



**In the Matter of:**

**MARK J. WATSON,**

**ARB CASE NOS. 04-023, 029,  
050**

**COMPLAINANT,**

**ALJ CASE NOS. 04-LCA-9,  
03-LCA-30**

**v.**

**ELECTRONIC DATA SYSTEMS CORPORATION,**

**RESPONDENT,**

**and**

**MARK J. WATSON,**

**ARB CASE NO. 04-099**

**COMPLAINANT,**

**ALJ CASE NO. 04-LCA-23**

**v.**

**DATE: May 31, 2005**

**BANK of AMERICA,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Mark J. Watson, *pro se*, Bartlett, Tennessee**

***For the Respondents:***

**Bradley A. Sherman, Esq., Lisa A. Wallace, Esq., *Duvin, Cahn & Hutton, Cleveland, Ohio*, for Electronic Data Systems, and Timothy S. Barker, Esq., *Fragomen, Del Rey, Bernsen & Lowey, Los Angeles, California*, for Bank of America**

## FINAL DECISION AND ORDER

Mark J. Watson filed complaints against Electronic Data Systems (EDS) and the Bank of America (BoA) under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004), and its implementing regulations at 20 C.F.R. Part 655, Subparts H and I (2004). The Administrator of the Wage and Hour Division (WHD), United States Department of Labor (DOL), declined to investigate Watson's complaints. The three Administrative Law Judges (ALJ) assigned to hear Watson's appeals granted the Respondents' motions for summary decision. Watson appealed to the Administrative Review Board (ARB). We affirm.

### BACKGROUND

After EDS terminated Watson's employment as part of a reduction-in-force in January 2002, he filed complaints with the WHD Administrator alleging, first, that EDS had displaced him with an H-1B worker<sup>1</sup> and, second, had hired another H-1B worker without first offering him the job. *See* Respondent's Petition for Review, Exhibits A, D. The Administrator informed Watson that WHD would not conduct an investigation. *Id.*, Exhibit C. Watson requested a hearing before an ALJ.

Subsequently, Watson filed a complaint alleging that EDS had provided incorrect or false information in completing its Labor Condition Applications (LCA) for H-1B workers. Respondent's Motion for Summary Decision, Exhibit B. Watson also filed a complaint alleging that BoA had denied his applications for three positions and had hired H-1B workers instead. *See* Supplemental Claim for Relief dated February 4, 2004. Again, the WHD Administrator declined to investigate either complaint, and Watson requested hearings. *See* Exhibit B attached to ALJ's Summary Decision dated December 29, 2003.

Prior to the hearings, the Respondents filed motions for summary decision. EDS argued in Case No. 03-LCA-030 that Watson's complaints were time-barred and that it was not subject to the regulations governing an employer's displacement and good-faith recruitment efforts of U.S. workers. 20 C.F.R. §§ 655.738, 655.739. In Case No. 04-

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<sup>1</sup> The INA permits an employer to hire non-immigrant alien workers from "specialty occupations" to work in the United States for prescribed periods of time. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700. Upon approval of the Department of Homeland Security, the Department of State issues H-1B visas to these workers. 20 C.F.R. § 655.705(b). An employer seeking to hire an alien in a specialty occupation on an H-1B visa must obtain certification from the United States Department of Labor (DOL) by filing a Labor Condition Application (LCA) that stipulates the wage levels and working conditions that the employer guarantees. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731, 732. *See Administrator v. Native Techs., Inc.*, ARB No. 98-034, ALJ No. 96-LCA-2 (May 28, 1999).

LCA-09, EDS argued that the ALJ had no jurisdiction because the WHD Administrator had not conducted an investigation. BoA sought summary decision in Case No. 04-LCA-23 on similar grounds.

In Case No. 03-LCA-30, the ALJ granted summary decision on the grounds that sections 655.738 and 655.739 did not apply to EDS because it was neither H-1B dependent nor a willful violator pursuant to section 655.736. 20 C.F.R. § 655.736. The ALJ also found that Watson's request for a hearing was timely filed because the WHD Administrator had not complied with the requirements of section 655.815(c).<sup>2</sup> 20 C.F.R. § 655.815(c). We assigned Watson's appeal of the ALJ's decision, ARB No. 04-029, and EDS's cross-appeal, ARB No. 04-029.

