



In the Matter of:

DEEPAK MEHRA,

ARB CASE NO. 2021-0056

COMPLAINANT,

ALJ CASE NO. 2017-LCA-00002

v.

DATE: December 21, 2021

WEST VIRGINIA UNIVERSITY,

RESPONDENT.

**Appearances:**

*For the Complainant:*

Deepak Mehra, *pro se*, Keyser, West Virginia

*For the Respondent:*

Wendy G. Adkins, Esq.; *Jackson Kelly PLLC*, Morgantown, West Virginia

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

## DECISION AND ORDER

PER CURIAM. This case arises under the H-1B visa program of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2013), and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I. Deepak Mehra (Complainant), an H-1B nonimmigrant worker, filed a complaint under H-1B regulations against his former employer, West Virginia University (Respondent), alleging it had failed to pay him the required wage rate. After an investigation, the United States Department of Labor's Wage and Hour Division (WHD) concluded

that Respondent had not committed any violations. Complainant filed objections and requested a hearing with an Administrative Law Judge (ALJ). After a hearing, the ALJ issued a Decision and Order Denying Complainant's Claim for Damages. Complainant appealed the decision to the Administrative Review Board (Board). We summarily affirm the ALJ's decision.

### BACKGROUND

Respondent employed Complainant in H-1B status from May 16, 2007, until May 15, 2013. Respondent hired Complainant as an Instructor in Engineering and promoted him to Assistant Professor in May 2010. Complainant worked at the Potomac State College (PSC) campus, an integrated division of Respondent that is located in Keyser, West Virginia. Respondent successfully submitted a Labor Condition Application (LCA) for Complainant's employment with the Department of Labor (Department). Respondent renewed the LCA twice.

For the first LCA period, lasting from August 16, 2006, to May 15, 2007, the required wage rate was \$3,469.67 per month.<sup>1</sup> For the second period, lasting from May 16, 2007, to May 15, 2010, the required wage rate was \$41,960 per year.<sup>2</sup> WorkForce West Virginia (Workforce), an entity authorized by the Department to issue prevailing wage determinations, provided the wage rates to Respondent.

For the period from May 16, 2010, to May 15, 2013, the required wage rate was \$56,180, as provided by the Department's Foreign Labor Certification Data Center Online Wage Library.<sup>3</sup> On May 14, 2010, Complainant received a 10% raise as a result of his promotion to Assistant Professor. Angela Ray, an Immigration Specialist for Respondent, testified that once her office became aware of the promotion in 2012, she analyzed whether the promotion required an amendment to

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<sup>1</sup> Decision and Order (D. & O.) at 6.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Workforce provided a prevailing wage rate of \$53,520 for this LCA period, but Respondent chose to use the rate provided by the Department to ensure compliance with the H-1B requirements. Hearing Transcript (Tr.) at 32. Respondent also considered the actual wage for Complainant but found that there were no other instructors with similar experience and qualifications at PSC. Respondent's Exhibit B.

the LCA. Though she found the promotion did not warrant an amendment, Ray found that Respondent had not paid the required wage for the third LCA period.<sup>4</sup> Respondent therefore calculated the back pay owed to Complainant and provided him \$9,483 to remedy the pay deficiency on March 30, 2012.

On April 16, 2014, Complainant filed a complaint against Respondent with the Department's Office of the Inspector General (OIG), alleging that it failed to pay him the correct salary. The OIG subsequently referred the complaint to the WHD. On October 8, 2014, Complainant filed a second complaint, which the WHD found to be untimely. However, the WHD determined that the April 2014 complaint was timely and that there was reasonable cause to investigate the allegations.

On October 4, 2016, the Assistant District Director of the WHD concluded that Respondent had paid Complainant the correct wage level and had not committed any violations. Complainant filed objections and requested a hearing with an ALJ. The ALJ held a hearing on March 22, 2021.<sup>5</sup> On June 29, 2021, the ALJ issued a Decision and Order Denying Complainant's Claim for Damages. The ALJ noted that Complainant did not receive his required wage during the third LCA period, but found that Respondent had voluntarily paid what it owed to Complainant after discovering the pay deficiency.<sup>6</sup> The ALJ thus determined that Complainant was not entitled to any additional remedies.<sup>7</sup> The ALJ therefore denied Complainant's complaint.

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<sup>4</sup> Tr. at 28-29. Complainant was receiving a \$50,220.50 salary. D. & O. at 6.

<sup>5</sup> The ALJ had previously dismissed the complaints as untimely, but the Board reversed the decision not to apply equitable tolling to the April 2014 complaint. *Mehra v. West Virginia Univ.*, ARB No. 2017-0058, ALJ No. 2017-LCA-00002, slip op. at 4-5 (ARB Nov. 21, 2019).

<sup>6</sup> D. & O. at 6-7.

<sup>7</sup> *Id.* The ALJ also found that civil monetary penalties were not appropriate. *Id.* at 8.

## JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision.<sup>8</sup> Under the Administrative Procedure Act, the ARB has plenary power to review an ALJ's factual and legal conclusions de novo.<sup>9</sup>

## DISCUSSION

An employer must file an LCA with the Department in order to hire an H-1B nonimmigrant.<sup>10</sup> The LCA stipulates to the Department the wage level the employer guarantees to pay the H-1B worker.<sup>11</sup> Employers are required to pay an H-1B worker the greater of either (1) the prevailing wage rate for the occupational classification in the area of the intended employment<sup>12</sup> or (2) the actual wage rate paid by the employer to all other workers with similar experience and qualifications for the specific employment.<sup>13</sup> If an employer fails to pay an H-1B nonimmigrant the required wage rate, the Administrator of the WHD may assess back wages equal to the difference between the wages paid and the wages that should have been paid.<sup>14</sup>

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<sup>8</sup> 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).

<sup>9</sup> *Lubary v. El Floridita*, ARB No. 2010-0137, 2010-LCA-00020, slip op. at 5 (ARB Apr. 30, 2012).

<sup>10</sup> *Limanseto v. Ganze & Co.*, ARB No. 2011-0068, ALJ No. 2011-LCA-00005, slip op. at 4 (ARB June 6, 2013).

<sup>11</sup> *Id.*

<sup>12</sup> An employer bases the prevailing wage "on the best information available" at the time of filing the LCA and is "not required to use any specific methodology to determine" it. 20 C.F.R. § 655.731(a)(2).

<sup>13</sup> *Wakileh v. Western Kentucky Univ.*, ARB No. 2004-0013, ALJ No. 2003-LCA-00023, slip op. at 2 (ARB Oct. 20, 2004) (citing 8 U.S.C. § 1182(n)(1)(A)). The actual wage is the wage paid to employees at the place of employment that "have substantially the same duties and responsibilities as the H-1B nonimmigrant." 20 C.F.R. § 655.731(a)(1).

<sup>14</sup> 20 C.F.R. § 655.810(a).

While Complainant's briefs are difficult to decipher, Complainant appears to argue on appeal that the prevailing wage for his employment should have been higher than the rate determined by the WHD. Complainant contends that his doctorate degree, which he received in May 2007, required Respondent to pay him a higher wage. He also argues that Respondent should have paid him a wage comparable to the higher salaries of the faculty at Respondent's Morgantown campus. Upon consideration of the parties' briefs on appeal, and having reviewed the evidentiary record as a whole, we conclude that the ALJ did not commit any reversible error in denying Complainant's claim. Accordingly, we summarily **AFFIRM** the ALJ's decision.

**SO ORDERED.**