U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 15 October 2019

CASE NO.: 2018-TAE-28

In the Matter of:

FRANK'S NURSERY, LLC,
Respondent

APPEARANCES:
FELIX MARQUEZ, ESQ.,
For the Secretary of Labor,

STEPHEN MENN, ESQ.,
For Respondent.

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

BACKGROUND

This matter arises under the H2-A provisions of the Immigration and Nationality Act, 8 U.S.C. § 1188, *et seq*., as amended by the Immigration Reform and Control Act of 1986, (the Act), and the implementing regulations found at 20 C.F.R. Part 655 and 29 C.F.R. Part 501.

The matter originates in an investigation conducted by the Department of Labor's Wage and Hour Division (WHD) covering the period from 6 Feb 15 through 2 Apr 16. Following that investigation, WHD alleged that Respondent violated various regulatory provisions by

- not disclosing actual terms or conditions of employment by failing to include on the job order any information relating to a drug screen policy,[1]
- failing to pay offered/required wage rate to corresponding U.S. workers while performing the same tasks as the H-2A workers and not paying one corresponding U.S. worker for hours worked during his last week of work,[2]
- failing to provide pay statements,[3]
- providing housing with rodent droppings in kitchen cabinets,[4]

[1] 20 C.F.R. § 655.121(a)(3).
[2] 20 C.F.R. § 655.122(l).
[3] 20 C.F.R. § 655.122(k).
[4] 20 C.F.R. § 655.122(d)(1).

- offering less favorable terms and working conditions to U.S. workers by failing to disclose drug screen policies and pay U.S. corresponding workers the adverse effective wage rate,[5] and
- illegally deducting Social Security and Medicare taxes from H-2A worker wages.[6]

In recognition of those violations, WHD assessed unpaid wages of $33,066.35 and civil money penalties of $25,713.40. WHD issued a determination letter notifying Respondent of its findings on 4 Jan 18. Respondent replied on 25 Jan 18, objecting to the findings and requesting a hearing. The matter was referred to the Office of Administrative Law Judges on 7 Jun 18. The matter was initially set to be heard on 24 Oct 18, but then continued on multiple occasions and ultimately set for 12 Sep 19. Both parties then filed cross-motions for summary decision accompanied by exhibits. Since the filing of the motions for summary decision indicated that neither party believed there were any significant factual issues in reasonable dispute, I conducted a conference call and asked if an in person hearing with live testimony was necessary. Counsel agreed that the case required no in person appearances or testimony and could be adjudicated on the merits with normal burdens of proof on the written record as submitted. The parties therefore agreed to waive a formal hearing and submitted briefs. Consequently, the evidentiary record in this case consists of

- WHD's Exhibits (AX) A-O
- Respondent's Exhibits (RX) 1-7

My findings and conclusions are based upon the evidence introduced and the arguments presented.

APPLICABLE LAW

Overview

The H-2A visa program arose out of the Immigration and Nationality Act of 1952. An eligible foreign worker is an alien

> having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary services or labor if unemployed persons capable of performing such service or labor cannot be found in this country[.][7]

Congress amended the program in 1986 to create separate agricultural and non-agricultural temporary foreign worker programs, leading to the H-2A program.[8] The Secretary of Labor enforces the attestations an employer makes in a temporary agricultural labor certification

[5] 20 C.F.R. §655.122(a).
[6] 20 C.F.R. §655.122(p).
[7] 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b) (2013).
[8] Staff of House Comm. On Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3-4 (Comm. Print 1991).

application and the regulations that implement the H-2A program.[9] Failure to abide by program regulations may result in monetary penalties imposed by the Department's Employment Standards Administration (ETA), debarment from filing other H-2A certification applications, and proceedings for specific performance, injunctive, or other equitable relief.[10]

A civil money penalty may be assessed by the Administrator for each violation of the work contract or [the applicable] regulations.[11] In determining the amount of such penalty, "the WHD Administrator shall consider the type of violation committed and other relevant factors[,]" including: previous history of violations, the number of workers affected, the gravity of the violations, efforts made in good faith to comply with the H-2A program, explanation of person charged with the violation, commitment to future compliance, and the extent to which the violator achieved a financial gain due to the violation or the potential financial loss or injury to the workers.[12]

A party has a right to a *de novo* hearing before an Administrative Law Judge, the decision of whom "shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record."[13] The decision may affirm, deny, reverse, or modify in whole or in part the decision of the WHD Administrator. In general, an ALJ lacks the inherent authority to rule on the validity of a regulation or to invalidate a regulation as written.[14]

ISSUES AND POSITIONS OF THE PARTIES

WHD's positions are clearly stated in the determination letter, which identifies six alleged violations. Respondent's answers are almost equally as clear. Respondent asserts that it had no drug testing requirement for its workers during the relevant hiring. It concedes that it implemented such a policy later, after a number of its domestic employees were discovered to be using marijuana. However, it further notes that none of the H-2A workers were terminated for drug use and that the implementation of a drug testing program did not constitute a change in the essential nature and conditions of employment under the regulations.
Respondent argues that WHD's allegations that it failed to pay offered/required wage rates to corresponding U.S. workers are incorrectly based on its misclassification of the work being done by the domestic employees. Respondent asserts that its H-2A workers were nursery workers, whereas only a few domestic employees were nursery workers. The vast majority of domestic workers were heavy equipment operators and truck drivers.

Respondent disagrees with WHD's allegation that it failed to provide pay statements, insisting that it did supply pay statements to all of its workers, including the H-2A workers. It concedes that its third-party payroll service may have failed to include the federal tax employer identification number on the statements, but argues that omission does not violate the regulations.

---

[9] 29 C.F.R. §§ 501.1, 501.5, 501.16, 501.17 (2010).
[10] *See In the Matter of Global Horizons, Inc*., 2006-TLC-00013 at slip op. 4 (ALJ Nov. 30, 2006).
[11] 29 C.F.R. § 501.19(a) (2010).
[12] 29 C.F.R. § 501.19(b) (2010).
[13] 29 C.F.R. § 501.41(b) (2010).
[14] *See Bolton Spring Farm*, 2008-TLC-00028 (BALCA May 16, 2008); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984).

Respondent does not dispute that WHD's inspection of living quarters may have disclosed unsanitary conditions. Respondent does argue that it provided sanitary housing for the H-2A workers, and the housing became unsanitary only when domestic workers hired through the Texas Workforce Commission program began occupying the same quarters and soiled them, notwithstanding Respondent's efforts to keep the premises sanitary.

Respondent concedes that Social Security and Medicare taxes were withheld from H-2A worker paychecks. However, it insists that the employees volunteered for and authorized the withholding and received corresponding refunds when they filed tax returns.

DISCUSSION

Wage Rates

WHD alleges that Respondent underpaid 21 workers in the amount of $33,066.35 by paying them various hourly rates below the Adverse Effect Wage Rate (AEWR).[15] The regulations provide that employers must pay H-2A workers "at least the AEWR, the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the federal or state minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period.[16] It defines corresponding employment as the "employment of workers who are not H–2A workers by an employer who has an approved H–2A Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H–2A workers during the validity period of the job order."[17]

Notwithstanding the cross motions for summary decision, it appears that there are some genuine issues of material facts in dispute between the parties. One of the most significant is whether Respondent's H-2A employees were doing the same classification of work as the corresponding domestic workers.

Respondent's brief explained that Respondent operates four separate divisions, only one of which uses H-2A workers, who are all employed as nursery workers. It argued that although a few domestic workers were employed as nursery workers, WHD incorrectly identified workers in the other divisions as corresponding workers, even though they were employed as landscapers, retail employees, secretaries, equipment operators, truck drivers, and administrators.[18]

Francisco Nunez Garcia, who owns and operates Respondent, testified at deposition that he understood that he must pay workers who do the same job the same rate, but in this case didn't pay all the workers the same rate because they did not do the same job.[19] He submitted an

[15] AX-A1.
[16] 20 C.F.R. § 655.122(l).
[17] 20 C.F.R. § 655.103.
[18] Even under the relaxed rules of evidence that apply in this proceeding (29 C.F.R. § 501.34(b)), counsel's arguments do not constitute evidence.
[19] AX-B (transcript p.57).

affidavit incorporating by reference lists of his employees identified as H-2A agricultural workers, heavy machine operator and commercial truck drivers, small tractor and deliveries dump truck operators, office employees, and landscaping/ plant installation employees.[20] He also submitted Department of Labor wage data related to office workers; retail sales persons; construction equipment operators; heavy truck drivers; landscaping and ground keeping workers; and farm, crop, nursery, and greenhouse workers.[21] The lists included all but two of the employees identified by the investigator as having been underpaid.

WHD answers that Nunez Garcia's testimony that the workers were involved in different jobs is simply incorrect. Its brief asserts that H-2A workers and domestic workers were doing the same tasks, as listed in the job order, to include planting, watering, fertilizing, trimming, and potting plants.[22] It offered the affidavit of its investigator, Erika Munoz, who stated that she interviewed three H-2A workers and five corresponding domestic workers, who reported that they performed the same tasks during the applicable period.[23] The investigator did not identify the workers she interviewed and no written statements were offered in evidence.

Since WHD is seeking the order awarding back wages and penalties, it bears the burden of proof.[24] The evidentiary record essentially consists of the affidavit of the investigator stating a number of employees told her they were doing the same work and Respondent's owner/operator's deposition testimony that they were not doing the same work.
I find that the limited record fails to establish that it is more likely than not that the relevant workers were engaged in the same work. Therefore, the motion for an order for back pay and penalties related to that allegation is denied.[25]

Drug Testing

WHD alleges that Respondent failed to disclose any information regarding its drug screen policy on its job order. The regulations require that " . . . every job order accompanying an Application for Temporary Employment Certification must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section."[26] They also note that "[e]ach job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops."[27]

[20] RX-1.
[21] RX-2.
[22] See n. 18.
[23] AX-A.
[24] 5 U.S.C. §556(d).
[25] This includes WHD allegation of one corresponding worker had not received wages for his last week of work (3 – 9 Apr 16.). It did not identify the amount of that underpayment or advance any arguments in support of that specific allegation, but instead simply cited seven pages of a table of weekly pay records of a number of various employees; 290 pages of payroll journals for various employees; and a picture of an envelope that was returned to sender, but arguably contained a check payable to Robert Villalpando for $401.
[26] 20 C.F.R. § 655.122 (c).
[27] 20 C.F.R. § 655.122 (b).

There does not appear to be a factual dispute related to this issue. Respondent concedes that there was no notice of a drug testing policy in the job order. However, its brief explains that at the time of hiring, Respondent was not testing employees for drugs, but only started doing so after a number of domestic workers were found using marijuana. It further noted that all employees, including the owner and his wife were subject to testing and no H-2A workers were terminated from drug use.[28]

Respondent argues that the possibility of drug testing is a standard condition of employment in the industry and did not require any specific notice. It further offered the Department of Labor's form for disclosing terms and conditions of employment and points out that there is no specific entries or questions concerning drug testing.[29]

WHD concedes that drug screenings are commonplace, but insists that they must be disclosed because they implicate employees' privacy rights. WHD offered the deposition testimony of respondent's owner, in which he agreed that the relevant job orders did not mention drug testing, explained that he did not understand it needed to be included at the time, and noted that current job orders do include that information.[30] WHD also offered an undated document explaining Respondents' drug policy, including employee drug tests.[31]

The record establishes that at the time of the relevant job orders, Respondent retained the right to subject its employees to drug testing, even though it was not doing so. Respondent did not include that information on those job orders. Thus, the dispute between the parties raises a question of law, which is whether or not the existence of a drug testing program is a condition of employment that must be included on a job order. One factor in that determination is whether the presence of a drug testing program is so widespread in the industry that it is an implied condition of employment that need not be specifically identified.

No evidence on that question was offered by either party, although WHD's brief concedes that drug screenings are sufficiently commonplace such that their prevalence may put an applicant on notice. Respondent similarly submits that drug testing is an unwritten condition that can be fairly read into any contract of employment in Texas. Notwithstanding its concession, WHD still argues that because of the privacy interests implicated by drug screening, the failure to include it as a condition of employment violates the regulation.

Neither the statute nor the regulations specifically address the inclusion of drug testing as a condition of employment. Moreover, neither party cited any case law addressing drug testing or even in support of its position in general. Given the general agreement of the parties as to the commonality of drug testing and the absence of specific legal authority to the contrary, I do not find that Respondent violated its obligations under the regulations in this case by failing to include notice of the possibility of drug testing.

[28] See n.18.
[29] RX-4.
[30] AX-B (transcript p.31).
[31] RX-L.

Pay Statements

WHD alleges that Respondent failed to provide its employees with pay statements in compliance with the requirements of the regulations. The regulation requires employers to furnish workers written statements that include, *inter alia* the employer's name, address and FEIN [Federal Employee Identification Number].[32] Specifically, WHD cites the absence of the FEIN from the statements Respondent issued.

There is no factual dispute as Respondent does not suggest that it included the FEIN. Instead, Respondent argues that it is in substantial compliance with the regulations, WHD did not originally cite the absence of the FEIN, and notes that any error would be the fault of the third-party payroll service it employs.

None of Respondent's arguments are well-founded in law. The regulation clearly requires employers to include their FEIN, along with other information in writing. Respondent cites no case law indicating that substantial compliance is sufficient or that employers may delegate their responsibility and liability to third party payroll agents.

