U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

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

PROSECUTING PARTY,

v.

GRAHAM AND ROLLINS, INC.,

RESPONDENT.

ARB CASE NO. 2019-0009

ALJ CASE NO 2018-TNE-00022

DATE: November 16, 2020

Appearances:

For the Respondent:
Leon R. Sequeira, Esq.; *LRS Law*; Prospect, Kentucky

***For the Administrator, Wage and Hour Division*:**
Kate S. O'Scannlain, Esq.; Jennifer S. Brand, Esq.; Paul L. Frieden, Esq.; Sara A. Conrath, Esq.; *U.S. Department of Labor*, *Office of the Solicitor*; Washington, District of Columbia

Before: James D. McGinley, *Chief Administrative Appeals Judge*, James A. Haynes and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER

This matter arises under the H-2B provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. §§ 1101 *et seq*., and the corresponding regulations. The matter involves the Administrator's determination that Employer Graham and Rollins, Inc. (Employer) violated certain H-2B provisions related to Applications for Temporary Employment Certification and I-129 Petitions for a

Nonimmigrant Worker filed in 2011 and 2012. After receiving the Administrator's Determination Letter, Employer requested a hearing before an Administrative Law Judge (ALJ) and filed a Motion to Dismiss Based Upon Untimeliness, which was granted on June 18, 2018 in a Decision and Order Granting Employer's Motion to Dismiss. The Administrator moved for reconsideration, which was denied on October 25, 2018. The Administrator appealed to the Board. The Secretary of Labor has delegated authority to the Administrative Review Board to issue agency decisions in this matter.[1]

Upon review of the ALJ's Decision and Order Granting Employer's Motion to Dismiss and the Order Denying Administrator's Motion for Reconsideration, we conclude that both are well-reasoned rulings based on the applicable law. The ALJ properly concluded that the Administrator's enforcement action was time barred by 28 U.S.C. § 2462.

Accordingly, we **AFFIRM**, **ADOPT** and **ATTACH** the ALJ's Decision and Order Granting Employer's Motion to Dismiss and the ALJ's Order Denying Administrator's Motion for Reconsideration.

SO ORDERED.

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[1] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

U.S. Department of Labor

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Issue Date: 26 June 2018

Case No.: 2018-TNE-00022

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Prosecuting Party,

v.

GRAHAM AND ROLLINS, INC.,
Employer.

DECISION AND ORDER GRANTING EMPLOYER'S MOTION TO DISMISS AND ORDER CANCELING HEARING AND ORDER DISMISSING CASE

This matter arises under the H-2B provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.*, and the corresponding regulations. Formal hearing is scheduled for July 17-19, 2018, in Newport News, Virginia.

The matter involves the Administrator's determination that Employer Graham and Rollins, Inc. ("Employer" or "Respondent") violated certain H-2B provisions by failing to pay outbound transportation costs to H-2B workers whose employment was terminated prior to the end of the contract, and by failing to notify USCIS or ETA of the termination of H-2B workers prior to the end of the contract within the required time period for notification. The violations related to *Applications for Temporary Employment Certification* and *I-129 Petitions for a Nonimmigrant Worker* filed in 2011 and 2012.

The Administrator did not assess a civil money penalty for the notification violations, but determined that Employer owed $8,280 related to the 2011 Application and $8,280 related to the 2012 Application, for a total of $16,560.00. The Determination letter states: "As a consequence of these H-2B violations, $16,560.00 in unpaid wages is owed to 126 H-2B nonimmigrant workers."

Employer requested a hearing, and the matter was docketed with OALJ. I issued a *Notice of Assignment and Scheduling Order* on April 4, 2018, and I issued a *Notice of Hearing and Prehearing Order* on April 19, 2018, setting the hearing for July 17-19, 2018. Under the

Prehearing Order, dispositive motions were due no later than 45 days before the hearing, and responses to such motions were due within 10 days after service of the motion.

On June 4, 2018, Employer filed a *Motion to Dismiss Based Upon Untimeliness*. Employer's motion stated that the Administrator issued a Determination Letter in this matter on February 13, 2018, alleging Respondent violated H-2B regulations in 2011 and 2012 and as a consequence owes $16,560.00 in unpaid wages to 126 H-2B nonimmigrant workers; that the Determination Letter was issued more than five years after the time period in which the violations were alleged to have occurred; and that the action is untimely, and Employer is entitled to a judgment in its favor. In its accompanying Memorandum, Employer argued that this action is brought by the Administrator alleging a substantial failure to meet conditions of the labor certifications issued in 2011 and 2012; that there is no express time limitation in the relevant INA provision or H-2B regulatory provision; that where no limitations period is stated, courts borrow the most analogous statute of limitations; and that one of the following limitations periods should apply, any one of which would bar this proceeding as untimely: the 2-year period for debarment under the INA; the 2-year limitation period for back wages under the Fair Labor Standards Act (FLSA); the 4-year limitation period of 28 U.S.C. § 1658; or the 5-year limitation period of 28 U.S.C. § 2462.

On June 19, 2018, the Administrator filed an *Opposition to Respondent's Motion to Dismiss*.[1] The Administrator argued that statutes of limitations do not run in administrative proceedings unless a federal statute directly sets a limitation; the INA does not set a limitations period applicable to H-2B provisions, therefore matters arising under the H-2B provisions are not subject to a limitations period; and statutes of limitations should not be borrowed from other federal statutes, with specific arguments against the statutes proposed by Employer.

Background

Employer Graham and Rollins, Inc., operates a crab meat processing business in the Tidewater area of Virginia. On January 14, 2011, the Department of Labor (DOL) received an *Application for Temporary Employment Certification* (ETA Form 9142) from Employer requesting certification of 110 H-2B workers for seafood processing. The period of intended employment was April 1, 2011 through December 31, 2011. In Appendix B.1 to the *Application*, Employer certified 14 conditions of employment, including the following:

> 10. Unless the H-2B worker is being sponsored by another subsequent employer, the employer will inform H-2B workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.35, and that if dismissed by the employer prior to the end of the period, the employer is liable for return transportation.
>
> 11. Upon the separation of employment of any foreign worker(s) employed under the labor certification application, if such separation occurs prior to the end date of

[1] As the Administrator's *Opposition* was filed more than 10 days after service of Employer's *Motion*, it was untimely. Nevertheless, the Administrator's arguments are addressed in this Order.

> the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than forty-eight (48) hours after such separation is discovered by the employer.

The DOL granted H-2B labor certification on January 21, 2011, for 93 workers for the period from April 1, 2011 through December 31, 2011. On January 25, 2011, Employer signed an *I-129 Petition for a Nonimmigrant Worker* for 93 unnamed H-2B workers (LCA number C-11014-53379), together with the four-page *H Classification Supplement to Form I-129*. The final page of the H Supplement contained certifications by Employer, including the following:

> The petitioner further agrees to notify DHS ... within 2 workdays if: an H-2A/H-2B worker fails to report for work within 5 workdays after the employment start date stated on the petition ...; the agricultural labor or services for which H-2A/H-2B workers were hired is completed more than 30 days early; or the H-2A/H-2B workers absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired. The petitioner agrees to retain evidence of this notification and make it available for inspection by DHS officers for a 1-year period.

Employer also agreed: "By filings this petition, I agree to the conditions of H-2A/H-2B employment and agree to the notification requirements."[2]

On February 28, 2012, the Department of Labor (DOL) received an *Application for Temporary Employment Certification* (ETA Form 9142) from Employer requesting certification of 110 H-2B workers for seafood processing. The period of intended employment was April 1, 2012 through December 31, 2012. In Appendix B.1 to the *Application*, Employer again certified 14 conditions of employment, including the two conditions (nos. 10 and 11) set forth above. The DOL granted H-2B labor certification on March 22, 2012, for 87 workers for the period from April 1, 2012 through December 31, 2012.[3]

On February 13, 2018, the Wage and Hour Division (WHD) of the DOL issued a Determination Letter to Employer.[4] The letter is captioned as follows:

> **Subject:** Administrator's Determination Pursuant to Section 214(c)(14) of the Immigration and Nationality Act (INA) and Applicable Regulations Pertaining to Violations Involving H-2B Nonimmigrant Workers

The letter stated:

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[2] The *Application* (Bates-stamped as DOL000368-375) and the *Petition* and *H Supplement* (DOL000385-394) filed by Employer in 2011 are attached to the Administrator's *Opposition to Respondent's Motion to Dismiss* as Exhibit 1. This exhibit also includes Employer's *Petition* and *H Supplement* filed in 2010 (see DOL000376-384), but the Determination Letter did not find any violations in 2010.

[3] The *Application* (DOL-SUPP000007-14) filed by Employer in 2012 is attached to the Administrator's *Opposition* as Exhibit 2. The *I-129 Petition* and *H Supplement* filed in 2012 were not provided.

[4] Although the letter is dated February 13, 2018, tracking information from the U.S. Postal Service (filed by Employer with its request for an administrative hearing) shows that the letter was first scanned at a USPS facility on February 20, 2018, and was delivered to Employer on February 24, 2018.

> An investigation by this office of Graham and Rollins, Inc., under the H-2B provisions of the INA, as amended, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) et seq., 1184(c)(14), and 20 C.F.R. Part 655, subpart A (2008) and applicable procedural regulations in 29 C.F.R. Part 503 (2015), covering the period from 04/01/2010 to 12/31/2013, disclosed that Graham and Rollins, Inc., committed the following violations regarding the USCIS Form I-129, petition for a Nonimmigrant Worker (I-129 Petition) and the Application for Temporary Employment Certification (ETA Form 9142 with Appendix B) (9142 Application) filed under the 2008 regulations: a substantial failure to comply with the outbound transportation and notification to USCIS and ETA requirements. Any I-129 Petition or 9142 Application included in this investigation is listed.

The Summary of Violations and Remedies enclosed with the letter recited that Employer "failed to pay outbound transportation costs to H-2B workers whose employment was terminated prior to the end of the contract," in violation of "Attestation #10 & 20 CFR 655.22(m)" in the 2011 and 2012 Applications, and in violation of "H-Supplement, Section 2, Page 17" of the 2011 and 2012 I-129 Petitions." The Summary listed "Back Wages Assessed" of $8,280 each for the 2011 and 2012 Applications, and $8,280 each for the 2011 and 2012 I-129 Petitions, for a "Total(s) Due for Payment Regarding this Violation" of $16,560.00.[5] The Summary of Violations and Remedies also recited that "Graham and Rollins, Inc. failed to notify USCIS or ETA within the required time period of H-2B workers whose employment was terminated more than 30 days prior to the end of the contract." No civil money penalty or back wages were assessed for this violation.

As set forth above, Employer has moved to dismiss this action as time-barred, and the Administrator opposes the motion on grounds that the INA does not include a statute of limitations, and the statutes cited by Employer are inapplicable.

The H-2B Program

The H-2B visa program provides for the admission of nonimmigrants to the United States to perform temporary nonagricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Such workers may be granted these temporary work visas when not enough workers in this country are able, willing, qualified, and available to perform these services. *Id.*; see 20 C.F.R. Part 655, subpart A. Employers who wish to employ H-2B workers submit an *Application for Temporary Employment Certification*; if the application is approved, the employers submit an *I-129 Petition* for H-2B visas that will admit these workers to the United States. 8 U.S.C. § 1184(c)(1). The Administrator has been delegated enforcement responsibility for ensuring that H-2B workers are employed in compliance with the statutory and regulatory labor certification requirements. 8 U.S.C. §§ 1184(c)(14)(A)-(B), 1103(a)(6). This includes the power to impose administrative remedies, including civil money penalties, on violators of the H-2B visa program. *Id.* §§ 1184(c)(14)(A)(i) and (B). Under 8 U.S.C. § 1184(c)(14)(A)(i), "civil money penalties in an

[5] The Determination Letter clarified that "where Graham and Rollins, Inc. violated both an I-129 requirement and the corresponding 9142 Application requirement, the associated back wages are listed under each citation .... However, the back wages for such violations will be collected under only one citation."

amount not to exceed $10,000 per violation" "may" be imposed for a "substantial failure to meet any of the conditions" of an H-2B petition or "a willful misrepresentation of a material fact in such petition." The applicable implementing regulations are set forth in 20 C.F.R. Part 655.

As this matter involves alleged violations related to *Applications* and *I-129 Petitions* filed in 2011 and 2012, the 2008 H-2B regulations apply to this proceeding.[6]

Discussion

The question presented by Employer's motion to dismiss is whether there is a limitations period applicable to this matter, and if so, whether this case is barred as untimely. Employer and the Administrator agree that the INA itself and the H-2B regulations do not include an express limitations period. The parties dispute whether a limitations period nevertheless applies.

Although the parties frame their arguments as a question of whether to "borrow" a limitations period from an analogous statute, I find 28 U.S.C. § 2462 applies by its own terms. Section 2462 provides:

> Except as otherwise provided by an Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

In *3M Company (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), the Environmental Protection Agency (EPA) assessed civil penalties against 3M for violations related to its use of two chemicals, including the failure to provide Premanufacture Notice of the importation of the chemicals and the incorrect certification that the applicable requirements had been satisfied. 3M argued that Section 2462 imposed a five-year limitations period, and an ALJ found that the statute only applied to judicial proceedings and did not apply to the administrative proceeding. The circuit court observed that the Administrative Procedures Act calls agency adjudications "proceedings," and recognizes that agency attorneys who bring administrative complaints are performing "prosecuting functions." *Id.* at 1456 (citing 5 U.S.C. § 554(b), (d)). The circuit court stated:

> Given the reasons why we have statutes of limitations, there is no discernible rationale for applying § 2462 when the penalty action or proceeding is brought in a court, but not when it is brought in an administrative agency. The concern that after the passage of time "evidence has been lost, memories have faded, and witnesses have disappeared" pertains equally to factfinding by a court and factfinding by an agency. *Order of R.R. Telegraphers v. Railway Express Agency*,

[6] On March 4, 2015, the United States District Court for the Northern District of Florida issued an order ("Injunction") vacating and permanently enjoining DOL from enforcing the 2008 Rule. *Perez v. Perez*, Case No. 3:14-cv-00682 (N.D. Fla. Mar. 4, 2015). The effective date of the Injunction was April 30, 2015. In a September 4, 2015 order ("Clarifying Order"), the District Court clarified that the Injunction "was not intended to, and does not, apply retroactively." The Clarifying Order remains in effect today.

> 321 U.S. 342, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). Statutes of limitations also reflect the judgment that there comes a time when the potential defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations," Note, *Developments in the Law—Statutes of Limitations*, 63 HARV.L.REV. 1177, 1185 (1950). Here again it is of no moment whether the proceeding leading to the imposition of a penalty is a proceeding started in a court or in an agency. From the potential defendant's point of view, lengthy delays upset "settled expectations" to the same extent in either case. *See Board of Regents v. Tomanio*, 446 U.S. 478, 487, 100 S.Ct. 1790, 1796, 64 L.Ed.2d 440 (1980).

Id. at 1457. In response to the ALJ's reliance on the maxim that statutes of limitations should be strictly construed against the government—an argument the Administrator makes in this case as well—the court noted "another Supreme Court maxim, older still, a maxim specifically relating to actions for penalties and one pointing in quite the opposite direction: 'In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture.'" *Id.* (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805)). The court held that the administrative proceeding is "an action, suit or proceeding" and thus Section 2462 applies.

I find the reasoning of *3M Company* to be persuasive and sound. This matter, like the matter at issue in *3M Company*, is subject to the Administrative Procedures Act, which recognizes that agency adjudications have "an accusatory flavor" and the hearing officer (ALJ) must be independent of the agency's "prosecution." *See id.* at 1456; 20 C.F.R. 655.72 (2009). The matter is referred to as a "proceeding," and the Administrator is referred to as the "prosecuting party." 20 C.F.R. § 655.71 (2009). Discovery is pursued, a hearing is held, rules of practice and procedure apply, evidence is introduced, findings are made, and an order is issued. *See* 20 C.F.R. §§ 655.72-.75 (2009); *3M Company*, 17 F.3d at 1456-57. I find that this matter is "an action, suit or proceeding," and thus Section 2462 applies.

The Administrator argues that "[s]tatutes of limitations do not run in administrative proceedings initiated by the federal government, unless a federal statute directly sets a time limit." *Administrator's Opposition*, at 3 (citing *BP America Production Co. v. Burton*, 549 U.S. 84, 96 (2006)). In *BP America Production Co.*, the question was whether 28 U.S.C. § 2415 applied. That statute provided that in "every action for money damages brought by the United States or an ... agency thereof," the "complaint" must be filed within six years after the right of action accrues. 549 U.S. at 89. The Court held as a matter of statutory construction that the use of the words "action" and "complaint" refer to judicial proceedings, and exclude administrative proceedings. The Court distinguished the case of *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346 (1927), because the statute at issue in *Bowers* referred to "suits" and "proceedings." Because Section 2415 referred only to an "action," the court held its application was limited to judicial proceedings. *BP America Production Co.*, 549 U.S. at 96. This case does not aid the Administrator, because Section 2462, like the statute in *Bowers*, refers to "an action, suit or proceeding." Section 2462, by its own terms, includes the "proceeding" pursued by the Administrator in this case. Therefore, a federal statute directly sets a time limit in this matter.

The Administrator also cites two decisions of the Administrative Review Board for the proposition that no limitations period applies, but I find both decisions inapposite. As further discussed below, both cases address the period of recovery for H-1B wages following a *timely filed complaint*. Both cases were subject to a 12-month limitation period for filing the complaint, and in both cases, the nonimmigrant worker filed a complaint within the 12-month period. The ARB addressed whether the timely filed complaints allowed the workers to seek all H-1B wages owed, and found they did. The ARB did not hold that no limitations period applies to matters arising under the INA (to the contrary, it found a 12-month limitations period applied and was satisfied in each case), and did not address which limitations period would apply in an H-2B matter like this one.

In *Vojtisek-Lom v. Clean Air Techs. Int'l Inc.*, ARB No. 07-097 (ARB July 30, 2009), Mr. Vojtisek-Lom filed a complaint on May 4, 2005, alleging that the employer did not pay him the correct H-1B wages in 2000 through 2005. The Administrator assessed back wages from September 2003 through March 2005; its investigator testified the evidence was not "sufficiently strong" to show violations before May 2003, and did not justify deviation from the "standard policy" to look back two years. The ALJ found a violation and calculated back wages from March 2000 through March 2005, and the employer challenged the ALJ's assessment of back wages for 2000-2002. The ARB noted that the INA required that a complaint be filed "not later than 12 months after the latest date on which the alleged violation(s) were committed," and Mr. Vojtisek-Lom's complaint was timely filed. The ARB held the timely complaint could cover the entire period of wage loss from 2000-2005, because the INA did not provide a time limitation for the recovery period, and the pertinent regulation "expressly permits the H-1B nonimmigrant to recover back wages for periods 'prior to one year before the filing of a complaint.'" There are critical distinctions between *Clean Air Techs. Int'l Inc.* and the instant case: *Clean Air Techs. Int'l Inc.* addressed the time period of recovery, not the time period to initiate the proceedings; *Clean Air Techs. Int'l Inc.* involved a complaint that was timely filed within the applicable 12-month period, whereas this case involves a Determination letter filed more than five years after the alleged violations; and the Administrator has not pointed to any regulation expressly permitting it to reach back to 2011 and 2012. For those reasons, *Clean Air Techs. Int'l Inc.* does not stand for the broad proposition asserted by the Administrator.

