

In the Matter of:

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

ARB CASE NO. 15-069

ALJ CASE NO. 2014-TNE-016

PROSECUTING PARTY,

DATE: August 16, 2017

v.

STRATES SHOWS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Prosecuting Party:

Laura Moskowitz, Esq.; Sara A. Conrath, Esq.; Paul L. Frieden, Esq.; Jennifer S. Brand, Esq.; Nicholas C. Geale, Esq.; U.S. Department of Labor, Washington, District of Columbia

For the Respondent:

R. Wayne Pierce, Esq.; The Pierce Law Firm, LLC; Annapolis, Maryland

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

AMENDED FINAL DECISION AND ORDER¹

This case arises under the H-2B provisions of the Immigration and Nationality Act (INA), 8 U.S.C.A. § 1101(a)(15)(H)(ii)(b) (Thomson Reuters 2014), as amended, and its implementing regulations at 20 C.F.R. Part 655 and 29 C.F.R. Part 503, Subpart C (2008). After

¹ The Administrative Review Board issued the initial Final Decision and Order on June 30, 2017. Thereafter, parties requested that we reconsider our opinion. We agreed and subsequently vacated the June 30, 2017 Order and granted the Administrator's Motion to Reconsider. This Final Decision and Order follows reconsideration.

an investigation, the Department of Labor's (DOL) Wage and Hour Division (WHD) cited Respondent Strates Shows, Inc., for several violations of the INA based on Strates Shows's H-2B temporary labor certifications for years 2010, 2011, and 2012. WHD assessed monetary penalties as a consequence of the violations. Strates Shows objected and requested a hearing before DOL's Administrative Law Judges (ALJ). Prior to hearing, the assigned ALJ issued an order of Dismissal without Prejudice on May 19, 2015 (erratum issued on June 4, 2015) from which Strates Shows appealed to the Administrative Review Board (ARB or Board). On June 30, 2017, the ARB issued a Final Decision and Order affirming the ALJ's dismissal without prejudice. On July 10, 2017, the Administrator filed an Emergency Motion for Stay and Motion for Reconsideration. The Administrator did not object to the outcome but objected to the ARB's characterization of the 2008 H-2B regulations as unenforceable. Because language in the original ARB decision caused confusion, we granted the motion for an Emergency Stay on July 20, 2017, and requested additional briefing. Having the benefit of briefing, we now reconsider and amend the Final Decision and Order, omitting the characterization of the 2008 H-2B regulations as unenforceable.

BACKGROUND

Strates Shows, based out of Orlando, Florida, is a traveling carnival that employs foreign workers through the H-2B program. Upon completion of several rounds of investigations, the WHD Administrator issued a Notice of Determination in May 2014 charging Strates Shows with violating several H-2B provisions in its labor certifications for 2010, 2011, and 2012. WHD assessed Strates Shows back wages and civil monetary penalties pursuant to WHD's authority under 29 C.F.R. Part 503.

Strates Shows requested a hearing, and the case was assigned to an ALJ. On March 4, 2015, while the matter was pending before the ALJ, the U.S. District Court for the Northern District of Florida vacated Part 655, Subpart A, of the 2008 H-2B regulations, concluding that the DOL lacked rulemaking authority to promulgate the 2008 rule under the relevant statutes. Thus, as of this date, DOL was enjoined from enforcing the H-2B regulations at Subpart A. *Perez v. Perez*, Case No. 3:14-cv-00682 (N.D. Fla. Mar. 4, 2015).²

² Under 8 U.S.C.A. § 1184(c)(14)(A), the Secretary of the Department of Homeland Security (DHS) is authorized to impose such administrative remedies as the Secretary determines appropriate, including civil monetary penalties, where the Secretary of DHS finds, after notice and an opportunity for hearing, "a substantial failure to meet any of the conditions of" or "a willful misrepresentation of a material fact in" the Form I-129 Petition for Nonimmigrant Workers that is required to be filed with DHS and approved before an H-2B nonimmigrant visa may be granted. *See* 8 U.S.C.A. § 1184(c)(1). Under the INA, the DHS Secretary is authorized to delegate this enforcement authority to the Secretary of Labor. *See* 8 U.S.C.A. § 1184(c)(14)(B). The Department of Labor adopted the 2008 H-2B regulations, which governed enforcement of the H-2B nonimmigrant program, without congressional authority. The district court in *Perez* rejected DOL's argument that the INA implicitly granted authority to the Department of Labor to enact legislative rules governing the H-2B program, and thus vacated the 2008 H-2B regulations and ordered a permanent injunction against their enforcement by DOL.

On April 29, 2015, the DOL and the Department of Homeland Security (DHS) jointly promulgated an interim final rule to replace the invalidated regulations. *See* Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 Fed. Reg. 24,042 (Apr. 29, 2015) (codified at 8 C.F.R. Part 214, 20 C.F.R. Part 655, 29 C.F.R. Part 503).

