



In the Matter of:

ADMINISTRATOR, WAGE & HOUR,
DIVISION, U.S. DEPARTMENT OF
LABOR

ARB CASE NO. 09-016

PROSECUTING PARTY,

ALJ CASE NO. 2008-TAE-003

v.

DATE: December 21, 2010

GLOBAL HORIZONS MANPOWER, INC.
and MORDECHAI ORIAN,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Roger W. Wilkinson, Esq., *U.S. Dep't of Labor, Office of Solicitor, Washington, District of Columbia*

For the Respondent:

Greg Ryan, Esq., Serena Spencer, Esq., *Global Horizons, Los Angeles, California*

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

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the H-2A temporary agricultural worker program of the Immigration Reform and Control Act of 1986. 8 U.S.C.A. §§1101(a)(15)(H)(ii)(a) (Thomson/West 2010) 8 U.S.C.A. § 1188(g)(2) (Thomson/West 2010);

29 C.F.R. Part 501 subpart B (2008)¹; 20 C.F.R. Part 655 subpart B (2008). The Administrator of the Wage and Hour Division, representing the Employment Standards Administration (ESA or Administrator) sent Notice on January 28, 2008, that Global Horizons Manpower, Inc. and Mordechai Orian (collectively “Global”) were found liable for back pay in the amount of \$142,105.47 and civil penalties in the amount of \$57,500.00. Global appealed the Administrator’s claim and the Administrative Law Judge (ALJ) assigned to the case scheduled a hearing. During the pre-hearing discovery phase, the Administrator filed a motion to compel and then moved for sanctions for Global’s repeated, obstructive tactics during discovery. The ALJ granted two different motions to compel and awarded sanctions, which included a partial judgment on the Administrator’s claim for back pay and civil penalties. After continued discovery abuse, the Administrator moved for a final judgment on all remaining claims as a sanction against Global, and the ALJ granted the Administrator’s motion. Global appealed to the Administrative Review Board (ARB or Board). Because we do not feel the ALJ abused his discretion, we affirm the ALJ’s sanctions against Global.

BACKGROUND

Global is an employment agency and labor contractor headquartered in Los Angeles. Admin. Resp. to Mot. to Dis., Ex. 6 at 2. On June 16, 2003, Global filed an application for an Alien Employment Certification for 200 temporary agricultural workers to work on the Taft Farms in Bakersfield, California, under the H-2A program. Admin. Resp. to Mot. to Dis., Ex. 6 at 2. On July 28, 2003, after reviewing Global’s attestations for compliance with its regulations, the Department of Labor accepted Global’s application for alien employment. Admin. Resp. to Mot. to Dis., Ex. 6 at 2.

Shortly after the project began, Global violated its attestations concerning wages and working conditions. In 2006, in a separate proceeding, the Employment and Training Administration (ETA) brought debarment proceedings against Global based on Global’s violations of the certification. The debarment claim went to hearing and Global’s debarment was affirmed. *Global Horizons, Inc.*, ALJ No. 2006-TLC-013 (ALJ Nov. 30, 2006).

Based on the same violations, on January 28, 2008, the ESA sent a Notice of its assessment of back wage liability and civil penalties against Global. Mot. to Dis. Ex. A. The ESA’s action is the subject of this appeal.

In the Notice, the Administrator alleged that Global violated aspects of its certification after the H-2A workers arrived in Kern and Tulare Counties in California between August 1, 2003, and April 30, 2004. Mot. to Dis. Ex. A. The Administrator alleged that Global: (1) provided U.S. workers with different and more onerous terms and conditions of employment than would have been provided to H-2A workers; (2) did not provide H-2A workers living

¹ In 2010, the Department of Labor (DOL) amended the 29 C.F.R. Part 501 regulations. The implementing regulations provide that the 2010 changes will take effect for temporary labor applications filed after March 15, 2010. 29 C.F.R. § 501.1(d) (2010). Global Horizons filed its application in June 2003 and therefore the 2010 amendments do not affect its claim.

accommodations and cooking facilities; (3) failed to provide the workers with the required transportation between the living accommodations and the work site; (4) did not pay workers the three-quarters guarantee of expected daily wages after arriving at the place of employment; (5) failed to maintain accurate and sufficient payroll records; (6) failed to provide accurate and sufficient wage statements to the U.S. workers; (7) failed to pay workers all wages when due; (8) sought a waiver of all claims; and (9) made misrepresentations to Department of Labor employees. The Administrator alleged that Global owed back wages in the amount of \$142,105.47 and penalties of \$57,500.00. Mot. to Dis., Ex. A (Summary of Violations); Recommended Decision and Order (R. D. & O.) at 2.

