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

September 4, 2013

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00078
	)	
THE RED COACH RESTAURANT, INC.,	)	
Respondent.	)	
____________________________________	)	

AFFIRMANCE BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
for Complainant

Jeffrey F. Swiatek, Esq.
Dina L. Allen, Esq.
for Respondent

I. PROCEDURAL HISTORY

This action arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a two-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against The Red Coach Restaurant, Inc. (Red Coach or respondent). Count I alleged that respondent hired nine individuals and failed to prepare Employment Eligibility Verification Forms (I-9) within three business days of their respective dates of hire, and/or failed to present the forms to ICE upon request. Count II alleged that respondent hired forty-one employees and failed to ensure proper completion of their I-9 forms. The complaint requested penalties in the amount of $34,650 for the fifty violations, or an amount of $693 per violation.

On August 7, 2013, Administrative Law Judge (ALJ) Ellen K. Thomas entered a final decision and order finding Red Coach liable for forty-nine violations and directing it to pay a civil money penalty in the amount of $16,300.[1] Respondent filed a timely request for

[1] This penalty assessment reduced ICE's proposed penalty of $30,184 by almost half.

administrative review of the ALJ's decision and order with the Chief Administrative Hearing Officer (CAHO), in accordance with OCAHO's regulations at 28 C.F.R. § 68.54 (2013). In its request for review, the respondent agreed with the ALJ's factual analysis of the case, and did not contest the issue of liability; rather, it argued simply that the final penalty should be further reduced. Neither party timely submitted any additional briefs or other materials related to the request for review.[2]

II. STANDARD OF REVIEW

The governing statute and regulations authorize the CAHO to modify or vacate a decision and order of the ALJ within thirty days of the date of that decision and order. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54. Under the Administrative Procedure Act, which governs the conduct of OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to the ALJ's decision. *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); *United States v. Karnival Fashion*, 5 OCAHO no. 783, 477, 478 (1995); *United States v. Remileh*, 5 OCAHO no. 724, 15, 17 (1995).

III. DISCUSSION

A. The Arguments of the Parties

Respondent's request for review argues that the civil penalty assessed by the ALJ in this case should be further reduced for two reasons. First, respondent argues that the penalty was still severe in proportion to respondent's ability to pay, even after it had been substantially reduced by the ALJ from ICE's proposed amount. Respondent asserts that, although the ALJ acknowledged in the final decision and order that "there is no deterrent effect to be achieved when the whole operation is now in the hands of another company altogether," and Red Coach was "in such a highly leveraged position that readily accessing cash may be a problem," the ALJ did not fully appreciate these factors and should have reduced the civil penalties further.

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[2] OCAHO's regulations governing administrative review provide that parties may file briefs or other written statements in connection with a request for review within twenty-one days of the date of entry of the ALJ's order. 28 C.F.R. § 68.54(b)(1). Because the ALJ's order was entered on August 7, 2013, the deadline for filing briefs and other written statements was August 28, 2013. In its request for review, respondent, through its attorney, indicated that it would file a brief in support of the request "on or before" the August 28th deadline, thereby demonstrating its knowledge of the filing deadline. However, Respondent sent its brief via Federal Express overnight delivery on August 28, and the brief was not received (filed) in this office until August 29th. This was evidenced by the Federal Express shipping label, as well as the brief's Certificate of Service. Since documents are not considered filed until they are received by OCAHO, *see* 28 C.F.R. § 68.8(b), respondent's brief was untimely and will not be considered. Respondent had the option of submitting the brief by facsimile on August 28th and concurrently forwarding the signed original via overnight delivery service, as it did for the request for review, but did not. Counsel in OCAHO cases are expected to be familiar with OCAHO's procedural requirements, and failure to meet filing deadlines in the context of administrative review (which must be conducted within strict statutory time frames, *see* 8 U.S.C. § 1324a(e)(7)) may result in the CAHO declining to consider those untimely-submitted filings. *See United States v. Silverado Stages, Inc.*, 10 OCAHO no. 1185, 5 (2013). Because respondent's counsel was aware of the filing requirements, as evidenced by his acknowledgment of the filing date in respondent's motion and compliance with such requirements in filing the motion, but failed to comply with these requirements in submitting the brief (or move to file out-of-time), the brief was not considered. ICE did not submit any response to the request for review.

Second, respondent asserts that, although the ALJ agreed that respondent did not have any history of previous violations (one of the five statutory factors that must be considered when assessing penalties, *see* 8 U.S.C. § 1324a(e)(5)), she did not mitigate the penalty as a result of this factor. Respondent contends that OCAHO case law mandates that the penalty be mitigated if there is no evidence of any prior violations and the government stipulates to the lack of previous violations.

B. Consideration of Statutory Factors Generally

Section 1324a(e)(5) provides that, in determining the amount of a civil penalty for paperwork violations, "due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations." 8 U.S.C. § 1324a(e)(5). However, nothing in the statute or regulations requires that the same weight be given to each of the factors, or prohibits consideration of other factors. *See United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6-7 (2011); *United States v. Monroe Novelty Co.*, 7 OCAHO no. 986, 1007, 1016-17 (1998). There is no one single, permissible method of calculating penalties. *Compare United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 730-32 (1989) (decision by the CAHO affirming the ALJ's use of a mathematical approach) *with United States v. Catalano*, 7 OCAHO no. 974, 860, 869 (1997) (adopting a judgmental approach). The weight to be given to each of the factors in assessing a civil penalty may depend upon the facts and circumstances of the particular case. *See United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995). Furthermore, when the government's evaluation of the penalty factors is supported by evidence in the record and the assessment is reasonable, the amounts do not necessarily need to be disturbed. *See United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 4 (2010).

C. History of Previous Violations

The fifth statutory factor that must be taken into consideration when assessing a civil penalty for paperwork violations is whether respondent has any history of previous section 1324a violations. 8 U.S.C. § 1324a(e)(5). Respondent's request for review notes that, in ICE's initial penalty calculation, this factor was treated as neutral. Respondent alleges that, although the ALJ agreed that Red Coach had no history of previous violations, she did not mitigate the fine as a result of this factor. Respondent asserts that "OCAHO case law is clear, if there is no evidence of any prior violations, and the government stipulates to that fact, the penalty must be mitigated," citing *United States v. Sunshine Building & Maintenance, Inc.*, 7 OCAHO no. 997, 1122 (1998), and *United States v. Task Force Security, Inc.*, 4 OCAHO no. 625, 333 (1994). However, neither case cited by respondent states that civil penalties *must* be mitigated if respondent has no history of previous violations.

The ALJ's decision in *Sunshine Building & Maintenance* merely stated that "[m]itigation is in order for this factor," and that "the penalties should be mitigated to some degree based on the lack of prior violations." *United States v. Sunshine Bldg. & Maint., Inc.*, 7 OCAHO no. 997, 1122, 1184-86 (1998). Similarly, the ALJ in *Task Force Security* held that because complainant did not argue that respondent possessed a history of 1324a violations, "the proposed civil money penalty will be mitigated for this factor." *United States v. Task Force Sec.*, 4 OCAHO no. 625, 333, 338 (1994). Neither case cited by respondent establishes the proposition that the ALJ is *required* to mitigate the civil penalty if respondent has no history of previous violations, and I

am unaware of any other case law mandating that outcome.[3] On the other hand, several OCAHO cases have explicitly held that it is appropriate to treat the lack of previous violations as a neutral factor. *See United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 9 ("the general viewpoint in OCAHO case law is that not violating the law in the past does not, on its own, necessarily provide adequate grounds for mitigation."); *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 29 (2011) ("our case law does not require reduction of a penalty in every case just because an employer has not been shown to have violated the law in the past."), *petition for review denied*, 2013 WL 3988679 (9th Cir. Aug. 6, 2013); *DJ Drywall, Inc.*, 10 OCAHO no. 1136, at 12; *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010) ("never having violated the law before does not necessarily warrant additional leniency."). Thus, a finding that respondent does not have a history of previous violations does not automatically entitle the respondent to mitigation of the civil penalty based on this factor.

Furthermore, in this case, the ALJ did substantially mitigate the penalty from the amount requested by ICE. While ICE may have treated the lack of previous violations as neutral, consideration of this factor, along with the other statutory factors, led the ALJ to mitigate the penalties assessed substantially below the amount that ICE had proposed after it had already mitigated the base fine. Based on the percentage of respondent's Form I-9's that contained substantive violations, ICE set the base fine at $770 per violation, for a total base fine of $37,730. After considering the statutory factors, ICE mitigated its fine request by twenty percent (based on its assessment that respondent was a small business; did not act in bad faith; was not found to have employed any unauthorized aliens; and the violations were "not particularly serious"), for a total requested fine of $30,184 ($616 per violation). In consideration of the record as a whole and the statutory factors in particular, the ALJ further mitigated the fine to $16,300 ($500 per violation for eight of the more serious violations and $300 per violation for the remaining forty one, resulting in an average fine of approximately $333 per violation). In making this determination, moreover, the ALJ disagreed with ICE's assessment that the violations were "not particularly serious."

Although the ALJ did not specify exactly how much she was mitigating the overall fine for each particular factor, she is not required to do so. *See United States v. Chef Rayko, Inc.*, 5 OCAHO no. 803, 650, 652 (1995) ("Nothing in statute or case law requires that the analysis by which each statutory factor is considered results in aggravation or mitigation of the penalty; it is

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[3] Two prior OCAHO decisions use the word "entitled" with regard to mitigation for lack of history of previous violations, but both were clearly speaking in the context of those specific cases and factual circumstances. *See United States v. Gloria Fashions, Inc.*, 6 OCAHO no. 887, 696, 700 (1996) (statement by the ALJ that, after considering the lack of a previous history of violations and respondent's assertion that it had resolved the discrepancies at issue, "I find that respondent is entitled to mitigation on this factor."); *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 638 (1989) (finding by the ALJ that respondent was, "in my view, entitled to full mitigation of penalty" in regard to the lack of history of previous violations).

Furthermore, it is well-settled that prior OCAHO ALJ decisions do not necessarily bind a different ALJ in a future case. *See United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO no. 908, 967, 970 n.7 (1997) (modification by the CAHO, finding that, "I am no more bound by a prior decision of an OCAHO ALJ than the ALJ in the instant case" and citing favorably to the ALJ's discussion of the effect of precedent in OCAHO cases); *id.* at 985 n. 10 (decision by the ALJ in the same case, asserting that, "stare decisis generally does not apply to administrative proceedings," and that, "while I will consider decisions by other Judges as persuasive authority, I am not bound by those decisions."); *see also United States v. Dominguez*, 7 OCAHO no. 973, 844, 858 n.15 (1997) ("an unreviewed interlocutory order issued by an [ALJ] is binding neither on the CAHO nor on other judges.").

sufficient if, judgmentally, the factors considered together yield a reasonable and just penalty."); *Felipe, Inc.*, 1 OCAHO no. 108, at 732 (affirmation by the CAHO) (explaining that the structured, mathematical approach applied by the ALJ in that case, though acceptable, was not the sole criteria and method to be used in assessing a civil money penalty); *cf. Ketchikan Drywall Servs., Inc. v. ICE*, No. 11-73105, 2013 WL 3988679 (9th Cir. Aug. 6, 2013) (upholding the ALJ's penalty calculation and stating that while the ALJ is required to impose a penalty for each violation, the statute "does not require the ALJ explicitly to make individualized findings with regards to each violation."). The ALJ complied with her obligation under the statute in considering the history of previous violations and the other required statutory factors, and I will not disturb that assessment.

D. Deterrent Effect and Respondent's Ability to Pay

Respondent also contends that, in considering respondent's ability to pay the proposed fine, the ALJ did not "fully appreciate" that the operation of the company was now in the hands of another company altogether and that a recent expansion and an agreement with a management company put Red Coach in a highly leveraged position that might make cash difficult to access. Although it is not one of the statutory factors, the ALJ may consider a company's ability to pay in setting civil penalties. *See New China Buffet Rest.*, 10 OCAHO no. 1193, at 6-7; *Raygoza*, 5 OCAHO no. 729, at 52; *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). In this case, the ALJ appropriately considered respondent's ability to pay, and the final, substantially reduced penalty was reasonable in light of the circumstances. *Cf. New China Buffet Rest.*, 10 OCAHO no. 1133 (adjusting the civil penalty to $450 per violation in part because the business was already closed).

IV. CONCLUSION

In this case, the ALJ properly considered respondent's lack of history of previous violations and ability to pay the proposed fine, and mitigated the overall penalty assessment in a just and reasonable manner. Accordingly, the final decision and order of the ALJ is AFFIRMED.

Under OCAHO regulations, the ALJ's order becomes the final agency order 60 days after the date of the ALJ's final decision and order, unless the CAHO modifies, vacates, or remands the order. 28 C.F.R. § 68.52(g). Because I have affirmed the ALJ's order, the ALJ's Final Decision and Order will become the final agency order 60 days after its issuance by the ALJ. A person or entity adversely affected by a final agency order may file a petition for review of the final agency order in the appropriate United States Circuit Court of Appeals within 45 days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

It is SO ORDERED, dated and entered this 4th day of September, 2013.

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Robin M. Stutman
Chief Administrative Hearing Officer