On May 12, 2015, the Administrator filed a motion before the ALJ in this case seeking dismissal without prejudice of this matter to allow it to issue a new Notice of Determination, citing nearly identical wage violations as those cited in the 2014 Notice of Determination, but in terms of statutory authority not affected by the *Perez v. Perez* decision. Strates Shows responded on May 13, with a motion to strike WHD's motion as well as a motion to dismiss with prejudice. In the dismissal motions, the parties discussed WHD's authority to initiate an enforcement action against Strates Shows for violations of the I-129 petition, including violations occurring before April 29, 2015, should the ALJ dismiss the present action, 2014-TNE-016.³

On May 19, 2015, the ALJ dismissed WHD's case "with prejudice." The ALJ subsequently issued an erratum decision on June 4, 2015, noting that the dismissal "with prejudice" was error and correcting his order to reflect dismissal "without prejudice." Strates Shows filed an appeal with the Board.

On August 28, 2015, while the matter was pending before the Board, the plaintiffs in *Perez v. Perez* asked the district court to clarify the scope of the injunction for labor certifications approved under the 2008 H-2B regulations prior to the March 4, 2015 injunction. On September 8, 2015, the district court held that the permanent injunction did not apply retroactively—did not apply to past labor certifications approved under the 2008 H-2B regulations before the injunction. Because the ALJ had already dismissed the case, the Administrator did not pursue this development for this assessment.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the Immigration and Nationality Act, as amended.⁴ 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 Reuters 2014). The ARB has authority to review the decisions of the DOL Administrative Law Judges. 29 C.F.R. § 503.51. "The Board reviews an ALJ's procedural rulings for abuse of discretion, i.e., whether, in ruling as [he] did, the ALJ abused the discretion vested in [him] to preside over the proceedings." *Walia v. Veritas Healthcare Sol., LLC*, ARB No. 14-002, ALJ No. 2013-LCA-005, slip op. at 5 (ARB Feb. 27, 2015).

³ After the ALJ dismissed this case, 2014-TNE-016, WHD issued a Notice of Determination on July 10, 2015, in which WHD charged Strates Shows with violations of its I-129 petition and imposed administrative remedies. The July 2015 Notice of Determination is not part of this case.

⁴ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

DISCUSSION

The H-2B classification applies to a nonagricultural worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C.A. 1101(a)(15)(H)(ii)(b).

Section 214(c)(1) of the Immigration and Nationality Act (INA), 8 U.S.C.A. § 1184(c)(1), requires an employer to petition the Department of Homeland Security (DHS)⁵ for approval of the prospective temporary worker as an H-2B nonimmigrant. Section 214 provides that DHS consult with appropriate agencies prior to granting an H-2B visa petition. DOL is one such “appropriate agency.” DOL facilitates its consultation role to DHS with H-2B regulations and temporary labor certifications.

On March 4, 2015, the U.S. District Court for the Northern District of Florida vacated and permanently enjoined the DOL’s 2008 H-2B regulations underlying the WHD’s assessment in 2014-TNE-016. The District Court concluded that the DOL did not possess independent legislative rulemaking authority under the relevant statutes to promulgate the 2008 H-2B regulations. It is undisputed that “when a court vacates an agency’s rule, the vacatur restores the status quo before the invalid rule took effect.” *Sierra Club v. U.S. Evtl. Prot. Agency*, 850 F. Supp. 2d 300, 303 (D.D.C. 2012); *Evtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004); *see also Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983) (*per curiam*) (noting that “[t]o vacate . . . means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside”).

The 2008 H-2B regulations codified at 20 C.F.R. Part 655, Subpart A, had served as the basis for the Wage and Hour Division’s enforcement action that resulted in the Administrator’s determination letter charging Respondent with violations of several provisions of the H-2B program. In light of the District Court’s vacatur of the 2008 H-2B regulations, WHD moved to dismiss its case against Strates Shows without prejudice so that it could refile its assessment against Strates Shows as a violation of the applicant’s I-129 petition.⁶ The ALJ granted WHD’s motion to dismiss without prejudice.

Respondent Strates Shows appeals the ALJ’s dismissal, asserting that the ALJ erred and that he should have dismissed the case with prejudice. Strates Shows argues that the April 29, 2015 H-2B regulations do not authorize retroactive application to reach substantive matters and assessments occurring before April 29, 2015. Strates Shows claims that the ALJ’s grant of WHD’s voluntary dismissal was inconsistent with Fed. Rules Civ. Proc. 41(a).⁷ Respondent

⁵ In 2002, Congress abolished the INS and transferred that authority to the DHS. Homeland Security Act of 2002 (Pub. L. No. 107-296, 116 Stat. 2135).

⁶ *Supra* note 4.

⁷ FRCP 41(a) Voluntary Dismissal.

argues that the ALJ failed to take into consideration prejudice to Strates Shows because of the late stage of proceedings before the ALJ and failed to consider the balancing remedies FRCP 41(a) requires when granting dismissal without prejudice, including awarding Strates Shows litigation costs and attorney's fees in consideration for the burdens the dismissal imposed. Respondent also argues that the ALJ was obligated to address the lack of subject matter jurisdiction over the present case due to the district court's vacatur of the 2008 H-2B regulations before addressing the Administrator's motion seeking voluntary dismissal. The ALJ's failure to expressly do so, Respondent argues, is a further basis for finding reversible error.

In response to Respondent's argument about the applicability of the April 29, 2015 H-2B regulations, the WHD Administrator states that its forthcoming WHD assessment under the April 29, 2015 regulations would not require retrospective application of any substantive parts of the 2015 H-2B regulations, only procedural components. WHD notes that neither the ALJ nor the ARB has the ability to rule on the validity of DOL's April 29, 2015 regulations authorizing enforcement of violations occurring before April 29, 2015, citing 29 C.F.R. § 503.40(b) (2015). WHD responds that Strates Shows will not suffer any prejudice when litigating a new WHD assessment under the I-129 procedur, as the new WHD assessment will require little to no new discovery. WHD Resp. Br. at 21. WHD argues that the I-129 imposes no new duty on Strates Shows that was not a preexisting obligation.

As the ALJ concluded, complications concerning application of the April 29, 2015 H-2B regulations are not relevant to this case. The issues raised by the parties may be relevant to any future enforcement action charging violations of Respondent's I-129 petition, but they are not relevant at this time. The issue here is whether the ALJ abused his discretion in dismissing 2014-TNE-016 without prejudice, which has nothing to do with potential problems that may or may not arise in any subsequent enforcement action charging Strates Shows with violations of its I-129 petition under the new 2015 regulations. Whether and to what extent the Administrator is able to pursue a subsequent H-2B enforcement action under regulations that have been adopted since vacatur of the 2008 regulations may prove relevant should an enforcement action be brought under the new regulations, but the issues any subsequent action under the new regulations raise are irrelevant to the present case.

Parties dispute whether the ALJ should have dismissed the matter with prejudice or without prejudice. Dismissals without prejudice are not judgments and put the parties back in the place as if the litigation had never happened. *Gutierrez v. Vergari*, 499 F. Supp. 1040, 1049 (S.D.N.Y. 1980). Dismissals with prejudice, however, are judgments that serve as a decision on the merits. *Versa Prods. v. Home Depot, USA, Inc.*, 387 F.3d 1325, 1327 (11th Cir. 2004).

...

(2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Because a dismissal with prejudice prevents a complainant from reinstating a case, it is not a sanction to be imposed lightly. *Anderson v. Dekalb Plating Co.*, ARB No. 98-158, ALJ No. 1997-CER-001 (ARB July 27, 1999); *Ball v. City of Chicago*, 2 F.3d 753 (7th Cir. 1993).

A court will not grant a voluntary dismissal without prejudice if the defendant suffers legal prejudice as a result thereof. Legal prejudice, for purposes of voluntary dismissals, does not result simply when a “defendant faces the prospect of a second lawsuit,” or when plaintiff “merely gains some tactical advantage.” *Watson v. Clark*, 716 F. Supp. 1354, 1355 (D. Nev. 1989). Legal prejudice does not arise from defendant’s missed opportunity for a legal ruling on the merits. Legal prejudice may be shown where actual legal rights are threatened or where monetary or other burdens appear to be extreme or unreasonable.

Concerning Strates Shows’s invocation of FRCP Rule 41(a), we are not prepared to hold that it applies. However, assuming for purposes of argument that it does apply, under the Federal Rules of Civil Procedure, a plaintiff’s motion to dismiss without prejudice, filed after the defendant has answered the complaint, requires court approval. FRCP 41(a)(2). In granting that motion to dismiss without prejudice, a trial court may award litigation costs or attorney’s fees to balance the burden imposed on the defendant.

In our case, WHD’s motion to dismiss without prejudice followed the district court’s vacatur of the underlying regulation, and was not dilatory or prejudicial conduct that warranted an order of litigation costs and attorney’s fees. Thus, there is no legal basis for concluding that the ALJ violated FRCP 41(a)(2) in granting the Administrator’s motion to dismiss without prejudice. Accordingly, we find that the ALJ did not abuse his discretion in rejecting Respondent’s argument that the late dismissal warranted the award of costs or attorney’s fees. *McCants v. Ford Motor Co.*, 781 F.2d 855, 861 (11th Cir. 1986).

CONCLUSION

The ALJ’s Decision and Order of Dismissal without prejudice is **AFFIRMED**.

SO ORDERED.

LEONARD J. HOWIE III
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge