the conference in accordance with 28 C.F.R. § 68.13(c).¹

II. INITIAL PREHEARING CONFERENCE

During the conference, the Court first addressed OCAHO's Electronic Filing Pilot Program.² The Court noted that OCAHO had invited the parties to participate in the program on September 13, 2023, and January 30, 2024. After confirming his interest in participating in the electronic filing program, Complainant's counsel stated that he had received the registration and certification form and would return the completed form to OCAHO. After explaining the technical requirements for participation in Electronic Filing Pilot Program to Respondent's counsel, he likewise expressed an interest in the program. The Court agreed to send him another copy

¹ OCAHO's Rules of Practice and Procedure for Administrative Hearings 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 The OCAHO Electronic Filing Pilot Program is described in detail in the Federal Register. *See* 79 Fed. Reg. 31143 (May 30, 2014). The program is further described in chapter 3.7 of the OCAHO Practice Manual. *See* <https://www.justice.gov/eoir/reference-materials/ocaho/chapter-3/7>.

of the registration and certification form,³ and counsel agreed to return the completed form. The Court encouraged both parties to contact OCAHO by telephone or email should they have questions regarding the program. The Court informed the parties that, if this case was approved for electronic filing but one or both of the parties later decided that they would like to revert to filing by mail, they could contact OCAHO. Should the parties elect to continue filing by mail, the Court instructed them to include “the Office of the Chief Administrative Hearing Officer” in the mailing address used to send filings to the Court.

The Court next discussed Complainant’s Notice of Filing of Notice of Intent to Fine. In response to the Court’s question, Respondent’s counsel confirmed that Respondent had been served with a copy of the NIF.

The Court then turned to the parties’ Joint Motion for and Consent to Referral to Settlement Officer Program. The Court explained that it had reviewed the parties’ joint motion. After providing the parties with an overview of the OCAHO Settlement Officer Program, including time periods for referrals and extensions, the Court directed the parties to the appropriate chapter of OCAHO’s Practice Manual and EOIR Policy Memorandum 20-16, the links to which were included in the Order for Prehearing Statements and Scheduling Initial Prehearing Conference dated January 25, 2024. Counsel for both parties responded affirmatively when asked if they understood the policies and procedures of the Settlement Officer Program and consented to their use. Neither party had any questions.

Respondent’s counsel then suggested that the Court defer the referral to the Settlement Officer Program for thirty to sixty days and mentioned seeking a stay of these proceedings until the United States Supreme Court issued a decision later this year in *SEC v. Jarkesy*. See *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446 (5th Cir. 2022) *cert. granted*, *SEC v. Jarkesy*, 143 S. Ct. 2688 (2023) (No. 22-859). Respondent’s counsel also commented that he could file a lawsuit in federal district court. Complainant’s counsel responded that it would oppose any request for a stay of proceedings as speculative and advocated for proceeding to mediation.

To the extent that Respondent’s counsel was attempting to make an oral motion to stay proceedings, it is denied without prejudice. See 28 C.F.R. § 68.11(a)

³ After the conference, OCAHO staff provided Respondent’s counsel another copy of the registration and certification form. To date, OCAHO has not received Respondent’s completed form.

(providing that “any application for an order or any other request shall be made by motion which shall be made in writing unless the Administrative Law Judge in the course of an oral hearing consents to accept such motion orally”). The Court explained to counsel that it did not consent to accept an oral motion to stay. The Court also notes that there is insufficient good cause to stay proceedings at this juncture as no case schedule has been set. As the Court explained during the conference, there is no date for the completion of discovery, there are no deadlines for the filing of dispositive motions and responses, and there is no date for a contested hearing in this matter. In short, there are no deadlines to stay in these proceedings. *See, e.g., Monda v. Staryhab, Inc.*, 8 OCAHO no. 1002, 86, 91 (1998) (“A stay of proceedings should not be granted absent a clear bar to moving ahead.”); *see also Ferrero v. Databricks*, 18 OCAHO no. 1505a, 2 (2024) (denying request for a stay for purposes of settlement discussions where no deadlines had been set in the case).⁴ As the Court explained, Respondent’s counsel is not precluded from filing a motion, but any such motion must be in writing and, given the potential complexities, Complainant would be afforded a reasonable amount of time to respond in writing pursuant to 28 C.F.R. § 68.11(b). The Court noted that, if the parties proceeded to mediation, they must mediate in good faith. If the parties chose not to participate in the Settlement Officer Program, the Court explained that it was prepared to set a case schedule.

Following this discussion, the parties agreed to participate in the OCAHO Settlement Officer Program and confirmed their consent to abide by the program’s rules. The Court then asked the parties if they were amendable to a sixty-day referral. Both parties agreed. The Court then found that this case was appropriate for referral to the Settlement Officer Program and told the parties that the Court would issue an order referring the case to the program for sixty days.

⁴ 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 after Volume 8, where the decision has not yet 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. Published decisions may be accessed through the Westlaw database “FIMOCAHO,” the LexisNexis database “OCAHO,” and on the United States Department of Justice’s website at <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

After noting that neither party had filed its prehearing statement, the Court stated that, given the parties' joint motion and the referral to the Settlement Officer Program, it would extend the filing deadline for prehearing statements. Should this case not settle through mediation, the Court told the parties that it would set a date for another prehearing conference before which the parties must file their prehearing statements. At the next prehearing conference, the Court explained that the parties must be prepared to set additional case deadlines, including dates for the completion of discovery, the filing of dispositive motions and responses, and a hearing.

Should the parties reach a settlement agreement through the OCAHO Settlement Officer Program, the Court explained that it may issue an order setting filing deadlines for settlement materials. The Court recommended that the parties consult 28 C.F.R. § 68.14 to understand the two avenues for leaving this forum after settlement. If the parties enter into a settlement agreement, the Court stated that 28 C.F.R. § 68.14(a)(2) provides that the parties may jointly file a notice of full settlement and an agreed motion to dismiss. The Court noted that it may require the filing of the settlement agreement. The Court instructed the parties that, if they settled and proceeded pursuant to 28 C.F.R. § 68.14(a)(2), they should state in their filing whether they were seeking dismissal with or without prejudice.

After confirming with the parties that they did not have any questions or other items for discussion, the Court adjourned the conference.

III. ORDERS

IT IS SO ORDERED that the parties' Joint Motion for and Consent to Referral to Settlement Officer Program is GRANTED. The Court finds that this case is appropriate for referral to the Settlement Officer Program and will issue a separate order referring this case to the Settlement Officer Program for sixty days.

IT IS FURTHER ORDERED that Respondent's oral motion for a stay of proceedings is DENIED without prejudice.

SO ORDERED.

Dated and entered on March 7, 2024.

Honorable Carol A. Bell
Administrative Law Judge