

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: 29 April 2005

Case No.: 2005LCA21

In The Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION
Prosecuting Party

v

THE BOARD OF TRUSTEES OF INDIANA aka
INDIANA UNIVERSITY
Respondent

ORDER GRANTING MOTION TO DISMISS

On February 23, 2005, this case was assigned to me for hearing and disposition, as the result of this Office's February 18, 2005 receipt of the Notice of Appeal filed by Dianne Barriger (nee Fong) regarding the February 3, 2005 Administrator's Determination in relation to H-1B specialty Occupations under the Immigration and Nationality Act. On February 28, 2005, I issued an Order to Show Cause, providing the Complainant, Ms. Barriger, fourteen days to show cause as to why her request for a hearing should not be dismissed for lack of standing to request an appeal. The Respondent was provided seven days thereafter to submit a response.

The Complainant submitted a response, but the Respondent did not file a reply. On March 29, 2005, I issued an Order setting this matter for hearing on April 26 and 27, 2005, in Bloomington, Indiana. On April 4, 2005, the Respondent contacted my Attorney Advisor, Ms. Tracy Lin, to inform her that the Respondent had received the Notice of Hearing, but had not received a copy of any of the documents submitted by the Complainant to which I referred in the Notice of Hearing. After reviewing the Complainant's correspondence, I concluded that the Complainant did not provide a copy of her submissions to the Respondent, or the other parties required to be served in this matter. Accordingly, I issued an Order canceling the hearing, and providing the Respondent time to respond.

On April 19, 2005, the Respondent filed a Motion to Dismiss, arguing that it had immunity from suit under the Eleventh Amendment, and that there was no jurisdiction to consider the Complainant's claim. The Complainant submitted her response on April 25, 2002.

DISCUSSION

Title 20 C.F.R. § 655.820 provides that any interested party who desires a review of a determination issued under §§ 655.805 and 655.815, including judicial review, shall make a request in writing to the Chief Administrative Law Judge. The regulation provides that:

(b) Interested parties may request a hearing in the following circumstances:

(1) The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an employer has committed violation(s).

.....

(2) The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s).

In this case, the Administrator determined, after investigation, that the Board of Trustees of Indiana University a/k/a Indiana University, committed violations in that it failed to pay wages as required, and failed to make available for public examination the labor condition application and other documents as required. The Administrator determined that the Respondent owed back wages to 32 H-1B nonimmigrants in the amount of \$35,537.42, and set out the specific violations and remedy imposed for each violation. The Respondent was directed to pay the back wages; no civil money penalty was assessed.

In her letter submitted to the Chief Administrative Law Judge on February 18, 2005, the Complainant stated that she did not disagree with or dispute the Administrator's determination that the Respondent was liable to pay her and other affected H1-B employees back wages. However, although she was also concerned that the decision did not provide for interest on wages that should have been paid almost two years ago, or any recognition that she and the other employees had incurred other costs and detriments, she wished to appeal on the basis that there was no civil money penalty assessed, which she felt was appropriate in this case.

The Respondent argued that § 655.820(b) does not allow for a hearing in this situation, which does not involve a determination by the Administrator that there was no basis for a finding that the Respondent committed a violation. Indeed, the Administrator did make a finding that the Respondent committed violations, and assessed the payment of back wages for a number of employees, including the Complainant. The Respondent has satisfied these assessments, and the Complainant has been paid the amount of back wages as assessed by the Administrator.

The Administrator's findings contain no determination that is adverse to the Complainant. While the fact that the Administrator declined to assess civil penalties may offend the Complainant as a citizen and member of the community, I do not interpret the term "interested party" so broadly, to include literally any person who wishes to challenge the Administrator's findings. I interpret the regulations to mean that a party whose interests are aligned with an employer's, that is, a party that has a stake in the outcome, may request a hearing if the Administrator determines, after investigation, that the employer has committed a violation.

Here, other than perhaps her interest in promoting the good of society by punishing the Respondent, the Complainant has no stake in the outcome of an appeal of the Administrator's findings with respect to the assessment of civil penalties.

The Complainant also argues that the Administrator did not fully investigate all of the issues that she raised in her original complaint filed in April 2003, or that if it did, it did not inform her of the outcome. However, as pointed out by the Respondent, a determination by the Administrator that an investigation on a complaint is not warranted is not subject to appeal. *See*, Title 20 C.F.R. § 655.806(2). Thus, this Court does not have jurisdiction to consider any of the Complainant's allegations that were not the subject of investigation and findings by the Administrator.

As I have found that this claim must be dismissed because the Complainant lacks standing, it is not necessary for me to address the Respondent's arguments that it is not required to abide by the rules governing the H-1B program in which it participates, on grounds of sovereign immunity.

ORDER

Accordingly, for the reasons discussed above, IT IS HEREBY ORDERED that this claim is dismissed.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.