

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 January 2013

Case No.: 2011-TAE-00004

In the Matter of:

RUSSELL L. GARBER,
d/b/a GARBER FARMS,
Respondent.

APPEARANCES:

Russell L. Garber, *pro se*

Mary L. Bradley, *Esq.*
For the Complainant

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the H-2A provisions of the Immigration and Nationality Act (“INA” or “Act”),¹ and the applicable regulations contained at 29 C.F.R. Part 501 and 20 C.F.R. Part 655. On November 13, 2009, the Administrator, Wage and Hour Division, United States Department of Labor (“Administrator”), levied a \$4,250.00 civil money penalty against the Respondent, Russell L. Garber (“Mr. Garber”) a farmer in Greenville, Ohio, who was authorized under the Act to employ temporary migrant workers. Mr. Garber objected, and this hearing ensued.

The hearing was held on August 2, 2011 in Columbus, Ohio. The Administrator was represented by counsel, and Mr. Garber represented himself. Testifying at the hearing were Mr. John Dudash, Assistant Area Director for the Department of Labor Wage and Hour Division in Columbus, Ohio; Ms. Barbara Barrett, Wage and Hour investigator; and Mr. Garber. Administrative Law judge Exhibits 1-5, Plaintiff’s Exhibits 1-20, and Respondent’s Exhibits 1-4 were admitted into evidence.² The parties have filed post-hearing briefs, and this case is ready for a decision.

¹ 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(c).

² In this decision, the Administrative Law Judge’s Exhibits will be referred to as “ALJX,” the Plaintiff’s Exhibits will be referred to as “PX,” and the Respondent’s Exhibits will be referred to as “RX.” Testimony from the hearing will be cited as “TR.”

Factual Background

Mr. Garber is the sole proprietor of Garber Farms, located Greenville, Ohio. (PX 2). The major crops grown on the 144 acre farm are squash, tomatoes, flowers, melons, and berries. (*Id.*). Mr. Garber also operates a bakery where he makes breads and pastries for sale. (*Id.*).

At all times relevant to this decision, Mr. Garber employed migrant workers under the INA's H-2A program on a temporary or seasonal basis. The housing that Mr. Garber provided for the workers was certified for occupancy by the Ohio Department of Health, which performs pre-occupancy inspections for the Department of Labor as part of the H-2A application process. (RX 2; TR 27). On July 15, 2009, a group of investigators from the Department of Labor's Wage and Hour Division went to Garber Farms to conduct a post-occupancy investigation. (TR 19). The purpose of the investigation was two-fold: (1) the department was conducting an agricultural enforcement plan; and, (2) the department was using the investigation as an opportunity to train newer investigators. (TR 20).

The members of the team conducting the initial investigation were John Dudash (TR 16), Barbara Barrett, Danielle Ehler, Melissa Castillo, and Tatiana Irving. (TR 21). Mr. Dudash and Ms. Barrett testified at the hearing. Mr. Dudash is the Assistant Area Director for the U.S. Department of Labor, Wage and Hour Division in Columbus, Ohio. (TR 16). At the time of the hearing, he had held that position for approximately four and one-half years, prior to which he was a wage and hour investigator in Savannah, Georgia for twenty-three years. (TR 16-17). He estimated that he has conducted at least one-hundred H-2A investigations. (TR 19). Ms. Barrett is a wage and hour investigator for the U.S. Department of Labor. (TR 61). She estimated that she has conducted "well over 2,000" investigations in her career, including "roughly 15" specifically for the H-2A program. (TR 63).

The investigation began with an opening conference between Mr. Dudash, Ms. Barrett, and Mr. Garber. (TR 22). The purpose of an opening conference is to explain the requirements of the Fair Labor Standards Act (FLSA), the Migrant Seasonal Agricultural Workers Protection Act (MSPA), the H-2A program, and the inspections that were going to be conducted. (TR 22-23). Prior to arriving at Garber Farms for the investigation, the investigators were unaware that Mr. Garber was an H-2A employer. (TR at 21). According to Mr. Dudash, "We don't know who has an H-2A award or certificate until we get to the establishment and find out from the owner or the manager that's what they're employing under." (TR at 20-21). Mr. Garber authorized the investigators to inspect the house and was given the opportunity to accompany them during the inspection, but he declined to do so. (TR 23-24).

The inspection was conducted under OSHA standard 1910.142. (TR 25). The results of the inspection of the house and its immediate area were recorded on the Migrant and Seasonal Workers Protection Act Housing Safety and Health Checklist. (TR 25; PX 2). The checklist has ninety-seven items that can be graded and recorded if any violations are found. (TR 26).

Violations can be cited as “aggravated” (the violation is currently affecting the health of the occupants), “serious” (the violation may affect the health of the occupants at some time in the future), or “marginal” (the violation may or may not be required to be corrected). (TR 26-27). The Administrator cited Mr. Garber for the following seventeen violations:

- 1) **Failed to ensure housing safety and health.**³ (PX 2; 19). Housing provided by the employer must meet the OSHA standards set out in 29 C.F.R. § 1910.142, which applies to temporary labor camps.⁴ The combination of the violations, as demonstrated by the plaintiff’s testimony and plaintiff’s exhibits, put the health of the workers in jeopardy. (PX 1).
- 2) **Grounds and open area not maintained in a clean and sanitary condition.**⁵ (PX 2, 19). Trash was stacked against the outside of the house and the grounds were not clean of debris. (PX 1, 3, 4, 10, 16, 17, 18). Mr. Dudash testified, and the photographic evidence verifies, that empty cardboard boxes were scattered about the grounds, there were either weeds or vines growing up the exterior of the house, the grass was not cut, and garbage was stacked up against the side of the house. (TR 30-32). This violation was rated as “serious” because the trash was stacked near an unscreened door possibly allowing access by insects and small animals. (TR 32-33). Mr. Dudash testified that these conditions risked infection of the food inside the house, as well as the food being harvested by the workers by cross contamination. (TR 33).
- 3) **Shelter does not provide protection against the elements.**⁶ (PX 2, 19). The building had a missing window pane. (PX 1, 5, 6, 17). The missing window pane is documented in several photographs taken by the investigators and submitted as exhibits in this case, including a photograph of investigator Melissa Castillo reaching her arm through the window to show that there is a missing pane of glass. (TR 34). The missing window pane was rated as a “serious” violation because the health of the workers could be affected by the lack of protection from the elements. (*Id.*).

³ 20 C.F.R. § 655.102(b)(1)(i) (2009). *Contents of Job Offer*. Minimum benefits, wages, and working conditions. Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H-2A application always shall include each of the following minimum benefit, wage, and working condition provisions: (1) Housing. The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing. (i) Standards for employer-provided housing. *Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Administration standards set forth at 29 CFR 1910.142*, or the full set of standards at §§ 654.404–654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii) of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at § 654.403 of this chapter.

⁴ *Id.*

⁵ 29 C.F.R. § 1910.142(a)(3) (2009). *Site*. The grounds and open areas surrounding the shelters shall be maintained in a clean and sanitary condition free from rubbish, debris, waste paper, garbage, or other refuse.

⁶ 29 C.F.R. § 1910.142(b)(1) (2009). *Shelter*. Every shelter in the camp shall be constructed in a manner which will provide protection against the elements.

- 4) **Windows cannot be opened halfway to allow for ventilation.**⁷ (PX 2, 19). At least one window in the stair case could not be opened. (PX 1). Mr. Dudash testified that “some of the windows were painted closed” and that there was no way to raise or lower them. (TR 35). The violation was rated as “serious” because the window did not allow for any ventilation. (TR 36). Mr. Garber testified that there was only one sealed window, and that there were three windows that would open, in addition to a screen door. (TR 83). He maintained that the open windows were sufficient to meet the ventilation requirement. (TR 84).
- 5) **Broken windows.**⁸ (PX 2, 19). The window that was missing a pane of glass was not screened. (PX 1, 5, 6, 17). The screen on the screen door was ripped. (PX 16). Testimony revealed that another window was broken and held together with duct tape. (TR 36). The photograph of this window was introduced as PX 7. These violations were rated as “serious” because the broken window could injure someone and the lack of screens could let in insects and rodents. (TR 37-38). Mr. Garber testified that the broken window was made of plexiglass, so the risk of injury from it was minimal. (TR 79).
- 6) **Toilets in an unsanitary condition.**⁹ (PX 2, 19). The workers were discarding used toilet paper in a trash can instead of flushing it in the toilet. (PX 1, 8). The testimony indicated that toilet paper was being placed into a plastic bucket instead of being flushed down the toilet. (TR 39). This violation was rated as “serious” because fecal matter was present on the toilet paper, attracting flies that could transmit germs, thus infecting the workers’ food. (TR 39). Mr. Garber maintained that it was not his responsibility to ensure the workers flushed their toilet paper. (TR 84).
- 7) **Toilet rooms not cleaned daily.**¹⁰ (PX 2, 19). Toilet rooms not cleaned daily, waste paper on the floor. (PX 1, 8). Mr. Dudash testified that the inspection was in the late morning or afternoon and the toilet room had not been cleaned that day. (TR 40). He rated the violation as “serious” because there was unflushed fecal material and contamination of the workers by flies was possible. (TR 41).
- 8) **No floor drains or adequate drainage.**¹¹ (PX 2, 19). The shower facility was constructed outside and “drained” the water onto the ground. (PX 1, 12, 13, 14, 15). The testimony and photographs showed that there was an outdoor shower and that the

⁷ 29 C.F.R. § 1910.142(b)(7) (2009). *Shelter*. All living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.

⁸ 29 C.F.R. § 1910.142(b)(1) & (8) (2009). *Shelter*. (1) Every shelter in the camp shall be constructed in a manner which will provide protection against the elements. (8) All exterior openings shall be effectively screened with 16-mesh material. All screen doors shall be equipped with self-closing devices.

⁹ 29 C.F.R. § 1910.142(d)(10) (2009). *Toilet facilities*. Privies and toilet rooms shall be kept in a sanitary condition. They shall be cleaned at least daily.

¹⁰ *Id.*

¹¹ 29 C.F.R. § 1910.142(f)(2) (2009). *Laundry, handwashing, and bathing facilities*. (2) Floors shall be of smooth finish but not slippery materials; they shall be impervious to moisture. Floor drains shall be provided in all shower baths, shower rooms, or laundry rooms to remove waste water and facilitate cleaning. All junctions of the curbing and the floor shall be coved. The walls and partitions of shower rooms shall be smooth and impervious to the height of splash.

water drained onto the ground. (TR 41). This violation was “serious” because of the potential for slipping, and the standing water would attract mosquitoes and other insects. (TR 42). Mr. Garber testified that the shower was installed by the workers without his knowledge. (TR 77).

- 9) **Walls and partitions not of waterproof material up to the splash line.**¹² (PX 2, 19). The outside shower did not have any waterproofing material up to splash line. (PX 1, 12, 13, 14, 15). Mr. Dudash testified that the shower was constructed with untreated plywood and that there were wet spots and areas of mold and mildew. (TR 43). Mr. Dudash rated the violation as “serious” because the mold and mildew buildup can lead to illness and disease. (TR 43).
- 10) **Inadequate supply of hot and/or cold running water for bathing and laundry purposes.**¹³ (PX 2, 19). There was no hot water for the shower during the initial investigation. (PX 1). The only water supply for the shower consisted of cold water from a hose hooked up inside the house. (TR 44). This violation was serious because cold water alone is not sufficient for bathing and health purposes. (TR 44).
- 11) **No refuse containers (insect and rodent proof) provided.**¹⁴ (PX 2, 19). There were no trash cans with lids. (PX 1). Mr. Dudash testified that he did not observe any refuse containers and that the garbage was stacked against the house. (TR 45). He stated, “in our exterior walkaround of the building we did not see any trash containers that were provided that would meet our standards, all we saw was this accumulation of plastic bags and cardboard around the house.” (*Id.*). He also testified that he observed numerous flies and ants; he did not observe any rodents, but the garbage was easily accessible to them. (*Id.*). Mr. Dudash rated the violation as “serious” because the garbage was not in a trash container with a tight lid and the garbage was in close proximity to broken windows and ripped screens. (TR 46).
- 12) **Failure to have at least one trash container for each family unit.**¹⁵ (PX 2, 19). There were no trash containers with tight lids on them in the units. (PX 1). This violation was “serious” because the lids are supposed to prevent an infestation of insects and keep out rodents. (TR 47).
- 13) **Food not free from vermin, rodents, flies, etc.**¹⁶ (PX 2, 19). Mr. Dudash testified that there were unclean pots and pans, dirty dishes, and an uncovered trash container in the

