U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

FLIGHTSAFETY SERVICES CORPORATION,

ARB CASE NO. 03-009

DATE: January 27, 2003

PETITIONER,

In re: Wage Determinations 94-2082, 94-2526, 94-2098, 94-2070, 94-2262, 94-2380, 94-2522, 94-2566, 94-2408, 94-2196, 94-2126, 94-2054, 94-2216, 94-2300, 94-2582, 94-2340, 94-2140, 94-2310.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the U.S. Department of Labor:

Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., U.S. *Department of Labor, Washington, D.C.*

For the Petitioner:

Iwana Rademaekers, Esq., *Jackson, Lewis, Schnitzler & Krupman, L.L.P., Dallas, Texas*

ORDER DENYING INTERLOCUTORY APPEAL

On October 17, 2002, the Administrative Review Board issued a Notice of Appeal and Order Establishing Briefing Schedule in this case arising under the McNamara-O'Hara Service Contract Act ("SCA"), as amended, 41 U.S.C.A. § 351 *et seq.* (West 1987) and 29 C.F.R. Parts 6 and 8. On November 14, 2002, the Administrator of the Wage and Hour Division moved the Board to dismiss the Petition for Review filed by Petitioners FlightSafety Services Corporation, and suspend the briefing schedule until the Board acts upon the motion. On December 3, 2002, the Board issued an Order requiring FlightSafety to show cause why "we should not dismiss its Petition for Review and remand the case to the Administrator because it has not petitioned the Board to review a final ruling of the Administrator in accordance with 29 C.F.R. § 8.1(b)" and granting the motion to suspend the briefing schedule. On December 11, 2002, the Board received

FlightSafety's response to the Show Cause Order. As discussed below, we grant the Administrator's Motion to Dismiss and remand the case to the Administrator for a final decision in accordance with 29 C.F.R. § 4.56(a)(2).

BACKGROUND

On August 29, 2002, the Department of Labor's Wage and Hour Division (WHD) received a request for review and reconsideration of a wage determination as provided in 29 C.F.R. § 4.56. In this request, FlightSafety sought review of the wage rates issued for the Computer Based Training (CBT) Specialist/Instructor, the Flight Simulator/Instructor (Pilot), and the Instructor classifications as listed in the above-referenced (see caption) wage determinations. FlightSafety averred:

> In the contested Wage Determinations, these SCA wage rates have been historically "slotted" against the Computer Systems Analyst I (03101) and Computer Systems II (03102). With the most recent SCA revisions to the Wage Determinations, the rates for some or all of the three Instructor positions ceased to be slotted without assigning another rate to these positions. This was either clerical error or arbitrary and capricious action by those who administer the SCA.

FlightSafety Services Corporation's Request for Review and Reconsideration of Wage Determinations (R. R. R.) at 2.

Addressing the timeliness of the R. R. R., FlightSafety wrote, "[T]his Request for Review and Reconsideration of the referenced SCA Wage Determination is timely submitted as the Request is submitted more than ten (10) days prior to the commencement of the subject contracts (October 1, **2001**) pursuant to 29 C.F.R. § 4.56.[1] Emphasis supplied.

That the reference to 2001 was a typographical error and that FlightSafety in fact intended to request reconsideration and review of wage determinations in a contract commencing October 1, **2002,** was plainly evident given the fact that the WHD received the R.R.R. on August 29, 2002 -- otherwise the statement that the R. R. R. was submitted ten days before the commencement of the contract on October 1, 2001, would have been

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[1] The cited regulation provides in pertinent part, "In no event shall the Administrator review a wage determination or its applicability after the opening of bids in the case of a competitively advertised procurement, or, later than 10 days before commencement of a contract option or extension." 29 C.F.R. § 4.56(a).

obviously erroneous. Nevertheless, Nila Stovall, Chief of the Branch of Service Contract Wage Determinations, chose to interpret FlightSafety's request literally. Accordingly, by letter dated September 20, 2002, Stovall informed FlightSafety that the Administrator could not review the wage determinations applicable to the October 1, 2001 contract because the Administrator is prohibited "from reviewing a wage determination or its applicability later than ten days before exercise of a contract option or extension." It is this letter from which FlightSafety appeals.[2]

DISCUSSION

The regulations addressing the Board's jurisdiction in cases like this one provide in pertinent part:

> The Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative . . .. The jurisdiction of the Board includes: (1) Wage determinations issued under the Service Contract Act.

29 C.F.R. § 8.1. The regulations further provide:

> Any interested party who is seeking a modification of [sic] other change in a wage determination under the Service Contract Act and who has requested the Wage-Hour Administrator or authorized representative to make such modification . . . and the request has been denied, shall have a right to petition of [sic] review of the action taken by that officer.

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[2] The Administrator states in her Motion to Dismiss that "FlightSafety never contacted the WHD to amend its reference to October 1, 2001 as the beginning of the relevant contract period or to seek clarification of the WHD's denial of its request for timeliness reasons." Motion to Dismiss at 3. However, there is also no indication in the filings before us that WHD made any effort to contact FlightSafety prior to issuing the September 20 letter in an attempt to correct the obvious error in the reference to the October 1, **2001** commencement date. If WHD had contacted FlightSafety to obtain clarification of the relevant contract period before issuing its letter or if FlightSafety had contacted the WHD to correct its error before filing this appeal, this particular appeal and resultant remand could have been avoided.

29 C.F.R. § 8.2(a).

The Administrator argues that Stovall was not authorized to issued a final ruling on the Administrator's behalf in this matter and that the letter does not include any language indicating that it is a final ruling or informing FlightSafety of its appeal rights. Motion to Dismiss at 4.

The Administrator, in support of her Motion to Dismiss, states that the Petition for Review should be dismissed without prejudice on the grounds that the matter is not ripe for review because the September 20th letter from Stovall does not constitute a final ruling by the Administrator. The Administrator also asserts that the Board should remand the case for consideration by the Administrator, "because FlightSafety's request for review and reconsideration raised significant issues regarding the WHD's methodology for issuing wage rates for the classifications at issue." Administrator's Motion to Dismiss Petition for Review at 4. Upon remand, the Administrator requests 60 days in which to issue a final decision in this matter because, "both WHD and Solicitor Office personnel responsible for handling and supervising this matter will be on pre-scheduled annual leave during the upcoming holiday season."

FlightSafety argues that because its request for reconsideration was plainly addressed to the Administrator, Stovall's response should be regarded as the final decision of the Administrator.

In a previous case in which a party requested reconsideration and received a response, that upon the filing of a petition for review, the Administrator characterized as non-final, we recognized:

> If an interested party seeks review and reconsideration of a wage determination pursuant to 29 C.F.R. § 4.56(a), the party=s expectation that it will receive in response a final decision of the Administrator subject to review pursuant to 29 C.F.R. ' 4.56(b) is reasonable. Accordingly, if the Wage and Hour Division issues a response to a request for a review and reconsideration that does not constitute a final order of the Administrator subject to such review, it behooves the Wage and Hour Division to so state explicitly, in an effort to reduce the number of premature appeals which waste the time and resources of both the parties and the ARB. *Accord Swetman Security Service, Inc.*, ARB Case No. 98-105 (July 23, 1998); *Diversified Collection Services, Inc.*, ARB Case No. 98-062 (May 8, 1998).

Defense Threat Reduction Agency, ARB No. 99-108, slip op. at 5 (Nov. 30, 1999). However, in this case, FlightSafety's error in identifying the wage determinations of which it sought reconsideration has contributed to its failure to receive reconsideration. In fact, FlightSafety did not request reconsideration of the wage determinations applicable to the contract commencing October 1, 2002. Therefore, the Administrator has not had the opportunity to reconsider those wage determinations or to issue a final decision subject to review by the Board.

Accordingly, we **DISMISS** FlightSafety's petition for review and, as requested by the Administrator, we **REMAND** this case to the Administrator to issue a final decision on FlightSafety's request for reconsideration of the wage determinations applicable to the contract commencing October 1, 2002. The regulations provide, "The Administrator will render a decision within 30 days of receipt of the request or will notify the requesting party in writing within 30 days of receipt if additional time is necessary." 29 C.F.R. § 4.56(a)(2). The Administrator had originally asked for 60 days to render her decision on remand because of the pre-scheduled annual leave of WHD and Solicitor's Office personnel during the holiday season. Given that the holiday season has passed, we expect that the decision on reconsideration will be issued in accordance with 29 C.F.R. § 4.56(a)(2).

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge