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ADMINISTRATOR, UNITED STATES,
DEPARTMENT OF LABOR,
WAGE AND HOUR DIVISION
Complainant



v.

ALDEN MANAGEMENT SERVICE, INC.
Respondent

Case No: 1996-ARN-3

ORDER ON REMAND

On August 30, 2002, the Administrative Review Board issued a decision affirming my November 19, 1999 *Decision and Order* in this case in all but one respect, *i.e.*, the ARB reversed my holding that back pay was limited to the period subsequent to April, 1994. The case was remanded to me to calculate backpay for the H-1A nurses for the entire period of their employment at respondent's facilities.

When the file was remanded to me, I held a conference call with counsel, who indicated that they would attempt to reach a stipulation on the back wages due under the ARB's remand order. I also set deadlines of November 22 and December 20, 2002 for the parties to file briefs and reply briefs, respectively, regarding the scope of this proceeding on remand. Those deadlines were extended two or three times at the parties' request, and the last reply brief was filed on April 24, 2003. I took no action at that time, however, because I was under the mistaken impression that the parties were still working on a stipulation.

On October 9, I held another conference call with the parties, at which time they informed me that they were waiting for me to issue an order setting the issues to be determined on remand. Accordingly, I make the following rulings:

First, a few months before the ARB's decision remanding the case to me, the Supreme Court issued a decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275 (Mar. 27, 2002), holding that the National Labor Relations Board does not have the authority to award backpay to an undocumented alien who has never been legally authorized to work in the United States. Respondent contends that the reasoning in *Hoffman Plastics* – that awarding backpay to unauthorized aliens “would unduly trench upon explicit statutory prohibitions critical to federal immigration policy,” *Hoffman Plastics, supra*, at 535 U.S. 151, 122 S. Ct. 1284 -- should be applied here to preclude the award of backpay to the non-immigrant nurses employed

by respondent. But as the Administrator points out, *Hoffman Plastics* is inapposite to the non-immigrant nurses employed by respondents. First, Unlike *Hoffman Plastics*, in which the award of backpay was for work not performed,¹ the backpay the Administrator seeks for the non-immigrant nurses was to make up for amounts they were underpaid for work actually performed for the respondent. Second, and of greater import, the non-immigrant nurses were brought into this country by the respondent in accordance with the provisions of a statute, the Immigration Nursing Relief Act (“INRA”), promulgated for the very purpose of bringing non-immigrant nurses into the United States. The anomalies the Court saw in the NLRB’s decision to award backpay in *Hoffman Plastics*, “award[ing] backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained by the first instance by a criminal fraud [by the illegal alien],” *Hoffman Plastics, supra*, at 535 U.S. 148-49, 122 S. Ct. 1283, are not present in this case. Therefore, *Hoffman Plastics* does not preclude an award of backpay to the non-immigrant nurses employed by respondent.

Second, the ARB’s remand order is unambiguous regarding the period for which back pay is to be calculated, *i.e.*, “the H-1A nurses are entitled to an award of back pay for the entire period of their employ at Alden facilities” ARB *Decision and Order of Remand* (hereinafter “ARB D & O”), slip op. at 19. Accordingly, as respondent unhappily conceded in its *Brief Regarding Issues Now Before the Administrative Law Judge*, the ARB’s order is the law of the case and must be followed. That being said, I must, however, express my disagreement with the ARB’s position.

My problem with the ARB’s remand order is that it went beyond the two-year period for which the Administrator was seeking backpay and for which there is evidence in the record to support a backpay award. In its decision, the ARB quoted the following provision of the INRA:

In addition to the sanctions provided under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

8 U.S.C.A. § 1182(m)(2)(E)(v).

ARB D & O, slip op. at 13. The problem with the ARB’s remand order that the non-immigrant nurses are entitled to backpay for the entire period they worked for respondent is not that the ARB determined that the administrator may seek backpay for up to six years in this case. For had the Administrator held that respondent violated attestations covering six years of employment of the nurses, the ARB’s remand order would be appropriate. Rather, the problem is that no allegation was ever raised by the Administrator that the nurses were paid less than the

¹ The undocumented aliens who were denied backpay in *Hoffman Plastics* were illegally laid off for participating in a union organizing campaign. The backpay they were awarded by the NLRB was for a period subsequent to the time they were laid off.

attestation rates prior to the effective date of the May 28, 1993 attestation, which was June 11, 1993, or subsequent to the end of the effective period for the April 24, 1994 attestation, which was June 13, 1995. *See* Administrator's Determination letter dated April 3, 1996 (Exhibit K to the parties' Joint Stipulations); Joint Stipulations 19-22; Exhibits N, X. The ARB itself noted that "the Administrator determined that AMS had violated a condition of *two attestations* when it paid H-1A nurses less than the wage rate for RNs employed at the AMS affiliates. Ex K." *Id.*, emphasis added.

Not only did the Administrator's Determination Letter fail to allege that nurses were underpaid under any other attestations, but the Administrator did not seek backpay for the period prior to June 11, 1993 or after June 13, 1995 in the litigation before me. *See, e.g.*, Joint Stipulation at 39, 50, 44-46, 68; Exhibit N. Further, the ABR did not cite any violations of the applicable attestations justifying the award of backpay for the entire time the H-1A nurses were employed by respondent.

Since the Administrator did not allege violations of the 1992 and 1995 attestations, it appears to be it a violation of due process for the ARB to order backpay for violations of those attestations. Nevertheless, I am bound by the ARB's remand order, and I will proceed accordingly.

Third, although the ARB stated in its remand decision that "we believe *the nurses involved* should be made whole, that is, be paid the prevailing wage rate for the entire period of time in Alden's employ . . ." (ARB D&O, slip op at 16)(emphasis added), the phrase "the nurses involved" is ambiguous. Was the ARB referring to all of the H-1A nurses employed by the respondent at any time, or just those 119 nurses whom the Administrator listed on the Form WH-56 attached to the Administrator's Determination Letter? The Administrator contends that the Remand order requires that all the H-1A nurses employed by the respondent under any of its attestations, not just the 119 nurses listed on the Form WH-56, receive backpay for all of the work they performed. The sweeping language used by the ARB in its discussion of the correct period which the backpay award may cover supports the Administrator's position. Accordingly, the Administrator is entitled under the remand order to prove that each of the H-1A nurses employed by the respondent under the INRA regardless of when that employment occurred should be awarded backpay. It follows that the Administrator is entitled to discovery relevant to making determinations regarding whether any of the H-1A nurses employed by respondent under the INRA were underpaid and thus should be awarded backpay.

I will schedule a conference call with the parties in about a week to discuss the future course of this case.

So Ordered.

A

JEFFREY TURECK
Administrative Law Judge

