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Issue Date: 17 December 2010

CASE NO.: 2010-TAE-00002

In the Matter of:

GLOBAL HORIZONS, INC. and
MORDECHAI ORIAN,
Respondents.

ORDER ON PARTIAL SUMMARY DECISION

This is an action under the Immigration and Nationality Act, 8 U.S.C. §1188, as amended in the Immigration Reform and Control Act of 1986, 8 U.S.C. §§1101, *et seq*.[1] The Administrator, Wage and Hour Division, alleges ten categories of violations of the applicable implementing regulations, 20 C.F.R. § 655, and seeks $459,257.66 in back wages and $350,800.00 civil money penalties.[2] All violations stem from a clearance order under which Respondent Global Horizons employed over 150 Thai-speaking nonimmigrant farm workers on H-2A visas to pick pineapple in Hawaii from November 15, 2004 to September 15, 2005.

On July 9, 2010, the Administrator filed a motion for partial summary decision addressed to seven of the ten categories of alleged regulatory violations. In support, the Administrator submitted a statement of undisputed facts; the declaration of counsel with eight exhibits (A.Ex. 1-8); the declaration of Investigator Modrakee with twenty-one exhibits (A.Ex. A-U); and the declaration of Assistant District Director Francisco Ocampo.

On August 30, 2010, Global Horizons submitted an opposition brief, along with a response to the Administrator's statement of undisputed facts.[3] The Company offered no evidence of its own. [4] The Administrator filed a reply on September 24, 2010.[5]

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[1] The implementing regulations for this statute are found at 20 C.F.R. Part 655 and 29 C.F.R. Part 501. These regulations were re-numbered after the initiation of the investigation that led to this case. I have cited to the current numbering; the text remains unchanged in pertinent part.

[2] The original determination of the Administrator found violations of eleven regulatory provisions; the order of reference amended this to ten and adjusted the back wages and civil money penalties accordingly. Order of Reference at 2.

[3] In Orders issued April 5, 2010 and May 3, 2010, I granted Respondent Orian's motion to for summary decision. Mr. Orian therefore filed no opposition to the present motion.

[4] The opposition refers to a declaration of Mordechai Orian, but none is attached. *See* R. Opp. at 6.

[5] Our rules do not permit reply briefs without prior leave. 29 C.F.R. §18.6(b). Here, the Administrator did not seek leave. On the other hand, Global Horizons did not object, and the reply is useful and not prejudicial to Global

I will grant the motion in part and deny it in part.

I. Legal Requirements for Summary Decision.

On a motion for summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on its pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

II. Respondent's Cross-Motion or Other Defenses Based on Laches or the Like.

Global Horizons asserts that the Administrator waited over five years to pursue this action. It states that, at this late date, it is essentially defunct and without assets and cannot be expected to defend itself. It argues that the matter is barred by laches, is a denial of due process, or is the result of unfair delay that should preclude any remedy. For this, it relies on a regulatory provision that requires hearings to be set within 60 days after the matter is referred to this Office. *See* 29 C.F.R. § 501.38.[6]

Respondent's argument is without merit. The Wage and Hour Division began the relevant investigation of Global Horizons no later than May 2005, some three months before Global Horizons completed the work in September 2005. Modrakee Decl. ¶ 3. Investigator Modrakee visited the worksite in Hawaii and interviewed workers that same year (2005) and continued the investigation into 2006 with document requests. *Id.* ¶ 4-5; A.Ex. A. Global Horizons thus was on notice even before the workers completed their jobs that it was under investigation. It should have begun preserving documents and preparing its defenses at that time. Even if it neglected its defenses, it was required to preserve its records in any event, as the applicable regulations

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Horizons. For example, the Administrator corrects typographical errors that Respondent noted in its opposition. Under the circumstances, I will allow the reply.

[6] It appears that Global Horizons' assertion is that *the Administrator* took too long to process the case and that this unfairly prejudiced the Company. To the extent that Global Horizons is complaining, not about the Administrator, but that *this Office* did not schedule a trial expeditiously enough, that argument is without foundation. This Office received the reference in November 2009 and set a trial for January 2010. It was Global Horizons that moved on four separate occasions, either independently or jointly with the Administrator, for continuances. I granted each motion, most recently resetting the trial to begin on January 10, 2011, nearly a year after I first noticed it. The time that the matter has been pending in this Office resulted from requests that Global Horizons made, not from anything it opposed or to which it objected.

require employers to preserve records related to a clearance order until three years from the date of the certification.[7]

And that didn't end Global Horizons' recordkeeping obligations. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 118 (S.D.N.Y. 2003); *see Kronisch v. United States*, 150 F.3d 112, 126-27 (2d Cir. 1998) (the "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation . . . . [or] when a party should have known that the evidence may be relevant to future litigation"); *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Here, Global Horizons received notice on September 8, 2008, that that the Wage and Hour Division had concluded its investigation and found violations. A.Ex. 2. From September 8, 2008 onward, Global Horizons thus was under a continuing duty to preserve all records relevant to the potential litigation. Arguably this duty attached earlier, when the Department notified the Company of the investigation in 2005.

If Global Horizons did not see to its defenses and maintain its documents, it must look to itself for its failures, not blame them on the Administrator. Its arguments based on laches and the like are without merit.[8] Three years is a long time to complete an investigation and issue findings, but there is no proof of unfair prejudice to Global Horizons.

III. Factual Disputes

The Administrator submitted a detailed statement of 63 allegedly undisputed material facts. It cites for each fact to evidence on the record. Global Horizons raises objects to portions of the record evidence: paragraph 23 of the Modrakee declaration and Administrator's Exhibits J, K, M, and O. I discuss those objections in the relevant substantive sections below. I will find that I need not reach the objection to paragraph 23 of the Modrakee declaration because I am denying that portion of the Administrator's motion for other reasons. I will overrule the remaining objections and admit those exhibits. I admit the remainder of the Administrator's proffered evidence without objection.

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[7] As the regulation provides: "The employer shall retain the records for not less than 3 years from the date of the certification." 20 C.F.R. § 655.122(j)(4).

[8] It appears that at least in some instances Global Horizons would rely on this argument to explain why it is unable to dispute some of the Administrator's proof at this time. Of the 63 alleged undisputed facts on which the Administrator relies, Global Horizons expressly concedes 39. It responds to six as "neither admit nor deny" (Facts 11, 13, 25, 26, 56 and 62); to two as "unable to admit or deny" (Facts 17 and 31); and to six as "unable to determine" (Facts 28, 31, 36, 42, 43, 48 and 49).

I reject these "neither admit nor deny" responses as inadequate to bring the asserted facts into dispute. Global Horizons cannot rely on pleadings alone at this stage, and to the extent that it is relying on the same argument as it asserted on laches, I reject it for the same reasons: it should have maintained its documents and prepared its defenses. Moreover, most of the documentation on which the Administrator relies are simply Global Horizons' own records; Global Horizons therefore has copies – through the Administrator – of many of the records it says it can't find.

Looking to the Administrator's list of 63 facts that it argues are undisputed, Global Horizons either concedes or does not dispute any but Facts 9, 10, 51, 52, 57, 59, 60 and 63. It does, however, assert that what the Administrator lists as Facts 39, 45, 51, and 60 are argument, not facts. I will discuss most of these contentions as I decide the separate alleged violations below. For the moment, I will address Facts 9, 52, and 57 in the margin and find them undisputed after the correction of typographical errors in the Administrator's opening papers.[9]

IV. Violations Alleged by Administrator

A. Improper Payroll Deductions for Damages to Housing

Liability. The Administrator asserts that certain deductions Global Horizons took from workers' paychecks for damage to their housing were improper because, to the extent the damage occurred, it was under a different clearance order. Employers must provide, without charge, housing to workers who "are not reasonably able to return to their residence within the same day" but may "require workers to reimburse them for damage caused to housing by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation." *See* 20 C.F.R. §§ 655.122(d)(1), (d)(3).

While the regulations do not specify whether an employer may require reimbursement on one labor contract for damage to housing during work on a different contract, the regulations do require that, "The job offer shall specify all deductions, not required by law, which the employer will make from the worker's paycheck." 20 C.F.R. § 655.202(b)(13).[10] A deduction for damages to housing is not legally *required*; rather, it is an action that the employer is *permitted* to do. Disclosure in the offer of employment therefore is required if the employer is going to exercise that right.

Here, the job offer stated nothing to alert workers that, if they took the job, they would be required to reimburse Global Horizons for damages to housing during their work *during a different period of employment.* The offer stated: "The employer will make the following deductions: . . . repayment of loans (if any); recovery of any loss to the employer due to damage (beyond normal wear and tear) or loss of equipment, housing or furnishings caused by the worker (if any); and deductions expressly authorized by the worker in writing (if any)." A.Ex. C at 9. Fairly read, the language in the offer refers to the terms and conditions of the *offered*

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[9] Fact 9 is undisputed on the record. In the reply papers, the Administrator corrected an incorrect citation; looking to the correct citation, the Fact is substantiated. See A.'s Resp. to R.'s Stmt. of Contested Facts ¶ 9; A.Ex. C at 14.

Fact 52 is undisputed as corrected. The Administrator stated that the determination letter found that Respondent owed $60,193.32 in back wages for failure to pay the proper wage rate to cooks, shuttle bus drivers, and a mechanic. *Id.* at 28-29. The determination letter actually differs slightly. There is no dispute that the amount stated in the letter is $60,257.90. *Id*. at 29.

There is also a typographical error to which Global Horizons refers on Fact 57, but this goes to a citation to law, not to a fact. The Administrator incorrectly cited a regulation concerning income tax withholding but acknowledged and corrected this in the reply. *Id*. at 31.

[10] "In the absence of a separate written work contract incorporating the required terms and conditions of employment . . ., the work contract at a minimum will be the terms of the job order . . . ." 20 C.F.R. §655.103(b).

employment, not some previous employment, and cannot extend to a recovery of loss from damage to housing during an earlier employment.

Respondent offers nothing to the contrary. *See* R. Opp. at 7-8. Rather, Global Horizon's chief executive officer, Mordechai Orian conceded the Administrator's contentions at his deposition:[11]

> Q: Was it Global's understanding that it could deduct from the H-2A earnings the cost of any damage caused by the worker to housing or furnishings that the worker occupied while they were at Maui Pineapple?
>
> A: If it's malicious damage, yes.
>
> Q: So damage that's, as stated here, "beyond normal wear and tear"?
>
> A: Yes.
>
> Q: And was it Global's understanding that that damage had to be done to furnishings or equipment specifically at Maui Pineapple housing?
>
> A: Of course, related to that contract.
>
> Q: So it was Global's understanding that it could deduct from the H-2A workers' earnings the cost of any damage caused to any furnishings or housing that the worker occupied under another contract?
>
> A: No. Every clearance is specific to that clearance order.

A.Ex. 8 at 67-68.

I therefore find Global Horizons liable on this claim.

Back wages. Global Horizons admits that, as to 73 workers, it deducted $75 each for damage to housing that occurred during work on a different work contract. R. Stmt. Contested Facts ¶ 12. It raises no objections to the payroll records that the Administrator placed on the record. *Id.* ¶¶ 13-14; R's Opp. 7-8. Accordingly, I find that the undisputed evidence on the record shows that Respondent improperly deducted a total of $5,475 ($75 times 73 workers) from the paychecks of 73 workers for damage allegedly done to housing under a different work contract. The Administrator is entitled to summary decision in this amount.

Civil money penalties. The Administrator may assess a civil money penalty of up to $1,000 for each violation of the regulations governing H-2A work contracts, consistent with a non-exhaustive list of seven factors. 29 C.F.R. §§ 501.19, 501.19(b). On appeal to this forum, an

[11] Although Global Horizons disputes the Administrator's characterization of Mr. Orian's testimony (*see* Fact 10), there is no dispute about what that testimony was.

administrative law judge may "affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator." 29 C.F.R. § 501.41(b).

Global Horizons argues that it is inappropriate to award penalties on summary decision. It contends that awards of penalties "necessarily involve the Court's weighing of certain evidentiary factors," and that such weighing is not permitted on summary decision. *Id.* This argument is without merit.

Reaching determinations through the weighing of undisputed facts as a matter of law is appropriate on summary decision. *See Cyberworld Enterprise Technologies, Inc. v. Administrator, Wage & Hour Division*, ARB No. 04-049, ALJ No. 2003-LCA-00017, 2006 WL 2205227 (ARB May 24, 2006) (affirming award of penalties on summary decision in an H-1B visa case); *In re Secretary of Labor v. A-One Medical Services,* ARB No. 02-067, ALJ No. 2001-FLS-00027, 2004 WL 2205227 at *5 (ARB Sept. 23, 2004) (same; willful violation under the Fair Labor Standards Act); *see also, Noriega-Perez v. United States,* 179 F.3d 1166 (9th Cir. 1999) (affirming ALJ's imposition on motion of civil money penalties in an immigration case).[12] Were Global Horizons to raise a genuine dispute as to a fact relevant to one of the seven factors that guide the setting of penalties, that would defeat summary decision. Failing that, however, summary decision is proper: there is no factual dispute to be resolved at a trial, and I will apply the legally mandated factors on summary decision exactly as I would on a decision following any trial.[13]

The factors that "may be considered [when assessing penalties] include, but are not limited to, the following:

1. Previous history of violation or violations of the H-2A provisions of the Act and these regulations;
2. The number of workers affected by the violation or violations;
3. The gravity of the violation or violations;
4. Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;
5. Explanation of person charged with the violation or violations;
6. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provision of the Act;
7. The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers."

29 C.F.R, § 501.19(b).

[12] The question is an easier one in non-jury cases such as this: The same judge would weigh the same undisputed facts after trial as before.

[13] Global Horizons misplaces its reliance on an unpublished magistrate judge's recommended, but not adopted, decision in a district court case, *United States v. Pacific Northwest Electric, Inc*., 2003 WL 24573548 (D. Idaho Mar. 21, 2003) (Fair Housing Act). The district court there found only that penalties were time-barred, nothing more. *Id.* at *3-10.

On the issue of the payroll deduction for damage to housing during a different contract period, the Administrator argues that a penalty should be assessed, and that it should be set at $200 for each of the 73 affected workers, for a total of $14,600. *See* Ocampo Decl. ¶ 5. Considering the factors, I find the Administrator is not entitled to summary decision for penalties in that amount.

Although the Administrator contends that Global Horizons has a history of H-2A violations, it points only to previous allegations, not to any final decisions with findings of violations and certainly none adjudicated prior to Global Horizons' conduct in the present case in 2005.[14] *See* Ocampo Decl. ¶ 5 n.1.

The violation affected a considerable number of workers (nearly half of those hired under the contract) but not to a monetary extent that I consider grave. The contract was for work over ten months at about $400 per week. For a worker who worked throughout the contract, earnings would be somewhat over $17,000. It could well be that some of the 73 affected workers earned somewhat less than $17,000, but regardless, a $75 charge, while not *de minimis*, is not grave.

It appears, and I conclude, that Mr. Orian knew the deductions would be proper only if they were for damage done during the current contract. But the Administrator doesn't show that Mr. Orian knew that these deductions were made or that they were made for damage done during a prior contract. Nor does the Administrator show that the person who made the deductions knew they were improper. The Administrator has not established for purposes of this motion that Global Horizons lacked good faith when it made these deductions.

I reject the Administrator's contention that Global Horizons' refusal to participate in a final conference with Investigator Modrakee shows recalcitrance about future compliance. *See* Modrakee Decl. ¶ 34; A.Ex. T. To be sure, Global Horizons missed an opportunity at which it might have given assurances of future compliance, but that falls short of recalcitrance.

Finally, the Administrator offers nothing to show that the workers who sustained the payroll deductions had not damaged Global Horizons' property, or had not damaged it to the extent of $75. It appears highly suspect that 73 different people would each damage their housing to the exact same extent, but the Administrator offers no proof at this stage to the contrary.[15] I am left to conclude for purposes of this motion that Global Horizons was not unjustly enriched in the sense of a windfall, but rather that it collected only enough to come within the regulatory allowance of requiring workers to pay for damage, except that the damage was something these workers did during an earlier period of employment.

[14] Mr. Ocampo cites to six cases: 2005-TAE-00001 (case still pending), 2005-TLC-00001 (Respondent withdrew appeal of denial of a H2-A clearance order); 2008-TAE-00003 (case decided against Respondent, but as a sanction for failure to comply with discovery, not as a decision on the merits); 2005-TAE-00013 (I could find no such case); 2005-LI-0056 (I could find no such case); 2005-ES-0001 (I could find no such case). (The last three of these appear to be before state agencies in California or Washington State.)

[15] As often happens in landlord/tenant disputes, there might be a question whether the "damage" was wear and tear and thus not collectible under the regulation. The parties do not address that question on the present motion.

This cannot justify a penalty more than three times as much as the total amount of money involved; it scarcely justifies a penalty at all. If the parties offer no further evidence on this point at trial, I will assess a penalty on this allegation of $2,500 following trial.

B. Improper Payroll Deductions for Meals

Liability. "The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals." 20 C.F.R. § 655.122(g). "Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. . . ." *Id.*[16]

Here, as Global Horizons does not dispute, the clearance order stated that the employees would buy their own food (which, of course, requires Global Horizons to provide cooking and kitchen facilities). A.Ex. C. Nonetheless, as again Global Horizons does not dispute, it deducted for food $42 per week from 124 workers.[17] Modrakee Decl. ¶ 15-16; A.Exs. B, F.

Rather than dispute these facts, Global Horizons cites evidence that the workers authorized the meal deductions in writing, A.Ex. 8 at 131-33, and that in the job offer it stated: "The employer will make the following deductions: . . . deductions expressly authorized by the worker in writing (if any)." A.Ex. C at 9.

I find that the offer letter's general provision that the employer will make deductions that workers expressly authorize in writing is insufficient to circumvent the regulatory requirement that any deduction for meals be specifically stated in the offer letter. The purpose of the disclosure is to allow the regulating federal agencies to assure that foreign workers are not being brought into the country to do work at wages below the prevailing wage that would be paid to U.S. citizens and others living in this country with the right to work here. *See generally* 20 C.F.R. § 655.103(a) (ensure that U.S. workers are not adversely effected); *see also,* 20 C.F.R. §655.122(a) (preferential treatment of aliens prohibited). If workers agree to meal prices that afford a profit to the employer, the effect is the same as if the employer paid below-market wages.

A private agreement between employers and foreign workers does nothing to assure that opportunities are preserved for American workers; that is the job of the regulatory agencies, and for that reason the meal charges must be disclosed to those agencies. Allowing the regulatory agencies to know of the amount of meal charges also allows the government to protect the foreign workers against exploitation. The workers' written assent to the deduction therefore is irrelevant to liability, and the Company is liable for the violation.

[16] "The amount of meal charges is governed by [20 C.F.R.] §655.173." 20 C.F.R. §655.122(g).

[17] Global Horizons' statement that it doesn't know if the correct number of workers involved was 124 is insufficient to raise a genuine issue of material fact on summary decision. Although Global Horizons argues that "the Administrator has not proven that Global deducted over $100,000 for food," it offers no evidence to the contrary. The payroll records support the Administrator's contention.

Back wages. The Administrator submits extensive payroll records, a spreadsheet showing calculations, and the declaration of Investigator Modrakee to show that the improper meal deductions totaled $109,218.00. Modrakee Decl. ¶ 15-16; A.Ex. B, F. Respondent does not dispute the payroll records or the calculations based on them from which the Administrator derived this figure. The Administrator therefore is entitled to summary decision that Global Horizons must pay $109,218.00 in back wages for improper meal deductions.

