



**Issue Date: 02 May 2018**

CASE NO.: 2016-LCA-00010

In the Matter of

**ADMINISTRATOR, WAGE AND HOUR DIVISION**  
Prosecuting Party

v.

**GB TECH, INC.,**  
**formerly known as EMPOWER IT, INC.**  
**DBA INFOBAHN TECHNOLOGIES**  
Respondent

**DECISION AND ORDER AFFIRMING ADMINISTRATOR'S DETERMINATION**

This matter involves a case arising under the Immigration and Nationality Act ("INA") H-1B visa program, 8 U.S.C. § 1101(a)(15)(H)(i)(b) and § 1182(n), and the implementing regulations promulgated at 20 C.F.R. § 655.700 *et seq.* The Act's H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations in the United States. See 8 U.S.C. § 1101(a)(15)(H)(i)(b). A hearing in this matter took place on May 9, 2016 in Cherry Hill, New Jersey.

**I. PROCEDURAL HISTORY**

This case centers on a complaint filed by the Administrator, Wage and Hour Division, U.S. Department of Labor ("the Administrator") on behalf of Krishna Kumar Joki ("Complainant") against Respondent, GB Tech Inc., ("Respondent"), which employed Complainant from October 2009 to October 2010. The Administrator asserts that Respondent violated the H-1B provisions of the INA by failing to pay Complainant the required wage for his final month of employment in September 2010. See Administrator's Pre-hearing Statement at 1.

After an investigation and by letter dated December 8, 2015 the District Director of the Wage and Hour Division issued a determination that Respondent failed to pay Complainant wages in the amount of \$6,666.66. On December 22, 2015, through counsel, Respondent requested a hearing before the Office of Administrative Law Judges ("OALJ"). Under § 655.840(b), an Administrative Law Judge ("ALJ" or "Judge") has the authority to affirm, deny, reverse, or modify, in whole or in part, the determinations of the Administrator.

A Notice of Hearing, issued January 5, 2016, set the hearing for May 9, 2016 in Philadelphia, Pennsylvania. The hearing was relocated to Cherry Hill, New Jersey by Order dated March 10, 2016. At the hearing, the undersigned admitted ALJX 1, JX A-G, and PX 1 into evidence.<sup>1</sup> (Tr. at 8-12.) The undersigned also denied the Administrator's Motion to Enforce Settlement and Dismiss the Request for Hearing, or in the Alternative, a Motion for Summary Decision at the hearing. (Tr. at 8.)

Complainant did not appear at the hearing, as he had returned to his home in India. Prior to the hearing, the Administrator filed a Motion for Leave to Provide Testimony Remotely on April 14, 2016, which the undersigned granted by Order dated April 26, 2016. The undersigned received Respondent's objection to the Administrator's motion on April 27, 2016. By Order dated May 2, 2016, the undersigned reconsidered the prior order. While permitting the Administrator to take the telephonic testimony of Complainant, the undersigned also instructed the Administrator to take the steps necessary to establish good cause and appropriate safeguards as per 29 C.F.R. § 18.81 in conducting Complainant's telephonic testimony and reserved for Respondent the right to restate its objection during the hearing.

The Administrator's counsel confirmed that she planned to examine Complainant audibly through the telephone and visually through an Internet-based program called WebEx. Respondent's counsel renewed his objection to taking testimony through this medium, citing the difficulty of making credibility determinations on video and a lack of knowledge as to the documents Complainant planned to use to confirm his identity. The undersigned allowed the testimony, but took note of Respondent's concerns and explained that she would consider those concerns when weighing Complainant's testimony. (Tr. at 17-20.)

Before the conclusion of the hearing, the undersigned set July 22, 2016 as the deadline for final briefs. (Tr. at 94-95.) The Administrator and Respondent filed their briefs on July 25, 2016 and July 27, 2016 respectively. The Administrator requested an opportunity to respond to Respondent's brief, which the undersigned granted by Order dated July 29, 2016. The Administrator filed a reply on August 5, 2016.

## **II. ISSUE**

Based on the assertions made by the parties at the hearing and in their post-hearing briefs, the sole issue to be determined in this matter is:

Did Respondent fail to pay Complainant wages in the amount of \$6,666.66 for the month of September 2010?

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<sup>1</sup> This Decision uses the following abbreviations: "ALJX" refers to Administrative Law Judge Exhibits; "JX" refers to Joint Exhibits; "PX" refers to Prosecuting Party Exhibits; and "Tr." refers to the transcript of the May 9, 2016 hearing.

### **III. STIPULATIONS**

The parties stipulated to the following facts:

- 1) Jurisdiction over the hearing in this matter is vested in the Office of Administrative Law Judges by § 212(n)(2) of the Act, 8 U.S.C. § 1182(n)(2) and the applicable regulations, 20 C.F.R. § 655.1 *et. seq.*
- 2) During the relevant period of time, September 1, 2010 through September 30, 2010, Respondent was an H-1B employer.
- 3) During the relevant period of time, September 1, 2010 through September 30, 2010, Respondent employed Complainant as a systems analyst under the H-1B program.
- 4) Joint Exhibits A-G, as listed below, are admissible.
- 5) On December 8, 2015, the Administrator issued to Respondent a Determination Letter detailing his findings.
- 6) A Summary of Violations and Remedies (“Summary”) was attached to the December 8, 2015 Determination Letter which stated that the investigation by the Wage and Hour Division (“WHD”) had determined that violations of the H-1B provisions of the INA had occurred as a result of Respondent’s failure to pay wages as required by 20 C.F.R. § 655.731.
- 7) Respondent merged with Empower IT, Inc. d/b/a Infobahn Technologies on November 15, 2010.
- 8) Respondent, as successor in interest, has assumed all liability for any violations of the H-1B program committed by Empower IT, Inc. d/b/a Infobahn Technologies.
- 9) The Form WH-56 “Summary of Unpaid Wages” is a true, accurate, and complete record of the form signed by an authorized representative of Respondent on November 2, 2015.
- 10) The copy of check number 9058 is a true, accurate, and complete record of the check transmitted to WHD by Respondent on November 13, 2015.

### **IV. EVIDENCE**

#### **a. Joint Exhibits**

- A. November 2, 2015 Form WH-56
- B. Check number 9058 from Respondent to Complainant for “Past wages for the period of September 30, 2010 in the amount of \$5,201.44.”
- C. November 13, 2015 letter to WHD enclosing check number 9058, pay register, and merger agreement
- D. December 8, 2015 Determination Letter
- E. December 22, 2015 Request for Hearing
- F. March 30, 2016 Response to the Administrator’s Request for Production of Documents
- G. March 30, 2016 Response to the Administrator’s Requests for Admissions

**b. Prosecuting Party's Exhibit**

1. Wage & Earnings Statement for Period of July 1, 2010 to July 30, 2010

**V. TESTIMONY**

**A. Complainant**

At the hearing, Complainant testified that he returned to India from the U.S. in February 2012. (Tr. at 26.) Complainant joined Infobahn Technologies (“Infobahn”) in March 2006 and left in September 2010. During that time, he performed consulting work on behalf of Infobahn for a client known as Citizens Property Insurance (“Citizens”) in Tallahassee, Florida. He ended his tenure with Infobahn at a salary of \$80,000 per year. He gave Infobahn a month’s notice prior to his September 2010 departure. It was only after leaving the company that he knew the company by Respondent’s name. Prior to a 2010 merger, Complainant did not experience problems receiving his paycheck, but after the merger he had to follow up with the human resources department over twenty or thirty days to receive his paycheck, sometimes delayed by a month. He also missed bonuses that were previously paid to him. After giving one month’s notice in August 2010 and leaving in September 2010, he did not receive his last month’s paycheck until two or three months after WHD became involved. (Tr. at 34-39.)

On cross-examination, Complainant clarified that during the time that Infobahn employed him, he worked for clients including HCL Technologies Massachusetts, Inc. (“HCL”) and Agency Workforce Innovation. Complainant introduced his existing client, Citizens, to Infobahn. He worked for Citizens as a consultant, and through a middle vendor, brought the company to Infobahn. After leaving Respondent in September 2010, Claimant next worked for VCARVE, Inc., with Citizens as the end client. (Tr. at 42- 45.)

Complainant continuously asked Respondent about his September 2010 compensation by email. (Tr. at 46.) Prior to starting his work with Respondent (then Infobahn), Complainant signed an employment contract that contained a non-compete clause and a confidentiality clause. He denied using confidential information to advance his career at VCARVE. In addition to not receiving his final month’s wages, Complainant’s DOL complaint included other compensation not paid to him (Tr. at 52-54.)

On the undersigned’s questioning, Complainant recalled that when he entered the U.S. in 2002, HCL, his employer at the time, sponsored him through an H-1B visa. Just as Complainant was sponsored by HCL but consulted for its client, Agency Workforce Innovation, Infobahn held Complainant’s H-1B visa as he consulted for Citizens. Complainant’s consulting work consisted of handling projects involving programming, technical designs, and architecture, as well as leading a team of programmers. Complainant confirmed that he wanted to pursue an opportunity with Citizens, but Citizens could not bring him onboard because of his status as a non-U.S. citizen. Thereafter, Complainant solicited the services of a middle vendor known as IT

Resources Corporation, which identified Infobahn as a company that could sponsor his H-1B visa. Infobahn billed IT Resources, which billed Citizens. (Tr. at 55-58.)

Starting in February or March 2010, Complainant started experiencing delays in receiving his paycheck and did not receive the same compensation he had previously received. By August, Complainant felt he could no longer live on paychecks delayed by a month, so he gave Respondent one month's notice of his intent to leave. Complainant worked for Respondent for the notice period of September 2010 and thereafter moved to VCARVE. IT Resources Corporation understood Complainant's plight and even appealed to Respondent to pay him on time, but it realized Complainant could not go on with delayed compensation and allowed him to leave. Once Complainant moved to VCARVE, he continued his work for Citizens, but IT Resources Corporation no longer served as the vendor. (Tr. at 59-60.)

When Complainant contacted Infobahn in September 2010, he spoke to Nagarju Akkineni, whom Complainant began dealing with after the merger when payment issues arose with Infobahn. He sent emails to Mr. Akkineni with copies to his superior; he turned these emails over to WHD. (Tr. at 61.)

#### B. Quyen Le

Quyen Le, an investigator at the U.S. Department of Labor, Wage and Hour Division in the Philadelphia District Office, has worked in this capacity for almost three years. Her responsibilities include investigating employers to determine compliance with H-1B regulations, among other compensation-related statutes. In order to prepare her for the position, Ms. Le underwent Pre-Basic 2 and Basic 2 training in which she studied H-1B regulations, completed practices and exercises, took webinars, and shadowed senior investigators. She recalled WHD receiving a complaint related to this matter in April 2011, alleging that Complainant worked for Infobahn as an H-1B employee until September 30, 2010, but was not paid by his employer, even though the employer reported it paid him. After the previous investigator retired, Ms. Le inherited this case in August 2015. Ms. Le contacted Complainant soon thereafter and Complainant provided her with his Labor Condition Application ("LCA"), July 2010 paystub, and his W-2 form. The July 2010 paystub reflected Complainant's monthly salary of \$6,666.66 and his yearly gross income of \$61,932.16. This information proved that Respondent paid the higher of the prevailing wage on the LCA and the actual wage because the prevailing wage approximated about \$70,000, while his salary indicates that Respondent paid him an actual wage of \$80,000. (Tr. at 64-68.)

Next, Ms. Le contacted Respondent and explained that Complainant alleged that Respondent did not pay him his last month's paycheck. She recalled speaking to a human resources director named Divya. Respondent replied by stating that its payroll records show Complainant as paid for that month, September 2010. Asked about the importance of Respondent's payroll record for September 2010 (JX C-005), Ms. Le stated the \$5,201.44 represents Claimant's net pay, showing that Respondent made deductions from his gross pay of \$6,666.66. Thereafter, Ms. Le contacted Respondent's counsel, who told her that Respondent had merged with Infobahn and inherited payroll records showing that Complainant had been paid. She replied that the W-2 form provided to her did not sufficiently show that Complainant

had been paid. Ms. Le did not recall providing examples of what would constitute sufficient information showing payment to Complainant during this conversation, but she testified that such examples include canceled checks or bank statements showing money withdrawn from the account. (Tr. at 69-72.)

After this conversation, WHD management instructed Ms. Le to proceed to the final conference, which included asking Respondent if it had additional evidence to submit. As is protocol, Ms. Le generated a WH-56 form, a summary of unpaid wages. Ms. Le determined that Respondent did not pay Complainant for his last month of work, violating the H-1B regulations. She calculated back wages for September 2010 of \$6,666.66 by dividing Complainant's \$80,000 annual salary by twelve for his monthly salary, basing this calculation on Complainant's July 2010 paystub. In a phone conversation, Respondent's counsel agreed to pay the back wages and Ms. Le emailed him the WH-56, dated October 15, 2015. (JX-A.) Ms. Le received a package from Respondent's counsel, including a check for \$5,201.44 with a notation in the memo line of "Past wages for the period of September 2010," which Ms. Le interpreted as Respondent's agreement that the check was intended to pay Complainant back wages for September 2010. Upon receiving the check, Ms. Le handed it to the Wage and Hour technician for mailing to Complainant and submitted the case for management review per agency policy. (Tr. at 72-79.)

Ms. Le indicated that she never received an official copy of the LCA. Normally, when starting an H-1B investigation, she would contact the employer and review its public access file. Here, however, Ms. Le believed this case to be pretty straightforward in that the case revolved around Complainant's last month's wages and Respondent did not deny that it owed Complainant those wages. The only remaining issue was whether Respondent actually paid him. Complainant had sent a copy of the LCA, but she did not need an official copy. Ms. Le noted that Complainant's year-to-date earnings as reflected on the pay register (JX-C 005) showed \$75,265.48 whereas Complainant's July 2010 paystub showed year-to-date earnings of \$61,932.16 (PX-1.) The difference between these two values, Ms. Le gleaned, was about two months' salary, consistent with what Complainant told her: that Respondent eventually paid him for August 2010, but not for September 2010. Ms. Le did not tell Respondent's counsel, nor is it her practice to tell other employers, that if they paid the back wages, WHD would not issue a Determination Letter as it is not within her authority to do so. (Tr. at 81-84.)

On cross-examination, Ms. Le stated that Complainant provided her with the July 2010 paystub and did not ask him for his August 2010 or September 2010 paystub; he did not have his August 2010 paystub. Ms. Le believed the pay register at JX-C 005 to be accurate as to Complainant's gross pay and net pay after withholding of required taxes and FICA, though her department does not have responsibility to ensure that employers withhold. Ms. Le found the W-2 sufficiently dispositive to decide that Complainant had been correctly paid. However, even though Complainant provided Ms. Le with a W-2 form that showed withholding consistent with the pay register, this does not necessarily mean Respondent actually paid Complainant. Ms. Le did not recall whether she generated the WH-56 before or after speaking with Respondent's counsel by phone. Nor did she recall telling Respondent's counsel that she intended to create the WH-56 during their phone conversation. Complainant provided Ms. Le with his July 2010 paystub, W-2 form, and LCA to support his claim and told her that he had trouble collecting his August 2010 compensation, but eventually received it. (Tr. 84-88.)

On redirect examination, Ms. Le clarified that JX-C did not sufficiently indicate that Complainant was paid for September 2010 or that the withholding listed in that document was actually paid to the Federal Government. Ms. Le created the WH-56 on October 15, 2015 and received the check from Respondent in November 2015. (Tr. at 88-89.)

On the undersigned's questioning, Ms. Le stated that, aside from the payroll records from JX C-005, she normally asks for other documents if the payroll register were inaccurate or false. Here, Ms. Le explained to Respondent that because Complainant alleged that he did not receive his payment even though the W-2 form suggests otherwise, it would need to provide something in addition to the payroll register to show that Complainant received his paycheck. Respondent did not provide such documentation. Ms. Le also asked Complainant for documentation proving he did not receive his September 2010 pay, and he did not provide such documentation either. (Tr. at 89-91.)

Finally on redirect examination, Ms. Le explained that WHD accepts a pay register as dispositive evidence of payment unless it has a reason not to and such a reason includes, as here, Complainant's allegation that he was not paid. On re-cross examination, Ms. Le confirmed that Respondent told her that it could not produce the canceled check in his case because its bank would not release those records. (Tr. at 91-92.)

## **VI. PARTIES' ARGUMENTS**

### Administrator's Position

The Administrator asserts that Respondent failed to pay Complainant, an H-1B employee whom it hired as a systems analyst, the required wage in violation of 20 C.F.R. § 655.731. If an employer fails to pay the required wage (the higher of the actual wage or the locally prevailing wage), the Secretary "shall order the employer to provide for payment of such amounts of back pay" to satisfy the wage requirement. 8 U.S.C. § 1182(n). The Administrator bears the burden of demonstrating that the employee performed the work for which he was not properly compensated. "Testimony by the employee alone regarding hours worked and wages paid had been found to be sufficient evidence to meet this burden." Law Offices of Sergio Villaverde, 2009-LCA-00019, slip op. at 11 (ALJ Nov. 4, 2010.) Once the Administrator meets that burden, this burden shifts to the employer to rebut the Administrator's evidence. See Anderson v. Mt Clemens Pottery Co., 328 U.S. 680, 687-88 (1946). If the employer fails to do so, then the fact-finder must find in favor of the employee. See Administrator's Brief at 7-8.

Respondent does not dispute that it employed Complainant through the H-1B program for the period of September 1, 2010 to September 30, 2010 and that wages were owed to Complainant. Instead, Respondent argues that it previously paid these wages. In support of its assertion that Respondent initially failed to pay Complainant his September 2010 wages, the Administrator cites Complainant's testimony that Respondent did not pay him until he received these wages from WHD in 2015. Despite having already received his back wages by late 2015 as a result of the WHD investigation, Complainant took considerable time and effort in preparing his case, including making himself available via video conferencing from India. The substance

of Complainant's testimony also supports his credibility, as he stated that Respondent stopped paying him on time starting in 2010 and that he tried his best to follow up with Respondent about the late paychecks owed to him. See Administrator's Brief at 8-9.

Respondent has presented no evidence in this case and has therefore failed to rebut the Administrator's evidence. Its only argument that it did not violate § 655.731 is based on a pay register that reflects payment for September 2010. This evidence does not sufficiently rebut the Administrator's evidence, because as per Ms. Le's testimony, when an employee complains that wages reported to the IRS are inaccurate, she requires additional documentation such as canceled checks or evidence of withdrawn money from a company bank account. Respondent did not provide this. The Administrator points to an ARB case affirming an ALJ's refusal to credit the employer for wages not reflected in tax records, even though the employer provided payroll records and W-2 forms. See Datalink Computer Products, Inc., ARB No. 14-0296, 2016 WL 866115 \*2 (ARB Feb. 29, 2016.) Here, a check generated from a third party payroll company for Complainant's September 2010 wages is similarly not conclusive evidence of payment sufficient to rebut the Administrator's evidence. See Administrator's Brief at 9-11.

### Respondent's Position

Respondent maintains that the Administrator failed to establish his *prima facie* case because he failed to enter the LCA No. 1-09174-5031951 into evidence, a fundamental aspect of his case. In the absence of the LCA, Respondent contends that the undersigned lacks jurisdiction in this matter. Alternatively, Respondent entered into evidence a pay register, indicating that a check numbered 10205 was issued on November 1, 2010 for the pay period ending September 30, 2010 in the amount of \$6,666.66 in gross pay. (JX-E 025.) Taxes and other statutory withholdings reduced his net pay amount to \$5,201.44. Respondent also highlights Ms. Le's testimony that this payment document was credible. (Tr. at 86.) Further, JX-E was admitted as a joint exhibit and the Administrator did not express an objection to its accuracy or authenticity at that time. If the Administrator truly questioned whether Respondent failed to pay Complainant, he could have subpoenaed bank records to verify whether the check cleared, but he did not do so.

Respondent further suggests the possibility that the timing of the check issuance may have confused Complainant. The voucher at PX-1 and pay register at JX-E show that Respondent paid Complainant his July wages on August 20, 2010. Further, the pay register shows that he received his September 2010 wages on November 1, 2010. Respondent surmises that Complainant could have reasonably expected his final paycheck sometime in October 2010, consistent with past pay practices. Respondent also suggests that Complainant's insufficient recordkeeping may have played a role in the confusion, as buttressed by Ms. Le's testimony that Complainant did not have pay stubs for the month of August upon her request.

Counter to the Administrator's argument, Complainant's testimony does not credibly establish that Respondent did not pay his September 2010 wages, according to Respondent. Respondent contends that the Administrator's counsel coached Complainant on the witness stand when Complainant initially stated that he received his paycheck two or three months prior to the May 2016 hearing. Counsel led him to correct his testimony that he received the check a few months after WHD investigators intervened, according to Respondent. Other inconsistencies in

Complainant's testimony, according to Respondent, include his assertion that Respondent stopped paying him regularly after a merger with another company even though the merger did not occur until November 2010 and his admission that Complainant signed a non-compete agreement with Respondent, yet he took one of its clients with him when he left Respondent's employ. Respondent does not argue that this allegation justified withholding pay from Complainant, but argues that these acts demonstrate Complainant's dishonesty, which makes his testimony less credible.

Finally, the Administrator relied entirely on Complainant's testimony and produced no evidence that Complainant ever attempted to collect the owed wages, according to Respondent. Although Complainant testified that he made these attempts, Ms. Le's testimony that Complainant failed to provide documentation showing whether he was paid casts doubt on Complainant's version of events.

#### Administrator's Response

The Administrator responded to Respondent's jurisdiction argument by first asserting that Respondent had stipulated to the jurisdiction issue and therefore it need not have presented evidence on this issue. When it appealed the determination letter, Respondent appealed on the basis that it had not violated H-1B provisions, but did not question the undersigned's jurisdiction. Its first jurisdictional challenge came after the Administrator's determination and after this matter was brought before OALJ. Respondent has not otherwise demonstrated exceptional circumstances that would justify Respondent to change or withdraw its stipulation to this issue.

In addition, the Administrator averred that he did not need to enter the LCA into evidence to prove his case. Respondent did not contend that it did not file an LCA for Complainant and the case does not present a dispute regarding the required wage or the amount of back wages owed, as Respondent had already paid the back wages at the time of the hearing. Respondent mistakenly conflated the LCA document with the binding power of the attestations therein, requiring it to pay an H-1B worker the actual or prevailing wage. See U.S.C. § § 1882(n)(1), 1182(t)(1)(a); 20 C.F.R. § 655.731. The LCA is not needed to address the issue of whether Complainant received payment or whether the Administrator has the authority to investigate and enforce these provisions, according to the Administrator.

Although Respondent argues that the absence of the physical representation of these obligations renders the obligations unenforceable, Respondent's stipulation as to its status as an H-1B employer achieves the same effect as the actual LCA because it necessarily implicates the filing of an LCA.

### **VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

If the Administrator finds that an employer has violated its obligation to pay wages to the H-1B worker, the Administrator may conduct an investigation with respect to suspected violations. See 20 C.F.R. § 655.50. The Administrator may then issue a Determination Letter citing violations, requiring payment of wages, and imposing fines. See 20 C.F.R. § 655.70. If a party disagrees with the Determination Letter, that party may appeal to the DOL, Office of Administrative Law Judges ("OALJ"). In this proceeding, the Administrator is the Prosecuting

Party and the employer is the Respondent. The Prosecuting Party bears the burden of proof with regard to each alleged violation. See Kumar v. Samuha, Inc., 2012-LCA-00005, slip op. at 3 (Feb. 28, 2013.)

The parties stipulated that Respondent employed Complainant under the H-1B program during the time period of September 1, 2010 to September 30, 2010. The parties also stipulated that a December 8, 2015 letter from WHD stated that an investigation revealed violations of the H-1B provisions of the INA had occurred as a result of Respondent's failure to pay wages as required by 20 C.F.R. § 655.731. Respondent makes six discrete arguments that purport to show that it paid Complainant required wages in the amount of \$6,666.66. This decision discusses these arguments below. First, however, as noted above, the Administrator bears the burden of proving that Respondent violated 20 C.F.R. § 655.371(c) by failing to pay Complainant the required wage for the period of September 1, 2010 through September 30, 2010.

Under 20 C.F.R. § 655.731(c)(4), for salaried employees, wages are "due in prorated installments (*e.g.*, annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly...." Complainant left Respondent's employ in September 2010, without having received his final paycheck for September 2010. He credibly testified that he continuously telephoned Infobahn, and sent them emails about his missing paycheck and he received no response. (Tr. at 46-47.) Later during the hearing, Complainant similarly testified that he contacted an individual named Nagarju Akkineni, an Infobahn representative who Complainant previously dealt with about his payment issues, in seeking his final paycheck. (Tr. at 60-61.) Villaverde stands for the proposition that Complainant's testimony regarding hours worked and wages paid suffice to meet his burden. See 2009-LCA-00019 at 11. Beyond Complainant's testimony, the undersigned finds that Respondent did not compensate Complainant for his work in September 2010 until well after WHD became involved in the matter, as Respondent transmitted a check for \$5,201.44 dated November 2, 2015, three months after WHD investigator Ms. Le inherited the case. (JX-C 002, Tr. at 66.) That more than five years elapsed between Complainant's last day of employment for Respondent and his receipt of a check in the precise amount of his monthly net compensation with a memo referencing his final month of employment plainly indicates that, in violation of § 655.731(c)(4), Respondent did not issue Complainant's September 2010 due to him on a "no less often than monthly" basis.

Respondent offers a number of arguments as to why the Administrator has failed to meet his burden of proof. First, Respondent claims that the Administrator failed to establish his *prima facie case* because he did not enter the LCA into evidence. However, admission of the LCA into evidence is not a prerequisite to showing that Respondent failed to provide Complainant his final prorated salary installment under § 655.731(c)(4). Instead, the Administrator presented evidence in Ms. Le's testimony that strengthens the Administrator's case.

According to Ms. Le, Respondent provided her with a W-2 form, which she described as insufficient to prove that Complainant received his September 2010 wages and she requested something more to prove Complainant's receipt of his final paycheck. (Tr. at 72, 80-90.) She further explained that a W-2 form that shows withholding consistent with Employer's pay register does not necessarily mean that Complainant received his compensation. (Tr. 86.) Ordinarily a pay register would adequately evidence payment, but when a Complainant alleges

that he was not paid, the investigator needs more proof from the employer; Respondent did not supplement its submission with other documents. (Tr. at 90.) The undersigned notes that the pay register amounts to a list of employees, their paycheck amounts, year-to-date earnings, and the amounts deducted from their gross pay. It does not reflect any confirmation that Complainant actually received his paycheck for September 2010.

The undersigned finds Ms. Le's testimony credible. Not only did she testify consistently when questioned by counsel and the undersigned, but her three years of WHD investigation experience and accompanying training reinforces the veracity of her testimony. In Ms. Le's experience, once Complainant alleged that he did not receive payment from Respondent, the burden of proof in the investigation shifted to Respondent to provide documentation proving payment to Complainant beyond a pay register and a W-2 form. She highlighted examples of such documents including canceled checks and bank statements showing money withdrawn from an account, but recalled Respondent could not provide such canceled checks because its bank would not release these records. (Tr. at 72, 92.) However, Respondent's inability to procure this contravening evidence does not relieve it of its burden of proof as expressed by Ms. Le.

Respondent also contends that the absence of the LCA from the record removes jurisdiction from the undersigned. Respondent does not provide any case law or underlying support for this argument. As just discussed, the Administrator does not need to present the LCA in order to prove his case successfully. Moreover, the parties willingly stipulated that jurisdiction in this matter is vested in OALJ by 8 U.S.C. § 1182(n)(2) and the applicable regulations, 20 C.F.R. § 655.1. "A court may allow a party to withdraw from a stipulation if the moving party can prove that he relied to his detriment on representations that were untrue, or that the stipulation stemmed from fraud, accident, mistake, inadvertence, surprise, or excusable neglect, or that some other reason justifies relief." U.S. v. Kulp, 365 F. Supp. 747, 763 (E.D. Pa. 1973), aff'd, 497 F.2d 921 (3d Cir. 1974). Respondent has not argued, let alone proven, that it relied to its detriment on such representations.

Third, Respondent avers that the documentary evidence shows that Complainant was paid for his work, pointing to the pay register showing payment to Complainant in the amount of \$6,666.66 for the pay period ending September 30, 2010. (JX-C 025.) Although the Administrator did not explicitly object to the pay register's authenticity, Administrator's counsel presented the aforementioned testimony of Ms. Le. In particular, Ms. Le testified that a pay register normally represents proof of payment in the absence of a reason not to accord it such weight. (Tr. at 91.) Here, according to Ms. Le, Complainant's assertion that he did not receive this final paycheck constitutes a reason not to take the pay register at face value. The Administrator need not, as Respondent suggests, subpoena bank records to show that the check had cleared. This is especially so in light of Respondent's eliciting Ms. Le's testimony that Respondent could not produce its own bank records. (Tr. at 92.)

Fourth, according to Respondent, Complainant may have been confused about his compensation, noting that the pay register shows that Respondent paid him his September 2010 wages on November 1, 2010, when he reasonably expected his final paycheck to issue in October 2010. Respondent also posits that Complainant did not maintain reliable records, as he could not locate his August 2010 or September 2010 pay stubs for Ms. Le. While Complainant

may or may not have understood the technicalities of payroll administration or kept reliable records, the fact that Respondent issued a check in the precise net amount of Complainant's monthly salary with a notation in the memo line of "Past wages for the period of September 2010," suggests that it was not an error on Complainant's part that he did not receive his last month's wages. Instead, this check, issued five years after Complainant left Respondent's employ, indicates an admission on Respondent's part that it previously failed to properly compensate Complainant.

Respondent cites a lack of credibility in Complainant's testimony as another reason the Administrator has not proven his case. Before addressing Complainant's credibility, the undersigned notes that Respondent incorrectly states that the Administrator relied solely on Complainant's testimony to support his case. She also elicited credible testimony from WHD investigator Ms. Le that supported the contention that Complainant did not receive his September 2010 until after WHD intervened. Respondent also accused the Administrator's counsel of coaching the witness in the following exchange:

Q: And when did you receive the last month's paycheck?

A: It was—I just have to refer back then. I know just a couple of—maybe two, three months after Wages and Hour Division got involved and they sent me a paycheck over here.

Q: You're saying that happened a few months after Wage and Hour investigator got involved; is that correct?

Tr. at 39.

At the hearing, Respondent's counsel did not object. After reviewing the transcript, the undersigned does not find that the Administrator's counsel prodded Complainant's testimony. She simply wanted Complainant to clarify his previous answer. This exchange does nothing to support Respondent's theory that Complainant was "heavily coached" prior to the hearing or that his testimony was self-serving.

Finally, Respondent asserts that Complainant's signing a non-compete agreement with Respondent and taking a client that he had brought with him to Respondent to his next employer undermines the truthfulness of his testimony. Aside from the dubiousness of using an alleged breach of contract as a prior bad act to impeach Complainant's credibility, neither party entered this non-compete agreement into evidence. Without the agreement itself, the undersigned cannot know the terms of such an agreement such that it could credibly determine whether or not Complainant actually breached the agreement. Therefore, the undersigned does not find that Complainant's taking a client with whom he had a relationship prior to his employment with Respondent to his next employer undermines his credibility as a witness.

### **VIII. ORDER**

For the foregoing reasons, the undersigned **AFFIRMS** the Administrator's determination that Respondent violated 20 C.F.R. § 655.731(c). The Administrator has not sought a civil money penalty and Respondent has paid the back wages that were due.

SO ORDERED.

**THERESA C. TIMLIN**  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition only one copy need be uploaded.

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.