



Issue Date: 19 February 2014

Case No. 2011-TNE-1

In the Matter of:
ADMINISTRATOR WAGE & HOUR DIVISION,
Prosecuting Party,

v.

G. H. DANIELS III & ASSOCIATES,
Respondent.

DECISION AND ORDER

This proceeding arises under the Temporary Nonagricultural Alien Employment (TNE) H-2B provisions of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(15)(H)(ii)(b), and its implementing regulations, which are located at 20 C.F.R. Part 655, Subpart A. A formal hearing was held on July 16, 2013, in Denver, Colorado. The hearing was conducted under the procedures at 20 C.F.R. Section 655.825 and 29 C.F.R. Part 18.¹ The following Decision and Order is based upon the record of that hearing, the testimony of the witnesses, and the exhibits submitted by the parties, both separately and jointly.²

¹ In *Bayou Lawn & Landscape Serv. V. Solis*, No. 3:12-cv-00183-MC-CJK (N.D. Fla. April 26, 2012), the U.S. District Court for the Northern District of Florida preliminarily enjoined the Department of Labor from implementing the 2012 H-2B Final Rule upon the basis that the plaintiffs had a reasonable likelihood of succeeding in their argument that the Department lacked the authority to issue the 2012 H-2B Final Rule and that the rule violated both the Administrative Procedure Act and the Regulatory Flexibility Act. In response, the Department of Labor published Guidance in Fed. Reg. 77, 28765 (May 16, 2012), in which it acknowledged that the preliminary injunction in *Bayou* “calls into doubt the underlying authority of the Department to fulfill its responsibilities under the Immigration and Nationality Act and DHS’s regulations to issue the labor certifications that are a necessary predicate for the admission of H-2B workers.” Consequently, the Department stated its intent to continue to process labor certifications under the 2008 H-2B regulations. At the hearing, the undersigned stated that the present action was being heard under the 2008, not the 2012, regulations. (Tr. 4).

² At the hearing, Administrative Law Judge Exhibits (“ALJX”) 1-17 were admitted, as were the Administrator’s Exhibits (GX 1-23). Respondent’s Exhibits (RX) 1-2 were admitted. (Tr. 16, 230). Additionally counsel for the Respondent was given post-hearing leave to supplement its Request for Review, which he stated was incomplete as contained in GX 22, as well as to submit the FLSA tolling agreement that was referred to throughout the hearing. (Tr. 12-13, 231). Subsequently, the Respondent submitted eighty-two pages of materials, consisting of Exhibits A-E, with Exhibit A being a complete copy of the Respondent’s Request or Hearing, and Exhibit D being the tolling agreement. In his Post-Hearing Brief, counsel for the Administrator objected to all but Exhibit A on the grounds of relevancy and lack of foundation. (Adm. P-Hg. Bf. at 3-4). While the particular relevancy of some of these documents may be questioned, they are at least sufficiently relevant to the myriad of issues raised at the hearing to justify their inclusion in the record. They are admitted together at Respondent’s Exhibit 3. “Tr.” refers to the transcript of the hearing.

BACKGROUND

Sometime in early 2010, the Respondent, with aid of present counsel, successfully requested certification from the Department of Labor to temporarily employ foreign nationals as seasonal, temporary landscape (H-2B) laborers solely in Eagle County, Colorado. (GX 4). As it turned out, however, the Respondent had a need for the laborers not only to work in Eagle County, but also Summit, Mesa, San Miguel, and Garfield counties. (*Id.*; Tr. 121).

By letter dated February 12, 2010, the Respondent's counsel attempted to remedy this situation by requesting that the DOL Certifying Officer either amend the previous certified application (C-09364-48313) to include the additional counties, or to revoke the previous certification and approve a new ETA-9142 application for certification (C-10047-49358) which included the additional counties. The Certifying Officer responded on February 22, 2010, by notifying the Respondent's counsel of certain deficiencies in the Respondent's new application for certification (C-10047-49358) and requesting further information to cure those deficiencies. (GX 5). The deficiencies, it should be noted, were certainly not such that could be overlooked. For example, the Certifying Officer observed that the Respondent had failed to list the number of hours per week which were required to be worked.

Although the Respondent, through counsel, could have responded to the Certifying Officer's notice of deficiencies and taken advantage of the opportunity to cure the deficient second application, this was not done. (GX 7). Indeed, the Respondent, through counsel, made no effort to cure the deficiencies in the second application. Accordingly, on March 25, 2010, the Certifying Officer notified the Respondent, through its counsel, that its new application for certification (C-10047-49358) was denied due to insufficient information. The Respondent was advised of its appeal rights.

Apparently recognizing that failure to respond to the DOL's request for information did not afford much room to appeal the denial of the second application for certification (C-10047-49358), counsel for the Respondent chose a different course. On April 19, 2010, counsel for the Respondent advised the Board of Alien Labor Appeals that it "respectfully withdraws its request to certify C-10047-49358..." (GX 7). Having withdrawn its second application, counsel for the Respondent argued to the Board that the Certifying Officer should have granted its request to amend the first approved application (C-09364-48313) to include the additional counties. (*Id.*). In this regard, counsel for the Respondent challenged the position of the Certifying Officer that the regulatory provisions for amendments to labor-certification applications apply only to pending applications, not to certified applications. (*Id.*; GX 8-Position of the Certifying Officer Before the Board of Alien Labor Certification Appeals).

On April 27, 2010, Associate Chief Administrative Law Judge William Colwell issued the Decision and Order of the Board, which affirmed the denial of labor certification. (GX 9). Judge Colwell determined that the Certifying Officer's position regarding amendments to certified applications was correct. (GX 9). Specifically, Judge Colwell determined that 20 C.F.R. § 655.34(1) and simple logic supported the Certifying Officer's position that any amendments to the application had to occur before test of the labor market for available U.S. workers. As for the second application, Judge Colwell stated that counsel's failure to respond to

the Certifying Officer's request for further information might be sufficient alone to deny the application, but in any case, Judge Colwell determined, the second application failed to offer bona fide job opportunities.

In short, the Respondent, through its present counsel, attempted and failed in its effort to obtain certification for the additional counties. Despite its failure, however, it is undisputed that the Respondent employed aliens in temporary labor in the additional counties for which it had tried and failed to receive certification. The Respondent's president, G.H. Daniels, III, testified at the hearing that the decision to do so was a business decision, made with full awareness that the legal process to either amend the first application to include the additional counties, or to obtain a new certification for the additional counties, had resulted in failure. (Tr. 212-213). At the hearing, counsel for the Respondent argued that notwithstanding its knowing violation of the terms of its original approved application, which was limited only to Eagle County, the Respondent was entitled to the defense of "good faith" since it had at least made an attempt, albeit unsuccessful, to get an application certified for the additional counties. As stated by counsel for the Respondent, the Respondent was aware that the Department of Labor "would take the position that [it] was in violation of the terms of the labor certification as approved." (Tr. 35). Nonetheless, counsel stated that the Respondent believed that if it was ever caught and charged with violations, the Respondent was entitled to a "good faith defense" because the Respondent had "made every effort to comply." (*Id.*).

The Department did, in fact, discover the violations. The process of discovery began when the Wage and Hour Investigator, David Carl Skinner, contacted the Respondent on January 24, 2011, to conduct an investigation under the Fair Labor Standards Act (FLSA). (Tr. 47). Upon learning that the Respondent also utilized the H-2B program, Skinner expanded the investigation to include compliance with that program. (Tr. 50-51). As a consequence of the expanded investigation, by letter dated September 6, 2011, the Respondent was notified that it was found to have both a) committed a willful misrepresentation of material fact on the its first application for labor certification (the one that had been initially approved), and b) substantially failed to meet a condition of the certification.

At the hearing, Skinner explained that the basis of the charge that the Respondent had willfully misrepresented a material fact stemmed from language on the approved application that indicated that overtime was not applicable and that employees would be working a straight schedule from Tuesday through Sunday. (Tr. 54-55). In fact, Skinner testified, his investigation showed that the Respondent knew at the time of the application that overtime was possible and that the main schedule of work would be Monday through Friday with variation, including work on Saturday. (Tr. 54). He testified that his FLSA investigation revealed that the employees worked "a good amount of overtime" amounting to \$77,314.92 due to eighty-seven employees. (Tr. 58). He testified that a review of the records also showed that the schedule of work was Monday through Friday, and that Daniels confirmed at the final conference that the original application should have stated those as the work days, not Tuesday through Sunday. (Tr. 59).

Skinner further explained that the determination that the Respondent substantially failed to comply with a condition of certification was based upon the fact that the Respondent employed alien labor in counties outside of Eagle County. (Tr. 63). He noted that the

Respondent had done a “good job” of documenting where its employees worked, and that these records showed that certain of its H-2B employees worked in counties for which the Respondent had not received certification to employ alien labor. (Tr. 63-66). Skinner also pointed out, in this regard, that as part of the certification process, the Respondent, through its counsel, had signed an attestation that they would not place workers outside of the intended area of employment. (Tr. 63-64; GX 1). Specifically, line 12 of that attestation states:

The employer will not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the Application for Temporary Employment Certification unless the employer has obtained a new temporary labor certification from the Department.

(GX 1).

Assistant District Director Amy DeBisschop testified that FLSA investigations generally are resolved quickly, involving a straightforward calculation of back wages, whereas H-2B investigations tend to be more time consuming. (Tr. 123). She explained, however, that Daniels wished to get both the FLSA and the H-2B matters resolved at the same time to know what his company’s liability would be for both. (*Id.*). She testified that she understood this desire from a business standpoint, but in order to accommodate such a request, Daniels was required to sign an agreement tolling the FLSA investigation. (Tr. 24). She stated that the purpose of the agreement was to toll the FLSA investigation pending resolution of the H-2B investigation in order for the Respondent to have before it both the amount of FLSA back wages and the H-2B civil money penalties at the same time. (Tr. 124).

Finally, however, DeBisschop presented Daniels with an installment plan before the H-2B civil money penalties were determined. DeBisschop testified that to allow installment payments for FLSA back wages was “very unusual.” (Tr. 126). She testified, however, that because she knew that the civil money penalties for the H-2B violations would be significant, and generally needed to be paid with thirty days within receipt of the notification letter absent a separate installment agreement, she decided to offer the Respondent a full year of installment payments to satisfy the FLSA back wages owed. (Tr. 127-128). She testified that she then spoke to the Respondent’s counsel over the telephone after sending him a copy of the proposed FLSA installment agreement. She testified that she specifically asked counsel if she could speak to Daniels directly to make sure that he understood the terms of the installment plan, and was told by counsel that she could. (Tr. 150-151). She testified that when she spoke to Daniels, he agreed to the installment plan and agreed to get started on the FLSA back wages owed “sooner, rather than later, so that when the civil money penalty assessment came, he would be in a better position to pay those.” (Tr. 154). Later, she clarified her testimony, stating that it was not necessarily Daniels’s desire to start the FLSA payments sooner, but it was a “collaborative” determination that going forward with the FLSA installment agreement ahead of the determination of the H-2B civil money penalties was “in the best interest of getting this case resolved.” (Tr. 155). She further explained that the Department had taken the “extremely unusual step” of waiving the twenty-five percent down payment normally required. (Tr. 155). She stated that the waiver was prompted by the knowledge that the Respondent was facing additional H-2B penalties. (*Id.*).

Daniels testified that when DeBisschop contacted him regarding the installment plan, she told him that she had to have the agreement “approved now” because she was going to lose the opportunity she had negotiated with him, which was to afford the Respondent twelve months of installment payments with no down payment. (Tr. 189). He testified that “as a business man” the installment agreement “sound[ed] like a reasonable thing to do” based on the low interest rate of one percent, as well as the absence of a down payment. (*Id.*). He testified, however, that he was still concerned about the amount of the H-2B civil money penalties, and that when he asked DeBisschop concerning these, she replied that she did not have a “total answer on that” because she was not the one to make the final determination. (*Id.*). He testified that she did not tell him that the civil money penalties would be substantial or significant, or in the range of \$5,000 to \$10,000. (*Id.*). Rather, Daniels testified that DeBisschop indicated that the penalties were “not going to be that bad a deal.” (Tr. 200) However, he testified that she also stated that she could not make any promises. (*Id.*) He stated that DeBisschop was “definitely... ambiguous” about the amount of the penalties. (*Id.*). He indicated that in his own mind, the penalties might “cost a couple of thousand dollars, \$3,000.” (Tr. 199). Later, though, he testified that he “wasn’t really prepared for anything” in terms of a monetary figure for the H-2B penalties. (Tr. 209). He testified that he never went so far as to determine what amount of penalties the company could pay. Ultimately, he stated that he thought the H-2B penalties could be anywhere from \$1,000 to \$3,000. (Tr. 210-211). He stated that he would “have loved to write the check for \$3,000 [so that] we’d all be done with it.” (Tr. 211). He testified that he was never told that an installment agreement may have also been available for payment of the H-2B penalties. (Tr. 215).

Under these circumstances, Daniels testified, he signed the installment agreement “in reservation.” (Tr. 190).

The “Installment Payment Agreement Document” covering the back wages owed as a result of the FLSA investigation was signed on August 31, 2011. (GX 16). Only six days later, on September 6, 2011, DeBisschop signed off on a letter informing the Respondent that the Administrator had determined that H-2B civil money penalties totaling \$25,000 had been assessed against it. (GX 21). Specifically, the Administrator had assessed a civil money penalty in the amount of \$5,000 against the Respondent for willfully misrepresenting a material fact on the labor-certification application. Further, the Respondent was assessed \$20,000 for failing to meet a condition of the application, meaning placing workers outside the area of intended employment.

By letter dated September 20, 2011, the Respondent, through counsel, requested a formal hearing with this Office. (GX22).

Subsequently, on July 6, 2012, the Respondent filed for bankruptcy. According to DeBisschop’s testimony, the Respondent made three or four payments under the FLSA installment agreement and then defaulted. (Tr. 156). According to DeBisschop, there was “an enormous amount of the back wages that are still being owed to the employees,” and consequently each employee would only get a “very small fraction” of the amount of back wages due him. (*Id.*).

ANALYSIS

1. Ancillary Issues

One may have thought many things about this case, but it is doubtful that one could have expected the argument, made by counsel for the Respondent throughout, that the Respondent's decision to go forward and place its H-2B workers in locations for which it had sought and failed to obtain certification was defensible as an act of "good faith." The undersigned is not persuaded that one can knowingly defy the law and yet act in "good faith." Applying counsel for the Respondent's definition of "good faith," no one would be bound by the law—police officers, having been denied a search warrant by a magistrate due to a lack of probable cause, could go ahead and conduct an unlawful warrantless search with impunity because they had at least tried to get a warrant, never mind that it had been denied.

Counsel's "good faith" argument is tied to its misplaced determination to relitigate, or somehow resuscitate, the Respondent's failed attempt to gain certification for the additional counties. According to counsel for the Respondent, the Administrator's decision to impose civil money penalties for the Respondent's decision to employ H-2B workers outside the area of intended employment "is analogous to a flagrant personal foul in basketball for elbowing someone in the head where there is no contact and the player took a dive." (Resp. P.-Hg. Bf. at 11). The metaphor proffered by counsel becomes increasingly elaborate, but the gist is that the DOL called a flagrant foul on the Respondent, when in fact there was no foul. The reason there was no foul, according to counsel, is that the BALCA decision and order affirming the denial of its attempt to obtain certification for the additional counties was "clearly erroneous." In this regard, counsel seems immune to the proposition that the BALCA decision was never appealed further and still stands as the law of the case. Instead, counsel continues to adhere to the view that BALCA decision, which he goes so far as to describe as "unlawful," is subject to collateral attack in these proceedings, and that the undersigned should not only treat it as a nullity, but somehow retroactively grant the certification that was denied by BALCA. Unfortunately for counsel, however, none of this makes any legal sense. The undersigned does not sit in appellate review of BALCA decisions, and even if I did, Judge Colwell's decision is manifestly correct and most decidedly not "unlawful." The undersigned has absolutely no authority to grant or deny labor certifications.

Counsel for the Respondent further argues in his brief, as he has done throughout these proceedings, that the actions of the Administrator are really what should be at issue in this case, not the Respondent's own actions. In this regard, counsel for the Respondent accuses the Department of Labor of engaging in many forms of deliberate misconduct, including misrepresentation, perjury, denial of right to counsel, and denial of due process.

With regard to the right to counsel, counsel for the Respondent alleges that it was denied its right to have counsel present during the "interrogation" of Kristen Nelson, its Controller. Nelson testified that when she was interviewed by Skinner and DeBisschop she was not asked if she wanted to have an attorney present, and would have preferred that one been there. (Tr. 167-168). Later, on cross-examination, she testified that she never asked either Skinner or DeBisschop to defer the interview until the presence of the Respondent's counsel could be

arranged. (Tr. 173). Upon redirect examination, she testified that the reason she did not ask for the Respondent's counsel to be present is that the Respondent's counsel had told her that he had been informed that he could not be there. (Tr. 175). DeBisschop testified in rebuttal, however, that she did not tell the Respondent's counsel that he was not entitled to be present during interviews of management personnel. (Tr. 225). She testified that she had to explain to the Respondent's counsel that he did not represent the non-management employees, and that interviews with non-management employees by investigators were deemed confidential and neither employers nor their attorneys were allowed to be present. (Tr. 225-226). She testified that when she spoke to Nelson a few days later, she, DeBisschop, was "very sensitive" to the issue of having the Respondent's counsel present, and so she made it "very clear" to Nelson that the Respondent's counsel had expressed an interest in being present in the interviews. However, she testified that Nelson had stated that it was "her preference not to wait, but to have the interview while Mr. Pooley was not present." (Tr. 227). As testified to by DeBisschop, "And since [Nelson] felt more comfortable, at that time, talking to us without Mr. Pooley being present, we spoke to her." (*Id.*).

Skinner, who was also present during the interview of Nelson, testified that although the Respondent's counsel asserted the Respondent's right to have an attorney present, the Respondent's counsel then left. (Tr. 100). He then testified that Nelson "specifically...told Amy DeBisschop and I that she did not want [the Respondent's counsel] there." (*Id.*). He testified that both he and DeBisschop conveyed to Nelson that at any time if she felt uncomfortable during the interview, she did not have to answer the question she was being asked. (*Id.*).

According to counsel for the Respondent, both Skinner and DeBisschop brazenly perjured themselves. (Resp. P.-Hg. Bf. at 16). In counsel's view, the perjurious nature of their testimony is demonstrated by an email exchange between himself and Skinner on January 27, 2011. (Resp. Submission of Exhibits, pp. 34-35). This email exchange, however, discusses the confidentiality of interviews with employees in general, not management employees. Furthermore, nothing in these emails impugns the testimony of Skinner and DeBisschop at the hearing. Indeed, the only testimony that is impugned is that of Nelson that she preferred to have the Respondent's counsel present during the interview.

I find no convincing evidence that either Skinner or DeBisschop engaged in perjury. Furthermore, even assuming for argument's sake that there was any validity to the Respondent's argument that Nelson should not have interviewed without the Respondent's counsel present, the question then would be the proper remedy. In this regard, counsel for the Respondent does not seek to have any particular evidence arising out of the interview suppressed. Rather, according to counsel for the Respondent, the appropriate remedy is "to vacate the CMPs and terminate these proceedings because agency compliance with the law is an essential safeguard of due process that would [be] undermined if [the] DOL can violate the law with impunity where suppression would be insufficient to deter the unlawful conduct." (Resp. P. Hg. Bf. at 19).

In short, assuming a violation of the Respondent's right to counsel, counsel for the Respondent is not arguing for the exclusion or suppression of any evidence. Rather, counsel for the Respondent is asking that the whole case against its client be dismissed based upon counsel's absence during an interview that did not lead to any particular evidence damaging to his client.

It bears emphasis that the Respondent does not argue that the Administrator was not entitled to review its records. Nor has the Respondent identified any particular statement or disclosure made by Nelson during the interview with Skinner and DeBisschop which the government is seeking to use against it—the so-called “fruit of the poisonous tree.” Rather, in counsel for the Respondent’s view, the fact that the interview took place at all without him is sufficiently egregious and “unlawful” that the case against his client pales in comparison and warrants its complete dismissal.

Admittedly, under the due process clause of the Fifth Amendment, even evidence otherwise reliable may be excluded from a civil or criminal proceeding, but only where the evidence has been obtained by official government misconduct which is so outrageous and grossly improper as to shock the conscience. *See United States v. Janis*, 428 U.S. 433, 453-460 (1976); *Hoffa v. United States*, 385 U.S. 293, 311 (1966); *United States v. Payner*, 434 F. Supp. 113, 129 and nn. 64 and 65 (N.D. Ohio 1977). Again, even assuming for argument’s sake, and only for argument’s sake, that there was a deprivation of a right to have counsel present during the interview with Nelson, the government did not attempt to make use of any statements Nelson made during the interview, but based its case on records which it otherwise had a right to inspect. There is nothing in such a scenario which would even remotely rise to the standard of governmental misconduct needed to dismiss the case against the Respondent.

The Respondent also argues in its brief that the civil money penalties levied against it “should be dismissed” because the determination letter issued by the Wage and Hour Division was insufficient to put it on notice of the specific alleged violations. In this regard, counsel for the Respondent asserts that the Administrator presented its case based on its trial counsel’s “post hoc rationalizations for the agency action” rather than any reasons articulated by the agency itself. (Resp. P.-Hg. Bf. at 2). Indeed, counsel describes the transcript of the hearing as “two hundred and twenty[-]three pages of post hoc rationalizations by agency counsel that may not be considered because review is limited to the agency record that existed at the time of the September 6, 2011[,] agency action in issuing the WHD Determination.” (*Id.*). Indeed, counsel for the Respondent implies that the Administrator’s trial exhibits should also not be considered because they improperly constitute “an attempt by agency counsel to justify the September 6, 2011[,] agency action after the fact.” (*Id.*).

Unless the undersigned is mistaken, and he sincerely hopes that he is, counsel for the Respondent appears to be making the argument that the undersigned cannot consider the record made at the hearing, including the testimony of witnesses and the exhibits presented by the government. Of course, such an argument elides the fact that it is the Respondent, not the government, which requested the hearing before this Office. Perhaps counsel for the Respondent is asserting that only it should have been allowed to present testimony and exhibits at the hearing. Given the other arguments that have been made, such a position would come as no surprise.

Counsel’s argument that I may not consider the record of the hearing requested by his client is so feckless that I hesitate to dignify it with a response.³ Suffice it to note, I am sure that

³ It is also more than a little ironic that counsel for the Respondent should argue that I not consider the record of the hearing since he did his best to interject himself as an unsworn witness. At one point, the following bizarre

somewhere in the Administrative Procedure Act there is a provision which would make it reversible error for me not to consider the record. And, it should go without saying, but apparently does not, that the testimony provided at the hearing by the Skinner and DeBisschop did not proffer “ad hoc rationalizations” for the agency’s action, but, rather, described the events and deliberations that led to the agency taking the action that it did. The same is true for the testimony of Daniels, who testified why he took the actions he did.

Finally, counsel for the Respondent raised the same issue regarding alleged deficiencies in the determination letter at the hearing. (Tr. 17-21). As counsel for the Administrator pointed out, the determination letter identified the claims, and thereafter if the Respondent was not certain of the facts underlying the claim, there were procedural means to challenge the determination or gain further particulars of the alleged violations, including discovery. As counsel for the Administrator noted, the parties went through discovery and there were no “mysteries” regarding the charges against the Respondent. (Tr. 20). I found this argument persuasive at the hearing, and I find it persuasive now. Given the conferences and discussions that took place between the parties before the determination letter was issued, as well as the discovery and several pretrial conferences before the hearing, I find it extremely difficult to believe that the Respondent was not adequately apprised of the violations which formed the basis of the civil money penalties levied against it.

2. *Collateral Estoppel*

As part of its argument that the Administrator’s conduct, not its own, should be on trial, the Respondent argues that the Administrator “knowingly made false representations” in an effort to get it to sign to the installment agreement to pay the FLSA back wages before knowing exactly what its liability would be on the civil money penalties. According to the Respondent, the Administrator had earlier used false statements regarding the civil money penalties to “trick” the Respondent into signing an agreement which tolled the statute-of-limitations on the FLSA investigation while the H-2B investigation went forward. The Respondent argues that the tolling agreement on the FLSA investigation was signed with the mutual understanding that the Respondent would have before it a determination of its complete outstanding liabilities for both the FLSA violations and the H-2B violations before signing any agreement to pay either. Because this did not happen, the Respondent argues that the Administrator should be collaterally estopped from collecting the H-2B civil money penalties that it eventually did impose.

As previously noted, several days before the civil money penalties were imposed, the Administrator presented the Respondent with an installment agreement to pay the FLSA back wages on unusual terms which offered a waiver of the usual twenty-five percent down payment

exchange took place during his questioning of DeBisschop concerning a conversation they had over whether she could speak with Daniels directly about the FLSA installment agreement.

DeBisschop: And at the end of the conversation I asked if it would be okay if I spoke to your client directly, to make sure he understood. And you said that was fine. And that’s when—
Respondent’s Counsel: “So, after I said, “no,” was there some part about “no,” that you didn’t understand?

(Tr. 151).

and an interest rate of one percent. DeBisschop testified that given its unusually favorable terms, she communicated to Daniels that he needed to either accept or reject the terms “sooner, rather than later,” meaning even before the H-2B penalties were imposed, and that to do so was “in the best interest of getting this case resolved.” (Tr. 154-155). She testified that the waiver of the usual twenty-five percent down payment was in consideration of the fact that the Respondent was facing additional H-2B penalties. (Tr. 155). Daniels’s testimony confirmed the fact that DeBisschop conveyed an urgency in having the FLSA installment agreement signed “now” out of concern that she would lose the opportunity to provide the terms she had negotiated with him. (Tr. 189). He testified that from a business standpoint, the terms of the FLSA installment agreement were attractive, although he still harbored concern about the amount of the H-2B penalties. (*Id.*). He testified when he asked DeBisschop about the still pending H-2B penalties, DeBisschop replied that she did not have a “total answer on that,” but indicated that the penalties were “not going to be that bad.” (*Id.*). Daniels did concede, though, that DeBisschop told him that she could not make any promises as to what the civil money penalties might be. (Tr. 200). DeBisschop, on the other hand, denied ever telling Daniels that the civil money penalties would not be “bad.” (Tr. 223). According to DeBisschop, at the time of the signing of the FLSA installment agreement, she did not know how much the H-2B civil monetary penalties would be. (Tr. 224). She testified that she told him, however, that the civil money penalties would be “significant, because they usually are.” (Tr. 224). She explained that it was not the Administrator’s policy to discuss the amount of the civil money penalties until the final determination, so employers are instead generally referred to the regulations and advised that the maximum penalty was \$10,000 per violation. (*Id.*). Although she had earlier testified that the “base rate” for a penalty is \$5,000 per violation, she testified that it had been communicated through her regional office that this policy of adopting \$5,000 as a “base rate” was not to be disseminated. (Tr. 228).

In his brief, counsel for the Respondent, noting that the civil money penalties were imposed within days after the signing of the FLSA installment agreement, again accused DeBisschop of perjurious testimony and engaging in “shell game ‘good cop, bad cop’” tactics. (Resp. P.-Hg. Bf. at 8). In the Respondent’s view, at the time of the signing of the FLSA installment agreement, DeBisschop had to have known more concerning the amount of the civil money penalties than she let on in her testimony. In any case, the Respondent argues that it was possible for the Administrator to have arranged matters so that Daniels would have known the exact amount of the civil money penalties before he signed the FLSA installment agreement. According to counsel for the Respondent, the Department of Labor “reneged on its assertion that by signing the tolling agreement, [the Respondent] would have resolution of both FLSA and H-2B matters at the same time.” (*Id.*).

In response to this argument, the Administrator argues that no matter how surprised Daniels was at learning of the amount of the H-2B civil money penalties, there is no evidence that he can point to of any affirmative misconduct by DeBisschop or anyone on behalf of the Administrator. (Adm. P.-Hg. Bf. at 17). Indeed, the Administrator argues that if there was any misconduct, it was on behalf of Daniels who acted “unreasonably” by refusing to pay the back wages he owed his employees and instead holding “the wages hostage” until he was certain of the H-2B civil money penalties (*Id.*). In any case, the Administrator notes that DeBisschop offered no promises as to what the civil money penalties would ultimately be, and that Daniels

made a deliberate business decision to sign the FLSA installment agreement ahead of the H-2B penalties without knowing their amount. It is only his surprise, based upon his own subjective beliefs regarding what the penalties might be, which forms the basis of his complaint, the Administrator argues, and such does not create an estoppel against the government.

Certainly it is possible to understand Daniels's view that the timing of the signing of the FLSA installment agreement and the imposition of the civil money penalties, given the matter of only a few days that separated them, could have been arranged differently so that he would have had both in front of him before signing the installment agreement. One could also question the Administrator's decision not to advise employers facing civil money penalties of its policy of using \$5,000 as a "base rate." It seems a bit disingenuous for DeBisschop not to have divulged this figure at some point during her discussion with Daniels. However, the reason the Administrator chooses a policy of non-disclosure is fairly evident, because if it did, then employers assessed a higher penalty would no doubt argue that they had been advised by the Administrator to expect a lower penalty and had relied on such.

In any case, the critical factual point on this issue is that DeBisschop, as acknowledged by Daniels, made no promises to Daniels as to what the civil money penalties might be. Still, Daniels chose to go forward and sign the FLSA agreement to take advantage of its favorable repayment terms. This was his decision to make based upon the information he had at the time. In order to give rise to an estoppel against the government based upon the actions of individual officers and agents, there must be a misrepresentation or some other form of affirmative misconduct. See *Premo v. U.S.*, 599 F.3d 540 (6th Cir. 2010). As stated by the court in *Premo*:

"Estoppel is an equitable doctrine which a court may invoke to avoid injustice in particular cases." *Mich. Express, Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004) (internal quotation marks omitted). The elements of an estoppel claim are: "(1) misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel." *Id.* However, the government "may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). A party attempting to estop the government "bears a very heavy burden." *Fisher v. Peters*, 249 F.3d 433, 444 (6th Cir.2001). At a minimum, Plaintiff must show some "affirmative misconduct" by the government in addition to establishing the other elements of estoppel. *Id.* Affirmative conduct "is more than mere negligence. It is an act by the government that either intentionally or recklessly misleads the claimant." *Michigan Express*, 374 F.3d at 427.

599 F.3d at 547.

Here, Daniels cannot persuasively complain that the Administrator made any false misrepresentation. Even if the original purpose of the FLSA tolling agreement was to have the resolution of the FLSA investigation await the imposition of the H-2B civil money penalties, there is no evidence that anything in the tolling agreement promised that the Administrator would not subsequently come to him and offer, as an alternative proposition, that he sign an

FLSA installment agreement which offered favorable terms but had to be signed before the civil monetary penalties were imposed. As noted, this was Daniels's decision to make, and to live with. He could have chosen not to sign the installment agreement and to have waited out the imposition of the civil money penalties. Instead, he chose to sign it and take advantage of the favorable terms, not knowing what the penalties would be and having received no promises from DeBisschop.

Moreover, even if DeBisschop could have provided him with more information regarding the possible amount of the penalties he was facing, such forbearance does not constitute "affirmative misconduct" on her part. DeBisschop had no fiduciary or special relationship with Daniels such that she was required to disclose everything she knew about the possible penalties he was facing, even if, in fact, she knew more than she revealed. Absent a positive duty to disclose, "affirmative conduct" requires more than just a complaint that the government might not have laid all of its cards on the table. As noted by the court in *Michigan Express, supra*:

The Ninth Circuit defines "affirmative misconduct" as a deliberate lie or a pattern of false promises. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184 (9th Cir.2001) (en banc). In an earlier case it gave a more developed definition, explaining that "[n]either the failure to inform an individual of his or her legal rights nor the negligent provision of misinformation constitute affirmative misconduct." *Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir.2000). The Seventh Circuit defines "affirmative misconduct" as "more than mere negligence.... It requires an affirmative act to misrepresent or mislead." *LaBonte*, 233 F.3d at 1053. The Fifth Circuit, in almost identical language, defines "affirmative misconduct" as "something more than merely negligent conduct." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 n. 12 (5th Cir.1996). Instead, "the [government] official must intentionally or recklessly mislead the estoppel claimant." *Id.* at 1350. Lastly, the Fourth Circuit defines "affirmative misconduct" as lying rather than misleading and as malicious, not negligent, conduct. *Keener v. E. Associated Coal Corp.*, 954 F.2d 209, 214 n. 6 (4th Cir.1992).

374 F.3d at 427.

As the trier of fact, I found DeBisschop's testimony credible and do not believe that it was "perjurious" as asserted by the Respondent. I believe her testimony that she told Daniels that the civil money penalties would be significant. I believe both her testimony and Daniels's that she made absolutely no promises regarding the amount of the civil money penalties should he sign the FLSA installment agreement. I do not find any convincing evidence that DeBisschop took any steps to affirmatively misrepresent or mislead Daniels, or that she was under a legal duty to disclose everything she knew about the Administrator's internal policy for determining the amount of civil money penalties. Ultimately, this was a situation in which Daniels could not resist the favorable terms of the FLSA installment agreement as presented to him, and made a decision to accept its terms in the absence of certainty regarding the amount of the H-2B civil money penalties. The fact that the civil money penalties that were then imposed greatly exceeded his subjective expectation, while understandably a source of regret, does not work an estoppel against the government.

Further, it should be noted that there is a fundamental logical fallacy in counsel for the Respondent's argument regarding an alleged estoppel. Even assuming, purely for argument's sake, that the Administrator had somehow misled the Respondent into signing the FLSA installment agreement, this would be an argument to estop the government from enforcing the installment agreement, not from imposing the H-2B civil money penalties. This matter, however, is not concerned with enforcement of the FLSA installment agreement. In fact, as previously noted, the Respondent subsequently filed for bankruptcy and made only three or four payments under the installment agreement, leaving the underpaid employees with, as DeBisschop testified, a "very small fraction" of the back wages they were owed. (Tr. 156). In other words, counsel for the Respondent is, in effect, arguing that the government should be estopped from enforcing an installment agreement which it is no longer honoring—and which is not even the subject of this present action.

Finally, it cannot be overlooked that the estoppel the Respondent is arguing for is an *equitable* estoppel. It is a fundamental principle that one who seeks an equitable remedy must himself have clean hands, meaning that the conduct of the party seeking relief must not violate conscience, good faith, or other equitable principles. As noted by the court in *Primo, supra*, the purpose of equitable estoppel is to avoid injustice, not to aid a wrongdoer in escaping justice. 599 F.3d at 547. Having failed to pay its workers for overtime and placed some H-2B employees outside of Eagle County in knowing defiance of the BALCA decision denying certification to do so, the Respondent clearly does not have the clean hands necessary to request equitable relief. Certainly there is no injustice to be avoided by the Respondent facing civil money penalties as a consequence of its own deliberate actions.

In sum, I find that the Respondent has clearly failed to sustain its "heavy burden" of demonstrating that the facts and circumstances in this matter give rise to an estoppel against the government.

3. *Civil Money Penalties*

The regulations provide that the Administrator may assess civil money penalties in an amount not to exceed \$10,000 per violation for any 1) substantial failure to meet the conditions provided in the H-2B application, or 2) any willful misrepresentation in the application, or 3) a failure to cooperate with a Department audit or investigation. 20 C.F.R. § 655.65(c). Further, the regulations define a "substantial failure" as a "willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application." § 655.65(d). A "willful failure" is, in turn, defined as a "knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart." § 655.65(e). Moreover, this subsection cites to certain illustrative cases: *McLaughlin v. Richard Shoe Co.*, 486 U.S. 128 (1988), and *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

Additionally, in assessing civil money penalties, the regulations stated that the Administrator "shall consider the type of violation committed and other relevant factors." § 655.65(g). The regulations then provide a non-exhaustive list of factors that "may be considered" by the Administrator. The enumerated other factors which "may be considered" are: 1) any previous history of violation, or violations, by the employer, 2) the number of U.S. and H-

2B workers affected by the violation or violations; 3) the gravity of the violation or violations; 4) efforts made by the employer in good faith to comply with the INA and regulatory provisions; 5) the employer's explanation of the violation or violations; 6) the employer's commitment to future compliance; and 7) the extent to which the employer achieved a financial gain due to the violation, or the potential loss to the employer's workers. (*Id.*). The regulations also provide that the highest penalties "shall be reserved for willful failures to meet any of the conditions of the application that involve harm to U.S. workers." § 655.65(g)(1-7).

As can be seen, the regulations contemplate some normative judgments by the Administrator. Although the regulations provide for an appeal to this Office, they do not spell out the standard by which an administrative law judge reviews the agency determination regarding the amount of the penalties. Case law, however, strongly indicates that the amount of the civil money penalties is not reviewed *de novo*, but, rather, under an abuse-of-discretion standard. For example, in *Administrator v. Mohan Kutty, M.D., ARB Case NO. 03-022*, Slip Opinion at 17, (ARB May 31, 2005), the Board stated in a similar context that "the Administrator is vested with discretion in calculating the amount of civil money penalties, and [because] the record demonstrates that she did not abuse that discretion, we will not modify the Administrator's assessment or the ALJ's determination [that the agency acted reasonably]."

Therefore, the undersigned may not set it aside the Administrator's assessment of civil money penalties unless it can be characterized as an abuse of discretion, meaning that the agency acted unreasonably, arbitrarily, or capriciously in determining the amount of the penalties. *See Lockheed Martin Corp. v. Admin. Review Board, U.S. Dept. of Labor*, 717 F.3d 1121, 1129 (10th Cir. 2013). In other words, simply because the undersigned may have chosen a different amount by showing either greater or lesser leniency does not entitle me to substitute my judgment for that of the Administrator. As counsel for the Administrator points out, simply because two minds can reasonably differ on a penalty does not constitute an abuse of discretion. *See Siskiyou County v. State Personnel Bd.*, 116 Cal. Rptr. 3d 469 (3rd Dist. 2010); *Long v. Social Sec. Admins.*, 635 F.3d 526, 530 (Fed. Cir. 2011).

1. Number of Violations

In the present case, the Administrator, as previously discussed, determined that the Respondent committed five different violations. The first violation was for willfully misrepresenting the work schedule and omitting the fact that the employees would work overtime. The remaining four violations were for substantially failing to meet the conditions of the labor condition application by placing H-2B workers outside of Eagle County. At the hearing, DeBisschop explained that the Administrator determined that there were four violations based upon the fact that the Respondent had sent H-2B workers into four additional counties for which it had not received certification: Summit, Garfield, San Miguel, and Mesa. (Tr. 121). Each violation was assessed a \$5,000 penalty.

The Respondent argues that the four violations charged for placing H-2B workers outside the area of intended employment is excessive, and that it should only have been charged with one violation. As noted, DeBisschop testified that she considered there to be four violations—one for each county outside of Eagle County in which the Respondent had placed an H-2B

worker. The Administrator’s view thus focuses on the number of job locations, or counties, outside of Eagle County, the area of intended employment, to which the Respondent sent H-2B workers, assessing a violation for each county. Indeed, the Administrator in its brief notes that there were really five jobs filled outside of Eagle County, but since two of them were in the same county, only four violations were assessed. (Adm. P. Hg. Bf. at 14). Conversely, counsel for the Respondent argues that no matter how many counties were involved, the fact is there was only one term or condition that had been violated—the condition that the Respondent not employ any workers outside of Eagle County, the area of intended employment. According to counsel, “If workers are outside the area of intended employment then only one term and condition of the labor certification has been violated because the area of intended employment is singular regardless of how many work locations are [outside] the area of intended employment.” (Resp. P. Hg. Bf. at 15).

Unfortunately, the regulations do not address specifically the issue of assessing the number of violations for each willful misrepresentation or failure to meet the conditions of the application. The Respondent’s argument would limit the number of violations to the number of conditions transgressed, no matter how many times. Violations of the law, however, have always been counted based on the number of times one breaks the law, not the number of laws broken. That is not to say that the “stacking” of civil money penalties cannot be a legitimate concern in a regulatory environment in which multiple agencies are given broad discretion to impose “CMPs.” Obviously, one continuous violation should be deemed a single violation, not a series of separate violations. However, here, each alleged violation involved not only a different job, but a different job in a different county, and thus a separate failure to test the job market in the area of employment. If the purpose of the Act and regulations is to insure that there are no U.S. workers capable of doing the job available, then it is not unreasonable for the Administrator to view every untested job market as a source of violation.

As noted, under an abuse-of-discretion standard, the reviewing court cannot invalidate an official action unless it is unreasonable, meaning arbitrary or capricious. The simple fact that there might be another reasonable approach does not necessarily invalidate the approach taken. *See Lockheed Martin Corp., supra; Siskiyou County v. State Personnel Bd., supra; Long v. Social Sec. Admins., supra.* As I cannot say that the Administrator acted unreasonably in finding a total of five violations (four of those for placing workers outside the area of intended employment, and one for misrepresenting the work hours and days), I have no basis to overturn that determination.

4. *Willful and Substantial*

As noted, the regulations define a “substantial failure” as a “willful failure that constitutes a significant deviation from the terms and conditions of the labor condition application.” § 655.65(d). A “willful failure” is, in turn, defined as a “knowing failure or a reckless disregard with respect to whether the conduct was contrary to sec. 214(c) of the INA, or this subpart.” § 655.65(e).

Regarding the placement of H-2B workers outside of Eagle County, I find that Daniels very much knew his conduct was contrary to the Act. The BALCA decision by Judge Colwell, applying the Act and regulations, made perfectly clear that he had not obtained certification to employ H-2B workers anywhere but Eagle County. Clearly, he decided to act in defiance of that decision. He testified that he had some discussion with counsel for the Respondent regarding whether the law afforded him some latitude to employ H-2B workers outside the area of intended of employment depending upon the distance involved. (Tr. 221). However, he stated that the argument was “never really resolved.” (*Id.*) Even giving him the benefit of the doubt that he entertained some hope that what he was doing was not quite as illegal as it seemed, clearly Daniels still acted with a “reckless disregard” for whether his conduct was contrary to the Act. Moreover, I find that the placing of H-2B workers outside of Eagle County, no matter what the distance involved, was a significant deviation from a condition of the labor condition application, which expressly limited the area of intended employment to Eagle County.

It should be noted that the deliberateness of the Respondent’s violation is underscored by the arguments made in its Post-Hearing Brief. Counsel for the Respondent first relies on the previously discussed basketball metaphor, and clings to the notion that Judge Colwell’s decision denying certification for the additional counties was “unlawful,” thus giving the Respondent the perfect right to ignore it. As stated by counsel in its brief, “When BALCA made a clearly erroneous determination, [the Respondent] was well into its season and took the good faith position that it complied with the law and the denial of its request for amendment was unlawful.... Accordingly, [the Respondent] took the position that if DOL penalized it for employing workers outside the area certified, it would defend on the basis that the denials of its request for amendment by the CO and BALCA were unlawful.” (Resp. P. Hg. Bf. at 12).

As discussed previously, this definition of “good faith” would make defiance of the law a virtue, not a vice. What counsel for the Respondent identifies as “good faith” is actually an attempt to nullify the legal framework for obtaining labor certification. Counsel for the Respondent also takes the rather astounding position that he should be able to cure his failure to respond to the request for information sent by the Certifying Officer with regard to his second application for certification now, before me, several years after the fact, even though, as noted, I have no authority to retroactively grant certification in this case.

It is manifest not only from the arguments of counsel but the statements of Daniels that the decision to go forward and place the H-2B workers outside of Eagle County, after failing to obtain certification to do so, was a deliberate business decision undertaken with full knowledge that the action was done without obtaining the necessary certification from the Department of Labor. Indeed, the Respondent ignored a decision of the Board of Alien Labor Certification Appeals that specifically denied its flawed application to employ H-2B workers outside of Eagle County. Nevertheless, after being told “no” by the Department of Labor, the Respondent acted as if the Department had said “yes.” As Daniels explained, he made a “business decision” to go forward and place the H-2B workers in counties for which the company had not received certification. (Tr. 212-213). Unfortunately, what may have appeared to be a good business decision was a horrible legal one, resulting in the Respondent breaking the law. Although Daniels admitted that his action did not “fall right to the letter of the law,” he made clear that it was his intention not “to be destructive or willful, or substantial, or anything like that.” (Tr.

186). He stated, “I’m just trying to keep people busy.” (*Id.*) I found Daniels quite sincere in his testimony. Unfortunately, it is the willful act of breaking the law that is at issue here, not Daniels’s sincerity in his belief he had a sound business reason for doing so. A willful violation does not require moral turpitude. The violations here are *malum prohibitum*, not *malum in se*.

With respect to the willfulness of the Respondent in misrepresenting the work schedule and hours on the application, Skinner testified that he concluded that the violation was willful because of the past history of employment which demonstrated that overtime was commonplace and that the work schedule was usually Monday through Friday, not Tuesday through Saturday. (Tr. 59-60). He further testified that at the final conference, Daniels agreed that the application should have provided the work days as Monday through Friday, not Tuesday through Saturday. (*Id.*). As noted, the FLSA investigation established that the Respondent’s employees had worked overtime and resulted in the Respondent signing an installment agreement to pay \$77,314.92 in back wages to all of its employees who were required to work overtime but not paid for doing so. Skinner conducted the FLSA investigation and explained that the Respondent’s payroll records were well kept and conclusively demonstrated that the employees’ regular work schedule was Monday through Friday, not Tuesday through Saturday, and involved overtime. (Tr. 5756-60; GX 15). With respect only to the Respondent’s H-2B workers, he testified that the payroll records showed that they worked a total of 3,870.61 overtime hours between first of April and the last of November 2009, and another 3,928 hours of overtime for the same period in 2010. (Tr. 57-58). He also stated that the payroll records demonstrated that, despite some variation, the work schedule was Monday through Friday. (Tr. 59). Skinner testified that he considered this inaccuracy to be a significant misrepresentation because Tuesday-through-Saturday was a “non-traditional” work schedule that might discourage U.S. workers from applying for the job. (Tr. 61). He also testified that the misstated absence of overtime may also have discouraged potential U.S. workers. (Tr. 61). When asked why he determined that the inaccuracy in the job description was willful for purposes of finding a violation and assessing a penalty, Skinner responded that the Respondent should have known that there was a possibility of overtime based on its past practice. (Tr. 62). He noted that the labor condition application allowed for a statement of “possible overtime” with a range of possible overtime hours. (*Id.*). He observed that rather than doing this, the Respondent, through counsel, had indicated that overtime was “not applicable,” which simply was not the case. (Tr. 62). According to Skinner, there were options available for the Respondent, through counsel, to have accurately stated the work schedule, one of which was to describe it as Monday through Friday with a possibility of work on the weekend. (*Id.*).

DeBisschop testified that she concluded that Daniels had “knowingly submitted false information.” (Tr. 117-118). However, she did not particularly explain why she believed that the Respondent had acted knowingly in putting false information on the application.

Daniels testified that the Department of Labor made a “bigger deal” out of the “Tuesday through Saturday thing” than he ever would have thought. (Tr. 212). He testified that in the future he would revert to describing the work schedule as Monday through Friday “if that’s what’s going to make everybody happy.” (*Id.*). Elsewhere, he testified that the Department of Labor could “sit here all day long and tell me what I signed and what I didn’t do...[but] I didn’t deliberately just do that....” (Tr. 214). He testified that he “made some mistakes” and that he

“need[ed] to correct them....” (Tr. 215). According to Daniels, the Respondent’s new applications for alien labor indicate the possibility of overtime. He stated that, although he still signs the form, “I don’t read it sometimes.” According to Daniels, he now directs his people that they have “to be sure you get the counties in there, you get the OT, that time in there.” (Tr. 216).

The definition of willful includes both a knowing violation and a lesser mental state, which is reckless disregard. Here, there was evidence in the form of testimony from Skinner that past practice should have made the Respondent well aware that the work schedule and potential for overtime was not correctly stated on the application. From this, I find that the Administrator could have reasonably inferred that Daniels, if he did not knowingly make a misrepresentation on the form, at least acted with a reckless disregard for his true hiring needs. In this regard, it appears that the Respondent’s need for its workers to work overtime, given the thousands of hours of overtime in the past, required more than mere negligence to overlook. The same can be said for the schedule pertaining to days of the week. If not knowing, then the violation is at least inexcusably reckless. The application requires considerably more effort at accuracy than the hit-or-miss attitude that was displayed here. I find, therefore, that the record supports a finding that the Respondent willfully made a misrepresentation on the application.

5. *Amount of Penalties*

By way of introductory explanation, DeBisschop testified the Department began with the “base rate of \$5,000.” (Tr. 22). Earlier she had explained that because the regulations provided for a penalty up to \$10,000 for each violation, the Department uses a methodology which starts at the middle, or \$5,000, for each violation, and then addresses mitigating factors which might reduce the amount or aggravating factors which might increase it. (Tr. 115-116). The amount of the penalties for the two types of violations will now be discussed.

i. Amount of Penalties for Placing Workers Outside of Eagle County

According to DeBisschop, in assessing the penalty for these violations, she placed particular emphasis on the willfulness of the Respondent’s decision to place H-2B workers outside of Eagle County despite the attestation that it would not do so. (Tr. 122). She stated that she found such conduct “really egregious.” (*Id.*). She particularly rejected the notion that the Respondent’s failed attempt to amend the certification or obtain a new certification for the additional counties demonstrated a desire to comply with the law which allowed them to knowingly break it in “good faith.” (*Id.*). In fact, she testified that she considered such conduct “the opposite of good faith.” She stated: “I think regardless of [what] their, you know, their personal feelings were, about why the denial took place, it was still denied and I think you have to live with that, even if you disagree with it.” (*Id.*). She stated that she also considered that the job markets in those counties were not adequately tested to determine if any U.S. workers were available. (Tr. 122-123).

DeBisschop further testified she did not feel that there were any applicable mitigating factors to reduce the amount below the median penalty of \$5,000; however, she also stated that she did not consider that there were any aggravating factors to increase the amount above the base rate, either. (Tr. 122).

Although DeBisschop originally testified that she did not find any mitigating factors applicable to the violations, suggesting that she had indeed at least considered them, her later testimony during cross-examination raises the issue of whether she actually even considered any mitigating factors before deciding not to apply them:

Q. Okay, and you had testified that you just decided not to apply any mitigating factors to the penalty for G.H. Daniels, is that correct?

A. I said we did not apply any mitigating or aggravating factors.

Q. Okay.

A. Based on the nature of the violations.

Q. Did you consider mitigating factors?

A. No.

Q. Were there mitigating factors?

A. I don't understand your question.

Q. Well, what are the mitigating factors?

A. Mitigating, in general?

Q. Well, what would you consider to be a mitigating factor that would go in an employer's favor, when it comes to any H-2B violations?

A. So, there are three factors that could, potentially, mitigate a civil money penalty assessment. Those are an employer's efforts to comply—

Q. Okay. Well—okay—go ahead. Pardon me.

A. His or her of the violation. And those two factors are seldom applicable in H-2B cases, because in order for us to cite an H-2B, it has to be willful. So, if either of those were applicable, it would be difficult to call them willful violations. And the third, potentially mitigating, factor, is the agreement to...future compliance. And then gravity could, also, potentially, be a mitigating factor.

Q. Okay. And you just testified you didn't apply—you did not apply any of those factors, is that correct?

A. Correct.

Q. Okay. So you did not consider G.H. Daniels'[s] efforts to comply?

A. No.

Q. Okay. And you did not consider G.H. Daniels'[s] explanation?

A. No.

Q. And did you not consider G.H. Daniels'[s] agreement to cooperate in the future?

A. Agreement to comply in the future, no.

Q. Comply in the future. Okay. Thank you.

A. Although if I had, those mitigating factors would not have applied anyway.

Q. I didn't ask that question.

MR. POOLEY: I'd like to strike that, Judge.

JUDGE SELLERS: All right. That was beyond the scope of the question. I'll strike that.

(Tr. 147-148).

As can be seen, it would appear from DeBisschop's testimony on cross-examination that not only did she not apply any mitigating factors to the four violations, but she also did not even consider those factors. This, in turn, raises the question of whether she was required to consider them, and, if so, whether by failing to do so she acted unreasonably.

The regulations are again, unfortunately, less than clear. Additionally, in assessing civil money penalties, the regulations state that the Administrator "shall consider the type of violation committed *and other relevant factors.*" § 655.65(g)(emphasis supplied). The use of the mandatory "shall" indicates that the Administrator must consider not only the nature of the violation itself, but "other relevant factors," before settling upon the amount of the penalty. However, the regulations then provide a non-exhaustive list of what are presumably "other relevant factors" in any given case, but then state only that they "may be considered," suggesting that the Administrator need not necessarily consider them. The enumerated other factors which "may be considered," as previously noted, include: 1) any previous history of violation, or violations, by the employer, 2) the number of U.S. and H-2B workers affected by the violation or violations; 3) the gravity of the violation or violations; 4) efforts made by the employer in good faith to comply with the INA and regulatory provisions; 5) the employer's explanation of the violation or violations; 6) the employer's commitment to future compliance; and 7) the extent to which the employer achieved a financial gain due to the violation, or the potential loss to the employer's workers. (*Id.*).

Although less than clear, the fact that the regulations state that the Administrator "shall" consider the nature of the violation along with "other relevant factors" would seem to preclude, if anything, exactly the type of analysis propounded by DeBisschop on cross-examination, which is to consider only the nature of the violation and nothing else. Here, however, it is clear from her earlier testimony that she did consider other factors, including the Respondent's explanation for the violation, which she soundly rejected, as well as the gravity of the violation, which she termed "egregious" in light of the Respondent's decision to proceed in defiance of Judge Colwell's decision denying certification for the additional counties, as well as the fact that the Respondent's action left the job market untested in the additional counties, thereby precluding any analysis of how many U.S. workers may have been affected. (Tr. 122-123).

Moreover, even if DeBisschop's failure to consider other mitigating factors such as the Respondent's commitment to future compliance was deemed unreasonable, and therefore an abuse of the Administrator's discretion, I do not perceive any basis in Daniels's testimony at the hearing that would lead me to modify the penalty imposed by the Administrator based upon overlooked mitigating factors. Indeed, the most salient characteristic of these violations is, as DeBisschop correctly noted, their flagrant defiance of the decision issued by Judge Colwell. As previously discussed, Daniels testified that he made a "business decision" to break the law, which although it offers some explanation for his conduct, does not ameliorate the nature of the violations. His testimony also demonstrates that he made a calculated decision, in the face of Judge Colwell's decision denying certification, to place workers outside the area of intended employment. His disagreement with the law, no matter how heartfelt, did not grant him license to ignore it. This is true even if he and Respondent's counsel believed that they were acting in good faith by defying the decision of Judge Colwell, or that the law left them some wiggle room to do what the decision said they could not.

Further, although Daniels testified he intended to comply with the law, his statements do not exactly inspire confidence, or reflect a full awareness of the serious nature of his violations. As noted, Daniels admitted that he had “made some mistakes” and needed to take corrective action. (Tr. 215). However, he still seemed to try and diminish the fact that he had rather brazenly violated the terms of the approved application. For example, his statement that his actions did not “fall right to the letter of the law” suggests that he remained convinced that his violations were technical rather than substantive in nature. (Tr. 186). His violations, though, did not involve technicalities or niceties of form; rather, they were, to use the term employed by DeBisschop, rather egregious. Similarly, he stated that it was not his intention “to be destructive or willful, or substantial, or anything like that.” (*Id.*) But his actions in placing the workers outside of Eagle County were, if anything, deliberate and willful. His statement that he was “just trying to keep people busy” also reflects the view, which I am not sure he ever completely surrendered, that at times business needs take precedent over compliance with the law. In this regard, Daniels testified that in the future he would emphasize compliance “if that’s what’s going to make everybody happy.” (Tr. 212). Again, it seems, Daniels perceived this matter as brought about by overly-technical government bureaucrats unfairly prosecuting him rather than his own failure to follow the necessary steps to adequately test the labor market for available U.S. workers, as well as his calculated decision to go forward in defiance of Judge Colwell’s decision.

The Administrator, it should be noted, argues in its post-hearing brief that the amount of \$5,000 in penalty for each violation was reasonable “in particular because [the Respondent] chose to violate the rule immediately after receiving an adverse decision from BALCA.” (Adm. P.-Hg. Bf. at 14). Indeed, the Administrator argues that such conduct was “inexcusable” and, in fact, “warranted a higher penalty.” (*Id.*)⁴

Conversely, in its brief, the Respondent argues that the Administrator’s methodology, of starting in the middle of the range of penalties, i.e., at \$5,000, and then deciding whether to reduce or increase the amount depending on the presence of mitigating or aggravating factors, was arbitrary and capricious, and thus an abuse of the Administrator’s discretion. (Resp. P. Hg. Bf. at 8). That the Administrator chooses to start in the middle of the penalty range and work either downward or upward based upon the weight of the mitigating versus the aggravating factors, does not strike me as an unreasonable approach. The fact that one could have reasonably adopted a different approach does not, as previously discussed, establish an abuse of discretion. Further, I cannot say that it was unreasonable, or arbitrary and capricious, for the Administrator to neither reduce nor increase the amount from what it refers to as the “base rate.” Although the result of assessing \$5,000 for each of the four violations amounts to a total penalty of \$20,000 for placing workers outside the area of intended employment, or double the amount possible for any one violation, the regulations do not contain any “penalty cap” or otherwise indicate that the Administrator is limited in the amount of civil money penalties it can cumulatively impose for multiple violations. Indeed, the only penalty cap is the maximum amount of \$10,000, but the

⁴ The Administrator also argues, albeit in a footnote, that “further evidence of the WHD’s reasonable approach to charging violations and CMPs” was the fact that WHD found evidence of other violations which it did not charge. (Admn. P.-Hg. Bf. at 14, n. 7). I do not assign significant weight to this argument, however, because it seems fundamentally unfair to use uncharged and therefore unproven violations to support penalties for those charged and proven.

regulations specifically state that the maximum is “per violation,” in other words, not for the cumulative number of violations.

In sum, I cannot conclude that the amount constituted an abuse of discretion. Moreover, even if it is assumed for the sake of argument that the Administrator erred in its methodology by not considering all potential mitigating factors, I have reviewed the record and cannot find any basis to modify the amount of the penalty. In other words, even if I were allowed to substitute my own judgment for that of the Administrator, I find that \$5,000 was a reasonable and appropriate penalty for each of these violations.

ii. Amount of Penalty for Misrepresenting Conditions on Application

Although the Respondent misrepresented both the possibility of overtime and the schedule of workdays on the labor application, the Administrator only charged one violation and assessed a civil money penalty of \$5,000. As previously discussed, DeBisschop testified that penalties were usually calculated beginning in the middle of the penalty range at \$5,000 per violation, and then adjusted upward or downward depending upon consideration of the aggravating and mitigating factors.

DeBisschop testified that in considering this particular violation, she concluded that this was a case in which “the employer knowingly filled out an application with false information.” (Tr. 117). As a consequence of the misrepresentation, she testified that there was no way of knowing how many potential U.S. workers may have applied for the job if it had been accurately described. (*Id.*). She testified that because she considered the violation to be willful, “we decided that it wasn’t appropriate to examine the remaining factors.” (Tr. 118). She repeated this point by stating, “So, we didn’t look at each individual factor.” Elsewhere, she testified, “We started just by looking at the nature of the violation, what was the type of violation, and given this type of violation, we didn’t feel that it warranted an examination of each of these factors.” (Tr. 119). Consequently, she testified, no mitigating factors were applied, nor were any aggravating factors, and therefore the assessment of the penalty remained in the middle of the range at \$5,000. (*Id.*).

As noted, Daniels testified that the Department of Labor had made a “bigger deal” out of the “Tuesday through Saturday thing” than he ever would have imagined. (Tr. 212). He testified that in the future he would revert to describing the work schedule as Monday through Friday “if that’s what’s going to make everybody happy.” (*Id.*). He was adamant that the Department of Labor could “sit here all day long and tell me what I signed and what I didn’t do...[but] I didn’t deliberately just do that...” (Tr. 214). On the other hand, he acknowledged that he had “made some mistakes” and that he “need[ed] to correct them...” (Tr. 215). He testified that the Respondent’s new applications for alien labor indicate the possibility of overtime. He stated that, although he still signs the form, “I don’t read it sometimes.” According to Daniels, he now directs his people that they have “to be sure you get the counties in there, you get the OT, that time in there.” (Tr. 216).

Considering this evidence, I find it clear that the Administrator not only did not apply, but also did not consider the enumerated mitigating factors. Although, as previously noted, the regulations state only that the Administrator “may” consider the enumerated factors, the regulations also state that the Administrator “shall” consider all relevant factors in assessing the penalty. As compared to the other violations, this violation involved a failure to accurately fill out the application, and therefore it would seem that the Respondent’s commitment to filling out the form accurately in the future is indeed relevant and cannot reasonably be ignored. But this appears to be exactly what the Administrator did. Therefore, I find that the Administrator acted unreasonably by focusing solely on the nature of the violation and, by DeBisschop’s own admission, concluding that “it wasn’t appropriate to examine the remaining factors.” (Tr. 118).

Although Daniels indicated in his testimony that he would take steps to ensure that the future applications would be filled out correctly, his testimony fell considerably short of a convincing *mea culpa*. Instead, as previously noted, he still seemed to treat this violation as more technical than substantive in nature. While he made clear that either he or his staff would pay more attention to the applications in the future, and correctly state the work schedule and need for overtime, he expressed his motivation for doing so in terms of placating the government—“making people happy”—as opposed to demonstrating an awareness of the seriousness of the undertaking. Indeed, throughout the proceeding there was a discernible lack of appreciation by both the Respondent and Respondent’s counsel that the labor application is not something to be trifled with but is a legal document with important ramifications that needs to be filled out with the utmost consideration for accuracy. Otherwise, when the conditions of work are misstated, the labor market for available U.S. workers is not tested, which is the whole purpose of the program—to insure that no qualified U.S. workers are overlooked. The same lack of respect for the process was demonstrated by the Respondent’s cavalier approach to the decision of Judge Colwell and his decision to openly defy its holding.

Conversely, it is clear that Daniels is a businessman who intends to continue to employ H-2B workers. As a businessman, he clearly has an appreciation for the bottom line. Therefore, it strikes me that to the extent that violations have significant monetary consequences, he will do his best to insure future compliance. Therefore, even if it is assumed that the Administrator’s methodology was unreasonable for failing to consider all relevant factors, I find that the amount of the penalty, \$5,000, was reasonable to insure future compliance. In other words, I find the assessment of this penalty a reasonable exercise of the Administrator’s discretion. Further, even if I were allowed to substitute my judgment for that of the Administrator, on this record I again do not find any basis to modify the amount of the civil money penalty imposed.

Conclusion

In closing, several aspects of this case are worth noting.

First, had the Respondent accurately filled out the first labor application, inserting the correct work schedule and need for overtime, there would be no violation with respect to misrepresenting the conditions of the job

Second, had the Respondent properly filled out the second application for alien labor certification which included the additional counties, there is no reason to believe that the labor certification would not have been approved. Not only was this not done, but when the Certifying Officer then sent to Respondent a request for further information which afforded the Respondent a second opportunity to supply the necessary information, the request was ignored. Rather, the Respondent took an appeal of the Certifying Officer's denial of the first application, which, given the legal issues, had absolutely no chance of success.

Subsequently, rather than live with its failure to obtain certification, or go through the process again, the Respondent—hopefully not with the advice of counsel, although this is not clear—made a deliberate decision to employ its H-2B employees outside of the county for which it had received certification. This decision was made notwithstanding the fact that the Respondent, through its counsel, had signed an attestation that the Respondent would “not place any H-2B workers employed pursuant to this application outside the area of intended employment listed on the Application....” (GX 1).

In short, the violations which led to the civil money penalties imposed in this matter were completely avoidable and all due to the Respondent. Still, throughout this proceeding, the Respondent has repeatedly accused the Administrator of official misconduct, including misrepresentation, perjury, denial of its right to counsel and due process, failure to follow the regulations, trickery, bungling, “good-cop/bad-cop” role playing, and “post-hoc rationalization.” According to the Respondent, the entire case against it must be dismissed because “[d]ismissal will deter DOL from bungling future H-2B investigations and committing future perjury in the same manner.” Indeed, counsel for the Respondent requests that I award him attorney fees under the Equal Access Justice Act because the imposition of civil money penalties in this case was “substantially unjustified.”

Finally, the astute reader, having noted that the Respondent is now in bankruptcy, may question the practical result of this decision, in which it would appear that the Respondent will pay nothing and the government will recoup nothing. The fact that this case will, in all probability, have zero practical effect was discussed in several pretrial settings. Counsel for the Respondent took the position that, despite his client's willingness to settle, it was incumbent upon the Respondent to “exhaust its remedies.” The Administrator took the Javertian view that the government was entitled to pursue the penalties imposed regardless of their collectability.

These observations aside, I find that the civil money penalties at issue were properly imposed and for a reasonable amount whether viewed as a reasonable exercise of the Administrator's discretion or upon my own *de novo* review.

ORDER

The civil money penalties imposed in this matter are hereby **AFFIRMED**.

JOHN P. SELLERS, III
Administrative Law Judge