



IN THE MATTER OF:

JOHN PEROULIS & SONS SHEEP, INC.;
LOUIS PEROULIS, Individually; and
STANLEY PEROULIS, Individually;

ARB CASE NO. 2013-0083

ALJ CASE NO. 2012-TAE-006

RESPONDENTS.

DATE: June 16, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Respondents, Peroulis and Sons Sheep, Inc., et al.:

Sam D. Starritt, Esq.; Matthew A. Montgomery, Esq.; Dufford, Waldeck, Milburn & Krohn, LLP; Grand Junction, Colorado

For the Principal Deputy Administrator, U.S. Department of Labor:

Diane A. Heim, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; U.S. Department of Labor, Office of Solicitor, Washington, District of Columbia

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge

DECISION AND ORDER OF REMAND

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 (INA), 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(a) and 1188(g)(2), and the U.S. Department of Labor H-2A regulations, 29 C.F.R. Part 501 and 20 C.F.R. Part 655, Subpart B.¹ Respondents John Peroulis

¹ As the Administrator notes (Response Brief, n.1), relevant to resolution of the present case are the implementing regulations at 20 C.F.R. Part 655 that were promulgated in 1987, see 52 Fed. Reg. 20,496 (June 1, 1987), which remained in effect until their amendment effective March 15,

and Sons Sheep, Inc., *et al.*, (Respondents or Peroulis) seek review of a Department of Labor Administrative Law Judge (ALJ) Order on Cross-Motions for Summary Decision, issued March 19, 2013, granting partial summary decision on behalf of the Department's Wage and Hour Division's Administrator (WHD or Administrator), and the final Decision and Order issued June 27, 2013, ordering the payment of wages, employee travel expenses, and assessing civil monetary penalties. For the reasons that follow, the Administrative Review Board (ARB or Board) vacates the ALJ's Order on Cross-Motions for Summary Decision and final Decision and Order (collectively referred to as the "D. & O.") and remands the case to the ALJ for further proceedings consistent with this Decision and Order of Remand.

BACKGROUND

Respondents, who own and operate a sheep ranch in Colorado, entered into a work contract governed by the INA employee protection provisions of the H-2A temporary agricultural worker program with Amador Inga Aquino covering the period April 11, 2008, to April 9, 2010. On July 17, 2008, Respondents terminated Aquino's employment after observing elk meat hanging near his sheep wagon on their ranch. A representative of the Colorado Division of Wildlife subsequently investigated Respondents' claim that Aquino had illegally killed an elk, although no charges of violation of Colorado law were ultimately pressed.

Following an investigation initiated in September 2008 of Respondents' compliance with H-2A program requirements in the termination of Aquino's employment, the Wage and Hour Division (WHD) determined that Peroulis had violated 20 C.F.R. § 655.102(b)(5), and (b)(6) by discharging Aquino without good cause and then failing to provide required wages and transportation reimbursements to Aquino. WHD issued a determination letter assessing Peroulis \$6,216.51 for back wages owed and transportation costs (for violation of the requirement to pay wages for three-fourths of the contract period; for making improper deductions for Aquino's inbound transportation; and for failure to pay Aquino's outbound transportation costs). In addition, WHD assessed \$3,000 in civil monetary penalties (CMPs) for the three violations.² Peroulis filed objections to WHD's assessment and requested a hearing before a Department of Labor Administrative Law Judge.

Both parties filed motions for partial summary decision with the ALJ. In support of its motion for summary decision, WHD argued that the undisputed facts showed that Peroulis had

2010, see 75 Fed. Reg. 6884-01 (Feb. 12, 2010), and which the parties agree are applicable to this case because the H-2A contract at issue in this case was entered into in April 2008.

² WHD also assessed another CMP of \$800 for a violation relating to improper housing. However, that CMP is no longer at issue in this case.

terminated Aquino's employment without good cause, had failed to comply with the terms of the job order and Aquino's work contract by failing to provide Aquino with two written warnings prior to his discharge, and by failing to properly notify the Colorado State Workforce Agency (SWA) of Aquino's discharge. In support of their motion for summary decision, Respondents argued that reimbursement of transportation expenses was not warranted because Aquino did not complete applicable periods of employment. In opposition to WHD's motion, Respondents argued that there existed disputed material facts about whether good cause existed for Aquino's discharge based on their honest belief that he had illegally possessed an elk carcass in violation of state law, and that they had substantially complied with the agency notice requirements which, they further argued, were not binding because the notice requirements had not been published in the Federal Register.

In his Order on Cross-Motions for Summary Decision, issued March 19, 2013, the ALJ denied Respondents' motion for summary decision, and granted, in part, and denied, in part, WHD's motion. With respect to WHD's motion for summary decision, the ALJ concluded that genuine issues of material fact existed as to whether Respondents had good cause for discharging Aquino, and thus denied that aspect of WHD's motion. The ALJ nevertheless ruled in WHD's favor with respect to the notice issue, holding that even if Respondents had good cause for terminating Aquino's employment, Respondents failed to notify SWA in writing of Aquino's discharge within two business days pursuant to the requirements of a September 17, 2007 ETA "Guidance Letter." Accordingly, by final Decision and Order issued June 27, 2013, the ALJ directed Respondents to pay \$6,216.51 in back wages (\$4,362.60 for the three-fourths wage guarantee; \$741.56 for Aquino's inbound transportation; and \$1,112.35 for his outbound transportation). The ALJ also ordered Respondents to pay \$3,000 in CMPs (\$1,000 for each of the three violations).

Peroulis sought review of the ALJ's decision before the Administrative Review Board, which the Board granted by order dated August 9, 2013.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board authority to issue final agency decisions under the H-2A program. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). *See also* 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. 2014).

We review a grant of summary decision *de novo*, i.e., under the same standard that the ALJs employ. This standard is set forth at 29 C.F.R. § 18.40(d) and is derived from Rule 56 of the Federal Rules of Civil Procedure. The ALJ is permitted to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision."

DISCUSSION

Under the H-2A visa program, nonimmigrant workers may be temporarily admitted to work in the United States performing seasonal agricultural work, after an employer files an application, provided the Department of Labor certifies that “there are not sufficient workers . . . available at the time and place needed, to perform the labor or services involved in the petition,” and that the employment of nonimmigrants “will not adversely affect the wages and working conditions of workers in the United States similarly employed.” 8 U.S.C.A. § 1188(a)(1)(A), (B); see 20 C.F.R. § 655.90; 29 C.F.R. § 501.1(a).

Among the numerous requirements that an employer must meet, both before being authorized to employ H-2A workers and during the term of their employment, is the requirement that the employer’s job offers to workers contain certain minimum terms and conditions of employment, which must be reflected in the job offer filed with the Department as part of the employer’s application for temporary labor certification. See 20 C.F.R. §§ 655.100(b), 655.101(a)(1), (b)(1); 655.102(b). Of relevance to the present case, the employer must provide or pay for the H-2A worker’s transportation and subsistence expenses from the worker’s place of origin to the place of employment if the worker completes 50 percent of the work contract period. 20 C.F.R. § 655.102(b)(5)(i). The employer must also provide or pay for the worker’s outbound transportation and subsistence expenses if the worker completes the work contract period. 20 C.F.R. § 655.102(b)(5)(ii). In addition, the employer must guarantee the H-2A worker employment for at least three-fourths of the workdays during the contract period. If the employer provides less than the required amount, the employer must nevertheless pay the worker what he or she would have earned had he or she worked the guaranteed number of days. 20 C.F.R. § 655.102(b)(6). If, however, an H-2A employee voluntarily quits his or her employment before the end of the contract period, or is terminated for cause, and the employer notifies the SWA of such action, the employer is relieved of the requirements to provide transportation expenses and payment of the three-fourths wage guarantee. See 20 C.F.R. § 655.102(b)(11).³

³ 20 C.F.R. § 655.102(b)(11) provides:

(11) Abandonment of employment; or termination for cause. If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the SWA of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b)(5)(ii) of this section, and that worker is not

Whenever the INA's H-2A provisions or the implementing regulations are found to have been violated, the Administrator is authorized to take such actions "as deemed appropriate, including . . . the recovery of unpaid wages, the enforcement of any other contractual obligations, and the assessment of a civil money penalty against any person for a violation of the H-2A work contract obligations of the Act or these regulations." 29 C.F.R. §§ 501.16, 501.19.

The issue identified in this case for consideration on appeal was whether the ALJ correctly concluded that the Respondents are liable for wages, transportation costs, and CMPs because they failed to provide written notification of Aquino's discharge to the appropriate agency within two business days as provided in the 2007 ETA Guidance Letter.⁴ However, since acceptance of this appeal, the Administrator has advised the Board that in light of WHD Field Assistance Bulletin No. 2012-01 (Feb. 28, 2012), under which WHD no longer will seek the payment of wages for such notice violations and no CMPs for a first-time violation, the Administrator has decided not to apply the ETA Guidance Letter to this case. Thus, the Administrator has advised, WHD does not seek affirmance of the ALJ's decision on the grounds addressed by the ALJ, in which back pay, transportation costs, and CMPs were awarded solely because Peroulis failed to give written and timely notice. Nevertheless, the Administrator urges the Board, in exercise of its authority to review the ALJ's summary decision *de novo*, to affirm the ALJ's back pay award and CMPs assessment on different grounds than those relied upon by the ALJ. The Administrator seeks affirmance of the ALJ's decision on the grounds that Aquino was not properly discharged for cause under this H-2A contract, positing an alternative issue for resolution on appeal:

Whether Respondents are liable for back pay (including transportation costs) and CMPs because they did not have good cause to discharge their H-2A employee because the employee did not commit a "violation" of any law and, even if he had committed such a violation, it was not of a "severe or emergency" nature.

Principal Deputy Administrator's Response Brief at 2.

The sole issue certified for review before the ARB has, by the Administrator's concession, been rendered moot on appeal. The ALJ did not rule upon the alternative rulings now proposed by the Administrator, that Respondents lacked good cause for discharging Aquino

entitled to the "three-fourths guarantee" (see paragraph (b)(6) of this section).

⁴ See ARB Order of August 9, 2013.

or failed to issue the requisite two warnings prior to termination,⁵ because he initially determined that Respondents failed to provide proper notice to the SWA of Aquino's discharge. The Administrator nevertheless seeks to have the ARB subject Respondents as a matter of summary decision for lack of good cause to liability for paying Aquino's transportation costs under 20 C.F.R. § 655.102(b)(5), wages pursuant to the "three-fourths guarantee" under 20 C.F.R. § 655.102(b)(6), and the assessment of CMPs under 29 C.F.R. § 501.19. However, in proposing that the ARB now summarily rule on the Administrator's alternative basis for imposing liability and sanctions on Respondents, the Administrator would have this Board disregard the ALJ's finding that "[t]here are a number of genuine questions of fact and mixed law and fact relating to whether or not Respondents had sufficient cause for terminating [Mr. Aquino]." ALJ Order on Cross-Motions for Summary Decision, at p. 6. The evidentiary record before us on appeal supports the ALJ's finding of issues of material fact and mixed fact and law precluding summary decision on the question. Accordingly, we reject the Administrator's proposal that the Board rule as a matter of summary decision on whether or not Respondents acted with good cause in discharging Aquino. Instead, we remand this case to the ALJ for further consideration of whether summary decision is appropriate because Respondents failed to issue Aquino two written warnings prior to termination or whether Respondents had acted with good cause following an evidentiary hearing.

⁵ WHD noted that the H-2A contract stated that a discharge for cause could be carried out but only after two written warnings to the employee. Admin. Br. at 6. Following the list of offenses that warrant termination, the contract states that:

[T]he employer will apply these standards uniformly in a non-discriminatory manner, as required by law. Termination may be carried out by the employer but only after **two written warnings** (not necessarily for the same offense). The warnings will be written in a language understandable to the worker and the worker will be given an opportunity to sign the warning. Termination may be carried out without first having issued any warning if the employee's offense is of a severe or emergency nature such as a threat to the life, safety and/or health of the worker, livestock, or others; or, is the intentional destruction of property.

CONCLUSION

Accordingly, for the foregoing reasons, the ALJ's June 27, 2013 Decision and Order is **VACATED**, and this case is **REMANDED** to the ALJ for consideration of WHD's alternate bases for ordering Respondents to pay Aquino wages and transportation costs pursuant to 20 C.F.R. § 655.102(b)(5) and (b)(6), and for the assessment of civil money penalties.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge