



Issue Date: 24 April 2013

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IN THE MATTER OF:)	2011-MSP-00008
)	
HART PRODUCE COMPANY, INC.)	
and JERRY BRANDEL,)	
an individual,)	
)	
Respondents.)	

Appearances:

For Plaintiff: Linda J. Ringstad, Esquire
For Respondents: Jerry Brandel, *Pro se*, Lay representative
Before: Administrative Law Judge Christine L. Kirby

Hearing Date: September 20, 2012

DECISION AND ORDER

This case arises under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq., (the “Act”) and implementing regulations at 29 C.F.R. (“Regulations”) Part 500. The purpose of the Act is to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.

Procedural History

On September 20, 2010, the District Director of the US Department of Labor, Wage and Hour Division notified Respondents that an investigation disclosed that they had committed violations of the Act and a civil money penalty in the amount of \$1250.00 was being assessed against them.

The five specific violations cited were:¹

§1910.142(d)(2) – Toilet rooms were not adequately ventilated and/or did not have a 6-foot square opening to the outside.

§1910.142(d)(10) - Toilets were in unsanitary condition.

¹ All violations refer to 29 U.S.C. § 1801 *et seq.*.

§1910.14(h)(1) - Refuse containers that were insect and rodent-proof were not provided.

§1910.142(i)² - Kitchen was not sanitary.

§1910.142(j) - There was an infestation by and harborage of insects and/or pests.

On October 20, 2010, Respondents filed a timely exception to the assessment with Plaintiff. Pursuant to the filing of the exception, on July 28, 2011, Plaintiff filed an *Order of Reference* with the Office of Administrative Law Judges (“OALJ”).

On July 28, 2011, the case was transmitted to the OALJ for adjudication. The OALJ issued a notice of docketing on August 10, 2011. Therein, Respondents were to file a *Statement of Intent to Continue Opposition to the Secretary’s Determination* within thirty days. On September 13, 2011, Respondents filed the *Statement*. Upon the filing of the *Statement* by Respondents, the parties were to exchange and file *Prehearing Exchange* information. On October 13, 2011, Plaintiff filed its *Prehearing Exchange* information. Respondents did not file its *Prehearing Exchange* information in a timely manner. Therefore, on November 10, 2011, Administrative Law Judge Purcell issued an *Order to Show Cause*, ordering Respondents to show cause why a default judgment should not be entered against them. Respondents did not comply with the *Order to Show Cause*. Therefore, on December 22, 2011, ALJ Purcell issued a *Decision and Order* ordering that a default judgment be entered against Respondents, Respondents pay a civil penalty in the amount of \$1250.00 for violations of the Act, and Respondent's request for hearing be dismissed.

On December 29, 2011, Respondent, Jerry Brandel, contacted OALJ indicating that he had filed *Prehearing Exchange* information, but erroneously failed to send a copy to OALJ. On January 3, 2012, ALJ Purcell rescinded his December 22, 2011, *Decision and Order* awarding a default judgment against Respondents and returned the case to the docketing section for prompt assignment and scheduling of a hearing.

The case was subsequently assigned to the undersigned judge for adjudication. On January 23, 2012, I issued a *Notice of Hearing and Prehearing Order* scheduling the case for a formal hearing on May 17, 2012. On May 9, 2012, I issued a *Notice of Hearing* rescheduling the formal hearing for September 20-21, 2012. On August 17, 2012, Plaintiff filed *Plaintiff’s Motion to Deem Requests for Admission Admitted*. On August 28, 2012, Respondent, Jerry Brandel, filed a response to Plaintiff's motion. In a telephonic conference with the parties on September 5, 2012, I denied the motion.

On September 20, 2012, I conducted a formal hearing in Chicago, Illinois. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. part 18. At the hearing, testimony was provided by the following witnesses: Amanda Joe Enrico, Jennifer Nichole Stewart, Mary Kathryn O’Rourke, and Jerry Brandel. At the hearing, I admitted Plaintiff’s Exhibits (“PX”) 1 through 14. I granted the parties 60 days

² At the hearing, this was corrected to “§ 1910.142(b)(9).”

after receipt of the transcript to submit closing briefs. On January 31, 2013, I granted an extension for the submission of closing briefs. Plaintiff and Respondents filed closing briefs on March 7, 2013. In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits, the testimony at hearing, and the arguments of the parties.