¹² *Id.*

¹³ 29 C.F.R. § 1910.142(f)(3) (2009). *Laundry, handwashing, and bathing facilities.* An adequate supply of hot and cold running water shall be provided for bathing and laundry purposes. Facilities for heating water shall be provided.

¹⁴ 29 C.F.R. § 1910.142(h)(1) (2009). *Refuse disposal.* (1) Fly-tight, rodent-tight, impervious, cleanable or single service containers, approved by the appropriate health authority shall be provided for the storage of garbage. At least one such container shall be provided for each family shelter and shall be located within 100 feet of each shelter on a wooden, metal, or concrete stand.

¹⁵ *Id.*

¹⁶ 29 C.F.R. § 1910.142(i) (2009). *Construction and operation of kitchens, dining hall, and feeding facilities.* In all camps where central dining or multiple family feeding operations are permitted or provided, the food handling

kitchen. (TR 47-48). Mr. Dudash rated the violation as “serious” because there was a “large number of flies” present in the kitchen and if the food were eaten, the workers could have gotten sick. (TR 48). Although he did not see any rodents, Mr. Dudash testified that “there was also some ants in the facility.” (*Id.*).

- 14) **Equipment and utensils not clean.**¹⁷ (PX 2, 19). During the inspection, there were pots and pans left on the stove that were not washed, and there were dirty dishes that had food on them in the kitchen. (TR 49). The violation was rated as “serious” because there were numerous insects present in the kitchen and if the food were eaten, the workers could have gotten sick. (TR 49).
- 15) **Kitchen area unclean.**¹⁸ (PX 2, 19). Testimony indicated that there was an odor in the kitchen and that there were no traps out for rodents. (TR 49). These violations were rated as “serious” because the overall condition of the kitchen was unclean and there were numerous insects present; this overall condition could lead to health hazards. (TR 50).
- 16) **Garbage containers, leakproof and with tight lids, not provided in kitchen.**¹⁹ (PX 2). There was no trash can with a lid in the kitchen. (PX 1). Mr. Dudash testified that there was a garbage can in the kitchen, but there was no lid. (TR 50). Mr. Dudash rated the violation as “serious” because it could contribute to an infestation of insects and rodents. (TR 51).
- 17) **Infestation by and harborage of insects and/or pests.**²⁰ (PX 2, 19). Testimony revealed that there were flies and other insects in the bathroom, kitchen, and on the walkway or the exterior of the house with the broken window, and that there were not any control measures observed. (TR 51). These violations were rated as “serious” because there was the potential to contaminate food and for the workers to get infected. (TR 52).

After the inspection was completed, Mr. Dudash explained to Mr. Garber the violations that the inspection disclosed. (TR 52). During the post inspection conference, Mr. Dudash explained that Mr. Garber would have time to correct the violations and that another inspection would be conducted. (TR 52).

