



In 2016, Employer obtained a business license to operate JHP Construction and submitted CW-1 petitions to hire these Employees, who were living in the Philippines, to work in Saipan as construction workers. Each of the five employees entered into a written contract with Employer, called “Employment Contract For CW-1 Petition.” (Copies of these 5 contracts were entered into evidence as Hearing Exhibits 2 to 6, respectively.) Each contract states that “regular hours” of work shall total 40 hours per week and that any hours worked more than 40 hours shall be considered overtime and paid at 1.5 times the regular rate. The contract’s duration is “one year commencing from October 1, 2016 to September 30, 2017.” *Id.*

Ultimately, the petitions were approved and Employees entered the CNMI in early January 2017; Employees began working at Employer’s construction site in Dandan on January 23, 2017. Employees worked full-time, and often overtime, constructing a house in Dandan, from January 23 until the end of April 2017. At the end of April, Employer informed Employees that she did not have the money to pay their wages for the last two weeks of April, or thereafter. [Testimony of four present Employees and Ms. Martinez.] At that point, Employees stopped working and sought assistance at the Department of Labor.

The former Secretary of Labor Edith Deleon Guerrero assigned the case to the Enforcement Section. [Testimony of Mr. Castro.] Investigator Ben Castro investigated the matter by interviewing all parties. Mr. Castro issued his Determination on May 19, 2017. During the investigation and at the Hearing that followed, Employees raised the following complaints about the Employer.

**Payroll Less Than the Contractual Wage:** For about three weeks, beginning in January 2017, Employer paid Employees at the rate of \$6.05 per hour instead of the \$6.55 rate that was stated in their contracts. After about three weeks, Employer discovered her mistake and began paying Employees their agreed-upon salary of \$6.55 per hour, but she never reimbursed Employees for her earlier mistake.

**Holding:** The wage rate of \$6.55 per hour is stated in each employment contract (Hearing Exhibits 2-6); therefore, each Employee is entitled to be reimbursed for all regular hours in which he was paid \$6.05 instead of \$6.55.

**Deductions:** Employer deducted \$50 per pay period from each of Employees’ salaries. Employer testified that she did this to reimburse herself for the cost of processing the CW-1 Petitions to bring these workers to the CNMI. [Testimony of Ms. Martinez.] **Holding:** The Hearing Officer notes that USCIS regulations regarding CW-1 status state that employers – not employees - shall pay fees for

petitions. [8 CFR 214.2(w)(5).] Furthermore, such unauthorized deductions would, in effect, drive each employee's wages below the stated contractual wage of \$6.55 per hour. There is no mention of such deductions in the contracts, which state that "the foregoing terms and conditions constitute the entire agreement of the parties." [Hearing Exhibits 2-7, at p. 3, ¶ 20.] For these reasons, the Hearing Officer finds that the deductions were unauthorized and improper, and that Employees should be reimbursed for all amounts deducted by Employer for processing fees.

**Additional Deduction for Mr. Dayao:** Mr. Dayao claimed that Employer pressured him to pay \$1,150, in addition to deducting \$100 one time from his paycheck, as reimbursement for processing fees. Dayao testified that his mother in Saipan paid \$750 in cash to Employer's common law husband, Pepito Lorenzo, to satisfy this "debt;" Dayao testified that he paid \$400 in cash directly to Mr. Lorenzo, sometime in February-April 2017, after he was told by Lorenzo that such amount was due for processing fees. [Testimony of Mr. Dayao and Mr. Lorenzo.] Employer testified that Pepito Lorenzo is her common-law husband who worked as construction supervisor at the construction site. [Testimony of Ms. Martinez.] Neither Employer nor Mr. Lorenzo denied that Lorenzo received \$400 from Mr. Dayao to "reimburse" Employer for processing fees. **Holding:** This payment that Mr. Dayao was pressured to make, amounts to an unlawful deduction from his pay that drove Employee's wages below his contractual hourly wage of \$6.55 per hour, as specified in his Employment Contract (Hearing Exhibit 2). Accordingly, the deduction is unauthorized and improper. Mr. Dayao should be reimbursed for the \$400 that he paid to Mr. Lorenzo for Employer's benefit. [The money that Mr. Dayao's mother allegedly paid to Employer is not subject to this Order as that person is not a party to this lawsuit.]

**Overtime:** Employer paid Employees "straight" time (i.e., regular pay) rather than overtime (1 and ½ times the regular pay rate) for all hours they worked more than 40 hours per week. Employer asserted that all Employees had agreed to this arrangement. [Testimony of Ms. Martinez.] At Hearing, two employees (Calisaan and Dayao) admitted they had agreed to the arrangement; whereas two employees (Consul and Carreon) denied they had ever agreed to it. **Holding:** The Hearing Officer rejects Employer's attempt to compensate overtime hours with straight pay for several reasons. First and foremost, such an "arrangement" is contrary to the express contract terms: overtime pay of 1.5 times regular pay is set forth in clear terms in each of the contracts (see Hearing Exhibits 2-7 at p. 2, ¶ 6.) Secondly, there is a clear public policy that overtime compensation should be 1.5 times regular pay, as expressed in the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

("FLSA").<sup>1</sup> Finally, even if some workers had "agreed" to be paid in that manner, the Hearing Officer would decline to enforce that agreement on the grounds that, given the unequal power relationship between Employer and Employees, such agreement would be inherently coercive and entered into under duress; therefore, as a matter of equity, it is unenforceable. Accordingly, Employees should be reimbursed for all "overtime" hours in which they were paid at regular wage rates.

**Failure to pay wages in April 2017:** It is undisputed that Employer failed to pay any wages to Employees for the time that Employees worked in the latter half of April 2017. Employer claimed that her client for the construction project had fallen behind in making scheduled payments to Employer. During investigation, Employer was still promising the investigator that she would pay the overdue amounts, but as of the date of hearing (5/31/2017), Employer claimed she still had not received funds from her client. [Testimony of Ms. Martinez.] **Holding:** Employer owes wages to each Employee for all hours worked, but not paid, including for work performed in April 2017.

**Investigator's Calculations:** Investigator Ben Castro carefully reviewed the various claims of Employees and detailed those claims in summaries that were entered into evidence as Hearing Exhibits 7a through 7e. Investigator's detailed calculations included: (1) wages owed for hours underpaid at \$6.05 per hour; (2) reimbursement of all unauthorized deductions taken by Employer; (3) reimbursement of all overtime hours that had been paid based on "straight" time rather than overtime (1.5 x \$6.55); and (4) wages for hours worked, but never paid, in April 2017. *Id.*

During the investigation, investigator Ben Castro met with each Employee and reviewed his detailed calculations with them. Employees told Mr. Castro that the totals were accurate. At Hearing, each Employee agreed with the amounts reported by the investigator. Notably, Employer raised no objections to Mr. Castro's calculations. **Holding:** The Hearing Officer has reviewed the investigator's calculations and finds them to be accurate. The Hearing Officer has relied on such calculations, as well as Employees' statements, in calculating unpaid wages and deductions in this case.

**Unpaid Wages/Unauthorized Deductions:** The total amounts owed to each Employee, are listed below:

---

<sup>1</sup> Employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek of at least one and one-half times their regular rates of pay. 29 U.S.C. § 207(a).

Moises E. Cardona <sup>2</sup>	\$1,690.74....plus liquidated and contractual damages;
Ricky C. Calisaan	\$1,269.05....plus liquidated and contractual damages;
Elmer R. Consul, Jr.	\$1,241.40....plus liquidated and contractual damages;
Kerwin M. Dayao	\$738.63....plus liquidated and contractual damages;
Joselito C. Carreon	\$1,493.70....plus liquidated and contractual damages.

For discussion of liquidated damages and contractual damages, see Conclusions of Law below.

### CONCLUSIONS OF LAW

**Unpaid Wages/Improper Deductions:** The Hearing Officer finds that Employer committed various errors in her payroll involving these Employees in the period from January through April 2017: (1) Employer paid wages at the rate of \$6.05 per hour instead of \$6.55 per hour for three weeks; (2) Employer improperly deducted amounts to reimburse herself for processing of CW-1 petitions; (3) Employer improperly paid overtime hours using a straight time rate rather than the overtime rate (1.5 x \$6.55 per hour) stated in the contract; and (4) Employer failed to pay Employees for the work performed by Employees in the last two weeks of April 2017.

The amounts owed to each Employee for the above violations were calculated by investigator Ben Castro, based on the representations made by each Employee during his interview at Enforcement. At Hearing, each Employee confirmed that he agreed with the exact amounts stated in the investigator’s calculations. Employer did not object to the amounts stated in the investigator’s calculations. [Copies of the investigators calculations appear at Hearing Exhibits 7(a-e).] The Hearing Officer finds such amounts to be accurate and supported by substantial evidence.

**Contractual Damages:** At Hearing, appearing without counsel, Employees were uncertain as to their legal rights to assert damage claims. Employees asked the Hearing Officer to consider their wage claims to extend “as far as the law allows.” The Hearing Officer finds that, in addition to amounts already calculated by the investigator, Employees may make a claim for contractual damages, as follows.

---

<sup>2</sup> During the investigation stage, Mr. Cardona informed the investigator that he intended to return to the Philippines as soon as possible. Mr. Cardona confirmed the totals included in the investigator’s calculations. The investigator told Cardona that his name would be included in the case. [Testimony of Mr. Castro.] Accordingly, Mr. Cardona’s claims were included in the Determination and Hearing and his claims are adjudicated in this Order. Prior to leaving the CNMI, Mr. Cardona provided his mailing address; this Administrative Order will be served on him by mail.

Each Employment Contract states that the term of the contract is from October 1, 2016 until September 30, 2017. In effect, Employees were promised work from the time of their entry into the CNMI through September 30, 2017. Employer announced in late April 2017, and again at Hearing, that she is financially unable to pay wages to Employees to finish the construction project. [Testimony of Ms. Martinez.] These facts establish that Employer has breached each Employment Contract by failing to provide Employees with work for five months, from May through September 2017.<sup>3</sup>

Contractual damages will serve to compensate Employees for wages lost as a result of Employer's failure to provide regular work from May through September 30, 2017.<sup>4</sup> Such contractual damages are calculated by multiplying weekly wages of \$262 (40 x \$6.55 = \$262) times the number of weeks (22) remaining on the contract (May 1 through September 30, 2017). Contractual damages amount to \$5,764 for each Employee (22 x \$262 = \$5,764). The Hearing Officer finds that each Employee is entitled to such contractual damages for wages lost due to Employer's breach of the Employment Contracts.

**Liquidated Damages:** The Commonwealth Employment Act of 2007 at 3 CMC § 4947(d)(2) authorizes an award of liquidated damages, amounting to twice the amount of unpaid wages, unless the Hearing Officer finds extenuating circumstances. Based on the evidence presented, the Hearing Officer finds that each Employee should be awarded liquidated damages equal to those amounts calculated by the investigator to be owed to each Employee for unpaid wages and unauthorized deductions.<sup>5</sup> [See Order at pp. 8-9. ¶ 4.]

**Sanctions:** In its Determination, Enforcement asked that Employer be sanctioned with the maximum fine of \$2,000 for each violation. [Hearing Exhibit 1 at p. 3.]

---

<sup>3</sup> Employer testified that she does not have the financial funds needed to continue her construction project. [Testimony of Ms. Martinez.] According to Employer, her "client" has stopped paying into the project; therefore, she has no present ability to pay for Employees' wages or materials. *Id.*

<sup>4</sup> The contracts contain no provision allowing Employer to invoke an early termination of the agreement. [See Hearing Exhibits 2-6.]

<sup>5</sup> The investigator calculated (1) wages owed for those hours underpaid at \$6.05 per hour, (2) reimbursement of all unauthorized deductions taken by Employer; (3) reimbursement for all overtime hours that had been paid based on "straight" time rather than overtime; and (4) wages for hours worked, but never paid, in April 2017. The investigator did not calculate contractual damages for work not provided from May through September 2017. Such contractual damages shall not be subject to liquidated damages.

At Hearing, Enforcement indicated that it would accept the Hearing Officer's discretionary ruling in this matter. [Testimony of Mr. Castro.]

In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of \$2,000 for each violation. 3 CMC § 4528(f)(2). The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and fairness, in accordance with the general principle, that "[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings." Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. The evidence in this case established that Employer committed multiple violations. First, Employer failed to pay the hourly wage specified in the Employment Contracts for about 3 weeks; Second, Employer took unauthorized deductions to reimburse herself for USCIS processing fees, thus lowering wages below the contracted amount. Third, Employer asked Employees to agree to be paid "straight time" for work over 40 hours per week and improperly paid such hours at the regular rate rather than overtime rates. Fourth, Employer failed to pay for work performed by Employees in April 2017. Of these violations, the Hearing Officer finds two to be particularly egregious: unauthorized deductions and failure to pay overtime. Such violations, committed against five employees, justify sanctions of \$2,000 each, for a total of \$4,000.<sup>6</sup> Employer's failure to pay wages in April was not willful, but caused by events beyond her control; therefore, no sanction will be issued for that conduct.

**Holding:** Based on the evidence presented and the considerations noted above, the Hearing Officer finds that Employer should be sanctioned in the total amount of \$4,000. Half of the sanction shall be suspended on the condition that Employer complies with the payment terms of the Order; if Employer fails to do so, the suspended sanction will be reinstated without further hearing. 3 CMC §§ 4947(d)(6) and (d)(11).

//

---

<sup>6</sup> Employer's defense to these charges was that she had mistakenly believed she was entitled to deduct processing fees and to make agreements with Employees to pay straight time instead of overtime. The Hearing Officer finds such excuses to be weak. Employer should have known that the terms of the Employment Contracts obligated Employer to pay overtime wages. Likewise, Employer should have known that deducting wages to pay processing fees was improper and coercive.

**Good cause having been shown, IT IS HEREBY ORDERED:**

1. **Judgment:** Judgment is hereby entered against Respondent Femina T. Martinez, and in favor of complainant-Employees on the claims contained in the Determination, as detailed above. [3 CMC § 4947(d)(1) and Regs. at NMIAC § 80-20.1-485(c)(2).] Employees shall be issued awards reimbursing them for unpaid wages and unauthorized deductions, as well as liquidated and contractual damages, as set forth below.

2. **Liquidated Damages:** Respondent Femina T. Martinez is hereby assessed liquidated damages in amounts equaling the individual wage awards to each Employee, as set forth in paragraph no. 4. [3 CMC § 4947(d)(2) and Regs. at NMIAC § 80-20.1-485(c)(3).]

3. **Contractual Damages:** Each complainant-Employee is awarded \$5,764 in contractual damages based on Respondent's failure to provide work in breach of each Employee's Employment Contract. [3 CMC §§ 4947(d)(1) and (d)(11); and Regs. at NMIAC §§ 80-20.1-485(c)(2) and 485(c)(13).]

4. **Awards for Unpaid Wages/Unauthorized Deductions, Liquidated Damages and Contractual Damages:** Judgment is entered against Respondent Femina T. Martinez and in favor of complainants in the following amounts:

**Moises E. Cardona** is awarded the following amounts:  
\$1,690.74 for unauthorized deductions and unpaid wages;  
\$1,690.74 in liquidated damages;  
\$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)  
For a total of \$9,145.48.

**Ricky C. Calisaan** is awarded the following amounts:  
\$1,269.05 for unauthorized deductions and unpaid wages;  
\$1,269.05 in liquidated damages;  
\$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)  
For a total of \$8,302.10.

**Elmer R. Consul Jr.** is awarded the following amounts:  
\$1,241.40 for unauthorized deductions and unpaid wages;  
\$1,241.40 in liquidated damages;  
\$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)  
For a total of \$8,246.80.



**Kerwin M. Dayao** is awarded the following amounts:  
\$1,138.63 for unauthorized deductions and unpaid wages;<sup>7</sup>  
\$1,138.63 in liquidated damages;  
\$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)  
For a total of \$8,041.26.

**Joselito C. Carreon** is awarded the following amounts:  
\$1,493.70 for unauthorized deductions and unpaid wages;  
\$1,493.70 in liquidated damages;  
\$5,764.00 in contractual damages for unprovided work (5/01/17 – 9/30/17)  
For a total of \$8,751.40.

5. **Payment Schedule:** Respondent Femina T. Martinez is ORDERED to pay the above-noted amounts by cashier's check or postal money order, payable to each Employee by name, and delivered to the Administrative Hearing Office no later than **thirty (30) days** after the date of issuance of this Order. 3 CMC § 4947(d)(2). Any failure to make timely payment of these awards shall cause a penalty of \$10 per day to be added to each award. 3 CMC § 4947(d)(11).

6. **Sanctions:** Respondent Femina T. Martinez is hereby SANCTIONED a total of four thousand dollars (\$4,000) for her conduct; however, half of this sanction is SUSPENDED for two years, provided that Respondent fully complies with the terms of this Order and commits no further violations of labor laws during that period. Respondent is ORDERED to pay the remaining \$2,000 in sanctions no later than **ninety (90) days** after the date of issuance of this Order. Proof of payment shall be submitted to the Hearing Office on or before the due date. 3 CMC §§ 4947(d)(6) and 4947(d)(11).

7. **Reinstatement of Suspended Fine:** If Respondent fails to comply with the terms of this Order, or commits further labor law violations during the two-year period, she shall be subject to a possible reinstatement of the suspended sanctions (\$2,000) plus added monetary sanctions, after a due process hearing on this issue.

//

//

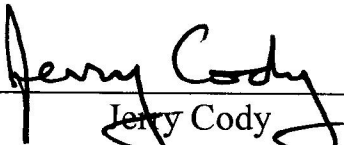
---

<sup>7</sup> This amount includes the total calculated by investigator Ben Castro (\$738.63) and the \$400 "deduction" that Mr. Dayao paid to Mr. Lorenzo. [See Order on page 3 – discussion regarding "Additional Deduction for Mr. Dayao."]

[CAC No. 17-011-05]

8. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within **fifteen (15) days** of the date of issuance of this Order. 3 CMC §§ 4948(a).

DATED: June 14, 2017

  
\_\_\_\_\_  
Jerry Cody  
Hearing Officer