Issues

The issues in this claim are:

1. Whether Respondents committed the five safety and health violations of the Act and the Regulations as set forth above;
2. If the violations were committed, whether they constitute “serious” violations and whether the assessed \$250.00 penalty for each violation is appropriate.

Contentions of the Parties

Plaintiff asserts that Respondents committed each of the five safety and health violations described above. It asserts that the violations were serious because they had the potential for danger and for seriously affecting the safety and/or health of the occupants. It asserts that it could have assessed a civil money penalty of not more than \$1,000.00 for each violation, and that its assessment of \$250.00 per violation was reasonable and considered Respondents’ prompt action to remedy the unsafe conditions.

Respondents assert that the Act imposes an impossible standard to meet and would require them to provide janitorial services around the clock. Respondents assert that inspectors unreasonably came to their camp unannounced and without appointment. They assert that they fully cooperated with the inspectors and corrected all the violations identified in a timely manner, within a seven day period. They assert that they should not be held liable for the actions of occupants who did not maintain the premises and that the civil money penalty is unfair.

Hearing Testimony³

Amanda Joe Enrico, Investigator

The witness testified as follows on direct examination. (Tr. 9-39). She is employed as an investigator with the US Department of Labor Wage and Hour Division. She has been an investigator since May of 2009 and has conducted at least thirty investigations under the Act. She was assigned to conduct an investigation of Hart Produce. She was assigned to investigate by the then Assistant District Director, now District Director, Mary O’Rourke. She was the lead investigator and was assisted by another investigator, Jennifer Stewart.

³ The summaries of testimony are not intended to be a verbatim transcript but merely to highlight relevant portions of each witness’ testimony

Initially, she did some background research on the company, planned out a time to visit the company, and corresponded with the State Agricultural Inspector. The nature of the investigation was a housing inspection. On August 10, 2010, she visited the [Hart Produce] labor camps, accompanied by Jennifer Stewart and Mark Stanfield, an inspector for the Michigan Department of Agriculture. Mr. Stanfield accompanied her to conduct a joint inspection of the housing camp, because they had received a referral from the State agency alleging violations under the Act.

They arrived at the camp in the late afternoon. At the camp, they met Arthur Brandel, the son of Jerry Brandel. They identified themselves to Mr. Brandel and explained the investigation process. He identified himself as the person who helps to repair and control the housing units. He was there to represent the Respondents. Mr. Stanfield had called over to the farm prior to their arrival to notify Respondents that he would be conducting an investigation. When they arrived at the camp, Arthur Brandel was already there. He agreed to go through the labor camp inspection with them. There were three buildings, each partitioned into four living units. There was a dumpster in front. The structures had cement foundations with wood on the outside. Mr. Brandel estimated that approximately 30 workers were living there and had been at the camp for two days.

They started the inspection with unit one. They inspected all of the units except units nine and ten because the residents in those units did not want them to enter. Shortly after they began the housing inspection, Jerry Brandel arrived. He was upset, questioned their authority to be there, raised his voice, and asked why the government had the authority to be on his property. She and Ms. Stewart identified themselves and explained the investigation process to him. She explained their authority to be there and asked Jerry Brandel to be present during the inspection. However he did not want to be present during the inspection, and after the conversation, he drove away. After he left, they continued to conduct the inspection with Mark Stanfield, Jennifer Stewart, herself, and Arthur Brandel.

Plaintiff's Exhibit ("PX") 12 contains 4 photographs taken by her on August 10, 2010. The first photograph is a picture of the outside of unit 10 where there is a quarter sized hole opening to the outside, with bees observed outside of that. She saw several bees flying in and out of that area. The second photograph is an opening to an attic area where the roof comes together between units 10 and 12. In that area that was open, there were several bees and at one point in time, Arthur Brandel opened it with a stick and they observed at least four to five bee nests inside the structure. The third photograph shows a hole in the ground about 1.5 feet x 1.5 feet, below unit 10. The fourth photograph shows a hole on the outside of unit 4 which goes into the inside of the unit. There would be cement between the hole shown and the inside of the unit.

