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Issue Date: 09 November 2016

BALCA Case No.: 2015-TAE-00014

In the Matter of:

JOE GOMEZ, JR. D/B/A
TEJAS WORKFORCE CONNECTION,
Respondent

BEFORE: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER GRANTING THE ADMINISTRATOR'S MOTION FOR SUMMARY DECISION

This proceeding arises under the Immigration and Naturalization Act, as Amended by the Immigration and Reform control Act. 8 U.S.C. § 110(a)(15)(H)(ii)(a) (hereinafter the "Act"), and the implementing regulations found at 29 C.F.R. Parts 501 and 502 for final administrative determination of violations and assessment of civil money penalties under the Act. The Administrator asserts that Respondent violated the three-fourths guarantee in violation of 20 C.F.R. § 655.122 and asserts unpaid wages and civil money penalties are owed.

By written notice issued February 3, 2015, unpaid wages in the total amount of $56,631.84 and civil money penalties in the total amount of $17,550 were assessed against Respondent for violations of the Act and the applicable regulations. Respondent, through counsel, made a timely written request for hearing by letter dated March 26, 2015. On September 9, 2015, the Administrator submitted an Order of Reference in the case. The case was set for hearing on December 15, 2015. At the request of the Parties, the hearing was continued so the Parties could complete discovery and submit motions for summary decision. On January 12, 2016, the Court granted David Warner's Motion to Withdraw as counsel for Respondent. On July 21, 2016, the Administrator filed a Motion for Summary Decision. On August 2, 2016, the Court issued an Order to Show Cause requiring Respondent to file a response to the Motion for Summary Decision no later than August 26, 2016. On August 8, 2016, Respondent requested, and was granted, a 45-day extension to file a response to the Motion for Summary Decision. On October 4, 2016, a conference call was held to discuss the pending motion and response. Respondent stated he would not be filing a response to the Motion for Summary Decision but later called back, indicating he may do so within the next few days. On October 14, 2016, the Court received Respondent's Response to Summary Decision. On October 20, 2016, the Administrator filed a Reply and a Motion to Strike Respondent's Response as being late. The Motion to Strike Respondent's Response is hereby **DENIED.**

SUMMARY JUDGMENT STANDARD

An administrative law judge may enter summary decision for either party on an issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 29 C.F.R. § 18.72.

By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding all unfavorable inferences which may be drawn from the record, there is no genuine issue of material fact to be decided and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); 29 C.F.R. § 18.72(a).

The non-moving party may not rest upon mere allegations, speculation or denials in his pleadings, but must set forth specific facts through affidavits, material obtained by discovery or otherwise, on each issue upon which he would bear the ultimate burden of proof. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 256 (1986). The response must set forth specific facts showing that there is a genuine issue of material fact for the hearing. 29 C.F.R. § 18.72(c).

The Court "views the evidence in the light most favorable to the nonmoving party, and then determines whether there are any genuine issues of material fact and whether the movant established that it was entitled to judgment as a matter of law." *Id. (citing Smale v. Torchmark Corp.*, ARB No. 09-012, slip op. at 5-6 (ARB Nov. 20, 2009)). "If the moving party meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence showing the existence of a genuine issue for trial." *Hammond v. Citrix Systems, Inc.*, AU No. 2008-SOX-00037, slip op. at 3 (AU June 11, 2008) *(citing Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 150 (2000); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The Court has examined the evidence submitted by the Administrator with the Motion for Summary Decision. Respondent has not submitted any evidence or challenge to the undisputed material facts as proposed by the Administrator. I find the following material facts are undisputed and supported by the evidence of record.

UNDISPUTED MATERIAL FACTS

1. The Administrator issued a determination to Respondent on February 3, 2015, alleging the following violations:

> Failed to comply with the 3/4 guarantee. Specifically, the investigation disclosed that the employer failed to guarantee to offer workers 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 and ending on the expiration date specified in the work contract. The contract began on 7/18/14 and was in effect until 10/1/14. Workers were sent home early resulting in the failure to comply with the 3/4 guarantee requirements. There were no approved contract modifications. As a result, 26 workers were found due back wages totaling $56,631.84.

(Ex. A, at *5).*[1]

2. The Administrator assessed a total of $17,550 in civil money penalties ("CMPs") as a result of the violations. *(Id.).*

3. Joe Gomez, Jr., is the 100% owner of Respondent, which he operated as a sole proprietorship to recruit and hire agricultural laborers from 1997 to 2014. (Ex. B, at 11, 20-21).

4. On June 26, 2014, Respondent's Application for Temporary Employment Certification ("TEC") was approved for 44 H-2A nonimmigrant agricultural workers from Mexico for the period July 18, 2014, through October 1, 2014, with an offered wage of $11.63 per hour. (Ex. C).

5. Although Respondent was approved for 44 H-2A workers, he only employed 26 H-2A workers. (Ex. D, at 6; Ex. E).

6. Respondent's H-2A workers were recruited by a company called Golden Opportunities International, LLC ("Golden Opportunities"). (Ex. D at 5).

7. Respondent's H-2A workers detasseled and derogued corn for Beck's Hybrids, a farm located in Atlanta, Indiana. (Ex. B at 63).

8. Deroguing corn involves hoeing down corn stalks that should not be in the field. (Ex. B at 13). Detasseling corn involves removing the tassel from the corn in order to aid the pollination process. (Ex. B at 13).

9. The TEC lists the job title for Respondent's H-2A workers as "Corn Detasseler." (Ex. C at 1).

[1] (Ex.) refers to the Administrator's exhibits attached to the Motion for Summary Decision.

10. The TEC's Statement of Temporary Need section includes only a description of corn detasseling and the hoeing of rogue corn: "Hoeing of rogue corn must be done within 10-15 days prior to the start of [tassel] growth. Must remove all [tassels] in a short time period because of the plant's growth cycle." (Ex. C at 1).

11. The job specifications in the signed employment contracts between Respondent and his H-2A workers state that the permit duration is July 18, 2014, through October 1, 2014. (Ex. F, at 2).

12. The only agricultural work described in the job description in the signed employment contracts between Respondent and his H-2A workers is corn detasseling and the hoeing of rogue corn: "Hoeing of rogue corn must be done within 10-15 days prior to the start of [tassel] growth. Must remove all [tassels] in a short time period because of the plant's growth cycle." (Ex. F at 2).

13. All of the newspaper advertisements used to recruit workers for Respondent indicated that the start date was July 18, 2014, and the end date was October 1, 2014. (Ex. G, at 4).

14. The only agricultural work described in all of the newspaper advertisements used to recruit workers for Respondent is corn detasseling and the hoeing of rogue corn: "Hoeing of rogue corn must be done within 10-15 days prior to the start of [tassel] growth. Must remove all [tassels] in a short time period because of the plant's growth cycle." (Ex. G at 4).

15. Respondent's H-2A workers began working on July 26, 2014. (Ex. B at 128; Ex. H, at 9).

16. Respondent terminated the employment contract with his H-2A workers on August 8, 2014. (Ex. I, at 3).

17. On August 14, 2014, Golden Opportunities sent a "Termination of H-2A Contract" to the U.S. Department of Labor ("Department"), Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Processing Center, for each of Respondent's 26 H-2A workers. (Ex. I at 1). The "Termination of H-2A Contract" contained the following information:

    a. The job order was valid from July 18, 2014, to October 1, 2014; and

    b. The contract was terminated on August 8, 2014, by Joe Gomez, Jr. because the "[c]orn detasseling season finished early." (Ex. I at 3).

18. On or about August 8, 2014, the Administrator informed Respondent that his H2A workers could not perform work that was not listed on the certified TEC. (Ex. K).

19. Respondent was hopeful that he would be able to obtain work harvesting pumpkins at a pumpkin patch located at Howe Farms. However, Respondent learned in early June 2014 that he would not be able to obtain work harvesting pumpkins. (Ex. B at 75).

20. Respondent contacted at least seven farms in Indiana trying to locate additional agricultural work for his H-2A workers in preparation for the 2014 season. (Ex. B at 77-81).

21. Respondent has worked as a labor contractor for Beck's Hybrids for twenty years. (Ex. B at 11).

22. In Respondent's twenty years of experience deroguing and detasseling corn, the period in which deroguing and detasseling corn is necessary lasts only five to six weeks depending on the weather. (Ex. B at 14-15).

23. No one ever contacted the Department on Respondent's behalf requesting to shorten the contract period. (Ex. J).

24. Respondent admits that Golden Opportunities never contacted the Department about adjusting the contract period; Golden Opportunities merely notified the Department that the contract was ended early. (Ex. B at 195).

25. Respondent admits that no one contacted the Department about adjusting Respondent's contract period, and "[t]hat's where [Respondent] went wrong." (Ex. B at 194-195).

26. Based on the actual start date of July 26, 2014, through the end of the contractual period on October 1, 2014, there were a total of 384 hours covered by the Respondent's employment contract with his H-2A workers. (Ex. K).

27. Although Respondent was required by the H-2A regulations to pay $11.63 per hour, Respondent paid his H-2A workers $11.73 per hour. (Ex. K).

