UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC

Issue Date: 17 May 2024

OALJ Case Nos.: 2022-MSP-00003
2022-TAE-00006

WHD Case No.: 1770359

In the Matter of:

JAVIER GUERRERO
d/b/a JAVIER H. GUERRERO, FLC,
Respondent.

Appearances:

Kathryn C. Hagerman, Esq.
Office of the Solicitor, Atlanta, GA
For the Plaintiff

Dane Steffenson, Esq.
Dane Law, LLC, Atlanta, GA
For the Respondent

DECISION AND ORDER

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 29 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.

Background and Procedural History

On February 13, 2017, the Administrator, Wage and Hour Division ("WHD"), U.S. Department of Labor ("Plaintiff" or "Administrator") issued a *Determination of Civil Money Penalties for MSPA Violations Against Javier H. Guerrero* informing

Javier Guerrero ("Respondent") that he was being assessed $1,400.00 in civil money penalties ("CMP") for allegedly violating the MSPA sometime during the period September 9, 2013 to September 8, 2015.[1] Plaintiff also issued a *Notice of Determination of Wages Owed, Assessing Civil Money Penalties* ("NOD") to Respondent on February 13, 2017 for allegedly violating provisions of the INA's H-2A non-immigrant worker program during the same period, informing Respondent that he owed back wages in the amount of $123,035.52 to eighty-seven (87) workers and was being assessed CMPs in the amount of $103,650.00.[2, 3]

Respondent, through his then counsel, Beau Howard, Esq. of Freed Howard requested a hearing for both matters in a single letter dated March 14, 2017.[4] In the letter, Respondent stated that "in prior correspondence and telephone conferences, we have communicated that we believe the DOL has made an error in calculating the amount of back wages owed pursuant to the three-fourths guarantee" and believe "the correct amount of back wages should be $29,382.31, comprised of $20,020.21 for failure to meet the three-fourths guarantee and $9,362.10 for AEWR."[5] Respondent attached a spreadsheet that showed the daily hours the workers worked for 2014 "as reflected by [Respondent's] timesheets." Respondent further stated in the appeal letter that he "should not be assessed any civil money penalties for failure to comply with the three-fourths guarantee or failure to pay AEWR" and that "the $4,500 in civil money penalties assessed based on apparent unsanitary living conditions for the H-2A workers is unreasonable."

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[1] Plaintiff found that Respondent allegedly housed workers without certificate authorization.

[2] Plaintiff found that Respondent allegedly failed (1) to pay the required three-fourths guarantee of hours worked, (2) to pay the Adverse Effect Wage Rate ("AEWR"), (3) to provide an adequate pay stub to workers, (4) to follow applicable laws, (5) to supply housing for the workers that met applicable safety and health standards, (6) to provide a valid copy of the Farm Labor Contractor Certificate of Registration ("FLCCR"), and (7) to keep adequate records.

[3] The *Order Granting Summary Decision, In Part*, mistakenly stated that the NOD "barred [Respondent] from participating in the H-2A program for three years." Rather, the NOD only provided notice that debarment would be imposed for failure to timely pay the assessed back wages and CMPs. It did not state that Plaintiff was presently seeking debarment.

[4] At my request, on January 24, 2022, a member of my staff contacted Mr. Howard who stated that he had not spoken with Mr. Guerrero in years and confirmed that neither he nor his law firm represent Respondent before this tribunal.

[5] The letter also stated that "[Respondent] offered the same work hours to all H-2A workers, and his economic incentive was to employ as many H-2A workers as possible any time there was fruit available to pick" and that Respondent sent busses to the workers' living quarters each day, taking as many workers as were willing to work.

Plaintiff eventually filed two *Orders of Reference* with the Office of Administrative Law Judges ("OALJ") on September 3, 2020, initiating these proceedings. However, as a result of miscommunication among its own staff, OALJ did not docket the cases until January 12, 2022. On January 25, 2022, I issued a *Notice of Docketing and Order of Consolidation* ("Order").

On November 14, 2022, counsel for the Plaintiff filed *Administrator's Motion for Summary Decision Against Javier H. Guerrero* ("MSD") with respect to Respondent's alleged violations of the MSPA and INA. The Plaintiff asserted, in part, that Respondent violated the INA and MSPA, owing $29,331.03 in H2-A back wages, $71,250.00 in H-2A CMPs,[6] and $1,400.00 in MSPA CMPs. As Respondent had not filed a response or requested an extension, on December 6, 2022, I issued *Order Granting Summary Decision, In Part*. I found that Respondent (1) violated the INA by failing to pay the three-fourths guarantee and required wage rate and owed $29,331.03 in back wages; (2) violated the INA by failing to provide workers a complete pay stub, failing to amend the H-2A certification to reflect correct housing information, failing to provide workers with sanitary housing, failing to provide a valid copy of the FLCCR, and failing to keep adequate records of workers' earnings; and (3) violated the MSPA by housing workers without certificate authorization. I affirmed the $1,050.00 CMP for failing to keep adequate records and the $1,050.00 CMP for not providing a valid copy of the FLCCR. [7, 8]

On December 15, 2022, Dane Steffenson, Esq. of Dane Law, LLC entered an appearance as counsel for Respondent. On December 16, 2022 Respondent, through counsel, filed *Motion for Reconsideration or to Amend or Alter Judgement and to Withdraw or Amend Admissions Deemed Admitted* ("Motion"), moving to set aside the December 6, 2022 Order.[9] Plaintiff filed *Plaintiff's Response in Opposition to*

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[6] As revised, $59,400 is for failing to comply with the three-fourths guarantee; $1,350.00 is for failing to pay the AEWR; $1,800.00 is for failing to provide a pay stub to workers; $2,100.00 is for failing to follow applicable laws; $4,500.00 is for not providing sanitary housing; $1,050.00 is for failing to keep adequate records; and $1,050.00 is for not providing a valid MSPA FLCCR.

[7] I found that Respondent did not reference or appeal CMPs assessed for failing to keep adequate records for workers' earnings or not providing a valid copy of the FLCCR and granted summary decision as to the assessment of both CMPs because they were less than the maximum allowed.

[8] I noted that a hearing remained scheduled to determine "the appropriateness of the $59,400.00 CMP assessed for the three-fourths guarantee failure, the $1,350.00 CMP for the wage rate violation, the $1,800.00 CMP for failing to provide workers a complete pay stub, the $2,100.00 CMP for failing to amend the H-2A certification, the $4,500.00 CMP for failing to provide housing meeting applicable safety and health standards, and the $1,400.00 CMP for housing workers without certificate authorization."

[9] In the MSD, Plaintiff asserted that Respondent failed to respond to a Request for Admissions, which I deemed admitted in my December 6, 2022 *Order Granting Summary Decision, In Part*. In

Respondent's Motion for Reconsideration of Order Granting Summary Decision, In Part on January 6, 2023. On January 9, 2023, I issued *Order Granting Respondent's Motion to Withdraw Request for Admissions Deemed Admitted and Continuing Hearing*, allowing Respondent to withdraw the Request for Admissions deemed admitted. However, I denied Respondent's December 16, 2022 Motion in all other respects, without prejudice, because the December 6, 2022 Order was "premised on violations Respondent admitted to in his March 14, 2017 letter and what he did and did not specifically appeal," such that the December 6, 2022 Order did not rely on admitted matters.[10]

On January 19, 2023, Respondent filed *Motion for Reconsideration*, requesting that the Tribunal set aside its finding that Respondent admitted that back wages were owed, alleging that the March 14, 2017 letter contested the back wage finding but did not admit to an amount owed.[11] Plaintiff filed *Plaintiff's Response in Opposition to Respondent's Second Motion for Reconsideration of Order Granting Summary Decision, In Part* on February 2, 2023, arguing that Respondent's March 14, 2017 letter raised for review only the issue of the amount of back wages, not whether it violated the INA and MSPA. The Tribunal conducted a prehearing conference on February 10, 2023 to advise on Respondent's January 19, 2023 Motion for Reconsideration.

I conducted a formal hearing via video conference on February 24, 2023, during which I summarized the prehearing conference, which amended my December 6, 2022 Order. I found that at the hearing, the Plaintiff "will have to prove that Respondent violated the INA by failing to comply with the three-fourths guarantee and failing to pay the required wage rate and owes back wages in the amount of $29,331.03." (Tr. at 4-5).[12] I did not amend my other findings, to include Plaintiff's burden to prove the appropriateness of $69,150.00 in CMPs under the INA and $1,400.00 in CMPs under the MSPA.[13] At the hearing, I admitted

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his Motion, Respondent averred that he did not receive the first set of Requests for Admissions and requested an extension of time to respond to the second in order to obtain counsel.

[10] I found that the withdrawal of the admissions may not change the scope of the hearing, which remained "focused on the amount of penalties for the admitted violations, rather than proving the underlying violations."

[11] The January 19, 2023 Motion also stated that Plaintiff "erroneously attempts to hold Respondent liable for hours 'available while certain workers were not in the United States" and that once the hours are properly accounted for, there are no violations.

[12] Citations to the hearing transcript will be abbreviated as "Tr." There appear to be two transcripts of the February 24, 2023 hearing with different pagination, resulting in a different number of pages. Citations to the hearing transcript refer to the 214-page transcript.

[13] $59,400 + $1,350.00 + $1,800.00 + $2,100.00 +$4,500.00 = $69,150.00.

Plaintiff's Exhibits 1-13 and 15 into evidence. I also admitted the parties' joint stipulations as Administrative Law Judge's Exhibit 1. Four witnesses testified.

