U.S. Department of Labor

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Issue Date: 05 August 2020

Case No.: 2019-TAE-00025

In the Matter of

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

v.

SEBASTIANO TOMARCHIO D/B/A BALD EAGLE FARMS
Respondent

DECISION AND ORDER AFFIRMING IN PART AND MODIFYING IN PART THE ADMINISTRATOR'S FINDINGS

This matter arises under the H-2A provision of the Immigration and Nationality Act ("INA" or "the Act"), as amended, 8 U.S.C. §§ 1101(a) and 1188(c), and the U.S. Department of Labor's ("DOL") implementing regulations found at 20 C.F.R. Part 655, subpart B, and 29 C.F.R. Part 501 ("the H-2A regulations" or "the [governing] regulations"). The Administrator of the Wage and Hour Division ("the Administrator") alleges Bald Eagle Farms ("Bald Eagle" or the "Farm") violated the Act and assesses civil money penalties against them.

STATEMENT OF THE CASE

Mr. Sebastiano ("Benny") Tomarchio is the sole owner of Bald Eagle Farms, located in Harrisonville, New Jersey.[1] His family has owned the farm since approximately 1960. The farm is about one-quarter mile from Harrisonville, a very small town. The road from the farm to Harrisonville does not have a sidewalk. The town where the workers go to shop on the weekends is about a 45-minute drive away.

In 2017, Benny first began using the H-2A program to recruit workers from Mexico to work on Bald Eagle Farms. A family friend, Antonio Constantino, in recruiting the workers, assisted him. In 2018, Benny filled out two Job Orders prepared by Agworks. One job order was for eight workers, who arrived on the Farm in April 2018. The second job order was for 52 workers who arrived on the Farm in June 2018. Respondent also hired three domestic workers to

[1] The Tribunal will also refer to Benny as Respondent throughout this Decision and Order.

work on the farm during the season. Respondent himself provided Agworks with all the information they used to prepare the contracts. Respondent also used One Step to aid the H-2A workers with the consulate portion of their application. Respondent used the ETA-790 (Job Order) as its work contract. The first set of workers cooked their own meals and when the second workers arrived, the workers were provided meals, cooked by Griselda Castaneda. Griselda Castaneda provided the workers with three meals a day, except on Fridays when she provided breakfast and lunch. She did not provide drinks with the meals, the workers could purchase those separately. For breakfast, she however provided coffee and the workers who did not want coffee would drink milk. Griselda Castaneda also cleaned the bathroom, kitchen, and cafeteria.

Investigators Jose Perez and John Crudup investigated Bald Eagle and visited the Farm on three occasions in September 2018, and again visited on or about January 15, 2019. During this visit, they interviewed workers at the Farm, reviewed work contracts, payroll documents, and information about the companies Respondent hired to bring the workers into the United States. District Director, John Kelly, assessed Civil Monetary Penalties against Respondent for violation of the H-2A regulations.

PROCEDURAL HISTORY

Respondent filed applications to hire 60 H-2A workers in 2018;[2] one application was for eight workers to work from April 10, 2018 to October 16, 2018 (JX 1) and the other was for 52 workers to work from June 29, 2018 to October 16, 2018 (JX 3).[3] On April 25, 2019, following an investigation by the Administrator's investigator, the Administrator issued a Determination Letter, finding Respondent had violated several H-2A regulations. The Administrator assessed back pay and civil money penalties ("CMPs") totaling $ 77,040.96.[4]

Respondent timely requested a hearing in this matter. The Parties filed an Order of Reference, dated and singed on July 26, 2019, with the Office of Administrative Law Judges. JX 6. On August 16, 2019, the undersigned received the assignment of this case. On August 20, 2019, the undersigned issued a Notice of Assignment, Notice of Hearing and Initial Pre-Hearing Order scheduling the hearing to begin on November 4, 2019 in Cherry Hill, New Jersey. On August 28, 2019, the parties filed a Joint Motion for Continuance requesting the Tribunal to continue the hearing for 90 days. On August 29, 2019, the Tribunal issued an Amended Notice of Hearing and Amended Pre-hearing Order granting the parties the request and rescheduling the hearing to begin January 23, 2020. On December 9, 2019, Complainant filed a Motion for Partial Summary Decision. Respondent replied to this motion on December 23, 2019. On January 8, 2020, the Tribunal issued an Order Denying Motion for Partial Summary Decision.

The undersigned held a hearing in this matter in Cherry Hill, New Jersey on January 23, 2020. Attorneys Allison Bowles and Amanda M. Wilmsen represented the Administrator and Attorney J. Larry Stine served as counsel for Respondent. The Tribunal heard testimony from

[2] The applications were signed by Sebastiano Tomarchio, owner of Bald Eagle Farms.
[3] Respondent ultimately hired 62 workers, 59 H-2A workers and 3 domestic workers. JX 5.
[4] $68,018.96 is the total amount assessed for unpaid wages and $9,022 is the total amount of CMP. JX 6

Investigator Jose Perez, Griselda Castaneda, Sebastiano Tomarchio, John ("Jack") R. Kelly, and Stephanie Constantino (by deposition). The Tribunal admitted Joint Exhibits 1-6, Complainant's Exhibits ("CX") 2-45[5] [CX 1 was not admitted at the hearing], and Respondent's Exhibits ("RX") 1, 5, 8 11, and 12. Both parties filed closing briefs.

ISSUES

1. Did Respondent fail or refuse to provide workers with free and convenient access to its kitchen facilities in violation of 20 C.F.R. § 655.122(g)?
2. Did Respondent fail to properly disclose its "meal plan" in violation of 20 C.F.R. § 655.122(g)?
3. Did Respondent violate 20 C.F.R. § 655.122(q) by charging workers for meals without prior, adequate disclosure?
4. Are the workers entitled to back wages for meals that were provided to them and deducted from their wages pursuant to 29 U.S.C. § 203(m)?
5. Did Respondent violate the disclosure notice, by failing to disclose the charges for beverages made by Ms. Castaneda?
6. Were purchases of beverages from Ms. Castaneda voluntary purchases by the workers and not deductions by Respondent?
7. Were the housing conditions Respondent provided in violation of 20 C.F.R. § 655.122(d)(1)(i)
8. Did Respondent violate 20 C.F.R. § 65.122(h)(1) by failing to properly reimburse workers for inbound travel subsistence?
9. Is the imposition of and the amount of Civil Monetary Penalties warranted?

STIPULATIONS OF FACT

The Parties agree to the following stipulations,

1. Respondent is an individual who operates a New Jersey farm.

2. Respondent is the sole owner of Bald Eagle Farms and has operated the Farm since approximately 1970.

3. During the 2018 growing season, Respondent employed both foreign nationals working on H-2A visas ("H-2A workers") as well as a few non-H-2A employees, including non-H- 2A employees engaged in corresponding employment ("domestic workers"), as defined by 20 C.F.R § 103(b).

4. To obtain workers for the period of April 10, 2018 to October 16, 2018, (the "2018 growing season"), Respondent filed two applications for Temporary Employment

[5] During the hearing, the Administrator attempted to withdraw CX 19. However, Respondent objected and moved to have it admitted as its own. The Tribunal allowed this but informed the parties that it would not re-designate the exhibit as an RX and kept it identified as CX 19. Tr. at 216.

Certification ETA Form 9142 ("TEO") and two Agricultural and Food Processing Clearance 01·dern (ETA Form 790) ("job orders").

5. During the 2018 growing season, Respondent's H-2A and domestic workers' duties included picking tomatoes.

6. Respondent first filed a job order for the period of April 10, 2018 to October 16, 2018. The Department of Labor subsequently approved that job order. JX 1 contains a true and accurate copy of that job order.

7. Respondent filed a TEC for the period of April 10, 2018 to October 16, 2018. The Department subsequently approved this TEC. JX 2 is a true and accurate copy of that TEC.

8. Respondent also filed a job order for the period of June 29, 2018 to October 16, 2018. The Department subsequently approved this job order. JX 3 is a true and accurate copy of that job order.

9. Respondent also filed a TEC for the period of June 29, 2018 to October 16, 2018. The Department subsequently approved this TEC. JX 4 is a true and accurate copy of that TEC.

10. After the Department of Labor approved these TECs and job orders, Respondent hired H-2A workers.

11. During 2018, Respondent qualified as an employer within the definition of 20 C.F.R. § 655.103(b).

12. JX 5 attached hereto is a chart listing the 59 H-2A workers and three domestic workers that Respondent employed during the 2018 growing season.

13. In the job orders, Respondent promised to pay these employees $12.05 per hour, which was the 2018 AEWR for New Jersey.

14. Antonio Constantino ("Constantino") recruited H2-A workers from Mexico for Respondent in 2018.

15. Constantino is married to Griselda Castaneda ("Castaneda").

16. Constantino and Castaneda are Stephanie Constantino's parents.

17. In 2018, Respondent's H-2A workers obtained their visas from the United States Consulate in Monterrey, Mexico.

18. In April 2018, eight H-2A workers traveled by air from Monterrey, Mexico to Respondent's farm.

19. The H-2A workers who traveled to Respondent's farm in April 2018 spent one day in transit.

20. In early July 2018, 46 H-2A workers traveled by bus from Monterrey, Mexico to Respondent's farm.

21. In late July 2018, five H-2A workers traveled by bus from Monterrey, Mexico to Respondent's farm.

22. The H-2A workers who traveled to Respondent's farm in July 2018 spent two days in transit.

23. Respondent did not reimburse its H-2A workers for the daily subsistence expenses they incurred during their travels from Mexico to the farm in April 2018.

24. Respondent did not reimburse its H-2A workers for the daily subsistence expenses they incurred during their travels from Mexico to the farm in July 2018.

25. During the 2018 growing season, Respondent's H-2A workers lived at Respondent's housing facility, which is located on the farm at 686 Harrisonville Road, Harrisonville, NJ 08039.

26. The OSHA regulations for temporary worker housing, 29 C.F.R. § 1910.142, apply to Respondent's housing facility.

27. Respondent's housing facility consists of two separate buildings. One building contains the dormitory where the workers sleep and the cafeteria where they eat ("Building 1"). The second building contains a kitchen and bathroom facilities ("Building 2").

28. Since 2014, Castaneda has used Respondent's kitchen to prepare meals for Respondent's workers.

29. When Respondent first started using the H-2A program in 2017, Respondent informed Castaneda about the H-2A Program's maximum daily allowance for meals.

30. Respondent also told Castaneda that she should keep receipts related to meals.

31. In 2018, Respondent informed Castaneda of the updated maximum daily allowable charge for meals.

32. During the 2018 growing season, Respondent paid for the utilities for its kitchen (including gas, electricity, and water), and provided various appliances for the kitchen, including stoves, freezers, and refrigerators.

33. During the 2018 growing season, Respondent made repairs to the kitchen as necessary.

34. From early July to the end of the 2018 growing season, Castaneda used Respondent's kitchen refrigerators to store the beverages and food she provided to Respondent's workers.

35. Between early July 2018 and the end of the 2018 growing season, each of Respondent's H-2A and domestic workers paid $75.00 each week for meals.

36. The $75.00 charge included 20 meals per week, three meals a day for Saturday through Thursday and breakfast and lunch on Fridays.

37. In addition to the $75.00 weekly charge for meals, between early July 2018 and the end of the 2018 growing season, Respondent's H-2A and domestic workers purchased bottled water, soft drinks, and energy drinks from Castaneda.

38. Neither of Respondent's two 2018 job orders disclose a charge for meals or beverages.

39. Between early July 2018 and the end of the 2018 growing season, Castaneda cleaned Respondent's kitchen, cafeteria, and bathroom facilities.

40. Castaneda filled out a Food Safety Compliance Sheet to reflect the cleaning that she did at Respondent's farm.

41. Respondent provided Castaneda with the Food Safety Compliance Sheets she used at Respondent's farm.

42. From July to the end of the 2018 growing season, Respondent provided Castaneda with an Employee List Report each week.

43. Between early July 2018 and the end of the 2018 growing season, Castaneda and two other women typically used Respondent's kitchen facilities between 6:00 a.m. and 7:00 p.m. each day to prepare meals for Respondent's workers.

44. The Wage and Hour Division of the U.S. Department of Labor, including Wage Hour Investigators ("WHI") Jose Perez and John Crudup, investigated Respondent to determine (among other things) whether the farm was in compliance with H-2A regulations for the 2018 growing season.

45. During their investigation, the WHI inspected the housing facility and kitchen area, interviewed Respondent's workers, and met with Respondent and with Castaneda.

46. On April 25, 2019, the Administrator issued a determination letter alleging that Respondent violated certain H-2A regulations and assessing $68,018.964 in back wages and $9,022.00 in CMPs against Respondent.

47. On May 2, 2019, Respondent filed a timely hearing request.

48. The Administrator filed an Order of Reference referring the matter to the OALJ.

49. JX 6 is a true and accurate copy of the Order of Reference, which includes true and accurate copies of the underlying determination letter and hearing request referenced in paragraphs 46-47.

PARTIES' POSITIONS

Administrator

The Administrator argues that Respondent, under the guise of offering free cooking and kitchen facilities, set rate of pay that included travel expenses and suitable housing, and recruited 60 farmworkers who travelled from Mexico to New Jersey. *See* Administrator's Brief at 10. However, from July to the end of the season, Respondent failed to provide the H-2A workers, along with three domestic workers, with free and convenient access to the kitchen facilities. The workers were forced to use a significant amount of their wages to purchase meals and drinks from Respondent's agent. These items were sold to the workers at a profit. The Administrator also argues that the workers were housed in unsanitary conditions. According to the Administrator, Respondent's actions

> violated the H-2A program rules in several fundamental ways: its (1) false promises about kitchen access, as well as undisclosed meal and beverage charges, violated 20 C.F.R. § 655.122(g), (p) and (q); (2) failure to reimburse expenses related to inbound travel violated § 655.122(h)(1); and (3) substandard housing violated § 655.122(d)(1).

Id. The Administrator asserts that pursuant to § 655.122(h)(1), Respondent was obligated to pay its workers for reasonable transportation and subsistence costs the workers incurred from traveling to Respondent's farm. *Id.* at 11. Respondent however failed to do so and has admitted it did not pay the workers for the reasonable expenses they occurred. *Id.* The parties also stipulated that Respondent owes $1,348.60 in back wages for this violation. *Id. citing to* Tr. 160:6-11; CX-20.

The Administrator also argues that Respondent violated the regulations by failing to provide the workers with free and convenient access to its kitchen so that they could prepare their meals. An H-2A employer has a legal duty to feeds its employees and under the regulations, it has one of two options. Under 20 C.F.R. § 655.122(g), the employer must either: "(1) furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals or (2) provide each worker with three meals a day, in which case, the job offer must state any charge . . . to the worker for such meals." *Id.* at 12. When an

employer opts for the second option, that employer has the exclusive obligation to provide meals to the workers. Additionally, the employer cannot profit from the provision of the meals.

In the case at hand, Respondent initially presented the workers with the first option, that it would provide workers with free and convenient access to its kitchen. However, from July 2018 (when the second group of workers arrived till the end of the 2018 season), Respondent violated this agreement. Instead, because of a "longstanding arrangement," Respondent placed Castaneda in charge of kitchen. Castaneda took over the kitchen where she stored and prepared food and thereby prevented the workers from gaining access to the kitchen. The workers thus had no choice but to pay her $75.00 for meals. The Administrator argues that Respondent and Castaneda benefited from this arrangement. Also, as Respondent's "job order did not disclose any charge to workers for meals but explicitly represented that Bald Eagle would 'furnish free and convenient cooking and kitchen facilities for [its farm] workers to prepare their own meals,' [Respondent's] arrangement with Ms. Castaneda constitutes an undisclosed meal plan in violation of 20 C.F.R. §§ 655.122(g) and (q). *Id.* at 12.

The Administrator maintains that contrary to Respondent's arguments that the workers independently hired Castaneda to cook for them, Castaneda's presence on the farm, her taking over the kitchen, and charging workers for the meals she prepared, was the result of an agreement between Castaneda and Respondent. Castaneda provided Respondent with free cleaning and in exchange, she ran the kitchen. Respondent facilitated and oversaw Castaneda's running of the kitchen. For example, Respondent provided Castaneda with the necessary paperwork to complete her cleaning and kitchen duties. Respondent also maintained the upkeep of the kitchen. Respondent informed Castaneda that the amount she charged the workers for meals were not to exceed the limitations set forth in the regulations and that she preserve her receipts to show that she complied with the regulations. According to the Administrator, because of Castaneda's (and her two kitchen aides) use of the kitchen, the workers were unable to utilize the kitchen to cook meals for themselves or store their groceries in the kitchen.

The Administrator describes Castaneda as Respondent's agent. Respondent, through Castaneda, used its kitchen as a prohibited company store. In violation of the regulations, Castaneda sold cold beverages and snacks to the workers at a profit. Under the regulations when an employer or its affiliations charge workers for items at a profit, such charges constitute unlawful deductions their wages. According to the Administrator, Castaneda had both actual and apparent authority to "act on Bald Eagle's behalf or at the very least 'act[ed] in [Bald Eagle's] behalf or interest (directly or indirectly).'" *Id.* at 23-24. As Respondent's affiliate, each time Castaneda sold beverages to the workers at a profit, Respondent shifted a cost that it could not legally deduct directly for its workers' wages to the workers and thus "made prohibited de facto deductions that reduced their wages below what was promised in the Job Orders." *Id.* at 21.

The Administrator additionally argues that Respondent had a legal duty to provide its employees with safe and sanitary housing that complied with the regulations. Respondent violated that duty. Responded failed to provide fly-tight garbage containers. Rather, Respondent placed large uncovered bins in the workers' dining area and out in the open. The WHI inspectors reported that there were no lids in sight of the garbage containers. Respondent also failed to empty out the garbage containers when they were full. Further, Respondent did not maintain

sanitary toilet rooms. There were trashcans in the toilets that contained fecal matter. There was toilet paper and garbage on the floors and in the toilets, and dirty sinks and urinals.

It is the Administrator's position that Respondent owes $48,075 in back wages to the workers for the improperly charged meals. The Administrator argues that Bald Eagle materially altered its job order when it unilaterally substituted a meal plan for the agreed upon free and open kitchen access. Bald Eagle's unilateral action resulted in improper charges to its workers (both domestic and H-2A). Bald Eagle's owner and Castaneda stipulated that each worker paid the weekly charge of $75 for meals. The Administrator posits that its back wage calculations are supported by the record and asks the Tribunal uphold the calculation. Bald Eagle, through Castaneda (its agent), charged both domestic and H-2A workers $75 per week for meals. The Administrator reviewed Bald Eagle's 2018 weekly payroll records to determine who worked each week and their pay. For the weeks between July 5, 2018 and September 25, 2018, the Administrator calculated $75.00 in back wages for each of the 62 affected workers.

The Administrator also contends that Respondent is liable to the workers for back pay due to illegal beverage charges. Castaneda charged the workers for the sale of beverages thus reducing their pay below the required minimum. Although Respondent was under a legal obligation to maintain records for charges and deductions (including drink and meal charges), Respondent failed to do so for drink sales. For this reason, the Administrator believes that the *Mt. Clemens* framework is applicable to the issue at hand and that because its calculations of the amount Respondent owes to the workers for drinks are reasonable, its calculation should be upheld. Once the prosecuting party "produces sufficient evidence to show the amount owed as a matter of just and reasonable inference, the burden then shifts to the employer to present evidence that negates the inference drawn from the prosecuting party's proof." *Id.* at 36 citing *In re Greater Mo. Med. Pro-Care Providers, Inc.*, ARB No. 12-015, 2014 WL 469269, at *16. If the employer fails to do so, the Tribunal may still award damages (even if they are approximations). *Id.* The Administrator also mentioned that the "*Mt. Clemens* standard squarely applies to calculating the amount owed for an employer's 'unlawful deductions.'" The Administrator's calculations meet the standards set forth in *Mt. Clemens*. The Administrator presented WHI Perez's summary of his interview with workers and with Castaneda as well as Castaneda's signed interview statement to support its calculations. *Id.* at 36-37. This is allowed under *Mt. Clemens*. Based on WHI Perez's interviews, the Administrator determined that Castaneda sold the workers "an average of 2.714 drinks per day, at an average charge of $1.40 per drink, for a total average cost to workers of $26.60 per week." *Id.* at 37. To determine the damages owed to each worker, the Administrator consulted Respondent's payroll records to determine the number of weeks each employee worked in 2018 and multiplied that number by $26.60 to determine the damages owed to each worker. *Id.* The Administrator argues that the decision to not to include Castaneda's estimate of the number of drinks she sold to each worker (because she had an incentive to provide low estimates) in his calculation, the frequency at which drinks were sold, the average price of the drinks are reasonable and supported by the record.

The Administrator additionally asks the Tribunal to honor the Administrator's total assessment of $9,022 in civil money penalty (CMP) against Respondent. This amount is reasonable and "well below" the maximum amount that the Administrator could have assessed for Respondent's "serious violations of multiple regulations under the H- 2A program." *Id.* at

40. The Administrator can assess civil money penalties when an Employer violates work contracts or regulatory obligations. The Administrator has enforcement discretion and can consider the totality of circumstances when determining the appropriate remedy for a violation. The Administrator asks that the Tribunal approve its $1,388 assessment in CMP for Respondent's failure to provide kitchen access to the workers, which resulted in undisclosed meal charges. The regulations authorize the Administrator to assess CMP upwards to $1,735 each time an employer fails to properly pay an individual worker or honor the terms or conditions of the worker's employment as required by the regulations. Though the Administrator had the authority to assess a CMP for each of the 62 workers, she did not. Rather, she exercised her discretion and assessed only one CMP for the overall violation. The Administrator considered the mitigating factors listed in 29 C.F.R. § 501.19(b) and reduced Respondent's penalty by 10% for each applicable mitigating factor. The Administrator believes that her assessment of $1,388.00 in CMP against Respondent for failing to provide the workers kitchen access is "well-founded and eminently reasonable." *Id.* at 44.

The Administrator contends that its assessment of $1,388 against Respondent for its improper sales of drinks in violation of 20 C.F.R. § 655.122(p) is appropriate and should be upheld. Here too, the Administrator exercised her discretion in calculating the penalty and assessed a substantially lower penalty than allowed by the regulations. Rather than assess a penalty for each worker affected, the Administrator used her discretion and assessed one penalty for the violation. The $1,388 penalty is a 20% reduction from the Administrator's original assessment. The 20% reduction was applied because of Respondent's lack of prior history of H-2A violations and Benny's assurance that he would comply with the regulation in the future.

The Administrator calculated $1,041.00 in CMPs for Respondent's failure to provide a copy of the work contract that contained the actual work conditions. The Administrator similarly assessed a penalty of $1,041.00 for Respondent's violation of 20 C.F.R. § 655.122(h)(1), i.e. for its failure to reimburse its workforce for daily subsistence costs they incurred on their transit from Mexico to the farm. In both these scenarios, the Administrator assessed only one penalty for the whole violation rather than one penalty for worker and reduced the potential CMPs by a total of 40% based on mitigating factors.

The Administrator additionally used her discretion to assess $4,164 in CMPs for Respondent's housing violations: "$1,388 for the failure to prevent insect infestation; $1,388 for failure to provide fly-tight garbage containers and to empty garbage containers when full; and $1,388 for the unsanitary toilet conditions." *Id.* at 48. The Administrator also used her discretion to assess three violations rather than the six violations that WHI Perez identified. For this penalty, the Administrator applied a 20% reduction because Respondent did not have a prior history of H-2A violations and because Benny immediately began to make corrections during the housing inspection and promised to comply in the future.

Respondent

Respondent disagrees that there was any sort of agency relationship with Castaneda. Rather, Respondent and Castaneda agreed that Castaneda would contract with the workers to provide them with 20 home-cooked meals per week at a charge, which did not exceed the

regulatory maximums. Resp. Br. at 12. Respondent refers to the fact that Castaneda refused to cook for the first group of workers who arrived in April 2018, to bolster its argument that Castaneda was not an agent; "[i]f Castaneda had truly been Respondent's agent or employee, she would not have been able to say "no." *Id.* Respondent avers that contrary to the Administrator's assertions, the only agreement that existed between him and Castaneda was that if Castaneda cooked for the workers she had to keep the kitchen clean. Respondent argues that he similarly instructed the workers that if they cooked they had to keep the place clean. Respondent also argues that the Administrator fails to meet its burden of demonstrating that there was an agency relationship between Respondent and Castaneda. Respondent claims that the Administrator makes a "paternalistic" assumption that Castaneda was Respondent's agent or employee based on Constantino's longstanding friendship with Respondent and her daughter's position as a seasonal part-time office worker for Respondent.

