

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 November 2012

Case NO: 2012 TNE 18

In the Matter of
ADMINISTRATOR, WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,
Prosecuting Party

v.

MARIANI ENTERPRISES, INC.
d/b/a MARIANI LANDSCAPING
Respondent

Appearances: Ms. Eileen R. Hurley, Attorney
For the Prosecuting Party

Mr. Thomas Y. Mandler, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER --
APPROVAL OF WITHDRAWAL OF APPEAL**

On November 15, 2012, I received a letter from Respondent's counsel withdrawing Respondent's appeal in this case.

Background

On August 8, 2012, the District Director ("Administrator"), Wage and Hour Division ("WHD"), U.S. Department of Labor, issued a determination that Respondent failed to meet a condition of its application for a temporary employment certificate by failing to pay offered wages as required to 32 H-2B workers, in the amount of \$9,110.21. Consequently, finding a substantial violation under 20 C.F.R. § 655.60(b) and noting the back wages in the amount of \$9,110.21 had been paid, the Administrator also assessed a civil monetary penalty ("CMP") in the amount in of \$9,110.21.

On August 23, 2012, through counsel, Respondent appealed the Administrator's determination and proposed CMP to the Chief Administrative Law Judge of the Office of Administrative Law Judges. In the appeal, Respondent explained that during a July 2010 internal payroll review, it was discovered that due to an administrative error, the H-2B workers

were being paid at the 2009 hourly wage rate of \$8.75, rather than the applicable 2010 hourly wage rate of \$9.02. The error was corrected and the back wages were paid to the H-2B workers at the beginning of August 2010. Although in the meantime Respondent had received notice that WHD intended to conduct an on-site payroll audit, and the audit was conducted on August 3, 2010, the Mariani Landscaping employees who conducted the company's internal audit were unaware of the WHD's notice and pending external audit. Respondent believed the failure to pay the correct prevailing wages was an inadvertent, unintentional, and purely technical failure. The temporary three month technical error was not willful, did not represent reckless disregard, and did not rise to the level of a significant deviation from the temporary employment certificate condition or substantial violation, in particular since the H-2B workers had been made whole. Consequently, Respondent requested that the Administrator's determination of a substantial violation be overturned and the proposed CMP be dismissed.

On August 27, 2012, in response to the appeal, I was assigned to conduct a hearing and render a decision in the case. In a September 12, 2012 conference call, the parties' counsel indicated they were not ready to proceed to a hearing and requested additional time. In a November 6, 2012 conference call, after expressing extreme disappointment with the Administrator's unwillingness to resolve the case without further litigation expense, Respondent's counsel advised that Respondent would withdraw its appeal and pay the CMP. Administrator's counsel had no objection to the withdrawal of the appeal.

Discussion

Although the appeal is being withdrawn with disappointment, in the absence of an objection, and considering that Respondent was ably represented by counsel, I find Respondent's withdrawal of its appeal of the Administrator's determination of a substantial violation under 20 C.F.R. § 655.60(b) and assessed CMP of \$9,011.21 to be voluntary. Accordingly, I **APPROVE** the withdrawal of the Respondent's appeal, which in turn renders the Administrator's August 8, 2012 determination and assessed CMP as the final order of the Secretary of Labor, which is not appealable.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

November 27, 2012
Washington, DC