On May 5, 2023, I granted *Respondent's Motion to Supplement Record*, admitting Respondent's Exhibits 1-4 and on July 24, 2023, I granted Respondent's *Motion to Correct Exhibits*, admitting corrected Exhibits 3-4.[14]

On July 17, 2023, counsel for both parties timely filed closing briefs. On July 14, 2023, I issued an order extending the deadline for response briefs to August 7, 2023. Both parties filed timely responses to the closing briefs.[15, 16]

Issues in Dispute[17]

1. Whether the penalty assessed by the Administrator for housing workers without certificate authorization is appropriate;

2. Whether Respondent violated the INA and the implementing regulations as set forth above by failing to comply with the three-fourths guarantee and failing to pay the required wage rate;

3. If Respondent violated the INA by failing to comply with the three-fourths guarantee and failing to pay the required wage rate, whether the penalties assessed by the Administrator are appropriate;

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[14] The following references will be used: "PX" for Plaintiff's exhibits and "RX" for Respondent's exhibits. Citations to Plaintiff's exhibits refer to the DOL number, not the page number within the individual exhibit.

[15] Citations to Respondent and Administrator's closing briefs will be abbreviated as "R. Br." and "Admin. Br.," respectively and citations to Respondent and Administrator's response briefs will be abbreviated as "R. Resp. Br." and "Admin. Resp. Br.," respectively.

[16] On August 11, 2023, Respondent filed *Motion for Leave to File Reply* and submitted *Reply to Plaintiff's Response Brief*. Although I did not explicitly permit the filing of reply briefs in the briefing schedule, Respondent's *Motion for Leave to File Reply* is GRANTED. Citations to Respondent's reply brief will be abbreviation as "R. Reply. Br."

[17] The parties stipulated to the following: (1) this Tribunal has jurisdiction to hear and decide these proceedings, (2) Respondent is covered by the INA and MSPA, (3) Assistant District Director Larry Benjamin was acting in his official capacity when he issued the Notice of Determination Letters, (4) Respondent timely requested a hearing concerning back wages and penalties assessed and included a spreadsheet listing $29,331.03 in back wages, and (5) on September 3, 2020, the Administrator filed Orders of Reference. ALJ-1.

4. Whether the penalty assessed by the Administrator for failing to provide pay stubs is appropriate;

5. Whether the penalty assessed by the Administrator for failing to follow applicable federal, state, and local laws and regulations is appropriate; and

6. Whether the penalty assessed by the Administrator for failing to provide housing meeting applicable safety and health standards is appropriate.

I now base my decision on all of the evidence admitted, relevant controlling statutory, regulatory, and case authorities, and the arguments of the parties.[18]

Findings of Fact

MSPA Violations

Respondent began working as a farm labor contractor in 2014, performing harvesting operations of blueberries, blackberries, and grapes.[19] (Tr. at 176; PX-1 at 1). The only FLCCR entered into the record was approved on October 23, 2014 and expired on September 30, 2016.[20] (PX-13). Respondent's job order listed housing locations in Alma, Manor, and Douglas, Georgia, but his FLCCR did not authorize him to house workers.[21] (PX-1 at 20; PX-13). Respondent paid for rooms

[18] In *Austin v. BNSF Railway Co.*, ARB No. 17-024, ALJ No. 2016-FRS-13, slip op. at 2 n.3 (ARB Mar. 11, 2019) (per curiam), the Administrative Review Board ("ARB") noted that an administrative law judge ("ALJ") need not include a summary of the record in the Decision and Order, as it is assumed that the ALJ reviewed and considered the entire record in making his or her decision. The ARB stated that what is more helpful for its review of whether the ALJ's findings of fact are supported by substantial evidence of record is a tightly-focused set of findings of fact. Accordingly, in this Decision and Order I focus specifically on findings of fact pertinent to the issues in dispute. I have, however, reviewed and considered the *entire* record.

[19] Respondent entered into a contract with Paulk Vineyards from April 26, 2015 to September 8, 2015. (PX-1 at 1-2). Respondent stated that he had a contract for 273 H-2A workers but 40 workers left upon arrival to the U.S. and that he also employed U.S. workers. (*Id.* at 5-6). Respondent hired an agent to assist him in preparing his paperwork and payroll for the H-2A workers. (Tr. at 194-95; PX-1 at 6, 30; PX-10 at 189). However, Investigator Williams noted that Respondent stated that his daughter completed his payroll in 2014. (PX-1 at 22).

[20] On September 1, 2015, the bus provided by Respondent was involved in an accident while driving workers to their housing when it slid down a shoulder/embankment and began to roll. (PX-1 at 4-5). The accident did not cause any fatalities or serious injuries and WHD found that Respondent had liability insurance, bus registration, and worker compensation as required by regulation. (*Id.* at 5-6; PX-13).

[21] Respondent's FLCCR states that Respondent is authorized for transportation and driving and is not authorized as a housing provider. (PX-13; Tr. at 58). The FLCCR lists two authorized vehicles to transport workers and the housing section is blank. (PX-13). Investigator Williams noted that Respondent explained that he sent his housing inspection information to the Chicago certification

weekly at the Champs Hotel in Douglas and did not require the H-2A workers to pay to stay at the hotel.[22] (Tr. at 151-52, 168, 178). The Champs Hotel was not inspected before workers arrived. (*Id.* at 181).

In June 2015, several workers moved from the Champs Hotel in Douglas, Georgia to the Miami Hotel in Pearson, Georgia.[23, 24] (Tr. at 60). Workers left the Champs Hotel because they wanted to be closer to stores and activities.[25] (*Id.* at 179). Respondent learned that the workers moved to the Miami Hotel, who told him that they wanted to live there, instead of the Champs Hotel. (*Id.* at 179-80). In order to retain his workers, Respondent offered to pay half the cost of the room, and workers paid the other half to the Miami Hotel.[26, 27] (*Id.* at 157, 165, 179-80). Respondent testified that workers were able to remain or return to the Champs

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team upon notice that his job order was deficient, but did not send it to the FLC certification team in Atlanta. (PX-1 at 22).

[22] The Champs Hotel has since been renamed to the Comfort Inn, but is referred to as the Champs Hotel throughout this Decision. (Tr. at 178). Respondent testified that he received a letter from Champs Hotel that the H-2A workers would stay at the hotel for the duration of the contract, though such a letter was not submitted into evidence. (*Id.*).

[23] The record states that workers moved to the Ballinger Hotel and the Miami Hotel, both of which were located in Pearson, Georgia. (PX-1 at 21). The hotels are referred to jointly in the record and in calculating CMPs, Investigator Williams referred to both. (PX-9 at 148; JX-1 at 21). ADD Benjamin understood that workers were residing at both hotels. (Tr. at 123).

[24] There appears to be a discrepancy regarding when workers moved from the Champs Hotel to the Miami Hotel. WHD documentation states that at the time of the WHD inspection on September 10, 2015, workers had lived at the Miami Hotel for four to eight weeks, but also states that the housing had been occupied since the end of May. (PX-1 at 16-17, 21). Roselino Hernandez, who worked as an H2-A worker for Respondent in 2015, stated that she moved to the Miami Hotel about a month and a half after coming to the United States. (Tr. at 151-52). Based on the varying reports, according significant weight to the worker, I assume, without finding, that workers began moving to the Miami Hotel in approximately June 2015.

[25] Two workers, Roselino Hernandez and Diacono Hernandez, worked picking fruit for Respondent during the 2015 season and testified that they voluntarily moved from the Champs Hotel to the Miami Hotel to join other workers, who wanted to be closer to restaurants, stores, and recreation activities. (*Id.* at 149-152, 155-56, 167, 172).

[26] WHD found that Respondent had moved some of the workers to Pearson, Georgia in July 2015 because workers wanted air conditioned rooms and ADD Benjamin testified that Respondent agreed to move the workers to the Miami Hotel. (PX-1 at 6, 21; Tr. at 125-26). However, Roselino Hernandez stated that the Champs Hotel had air conditioning. (Tr. at 153). According greater weight to the worker, who resided at the hotel, I credit Respondent's testimony that workers left the Champs Hotel and moved to the Miami Hotel on their own accord.

[27] Respondent paid the workers living at the Miami Hotel an extra $15.00 a week. (Tr. at 15; PX-1 at 6).

Hotel at any time. (*Id.* at 170-71, 173, 181-82). WHD received a complaint about the Miami Hotel and investigated it on September 10, 2015.[28, 29] (*Id.* at 54-55, 123-24; PX-12).

WHD Investigator Warren Williams was assigned to investigate Respondent. (Tr. at 19). Assistant District Director ("ADD") Larry Benjamin supervised Investigator Williams during the investigation and prepared the NOD.[30] (*Id.*, 22; PX-3 at 46). ADD Benjamin issued and signed the determination letter. (Tr. at 25; PX-1). The investigative period was from on or about September 9, 2013 to September 8, 2015.[31] (PX-3 at 44; PX-4 at 53; Tr. at 134).

Investigator Williams noted that Respondent had limited control of the Miami Hotel because "[h]e rented the property from the housing provider (HP) and relied upon the HP to ensure housing compliance." (PX-1 at 15). WHD found that the Miami Hotel was under Respondent's control and that the innkeeper exception did not apply to the Miami Hotel because "there were no members of the public or non-farm workers there at the time when he had the workers there." (Tr. at 67; PX-1 at 6). ADD Benjamin testified that he understood that WHD confirmed that Respondent or his workers rented the entire facility and no rooms were available to the public, as he believes Investigator Williams would have indicated that there were non-farm workers at the hotel if he granted the innkeeper exemption. (Tr. at 67-68). ADD Benjamin explained that he was unaware who Investigator Williams spoke to in making this assessment and that WHD makes the innkeeper exception determination at the time the investigator is present without conducting year-round inspections to determine if the housing functions as a hotel at all times of year when

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[28] ADD Benjamin testified that WHD did not inspect the Ballinger Hotel, which was listed on Respondent's paperwork, and that investigators "arrive at a property that is listed on the contract and [if] nobody is there, because they were all moved out, then we won't inspect it, because no matter what condition it's in, it doesn't matter because no one is being housed there." (Tr. at 123).

[29] The Narrative Report states that WHD inspected the Miami Hotel on November 9, 2015. (PX-1 at 14). ADD Benjamin explained that he was unsure why Investigator Williams put the November date, but that the actual inspection in the case diary was conducted on September 10, 2015. (Tr. at 139).

[30] As ADD, Mr. Benjamin supervises investigators and reviews cases after they are submitted for accuracy. (*Id.* at 17, 19). In this case, ADD Benjamin testified that he ensured Investigator Williams' report conformed to formatting standards, evidence was present, and the conclusions were valid. (*Id.* at 63). ADD Benjamin reviewed Investigator Williams' computations and transcriptions of the payroll records that Investigator Williams reviewed, but ADD Benjamin did not review payroll records. (*Id.* at 64). ADD Benjamin did not go onsite. (*Id.*). Investigator Williams worked as an investigator for at least seven years and has since retired. (Tr. at 13, 74).

[31] Respondent submitted his 2016 tax return, which shows gross income of $325,698.00 and a profit of $8,128.00. (RX-2).

no farm workers are present. (*Id.* at 68-70). Respondent explained that there were other rooms available for the owner to rent to other guests. (*Id.* at 181-82).

Investigator Williams determined that Respondent violated 29 C.F.R. § 500.101(a) and § 500.105(2)(C)[32] by failing to amend his FLCCR to authorize housing in order to house workers. (PX-1 at 23, 30). ADD Benjamin testified that Respondent's FLCCR was valid at the time of the investigation and that farm labor contractors ("FLCs") must apply for certification. (Tr. at 58, 65). WHD found that Respondent used the Miami and Ballinger Hotels to house workers—which were not listed on his FLC registration or H-2A job certification—and assessed a total of $1,400 in CMPs for two violations, viewing each hotel location as a separate violation. (Tr. at 25, 59-60; PX-1 at 30). To calculate the CMP, Investigator Williams applied a 30 percent reduction to $2,000.00[33] based on three mitigating factors: Respondent had no prior history of H-2A violations, Respondent came into compliance and gave assurance of future compliance, and the potential financial gain to Respondent and loss to employees was minimal. (Tr. at 58-60; PX-1 at 30-31).

INA Violations

In March 2014, the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification ("OFLC") certified Respondent's Application for Temporary Employment Certification, which was assigned number H-300-14065-212889 ("TEC 1"). (PX-10). TEC 1 authorized Respondent to hire up to 74 foreign workers for a full-time position harvesting, gathering, counting, and packing blueberries, blackberries, grapes, and cucumbers at a worksite in Wray, Georgia for the period of April 20, 2014 to October 10, 2014. (*Id.* at 187-192).

As part of his investigation, Investigator Williams relied on payroll records to initially assess $123,035.52 in back wages.[34] (Tr. at 23, 33, 72; PX-3 at 44).

In his initial calculation of back wages, Investigator Williams mistakenly gave Respondent credit for hours worked for the three-fourths guarantee

[32] Investigator Williams appears to have cited 29 C.F.R. § 500.101(a) and § 500.105(2)(C) in error, as they relate to motor vehicle safety. Based on the testimony of ADD Benjamin and the record as a whole, it appears that the provisions most relevant to the facts of this case are 29 C.F.R. §§ 500.40, 45(c), and 55(a). (Admin. Br. at 3).

[33] The maximum CMP was $1,000.00. $1,000.00 x 2 = $2,000.00.

[34] WHD initially assessed back wages of $113,592.02 for failure to comply with the three-fourths guarantee for 57 workers and $9,443.50 for failure to pay the required rate of pay for 69 workers. (PX-3 at 49).

computation, when he should have instead given Respondent credit for hours offered. (Tr. at 33; PX-2 at 41). Respondent's former attorney, Mr. Howard, sent *Appeal of Notice of Determination of Wages Owed, Assessing Civil Money Penalties* to ADD Benjamin. (PX-5). The March 14, 2017 letter stated that WHD miscalculated back wages owed, and that based on an amended spreadsheet, Mr. Howard believed the correct amount should be $20,020.21 for failure to meet the three-fourths guarantee and $9,362.10 for failure to pay AEWR. (*Id.* at 60). Respondent stated that the amended spreadsheet reflected a more accurate record of hours offered for the 72 workers Respondent employed, as the spreadsheet showed the hours worked as reflected by Respondent's timesheets. (*Id.* at 63). The new data included the hours that were actually worked on each day by each worker.[35] (Tr. at 34; PX-5 at 63). Mr. Howard altered the spreadsheet, which was created by WHD, based on Respondent's pay records, explaining that "the hours-offered data is presented on a separate page, with the hours offered-but-not-worked highlighted in orange" (hereinafter "amended spreadsheet"). (PX-5 at 63). ADD Benjamin met with Mr. Howard upon reviewing the March 14, 2017 letter and amended spreadsheet. (Tr. at 31).

On March 15, 2018, ADD Benjamin drafted an addendum detailing the reduction of back wages and CMPs, relying on the amended spreadsheet that was provided by Mr. Howard.[36] (PX-2; Tr. at 136). ADD Benjamin took the numbers in the spreadsheet as true and Investigator Williams reviewed the amended spreadsheet to determine where corrections were made, assessing a revised total of $29,331.03 in back wages.[37] (Tr. at 77; PX-2 at 42). The addendum notes ADD Benjamin's failed attempts to reach Mr. Howard. (PX-2 at 43). ADD Benjamin did

[35] From July 2, 2014 to July 27, 2014, the amended spreadsheet states that "farm closes." (PX-6). Respondent did not know what that means and did not check the spreadsheet prepared by Mr. Howard to ensure its accuracy. (Tr. at 190, 193-94). He signed an affidavit stating that he reviewed the spreadsheet Mr. Howard compiled and that it is accurate to the best of his knowledge. (PX-15). Respondent explained that he cannot read. (Tr. at 206).

[36] In the NOD, WHD assessed $2,040 in back wages for failure to provide housing at no cost with a proposed CMP of $1,200. (PX-1 at 6-8). In the addendum, WHD removed this violation, stating that the regulations do not require air conditioning and "if the original housing was available and the [workers] chose to stay elsewhere, that was not a violation." (PX-2 at 42).

[37] ADD Benjamin testified that under the FLSA, investigators are not required to compute back wages and WHD often asks employers to compute the back wages themselves. (Tr. at 80-81). ADD Benjamin does not believe that any underlying documents were submitted to WHD to support the amended spreadsheet and did not directly observe any records Respondent provided to Investigator Williams. (*Id.* at 73, 77-78).

not provide any notice in writing to Respondent because ADD Benjamin was unable to reach Mr. Howard.[38] (Tr. at 78-79).

Failure to Comply with Three-Fourths Guarantee

WHD calculated the three-fourths guarantee by looking at the entire season as 17 weeks and using the hours offered in the amended spreadsheet.[39] (Tr. at 99; PX-6). The three-fourths guarantee deficiency was therefore amended to include the corrected hours and multiplied by the AEWR rate.[40] (Tr. at 34). WHD found that Respondent violated 20 C.F.R. § 655.122(i) and that the sum of the amended three-fourths guarantee computation was $20,020.21.[41] (*Id.* at 34-36; PX-6). Based on the payroll data and amended spreadsheet, Investigator Williams prepared a summary of the back wages. (Tr. at 36-37; PX-7). Based on the amended spreadsheet provided by Mr. Howard, WHD reduced the number of workers owed from 57 workers owed $113,592.02 to 44 workers owed $20,020.23. (Tr. at 33; PX-2 at 42).

I find that when Respondent offered work, he offered it to all workers.[42] (Tr. at 97). Respondent testified that workers worked in different fields, which could

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[38] ADD Benjamin testified that had he reached a settlement agreement with Mr. Howard, he would have updated the file with a letter stating as such. (*Id.* at 80). Respondent testified that Mr. Howard told him to send a payment, which Respondent believed was the money that he owed to the government and that the amount had been paid. (*Id.* at 183-84, 186-87). Respondent testified that he provided records from 2014 and 2015 to Mr. Howard but subsequently did not retain all the records for that period. (*Id.* at 185-86).

[39] WHD calculated the blank cells in PX-6 as zero hours offered that day. (*Id.* at 99). ADD Benjamin testified that it is not unusual for payrolls to include workers with no hours listed because while they are no longer working, they have not been removed from the system. (*Id.* at 100). He explained that these individuals would not have contributed towards the three-fourths guarantee calculation because it is WHD policy not to charge a first-time violator with payment for the three-fourths guarantee for individuals who absconded, though employers should report their absconding to ETA and WHD. (*Id.* at 100-101).

[40] Respondent was initially assessed back wages for several workers under the three-fourths guarantee, including Javier Lopez, Jose Lino Lopez, and William Lucas, who did not work for extended periods of time and the amended spreadsheet reflects that they were not offered hours during that period. (*Id.* at 108-110; PX-8 at 102, 104, 114; PX-6). ADD Benjamin testified that if they had been offered hours to work on those days, it would reduce the three-fourths guarantee. (Tr. at 108-110).

[41] The summary in PX-7 was transferred from the amended spreadsheet. (*Id.* at 36-37). PX-6 lists $20,020.21 as the sum of the amended three-fourths guarantee computation but PX-7 lists $20,020.23 as the sum. (PX-6; PX-7). ADD Benjamin attributed the two-cent difference to a rounding error from using the Excel spreadsheet. (Tr. at 37).

[42] Respondent testified that after the workers moved to the Miami Hotel, several workers began working for another employer. (*Id* at 179-180). Respondent explained that when these workers did not have a job, they would return to help him. (*Id.* at 180). Respondent testified that though Mr.

result in different hours, and there was not a day where he only offered work for part of the workers.[43] (*Id.* at 187, 189-190).

After the hearing, Respondent filed a revised version of the amended spreadsheet, in which Respondent entered, using cells highlighted in blue, the daily average hours worked in each of the previously empty cells in the amended spreadsheet.[44] (RX-3; RX-4). Based on the revisions, Respondent asserts that the hours Respondent offered exceed the three-fourths guarantee for every worker. *Motion to Supplement Record* at 3.

Failure to Pay the Required Wage Rate

Respondent paid workers on a piece rate or by hour. (PX-1 at 6, 11). The 2014 prevailing wage in Georgia was $10.00.[45] The contract wage rate was $10.00

Howard filled in hours offered when people did not go to work, he does not know why there are blank cells in the amended spreadsheet. (*Id.* at 190-92). For example, on July 2, 2014, he testified that he was certain that he offered hours to every single worker that day because the fruit growth begins slowly and that there is more fruit to pick each day as the season progresses. (*Id.* at 192). Further, Respondent, through his attorney Mr. Howard, consistently stated that several workers declined work on some days, as he believed that the workers accepted temporary work with other farm labor contractors that offered higher piece rates. (PX-5 at 5). Mr. Howard also informed WHD that several workers left early to return to Mexico and that he would provide documentation where available, as well as records with instances where workers decided not to work for personal reasons. (PX-2 at 41). This documentation was entered into the record.

Roselino Hernandez, who worked for Respondent during the investigative period, though not in 2014, stated that everybody was able to work when work was available and that there were not certain days where some individuals were allowed to work when others were not. (Tr. at 159). He also explained that he knew he was guaranteed 40 hours a week. (*Id.* at 162). Further, he noted that some people worked every day, some did not want to work, and some individuals left, explaining that other farm contractors or employers offered the workers different work. (*Id.* at 159-60).

[43] Workers could be offered a different number of hours in the same day. For example, on May 30, 2014, workers were offered both 7.5 and 7.6 hours. (*Id.* at 120; PX-6). Respondent explained that on days when it rained, some workers in different locations would finish at different times, but that the hours for the workers within the group should work the same hours. (Tr. at 188-89). He also testified that workers sometimes worked additional hours washing buckets out for the next day to explain why one individual worked longer than others in a group. (*Id.* at 189).

[44] Respondent explained that he "hired someone to perform the manual ministerial task of inserting the "average hours worked" number into empty cells in corresponding columns. "No calculations or other changes were performed. Once the empty cells are filled in, the spreadsheet automatically calculates the total hours offered on the first tab of PX-6. . . . Each previously empty cell into which the 'average hours worked' number was inserted is highlighted in blue. Again, no other changes were made." *Motion to Supplement Record* at 3.

[45] Department of Labor, Employment and Training Administration, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2014 Adverse Effect Wage Rates*, 79 Fed. Reg. 665 (Jan. 6, 2014).

an hour. (PX-10 at 191; Tr. at 41). By dividing total pay by total hours worked, Investigator Williams found that Respondent "was paying a piece rate that was below" the required wage rate. (Tr. at 47, 85).

Based on the amended spreadsheet, WHD found that Respondent violated 20 C.F.R. § 655.122(l) and reduced the amount of back wages owed for failure to pay the required wage rate from $9,443.50 owed to 69 workers to $9,310.80 owed to 65 workers. (Tr. at 41; PX-2 at 42). ADD Benjamin testified that after the revisions, several workers were not found to be due anything under the three-fourths guarantee and the remaining amount owed was under $20.00, which WHD policy treated as de minimis.[46, 47] (Tr. at 42).

Civil Money Penalties

Initially, the NOD assessed Respondent $103,650.00[48] in CMPs for INA violations. (PX-3 at 44, 53). WHD later amended the total for INA CMPs to $71,250. (PX-2 at 43).

Failure to Comply with Three-Fourths Guarantee

Based on the amended spreadsheet, WHD found that Respondent failed to comply with the three-fourths guarantee in violation of 20 C.F.R. § 655.122(i) and assessed a CMP of $59,400.00 based on 44 workers. (PX-2 at 42; Tr. at 33; PX-1 at 8). In assessing factors to consider a per-worker rather than per-violation

[46] Per its policy, WHD did not request back wages when the total due to an individual employee is under $20.00. (Tr. at 42). The amended spreadsheet lists $9,362.10 as the amount due. (PX-6). After removing the de minimis employees, Investigator Williams assessed $9,310.80. (Tr. at 44-45, 137; PX-7).

[47] ADD Benjamin testified that there was an error in the formula calculating the regular rate in the original back wage computation sheets, PX-8, which appeared to calculate the regular rate using the piece rate in several instances. (Tr. at 87-94). For example, the formula generated a regular rate that exceeded $10.00 as a violation for Abimael Domingo, Alfredo Godinez, Brandy Gomez, Moises Hernandez, Enevi Lopez, and Roberto Lopez (PX-8 at 76, 85-86, 94, 100, 108; PX-6) and the regular rate was miscalculated for Alfredo Godinez, as his pay appears to have been divided by the number of pieces rather than total hours. (Tr. at 89; PX-8 at 85). Additionally, ADD Benjamin testified regarding the discrepancy between the spreadsheet submitted by Mr. Howard and PX-8. (Tr. at 94-97). ADD Benjamin explained that WHD did not rely on PX-8 to determine the back wages it is currently seeking. (*Id.* at 135).

[48] Respondent was initially assessed $76,950.00 for failing to comply with the three-fourths guarantee; $16,200.00 for failing to pay the required wage rate; $1,050.00 for failing to keep adequate records; $1,800.00 for failing to comply with pay statement requirements; $2,100.00 for failing to comply with applicable Federal, state, and local employment-related laws assessed; $4,500.00 for failing to provide or secure housing without charge to the worker that complies with applicable housing and safety and health standards; and $1,050.00 for failing to provide a valid copy of the FLCCR. (PX-3 at 49-51; PX-9 at 143-46).

calculation, Investigator Williams noted that (1) the violation was serious in nature, (2) a significant number of workers were exposed to the violation, (3) Respondent did not have knowledge of this requirement, (4) this was Respondent's first H-2A violation, (5) Respondent had control over the violations, (6) there is a potential for financial gain and workers' wages were affected, (7) not providing the three-fourths guarantee is considered as a single item violated by conduct, and (8) there were extensive back wages owed to the workers.[49] (PX-1 at 9). To calculate the CMP, Investigator Williams applied a 10 percent reduction to $66,000.00[50] because Respondent had no prior history of H-2A violations.[51] (Tr. at 38-39).

Failure to Pay the Required Wage Rate

Based on the amended spreadsheet, WHD assessed a CMP of $1,350.00 based on a per-regulation violation for Respondent's failure to pay the required wage rate.[52] (Tr. at 46; PX-2 at 42). To calculate the CMP, Investigator Williams applied a 10 percent reduction to the $1,500 maximum CMP because Respondent had no prior history of H-2A violations.[53] (PX-1 at 11-12).

Pay Stub Violations

Respondent provided a pay stub from 2015 to Investigator Williams as part of the investigation.[54] (Tr. at 51, 132). Upon reviewing this pay statement, which Respondent provided to workers, Investigator Williams determined that the statements lacked three requirements: the hours of employment offered, the hours actually worked, and Respondent's Federal Employer Identification Number

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[49] ADD Benjamin testified that WHD generally assesses CMPs per worker for wage-related violations and that it was not "an insignificant amount of money so [he] felt that the per worker assessment was valid" in this case. (Tr. at 84).

[50] The maximum CMP was $1,500.00. $1,500.00 x 44 = $66,000.00.

[51] WHD did not consider the specific amount owed to each worker when calculating the CMPs, viewing the amount of back wages in the aggregate. (*Id.* at 141-42). WHD also does not consider the period of time in which the back wages were incurred or employer's financial situation when assessing CMPs. (*Id.* at 142-43).

[52] WHD initially assessed the CMP on a per-worker basis, but changed it to a per-regulation basis based on its policy that when there are multiple wage violations, the per-worker standard is applied to only one of the violations. (*Id.* at 48; PX-2 at 42).

[53] As with CMPs for the three-fourths guarantee, WHD did not consider the specific amount of back wages owed to each worker, the period of time in which the back wages were incurred, or employer's financial situation when assessing CMPs. (Tr. at 141-43).

[54] ADD Benjamin testified that it is standard operating procedure for WHD to request records that employers provide to employees which show hours worked and pay. (*Id.* at 133).

("FEIN"). (PX-1 at 13; Tr. at 48-49). The pay stub entered into the record appears to belong to worker Epifanio Anastacio Dionicio and is dated June 19, 2015. (PX-11).

H2-A worker Roselino Hernandez testified that Respondent paid him in checks based on how much fruit he picked. (Tr. at 160-61). He received, in addition to a document similar to the pay stub at PX-11, a receipt "based on pounds and the packages," which included his name, address, quantity of what he packed, and the amount they paid per unit. (*Id.* at 161-63). He testified that he also had a card, which he marked at the place he "dropped" the fruit, which contained the FEIN. (*Id.* at 164). Respondent told WHD that he provides workers a worksheet with their work activities either by piece rate or by hour. (PX-1 at 6).

WHD found that Respondent violated 20 C.F.R. § 655.122(k) and assessed a $1,800.00 CMP, assessing the maximum CMP for each of the three deficiencies. (*Id.* at 13; PX-9 at 142). Investigator Williams applied a 60 percent reduction to $4,500[55] for six mitigating factors, as (1) Respondent had no prior history of H-2A violations, (2) the violation had no direct effect on wages, (3) Respondent made a good-faith effort to comply because he provided wage statements to workers, (4) Respondent explained that he felt that the wage statement was complete and correct, (5) Respondent gave assurances of future compliance, and (6) Respondent had no financial gain and employees had no financial loss. (PX-1 at 13; Tr. at 49-50).

Failure to Follow Applicable Federal, State, and Local Laws and Regulations

Investigator Williams determined that Respondent violated 20 C.F.R. § 655.135(e) by failing to amend his FLCCR to reflect correct housing information, which is required by the MSPA, and did not maintain proper records with employee information under the FLSA.[56] (PX-1 at 19). WHD assessed $2,100.00 in CMPs based on his violation of the MSPA and FLSA, assessing a CMP for each law Respondent violated. (Tr. at 55-56, 58; PX-9 at 142; PX-1 at 19). Investigator Williams applied a 30 percent reduction to $3,000[57] for three mitigating factors because Respondent had no prior history of H-2A violations, it had no direct effect on housing safety, and Respondent's financial gain was minimal and loss to employees was insignificant. (Tr. at 57; PX-1 at 19). Investigator Williams noted

[55] $1,500.00 x 3 = $4,500.00.

[56] Investigator Williams found the Respondent did not record the workers' home address in his earnings records. (PX-1 at 22).

[57] The maximum CMP was $1,500.00. $1,500.00 x 2 = $3,000.00.

that Respondent told him that he would add the workers' home of record to the earnings statements. (PX-1 at 22).

Failure to Provide Housing Meeting Applicable Safety and Health Standards

As part of his investigation, Investigator Williams found five housing violations at the Miami Hotel in violation of 20 C.F.R. § 655.122(d)(1)(i): (1) the hotel grounds had garbage and debris,[58] (2) the screen doors were missing or the soft-closing devices on the doors did not work,[59] (3) there was unsanitary conditions for storing food,[60] (4) there was insufficient lighting,[61] and (5) the dining halls were not kept clean and garbage containers were not leakproof or did not have lids.[62] (Tr. at 51-52, 138; PX-1 at 14; PX-9 at 148-150). Investigator Williams stated that Respondent did not have knowledge of the violations, and that based on the condition and "previous inspection in June 2015 for the housing provider," the violation had been present for at least three months. (PX-1 at 15). WHD calculated CMPs based on photographs taken at the hotel on the day of the investigation and the investigation form completed by Mr. Williams. (Tr. at 55, 141). WHD assessed a $4,500.00 CMP, assessing $1,500.00 for each of the five violations.[63] (*Id.* at 53; PX-12). To calculate the CMP, Investigator Williams applied a 40 percent reduction to $7,500.00[64] because of four mitigating factors: Respondent had no prior history of H-2A violations, Respondent made an effort to comply with the safety and health requirements at the Miami Hotel, Respondent gave assurance that he would comply in the future and the housing issues were abated, and Respondent's financial gain

[58] Investigator Williams found that Respondent violated 29 C.F.R. § 1910.142(a)(3) because areas around the building were full of garage and debris, rubbish was a tripping hazard and could harbor pests, and food on the ground attracted insects. (*Id.* at 15).

[59] Investigator Williams found that Respondent violated 29 C.F.R. § 1910.142(b)(8) because of the fly and insect infestation and because of faulty screen doors and windows. (*Id.* at 16; PX-9 at 148).

[60] Investigator Williams found that Respondent violated 29 C.F.R. § 1910.142(b)(9) because of the fly and insect infestation, spoilage, and bacteria contamination. (PX-1 at 16).

[61] Investigator Williams found that Respondent violated 29 C.F.R. § 1910.142(g) because wiring was exposed, workers were "forced to improvise" to have lighting, and light fixtures were missing. (*Id.* at 17).

[62] Investigator Williams found that Respondent violated 29 C.F.R. § 1910.142(i) because food handling facilities did not comply with the Food Service Sanitation Ordinance and Code and that kitchens were not free from vermin. (*Id.* at 18; PX-9 at 149).

[63] Investigator Wiliams stated that because the violations had a discernible harm to the health of workers, he assessed CMPs on a per-requirement basis. (PX-1 at 15-18).

[64] The maximum CMP was $1,500.00. $1,500.00 x 5 = $7,500.00.

was minimal and the potential financial losses for workers was also minor. (PX-1 at 14; Tr. at 52-54).

Discussion

The Administrator has the burden of proof,[65] and the standard of proof is preponderance of the evidence.[66] The Administrator has the burden of proof regarding the reasonableness of the civil monetary penalty. *See* 5 U.S.C. § 556(d); *Three Chimneys Farms, LLC*, 2013-TAE-00011, slip op. at 16-17 (2015) (citing cases). The appropriateness of the penalty and application of mitigating factors is reviewed by the ALJ *de novo*. *Adm'r, WHD, USDOL v. Peroulis & Sons Sheep, Inc. et al.*, ARB Nos. 14-076, 14-077, ALJ No. 2012-TAE-004, slip op. at 8 (ARB Sept. 12, 2016) (citing 29 C.F.R. § 501.41(b) (providing for "*de novo* hearing" before the ALJ)).

MSPA Violations[67]

On summary decision, I held that Respondent violated the MSPA by housing workers without certificate authorization. The appropriateness of the CMPs for this violation are addressed below.

[65] Administrative Procedure Act, 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). Pursuant to 29 C.F.R. § 500.223(b), the Secretary of Labor is the plaintiff and the person requesting the hearing is the respondent. Section 500.20(t) defines "Secretary" as the Secretary of Labor or Secretary's authorized representative. Secretary's Order 01-2014, ¶ 10, 79 Fed. Reg. 77,527 (Dec. 24, 2014), delegated and assigned responsibility to the WHD Administrator, to carry out the Secretary of Labor's functions under 8 U.S.C. 1188(g)(2), relating to assuring employer compliance with terms and conditions of employment under the temporary alien agricultural labor certification program (H-2A visas). Similarly, pursuant to 29 C.F.R. § 501.36(b), the WHD Administrator is the plaintiff and the person requesting the hearing is the respondent.

[66] The Part 500 and Part 501 regulations do not state a standard of proof. Pursuant to 29 C.F.R. § 500.219 and 29 C.F.R. § 501.34(a) the Office of Administrative Law Judges' Rules of Practice and Procedure at 29 C.F.R. Part 18 apply where the Part 500 or Part 501 regulations do not contain a specific provision. In turn, 29 C.F.R. § 18.10(b) provides that the Administrative Procedure Act, 5 U.S.C. 551 through 559, applies unless the governing statute, regulation, or executive order prescribes a different procedure. 5 U.S.C. § 556(d) reflects a preponderance of the evidence standard for administrative hearings. *Steadman v. SEC*, 450 U.S. 91, 100-102 (1981).

[67] On summary decision, I found that Respondent violated the MSPA by failing to provide a valid copy of the FLCCR. As such, I find it unnecessary to address this violation.

INA Violations[68]

Failure to Comply with Three-Fourths Guarantee

The H-2A program requires employers to "guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays" covered by the TEC period. 20 C.F.R. § 655.122(i). Employers must offer work hours during the work contract period specified in the TEC and the work contract period can only be shortened by agreement of the parties with the OFLC Certifying Officer's approval. *Id.* § 655.122(i)(i)-(ii). Workers may be offered more than the specified hours of work on a single workday. *Id.* § 655.122(i)(iv). If an employer affords the worker less employment than 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, Administrator argues that Respondent, through his previous attorney Mr. Howard, admitted that he owed $20,020.21 for failure to meet the three-fourths guarantee by amending WHD's spreadsheet and through the March 14, 2017 letter.[69] (Admin. Br. at 8-9). In particular, Administrator asserts that Respondent's testimony that he offered hours to every employee contradicts the data in the amended spreadsheet, which contains blanks cells that indicate that he did not offer hours for several dates.[70] (*Id.* at 11-12). Further, Administrator argues that Respondent has not submitted underlying documentation to show that a different amount of back wages is owed and that Rosalino Hernandez's testimony that

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[68] On summary decision, I found that Respondent violated the INA for (1) failing to keep adequate records for workers' earnings, (2) failing to provide workers a pay stub with required information, (3) failed to follow applicable laws, including by failing to amend its H-2A certification, and (4) housing workers without certificate authorization. As such, I find it unnecessary to address these violations.

[69] Respondent argues that this letter and the amended spreadsheet are inadmissible as settlement negotiations and are unauthenticated. (Resp. Br. at 6, 8). Respondent alleges that the tribunal may not rely on the letter and amended spreadsheet regarding the validity and amount of any potential claim. (R. Reply. Br. at 1-2) Administrator argues that the letter specifically requested a hearing and that these documents are not settlement communications because they are the basis of the tribunal's *Order Granting Summary Decision, In Part*. (Admin. Resp. Br. at 7). I find that Mr. Howard's letter and amended spreadsheet are not settlement negotiations. The letter is captioned "Appeal of Notice of Determination" and disputes back wages, CMPs for the three-fourths guarantee and required wage rate, and the housing CMPs. Further, the letter states that "we request a hearing concerning the back wages and penalties assessed." I therefore find that the letter and amended spreadsheet are not settlement negotiations and can be relied on regarding the validity and amount of the claims.

[70] Administrator also notes that Respondent's testimony that he did not review the amended spreadsheet, which he asserts is inaccurate, is not credible because Respondent signed an affidavit, which provided that he reviewed the spreadsheet and that it was true and accurate to the best of his knowledge. (Admin. Br. at 12-13).

Respondent offered the same hours to all workers is not reliable or credible because he did not work for Respondent in 2014. (*Id.* at 10-11). Finally, Administrator argues that Respondent's spreadsheet, submitted after the hearing, is unauthenticated, unreliable, and contrary to Respondent's affidavit. (*Id.* at 14). Respondent argues that the amended spreadsheet is unreliable because ADD Benjamin did not review the underlying payroll records to ensure accuracy and admitted that the amended spreadsheet contains discrepancies.[71] (R. Br. at 3, 10). Respondent also asserts that Respondent offered the same work hours to the workers and that the blank cells in the amended spreadsheet should be counted as hours offered but not worked because Respondent sent transportation, which picked up as many workers as were willing to work. (*Id.* at 7, 11-12).

The evidence in the record includes a spreadsheet created by WHD and amended by Respondent's previous attorney, which reflects that $20,020.21 is owed in back wages for failure to comply with the three-fourths guarantee, as well as investigative materials prepared by Investigator Williams and letters drafted by ADD Benjamin in reliance on Investigator Williams' investigation. Other than one paystub, offered to show a violation regarding the included information, the underlying documentation, such as payroll records or timesheet data, is not part of the record. Both sides are hampered by the lack of physical evidence in this case, which was caused in part by Administrator's delay in initiating this proceeding.

I do not accord weight to Respondent's post-hearing spreadsheet, which Respondent asserts shows that he offered hours that exceeded the three-fourths guarantee for each worker. (RX-3/RX-4). Based on Respondent's testimony that he did not retain documentation or records from 2014, the spreadsheet appears to reinforce Respondent's testimony that he offered hours to every worker. Further, Respondent alleges that the blank cells in the spreadsheet were filled in with the average hours offered, asserting that the amended spreadsheet submitted by Mr. Howard was similarly updated. However, Mr. Howard relied on payroll records to fill in the hours offered-but-not-worked. I therefore have concerns regarding the use of average hours offered, as Respondent's testimony demonstrates that groups of workers could be offered different hours and that some workers were offered additional hours to clean buckets. Therefore, while I previously found that when Respondent offered work, he offered it to all workers, I do not accord weight to Respondent's spreadsheet because it is not based on underlying data and because of his testimony that he did not offer every worker the same number of hours every day.

[71] Respondent also criticizes the computation of back wages for the failure to comply with the three-fourths guarantee because Investigator Williams initially made an error in his calculations by not giving Respondent credit for hours offered. (R. Br. at 3-4).

I accord some weight to the amended spreadsheet. WHD created the spreadsheet and Mr. Howard amended it using underlying documentation, providing that the spreadsheet showed the daily hours worked in 2014 "as reflected by [Respondent's] timesheets." In his letter, Mr. Howard did not state that the timesheets he relied upon were incomplete or inadequate. Further, I find that the amended spreadsheet is consistent with Respondent's testimony that workers absconded for periods of time, as it reflects that several workers did not work for several consecutive days or weeks. However, I note that the amended spreadsheet contains several discrepancies, including that it lists that the farm was closed in July despite reflecting hours worked and Respondent's testimony that the farm was not only open, but that there was more fruit to pick than in the beginning of the season. Additionally, in the orange cells, Mr. Howard identified hours that were offered, but not worked, leading to the inference that the blank cells demonstrate that Respondent did not offer work to all workers, which WHD calculated the blank cells as zero hours offered that day.[72] Therefore, while the amended spreadsheet was edited by both parties and based on underlying data, there are inconsistencies between my finding that when Respondent offered work, he offered it to all workers. I therefore only accord the amended spreadsheet some weight.

I accord substantial weight to Respondent's assertion that when he offered work, he offered it to all workers, which was corroborated by Mr. Howard's letter, Respondent's testimony, and testimony from workers Respondent employed the following year, in 2015. I also credit Respondent's explanation that several workers left to work for other employers or absconded, as the amended spreadsheet reflects that several workers did not work for extended periods of time.[73] Therefore, based on the evidence in the record, several workers left for the season or later returned.[74]

The preponderance of the evidence is that when Respondent offered work, he offered it to all workers, and that several workers left to work for other employers or absconded. Other than the amended spreadsheet, which I only accord some weight, Administrator did not offer evidence that Respondent distinguished between workers when offering work or that he was economically incentivized not to offer

[72] I note that the amended spreadsheet does reflect that one worker, Cirio Gomez, left for the season on July 16, 2014. (PX-6).

[73] While Respondent signed an affidavit that the reviewed the amended spreadsheet for accuracy, I still find him credible regarding the hours he offered workers.

[74] 20 C.F.R. § 655.122(n) requires employers to notify the National Processing Center and the Department of Homeland Security when an H-2A worker voluntarily abandons employment before the end of the contract by failing to report for regularly scheduled work for five consecutive days. I urge Respondent to comply with all provisions of the H2-A regulations to avoid future enforcement actions.

work to all workers. As such, I find that Respondent did not violate 20 C.F.R. § 655.122(i).

WHD calculated that Respondent owed $20,020.21 in back wages for violations of the three-fourths guarantee. Because I previously found that Respondent did not violate 20 C.F.R. § 655.122(i), Respondent does not owe $20,020.21 in back wages.

Failure to Pay the Required Wage Rate

WHD found that Respondent violated 20 C.F.R. § 655.122(l) by failing to pay the required wage rate. Specifically, WHD found Respondent was paying a piece rate that was below the required wage rage. 20 C.F.R. § 655.122(l) states:

> Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the AEWR; a prevailing wage if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of § 655.120(c); the agreed-upon collective bargaining rate; the Federal minimum wage; or the State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

Further, the regulation requires that if a worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in an amount that the worker would have earned had the worker been paid the appropriate hourly rate, the worker's pay must be supplemented so that the worker's earnings are at least as much as the worker would have earned if the worker was paid at the hourly wage rate. *Id.* § 655.122(l)(2)(i).

Here, Administrator argues that Respondent, through his previous attorney Mr. Howard, admitted that he owed $9,362.10 for failure to pay the required wage rate by amending WHD's spreadsheet and through the March 14, 2017 letter. (Admin. Br. at 8-9). Further, Administrator argues that Respondent has not submitted underlying documentation to show that a different amount of back wages is owed. (*Id.* at 10). Respondent argues that the amended spreadsheet is unreliable and contains disparities. (R. Br. at 3, 10). Respondent also asserts that there is insufficient evidence to prove that back wages are owed for failure to pay the required wage rate.[75] (*Id.* at 3-4).

[75] Respondent also criticizes the computation of back wages for the required wage rate because of Investigator Williams' error in calculating back wages for the three-fourths guarantee. (R. Br. at 3-4).

I previously accorded some weight to the amended spreadsheet, as it was created by WHD and updated by Mr. Howard using underlying documentation. I maintain my concerns about the spreadsheet given the discrepancies in the record regarding the hours offered data in the spreadsheet, but accord the spreadsheet probative weight regarding the required wage rate because it does not involve hours offered. While I agree that the underlying documentation is not in the record, I find that the evidence in the record is consistent with the spreadsheet.[76] Further, while Respondent demonstrated the discrepancies between the original back wage computation sheets (PX-8) and the amended spreadsheet, WHD did not rely on original computation sheets to assess the current back wages. Respondent did not offer evidence of discrepancies or inaccuracies within the amended spreadsheet regarding the calculation of the required wage rate. Based on the foregoing, I find that Respondent violated 20 C.F.R. § 655.122(l).

WHD calculated that Respondent owed $9,310.80 in back wages for failure to pay the required wage rate. Respondent paid workers on a piece rate or by hour. Investigator Williams calculated the back wages owed by dividing total pay by total hours worked, taking into account de minimus employees, based on the AEWR and contract wage rate of $10.00 an hour. As Respondent was required to pay at least $10.00 an hour regardless of whether the worker was paid hourly or on a piece rate, I find this an appropriate and correct calculation. As such, I find that Respondent owes $9,310.80 in back wages to 65 workers.

Civil Money Penalties

Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the Department of Labor is required annually to adjust for inflation the maximum amount of CMPs that may be assessed for violations of its regulations. *See* Pub. L. 114-74, Sec. 701; 28 U.S.C. § 2461 (note). Section 6 of the statutory note states that "[a]ny increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect." (*Id.*).

The alleged violations in this case occurred sometime between September 9, 2013 and September 8, 2015 and WHD assessed the CMPs on February 13, 2017. The Department of Labor promulgated its adjustments for 2017 on January 18,

[76] I note that during the hearing, Respondent's counsel noted discrepancies in the wage computation sheets, marked as PX-8. However, I do not accord any weight to PX-8: while WHD relied on it in its initial assessment of back wages for Respondent's alleged failure to pay the required wage rate, WHD is solely relying on the amended spreadsheet to determine the back wages it is currently seeking. (Tr. at 135).

2017, which provide that, for violations occurring on or before November 2, 2015 and where the penalties are assessed after August 1, 2016, the pre-August 1, 2016 penalty applies, which is $1,000.00 for the MSPA violations and $1,500.00 for the INA violations. *See Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2017*, 82 Fed. Reg. 5373, 5374 (Jan. 18, 2017); *see also Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments*, 81 Fed. Reg. 43430, 43459 (July 16, 2016).

MSPA Violations[77]

Having found that Respondent is responsible for a violation of the MSPA, I must determine whether the violations warrant imposition of a $1,400 CMP. *See* 29 C.F.R. § 500.262(c).[78]

The MSPA permits the Department of Labor to assess CMPs for violations of the Act. *See* 29 U.S.C. § 1853. The maximum CMP for a violation in this case is $1,000.00. When determining the amount of the CMP to be assessed for violations of the MSPA, the regulations state the Department of Labor should consider the type of violation and other relevant factors, which include, but are not limited to: (1) previous history of violations; (2) the number of workers affected by the violation; (3) the gravity of the violations; (4) good faith efforts made to comply with the Act; (5) explanation of person charged with the violation(s); (6) commitment to future compliance; and (7) the extent of financial gain achieved by the violation or potential injury to the workers. 29 C.F.R. § 500.143(b)(1)-(7).

Administrator argues that it appropriately assessed CMPs for the two locations Respondent housed workers at without certificate authorization. (Admin. Br. at 26). Respondent alleges that WHD should not have assessed CMPs for two locations because Respondent was not responsible for the condition of either hotel nor required housing authorization for both locations because the Champs and Miami Hotels were available to the public. (R. Br. at 2, 14, 17).

I find that the CMP for the MSPA violation should be eliminated. I previously found that workers moved, on their own volition, to the Miami Hotel from the Champs Hotel.[79] Further, apart from stating that workers resided at both

[77] On summary decision, I affirmed the $1,050.00 CMP for not providing a valid copy of the FLCCR. As such, I find it unnecessary to address this penalty.

[78] The implementing regulations of the MSPA states: "The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations, and the appropriateness of the remedy or remedies imposed by the Secretary." 29 C.F.R. § 500.262(c).

[79] While I held in the *Order Granting Summary Decision, in Part* that Respondent violated the MSPA by housing workers without certificate authorization, I find that pursuant to 29 C.F.R. §

the Ballinger and Miami Hotels in Pearson, Georgia, Administrator did not offer any evidence that Respondent used the Ballinger Hotel or caused it to be used to house workers.[80] Additionally, Respondent testified that he sent his housing inspection information to Chicago, not Atlanta, upon learning that his job order was deficient. Therefore, I agree with Investigator Williams that the CMP should be reduced because Respondent had no prior history of H-2A violations, Respondent came into compliance, gave assurance of future compliance, and the potential financial gain to Respondent and loss to employees was minimal. Further, based on my findings, I believe that the CMP should be further reduced because it is not a grave violation, Respondent has a credible explanation regarding multiple housing locations, and he attempted to comply with the requirement. Although I maintain my finding that Respondent violated the MSPA, based on the evidence before me, I find that it is inappropriate to assess CMPs for this violation.

INA Violations[81]

Having found that Respondent is responsible for a violation of the INA, I must determine whether the violations warrant imposition of $69,150.00 in CMPs. *See* 20 C.F.R. § 501.41(b).[82]

The H-2A program allows the Department of Labor to assess CMPs for violations of the Act. *See* 8 U.S.C § 1188(g)(2); 20 C.F.R. § 501.19. The maximum CMP for a violation in this case is $1,500.00. When determining the amount of the CMP to be assessed for violations of the INA, the regulations state the Department of Labor should consider the type of violation and other relevant factors, which include, but are not limited to: (1) previous history of violations; (2) the number of

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500.55(a)(3), Respondent did not use or cause the Miami Hotel to be used. Though he paid workers additional money to stay at the Miami Hotel, he allowed workers to continue residing at the Champs Hotel, and did not require the workers to move to the Miami Hotel.

[80] In fact, ADD Benjamin testified that the Ballinger Hotel was listed on Respondent's paperwork. It is unclear from the evidence provided what paperwork ADD Benjamin was referencing, but this undermines Administrator's argument that Respondent failed to amend his certificate.

[81] On summary decision, I affirmed the $1,050.00 CMP for failing to keep adequate records. As such, I find it unnecessary to address this penalty.

[82] The regulation states:

> The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator.

29 C.F.R. § 501.41(b).

workers affected by the violation; (3) the gravity of the violations; (4) good faith efforts made to comply with the Act; (5) explanation of person charged with the violation(s); (6) commitment to future compliance; and (7) the extent of financial gain achieved by the violation or potential injury to the workers. 29 C.F.R. § 501.19(b)(1)-(7).

Failure to Comply with Three-Fourths Guarantee

Above, I found that Respondent did not violate 20 C.F.R. § 655.122(i). Because there was no violation, Respondent does not owe $59,400.00 in CMPs.

Assuming arguendo that Respondent violated 20 C.F.R. § 655.122(i), it must be initially noted that the amended spreadsheet edited by both parties determined $20,020.21 owed in back wages for the alleged three-fourths guarantee violation. Thus, the CMP imposed by Administrator based on per-worker violations exceeded the back wages by almost three-fold. As discussed above, the evidentiary basis for any violation under section 655.122(i) in this matter was very limited. Although CMPs are not required to be a lesser amount than the back wages owed, here the assessed amount is excessive given the minimal evidentiary basis for the existence of a violation. The fact that the WHD-imposed CMP is so relatively high is because the Administrator applied a per-worker assessment.

It is not in dispute that the WHD has the discretion to assess CMPs for "each violation" based on a per-worker assessment. In this regard, Administrator cited *Adm'r, Wage & Hour Div., USDOL v. Sun Valley Orchards, LLC*, ARB No. 2020-0018, ALJ No. 2017-TAE-00003, slip op. at 13 (ARB May 27, 2021). However, in *Sun Valley Orchards*, the Administrator had opted to apply the per-worker violation only to making false promises about kitchen access and failing to disclose meal charges.[83] In that very same case, however, the Administrator only imposed a single CMP assessment for three-fourths violations, and a single CMP for unlawful attempts to cause the workers to waive the three-fourths guarantee. The ARB affirmed the single CMP for the three-fourths violations. *Id.*, slip op. at 21. Thus, the mere fact that WHD has the discretion to impose per-worker assessments for CMPs does not mean that it is compelled to do so. A decision to impose per-worker assessments for three-fourths violations needs to be based on something more than just the discretion to do so. In this case, Administrator's post-hearing brief relies on the need for deterrence.

[83] In affirming the per-worker CMP assessments, the ARB found that the Administrator had not "abused her discretion" in this regard. It should be noted, however, that the ALJ had agreed with and affirmed the Administrator's per-worker assessments. As noted above, the regulation at 29 C.F.R. § 501.41(a), which provides that the ALJ's decision "may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator" is de novo review authority (and not abuse of discretion authority) in reviewing CMP factors. *Peroulis & Sons Sheep, Inc.,* slip op. at 8.

Therefore, I would find that $59,400.00 in CMPs is inappropriate and instead would impose a single $1,500 CMP. First, I would modify the CMP assessment from a per-worker to a per-regulation calculation. Investigator Williams, in part, relied on the seriousness of the violation and extensive back wages owed to workers, to assess a per-worker violation based on an assessment that $113,592.02 in back wages was owed under the three-fourths guarantee. The provision allowing for a per-worker violation assessment, *see* 20 C.F.R. 501.19(a), "is written so as to protect smaller employers and first-time unintentional violators while appropriately targeting repeat and willful violators and those who abuse or exploit large numbers of workers with the largest penalties." Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6943-44 (Feb. 12, 2010). Therefore, as this is Respondent's first violation, I find that a per-worker calculation is inappropriate.[84] While WHD reduced the CMPs from $76,950.00 to $59,400.00 based on the reduction in back wages of more than $90,000, I find that this reduction warrants a per-regulation calculation.

Finally, although not briefed by the parties, I note that in *Adm, WHD, USDOL v. A&M Labor Mgmt., Inc.*, ARB No. 2023-0025, 2022-MSP-00002, 2022-TAE-00004 (ARB July 31, 2023), the ARB found that I erred in ruling that the respondent committed a single violation of the MPSA's vehicle insurance coverage requirements, finding that 29 C.F.R. § 501.143(a) permits WHD to assess a CMP for each violation.[85] The ARB's focus was on my legal error in reliance on a decision under the Bank Secrecy Act for the proposition that "when the legal duty imposed by a statute is violated regardless of the number of errors made, it is not appropriate to multiply the resulting penalty by the number of errors that were actually made." Instead, under the MSPA, the ARB found a clear legal duty of contractors to obtain insurance coverage for each worker being transported. The ARB held that respondent A&M violated the MSPA and its implementing regulations by not providing insurance coverage for each worker, committing eight separate violations. Moreover, it is apparent that the respondent's failure to obtain workers' compensation for each worker in that case had very serious consequences.

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[84] Furthermore, ADD Benjamin testified that it is WHD policy not to charge a first-time violator for the three-fourths guarantee for individuals who absconded. This was Respondent's first year as a FLC and I found above that the evidence showed that several workers absconded either for the entire season or for days at a time. I also note my finding that the preponderance of the evidence is that when Respondent offered work, he offered it to all workers, and that several workers left to work for other employers or absconded.

[85] In *A&M Labor Mgmt.*, the MSPA regulations applied, which gave the ARB the authority to modify or vacate the ALJ's Decision and Order, and the full review authority provided by 5 U.S.C. § 557(b) (". . . all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"). *A&M Labor Mgmt.*, slip op. at 5 n.26, 10. In contrast, the ARB's review authority under the INA H-2A regulations is a bit more constrained. There, the ARB must apply substantial evidence review as to findings of fact but de novo review of conclusions of law. *Sun Valley Orchards*, slip op. at 9.

Thus, while I recognize that *A&M Labor Mgmt.* indicates that some violations inherently compel a per-worker assessment for CMPs, it involved a different type of violation under the MSPA, and a different set of facts from those presented here.

The caselaw, as illustrated by *Sun Valley Orchards*, shows that WHD will use a single violation CMP assessment for INA three-fourths violations under certain factual patterns. In the instant case, the WHD concluded under its view of the circumstances that it should exercise its discretion to use a per-worker assessment. I find, based on de novo review and the record made in this hearing, that the circumstances in this matter do not support a per-worker CMP assessment.

In sum, I found no section 655.122(i) violation to support any CMP assessment. However, should it be determined that there was a section 655.122(i) violation, under the facts of this case, I would find a single violation CMP of $1,500.00 is appropriate.

Failure to Pay the Required Wage Rate

Because I found that Respondent violated 20 C.F.R. § 655.122(l), I must determine whether the violates warrant imposition of a $1,350.00 CMP. Administrator asserted that it conservatively calculated the CMP on a per-regulation basis and that WHD is not required to consider the amount of back wages owed to each worker in determining the amount of CMPs to assess. (Admin. Br. at 22). Further, Administrator argues that it properly applied the mandatory mitigating factors by mitigating by 10 percent because Respondent did not have a history of noncompliance. (*Id.* at 22). Respondent asserts that the Administrator erroneously assessed CMPs after reducing the total amount of back wages owed by 80%. (R. Br. at 2).

I find that the CMP for failing to pay the required wage rate should be reduced. I agree with Investigator Williams that the CMP should be reduced given Respondent has no previous H-2A violations, however I believe the CMP should be further reduced because 2014 was the first year Respondent was an FLC. As such, a 20 percent reduction should be applied to the maximum CMP. I find that the appropriate CMP for the violation of 20 C.F.R. § 655.135(l) is $1,200.00.[86]

Pay Stub Violations

Because I found that Respondent violated 29 C.F.R. § 655.122(k), I must determine whether the violation warrants imposition of a $1,800.00 CMP. Administrator argues that it conservatively assessed the CMP for Respondent's failure to provide all pay statement requirements to his workers because it applied

[86] $1,500.00 X (0.8) = $1,200.00.

six of the seven mitigating factors. (Admin. Br. at 25). Further, Administrator argues that the pay stub is dated within the investigative period. (Admin. Resp. Br. at 11). Respondent asserts that the paystub in the record should not be given weight because it is from 2015. (R. Br. at 17). Respondent further notes that workers received a receipt with the number of hours worked as well as their name and address. (*Id.* at 17).

I find that the CMP for this violation should be reduced. I agree that the worker who received the paystub, Epifanio Anastacio Dionicio, is not listed as a worker during the 2014 season on the amended spreadsheet. However, the pay stub was dated during the investigative period. Further, I credit Respondent and the worker's testimony that Respondent provided a separate slip with Respondent's FEIN and worksheets with their "work activities" by piece rate or hour. 20 C.F.R. § 655.122(k) requires employers to furnish the required information in one or more written statements. Therefore, it was permissible for Respondent to provide multiple statements and it appears that the paystubs were only missing the hours of employment offered. I do not find it appropriate to assess a CMP for failure to include Respondent's FEIN and the hours actually worked. I agree with Investigator Williams that the CMP should be reduced because (1) Respondent had no prior history of H-2A violations, (2) the violation had no direct effect on wages, (3) Respondent made a good-faith effort to comply because he provided wage statements to workers, (4) Respondent explained that he felt that the wage statement was complete and correct, (5) Respondent gave assurances of future compliance, and (6) Respondent had no financial gain and employees had no financial loss. As such, a 60 percent reduction should be applied to the maximum CMP for Respondent's failure to include the hours of employment offered. I find that the appropriate CMP for violation of 20 C.F.R. § 655.122(k) is $600.00.[87]

Failure to Follow Applicable Federal, State, and Local Laws and Regulations

Because I previously found that that Respondent violated 20 C.F.R. § 655.135(e), I must determine whether the violation warrants imposition of $2,100.00 in CMPs for not maintaining proper records under the FLSA regarding employee information and failing to amend the FLCCR to reflect correct housing information, which is required by the MSPA. Administrator alleges that Respondent did not offer any evidence or testimony about the appropriateness of this CMP, only about his liability. (Admin. Br. at 26). Respondent argues that the original housing remained available so there was no need to change the housing certification because the address listed on the certification remained available. (Tr. at 15).

[87] $1,500 X (0.4) = $600.

First, I find that the $1,050.00 CMP because Respondent "did not maintain the proper records under the FLSA in regards to employee information" should be eliminated. (PX-1 at 19). On summary decision, I found that Respondent violated 20 C.F.R. § 655.122(j)(1) for failing to comply with recordkeeping, including failure to record workers' home addresses, and approved a $1,050.00 CMP. Further, Respondent told Investigator Williams that he would add the workers' home of record to earnings statements, remedying this violation. I therefore find it inappropriate to issue a CMP for the FLSA violation under 20 C.F.R. § 655.135(e) given that I approved a CMP for the underlying offense and because Respondent has made a promise of future compliance.

Second, I find that the $1,050.00 CMP because Respondent did not amend his certificate to reflect correct housing information should be eliminated. I previously found that CMPs should be eliminated for housing workers without certificate authorization because workers moved on their own volition to the Miami Hotel, Administrator did not offer any evidence that Respondent used the Ballinger Hotel or caused it to be used to house workers, and Respondent attempted to comply with the requirement. I therefore find that it is inappropriate to assess a $1,050.00 CMP based on Respondent's failure to amend his FLCCR to reflect correct housing information for the MSPA violation under 20 C.F.R. § 655.135(e). I therefore find that the $2,100.00 in CMPs for Respondent's failure to follow applicable federal, state, and local laws and regulations should be eliminated.

Failure to Provide Housing Meeting Applicable Safety and Health Standards

Because I found that Respondent violated 20 C.F.R. § 655.122(d)(1)(i), I must determine whether the violation warrants imposition of a $4,500.00 CMP. Administrator argues that Respondent does not dispute that he provided worker housing at the Miami Hotel and that it did not meet applicable safety and health standards. (Admin. Br. at 23-24). Respondent argues that the inspection of Miami Hotel occurred after the period of inspection and that that Respondent provided adequate housing at the Champs Hotel. (R. Br. at 14, 16). Respondent also alleges that Administrator has not provided any authority to support its argument that Respondent is responsible for housing a worker chooses to live in rather than the adequate housing Respondent provided elsewhere. (R. Resp. Br. at 9). Finally, Respondent argues that none of the seven factors support assessing a CMP, because (1) Respondent has history of violations, (2) no workers were affected if there was no violation, (3) there is little gravity of the violation, as Respondent argues a violation did not exist, (4) Respondent is now in compliance, (5) Respondent had a reasonable explanation, (6) there is no evidence Respondent lacked commitment to future compliance, and (7) Respondent lost, rather than gained, money. (*Id.* at 10).

I find that the CMP should be eliminated. ADD Benjamin testified that he was unaware of any law or regulation that requires H-2A workers to stay at the housing that the employer provides, only that employers must offer the housing.[88] (Tr. at 124). Administrator also offered no authority to support assessing a CMP for a location that workers voluntarily moved to when Respondent provided compliant housing elsewhere.[89] Further, the investigation of the Miami Hotel occurred on September 10, 2015, after the period of investigation ended on September 8, 2015. As such, the $4,500 CMP should be eliminated.

SUMMARY

On February 13, 2017, WHD initially assessed Respondent $123,035.52 in back wages and $105,050.00 in CMPs.[90] Based on an amended spreadsheet, WHD revised the amount of back wages it sought to $29,382.31 and $72,650.00 in CMPs.[91] On summary decision, I affirmed the $1,050.00 CMP for failing to keep adequate records and the $1,050.00 CMP for not providing a valid copy of the FLCCR.[92] The issues that remained before me at the hearing included:

1. Whether Respondent violated the INA by failing to comply with the three-fourths guarantee and failing to pay the required wage;

2. If Respondent violated the INA, the appropriateness of CMPs for failing to comply with the three-fourths guarantee and failing to pay the required wage; and

[88] This is further supported by Investigator Williams' report, which provided that while Respondent was aware of the requirements, Respondent "did not have much control over the housing." (PX-1 at 14).

[89] That Respondent provided compliant housing elsewhere is supported by the H2-A workers' consistent testimony that the bathrooms, kitchens, and common areas in the Champs Hotel were clean, and the rooms had window screens and electricity. (Tr. at 152-55, 171-72).

[90] $103,650.00 in CMPs under the INA and $1,400.00 in CMPs under the MSPA.

[91] $71,250.00 in CMPs under the INA and $1,400.00 in CMPs under the MSPA.

[92] I also found that Respondent (1) violated the INA by failing to pay the three-fourths guarantee and required wage rate and owed $29,331.03 in back wages; (2) violated the INA by failing to provide workers a complete pay stub, failing to amend the H-2A certification to reflect correct housing information, failing to provide workers with sanitary housing, failing to provide a valid copy of the FLCCR, and failing to keep adequate records of workers' earnings; and (3) violated the MSPA by housing workers without certificate authorization. During a February 10, 2023 prehearing conference, I amended my finding that Respondent violated the INA by failing to pay the three-fourths guarantee and required wage rate and owed $29,331.03 in back wages.

3. The appropriateness of CMPs for (1) housing workers without certificate authorization; (2) pay stub violations; (3) failure to follow applicable federal, state, and local laws and regulations; and (4) failing to provide housing meeting applicable safety and health standards.

Based on the evidence before me, I have determined that Respondent did not violate the three-fourths guarantee but does owes $9,310.80 in back wages for failing to pay the required wage rate. I also found that Respondent owes $1,200.00 in CMPs for failing to pay the required wage rate and $600 in CMPs for failing to provide workers a complete pay stub, but no CMPs for housing workers without certificate authorization, failing to follow applicable laws and regulations, and failing to provide housing meeting applicable safety and health standards.

ORDER

IT IS ORDERED that Respondent, Javier Guerrero, pay back wages of $9,310.80[93] to 65 workers and civil money penalties totaling $3,900.00[94] to the United States Department of Labor for violations of the Migrant and Seasonal Agricultural Workers' Protection Act and the Immigration and Nationality Act.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

[93] WHD's narrative addendum, prepared by ADD Benjamin, states that on November 2, 2017, WHD received a check for $1,400, which was instructed to apply to the back wages. (PX-2 at 43). Proof of this payment was not entered into evidence and I therefore do not apply it against the $9,310.80 in back wages owed. However, to the extent Respondent has paid any portion of the back wages owed, it shall be applied to the outstanding amount.

[94] $1,050.00 + $1,050.00 + $1,200.00 + $600.00 = $3,900.00.

NOTICE OF APPEAL RIGHTS:

MSPA

To appeal, you must file a Petition for Issuance of a Notice of Intent ("Petition") to modify or vacate that is received by the Administrative Review Board ("Board") within twenty (20) days of the date of the administrative law judge's decision. *See* 29 C.F.R. §§ 500.263 and 500.264; Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (March 6, 2020).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. *See* 29 C.F.R. § 500.264(b).

If the Board declines to modify or vacate the administrative law judge's decision, then the decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 500.262(g).

INA

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 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).

FILING AND SERVICE OF AN APPEAL

1. **Use of EFS System:** The Board's Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to https://efile.dol.gov. All filers are required to comply with the Board's rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at https://www.ecfr.gov/current/title-29/subtitle-A/part-26.

   A. **Attorneys and Lay Representatives:** Use of the EFS system is **mandatory for all attorneys and lay representatives** for all

filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R. § 26.3(a)(1), (2).

B. Self-Represented Parties: Use of the EFS system is strongly encouraged for all self-represented parties with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party's proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

Administrative Review Board
Clerk of the Appellate Boards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board's EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to https://efile.dol.gov, select the button to "Create Account," and proceed through the registration process. If the party already has an account, they may simply use the option to "Sign In."

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting "eFile & eService with the Administrative Review Board" from the main dashboard, and selecting the button "File a New Appeal - ARB." In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFS System, select "eFile & eService with the Administrative Review Board," select the button "Request Access to Appeals," search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button "Submit to DOL."

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the "Support" tab at https://efile.dol.gov.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

- **Service on Registered EFS Users:** Service upon registered EFS users is accomplished automatically by the EFS system.

- **Service on Other Parties or Participants:** Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.