In Case No. 04-LCA-9, the ALJ granted summary decision on the grounds that because the WHD Administrator had not investigated Watson's complaint, the Office of Administrative Law Judges had no jurisdiction to provide a hearing pursuant to section 655.206(b). 20 C.F.R. § 655.206(b). Accordingly, he denied Watson's request for a hearing. We assigned Watson's appeal of the ALJ's decision, ARB No. 04-050.

In Case No. 04-LCA-23, the ALJ granted summary decision on similar grounds, noting that nothing in the INA or its implementing regulations conferred jurisdiction on OALJ to order the WHD Administrator to investigate a complaint. We assigned Watson's appeal of the ALJ's decision, ARB No. 04-099.

#### **JURISDICTION AND STANDARD OF REVIEW**

The Administrative Review Board has jurisdiction to review the ALJ's decision under 8 U.S.C.A. § 1182(n)(2) and 20 C.F.R. § 655.845. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the INA).

Under the Administrative Procedure Act, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). The ARB has plenary power to review an ALJ's factual and legal conclusions de novo. *Yano Enters., Inc. v. Administrator*, ARB No. 01-050, ALJ No. 01-LCA-001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson*, ARB No. 00-068, ALJ No. 99- LCA-004, slip op. at 3 (ARB Apr. 30, 2001).

We review a grant of summary decision de novo, i.e., under the same standard the ALJs employ. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for

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<sup>2</sup> Section 655.815 addresses the procedural requirements for the Administrator's determination, which must contain the rationale for his findings and remedies, if appropriate, and must be filed with the OALJ. 20 C.F.R. § 655.815(a)-(c).

either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision.”

Once the moving party has demonstrated an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e). If the non-moving party fails to demonstrate an element essential to his case, there can be “no genuine issue as to any material fact,” because “a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 02-CAA-21, slip op. at 3 (ARB May 28, 2004), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Accordingly, the Board will affirm an ALJ’s recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999).

## DISCUSSION

We have consolidated these four appeals because their disposition turns on a single issue: Whether, absent an investigation by the WHD Administrator, the Office of Administrative Law Judges (OALJ) has jurisdiction to review a complaint filed under 8 U.S.C.A. § 655.1182(n)(2)(A).

The INA defines various classes of aliens who may, under different types of visas, enter the United States for prescribed periods of time and purposes. 8 U.S.C.A. § 1101(a)(15). One class of visa, known as H-1B, allows employers temporarily to hire these workers in a specialty occupation (generally requiring a four-year degree). 8 U.S.C.A. § 1101(1)(15)(H)(i)(B). Employers must file a Labor Condition Application (LCA) for employees they want to hire and guarantee specified wages and working conditions. 8 U.S.C.A. § 1182(n)(1); 20 C.F.R. §§ 655.731-733.

Employers filing LCAs after January 19, 2001, must meet additional requirements if (1) they are H-1B dependent (that is 15 percent of their workforce is foreign) or (2) DOL considers them to be a willful violator. 8 U.S.C.A. § 1182(n)(1)(E). The additional requirements mandate that an employer will (1) not displace any of its U.S. workers, (2) not place an H-1B worker at another employer’s worksite without ensuring that a U.S. worker will not be displaced, (3) recruit U.S. workers, and (4) offer the job to any U.S.

worker who is equally or better qualified than the H-1B worker. 8 U.S.C.A. § 1183(n)(1)(F)-(G).

The Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints regarding an employer's (1) "failure to meet a condition specified" in an LCA or (2) "misrepresentation of material facts" in an LCA. 8 U.S.C.A. § 1182(n)(2)(A). An aggrieved party, defined at 20 C.F.R. § 655.715(1) as a person whose interests are adversely affected by the employer's alleged non-compliance with the LCA, may file a complaint. 8 U.S.C.A. § 1182(n)(2)(A).