Respondent argues that the Administrator wrongly assumes that Respondent utilized Castaneda as his agent to provide a meal plan to the workers contrary to the job order. According to Respondent, "Castaneda provided meals, and her 'agreement' with Respondent was limited to keeping the premises clean." *Id.* at 15. The Administrator has failed to provide evidence that "Respondent contracted with Castaneda for meal service, employed or paid Castaneda, or made any money off the arrangement." *Id.* Respondent on the other hand has provided evidence that the workers independently contracted with Castaneda and paid her directly. In addition, there is no evidence to indicate that Respondent was in charge of the meal service, that Respondent deducted money from the workers' pay for the meals, or that Castaneda was Respondent's agent or employee. Respondent likens the agreement with Castaneda to the agreement between the independent food trucks that visited Bald Eagle.

Respondent alleges that it did not violate the regulations as it honored the terms in its work order and provided kitchen facilities to the workers at no charge. However, it was "more convenient for the workers to come back from the fields to a waiting meal than it would have been for them to shop, cook, and clean up after themselves." *Id.* at 18. Respondent contends that the facts do to support the Administrator's position that Respondent "'tasked' Castaneda with operating the meal plan." *Id.* Castaneda approached Respondent and asked if he had any work for her. Respondent responded in the negative and told her to ask the workers. Castaneda spoke to the workers and they asked her to cook for them. It became a tradition where every season, the workers would contact her prior to arriving in New Jersey and ask her to prepare their meals. Since she had autonomy in deciding whether to cook, she refused to prepare meals for the eight workers who arrived in the early part of 2018 but started cooking for the workers when the larger group arrived. The workers themselves engaged Castaneda to use their free and convenient kitchen facilities to prepare and serve them meals. Respondent was not involved in that transaction. Respondent posits that it "was infinitely more convenient, not to mention cost-effective, for the workers to pay Castaneda to go to the store, cook, pay for helpers, serve, and clean up than for 60 workers to do it all themselves." *Id.* at 19. WHI Perez even acknowledged that workers tend to make agreements amongst themselves to "use the free kitchen and cook, sometimes designating and compensating one of their number to take full responsibility." *Id.* Respondent maintains that "the contractual arrangement with regard to meals existed only between the workers and Castaneda, not between Castaneda and Respondent." *Id.*

Respondent continues: "the H-2A regulations do not require workers each to do their own cooking when free kitchen facilities are provided" and according to WHI Perez, it is typical for workers to form a "cooperative arrangement amongst themselves." *Id.* The workers' agreement with Castaneda was a "viable and legal alternative to doing one's own shopping and cooking and washing-up." *Id.* Respondent adds that Castaneda testified that the workers used the kitchen to cook for themselves on a few occasions and that she made it clear to them that were to clean up after themselves.

Respondent maintains that Castaneda is not its agent. There are several factors to determine whether one is considered an employee under the principles of agency. The H-2A regulations, the Supreme Court, and the Restatement of Agency provide factors that are relevant to establishing an employment relationship (with no one factor being dispositive). Respondent asserts that when the factors set forth by the Second Restatement of Agency are applied to the case at bar, they "militate strongly in favor of finding that Castaneda was not Respondent's employee or agent." *Id.* at 23. Respondent also asserts that its case is distinguishable from what transpired in *Sun Valley*[6] (which the Administrator heavily relies on):

> Unlike *Sun Valley's* Hernandez, Castaneda was not an employee of Respondent, did not act as Respondent's agent, was not paid by Respondent, did not also supervise the workers, and did not cash their paychecks and hold back meal charges. Hernandez may have been Sun Valley's agent on the facts of that case, but on the facts of this one, Castaneda was not Respondent's agent.

Id. at 24. Respondent states that the Administrator exaggerates the housing violation that occurred. Respondent claims it designated one worker to empty out the trashcans and garbage cans each day. However, on the day of the inspection, the worker had not yet emptied out the cans. Respondent admits that the garbage cans were missing lids but that it was in compliance with the relevant OSHA standard because it had a procedure in place to keep the facility clean. Respondent does not believe that the lack of garbage can lids merits a penalty, as it was a *de minimus* violation.

During the investigation, the WHI investigators found fecal matter in the toilet trashcans. Under the OSHA regulations, the toilet area must be kept in sanitary conditions and cleaned at least daily. Respondent does not believe this standard is violated when "a worker forgets his instructions and instead follows his customary cultural practices and places used toilet paper into the trash can without the employer's knowledge." *Id.* at 25. Respondent opines that according to OSHA, Employers are not held responsible if they have no knowledge of a violation and that, there is no proof of knowledge in this matter. Respondent also argues that it met the standards set for controlling pest. Respondent states the Administrator has failed to demonstrate how the fly strips it installed were ineffective or how there was an infestation if the facility.

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[6] *In re Sun Valley Orchards, LLC*, 2017-TAE-0003 (OALJ Oct. 28, 2019), appeal docketed, ARB No. 2020-0018.

Respondent does not believe Castaneda's sale of beverages was in violation of the regulation. Respondent contends that the regulations do not mandate that an Employer provide soft drinks to workers. Water, milk, and coffee were available to the workers during meals at no additional cost. Respondent notes that the water freely available in the cafeteria and at the field was cool and potable. The soft drinks on the other hand were "matters of choice" and the workers could spend their money however the wanted. *Id.* at 25-26. Further, if "Castaneda was an independent contractor then her sales of cold soft drinks were no more a violation of the H-2A regulations than the sales by food trucks that WHI Perez acknowledged visited the fields." *Id.* at 26.

Respondent believes that the Tribunal should not accept the Administrator's request to draw an adverse inference from Stephanie Constantino's absence at the hearing. Stephanie Constantino is a seasonal employee who was not working for Respondent at the time the hearing was conducted. Consequently, she was not in Respondent's control. Respondent disagrees that the Administrator lacks the power to subpoena witnesses at an adjudicatory proceeding. Respondent points out that the Administrator subpoenaed Castaneda for the trial and that "Courts have acknowledged that the power of an agency to conduct adjudicatory, trial-type hearings gives rise to an implied power on the part of the agency to issue subpoenas compelling the attendance of witnesses." *Id.* at 27.

Respondent asks that if the Tribunal finds Respondent charged the workers for meals and failed to disclose those charges in advance it should not approve the administrator's demand of back wages at $75 per week for meals for all the workers. Respondent alleges that this will create a windfall since the workers still benefited from having 20 meals a week and were relieved of the burden of purchasing groceries and preparing their own food. Respondent advises that the "H-2A regulations are designed to ensure a level playing field so domestic workers are not disadvantaged" and "the statutory authority given to the Department of Labor does not provide the Secretary of Labor to assess back wages in excess of that allowed by the FLSA." *Id.* at 28. It is Respondent's firm believe that the Tribunal should not task Respondent with reimbursing the workers for the meals they consumed. Respondent believes that the appropriate amount would be a nominal amount for Respondent's failure to disclose Castaneda's meal plan to the second group of workers. It is Respondent's position that it would be liable for at most the $300/week that "Castaneda cleared after subtracting the cost of groceries, her pay, and the pay for the two women who assisted her in the kitchen." *Id.* at 29.

Respondent argues that the unpublished criteria that the Administrator used to calculate the CMPs offends due process. It also alleges that it made good-faith effort, including hiring advisors and specialists, providing free and adequate kitchen facilities to the workers, and making immediate corrections post inspection, to comply all the requirements of the H-2A program. As such, the Administrator should have reduced the CMPs accordingly.

Respondent's position is that it is liable solely for its failure to reimburse workers for inbound subsistence, which it has stipulated to.

FACTUAL SUMMARY

Benny Tomarchio is the sole owner of Bald Eagle Farms, located in Harrisonville, New Jersey. His family has owned the farm since approximately 1960. Tr. at 233:3-6. The farm is about one-quarter mile from Harrisonville, a very small town. The road from the farm to Harrisonville does not have a sidewalk. The workers visit Bridgeton, New Jersey, about a 45-minute drive from the farm on the weekends to shop. Tr. at 234:10-14.

Respondent initially employed domestic workers ("walk-ins") to work on his farm. Tr. at 237:16. However, due to frustrations of using domestic workers he began researching the H-2A program. Tr. at 237:21-238:10. In 2017, he applied to the H-2A program to recruit workers from Mexico. Tr. at 238:13-16. He also utilized the program in 2018 and in 2019. Tr. at 238: 17-21. On all occasions, Respondent worked with Agworks to secure labor from Mexico. Agworks furnished Respondent with the rules and regulations of the H-2A program, which respondent reviewed. Respondent also attended a meeting hosted by the New Jersey Vegetable Growers on the H-2A program. Tr. at 240:6-14.

In 2018, Respondent filled out two job orders, prepared by Agworks but with information that Respondent provided. *See* JX 1 and JX 2, CX 4T; Tr. at 249:15-20. Respondent requested 8 workers to work from April 10, 2018 to October 16, 2018 (JX 1), and 52 workers to work from June 29, 2018 to October 16, 2018. Respondent reviewed and signed both work contracts. Tr. at 250:10-25. The DOL certified the job orders. JX 2 and JX 4. Both Job orders stated that Respondent would providing housing at no cost to the H-2A workers. JX 1, JX 3. They also stated that Respondent would provide the workers with free cooking and kitchen facilities for workers to prepare their own meals. The workers were to buy their own groceries. JX 1, JX 3; Tr. at 252:4-14. The orders also stated that social security, federal and state taxes, and "other" would be deducted from the workers' wages. However, meals would not be deducted. JX 1, JX 3. The job order also mentioned that Respondent would reimburse those workers who did not reside within commuting distance and were eligible for employer provided housing for reasonable cost of transportation and subsistence from where the workers traveled from to the farm. JX 1, JX 3. The reimbursement was to be paid in full during the first workweek. JX 1, JX 3.

The first group arrived in April and the second group arrived in June. Some of the workers abandoned the farm in August. Tr. at 144: 19-24. The workers were not provided with the contract when they were in Mexico. Tr. at 189:20-25. In 2018, WHI Perez and Crudup visited Bald Eagle on September 11, 12, and 17. Tr. at 45:17-24. They visited again on January 15, 2019. Tr. at 45:23-24. There, they inspected the campgrounds and interviewed the workers, Griselda Castaneda, and Benny. They also reviewed work contracts, payroll records and other documents. *See* Tr. at 45-47.

Griselda Castaneda has been cooking for workers on the farm since 2014. Tr. at 271:16-21. In 2018, she did not cook when the first group of workers arrived. However, after the second group of workers arrived, she began cooking for the whole group. Tr. at 417:11-15. Respondent knew Castaneda was charging the workers for meals and advised her to keep her

receipts. Tr. at 273:14-274:2-9. In 2017, when respondent joined the H-2A program, he told Castaneda that there was a daily maximum amount she could charge. He also told her about any increases in the maximum daily meal allowances. Tr. at 274:25-277:2. She could not charge the workers more than $12.26 per day. Tr. at 282:7-10. In 2018, she charged the workers $75 per week for the meals. Tr. at 417: 22-25. She provided them with meals 7 days a week. Tr. at 284: 16-18, 417:24-418:1-7. She gave them three meals six days a week and then two meals on Fridays. The meals did not include beverages. Tr. at 429:18-21. She sold drinks to the workers and she does not keep the receipts for the beverages. Tr. at 435:3-5. She collected the money for the drinks at the time the workers purchased them. Tr. at 436:8-12. The workers were paid weekly on a Friday. *See* Tr. at 155:1-5, 339:7-15. They pay for the meals on Friday, when Benny pays them. Tr. at 436:19-21. Benny was sometimes in the cafeteria when the workers were paid, if he was not there, then her daughter, Stephanie was present to pay the workers. Tr. at 436:24-437:1-5. She asked the office to give her the list of workers so she could keep track of payments. Tr. at 437:16-438:1-5.

Castaneda worked in the kitchen approximately 70 hours, every day except Friday. Tr. at 426:18-23, Tr. at 427:10-12. She has two workers help her in the kitchen; one of them works full time and the other is a part-time worker. Castaneda locked the kitchen when she left for the day. However, Benny had a key and one of the H-2A workers also had a key. Tr. at 288:2-15. She locks the kitchen on Fridays so that the workers do not leave bottles of beer. Tr. at 419:20-23.

Respondent is friends with Castaneda and her husband, Constantino. Tr. at 303:13-24. Castaneda and Constantino's daughter, Stephanie Constantino, is on Respondent's payroll and is a seasonal worker.

DISCUSSION

The rules to be used in these proceedings involving enforcement of the work contract or obligations are set forth in 29 C.F.R. Part 501, Subpart C. 29 C.F.R. § 501.30. In its decision, the Tribunal "may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator." 29 C.F.R. § 501.41(b).

To enforce the employee-protection provisions under the H-2A program, the Secretary of Labor "is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as maybe necessary to assure employer compliance with terms and conditions of employment." 8 U.S.C. § 1188(g)(2). Here, the Administrator chose to enforce the employee-protection provisions by imposing civil money penalties.

The Administrator enforces the attestations an employer makes in a temporary agricultural labor certification application, as well as the regulations that implement the H-2A program. *See* 29 C.F.R. §§ 501.1, 501.5, 501.16, 501.17. An "employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." 20 C.F.R. § 655.122(a). Thus, the

H-2A regulations prohibit any discrimination between H-2A workers and domestic workers. *Id.* The Administrator may penalize an employer who fails to abide by the governing H-2A regulations through the imposition of monetary penalties, debarment from filing other H-2A certification applications, and instituting proceedings for specific performance, injunctive, or other equitable relief. *See In re: Global Horizons, Inc*., 2006-TLC-00013, slip op. at 4 (ALJ Nov. 30, 2006).

The Administrator may assess CMPs against a violating employer for each violation of the work contract or the governing regulations. 29 C.F.R. § 501.19(a) (2010). In determining the amount of such penalty, "the WHD Administrator considers the type of violation committed and other relevant factors[,]" including:

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

29 C.F.R. §501.19(b).

A party has a right to a *de novo* hearing before an administrative law judge, who may affirm, deny, reverse, or modify in whole or in part the decision of the Administrator. *See, e.g., Three D. Farms, LLC d/b/a Three D Farms*, 2016-TAE-00003 (Aug. 18, 2016); *Seasonal Ag Services, Inc.*, 2014-TAE-00006, slip op. at 12 (Dec. 5, 2014).

I. The Administrator Properly Found that Respondent Violated 20 C.F.R. § 655.122(D)(1) by Providing Inadequate Housing to The H-2A Workers. The Administrator Imposed A Reasonable Fee of $4,164 in CMP.

A. *Respondent Failed to Provide the Workers With Housing that Met Regulatory Standards.*

20 C.F.R. § 655.122(d)(1)(i) requires that employer provided housing must fully meet OSHA standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417, whichever are applicable under § 654.401.[7] Thus, employers like Respondent who choose to provide housing to H-2A workers must fully comply with the regulations.

[7] WHI Perez explained that there are two different sets of health standards (ETA standards and OHSA standards) that apply to housing provided to H-2A employees. Tr. at 57. The type of standard that applies depends on when the building was constructed or when significant modifications were done to the building. Here, OSHA standards applied since the building was constructed after 1984. Tr. at 58,

Respondent testified that a New Jersey Department of Labor inspector visited the Farm to inspect the buildings and dormitories prior to the workers' arrival. Tr. at 342:3-6. The inspector found the buildings to be satisfactory. Tr. at 343:7-8. Respondent also testified that he performs the maintenance on the farm. What he is unable to do himself, he hires someone else to do it. He performed maintenance on the buildings in the wintertime, prior to when the workers arrived. Tr. at 341:1-7. During the season, he walks through the buildings to see if there are any broken doors or windows. Tr. at 345:15-18. He admitted he does not look at every detail. Tr. at 345:7-13.

On September 11, 2018, lead WHI Perez and fellow WHI Crudup visited Bald Eagle.[8] Tr. at 45:23-24. Respondent stated that there was a broken window in the bathroom when the Wage and Hour Investigators arrived. However, he was not aware of this until the day of the inspection. Tr. at 347: 16-19. Respondent states that he has someone come in at the beginning of the year to look at the screen doors. Tr. at 348:2-11. At the start of the season, the doors had self-closing devices. Tr. at 348:15-16.

During the hearing, WHI Perez testified that he observed uncovered garbage cans outside the workers dormitories. The garbage cans were full and there were flies and bees around the garbage cans. Neither he nor his fellow investigator, John Crudup, saw garbage can lids during the investigation. WHI Perez also observed fecal matter in uncovered trashcans in the workers' restrooms. He also testified that some of the doors had no self-closing devices and some of the doors had gaps. *See.* Tr. at 59:11-20, 66:1-8, 70:11-15, 80:12-23, 81:16, 87:10, 96:15-97:24. Further, the doors that led into the workers dormitories were ill fitted, they had gaps that went "all the way around." Tr. 72:24-25; CX 39, CX 40. There were gaps between the screen door and the seal on the door. Tr. 73:13-19, 74:12-25; CX 21-22. Some of the doors, such as the door that led into the worker's bathroom, also did not have self-closing devices. Tr. at 89: 7-11; CX 21, CX 38. Inside the workers' dormitories were fly strips that had dead flies on them. Tr. at 77:1- 79:16; CX 29. There were also flies and bees around the garbage cans outside the workers' dormitories.

There were also trashcans in the toilet that contained fecal matter. *See* CX 27. The trashcans did not have lids on them. Tr. at 59:16-17, 92:22- 93:16, 94:14-21, 362:24-25. WHI Perez testified that this is problematic because due to the gaps on the doors and doors missing self-closing devices, bees and flies could easily land on the toilet paper with fecal matter, collect some of the contaminates on their body and make their way into the food (as the kitchen was located close to the bathroom) and contaminate the food being fed to the workers. Tr. at 93:19-94-6.

Respondent's counsel acknowledges that the trashcans had no lids. Resp. Br. at 24. Respondent however believes that it was in compliance with OSHA standards because it had put in place procedures to dispose waste daily. Respondent designated one worker to empty out the trash and garbage cans daily. Resp. Br. at 25. However, on the day of the inspection, that worker had not yet emptied out the cans. Concerning the fecal matter in the trashcan, Respondent ascribes that to a cultural problem and argues that they were emptied every day. *Id.*

[8] WHI Perez also visited the farm September 12th, 2018, September 17th, 2018 and again in January 2019. Tr. at 45.

Respondent testified that prior to the inspection in September 2011; he had never seen fecal matter in the bathroom trashcans. Tr. at 362:23-25. He claims he checked the bathrooms periodically. Tr. at 362:20-23.

Respondent does not believe that there was an insect infestation of the Farm.[9] Respondent argues that it complied with the regulations when it took effective measures, such as using fly strips, to prevent infestation. Resp. Br. at 25. Respondent's position is that the Administrator has not successfully demonstrated that these means were ineffective or that there was an "infestation." The dictionary meaning of infest is "to spread or swarm in or over in a troublesome manner." Merriam-Webster. Simply seeing insects on the farm and using fly strips does not prove an infestation.[10]

1. *The Record Overwhelmingly Supports WHI Perez's Testimony and Shows that Respondent Failed to Provide Air-Tight Containers.*

29 C.F.R. § 1910.142(h) mandates that "[f]ly-tight, rodent-tight, impervious, cleanable or single service containers, . . . shall be provided for the storage of garbage," that "[g]arbage containers shall be kept clean" and that "Garbage containers shall be emptied when full, but not less than twice a week. *Id.* at 1910.142(h)(1)-(3).

Here, the record overwhelming shows that Respondent did not meet its housing obligations. As the record shows, the trashcans had no lids on them and were filled with garbage. *See* CX 21-22, CX 30 through CX 34. Also, some of the garbage containers were full and some were overflowing with garbage. *See* CX 21-22, CX 30 through CX 34. The undersigned is unpersuaded by Employer's argument that it designated a worker to take out the trash and that at the time of the inspection, that employee had not gotten round to doing it. While the undersigned agrees with Respondent that "this is not a matter of 'gotcha,'" the regulations make it clear that Employers are supposed to provide garbage containers with lids. The record is clear that Employer violated this aspect of the regulation and rectified the issue the next day. The record supports the Administrator's findings.

2. *The Record Demonstrates that Respondent Failed to Take the Necessary Steps to Prevent Insect Infestation on the Farm.*

The record also establishes that the Farm was riddled with insect infestation. Under OSHA regulations, "effective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests." 29 C.F.R. § 1910.142(j). In the case at hand, the record shows that Respondent did not take measures to prevent insect infestation. The doors that led into the workers dormitories were poorly fitted and had gaps. Tr. 72:24-25; CX 21. There were gaps were between the screen door and the seal on the door. Tr. 73:13-19, 74:12-25; CX 21. The door to the dining room area did not have a self-closing device and the door that led into the bathroom was propped open by a mop. Tr. at 89: 7-11; CX 21, CX 38. Inside the workers' dormitories were fly strips that had dead flies on them. Tr. at 77:1- 79:16; CX 21, CX 28-CX 29.

[9] "Simply seeing insects on the farm and using fly strips does not prove an infestation." Resp. Br. at 25.

[10] Respondent states: "[t]he dictionary meaning of infest is "to spread or swarm in or over in a troublesome manner." Resp. Br. at 25 quoting Merriam-Webster.

Though a few fly strips do not indicate a fly infestation, the overall record indicates that there was an infestation on the farm. The undersigned finds that these gaps in the doorway served as an easy entry for flies and insects to enter the worker's dormitories. The evidence also shows that the fly strips had several flies (with WHI Perez estimating in one instance that the fly strip held 15-20 flies).[11] There were flies and bees around the garbage cans outside the workers' dormitories. Taking all this evidence in, consideration, the Administrator rightly found that the workers' facilities were infested with flies.

3. *The Record Shows that Respondent Failed His Obligation to Keep the Toilets in Sanitary Condition.*

Respondent also failed to maintain sanitary restroom conditions. There were trashcans in the toilet that contained fecal matter and these did not have lids on them. *See* CX 27, CX 37. As WHI Perez testified, due to the gaps on the doors and doors missing self-closing devices, bees and flies could easily land on the toilet paper with fecal matter, collect some of the contaminates on their body and make their way into the food (as the kitchen was located close to the bathroom) and contaminate the food being fed to the workers. Employer argues that the workers' habit of throwing toilet paper containing waste is a cultural matter and that he had signs indicating toilet paper should be disposed of in the toilet and not in trashcans.[12]

The undersigned however does not find that this "cultural matter" absolves or lessens Respondent's liability. The record establishes that Respondent was aware of this behavior. Tr. 376:1-4, 376:16-18. Further, other than his testimony that he had signs around to tell the workers not to place the toilet paper in the trashcans, Respondent has not demonstrated that with knowledge of these matters, he took steps to cure this or abate this issue. *See* Tr. at 363: 12-20. OSHA requires that "[p]rivies and toilet rooms shall be kept in a sanitary condition . . . [and] shall be cleaned at least daily." 29 C.F.R. § 1910.142(d)(10). The record additionally demonstrates that the trashcans had no lids, there was trash on the toilet floor and that the floor, urinals, sinks, and toilets had not been cleaned recently. *See* CX 21, CX 27.

The undersigned finds that the Administrator has successfully established that Respondent violated 20 C.F.R § 655.122(d)(1).

B. *The Administrator Reasonably assessed $4,164 in CMP for Respondent's Housing Violations.*[13]

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[11] Tr. 79:14.

[12] This was also echoed by WHI Perez during the hearing. He theorized that in Mexico, because the sewer systems are not up to par, people are advised from a young age to dispose of toilet paper in the trashcan rather than flush it. Tr. at 60:24-61:8.

[13] Respondent argues that the Administrator's unpublished criteria it used in calculating CMPs violate Respondent's due process. Resp. Br. at 29. Respondent argues that it also made good faith effort to comply with the regulations and the CMPs should have been reduced accordingly. The Tribunal is unpersuaded by this argument and finds that the CMPs assessed for each violation was reasonable and the criteria used did not violate Respondent's due process. *See infra*, Part V.

The Administrator found Employer liable for violating three housing regulations.[14] Per the Administrator:

> (1) Respondent failed to take effective measures to prevent insect infestation (which was grouped for citation purposes with Bald Eagle's screen doors not being tight fitting or equipped with self-closing devices);
> (2) Respondent failed to provide fly-tight garbage containers (which was grouped with Bald Eagle failing to empty garbage cans when full); and
> (3) Respondent did not keep its toilet rooms in a sanitary condition.

See Administrator's Br. at 28; JX 6.[15]

District Director John Kelly testified that OSHA standards were used in this case. Wage and Hour found that Respondent had violated about six OSHA standards. However, those violations were grouped together because they were similar. Tr. at 518:4-12. Thus Respondent was cited for three violations. All three violations were each reduced by 20% after the mitigation factors were considered. Tr. at 519:9-17. For all three violations, the Administrator found that Respondent's lack of history (factor 1) was a mitigating factor and reduced the CMP by 10%. Tr. at 520:8-14. Also, because Employer immediately began to comply and promised to comply in the future (factor 6), the Administrator reduced the CMP for all three violations by another 10%. Tr. at 522:11-24.

Employer testified that he was not aware that paper containing fecal matter was being thrown into the garbage can. He stated that had it been an issue, Ms. Castaneda would have brought it to his attention. Employer mentioned that though he visits the buildings on the farm regularly, he inspects the bathrooms weekly. District Director John Kelly found Respondent's explanation wanting— as the Employer, Respondent should have known that the camp should have complied with the applicable standards. Tr. at 521:21-522:1-10. Mr. Kelly also mentioned that other than the fact that Respondent had avoided the costs associated with keeping the camp up to standards, the unsanitary conditions posed a threat to the workers' health. The improper disposal and storage of waste led to an insect infestation. As toilet tissue was not disposed of properly in the bathroom, it was probable that insects could land on the soiled tissues and transmit that to the workers food in the kitchen and cause illnesses to workers. Tr. at 523:7-20.

In its brief, Respondent argues that the Administrator overstates the housing violations. Respondent provided that the housing facilities were inspected and approved prior to the workers' arrival on the farm. Resp. Br. at 24. Further, Respondent had designated a worker to empty the trash cans but the worker had not yet done so. Respondent also argues that OSHA does not impose absolute liability and that Respondent reasonably complied with the standards. Respondent further asserts that it should not be held responsible when a "worker forgets his

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[14] The Administrator, in exercising her discretion, cited Respondent for three violations as they overlapped with some of the other violations. *Id.*

[15] The Administrator found that Respondent violated 20 C.F.R. § 655.122(d)(1). JX 6. "Specifically, the investigation disclosed that the housing located at 686 Harrisonville Rd failed to meet applicable OSHA Standards (20 CFR 1910.142). Toilets were not kept in a sanitary condition, effective measures to prevent infestation were not taken and fly tight garbage containers were not provided. *Id.*

instructions and instead follows his customary cultural practices and places used toilet paper into the trash can without the employer's knowledge." Resp. Br. at 25. Further, Respondent complied with the standards by installing fly strips, as the standard requires effects means of controlling insects. Mr. Kelly testified that for the housing violations, he did not find evidence that Respondent made good faith effort to comply with the regulations at the time he assessed the penalty. *See* testimony at Tr. 534:1-538:1-3. In assessing the housing violation, Mr. Kelly relied on the housing inspection report, photographs of the camp in the file, and the narrative report of the investigation. Tr. at 540:20-21.

The Tribunal finds that the assessment for $4,164.00 was reasonable. Pursuant to 29 C.F.R. § 501.19 (a):

> A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or the regulations in this part constitutes a separate violation. 29 C.F.R. § 501.19(b) provides factors that the WHD Administrator can consider when determining the amount of penalty to be assessed for each violation.

District Director John Kelly testified that they look at the regulations to determine the fine and discount 10 percent for each mitigation. Tr. at 491:22-23. In this case, he reviewed the files and evaluated investigators recommendations. Tr. at 488. The Administrator reasonably considered the level at which to assess CMPs against Respondent and then considered all of the mitigating factors. District Director John Kelly credibly explained why he did not reduce the CMPs in consideration of the regulatory factors 2 through 5 and 7. *See* Tr. at 520:9-524:2-6.

II. Respondent Admits and the Tribunal Finds that because Respondent Did Not Pay the H-2A Workers their Daily Subsistence for Travel from Mexico to the Farm, Respondent Owes $1,348.60 in Back Wages.

Respondent utilized with One Step's services to help with the H2-A workers. One step provides Respondent invoices detailing how much respondent owes for the workers' accommodations in Monterrey, Mexico. Tr. at 370:10-12; CX 20.

A. *Respondent Owes $1,348.60 in Back Wages*.

Respondent was required to pay its workers for reasonable costs they incurred for their transportation and daily subsistence from Mexico to the Farm. *See* 20 C.F.R. § 655.122(h)(1). Respondent admits and the Parties stipulate that Respondent did not pay the workers for their travel costs and daily subsistence and that it owes $1,348.60 for back wages. Tr. at 159: 2-21, 160:7-10, 349:14-16; CX 20, CX 45T.

B. *The Administrator's Assessment of 1,041.00 in CMPs was reasonable.*[16]

[16] *See supra* fn. 13.

The Administrator found Respondent liable for $1,041.00 for violating 20 C.F.R. § 655.122(h)(1). Tr. at 508:7-9. The Administrator first determined what level to issue the CMP and then considered mitigating factors. Tr. at 508:9-12. The Administrator determined that the appropriate level was 17-35 because workers were not affected, the violation was not willful or reoccurring, because no one was injured, and a U.S. worker was not displaced. Tr. at 508:6-18. The Administrator reduced the CMP by 40% due to four mitigating factors:

- Factor 1: lack of history of H-2A violations;
- Factor 3: gravity of the violation;
- Factor 6: commitment to future compliance; and
- Factor 7: financial gain to employer or loss to employee.

See Tr. 508:22-513:14.

Respondent contests this penalty. Respondent states that it made a good faith effort to immediately rectify this issue when it found out that it had violated the regulations. Resp. Br. at 11; *see also* Tr. at 159:16-21. When the investigators visited the farm, Respondent offered to pay the back wages he owed for the workers' daily subsistence. Tr. at 160: 21-25. WHI Perez declined this offer because management advised that it was necessary to first conduct the entire investigation to determine the correct amount of back wages. Tr. at 161:2-5.

Mr. Kelly stated that according to the regulations, the workers' daily subsistence costs should have been paid halfway through the contract.[17] Tr. at 529:5-19. The investigation occurred on September 11, meaning that when Respondent made the offer to pay for the daily subsistence "he was off by a few day." Tr. at 529:21-530:1-2. However, the Administrator did not reduce the CMP based on good faith. Tr. at 530:3-5.

20 CFR § 655.122 (h)(1) provides that:

> If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment.

20 CFR § 655.122 (h)(1).

The Administrator found Respondent liable for $1,041.00 for violating 20 CFR § 655.122 (h)(1). JX 6. Here too, the Tribunal finds that the assessment was reasonable. The Administrator reasonably considered the level at which to assess CMPs against Respondent and then considered all of the mitigating factors. District Director John Kelly aptly explained why he

[17] District Director John Kelly acknowledged that Respondent should have paid around the end of August or first of September. Tr. at 529:18-20.

did not reduce the CMPs in consideration of the regulatory factors 2, 4, or 5. Though Respondent argues that the Administrator did not credit Respondent's good faith efforts to comply with the regulations and thus consider that as a mitigating factor, the Tribunal finds that the Administrator considered Employer's commitment to rectifying the issue immediately as a mitigating factor and reduced Employer's CMP by 10% as it demonstrated Respondent's efforts to complying in the future. *See* Tr. at 512:16-24.

Further, the regulation is clear that the Respondent must reimburse the workers their daily subsistence upon completion of 50% of the contract. Here, Respondent's statement that he did not know that he ought to do so is unavailing. Respondent's own job orders stated that he would reimburse the workers for their daily subsistence within the first workweek. Respondent did not abide by his own standards.

For all these reasons, the Tribunal finds that the assessment for $1,041.00 was reasonable.

III. The record establishes that Respondent failed to provide the H-2A workers with the work contract prior to their departure from Mexico. The Administrator reasonably assessed a CMP of $1,041.00.

Employer are obligated to provide H-2A workers with a copy of the work contract "no later than the time at which the worker applies for the visa, . . . , a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable."[18] 20 CFR § 655.122(q). Here, investigator Perez determined that none of the workers received a contract when they were in Mexico. Tr. at 24-25. He made that determination based on worker interviews. Respondent did not provide WHI Perez and Crudup with evidence that the workers receive the work contract before the left Mexico for the farm.[19] Tr. at 223:14-17. The Tribunal finds Investigator Perez' testimony to be credible and the evidence indicates that the workers did not receive the work contract at the time of their recruitment, in violation of 20 CFR § 655.122(q). *See e.g.*, Tr. at 50:4-15, 89:21-25

The Administrator assessed a CMP of $1,041.00 for this violation. The Administrator first determined that this violation was the lowest level. Tr. at 489:24-25. He also looked at mitigating factors set forth in 29 C.F.R. 501.19. Since Respondent did not have a history of H-2A violations, the Administrator found this to be a mitigating factor and reduced the penalty by 10%.[20] Tr. at 495:23-496:1-4. Since all the workers were affected, Respondent did not receive credit for factor 2. Tr. at 498:18-19. Factor three was a mitigating factor because the workers' wages, safety, and health, and working conditions were not directly affected. Tr. at 49:24-25. Since there was no evidence of good faith, factor four was not a mitigating factor. Tr. at 500:1-7.

[18] Bald Eagle did not enter into separate written contracts with its workers. It used the ETA-790 as its work contract. CX 3.

[19] Respondent testified that unlike in 2018, unlike in 2019, he did not receive documents from One Step with the workers' names and signatures, saying they had received the contract in Mexico. Tr. at 372:19-373:1-3.

[20] District Director John Kelly stated that 10 percent is used as a reduction in all 11 factors and it is the national policy. Tr. at 498:11-12.

He considered factor six, which was Respondent's explanation but gave no reduction. Tr. at 500:8-10. He however gave credit for factor seven, because Respondent agreed to comply in the future. Tr. at 500:11-19. Respondent also received credit for factor seven, financial gain to the employer, or financial loss, or injury to the workers. Tr. at 500:20-25. In sum, the Administrator reduced the base amount for the violation by 40%. Tr. at 501:8-9.

The Tribunal finds that the assessment of CMPs in the amount of $1,041was reasonable. The District Director explained that he considered the level at which to assess CMPs against and then considered all of the mitigating factors. District Director John Kelly adequately explained why he did reduce the CMPs in consideration of certain factors and why Respondent did not receive credit for other factors. Further, rather than assess a CMP of $1,041 per worker, the Director used his discretion to impose a single penalty. The Tribunal finds that the CMP is reasonable.

IV. Respondent violated numerous wage-related and disclosure regulations. Therefore back pay and CMPs are warranted.

The regulations require employers to provide a prospective H-2A worker a copy of the work contract prior to the worker's application for a visa. § 655.122(q). The work contract must contain, *inter alia*, terms concerning whether the employer will provide meals or kitchen access, as stated in § 655.122(g). Twenty C.F.R. § 655.122(g) also requires an employer to provide H-2A workers either "three meals a day or [to] furnish free and convenient cooking and kitchen facilities." 20 C.F.R. § 655.122(g). If the employer requires workers to pay for their meals, the employer must state the charge on the job offer. *Id.*

The Tribunal is tasked with resolving the issue of whether Respondent denied workers access to the kitchen and made impermissible deductions from their wages for food and beverage. To resolve some of these issues, the Tribunal must resolve the role of Griselda Castaneda on the Farm.

A. *The Job Order Unambiguously Stated That Workers Would Have Free And Open Access To The Kitchen.*

In the case at bar, Respondent filed two job orders. One of the job orders concerned the period April 10, 2018 to October 16, 2018. JX 1. The other covered the period from June 26, 2018 to October 16, 2018. JX 3. The job orders outline the terms of the contract. It contains information such as why the workers are coming into the United States, how much money they will be making, and the number of hours they will be working. JX1 and JX 3; Tr. at 48:5-10.

Section 14 of the job order requires the employer to "describe how [it] intends to provide either [three] meals to each worker or furnish free and convenient cooking and kitchen facilities." *See e.g.*, JX 1. In both job orders, Respondent started that it "will furnish free cooking and kitchen facilities . . . so that workers may prepare their own meals." *See* JX 1 and JX 3; Tr. at 252:4-13. Benny signed both documents in his capacity as Employer. JX 1 and JX 3. Benny informed Agworks what he wanted the terms of the work contract to be. Tr. at 48:14-

17, 249:15-24; CX 4T. Respondent declared that he had read and agreed to all the applicable terms, assurances, and obligations as a condition to receiving the temporary labor certification from the United States Department of Labor. *See* JX 2 and JX 4; Tr. at 244:12-16. Respondent testified that when he worked with Agworks, he reviewed and signed JX 1 and JX 2; Tr. at 250:10.

Thus according to the terms of the job order, Respondent agreed that he would provide free cooking and kitchen facilities to the workers. The Tribunal now turns to whether Respondent broke the terms of the agreement when Griselda Castaneda began cooking for the workers.

B. *The first group of H-2A workers initially had access to the kitchen. However, when the second group of workers arrived, the workers no longer had access to the kitchen to prepare their meals.*

When the first workers arrived in April, they had access to the kitchen. They were able to cook their own meals.[21] CX 45T. However, after July 5 until the end of the season, the workers did not have access to the kitchen to prepare their own meals. Tr. at 16-18, 123:11-124:1-2. CX 5. Castaneda would not allow them to enter the kitchen to prepare their own meals. CX 45T. The workers were only allowed to go into the kitchen to reheat their meals. Tr. at 208:8-10. The workers paid $75 per week for a meal. Tr. at 125:1-12, 417: 17-23. The workers ate sandwiches and coffee for breakfast, and those that did not want coffee drank milk. Tr. at 12:1-12, 458:1-13. After Castaneda began cooking in 2018, the workers did not store food in the kitchen.[22] They also no longer had access to refrigeration. Tr. at 125:20-23, 200:17-24.

During the investigation, Castaneda informed the WHI Perez that she was in charge of the kitchen at the Farm. CX 5. She obtained permission from Benny. She stated that she cooks for all the workers on the Farm. The meals do not come with drinks and workers have to purchase those separately. She also stated that the workers have access to prepare their own meals if they are inclined to. Though the majority of the pots and pans in the kitchen belong to her, she will allow the workers to use them. However, none of the workers cooked for themselves and they all purchased food from her.[23] WHI Perez testified that there was not sufficient space in the kitchen for 50 to 60 workers to cook their meals. Tr. 117:6-7. From what he observed, there was also not enough utensils and pots and pans for 50 to 60 workers. Tr. at 117:13-23. He also testified that the number of stoves in the kitchen was insufficient for the number of workers on the farm. He does not believe that there was space in the kitchen for the number of workers on the farm to cook their own food or even store their foods to prevent them from spoiling. Tr. at 118: 2-9. He did not see any contract between the workers and Castaneda nor did he ask to see one. Tr. at 229:5-10.

[21] In April, Respondent had about 11 workers on the Farm. Tr. at 254:1-17.
[22] Castaneda had two kitchen aides who assisted her in the kitchen. Tr. at 111:5-11; CX 7.
[23] Castaneda acknowledged her statement in WHI Perez's presence. Tr. at 102:16-20.

The record demonstrates that the food and the drinks in the kitchen belonged to Castaneda and not the workers. There was a chest freezer in the kitchen, the contents in which belonged to Castaneda. CX 15; Tr. at 112:10-113:1-3. The refrigerators in the kitchen also contained food and drinks that belonged to Castaneda. Tr. at 113:5-114:1-7; CX 12, CX 13. There were also drinks stacked up in the kitchen. Those belonged to Castaneda as well. CX 14; Tr. at 116:1-18, 117:1-7. Castaneda cleaned the kitchens. Tr. at 257:9-14. She locked the cafeteria when she left. Tr. at 288:2-3. Benny had a key to the kitchen and one of the H-2A workers had a key as well. Tr. at 288:7-23, 100:19-101:1-10.

Castaneda testified that when the first group of workers arrived, they called her to cook. However, she declined because they were too few. Tr. at 454: 16-24. When the second group of workers arrived, they called her and asked her to cook. Tr. at455:4-6. Respondent testified that Constantino approached him about having Castaneda cook. Tr. at 258:5-6. Respondent stated that Castaneda could cook but she had to keep it clean as it originally was. Tr. at 258:9-11. Castaneda originally started cooking at the Farm in 2014, so prior to when Respondent began participating in the H-2A program. Tr. at 374:13-25.

Respondent argues that it provided kitchen access to the workers. However, it was "infinitely more convenient, not to mention cost-effective, for the workers to pay Castaneda to go to the store, cook, pay for helpers, serve, and clean up than for 60 workers to do it all themselves. . . . The free kitchen that comes with a cook who also shops, serves, and cleans up is the last word in convenience, and at $75 per week (just $3.75 per meal) it's a deal." Resp. Br. at 19. Respondent also argues that it is not against the regulations if the workers choose not to do their own cooking. *Id.* The workers are free to make arrangements such as buying their own meals or taking turns cooking for each other. *Id.* Respondent also states that the workers cooked their own shrimp on a couple of occasions. *Id. citing* Tr. at 460.

The undersigned is unpersuaded by Respondent's position. Though it is true that the workers are not obligated to prepare their own meals, that the regulations do not prohibit them from making arrangements for someone else cooks for them, and that it might be more convenient or a "deal" for the workers to have Castaneda cook for them, that is not the case here.[24] The record does not establish that the workers and Castaneda had a mutual agreement where she would cook for them. Castaneda's testimony contradicts with the workers statements and is also self-contradictory. During the investigation, Castaneda informed WHI Perez that it was Benny who had called her to cook for the workers.[25] CX 5. In her statement to WHI Perez she mentioned that Benny gave her permission to use the kitchen so she can prepare food for the workers. *See* CX 5. However, at the hearing, Castaneda suggested that she did not review this statement with WHI Perez. Tr. at 450:13-16. Yet, her signature appears on the document. The documents reveals that she made certain corrections to her statement indicating that she had the

[24] When asked by Respondent's counsel whether the workers could decide to hire a cook if they chose to do so, WHI Perez responded that the workers could spend their money however they saw fit. Tr. at 176:16-23.

[25] "[Castaneda] told me that Benny asked her . . . a week or two prior to the workers arriving, the second group coming, he called her and he asked her to come cook for the workers." Tr. at 194:1-4.

opportunity to review the statement she made to WHI Perez.[26] Tr. at 103:14-25; CX 5. As the undersigned noted at the hearing, he did not find Castaneda's testimony credible. Tr. at 546:24-547:1-11. Thus, the undersigned is not persuaded by her contradicting testimony.

Further, the weight of evidence demonstrates that the H-2A workers did not have access to Respondent's kitchen after July 5, 2018.[27] When the second workers arrived, they were told during orientation that there was a lady in the kitchen who cooks. DX 44 at 77-78. If they did not want to buy food from her, there were extra stoves and refrigerators that the men could use to prepare their own meals. *Id.* at 48. The first group of workers were present to hear this information as well. *Id.* at 79.

In reality however, this was not the case. The workers were only allowed to go into the kitchen to reheat their food. From the record, the workers did not have the ability to store any food that they bought in the kitchen as the refrigerators and freezers were filled with food and drink items belonging to Castaneda. Occasionally being able to prepare their own meals does not equate having free access to the kitchen. Castaneda frequently locked the kitchen and even though Benny or one of the H-2A workers had keys to the kitchen that does not mean that the workers access to the kitchen was unrestricted. Castaneda and her workers worked in the kitchen for 70-80 hours six days a week on Fridays Castaneda worked from 5:30 a.m. to 1:00 p.m. Tr. at 426:19-427:1-13. Thus, any free access workers had to the kitchen would have to be after Castaneda left for the day. Additionally, because Castaneda utilized all the space in the kitchen (which did not have enough space or storage for the 50 plus workers) there was no room for the workers to store any groceries they bought. The workers went into town once a week on Fridays. If they bought groceries or drinks, they would have no place in the kitchen to store those items.

As part of the work contract, Respondent agreed that he would provide free cooking and kitchen facilities to the workers. However, that was not the case in reality and the Tribunal finds that Respondent breached a material term of the job order. The Tribunal therefore finds that Respondent violated 20 C.F.R. §§ 655.122(g) and (q).[28] Nonetheless, this is not the end of the inquiry as the Tribunal still needs to resolve whether or not Castaneda was Respondent's agent or an affiliate of the Farm.

C. *The Evidence establishes that Griselda Castaneda was Respondent's Agent.*

Around 2014, Antonio Constantino approached Respondent about Castaneda's desire to cook on the farm. Tr. at 258:1-11, 329:18-25, 453:15-25. He advised Castaneda to speak with

[26] Castaneda informed WHI Perez that she could not read his handwriting so he stood next to her and they read the statement side-by-side. Tr. at 103:10-13.

[27] According to WHI Perez's testimony, when the workers arrived at Bald Eagle, Castaneda told them that if they wanted to eat they would have to pay her $75. Tr. at 209:14-19

[28] Castaneda began cooking on the farm in 2014. The undersigned makes no conclusion on what transpired between Castaneda and the workers during that time. However, when Respondent began participating in the program, it was his responsibility to ensure that Castaneda's cooking duties did not violate his obligations under the contract. Respondent failed to do so.

the workers. Tr. at 330. He informed Castaneda that if she wanted to cook then she was responsible for keeping the kitchen clean. Additionally, she had to clean the premises, including the toilets, as well. *See* Tr. at 258:1-261:15, 262:22-24, 403:1-12. Respondent testified that he did not hire Castaneda. Tr. at 330: 17-18. He does not pay her or the helpers that she employees. CX 4T. Their wages come from Castaneda's profit. CX 4T, CX 5; Tr. at 301, 432.

When Respondent began using the H-2A program, he knew Castaneda was charging for the meals and advised her to keep the receipts. He also updated her about increases in the daily maximum allowances. Tr. at 273:14-274:1-6, 19-275:1-24. Though he saw the receipts he never went through them or supervised her in keeping the receipts. Tr. at 331:11-16. He did not supervise her in the kitchen nor did he have any supervision over the helpers Castaneda hired or how much she paid them. Tr. at 332. Castaneda determined the hours and Respondent stated that he had no input in her work hours. Tr. at 332, 457. He did not make money from the meals or drinks that she sold. Tr. at 334:9-18, 459. Respondent did not direct how much she should charge for the meals or what to prepare. Tr. at 457. When the first group of workers arrived, Respondent paid for the utilities and did not charge them anything. It was the same for the second group of workers. Tr. at 335.

In 2018, Castaneda began cooking after the second group of workers arrived. Tr. at 93. Though she testified that Benny did not call her to come and cook for the workers, her testimony to WHI Perez states otherwise. *Cf.* Tr. at 412:19-22 to CX 5. She stated that several of the workers called her to come and cook.[29] Tr. at 454:8-15. Although the first group of workers called her too cook, she declined. Tr. at 454:16-20. She told them that once more workers arrived on the Farm, they could call her and she would cook for them. If they did not, she would not come. Tr. at 454:16-24. On the afternoon the second group of workers arrived, the workers called her to cook for them; if they did not like the food they would cook for themselves. Tr. at 455:1-6. She stated that she is familiar with some of the workers because they come from her hometown. Tr. at 456

Respondent expected her to follow the law because if she got into trouble, then he would get into trouble as well. Tr. at 277:15-19. If Castaneda wanted to charge more than the regulations allowed, he would inform her that she could not do that. Tr. at 282. Respondent testified that if the workers were working late, sometimes they would tell him to inform Castaneda of that fact. Tr. at 281:16-282:1-3. Respondent ate breakfast that Castaneda prepared numerous times. Respondent did not pay Castaneda for her cooking or cleaning activities. Tr. at 301-302. He did not charge her rent for using the kitchen or for utilities. Tr. at 411:15-412:1-2; CX 4T. When Castaneda informed him that the stove broke, he replaced them. *See* Tr. at 429.

[29] Stephanie Constantino testified at her deposition that the workers called Castaneda to come and cook. CX 44 at 89, 127. She also calls her mother to let her know when the second group of workers are arriving. CX 44 at 96, 126. She added that when the second group of workers arrive, they were told that Castaneda cooks in the kitchen if they wanted to buy food from her. CX 44 at 77-79. Respondent was present during this time and so were the men from the first group. CX 44 at 78-79.

Respondent testified that the he considers the items in the kitchen as his.[30] *See* Tr. at 301. Stephanie Constantino testified that some of the cookware belonged to Castaneda and others belonged to Benny. CX 44 at 113:6-7.

