In the Matter of:

**U.S. DEPARTMENT OF LABOR,
ADMINISTRATOR, WAGE AND HOUR
DIVISION, EMPLOYMENT STANDARDS
ADMINISTRATION,**

PLAINTIFF,

and

**NURSES PRN OF DENVER, INC.,
NURSES PRN SUNCOAST, INC.,**

COMPLAINANTS,

v.

**HCA MEDICAL CENTER HOSPITAL,
LARGO, FLORIDA,**

RESPONDENT.

ARB CASE NO. 97-131

ALJ CASE NO. 94-ARN-1

DATE: June 30, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:
Steven J. Mandel, Esq., William J. Stone, Esq., Paul Frieden, Esq.
Carol Arnold, Esq., *U.S. Department of Labor, Washington, D.C.*

For the Respondent:
Wendolyn S. Busch, Esq., Kip P. Roth, Esq., *Trenam, Kemker, Scharf, Barkin, Frye, Oneill & Mullis, Tampa, Florida*

SECOND ORDER OF REMAND

This complaint was brought pursuant to the Immigration Nursing Relief Act of 1989, 8 U.S.C. §§1101(a)(15)(H)(i)(a) and 1182(m) (1994) (INRA) and implementing regulations, 29 C.F.R.

Part 504, Subparts D and E (1995); 20 C.F.R. Part 655, Subparts D and E (1998).[1/] The Complainants in this matter, Nurses PRN of Denver, Inc., and Nurses PRN Suncoast, Inc. (the contractors), are companies that provide temporary nursing services to health care facilities. The Respondent, HCA Medical Center Hospital, Largo, Florida (the hospital), is an adult acute care hospital that specializes in cardiology and provides facilities for open heart surgery. At one time, the contractors had supplied temporary nurses to the hospital, but this arrangement ended in 1989, several years prior to the filing of the complaint. The U.S. Department of Labor Administrator, Wage and Hour Division, Employment Standards Administration (Administrator) also is a party to this proceeding as the Plaintiff.

The INRA was designed to alleviate a national shortage of registered nurses by admission of foreign registered nurses (H-1A nonimmigrant alien nurses) to work in the United States. Admission of foreign nurses was dependent on attestations by participating health care facilities, including a certification that foreign nurses were needed for the delivery of patient care,[2/] that employment of foreign nurses would not have an adverse effect on the wages and working conditions of U.S. nurses, and that the health care facility was taking steps to recruit and retain U.S. nurses so as to reduce reliance on foreign nurses. 8 U.S.C. §1182(m)(2)(A). Facilities which fail to meet conditions of the attestation, or which misrepresent material facts in an attestation, are subject to administrative remedies, disapproval of subsequent attestation petitions, and back pay liability. 8 U.S.C. §1182(m)(2)(E)(iv) and (v).

The contractors filed a complaint alleging that the hospital had misrepresented attestation elements when it hired foreign nurses through the H-1A visa program. The Administrator investigated the complaint and issued a determination; this determination was contested by both the contractors and the hospital. An Administrative Law Judge (ALJ) then convened a hearing and issued a decision; this first ALJ decision was reviewed by this Board on appeal. We affirmed the ALJ's finding that the contractors, and the nurses employed by the contractors, were not entitled to relief. We remanded the matter to the ALJ for a determination whether the nurses employed by the hospital were owed backpay for performing shift and specialty unit work, and, if so, the backpay amounts owed. *U.S. Dep't of Labor, Administrator, Wage & Hour Division, Employment Standards Administration and Nurses PRN of Denver, Inc., Nurses PRN Suncoast, Inc. v. HCA Medical Center Hospital, Largo, Florida*, ALJ Case No. 94-ARN-1, ARB Ord. of Rem. (O.R.), June 28, 1996.

A second ALJ issued a Decision and Order on Remand on July 14, 1997, dismissing the case in its entirety. The ALJ's decision has been appealed to us by the Administrator. For the reasons

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[1/] Part 504 of Title 29 C.F.R. has been amended to delete its duplication of parallel regulations contained in 20 C.F.R. Part 655. In its current form, Part 504 contains a cross-reference to Part 655. 29 C.F.R. §504.1 (1998).

[2/] "Need" presumes a substantial disruption, through no fault of the health care facility, in the delivery of health care services without H-1A nurses. The element may be met by demonstrating a current nurse vacancy rate of seven percent or more, an unutilized bed rate of seven percent or more, the elimination or curtailment of essential health care services or the inability to implement established plans for needed new health care services.

discussed below, we reverse the ALJ's order of dismissal and remand the case to the ALJ to make the findings directed in our previous order.

BACKGROUND

In April 1993, the hospital applied to the U.S. Department of Labor Employment and Training Administration to renew its INRA H-1A petition to employ four H-1A nonimmigrant alien nurses. To demonstrate need, the hospital attested to excessive nurse vacancy rates and unutilized bed rates and to the elimination or curtailment of essential health care services. In addressing labor safeguards, the hospital attested that employment of H-1A nurses would not adversely affect the wages and working conditions of U.S. nurses similarly employed and that the hospital's nurses consequently would be paid at least the prevailing wage. 8 U.S.C. §1182(m)(2)(A)(ii) and (iii); 20 C.F.R. §655.310(e). The hospital also attested that it would fulfill certain responsibilities under the program pertaining to the recruitment, retention and training of U.S. nurses. *See* O.R., *slip op.* at 3.

The contractors complained that the hospital had misrepresented attestation elements.[3/] After conducting an investigation, the Administrator determined on May 5, 1994, that the hospital had failed to meet conditions of attestation. 8 U.S.C. §1182(m)(2)(E)(ii).

In response to the Administrator's findings, the hospital requested a hearing contesting the finding that it had misrepresented the attested vacancy rate. The contractors also requested a hearing, contesting the Administrator's failure to find additional violations, including that the hospital had failed to pay shift and specialty unit differentials – a portion of the prevailing wage rate – to non-H-1A nurses whose employment was similar to that of the H-1A nurses.

The ALJ remanded the matter to the Wage and Hour Division for further investigation of the contractors' allegations. On August 30, 1994, the Wage and Hour Division reported to the ALJ that no additional violations had been found; however, the Division's report did not address the issue whether the non-H-1A nurses were entitled to pay differentials.

The ALJ convened a hearing in October 1994. In a decision issued on May 10, 1995, the ALJ found:

(1) The hospital's attested vacancy rate was incorrect, and therefore the hospital had misrepresented a material fact in its attestation.

[3/] The Denver and Suncoast Nurses PRN (or *Pro Re Nata,* meaning "as needed" or "as necessary") supply nursing services on a daily, weekly or monthly basis. The hospital utilized the contractors' services until October 1989. Thereafter, it augmented its own nursing staff and sharply decreased use of contract nurses. The contractors asserted that their nurses had been displaced by H-1A nurses secured by means of a defective attestation. The contractors sought an award of back pay representing wages lost due to the wrongful displacement and compensation for loss of annual contract sales at the hospital.

(2) The hospital's notice to its nurses of the attestation omitted required information, and the hospital neglected to maintain required documentation in support of the attestation; therefore the hospital had failed to meet a condition of the attestation.

(3) Although the hospital complied with the INRA's prevailing wage provisions in payment of base wage rates, it may not have paid the correct shift and speciality unit differentials because it neglected to elicit this information from the State Employment Security Agency as required under the regulations; therefore the hospital had violated a condition attested to by failing to obtain complete information establishing the prevailing wage.

The ALJ ordered the hospital to determine whether any of its nurses had been paid an incorrect prevailing wage, including pay differentials, and to pay any wages due. *U.S. Dep't of Labor, Administrator, Wage & Hour Division, Employment Standards Administration and Nurses PRN of Denver, Inc., Nurses PRN Suncoast, Inc. v. HCA Medical Center Hospital, Largo, Florida*, ALJ Case No. 94-ARN-1, Dec. and Ord., May 10, 1995.

The hospital apparently never made the determination ordered by the ALJ, but instead petitioned for review of the ALJ's decision. The contractors also petitioned for review of the decision.

On June 28, 1996, the Board issued an order addressing two issues: (1) whether the contractors' nurses, who were displaced by H-1A nurses, were entitled to back pay; and (2) whether the case should be remanded for findings regarding the hospital's liability for failure to pay the prevailing rate to its nurses (including pay differentials). With regard to the first issue, the Board held that the contractors' employees were not entitled to back pay.[4/] On the second issue, the Board remanded the case for a determination of the hospital's liability to its own employees, *i.e.,* its H-1A and non-H-1A nurses, who should have been compensated at the prevailing rate. The contractors and the hospital had joined in requesting a remand, and the Administrator did not object.

The case was assigned to a second ALJ on remand. On December 3, 1996, the ALJ directed the parties to submit additional evidence and briefing on the issue of the hospital's liability. The Administrator requested an opportunity either to reopen the investigation on the wage payment issue, or to reopen discovery in order to examine the hospital's records. The hospital objected to reopening the investigation, citing the disruption that would be caused, and arguing that a new investigation was untimely under the regulations. In addition, the hospital objected to the belated disclosure of records which it argued the Administrator had disregarded previously. On May 21, 1997, the ALJ

[4/] The Board found (1) that the contractors' employees were not parties to the action where party status was necessary to assert a claim for back pay and (2) that the damages claimed by the contractors, namely loss of annual contract sales at the hospital, could not be remedied under the INRA.

denied the Administrator's request for further investigation or discovery and directed the parties to submit any additional evidence and briefing.

On July 14, 1997, the ALJ dismissed the case for lack of evidence. The ALJ found that, although the hospital had failed to pay four H-1A nurses prevailing shift differentials, the Administrator had failed to prove the amounts due these nurses. The ALJ also found that the Administrator failed to prove that the hospital had paid any of its non-H-1A nurses incorrectly. This appeal followed.

On review, the Administrator now argues that the ALJ abused his discretion by foreclosing investigation or discovery which would have permitted compliance with the Board's June 28, 1996, remand order. The hospital counters that dismissal is appropriate because the Administrator essentially waived further investigation. It argues specifically that the Administrator is directed, by regulation, to conduct any investigation, in its entirety, within 180 days of a complaint; that the Administrator seeks to investigate the very same issue that it investigated more than three years ago; and that the Administrator should bear the consequences of its failure to conduct a proper investigation in the first instance.

DISCUSSION

I. Procedural Posture of the Case on Remand

The Board's remand of the case was limited to the issue whether the hospital failed to pay its nurses the prevailing wage, including shift and specialty unit pay differentials, during the period of the 1993-1994 attestation. O.R., *slip op.* at 7. The remand contemplated that the ALJ would conduct further proceedings to resolve the issue and that he would enter findings of liability and back pay, if appropriate. *Id.* The proceedings should have focused on shift and specialty unit differentials, since the hospital had complied with the INRA's prevailing wage provisions pertaining to base hourly pay rates. The ALJ previously had found that back pay might be owed to the nurses because the hospital had failed to elicit this information about pay differentials from the State Employment Security Agency as required under the regulations, and because pay differentials were determined to comprise a portion of the prevailing rate. None of the parties objected to the remand; indeed, the hospital requested it.[5/]

As noted above, in the first ALJ's Decision and Order issued May 10, 1995, the hospital was

> ordered to determine whether any of its core [non-contract U.S.] nurses similarly employed to [its] H1-A nurses were not paid the correct prevailing wage (including shift differentials) during the period of its 1993-1994 attestation, and if any such nurse was not paid the correct prevailing wage the [hospital] is hereby ordered to pay each such nurse the correct back wages.

[5/] In its reply brief on review of the first ALJ's decision before the ARB, the hospital requested that the "issue be remanded to the ALJ for determination" and that the Board direct the ALJ to permit the parties to submit additional evidence and briefing on the issue. Reply brief at 19-20.

U.S. Dep't of Labor, Administrator, Wage & Hour Division, Employment Standards Administration and Nurses PRN of Denver, Inc., Nurses PRN Suncoast, Inc. v. HCA Medical Center Hospital, Largo, Florida, ALJ Case No. 94-ARN-1, Dec. and Ord., May 10, 1995, *slip op.* at 10-11. This order that the *hospital* determine whether underpayments had occurred, and to determine the amount of the underpayment, plainly recognized that the records needed to make such a determination remained in the possession of the hospital. The Board's later 1996 remand order called for precisely the same line of inquiry that had been ordered by the first ALJ. The Board thus anticipated cooperation by the parties when we remanded the case for further findings.

A. The Parties' Motions on Remand

On remand, the second ALJ ordered the parties to submit evidence of underpayment and briefing. The Administrator requested an opportunity to conduct further investigation or discovery in order to comply with the ALJ's order because she did not have "in her possession, custody, or control" pertinent evidence which existed outside of the hearing record in the hospital's payroll records. Brief in Response to Order on Remand and Request to Perform Investigation dated January 16, 1997, at 2. In response to the Administrator's request, the hospital abruptly changed tack. It asserted that further investigation or discovery was foreclosed because the Administrator lacked authority under the regulations to conduct investigations beyond the 180-day limitation period, and because the Administrator intentionally had ignored evidence of pay differentials during the previous investigation.[6/] The hospital charged that it had cooperated fully in the initial investigation despite "significant disruption to [its] business" and that further investigation or discovery would visit "unwarranted and unnecessary intrusion." The hospital stated:

> To force [the hospital] to undergo another investigation, one which [the Administrator] states will take *60 days* and would require "payroll records from the [hospital] demonstrating the pay, including the amounts paid as shift differential, for the period in question, together with the shifts worked by each nurse in the facility" during a one-year period, would severely punish [the hospital] for [the Administrator's] failure to properly investigate this issue three years ago.

Respondent's Memorandum in Opposition to Plaintiff's Request to Perform Investigation or for Discovery dated February 21, 1997, at 2-3 (emphasis in original).

B. The ALJ's Disposition on Remand

Concurring with the hospital's argument, the ALJ denied the Administrator's request for investigation or discovery, declaring that

> Although the 180 day period may not constitute an absolute bar, I find the cases cited by the government [*Brock v. Pierce County,* 106A S.Ct. 1834 (1986); *Roadway*

[6/] The Administrator argued that the time limitation was directory rather than jurisdictional, and that the investigator erroneously had been instructed to disregard the pertinent evidence.

> *Express v. Dole,* 929 F.2d 1060 (1991)] to not be on point. Those cases dealt with the time limit of 120 days for issuance of a decision.
>
> Here we are asked to permit new discovery years after the initial investigation, years after the investigation was required to be completed, and years after the trial of the matter. The basis of the request is that a mistake was made in failing to investigate properly in the first instance. The request to permit discovery is denied.

Fifth Order on Remand issued May 21, 1997, slip op. at 1-2. In the Decision and Order on Remand issued July 14, 1997, the ALJ dismissed the complaint for failure to produce the precise evidence that the Administrator had attempted to obtain by requesting further investigation or discovery. The ALJ compared the prevailing rates required by the State Employment Security Agency with the rates paid by the hospital to its four H-1A nurses, and stated:

> Based on the [comparison], I conclude that [the hospital] failed to pay these four nurses the prevailing shift differentials in Pinellas County. [The Administrator] has failed to demonstrate that [the hospital] failed to pay the prevailing shift differentials to any of its other nurses. In addition, [the Administrator] has failed to fulfill its burden of proof as to the amount due these four nurses. Accordingly, because of the failure of [the Administrator] to sustain its burden of proof, this matter is dismissed.

Slip op. at 2-3.

On appeal to the Board, the Administrator contends that the ALJ abused his discretion in denying the Department's requests for additional investigation or discovery, and then dismissing the case.

II. Time Frames for Investigation

Both the INRA and its implementing regulations contain limitations periods. The INRA provides that "the Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints" regarding attestations and that, under such process, the Secretary shall determine "within 180 days after the date [a] complaint is filed" whether a basis exists to make a finding that a facility has failed to meet a condition attested to or has misrepresented a material fact. In the event of such a determination, the Secretary shall provide notice and an opportunity for a hearing "within 60 days of the date of the determination." 8 U.S.C. §1182(m)(2)(E)(ii) and (iii). The INRA does not provide a limitation for issuance of the Secretary's findings following a hearing.

The regulations provide that if the Administrator determines that there is reasonable cause to believe that a complaint warrants investigation, he "shall conduct an investigation within 180 days of the receipt of a complaint." 20 C.F.R. §655.405(c). After investigation, but also within 180 days of receiving the complaint, the Administrator "shall . . . issue a written determination, stating whether a basis exists to make a finding that the facility failed to meet a condition of its attestation, or made a misrepresentation of a material fact therein ...." 20 C.F.R. §655.405(d). Any such determination "shall specify any sanctions imposed due to the violations." *Id.* Interested parties

may request a hearing within 10 days of the Administrator's determination. 20 C.F.R. §655.420. An ALJ shall be assigned to hear a complaint upon receipt by the Chief ALJ of a hearing request. Hearings shall be convened within 60 days of the Administrator's determination. 20 C.F.R. §655.435. The regulations direct an ALJ to issue a decision within 90 days of receipt of the transcript of hearing. 20 C.F.R. §655.440. Interested parties may petition the Secretary for review of the ALJ's decision within 30 days of its issuance. 20 C.F.R. §655.445. Within 30 days of receipt of a petition, the Secretary shall notify the parties of an intent to review the ALJ's decision. The Secretary's final decision shall issue within 180 days of notification of intent to review. *Id.*

Prior to the Board's remand in this case in 1996, development of the record had proceeded in an orderly manner subject to a degree of flexibility appropriate in an administrative forum. For example, following the Administrator's determination and prior to opening the hearing, the ALJ remanded the complaint to the Wage and Hour Division to consider the contractors' contention that additional violations existed. On review of the ALJ's decision, the Board remanded the case to the ALJ. Neither the INRA nor the regulations provide for a remand by an ALJ to the Wage and Hour Division or a remand by the Board to an ALJ. Remands nonetheless are employed routinely for purposes of rectifying legal errors. *PPG Industries, Inc. v. United States,* 52 F.3d 363, 365-366 (D.C. Cir. 1995).

The second ALJ erroneously discounted case precedent cited by the Administrator in support of the reopening of the record. The 180-day limitation for conducting investigations at issue in the instant case carries none of the indicia that would divest the Administrator of the authority to investigate after expiration of the limitation. While their language may be mandatory, the statutory and regulatory provisions imposing the investigatory time limitation nowhere specify the consequences of a failure to meet the limitation. Ordinarily, if there is congressional or administrative intent to foreclose action in the event that a time limitation is not met, the statute or regulations specify consequences that flow from the failure to meet the limitation. *Brock v. Pierce County,* 476 U.S. 253, 259 (1986) (parallel limitations without specified consequences in Comprehensive Employment and Training Act and implementing regulations were "intended to spur the Secretary to action, not to limit the scope of his authority"). Nothing in the legislative or regulatory history of the matters at issue here suggests an intent to bar agency action beyond the limitations period. Conducting an investigation and issuing a determination may pose unanticipated difficulties, and the ability of the Administrator to meet the limitation may be subject to factors beyond his control. Absent any statement of contrary intent, such a limitation provides a projected timetable for agency action on a given complaint, rather than curtailing the agency's authority to resolve complaints if the time limitation is not met. Mandatory language that an agency "shall" act within a limitations period, standing alone, "does not divest [the agency] of jurisdiction to act after that time." *Id.* at 266.

The Administrator was empowered to conduct further investigation in this case. Moreover, while the hospital argued that prejudice would result from further investigation, it failed to demonstrate the specific manner in which it would suffer prejudice. Absent a finding of prejudice, the mere passage of time over the course of the proceeding offers insufficient basis for denying the Administrator's motion. The ALJ's denial therefore constituted error.

III. Abuse of Discretion

The Board remanded the case to the ALJ with instructions "to determine whether [the hospital] failed to pay any of its nurses the prevailing wage . . . during the period of . . . attestation and, if so, the amounts due." In execution of the Board's order, the ALJ availed himself of a discovery device to *avoid* making the determination and to dismiss the proceeding. We agree with the Administrator that the ALJ abused his discretion in this instance.

The hospital's objection to further investigation or discovery amounted to a motion for limitation or for a protective order. The scope of discovery under the Federal Rules of Civil Procedure and the regulations governing administrative hearings before ALJs is broad. Fed. R. Civ. P. 26-37; 29 C.F.R. §§18.13-18.23. The rules nonetheless permit adjudicators to impose discovery limitations under certain circumstances.

One such limitation may arise in the event that "the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." Fed. R. Civ. P. 26(b)(2). In this context, the hospital argued that the Administrator had waived further access to payroll records because she had investigated thoroughly once before.

A second form of limitation is a protective order. The rules provide for protective orders, stating that, upon certification that the movant has attempted in good faith to resolve the dispute and for good cause shown, a court may "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by ordering, *inter alia,* "that the disclosure or discovery not be had." Fed. R. Civ. P. 26(c); 29 C.F.R. §18.15 (provision for protective orders incorporated under ALJ rules of practice and procedure). For example, protective orders may issue to prevent use of discovery for purposes unrelated to a lawsuit. *See Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 34 (1984) (because of liberality of discovery, courts must be authorized to issue protective orders); *Jennings v. Peters,* 162 F.R.D. 120, 122 (N.D. Ill. 1995) (protective orders ensure that power of liberal discovery is not abused); *Adolph Coors Co. v. American Ins. Co.,* 164 F.R.D. 507, 513-514 (D. Colo. 1993) (protective orders restrict the use that a party can make of information obtained through discovery). The process of issuing a protective order generally entails a balancing of interests, *i.e.,* comparison of hardship to the party against whom discovery is sought with the probative value of the information to the discovering party. *In re Eli Lilly & Co., Prozac Prod. Liab. Litig.,* 142 F.R.D. 454, 458 (S.D. Ind. 1992). In this case, the hospital's allegation that it would be affected adversely by further investigation or discovery suggests that it sought protection. Under the law governing discovery, the party moving for a protective order bears the burden of showing that protection is warranted. *Landry v. Air Line Pilots Ass'n Int'l,* 901 F.2d 404, 435 (5th Cir.), *cert. denied,* 498 U.S. 895 (1990). In granting the hospital protection, the ALJ imposed the most limiting alternative under the rules – preclusion of disclosure or discovery altogether.

The Administrator, when initially investigating and issuing a determination in the case, found no violation as to payment of prevailing wage rates. The Administrator's finding thus had foreclosed development of a record on the issue of pay differentials. While the Administrator technically may have been able to obtain information contained in the hospital's payroll records, she had no reason at that juncture in the case to do so. The first ALJ effectively reversed the "no violation" finding

with regard to shift and specialty unit differentials. Limitation under Fed. R. Civ. P. 26(b)(2) does not appear appropriate in these circumstances because the Administrator realistically was not accorded "ample" opportunity through discovery to secure the payroll information.

Reopening the proceedings to receive evidence on an issue is entirely proper where, as here, an agency has erred legally by failing to consider differentials as part of the prevailing wage rate. *Cissell Manufacturing Company v. U.S. Dep't of Labor,* 101 F.3d 1132, 1136-1138 (6th Cir. 1996); *PPG Industries, Inc. v. United States, supra* 52 F.3d at 365-366. The first ALJ sought to develop a record on the issue when he directed the hospital to calculate the amount of underpayment. In denying the Administrator's request for further investigation or discovery because "a mistake was made in failing to investigate properly in the first instance," the second ALJ erroneously disregarded precedent permitting an agency to reopen proceedings for purposes of taking new evidence when its legal determinations are found to be erroneous.

The hospital has failed to demonstrate that it made a good faith effort to resolve the dispute and that it had "good cause" for securing a protective order under Fed. R. Civ. P. 26(c) and 29 C.F.R. §18.15. A finding of good cause requires specific demonstration that disclosure of the requested information will cause a clearly defined and serious injury. *Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 483 (3d Cir. 1995) (failure to sustain burden of demonstrating specific injury from public dissemination of privileged documents). Preclusion of discovery, as ordered by the ALJ in this case, is rare and requires a showing of "extraordinary" or "exceptional" circumstances. *Kaiser v. Mutual Life Ins. Co. of New York,* 161 F.R.D. 378, 380 (S.D. Ind. 1994); *Bucher v. Richardson Hosp. Auth.,* 160 F.R.D. 88, 92 (N.D. Tex. 1994). The hospital's nonspecific claim of "unwarranted and unnecessary intrusion" falls well short of the requisite demonstration. Furthermore, the hospital makes no claim whatever to substantiate the element of "good faith effort" toward resolving a discovery dispute. The ALJ therefore abused his discretion in protecting the hospital from further investigation or discovery.

The ALJ also abused his discretion by ignoring the procedural history of the case. The record before the first ALJ showed that the hospital failed to pay the prevailing wage for shift differentials. (Indeed, the second ALJ cited this evidence of liability in his July 14, 1997, Decision and Order on Remand, slip op. at 2.) Accordingly, the ARB remanded the case for development of the record as to extent of liability, *e.g.,* for payroll information supporting determinations as to the identity of nurses working shifts for which a differential was due, the number of hours worked and the amounts actually paid. The Administrator had not culled this information as part of the original investigation because of the Wage and Hour Division's finding of "no violation" on this issue; it was this finding of "no violation" that the first ALJ reversed, prompting the ALJ to order the hospital to determine whether its nurses had been underpaid. The hospital apparently failed to comply with the ALJ's order when it instead appealed the decision to the ARB. On review, the ARB *did not reverse* the first ALJ's finding that shift and speciality unit differentials comprised a portion of the prevailing wage, and we remanded for a determination of liability; therefore, further investigation or discovery was integral to securing the information required under the ARB's remand order. The second ALJ thus abused his discretion by curtailing any opportunity whatever for securing this information on remand.

CONCLUSION

The Decision and Order on Remand issued on July 14, 1997, which dismissed the complaint, is **REVERSED**, and the Fifth Order on Remand issued on May 21, 1997, which denied the Administrator the opportunity to conduct further investigation or discovery, is **REVERSED and VACATED**. The case is **REMANDED** to the ALJ. The ALJ is directed to reopen the record and to obtain evidence from the parties, including the hospital, of any failure by the hospital to pay its nurses the prevailing wage, including pay differentials, and the amounts due. Based on the evidence thus obtained, the ALJ is directed to decide whether the hospital unlawfully failed to pay its nurses the prevailing wage, and to order appropriate relief.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member