U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 August 2019

Case No.: 2018-TNE-00008

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Prosecuting Party,

v.

DEGGELLER ATTRACTIONS, INC.,
Respondent.

Appearances:

Wayne Pierce, Esq.
Pierce Law Firm, LLC
Annapolis, Maryland
and
Terrance W. Anderson, Esq.
Gray Robinson, P.A.
Miami, Florida
For the Respondent

Jonathan Hoffmeister, Esq.
Jana Edmondson-Cooper, Esq.
Office of the Solicitor
Atlanta, Georgia
For the Prosecuting Party

Before: Morris D. Davis, Administrative Law Judge

DECISION AND ORDER

Procedural Background

This matter arises under the H-2B provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.*, and the implementing regulations at 20 C.F.R. Part 655, Subpart A (2008). The H-2B program permits employers to hire foreign workers to perform temporary, nonagricultural work within the United States if there are not sufficient U.S. workers who are able, willing, qualified, and available at the place where the alien is to perform such services or labor.

The Administrator, ("Administrator" or "Complainant") Wage and Hour Division ("WHD") of the Department of Labor ("DOL"), issued a determination (Reference No.:

1736916) to Deggeller Attractions, Inc., ("Respondent" or "Deggeller") via letter on December 15, 2017, stating that Respondent was found to be in violation of certain H-2B provisions of the INA (regarding a Petition for Nonimmigrant Worker and an Application for Temporary Employment Certification) covering the period from February 1, 2013, to November 27, 2013, by a substantial failure to comply with the terms and working conditions and offered wage requirements. The Administrator determined that Respondent owes $150,205.77 in unpaid wages to one U.S. worker and 42 H-2B nonimmigrant workers and $15,500.00 in civil money penalties. (RX 34).[1]

On January 12, 2018, Respondent objected to the Administrator's findings and requested a hearing. The case was docketed at the Office of Administrative Law Judges on January 18, 2018, and it was assigned to me on March 14, 2018. On April 4, 2018, I issued a Notice of Hearing and Prehearing Order and set this case for hearing on August 31, 2018 in Miami, Florida. (AX 1). By Order dated May 10, 2018, the hearing was rescheduled for August 20, 2018, in Washington, D.C. (AX 2). The parties jointly requested a continuance and I issued an Order on August 2, 2018 rescheduling the hearing for October 4, 2018 in Arlington, Virginia. (AX 3).

Respondent filed a Motion for Summary Judgment on August 23, 2018 and the Administrator filed a Response on September 4, 2018. I issued an Order on September 20, 2018 denying the motion. (AX 4).

The hearing was conducted on October 4-5, 2018. I issued an Order on January 2, 2019 granting a joint request to extend the deadline for the submission of final briefs. Both parties submitted final written briefs on January 28, 2019. The Administrator's party representative at the hearing was Paul Dean, a Wage and Hour Division investigator. (TR 8-9). Respondent's corporate representative at the hearing was Andy Deggeller. (TR 9).

Evidence and Evidentiary Issues

Complainant objected to RX 1, 38-50, 52-57, and 59-61, arguing that Respondent failed to produce them in a timely manner.[2] (TR 11-16, 21-25, 35-38). I admitted the documents and gave Complainant 60 days post-hearing to have the documents reviewed and to submit a rebuttal report, if it chose to do so. (TR 40-43).

The parties submitted four joint exhibits, which were admitted. (TR 45-47; JX 1-4). Complainant initially submitted three exhibits, which were admitted. (TR 53; CX 1-3). Respondent submitted 72 exhibits, which were admitted. (TR 54; RX 1-57, 59-73). During the hearing, Complainant submitted seven additional exhibits. Respondent objected to CX 10 and the objection was sustained. CX 1-9 were admitted. (TR 452-453). On December 7, 2018, Complainant submitted a report prepared after its post-hearing review of the exhibits listed in the

[11] Administrative Law Judge exhibits are designated "AX," Complainant's exhibits are designated "CX," Respondent's exhibits are designated "RX," joint exhibits are designated "JX," and citations to the transcript of the hearing are designated "TR" followed by the page number(s).

[2] With respect to RX 1, Respondent's corporate representative and its co-counsel agreed to waive any potential conflicts of interest if Mr. Pierce was required to testify at the hearing as a fact witness. (TR 18-19).

paragraph above. There being no objection, Complainant's report (which includes a compact disc with supporting analysis) is admitted as CX 11. Respondent submitted a corrected copy of RX 61. There being no objection, the corrected copy of CX 61 is admitted into evidence in lieu of the document that was submitted in Respondent's evidence binder at the hearing. In lieu of paper copies of the voluminous time records contained in RX 46 and RX 47, a compact disc containing the same information in electronic format was submitted post hearing and is appended to the record. (TR 247-249). The evidentiary record is now closed.[3]

Testimonial Evidence

Paul Dean

Complainant called Paul Dean as a witness. (TR 57-58). Mr. Dean is an investigator for the Department of Labor's Wage and Hour Division where he has been employed since October 2009. He has two associate's degrees and a bachelor's degree in public affairs and communications. Mr. Dean quit high school after his junior year, joined the Army and served on active duty for three years. He earned a GED while he was in the Army. After leaving active military service, Mr. Dean worked as a mechanic and as a messenger before taking a job with the U.S. Postal Service where he worked for 19 years. (TR 59). He was a mail handler and postal carrier for the first ten years and he held management positions during the last nine years. When Mr. Dean was on active duty in the Army, he was a mechanic and worked on tanks. When he was in the Army National Guard, he was a crew chief on a Cobra helicopter. When he was in the Air National Guard and the Air Force Reserve, he worked in public affairs and as a journalist. He served in Iraq in 2005-2006 and he retired from the military in March 2018 with 33 years of service. (TR 60).

Mr. Dean joined the Department of Labor in 2004 as an economics assistant for the Bureau of Labor Statistics in Florida where he worked on the Consumer Price Index. He said his time as a journalist in the military helped prepare him for his current role as an investigator because conducting interviews and fact-checking are key components of both professions. (TR 62). He spent the first few weeks as an investigator shadowing an experienced investigator and reviewing regulations, and then he went to a five-week basic course that focused mainly on the Fair Labor Standards Act, which he said is "the meat and potatoes of what we do." (TR 63). He continued to shadow an experienced investigator when he returned from the basic course and then later he went to a two-week course on more complex areas like the work visa programs, Service Contract Act, and Davis-Bacon Act. He continued to shadow with an investigator until it was determined that he was ready to serve as a lead investigator. (TR 63-64).

Mr. Dean said that H-2B cases are common in south Florida where he lives. The course he attended included about three full days of training on H-2B and one of the cases where he assisted the lead investigator he was shadowing was an H-2B case. (TR 64). Part of his training included how to calculate damages and civil money penalties. He has averaged 35-40

[3] Respondent's counsel submitted Respondent's exhibits in a tabbed binder. Exhibits that were in excess of 20 pages in length were accompanied by a brief summary of the contents as directed in the Prehearing Order. Respondent's efforts are acknowledged and were much appreciated.

investigations per year and he has been involved in seven H-2B investigations, including six where he was the lead investigator. (TR 65-66).

Mr. Dean described the procedure an employer goes through to hire workers under the H-2B program. If an employer cannot fill a need from available U.S. workers, it begins by applying for a prevailing wage determination with the Employment Training Administration ("ETA"). After obtaining the wage determination, the employer conducts recruiting, which includes testing the area labor market and advertising in the newspaper and with the State Workforce Agency ("SWA"). The employer submits the recruiting report and evidence of its need for temporary workers with its ETA Form 9142 Application for Temporary Employment Certification. (TR 67). If ETA approves the application and grants the certification, the employer submits an I-129, Petition for a Nonimmigrant Worker, to the Department of Homeland Security to start putting names with the vacancies. (TR 68).

20 C.F.R. Part 655 addresses the attestations employers make as part of the application process. 29 C.F.R. Part 503 describes the employer's obligations with respect to paying for transportation and the rate of pay. 29 C.F.R. Part 531 describes how payments must be paid and credits that can be applied to required wages. (TR 69).

Mr. Dean said one of the allegations in this case is that U.S. workers were not offered the same terms and conditions as H-2B workers and another allegation is that H-2B workers were not paid as reflected in the application. (TR 69-70). The case was referred to WHD from a human trafficking office in Charleston and the complainants identified themselves as H-2B workers for Respondent. (TR 70-71). No investigative work had been done on the case when it was assigned to Mr. Dean in August 2014. (TR 71-72). He started his work by doing an online search that confirmed that Respondent had H-2B workers and reviewing the laws to determine which ones might apply. (TR 72-73). Next, he contacted the employer to get information from the employer and arrange interviews with current and former employees. (TR 73). As part of an H-2B investigation he asks for the ETA Form 9142, I-129, copies of the visas for the H-2B workers, payroll records, time sheets, and employee contact information. (TR 73-74).

Since Respondent is on the road for much of the year, it took Mr. Dean some time to establish contact. He finally reached someone by telephone who he believed was Catherine Deggeller, the person who had signed the ETA Form 9142. She was listed as an officer in the company at the Florida Department of Corporations. (TR 74).

The ETA Form 9142 Ms. Deggeller signed is at CX 5. It listed the date of need as February 1, 2013 through November 27, 2013. It showed Ms. Deggeller's title was corporate secretary. (TR 76). The form was also signed by Respondent's attorney, Mr. Pierce. Mr. Pierce and Ms. Deggeller signed the I-129, which is in CX 6 as well. (TR 77). Mr. Dean said he had two conversations with Ms. Deggeller before Respondent retained counsel and then his contact with Respondent was through counsel. He said that while he would have liked to have gotten things from Respondent a little faster, he thought they had a productive working relationship. (TR 79). He asked Mr. Pierce to arrange the interviews and Mr. Pierce set up a conference call for Mr. Dean to conduct them. (TR 79-80). Mr. Dean said payroll records and time records are not the same thing. He received payroll records and noted that nearly all of them reflected 50

hours of work per week, which would be unusual for work in the traveling amusement environment. He had more difficulty getting time records, but he said he understood that Respondent was out on the road, which made it difficult to retrieve and produce the records that were stored in Florida. (TR 80-81). DOL put H-2B investigations on pause in the midst of Mr. Dean's investigation of Respondent, but he viewed the investigation as open and believed Mr. Pierce was aware of that as well since there had been no final conference and Mr. Pierce was an experienced attorney who handled H-2B cases. (TR 81-82). Mr. Pierce had corroborated that 50 hours per week was a reliable estimate and Mr. Dean verified it in interviews with workers from the previous season. (TR 82). Mr. Dean's supervisor instructed him to move forward with the investigation with the payroll records and without the time records. (TR 82-83). The payroll records Respondent provided to Mr. Dean are in RX 51 (which is the same as CX 2 and is on a disc attached to the record). (TR 84-85).

Ms. Deggeller signed at Appendix B to the ETA Form 9142, which is the attestations for the H-2B program. (TR 86; CX 5). Mr. Dean's investigation found that Respondent violated Attestations 4 and 5. Attestation 4 correlates with 20 C.F.R. § 655.22(a) and Attestation 5 correlates with § 655.22(e). Mr. Dean said the focus of Attestation 4 is on potential U.S. workers and it is intended to insure that potential U.S. workers are fully informed about the position, work location, pay and deductions. (TR 87). Mr. Dean determined that Respondent violated the requirement by not disclosing a bonus opportunity to potential U.S. workers. (TR 87-88). That information was not included in the newspaper or SWA advertisements. Respondent also listed a rate of pay for overtime work in the ETA Form 9142, but then it did not adhere to that rate. (TR 88). Most of the H-2B workers had worked for Respondent for multiple seasons and were well aware of the potential for recruitment and retention bonuses while potential U.S. workers did not have that same information. (TR 88-89).

Respondent was required to pay not less than the federal minimum wage, the state minimum wage or the prevailing wage as determined by the ETA. Respondent's business requires travel to multiple states, so the minimum wage it is required to offer varies as it moves from one location to another. (TR 89). Mr. Dean said that since these are minimum wage jobs, knowing that there is the prospect of earning a bonus for completing the season or recruiting a new worker along the way could be important to a potential U.S. applicant. (TR 90). Someone who worked 35-40 hours per week for the entire season would earn between $9,000 and $11,000. If that person recruited another worker who stayed on until the end of the season, he or she could earn an additional $1,000. That and the potential retention bonus could increase a worker's earnings by 10 to 20 percent. (TR 91-92). The newspaper and SWA advertisements Respondent placed did not contain information about potential bonuses; therefore, they did not fully communicate the pay that was available for the position. (TR 92). Mr. Dean interviewed three workers who received end-of-season retention bonuses of $600 to $800. Either the retention bonus or the recruitment bonus alone would constitute a violation of Attestation 4 and Mr. Dean's recommendation was that it be treated as a willful violation. (TR 94). Catherine Deggeller, one of Respondent's officers, signed the ETA Form 9142 stating that Respondent would comply with the requirements of the attestations. The potential bonuses would be a significant part of what a worker could earn, so failing to inform potential U.S. workers was a substantial failure to comply with Attestation 4. (TR 95).

Mr. Dean's investigation led him to conclude that Respondent violated Attestation 5, which correlates with § 655.22(e). (TR 95). Based upon his review of payroll records, interviews and admissions by Respondent's counsel, Mr. Dean found that Respondent took undisclosed deductions from workers' wages that reduced their wages below the offered wage. He also found that Respondent advertised an overtime pay rate, but there was no record that an overtime premium was ever paid. (TR 96). In the ETA Form 9142, Respondent said the hourly wage rate was $7.93 to $8.25 and in block 1-A indicated that overtime was not applicable. In block 3, however, Respondent refers to an addendum. (TR 98). The addendum states that the overtime rate is $11.90 to $12.38 per hour and in the application Respondent said the basic work hours were 30 to 40 hours per week and that overtime is defined and paid in accordance with prevailing law. (TR 99). Mr. Dean said that Respondent's counsel provided him with evidence of a court case that determined Respondent was exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA"), but the FLSA overtime exemption was not applicable because Respondent submitted an attestation that it was going to pay overtime. (TR 100-101). The availability of overtime was noted in Respondent's newspaper and SWA advertising. (TR 102-103). Mr. Dean found no evidence that Respondent paid overtime premium pay during the course of the contract period. (TR 103). Despite communicating on its ETA Form 9142, newspaper advertising and SWA notice that overtime was available, the payroll records indicated that Respondent tried to pay a fixed salary for a fluctuating work week. Mr. Dean said 10 hours of overtime work per week for 40 weeks at $4.00 per hour would be $1,600.00, which is substantial amount of money for a minimum wage worker. (TR 104).

Back wages were deemed applicable for this violation. Mr. Dean noted that at times Respondent had workers operating in different states where different wage rates applied and he asked for and never received a schedule of who was working where and when. (TR 105). He said he wanted the actual time records to determine how many hours were worked and at what location in order to calculate the actual rate of pay a worker was entitled to receive, but Respondent failed to provide the information. Since he was unable to determine exactly where a worker was at any given point in time during a week, he used the higher wage rate for the week. (TR 106). According to the payroll records Respondent provided (RX 51), workers were paid $420.00 for a 50 hour week prior to deductions, which equates to $8.40 per hour. (TR 107). The computation of back wages reflected in CX 3 would have been higher had $8.40 per hour been used across the board as the hourly rate. (TR 108).

Mr. Dean said Respondent's newspaper and SWA advertisements "refer in some vague way to housing for a credit." (TR 108). While he found the language of the advertisements to be vague, in practice he said Respondent deducted $60 per week from the pay of workers who stayed in a traveling bunkhouse. There was no indication of the $60 weekly deduction on the payroll, but workers said they were paid in cash – which Mr. Dean said was common in industries where workers do not have ready access to banks – and the pay they received was reduced by the $60 weekly charge. (TR 108).

The SWA notice – which is at pages 4-6 of CX 7 – is in the public domain and is primarily for the benefit of unemployed U.S. workers who are using the state workforce agency to try and find employment. Mr. Dean said there was no reason to believe that potential H-2B workers would be checking the SWA notices of localities in the United States. (TR 109). The

payroll records Respondent provided show the $60 deduction and during the investigation, Mr. Dean determined that the deduction was for housing in a traveling bunkhouse. (TR 109-110). In the ETA Form 9142, which is at CX 5, there is no mention of a payroll deduction for housing. If Respondent is paying $8.40 per hour and deducts $60 per week, it reduces the actual wage below the stated offered range. (TR 110). The H-2B regulation at § 655.22(g)(1) requires employers to disclose all deductions that are not required by law. Taxes are a deduction required by law.

A deduction for housing can potentially be a lawful deduction if it is reasonable and disclosed. In this case, the workers Mr. Dean interviewed believed the bunkhouse was clean and safe, but it is up to the Secretary, not the workers, to determine reasonableness. (TR 113). Under a primary benefit analysis, if providing something like housing primarily benefits the employer then it is an ordinary cost of doing business and no deduction from an employee's pay would be legal. Mr. Dean did not investigate the reasonableness of the cost or who primarily benefitted from on-site housing because Respondent failed to disclose the deduction as required by the regulation. (TR 114). Mr. Dean determined that the failure to disclose the housing deduction was a willful violation and a substantial failure to comply with the H-2B regulations. (TR 115). He calculated back wages owed due to the undisclosed housing deduction for each worker as well as a total that also included unpaid overtime. (TR 115-115; CX 3). A Form WH-56 that compiles all the back wages alleged to be owed to each worker was prepared and used to attempt to get Respondent to voluntarily pay back wages. (TR 116-117; CX 1).

The Wage and Hour Division calculated the civil money penalty ("CMP") owed for the violation of Attestation 4 related to bonuses as $5,500.00. In determining the amount, they consider mitigating factors, including the employer's prior history and the severity of the violations. (TR 117). As an investigator, Mr. Dean makes a CMP recommendation, but a manager makes the final decision. In this case, a follow-on investigator made the recommendations to the manager. The CMP for the violation of Attestation 5 related to undisclosed deductions was $10,000.00. (TR 118). The CMP is equal to the back wage finding or $10,000.00, whichever is less, so in this case the CMP was capped at $10,000.00 even though the back wage finding was substantially higher. (TR 119).

On cross-examination by Respondent, Mr. Dean said that the narrative report at RX 33 was prepared and signed by investigator Kirby Joseph who was the investigator assigned to the case at the time of the final conference. Mr. Dean met with Mr. Joseph for more than an hour when the case was transferred and Mr. Joseph had access to the materials Mr. Dean had prepared. Mr. Dean said he has read the report Mr. Joseph wrote and he is fine with its content. (TR 122). The purpose of the report is to describe the findings, identify any violations, and describe the reasons for any violations. (TR 123).

Mr. Dean did not request to interview any members of the Deggeller family. (TR 123-124). He agreed that in the final narrative report the only bonus identified as a violation was the bonus for recruiting a new employee and the retention bonus was not mentioned. (TR 126-127). He agreed that in the ETA Form 9142 Respondent properly disclosed the recruiting bonus in Addendum Section H.6. TR 127; RX 7 at 10). He agreed that nothing in the 2008 regulations required employers to match the wording of its advertising with the wording in the ETA Form 9142. Section 655.17 of the regulation mandates disclosure of the wage offer only. (TR 128).

The regulation defines the term "wage offer" as the highest of the prevailing wage, federal minimum wage, state minimum wage or local minimum wage. (TR 129). Mr. Dean agreed that Respondent's application for certification disclosed that the wage offer was the prevailing wage and that in the addendum on the recruitment bonus it said the bonus was an incentive for current workers. (TR 130-131). He agreed that the charged violation was related to Respondent's advertising and not its ETA Form 9142 and that the advertising is directed at prospective employees. (TR 131-132). He also agreed that the alleged violations were based upon the 2008 regulations, not the 2015 regulations. (TR 135).

Mr. Dean agreed that the 2008 H-2B regulations did not require an employer to pay overtime. (TR 137). In this case, overtime would have to be required by the Fair Labor Standards Act or state or local law. (TR 138). Mr. Dean said he had not seen a case where an employer paid workers in advance for work they had not yet performed. He was aware that there is a FLSA exemption for amusement operators. It applies either a seasonal test of not more than seven months of operations per year or a ratio test based on the differential between the six high and six low revenue months for the operator. (TR 140).

RX 18 is a copy of handwritten notes Mr. Dean took during the first telephone conversation he had with Respondent's counsel, Mr. Pierce, on August 28, 2016. (TR 141-142). He noted that counsel said Respondent was FLSA exempt and the exemption is noted in the narrative report. (TR 142; RX 33 at 2). Mr. Dean acknowledged that he was unaware of state wage and hour and overtime requirements. He disagreed with the assertion that all of Respondent's H-2B workers were paid for all of the time that they worked since he was unable to review time records because Respondent failed to produce them and a worker he interviewed believed that the worker was not paid for all of the hours he worked. (TR 145-146). Mr. Dean did not attempt to apply either of the tests to determine if the FLSA exemption applied because Respondent stated in its ETA Form 9142 that it would pay overtime, so the FLSA exemption was not an issue. (TR 146). He testified:

> I don't know the Employer's intent. I know what they communicated their intent to be on their application for temporary nonimmigrant workers. They communicated that they were going to pay overtime. They communicated in the newspaper advertisement that there was overtime. They communicated in the SWA posting that there was overtime available. If they did not plan on paying overtime, why would they tell the world that they were going to?

(TR 147-148).

The instructions for the ETA Form 9142 say that they explain the questions and attestations, if an applicant needs additional space it can attach an addendum, and that answers can be conditioned. (TR 150; RX 6). Mr. Dean agreed that it was proper for an applicant to provide a conditioned answer. (TR 151). Section F.a.2 of the instructions directs the applicant to "[e]nter the basic hours of work required per week and overtime hours per week in accordance with State and Federal law for the work and area of employment." (TR 152-153; CX6 at 2). Mr. Dean agreed that the word "required" was not defined in the instructions. (TR 153). He said overtime was required in this case because Respondent signed the ETA Form 9142 stating that it

would pay overtime. (TR 157). Respondent's counsel asked Mr. Dean to look at Webster's Dictionary definition of "overtime," which is in RX 73. Mr. Dean said he did not enforce the dictionary, so Webster's definition had no meaning to him. (TR 158-159). He said Respondent promised in the ETA Form 9142 to pay a certain wage, so the FLSA had no bearing. (TR 161). He agreed that if someone worked less than 40 hours per week then there is no entitlement to overtime pay. (TR 163). He said that Respondent's obligation in the application was to describe the rate of pay and, in this case, Respondent stated the basic rates in the different metropolitan statistical areas where it operated and then a corresponding range for overtime that was one and half times the basic rate range. (TR 164). Mr. Dean agreed that in the ETA Form 9142 that Respondent submitted for the 2013 season it did not use the words "overtime is available." (TR 165; RX 7). While Mr. Dean agreed that Respondent stated that "overtime is defined by and paid in accordance with prevailing law," he said it was in a separate paragraph and was not correlated with the prior wage rate section. (TR 166-167; RX 7).

Mr. Dean said he used information provided by the Office of Foreign Labor Certification in the Employment and Training Administration, but he did not know if the 2008 regulations gave ETA and WHD concurrent jurisdiction over interpretation of the regulations. (TR 167-168). He said he relied on what was in writing in the regulations and did not rely on rumor, innuendo or what an agency might think is appropriate. Mr. Dean denied researching the personal background of Respondent's counsel on wage and hour issues, but he said he began his investigation by doing research on Respondent's history. (TR 169). He said Respondent's counsel told him that he was having discussions with a WHD investigator in Chicago and that counsel represented the amusement industry trade organization. He was aware that historically the amusement industry ranked first or second in the number of H-2B applications. He had no knowledge of Respondent's counsel's assertion that the same conditional language used in Respondent's ETA Form 9142 was used in 150 other H-2B applications that were all approved and were never questioned. (TR 170).

Mr. Dean was directed to RX 31, a calculation of unpaid overtime. When asked if it accurately identified when each employee was on the clock and working for Respondent, he said no, because Respondent never provided him with time records, only payroll records. Mr. Dean went through the payroll records, week by week and name by name, and identified who worked each week, but ultimately RX 31 was prepared by the follow-on investigator, Mr. Joseph, and not by Mr. Dean. (TR 171).

Mr. Dean prepared RX 32, a chart related to the bunkhouse that he developed from information in the payroll records. He agreed with Respondent's counsel that he believed counsel personally corroborated that every one of the workers worked 50 hours every week. (TR 172). That was based upon Mr. Dean's memory, not anything that he reduced to writing during the investigation. Mr. Dean said he was "100 percent certain that 50 hours a week is not correct." He said he used 50 hours per week because Respondent failed to provide additional time records. (TR 173). He agreed that the 50 hours per week number did not align with what witnesses told him during the investigation. He agreed that the witness statement marked RX 21 indicates that workers averaged 40 to 50 hours per week and some weeks it was much less. Mr. Dean said Respondent represented that workers always worked 50 hours per week. (TR 174). When asked to agree with the statement that an FLSA exempt amusement operator is not

required to maintain timekeeping records, Mr. Dean responded that the FLSA does not mention the H-2B program and when an H-2B employer attests that it is going to pay the offered wage for all hours worked it has a duty to supply time records that validate its compliance. (TR 176-178). He disagreed that Respondent's operating hours provided some proof of how many hours employees worked. He said operating hours do not account for time required for set-up, teardown, cleaning up in the morning and the evening, and travel between sites. (TR 178-179).

Mr. Dean agreed that there was an email in RX 24 from Respondent's counsel in January 2015 stating that he had received ten inches of records that included time records and he would need to review them, that RX 25 reflects that Mr. Dean called Respondent's counsel in March 2015 and advised that all H-2B investigations had been placed on hold, RX 26 reflects that counsel's office confirmed with Mr. Dean in September 2015 that H-2B investigations were still on hold, and RX 27 reflects that Mr. Dean reinitiated contact with Respondent's counsel in April 2016. (TR 179-180). At the hearing, Respondent's counsel displayed a box full of records that he said were the original time records. (TR 180-181). As noted earlier, a copy of those records (RX 46-47) were submitted post-hearing on a compact disc that is appended to record in lieu of the paper documents.

Respondent's counsel said that in RX 34 – the summary of unpaid wages to H-2B workers in the Administrator's December 15, 2017 determination – there were instances where the same worker was identified under different names and counted more than once. Mr. Dean said they attempt to perform calculations as accurately as possible and if there were documented mistakes they would be corrected. (TR 181-182). When counsel asked if Mr. Dean was aware that four of the H-2B workers entered into a settlement in a private lawsuit against Respondent and agreed to waive all claims for wages and violations of the regulations, Mr. Dean said that if there was proof that the calculations needed to be amended they would be amended, but there is no private right of action under the H-2B regulations. (TR 182-183). When counsel asked how Mr. Dean was able to determine in some instances that an H-2B worker worked less than 50 hours in a week, Mr. Dean said where there was face-of-the-record evidence of the hours worked then those figures were used. (TR 183; RX 31).

Mr. Dean said this was his first investigation involving the amusement industry, so he could not agree with counsel's assertion that it was a common practice in the mobile amusement industry to recoup housing costs from H-2B workers. Counsel directed Mr. Dean to RX 68, which is an email from the Chicago National Processing Center in August 2008 responding to questions from the President of JKJ Workforce Agency about situations involving carnival and amusement workers. The response states, among other things, that employers are not required to pay for housing for foreign workers. There is no indication who at the National Processing Center issued the response. (TR 184; RX 68). Counsel directed Mr. Dean to RX 72, which is a decision by Administrative Law Judge Richard Morgan dated April 10, 2015. Mr. Dean said he had never seen the document before. (TR 184-185).

Counsel asked Mr. Dean if his sole basis for invalidating the bunkhouse deduction was the fact that it was not listed in the ETA Form 9142. Mr. Dean said that was part of his basis. Counsel directed him to pages 6 and 14 of RX 33 – the December 2017 report of investigation – where it states that the deductions were not listed in the ETA Form 9142. Mr. Dean agreed that

is what the report says, but he noted that he did not write the report. (TR 185). The report was written by the follow-on investigator, Mr. Joseph. (RX 33 at 15). Counsel directed Mr. Dean to notes Mr. Dean prepared prior to testifying, specifically a portion on § 655.22(g)(1), and asked him to read from the notes. Mr. Dean read, "[t]he job offer must specify all deductions not required by law." (TR 186-187). Mr. Dean agreed that the section he read said "job offer" and not the ETA Form 9142, and he agreed that the term "job offer" is not defined in the 2008 regulation. (TR 187). He said that his interpretation of the regulation led him to conclude that the job offer was the newspaper and SWA advertisements and here Respondent did not disclose the lodging cost and deduction in the ads. (TR 191-192). He agreed again that the regulation did not define the term "job offer." (TR 192). He agreed that most of Respondent's workers are returning workers, that there was a housing deduction prior to 2013, and it was reasonable to assume that returning workers were aware of the lodging deduction. (TR 192-193). Mr. Dean agreed that in the witness statement of Melissa Prinsloo, she said that she knew her rate of pay before she left South Africa to come work for Respondent. (TR 194; PX C-4 at B-5). He added that he was not concerned with returning foreign workers, he was concerned with the pool of unemployed U.S. workers who need full knowledge of the job offer in order to make a reasonable decision on whether to apply for the job. (TR 195).

Mr. Dean agreed that the third sentence of the fourth paragraph of page 14 of RX 33 refers to 29 C.F.R. Part 503, which is the 2015 regulation, and that the report states that the job order, not the ETA Form 9142, must specify all deductions, which was not the requirement in 2013. (TR 195). Mr. Dean again stated that he did not write the narrative report. He agreed that the primary benefit rule is an FLSA concept and if an employer is exempt from the FLSA it is exempt from the rule. (TR 196). He agreed that the lowest hourly wage for Respondent's 2013 season was $7.93 and the highest was $8.25. (TR 204). He agreed that the lowest wage – $7.93 per hour – times the low end of the basic hours of 30 to 40 per week – 30 hours – equals $237.90, which is also the low figure Respondent listed in the I-129, and that the high end – $8.25 per hour times 40 hours per week – equals $330.00 as shown in the I-129. (TR 205). Mr. Dean said the only time he recalled using an I-129 was to establish whether a job is a bona fide full-time position. (TR 206). Mr. Dean said he was familiar with local convenience travel, but he was unaware of an employer trying to take a credit or deduction for providing local travel. (TR 209). He agreed that inbound and outbound travel is a FLSA requirement and if an employer is exempt from a law it is not required to comply with the law. (TR 210). He was aware that some employees in witness statements said Respondent provided them a break on food and he agreed that there was nothing that prevented an FLSA exempt employer from taking a credit for food. He agreed that when he turned the case over to Mr. Joseph, he had not done any investigation concerning the reasonableness of credits for local convenience travel, inbound and outbound travel, or food. (TR 211).

On redirect examination by Complainant, Mr. Dean was referred back to RX 33, the narrative report, specifically page four. He agreed that the report said that with respect to Attestation 4, Respondent failed to accurately advertise an incentive bonus and that interviews with H-2B workers disclosed that they received bonuses at the end of the season. He said he interpreted that to reference the retention bonus. (TR 224-225). Mr. Dean was asked to look at the ETA Form 9142 again. (TR 225; CX 5). He agreed that a U.S. applicant who applied for a

job with Respondent and was hired would be eligible to earn the recruitment bonus and that an applicant would be interested in knowing about the potential bonus. (TR 226).

Mr. Dean said that he had reviewed hundreds of payrolls and that most workers are paid more than the minimum wage. He said when a business needs workers they tend to pay what the market demands in order to get workers. (TR 228). He said that when he does an investigation he looks at whether there are substantial differences in what the employer put in the ETA Form 9142, the newspaper advertisement, and the SWA notice. While the language does not have to be precisely the same, they should give potential U.S. workers all of the relevant information necessary to make a decision about whether to apply for the job. (TR 231). The housing deduction affected H-2B workers. (TR 235). Some of the H-2B workers had worked for Respondent for a number of seasons, at least eight years in one case. (TR 236).

On re-cross examination by Respondent, Mr. Dean agreed that the hearing was related to the 2008 regulation. (TR 237). He said he had never been assigned to a case under the 2015 regulation and he had never done a comparison of the 2008 regulation and the 2015 regulation. (TR 239-240). Mr. Dean said that under the 2008 regulation, if a deduction is not disclosed it is an illegal deduction. (TR 240). He said Respondent's counsel told him that Respondent stopped the bunkhouse deduction because of a court decision. (TR 241-242). He agreed that Respondent applied the bunkhouse deduction to both U.S. workers and H-2B workers. (TR 243). He also agreed that he did not interview any potential U.S. workers who said they did not accept a job with Respondent because of the bunkhouse deduction, but he added that since it was not advertised they would not have been aware of it. (TR 244-245).

Andrew Deggeller

Respondent called Andrew Deggeller, who was its representative at the hearing. (TR 256-257). Mr. Deggeller said his name does not appear on any of the paperwork Respondent submitted for the 2013 season. His mother is Catherine Deggeller. He said he is the third generation of his family to work in the carnival industry. His grandfather and great uncle started designing and producing carnival equipment and rides like the spider and tilt-a-whirl. The company started in Ohio, then moved to Indiana, and is now located in Stuart, Florida. (TR 257-258). His father starting running the company in 1980 at the age of 29. His grandfather and great uncle had sold it to a Canadian company, and his father and uncle restarted in in 1980. His father bought out his uncle's interest in 2009. (TR 258-259). Deggeller Attractions provides midway operations to fairs and festivals. Respondent generally returns about half of its revenue to the fair and festival operators. (TR 260-261).

Mr. Deggeller completed two and a half years at the University of Richmond and quit school to help run the company after his father was diagnosed with a degenerative disease. He, his wife, his sister and his mother all work for the company. (TR 261-262). He serves on the board of directors of the Outdoor Amusement Business Association, the industry's trade association. (TR 262-263).

Mr. Deggeller said that for years the company operated without the need for H-2B workers and if he had a choice they would not be in the H-2B program now. The majority of the

staff are Americans and some have been with the company since his grandfather ran the business. (TR 263). Mr. Deggeller said it is more expensive to hire H-2B workers than American workers. As an example, bringing in a worker from South Africa costs $4,000.00 to $5,000.00. He said the transient nature of the business makes it hard to attract workers. He said his nephew told him "there's absolutely, positively, no way that I'm going into the carnival business." (TR 264). The work involves constant travel, changing hours and there is no consistency in day to day life. (TR 264-265). In addition, drug testing prevents a lot of potential U.S. workers from coming to work for Respondent, which Mr. Deggeller described as "shocking." (TR 265). The impact of drug testing and background checks on the applicant pool "diminishes it substantially." (TR 265-266). Mr. Deggeller said that in the years since he took over running the company from his father he could not recall turning down one legitimate U.S. applicant. Often, they show up and then realize they have to do a drug test and a background check and they are never seen again. Respondent went into the H-2B program in 2005 to 2007. Mr. Deggeller said most large carnival operators participate in the program and that he could not find enough workers to operate 60 pieces of equipment without the program. (TR 266).

Mr. Deggeller said Respondent uses its Facebook page, holds a job fair before opening at every venue, and runs ads on the industry's website to try and recruit U.S. workers. He said this is a year-round process and he does not believe there is any external requirement for the company to make these efforts. (TR 267).

Mr. Deggeller came up with the idea of a recruitment bonus to try and avoid having to hire H-2B workers. He said he has a lot of employees who have worked for him for a long time and understand the work and the living conditions. He thought that if they knew others who might be interested in that kind of work he would offer them a recruitment bonus. He said it would be hard for someone who did not understand the business to recruit when they have no experience in what it is like to work in a carnival operation. (TR 268). He thought the term "current employees" as used in the ETA Form 9142 to describe eligibility for the recruitment bonus was accurate because they know what it involves, can explain the job to potential interested workers, and he knows them personally and trusts them to recruit for him. (TR 269-270). He said he gives employees birthday gifts or sometimes gives them a gift card if they have had a bad day, and those things are not advertised in the H-2B application. (TR 270-272). Current employees know about the recruitment bonus. A lot of his H-2B workers are brothers or sisters or cousins of previous employees. He said there is no difference in terms of the bonus between prospective U.S. workers and prospective H-2B workers and that it is not disclosed to either one before hiring. (TR 272).

Mr. Deggeller said that instead of retention bonus for working the whole season, he would call it a "difference in performance bonus." (TR 273). He said there is no automatic entitlement to the bonus and that he looked at how the employee's performance improved from the previous season in assessing whether to award a bonus and the amount of the bonus. The bonus was not counted towards meeting the prevailing wage rate. (TR 273-274).

The financial records in the first part of RX 39 are from 2012 and were used to establish the FLSA exemption for the 2013 season and the financial records in the latter part of the exhibit beginning on page 85 are records from the 2013 season. (TR 275). Mr. Deggeller identified RX

40 as a document tracking revenue from the 2009 season through the 2012 season for purposes of the FLSA exemption. (TR 276).

Mr. Deggeller said Respondent was sued in the U.S. District Court for the Southern District of Florida in a wage and hour class action suit entitled *Morales-Toeldano v. Deggeller Attractions*. He said RX 15 is a stipulation by the parties dismissing that case prior to the initiation of the current complaint and in it the parties agreed that Respondent was FLSA exempt. (TR 278). He identified RX 16 as the order the judge signed approving the stipulation.[4] Mr. Deggeller said his company never paid overtime that it was not required to pay and that he did not know how the Department of Labor defined overtime for an employer that is exempt from the FLSA. (TR 279). He said the statement in the ETA Form 9142 saying that overtime would be paid in accordance with prevailing law meant that if the law required him to pay overtime he would pay it and if the law did not require him to pay overtime he would not pay it. (TR 280). He said that in discussions with his peers in the amusement industry he was not aware of anyone paying overtime that they were not obligated to pay. (TR 281).

Mr. Deggeller said he does not have a desk job and works outside with his employees, so he knows exactly when they are working. He knows how long it takes to set up and tear down equipment, that it takes 15 minutes to get their uniforms and grab a ticket bag before opening, 15 to 20 minutes to inspect every ride as part of the daily inspection, 15 minutes to turn in tickets and uniforms at the end of the night, as well as the number of hours they are open and working. He wants to give his employees all of the credit they earn because turnover means having to retrain new employees and he wants to retain the current ones. (TR 281). Time sheets – which Mr. Deggeller said are referred to as sign-in sheets – are kept in the uniform office. When workers come in and are issued their uniforms they sign in and when they return their uniforms at the end of the night they sign out. A person might sign in and then go have breakfast or read a magazine for an hour and a half before starting work. (TR 283-284). He said the sign-in sheets "aren't as precise as other means in terms of determining hours." (TR 284). The amount of time it takes to set up a ride varies significantly. If a ride takes 15 minutes to set up, a crew might have three to five rides to do while another crew with a ride that takes three hours to set up might only be responsible for doing one ride. (TR 287). At the end of a run, the crews will normally work two or three hours on teardown, sleep for six or seven hours, and then spend another four or five hours getting everything torn down and loaded on the trucks and trailers. (TR 288). Weather also influences how long it takes to set up and teardown. (TR 289). He said he did not have workers that were on-call. (TR 289). Travel to the next location was not work. (TR 290). During the 42 week season they travel 3,500 to 4,000 miles and it takes 70 to 80 hours of driving time. (TR 292).

Included in the thousands of pages of documents in RX 47, Mr. Deggeller said there were "break sheets" showing how often and for how long workers got breaks. (TR 296). An employee gives worker one a 45-minute break, then gives worker two a 45-minute break, then gives worker three a 45-minute break, then gives worker four a 45-minute break, then takes a 45-

[4] Respondent's counsel represented that the judge's order "[j]udicically affirmed that [Respondent was] in fact FLSA exempt." (TR 279). The order states that (1) the action is dismissed with prejudice and (2) all motions are denied as moot. (RX 16). It did not make findings with respect to the Fair Labor Standards Act.

minutes break, and at that point the cycle starts over. The break sheet is intended to make sure employees have the opportunity to take a break, although some decline to do so. (TR 296-297).

Mr. Deggeller said that if there was ever a time when every worker worked for exactly 50 hours per week it was "totally by coincidence." (TR 298). For a portion of the season, in order to cover all of the events, Respondent operates in multiple locations simultaneously. Respondent's Exhibit 61 shows the hours worked for the main unit for the 2013 season. It shows the date of the event in column one, the location of the event in column two, and the hours of operation each day, including set up and teardown, (taken from RX 39) in column three. (TR 298-300). Mr. Deggeller said he knows how long it takes to set up and teardown and he allocated time, but he does not track the exact time. (TR 300-301). Column four, labeled On Duty, Not Oper./Main, shows .75 hours per day, which Mr. Deggeller said was 30 minutes to walk to the ride, inspect it, and power it up, and then 15 minutes at the end of the night to shut it down and walk back. It also shows 3.75 hours in certain places, which Mr. Deggeller said was for maintenance work. Adding those columns together gives a daily total and then a weekly total. (TR 301-303). The column labeled Weekly Total After Breaks deducts 30 minutes per three hour shift from the weekly total. The column labeled Credit Hours is the over or under compared to a 50-hour week. (TR 304-305). The compensable work hours for the main unit in the 2013 season was 1,830.45 hours. (TR 305; RX 61 at 12). The Credit Hour columns shows that Respondent paid main unit workers for 226.69 and second unit workers 182.70 hours that they did not work. (TR 306; RX 61 at 12 and 37).

Mr. Deggeller said he used a "prepayment plan" to promote consistency based on 50 hours per week. He said employees may work 30 hours one week and 60 hours the next week, but he pays them for 50 hours per week, including weeks when they are not operating. That provides employees with a consistent paycheck every week. (TR 309-310). Employees understand that they may have a busy week one week and an easy week the next because there are peak and valleys in the way they operate. (TR 311). Mr. Deggeller said he typically has 60 to 70 percent returning workers each year. In RX 42, which shows who worked the 2012 and 2013 seasons, there are some names that appear to be two different people when it is actually the same person. Mr. Deggeller said that hyphenated names cause that problem. (TR 312).

Mr. Deggeller reviewed RX 38, which are confidential settlements with four H-2B workers who are also included in Mr. Dean's backpay calculations. He said that in the settlements the four workers released any claims for back wages arising out of any breach of the H-2B regulations. (TR 313-314).

Mr. Deggeller said RX 63 were photographs of the exterior and the interior of the bunkhouse. (TR 314-315). It includes bathrooms and showers and there are also bathroom and shower trailers at the site. (TR 315). In response to my question, Mr. Deggeller said the rooms in the trailer were approximately eight to ten feet in width and length. (TR 316).

Respondent works with a recruiter in South Africa and two recruiters in Mexico to try and find H-2B workers. (TR 317). Mr. Deggeller said he wanted the recruiters to have accurate information to pass along to potential workers because he did not want to take one of the slots

and then turn around and go home, and because applicants have to go to the U.S. Consulate for an interview and have to be able to discuss the job offer. (TR 318). Mr. Deggeller said:

> I'm not trying to hide anything. I expect the recruiters to make that abundantly clear to the employee. Understand, it does not help me at all if I have an employee show up and want to go home. That does not help me. I make it clear to the recruiters exactly, tell them everything to expect, because it'll only hurt me if they don't.

(TR 319). Mr. Deggeller did not know if recruiters provide prospective workers with a copy of the ETA Form 9142. (TR 319).

Respondent's Exhibit 62 is a statement signed by 12 workers who had worked for Respondent for at least five years, including in 2013. In the statement, the workers said they were told exactly what to expect about the job and the pay before they arrived in the United States. (TR 320-321). They were aware of potential credits for housing, local travel, travel in and out of the U.S., food, and other things. (TR 321). Mr. Deggeller said all of the returning workers knew about the $60.00 bunkhouse charge. (TR 322). He said workers were not required to live in the bunkhouse. Some workers live in the bunkhouse while others have their own trailers, stay with friends in the area, or stay in motels. (TR 323). Mr. Deggeller said the primary benefits of the bunkhouse is for the workers. They have a secure place of their own to keep their belongings as the operation moves from location to location. (TR 323-324). It allows workers to pool their money, buy groceries, and eat together, which saves them money that they can send back home. (TR 324-325). The 12 workers who signed RX 62 said the bunkhouse charge was reasonable. (TR 325). Respondent compiled a list of expenses incurred in operating the bunkhouse. According to those figures, the actual operating cost was $129.00 per bunkhouse resident per week. (TR 327-330; RX 53).

Mr. Deggeller said local convenience travel includes a weekly trip to Walmart on payday. It also includes trips to water parks, fishing trips, and trips to the hospital when medical care is required. (TR 331). Respondent estimated that the cost of local convenience travel was $13.59 per worker. (TR 332; RX 54). Mr. Deggeller identified RX 56 as a summary of the in and out of country travel costs for H-2B workers. He said the primary beneficiary of the travel cost is the worker who is able to get to and from a job. (TR 333). He said the substantial costs incurred for H-2B travel is one of the reasons why he would prefer to hire U.S. workers. Respondent's Exhibit 57 is a summary of food costs for the 2013 season. (TR 334). Respondent's Exhibit 60 is a summary of all of various expenses incurred for lodging, travel and food, which averages $129.00 per worker per week, and a total cost to Respondent of $311,304.00. (TR 334-335).

Mr. Deggeller said he hired counsel to help with the H-2B process because he runs a carnival and is not competent to navigate the H-2B process on his own. He said it is like filing his taxes: He hires an accountant to do it. (TR 335-336). He has worked with Mr. Pierce for a number of years as have many others in the industry. He also relies on the advice he gets from the recruiters he retains in South Africa and Mexico. (TR 336).

On cross-examination by Complainant, Mr. Deggeller said he quit school and came home to help run the family business at the end of 2001 or beginning of 2002. (TR 339-340). He agreed that Respondent supports festivals and cultural events, and the contracts generally return about half of the revenue to the events' hosts. (TR 340). He said the percentage of U.S. workers changes from year to year, but it has remained over 50 percent. (TR 341). Mr. Deggeller had no role in filling out the ETA Form 9142 that is in issue. (TR 342-343). It was filled out and signed by his mother, Catherine Deggeller, with the help of counsel, Mr. Pierce. Mr. Deggeller said that Respondent always falls below the 33 percent ratio threshold. (TR 343).

Deggeller Foods is owned by Don and Cathy Deggeller, Mr. Deggeller parents. Cathy Deggeller is Catherine Deggeller, who is the corporate secretary for Deggeller Attractions and who signed the ETA Form 9142 in issue. Superior Midway Rides is owned by Heidi Deggeller, who is Mr. Deggeller's sister. Heide Deggeller works for Deggeller Attractions as a member of the office staff. (TR 345). Deggeller Foods owns and operates some of the concession stands that operate at the carnival and it brings over H-2B workers as does Superior Midway Rides. Mr. Deggeller said he did not know whether any of the Deggeller Attractions H-2B workers ever worked in one of the other entity's operations. (TR 345-347).

Mr. Deggeller said workers travel from site to site in multiple ways. Some have their own vehicles, some ride with friends, some ride in one of Respondent's vans. He could not give percentages on the various means of transportation. (TR 352-353). He said everybody ends up going in one of the vans on Thursday nights, which is payday, when they go to Walmart because it is usually at one o'clock in the morning and they will not have friends driving them around at that time of the night. (TR 354).

Mr. Deggeller said he tried to make sure workers got a break at least every three hours. He agreed that it was impossible that every worker worked exactly 50 hours per week. (TR 356). He said the paystubs show 50 hours per week because the system he uses needed a number to input and it allowed employees to get a consistent paycheck rather than one that fluctuates from week to week; it was mutually beneficial. (TR 358-359).

The bunkhouses are custom built trailers designed specifically for transient housing. (TR 360). While there are two bunks per room, there is typically just one person assigned to each room. (TR 361). The 12 H-2B workers that signed the statement at RX 62 are not supervisors, most speak English as a second language, they are all returning workers, and they currently work for Respondent. The workers did not write the statement themselves; it was written by Respondent's counsel, Mr. Pierce. (TR 362-365). Mr. Deggeller agreed that there was no prior written notice to H-2B workers that $60.00 per week will be deducted for lodging, but he said they are advised of it prior to going to the U.S. consulate in their home countries. (TR 366). He said owning the bunkhouses is a cost and there is no financial benefit for Respondent. (TR 368). Mr. Deggeller explained that he kept recruiting workers from South Africa even though the travel cost was substantially higher than for workers from Mexico because sometimes there are not enough workers from Mexico available and the South African workers have been coming year after year. (TR 369). He agreed that he needed H-2B workers because he could not recruit a sufficient number of U.S. workers. (TR 370-371). He did not dispute that an employer is not required to provide food and housing for H-2B workers. (TR 371). He agreed that he did a lot

of things he did for his employees to maintain morale and keep them happy so they will keep coming back year after year. (TR 372). He agreed that employees suing an employer would suggest that they were less than satisfied. (TR 373).

Mr. Deggeller said that returning H-2B workers outnumber new H-2B workers each year. He has had new H-2B workers that started work and then did not finish the season. A worker would need to work a full season to know enough about what the job entails in order to have the background to recruit a new employee. (TR 375). Mr. Deggeller said an H-2B worker had never gotten a recruitment bonus. He has only paid two recruitment bonuses and neither one was paid to an H-2B worker. He did not recall when he gave the bonuses. Had it been in 2013 he would have known about it. (TR 377). About 80 percent of workers get a bonus at the end of the season. The amount ranges from a couple hundred dollars to eight or nine hundred dollars. If a first year employee got a bonus it would be a "good job, I know it was tough on you" award and not a performance bonus because there would be no prior year's work to serve as a basis of comparison. (TR 378-379). Workers sign in and sign out when they pick up and turn in their uniforms. It is possible that a worker could inspect a ride before going to get a uniform and sign in and if that happened, that time would not be reflected in the sign in log. (TR 379).

Quiet hours in the bunkhouse area begin two hours after shutdown. Firearms and drug paraphernalia are not allowed in the bunkhouse, but otherwise whatever is legally permitted is allowed. (TR 380-381). If an employee fails a drug test or is caught trying to have someone bring them drugs or drug paraphernalia, "[t]hey're gone." (TR 382). Mr. Deggeller keeps break sheets because he wants to make sure employees get breaks so they can eat or talk on the phone or do other things. (TR 383). Based on his personal experience, he knows how long it takes to do set up and teardown and there is not much variation in the amount of time that it takes. (TR 384). Weather can play a role in how long it takes, but the variations in times are slight. (TR 385).

The summary of hours worked in RX 61 was a collaborative effort. Mr. Deggeller said he got summary sheets from his wife and his sister, he provided them to Respondent's counsel, Mr. Pierce and Mr. Anderson, and they input the information into the spreadsheet format shown in the exhibit. Since Mr. Pierce and Mr. Anderson do not know much about how the carnival business operates, Mr. Deggeller said he had to explain it to them. (TR 386). At the end of the season there is no reckoning of the prepayment plan that pays employees for 50 hours per week and the actual amount of time that was worked. Mr. Deggeller said he was not going to go to employees and ask for money back. He said the events and the hours worked do not change much from year to year. (TR 387). They have never added a huge event to the schedule that would require reassessing the calculation of hours worked. (TR 388). Mr. Deggeller reviewed the week of February 6 when they were at the Martin County Fair and he agreed that employees worked 51.08 hours, but they were paid for 50.0 hours. (TR 390). Mr. Deggeller could not recall how many of the H-2B workers used the bunkhouse in 2013. It is possible that they all did. (TR 391). Most of the H-2B workers are returning workers and many of them leave things in their rooms in the bunkhouse from season to season. (TR 392).

Looking at RX 51, Mr. Deggeller agreed that it appeared workers got $410.50 gross pay in 2013. (TR 393). Net pay was $316.50, which was normally paid in cash. (TR 394). He

allows workers to take a draw against future pay if they happen to run out of money between pay periods and the draw is repaid by deductions from later paychecks. Workers do not pay for courtesy rides in the van. (TR 395). Workers do not pay when Mr. Deggeller orders pizzas or holds a cookout. They do not pay for the trip in and out of the country. Those are credits for Deggeller, not deductions taken out of an employee's pay like income tax. (TR 396).

On redirect examination by Respondent's counsel, Mr. Deggeller said he created a spreadsheet for the 2012 season that was used by counsel to do the numbers for the 2013 season as shown in RX 61. (TR 397).

In response to question from me, Mr. Deggeller said the purpose of the sign-in sheets was two-fold. First, uniforms are expensive and it allows him to keep track of who signs one out and who brings one back. Second, it provides an immediate indication of how many people made it to work that day. He said he hires a lot of locals and it helps keep track of them. (TR 398). Mr. Deggeller agreed that on page 7 of RX 61 it shows employees worked 111.50 hours before breaks were deducted leaving 92.99 hours worked. He said that was a mistake and he did not know why. (TR 399). He agreed that the numbers need to be checked rather than relying on what is shown in the spreadsheet.[5] (TR 400). Mr. Deggeller said the 50 hour week he uses for the prepayment plan is something he does, but others in the industry use a 40 hour week. He said his Hispanic workers in particularly wanted stable and consistent pay. Respondent pays a consistent 50 hours per week even if the actual total is much less and it pays the highest prevailing wage and uses it for the entire season. Mr. Deggeller said he liked his employees and that he would rather pay them extra than invest in a computer system to keep more precise records. (TR 402). Mr. Deggeller said it took a long time to provide the Department of Labor the records it requested because Respondent is a small family business and they do not get home to Florida where the records are kept until just before Thanksgiving when they come off the road. He added that he is still using the paper-intensive system his parents used and he is trying to move to a cloud-based system that will provide better access. (TR 402-403).

Wayne Pierce

Respondent's next witness was its counsel, Mr. Pierce. (TR 404). Mr. Pierce is a 1982 graduate of the University of Maryland School of Law and he served in the Army Judge Advocate General Corps. (TR 405). He opened a solo practice in 2005 and specializes in the amusement industry. He is the general counsel for the Outdoor Amusement Business Association, the industry's trade group. He started doing work involving the H-2B program in 2006 and filed his first ETA Form 750 in 2007. (TR 406). Mr. Pierce estimates that since 2007 he has submitted about 200 H-2B applications. (TR 407). He had a case in 2011 involving a carnival in Michigan where the auditors wanted work hours to be defined with greater precision. That led him to adopt the "overtime is defined and paid in accordance with prevailing law language" that he used in this case. After he used that language the application was approved by the Office of Foreign Labor Certification. He has used that same language in approximately 150 applications that have been approved over the past seven years, including ones that have gone through audits. (TR 408-412).

[5] A revised version of RX 61 was submitted post-hearing in lieu of the one introduced at the hearing.

On cross-examination by Complainant, Mr. Pierce agreed that in North Carolina the threshold for overtime is 45 hours per week. (TR 418). He disagreed that Respondent failed to pay overtime for work over 45 hours in North Carolina because Respondent overpaid by such a substantial amount. He agreed that Respondent paid employees for 50 hours of work per week, but he disagreed that workers actually worked 50 hours per week. (TR 419). Mr. Pierce did not know if Powhatan County was in North Carolina or the location of the Pungo Strawberry Festival. He agreed that Maryland has adopted the American Bar Association model rules of professional conduct. (TR 420). Rule 3.7 governs situations such as this where an attorney is a witness. The rule states:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of the legal services rendered in the case or; (3) disqualification of the lawyer would work substantial hardship on the client.

(TR 421). Mr. Pierce did not agree that he had testified on a contested issue. He said he testified about the prior case that led to the language on overtime that was used in this case and that his testimony was to establish that there was no willful violation. He reiterated that he did not believe his testimony was on a contested issue. (TR 421-422). He agreed that he has been a member of the Maryland Bar since 1982. (TR 423). Comment 3 to Maryland Rule for Attorneys, Rule 19-303.7, Attorney as Witness, which corresponds with ABA Model Rule 3.7, states:

> To protect the tribunal, section (a) of this Rule prohibits an attorney from simultaneously serving as advocate and necessary witness except in those circumstances specified in subsections (a)(1) through (a)(3) of this rule. Subsection (a)(1) of this Rule recognizes that if testimony will be uncontested, the ambiguity in the dual rule are purely theoretical. Subsection (a)(2) of this rule recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered permitting the attorney to testify avoids the need for a second trial with a new attorney to resolve that issue. Moreover, in such a situation, the judge has firsthand knowledge of the matter in issue. Hence, there is little dependence on the adversary process to test the credibility of the testimony.

(TR 425). Comment 2 on the Rule states in part:

> Providing the roles of advocate and witness can prejudice the tribunal and the opposing party, and can also involve a conflict of interest between the attorney and client. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.

(TR 425).

Jody Bachman is Mr. Pierce's sister and she works as a paralegal in his office where she does day-to-day processing of applications and petitions. She is referenced in a memorandum Mr. Dean wrote on August 26, 2014, in which he said he was told by Ms. Deggeller that Ms. Bachman does all of Respondent's H-2B records and payroll. (TR 432-433; CX 10). Mr. Pierce denied that his sister was ever employed by Respondent or ever had any involvement with Respondent's payroll. (TR 434). Counsel for Complainant argued that Mr. Pierce's sister working for Respondent shows the potential for bias. (TR 435). Mr. Pierce agreed that he could have written in Section G-3 of the application that Respondent did not believe it was required to pay overtime under any prevailing law. He said he chose a short declarative statement that he believed was pretty clear. (TR 436).

On redirect examination by Respondent, Mr. Pierce said he believed Powhatan County and Pungo were in Virginia, not North Carolina. (TR 437). He said he believed that it would be a significant hardship for Respondent if he was not allowed to represent them at the hearing since he was involved in the entire process. (TR 437-438).

I asked Mr. Pierce why he include in the addendum to the application the language about overtime and extra hours being available if he believed Respondent was exempt from the FLSA overtime requirements. (TR 439-440). He said he included that language because of his involvement in the Wade Shows case and he intended to convey that sometimes work hours will go over 40 hours. (TR 440).

Paul Dean – Recalled

Complainant recalled Mr. Dean as a witness. (TR 446). He identified CX 10 as a memorandum for the file that he prepared after talking with Ms. Deggeller. He said the statement about Ms. Bachman's role was what was conveyed to him by Ms. Deggeller. (TR 447-449).

Andrew Deggeller – Recalled

I recalled Mr. Deggeller to the witness stand and asked if Ms. Bachman had ever been employed by Respondent. Mr. Deggeller answered "no." (TR 451). I declined to admit CX 10 into evidence. (TR 452-453).

Legal Analysis and Discussion

The H-2B visa program permits employers to hire nonimmigrant foreign workers to perform temporary nonagricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Such workers may be granted temporary work visas when not enough U.S. workers are able, willing, qualified and available to perform such services or labor. An employer who wishes to employ H-2B workers submits an Application for Temporary Employment Certification and, if the application is approved, the employer submits an I-129 Petition for H-2B visas that will admit the foreign workers into the United States. 8 U.S.C. § 1184(c)(1). The Administrator has been delegated enforcement responsibility for ensuring that H-2B workers are employed in compliance with the statutory and regulatory labor certification requirements. 8 U.S.C. §§

1184(c)(14)(A)-(B), 1103(a)(6). This includes the power to impose administrative remedies, including civil money penalties, on employers who violate the H-2B visa program requirements. 8 U.S.C. §§ 1184(c)(14)(A)(i) and (B). Under 8 U.S.C. § 1184(c)(14)(A)(i), "civil money penalties in an amount not to exceed $10,000 per violation" for a "substantial failure to meet any of the conditions" of an H-2B petition or "a willful misrepresentation of a material fact in such petition." The applicable implementing regulations are set forth in 20 C.F.R. Part 655.

As this matter involves alleged violations related to an Application and I-129 Petition filed for the 2013 season, the 2008 H-2B regulation apply. In 2014, the United States District Court for the Northern District of Florida issued an order ("Injunction") vacating and permanently enjoining DOL from enforcing the 2008 Rule. *Bayou Lawn & Landscape Services v. Perez*, 81 F.Supp.3d 1291 (N.D. Fla. 2014). In a September 2015 Clarifying Order, the District Court clarified that the Injunction "was not intended to, and does not, apply retroactively."

The burden is on the Complainant to establish by a preponderance of the evidence that a violation occurred. 5 U.S.C. § 556(d). *See OFCCP v. Florida Hospital of Orlando*, ARB Case No. 11-011, OALJ Case No. 2009-OFC-00002, slip op. at 20 n.60 (ARB July 22, 2013).

The Administrator alleged (see RX 34) that Respondent committed two violations:

(1) Offered terms and working conditions that were not normal to workers similarly employed in the area of intended employment or were less favorable than those offered to the foreign workers in violation of Attestation 4 and 20 C.F.R. §655.22(a). The Administrator deemed the violation a substantial failure and assessed a $5,500.00 civil money penalty.

(2) Offered wage did not equal or exceed the highest of the prevailing wage, Federal, State or local minimum wage or Respondent failed to pay the wages listed in the I-129 Petition or 9142 Application in violation of Attestation 5 and 20 C.F.R. § 655.22(e), and in violation of Part 4, questions 9 and10, of the I-129. The Administrator deemed the violation a substantial failure and assessed back wages of $150,205.77 and a $10,000 civil money penalty.

Violation of Attestation 4 – Failure to inform potential U.S. workers of the possibility of earning a recruitment bonus and a retention bonus.

1. **Recruitment Bonus**

In the Addendum to Section H.6. of the ETA Form 9142, Respondent stated that current workers could earn "a substantial bonus at the end of the 2013 season" by recruiting a new worker that met the eligibility requirements and was hired. The bonus was $250.00 if the new worker remained employed by Respondent for at least 60 days, another $250.00 if the new workers remained employed by Respondent for five months, and another $500.00 if the new worker was employed for the entire season. (CX 5; RX 7). The potential recruitment bonus was not mentioned in Respondent's newspaper advertisements or its SWA posting. (RX 2-5).

In its final brief, Complainant alleges that "Wage and Hour Investigator Paul Dean ("WHI Dean") noted that three of the workers he interviewed received recruitment bonuses, which ranged from $600 to $800," and it cites Mr. Dean's testimony at page 93 of the hearing transcript (Compl. Brief at 3). I reviewed Mr. Dean's entire testimony as well as his interview summaries (CX 4), and I did not find any evidence supporting Complainant's assertion. Instead, three of the seven foreign workers Mr. Dean interviewed said they got bonus payments at the end of the season: Ms. Bender got $600.00, Ms. DuTuit got $800.00, and Mr. Preterse got $750.00. (CX 4). They did not specify the reasons they received bonuses, but the reasonable inference is they were retention or performance bonuses rather than recruitment bonuses. According to addendum, recruitment bonus were paid in $250.00 or $500.00 increments depending on how much of the season the recruit worked, and none of the foreign workers reported receiving bonuses in either of those amounts. Additionally, Mr. Deggeller testified that he only recalled paying recruitment bonuses on two occasions and neither time was it paid to a foreign worker. (TR 377-378).

The addendum states that the recruitment bonus was an incentive for "current workers" to help Respondent secure additional qualified workers. Mr. Deggeller testified that a worker would not have sufficient experience to recruit a new worker until the worker had been through a full season, understood what the job entailed, and was qualified to assess whether someone might be a good prospect for that type of work. (TR 268-270). There was no evidence that contradicted Mr. Deggeller's testimony.

I find that Respondent did not violate 20 C.F.R. § 655.22(a) and Attestation 4 by failing to disclose the recruitment bonus to potential U.S. workers. First, Mr. Deggeller testified that a first-year worker lacks the breadth and depth of experience to recruit and would not be eligible to earn a recruitment bonus. There was no evidence presented that contradicted his testimony or that suggested a first-year worker had ever received a recruitment bonus. Accordingly, the terms offered to potential U.S. workers were no less favorable than the terms offered to foreign workers since neither group would be eligible for the recruitment bonus in the first year. Second, even if new hires were eligible to earn a recruitment bonus, Mr. Deggeller testified that in the years since he started offering the bonus he had only awarded it twice. There was no evidence presented that contradicted his testimony. The evidence of record shows that the recruitment bonus was at best a remote possibility even for Respondent's most seasoned workers. Considering all of the evidence on this issue, I find that Respondent was not obliged to inform potential U.S. workers of a bonus for which they would be ineligible in their first year of employment and, even if they remained employed by Respondent for years, they would likely never earn.

2. **Retention Bonus**

The retention bonus is a different story. Mr. Deggeller testified that about 80 percent of workers received a bonus at the end of the year and that bonuses ranged from about $200.00 to $900.00. He said that he based a bonus award on a comparison of how the worker's performance in the current season compared to his or her performance during the last season. A new employee could earn a bonus, but Mr. Deggeller said that since he had no prior year's

performance to serve as a basis of comparison, it would be more of a "good job, I know it was tough on you" award. (TR 378-379).

According to the schedule for the 2103 season reflected in Revised RX 61, the season began in early February and ended in late November, a period of 42 weeks. According to the payroll records for the 2013 season, a worker who made it through to the end of the season earned between about $16,560.00 and $18,180.00. (RX 51, Payroll, at 585 and 589). An end of year bonus of between $200.00 and $900.00 would be the equivalent of as little as one-half of a week's pay to as much as more than two weeks' pay. The failure to inform potential U.S. workers of this likely bonus may have deterred potential workers from applying for employment and may have been a valid basis to have denied Respondent's application. *See generally Norwalk La Mirada Unified School District*, 2012-PER-01106 (March 31, 2017).

However, as Respondent notes in its brief, Complainant did not raise the retention bonus issue until the hearing. (Resp. Brief at 3). The narrative report from the investigation states that the alleged violation of Attestation 4 was the failure to disclose the recruitment bonus and the report does not address the propriety of the retention bonus. (RX 33 at 14). The Administrator's determination referred to the investigation and informed Respondent that it was alleged to have violated Attestation 4, but it did not state specifically the basis for the allegation. (RX 34). The regulation required that if a violation was found the Administrator had to set forth "the reason or reasons therefore" in the determination. 20 C.F.R. § 655.70(c)(1). Raising a new and additional basis for an alleged violation for the first time at the hearing denied Respondent of the pre-hearing notice of the "matters of fact and law asserted," which is mandated by the Administrative Procedures Act, 5 U.S.C. § 554(b)(3). *See generally In the Matter of the Qualifications of Edward A. Slavin, Jr.*, ARB Case No. 04-008, ALJ Case No. 2004-MIS-00002, slip op. at 19 (ARB Apr. 29, 2005). Accordingly, I am unable to find that Respondent violated Attestation 4 by failing to inform potential U.S. workers of the retention bonus.

In summary, I find that Respondent did not violate Attestation 4 by failing to provide notice to prospective U.S. workers of a potential recruitment bonus and retention bonus.

Violation of Attestation 5 – Offered wage did not equal or exceed the highest of the prevailing wage; Federal, State or local minimum wage; or the wage listed on the ETA Form 9142 or Form I-129

1. **Overtime Pay**

Authorization to bring foreign workers into the United States through the H-2B program is a privilege, not a right. Those who request and receive authorization have an inherent duty to maintain reasonably accurate records to document compliance with the program's requirements. In this case, where Respondent requested and received authorization to employ H-2B workers and to pay them an hourly wage, there was an inherent duty to keep reasonably accurate records of the time they worked.

In its final brief, Respondent cited a 2005 Wage and Hour Opinion Letter in support of the propriety of its prepayment plan. Opinion Letter, FLSA-2005-3 (Jan. 7, 2005). In that case,

the employer provided commercial aircraft maintenance services and the hours its employees worked varied significantly from week to week. The employer's prepayment plan paid workers for 40 hours per week, even if they worked fewer hours, in order to provide workers with a consistent paycheck from week to week. The pay for hours that were not worked was treated as an advance on future overtime pay that employer paid at a rate of time and a half. The Administrator advised the employer that "[p]lans of this type require the use of a system whereby the employer can maintain a running account for each employee of the amount to the employer's credit."

Complainant contends that Respondent's time records (RX 47) and time summary (Revised RX 61) are incomplete and inaccurate. (CX 11). I have reviewed RX 47 and Revised RX 61 and I afford them little weight. The significant deficiencies Complainant identified in RX 47 are accurate and consistent with my review of the records. (CX 11 at 2-3). The time summary in Revised RX 61 is based on the hours Respondent operated during the 2013 season, minus time that should have been covered by breaks, plus Mr. Deggeller's estimation of the length of time required to set up operations and then tear it down. It is not a record of the actual amount of time any particular employee worked that season. Complainant states that it substantiated an average of about 49 work hours per week based upon its review of the incomplete records Respondent provided. (CX 11 at 4). That is close to the 50 hours per week that Respondent used as the regular basis for doing its payroll. While I agree with Respondent that it is unlikely that all of its employees worked exactly 50 hours per week, Respondent failed to provide records to establish the actual hours that its employees worked. Therefore, I find that 50 hours per week – the figure Respondent used for its payroll – is the figure best supported by the evidence of record.[6] (RX 51).

The bigger issue is whether Respondent was required to pay overtime. Attestation 5 nearly mirrors the wording of 20 C.F.R. § 655.22(e), which states: "The offered wage equals or exceeds the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and local minimum wage, and the employer will pay the offered wage during the entire period of the approved H–2B labor certification." In the Job Offer Information section of the ETA Form 9142, Respondent stated that the basic hours of work per week was 30 and marked "N/A" for overtime. In the comments, Respondent noted that the hours of operation are determined by event sponsors and vary. (RX 7 at 4). In the section on Rate of Pay, Respondent said the basic rate of pay offered ranged from $7.93 per hour to $8.25 per hour and entered "N/A" for overtime rate of pay, and it said to see the Addendum. (RX 7 at 6). In the Addendum, Respondent said the prevailing wage varied from location to location and that an itinerary was attached. It said basic hours were 30 to 40 per week, overtime varies, extra hours are available some weeks and vary, and that the overtime rate was $11.90 to $12.38 per hour (which I note is 1.5 times the low and high prevailing rates). It also said that "[o]vertime is defined by and paid in accordance with prevailing law." (RE 7 at 9).

[6] Respondent claims that the 2008 regulation did not require it to maintain time records. (Resp. Brief at 10). While there may have been no express requirement to keep time records, it is implicit that an employer who commits to pay its employees based upon the amount of time they work will make reasonable efforts to accurately document that time and pay its employees accordingly.

In the I-129, Respondent stated that the weekly pay was $237.90 to $330.00 and under the heading Other Compensation entered "N/A." (RX 11 at 6). I note that the pay range listed in the I-129 equates to the lowest prevailing wage ($7.93 per hour) times the fewest number of regular hours (30 per week), which is $237.90, to the highest prevailing wage ($8.25 per hour) times the most number of regular hours (40 per week), which is $330.00, listed in the ETA Form 9142.

Complainant contends that Respondent committed to paying time and a half for hours worked in excess of 40 hours per week based upon the entries in the ETA Form 9142. (Compl. Brief at 10-11). I have reviewed Respondent's entries on the ETA Form 9142 and find that interpreting what they mean, taken together, is unclear and confusing. The one clear point is the basic hourly wage range of $7.93 to $8.25 depending on location. The basic hours were stated as 30 hours on the face of the form and 30 to 40 hours in the Addendum. The Addendum states that "extra hours" are available some weeks and vary, but it does not explain what that means: Does that mean there will be opportunities to work more than 30 hours or 40 hours per week and, if so, is that at the basic hourly rate or at the overtime rate? In one place Respondent said overtime is "N/A," in another that overtime "varies," and in a third that overtime is defined by and paid in accordance with prevailing law. On one hand, Respondent should not gain an advantage for submitting a garbled mess, but on the other hand Complainant should not gain an advantage when its Certifying Officer approved the application with the ambiguous language included. I find that Respondent's obligation, if any, to pay overtime is not governed by what it wrote in the ETA Form 9142 because of the ambiguity of the wording. Instead, I find that Respondent's obligation, if any, to pay overtime is governed by applicable Federal, State or local law.

Respondent claims that it is exempt from the FLSA and Complainant has not presented any evidence to the contrary. (TR 274-279; RX 39-40). I find that no overtime requirement was imposed by Federal law. *See* 29 U.S.C. § 213(a)(3).

There was no evidence presented of any overtime requirements imposed by local law and I find that local law imposed no overtime requirements.

The only evidence presented of an overtime requirement imposed by State law was for work performed while Respondent operated in the State of North Carolina. Mr. Pierce testified that overtime is required in North Carolina for hours in excess of 45 hours per week. (TR 410; RX 1 at 7). On July 25, 2019, I issued an Order notifying the parties that I intended to take official notice of 2017 North Carolina Laws Session Law 2017-185 (S.B. 82) and North Carolina General Statutes § 95-25.4 and § 95-25.14(c)(8), and I gave them an opportunity to file objections. Complainant did not submit a response. Respondent submitted a response on August 2, 2019 objecting to official notice of North Carolina statutory law. Respondent contends that it was not provided notice of an alleged violation of North Carolina's overtime law in the Administrator's determination letter and that the North Carolina overtime requirement is not relevant to any alleged violation.

Respondent's objections are noted and overruled. Respondent's counsel, Mr. Pierce, was aware of North Carolina's requirement to pay time and a half for hours in excess of 45 hours per week for work performed in the state. He prepared Respondent's ETA Form 9142, personally

crafted the language saying that "[o]vertime is defined by and paid in accordance with prevailing law," and is one of the two signatories on the form and its attestations. While the report of investigation states that Respondent failed to pay overtime for hours in excess of 40 hours per week at a rate equal to one and half times the rates listed in the ETA Form 9142, the Administrator's determination described the alleged violation as the "[o]ffered wage did not equal or exceed the highest of the prevailing wage, Federal, State or local minimum wage **or** the employer failed to pay the wage listed on the I-129 Petition or 9142 Applications." (RX 33 at 14; RX 34 at 6) (emphasis added). Accordingly, I find that the Administrator put Respondent on notice that the failure to pay the wage required by state law was a potential basis for the alleged violation.

The 2017 North Carolina Session Law, which went into effect on January 1, 2018, modified § 95-25.4, which required a seasonal amusement or recreational establishment to pay workers time and a half for hours worked in excess of 45 hours per week, and § 95-25.14(c)(8) by adding seasonal amusement and recreational establishments to the list of entities exempt from overtime requirements. As noted, those changes were not in effect during the charged period; therefore, when Respondent operated in North Carolina during the 2013 season it was required to pay overtime at a rate of time and a half for hours worked in excess of 45 hours per week.

According to the itinerary Respondent submitted with its ETA Form 9142, it operated at four events in North Carolina during the 2013 season. It operated at a community fair in Harnett County from April 17-21; a festival in Cumberland County on April 20; a fair in Cumberland County from April 25 to May 18; and a celebration in Dare County from June 11-15. (RX 7 at 20-21). The employees who worked at those events and were paid for working more than 45 hours a week were entitled to overtime for the hours that exceeded 45 hours. It is clear that Mr. Pierce, who assisted Respondent in completing the ETA Form 9142 and signed the form, was aware of the overtime requirement in North Carolina; therefore, I find that this was a substantial failure to comply with the terms and conditions of the certification.

There was no evidence presented concerning overtime requirements in any of the other states where Respondent operated during the 2013 season.

I am unable to determine from the evidence of record which of Respondent's employees worked in North Carolina, the exact periods of time they worked there, or the number of hours for which they were paid for work performed in the state. An employee who was paid for 50 hour of work for a week in North Carolina is entitled to a 50 percent hourly overtime premium for the 5 hours that exceeded 45 hours. If an employee was paid for 45 hours or less for a week of work in North Carolina, he or she is not entitled to an overtime premium. As an example, an employee who was paid $8.01 per hour for 50 hours of work in a week at Fort Bragg, North Carolina, would be entitled to an additional $4.01 per hour for the 5 hours in excess of 45 hours, or a total of $20.05 for the week. The four employees identified in RX 38 who settled claims with Respondent and executed releases of liability are not entitled to overtime for work performed in North Carolina.

Since I am unable to determine which employees are entitled to overtime under North Carolina law and the proper amount they are due, the parties are ordered, within 30 days of the

date of this decision, to confer, identify the employees who worked in North Carolina during the 2013 season and were paid for working more than 45 hours per week, and to determine the overtime amount due for hours in excess of 45 hours per week.

2. **Housing Deductions**

Since the issuance of the 2015 regulation, the Department of Labor has made it clear to employers in Respondent's industry that the cost of lodging is a business expense to be borne by the employer and any charges must be disclosed in the job order and may not reduce the worker's wage below the offered wage. The Department provided model language for use in a job order where lodging is offered: "Employer offers room and board in shared, dormitory housing and will deduct $50 per person per week for these expenses for employees who choose them." *See* 20 C.F.R. § 655.18(b)(10); Obligations and Job Order Content for Employers of a Mobile Workforce, available online at https://www.foreignlaborcert.doleta.gov/pdf/H-2B_2015_IFR_FAQ_Job-Order-Content_Mobile-Occupations.pdf; and Office of Foreign Labor Certification 2015 H-2B Interim Final Rule (IFR) Job Order Content Checklist, January 2016 (Updated), available at https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Job_Order_Checklist.pdf.

This case, however, predates the 2015 regulation and the topic was not as clearly addressed in the 2008 regulation. In the 2008 version, 20 C.F.R. § 655.22(g)(1) states, in pertinent part: "The employer must make all deductions from the worker's paychecks that are required by law. The job offer must specify all deductions not required by law that the employer will make from the worker's paycheck. All deductions must be reasonable. However, an employer subject to the FLSA may not make deductions that would violate the FLSA." (emphasis added).

Complainant contends that Respondent's failure to disclose the housing deduction in the job offer was a substantial violation. (Compl. Brief at 15). Respondent contends that the regulation does not define the term "job offer" and that the job offer could take place when the H-2B workers were still in their home countries or even after they arrived in the United States to start work. (Resp. Brief at 12).

The term "job offer" is used twice in the 2008 regulation. In addition to its use in connection with deductions, the term "job offer" is also used in § 655.34(c), entitled "Amendments to Applications, which states: "Other amendments to the application, including elements of the job offer and the place of work, may be requested, in writing, and will be granted if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under § 655.32." (emphasis added).

The term "job offer" is used six times in the preamble to the 2008 regulation. 73 Fed. Reg. 78020, 78029, 78032, 78035, 78037 (Dec. 19, 2008). In addition to one reference concerning giving notice of deductions, the other five instances refer to steps taken by the State Workforce Agency and the National Processing Center in the course of an employer submitting an Application for Temporary Employment Certification, ETA Form 9142.

The term "job offer" is used consistently in the 2008 regulation and in the preamble, and it is clear that it refers to the proposed terms and conditions of employment and that the job offer predates approval or disapproval of the application for certification. *See Magers, et al. v. Seneca Re-Ad Industries, Inc.*, ARB No. 16-038, 16-054, ALJ No. 2016-FLS-00003, slip op. at 20, n.72 (ARB Jan. 12. 2017) ("The presumption of consistent usage is strong when the same word is used in the same statute passed at the same time."); *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-00154, slip op. at 24, 29 (ARB Sept. 30, 2016, reissued Jan 4, 2017); *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)).

Accordingly, I find that Respondent's arguments concerning the term "job offer" are not persuasive. Those arguments would perhaps carry more weight had the ETA Form 9142 Respondent submitted for the 2013 season been prepared by Mr. Deggeller or another member of the Deggeller family who did not have legal training, but here the application was prepared by Mr. Pierce who testified that he spent "essentially all my professional time working with the amusement industry" and had been involved in the H-2B program and filing applications since 2006 or 2007. (TR 406). Therefore, I find that the 2008 regulation mandated that deductions other than those required by law had to be disclosed in the job offer, that the job offer was part of the application for labor certification, and that the failure to disclose that Respondent would deduct $60.00 per week from workers' pay was a substantial failure to comply with the requirements of the regulation.

Respondent contends that the workers' believed they got good value for the $60.00 weekly housing charge, that the actual value of the housing it provided was substantially greater than $60.00 per week, and that it is entitled to credits for providing workers with transportation and food. (Resp. Brief at 10-13). First, the reasonableness of the housing deduction is irrelevant since the deduction was not disclosed in the job offer as required by the regulation. Second, Respondent providing transportation, occasional meals, and other things of value offered from time to time to enhance morale were not disclosed in the job offer and cannot be claimed as an offset to the housing deduction. Third, the $60.00 per week housing deduction reduced the actual wage below the offered wage. When workers were paid for 50 hours of work, a $60.00 deduction amounted to a reduction in pay of $1.20 per hour.

Complainant calculated the amount of back pay Respondent is alleged to owe workers for the improper housing deductions during the 2013 season and it totals $89,280.00. (RX 32 at 3). There are some discrepancies apparent on the face of the document. First, the list includes the four workers that settled claims with Respondent and released any further claims. A total of $7,320.00 should be deducted from the total for the amounts alleged to be owed to Jose Aguilar, Shenene Swanepeol, Narcisco Hernandez and Frederick Hernandez. (*See* RX 38). That reduces the amount Respondent is alleged to owe to $81,960.00. Second, Mr. Deggeller testified that Julio Hernandez and Julio Barrientos are the same person and that Augusto Perdomo and Augusto Enriques are the same person. (TR 312-313). Those errors should be corrected, but it does not appear that they would change the fact that the workers are each entitled to $2,580.00

for the pay deductions. Therefore, I find that Respondent owes $81,960.00 to its workers for the $60.00 per week deduction from their pay for housing.

Civil Money Penalties

Complainant claims that Respondent owes $15,500.00 in civil money penalties, with $5,500.00 allocated to the alleged violation of Attestation 4 and $10,000.00 allocated to the alleged violation of Attestation 5. (RX 34 at 6). Since I found there was no violation of Attestation 4, any civil money penalty would be assessed for the violation of Attestation 5 alone. In assessing what constitutes an appropriate civil money penalty, § 655.65(g) states:

> In determining the amount of the civil money penalty to be assessed pursuant to paragraphs (b) and (c) of this section, the WHD Administrator shall consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, 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. Other factors which may be considered include, but are not limited to, the following:
>
> (1) Previous history of violation, or violations, by the employer under the INA and this subpart, and 8 CFR 214.2;
> (2) The number of U.S. or H–2B workers employed by the employer and 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 of this subpart and at 8 CFR 214.2(h);
> (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 financial loss to the employer's workers.

There was no evidence presented that Respondent had violated the provisions of the H-2B program before. It appears that the violations had an impact on most if not all of Respondent's workers, both U.S. and H-2B. The gravity of the violations I assess as moderate. The failure to pay overtime for work in North Carolina did not have a significant impact given that it amounts to roughly $20.00 per week for the few weeks Respondent operated in North Carolina. The $60.00 per week housing deduction, on the other hand, had a moderate impact on most if not all of Respondent's workers for the entire season. As Complainant notes in its brief, $60.00 per week for someone whose gross pay is about $420.00 per week equates to a nearly 15 percent shortfall. (Compl. Brief at 13). I find that Respondent did make a good faith effort to comply with the requirements of the H-2B program, most notably it retained counsel who is experienced in this area to assist in meeting the requirements of the program. Respondent's explanations for the violations were not compelling. Mr. Pierce knew there was an overtime requirement in North Carolina, but there was no evidence that Respondent attempted to comply. Similarly, the argument Respondent advanced on its failure to provide notice of the housing deduction was not credible. Finally, I believe Respondent will make a good faith effort to

comply with all H-2B requirements in the future. I found Mr. Deggeller to be a sincere and credible witness. It was apparent that he takes pride in carrying on his family's business and values the workers that make it possible.

When I weigh all of the factors, I find that the appropriate amount for a civil money penalty for the violation of Attestation 5 is $5,000.00.

ORDER

It is hereby ordered that:

1. The parties will, within 30 days of the date of this decision, confer, identify the employees who worked in North Carolina during the 2013 season and were paid for working more than 45 hours per week, and determine the overtime amount due for the hours that were in excess of 45 hours per week.
2. Respondent will pay $81,960.00 to the workers named in RX 32, page 3, except for the four worker named in RX 38 who previously released Respondent from further liability.
3. The amounts due to workers in the 2013 season will include prejudgment compound interest on the back pay owed and post-judgment interest until satisfaction in full.[7]
4. Respondent will pay a civil money penalty in the amount of $5,000.00.
5. The Administrator of the Wage and Hour Division, U.S. Department of Labor, shall make such calculations with respect to back pay and interest necessary to carry out this order.[8]

SO ORDERED.

MORRIS D. DAVIS
Administrative Law Judge

[7] *Ahad v. Southern Illlinois University School of Medicine*, ARB No. 16-064, 16-065, ALJ No. 2015-LCA-00023, slip op. at 7-8 (ARB, Jan. 29, 2018); *Administrator, Wage and Hour Div. v. Help Foundation of Omaha, Inc.*, ARB No. 07-008, ALJ No. 2005-LCA-00037 (ARB Dec. 31, 2008); *Amtel Group of Florida, Inc. v. Yongmahapakorn (Rung)*, ARB No. 04-087, ALJ No. 2004-LCA-00006, slip op. at 12-13 (ARB Sept. 29, 2006).

[8] Interest on unpaid overtime in the State of North Carolina is established by N.C. Gen. Stat. 95-25.22 and accrues at the rate set by N.C. Gen. Stat. 24-1.

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision and order, including judicial review, shall file a Petition for Review ("Petition") with the Administrative Review Board ("ARB"). The ARB must receive the Petition within 30 calendar days of the date of this decision and order. 20 C.F.R. § 76(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. No particular form is prescribed for the Petition; however, any such petition shall:

(1) Be dated;
(2) Be typewritten or legibly written;
(3) Specify the issue or issues stated in the administrative law judge decision and order giving rise to such petition;
(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;
(5) Be signed by the party filing the petition or by an authorized representative of such party;
(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and
(7) Attach copies of the administrative law judge's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

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

20 C.F.R. § 655.76(b). If the ARB determines that it will review this decision and order, it will issue a notice specifying the issue or issues to be reviewed; the form in which submissions shall be made by the parties (e.g., briefs); and the time within which such submissions shall be made.

20 C.F.R. § 655.76(e). When filing any document with the ARB, the party must file an original and two copies of the document. 20 C.F.R. § 655.76(f).