



**In the Matter of:**

**ADMINISTRATORS, WAGE AND HOUR  
DIVISION AND OFFICE OF FOREIGN  
LABOR CERTIFICATION, UNITED  
STATES DEPARTMENT OF LABOR,**

**ARB CASE NO. 14-003-B**

**ALJ CASE NOS. 2011-TNE-002  
2012-PED-001**

**PROSECUTING PARTIES,**

**DATE: September 17, 2014**

**v.**

**PETER'S FINE GREEK FOOD, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Prosecuting Parties:*

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; William C. Lesser, Esq.; Paul L. Frieden, Esq.; and Laura Moskowitz, Esq., *United States Department of Labor, Office of Solicitor; Washington, District of Columbia***

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge***

### **FINAL DECISION AND ORDER ON CIVIL MONEY PENALTY**

This case arises under the H-2B temporary employment program of the Immigration and Nationality Act (INA), as amended.<sup>1</sup> The Administrator of the Wage and Hour Division (WHD

---

<sup>1</sup> 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1), (14) (Thomson/West 2005 & Thomson Reuters Supp. 2013), as implemented by 20 C.F.R. Part 655, subpart A (2009). The Department of Labor (DOL) has provided notice of the continuing effectiveness of the 2008 H-2B rule, which consists of the regulations governing DOL's role in the H-2B temporary worker program. Temporary Non-agricultural Employment of H-2B Aliens in the United States, 77 Fed. Reg. 28,764, 28,765 (May 16, 2012). Thus, the 2008 H-2B rule regulations found at 20 C.F.R. Part 655, subpart A

Administrator) issued a Final Determination against Peter's Fine Greek Food (Peter's), determining that Peter's owed back wages to some of its former H-2B employees and assessing a total of \$51,500 in civil money penalties against Peter's for several violations of the INA and its implementing regulations, including a \$10,000 civil money penalty for failing to cooperate with the Wage and Hour Division's investigation. Peter's requested a hearing before an Administrative Law Judge (ALJ), and the ALJ held the hearing on December 12-13, 2012. In a Decision and Order (D. & O.) addressing the WHD Administrator's assessments of back wages owed and civil money penalties (2011-TNE-002), the ALJ ordered Peter's to pay \$14,422.32 in back wages to eight of its former H-2B employees, plus pre-judgment compound interest on the back wage assessments and post-judgment interest on the back wage assessments, until satisfied. In addition, the ALJ reduced the civil money penalty assessments that the WHD Administrator assessed to a total of \$31,000, including reducing the civil money penalty for Peter's failure to cooperate with the Wage and Hour Division's investigation from \$10,000 to \$1,000. The WHD Administrator timely petitioned the Board to review the ALJ's decision to reduce the civil money penalty for Peter's failure to cooperate with the Wage and Hour Division's investigation from \$10,000 to \$1,000.<sup>2</sup>

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision pursuant to 8 U.S.C.A. §§ 1103(a)(6) and 1184(c)(1), (14) and 20 C.F.R. § 655.76(c) (2009).<sup>3</sup> The regulations do not specifically explain whether the ARB's review of a civil penalty assessment is de novo or a review for abuse of discretion (either the WHD Administrator's or the ALJ's exercise of discretion). The WHD Administrator contends that the ALJ erred in reducing the civil money penalty for Peter's failure to cooperate with the Wage and Hour Division's investigation from \$10,000 to \$1,000 based on only one of many applicable factors to be considered under the regulations. Regardless of whether the Board has the authority to perform a de novo review, we choose to accept the ALJ's findings if they are reasonable. Because we find that the ALJ's fact findings and reasoning do not support the ALJ's reduction, and do support the WHD Administrator's initial assessment, we need not decide whose discretion is under review. We rely on the ALJ's findings to reinstate the WHD Administrator's \$10,000 civil penalty assessment.

---

(2009), which became effective on January 18, 2009, *see* 73 Fed. Reg. 78,020 (Dec. 19, 2008), apply to this case.

<sup>2</sup> Previously, we issued a Final Decision and Order On Debarment, affirming the ALJ's separate Decision and Order (2012-PED-001) reducing the determination of the Administrator of the Office of Foreign Labor Certification (OFLC Administrator) debarring Peter's from participating in the H-2B temporary employment certification program from a period of two years to one year for substantial violations of a material term or condition of its temporary labor certification. *Adm'r, Wage and Hour Div. and Office of Foreign Labor Certification v. Peter's Fine Greek Food, Inc.*, ARB No. 14-003-A, ALJ Nos. 2011-TNE-002, 2012-PED-001 (ARB Feb. 26, 2014).

<sup>3</sup> *See* Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, § 5(c)(19) (Nov. 16, 2012) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

### *Relevant Statutory Authority and Regulations*

Under 8 U.S.C.A. § 1184(c)(14)(A)(i), “civil money penalties in a an amount not to exceed \$10,000 per violation” “may” be imposed for a “substantial failure to meet any of the conditions” of an H-2B petition or “a willful misrepresentation of a material fact in such petition.” In addition, under 8 U.S.C.A. § 1184(c)(14)(C), “[i]n determining the level of penalties to be assessed under subparagraph (A), the highest penalties shall be reserved for willful failures to meet any of the conditions of the petition that involve harm to United States workers.”

Pursuant to the applicable regulations, 20 C.F.R. § 655.50(c) (2009), addressing “[e]mployer cooperation/availability of records,” states:

An employer shall at all times cooperate in administrative and enforcement proceedings. An employer being investigated shall make available to the WHD Administrator such records, information, persons, and places as the Administrator deems appropriate to copy, transcribe, question, or inspect. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative.

Similar to the statute, 20 C.F.R. § 655.65(c) (2009), “[r]emedies for violations,” provides:

The Administrator may assess civil money penalties in an amount not to exceed \$10,000 per violation for . . . a failure to cooperate with a Department audit or investigation.

Finally, 20 C.F.R. § 655.65(g) (2009) states:

In determining the amount of the civil money penalty to be assessed pursuant to paragraph[] (c) of this section, the WHD Administrator shall consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

- (1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;
- (2) The number of U.S. or H-2B workers employed by the employer and affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made by the employer in good faith to comply with the INA and regulatory provisions of this subpart and at 8 CFR 214.2(h);
- (5) The employer's explanation of the violation or violations;
- (6) The employer's commitment to future compliance; and
- (7) The extent to which the employer achieved a financial gain due to the violation, or the potential financial loss to the employer's workers.

#### *ALJ's Fact Findings*

The ALJ noted that the Wage and Hour Division investigator first requested pay records from Peter Karageorgis, the president and sole shareholder of Peter's, at the New York State Fair on September 5 and 6, 2010.<sup>4</sup> In response, the ALJ found that an attorney representing Peter's, Malcolm Scheult, provided the Wage and Hour Division with "only minimal records" on September 9, 2010, whereas records regarding Peter's "H-2B employees, their dates and hours of employment and payment records were not provided."<sup>5</sup>

The ALJ noted that a second request for records regarding employee information, hours and dates, and payment records, which Karageorgis testified that he kept, was sent to Karageorgis, attorney Scheult and Peter's accountant on September 9, 2010.<sup>6</sup> But Wage and Hour Division investigators testified that they did not receive any additional records.<sup>7</sup> The ALJ determined that "[a]lthough Karageorgis offered explanations for why documents were not provided at certain times during the investigation, . . . he did not provide a credible response explaining why the documents from the 2010 fair season were either never produced or not

---

<sup>4</sup> D. & O. at 45; *see also* D. & O. at 2, 5, 17.

<sup>5</sup> D. & O. at 45; *see also* D. & O. at 6.

<sup>6</sup> D. & O. at 45.

<sup>7</sup> *Id.*

produced until shortly before the November 2011 hearing.”<sup>8</sup> Instead, the ALJ found “it more likely that Respondent kept no written records of employee hours” and the “records presented at the hearing were clearly created after the fact, for the purposes of this litigation.”<sup>9</sup> The ALJ also drew an adverse inference as to some “late-produced” records citing grounds of “purposeful sluggishness.”<sup>10</sup>

So, although the ALJ found that payroll and timesheets did not exist, other records, which did exist at the time of the Wage and Hour Division’s request (including a list of Peter’s H-2B workers, its 2010 Form I-129 Petition for Nonimmigrant Workers and the Department of Homeland Security’s approval of Peter’s H-2B workers) were not turned over.<sup>11</sup> Thus, the ALJ found that Peter’s repeatedly failed to turn over documents to the Wage and Hour Division despite the WHD Administrator’s multiple requests and, therefore, failed to cooperate with the investigation.<sup>12</sup>

#### *WHD Administrator’s Civil Money Penalty Assessment*

The ALJ noted that the “Administrator assessed a \$10,000.00 civil money penalty for the failure to cooperate because the failure [1] affected all employees, [2] evinced a lack of good faith effort, [3] was not justified by a credible explanation, and [4] made it more difficult for the WHD Administrator to determine compliance which [5] provided [Peter’s] an opportunity for financial gain from noncompliance.”<sup>13</sup>

#### *ALJ’s Civil Money Penalty Assessment*

Assessing the gravity of Peter’s failure to cooperate, the ALJ noted that Peter’s “did comply with the investigation in several important ways.” Specifically, the ALJ found that “[Wage and Hour Division] investigators testified that Karageorgis was cooperative and allowed them to interview himself and his employees,” Attorney Seheult sent some of the requested documentation, and Karageorgis complied with the [Wage and Hour Division] Investigator’s request that he pay his employees at the New York State Fair.<sup>14</sup> The ALJ also found it “likely”

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 46.

<sup>10</sup> D. & O. at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see also Administrator’s Exhibit (AX) 1, WHD Administrator’s Mar. 18, 2011 Final Determination.

<sup>14</sup> D. & O. at 46.

that had payroll records existed before the investigation, Peter's would have turned them over to the Administrator, as Peter's "did turn over the records that he had." Thus, the ALJ found that the civil money penalty should be reduced to \$1,000.00 because although Peter's failed to turn over all of the documents the Administrator requested, in part this failure was due to the fact that some of the requested documents did not exist.<sup>15</sup>

#### *WHD Administrator's Contentions*

The WHD Administrator contends that the ALJ's focus only on the "gravity" of Peter's failure to cooperate and her speculation that Peter's "would have" turned over requested records if they existed is inconsistent with the ALJ's findings that Peter's repeatedly failed to turn over documents that did exist, that Peter's explanations for why the documents were not provided were not credible, and that Peter's created some records for the purposes of the litigation. Moreover, the WHD Administrator asserts that the ALJ did not consider the other regulatory factors at 20 C.F.R. § 655.65(g) (2009), which states that the Administrator "shall consider the type of violation committed and other relevant factors." The WHD Administrator notes that the \$10,000 civil money penalty assessment was also based on other regulatory factors, including: 1) Peter's opportunity for financial gain from its failure to cooperate, 2) its lack of a credible explanation for its failure to cooperate, and 3) Peter's lack of a good faith effort to cooperate.

The WHD Administrator also contends that Peter's failure to cooperate made it more difficult for the Administrator to conduct its investigation, determine any violations, and enforce the Act. Only an assessment of a full \$10,000 civil money penalty, the WHD Administrator, asserts, serves as a meaningful deterrent against non-cooperation.

#### *Analysis*

The ALJ's findings establish numerous ways that Peter's responses to document requests frustrated the WHD's investigation efforts. The ALJ found that Peter's never turned some of Peter's records over to the WHD, while it turned other records over just before the evidentiary hearing started, a year after the initial notice of investigation. The ALJ disbelieved the reasons that Peter's gave for its nonproduction or late production. Peter's created some records after the investigation began.<sup>16</sup> The ALJ also essentially found that Peter's was lying about having other records that Peter's actually did not have.

Records are crucial to effective enforcement of labor laws. Peter's stonewalling and deceptive tactics fundamentally interfered with the WHD's efforts to determine whether Peter's complied with its wage obligations, requiring the WHD to reconstruct the hours and payments.<sup>17</sup> The ALJ acknowledged that all the workers were affected by the violation of the wage and hour

---

<sup>15</sup> *Id.*

<sup>16</sup> D. & O. at 19.

<sup>17</sup> *Id.* at 10.

laws and that such a violation was “serious.”<sup>18</sup> Stonewalling and misleading the investigators month after month about the records pertaining to wage and hour laws is just as serious. The fact that Peter’s cooperated by permitting interviews does not remedy the repeated stonewalling and obfuscation over the records, a much more reliable source of information than verbal interviews where witnesses can alter testimony and fail to remember details. Thus, Peter’s engaged in a “willful” failure to cooperate in response to the Wage and Hour Division’s investigation, which supports an assessment of a civil money penalty of \$10,000 pursuant to the statutory criteria at 8 U.S.C.A. § 1184(c)(14)(A)(i) and (C) and the applicable regulations at 20 C.F.R. § 655.65(c) and (g) (2009).

### CONCLUSION

Accordingly, we **AFFIRM** the ALJ’s determination that Peter’s Fine Greek Food failed to cooperate with the Wage and Hour Division’s investigation. But we **VACATE** the ALJ’s assessment of a civil money penalty of \$1,000 for Peter’s Fine Greek Food’s failure to cooperate with the Wage and Hour Division’s investigation and instead **AFFIRM** the WHD Administrator’s assessment of a civil money penalty of \$10,000.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

---

<sup>18</sup> *Id.* at 35.