SEP 21 1992

In the Matter of:

THEADERS HALL Sr., &:
ART HALL, d/b/a/ Case No. 92-TAE-5
HALL PRODUCE FARMS

Appearances:

the respondents,
pro se

for the Department of Labor,
Michael Henry Olvera, Esquire

Before:Glenn Robert Lawrence
Administrative Law Judge

DECISION AND ORDER

This case arises under the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act, 8 U.S.C. S9 1101(a)(15)(H)ii(a), 1184(c) and 1186, and in accordance with the regulations at 20 CFR Part 655 and 29 CFR Part 501. By notice dated May 11, 1990, a civil money penalty was assessed against the respondents in the amount of $4,970.00 as a result of the alleged violations of the Act and the applicable regulations thereunder.

Statement of the Case

On April 11, 1989, Respondents, Theaders Hall, Sr. and Art Hall, filed an application with the Department of Labor for certification of alien employment through the H-2A program. (GX-1)[1] Respondents needed farm workers to help harvest the crops. According to the clearance order, attachment 9, item 1, the applicable adverse effect wage rate was $3.91 per hour. An addendum also listed the piece rate for the applicable crops. The order stated that if the worker's piece rate earnings results in average hourly earnings of less than the guaranteed rate, the worker will be provided make-up pay at the guaranteed minimum rate for each hour worked on piece rate basis. The order also provided for ten hours of anticipated work per day as well as housing and transportation arrangements.

[1] The following abbreviations will be used herein: GX = Government's exhibit; TR = transcript of the hearing.

On May 13, 1989, eight workers arrived at Hall Produce. (TR-77). Although there are great discrepancies as to the amount of hours and specific days worked, farm for two weeks. they worked on Respondents'

Between June 9, and 12, 1989, five of the workers filed complaints with the Department of Labor alleging that they did not receive the proper pay for their work. (GX-4). Immediately thereafter, John O. Haley, a compliance officer with the wage-hour division of the Department of Labor, investigated the allegations. On May 11, 1990, the Department notified Respondents that a civil money penalty of $4,970.00 had been assessed against them for violations of the Act and the applicable regulations issued thereunder. By letter dated May 22, 1990, Respondents denied the allegations and, on February 25, 1992, the matter was submitted to this Office for a final determination of the violations and the appropriateness and reasonableness of the penalty imposed. A hearing was held in Little Rock, Arkansas on July 15, 1992.

Conclusions of Law and Findings of Fact

20 CFR 655.102(b) requires that every job offer which accompanies an H-2A application shall include specific minimum benefit, wage, and working condition provisions, as set forth in subsections (l)-(14). The regional administrator of the Employment Standards Administration, Wage-Hour Division determined that Respondents had violated various provisions of this regulation. The administrator then assessed a civil money penalty of $4,970.00 in accordance with 29 CFR Part 501.

The first violation cited by the administrator is failure to provide a copy of the work contract to the employees. 20 CFR 655.102(14). Subsection 14 requires that the employer provide a copy of the work contract to the worker no later than on the day the work commences. The contract must contain the provisions as required by paragraphs (a) and (b) of this section. The evidence reveals that Respondents did in fact provide the workers with a statement describing, of pay, the pay day, in both Spanish and English, the piece rate hoeing, planting, and the rate for work by the hour for however, and tractor driving. (GX-2). The document, housing, did not include provisions regarding the workers' their modes of transportation to work, nor the periods of time that they would be working. (TR-23-25). This document does not comply with the regulations and therefore, a penalty imposed under 20 CFR Part 501 is proper.

The penalty imposed by the administrator, however, is harsh. The regulations at 29 CFR 501.19(b) list various factors that should be taken into consideration when a penalty is assessed. Those factors include: previous history of violations; the number of workers affected by the violations; the gravity of the violations; the efforts made in good faith to comply with the Act; explanations of the violations; as well as the extent to which the violator achieved a financial gain because of the violation. 29 CFR 501.19(b). When taking these factors into consideration, I find that the administrator's penalty of $550.00 is unreasonable.

The witness for the government, Mr. Haley, testified that the gravity of the violation was low. (TR-27). He also stated that there were eleven workers. (TR-26). Respondents, however, testified that there were only eight workers. (TR-55,77). Moreover, the record only reveals

evidence of eight workers. (GX-3). Mr. Haley also testified that Respondents had little to gain from this violation. (TR-28). Finally, he testified that the reason for the violation was a lack of knowledge of the requirements on the part of Respondents. (TR-28).

Mr. Haley testified that the amount of the penalty is based on the number of workers affected by the violation. Counting eleven workers affected, the administrator assessed a penalty of $550.00, $50.00 per worker. For the reasons stated above, I find the penalty of $550.00 is inappropriate. Accordingly, I reduce the penalty to $25.00 per worker. Given the evidence only reveals the existence of eight workers, the penalty assessed should be $200.00.

The second violation cited by the administrator is for failure to make and maintain accurate and adequate payroll records as required by 20 CFR 655.102(b)(7). Because the evidence involved with this violation is so closely linked to the evidence proffered for the fourth violation, failure to pay the proper rate, I will discuss this violation in conjunction with the latter.

The administrator also cited Respondents for failure to provide the workers with wage statements as required by 20 CFR 655.102(b)(8). The evidence in this regard is somewhat unclear. One of the workers who filed a complaint against Respondents stated that he never received a statement of his wages. (GX-4). Additionally, Mr. Haley testified that Respondent told him that all he gave the workers was the piece rate wage and the number of bushels they harvested (TR-36). The regulations require the employer to provide the worker with a written statement containing the worker's total earnings for the pay period, his hourly rate and or piece rate, as well as the hours offered and the hours actually worked. 20 CFR 655.102(b)(8). Respondents have not disputed Mr. Haley's testimony.

However, I find the penalty of $550.00 is excessive. Mr. Haley testified that Respondents were now attempting to conform to the regulatory requirements. (TR-37). And although the requirement is important because it allows the employee to know the hours he has worked and the pay he will receive, as well as insuring the employee is properly paid, the gravity of the violation is slight. It is merely a record keeping requirement and it does not directly affect the worker's compensation. Accordingly, I find a penalty of $25.00 per worker is more appropriate for the violation. Thus, the penalty for violation of 20 CFR 655.102(b)(8) is assessed at $200.00.

Finally, the workers allege that they were not paid properly. (GX-4). The administrator has cited violation of sections 102(b)(7) and 102(b)(9), the failure to maintain accurate and adequate records of the hours worked and failure to pay the proper rate. Respondents have submitted a time sheet which includes the hours worked, the pay earned, and the monies advanced. (GX-3). I question the accuracy of this record.

Mr. Haley testified that when he first went to Respondents' farm to investigate, Respondent was unable to produce a copy of such records. It was only on a later date that the document identified as GX-3 was presented. Furthermore, Mr. Haley testified that he believes the hours presented had been reconstructed to arrive at an amount consistent with the hourly rate, yet was actually paid on the piece rate. (TR-50). There is evidence to support this contention.

Although Respondents testified that they paid the workers on an hourly rate, the evidence reveals that Respondents did in fact pay on a piece rate and reconstruct the hours to arrive at the hourly amount. Respondent testified that he did not want to pay an hourly rate and that, in fact, his plan was to pay at a piece rate. (TR-81,88). Additionally, Mr. Haley testified that in conference, Respondent stated that he had never paid an hourly wage. Moreover, the document that Respondents provided the workers with lists the rate of pay as piece rate. (GX-2).

Furthermore, GX-3 is inconsistent with the contract and application. (GX-1). This document provides for ten hours per day, fifty hours per week. GX-3 lists approximately six hours per day and from twenty-six to thirty-six hours per week. The workers alleged that they worked approximately twelve hours per day and six days per week. (GX-4).

On rebuttal, Respondent testified that the workers signed a book which details the hours worked and the compensation paid. (TR-89). This book, however, has not been presented as evidence. Additionally, Respondent's testimony contains inconsistencies... Respondent testified that before the workers came to the farm, the agreement was to pay them a piece rate. After a day or two, they then decided to change it to an hourly rate and arrived at the rate of $3.91. (TR-82). The workers arrived on May 13, 1989. The application for certification employment, however, was signed at the earliest on April 11, 1989 and at the latest April 21, 1989. This application and contract provides that the hourly rate was $3.91, but yet Respondent contends that he had never heard of the hourly rate until after the workers arrived. This inconsistency places Respondent's credibility in doubt.

This evidence supports the contention that Respondents failed to maintain proper payroll records and failed to pay the workers the proper rate. They list merely twenty-six hours of work per week in order to meet the $3.91 minimum. The workers were only paid approximately $85.00 per week for approximately fifty hours of work per week.

The administrator assessed a penalty of $1,870.00 for eleven workers for failure to maintain accurate and adequate payroll records. I believe the penalty is both reasonable and appropriate. The gravity of the violation is severe and the employer achieved financial gain from the violation. However, the penalty must be assessed for eight workers rather than eleven. Therefore, the appropriate penalty is $1,360.00.

For the same reasons, I find that the penalty of $2,000 is appropriate for violation of section 655.102(b)(9). Failure to pay the proper rate is a grave violation, given the direct impact on the worker and the financial gain achieved by the employer. The administrator, however, only found Respondents to have violated this section with respect to eight workers. Therefore, the penalty of $2,000.00 is appropriate and shall remain unchanged.

Accordingly, the penalty assessed against Respondents has been modified to $3,760.00 as consistent with this Decision and Order.

ORDER

Respondents, Theaders and Art Hall, d/b/a Hall Produce Farm, are hereby ordered to pay the penalty of $3,760.00.

GLENN ROBERT LAWRENCE
Administrative Law Judge