



Issue Date: 25 June 2019

**OALJ No.:** 2018-LCA-00029

**WHD No:** 1816177

*In the Matter of:*

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

*and*

**VIMALRAJ MANOHARAN,**  
*Party-in-Interest,<sup>1</sup>*

*v.*

**HCL AMERICA, INC.,**  
*Respondent.*

**ORDER DISMISSING CLAIM IN PART AND HOLDING THE  
CLAIM IN ABEYANCE IN PART**

This proceeding arises under the H-1B non-immigrant worker program of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), and the implementing regulations at 20 C.F.R. part 655, subparts H and I. Such proceedings are generally referred to as "LCA" cases because they are grounded in the labor condition application filed with the U.S. Department of Labor by an employer that seeks to employ nonimmigrant workers in specialty occupations under H-1B, H-1B1, or E-3 visa categories.

**BACKGROUND**

On August 2, 2018, Administrator, Wage and Hour Division, ("Administrator") issued a determination ("Determination") regarding HCL America Inc.'s ("Employer's") employment of Vimalraj Manoharan, who is a

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<sup>1</sup> The party designation of Vimalraj Manoharan is at issue in this Order. The designation identified in the caption reflects the conclusions in this Order.

nonimmigrant. Administrator determined that Employer committed three violations:

**VIOLATION:** HCL America, Inc. failed to pay wages as required in violation of 20 C.F.R. § 655.731. See 20 C.F.R. § 655.805(a)(2).

The violation includes failure to pay the required wage rate for productive and nonproductive time.

. . .

**VIOLATION:** HCL America, Inc. failed to specify accurately on the LCA in violation of 20 C.F.R. § 655.730 and § 655.731. See 20 C.F.R. § 655.805(a)(6).

The violation includes inaccurately stating the H-1B nonimmigrant's occupation.

. . .

**VIOLATION:** HCL America, Inc. failed to comply with the provisions of subpart H or I in violation of 20 C.F.R. § 655.730. See 20 C.F.R. § 655.805(a)(16).

The violation includes inaccurately stating the prevailing wage rate.

Determination at 3. Employer paid back wages in the amount of \$8,999.45 to Manoharan for the first violation. *Id.*

On September 13, 2018, Manoharan filed a request for hearing ("Request for Hearing" or "Hr'g Req.") and is proceeding *pro se*. Manoharan requests a hearing for two claims: First, Manoharan alleges that Administrator assessed the wrong amount of back wages owed to him by Employer for the first violation in the Determination. Hr'g Req. at 2. Second, Manoharan alleges that Employer retaliated against him, but Administrator neither investigated nor made a determination on this claim despite Manoharan's complaint. *Id.* at 2.

On February 28, 2019, I issued an Order to Show Cause directing the parties to explain whether Manoharan's back wages claim should be held in abeyance for Administrator to indicate whether it will prosecute the claim; the order also asked the parties to explain whether Manoharan's retaliation

claim should be dismissed for lack of jurisdiction. The Order to Show Cause further stated there was no indication from Manoharan that the Request for Hearing was sent to Administrator as required by 20 C.F.R. § 655.820(f).

On February 28, 2019, Manoharan filed his response to the Order to Show Cause ("Manoharan Response" or "Manoharan Resp."). On March 8, 2019, Employer replied to the Manoharan Response ("Employer's Reply"). On March 15, 2019, Manoharan filed a sur-reply to the Employer's Reply ("Manoharan's Sur-reply").

## **DISCUSSION**

The relevant regulations prescribe which parties can request a hearing and when:

(b) Interested parties<sup>[2]</sup> may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator *determines, after investigation*, that there is no basis for a finding that an employer has committed violation(s). In such a proceeding, the party requesting the hearing shall be the prosecuting party and the employer shall be the respondent; the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.

(2) The employer or any other interested party may request a hearing where the Administrator *determines, after investigation*, that the employer has committed violation(s). In such a proceeding, the *Administrator shall be the prosecuting party* and the employer shall be the respondent.

§ 655.820 (emphases added). The regulations also provide in part that "[n]o hearing or appeal pursuant to this subpart shall be available where Administrator determines that an investigation on a complaint is not warranted." § 655.806(a)(2).