28. Based on the actual start date of July 26, 2014, through the end of the contractual period on October 1, 2014, the three-fourths guarantee is equal to 288 hours of work, which equals $3,349.44 for each H-2A worker based on the $11.63 per hour required wage. (Ex. K).

29. Utilizing Respondent's time records and payroll sheets, the Administrator took the amount paid to each H-2A worker, as reflected on Respondent's payroll, and subtracted that amount from the $3,349.44 owed to determine the amount of back wages due each H-2A worker. (Ex. K).

30. The Administrator calculated a total of $56,631.84 in back wages due to Respondent's 26 H-2A workers that should have been paid to meet the three-fourths guarantee. (Exs. K, E).

31. The Administrator assessed a total of $17,550 in CMPs for Respondent's failure to comply with the three-fourths guarantee, under his authority at 29 C.F.R. § 501.19(c) to assess CMPs of up to $1,500 "for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part [29 C.F.R. Part 501] ... (Ex. L).

32. The Administrator began with a base CMP of $1,500 in accordance with the policy of the Wage and Hour Division. (Ex. L).

33. The Administrator then considered the factors in 29 C.F.R. § 501.19(b):

    a. The previous history of violation(s) of 8 U.S.C. § 1188, 20 C.F.R. Part 655, subpart B, or the regulations in 29 C.F.R. Part 501;

    b. The number of H-2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation;

    c. The gravity of the violation;

    d. Efforts made in good faith to comply with 8 U.S.C. § 1188, 20 C.F.R. Part 655, subpart B, and the regulations in 29 C.F.R. Part 501;

    e. Explanation from the person charged with the violation;

    f. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated 8 U.S.C. § 1188; and

    g. 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. (Ex. L).

34. Based on the factors above, the CMPs were adjusted by a total of 40% to $900 for each violation in accordance with the above regulatory factors:

    a. The base CMP of $1,500 was reduced by 10% because Respondent had no history of H-2A violations *(see* 29 C.F.R. § 501.19(b)(1));

    b. The base CMP was further reduced by an additional 10% because Respondent made efforts in good faith to comply with the NA and the H-2A regulations by hiring a company that specialized in obtaining H-2A visas. Respondent also made an effort in good faith to comply when he sent the H-2A workers home after being informed by the Administrator that he could not employ workers outside of work listed in the job order. (Ex. L; § 501.19(b)(4));

c. The base CMP was further reduced by an additional 10% because Respondent explained that he was unaware that he could not employ workers outside of work listed in the job order. (Ex. L; § 501.19(b); and

d. The base CMP was further reduced by an additional 10% because Respondent agreed to future compliance and demonstrated compliance by sending his H2A workers home after the approved work was completed. (Ex. L; § 501.1 9(b)(5)).

35. The resulting figure ($900) was multiplied by the number of violations (26), resulting in a subtotal of $23,400. After taking into account all of the circumstances of the case in order to reach a fair and reasonable assessment of CMPs, that subtotal was further reduced by an additional 25% ($5,850), resulting in the assessment of $17,550 in CMPs for the alleged violations. (Ex. L).

Based on Respondent's October 14, 2016 Response to Summary Decision and the materials submitted with Respondent's March 26, 2015 letter, I find the following facts are disputed and for purposes of the Motion for Summary Decision are deemed true. [2]

1. Prior to the workers entering the United States, Respondent notified the workers that the permit duration in the original employment written contract had changed and the work as a detasseler would only last four to five weeks.

2. At the time the workers were notified of the new permit duration, the workers had the opportunity to not work for Respondent.

3. The actual agreement between Respondent and the workers is not reflected in the work contract.

4. In early August 2014 the workers were terminated and were paid any and all compensation due to that date. The workers do not believe that they are owed any further compensation.

5. Respondent did not intend to mislead the workers and never intended to be noncompliant with the H-2A regulations.

[2] The Administrator's Motion to Strike the 26 H-2A Workers' Affidavits is hereby **DENIED.**

RESPONDENT FAILED TO MEET THE THREE-FOURTHS GUARANTEE IN VIOLATION OF 20 C.F.R. § 655.122(i).

With certain exceptions not applicable here,[3] the regulations require employers of H-2A workers to guarantee at least three-fourth of the contract hours as follows:

> (1) Offer to worker. 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.
>
> (i) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO
> (ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. . .
>
> (iv) If during the total work contract period the employer affords the H-2A 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…

20 C F.R. § 655.122(i).

The three-fourths guarantee is one of the regulations designed "to ensure that the employment of aliens under H—2 will not adversely affect the working conditions of similarly employed U.S. workers." *Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765* F.2d 1334, 1338 *(5th* Cir. 1985). "The DOL requires the guarantee as a condition of employment in order to assure that growers do not 'artificially' inflate the labor pool by recruiting more workers than are needed." *Id.* at 1342.

