

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Office of Research Integrity,)	
Dept. of Health and Human Services)	Date: December 7, 2022
)	
Petitioner,)	
)	
- v. -)	Docket No. C-23-88
)	
Dr. Ariel Fernandez,)	
)	
Respondent.)	
_____)	

**NOTICE OF ALJ APPOINTMENT AND
ORDER SCHEDULING INITIAL PREHEARING CONFERENCE**

In a letter dated November 18, 2022, the Civil Remedies Division acknowledged receiving Respondent’s request to extend the deadline for filing a request for hearing. Subsequently, on December 6, 2022, Respondent filed his request for a hearing and multiple supporting exhibits.

On December 7, 2022, I was appointed to determine whether the hearing request should be granted and, if it should be granted, to make recommended findings in the case. 42 C.F.R. § 93.502(a). The staff attorney working with me is Tony Tran. Mr. Tran can be reached by telephone at (202) 565-0110 and by e-mail at tony.tran@hhs.gov.

This order tells the parties what they must do to present evidence and arguments in this case.

1. Procedures Governing this Case

These proceedings are governed by the regulations at 42 C.F.R. Part 93 and in particular Subpart E—Opportunity to Contest ORI Findings of Research Misconduct and HHS Administrative Actions (§§ 93.500 - 93.501). *See also* 42 U.S.C. § 289(b). Further, the Civil Remedies Division Procedures (CRDP) supplement these procedures. The CRDP were enclosed with CRD’s November 18 letter and are also available at <http://www.hhs.gov/dab/divisions/civil/procedures/divisionprocedures.html>.

2. Supplementing the Request for Hearing

Under 42 C.F.R. § 93.501(c), a request for hearing must:

- i. Admit or deny each finding of research misconduct and each factual assertion made in support of the finding;
- ii. Accept or challenge each proposed HHS administrative action;
- iii. Provide detailed, substantive reasons for each denial or challenge;
- iv. Identify any legal issues or defenses that the respondent intends to raise during the proceeding; and
- v. Identify any mitigating factors that the respondent intends to prove.

An ALJ must grant a hearing request if “there is a genuine dispute over facts material to the findings of research misconduct or proposed administrative actions, including any debarment or suspension action.” 42 C.F.R. § 93.503(a). A “general denial or assertion of error for each finding of research misconduct, and any basis for the finding, or for the proposed HHS administrative action in the charge letter, is not sufficient to establish a genuine dispute.” *Id.* An ALJ must dismiss a hearing request if a respondent “[d]oes not raise a genuine dispute over facts or law material to the finding of research misconduct and any administrative actions, including debarment and suspension actions, in the hearing request or in any extension to supplement granted by the ALJ.” 42 C.F.R. § 93.504(a)(2).

On November 14, 2022, Respondent requested to extend the deadline for filing request a hearing to December 30, 2022. Respondent claimed he needed more time to prepare and substantiate his hearing request because he received the Office of Research Integrity’s (ORI’s) charge letter on November 9, 2022, while he was traveling internationally to “give a talk” and more than 12 years after ORI was notified of an investigation at Respondent’s home institution. Subsequently, on December 6, 2022, Respondent filed his request for hearing and multiple supporting exhibits. Respondent’s December 6 filing

makes his extension request moot. *See also* 42 C.F.R. § 93.509 (expressly prohibiting the ALJ from modifying the 30-day deadline for filing a request for hearing anyway).

The governing regulations at 42 C.F.R. § 93.501(d) authorize me to grant Respondent additional time to supplement his hearing request for good cause shown. Respondent may submit a written request to supplement his hearing request, but must do so on or before **December 24, 2022**. Any written request to supplement a hearing request must show good cause and include the proposed supplementation of the request for hearing. 42 C.F.R. § 93.501(d)(1). Good cause, for this purpose, means “circumstances beyond the control of the respondent or the respondent’s representative and not attributable to neglect or administrative inadequacy.” 42 C.F.R. § 93.501(d)(2). **If Respondent moves to supplement his request for hearing, ORI must respond to the motion within 10 days. 42 C.F.R. § 93.510(c).**

3. Notice of Initial Prehearing Conference

I will convene an initial prehearing conference on **Thursday, January 4, 2023, at 2:00 p.m. Eastern Time**. 42 C.F.R. § 93.511(a). The parties will be notified of the prehearing conference connection instructions in a separate communication. The prehearing conference will be recorded, and an audio copy of the recording will be made available to the parties upon request. 42 C.F.R. § 93.511(d).

The substance of the initial prehearing conference is addressed at 42 C.F.R. § 93.511(b). The parties must be prepared to discuss the case, including whether there are any disputes of material fact related to the ORI findings of research misconduct and HHS administrative actions.

4. Filing and Service of Documents

The parties must file all documents using the Departmental Appeals Board’s electronic filing system (DAB E-File). **In addition to submitting documents electronically, I direct each party to submit one hard copy.** The parties must send the hard-copy submissions to:

Carolyn Cozad Hughes, Administrative Law Judge
Civil Remedies Division, MS-6132
330 Independence Avenue, SW
Cohen Building, Room G-644
Washington, DC 20201

5. Representation and Notice of Entry of Appearance

Each party may be accompanied, represented, and advised by an attorney. 42 C.F.R. § 93.505(b)(1). The attorney who will represent Petitioner, the Office of Research Integrity (ORI), must file an entry of appearance no later than **December 24, 2022**. If Respondent appoints an attorney, his attorney must file an entry of appearance as soon as practicable. An entry of appearance must include the attorney's mailing address, telephone number, facsimile number, and e-mail address.

6. Other matters

Ex parte communications are forbidden, and no party may contact me directly unless both parties have notice and an opportunity to participate in the communication. 42 C.F.R. § 93.507(a). Mr. Tran, whose contact information is listed above, may be able to assist a party with non-substantive, technical, or procedural issues, such as questions about DAB E-File.

An ALJ may take action against a party for violating an order or procedure, or for other conduct by a party that interferes with the prompt, orderly, or fair conduct of the hearing. 42 C.F.R. § 93.515. The parties are cautioned to follow directives set forth in any orders and to comply with the provisions set forth at 42 C.F.R. Part 93.

/s Carolyn Cozad Hughes
Carolyn Cozad Hughes
Administrative Law Judge

Service by DAB E-File.