Penalties. The Administrator moves for assessment on summary decision of $24,800 in civil money penalties for the improper meal deduction, which amounts to $200 per affected worker. Ocampo Decl. ¶ 6. The Administrator argues: (1) 79% of workers were affected; (2) $42 per week represented a "significant portion" of the workers' earnings (of $400 per week); (3) Respondent failed to disclose the deductions in the clearance order, suggesting bad faith; (4) Respondent didn't submit the alleged written authorizations from the workers; and (5) Global Horizons gained $109,218 as a result of the conduct.[18] *Id.*

Through Mr. Orian's testimony, Global Horizons offers evidence that it was acting at the workers' request and in good faith. *See* A.Ex. 8 at 129-37. According to Mr. Orian, Respondent began the meal deductions only after a group of workers proposed that the workers pool their resources to buy food for communally prepared meals. *Id.* They felt this would be less expensive and would save time for the workers. *Id.* Mr. Orian testified that Global Horizons gave the workers a choice whether to participate, and the workers themselves selected the four cooks. *Id.* As noted above, he said each worker who chose to participate signed an authorization for payroll deductions written in Thai. *Id.*

Taking these statements as true, as I must on a motion for summary decision, I find that the Administrator has failed to offer sufficient undisputed evidence to support the imposition of civil money penalties on the meal deduction allegation. Although the Company's practice is inconsistent with the Congressional framework and cannot be excused, there is no indication that the Company in fact exploited the workers (or gained an advantage by hiring them rather than U.S. workers) by overcharging for meals. Providing cooked food for $42 per week is hardly excessive, especially with Hawaii's high cost of living. The fact that the workers requested the program and agreed to it individually and in writing is inconsistent with any finding of a lack of good faith, especially given the price. Most important is that Global Horizons will have to refund the full amount that it collected, despite having paid for the food and the cost of preparing it; the Administrator's contention notwithstanding, nothing on the record shows that Global Horizons profited[19] from the preparation and sale of the food.[20] If the parties offer nothing further at trial, I will deny penalties on this portion of the claim.

[18] Administrator also cites the same past violations and lack of commitment to future compliance discussed above on the housing damage deductions. I disregard these for the same reasons as before.

[19] A deduction is *per se* unreasonable and thus unlawful if the employer profits by it. *See* 20 C.F.R. §122(p)(1, 2).

[20] The Administrator goes too far in the contention that Global Horizon's failure to disclose the meal charges on the application establishes bad faith. What appears to have initiated the practice was a request from the workers, and that came after the application had been approved and the workers started working.

C. Failure to Offer Sufficient Hours of Work

> The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

20 C.F.R. 655.122(i)(1). A "workday" is "the number of hours . . . stated in the job order and excludes worker's Sabbath and Federal holidays." *Id.* If "the employer affords the . . . worker less employment than that required . . ., the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days." *Id.*

Here, the Administrator alleges that Respondent failed to meet this requirement for 22 workers. Modrakee Decl. ¶¶ 17-18; A.Ex. B; A.Ex. G; *see* R. Stmt. Contested Facts ¶¶ 24-27. Global Horizons refers to its inability to find its documents but raises no dispute with the sufficiency of Administrator's evidence or calculations of the wages owed. The undisputed evidence shows that Respondent owes these 22 workers a total of $81,668.79 in back wages, in the amounts identified by the Administrator in Exhibit G. Thus, I grant Administrator's motion for summary decision as to this count.

On this allegation, the Administrator seeks summary decision that Global Horizons must pay $10,500 in civil money penalties, which is $500 for each of the twenty-two affected workers. Ocampo Decl. ¶ 7. The Administrator argues: (1) the violation affected 14% of the workers; (2) violations of this sort are serious in light of the purpose of the Act because they make the position less appealing and discourage U.S. workers from applying; (3) Respondent acted in bad faith, as it stated in its clearance order that it would comply with the three-fourths requirement; (4) Respondent has offered no explanation of its violation; and (5) Respondent realized significant financial gain as a result of its violation.[21] *Id.*

I find especially troubling Global Horizon's lack of explanation for neither supplying sufficient work nor paying wages for the guaranteed minimum number of workdays. The Administrator is correct that this results in Global Horizon's enrichment at the expense of these workers. When an employer asks to bring foreign workers into the country, one of the risks it takes is that it will find insufficient work for those whom it hires. This has the salutary effect of discouraging unnecessary reliance on foreign labor. I conclude that the Administrator is entitled to summary decision on this point, and Global Horizons must pay an additional $10,500 in civil money penalties for this violation.

[21] On this and each of the other claims discussed below, the Administrator again advanced the unfounded arguments about past violations and lack of commitment to future compliance discussed in the text above. I reject these arguments in each instance.

D. Recordkeeping Violations

An employer must keep records to show when each worker "began and ended each workday." 20 C.F.R. § 655.122(j)(71). The employer must also "furnish to the worker on or before each payday" written statements showing, among other information, "the hours of employment offered to the worker . . . ." 20 C.F.R. § 655.122(k)(3, 4). The Administrator alleges that Global Horizons violated both of these requirements.

In support, the Administrator offers a review of the records it received from Respondent, which should have but do not include this information, and the Declarations of Modrakee and counsel stating that they received no other relevant records from Respondents. A.Ex. B (payroll register); A.Ex. C (clearance order); A.Ex. H (Respondent's spreadsheet identifying all hours worked by all workers); A.Ex. I (earnings statements Respondent provided to workers); Modrakee Decl. ¶¶ 9-10; Darling Decl. ¶¶ 3-4.

Other than its continuing assertion that it can no longer find its records (a defense that I rejected above), Global Horizons offers nothing to bring into question the inference that it failed to comply with these two recordkeeping requirements. The Administrator has therefore established the violations.

On the other hand, the Administrator does not assert that Global Horizon failed to comply with any of the numerous other related recordkeeping requirements, such as providing a pay stub showing the worker's total earnings and hours worked for the pay period, hourly rate (or piece rate), an itemization of deductions, the beginning and ending dates of the pay period, and the employer's name, address, and federal employer identification number. Nor does the Administrator contend that Global Horizons failed to maintain accurate and adequate summary payroll records; records showing the nature and amount of work done; the pay rates; the workers' hours worked per day; the workers' earnings per day; the amount of any deductions taken from the pay; and certain other required records.

The Administrator's evidence, in the absence of any evidence to the contrary, is sufficient to support an inference that Global Horizons failed to maintain records that show the time of day that each worker started and stopped working and failed to supply the workers with a written statement each pay period of the hours of work it offered them. The Administrator is entitled to summary decision on the point.

The Administrator seeks on summary decision an order that Global Horizons pay a civil money penalty of $78,000, which is $500 for each of the 156 affected workers. Ocampo Decl. ¶¶ 8-9. *Id.* ¶ 9. The Administrator states that all workers were affected and that Global Horizons offered no explanation for the failures. More important, the Administrator views the violations as severe because, without accurate records, it is difficult to determine what the workers are lawfully owed or how much Global Horizons might have profited through its compliance failures.

Although the Administrator's contentions are correct, they neglect Global Horizons' overall general compliance with its recordkeeping obligations. And, as I've found on the Administrator's other claims, the records that Global Horizons did keep in fact were adequate for

the Administrator to make out undisputed showings of several violations. The amount of penalties sought cannot be justified on this record, and summary decision on penalties for these violations is denied. Following trial, I will be unlikely to impose penalties absent a showing of actual harm to the H-2A program or to the workers involved.

E. Improper Wage Rates for Cooks, Mechanic and Drivers

In the H-2A program, an employer must pay the highest of the adverse effect wage rate, the prevailing wage, the agreed-upon collective bargaining rate, and the federal or state minimum wage. 20 C.F.R. § 655.122(l). The Administrator identifies seven employees – four who worked as cooks, one who worked as a mechanic, and two who worked as shuttle bus drivers – whom the Administrator alleges were improperly paid the adverse effect wage rate for agricultural laborers rather than for the respective job each did. *Id.*

Respondent acknowledges that the identified individuals performed work as cooks, mechanics and shuttle bus drivers as the Administrator contends. R's Stmt. Contested Facts ¶¶ 35, 41, 47. It also admits that these workers were paid the adverse effect wage rate for agricultural workers. *Id.* ¶¶ 33, 38, 44, 50.

The Administrator offers evidence of the adverse effect wage rate for each of these jobs.[22] *See* Facts 43, 49, A.Ex. K. Respondent offers nothing to dispute this evidence other than to object that the Administrator's evidence fails to show whether it "pertains to the relevant time frame." On the contrary, the Administrator's evidence, Exhibit K, expressly states that the adverse effect wage rates listed were adopted on September 27, 2004, which is shortly before the start of the work contract at issue. Respondent's objection is overruled, and the wage rates are established as undisputed.

Finally, Respondent objects to the Administrator's reliance on payroll records to show the amount of unpaid wages, allegedly disputing Facts 39, 45 and 51.[23] But Respondent does not object to the authenticity or accuracy of the payroll records; it merely argues that the calculation of unpaid wages is incorrect because, in its view, the Administrator has failed to show that these workers are entitled to more than agricultural workers. This is insufficient to place the facts into dispute. It is also legally deficient to avoid an order to pay back wages.

In particular, Respondent argues that it was not required to pay the identified workers the adverse effect wage rate for cooks, mechanics, or drivers because the work they performed was

[22] On the cook job, the Administrator characterized the job as a Cook II within the definition of the Directory of Occupations, and used a wage rate appropriate to that job in the calculations. Respondent objects that the cooks should be in the Cook I category. R. Opp. 11. But, as the Administrator correctly argues, the job duties here involved cooking for more than 150 people, three meals per day, six days per week, and this more closely fits the definition of a Cook II. A Cook I performs "moderately difficult tasks in preparing small quantities of quickly prepared food." A.Ex. J.

[23] Global Horizons also objects to the evidence underlying Facts 36, 42, and 48. It challenges the authenticity of job descriptions the Administrator excerpted from the DOL Service Contract Act Directory of Occupations. I have taken official notice of the Directory, compared the excerpts with the Directory, and found them true and correct. The objections are overruled.

"incidental to and integral to agricultural work." R. Opp. 11. This neglects the Act's core concern to ensure that the program doesn't depress the wages of U.S. workers. *See supra.* This is reflected in the regulatory requirement that the employer pay the *highest* comparative wage. *See* 20 C.F.R. § 655.122(l). Agricultural work doesn't require the skills necessary for the work of cooks, mechanics, or drivers; that's why those jobs pay more. Moreover, the work of cooking for over 150 people, three meals per day, six days per week is not a mere incidental related to some other job.

Respondent raises no objections to Administrator's summary of the payroll records or to the calculations used to determine back wages. *See* Modrakee Decl. ¶¶ 21-27; Ex. B; Exs. J-P. I therefore find that Respondent owes a total of $56,047.56 in back wages to the cooks, $2,442.00 in back wages to the mechanic, and $775.50 to the drivers, as set forth in Administrator's calculations.

On these violations, the Administrator seeks summary decision for a civil money penalty of $500 for each affected worker, Ocampo Decl. ¶ 10, and gives evidence of seven affected workers. The Administrator argues that the failure to pay correct wages provided a significant financial gain to Respondent, given the relatively small number of workers involved. Ocampo Decl. ¶ 10. As the Administrator argues, wages for U.S. workers are likely to be adversely affected, "if employers are permitted to pay H-2A workers far less than the local prevailing wage rate for the type of work performed." *Id.*

Given the significant financial windfall to Global Horizons, the obviousness of the underpayment of wages, the inadequacy of the Company's explanation that the work was merely incidental to agricultural work, and the negative impact on the program's core concerns, I readily allow the Administrator's request for summary decision on this point in the sought amount of $500 per worker, for a total of $3,500.

F. Improperly Deducted Federal Income Tax

The Administrator contends that Respondent improperly withheld federal income tax from the workers' paychecks in violation of 20 C.F.R. § 655.122(p)(1) and the relevant provisions of the Internal Revenue Code, *citing,* I.R.C. § 3121(b)(1) and Treas. Reg. § 1.1441-4(b)(1)(ii). Respondent does not deny that it withheld the tax in the amounts the Administrator asserts or that the withholding was improper under the applicable tax laws. R. Opp. at 12; R.'s Stmt. Contested Facts ¶¶ 54-57. Rather, it argues that it deducted the tax on the advice of federal tax authorities, and that it both forwarded the withheld taxes to the IRS, and also repaid the improperly deducted taxes back to the workers. R. Opp. at 12.

In support, however, Respondent offers no proof of its own. The Administrator concedes that Mr. Orian testified at a deposition that Global Horizons withheld the taxes on the advice of an IRS employee. *See* Ocampo Decl. ¶11(e). But there is no evidence on the record that Global Horizons returned the withheld funds to the employees. At summary judgment, an evidentiary showing is required. Respondent's reliance on an IRS employee's advice is relevant to penalties, but not to liability, and Respondent makes no other evidentiary showing. I therefore find that the Administrator has established, based on undisputed facts, that Global Horizons improperly

withheld from the workers' pay $77,163.36 in federal income taxes. The Administrator is entitled to summary decision in that amount.

The Administrator also seeks on this motion $200 in penalties for each of the 142 affected workers, for a total of $28,400. For purposes of this motion, I must assume that the Company withheld the taxes on the advice of an IRS official. Looking to the factors for assessing penalties, including the employer's explanation, indications of good faith, and any history of similar violations, the penalty sought is excessive on this record. Summary decision on penalties is denied.

G. Failure to Pay Required Overtime Compensation

The final claim on which Administrator moves for summary decision is a failure to pay required overtime compensation, in violation of 20 C.F.R. § 655.103(b) and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, *et seq.*, 203(e), and Hawaii's wage and hour law, HAW. REV. STAT. § 387-3(a). Section 655.135(e) requires that H-2A employers comply with all applicable laws. The FLSA and Hawaii's wage and hour law require the payment of overtime for the cooks and agricultural workers, respectively.[24]

The Administrator relies on Respondent's payroll records, the declaration of Investigator Modrakee, and the investigator's summary of her calculations. A.Ex. B; Modrakee Decl. ¶¶ 22-23, 30-31; A.Ex. R.

Respondent objects that the Administrator's evidence is inadmissible hearsay: Investigator Modrakee's recitation of information learned in interviews with the cooks to determine their hours worked per week.[25] R. Opp. 12-13. This argument, however, fails as to the agricultural workers because the Administrator relies only on Respondent's payroll records for those workers. *See* Modrakee Decl. ¶¶ 32-33.

As to the agricultural workers, Respondent raises no other objections to the Administrator's evidence, calculations, or total back wages owed. R. Opp. 12-13. The Administrator's evidence is substantial and undisputed, and I therefore grant Administrator's motion for summary decision as to the agricultural workers, and find that Respondent owes $98,720.43 in unpaid overtime to them.

As to the cooks, the Administrator does rely on interviews of the workers to establish work hours. Global Horizons states that it requested copies of the interview notes during discovery, and the Administrator refused to produce them based on an asserted "informant's privilege."[26]

[24] Hawaii's overtime law permits modification of the overtime requirements for certain agricultural employers for up to twenty work weeks in each year if the employer designates the particular weeks. Global Horizons doesn't assert that this is relevant here or that it designated any weeks under Hawaii law.

[25] Respondent also objects to the overtime calculations for the cooks inasmuch as they are based on the Cook II AEWR rather than the agricultural rate. This argument is without merit, as discussed above in section IV.5.

[26] The Administrator states that he produced a redacted version of the investigator's notes, but the redactions are not on the record for consideration.

Global Horizons did not move to compel, but generally, when a party relies on a summary of records in lieu of producing the records themselves, it must make the records available to other parties for examination and photocopying, and the judge may order that they be produced at the hearing. *See* 29 C.F.R. §1006.[27]

Here, the Administrator did not put the investigator's interview notes on the record; only the investigator's summary is offered. Were I to grant summary decision, it would preclude an order requiring the production of the underlying investigator's notes at the hearing, a production to which Global Horizons might be entitled. The parties have not briefed the "informant's privilege," and I make no ruling about it. Nor do I rule on whether the Administrator may offer evidence indirectly when it has asserted privilege on the underlying documents during discovery.[28]

Rather, I will deny summary decision as to the cooks for other reasons: The Administrator concedes that there are discrepancies between Respondent's payroll records and the information obtained from the cooks about the number of hours they worked. A.'s Stmt. Uncontested Facts ¶58-59; Modrakee Decl. ¶ 23. After a trial, I might or might not accept the investigator's reports of the cooks' hearsay statements, but on the present record the facts are in dispute, and summary decision as to the cooks therefore is denied.

The Administrator seeks penalties on summary decision calculated at $500 per affected worker, which would amount to $77,000 for the 154 agricultural workers.[29] Modrakee Decl. ¶ 33. The Administrator relies on the large number of workers affected, the significant loss of wages to the workers, the fact that Respondent offered no explanation for its failure, and the significant financial gain to Respondent. Ocampo Decl. ¶ 12. All of these factors support the imposition of the amount sought, and I grant summary decision on the Administrator's claim that $77,000 in penalties should be imposed for the failure to pay overtime to the agricultural workers.[30]

Order

For the reasons stated above, the Administrator's motion for partial summary decision is GRANTED in part and DENIED in part. The motion is GRANTED as to the following:

[27] Our general rules of evidence apply. *See* 29 C.F.R. §501.34, incorporating 29 C.F.R. Part 18 for these purposes.

[28] Global Horizons objects that the investigator's summary is hearsay. *See* 29 C.F.R. §§18.801, *et seq.* The exceptions for records of regularly conducted activity, for public records and reports, or other exceptions might well apply. *See, e.g.*, 29 C.F.R. §18.803(a)(6, 8). To the extent that the cooks are no longer in the country and are unavailable, an exception might apply because their statements were made to a federal investigator with attendant criminal sanctions for false statements. *See* 29 C.F.R. §18.804(b)(1, 5). But, as I will find the Administrator's showing as to the cooks insufficient, I do not reach the question.

[29] This number (154) apparently includes some of the cooks as well, but for hours they worked as agricultural laborers. *Compare* A.Ex. S (calculations for affected cooks) *with* A.Ex. R (calculations for affected agricultural workers).

[30] As I have denied summary decision on the alleged failure to pay overtime to the cooks, the predicate for penalties as to the cooks is lacking, and the motion is denied in that regard as well.

1. For the improper payroll deduction for damage to housing, Global Horizons will pay $5,475 in back wages.

2. For the improper payroll deduction for meals, Global Horizons will pay back wages of $109,218.

3. For the failure to offer sufficient hours of work, Global Horizons will pay back wages of $81,668.79 and a civil money penalty of $10,500.

4. On the recordkeeping allegation, I find Global Horizons liable and GRANT summary decision.

5. For paying cooks, a mechanic, and drivers at deficient wage rates, Global Horizon will pay $56,047.56 to the cooks, $2,442 to the mechanic, and $775.50 to the drivers. Global Horizons will also pay a civil money penalty of $3,500.

6. For the improper withholding of income taxes, Global Horizons will pay $77,163.36 in back wages.

7. For the failure to pay overtime to the agricultural workers, Global Horizons will pay back wages of $98,720.43 and a civil money penalty of $77,000.

In all other respects, the Administrator's motion for partial summary decision is DENIED. All parties may offer evidence and argument at trial as to all claims and issues other than those on which I have granted relief above in the present motion. On the claims on which I denied the motion as to civil money penalties, the denial is without prejudice to the Administrator's seeking such remedies at trial.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge