



In the Matter of:

GARY J. WICKE

ARB CASE NO. 02-062

Dispute concerning the proper wage rates for truck drivers employed by E. Larsen Co., contractor to the Forest Service, United States Department of Agriculture, for land rehabilitation at various locations in the Nicolet-Chequamegon National Forests.

DATE: May 21, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Petitioner:

Gary J. Wicke, Gleason, Wisconsin

For the Respondent:

Jeffrey T. Jones, Esq., Ruder, Ware & Michler, Wausau, Wisconsin

ORDER DISMISSING PETITION FOR REVIEW

BACKGROUND

On August 20, 2000, Gary J. Wicke filed a complaint with the Wausau, Wisconsin Wage and Hour office in which he alleged that E. Larsen Co. had not paid the proper wage rate under the Davis-Bacon Act (DBA), 40 U.S.C. §§ 276a – 276a-5 (1994), for truck-driving duties he had performed. Roger J. Bertler, a Wage and Hour investigator, contacted Wicke shortly thereafter to obtain additional information. After Wicke explained the circumstances of his duties, Bertler informed Wicke that the DBA did not apply to the work Wicke performed. Wage and Hour took no further action on the complaint and issued no written decision in response to the complaint.

Wicke contacted Congressman David Obey concerning his complaint. Terry Schulta, a Constituent Aide to Congressman Obey, contacted Bertler. On January 15, 2002, Bertler wrote to Schulta and explained that he had informed Wicke that the DBA did not cover the truck-driving

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

duties he performed for E. Larsen Co. and that the Department would take no further action on his complaint because there was no violation of the law. Attachment to Petition for Review.

On February 26, 2002, Wicke requested the Administrative Review Board (“Board”) to review Wage and Hour’s decision that the DBA was inapplicable to the truck-driving duties he performed while employed by E. Larsen Co. In response, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule. The Administrator of the Wage and Hour Division, U.S. Department of Labor, has moved the Board to dismiss Wicke’s Petition for Review without prejudice, stating that “the matter is not ripe for review” because the Wage and Hour Division has not issued a final order in this matter. Administrator’s Motion to Dismiss the Petition for Review and to Suspend the Briefing Schedule (Adm. Mot.) at 1. The Administrator also moved to suspend the briefing schedule.

In response to the Administrator’s Motion to Dismiss, we issued an Order to Show Cause and Suspend the Briefing Schedule. The Order directed Wicke to submit a response to the Administrator’s Motion explaining why we should not dismiss his petition for review because it does not appeal a final ruling of the Administrator.

DISCUSSION

The applicable regulations governing practice before the Board with regard to Federal and Federally-assisted construction contracts provide that “[a]ny party or aggrieved person shall have a right to file a petition for review with the Board . . . within a reasonable time from any final decision in any agency action under part 1, 3, or 5 of this subtitle.” 29 C.F.R. § 7.9(a) (2001). The Administrator contends in her Motion to Dismiss that she does not consider Bertler’s letter to Schulta to constitute a final ruling. She states that although the letter may have indicated the Wage and Hour Investigator’s opinion concerning the merits of the issue Wicke raised, it did not provide notice of a final ruling on the DBA complaint. Furthermore, she asserts, it was not issued by the Administrator, and Wicke had not requested the Administrator for a ruling pursuant to 29 C.F.R. § 5.13. Adm. Mot. 3. The Administrator also noted that the telephone conversation in which Bertler informed Wicke that Wage and Hour would not take action on his complaint because there was no violation was merely part of a “preliminary screening process and in no way constituted a final ruling issued by the Administrator.” *Id.* at 3 n.1. However, the Administrator states that should the Board grant her Motion to Dismiss, “Counsel for the Administrator has been advised that Wage and Hour will treat the Petition for Review as a request for an official ruling.” Adm. Mot. at 3.

Wicke, in his response to the Administrator’s Motion, states that he has sent a letter to the Administrator requesting a “final and written ruling in the matter” and that “[i]f the Administrator is willing to make a ‘final’ decision the case, I would be willing to wait for the decision.”

CONCLUSION

We agree with the Administrator that this case is not yet ripe for review because the Administrator has not yet issued a final decision as provided in 29 C.F.R. § 7.9(a). Therefore, we **DISMISS** Wicke's petition for review without prejudice and **REMAND** the case to the Wage and Hour Division for an official ruling.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge