



Issue Date: 11 February 2022

**OALJ Case Nos.: 2022-MSP-00001
2022-TAE-00002**

MSPA Case No.: 2022-MSPA-00001

WHD Case No.: 1845643

In the Matter of:

LEE'S SHILOH FARMS, INC. d/b/a FIRST FARM INC.,
Respondent

**ORDER DENYING RESPONDENT'S MOTION TO DISMISS
AND SCHEDULING HEARING**

These matters arise under the Migrant and Seasonal Agricultural Worker Protection Act of 1983 ("MSPA"), 29 U.S.C. § 1801, *et seq.*, and the implementing regulations at 20 C.F.R. Part 500; and the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act, ("INA"), 8 U.S.C. §§ 1101(a)(15)(H), 1184(c), 1188, and the implementing regulations at 20 C.F.R. Part 655, and 29 C.F.R. Part 501.

By notice dated July 10, 2018, the Wage and Hour Division of the U.S. Department of Labor ("Plaintiff") informed the above-named Respondent of the assessment of civil money penalties ("CMP") totaling \$1,710.10 for violations of the MSPA.¹ On June 29, 2018, Plaintiff issued a Notice of Determination ("NOD") letter to Respondent for alleged violations of the INA's H-2A non-immigrant worker program, assessing CMPs in the amount of \$24,703.20.² On August 8, 2018, Respondent requested a hearing in each matter. 29 C.F.R. § 500.212; 29 C.F.R. § 501.33. Without explanation for the delay, Plaintiff filed two *Orders of Reference* with the Office of

¹ Plaintiff found that, during the period from December 9, 2017 to April 28, 2018, Respondent allegedly failed to post the required MSPA poster and provide wage statements to workers.

² Plaintiff found that, during the period from December 9, 2017 to April 28, 2018, Respondent allegedly: (i) "[f]ailed to satisfy requirements of the job order by not stating actual terms and conditions"; (ii) failed to post the H-2A poster; (iii) "[f]ailed to provide meals or kitchen facilities"; (iv) did not comply with inbound transportation requirements; (v) took unlawful deductions; (vi) did not comply with frequency of pay requirements; (vii) unlawfully cost-shifted; (viii) did not comply with pay statement requirements; (ix) failed to meet health and safety requirements in housing; and (x) "[f]ailed to follow all applicable federal, state, and local laws and regulations."

Administrative law Judges (“OALJ”) on December 23, 2021, initiating these proceedings. 29 C.F.R. § 500.224; 29 C.F.R. § 501.37.

On January 7, 2022 I issued a *Notice of Docketing and Order of Consolidation*. On January 20, 2022, counsel for the Respondent filed *Motion to Dismiss and Notice of Intent to Oppose* (“Motion” or “Mot.”). Counsel for the Plaintiff filed *Complainant’s Response to Respondent’s Motion to Dismiss* (“Response” or “Rsp.”) on February 4, 2022.

In the Motion, the Respondent argues that these matters should be dismissed because the Administrator did not promptly refer the case to OALJ in accordance with 29 C.F.R. § 500.224(a).³ (Mot. at 2). Counsel for the Respondent asserts that “the passage of time [from August 8, 2018 to December 23, 2021] will work an extreme hardship and prejudice on the Respondent since witnesses, documents and evidence will be difficult or impossible to locate and interview.” (*Id.*).

In its Response, the Plaintiff states that “[s]everal factors, including the COVID pandemic, played into the delay between the request for hearing and the filing of the Orders of Reference.” (Rsp. At 2). Plaintiff further argues that the language in 29 C.F.R. § 500.224(a) requiring prompt action is directory only and that, in any event, Respondent has failed to show actual prejudice that would warrant dismissal. (*Id.*).

I find the “prompt action” language used in the implementing regulations is precatory not directive and Respondent has failed to show actual prejudice suffered as a result of the Administrator’s delay in referring these matters to OALJ for hearing. Respondent generally avers that it will have trouble locating witnesses and that “the CPA who prepared Respondent’s payroll records has retired and is no longer employed.” (Mot. at 2). However, witnesses relocate or become unavailable in most cases and Respondent provides no concrete examples of how its case has been actually prejudiced or compromised by the delay. The Administrative Review Board (“ARB”), has held that general claims by a Respondent that the passage of time has prejudiced their defense do not suffice to show actual prejudice. *KP & L Electrical Contractors, Inc., et al.*, ARB Case No. 99-039 (May 31, 2000).⁴

As to the absence of records, Respondent was aware these matters may result in litigation when it received notice of the CMP assessments in June and July 2018 and had the opportunity

³ Respondent argues there was over a three- and half-year delay between its request for hearing and the referral to OALJ by the Administrator. (Mot. at 2).

⁴ In *KP & L Electrical Contractors*, the ARB stated that “four factors should be weighed to determine if a contractor’s rights have been violated because of a delay in holding a hearing in an enforcement action: 1) the length of the delay; 2) the reason for the delay; 3) the defendant’s assertion of his right to a hearing; and 4) prejudice to the defendant. . . . With respect to the fourth factor . . . a respondent must show actual prejudice, not just allege potential prejudice.” ARB Case No. 99-039 at 7-8 (quoting *Tom Robb, Inc.*, WAB Case No. 94-03 (June 21, 1994) (internal quotation marks omitted). The ARB did not address the first three factors because the respondent failed to show actual prejudice. As such, I find that it is only necessary to evaluate whether Respondent has shown actual prejudice in this case.

then to preserve any documents it believed relevant to their defense and there is no evidence that Respondent requested a status of the cases at any time during the three plus years from receipt of the notices to the filing of the Orders of Reference. Additionally, any difficulty locating and interviewing witnesses will similarly impact Plaintiff's burden. Finally, Respondent may argue the lengthy delay as a factor for the tribunal to consider in determining whether to modify the assessed penalties. 29 C.F.R. § 500.262; 29 C.F.R. § 501.41.

For the foregoing reasons, Respondent's Motion to Dismiss is **DENIED**.

Notice of Hearing and Prehearing Order

YOU ARE HEREBY NOTIFIED that pursuant to the MSPA and the INA, and the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges,⁵ **this case is now scheduled for a hearing to begin at 9:00 a.m. (EDT) on Thursday, June 2, 2022 in or around Jacksonville, Florida.**⁶ **A request for a continuance due to a previously scheduled court case or other existing conflict should be filed with this tribunal within ten (10) days of the entry of this notice.**

In the interest of expediting the hearing and ensuring a prompt disposition of the matter, **IT IS ORDERED** that the parties shall take the following action:

Initial Disclosures. Within thirty (30) days of the date of this Order, the parties must provide to all other parties the documents and information set forth in 29 C.F.R. § 18.50(c)1(i), to the extent not previously exchanged. All disclosures must be in writing, signed and served. The parties must supplement the disclosures when required by 29 C.F.R. § 18.53(a).

Discovery. Discovery, including depositions, will begin immediately. The parties must complete all discovery no later than forty-five (45) days before the hearing date. Formal discovery is to be conducted in this matter pursuant to 29 C.F.R. §§ 18.50-18.65 unless otherwise directed by this Prehearing Order.

Joint Stipulation. The parties are directed to jointly stipulate to all uncontested issues, facts, and evidence they agree should be made part of the record. A copy of the stipulation form should be filed with the tribunal no later than fifteen (15) days before the hearing date.

⁵ 29 C.F.R. Part 18.

⁶ OALJ has indefinitely suspended those hearings requiring parties to be in the same physical location. See *Administrative Order and Notice*, 2020-MIS-00008 (Chief ALJ June 1, 2020), a copy of which can be reviewed at www.dol.gov/agencies/oalj. Accordingly, while this hearing is tentatively scheduled as "in-person" in Jacksonville, it may be continued or converted to a video as dictated by the ongoing COVID-19 pandemic. The parties shall be informed of the appropriate courtroom location or dial-in information by separate notice.

Motions. Any dispositive prehearing motion is to be filed no later than April 18, 2022, with responses due May 2, 2022. All evidentiary and non-dispositive trial motions are to be filed no later than May 16, 2022, but will be taken under advisement and ruled upon at the hearing.

Exhibits. The parties shall mark all Joint Exhibits as JX-1, JX-2, JX-3, etc. Separate Plaintiff and Respondent exhibits shall be marked PX and RX, respectively. Any objections to an exhibit, or part of an exhibit, will be made to and resolved by the tribunal at the hearing. The parties will email copies of the exhibits to the tribunal at OALJ-Headquarters-DC@dol.gov with a copy to attorney-advisor Melina Oliverio at Oliverio.melina.t@dol.gov by May 23, 2022. DO NOT MAIL EXHIBITS TO THE JUDGE.

Prehearing Submissions. At least twenty-one (21) days before the hearing date, the parties shall exchange, with a copy to the Tribunal, a prehearing submission containing the following information:

- (i.) a simple statement of the issues to be determined and the relief and remedies sought; and
- (ii.) the name and address of each witness the party expects to call and a brief summary of the testimony that the witness is expected to furnish.

Prehearing Conference. A pre-hearing conference may be held prior to the calling of this matter for hearing.

SO ORDERED.

STEPHEN R. HENLEY
Chief Administrative Law Judge