



OOD  
PM 20-16

Effective: August 3, 2020

To: All of OCAHO  
From: James R. McHenry III, Director  
Date: August 3, 2020

## OCAHO SETTLEMENT OFFICER PROGRAM

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PURPOSE:	Describes the policies and procedures for use of settlement officers in cases before the Office of the Chief Administrative Hearing Officer
OWNER:	Office of the Director
AUTHORITY:	5 U.S.C. §§ 556(c)(6), 571-584; 8 C.F.R. § 1003.0(b); 28 C.F.R. § 68.28(a)
CANCELLATION:	None

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### I. PURPOSE AND ELIGIBILITY

#### A. Purpose.

This Policy Memorandum (PM) establishes a voluntary process whereby the parties in cases before the Office of the Chief Administrative Hearing Officer (OCAHO) may use a settlement officer to mediate settlement negotiations as a means of alternative dispute resolution.

#### B. Settlement officers.

##### 1. Subject to Section I.C. of this PM:

- a. Any active Administrative Law Judge (ALJ) may serve as a settlement officer in any OCAHO proceeding, except that an ALJ may not serve as the presiding ALJ and a settlement officer in the same case.
- b. The CAHO may serve as a settlement officer in any proceeding which is not potentially subject to administrative review by the CAHO.

##### 2. The presiding ALJ, in consultation with the Chief Administrative Law Judge (CALJ), shall designate the settlement officer in an appropriate case in accordance with this PM. The CALJ shall maintain a roster of available settlement officers to

facilitate that consultation and shall ensure an efficient distribution of cases among available settlement officers.

3. The settlement officer shall have no official, financial, or personal conflict of interest with respect to the parties or the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the settlement officer may serve.
4. The settlement officer convenes and oversees settlement conferences and negotiations, confers with the parties jointly and/or individually, and seeks voluntary resolution of issues. Unlike the presiding ALJ, the settlement officer does not render a formal decision in the case.

### C. Eligibility.

This PM applies to all adjudicatory proceedings before OCAHO subject to the following provisions:

1. A case shall not be referred to a settlement officer if any party objects to referral of the matter to a settlement officer.
2. In cases in which one or more of the parties are appearing *pro se* (i.e., without an attorney or other representative authorized under 28 C.F.R. § 68.33), if all *pro se* parties have been fully informed about the settlement officer procedure and have consented to its use, the presiding ALJ may in his or her discretion refer the case to a settlement officer notwithstanding a party's *pro se* status.
3. The presiding ALJ shall not refer the case to a settlement officer, because the case is not appropriate for referral, if the ALJ determines that:
  - a. a definitive or authoritative resolution of the matter is required for precedential value;
  - b. the case involves or may bear upon significant questions of government policy that require additional procedures before a final resolution may be made;
  - c. maintaining uniform interpretation and application of established policies or precedent is of special importance and settlement would not likely reach consistent results among individual decisions;
  - d. the matter significantly affects persons or organizations who are not parties to the proceeding;
  - e. a full public record of the proceeding is important; or

- f. the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances.
4. Cases potentially subject to administrative review by the CAHO cannot be referred to the CAHO to act as a settlement officer.
5. Cases actively under administrative review by the CAHO are not eligible for referral to a settlement officer.
6. A subpoena proceeding is not eligible for referral to a settlement officer.

## II. METHOD OF REFERRAL; TIMING AND EFFECT

### A. Referral of a case to a settlement officer.

The presiding ALJ may refer a case to a settlement officer upon:

1. receipt of written confirmation of consent to referral from each party in the case and,
2. subject to 5 U.S.C. § 572(b) and Section I.C.3. of this PM, determination by the presiding ALJ that the case is appropriate for referral.

### B. Decision not to refer a case to a settlement officer.

No party has a right to have a case referred to a settlement officer. The decision of the presiding ALJ not to refer a case to a settlement officer in no way precludes or prohibits the parties from conducting settlement negotiations between themselves or from reaching a settlement agreement and proceeding in accordance with 28 C.F.R. § 68.14.

### C. Order; stay of proceedings

If the presiding ALJ determines that referral to settlement officer is appropriate in accordance with Section II.A of this PM, the presiding ALJ shall issue an order referring the case to a settlement officer, designating the name of the settlement officer to whom the presiding ALJ is referring the case, and specifying whether and to what extent the procedural deadlines in the case have been stayed. If settlement is not reached, the presiding ALJ shall set appropriate procedural deadlines upon termination of the settlement officer proceedings.

D. Time limitations.

1. A request for referral of a case to a settlement officer may be made at any time while proceedings are pending up to 30 days prior to the date scheduled for a hearing in the matter.
2. Settlement negotiations before a settlement officer shall not exceed sixty (60) days from the date of referral to the settlement officer. However, with the consent of the parties, the settlement officer may, in his or her discretion, seek to extend the time period for negotiations for a reasonable amount of time, not to exceed an additional thirty (30) days. If an extension of the negotiation period is sought, the settlement officer shall seek approval of the extension from the presiding ALJ. If the presiding ALJ determines that an extension of the negotiation period is appropriate, the presiding ALJ shall issue an order extending the period of settlement negotiations and specifying whether and to what extent the procedural deadlines in the case continue to be stayed.

III. SETTLEMENT CONFERENCES; POWERS AND DUTIES OF SETTLEMENT OFFICERS; ATTENDANCE OF PARTIES AND REPRESENTATIVES

A. Settlement conferences.

In general, the settlement officer should communicate with the parties by telephone or video conference call. However, the settlement officer may schedule an in-person conference with the parties when:

1. the parties or the offices of the attorneys or other representatives of the parties are in the same metropolitan area where the settlement officer is located, and
2. the settlement officer determines that such conference is necessary to resolve the case (or substantial issues therein) and represents a prudent use of resources.

B. Powers and duties of settlement officer.

1. The settlement officer shall convene and preside over conferences and settlement negotiations between the parties.
2. The settlement officer may confer with the parties jointly and/or individually.
3. The settlement officer may require that an attorney or other representative authorized under 28 C.F.R. § 68.33 for each represented party be present at settlement conferences and that the parties or representatives with full settlement authority also be present or available by telephone.
  - a. A unit or agency of government may satisfy the attendance requirement if represented by an attorney who has authority to settle

(or can seek approval of a settlement from superiors with such authority), and who is knowledgeable about the facts of the case, the government unit's position, and the policies and procedures under which the governmental unit decides whether to accept proposed settlements.

b. If the action is brought by the government on behalf of one or more individuals, at least one such individual must also attend or be present or available by telephone.

4. The settlement officer may impose other reasonable requirements on the parties to expedite an amicable resolution of the case.

#### IV. CONFIDENTIALITY

##### A. Generally.

No evidence regarding statements or conduct in the settlement proceedings under this settlement officer program shall be admissible in the underlying proceeding or any subsequent administrative proceeding before OCAHO, except by stipulation of all parties. Documents disclosed in the settlement process may not be used in litigation unless obtained through appropriate discovery or subpoena. The settlement officer shall not discuss any aspect of the case with the presiding ALJ, except to request an extension of the negotiation period pursuant to Section II.D.2 of this PM. The settlement officer shall not be subpoenaed or called as a witness in any hearing in the case or any subsequent administrative proceeding before OCAHO with respect to any statement or conduct during the settlement discussions.

##### B. Statutory confidentiality provisions.

The proceedings before the settlement officer shall be subject to the confidentiality provisions of 5 U.S.C. § 574, which generally prohibit disclosure of dispute resolution communications by parties and a settlement officer unless a specific enumerated exception applies.

##### C. Confidentiality agreements between the parties.

Parties may agree to alternative confidentiality protections by entering into a confidentiality agreement between themselves. However, if the agreement provides for alternative confidentiality protections regarding disclosure by the settlement officer, the parties must inform the settlement officer of any modifications to the confidentiality protections of 5 U.S.C. § 574 before commencement of settlement negotiations utilizing the settlement officer procedure.

#### V. TERMINATION OF SETTLEMENT NEGOTIATIONS

A. Settlement of the case.

If settlement is reached pursuant to negotiations under this settlement officer program, the parties shall proceed in accordance with 28 C.F.R. § 68.14.

B. Expiration of time.

If the time period—including any extension granted pursuant to Section II.D.2 of this PM—for settlement negotiations before a settlement officer expires, settlement negotiations before the settlement officer shall be terminated and the case shall be returned to the presiding ALJ for appropriate further action.

C. Termination by the parties or settlement officer.

Settlement negotiations before the settlement officer shall be terminated immediately if a party unambiguously indicates that it no longer wishes to participate or, if in the view of the settlement officer, further negotiations would be unproductive or otherwise inappropriate. Upon such termination, the case shall be returned to the presiding ALJ for appropriate further action.

D. Continued negotiations by the parties

The termination of settlement negotiations before the settlement officer in no way precludes or prohibits the parties from continuing or resuming settlement negotiations between themselves or from reaching a settlement agreement and proceeding in accordance with 28 C.F.R. § 68.14.

## VI. AVAILABILITY OF SETTLEMENT OFFICER PROGRAM RULES

A copy of the rules pertaining to OCAHO's settlement officer program shall be distributed to all parties in eligible OCAHO cases at or around the time the ALJ issues an order for prehearing statements (or similar order), unless the ALJ in his or her discretion determines that such notice would be more appropriate at another stage in the case.

## VII. CONCLUSION

The program set forth in this PM will be reviewed as needed and amended to reflect any required changes.