In *Administrator v. Avenue Dental Care*, ARB No. 07-101 (ARB Jan. 7, 2010), Dr. Dutta, a dentist, was hired by Avenue Dental Care in June 2002 under the H-1B program. In September or October 2005, Dr. Dutta filed a complaint alleging that Avenue Dental Care had not paid him wages due, and had not reimbursed him for his LCA filing fee. As in *Clean Air Techs. Int'l Inc.*, the ARB found Dr. Dutta's complaint for back wages had been timely filed, because it was filed within 12 months after the latest date on which the alleged violations were committed, and thus he was entitled to back pay for the entire period of his H-1B employment. The ARB found the filing fee claim was time-barred, however, because it was not filed within 12 months of the violation. As with *Clean Air Techs. Int'l Inc.*, this case involved the period of recovery following a timely filed complaint, not the time limitation applicable to initiate the proceeding. On the only issue involving the initiation of the proceedings, the ARB enforced a time limitation against the H-1B worker, finding that his claim for reimbursement of the LCA filing fee was time-barred.

In sum, both of these cases address the period of recovery for H-1B wages following a *timely filed* complaint. Neither of these cases address whether the instant case is timely, or assist the Administrator in her argument that there is no time limitation for initiating this proceeding.

Therefore, the Administrator is mistaken that no limitation applies. I find that the five-year limitations period in 28 U.S.C. § 2462 applies to this proceeding.

The Administrator argues that Section 2462 does not apply to this case, because the Administrator is "seeking to recover unpaid wages owed to temporary nonimmigrant workers" in this case, and is not seeking civil money penalties. The Administrator asserts that "the recoupment of unpaid wages in these cases" does not come within the scope of Section 2462, because the Administrator is "seeking remedies to achieve make-whole relief" and the remedy represents "damages caused by the defendant." *Administrator's Opposition*, at 7-8.

Under 20 C.F.R. § 655.65 (2009) ("Remedies for violations"), the Administrator may assess a civil money penalty for willfully failing to pay wages, charging prohibited fees or expenses, or making impermissible deductions; the Administrator may assess a civil money penalty for impermissible terminations by layoff; and the Administrator may assess a civil money penalty for a substantial failure to meet the conditions provided in the *Application* and *I-129 Petition*. *Id.* § 655.65(a)-(c) (2009). Guidelines for determining the amount of the civil money penalty appear in subsection (g). *Id.* § 655.65(g) (2009). In addition, "the Administrator may impose such other administrative remedies as the Administrator determines to be appropriate, including reinstatement of displaced U.S. workers, or other appropriate legal or equitable remedies." *Id.* § 655.65(i). If the Administrator finds that the employer did not pay wages as required by Section 655.22(e) (the prevailing wage), the Administrator "may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of § 655.22(e)." *Id.*

Employer is alleged to have committed a substantial failure to comply with the outbound transportation and notification conditions as certified in the *Application* and *I-129 Petition*, which is punishable under § 655.65(c). The Administrator assessed "$0.00" as a "civil money penalty" and "$8,280" each year as "back wages assessed" under the 2011 and 2012 Application and I-129 Petition. Employer asserts that the Administrator "has authority to seek back pay only for violations of § 655.22(e) and this action alleges violations of § 655.22(m)," and argues the court lacks subject matter jurisdiction over the Administrator's claims. Although Employer is correct that § 655.65 provides for "back pay" only for failure to pay the prevailing wage, the regulation also permits the Administrator to impose "other appropriate legal or equitable remedies" as appropriate. I find the Administrator had authority to impose other remedies, and this court has jurisdiction over its assessment of such other remedies. The question is whether the "other ... remedies" assessed are a "penalty" within the scope of 28 U.S.C. § 2462.

First, as a legal matter, this is not an action for "back wages," notwithstanding the Administrator's characterizations. As discussed above, the regulation providing for H-2B remedies (§ 655.65) allows the Administrator to seek "back pay" for violations of § 655.22(e) (prevailing wage), which is not at issue here. This is an action for "other ... remedies" under the regulation for violations found by the Administrator. The violations cited in the attachment to

the Determination Letter are based on failures to comply with attestations and certifications (specifically, the attestations that Employer would inform H-2B workers who were terminated early that it was liable for outbound transportation, and would inform DHS and DOL of the early termination; and certifications that Employer agreed to the conditions of employment and notification requirements).[7]

Moreover, it is not clear that the amounts assessed against Employer in the Determination Letter ($8,280 for violations in 2011 and $8,280 for violations in 2012) represent a set amount the Administrator considered due to specific individual workers. While the Determination Letter states that "$16,560.00 in unpaid wages is owed to 126 H-2B nonimmigrant workers," the Administrator's Prehearing Statement (filed June 18, 2018) asserts that Employer dismissed early and did not pay the full return transportation for 61 H-2B workers in 2011, and 72 H-2B workers in 2012.[8] The Administrator further asserts that the balance of the cost of outbound transportation owed to the H-2B workers is approximately $80 per worker. Several problems are evident:

- With 61 allegedly affected workers in 2011 and 72 allegedly affected workers in 2012, it is difficult to see how the Administrator's Determination Letter could have assessed the same amount each year ($8,280 per year) for costs owed to a different number of workers each year;
- The total number of affected workers (61 in 2011 plus 72 in 2012) does not equal the 126 alleged in the Determination Letter;
- The bus fare allegedly owed per worker ($80) multiplied by the number of affected workers (61 in 2011 and 72 in 2012) does not equal the sum assessed in the Determination Letter ($80 x 61 = $4,880; $80 x 72 = $5,760).[9] That is, the Administrator now seeks *less* money ($10,640) for *more* affected workers (133 workers) than identified in the February 2018 Determination Letter.

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[7] Because I find the Administrator's Determination is not an action for back wages, I do not address Employer's argument that the two-year limitation period of the FLSA for recovery of back wages should apply here.

[8] The parties' positions, as set forth in the Administrator's Prehearing Statement and Employer's discovery responses (attached to the Administrator's *Motion to Compel and to Deem [Certain Requests] Admitted*) are as follows:

- The Administrator contends that Employer recruited nonimmigrant workers from Sinaloa, Mexico under the H-2B program; Employer dismissed 61 of the 2011 H-2B workers and 72 of the 2012 H-2B workers before the end of the employment period specified in the Applications; Employer did not pay the full cost of return transportation from Newport News, Virginia to Sinaloa, Mexico, for the 133 H-2B workers dismissed early in 2011 and 2012, and instead paid to transport those workers from Newport News, Virginia to Phoenix, Arizona; the bus fare from Phoenix, Arizona to Sinaloa, Mexico is approximately $80.00 per person; consequently, the 61 workers dismissed early in 2011 are owed a total of $4,880.00 and the 72 workers dismissed early in 2012 are owed a total of $5,760.00; and, Employer did not notify DHS or DOL within two work days of the early dismissal of those H-2B workers.
- Employer contends that H-2B workers "were offered return transportation by bus to the place of recruitment abroad," and "some workers instead requested that the entire value of the return transportation by bus to the place of recruitment be instead applied to a plane ticket to Arizona"; therefore, Employer "provided workers with the monetary value of return transportation by bus to the place of recruitment abroad."

[9] In her Prehearing Statement, the Administrator now seeks a remedy of $10,640.00. The Administrator states in the Prehearing Statement that "[t]he total amount of the alleged underpayment to each employee" is set forth in an Attachment A, but no attachment was filed with the Prehearing Statement.

All of this calls into doubt the Administrator's argument that the assessment of $8,280 against Employer for violations in 2011 and $8,280 for violations in 2012 represents straight "back pay" and "make-whole relief."

Finally, the cases cited by the Administrator are distinguishable. The Administrator relies on *United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998), *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397 (1906), and *United States v. Perry*, 431 F.2d 1020, 1025 (9th Cir. 1970). In *Telluride*, the government argued that Section 2462 was inapplicable to non-monetary penalties.[10] 146 F.3d at 1245. The court analyzed whether a restorative injunction constituted a "penalty," and observed that the term "penalty" was not defined in Section 2462, so its ordinary meaning is used. *Id.* The court noted that dictionaries "generally define 'penalty' as relating to punishment," and that the Supreme Court had defined "penalty" as "something imposed in a punitive way for an infraction of a public law." *Id.* (quoting *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915)). The court interpreted a penalty under Section 2462 to mean a sanction or punishment for violating a public law that goes beyond compensation for the injury caused by the defendant. *Id.* at 1246. Because the restorative injunction at issue in *Telluride* sought "to restore only the wetlands damaged by Telco's acts to the status quo," the court held it was not a penalty. In *Chattanooga Foundry & Pipe Works v. Atlanta*, a price-fixing scheme caused the City of Atlanta to purchase iron water pipe at an inflated price. The Court held that the five-year limitations period in Section 1047 did not apply for reasons that had been "stated so fully by this court that it is not necessary to repeat them." *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. at 397 (citing *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)). In *Huntington*, the Court had drawn a distinction between actions that are "purely remedial," and those "prosecuted for the purpose of punishment, and to deter others from offending in like manner"; it observed there were "wrong[s] to the public" involving "a breach and violation of public rights and duties," and "wrong[s] to the individual" involving "an infringement or privation of the private or civil rights belonging to individuals." 146 U.S. at 668. Finally, in *Perry*, the court considered whether an action by the government to recover kickbacks made in violation of the Anti-Kickback Act constituted an action for a penalty subject to Section 2462. 431 F.2d at 1024-25. The court stated: "The question is whether the Government's remedy under the Act is compensatory in nature, or has a purpose going beyond making the plaintiff whole." *Id.* at 1025. Relying on these cases, the Administrator argues "the recoupment of unpaid wages in these cases" is not a penalty, and seeks only "make-whole relief."

This case is not merely about "recoupment of unpaid wages," however. Unlike the H-1B cases discussed above (*Clean Air Techs. Int'l Inc.* and *Avenue Dental Care*), this case was not based strictly on unpaid wages, but on a substantial failure to comply with attestations and certifications made in the H-2B filings. While the Administrator argues its intention is to recoup money for the affected workers, that does not transform the nature of the action itself. The violations listed in the Determination Letter (for which remedies are imposed) are the failure to comply with attestations and certifications made to the government; that is, they are public wrongs. Similarly, the monetary remedy assessed against Employer was not purely remedial or compensatory, as the amount assessed in the Determination Letter does not bear a direct relation to the losses allegedly sustained by the affected H-2B workers. Additionally, as reasoned by

[10] Here, the remedies assessed against Employer are monetary.

Associate Chief Judge Almanza in *Administrator v. Hotelmacher, LLC and Steakmacher, LLC*, 2017-TNE-00010 and 2017-TNE-00011,[11] there is a distinction between cases in which the government seeks compensation for its own losses, and those in which it seeks remedies for others. In the latter circumstance, the Administrator is not made whole for the violations through the assessed monetary remedies, and the remedies are a "penalty" under Section 2462.

I find that the monetary remedies assessed against Employer in this matter are "something imposed in a punitive way for an infraction of a public law." I reject the Administrator's argument that the assessment is purely remedial, for the reasons discussed above. I find that the assessment goes beyond mere compensation for the violations cited by the Administrator, for the reasons discussed above. Therefore, I find that the pecuniary remedies assessed against Employer for its alleged failures to comply with the attestations and certifications made in its *Applications* and *I-129 Petitions* constitute a "penalty" under 28 U.S.C. § 2462.[12]

As I have found that Section 2462 applies, this proceeding for the enforcement of the monetary remedies assessed against Employer in the Determination Letter "shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. In *3M Company*, the court addressed when a claim "accrues," and held that the answer "has been settled for more than a century": "a claim accrues at the moment a violation occurs." 17 F.3d at 1461-62. Here, the violations are based on alleged failures by Employer when H-2B workers were terminated before the end of the period of intended employment. The periods of intended employment were April 1, 2011 through December 31, 2011, and April 1, 2012 through December 31, 2012. Consequently, any violation based on early termination would have had to occur before December 31, 2011 for the alleged 2011 violations, and before December 31, 2012 for the alleged 2012 violations. The Administrator's February 13, 2018 Determination Letter issued more than five years after the alleged violations occurred and the claims accrued. Consequently, this proceeding was not timely commenced, and is time-barred under Section 2462.

Because I find that the proceeding is untimely under Section 2462, Employer's Motion to Dismiss Based Upon Untimeliness will be granted, and this proceeding will be dismissed with prejudice. The hearing scheduled for July 17-19, 2018, will be canceled, rendering the prehearing telephone conference scheduled for 10:00 a.m. on June 26, 2018 unnecessary and the Administrator's request for interpretation services at the hearing moot. The Administrator's pending discovery motions (including a motion to compel, a motion to deem certain requests for admission admitted, and a motion to extend the discovery deadline) and her motion for continuance are also moot.

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[11] *See Order Denying Respondents' Request for Summary Decision*, issued May 17, 2018.

[12] Additionally, as the Administrator may impose a civil money penalty for any violation of the regulations, Section 2462 arguably applies generally to 20 C.F.R. § 655.65 (2009) and all proceedings brought under it.

ORDER

It is hereby ordered that:

1. Employer's Motion to Dismiss Based Upon Untimeliness is **GRANTED**.

2. The hearing scheduled for July 17-19, 2018, in Newport News, Virginia, is **CANCELED**.

3. This matter is **DISMISSED** with prejudice.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA

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

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

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

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

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

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

20 C.F.R. § 655.76(b). If the ARB determines that it will review this decision and order, it will issue a notice specifying the issue or issues to be reviewed; the form in which submissions shall be made by the parties (e.g., briefs); and the time within which such submissions shall be made. 20 C.F.R. § 655.76(e). When filing any document with the ARB, the party must file an original and two copies of the document. 20 C.F.R. § 655.76(f).

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 25 October 2018

Case No.: 2018-TNE-00022

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Prosecuting Party,

v.

GRAHAM AND ROLLINS, INC.,
Employer.

ORDER DENYING ADMINISTRATOR'S MOTION FOR RECONSIDERATION

This matter arises under the H-2B provisions of the Immigration and Nationality Act ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.*, and the corresponding regulations. On June 26, 2018, I issued a Decision and Order Granting Employer's Motion to Dismiss.

On July 6, 2018, the Administrator filed a *Motion for Reconsideration and Memorandum in Support*. I granted Employer's request for an enlargement of time for its response, and Employer filed *Respondent's Opposition to Administrator's Motion for Reconsideration* on July 30, 2018. I granted the Administrator leave to file a reply brief, and the Administrator filed a *Reply in Support of the Administrator's Motion for Reconsideration* on August 8, 2018.

The Underlying Decision and Order

Employer Graham and Rollins, Inc. filed a *Motion to Dismiss Based Upon Untimeliness* on June 4, 2018. Employer stated that the Administrator's Determination Letter, dated February 13, 2018, was issued more than five years after the alleged violations (in 2011 and 2012) occurred. Employer argued the proceeding was time-barred under the two-year limitations period in the "closely related" H-2A regulations, the two-year limitations period for recovery of back wages in the Fair Labor Standards Act (FLSA), the four-year limitations period of 28 U.S.C. § 1658 (for actions arising under an Act of Congress after December 1, 1990), or the five-year limitations period of 28 U.S.C. § 2462 (for enforcement of a civil penalty). Employer also argued that this court lacks jurisdiction over this action because DOL lacked statutory authority to promulgate the H-2B regulations (citing *Perez v. Perez*, No. 3:14-cv-00682 (N.D. Fla. Mar. 4, 2015), but acknowledging *Administrator v. Strates Shows*, ARB No. 16-069 (ARB Aug. 16, 2017)). Finally, Employer argued that while the Administrator purported to seek "back pay" in

the Determination Letter, back pay is not an authorized remedy for a violation of Section 655.22(m), which is the type of violation alleged against Employer.

On June 19, 2018, the Administrator filed an untimely *Opposition to Respondent's Motion to Dismiss*.[1] The Administrator argued that statutes of limitations do not run in administrative proceedings unless a federal statute directly sets a limitation; the INA does not set a limitations period applicable to H-2B provisions, therefore matters arising under the H-2B provisions are not subject to a limitations period; and statutes of limitations should not be borrowed from other federal statutes, with specific arguments against the statutes proposed by Employer.

On June 26, 2018, I issued a Decision and Order Granting Employer's Motion to Dismiss. I concluded that 28 U.S.C. § 2462 applies to this matter, and therefore imposes a five-year limitations period. I reasoned that Section 2462 applies in administrative proceedings for the reasons set forth in *3M Company (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), and that the H-1B cases upon which the Administrator relied to argue that no limitations period applies were inapposite, because they addressed the period of recovery for H-1B wages following a *timely filed complaint*, not the question of which limitations period would apply in an H-2B matter like this one. In response to Employer's argument that the Administrator "has authority to seek back pay only for violations of § 655.22(e) and this action alleges violations of § 655.22(m)," and therefore the court lacks subject matter jurisdiction over the Administrator's claims, I found that the Administrator had authority to impose "other ... remedies" under 20 C.F.R. § 655.65(i), and this court has jurisdiction over its assessment of such other remedies. I stated that the dispositive question was whether the "other ... remedies" assessed are a "penalty" within the scope of 28 U.S.C. § 2462.

On that question, I concluded the remedy assessed against Employer in the Determination Letter is a "penalty" for purposes of Section 2462, reasoning:

- This is an action for "other remedies" under Section 655.65(i), not for back pay as required by Section 655.22(e) (the prevailing wage), and the Administrator's argument or characterization of the case as one for "back wages" does not transform the nature of the proceeding from one based upon failures to comply with attestations and certifications.[2] [3]
- "[I]t is not clear that the amounts assessed against Employer in the Determination Letter ($8,280 for violations in 2011 and $8,280 for violations in 2012) represent a set amount the Administrator considered due to specific individual workers."

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[1] The *Notice of Hearing and Prehearing Order* issued April 19, 2018 provided: "Dispositive motions must be filed no later than 45 days before the hearing, with responses due within 10 days after service of such motions." Employer's motion to dismiss was served on June 4, 2018, making the Administrator's response due June 14, 2018.

[2] The Determination Letter did not make any reference to Section 655.22(e) or a failure to pay the prevailing wage. Rather, it found "a substantial failure to comply with the outbound transportation and notification to USCIS and ETA requirements." The Summary of Violations and Remedies cites only Section 655.22(m), and does not cite Section 655.22(e).

[3] Because I found that the Administrator's Determination Letter is not an action for back wages, I did not address Employer's argument that the two-year limitation period of the FLSA for recovery of back wages should apply here.

- The cases cited by the Administrator to argue that Section 2462 is inapplicable are distinguishable, because "this case was not based strictly on unpaid wages, but on a substantial failure to comply with attestations and certifications made in the H-2B filings," and "the monetary remedies assessed against Employer in this matter are 'something imposed in a punitive way for an infraction of a public law'" (quoting *United States v. Telluride Co.*, 146 F.3d 1241, 1245 (10th Cir. 1998), which quoted *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915)).

I concluded that "the pecuniary remedies assessed against Employer for its alleged failures to comply with the attestations and certifications made in its *Applications* and *I-129 Petitions* constitute a 'penalty' under 28 U.S.C. § 2462." Because the Administrator's February 13, 2018 Determination Letter issued more than five years after the alleged violations occurred and the claims accrued, I found the proceeding was not timely commenced, and is time-barred under Section 2462. I therefore granted Employer's Motion to Dismiss.

Parties' Arguments on Reconsideration

In the Motion for Reconsideration, the Administrator argued that this court applied the wrong standard of review "to the extent that it failed to draw all reasonable inferences in favor of the Administrator." The Administrator contends that review of a motion to dismiss is generally limited to the four corners of the initial pleading, which is the Determination Letter in this case. The Administrator argues that, because this court "considered other filings and documents," the matter must be treated as a motion for summary judgment, and all credibility assessments, ambiguities, and inferences must be drawn in the Administrator's favor. The Administrator argues that this court did not draw all inferences in its favor, because it "assumed that the Administrator's revised calculation of the transportation costs was evidence that the damages sought did not constitute 'make-whole relief.'" Because the revised assessment sought in the Administrator's Prehearing Statement was equal to the total of transportation costs alleged in the Prehearing Statement, the Administrator asserts it was entitled to the "reasonable inference that it was seeking back wages in the amount of $10,640."[4]

The Administrator also argues that "the Court's ruling was based on an incomplete record," because "Respondent's failure to comply with the discovery rules precluded the Administrator from thoroughly opposing Respondent's untimeliness argument and resulted in the mischaracterization of the Administrator's back wage claim as a penalty."

[4] The Administrator asserts that the amount of $10,640 is "the amount the Court subsequently determined was an accurate reflection of the H-2B employees' transportation costs." (Motion for Reconsideration at 4; *see also id.* at 7). I did not make any determination as to the amount of any employee's transportation costs or how many employees were affected; indeed, I did not make any determination whether Employer failed to pay full outbound transportation costs for those employees (Employer contends it paid the full costs to the employees). Thus, I did not "determine" the accurate amount of "the H-2B employees' transportation costs." Instead, I noted the difficulty in reconciling the transportation costs claimed by the Administrator in her Prehearing Statement ($80 per worker) multiplied by the number of allegedly affected workers (61 in 2011 and 72 in 2012) with the assessment levied against Employer in the Determination Letter ($8,280 per year).

The Administrator reiterates her argument that it is seeking back wages, and back wages are not penalties. The Administrator contends that Employer's failure to pay outbound transportation costs "resulted in [the H-2B] employees receiving less than the prevailing wage"; thus, "any recovery in this case amounts to recovery of wages due to the H-2B employees." (Motion for Reconsideration at 2-3, 8-10). The Administrator quotes page 8 of my Decision and Order Granting Employer's Motion to Dismiss, in which I quoted 20 C.F.R. § 655.65(i), as follows: "If the Administrator finds that the employer did not pay wages as required by Section 655.22(e) (the prevailing wage), the Administrator 'may require the employer to provide for payment of such amounts of back pay as may be required to comply with the requirements of § 655.22(e).'" (Motion at 6-7, quoting Order at 8). The Administrator also contends the discrepancy between the assessment against Employer in the Determination Letter ($8,280 for 2011 and $8,280 for 2012, for a total of $16,560.00) and the Administrator's request in its prehearing statement (a total of $10,640.00, comprised of $80 per worker multiplied by 61 workers in 2011 ($4,880) and 72 workers in 2012 ($5,760)), is "due to a clerical error" whereby "the Determination Letter inadvertently included back wages for 2010." (Motion for Reconsideration at 7). The Administrator contends that removing the outbound transportation costs for 2010 reduced the amount of back wages owed to the amount claimed in the Administrator's Prehearing Statement.

Employer responded to oppose the Administrator's motion for reconsideration. Employer argued that "[t]he plain language of the Dismissal Order rebuts the Administrator's theory" that I treated the motion to dismiss as a motion for summary judgment, because the order rests not on factual findings, but on the legal determination that the five-year statute of limitations in Section 2462 applies to this matter. Employer stated that "the Administrator reiterates the same arguments she raised in her original opposition to Respondent's motion: that this is an action for back wages (or back pay) and not an action for penalties, and therefore section 2462 is inapplicable." Employer responded that the Administrator has not issued a revised Determination Letter specifying any new or revised amount allegedly due. Employer further argued that the Administrator alleged a violation of 20 C.F.R. § 655.22(m), which the regulations do not permit to be remedied with back pay, as back pay is a remedy for violations of § 655.22(e) only (pursuant to § 655.65(i)); and that § 655.22(m) itself[5] "actually imposes no requirement upon an employer to pay transportation costs," and imposes only a requirement to inform the H-2B workers of the obligation to pay transportation costs, making the violation one of failure-to-inform and the remedy either a civil money penalty or an "other remedy" under the regulations. Employer contended: "Because the Administrator lacks authority to seek back wages as a remedy for the violations alleged in this matter, the remedy sought by the Administrator must be a penalty and that penalty is subject to the limitations period of 28 U.S.C. § 2462." (Opposition at 7). Employer also argued that if the remedy sought is back pay, then the two-year limitations period of the FLSA applies.

The Administrator filed a reply in which she first argued that the court should reject Employer's argument that the Administrator lacks authority to enforce H-2B violations at all.

[5] The requirement to pay transportation costs is found in 8 U.S.C. § 1184(c)(5)(A). Employer argued that "neither the Administrator, nor the Secretary of Labor has any authority to interpret, let alone enforce that statutory provision of the Immigration and Nationality Act ("INA") because section 1184 is plain directed to the authority of the Attorney General (subsequently amended to the Secretary of Homeland Security)." (Opposition at 6).

The Administrator asserted that Employer's argument regarding Section 655.22(m) was "wholly inaccurate," because 8 U.S.C. § 1184(c)(5)(A) expressly requires employers to pay the return costs of H-2B workers who are prematurely dismissed, and 20 C.F.R. § 655.22(m) is derived directly from the statute and thus also requires Employer to pay the return transportation costs at issue here. The Administrator argued that the "permissive language" of 20 C.F.R. § 655.65(i) allows for the recovery of transportation costs as back wages, and that recovery of back wages is not limited to violations under § 655.22(e). Finally, the Administrator argued that the two-year limitation period of the FLSA does not apply, and cannot be "borrowed" to apply to this proceeding.

Applicable Standards on Reconsideration

The Federal Rules of Civil Procedure govern motions for reconsideration before this tribunal, with the exception of setting a time period for the filing of a motion for reconsideration. *See* 29 C.F.R. §§ 18.10, 18.93. Pursuant to FED. R. CIV. P. 59(e), motions for reconsideration can only be granted if the movant: (1) shows an intervening change in the controlling law; (2) introduces newly discovered or previously unavailable evidence; or (3) shows that there has been a clear error of law or a manifest injustice. *Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 407 (4th Cir. 2010) (citing *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 197 (4th Cir. 2006)). Generally, reconsideration is considered "an extraordinary remedy," and should be used sparingly. *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citations omitted). Furthermore, Rule 59(e) motions may not be used to "raise arguments which could have been raised prior to the issuance of [an order], nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Id.*

Discussion

The Administrator argued that I treated the motion to dismiss as a motion for summary judgment, and therefore applied the wrong standard of review; that it was prevented from fully responding to the motion by the Respondent's failure to comply with discovery rules; and that the remedy assessed in the Determination Letter is back wages, not a penalty. The Administrator has not pointed to an intervening change in the controlling law or new evidence; she asserts a clear error of law or manifest injustice as the basis for reconsideration.

As a preliminary matter, I note that the Administrator did not raise any argument in her *Opposition to Respondent's Motion to Dismiss* that she was prevented from fully responding to the motion to dismiss by a lack of discovery. Motions for reconsideration cannot be used to raise arguments or new legal theories that could have been made before the order issued. *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d at 403. As this is a wholly new argument raised for the first time on reconsideration, I find it does not provide grounds to reconsider my order granting the motion to dismiss.

The Administrator's argument that I applied the wrong standard, because I converted the motion to dismiss to a motion for summary judgment, is unavailing. First, each of the bases of my conclusion that the assessment made in the Determination Letter was a penalty rested on the Determination Letter itself. I found that the action was one for "other remedies" based upon

failures to comply with attestations and certifications (the basis for the violations stated in the Determination Letter and the Summary of Violations and Remedy), not one for back pay based on a prevailing wage violation; that the Determination Letter did not show that the "other remedies" assessed against Employer ($8,280 for violations in 2011 and $8,280 for violations in 2012) represented a set amount the Administrator considered due to specific individual workers, to render those amounts "purely remedial"; and that the cases relied upon by the Administrator were inapposite or otherwise did not compel a different conclusion. As these conclusions are demonstrated by the Determination Letter itself,[6] the motion was properly adjudicated as a motion for dismissal due to untimeliness, and not converted to a motion for summary judgment.

Second, my observation that the Administrator's *own* representations regarding the transportation costs demonstrated several problems with her assertion that the amounts assessed in the Determination Letter were purely remedial did not convert the matter to a motion for summary judgment. This information was submitted by the Administrator herself. "[T]he problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered; it is for that reason—requiring notice so that the party against whom the motion to dismiss is made may respond—that Rule 12(b)(6) motions are ordinarily converted into summary judgment motions. Where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated." *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). Here, there could be no concern about lack of notice to the Administrator, as the Administrator had actual notice of this information, relied upon it in prosecuting the case against Employer, and put the information before this court herself.

Third, this court merely accepted the Administrator's assertions as to the transportation costs for purposes of showing that they did not support her contention that the assessments were purely remedial; I did not make any factual findings regarding amounts owed or numbers of workers affected. Neither party presented evidence regarding the transportation costs, or the number of affected workers, and I did not make a finding on either point. Employer contends that it paid the full transportation costs for its employees, by providing the H-2B workers with the monetary value of return transportation by bus to the place of recruitment abroad, which the workers then applied to airfare to Arizona; the Administrator contends that by paying transportation only to Arizona, Employer still owes the balance of the cost of travel from Arizona to Mexico, which the Administrator represented was $80. I did not make factual findings or resolve these disputes. Instead, *accepting the Administrator's position and assertions as true*, I noted that the Administrator's own figures belied her argument that the amounts assessed against Employer in the Determination Letter were purely remedial. Therefore, to the extent that factual disputes and inferences should be resolved in the Administrator's favor in resolving the motion, that does not change the result; it remains that the Administrator's own

[6] The Determination Letter dated February 13, 2018 and its enclosed Summary of Violations and Remedies were served upon the Office of Administrative Law Judges when the letter issued. Although the letter lists two other enclosures, those documents were not included when the Determination Letter was served upon OALJ, and they were not included in the copy of the Determination Letter filed as an exhibit with the Administrator's *Opposition to Respondent's Motion to Dismiss*. Thus, only the Determination Letter and the Summary of Violations and Remedies were put before this court.

factual assertions—that $80 in transportation costs is owed to 61 H-2B workers in 2011 and 72 H-2B workers in 2012—do not support her argument that the amounts assessed in the Determination Letter of $8,280 in 2011 and $8,280 in 2012 represent nothing more than remedial, make-whole relief to the H-2B workers.[7]

For these reasons, I find that the Administrator's argument that the court applied an incorrect standard does not warrant reconsideration of the order granting the motion to dismiss.

The Administrator's final argument is that the amounts assessed against Employer for the 2011 and 2012 violations constitute back wages, not a penalty. To the extent the Administrator repeats arguments previously made in her *Opposition to Respondent's Motion to Dismiss*, those arguments were previously addressed in my order and do not warrant reconsideration. The Administrator also tried a new tack on reconsideration, arguing that the assessments *are* based on prevailing wage violations and thus represent back wages. *See* Motion for Reconsideration at 8-10. This argument could have been made in the Administrator's response to the Motion to Dismiss (in which Employer specifically argued that the Administrator has authority to seek back wages only for prevailing wage violations under § 655.22(e)), but it was not; consequently, it is not a proper basis for a motion for reconsideration. *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d at 403. Additionally, the argument that the assessment was actually made for a prevailing wage violation finds no support in the Determination Letter, which did not mention the "prevailing wage" or cite § 655.22(e). Thus, even if the new argument was properly made, the Administrator could not prevail in her contention that this is actually a prevailing wage case under § 655.22(e), when the Administrator made no such finding in the Determination Letter itself and cited only § 655.22(m) in the Summary of Violations and Remedies. Accordingly, the Administrator has not demonstrated a clear error of law or manifest injustice warranting reconsideration on this ground.

Because the Administrator has not established a clear error of law or a manifest injustice warranting the "extraordinary remedy" of reconsideration, the Administrator's Motion for Reconsideration will be denied.

ORDER

Based upon the foregoing, IT IS ORDERED that the Administrator's Motion for Reconsideration is DENIED.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

[7] Similarly, $80 per worker multiplied by the number of workers noted in the Determination Letter (126) does not equal $16,560 (the combined amount of the two assessments).

MM/jcb
Newport News, VA