U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

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

PROSECUTING PARTY,

v.

JOHN PEROULIS AND SONS SHEEP, INC., LOUIS PEROULIS, Individually, and STANLEY PEROULIS, Individually,

RESPONDENTS.

ARB CASE NOS. 14-076
14-077

ALJ CASE NO. 2012-TAE-004

DATE: SEP 12 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party, 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

For the Respondents, Peroulis and Sons Sheep, Louis and Stanley Peroulis:
Sam D. Starritt, Esq.; Matthew A. Montgomery, Esq.; *Dufford, Waldeck, Milburn & Krohn, LLP*; Grand Junction, Colorado

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*. Judge Brown concurring, in part, and dissenting, in part.

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.[1] Peroulis and Sons, Inc.; and Louis and Stanley Peroulis (Peroulis) seek review of the U.S. Department of Labor Administrative Law Judge's (ALJ) October 23, 2013; June 2, 2014; and June 17, 2014 decisions remanding, affirming, and denying reconsideration of the U.S. Department of Labor's Wage and Hour Division's (WHD or Administrator) assessment of violations and civil monetary penalties. For the following reasons, the Administrative Review Board (ARB or Board) affirms the ALJ.

BACKGROUND

Peroulis raises sheep in northwestern Colorado. For the past thirty years, Peroulis has hired H-2A workers to perform various sheep-raising services at the Peroulis ranch. This matter involves two H-2A contracts between Peroulis and the sheepherders. The first covered services performed from October 17, 2008, until October 16, 2009, and the second from October 17, 2009, until October 16, 2010.

The WHD investigated Peroulis in November 2008 through December 2009 and issued a Notice of Determination on October 12, 2010, charging Peroulis with several categories of violations.[2] The first category involved violations of mobile or range housing requirements as established by a 2001 Employment Training Administration (ETA) Training and Employment Guidance Letter (TEGL or Field Memorandum) 24-01. Oct. 23, 2013 D. & O. at 1-2. Peroulis certified in accordance with Field Memorandum 24-01 that it would house only one worker per mobile wagon for those mobile wagons certified for only one person. Peroulis further certified that the mobile wagons had egress windows. The second category of violations concerned a certain work site that did not meet fixed-housing standards, which requires electricity, bathing facilities, hand-washing facilities, and requires that housing be a certain distance from the animals. 20 C.F.R. § 654.400 *et seq.* The third and fourth categories involved payroll and transportation and subsistence costs. Oct. 23, 2013 D. & O. at 1-2.

In addition to the direct assessments, WHD also assigned civil monetary penalties (CMPs). The CMPs assessed varied by contract according to which CMP rules applied. The DOL amended the H-2A regulations in December 2008, 73 Fed. Reg. 77,110 (the "2008 Rules"). Before the 2008 Rules went into effect, the DOL applied the "1987 Rules." 52 Fed. Reg. 20,496. The 1987 Rules had a $1,000 cap on CMPs; the 2008 Rules had a $5,000 CMP cap.

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[1] 8 U.S.C.A. § 1101(a)(15)(H)(ii)(a) (Thomson Reuters 2008) (H-2A); 8 U.S.C.A. § 1188(g)(2) (Thomson Reuters 2008); 29 C.F.R. Part 501 (2008); 20 C.F.R. Part 655 subpart B (2008). The H-2A regulations were amended in 2015. 80 Fed. Reg. 62,957 (Oct. 16, 2015). Parties do not argue that the 2015 rules affect this proceeding.

[2] Oct. 23, 2013 D. & O. at 1-2. The WHD initially assessed $21,685.94 in back wages and $49,890.00 in civil monetary penalties. *Id.* at 11; GX-4. The revised total was $1,104.90 in unpaid wages and $44,490 in CMPs. Oct. 23, 2013 D. & O. at 13.

The 2008 Rules went into effect in January 2009. Contract One began in October 2008 and thus the 1987 Rules were in effect. The ALJ assigned $6,490 in CMPs for Contract One, including $1,050 for mobile housing violations (two housing violations $700 and one egress window $350). Oct. 23, 2013 D. & O. at 11, 23.

