U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THE HEAVY CONSTRUCTORS ASSOCIATION OF THE GREATER KANSAS CITY AREA; and CONSTRUCTION AND GENERAL LABORERS LOCAL UNION NO. 1290, AFFILIATED WITH THE LABORERS INTERNATIONAL UNION OF NORTH AMERICA; and BUILDING MATERIAL, EXCAVATING, HEAVY HAULERS, DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 541, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; and OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 518

ARB Case No. 96-128

DATE: July 6, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

FINAL DECISION AND ORDER

This case is before the Administrative Review Board on remand from the United States District Court for the Western District of Missouri. Petitioners in this matter, Heavy Constructors Association of the Greater Kansas City Area (HCA) and three construction union locals (Unions) with whom HCA has collectively bargained relationships, filed an action in the District Court seeking certain injunctive relief from a November 24, 1995 final ruling of the Administrator, Wage and Hour Division. Administrative Record (R.) Tab Q. The Department of Labor (DOL) moved to dismiss the court action on the basis that Petitioners had failed to exhaust administrative remedies before the Wage Appeals Board, pursuant to 29 C.F.R. Part 7. The District Court by Memorandum and Order of April 30, 1996, directed the Petitioners to file an appeal with the Wage Appeals Board within five days. Pursuant to this Order, Petitioners filed the instant petition for review with the Wage Appeal Board on May 3, 1996. Subsequent to the

[1] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the Davis-Bacon and Related Acts and their implementing regulations to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996)(copy attached). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

District Court's order, the Secretary abolished the Wage Appeals Board and transferred its responsibilities to the newly created Administrative Review Board. *See* n. 1, supra. The Board has considered the record and the arguments of the parties and for the reasons given below dismisses the petition for review.

BACKGROUND

Petitioners seek retroactive correction of Wage Determination No. KS950012 (Mod. 0), published on February 10, 1995. R. Tab S. This Wage Determination was incorporated into the bid specifications for and governed the contract for reconstruction of approximately three miles of Interstate Highway 1-35 in Johnson County, Kansas. Bid opening on this contract took place on April 19, 1995 and the contract was awarded on April 26, 1995. R. Tab M.

For a number of years Petitioners have been parties to collectively bargained agreements in the general Kansas City area, including all or parts of Jackson, Clay, Platte, Ray and Cass counties in Missouri and Wyandotte, Johnson and Miami counties in Kansas. According to Petitioners, HCA represents 80% to 90% of the heavy and highway contractors and the three Unions represent virtually all of the mechanics and laborers performing work on heavy and highway construction in the geographic area. Consequently, Petitioners assert that the collectively bargained agreements between the three Unions and HCA establish the prevailing wage and fringe benefit rates for the Kansas City area. On August 1, 1994, HCA and the Unions entered into new collectively bargained agreements which called for an increase in the wage rates and fringe benefits effective January 1, 1995.

On January 6, 1995, DOL -- through the Wage and Hour Division -- issued the first of a series of wage determinations that did not include the newly negotiated rates for **the laborers** and truck drivers. HCA requested, by letter of January 9, 1995, correction of the wage determination's rates to reflect the newly negotiated rates. After publication of the wage determination (dated February 10, 1995) that was incorporated into the contract documents in question and that did not include the newly effective basic hourly rates for laborers and truck drivers, HCA again by letter requested an update and correction of the rates. HCA asserted that the wage rates identified for laborers and truck drivers in the wage determination were less than those included in the collectively bargained wage escalator agreements between HCA and the Unions. The wage determination's cement mason rate did include the escalator amount, but did not include an amount of 50c hourly, designated as supplemental dues. Prior to the award of the contract that is the subject of these proceedings, two additional modifications of the wage determination were issued, neither of which included the increase in rates called for by HCA.

On June 9, 1995, HCA again wrote to request changes in the wage rates used in the wage determination to reflect the collectively bargained agreements. R. Tab G. The laborer rate was updated in Modification 6, published on June 16, 1995 and the truck driver rate was updated in Modification 11, published on August 25, 1995. Lastly, the cement mason rate was corrected in Modification 12. published on September 1, 1995 to include the supplemental dues amount. HCA's initial request for retroactive application of the changes in the wage determination (based on the "clerical error" exception under 29 C.F.R. § 1.6(d)) was made in its letter of July 21, 1995 to the Administrator. R. Tab J. HCA repeated this request in its letter of October 16, 1995 to the Administrator and specifically cited the Administrator's authority under .19 C.F.R. § 1.6(d) to

retroactively correct "clerical errors." The Administrator denied HCA's request for retroactive changes to the wage determination by ruling letter dated November 24, 1995.

In her letter the Administrator expressed regret for "delays in issuance of the most up-todate collectively bargained rates," but ruled that a "delay in incorporating revised collectively bargained rates in a wage determination does not constitute a 'clerical error'" under 29 C. F. R. § 1.6(d). R. Tab Q, p. 5, 6. The Administrator also noted that resort to section 1.6(d) to retroactively correct an error was a matter committed to the discretion of the Administrator. The Administrator advised HCA that her letter constituted a final determination that could be appealed to the Wage Appeals Board pursuant to 29 C . F. R. § 1. 9 and 29 C . F . R. Part 7 and that such petition should be filed within thirty days of the date of the ruling letter. Petitioners then brought suit in the District Court. While the matter was pending in the District Court, the Administrator notified the Kansas Department of Transportation that the changes in cement mason wage were to be made retroactive to the start of construction on the I-35 highway project. This action was taken for the stated reason that the original wage determination rate for cement masons "was not the mere result of processing delays, but constituted an inadvertent clerical error." R. Tab R, p. 1.

On April 20, 1996 the Memorandum and Order that directed Petitioners to seek review before the Wage Appeals Board was issued. On May 3, 1996 the Administrative Review Board assumed jurisdiction over this matter.

DISCUSSION

The Board initially considers the Administrator's argument that the Petition for Review in this matter is time-barred. As noted, the Administrator's final ruling was issued on November 24, 1995. In that determination, Petitioners were advised of their right to file a petition for review with the Wage Appeals Board within 30 days of the date of the ruling. We do not agree that the petition for review was untimely under the facts of this case. Petitioners do not challenge the validity of the wage determination. They seek retroactive application of two corrections incorporated into the wage determination. Therefore, the general rules requiring timely challenges to wage determinations are inapplicable. We accept this matter for review under the Board's authority to accept a petition for review which is filed "within a reasonable time from any final decision in any agency action under [29 C. F. R.] part 1. . . . " 29 C. F. R. § 7.9(a).

The other issue before the Board is whether the Administrator wrongly denied Petitioners' request to find "clerical error" and, upon that finding, retroactively correct the wage determination to cover the contract in question. Under 29 C.F.R. § 1.6(d) the Administrator is authorized to retroactively correct wage determinations containing "clerical errors." Our exploration into the nature and extent of Administrator's authority under this provision begins with the text of the regulation. Section 1.6(d) reads:

> Upon his/her own initiative or at the request of an agency, the Administrator may correct any wage determination, without regard to paragraph (c) of this section. whenever the Administrator finds such a wage determination contains clerical errors. Such corrections shall be included in any bid specifications containing the wage determination, or in any on-going

contract containing the wage determination in question, retroactively to the start of construction.

The Wage Appeals Board addressed the question of what constitutes a clerical error in the case of *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 469,* WAB Case No. 90-40, Mar. 29, 1991. In that case, the Board held that delay by the Wage and Hour Division in utilizing revised collective bargaining rates did not amount to "clerical error," within the-meaning of 29 C.F.R. § 1.6(d). We conclude that *Local 469 is* on point and find that Wage and Hour's delay in adopting the revised laborer and truck driver rates does not rise to the level of clerical error subject to the Administrator's authority to issue retroactive corrections. On the other hand, failure to include the supplemental dues payment for cement masons did not occur because of a delay in adopting new rates. The new wage escalator for cement masons was included in the initial wage determination, but because of an inadvertent omission, the supplemental dues payment was not.

Even if Wage and Hour's administrative delay in utilizing the wage data for laborers and truck drivers could be considered to be clerical error, Petitioners err in suggesting that Section 1.6(d) requires the Administrator to make such corrections whenever a clerical error is brought to his or her attention. Quite to the contrary, the unmistakable intent and clear language of Section 1.6(d) is to commit such corrections to the sole discretion of the Administrator.

Section 1.6(d) begins with a recitation of the process under which a correction is to be originated. The regulation provides that a correction may be made upon the Administrator's own initiative or at the request of a contracting agency. No procedure is provided under which an interested party is entitled to invoke the correction process. If an error is brought to the attention of the Administrator by an interested party, it is left to the Administrator to institute the correction process. The fact that interested parties are not extended any procedural rights under Section 1.6(d) underscores the discretionary nature of the regulation.

Even without the prefatory phrase, the first sentence of Section 1.6(d) clearly establishes the discretionary nature of the Administrator's authority. The first sentence which invests in the Administrator the authority to correct clerical errors provides that the Administrator "may correct any wage determination" containing clerical errors. The clearly permissive nature of the Administrator's authority is manifest in the language of the regulation.

Not only is the discretionary nature of the Administrator's authority dictated by the clear language of the regulation, but it also well supported by policy considerations. Fairness to all bidders and finality and regularity in the contracting agency's procurement process explain the Administrator's long standing reluctance to employ Section 1.6(d) to correct wage determinations after contract award. *See* Statement for the Administrator, p. 13. As Wage Appeals Board Member Thomas X. Dunn stated in *Beacon Place Corporation,* WAB Case Nos. 87-34, -39, Sep. 30, 1989, slip op. at 8:

> Contractors have few rights under the Davis-Bacon Act. Workers enjoy the benefits of the Act, while generally the contractors have compliance obligations only. However, throughout the years, one of the few protections given to

> contractors is. that once the award has been made, the contractor has a right to rely on the wage determinations on which he has made his bid.

These policy considerations do not, however, preclude an interested party from timely seeking a correction in an inaccurate wage determination. The regulations specifically provide an avenue for an interested party to challenge a wage determination. 29 C.F.R. §§ 1.8 and 1.9 and 29 C.F.R. Part 7. This avenue was available to Petitioners to challenge the wage determination in question, but was not pursued.

Petitioners' failure to pursue this avenue left it to the discretion of the Administrator to determine the appropriate response to *the inaccuracy* in the wage determination. The regulations do not compel the Administrator to correct every conceded mistake in the wage determination. Mistakes in the very technical and complex wage determination process are inevitable. Correcting those mistakes must be weighed against other important policy considerations. The task of balancing these competing interests is assigned to the Administrator. Absent a clear abuse of that discretion by the Administrator, the Board will not upset an Administrator's ruling. No such abuse of discretion has been demonstrated in this proceeding.

Petitioners' reliance on the mandatory language of the second sentence of Section 1.6(d) is misplaced. The second sentence begins "(S)much correction shall be included" in any on-going contract. The word "Such" refers back to those corrections which the Administrator elects to make pursuant to the discretion invested in her by the first sentence of Section 1.6(d). It does not act as a limitation on that discretion. The case on which Petitioners place great reliance to support their reading of the regulation, *Anderson v. Yungkau, 329 U.S.* 436 (1947) interpreted a rule constructed in a manner very similar to Section 1.6(d).[2] The Supreme Court held in that case that: "When the same Rule uses both `may' and `shall', the ordinary inference is that each is used in its usual sense -- the one act being permissive, the other mandatory." The Board reads Section 1.6(d) accordingly. The Administrator's authority is clearly permissive not mandatory.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

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[2] The Supreme Court in *Anderson* was called upon to interpret Rule 25(a) of the Federal Rules of Civil Procedure which at that time read:

> If a party dies and the claim is not thereby extinguished. the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party." [Emphasis added].