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<sup>2</sup> "Interested party" is defined as "a person or entity who or which may be affected by the actions of an H-1B employer or by the outcome of a particular investigation and includes any person, organization, or entity who or which has notified the Department of his/her/its interest or concern in the Administrator's determination." § 655.715.

Under § 655.820(b), Manoharan potentially qualifies as a complainant and interested party depending on the procedural posture. Manoharan qualifies as a complainant because he complained to Administrator to investigate Employer. He also qualifies as an interested party because he is a person affected by the outcome of Administrator's investigation, both as a potential recipient of relief (e.g., back wages) and as an employee of Employer. But, these designations alone do not establish jurisdiction or Manoharan's ability to prosecute these claims, which need closer examination.

#### **A. Back Wages Claim – Claim Prosecution**

For the back wages claim, § 655.820(b)(2) applies because Administrator found that Employer committed a violation in the determination. Thus, Manoharan will only be considered an interested party—not a complainant—because only interested parties and employers may request a hearing under § 655.820(b)(2).

The Manoharan Response states that the Request for Hearing was sent to Administrator and provides an email confirming receipt by Administrator's office. Manoharan Resp. at 1. Manoharan further claims "it is clear that Administrator was made aware of Request for Hearing in timely manner and they choose not to prosecute." *Id.*

Employer responds by arguing that an interested party may request a hearing to review an Administrator determination under § 655.820(b)(2) but is unable to prosecute the claim. Employer Reply at 5. The prosecution power lies with Administrator when Administrator finds violations in its determination. *Id.*

Manoharan replies by stating Administrator should be on notice about the Request for Hearing, has not communicated an intent to prosecute the claim, and must prosecute a claim once a request for hearing is filed. Manoharan Sur-reply at 1. Manoharan asserts that Administrator may not decline to prosecute, and an interested party may prosecute the claim in Administrator's practical absence. *Id.* Manoharan then cites a case<sup>3</sup> where an interested party prosecuted a claim without Administrator. *Id.*

The language of § 655.820(b)(2) gives Administrator the exclusive power to prosecute but does not compel Administrator to do so. First, the regulatory language precludes any party besides Administrator (i.e. an

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<sup>3</sup> Huang v. Ultimo Software Sols. Inc., OALJ No. 2008-LCA-00011 (U.S. Dept. of Labor Dec. 17, 2008).

interested party) from prosecuting a claim pursuant to § 655.820(b)(2). The first sentence of § 655.820(b)(2) identifies interested parties and employers as the two entities that may request a hearing. The second sentence only identifies Administrator and employers as the prosecuting and responding parties. § 655.820(b)(2). The inclusion of an interested party in the first sentence and omission from the second sentence signals that an interested party may request a hearing but may not prosecute the claim. Also, the use of the definite article “the” in “Administrator shall be *the* prosecuting party” indicates exclusivity; had the indefinite article “a” preceded the phrase “prosecuting party,” that would indicate Administrator is one of potentially other prosecuting parties. The title of § 655.820 and introductory sentence of § 655.820(b) describe requesting a hearing but not prosecuting a claim. That structure establishes a baseline of who may request a hearing, requiring additional language to enable a party to prosecute or respond to a claim.

This interpretation of § 655.820(b)(2) is strengthened by the previous paragraph, § 655.820(b)(1), which permits the complainant or employer to prosecute the claim and allows Administrator to intervene or appear as *amicus curiae* when Administrator finds no violation at the lower level. Allowing a party to request a hearing but not prosecute is consistent with the general regulatory structure. Because Administrator would unlikely request a hearing to review its own determination, allowing the employer or interested party to request a hearing logically follows, even where Administrator would then prosecute the claim before the Office of Administrator Law Judges. Exclusively allowing Administrator to prosecute claims under § 655.820(b)(2) is also consistent with Administrator being the sole prosecuting party at the lower level, §§ 655.800–.815, and the requirement that interested parties send copies of a request for hearing to Administrator. § 655.820(f).