Contract Two began in October 2009. Following a legal challenge, DOL tried to suspend the 2008 Rules in May 2009. But because a federal court enjoined the WHD from suspending the 2008 Rules, WHD applied the 2008 Rules to Contract Two. For the second contract, WHD assigned $38,000 in CMPs, including $20,000 for mobile housing violations.

Peroulis filed objections to WHD's assessment, and WHD issued an Order of Reference to the Office of Administrative Law Judges on January 11, 2012. The case was assigned to an ALJ for hearing. Parties, however, agreed to waive hearing and submitted evidence directly to the ALJ.

Peroulis conceded a majority of the violations. WHD either satisfied or rescinded the direct assessments. Peroulis's remaining contentions centered on WHD's assessment of CMPs on constitutional and various other grounds. Peroulis challenged the WHD's ability to issue CMPs generally because Congress has not delegated such authority to the DOL under 8 U.S.C.A. § 1188. Peroulis contends that the DOL cannot enforce state law in a non-Article III forum. Peroulis also grieved the use of the 2008 Rules to Contract Two.

On October 23, 2013, the ALJ issued an order agreeing with the WHD and rejecting consideration of many of Peroulis's arguments. Peroulis had justified its mobile housing violations on the position that it was safer to house two individuals per mobile unit in the winter because it would be warmer. The ALJ remanded the $21,050 CMP for mobile housing violations to the WHD to consider Peroulis's reasons for the violation.[3]

June 2, 2014 Order on Remand

The WHD's position on remand was that Peroulis's attestation of compliance but simultaneous violation of the mobile housing rules was willful and worthy of the highest CMPs. WHD characterized Peroulis's decision-making as financially motivated and therefore reaffirmed its assessment of $21,050 in CMPs associated with mobile housing (both contracts). The penalties ranged from $350 for a failed egress window to $5,000 for willful and repetitive violation of the single-occupancy attestation.

The case returned from the WHD on remand to the ALJ. Before the ALJ the second time, Peroulis submitted a letter from an association with insight on the practice of mobile

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[3] From this order, Peroulis filed an interlocutory appeal with the ARB. Peroulis indicated to the ARB that the interlocutory order was defensive in the event that the October 23 Order was deemed a final order. Since the ARB did not treat the October 23 Order as a final order, the interlocutory appeal was unnecessary. The ARB dismissed it on January 15, 2014 (ARB No. 14-012).

housing for sheepherders. The industry letter claimed that sharing mobile housing in the winter was safe and well established.[4]

The ALJ considered Peroulis's evidence supporting its justification for doubling up workers and found that Peroulis's reasons were not wholly cost-driven and that the practice was common in the industry. During the winter months, the workers need to move the sheep to different camp sites. Two workers are needed during the winter: one to move and tend the sheep; the other to melt water and tend the camp and horses. Trucks are not always able to reach the mobile camp site due to snow, so the workers rely on horses. Horses can pull a single wagon but not a double unit. Notwithstanding the fact that WHD demonstrated that Peroulis willfully violated the regulations, the ALJ determined on June 2, 2014, that Peroulis's reasons for assigning workers to a single unit warranted mitigation. Accordingly, the ALJ reduced the CMPs by one-third to $14,033.33.

The Administrator asked the ALJ for reconsideration on June 9, 2014, arguing that the ALJ was reviewing the CMPs on a de novo basis rather than on an abuse of discretion standard. On June 17, 2014, the ALJ explained, in response, that he reviewed the CMPs de novo because he was considering evidence not presented to WHD. The ALJ applied an abuse of discretion standard to the WHD's interpretation of the regulations but a de novo review standard as to whether the evidence warranted mitigation of the CMPs. Both Peroulis and the Administrator appealed the ALJ's order to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the 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); 29 C.F.R. § 501.42. Under the Administrative Procedure Act (APA), 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 Reuters 2015).

DISCUSSION

1. Statutory and Regulatory Framework

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:

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[4] There was some dispute whether the letter was in the record. The Administrator states that the ALJ denied a motion to supplement the record in his October 2013 order. Administrator's Brief (Admin. Open. Br.) at 13. The ALJ discussed this letter in his June 2, 2014 order and therefore we deem the letter part of the record. June 2, 2014 D. & O. at 3 n.8.

> (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. . . .

8 U.S.C.A. § 1101(a)(15)(H)(ii)(a).

Under the INA, as amended, foreign workers 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.[5] Employers, who need labor, petition for H-2A visas to admit these agricultural workers to the United States. 8 U.S.C.A. §§ 1184(a), (c)(1). Congress authorized the Department of Labor to enforce the employee protection provisions applicable to those workers admitted under the program. INA Section 218(g)(2), as amended, codified at 8 U.S.C.A. § 1188(g)(2); see also 29 C.F.R. Part 501.

Because of the unique nature of the sheepherding business, the DOL Administrator has the authority to establish special temporary employment guidance letters (TEGL or Field Memorandum) for H-2A applications. 20 C.F.R. § 655.93(b). In 2001, the ETA issued a TEGL providing special guidelines for sheep and goatherders. Field Memorandum 24-01 (Aug. 1, 2001). These special regulations applied to mobile or range housing such as that at issue in this case. The fixed or ranch site, however, was subject to the same standards as those for other agricultural workers. 20 C.F.R. § 655.400 *et seq.*

As part of the Secretary's enforcement power, the DOL may issue civil monetary penalties as well as order debarment. In determining the amount of the penalty, the Administrator may consider several factors including the history of the company's past compliance, the number of workers affected, and the aggravated or willful nature of the noncompliance.[6]

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[5] 8 U.S.C.A. §§ 1101(a)(15)(H)(ii)(a), 1184(a), (c); 20 C.F.R. Part 655 subpart B (655.90-.113); 29 C.F.R. § 501.0-.47; *Global Horizons, Inc.*, ALJ No. 2006-TLC-013, slip op. at 2-3 (Nov. 30, 2006).

[6] 29 C.F.R. § 501.19:

> (1) Previous history of violation or violations of the H-2A provisions of the Act and these regulations;
> (2) The number of H-2A employees, corresponding U.S. employees or those U.S. workers individually rejected for employment affected by the violation or violations;
> (3) The gravity of the violation or violations;
> (4) Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;
> (5) Explanation of person charged with the violation or violations;

2. Peroulis's and the Administrator's Petitions for Review

Peroulis's petition for review raises the following points of error: (1) the ALJ erred in finding that the 2008 Rules apply to Contract Two; and (2) the H-2A regulations and the ETA Field Memorandum extend beyond the DOL's delegated authority and are unconstitutional or otherwise invalid. The Administrator's cross petition for review challenges the ALJ's reduction of the WHD's CMPs by one-third.

A. Unconstitutional, Invalid, or Expired Rules and Regulations

We first turn to Peroulis's challenge to the validity of H-2A regulations and ETA Field Memorandum 24-01. Peroulis argues that Congress did not delegate power to the DOL to enforce the 1987 or 2008 regulations or to issue civil monetary penalties. Peroulis contends that the DOL cannot enforce state contract law in a non-Article III court such as DOL's administrative tribunals. Peroulis Brief (Peroulis Br.) at 10, 12-17.

The ARB is not permitted to rule on the validity of DOL regulations. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994); Secretary's Order 02-2012, 77 Fed. Reg. 69,378 (Nov. 16, 2012) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."). Accordingly, Peroulis's claims are not properly before us.

Peroulis argues that Field Memorandum 24-01 is invalid because the DOL did not issue it following a period of notice and comment. In *Mendoza v. Perez*, 754 F.3d 1009, 1020-25 (D.C. Cir. 2014), the court reviewed two field memoranda, one of which was Field Memorandum 32-10 that superseded Field Memorandum 24-01. The court declared that the field memoranda were substantive and promulgated as part of the legislative authority delegated to the DOL. *Mendoza*, 754 F.3d at 1021-25. The APA requires that substantive rules receive notice and comment before publication. 5 U.S.C.A. § 552(a)(1)(D). The field memoranda discussed in *Mendoza* were not issued with notice and comment.

Analogously, Peroulis argues that Field Memorandum 24-01 at issue here is invalid because it, too, was substantive but not issued with notice and comment. The Administrator counters that not all APA violations result in enjoining the use of the rule or regulation. Administrator's Response Brief at 27 (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). The Administrator noted that *Mendoza* did not invalidate Field Memorandum 32-10. The Administrator claims that the Field Memorandum was still being used during the litigation. The D.C. Circuit remanded the case to the district court

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(6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provisions of the Act;
(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

to craft a proper remedy for the APA violation. The district court, on remand, accepted a schedule for the DOL to redo the notice and comment period for the challenged Field Memorandum, 32-10. The district court commented that the absence of notice and comment required vacatur but held that vacatur would occur upon the effective date of the new Field Memorandum complying with notice and comment. *Mendoza v. Perez*, 72 F. Supp. 3d 168, 175 (D.D.C. 2014) (district court on remand).

Our authority to rule on the validity of the Field Memorandum 24-01 is uncertain. But even if we were to entertain a dispute regarding the Field Memorandum on the grounds that Peroulis alleged, the courts in deciding *Mendoza* did not rule the Memorandum invalid, they merely ordered the DOL to cure the deficiency before vacatur. Therefore, we reject Peroulis's challenges to the Field Memorandum based on the *Mendoza* litigation.

Peroulis also argued that Field Memorandum 24-01 had expired. Field Memorandum 24-01 was issued in 2001 but contained an August 31, 2003 expiration date. GX-7, P5. WHD investigator DeBisschop stated in her affidavit that although the memorandum had expired, the WHD continued to use it beyond that date. Field Memorandum 24-01 was included in the ETA procedures that Peroulis agreed to comply with. We agree with the Administrator that the continued use of the Field Memorandum obviates the argument that the Field Memorandum had expired for purposes of the Peroulis contract.

B. The 1987 Rules or the 2008 Rules

Having rejected the arguments challenging the validity of the H-2A CMP program and Field Memorandum 24-01, we turn to which set of CMP rules apply: the 1987 Rules or the 2008 Rules.

The 1987 and 2008 Rules have different CMP caps, $1,000 in the 1987 Rules and $5,000 in the 2008 Rules. The ALJ held that the 1987 Rules applied to Contract One and the 2008 Rules applied to Contract Two. Peroulis argues on appeal that the 1987 Rules are in effect for Contract Two as well as for Contract One.

Contract Two was filed in August 2009 and began in October 2009. The 2008 Rules became effective on January 17, 2009. 73 Fed. Reg. 77,110. The DOL attempted to suspend the 2008 Rules in May 2009, 74 Fed. Reg. 25,972. A growers association sued the DOL over the suspension rule and a district court enjoined the suspension rule on June 29, 2009. The DOL recognized the injunction on the same day.[7]

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[7] See October 23, 2013 D. & O. at 5, citing DOL Website, http://www.foreignlaborcert.doleta.gov/archives.cfm#twentyzeronine:

> June 29, 2009: Suspension Enjoined On June 29, the U.S. District Court for the Middle District of North Carolina issued a preliminary injunction against the Department's Final Suspension of the December 2008 Final H-2A Rule. As a result of this court action, and unless and until additional court action takes place, the Suspension is no longer in effect; the December 2008 Final Rule remains in effect.

Peroulis contends that because the claims against the DOL's 2009 suspension were dismissed as moot before relief had been awarded in this matter, the 2009 suspension remained in effect for Contract Two. The 2009 suspension, if applicable, would have reinstated the 1987 Rules for a period of nine months, which would overlap with Peroulis's Contract Two. Peroulis Petition for Review at 7; Oct. 23, 2013 D. & O. at 8. Peroulis also argued that the injunction was issued in the Fourth Circuit and this case would be in a different jurisdiction, the Tenth Circuit.

The Administrator clarified that the 2009 suspension was enjoined by court order and regulatory notice before Peroulis's Contract Two was filed and before work began. Therefore, the 2008 Rules were in effect until the 2010 Rules were adopted. The Administrator claims that the injunction, although issued in the Fourth Circuit, was nationwide in effect.

We agree with the Administrator on these points. Contract Two began in October 2009. The 2008 Rules were applicable to Contract Two as the injunction was issued in May 2009 and the DOL recognized the injunction in late June 2009. The DOL recognized the injunction on a nationwide basis.

C. Single-Occupancy Mobile-Range Violation

The ALJ accepted Peroulis's safety justification for housing two workers in a single camper as grounds for mitigating the CMPs. The Administrator cross-appealed the ALJ's reduction of the CMPs by one-third, arguing that Peroulis's violation was willful and in direct defiance of its attestations and that Peroulis should be assessed the full amount of the WHD's initial assessment. On remand, the WHD chose not to reduce the CMPs because of the "repeated nature of the range housing violations." DeBisschop investigated other herders in Colorado, but Peroulis was the only one who placed two herders per wagon. Administrator's Opening Brief (Admin. Open. Br.) at 7. On appeal, the Administrator discussed the factors supporting the higher CMPs. Administrator's Petition for Review at 7. According to the Administrator, WHD found that five of the seven factors did not warrant reduction of the CMPs, and the ALJ wrongly emphasized two factors (employer's compelling safety and business reasons for its action and no financial gain) over the clear weight of factors weighing against reducing the CMPs. Admin. Open Br. at 23. For the Administrator, the violation was willful, had been done in the past, and there was no showing that Peroulis intended to comply with the housing regulation in the future. Peroulis countered the Administrator by stating that if it were motivated by profit, it would have two workers per mobile unit all year long rather than just in the winter.

We find that the ALJ did not err in reviewing the CMP factors de novo.[8] Parties have the right to a de novo hearing before the ALJ. 29 C.F.R. § 501.41(b). A party may file an objection

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[8] The Administrator cited to *Peter's Fine Greek Food*, ARB 14-003b, ALJ Nos. 2011-TNE-002, 2012-PED-001 (ARB Sept. 17, 2014) in support of its position. The H-1B CMP regulations at issue in *Peter's Fine Greek Food* are identical or nearly identical to the H-2A regulations at issue here. In *Peter's Fine Greek Food*, the ALJ reduced the CMP from $10,000 to $1,000. The ARB reversed, finding that the ALJ's reasoning did not support its conclusion. The ARB worked within the ALJ's analysis to find error. The ARB did not state that the ALJ should defer to WHD's factual findings.

that triggers an Order of Reference to the Office of ALJs and gives the objecting party an opportunity to have a hearing with the ALJ. A copy of WHD's assessment is attached to the Order of Reference, which becomes akin to a complaint before the ALJ. Section 501.41 provides that the ALJ may alter or amend the WHD's assessment.

Having concluded that the ALJ did not necessarily owe deference to the WHD's factual determinations, we turn to the Administrator's arguments on appeal. The Administrator argues that the weight of several factors supports the full CMP assessment and that the ALJ erred in reducing the assessment by one-third. The ALJ acknowledged the WHD's points but nonetheless felt the evidence warranted reduction of the CMPs associated with housing two workers in a single camper during the winter months. We do not find that the ALJ erred. We note that the ALJ did not dismiss the WHD's CMPs but merely reduced them by a one-third.[9] Finally, we agree with the Administrator's challenge to the ALJ's reduction of the egress window CMP of $350. Because Peroulis's justification does not apply to that violation, we vacate the reduction of $350 by 1/3 and reinstate the full $350. Accordingly, we add $116.67 to the amount the ALJ ordered ($350/3).

CONCLUSION

Accordingly, the ALJs decisions are **AFFIRMED** and both Peroulis's and the Administrator's petitions for review are **DENIED with the exception of adding $116.67 to $14,033.33 for a total award of $14,150.**

SO ORDERED.

[redacted]

PAUL M. IGASAKI
Chief Administrative Appeals Judge

[redacted]

[redacted] **JOANNE ROYCE**
Administrative Appeals Judge

E. Cooper Brown, Administrative Appeals Judge, concurring, in part, and dissenting, in part:

I join with the majority in affirming the ALJ's assessment of civil money penalties (CMPs), with the exception of the ALJ's reduction in the amount of CMPs assessed. I would assess the maximum penalty for each identified mobile range housing violation.

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[9] Our holding is limited to the facts of this case.

The Department of Labor requirements for mobile range housing require that each sheepherder employed under the H-2A temporary agricultural worker program be provided with a separate sleeping unit, consisting of a bed, cot, or bunk. Respondents willfully violated this requirement under the two Job Orders by requiring sheepherders to sleep two to a bed in a shared mobile sheep wagon designed for one person throughout the winter months, as they had for years. Respondents did so notwithstanding having attested, under penalty of perjury as a condition for H-2A approval, that "no housing will be occupied at any time by more workers than the approved capacity of such housing" and that while on the range, the sheepherder "will be provided with housing that complies with the U.S. Department of Labor requirements for mobile housing for range herders." Admin. Appx. Att. 3 (GX2 at 11).

Respondents argue that the Board should not reverse the ALJ's reduction in the maximum CMPs assessed by the Wage and Hour Division for the housing violations, asserting that to do so would constitute an impermissible exercise of de novo review "of factual questions decided by an ALJ." P&S Response Brief, at 1-2, 7. However, the question presented does not involve review of the ALJ's factual findings. Involved is exercise by the Board of its de novo review authority over the ultimate legal issue in this case, i.e., the amount of the appropriate CMP for Respondents' willful violations of the H-2A requirements.

The INA authorizes the Secretary "to take such actions, including imposing appropriate penalties . . . as may be necessary to assure employer compliance with terms and conditions of employment under this section." 8 U.S.C.A. § 1188(g)(2). Pursuant to this authority, WHD is authorized to assess CMPs up to a maximum prescribed amount for willful violations of the rules. See 29 C.F.R. § 501.19(c)(1). In determining the amount of the CMP, the type of violation committed is to be considered, together with the employer's previous history of violations, the number of H-2A and corresponding workers affected, the gravity of the violation(s), the employer's good faith efforts to comply, the employer's explanation of the violations, the employer's commitment to future compliance, and the extent to which the employer achieved a financial gain due to the violation or the potential financial loss or injury to the H-2A workers. 29 C.F.R. § 501.19(b).

Under the circumstances of this case, I am of the opinion that WHD correctly concluded that no CMP reduction was appropriate, given Respondents' repeated and willful violations, knowing, if not fraudulent, misrepresentations in order to secure the H-2A applications, and their open refusal to comply in the future. In addition to Respondents' obvious intentional disregard of the certifications of compliance that they made under penalty of perjury in order to secure approval of the H-2A applications, Respondents have a history of H-2A violations dating back to 2001, including the specific violation herein at issue. The violations herein at issue affected at least eight H-2A workers assigned to the range in the winter (consisting of all but two of Respondents' H-2A workers). The violations were serious, with the potential of seriously affecting the workers' health. As WHD noted, sharing a bed and sleeping in the cramped quarters provided by Respondents, designed for just one worker, for several months in the winter could easily affect a worker's health, affect the workers' ability to get proper sleep, and afford no privacy. The seriousness of the potential impact upon the workers was accentuated by the fact that the cramped accommodations also did not afford the workers an adequate secondary means of escape in the event of emergency. Finally, not only did Respondents make no attempt to

comply with the mobile range housing requirement, they made it clear that they had no intention of complying in the future.

The ALJ found evidentiary support for each of the foregoing factors warranting the maximum CMP assessment for each violation under 29 C.F.R. § 501.19(c)(1). See ALJ D. & O. (June 2, 2014), at p.5. Nevertheless, the ALJ reduced the maximum CMP assessment because the ALJ was of the opinion that the evidence supported a finding "that Respondents' motivation was not primarily driven by cost, but instead by safety concerns" and business necessity, i.e., "that pulling one wagon per sheep herder to remote mountain sites would be inefficient and would severely limit the herders' ability to move the flock as frequently as is necessary." The ALJ finds that "the weight of the evidence in this regard is that single unit housing is common in the industry, not unsafe, and preferred by many employees." *Id.* In reaching this conclusion, the ALJ appears to have heavily relied upon a letter submitted into evidence over the objections of WHD from the President of the Rock Springs Grazing Association. Aside from providing historical context for the range housing of sheepherders, this letter, which scarcely meets the definition of "evidence" (if at all), is nothing more than a self-serving industry letter of justification for the practice for which Respondents seek immunity from H-2A regulation—scattered throughout with hearsay suggesting the sheepherders' preference for the single wagon accommodation. The letter asserts that the practice engaged in by Respondents is the industry practice. The *evidence* of record indicates otherwise. Contrary to the Association's assertion and the ALJ's finding, WHD investigator DeBisschop testified under oath that other investigations of sheepherder operations in Colorado in which she has been involved revealed that "Respondents are the only employer she has encountered that puts two in a wagon." ALJ D. & O. Oct. 23, 2013), at 24. Moreover, the ALJ ignores the obvious cost saving to Respondents, whether intended or not, of using 80-year-old wagons, rather than expending the money necessary to upgrade their mobile range units to meet H-2A standards. Indeed, the ALJ ignores the Association's President's acknowledgment that there exist "modern designs of the original sheep wagon" that "appear to be a practical solution to replace old wagons" such as those utilized by Respondents.

Under the H-2A program, there exist numerous requirements that employers must meet, both before being authorized to employ H-2A workers and during the term of their employment. See generally 8 U.S.C.A. § 1188; 20 C.F.R. Part 655, Part B. Pursuant to 20 C.F.R. § 655.93(b), the Employment and Training Administration's Office of Foreign Labor Certification (OFLC) is authorized to establish special procedures with respect to, among other things, the employment of sheepherders as H-2A workers that allow for variances from certain H-2A requirements. For example, under the regular H-2A housing standards, housing provided by H-2A employers generally must meet OSHA standards set forth at 29 C.F.R. § 1910.142 and 29 C.F.R. § 1910.142(b). See 20 C.F.R. § 655.122(d). These standards do not apply for sheepherder housing. Instead, pursuant to the authority vested in OFLC, lower standards for employer-provided range housing exist. See *Mendoza v. Perez*, 754 F.3d 1002, 1009 (D.C. Cir. 2014). See also ETA FM 24-01, since revised and updated per Training and Guidance Letter (TEGL) 32-10 (June 14, 2011). Another example: lower minimum wage requirements are imposed for the employment of sheepherders. *Mendoza, supra.* Were these special procedures not in place, employers such as Respondent would be required to follow the regular, more stringent H-2A requirements. *Mendoza*, 754 F.2d at 1011. Rather than brazenly thumbing their nose at these

lessened requirements for H-2A sheepherder employment and arguing (to their detriment) that the lessened standards do not apply, Respondents should be embracing them and working with WHD to assure their efficacy.

Under the circumstances of this case, I am fully in agreement with WHD's conclusion that no CMP reduction is appropriate, given Respondents' repeated and willful violations, their fraudulent misrepresentations in order to obtain the H-2A labor certifications, and their open acknowledgment of their intent to continue to engage in the same conduct for which they are here held liable.

[redacted]

E. COOPER BROWN
Administrative Appeals Judge