



In the Matter of:

**MULTISERVICE JOINT VENTURE,
INC.,**

ARB CASE NO. 06-004

PETITIONER.

DATE: December 28, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Eric Steele, Esq., *Davis & Steele, Washington, D.C.*

For the Deputy Administrator, Wage and Hour Division:

Mary J. Reiser, Esq., Ford F. Newman, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

In this case arising under the McNamara-O’Hara Service Contract Act (SCA),¹ the Contract Work Hours and Safety Standards Act (CWHSSA)² and the SCA interpretive regulations,³ Multiservice Joint Venture, Inc., has petitioned the Administrative Review Board to review “the July 14, 2005 and August 2, 2005 Determination Letters concerning wages and the September 2, 2005 Determination Letter concerning vacation pay issued by Corlis L. Sellers, the Regional Administrator for the Wage and Hour Division in Baltimore, MD.”⁴ The Board must determine whether it has

¹ 41 U.S.C.A. §§ 351-358 (West 1994).

² 40 U.S.C.A. §§ 3701-3708 (West Supp. 2004).

³ 29 C.F.R. Part 4.

⁴ The July 14 letter is attached to Multiservice’s petition for review. It is not in fact signed by or for Corlis Sellers. Instead, it is signed by Darlene A. Bagby, Wage and Hour Investigator.

authority to consider Multiservice's appeal. We conclude that because Multiservice has failed to appeal from either a Department of Labor Administrative Law Judge's decision or a final order of the Department's Wage and Hour Administrator, we do not have authority to consider the merits of Multiservice's appeal.

BACKGROUND

On July 14, 2005, Darlene A. Bagby, a Wage and Hour Investigator, sent a letter to David R. Tolson, Multiservice's president, concerning a Wage and Hour investigation of Multiservice's performance on Contract Number N62477-02-D-0558 with the United States Department of the Navy. The letter referred to a final conference at which Multiservice was informed of the results of an investigation into its payment of wages under the contract. The letter stated that the investigation had revealed that, as a result of SCA violations, Multiservice had underpaid 144 employees in the amount of \$47,758.63. The investigation also discovered that Multiservice paid a small group of employees overtime based upon rates less than the proper wage rate, resulting in violations of the CWHSSA. Bagby also informed Multiservice that the investigation report would be forwarded to the Wage and Hour District Director, Bezarah B. Gaither, "for review and a determination as to whether action should be taken to request the withholding of contract funds necessary to satisfy back wage findings." Bagby advised Multiservice that it could submit its views to the District Director within 15 days and that "any determination regarding the withholding of contact funds will not result in the distribution of these funds to the underpaid workers until such time as the administrative remedies available to your firm have been completed." Bagby included a copy of the applicable regulations⁵ with the letter.

Multiservice submitted its views to the District Director.⁶ The District Director informed Multiservice in a letter dated August 2, 2005,⁷ that she had reviewed its letter but that "absent any new data to provide a basis for revising the findings in this investigation," she would proceed with the withholding pursuant to the regulations at 29 C.F.R. § 4.187 and the Federal Acquisition Regulations (FAR).⁸ Accordingly, she wrote to Danny Stubbs, Contracting Officer for the United States Department of the Navy, on August 2, 2005, on behalf of Regional Administrator Corlis L. Sellers and requested that funds due the contractor in the amount of \$47,758.63 be withheld "to protect the interests of the federal government and the affected employees."⁹

⁵ 29 C.F.R. Part 6, Subpart B.

⁶ Deputy Administrator's Reply to Petitioner's Response to Order to Show Cause (D. A. Rep.) at 3.

⁷ A copy of the letter is attached to Multiservice's petition for review.

⁸ 48 C.F.R. § 22.1022.

⁹ A copy of the letter is attached to Multiservice's petition for review.

On September 2, 2005, District Director Gaither, on behalf of Regional Administrator Sellers, wrote to Contracting Officer Stubbs (with a copy to Multiservice's counsel) to advise him that Wage and Hour had discovered additional violations.¹⁰ Specifically, the agency concluded that Multiservice had failed to pay fringe benefits for which it was liable in the form of vacation pay totaling \$21,905.10 to thirty-six employees. Wage and Hour requested that a total of \$69,663.73 be withheld to cover back wages of \$47,758.63 and unpaid fringe benefits of \$21,905.10.

In response to Multiservice's petition for review, the Board ordered Multiservice to show cause why it should not dismiss the appeal because Multiservice had not petitioned the Board to review an ALJ's decision as provided in the applicable regulations. Multiservice filed a response to the Board's Order and the Deputy Administrator replied to Multiservice's response.

DISCUSSION

The Secretary of Labor has delegated her authority to the Board to issue final agency decisions under the SCA and CWHSSA upon review of final decisions by the Administrator of the Wage and Hour Division or Department of Labor Administrative Law Judges.¹¹ In addition the SCA's regulations provide that:

A petition for review of a final written decision . . . of the **Administrator** or authorized representative may be filed by any aggrieved party within 60 days of the date of the decision of which review is sought.^[12]

Multiservice argues that the Board has jurisdiction in this case because it is seeking review of "final decisions issued by the **Regional Administrator**."¹³ The Deputy Administrator responds that the letters in question are clearly not final orders of the Administrator because none of them were signed by or on behalf of the Administrator and they contain no language indicating that they constitute the Administrator's final decision.¹⁴ The Deputy Administrator argues that, instead, these letters were intended to

¹⁰ A copy of the letter is attached to Multiservice's petition for review.

¹¹ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002). *See also* 29 C.F.R. § 8.1 (2005).

¹² 29 C.F.R. § 8.7(b)(emphasis supplied).

¹³ Petitioner's Response to the Order to Show Cause at 1 (emphasis supplied).

¹⁴ Deputy Administrator's Reply to Petitioner's Response to Order to Show Cause at 6. 7.

notify Multiservice of its SCA violations and to request that the contracting agency withhold contract funds to secure the alleged back wage liability.¹⁵ Therefore, the letters were a precursor to the filing of the administrative complaint in this matter and do not constitute final written decisions of the Administrator that could form the basis for an appeal under the Department's regulations at 29 C.F.R. § 8.7(b).¹⁶

We agree that the letters from which Multiservice has appealed are not final decisions of the Administrator. As we held in *Ronald R. Bradbury, Dispute Concerning the Payment of Prevailing Wage Rates by RLH Flooring and TLT Construction Corp.*:¹⁷

Final agency decisions ordinarily are issued by the Administrator or her authorized representative. 29 C.F.R. §§ 5.2 (b), 5.13. In practice, [this] usually means a decision made by the Administrator or a senior member of her staff at the headquarters office in Washington, D.C. The Administrative Review Board and its predecessor, the Wage Appeals Board, have held that decisions by lower level operations and field staff within the Wage and Hour Division typically are not "final decisions" of the Administrator within the terms of the regulations, and therefore are not ripe for appeal.¹⁸

Accordingly, pursuant to the Secretary's delegation and the applicable regulations, the Board does not have authority to consider Multiservice's appeal because Multiservice has not appealed a final decision of the Administrator.

Multiservice also argues that Wage and Hour's request that the Contracting Officer withhold funds pursuant to 29 C.F.R. § 4.187¹⁹ violates its right to due process.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ ARB No. 01-100 (Nov. 9, 2001)(under the Davis-Bacon Act (DBA), 40 U.S.C.A. § 3142, et seq. (West 2005)).

¹⁸ Slip op. at 3 (citations omitted).

¹⁹ The regulation provides in pertinent part:

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued

We agree that the Board's decision in *Ray Wilson Co.*²⁰ disposes of this argument. In *Wilson*, a case arising under the DBA, the Board rejected the argument that an analogous withholding provision²¹ violated due process. In particular, the Board held that the Department's procedures for determining the merits of alleged DBA violations, that include an opportunity for an ALJ fact-finding hearing, afford the contractor sufficient due process for resolution of any property interest the contractor might have had in the withheld funds.²² Like the DBA, the SCA, provides an opportunity for an ALJ hearing.²³ The Board further explained that a Davis-Bacon contractor has no property interest in withheld contract funds until it has shown that it has complied with the statute's applicable prevailing rate and overtime requirements.²⁴ Accordingly, we reject Multiservice's argument that the SCA's withholding procedures violate due process.

The penultimate paragraph of the July 14, 2005 letter from the Wage and Hour Investigator informed Multiservice that the withheld funds would not be disbursed until "the administrative remedies available to your firm have been completed." The applicable regulations provide that the Associate Solicitor for the Fair Labor Standards or a Regional Solicitor will issue a complaint that will be served upon the respondents.²⁵ The complaint shall contain a clear and concise factual statement of the grounds for relief

payments due either on the contract or on any other contract (whether subject to the Service Contract Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. . . . It is mandatory for a contracting officer to adhere to a request from the Department of Labor to withhold funds where such funds are available. (See Decision of the Comptroller General, B-109257, October 14, 1952, arising under the Walsh-Healey Act.) Contract funds which are or may become due a contractor under any contract with the United States may be withheld prior to the institution of administrative proceedings by the Secretary. (*McCasland v. U.S. Postal Service*, 82 CCH Labor Cases para. 33,607 (N.D. N.Y. 1977); *G & H Machinery Co. v. Donovan*, 96 CCH Labor Cases para.34,354 (S.D. Ill. 1982).)

²⁰ ARB No. 02-086 (Feb. 27, 2004).

²¹ See 29 C.F.R. § 5.9 (2005).

²² Slip op. at 4-5.

²³ See 29 C.F.R. Part 6.

²⁴ Slip op. 6.

²⁵ 29 C.F.R. § 6.15(a)(2005).

and the relief requested.²⁶ A Department of Labor Administrative Law Judge (ALJ) will then notify the parties of the time and place of the administrative hearing.²⁷ Within 40 days after the date of the ALJ's decision, any party who seeks review of the ALJ's decision may petition the Board to review the decision.²⁸

The Deputy Administrator has stated that the Solicitor's Office is currently reviewing the investigation file in this case and that it has not yet issued a complaint. If and when the Solicitor's Office issues a complaint, the ALJ will notify Multiservice of the time and place for its hearing and if Multiservice is dissatisfied with the ALJ's final order, it may then petition the Board for review.

Accordingly, because we do not have authority to consider Multiservice's appeal, we **DISMISS** it.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

²⁶ 29 C.F.R. § 6.15(b).

²⁷ 29 C.F.R. § 6.15(c).

²⁸ 29 C.F.R. § 6.20.