On July 29, 2009, Ms. Barrett conducted the abatement check. (TR 68). Mr. Garber was present and authorized her to return to the house. (TR 66). Ms. Barrett does not remember if she had the photographs with her at the abatement check, but she did have the MSPA Housing Safety and Health Checklist (PX 2). (TR 67). All of the violations were abated. (TR 68). At the post-inspection conference, Ms. Barrett summarized the results of the abatement check and explained

facilities shall comply with the requirements of the “Food Service Sanitation Ordinance and Code,” Part V of the “Food Service Sanitation Manual,” U.S. Public Health Service Publication 934 (1965), which is incorporated by reference as specified in § 1910.6.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 29 C.F.R. § 1910.142(j) (2009). *Insect and rodent control*. Effective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests.

the requirements of the FLSA, MSPA, field sanitation, and H-2A guidelines. (TR 69). Ms. Barrett also provided Mr. Garber with publications on field sanitation and MSPA, as well as explained what he needed to do to come into and stay in compliance with the law. (*Id.*).

After the investigation was completed, Ms. Barrett entered all of the data into a computer program, which she called a “Wizard,” to determine what the civil penalty would be. (TR 71). The Wizard determines the amount of the penalty to be imposed based on the seriousness of the violation, the annual gross income of the farm, history of previous violations, and whether or not the violations had been corrected. (TR 71-73). The system assessed a \$250.00 penalty for each violation, totaling \$4,250.00. (TR 73-74). Ms. Barrett explained that these assessments were at the low end of the spectrum (under the regulations in effect at the time penalties could be \$1,000 per violation) because all of the items had been corrected. (TR 74, P. PHB at 15).

Mr. Garber testified that the inspection occurred at a very busy time of the year for him. (TR 81). He contended that he was not the occupants’ “housekeeper” and was not responsible to clean their living quarters for them. (TR 81, 84). He also specifically contested the violation regarding the window being painted shut, maintaining that there was only one sealed window, and that there were three open windows and a screen door that provided for adequate ventilation. (TR 83). On cross-examination, Mr. Garber acknowledged that he had applied to become an H-2A employer, that the H-2A program is regulated by the U.S. Department of Labor, and that he is required to comply with those regulations. (TR 87-88).

Discussion

All H-2A employers are required to provide for their employees housing that meets OSHA standards.²¹ The applicable standards are found at 29 C.F.R. § 1910.142.²² The Secretary of Labor, through the Wage and Hour Division, is given the authority to investigate compliance with the standards.²³ Investigators have the authority to enter and inspect employer provided housing; and employers are required to cooperate with the investigators.²⁴ Upon the finding of a violation, the Secretary may assess a civil money penalty of up to \$1,500 per violation.²⁵ In determining the amount of the penalty, the Secretary “shall consider the type of the violation and other relevant factors,” including (1) the employer’s prior history of violations, (2) the number of H-2A workers affected by the violation, (3) the gravity of the violation, (4) whether the employer has made a good faith effort to comply, (5) the employer’s explanation for the violation, (6) the employer’s commitment to future compliance, and (7) the extent to which the employer achieved financial gain from the violation.²⁶

²¹ 20 C.F.R. § 655.122(d)(1)(i).

²² *Id.*

²³ 20 C.F.R. § 501.6(a).

²⁴ *Id.* at §§501.6, 501.7.

²⁵ 20 C.F.R. § 501.19(c).

²⁶ *Id.* at 501.19(b).

Here, Mr. Garber has raised two threshold issues at the hearing and in his post-hearing brief. First, Mr. Garber cites the Fourth Amendment to the United States Constitution as an affirmative defense. (R. PHB at 3). Mr. Garber states:

When Mr. Dudash entered the workers private dwelling without their permission, knowledge or warrant he violated the Fourth Amendment to the Constitution of the United States of America. Regardless of what is claimed as certain investigative rights of a department of government the Constitution is the supreme law of the United States of America. The Constitution states the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches. Mr. Dudash was legally guilty of Criminal Trespass on this Said property.

(*Id.*).

The Respondent's Fourth Amendment argument is meritless, for several reasons. First, "in the context of a regulatory inspection of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute."²⁷ The H-2A regulations explicitly authorize the investigators to "enter and inspect" the temporary workers' housing to ensure that the employer is in compliance with the housing standards.²⁸ Therefore, the investigators were not required to have a warrant to inspect the housing. Second, even if a warrant was required, Mr. Garber consented to the inspection. Mr. Dudash was asked, "So did Mr. Garber authorize you to inspect the housing?" (TR 23-24). He responded, "Yes, he did. He said he was too busy to accompany us at the time." (TR 24). Similarly, when Ms. Barrett returned for the abatement check, Mr. Garber authorized her to inspect the house: "Q. Okay, and Mr. Garber authorized you to return to the house? A. Correct. He also informed us that there was no one home at the time at the house." (TR 65-66).

Mr. Garber has not contended that he refused entry or that the investigators entered the housing without his permission. Instead, he argued in his brief and at the hearing that the investigators violated *the workers'* Fourth Amendment rights. (TR 76 ("I feel like [the Fourth Amendment] was violated because they didn't get the occupants of the house's permission. . . ."); R. PHB at 3 ("When Mr. Dudash entered the workers private dwelling without their permission, knowledge or warrant he violated the Fourth Amendment to the Constitution of the United States of America.")). Mr. Garber does not have standing to assert the Fourth Amendment on the workers' behalf. "In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that *he personally* has an expectation of privacy in the place searched, and that his expectation is reasonable."²⁹ In sum, the investigators here had the authority to enter the housing, and Mr. Garber authorized them to do so. Mr. Garber's Fourth Amendment defense is rejected.

Mr. Garber also argues in his brief that as a family farm he is exempt from the H-2A housing requirements. (R. PHB at 2). Mr. Garber cites a case from the Fifth Circuit Court of

²⁷ *U.S. v. Biswell*, 406 U.S. 311, 315 (1972).

²⁸ 29 C.F.R. § 501.6.

²⁹ *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

Appeals—*Malacara v. Garber*³⁰—in support of his position. However, that case involved the family business exemption of the Migrant and Seasonal Agricultural Worker Protection Act,³¹ not the INA. Mr. Garber not pointed to any provision exempting family farms from the requirement that H-2A workers be provided housing that complies with OSHA standards. Thus, Mr. Garber’s claim that he is exempt from the H-2A housing requirements is rejected.

Having disposed of Mr. Garber’s two threshold defenses, the next issue is whether the civil money penalty imposed by the Secretary is proper. Mr. Garber generally argues that he is not responsible to clean up after the workers. While I agree with Mr. Garber to an extent, that does not absolve him of his responsibility to provide housing that complies with OSHA standards. Many of the violations cited by the investigators were entirely within Mr. Garber’s control.

As to the specific violations, the regulations give me the authority to affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.³² I find that the preponderance of the evidence presented at the hearing proves the violations of the cited standards, with some exceptions. The Administrator cited Mr. Garber four times (violations 13-16) for various violations of the Kitchen, Dining Halls, and Central Feeding Facilities standard located at 29 C.F.R. 1910.142(i). That provision states:

(i) *Construction and operation of kitchens, dining hall, and feeding facilities.* (1) In all camps where central dining or multiple family feeding operations are permitted or provided, the food handling facilities shall comply with the requirements of the “Food Service Sanitation Ordinance and Code,” Part V of the “Food Service Sanitation Manual,” U.S. Public Health Service Publication 934 (1965), which is incorporated by reference as specified in § 1910.6.

Mr. Garber maintains that the housing at issue was a single family dwelling and multiple family feeding operations were not provided. (R. PHB at 2). I agree. The Administrator has not presented any evidence that the house contained a central dining or multiple family feeding facility. The evidence suggests the house contained a typical kitchen. Mr. Garber is correct that he is not responsible for his employees’ failure to clean up after themselves after preparing their meals; even assuming the kitchen standard applies, nothing in the standard suggests as much. I therefore strike violations 13-16, for a total reduction of \$1,000.00.

Mr. Garber was also cited for two violations of the 20 C.F.R. 1910.142(d), the Toilet Facilities standard (violations 6 and 7). Both violations related to subparagraph (10), failure to keep toilet facilities in a sanitary condition and failure to clean them daily. As for the first violation (violation 6), although the photograph submitted by the investigators does not, in fact, depict fecal matter on the toilet paper in the bucket next to the toilet, Mr. Dudash testified that this was the case (TR 39), and Mr. Garber does not contradict Mr. Dudash’s testimony. Instead, Mr. Garber contends that he “cannot go with them to the toilet to be sure they put their

³⁰ 353 F.3d 393 (5th Cir. 2003).

³¹ 29 U.S.C. § 1803(a)(1).

³² 20 C.F.R. § 501.41.

toilet paper where the U.S. Department of Labor has required them to place it.” (R. PHB at 2). I agree with Mr. Garber that he cannot be expected to accompany his workers into the bathroom; however, the regulations clearly place the responsibility on Mr. Garber for keeping the bathroom sanitary. The presence of fecal matter in the bathroom constitutes an unsanitary condition because, as noted by Mr. Dudash, this attracts flies that could potentially contaminate the workers, who in turn could contaminate the food they were handling. (TR 39). I therefore affirm violation 6.

I do not, however, affirm violation 7. The Administrator cited Mr. Garber under 29 C.F.R. 1910.142(d)(10) for failure to clean the bathroom daily. Mr. Dudash testified that “[w]hen we got there to do the housing inspection, it was the afternoon or late morning. So this room had not been cleaned that day yet so we cited, or I cited that as a serious health condition at that time for the same reasons (used toilet paper in a bucket). (TR 40). For one thing, this violation is duplicative of violation 6 in that it is based on the used toilet paper; more importantly, however, Mr. Dudash stated that the bathroom hadn’t been cleaned as of the time of the inspection, which was in the morning. This does not establish the bathroom was not cleaned daily. Perhaps it was cleaned in the evening. Therefore, I strike violation 7 and reduce the total fine by an additional \$250.00.

Mr. Garber maintained that the violation for the window that could not be opened (violation 4) should not have been assessed because there were enough windows in the room to meet the minimum square footage required by the Code. (TR 77). The cited standard reads as follows: “All living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.”³³ The first sentence is the minimum requirement for the square footage of the windows required based upon the size of the room; the second sentence is the requirement for the windows that are installed. The plain meaning of the phrase “[a]t least one-half of *each window* shall be constructed that it can be opened for purposes of ventilation”³⁴ denotes that all installed windows must meet this requirement. The evidence clearly demonstrates that at least one of the windows was painted shut. (TR 35; PX 5). Mr. Garber’s contention that he met this requirement is without merit.

As for the remaining violations, I find that they are all supported by the evidence. The photographs and the testimony clearly demonstrate that the grounds around the house were unkempt, there was a dangerous makeshift shower constructed on the outside of the house, the garden hose used for the shower supplied cold water only, the screen was ripped open, one window pane was broken and another was missing and painted shut, and the house was infested with flies and ants. Taken together, these conditions clearly demonstrate Mr. Garber’s failure to ensure housing safety and health for the H-2A workers he employed. Accordingly, I uphold violations 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, and 17.

³³ 29 C.F.R. § 1910.142(b)(7).

³⁴ *Id.*

ORDER

It is HEREBY ORDERED, that the Administrator's civil money penalty of \$4,250.00 against Russell Garber, doing business as Garber Farms is modified, and the penalty is reduced to \$3,000.00. Mr. Garber shall pay the penalty within thirty days of the receipt of this Decision and Order.

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 501.42(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. The Respondent, Administrator, or any other party desiring review of the administrative law judge's decision may file a Petition. 29 C.F.R. § 501.42(a). Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties to the case as well as the administrative law judge. 29 C.F.R. § 501.42(a).

If no Petition is timely filed, or the ARB does not accept the Petition for review, the administrative law judge's decision becomes the final agency action. *See* 29 C.F.R. §501.42(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 501.42(a).