U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

VIMALRAJ MANOHARAN,

COMPLAINANT,

v.

HCL AMERICA, INC.,

RESPONDENT.

ARB CASE NO. 2020-0007[1]

ALJ CASE NO. 2018-LCA-00029

DATE: December 21, 2020

Appearances:

For the Complainant:
Vimalraj Manoharan, pro se, Tamilnadu, India

For the Respondent:
R. Blake Chisam, Esq., K. Edward Raleigh, Esq., and Samantha Anne Caesar, Esq.; *Fragomen, Del Rey, Bernsen & Loewy, LLP*, Washington, District of Columbia

BEFORE: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell, *Administrative Appeals Judge;* and Randel K. Johnson, *Administrative Appeals Judge*

ORDER OF REMAND

PER CURIAM. This case arises under the H-1B visa program of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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[1] We note that this appeal was previously consolidated with another appeal filed by Manoharan, ARB No. 2019-0067. However, because we then considered ARB No. 2019-0067 separately and remanded the matter, we vacated the order consolidating the two appeals. *See Manoharan v. HCL America, Inc.*, ARB No. 2019-0067, ALJ No. 2018-LCA-00029, slip op. at 4 n.13 (ARB Dec. 7, 2020).

(2014) and 8 U.S.C. § 1182(n) (2013). The statute has implementing regulations at 20 C.F.R. Part 655, subparts H and I (2020). Vimalraj Manoharan (Complainant) filed a complaint against his former employer, HCL America, Inc. (Respondent), with the Wage and Hour Division of the U.S. Department of Labor (WHD), alleging that Respondent failed to pay him required wages and terminated his employment in retaliation for protected conduct.

After an investigation, the WHD issued a letter determining that Respondent failed to pay Complainant required wages and awarded Complainant $8,999.45 in back wages. The letter did not address the retaliation claim. Complainant requested a hearing with the Office of Administrative Law Judges (OALJ) regarding the WHD's failure to investigate the retaliation charge and the WHD's assessment of back wages. After the Administrative Law Judge (ALJ) issued an Order to Show Cause and the parties responded, the ALJ entered an Order Dismissing Claim in Part and Holding the Claim in Abeyance in Part. The ALJ determined that Complainant could not prosecute the wage claim under the pertinent regulations because the WHD had found that Respondent committed a wage violation. The ALJ therefore held the wage claim in abeyance for 60 days pending a decision by the Administrator regarding whether to prosecute the claim. The ALJ dismissed the retaliation claim for lack of jurisdiction. After the Administrator declined to prosecute, the ALJ dismissed the wage claim.

Complainant appealed the ALJ's order holding the wage claim in abeyance and order dismissing the claim to the Board.[2] Because Complainant was permitted to challenge the Administrator's back wage assessment under 20 C.F.R. § 655.820(b)(1), we reverse the ALJ's order and remand this case to the OALJ to hold a hearing and permit Complainant to act as the prosecuting party for the back wage claim.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to 20 C.F.R. § 655.845.[3] Under the Administrative Procedure Act, the ARB has plenary power to review an ALJ's factual and legal conclusions de novo.[4]

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[2] Complainant had also petitioned the Board to review the ALJ's order dismissing the retaliation claim in a separate appeal. The Board accepted the petition and then remanded the claim to the WHD to issue a determination whether Complainant presented reasonable cause for an investigation on the claim as required under 20 C.F.R. § 655.806(a)(2). *See Manoharan v. HCL America, Inc.*, ARB No. 2019-0067, ALJ No. 2018-LCA-00029 (ARB Dec. 7, 2020).

[3] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

BACKGROUND

On February 22, 2017, Complainant, an H-1B worker, filed a complaint with the WHD, alleging that his former employer, Respondent, had committed several violations of the H-1B provisions of the INA, including failure to pay him the required wage rate.[5]

On August 2, 2018, the Administrator of the WHD (Administrator) issued a determination letter that included findings that Respondent committed several violations of the INA, including failing to pay Complainant required wages, failing to specify the H-1B nonimmigrant's occupation on the Labor Condition Application (LCA), and inaccurately stating the prevailing wage rate on the LCA.[6] The Administrator assessed back wages in the amount of $8,999.45 for Complainant and noted that Respondent already paid Complainant the assessment in full.[7] The letter ordered Respondent to comply with relevant H-1B regulations and did not assess any further penalties.[8]

On August 6, 2018, Complainant requested a hearing on the matter.[9] In relevant part, he contended that WHD's assessment of back wages was too low and did not accurately consider the start date, end date, and duration of his employment.[10] On February 21, 2019, the ALJ issued an Order to Show Cause why the wage claim should or should not be held in abeyance for the Administrator to indicate whether WHD would prosecute the claim.[11] On June 25, 2019, the ALJ entered an order holding the claim in abeyance for sixty days and ordered the Administrator to respond with the decision whether to prosecute the claim within the sixty days.[12]

The ALJ determined that Complainant could not request a hearing on the wage claim because 20 C.F.R. § 655.820(b)(2) (Subsection 2) "gives [the]

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4 *Lubary v. El Floridita*, ARB No. 2010-0137, 2010-LCA-00020, slip op. at 5 (ARB Apr. 30, 2012).

5 WHD's Brief at 5.

6 Order Dismissing Claim in Part and Holding the Claim in Abeyance in Part (O.D.C.) at 1-2.

7 *Id.* at 2.

8 Respondent's Brief on appeal at 3.

9 *Id.*

10 WHD's Brief at 6.

11 Order to Show Cause at 4.

12 O.D.C. 1.

Administrator the exclusive power to prosecute" a claim.[13] Subsection 2 applies "where the Administrator determines, after investigation, that the employer has committed violation(s)," while 20 C.F.R. § 655.820(b)(1) (Subsection 1) applies "where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s)." Because the Administrator had found that Respondent failed to pay required wages to Complainant, the ALJ determined that Section 2 applied in the circumstances.[14] The ALJ, therefore, concluded that Complainant could "request a hearing for the back wages claim but may not prosecute it because Administrator is the only party that may do so."[15]

On July 2, 2019, the Administrator filed a notice declining to prosecute the wage claim.[16] As a result, the ALJ dismissed the claim on October 2, 2019.[17] Complainant filed a timely appeal of the dismissal thereafter.

The Board accepted the appeal, and both parties filed briefs describing their arguments. In its acceptance of the appeal, the Board invited the Administrator "to file a brief or other statement of position as Amicus Curiae concerning its decision not to further prosecute" the claim.[18] The Administrator consequently filed an amicus brief on January 29, 2020.[19]

DISCUSSION

Under 20 C.F.R. § 655.820(b), interested parties may request a hearing on a complaint against an H-1B employer in the following circumstances:

> (1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.

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13 O.D.C. 6-7.

14 O.D.C. 7.

15 O.D.C. 6.

16 WHD's Brief at 6-7.

17 Order Dismissing Case for Failure to Prosecute at 1-2.

18 Notice of Intent to Review and Briefing Schedule, Nov. 27, 2019, at 1.

19 WHD's Brief at 26.

> (2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the employer shall be the respondent.

Complainant and the Administrator provide separate arguments for the reversal of the ALJ's dismissal of the wage claim. Complainant contends that Subsection 2 requires the Administrator to act as prosecuting party on behalf of Complainant when he requested a hearing on the back wages assessment and permits him to prosecute the claim, as well. The Administrator argues that Complainant was permitted to contest the back wages assessment under Subsection 1, rather than Subsection 2. As discussed below, we reject Complainant's argument but agree with the Administrator.

1. Complainant Cannot Prosecute under Subsection 2

Complainant argues that Subsection 2 provides that any interested party can request a hearing and that either the Administrator must prosecute the claim on behalf of the complainant or that the complainant may prosecute the claim himself.

Complainant contends that the use of "shall" in Subsection 2's language providing that the "Administrator shall be the prosecuting party" mandates that the Administrator must prosecute a claim on behalf of a complainant that requests a hearing. Complainant claims that "shall" indicates the requirement, rather than the ability, for the Administrator to prosecute a claim.

Complainant's interpretation of Subsection 2, however, is misplaced. The plain meaning of the clause that the "Administrator shall be the prosecuting party" designates the Administrator's role when a hearing is requested under Subsection 2, rather than mandating that the Administrator act a prosecuting party in that scenario. The same sentence provides that "the employer shall be the respondent," which specifies the role of the employer who the Administrator found had committed a violation. Subsection 1 uses similar language, providing that "the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent." It would be unreasonable to interpret the regulation's use of "shall" in the subsections to require any interested party to act or allow a complainant to force the Administrator to advance a position that it had already rejected.[20]

Complainant also contends that a complainant may act as a prosecuting party under Subsection 2. Complainant seemingly argues that Subsection 2 derives

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[20] Indeed, the WHD agrees with this interpretation. WHD's Brief at 19.

its "properties" from Subsection 1 and, because a complainant may prosecute a claim under Subsection 1, a complainant may do so under Subsection 2, as well.[21]

Complainant's interpretation of the regulation, again, is mistaken. Subsection 1 and Subsection 2 are separate rules that apply in different circumstances. Subsection 1 applies when the Administrator finds that an H-1B employer has not committed a violation, while Subsection 2 applies when the Administrator determines that the employer has committed a violation. Therefore, the rules of Subsection 1 do not carry over to Subsection 2.

Further, Subsection 2 provides that the "Administrator shall be *the* prosecuting party."[22] Here, the use of "*the*", rather than "*a*," as the article preceding "prosecuting party" demonstrates exclusivity in prosecutorial authority. Notably, Subsection 1, unlike Subsection 2, includes language permitting any interested party to prosecute and allowing another party to intervene.[23] If the intent was to allow any party to prosecute or intervene when the Administrator declines to prosecute after a violation had been found under Subsection 2, the Secretary would have included such language.

Complainant cites *Cot v. Univ. of S. Carolina*, ALJ No. 2018-LCA-00030 (OALJ September 21, 2018), which he claims states that the Administrator must act as a prosecuting party when a complainant requests a hearing under Subsection 2 and that the complainant is permitted to prosecute the claim, as well.[24] Complainant, however, misunderstands the ALJ's holding. The order cited by Complainant simply requested the Administrator to address whether it should be named as the prosecuting party under Subsection 2, because the ALJ had originally assigned the complainant as the prosecuting party, while also allowing the complainant to address the issue. In a later decision, the ALJ allowed the complainant to proceed as the prosecuting party under Subsection 1, after he had dropped the claims where the Administrator had found violations.[25]

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21 Complainant's Brief on appeal at 5.

22 20 C.F.R. § 655.820(b)(2) (emphasis added).

23 20 C.F.R. § 655.820(b)(1) ("[T]he Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.").

24 *See Cot v. Univ. of S. Carolina*, ALJ No. 2018-LCA-00030, slip op. at 2 (OALJ September 21, 2018) ("[T]he Administrator is hereby ORDERED TO RESPOND . . . to address whether it should be named as the Prosecuting Party in this matter under 20 C.F.R. § 655.820(b)(2). [The complainant] is permitted, but not required, to file a response on this point . . . as well.").

25 *See Cot v. Univ. of S. Carolina*, ALJ No. 2018-LCA-00030, slip op. at 3 (OALJ February 1, 2019) ("Dr. Cot was no longer seeking review of the Administrator's determination regarding wages for nonproductive time, and instead was seeking review of

In conclusion, we hold that only the Administrator has the discretionary power to prosecute claims under Subsection 2. We therefore reject Complainant's argument that the ALJ should have permitted a hearing on the wage claim under Subsection 2.

2. Complainant May Contest the Back Wages Assessment under Subsection 1

The WHD separately argues that the ALJ should have evaluated Complainant's request under Subsection 1, rather than Subsection 2. Principally, the WHD argues that Complainant's contention that he was owed wages for additional time periods is a challenge to a determination that Respondent did not commit a violation.[26] In his petition for a hearing, Complainant contended that the Administrator's assessment was too low because it did not correctly take into account his "employment start date, end date and duration."[27] The WHD contends that this amounts to an argument that Respondent committed additional wage violations over a longer or different period of time beyond those found by WHD, which would permit Complainant to request a hearing under Subsection 1.[28]

Respondent argues that the WHD's interpretation ignores the plain meaning of the regulation.[29] Under the plain meaning of the text, Respondent contends that the key distinction when determining which subsection to apply is whether the Administrator determined that the employer committed violations: Subsection 1 applies when no violation is found at all, and Subsection 2 applies if the Administrator determines that the employer has committed violations.[30] Therefore, because the Administrator had found Respondent failed to pay Complainant required wages, Subsection 2 applies to Complainant's request for a hearing.[31]

Respondent's interpretation creates a sharp imbalance between the rights of H-1B employers and employees in adjudicating complaints under the INA. If the Administrator finds a reasonable basis that a violation occurred, the INA requires the Administrator "to provide for notice of such determination to the interested

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various other allegations not found by the Administrator—I determined that Dr. Cot is the prosecuting party in this matter under Section 655.820(b)(1).").

26 WHD's Brief at 14-16.

27 Request for Hearing at 2.

28 WHD's Brief at 14-16.

29 Respondent's Reply to WHD's Brief at 7-9.

30 *Id.* at 9.

31 *Id.*

parties and *an opportunity for a hearing* on the complaint."[32] Here, Complainant was denied an opportunity for a hearing to challenge the most important aspect of the Administrator's findings, the amount of wages he was rightfully owed for his work.

Without the opportunity for an employee to participate in a hearing on the Administrator's remedy, the Administrator would be able to order a remedy that is unequivocally inadequate or even no remedy at all, despite a finding that the employer committed an H-1B violation, with no recourse for the complainant. This would prove especially problematic when, as in this case, the complainant was owed back wages. Under 20 C.F.R. § 655.810, if the Administrator determines that an employer failed to pay required wages, the Administrator "*shall* assess and oversee the payment of back wages" to the aggrieved employee, which "*shall* be equal to the difference between the amount that should have been paid and the amount that actually was paid."[33] The Administrator, therefore, would be able to defy its nondiscretionary requirement that the employee be paid proper back wages, but the employee would have no means to rectify the Administrator's transgression.

This interpretation is, therefore, untenable in light of the overall regulatory scheme.[34] Indeed, the Department of Labor has not generally applied Respondent's or the ALJ's interpretation of the regulation, as the WHD cites several ALJ and Board decisions where an H-1B complainant requested a hearing to contest the Administrator's back-wage assessment and there was no suggestion that a complainant may not serve as the prosecuting party.[35] We therefore hold that

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[32] 8 U.S.C. § 1182(n)(2)(B) (2013) (emphasis added). The Secretary delegated his "investigative and enforcement functions" under § 1182(n) to the Administrator. 20 C.F.R. § 655.800(a).

[33] 20 C.F.R. § 655.810(a) (emphasis added). Other remedies for LCA violations, including civil money penalties, may be ordered within the Administrator's discretion. *See* § 655.810(b) ("The Administrator *may* assess civil money penalties for violations") (emphasis added).

[34] Generally, courts apply traditional methods of interpretation to regulations and enforce the plain meaning of the rule that those methods reveal. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019). When applying those methods, the words are read "in their context and with a view to their place in the overall [regulatory] scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Courts may depart from the plainest meaning of the pertinent language of a rule when "such a reading turns out to be 'untenable in light of [the regulation] as a whole.'" *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015) (quoting *Dep't of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994)).

[35] *See Dedios v. Med. Dynamic Sys., Inc.*, ARB No. 2016-0072, ALJ No. 2013-LCA-00009 (ARB Mar. 30, 2018); *Vinayagam v. Cronous Sols., Inc.*, ARB No. 2015-0045, ALJ No. 2013-LCA-00029 (ARB Feb. 14, 2017); *Batyrbekov v. Barclays Cap. (Barclays Grp. US Inc.)*, ARB No. 2013-0013, ALJ No. 2011-LCA-00025 (ARB July 16, 2014); *Puri v. Univ. of Ala. Birmingham Huntsville*, ARB No. 2010-0004, ALJ Nos. 2008-LCA-00008, -00043 (ARB Nov.

Complainant's hearing request was a challenge to the Administrator's findings that Respondent had not committed violations and, consequently, Complainant was permitted to serve as prosecuting party in a hearing on the Administrator's back wages assessment under Subsection 1.

CONCLUSION

We **REVERSE** the ALJ's order dismissing the back wages claim and **REMAND** the case to the OALJ for a hearing on the Administrator's back wages assessment, with Complainant serving as the prosecuting party pursuant to 20 C.F.R. § 655.820(b)(1).

SO ORDERED.

30, 2011); *Jinna v. MPRSoft, Inc.*, ALJ No. 2018-LCA-00039 (OALJ July 16, 2019); *Arameddy v. IK Solutions, Inc.*, ALJ No. 2006-LCA-00020 (OALJ Nov. 15, 2006).