The conditions depicted in PX 12 are violations of §1910.142(j) which requires effective measures be taken to prevent the infestation and harborage of insects and rodents. She recommended a classification for this violation of "serious" because it left workers vulnerable to the potential for the spread of disease and infections from insects or rodents.

PX 8 contains two photographs taken by her on August 10, 2010. The first photograph shows the ceiling fan in the bathroom of unit one. It was not functional. She observed a large

amount of buildup and a dent in the fan. She also identified a large amount of black mold in the shower area that also indicated the fan was not properly ventilating. The second photograph shows the fan in unit 12. The fan was not working properly. She and Arthur Brandel tried to turn it on and it made a strange noise. There was a large amount of buildup. Arthur Brandel admitted that the fan was not working properly and said he would get it fixed.

The conditions depicted in PX 8 are violations of §1910.142(d)(2) which requires toilet facilities to have at least a 6 square-foot opening to the outside and/or adequate ventilation. There were also no windows in the areas or other vents that were working. She recommended a classification of “serious” for this violation because workers were exposed to bathing and using toilet facilities in units that were not equipped with adequate ventilation devices.

PX 9 contains four photographs taken by her on August 10, 2010. The first photograph shows the toilet area of the bathroom of unit 5 where there was mold on the wall surrounding the toilet. The second photograph is the shower facility in unit 5 where she observed mold from the floor to the ceiling. There were no other toilets or showers in unit 5. The third photograph is the shower in unit one which shows mold on each of the shower walls extending from the floor to the ceiling. There were no other showers in this unit. The fourth photograph shows the shower unit of unit 3 where she observed mold from the floor to ceiling on all of the walls.

The conditions depicted in PX 9 are violations of §1910.142(d)(10) which requires toilet facilities be maintained in a clean and sanitary condition and be cleaned at least once daily. The large amounts of mold in each of the units indicated that these units were not maintained in a clean and sanitary condition and were not cleaned at least once daily. She recommended a classification of “serious” for this violation because workers living in these units would be vulnerable while bathing and using the toilet facilities and would be exposed to mold that could lead to the spread of disease.

PX 11 contains five photographs taken by her on August 10, 2010. The first photograph shows the kitchen area of unit 5. She observed the left knob of the stove was not working and there was a high amount of black soot on the stove and below it and on the counter surrounding it. There were no other cooking appliances available in the kitchen. The second photograph shows the stove of unit 8 where she observed a large amount of black soot buildup. There were no other stoves available. The third photograph shows the stove of unit 8. The fourth photograph shows the stove in unit 7. There was an additional stove in unit 7 that also had a large amount of buildup of black soot. The fifth photograph shows the only sink available in unit 5. The sink was filled with mold and was black on the bottom and on its walls.

The conditions depicted in PX 11 are violations of §1910.142(b)(9) which requires that kitchen facilities for storing and preparing food be maintained in a clean and sanitary condition. She recommended a classification of “serious” for this violation because the large amount of black soot buildup in each of these units could cause the release of carcinogens in the air, as well as pose a fire hazard for residents cooking in those facilities. The sink in unit 5 left workers in that facility unable to wash their dishes or silverware in clean and sanitary conditions.

PX 10 contains four photographs taken by her on August 10, 2010. The first photograph shows the kitchen area of unit 3. She observed that there was no trash container provided that would be insect or rodent proof. Arthur Brandel explained that he did not want to provide such containers because workers would steal them. The trash containers depicted in the first photograph came from the workers but had no lids. The second photograph shows the kitchen area of unit one. It did not contain any refuse containers. The workers used the table as a refuse container. The third photograph shows the living quarters of unit 8 and shows a trash container with no lid. There were no other refuse containers in the room. The fourth photograph shows the kitchen area of unit 6. The only refuse container was an open bag.

The conditions depicted in PX 10 are violations of §1910.142(h)(1) which requires that refuse containers be rodent proof, not open to the outside, and be provided for the workers with at least one for every unit. She recommended a classification of “serious” for this violation because it could lead to the spread of disease and the entrance of insects or rodents into the containers.