Respondent paid the workers every Friday. He paid them in the cafeteria. Castaneda was also present in the cafeteria during this time. Typically, after he had paid the workers, the workers would in turn pay Castaneda for the meals. *See* Tr. at 283-284. When he was not around to pay the workers, Stephanie Constantino paid them. Tr. at 437. Castaneda kept track of meal payments from the workers. Tr. at 437:23-24. She used a form she obtained from Respondent with the list of workers. Tr. at 438:1-6; CX 44 at 87.

1. *Castaneda acted with Respondent's actual authority.*

The Administrator describes Castaneda as an affiliate person who had both actual and apparent authority to act on Respondent's Behalf. Respondent argues the contrary. It states Castaneda was an independent contractor with familial ties to Respondent. He likens Castaneda's sale of food and beverages to the sales from the food truck that visited the Farm. As an independent contractor, Castaneda's food and beverage sales did not violate the H-2A regulations just as the food truck's sales did not violate them.

According to Section 2.01 of the Restatement, an agent has actual authority "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement § 2.01. An agent's belief is reasonable where it is "grounded in a manifestation of the principal." Restatement (Third) Of Agency § 2.02 cmt. c (2006).

Castaneda has been cooking and cleaning on the Farm since 2014. In 2014, when Respondent was approached by Castaneda's husband about cooking meals, he told them that it was up to the workers. In 2017, when the H-2A workers first arrived, Castaneda continued cooking for the workers when the second group arrived and did so again in 2018. Evidently, Castaneda would have had to have permission from Respondent to use his kitchen to cook for Respondent's farm workers. It's unfathomable that she would have set up shop without Respondent's knowledge. As part of his agreement to allow Ms. Castaneda to cook in the kitchen, he required keep the kitchen clean and to clean the premises. The undersigned finds that whiles these factors (standing alone and cumulatively) do not make her an agent, the record contains evidence that she had actual authority to provide meals to the workers.

Here, like in *Sun Valley*, Respondent paid the utilities for the kitchen. Similarly to *Sun Valley*, Respondent told Castaneda to keep her receipts and make sure that she did not exceed the daily allowable maximum as set forth by the regulations.[31] Unlike *Sun Valley*, Respondent does

[30] This testimony contradicts what Respondent said in his interrogatories. Respondent stated that some of the utensils the workers used to eat meals belonged to Ms. Castaneda. *See* CX 2 at 10.

[31] The Tribunal notes that a prudent effort on the part of an Employer to make sure it is not violating the H2A program does not automatically mean that Respondent is establishing an agency relationship.

not pay for Castaneda's wages. Castaneda does not supervise the workers nor does she personally take out meal payments from the workers' wages. The workers were paid on Fridays, either by Respondent or by Stephanie Constantino, in the cafeteria. Other than a few occasions, the workers would typically walk over and pay Castaneda once they received their pay as she was in another section of the cafeteria. Respondent is not in charge of the hours that Castaneda keeps and does not direct the meals that she makes for the workers. Castaneda is not on Respondent's payroll. She makes a profit directly from the workers. From this profit, she pays the other ladies who work with her. Though Stephanie Constantino mentioned that she informs her mother when the workers will arrive on the farm the relay of such information does not establish actual authority.[32]

However, during the WHI investigation, Castaneda mentioned that it was Benny who called her and asked her to come and cook for the workers in 2018.[33] Though one factor is not dispositive in establishing an agency relationship, the undersigned finds that this admission clearly establishes that Benny authorized Castaneda to cook for the H-2A workers in 2018 and that Castaneda reasonably believed that he wished her to act accordingly. Further, Castaneda was not paying rent to use the kitchen and she was not in charge of making kitchen repairs. Respondent paid for the utilities and when items in the kitchen were not functioning properly, he fixed or replaced them. The preponderant evidence establishes that in the operation of the meal plan Castaneda acted with Respondent's actual authority. Through his communicating with Castaneda and asking her to come and cook for the workers prior to the second group's arrival, Castaneda reasonably believed that the Respondent wished her to operate the meal plan. Therefore, her actions are imputed to Respondent.

2. *The Evidence does not establish that Castaneda had Apparent Authority.*

Although the evidence preponderantly establishes that Castaneda acted with actual authority, there is not enough evidence to show that the farmworkers reasonably believed that Castaneda was Respondent's agent. Restatement (Third) Of Agency § 2.03 defines apparent authority as, "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."

The Administrator argues that the Bald Eagle's workers reasonably understood that Ms. Castaneda was Bald Eagle's agent in part because Stephanie Constantino informed the workers (in Respondent's) presence about Castaneda in July. Resp. Br. at 26. After that the workers would see Castaneda in the kitchen preparing meals and drinks. *Id.* Also, Respondent and Ms. Castaneda testified that Respondent and Stephanie Constantino ate the meals that Castaneda cooked. *Id.* The Administrator states that:

[32] The undersigned notes that Castaneda's contradictory account of

[33] Castaneda's testimony is rife with multiple contradictory accounts of how she came to cook for the H-2A workers. Her statement to WHI Perez mentions that it was Benny who called her two weeks prior to the second group of workers asking her if she wanted to come and cook. At the hearing, she stated that it was the workers who called her the afternoon the second group arrived.

> [Respondent's] regular presence at the Farm's kitchen where Ms. Castaneda openly operated the company store, CX-14, further underscores that any reasonable Bald Eagle worker would understand that Ms. Castaneda was the Farm's agent. So too does the integral role Ms. Castaneda's family played in each aspect of the Farm's H-2A operation, particularly that of her husband Antonio Constantino, who also attended Bald Eagle's orientation at times.

Resp. Br. at 26. Because the workers frequently saw Antonio Constantino at the Farm and thought of him as a managerial figure, they probably saw Castaneda as being in some sort of managerial power because of her connection to her husband. *Id.* at 26 *quoting* WHI Perez's testimony.

The undersigned does not find this argument to be compelling. The fact that her daughter, Stephanie Constantino or Respondent ate in the cafeteria is not enough for one to reasonably believe that Castaneda was Respondent's agent. The same goes with the workers thinking that because they saw her husband at the farm frequently and believed he had some managerial power, they believed that Castaneda had some managerial power as well. The workers at the Farm were familiar with Castaneda's role. At orientation, they were told that she cooked and they had the option of buying food from her.[34] When the first group of workers arrived, once in a while Castaneda's husband drove them to town to buy groceries. Tr. at 385:6-9. However after the second group of workers arrived, Respondent hired a bus company to transport the workers into town. Tr. at 339:3-13. Unlike in *Sun Valley*, Castaneda's role was limited to cooking and cleaning. Neither the workers nor Respondent spoke with Castaneda about the Farm operations. There is thus no indication here that the workers held reasonable beliefs that Castaneda had authority to act on Respondent's behalf.

In sum, Castaneda had actual authority to act on Respondent's behalf.

D. *Through its agent Castaneda, Respondent unlawfully deducted meal and beverage costs from the workers' wages.*

As Respondent's agent, Castaneda was an "affiliated person." *See* WHD Bulletin No. 2012-3 ("The term 'affiliated person' includes but is not limited to agents. . . . any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship."). The regulations therefore prohibit Castaneda from charging any deduction not listed on Respondent's job order. *See* 20 C.F.R. § 655.122(p)(2).

1. *The Administrator properly found that the meal charges were not disclosed in Respondent's job contract and properly assessed $*48,075.00 *in back wages.*

[34] That reality was different does not indicate that the workers reasonably could have believed that she was Respondent's agent.

Once the second group of workers arrived in July, none of the workers had access to the kitchen to prepare their meals. All the workers purchased meals from Castaneda at a cost of $75.00, paid on a weekly basis; no worker prepared their own meals July 2018. Tr. 285:19-286:25, 414:15-415:10. The Administrator found that Respondent was liable for $48,075.00 in back wages and imposed a CMP of $1,388.00. *See* CX 17 at 48, JX 6. As Respondent made deductions from the workers' pay for the meals, Respondent is required to provide back pay to the affected farmworkers. *See* § 655.122(p)(1) (requiring the job offer to include *any* deduction "not required by law which the employer will make form the worker's paycheck); *Global Horizons, Inc.*, OALJ Case No.: 2010-TAE-00002, slip op. at 2 n.7 (ALJ Dec. 13, 2011) (recognizing that, although the meals deduction of $6.00 per day was a "favorable rate[]," it does not "negate the violation, as the deductions thwarted the regulatory scheme.").

WHI Perez assessed back wages for Castaneda's meal charges because the charges were not properly disclosed in the job order. Tr. at 139. WHI Perez is highly qualified to calculate back wages[35] and credibly testified to the methodology he used in arriving at the amount. *See* CX 16, CX 17; Tr. at 319-415.[36] The Parties stipulated that Castaneda charged $75 per week for each worker. The spreadsheet that WHI Perez created lists, *inter alia*, the worker's name, hours worked, the weeks the weeks worked, and how much the worker paid for meals each week. CX 17. WHI Perez also factored into the calculation whether the workers had access to the kitchen and whether the worker was part of the group that abandoned the Farm. *See* Tr. at 145-146. The Administrator's calculations, are reasonable and support the requirement for Respondent to provide back pay in the amount of $48,075.00 for the 62 workers.

Respondent argues that upholding back wages at $75 per week for all the workers will create a windfall since the workers benefited from 20 meals per week and were relieved of the burden of purchasing groceries and preparing their own food. Resp. Br. at 27. Respondent stated that the damages should be limited to CMPs for Respondent's failure to provide a proper notice. *Id.* at 28. Respondent relies section 3(m) of the FLSA to argue that these meals were part of the workers' wages and thus the workers' are not entitled to a back pay.[37] *Id.*

Despite Respondent's contentions, Respondent does not merit a 3(m) credit. Respondent's job order stated that he would provide his workers with free and convenient kitchen access. The job order did not disclose that the workers would be provided meals or the charge for such meals. As the Tribunal has found, Respondent violated the H-2A regulations in

[35] WHI Perez at the time of the hearing had worked as an investigator for eight and a half years. Tr. at 40:13-24. He has conducted about five to ten H-2A investigations. Tr. at 41:1-9.

[36] WHI Perez testified that he based his calculations on the payroll records (CX 16) he obtained from Respondent. Tr. at 139: 12-24. He stated that non H-2A workers are corresponding U.S. workers and consequently are afforded the same protections as U.S. workers. Tr. at 12-23. For the first group of workers he did not include food charges for the weeks of April 24, 2018 through July 3, 2018 because they had access to the kitchen during this timeframe. Tr. at 144:1-12; CX 17. There were about 11 workers who abandoned the farm, for these group of workers, WHI Perez did not calculate food charges from August 14, 2018 through September 11, 2018. Tr. at 144:12-145:1-6; CX 17.

[37] 29 U.S.C. § 203(m)(1)states that "'Wage'" paid to any employee includes the reasonable cost, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: . . . ."

this regard and accordingly violated material terms of his contract with the workers. Respondent thus cannot turn around and argue that the workers benefited from his deduction of their wages. The charge for the meals was a deduction from the workers' wages and Respondent must remit the full sum in back wages to the impacted workers. To find otherwise will be an affront and will not deter other H-2A employers from committing similar violations. *See Sun Valley* at 39 ("A less severe consequence would deny the farmworkers their contractual right to the . . . hour[ly] minimum wage promised on the job order. . . . The violation consists of the deduction itself—not the purported reasonableness of the deduction.").

Additionally, the burden is on Respondent to show that he is entitled to any credit. *Ortiz v. Paramo,* No. 06-3062, 2009 WL 4575618, at *4 *(*D.N.J. Dec. 1, 2009*)*; 29 C.F.R. § 516.27(a). To receive the 3(m) credit, Respondent must meet certain requirements including maintaining accurate records of the costs incurred in the furnishing of the lodging.[38] Such records were not presented before this Tribunal. Thus Respondent is not entitled to such credit. *Ortiz citing Reich v. Chez Robert, Inc.,* 821 F.Supp. 967, 977–78 (D.N.J.1993), *vacated on other grounds,* 28 F.3d 401 (3d Cir.1994).

2. *The Record does not Establish that Respondent Unlawfully Deducted Drink Charges from the Workers' Wages.*

Castaneda sold a variety of drinks (Gatorade, jumex, coke, monster energy) to the workers. Tr. at 128:1-10. She sold them in the kitchen during lunch and dinner as well as on the field.[39] Tr. at 128:11-19, Tr. at 428:15-24. She collected payment for the drinks at the time of sale. Tr. at 436:8-10. Castaneda did not include water with the meals. Tr. at 132:4-9, 429:18-21. She sold bottled water to the workers. Tr. at 439:10-13. If the workers wanted a drink, they had to purchase it from her. *Id.* Respondent did not provide a set of non-disposable cups that were of sufficient quantity for the workers. Tr. at 314:11-315:1-14. Respondent however had disposable cups in storage rooms. Tr. at 316:1-6. The workers could not go in there whenever they pleased. Tr. at 316:7-13. The cafeteria does not have running water but there are sinks in the kitchen and in the bathroom. Tr. at 317-318. Respondent puts water softener in the water. Tr. at 294. He stated that the workers do not like the taste of the tap water and would rather have bottled water. Tr. at 294-295. Respondent also provided water to the workers in the field. Tr. at 163; CX 45T.

WHI Perez found Respondent (through Castaneda's sale of drinks) violated the regulations. He explained that the sale of drinks was not disclosed the workers' job contracts. Also it brought the workers below their rate and she was selling at a profit. Tr. at 128:20-129:1-10. Castaneda purchased the drinks from Jetro, a restaurant wholesaler. Tr. at 129:10-14. She rarely kept receipts of the drinks she purchased and she did not have a record of her drink sales.

[38] An employer claiming the section 3(m) credit must generally keep two kinds of records: (1) records regarding the cost to the employer of providing the housing and (2) records regarding wage calculations taking lodging into account. *See* U.S. Dep't of Labor, Wage & Hour Div., *Credit towards Wages under Section 3(m) Questions and Answers*, (last visited Aug. 3, 2020), https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq#1.

[39] She testified that she goes to the field to sell drinks to the workers when they call her. Tr. at 438:22-24.

Tr. at 151:15-17, 133:14-18, 135:24136:1-4, 435:2-5, 436:13-15; CX 6 at 3, 4, 13, 14 (examples of receipts that show drink purchases). WHI Perez testified about the method he used in determining whether Castaneda was making a profit from the sale of drinks. Tr. at 129-131, 190:1-192:1-25, 217:18-220; CX 18, CX 19. WHI Perez accessed the Jetro website in November 2018 and found an advertisement for drinks. Tr. at 129-130; CX 18. Based on the information of the advertisement, as well as his interview with Castaneda and the workers, he estimated how much profit Castaneda was making. Tr. at 130:1-12.

WHI Perez's explained the process he used to calculate how much Respondent owed in back wages for drinks.[40] *See* Tr. at 139-147, 151:10-1531-25; CX 17. In his calculation, he did not make adjustments for the Friday dinners (since the workers did not at the farm) nor did he make adjustments for days when the workers were off. Tr. at 220:4-18. WHI Perez concluded that the workers paying for drinks was a deduction because the workers were deprived of access to refrigerators. Tr. at 149. In his calculations, he used the full amount that workers spent on drinks rather than Castaneda's profit because it was not disclosed in the work contract that the deduction would be taken. Tr. at 158:11-16. Since the workers had no refrigerators to store the beverages they purchased outside of Castaneda's kitchen, they were forced to buy drinks from Castaneda. Tr. at 149:2-14, 156:15-127:1-10. He further explained:

> The problem lies when Griselda doesn't allow the workers to enter the kitchen so they wouldn't have access to the refrigeration. So part of you know, she even told me during her interview statement that part of the meal you know, the meals don't include drinks. If you want a drink, you have to purchase it from me. So the problem starts with the fact that they didn't have access to the kitchen, which includes refrigeration. The second part is she's earning a profit from these drinks. This is where her profit is coming from is the drinks.

Tr. at 156:18-157:1-2. The weather in New Jersey during this time is very hot —sometimes in excess of 100 degrees Fahrenheit. Tr. at 149:17-25.

Castaneda sold drinks and bottled water to the workers in the cafeteria during lunch and dinnertime as well as on the fields when they called her. The Tribunal however does not find that the money the workers paid for drinks was an unlawful deduction. Though it is true that the workers were denied access to the refrigerators and therefore in the event that they purchased drinks not sold by Castaneda, they had nowhere to store them, the workers had access to cool drinking water during meal times and on the field. Respondent noted that the cafeteria where the workers ate did not have water but there were sinks in the kitchen. Though it might have been inconvenient for the workers to obtain water from behind the kitchen counter and to carry water from the kitchen area to the cafeteria, the undersigned finds that it is a slight inconvenience. The cafeteria and the kitchen were located close to each other. Also though Respondent did not provide a sufficient quantity of non-disposable cups to workers, he testified that he had ample disposable cups for the workers. He stored them in the storage room and though the workers could not access the storage room on their own, it is reasonable to infer that they only had to ask for cups should they run out of them. The undersigned also recognizes that Castaneda

[40] Here too, WHI Perez included corresponding US workers as they are afforded the same protections as H-2A workers. Tr. at 154:4-9.

sometimes sold drinks to the workers in the field. The workers had water available to them in the field and were not obligated to buy drinks from Castaneda. It is of no consequence that the workers did not like the taste of the water. The Administrator has not shown that other than the taste of the water, there were other issues with the water. That the workers preferred the taste of bottled water over the tap water was a personal preference.

For these reasons, the undersigned finds that the Administrator's assessment of $17,050.60 in back wages for drinks was unreasonable.

3. *The Administrator reasonably imposed $1,388.00 in CMPs for Respondent's Failure to Provide Kitchen Access, which Resulted in Undisclosed Meal Charge. However $1,388.00 in CMPs for Improper Charges for Drinks is without merit.*

As the Tribunal found that Respondent did not improperly charge the workers for drinks, $1,388 in CMPs that the Administrator imposed in unwarranted. However, the Tribunal finds that the CMPs imposed for Respondent's failure to provide kitchen access is reasonable.

Under the regulations, Employer must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. 20 C.F.R. § 655.122(g). Respondent stated in his job order that he would provide free and convenient cooking and kitchen facilities to its workers. However, from July 2018 through the end of the season, Respondent, through its agent Castaneda, violated its work contract by denying the workers access to the kitchen and charging them for meals.

The Administrator testified regarding how he calculated the CMP and the mitigating factors that applied based on the information before him. Tr. at 501:9-504:1-11, 505:24-507:1-2. Rather than assess a CMP for each of the workers who were denied kitchen access from July 2018 to the end of the season, the Administrator imposed a single penalty for the violation.

The Administrator's assessment of $1,388.00 in civil money penalties for the kitchen access was reasonable.

V. **The Administrator did not violate Respondent's Due Process when it assessed CMPs against Respondent. The Record does not show that Employer Made Good faith Effort to comply with the Regulation**s.

In total, the Administrator assessed $9,022 in Civil Money Penalties against Respondent. The Administrator argues that is well below the maximum that could have been assessed for Respondent's numerous violations. Administrators Br. at 40. The Administrator also posits that the CMPs assessed fully complied with the Small Business Regulatory Enforcement Fairness Act (SBREFA). Administrator's Br. at 42 fn. 29. Respondent argues that:

> Complainant's calculation of CMP using unpublished criteria offends due process. Kelly gave no credit for Respondent's "good faith," but it is not at all

> clear what indicia of "good faith" he would have needed to see. Respondent made a valiant effort to comply with all the requirements of the H-2A program, hiring advisors and specialists.

Resp. Br. at 29. Respondent also posits that it made good faith effort to comply with the regulations. It states that its actions in hiring professional vendors to ensure it complied with the H-2A visa process and transportation and paying workers who did not fully complete the regulation and the fact that it passed the New Jersey DOL inspection are examples of the efforts it made to comply with the regulation. *See* RX 1, RX 5, RX 8, Tr. at 342:1-343:1-5, 356:17-19, 358:1-18.

Respondent's argument that the Administrator did not give it credit for good faith credit and that it is not clear what indicia of good faith the Administrator needed to see are unavailing. The Administrator testified that when it assessed the CMP's it considered varying documents and interviews before him. He noted that he did find evidence of a good faith attempt to comply. When presented with hypotheticals about whether he would have given Respondent credit for good faith had "he had a belief that One Step was providing a[n] ETA or whether there would be no CMP if the employees were not required to purchase the beverages, Mr. Kelly responded he believes he would have. *See* Tr. at 526:1-4, 532:12-18.

The Tribunal finds that Respondent has not presented evidence to show good faith compliance with the regulations. Though the Tribunal notes that Respondent's camp passed New Jersey DOL regulations and that Respondent took steps to comply with the H-2A program, the Tribunal does not find these actions to be particularly relevant to the specific regulations that Respondent was cited for. For example: though respondent stated he did not know he had to reimburse the workers the subsistence, he signed the Job Order and stated that he would reimburse the workers within their first workweek. The record does not show that he intended to comply with the terms of his own job records. Additionally the record does not establish that prior to the investigation, Respondent made good faith effort to maintain sanitary conditions, purchase trashcans with lids, or repair the doors that had gaps.

The Tribunal is equally unpersuaded by Respondent's assertions that its due process was violated. As discussed above, the Administrator fashioned appropriated CMPs for Respondent's violations. For each violation, the Administrator successfully established that Respondent violated the regulations and articulated (based on the evidence before him) why he determined certain mitigating factors applied (and thereby reduced the penalty accordingly) and why certain mitigating factors were not applicable to Respondent's claim. Further, after reviewing the Small Business Regulatory Enforcement Fairness Act, the Tribunal finds that the Administrator's assessment comports with the Act.

The Small Business Regulatory Enforcement Fairness Act ("SBREFA") requires that enforcement agencies have a program for "the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity." Pub. L. No. 104-121, § 223, 110 Stat. 847, 862 (1996). Policies enacted pursuant to the Small Business Regulatory Enforcement Fairness Act can contain conditions and exceptions

such as: excluding violations that pose serious health, safety or environmental threats; and requiring a good faith effort to comply with the law. *Id.*

Though the Tribunal disagrees with the Administrator's statement that "the regulatory factor for number of workers affected serves as a proxy for a business's size" the Tribunal is in agreement that the SBREFA does not have a blanket requirement that an agency reduce a penalty because of the business size. The Tribunal finds that the H-2A regulations however make provisions for reductions of penalty (such as a showing of good faith effort to comply with the regulation, and threat posed to the health of workers) which demonstrate that the agency considers small businesses in its enforcement activities. Additionally, the Tribunal finds that the Administrator's use of discretion to significantly reduce Respondent's CMPs[41], and consequently the total CMP that Respondent is now liable for, is reasonable, especially given the size of Respondent's farm.

In summary, after reviewing the evidence, the Tribunal finds that other than a reduction in CMPs for the drink deductions, no other reduction in CMPs is not warranted in this case.

VI. Conclusion

This Decision modifies, in part, the Administrator's findings. The preponderant evidence of record establishes that Respondent owes $49,423.60[42] in back wages and $7,634.00[43] in civil money penalties. The undersigned found the Administrator's assessments to be reasonable and accurate, except for the back wages and CMP owed for beverages.

THEREFORE, the undersigned finds that Respondent:

1. Violated 20 C.F.R. § 655.122(h)(1) by failing to reimburse workers for inbound daily subsistence, and accordingly owes $1,348.60 in back wages and $1,041.00 in CMPs;
2. Violated 20 C.F.R. § 655.122(g) by making false promises about kitchen access and failing to disclose the meal charges, and accordingly owes $48,075.00 in back wages and $1,388.00 in CMPs;
3. Violated 20 C.F.R. § 655.122(q) by failing to provide workers with a copy of the work contract with the actual conditions of employment, warranting $1,041.00 in CMPs; and
4. Violated 20 C.F.R. § 655.122(d) through its inadequate housing, warranting $4,164 in CMPs.

[41] For each violation, rather than impose CMPs for each individual worker, which was well within the Administrator's rights, the Administrator imposed a single CMP for the overall violation. *See* 29 C.F.R. § 501.19(a).

[42] $1,348.60 in back wages for inbound daily subsistence and $48,075.00 for meal charges.

[43] $1,041.00 in CMPS for violating 20 C.F.R. § 655.122(h)(1); 1,388.00 in CMPs for violating 20 C.F.R. § 655.122(g); $1,041.00 in CMPs for violating 20 C.F.R. § 655.122(q); and $4,164 for violating 20 C.F.R. § 655.122(d).

SO ORDERED.

SCOTT MORRIS
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review (§Petition§) with the Administrative Review Board (§ARB§) within 30 days of the date of this decision. 29 C.F.R. § 501.42. 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 (e-File) 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 away 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. If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition, only one copy need be uploaded. Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. §501.42(a).