[3] The three-fourths guarantee does not apply if an H-2A worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies DHS. Also, if a fire, weather, or other Act of God makes the fulfillment of the contract impossible the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination. Respondent does not argue that either of these exceptions applies.

Respondent's approved TEC and his employment contracts state that the period of employment was July 18, 2014, through October 1, 2014; these were the same dates listed in all of Respondent's recruitment advertising. The H-2A workers began working on July 26, 2014; Respondent terminated their employment contracts on August 8, 2014.

Respondent has shown that prior to start of the employment contract, Respondent notified the workers that the contract period had been shortened and the workers were given the opportunity to not work for Respondent. All the workers believe they have been fully paid in accordance with this oral modification of the written employment contract. However, 20 C.F.R. §655.122(i)(1)(ii) provides that the "work contract period can be shortened by agreement of the parties only with the approval of the CO. . . ." It is undisputed that Respondent never sought approval from the Certifying Officer to shorten the work contract period as the regulations require, and the Certifying Officer did not approve any shortening of the work contract period.

When an employer fails to meet the three-fourths guarantee, H-2A workers "are entitled to payment of wages equal to amount they would have earned had they worked the guaranteed number of days." *Martinez-Bautista v. D & S Produce,* 447 F. Supp. 2d 954, 963 (ED. Ark. 2006). Respondent's argument that holding him to the three-fourths guarantee would be unfair and create a windfall to the H-2A workers is unavailing: "There is no 'hardship' exception to DOL's labor standards for H—2 workers." *Salazar-Calderon, 765* F.2d 1334, 1342-43 *(citing Florida Sugar Cane League v. Usery,* 531 F.2d 299, 304 (5th Cir. *1976), quoting Elton Orchards, Inc. v. Brennan,* 508 F.2d 493, 500 (1st Cir.1974). The undisputed facts establish and I find, that Respondent violated the three-fourths guarantee. Further, the undisputed facts establish, and I find that the Administrator's back wage computations are correct. I find the Administrator is entitled to summary decision on these issues.

THE CIVIL MONEY PENALTIES ASSESSED BY THE ADMINISTRATOR FOR THESE VIOLATIONS ARE APPROPRIATE

The Administrator assessed $17,550 in CMPs for Respondent's failure to comply with the three-fourths guarantee. With certain exemptions not relevant here, the Administrator may assess CMPs of not more than $1,500 for each violation of 20 C.F.R. Part 655, Subpart B. 29 C.F.R. § 501.19(c). In determining the amount of penalty to be assessed, the Administrator applied the base CMP for failure to comply with the three-fourths guarantee. ($1,500 for each violation). The Administrator then considered the factors listed in 29 C.F.R. § 501.19(b)(1)—(7). The base CMP was adjusted and reduced to a $900 CMP for each of the twenty-six violations for a total CMP of $23,400.

I find these adjustments made by the Administrator were not an abuse of discretion and is appropriate. However, in this case, the Administrator, after taking into account all of the circumstances of the case in order to reach a fair and reasonable assessment of CMPs, further reduced the CMP by an additional 25% ($5,850), resulting in the assessment of $17,550 in CMPs for the alleged violations.

After deliberation on the undisputed facts, I find the Administrator considered and applied the relevant factors outlined in 29 C.F.R. § 501.19(c). I find the Administrator's assessment of $l7,550 in CMPs is reasonable, appropriate, not arbitrary and should be upheld.

CONCLUSION

Summary decision in favor of the Administrator is appropriate as the Administrator has shown that there is no genuine dispute as to any material fact and that Respondent violated the three-fourths guarantee and failed to pay its workers wages equal to the amount they would have earned had they worked the guaranteed number of days. Thus, despite all justifiable inferences drawn in favor of Respondent, the Administrator is entitled to summary decision in its favor. Moreover, the Administrator's back wage calculations and civil money penalties are appropriate and are upheld.

ORDER

For failure to pay workers in accordance with the three-fourths guarantee, Respondent will pay $56,631.84 in back wages owed to 26 H-2A workers and $17,550 in civil money penalties.

So ORDERED.

So ORDERED.

Digitally signed by LARRY PRICE
DN: CN=LARRY PRICE,
OU=JUDGE, O=US DOL Office of
Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

LARRY W. PRICE
Administrative Law Judge