PX 7 contains two pages with her handwriting. She took this interview of Arthur Brandel throughout the course of the inspection. The second page has her signature as well as the signatures of Jennifer Stewart and Arthur Brandel. Mr. Brandel had an opportunity to review the statement for accuracy.

PX 5 contains two pages and is the Department of Energy's Labor and Economic Growth, corporation filings for Jerry Brandel and Hart Produce Company. She obtained this document from the state website as part of her research to discover the person who owns and controls the housing facilities. Also, Arthur Brandel explained that his father, Jerry Brandel, owned the camps and he worked for his father. Arthur Brandel stated that he took care of the camps as well as a mechanic that works for them. Arthur Brandel explained that the workers who lived in the camp had arrived a couple days prior to the inspection and were working in migrant agricultural work for Hart produce, harvesting cucumbers. After the inspection, she scheduled a reinspection of the camp for August 23, 2010.

During the reinspection she was accompanied by Jennifer Stewart. They found that each of the issues identified previously had been corrected.

The witness testified as follows on cross-examination. (Tr. 39-53). With regard to the third photograph in PX 12, she observed a hole that was open to the outside and going under the unit. The floors in that building are cement. It is possible that in the attic area of units 10, 11, and 12 that was infested with bees, that the bees could potentially affect the unit, the workers inside, and workers walking around outside or opening their doors close to that area of the camp. However she did not see any bees inside the rooms.

With regard to page 5 of PX 11 which is a photograph depicting a kitchen, she testified that the areas where the workers would be cleaning and storing food were not in a clean and sanitary condition. According to the regulation, the areas where residents would be cleaning, preparing, and storing food, should be maintained in a clean and sanitary condition. The person who owns and controls the housing is responsible for maintaining the camp according to the

regulation. The rooms should be maintained in a clean and sanitary condition. Her office has the authority to inspect camps and conduct housing inspections. They expect that upon inspection, the conditions of the camp will be in accordance with the regulations. During an inspection, she verifies whether or not the camp meets the applicable health and safety standards.

She cannot testify as to the state standards, because she only enforces the federal standards. The federal standards are located on the website of the Department of Labor and on the Internet. They are also published. She has the authority under the law to inspect the camps. At the time of the inspection, they arrived in the late afternoon to inspect the camp. She has the authority to enforce the law and ensure the camp meets the regulations.

With regard to the third photograph of PX 11, at the time of the inspection, Arthur Brandel agreed that there was a large level of soot buildup and in particular, in unit 5, the stove was not working. He agreed to get new stoves. It was her assessment that the soot buildup created a potential fire hazard and could cause the release of carcinogens into the air. It was her observation that a large amount of the buildup was caused over time. There were large levels of soot that posed a fire hazard, and it would not have been caused by workers who had just moved in two days prior. She does not know specifically what caused the soot to be built up on the stoves. Those residents who had moved in two days prior were subjected to conditions they had not caused. She also observed some food particles on the stoves. The whole unit of the stove heats up and that releases carcinogens. This is a condition that is created over time. The new residents did not cause the buildup on the stoves, but were exposed to these conditions when they were preparing and storing their food.

She observed some personal belongings in the units. Arthur Brandel allowed them to go into each of the rooms inspected. All of the units they inspected except one had residents living in them. However she and Arthur Brandel decided to inspect the empty unit, unit 7, as well because he said there would be a potential for workers to be moving in there.

When she returned for the reinspection, the problems she observed had been corrected. Arthur Brandel agreed to correct the issues and he also acknowledged the issues.

Jennifer Nichole Stewart, Investigator

The witness testified as follows on direct examination. (Tr. 53-60). She is employed by the US Department of Labor, Wage and Hour Division as an investigator. She has been an investigator since May of 2009. She has conducted approximately 30 investigations. She took part in the investigation of Hart Produce. When they arrived at the camp, they were met by Arthur Brandel who explained he was the son of Jerry Brandel, and that he was operating the housing in conjunction with his father and maintaining it. Mr. Brandel estimated that there were 30 to 35 residents at the camp. At this point in the testimony, Ms. Stewart was beginning to testify about the photographs taken by Ms. Enrico on August 10, 2010, and previously testified to by Ms. Enrico. Respondent, Jerry Brandel, agreed that the photographs were accurate representations of conditions on August 10, 2010. Therefore, he agreed that there was no need for this witness to testify regarding each photograph, previously described.

Mary Kathryn O'Rourke, District Director

The witness testified as follows on direct examination. (Tr. 60-70). She is the District Director at the US Department of Labor, Wage and Hour Division in Grand Rapids, Michigan. On August 10, 2010, she was the Assistant District Director and her duties were to supervise the work of investigators, assign work, and evaluate it. She supervised Amanda Enrico and Jennifer Stewart in their investigation of Hart Produce.

She concurred with their classification of the violations as serious. Violations are classified as aggravated, serious, or marginal. Aggravated violations are those that can cause immediate, serious harm to someone. Serious violations have the potential to impact the health or safety of the individuals. Marginal violations are procedural violations that do not have any impact on the health and safety of the workers. Under the Act, the maximum penalty that Wage and Hour can assess for a violation is \$1000.00. The maximum penalty could be assessed for a serious violation. To determine the appropriate penalty, she evaluates all of the information obtained during the investigation and its potential impact on the health and safety of the worker. She considers factors such as history of previous violations, number of workers affected, the explanation of the person responsible for the violations, and the person's attitude towards future compliance.

PX 3 is a civil money penalty computation summary sheet. Marginal violations can be listed, but there would be no civil money penalty associated with such violations. The penalty would be higher if a violation were serious, but no steps had been taken to correct it. The exhibit shows that a \$250.00 civil money penalty was assessed for each of the serious violations in this case. She determined that a penalty should be assessed based on her evaluation of the circumstances and the evidence. She took into consideration that the Respondents had explained that it was a busy time of the year, so they were too busy to maintain the camp and that the workers themselves were responsible for the violation if, for example, a trash receptacle were provided, it was assumed that the workers would take care of it.

PX 1 is a civil money penalty assessment letter signed by her. Its purpose is to provide written notification of the violations found during the investigation. The Wage and Hour Division takes part in outreach programs each year and provides information to growers to let them know what types of laws affect them and what they need to know.

The witness testified as follows on cross-examination. (Tr. 70-82). The civil money penalty assessment letter serves as a reminder of the violations that were found during the investigation. She was aware at the time the letter was written, that the violations had been corrected. Her department does unannounced as well as announced inspections. The statute gives them the authority to enter and inspect premises to determine compliance without prior notice. Their investigation was administrative rather than criminal in nature. All agricultural employers who hire, recruit, and employ migrant and seasonal agricultural workers are covered under the Act. The law applies to people who provide housing to migrant agricultural workers unless they provide such housing to those workers on exactly the same basis as they provide it to the general public.

Jerry Brandel, Respondent

The witness gave the following narrative statement. (Tr. 82). The evidence that has been collected is good evidence and is factual. However the bees that were observed outside of the buildings were not in the rooms themselves. No evidence was presented that they are in the rooms and based on the construction of the buildings they could not come into the rooms. So, with regard to the photograph showing the water faucet outside a building, there is no way that rodents could enter the building through the cement floor. The bee problem that was observed outside the building was corrected.

They had workers start in the first week of May who began occupying the rooms. In the first part of July, they had 8 single men who were drunk, and they told them to leave. The men were drinking every night and had beer cans stacked up outside. When they tried to evict these men, they were told that the men had 30-day renter rights and could not be forced out. So, the people who caused the problem as shown in the pictures could not be forced out. The inspectors showed up two days after these men finally left. They did not receive prior notice that the inspectors were coming. He got a call at 5:30 in the afternoon from the camp stating that inspectors were there. When he arrived, they were in room number one. He was upset that they were in a man's room who was not present. His son arrived around five minutes later. He left his son in charge to accompany the inspectors.

He agrees that the residents who had only been there for two days did not cause the conditions that were observed in the sink and the buildup on the stove. However, he wants to note that there were not problems in every room and that all of the problems were corrected. He has no quarrel with the law which is designed to protect people, but believes that the violations were caused by the residents and not Respondents.

He does not believe that he should be expected to regulate the camp twenty-four hours a day. No housing provider can be in compliance twenty-four hours a day, seven days a week. It is impossible. Some of the residents are not neat and clean. He spent \$50,000.00 ten years ago remodeling all of the facilities and doing everything to comply with the state laws. They have not had a federal inspection of the camp in 15 to 20 years. Ten days prior to the inspection, the state inspectors had been to the camp and had seen all of the debris from the prior residents. They cleaned that up and complied with the law.

He never had any warning that the inspectors were coming. They came during the busiest time of the season. He does not believe that is right. He thinks the inspectors should have to give prior notice. He won a case in 1982 involving the issues of migrant labor, child labor, and independent contractors. He does not believe it is the housing provider's fault if workers do not maintain the premises, and he cannot be expected to provide janitorial service every day. He does not think that was the intent of the law.

The state inspectors come in twice a year. They provide prior notice of inspections. He has no quarrel with that. He does not believe there are any major violations here that cannot be corrected by talking to people. The penalty of \$1250.00 just does not make any sense to him because the violations could be corrected very easily and were corrected. He complied promptly

within five to six days. When you are running a labor camp, if someone does not tell you about a problem, you have no idea what is going on in that room, because the residents own the room and lock the doors. If the rooms are dirty, he has no control over that. Yet, he is subject to inspections any time the inspectors want to come. No farmer can keep up with that. Any day of the week, you can be out of compliance, because you cannot control what people are going to do in the rooms. If no one complains about them, you have no knowledge of the problem. He believes that he is being victimized by the system and that to be fined after he had cooperated and corrected everything does not make sense. It amounts to cruel and unusual punishment. He believes the inspectors have a job to do, but are going about it in the wrong way.

Documentary Exhibits

Plaintiff submitted PX 1-14, which I have examined *in toto*, and are part of the record of proceedings. Respondents did not submit any documentary exhibits.

Credibility

I find that the testimony of the witnesses was credible and consistent with the evidence presented. Respondent, Jerry Brandel, was forthcoming and conceded that the conditions demonstrated in the photographs were an accurate depiction of the labor camp on the date of the August 10, 2010, inspection.

Discussion

This case arises under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq., (the “Act”) and implementing regulations at 29 C.F.R. (“Regulations”) Part 500. Section 203(a) of the Act requires “each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for insuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing.” 29 U.S.C. § 1823(a). Substantive safety and health standards include fire prevention, structurally sound building construction and defective maintenance and reasonable protection of occupants from insects and rodents. 29 C.F.R. § 500.133. The Act is a remedial statute and should be construed broadly to effect its humanitarian purpose. *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993).

The standards promulgated by the Occupational Safety and Health Administration (“OSHA”) found at 29 C.F.R. § 1910.142 applied to labor camps under construction after March 4, 1980, and are enforceable under the Act. 29 C.F.R. § 500.132. Section 512(a) of the Act authorizes the Secretary to investigate and inspect housing to determine compliance with the Act. 29 U.S.C. § 1862(a). I find that the Act and promulgating regulations are applicable to this matter.

It is apparent from Respondent, Jerry Brandel’s, statements at the formal hearing and in his post-hearing brief that he concedes that the conditions depicted in photographs taken by Investigator, Amanda Joe Enrico, on August 10, 2010, were accurate. At the hearing, he praised the Department of Labor inspectors and attorney and stated that the evidence collected was very

good evidence and factual. He does not dispute that these conditions amounted to violations under the Act. I find after my independent review of all of the evidence presented, that the five violations identified by the inspectors on August 10, 2010, did in fact exist and that the Respondents were responsible to maintain the premises in question in a manner that complies with substantive Federal and State safety and health standards and failed to do so. I specifically find with regard to the violation of § 1910.142(j) that the evidence established only that there was an infestation of bees, but not of wasps or rodents. Nonetheless, the infestation of bees constituted a violation. I also find that the violations were correctly categorized as “serious” in that they had the potential to impact the health or safety of the workers who occupied those facilities.

The issues Respondents are disputing are the fairness of the Act and the imposition of a \$1250.00 civil money penalty. Specifically, Respondents find it unfair that inspectors can conduct unannounced inspections and they assert that this requires them to provide around-the-clock janitorial service to maintain the premises. They assert that they cannot be responsible for residents who do not take care of the living facilities provided to them. They assert that the conditions depicted in the photographs presented by Plaintiff were caused by occupants over whom they had no control, and that they were unaware of the unsanitary and potentially dangerous conditions.

To the extent that Respondents are challenging the validity or constitutionality of the Act, it is beyond my purview to make a ruling in this regard. However, Respondents may preserve this issue for appellate purposes. I note, however that the unsanitary and potentially dangerous conditions presented in the photographic and testimonial evidence occurred over a long period of time. The evidence establishes, and Respondents admit, that the residents who were occupying the premises at the time of the inspection had only been there for two days and could not have possibly caused the conditions that were observed, e.g., mold from ceiling to floor in the showers, built up soot on the stoves, mold in the sink, missing trash receptacles, etc.

Other conditions such as insect infestation cannot be attributed to the residents. These facts weaken Respondents’ argument that they are being victimized because they could not be expected to provide janitorial services around-the-clock. It appears from the conditions presented, that janitorial services, in fact, had not been provided for quite some period of time, and that the facilities had not been inspected for pest infestation.

Furthermore, although Respondents may, in fact, have had prior residents who were problematic, they did nothing to ensure that the premises were up to standards after these problematic residents departed and prior to the new residents moving in. Given the problems that Mr. Brandel credibly described with the prior residents, it is clear that Respondents were on notice that the facilities were not up to standards and had not been maintained by the prior residents. Thus, Respondents’ argument that they were unaware of problems, lacks persuasiveness.

Civil Money Penalty

Having found that Respondents are responsible for five violations of the Act identified by the inspectors on August 10, 2010, it must be determined whether the violations warrant imposition of a \$1,250.00 civil money penalty. 29 C.F.R. § 500.262(c).⁴

An analysis of whether a civil money penalty is appropriately assessed must include consideration of the implementing regulating factors at 29 C.F.R. § 500.143:

- (1) Previous history of violation or violations of this Act and the Farm Labor Contractor Registration Act;
- (2) The number of workers affected by the violation or violations;
- (3) The gravity of the violation or violations;
- (4) Efforts made in good faith to comply with the Act;
- (5) Explanation of person charged with the violation or violations;
- (6) Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the Act;
- (7) The extent to which the violator achieved a financial gain due to the violation or the potential financial loss or potential injury to the workers.

Applying the factors to this case, I note that Respondents did not have a history of violations of this Act. Respondent estimated there were approximately 30 to 35 workers in the camp. All of the units, except for interiors of units 9 and 10, were inspected. Violations were found inside seven of the units, and bees were found outside an additional three units. I find that the gravity of the violations is serious because they had the potential to injure the workers who occupied those facilities. Additionally, these problems appear to have developed over a significant period of time, indicating that Respondents had not been properly maintaining their premises for an indeterminate period of time.

Respondents concede that the conditions depicted in the photographs taken by Ms. Enrico were accurate. Respondents also promptly corrected the violations brought to their attention. It does not appear that these violations contributed to the financial gain of Respondents. However, it is unclear if Respondents are committed to future compliance given that they complained of

⁴ 29 C.F.R. § 500.262(c) states:

The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations, and the appropriateness of the remedy or remedies imposed by the Secretary. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

the fairness of the Act and given their statement that they cannot be expected to provide janitorial services around the clock.

Based on a review of the 29 C.F.R. § 500.143 factors, it is apparent that a \$5,000.00 penalty could have been assessed, but only a \$1,250.00 penalty was, in fact, assessed. Based on the testimony of Ms. O'Rourke I find that she properly considered mitigating factors to include that Respondents did not have a history of violations and promptly corrected the violations that were brought to their attention. I also note that PX 3 demonstrates that four additional violations were found, but were classified as marginal, and no penalty was assessed. Therefore, I find the \$1,250.00 penalty to be reasonable.

ORDER

IT IS ORDERED that Hart Produce Company, Inc. and Jerry Brandel pay a civil money penalty of \$1,250.00 to the United States Department of Labor for violations of the Migrant and Seasonal Agricultural Workers' Protection Act.

SO ORDERED.

CHRISTINE L. KIRBY
Administrative Law Judge

Washington, DC