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In the Matter of:

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

Date Issued: May 30, 2001
Case No: 2001-JSA-00003

v.

LOUIS A. DRAZIN,
Respondent.
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DECISION AND ORDER

Background

This matter arises in the context of a H-1B labor condition application (“LCA”). In administering LCAs, the Department of Labor divides responsibilities: the Employment and Training Administration administers the program for receiving applications and issuing certifications of the LCAs; the Wage and Hour Division of the Employment Standards Administration is responsible for investigating an employer's misrepresentation in or failure to comply with the LCA. *See* 20 C.F.R. §§ 655.705, 655.800.

When an employer files an LCA, one of the matters to which it attests is that it will pay — for the entire period of authorized employment — the greater of either the actual wage rate or the prevailing wage rate. 655.731(a). The prevailing wage rate is to be based on the “best information available as of the time of filing the application.” An employer may utilize a state employment security agency (“SESA”) or other enumerated sources in determining the prevailing wage to which it will attest. ETA's review of the LCA for purposes of issuing the certification is restricted to determining if the document is “incomplete or obviously inaccurate.” *See* 655.740. ETA does not evaluate whether the LCA prevailing wage attestation actually satisfies the actual/prevaling wage requirement. In other words, ETA's role in accepting and processing LCAs is primarily ministerial.

When this case was docketed, it appeared that Mr. Drazin was seeking to appeal either a wage determination in the attestation process, or an investigation into an H-1B labor condition application. Thus, the case was docketed as an “LCA” case. Because the nature of Mr. Drazin's hearing request was unclear, however, an Order to Show Cause was issued on April 27, 2001, directing the parties to show cause why the matter should not be dismissed for lack of jurisdiction and/or because the issue of prevailing wage is moot given that the position for which

the wage determination in dispute no longer exists. The responses to the Order to Show Cause have clarified, however, that the instant matter does not involve an appeal from a wage determination made during the application process nor from the final result of a Wage and Hour investigation. Rather, it is an interlocutory matter arising during the course of the Wage and Hour investigation. Technically, this case arises under the Job Service Complaint System procedure rather than the LCA enforcement procedure — although the two are related.

When Wage and Hour conducts an investigation into a LCA, and if the wages paid to the H-1B nonimmigrant are in dispute, it may request from ETA a prevailing wage determination, which Wage and Hour is required to use as the basis for determining violations and computing back wages, if such wages are found to be owed. 655.731(d)(1). The Wage and Hour investigation is suspended during the period in which ETA makes the prevailing wage determination. The regulations provide an employer with the right to challenge the ETA wage determination through the Job Service complaint system, and should the employer exercise that right, the Wage and Hour investigation continues to be suspended during the pendency of that appeal. 655.731(d)(2). ETA may, when making the wage determination, consult with the appropriate state employment security agency.¹ 655.731(d)(2)(ii). In other words, the Wage and Hour investigator is required to use a prevailing wage determined by ETA as the benchmark by which the investigator determines whether the employer failed to pay the wages attested to in the LCA, and if so, how much of a deficiency was involved. The investigation is stayed until the benchmark prevailing wage as determined by ETA is established.

It is now clear that the present case is at the stage where the investigator has requested a prevailing wage determination from ETA,² and Mr. Drazin has been informed of his right to challenge the prevailing wage determination under the Job Service complaint system. It is also clear that Mr. Drazin exercised that right in a letter dated May 2, 1998, in which he stated “With this letter I am challenging the ETA determination...” Mr. Drazin, however, also stated that the reasons for his challenge were described in a letter to the Wage and Hour investigator -- a copy of which was attached. In the letter to the Wage and Hour investigator, Mr. Drazin explains his challenge is based essentially on a complaint that the wage determination was being used after-the-fact to question a wage rate that was never challenged by ETA.

For reasons unknown, Mr. Drazin's appeal of the wage determination was not responded to until March 9, 2001, when a ETA Certifying Officer wrote to Mr. Drazin to explain that the only challenge he could make in the present stance of the case was to whether the prevailing wage determination made by the California EDD for the position of Wholesaler II in 1992 was correct. The Certifying Officer ruled that because Mr. Drazin's appeal letter did not point to any

¹ The regulations are inconsistent in referring to both the employment service complaint system and the job service complaint system. For present purposes, they are the same thing.

² Actually, the Wage and Hour investigator in this matter appears to have requested the wage directly from the EDD, rather than going through ETA.

deficiency in the EDD wage determination, the EDD wage determination would be affirmed. The Certifying Officer then informed Mr. Drazin of his right to file an appeal with the Office of Administrative Law Judges.

Discussion

The issue in this case is whether the Certifying Officer properly made a summary dismissal of Mr. Drazin's appeal of the ETA prevailing wage determination (*i.e.*, EDD's wage determination). The Certifying Officer correctly determined that the reasons given by Mr. Drazin for appealing the prevailing wage determination were not relevant to the limited issue he could then appeal — whether the prevailing wage determination correctly stated the prevailing wage for the position of Wholesaler II in 1992. The issues raised by Mr. Drazin might be relevant to the Wage and Hour investigation into whether there was a violation of the LCA regulations, but they did not present any argument as to why the wage determination was in error. In other words, the Certifying Officer determined in effect that Mr. Drazin's reasons for appealing were deficient as a matter of law and therefore there was no need to refer the appeal to the Job Service complaint system.

Nonetheless, it is not clear that the Certifying Officer had the authority to summarily dismiss the matter. The Job Service complaint system regulation at 20 C.F.R. § 658.421(a) states unambiguously that “[n]o JS-related complaint shall be handled at the ETA regional office level until the complainant has exhausted the State agency administrative remedies...”³ Furthermore, summarily affirming the wage determination based on an inartfully drafted appeal letter may be inappropriate in a case involving a *pro se* litigant, whose filings cannot be held to the same standard for pleadings as if he or she were represented by legal counsel. *See, e.g., Grizzard v. Tennessee Valley Auth.*, 1990-ERA-52 (Sec’y Sept. 26, 1991) (Secretary of Labor decision in a ERA whistleblower case). A complainant, however, must allege a set of facts which, if proven, could support his/her claim of entitlement to relief *Id.*

³ The logic of the LCA regulations in referring appeals of wage determination to the Job Service Complaint System can be difficult to follow. Where the Wage and Hour investigator requests a prevailing wage determination from ETA; the regulations permit, but do not require, ETA to consult with a SESA when making that determination. Yet all appeals from the prevailing wage determination in response to a Wage and Hour investigator's request for such a determination are referred to the Job Service complaint system. In practice, it appears that a SESA is always consulted in making prevailing wage determinations. Thus, in context, it appears that the LCA regulation referral to the Job Service complaint system regulations contemplates that the job service would adjudicate such disputes at the state level. If ETA made the determination without referral to a SESA, it is not clear how the Job Service complaint system regulations would accommodate the appeal. In the instant case, however, it is clear that the California EDD made the challenged wage determination.

Thus, I find that Mr. Drazin has the right to have his challenge to the ETA wage determination adjudicated through the Job Service complaint system found in 20 C.F.R. Part 658, Subpart E. Although I concur with the Certifying Officer that Mr. Drazin may have misunderstood the scope of what was ripe for appeal, the Certifying Officer's summary affirmance of the EDD prevailing wage determination short-circuited the regulatory process and denied Mr. Drazin's right to pursue the Job Service complaint system appeal.

In his submissions to this court, Mr. Drazin has consistently maintained a desire for final resolution of the Wage and Hour investigation. The matter has already been delayed for three years due to administrative inefficiency. Thus, rather than automatically remanding this case for a Job Service complaint system adjudication of Mr. Drazin's appeal of the ETA prevailing wage determination, it may be appropriate to emphasize that the scope of such a proceeding would be limited to determining whether the prevailing wage determination made by the California EDD for the position of Wholesaler II in 1992 was correct. Such a proceeding would not be an appropriate forum for the issues raised by Mr. Drazin in his May 2, 1998 letter to the Wage and Hour investigator. Nor would such a proceeding lead to a termination of the Wage and Hour investigation, which at this point is merely in suspension awaiting resolution of the prevailing wage determination. Thus, unless Mr. Drazin intends to present evidence showing that the prevailing wage for a Wholesaler II in 1992 was something other than what EDD determined, a Job Service complaint system proceeding may merely delay the ultimate resolution of Wage and Hour investigation. On the other hand, since the ETA wage determination will provide the benchmark for the Wage and Hour investigation into whether wages were properly paid under the LCA and for calculation of back wages, if any are due, Mr. Drazin may wish to pursue his right to the Job Service complaint system adjudication.

ORDER

Thus, it is ORDERED that Mr. Drazin file with this court on or before the close of business on June 21, 2001, a statement indicating whether his position is that he

- (1) wants a remand to ETA for transmittal of the prevailing wage challenge to the Job Service complaint system. The purpose of such a remand would be limited to the issue of whether the EDD correctly reported the 1992 prevailing wage for a Wholesaler II. Issues such as whether it is fair to use that prevailing wage as the benchmark for the Wage and Hour investigation would not be at issue. After completion of any such proceeding, the matter would be referred back to the Wage and Hour investigator for completion of his investigation.
- (2) concedes that the EDD correctly reported the 1992 prevailing wage for a Wholesaler II. If Mr. Drazin so concedes, his appeal of the ETA wage determination would be dismissed, and the matter would be immediately referred

back to the Wage and Hour investigator for completion of his investigation.

SO ORDERED.

THOMAS M. BURKE
Associate Chief Judge

JMB/trs