Global requested a hearing and the case was assigned to an ALJ. Thereafter, the parties began discovery. During the pre-hearing discovery phase, the Administrator filed a motion to compel Global to respond to discovery. The ALJ granted the motion to compel. The Administrator then moved for, and the ALJ awarded, sanctions due to Global's tactics thwarting the Administrator's discovery requests. The sanctions included a partial judgment on the Administrator's claims. After subsequent violations, on August 12, 2008, the Administrator sought a full judgment as a sanction for Global's willful and flagrant abuse of pre-hearing discovery. Global opposed the Administrator's motion. On September 15, 2008, the ALJ granted the motion for full judgment. The ALJ concluded that Global acted in bad faith by: repeatedly disobeying court orders; withholding documents from the Administrator's request; willfully failing to provide documents responsive to specific requests; obstructing the completion of the deposition; and engaging in a dump of filler and duplicate documents in the responses it did make. R. D. & O. at 12. Global filed a petition for review with the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the H-2A program. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 501.42. Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (Thomson/West Supp. 2010). In reviewing an ALJ's award of full judgment against Global for abuse of discovery, we must determine whether the ALJ abused his or her discretion. *See Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014, slip op. at 3-4 (ARB Sept. 30, 2002).

DISCUSSION

1. H-2A Statutory and Regulatory Framework

For several decades, the United States has temporarily admitted immigrants as agricultural workers. The H-2A visa program had its genesis in the Immigration and Nationality Act of 1952 (the Immigration Act). *Global Horizons, Inc.*, ALJ No. 2006-TLC-013, slip op. at 2-3 (describing the background of the H-2A temporary agricultural worker program). The

Immigration Reform and Control Act of 1986 amended the 1952 Immigration Act to create a new category of temporary agricultural worker (designated an “H-2A” worker), defined as:

(H) an alien ... (ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of Title 26, agriculture as defined in section 203(f) of Title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature. . .

8 U.S.C.A. §§1101(a)(15)(H)(ii)(a); *Global Horizons, Inc.*, ALJ No. 2006-TLC-013, slip op. at 2-3.

Under the INA, as amended, immigrants may receive visas to work temporarily in the United States when there are not enough workers in this country who are able, willing, qualified, and available at the time and place needed to perform agricultural labor or services. 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(a), 1184(a), (c); 20 C.F.R. Part 655 subpart B; *Global Horizons, Inc.*, ALJ No. 2006-TLC-013, slip op. at 2-3. Employers who need the labor (or their agents, such as the Respondent *Global Horizons, Inc.*) petition for the H-2A visas to admit these agricultural workers to the United States. 8 U.S.C.A. § 1184(b), (c)(1).

Congress authorized the Department of Labor to enforce the employee protection provisions for those workers admitted under the program.

The Secretary of Labor is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section.

Section 218(g)(2) of the INA, as amended, codified at 8 U.S.C.A. § 1188(g)(2).

The Secretary of Labor enforces both the attestations an employer makes in a temporary agricultural labor certification application and the wages and working conditions under the H-2A program.² The ETA enforces the certification process. The ESA enforces the monitoring of the

² The employer must: arrange to house the temporary foreign workers; protect them from the economic consequences of job injuries with workers’ compensation insurance; furnish necessary tools, meals, and transportation; guarantee the number of paid work days at the prevailing wage rates; pay the workers at frequent intervals; and keep records to demonstrate compliance with these requirements. 29 C.F.R. Part 501 subpart B; 20 C.F.R. Part 655 subpart B; *Global Horizons, Inc.*, 2006-TLC-013, slip op. at 2-3.

wages and working conditions of the H-2A program.³ According to DOL regulations, false or fraudulent assurances about the jobs, wages, working conditions, or the failure to abide by program regulations may result in: (1) monetary penalties imposed by the Department's ESA; (2) debarment from filing other H-2A certification applications imposed by the ETA; and (3) proceedings for specific performance, injunctive, or other equitable relief in U.S. District Court. 29 C.F.R. §§ 501.16, 501.19.

2. The ALJ's Award of Sanctions

On January 28, 2008, the Administrator served its Notice of assessments for Global's violation of wages and working conditions. 29 C.F.R. § 501.31. Global objected and requested a hearing. The ALJ assigned to the case set a hearing date and parties began pre-hearing discovery. During the pre-hearing discovery phase, the Administrator (1) served an Initial Request for Discovery, (2) served a Second Request for Discovery, and (3) attempted to depose Global and its CEO. These three efforts met separate fronts of obstructionist tactics by Global, which were committed even in the face of the ALJ's efforts to curtail Global's improper tactics. While each effort is described separately below, in reality, they overlapped and ultimately converged into the ultimate sanction of a final judgment for the Administrator on all claims.

