U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ADMINISTRATOR,
WAGE AND HOUR DIVISION,

PETITIONER,

v.

THIRSTY'S INC.,

RESPONDENT.

ARB CASE NO. 96-143

ALJ CASE NO. 94-CLA-65

DATE: May 14, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case is before us for review pursuant to the oppressive child labor provisions of the Fair Labor Standards Act of 1938, as amended, (the Act or FLSA), 29 U.S.C. § 216 (1988)[1/], and the implementing regulations at 29 C.F.R. Parts 570, 579 and 580 (1996). The Administrator of the Wage and Hour Division, U. S. Department of Labor, appealed the Administrative Law Judge's (ALJ) May 16, 1996, Decision and Order Modifying Civil Money Penalty (D. and O.). That decision reduced the amount of the civil money penalty (CMP) assessed by the Administrator in the sum of $10,497.50 against the Respondent, Thirsty's, Inc. (Respondent or Thirsty's) by 75%, to the amount of $2,624.38. The CMP was assessed as a result of Thirsty's employment of minors in violation of § 212 of the Act and the regulations promulgated thereunder at 29 C.F.R. Part 570. We modify the ALJ's decision as set forth below.

BACKGROUND

The Respondent is a retail business selling non-alcoholic drinks to the public in shopping malls in the Houston, Texas area. The Wage and Hour Division's investigation of Respondent

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[1/] Allowable maximum civil money penalties that may be assessed for violations of the child labor standards occurring subsequent to November 5, 1990, were increased from $1,000 to $10,000. 29 U.S.C. § 216(e). Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-598, § 3103, 104 Stat. 1388-29.

concerned the employment of minors under sixteen years of age during a two-year period from December 1989 through December 1991. The investigation revealed that thirty two teenagers worked in excess of the regulatory allowable hours, in contravention of 29 C.F.R. § 570.35, as well as one child who began working two weeks before her fourteenth birthday in violation of § 570.2(a)(1).[2/] Respondent did not dispute the factual findings of the Wage and Hour Compliance Officer, but disputed the amount of the assessed CMP.

DISCUSSION

The child labor provisions of the FLSA were enacted to protect working children from physical harm and to limit their working hours to prevent interference with their schooling.[3/] The implementing regulations at § 570.35, which pertain to allowable work periods for children under the age of 16, are very specific with regard to the number of allowable hours during a day or week that a child may work. The regulations also restrict work with regard to the time of day, and differentiate between work during the school year and during summer vacations.

The Wage and Hour Compliance Officer uncovered a significant number of violations in the Respondent's workplaces. There were approximately 400 specific violations ranging in severity of noncompliance: 30 of the 32 children worked from 1-16 weeks for Thirsty's, of whom 6 worked only one week and 7 worked more than two months; 2 others worked more than four months; 9 of the children had three or fewer time violations, and 6 had more than twenty, of these, 2 had more than forty specific violations. Administrator's Exhibit (A.X.) 2. Thus the violations cannot be considered *de minimus* pursuant to § 579.5(d)(1).

The assessed CMP was determined by the Compliance Officer following a schedule set forth in the Child Labor Civil Money Penalty Report (Form WH-266), and then reduced by a 15% factor, because Respondent had fewer than 100 employees, also pursuant to the penalty schedule. A.X. 3. Testimony of Ernestine Dennis (Dennis), Compliance Officer, Transcript (T.) at 30.

[2/] The regulations pertaining to agricultural jobs are not relevant in this case.

[3/] The Act at 29 U.S.C. § 212(c) entitled **Oppressive child labor** provides: "No employer shall employ any child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce."

The Act at 29 U.S.C. § 203(l) defines **Oppressive child labor** and provides, in part:

> The Secretary of Labor shall provide by regulation or order that the employment of employees between the ages of fourteen and sixteen years . . . shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such labor is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

The ALJ determined that there was no dispute that the violations of the Act occurred. D. and O. at 6-7. However, he also determined that the penalty assessment procedure used by Dennis was violative of the regulations at § 579.5(b)and (c), which provide that certain factors shall be considered in determining the appropriateness of an assessed penalty.[4/] D. and O. at 8. The ALJ concluded from the evidence before him at the hearing, including Dennis' testimony, that Dennis considered only one of the regulatory factors. *Id.* and n.6. Dennis testified that she assessed the CMP by each minor rather than by each violation because the Respondent had not been previously investigated. T. at 32-33.

The ALJ found that the use of Form WH-266, which prescribes the assessment process through the use of predetermined dollar values associated with various categories of violations as they pertain to each of the minors involved, denied individual employers the due process guaranteed by the applicable regulations. D. and O. at 15. Although the ALJ recognized the need for administrative efficiency through the use of standardized penalties and procedures, he found that the use of what he characterized as a "boilerplate form" and a "numbers game" procedure violated the pertinent regulations, *Id.* at 8, and effectively eliminated the discretion he found inherent in the Secretary's promulgation of the regulations pertaining to the assessment of penalties under the child labor laws. *Id.* at 15. The ALJ determined that the penalty should have been assessed only after all the evidence pertaining to the violations was considered in light of the factors delineated in the regulations. *Id.* The ALJ identified and reviewed each regulatory factor and, finding favorably on behalf of Respondent in each factor, reduced the assessed penalty by 75%. *Id*. at 10-12, 15.

The Administrator objects to the ALJ's dismissal of the penalty schedule as "boilerplate" or a "numbers game." Administrator's Petition for Review (Petition) at 21. The Administrator

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[4/] The regulations at 29 C.F.R. § 579.5 titled **Assessing the penalty** provide in part:

> (b) **In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the size of the business** of the person charged with the violation or violations, taking into account the number of employees employed by that person[,] . . . dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person.
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> (c) **In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations**, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so illegally employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside of school hours. (Emphasis supplied)

argues that the establishment of a standardized penalty schedule permits the enforcement of the child labor laws in a consistent and uniform manner, free from subjective appraisals and is allowable within statutory and regulatory criteria. Petition at 14. The Administrator recognizes that while a standardized penalty schedule may result in certain imprecision in determining a penalty in a specific case, this imprecision is preferable to the subjective appraisals of the employer's culpability by a Compliance Officer. *Id.*

Given the breadth of the interpretive possibilities set forth in the regulations to determine the appropriateness of CMPs, we look to the clear intention of the language of the Act, and the intent of the regulations to gauge the gravity of the violations of the child labor laws. We find that the Administrator's operational interpretation is reasonable and consistent with Congressional purpose and regulatory guidelines. Since that interpretation does not conflict with the Act's plain meaning, it should be granted due deference. *See U.S. v. Larionoff,* 431 US 864, 872 (1977) (where an agency's regulatory interpretation is not plainly inconsistent with the wording of the regulations and the regulations are consistent with the statute, the agency's interpretation will be accepted); *Udall v. Tallman,* 380 US 1,16 (1965)(the Court will clearly give deference to an agency's interpretation of its own regulations); *Bowles v. Seminole Rock and Sand Co.*, 325 US 410, 414 (1965)(the ultimate criterion for judicial construction of an ambiguous regulation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."). Consequently, we find that although the penalty schedule did not reference each criterion of the regulatory guidelines, nevertheless it is a reasonable interpretation of those guidelines and within the broad authority granted an agency charged with implementing those regulations. *See Coal Employment Project v. Dole,* 889 F.2d 1127, 1131 (D. C. Cir. 1989).

The regulations list the various factors to be taken into consideration in determining the appropriateness of CMPs, but they are ambiguous with regard to the utilization of these factors to determine the appropriateness of a CMP. There is no guidance as to the weight or import of any particular factor, nor do the regulations prescribe any numerical or percentage factor to guide an increase in the assessment for an aggravated violation or a mitigation of the assessment where appropriate. The factors listed at § 579.5(c) concern aggravating factors and the those listed at § 579.5(d)(2) pertain to mitigating factors.

Section 579.5(a) provides for a maximum civil penalty of $10,000 for each employee who was subject to a violation of the Act, taking into account the size of the business of the person charged with the violations and the gravity of those violations. Subsection (b) provides certain factors to consider in determining the size of the business. Subsection (c) provides factors to consider in determining the gravity of the violations. The Administrator used one of the factors listed in subsection(b), the number of employees, to make an initial determination of Thirsty's eligibility for a reduction of the penalty. We agree that the number of employees is generally a good indicator of the size of a business. Any error committed by not evaluating the other factors set out in subsection (b) was harmless because the Administrator found Thirsty eligible for the appropriate reduction. It is important to note that the initial determination of the investigator on Form WH-266 is subject to review and may be modified by the District Director.

The factors listed in subsection (c) are treated in the same manner. Factors are identified, but there is no regulatory guidance concerning how each factor might be used in determining the gravity of an employer's child labor law violations or the appropriateness of any consequent penalty.

Section 579(d) deals with mitigating factors of a violation and the determination of whether a civil penalty would be necessary to achieve the purposes of the Act. Subsection (d)(1) allows for a determination that the violations were *de minimis,* and subsection (d)(2) lists some of the factors set forth in subsection (c), which if not present, might allow for no penalty assessment.

The Secretary has affirmed reductions of an assessed CMP by a presiding ALJ where an employer was found to have comported with the mitigating factors of subsection (d)(2). *Administrator, Wage and Hour Division v. Navaho Manufacturing,* 92-CLA-13, Sec. Final Dec. and Order, issued Feb. 21, 1996, slip op. at 5-7; *Administrator, Wage and Hour Division v. City of Wheat Ridge, Colorado,* 91-CLA-22, Sec. Final Dec. and Order, issued Apr. 18, 1995, slip op. at 11; *Administrator, Wage and Hour Division v. D. D. & D., Inc. dba Sizzler Family Steakhouse,* 90-CLA-35, Sec. Final Dec. and Order, issued Apr. 3, 1995, slip op. at 7-9. It should be noted, however, that although the ALJs' reductions of the CMPs were affirmed in these cases, the Secretary did not question the appropriateness of the Administrator's use of a schedule of penalties as a method of assessing the CMPs.

The grid and matrix schedule incorporated in form WH-266 is an appropriate tool to be used by a field Compliance Officer to recommend penalties through the enumeration and determination of the gravity of factual violations. We note that Part A includes an analysis reflecting the mitigating factors set out in 29 C.F.R. § 579.5(d)(2). As noted above, the recommended determination is subject to approval by a reviewing official.

We further note that the agency's use of the schedule of penalties was well established at the time that Congress increased the maximum penalty for employers violating the child labor laws, and no issue was raised with regard to the manner of assessment or enforcement. We therefore reverse the ALJ's blanket dismissal of the schedule of standardized penalties and find the Administrator's establishment of a standardized penalty schedule for the initial recommended determination is not violative of the pertinent regulations.

Additionally, the regulations provide for a review of assessed CMPs by an ALJ, whose regulatory authority is broadly drawn consistent with the factors to be considered, thereby providing adequate due process.[5/] We find that a presiding ALJ has the authority to review the

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[5/] The regulations at § 580.12 entitled "**Decision and Order of Administrative Law Judge**" provide in part:

(continued...)

case and to duly consider all of the factors delineated by the pertinent regulations. An ALJ's scope of authority to change the Administrator's assessments is untrammeled, 29 C.F.R. § 580.12(c), and specifically includes a determination of the appropriateness of the assessed penalty. 29 C.F.R. § 580.12(b). We find that the review and modification of an assessed CMP is not an arrogation of the Administrator's authority, but a proper adjudicatory process. While we reverse the ALJ's determination that the schedule of penalties is violative of the regulations or of an employer's right to due process, we affirm an ALJ's authority to review and modify the Administrator's CMP assessment.

However, we disagree with the ALJ's contention that it would be inappropriate to increase the penalty if it were warranted in the case before him and after all of the factors were considered. *See* D. and O. at 8, n.7. An increased penalty is not a punishment levied on an employer for seeking a hearing and review, but rather a possible outcome of an adjudicator looking anew at a situation where violations of child labor laws occurred and determining that the violations were of greater gravity than the Compliance Officer and Administrator determined.

We disagree with and modify the ALJ's 75% reduction of the assessed CMP. We note that the proposed reduction results in an approximate $80 penalty per child, regardless of the number of violations attributed to the child's employment. This penalty is not appropriate for an egregious work situation where some children were subjected to multiple violations over a period of months.

We are not convinced that Thirsty's management made adherence to the restrictions in the child labor laws a priority. The violations occurred in at least eleven locations, A. X. 2, out of the twelve or thirteen locations that Thirsty's operated during the period in question. Testimony of James Read Boles, President of Thirsty's, T. at 38. Boles' testimony indicates that the managerial staff, who controlled the local hiring, was relatively stable even at the start-up, in contrast to the high turnover rates of the clerks. *Id.* at 41. We are of the opinion that Respondent was obliged to emphatically advise its local managers with regard to the legal restrictions of hiring children younger than sixteen, since the employment of such youth was apparently a common practice, in a manner beyond the "bi-weekly little update" or a memorandum. *Id*. at 44. We are of the opinion that the distribution and gravity of the violations in light of Congressional concern regarding the abuses of child labor militates in favor of a greater level of assessment of penalties.

[5/](...continued)

(b) The decision of the (ALJ) shall be limited to a determination of . . . the appropriateness of the penalty assessed by the Administrator.

(c) The decision . . . may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator.

Accordingly, **IT IS ORDERED** that the civil money penalty assessed by the Administrator against the Respondent, Thirsty's, Inc., is modified for the reasons set out above, with a twenty-five (25%) percent reduction of that penalty, in due deference to regulations at 29 C.F.R. § 580.12(c), which pertain to the ALJ's review authority. The Respondent is ordered to pay a penalty of $7,873.12 to the United States Department of Labor for violations of the child labor provisions of the Fair Labor Standards Act as amended, 29 U.S.C. §§ 212, 216(e) (1988 and Supp. III 1991).

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member