Second, the choice of language “Administrator shall be the prosecuting party” mandates that Administrator take the party designation of prosecuting party; however, it does not use language that compels action, *e.g.*, “Administrator shall prosecute.” The prosecuting party designation gives Administrator the power to prosecute a claim, but no language in the relevant subpart suggests Administrator is compelled to prosecute any claims. Further, inaction by Administrator will not permit an interested party to become the prosecuting party because Administrator has the exclusive power to prosecute under § 655.820(b)(2), and no other provision in part 655, subparts H or I indicates any permissible shift or delegation of prosecution power. The case Manoharan cites, *Huang v. Ultimo Software Sols. Inc.*, OALJ No. 2008-LCA-00011, did permit an interested party to prosecute a back wages claim despite Administrator finding a violation at the

lower level. But, other Administrative Law Judge decisions are not binding precedent, and this issue of whether an interested party may prosecute a claim under § 655.820(b)(2) has not been resolved by the Administrative Review Board or other applicable court of appeal. Also, the court in *Huang* did not explain why it permitted the interested party to prosecute under § 655.820(b)(2); it appears that issue was never raised. OALJ No. 2008-LCA-00011. Its persuasive value is minimal and does not control this case.

Thus, under § 655.820(b)(2), Manoharan may request a hearing for the back wages claim but may not prosecute it because Administrator is the only party that may do so. Similarly, Administrator is not compelled to prosecute this claim, and its inaction will not cause the prosecution power to shift to Manoharan.

While Manoharan indicates he put Administrator on notice of his Request for Hearing, this claim should still be held in abeyance to give Administrator time to respond. An order requiring a response will likely yield a clear written decision of Administrator's intent. To date, Administrator has not communicated whether it will prosecute this claim. If Administrator chooses not to prosecute this claim, it will be dismissed for failure to prosecute.

## **B. Retaliation Claim – Jurisdiction**

Manoharan argues that the retaliation claim is not a separate case and is related to the back wages claim. Manoharan Resp. at 2. Further, Manoharan indicates that Administrator did not respond to his request for the retaliation claim to be investigated within the ten days required by § 655.806(a)(2). *Id.*

Employer responds with case law indicating that Administrator's decision not to investigate is nonreviewable. Employer Reply at 6. Administrator Law Judges may only review the claims on which Administrator makes determinations, and there was no determination or mention made in regards to a retaliation in this case. *Id.* Employer argues that the retaliation claim being related to the back wages claim is not sufficient to establish jurisdiction. *Id.* at 7.

Manoharan replies, claiming that he timely submitted all the proper documents to Administrator and that the omission of this claim from the Determination was an error. Manoharan Sur-reply at 2. Manoharan apparently included the retaliation claim in the Request for Hearing to uncover why Administrator did not make a determination on his retaliation complaint. *See id.* at 2 ("It is not admittance, instead an Appeal, seeking answer to know why this claim went silent.").

Section 655.820(b) only permits a request for hearing “after investigation” and determination by Administrator, regardless of the outcome. The regulations also make clear that requests for hearing are not permitted when Administrator decides not to investigate a complaint. § 655.806(a)(2). Administrator has “broad authority to investigate and determine whether the employer has violated any of those provisions,” and an investigation and determination are prerequisites for a request for hearing. *Gupta v. Headstrong, Inc.*, ARB Nos. 11-605, 11-008, OALJ No. 2011-LCA-00038, at 6, 8 (ARB June 29, 2012).

Manoharan is incorrect that the retaliation claim arising from similar circumstances as the back wages claim is sufficient to make the retaliation claim ripe for a request for hearing. Under the relevant regulations, claims must be investigated by Administrator who must also issue a determination before a proper party may request a hearing. Here, Administrator neither investigated nor issued a determination for a retaliation claim, which is factually distinct from the back wages claim. Similarly, a request for hearing is not proper to review Administrator’s failure to adhere to the § 655.806(a)(2) ten-day investigation decision deadline because that alleged failure is not a “determin[ation], [made] after investigation” as required by § 655.820(b).

Thus, the undersigned does not have jurisdiction over Manoharan’s retaliation claim for lack of an investigation and determination by Administrator, and the claim must be dismissed.

### **ORDER**

In light of the foregoing, it is **ORDERED** that

1. Manoharan’s back wages claim is held in **ABEYANCE** for 60 days.
2. Administrator is **ORDERED** to respond with its decision whether it will prosecute this claim within the 60 days. Further, I direct docketing to send a copy of this Order to Administrator.
3. Manoharan’s retaliation claim is **DISMISSED**.

**SO ORDERED.**

**WILLIAM S. COLWELL**

Associate Chief Administrative Law Judge

Washington, D.C.  
WSC/aje