A. The Administrator's Initial Request for Discovery

On March 7, 2008, the Administrator served its initial set of 72 discovery requests with subparts (Initial Request). On April 7, 2008, Global served a two-paragraph response to the Initial Request, refusing to produce any documents under a work product privilege, rule 29 C.F.R. § 18.14(c). After quoting from § 18.14(c), Global's refusal stated:

The Secretary has improperly propounded a voluminous demand for documents, most of which, the Secretary already has possession of, the remainder of which are accessible through other means. The Secretary is not entitled to any documents until it makes the requisite showing and only then if the Court orders that such documents be produced.

On this bas[is], the Secretary's Requests for Production of Documents is improper to command production. No documents are being produced in response to this invalid request.

Global's April 7 Response to Initial Request; Mot. to Compel, Ex. 2.

Following Global's response to the Initial Request, on April 15, 2008, the Administrator served a written "meet and confer" request on Global's counsel claiming that Global's reliance on § 18.14(c) was misplaced and that Global had failed to connect a privilege to a particular request. Mot. to Compel at 1-2; R. D. & O. at 3. Global responded to the Administrator and

³ In 2010, the DOL amended the 29 C.F.R. Part 501 regulations to reassign the ESA's responsibilities to the Wage and Hour Administrator. 29 C.F.R. Part 501 (2010). As we stated above, *supra* note 1, the 2010 regulations do not affect Global's claim.

promised to call the attorney for the Administrator by a certain date. When there had been no return response by the agreed upon date, the Administrator followed up with phone calls to Global. On April 25, 2008, after failing to meet and confer successfully with Global, the Administrator filed a motion to compel responses to its Initial Request. Global opposed the motion and moved for a protective order.

On May 15, 2008, the ALJ granted the Administrator's motion to compel. The ALJ found that Global's use of § 18.14(c) was boilerplate, without merit, and in bad faith. May 15 Order Compelling Prod. at 2, 5-6, 9; R. D. & O. at 3. The ALJ further found that any objections filed subsequent to the motion to compel were waived because Global failed to make specific objections within thirty days. May 15 Order Compelling Prod. at 7-9. The ALJ noted that the implementing regulations require Global to keep documents of workers' earnings. May 15 Order Compelling Prod. at 6; 20 C.F.R. § 655.102(b)(7). The ALJ ordered Global to "provide all responsive documents in its possession identified by stamped Bates numbers . . . without objection" on or before May 30, 2008. May 15 Order Compelling Prod. at 9-10. Moreover, the ALJ warned Global that if it did not reply with documents responsive to the Administrator's request, he would grant sanctions in the amount requested by the Administrator, \$142,105.47 (back wages) and \$57,500 (civil penalties). May 15 Order Compelling Prod. at 9-10; R. D. & O. at 3.

After the order to compel, Global provided problem-laden responses, which were received three days after the ALJ's deadline. July 7 Sanct. Order at 9. In its response, for the first time, Global claimed that documents did not exist for 29 of the 72 requests and that documents were lost or destroyed for 3 additional requests. June 6 Mot. for Sanct. at 2, 6, 7. One disc contained deposition transcripts and associated exhibits without Bates stamps; the other supposedly contained an additional 650 pages referenced in the response but instead only contained a one kilobyte unusable file. June 6 Mot. for Sanct. at 4-5. The Administrator contacted Global about the discs on June 3 and again on June 4, requesting hard copies of the other 650 pages from the unusable disc by June 4 and requesting hard copies of the Bates-stamped transcripts by June 6. June 6 Mot. for Sanct. at 5.

Having received no response to the June 3rd or June 4th requests, or any documents by June 6th, the Administrator filed a motion for sanctions requesting the ALJ find that Global admitted it did not pay back wages in the amount of \$142,105.47 and \$57,500 in civil money penalties. June 6 Mot. for Sanct. at 2, 5, 13. The Administrator claimed Global had a duty to preserve documents and that "[a] majority of the documents requested . . . if produced, would be very damaging to the Respondents" and would address whether Global failed to pay the three-quarters guarantee and associated penalties. June 6 Mot. for Sanct. at 6, 7, 9. The Administrator further claimed the documents requested in the Initial Request, if produced, would substantiate approximately 92% of the Administrator's claims. June 6 Mot. for Sanct. at 7.

On June 9, after it had filed the motion for sanctions, the Administrator received from Global a substitute disc containing the documents. Admin. Resp. to Mot. for Recon. July 7 Sanct. Order at 4. Global's production, complained the Administrator, in addition to being late, contained a number of objections notwithstanding the ALJ's order that all objections to the Initial Request were waived and that any production should be made "without objection."

Global objected that documents were missing, destroyed, did not exist, or were already in the possession of the Administrator from prior litigation. July 7 Sanct. Order at 8, 10; R. D. & O. at 4. Global also objected that the Administrator's request that the deposition transcripts be Bates stamped was unreasonable. Resp. to Mot. for Sanct. at 2-3. After receiving the June 9 production, the Administrator subsequently notified the ALJ that several of the documents produced were illegibly dark. June 23 conference call; July 7 Sanct. Order at 7-8; R. D. & O. at 4. In its response, Global objected to the Administrator's motion for sanctions, but did not object to the severity of the proposed sanctions and did not make alternative suggestions. July 7 Sanct. Order at 9.

On July 7, 2008, the ALJ granted sanctions against Global for violating the May 15 Order concerning the Administrator's Initial Request. In the July 7 Sanction's Order, the ALJ took administrative notice of Global's bad faith, delay, and gross negligence both in previous cases before the ALJ and in cases before other ALJs. July 7 Sanct. Order at 8. The ALJ entered sanctions because of Global's: (1) meritless reliance on § 18.14(c) without a privilege log; (2) "willful and flagrant" violation of continuing to refuse to provide documents responsive to several requests based on the excuse that the Administrator has the documents from previous litigation after the ALJ found all objections waived; and (3) production of a useless one kilobyte disc and illegible documents. July 7 Sanct. Order at 8; June 6 Mot. for Sanct. at 6-9. The ALJ was skeptical that the documents pertaining to more than 25 requests in the Initial Request were "non-existent, lost, or *accidentally* destroyed." July 7 Sanct. Order at 8. The ALJ further noted that although Global eventually mailed some of the documents, it did not do so on May 30th and instead dragged out its response until June 6. July 7 Sanct. Order at 9.

As part of the sanction, the ALJ, citing the Administrator's sworn declaration, deemed admitted the Administrator's averment that the requested documents would show violations accounting for approximately 92% of the Administrator's claimed wages and penalties. July 7 Sanct. Order at 10, 13. The ALJ denied Global's request for reconsideration of the July 7 sanctions order.

B. Individual and Rule 30(b)(6) Depositions of Orian

Meanwhile, beginning in March 2008, the Administrator attempted to depose Mordechai Orian, the CEO of Global Horizons. On March 11, 2008, the Administrator issued deposition notices for March 26 for Orian in an individual capacity and also for March 28 for Global's Rule 30(b)(6) deponent (also Orian). July 7 Sanct. Order at 2. Global objected to the Administrator's mistaken use of 2006 instead of 2008. The Administrator then corrected the dates and resubmitted the amended notice on March 17, to which Global responded that the amended notice for depositions was untimely. July 7 Sanct. Order at 2-3. After a conference call, the individual-capacity deposition of Orian was rescheduled to May 21 and the hearing was continued from April 25 to August 18, 2008. July 7 Sanct. Order at 3.

On March 28, the Administrator deposed Orian as a Rule 30(b)(6) deponent but did not finish because of frequent breaks, a tardy reporter, and because Global spent several hours depositing its client. July 7 Sanct. Order at 3. The Rule 30(b)(6) deposition was continued until May 20. On May 20, the deposition resumed, and, according to the Administrator, Global

consumed another three hours deposing her own client. Mem. Supp. Sanct. for Obstr. Dep. at 3. During the deposition, Global repeatedly objected to the Administrator's questions, which resulted in the parties having to call the judge to intervene and order the deposition to continue. July 7 Sanct. Order at 4-5; Mem. Supp. Sanct. for Obstr. Dep. at 3. The Rule 30(b)(6) deposition spilled over into the next day, May 21. After concluding the Rule 30(b)(6) deposition, the parties began the individual-capacity deposition. After twenty-three minutes, Global refused to continue, claiming the Administrator was only entitled to a total of seven hours of deposition of Orian in both his individual and the Rule 30(b)(6) capacities.⁴

On May 30, 2008, the Administrator filed a motion for sanctions due to Global's repeated obstruction of the attempted deposition of Orian on March 28, May 20, and May 21, 2008, and failure to produce any of the requested documents.⁵ The Administrator complained that Global could have brought up the seven-hour rule for both the individual and Rule 30(b)(6) deposition in the May 20 conference call concerning depositions. Mem. Supp. Sanct. for Obstr. Dep. at 6. On June 23, 2008, the ALJ denied the motion for sanctions but ordered the deposition to continue and Orian to produce documents for the deposition before June 30, 2008, which was later extended to July 8, 2008. On July 8, 2008, the day after being sanctioned by the ALJ, Global provided narrative responses to the request for documents for Orian's deposition. According to the Administrator, Global did not provide a single document with its response. Mot. for Term. Sanct. at 1. On July 22, the deposition of Orian continued, but Orian repeatedly refused to answer questions under Global's instruction, even after objections were made for the record. Mot. for Term. Sanct. at 1-2.

C. The Administrator's Second Request for Discovery

As the motion for sanctions concerning the Initial Request progressed, the Administrator faced similar obstacles to its subsequent requests for discovery. On April 4, 2008, the Administrator served its second set of discovery requests on Global (Second Request). On April 9, 2008, Global responded with the same § 18.14(c) objection that it raised with the Administrator's Initial Request. Mot. to Compel 2nd Req., Ex. 2; R. D. & O. at 3. On May 23, 2008, the Administrator sent a "meet and confer" notice concerning the Second Request and requested documents by May 30. Having received no documents, on June 4 the Administrator filed a motion to compel production of documents for the Second Request. Mot. to Comp. 2nd Req. at 3, 5; R. D. & O. at 4.⁶

⁴ Mem. Supp. Sanct. for Obstr. Dep. at 4-5. The deposition began at 9:58 a.m. At 10:03 a.m., counsel for Global took a fifteen-minute break. At 10:34 a.m., counsel moved for adjournment of the deposition. *Id.* at 5.

⁵ The April 14, 2008, deposition notice for Orian in his individual capacity requested he bring various documents to the deposition. July 7 Sanct. Order at 5.

⁶ The Administrator's motion to compel on the Initial Request had been granted by the ALJ on May 15, 2008.

On July 7, 2008, as part of the sanctions order concerning the Initial Request, the ALJ granted the Administrator's motion to compel the production for the Second Request and overruled all of Global's objections to the Administrator's Second Request. July 7 Sanct. Order at 13. The ALJ ordered documents be produced in usable, legible form by July 18, 2008. The ALJ again warned Global that further failure could result in additional sanctions including rendering full judgment against Global. July 7 Sanct. Order at 13-14; R. D. & O. at 5.

On July 18, despite the ALJ's previous sanction and warnings, Global responded that it had a razor thin budget and that it was unable to fully meet the July 18 deadline, but would send what it had. Dec. Mot. for Term. Sanct. at 2. Global sent 6500 pages on July 18, and attempted to send the rest in batch emails later that day. The emails did not go through, but Global produced the documents on July 23rd. Resp. to Mot for Term. Sanct. at 16-17.

D. Motion for Terminating Sanctions

After receiving the productions for the Second Request, on August 12, 2008, the Administrator moved for sanctions seeking final judgment for the Administrator on all claims. The Administrator claimed that Global's response to the Second Request continued Global's pattern of non-responsiveness in that the documents consisted of one half filler, duplicates, and documents difficult to read or copy in part, or otherwise non-responsive to the particular requests. Mot. for Term. Sanct. at 2; Decl. Mot. for Term. Sanct. at 2; R. D. & O. at 6-7, 9, 10. The Administrator argued that Global was claiming documents did not exist despite deposition testimony to the contrary. Mot. for Term. Sanct. at 2. The Administrator claimed that many documents pertaining to the Second Request were confusing because of their Bates stamps. Decl. Mot. for Term. Sanct. at 2-3. The Administrator further claimed that more than a thousand documents produced for the Second Request were actually responsive to the Initial Request but were not produced for the Initial Request as required by the ALJ's May 15 Order. Decl. Mot. for Term. Sanct. at 5.

In moving for final judgment against Global, the Administrator also alleged that Global failed to produce a single document for Orian's deposition despite the June 23 Order to Produce documents. Mot. for Term. Sanct. at 1. The Administrator also accused Orian of refusing to answer questions during the July 22 deposition. Mot. for Term. Sanct. at 1. When raising objections at the deposition, counsel for Global instructed Orian not to answer any questions after making objections which did not justify a refusal to answer questions. Mot. for Term. Sanct. at 2; Admin. Opp. to Mot. for Recon. at 5-7; R. D. & O. at 9.

The ALJ granted the Administrator's motion for terminating sanctions on September 15, 2008. Summarizing Global's responses to the Administrator's Initial Request, the ALJ stated:

In a nutshell, Global first relied on a patently frivolous argument and refused to turn over any documents without making specific objections in a timely manner. After I issued an order to compel production of documents, Global waited until the very last day and sent the Administrator a couple of deposition transcripts and a useless disk, allegedly by accident. Approximately a week

later, Global provided another disk with mostly legible files, but still refused to turn over some documents and also claimed that many others were non-existent, missing, or accidentally destroyed.

R. D. & O. 4.

Pertaining to the depositions and request for documents, the ALJ found that Global repeatedly and inappropriately counseled Orian not to answer questions, rather than making objections and proceeding with the deposition. R. D. & O. at 9. The ALJ held that the objections were not based on legitimate grounds. The ALJ found Global's responses to the request for documents for Orian's deposition were evasive with a repeating statement that Orian did not have any documents and that documents were in the possession of Global Horizons or already produced in earlier responses. R. D. & O. at 7-8.

The ALJ also found that Global's response to the Initial Request contained further objections which the ALJ had twice before found waived and for which Global had already been sanctioned before, in part. R. D. & O. at 5-6. The ALJ found that Global's excuses were in bad faith and made without any offer to retrieve documents in the possession of or within the knowledge of Global's former counsel. R. D. & O. at 6. The ALJ also concluded that, despite Global's previous claim that documents did not exist, were missing, or destroyed, Global's response to the Second Request for documents included material documents which should have been produced in the Initial Request. R. D. & O. at 9. The ALJ concluded that Global willfully withheld documents responsive to the Administrator's requests. R. D. & O. at 6, 9. Accordingly, the ALJ awarded full judgment against Global.⁷

E. Appeal to the ARB

On appeal to the ARB, Global claims the first request was burdensome and oppressive. Br. 2. Global argues that the Administrator failed to properly meet and confer under Fed. R. Civ. P. 37(a) and that it complied with the May 15 Compel Order. Global also argues that it corrected the disc error promptly and the Administrator was not prejudiced. For the reasons discussed below, we conclude that the ALJ did not abuse his discretion.

The Department of Labor Rules of Practice and Procedure for hearings before the Office of Administrative Law Judges are found at 29 C.F.R. Part 18 (2008) and apply to the H-2A program. 29 C.F.R. § 501.34. These regulations provide that "the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings." 29 C.F.R. § 18.29(a). DOL rules permit an ALJ to "take such action . . . as is just" when a party fails to comply with an order of the ALJ. 29 C.F.R. § 18.6(d)(2); *Sisfontes v. Int'l Business Software Solutions, Inc.*, ARB Nos. 07-107, -114, ALJ No. 2007-LCA-014 (ARB Aug. 31, 2009). In such a case, the ALJ may "[r]ule . . . that a decision of the proceeding be rendered against the non-complying party." 29 C.F.R. §§ 18.6(d)(2)(v), 18.29(a)(8); Fed. R. Civ. P. 37(b)(2)(A)(vi).

⁷ The July 7 Sanctions Order awarded approximately 92% of the Administrator's claimed back pay damages and civil penalties. The September 15 Order granting terminating sanctions awarded the remainder of the Administrator's claim.

In the federal courts, judges recognize that “[d]ismissal of an action for failure to cooperate in discovery is a sanction of last resort that may be imposed only if the court concludes that a party’s failure to cooperate in discovery is due to willfulness, bad faith, or fault.” *Reg’l Refuse Sys. v. Inland Reclamation Co.*, 842 F.2d 150, 153-54 (6th Cir. 1988), *superseded on other grounds*. Courts note that “default judgment granting relief against a defendant for failure to cooperate in pretrial discovery is a harsh sanction, which must be cautiously used.” *Sec. & Exch. Comm’n v. Research Automation Corp.*, 521 F.2d 585, 588 (2d Cir.1975). “[D]istrict court judges are well aware that defaults should be entered only when absolutely necessary, such as where less drastic sanctions have proven unavailing.” *United States v. Di Mucci*, 879 F.2d 1488, 1493 (7th Cir. 1989) (internal quotation marks and citations omitted). “[T]here must be at least some finding of contumacious conduct, dilatory tactics, the failure of less drastic sanctions, bad faith, willfulness, or fault before sanctions may be imposed by a party who fails to comply with a discovery order.” *Litetronics Int’l, Inc. v. Tech. Consumer Prods., Inc.*, No. 03 C 5733, 2006 WL 2850514, at *2 (N.D. Ill. Sept. 28, 2006).

As this case arises in California, the ALJ relied on Ninth Circuit law in deciding to order sanctions. In the Ninth Circuit, courts consider the following factors when deciding whether default is the proper sanction for discovery non-compliance: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the moving party; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004); *Pagtalunan v. Galaza*, 291 F.3d 639 (9th Cir. 2002). The Ninth Circuit’s multi-factor test is far from a mechanical checklist; rather, it functions as “a way for a district judge to think about what [discovery sanction is just].” *Valley Eng’rs v. Electric Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998).

Though we note that entering a judgment against a non-complying party is a severe sanction and deserves closer scrutiny within the abuse-of-discretion framework, we agree with the ALJ that Global’s conduct constitutes willful, contumacious disregard of the discovery process as well as disregard of the ALJ’s multiple warnings and orders.

Global began its responses to requests for discovery by providing a meritless, two-paragraph objection based on § 29 C.F.R. § 18.14(c) (work product privilege) to over 115 requests with subparts. We agree with the ALJ that Global’s response was frivolous and in bad faith. At minimum, Global should have attempted to provide the information it could and, in good faith, it should have asserted particularized legally supportable objections, if any existed. The ALJ exercised proper discretion by dismissing Global’s objections, granting a motion to compel and finding all objections waived for the Administrator’s Initial Request for Discovery.

After the compel order, Global delayed actual productions beyond the dates ordered by the ALJ, and when it finally did produce documents, those productions were illegible, nonresponsive, not properly Bates-stamped, or provided in unusable formats. Global continued to make objections despite the ALJ’s compel order that all objections were waived. Global’s noncompliance with the ALJ’s order was a serious misstep and, as pointed out by the ALJ, materially interfered with the Administrator’s ability to prosecute its claims. In ruling on the

Administrator's motion for sanctions, the ALJ carefully examined Global's repeated obstructive tactics, the specific impact of Global's conduct and then carefully examined his options. Because Global's discovery conduct occurred in the face of a previous compel order, the ALJ awarded sanctions against Global in the amount requested by the Administrator. The ALJ deemed more than 90% of the Administrator's claim for back wages and penalties admitted.

Following the first sanctions order, Global continued to abuse the discovery process. The Administrator filed another motion to compel, this time for its Second Request for Discovery. The ALJ granted the motion and ordered the second compel order in the case. When Global finally produced documents for the Administrator's Second Request, those produced documents included filler, were full of duplicates, and were not responsive to particular requests. Initially claiming documents were not in their possession, did not exist, or were accidentally destroyed, Global produced certain documents covered by the Initial Request only after the ALJ had granted sanctions deeming the content admitted. These documents were essential to the Administrator's case against Global.

On another front during the pre-hearing phase, Global also showed obstinate conduct in the Administrator's depositions by refusing to produce deposition documents and by improperly refusing to answer questions after making an objection for the record. Mot. for Term. Sanct. at 1; R. D. & O. at 8-9. We examined the deposition testimony and found Global's conduct to be abusive and in bad faith.⁸

In August 2008, the ALJ notified parties that he would continue the hearing date. Aug. 15 Order Cont'g Hear'g. at 1. The Administrator filed its motion for sanctions and, because of the ALJ's notice, it did not file a pre-hearing statement. Despite having full knowledge that the hearing had been continued, Global, in bad faith, filed a counter-motion for sanctions against the Administrator for failing to file a pre-hearing statement. R. D. & O. at 10-11.

Prior to issuing the terminating sanctions, the ALJ gave multiple warnings explaining the consequence of Global's continued non-compliance. Nonetheless, throughout the pre-hearing phase, Global persistently violated the ALJ's warnings and orders. For these reasons, we conclude that the ALJ did not abuse his discretion in granting terminating sanctions against Global.

Global's arguments on appeal do not convince us otherwise. On appeal to the ARB, Global claims the Initial Request was burdensome and oppressive. Br. 2. The proper step, however, would have been to confer with the Administrator before the response was due and, if necessary, seek the ALJ's intervention. Instead, Global provided no information and simply served a meritless, two paragraph 29 C.F.R. § 18.14(c) argument to the Initial Request, making a similar objection to the Second Request. See May 15 Order Compelling Prod. at 8; *Mitchell v. Nat'l R.R. Passenger Corp.*, 208 F.R.D. 455, 458 n.4 (D.D.C. 2002) (refusing boilerplate "burdensome" arguments to discovery requests).

⁸ See, e.g., Mem. in Supp. of Plt. Opp. to Global's Req. for Stay. Ex. 2 (excerpting Global's obstructionist conduct in the July 22nd deposition); Decl. of Serena Spencer in Opp. to Admin. Mot. for Dep. Costs (appending deposition transcripts).

Global argues that the Administrator failed to properly meet and confer under Fed. R. Civ. P. 37(a). This argument does not erase the fact that Global's discovery response was utterly frivolous and in bad faith in the first instance, even if the Administrator did not allegedly meet and confer to discuss the discovery issues. Moreover, under the ALJ rules concerning motions to compel, 29 C.F.R. § 18.21, there is no expressed "meet and confer" obligation as provided in the federal rules.⁹ Under the Fed. R. of Civ. P. 37(a), a party seeking to compel discovery must include a certification that it attempted in good faith to meet and confer with the opposing party concerning the requested discovery. Despite the absence of an expressed requirement in the ALJ rules, the Administrator did attempt to meet and confer with Global. Specifically, the Administrator sent a written letter to Global. Global responded to the Administrator and promised to call the attorney for the Administrator by a certain date. When there had been no return response by the agreed upon date, the Administrator followed up with a phone call. Failing to reach Global, the Administrator filed its motion to compel. Whether or not the Administrator could have done a little more fails to demonstrate abuse of discretion by the ALJ, especially given Global's bad faith conduct.

Global also argues that the Administrator was not prejudiced by any of Global's discovery tactics. We find compelling the Administrator's arguments that it was prejudiced. Resp. to Global's Req. for Recon. at 11. The Administrator claims Global's gross negligence and bad faith impacted the Administrator's ability to timely acquire material information and that it was prejudiced by Global's withholding material documents—only to produce them after the sanctions order deemed those allegations admitted. The Administrator also claims Global's discovery tactics precluded the Administrator from engaging in follow-up discovery based on initial responses to the requested discovery. We find that the Administrator demonstrated that it was sufficiently prejudiced by Global's discovery conduct. In addition, Global's conduct required the Administrator to spend substantial time and resources filing numerous motions to compel and motions for sanctions. Most importantly, the ALJ's progressive intervention was not working, ultimately pushing the ALJ to the last resort, ultimate sanction. Beyond those costs to the Administrator, the ALJ and his staff also spent a large amount of resources pouring over motions and exhibits stemming from Global's discovery conduct. R. D. & O. at 4-5 (describing the effect of Global's conduct on the ALJ's docket).

Though we note that entering a judgment against a non-complying party is a severe sanction and deserves closer scrutiny, we affirm the ALJ's award of full sanctions against Global. For the above reasons, we agree with the ALJ that Global's conduct constitutes willful, contumacious disregard of the discovery process and find that the ALJ did not abuse his discretion in granting full sanctions against Global.

F. Administrative Notice

As noted above, the ALJ, for example, took judicial or administrative notice of Global's evasive discovery tactics in another of the ALJ's cases as well as in other administrative law

⁹ We certainly believe that parties should attempt to meet and confer to seek resolution of litigation disputes before resorting to the ALJ.

cases with other ALJs. The ALJ took administrative notice in the May 15 2008 Order to Compel at 4, the July 7 Sanctions Order at 4, 8, and the terminating sanctions in the R. D. & O at 2-3. Global argues on appeal that the ALJ's use of administrative notice of alleged discovery abuse in other cases was improper. Br. 7-8. We agree that it was not a proper use of judicial notice.

ALJ Rule 18.201 allows an ALJ to take administrative notice of certain facts generally known within a local area or capable of accurate determination by sources whose accuracy cannot be reasonably questioned. Rule 18.201(b) provides

(b) Kinds of facts. An officially noticed fact must be one not subject to reasonable dispute in that it is either: (1) Generally known within the local area, (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or (3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.

29 C.F.R. § 18.201.

We conclude that it was error for the ALJ to take administrative notice of Global's discovery conduct in other cases. Contrary to the requirements of Rule 18.201, the facts which the ALJ took notice of were not facts generally known within the territorial jurisdiction of the ALJ or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Further, the effect of Global's alleged discovery conduct in other cases is likely disputable. Generally, documents that are part of the public record may be judicially noticed to show, for example, that a judicial proceeding occurred or that a document was filed in another court case, but a court may not take judicial notice of findings of facts from another case to support a contention before it. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 & n. 5 (9th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

While we find the ALJ erred in taking administrative notice of the discovery abuses in other cases, that error was harmless and did not affect the ALJ's overall basis for award of terminating sanctions. The ALJ supported both the July 7 and September 15, 2008 sanctions awards with detailed findings of violations particular to this case and independent of Global's conduct in other cases.

To the extent that other appellate issues were properly before us, our affirmance of the ALJ's dismissal sanction makes all other issues moot.

CONCLUSION

After repeated violations of pre-hearing discovery orders, the ALJ awarded terminating sanctions against Global. We find the ALJ did not abuse his discretion, and for the reasons above, we affirm the R. D. & O.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge