U.S. Department of Labor

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

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

FRANK'S NURSERY LLC

RESPONDENT.

ARB CASE NOS. 2020-0015
2020-0016

ALJ CASE NO. 2018-TAE-00028

DATE: October 4, 2021

Appearances:

For the Prosecuting Party, Administrator, Wage and Hour Division:
Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Maria Van Buren, Esq., James M. Morlath, Esq.; *U.S. Department of Labor*; Washington, District of Columbia

For the Respondent:
Stephen E. Menn, Esq.; *Law Office of Stephen E. Menn*; Houston, Texas

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

ORDER DENYING RECONSIDERATION

PER CURIAM. This case arises under the H-2A temporary agricultural worker program of the Immigration and Nationality Act (INA), as amended, and the H-2A program's implementing regulations.[1] The Administrator of the United States

[1] *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2014); 8 U.S.C. § 1188 (2000); 20 C.F.R. Part 655, Subpart B (2021); 29 C.F.R. Part 501 (2021).

Department of Labor's Wage and Hour Division (Administrator) found that Respondent Frank's Nursery LLC (Respondent) violated H-2A program requirements by: 1) failing to disclose the existence of a drug screen policy on its H-2A job order;[2] 2) failing to include Respondent's Federal Employee Identification Number (FEIN) on its pay statements;[3] 3) failing to meet the applicable safety and health standards for employer-provided housing;[4] and 4) making impermissible deductions for Social Security and Medicare taxes from the H-2A workers' pay.[5] Respondent requested a hearing and the matter was assigned to the Department of Labor's Office of Administrative Law Judges.

On October 15, 2019, an Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) agreeing with the Administrator that Respondent violated the H-2A program requirements by failing to include its FEIN on its paystubs, failing to meet applicable housing requirements, and making deductions for Social Security and Medicare taxes. However, the ALJ found that Respondent did not violate the H-2A program requirements when it failed to disclose the existence of a drug screen policy in its job order. The Administrator and Respondent filed cross-appeals to the Administrative Review Board (ARB or the Board).

On August 25, 2021, the Board issued a decision in which we concluded that Respondent had committed all four of the foregoing violations with which it had been charged. Accordingly, we ordered Respondent to pay the back wages and CMPs assessed by the Administrator.

On September 2, 2021, Respondent filed a motion seeking reconsideration of our decision. The ARB may reconsider a decision after receiving a motion for reconsideration within a reasonable time of the date on which the decision was issued.[6] The Board will reconsider a decision under limited circumstances, which include: 1) material differences in fact or law from those presented to the Board of which the moving party could not have known through reasonable diligence; 2) new

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2 *See* 20 C.F.R. § 655.121(a)(3).

3 *See* 20 C.F.R. § 655.122(k)(8).

4 *See* 20 C.F.R. § 655.122(d)(1).

5 *See* 20 C.F.R. § 655.122(p).

6 *Onysko v. Utah Dep't of Envt'l Quality*, ARB No. 2019-0042, ALJ Nos. 2017-SDW-00002, 2018-SDW-00003, slip op. at 2 (ARB Feb. 4, 2021) (Order Denying Motion for Reconsideration).

material facts that occurred after the Board's decision; 3) a change in the law after the Board's decision; or 4) a failure to consider material facts presented to the Board before its decision.[7]

Respondent has not established that any of the foregoing circumstances exist in this case. The vast majority of Respondent's motion repeats, often word-for-word, the arguments it previously made in its briefs to the ALJ and the Board. For example, Respondent argues, once again, that: 1) drug screening is not a material condition of employment; 2) drug screening is an unwritten condition that can be fairly read into any employment contract in Texas; 3) the Department of Labor's online guidance and sample paystubs for other statutes prove that Respondent was not required to include its FEIN on paystubs under the INA; 4) the unsanitary conditions in the employee housing were caused by the employees and were not the responsibility of Respondent; 5) any violation of the housing requirements was *de minimis*; 6) the H-2A workers agreed to Social Security and Medicare deductions by failing to claim an exemption from federal income tax on their form W-4s; 7) any violation with respect to deductions was the fault of Respondent's payroll vendor; 8) Respondent did not retain the deductions made for Social Security and Medicare taxes and any deductions were refunded to the workers; and 9) any CMP for the deductions should be reduced because of a "complete lack of wrongdoing" on its part. The Board already considered and rejected each of these arguments, and they do not fall within any of the four limited circumstances under which we will reconsider our decision.[8]

Respondent makes only one additional proffer which it did not previously make to the Board. Respondent points to the fact that the Form ETA-790, which it had to complete as part of the process to hire H-2A workers, included "social security" as a potential deduction an employer might make from workers' wages. Although Respondent does not elaborate on the significance of this evidence, we presume that Respondent believes this renders the deductions it made for Social Security and Medicare taxes permissible. This proffer does not create a basis for the Board to reconsider its decision. The ETA Form-790 is not new or newly discovered evidence; it was available as part of the record below and on appeal. Although

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[7] *Id.* (citing *Wolslagel v. City of Kingman, Ariz.*, ARB No. 2011-0079, ALJ No. 2009-SDW-00007, slip op. at 1 (ARB June 24, 2013) (Order Denying Motion for Reconsideration)).

[8] *See Laquey v. UnitedHealth Grp., Inc.*, ARB No. 2017-0060, ALJ No. 2016-SOX-00002, slip op. at 3 (ARB Jan. 12, 2021) (Order Denying Reconsideration).

Respondent had many opportunities before now to point to, and argue about the significance of, the types of deductions included on the form, it failed to do so.

Accordingly, we **DENY** Respondent's Motion for Reconsideration.

SO ORDERED.