Further, the Secretary shall conduct an investigation of a complaint if there is **reasonable cause** to believe that such failure or misrepresentation by an employer who filed an LCA has occurred. 8 U.S.C.A. § 1182(n)(2)(A). Under subsection (B), the Secretary "shall provide . . . for a determination as to whether or not a **reasonable basis** exists" to find either a failure or a misrepresentation on the part of an employer. (Emphasis added.) If the Secretary finds a reasonable basis for a determination, she shall provide notice to the parties and an opportunity for a hearing. 8 U.S.C.A. § 1182(n)(2)(B).

The implementing regulations provide a framework for the aggrieved party in filing a complaint, which "shall set forth sufficient facts" for the WHD Administrator to determine whether there is reasonable cause to believe that a violation of section 655.805<sup>3</sup> has been committed, and therefore that an investigation is warranted. 20 C.F.R. § 655.806(a). If the Administrator determines that the complaint fails to present reasonable cause for an investigation, he shall notify the complainant, who may submit a new complaint with such additional information as may be necessary to warrant an investigation. "**No hearing or appeal . . . shall be available where the Administrator determines that an investigation on a complaint is not warranted.**" 20 C.F.R. § 655.806(a)(2). (Emphasis added.) Thus, unless the Administrator finds that the facts presented in a complaint establish a reasonable cause for WHD to investigate, there will be no investigation and, therefore, no determination will be issued.

Section 655.820 governs OALJ review of a determination issued by the WHD Administrator. It states that interested parties may request a hearing in two circumstances. First, "where the Administrator determines, **after investigation,**" that there is no basis for finding that an employer committed violations, and second, "where the Administrator determines, **after investigation,**" that the employer has violated the INA. 20 C.F.R. § 655.820(b)(1)-(2). (Emphasis added.) Thus, the prerequisite for requesting a hearing is that the WHD Administrator has conducted an investigation and made a determination.

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<sup>3</sup> Section 655.805 delineates the various violations that the Administrator may investigate, including the following: misrepresenting a material fact on an LCA, displacing a U.S. worker, and failing to recruit in good faith U.S. workers. 20 C.F.R. § 1182.655805(1)(1-16).

Here, Watson failed to produce any evidence disputing the fact that the Administrator did not investigate any of his complaints against EDS or BoA. The record contains no evidence that the WHD Administrator had any reasonable cause to believe that any of Watson's four complaints warranted investigation.

It is undisputed that the Administrator responded identically in letters dated June 16 and December 3, 2003, to two of Watson's complaints against EDS. The Administrator informed Watson that WHD was "not able to do the investigation" he requested because EDS was neither H-1B dependent nor a willful violator. Therefore, there was no reasonable cause to believe that a failure or misrepresentation by EDS had occurred. The Administrator added that if Watson had evidence that EDS was H-1B dependent, he should contact WHD again. The Administrator did not respond at all to Watson's July 7, 2003 complaint against EDS or his February 4, 2004 complaint<sup>4</sup> against BoA.

Thus, in all four complaints, the Administrator declined to investigate. Therefore, the Administrator made no determination. Without that determination, no hearing was possible. A reading of the statute and its implementing regulations leads us to conclude that the Administrator has complete discretion in deciding whether to investigate a complaint filed by an aggrieved party such as Watson. If the Administrator decides that a complaint provides no reasonable cause for an investigation, whether or not that decision is communicated to the complainant, there is no other administrative recourse.

Watson argued that the ALJ should have found reasonable cause and ordered the WHD Administrator to conduct an investigation of his complaints. Original Petition for Administrative Review at 8. He asserted that the OALJ's refusal to review the WHD Administrator's failure to act appears to "support a conspiracy" to deprive U.S. workers of employment rights. Rebuttal to Respondent's Answer to Petition for Review at 5.

There is no legal authority supporting Watson's argument. Nor has he produced any evidence showing a conspiracy. The INA implementing regulations contain no default provision that confers jurisdiction on the OALJ if the WHD Administrator does not investigate a complaint. Nothing in the statute or the regulations provides any basis for an ALJ to order the WHD Administrator to investigate or issue a determination.

Indeed, as the ALJ in Case No. 04-LCA-23 noted, section 655.806 provides the Administrator with discretion in deciding whether an investigation is warranted. 20 C.F.R. § 655.806(a)(2). Nothing in the statute or regulations permits an ALJ to determine whether the Administrator has abused that discretion. *See Somerson v. Eagle Express Lines Inc.*, ARB No. 04-046, ALJ No. 2004-STA-12, slip op. at 2 (ARB May 28,

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<sup>4</sup> In his brief to the Board, and before the ALJ in Case No. 04-LCA-23, Watson argued that he "speculatively" filed his complaint on May 27, 2003, and the Administrator wrote him back that BoA was neither H-1B dependent nor a willful violator. There is no evidence in the record of either document.

2004) (mandamus motion to compel the ALJ to schedule a hearing denied for failure to show cause that such action was non-discretionary). Inasmuch as the Administrator's investigation and subsequent determination are required to confer jurisdiction upon the OALJ, we conclude that no hearing was available on Watson's complaints. Cf. *Chelladurai v. Core Consultants, Inc.*, ARB No. 02-110, ALJ No. 02-010, slip op. at 2 (ARB Aug. 26, 2003) (WHD investigated the complaint and determined that the employer had failed to pay the H-1B worker as required).

Watson has filed voluminous pleadings asserting that EDS and BoA have violated various provisions of the regulations governing H-1B workers, but has provided no evidence supporting his allegations. Nor has he submitted any evidence that the WHD Administrator conducted an investigation of any of his complaints. His bald accusations that EDS and BoA are willful violators or have misrepresented material facts on their LCAs are immaterial to the fact that no investigation of his complaints occurred. His speculation about a "conspiracy" is similarly immaterial.

While we are cognizant of Watson's pro se status, see *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 00-STA-28, slip op. at 8-9 (ARB Feb. 28, 2003), and have reviewed each of his pleadings, we find that the record indisputably demonstrates that the Administrator declined to investigate his complaints. Accordingly, we conclude that there is no genuine issue of material fact regarding this essential element of his claims. Because Watson failed to adduce evidence of an investigation by the WHD Administrator, a prerequisite to his request for a hearing, all other facts alleged by him are immaterial, and the Respondents are entitled to summary decision.

EDS appealed the ALJ's finding that Watson's request for a hearing in Case No. 03-030 was timely filed. In view of our decision that Watson was not entitled to a hearing on his complaints, we need not address this issue. See *Lane v. Roadway Express, Inc.*, ARB No. 03-006, ALJ No. 02-STA-38, slip op. at 3 (ARB Feb. 27, 2004) (ARB will exercise its discretion in determining that an issue is moot).

EDS also asked the ARB to punish Watson "for abusing the judicial process" and order him to pay EDS \$2,233.00 in attorney's fees. Response to Complainant's Petition for Review at 4-6. We have no power to impose monetary sanctions on Watson. See *Malpass v. General Elec. Co.*, 85-ERA-38, slip op. at 20-22 (Sec'y Mar. 1, 1994) (federal rules of civil procedure do not give the Secretary the authority to impose sanctions and penalties if not otherwise authorized by law); cf. *Puckett v. Tennessee Valley Auth.*, ARB No. 03-024, ALJ No. 02-ERA-15, slip op. at 5 (ARB June 25, 2004) (ARB affirms as in accordance with law the ALJ's dismissal of the case because the complainant's attorney refused to comply with a scheduling order); *Somerson v. Mail Contractors of America*, ARB No. 02-057, ALJ Nos. 2002-STA-18-19, slip op. at 10 (ARB Nov. 25, 2003) (complainant's conduct was blatantly contumacious and warranted dismissal of the case).

## CONCLUSION

In view of our decision, we **DISMISS** EDS's appeal of the ALJ's finding that Watson's request for a hearing was timely. ARB No. 04-029. Further, we **AFFIRM** the ALJs' orders granting summary decision in ARB Nos. 04-023, 050, and 099. Accordingly, we **DISMISS** Watson's complaints.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**