Consequently, I find Respondent failed to comply with the regulation requiring complete written pay statements. Respondent declined to address the appropriateness of the money penalties suggested by WHD and therefore Respondent is ordered to pay civil money penalties in the amount of $7,200.

Housing Standards

WHD alleges Respondent failed to meet its obligations under the regulations requiring the provision of safe and hygienic housing. The regulation requires employers to provide housing that meets DOL Occupational Safety and Health Administration (OSHA) standards.[33] There is no factual dispute that the housing failed to meet basic standards for cleanliness and health. WHD offered photos[34] and the deposition testimony of Respondent's owner, who conceded that he would not want to live in the housing, which was cluttered with trash and debris.[35] However, Respondent counters by suggesting that even though it provided appropriate housing the employees inhabiting the housing lived like pigs, creating their own unsafe and unhealthy environment.[36]

Thus, the central legal question is whether Respondent's obligation to provide housing is an ongoing one. Obviously, implicit in the regulatory scheme is an obligation for employers to maintain housing in the appropriate state. In this case, it appears that certain employees residing in the housing are making it difficult for Respondent to meet its obligation. Nonetheless,

[32] 20 C.F.R. § 655.122(k)(8).

[33] 20 C.F.R. § 655.122(d)(1).
[34] AX-O.
[35] AX-B (transcript p.72-3, 86, 92).
[36] *Id.*

inasmuch as it ultimately controls those employees, it cannot use them as an excuse to fail to meet its regulatory obligations.

Consequently, I find that Respondent failed to provide appropriate housing as required by the regulation and in the absence of any rebuttal to the quantum of civil money penalties urged by WHD, Respondent is ordered to pay civil money penalties in the amount of $1,326.40.

Paycheck Deductions

WHD alleges Respondent failed to comply with the regulations by unlawfully deducting Social Security and Medicare taxes from H-2A workers who are exempt from Federal Insurance Contribution Act (FICA) taxes. WHD notes that Internal Revenue Service (IRS) regulations specifically exempt H-2A workers from withholding. Respondent does not dispute that deductions were taken for withholding and its owner testified that Respondent withheld Social Security and Medicare taxes from the paychecks of H-2A workers.[37]

The relevant regulation provides

> (1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable . . .
>
> (2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 C.F.R. Part 531.[38]

Respondent cites Internal Revenue Service regulations and forms to argue that all deductions were made on the request of the H-2A workers, who would be able to recoup any wages when they filed their tax returns. Respondent further submits that it realized no benefit from the

[37] AX-B (transcript p.49).

[38] 20 C.F.R. § 655.122(p). (29 C.F.R. § 531.38 in turn notes that "[t]axes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency may be included as "wages.").

withholding, which was done by its third-party pay administrator, upon whom it relied to properly process H-2A paychecks.

The cited regulations indicate and the parties do not seem to dispute that Respondent's H-2A workers' wages were (1) not subject to Social Security and Medicare tax, (2) subject to federal income tax, and (3) subject to withholding by Respondent only with the mutual agreement of Respondent and the H-2A worker.

Nonetheless, Respondent argues that by filing W-4 forms, its H-2A workers were entering into a new mutual agreement to have Social Security and Medicare taxes withheld. While that argument would be a rational one to make in justifying the withholding of federal income tax, it is nonsensical that an employee would ask his or her employer to withhold from their paycheck money to pay nonexistent taxes. Consequently, I find that the withholding was unreasonable and contrary to the regulations. Further while Respondent may have delegated to its third-party pay processing agent the authority to determine what amount should be withheld, Respondent may not delegate its liability in the event the withholding was incorrect. Consequently, Respondent is ordered to pay back wages in the amount of $12,036.16 as set forth by WHD and civil money penalties in the amount of $2,700.00.

CONCLUSION

In sum, the motion for an order for back pay and penalties related to wage rates is denied. I do not find that Respondent violated its obligations under the regulations in this case by failing to include notice of the possibility of drug testing. I find Respondent

- failed to provide complete written pay statements and is ordered to pay civil money penalties in the amount of $7,200.00;
- failed to provide appropriate housing as required by the regulations and is ordered to pay civil money penalties in the amount of $1,326.40;
- unreasonably withheld money from workers' paychecks and is ordered to pay back wages in the amount of $12,036.16 and civil money penalties in the amount of $2,700.00.

In total, civil money penalties of $11,226.40 and back wages of $12,036.16 are assessed against Respondent.

SO ORDERED.

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review (§Petition§) with the Administrative Review Board (§ARB§) within 30 days of the date of this decision. 29 C.F.R. § 501.42. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition, only one copy need be uploaded.

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. §501.42(a).