



In the Matter of:

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL #50,**

ARB CASE NO. 05-157

DATE: December 29, 2005

PETITIONER,

v.

**ADMINISTRATOR, WAGE AND HOUR
DIVISION, UNITED STATES DEPARTMENT
OF LABOR,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

**James D. Carney, *United Government Security Officers of America,
Westminster, Colorado***

For Respondent Administrator, Wage and Hour Division:

**Joan Brenner, 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 DISMISSING APPEAL

This case arises under the substantial variance provisions of the McNamara-O'Hara Service Contract Act (SCA).¹ The Petitioner, United Government Security Officers of America, Local #50, has requested the Administrative Review Board to grant it Summary Judgment based on the Deputy Administrator's "procedural" default in

¹ 41 U.S.C.A. § 353(c) (West 1994) (section 4(c)).

failing to timely respond to its request for a substantial variance hearing before a Department of Labor Administrative Law Judge as provided in 29 C.F.R. § 4.10(b)(2).²

The issue before us therefore is whether we have authority to grant the relief requested given that the Secretary of Labor has delegated her authority to the Board to issue final agency decisions under the SCA upon review of final decisions by the Administrator of the Wage and Hour Division or Department of Labor Administrative Law Judges.³ Upon review of the applicable law and the parties' briefs, we conclude that we do not have authority to grant the relief requested because neither the Administrator nor an ALJ have issued a final decision in this case.

BACKGROUND

I. Overview of the SCA's wage determination and substantial variance hearing procedures.

The SCA generally provides that every contract exceeding \$2,500 into which the United States enters, the principal purpose of which is to provide services through the use of service employees in the United States, must contain a provision that specifies the minimum hourly wage and fringe benefit rates that are payable to the various classifications of service employees working on the contract.⁴ The Department of Labor's Wage and Hour Division (WHD), acting under the authority of the Wage and Hour Administrator predetermines the wage and fringe benefit rates.

There are two types of SCA wage schedules – also known as wage determinations – that the WHD prepares for inclusion in service contracts. The first type is a general wage determination, and the wages and fringe benefits contained in such a schedule are based on the rates that the WHD determines prevail in the particular locality for the various classifications of service employees to be employed on the contract.⁵ These wage determinations sometimes are referred to as “prevailing in the locality”-type wage determinations.

² This regulation provides that the Administrator will respond within 30 days after receiving such request by “granting or denying the request or advising that additional time is necessary for a decision.” 29 C.F.R. § 4.10(b)(2).

³ 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).

⁴ *See* 41 U.S.C.A. §§ 351(a)(1), (a)(2). *See generally* *United States Dep't of State*, ARB No. 98-114, slip op. at 3-5 (Feb. 16, 2000).

⁵ 41 U.S.C.A. § 351(a)(1), (2).

A second type of wage determination is issued at locations where there is a collective bargaining agreement between the service employees and an employer working on a Federal service procurement. Under these circumstances, the WHD must specify the wage and fringe benefit rates from the collective bargaining agreement (CBA)(including prospective increases) as the required minimum rates payable to the service employee classifications to be employed on the procurement contract.⁶ In addition, section 4(c) requires generally that the negotiated wage rates (and prospective increases) must be incorporated into a successor contract's wage determination in those instances in which a labor agreement has been negotiated between the service employees and a contractor's predecessor.⁷

Section 4(c), however, contains provisions that restrict the applicability of CBA-based wage and fringe benefit rates in wage determinations:

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are *substantially at variance with those which prevail for services of a character similar in the locality.*^[8]

The section 4(c) proviso states that wages and fringe benefits contained in a CBA shall not apply to a service contract "if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality."⁹ Therefore, the collectively-bargained wage or fringe benefit rates negotiated between a Federal service contractor and the union representing its employees may not be

⁶ *Id.*

⁷ 41 U.S.C.A. § 353(c).

⁸ *Id.* (emphasis added).

⁹ *Id.*

applied to a successor procurement period if, following a challenge and hearing, it is determined that the negotiated wages are substantially different from locally-prevailing rates for similar work.¹⁰

Either the contracting agency or other affected or interested person may request a substantial variance hearing by filing such request in writing with the WHD Administrator.¹¹ The Administrator “will respond to the party requesting a hearing within 30 days after receipt, granting or denying the request or advising that additional time is necessary for a decision.”¹² Furthermore,

[n]o hearing will be provided pursuant to this section and section 4(c) of the [SCA] unless the Administrator determines from information available or submitted with a request for such a hearing that there may be a substantial variance between some or all of the wage rates and/or fringe benefits provided for in a collective bargaining agreement to which the service employees would otherwise be entitled by virtue of the provisions of section 4(c) of the Act, and those which prevail for services of a character similar in the locality.¹³

The Administrative Review Board has jurisdiction to hear and decide, in its discretion, appeals from ALJ decisions in substantial variance proceedings and final actions of the WHD Administrator.¹⁴ In considering such appeals, “[t]he Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations which has been duly promulgated through notice and comment by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.”¹⁵

II. Factual and procedural background

On July 29, 2005, Local #50 filed a request for a substantial variance hearing. WHD received the request on August 4, 2005. WHD did not respond to the request by denying, granting or advising of a need for additional time within 30 days as provided by

¹⁰ See 29 C.F.R. § 4.10.

¹¹ 29 C.F.R. § 4.10(b).

¹² 29 C.F.R. § 4.10(b)(2).

¹³ *Id.*

¹⁴ 29 C.F.R. § 8.1(b)(2), (6).

¹⁵ 29 C.F.R. § 8.1(b).

the regulations.¹⁶ On September 14, 2005, Local #50 filed Petitioner’s Motion for Summary Judgment with the Board. In this motion Local #50 argues that summary judgment is warranted in this case despite the fact that there is no final decision of the Administrator or Administrative Law Judge for the Board to review because the Administrator has failed to respond to its request for a substantial variance hearing within thirty days as provided in the applicable regulation.¹⁷ As a result of the Administrator’s failure to timely respond, Local #50 argues that should it prevail, its remedy may be diminished if “the intent and purpose for efficient processing of the variance request has been sufficiently circumvented.”¹⁸ Therefore, Local #50 requests the Board to

examine the record of the original filing to the Administrator . . . and find that the wage rates for the Colorado Springs locality in the AmGard Collective Bargaining Agreement are at a substantial variance below what is fair for that locality, and order judgment of application of the appropriate wage rates that are at what is prevailing, fashioning a proper remedy and wage rate consistent with the Petitioner’s declarations . . . which are uncontroverted.^{19]}

In response to Local #50’s motion, the Board ordered the Deputy Administrator to show cause why the Board should not grant Local #50’s Motion for Summary Judgment. The Deputy Administrator filed a Response . . . to the Administrative Review Board’s Order to Show Cause in which he argues that the motion for summary judgment should be denied for several reasons. First the Administrator contends that under the plain language of the statute and regulations, the Board lacks authority to grant the relief requested because section 4(c) provides an exception to paying the predecessor contract rates only when “the Secretary finds *after a hearing* in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.”²⁰ Furthermore the regulations to which section 4(c) refers provide that “[u]nder the Department’s regulations, a substantial variance determination can be made only after a formal evidentiary hearing has been conducted by an ALJ, giving all affected or

¹⁶ 29 C.F.R. § 4.10(b)(2).

¹⁷ This regulation provides in pertinent part, “The Administrator will respond to the party requesting a hearing within 30 days after receipt, granting or denying the request or advising that additional time is necessary for a decision.” 29 C.F.R. § 4.10(b)(2)(2005).

¹⁸ Petitioner’s Motion for Summary Judgment (Pet. Mot.) at 5.

¹⁹ Pet. Mot. at 7-8.

²⁰ Deputy Administrator’s Response at 3 quoting 41 U.S.C.A. § 353(c).

interested parties – including, among others, the contractor, the contracting agency and the Administrator of the Wage and Hour Division – an opportunity to participate. See 29 C.F.R. 4.10 (b), (c).”²¹

The Deputy Administrator also stated that the WHD had advised him that it is “proceeding with the necessary action to facilitate a hearing in accordance with the provisions of 29 C.F.R. 4.10” and that the “Deputy Administrator’s letter responding to Local 50’s hearing request should be issued within a few days of this response to the Board.”²²

Finally, the Deputy Administrator argues that “although prompt action is important, and delays are to be avoided to the extent possible, the regulation’s language does not require absolute adherence to a stated deadline. In support of this argument, the Deputy Administrator cites *Brock v. Pierce County*²³, for the proposition that “the Supreme Court stated that government agencies do not forfeit jurisdiction for failure to comply with statutory time limits unless the statute “both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision.” (Citation omitted; emphasis in original).”²⁴ Accordingly, the Deputy Administrator argues that because the governing regulation specifies no consequence for the failure to respond within thirty days, “the Deputy Administrator properly retains jurisdiction and authority to review and respond to Local 50’s hearing request, as he deems appropriate.”²⁵

Local #50 filed a rebuttal to the Deputy Administrator’s response arguing that this case is distinguishable from *Pierce County* in that in this case, “the Petitioner . . . is not attempting to disengage the Administrator from his mandate. In fact, we are trying to prompt the Administrator to engage in his mandate under the Service Contract Act (SCA).”²⁶ Local #50 also argues that in *Pierce County*, the Supreme Court held that it had not adopted the appellate court decisions upon which the Deputy Administrator relied for its argument that a government agency does not lose jurisdiction for failure to comply with statutory time limits unless the statute requires the agency to act within a certain

²¹ *Id.*

²² *Id.*

²³ 476 U.S. 253, 259 (1986). In this case the Supreme Court held that the Secretary of Labor did not forfeit its jurisdiction to recover misused CETA funds despite the fact that the Secretary did not issue a final determination as to the misuse of the funds within 120 days after audit or receipt of complaint as provided by statute.

²⁴ Deputy Administrator’s Response at 4.

²⁵ *Id.*

²⁶ Petitioner’s Memorandum in Reply to the Response of the Administrator at 3.

time period and specifies a consequence for the agency's failure to do so.²⁷ It also asserts that in this case, unlike in *Pierce County*, there are no public interests at stake and that Board review provides a "less drastic remedy" than voiding agency action.²⁸ Finally, Local #50 argues that *Pierce County* is distinguishable because Local #50 has demonstrated that the Deputy Administrator's failure to timely respond to its request will prejudice its interests.²⁹

DISCUSSION

We agree with the Deputy Administrator that we do not have authority to grant summary judgment in this case as Local #50 has requested. The Secretary's delegation of authority to act is limited: the Board may review final judgments of the Administrator and ALJs.³⁰ Admittedly there has been no such final order in this case. Furthermore, the plain language of the statute³¹ and its interpretive regulations,³² which we are bound to uphold,³³ provide that a finding of substantial variance may only be rendered after a hearing. Thus, in the absence of a final decision of the Administrator or an ALJ's decision, we may not consider Local #50's petition.³⁴

²⁷ *Id.* at 4.

²⁸ *Id.* at 5.

²⁹ *Id.* at 6.

³⁰ Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002).

³¹ 41 U.S.C.A. § 353(c) (West 1994).

³² 29 C.F.R. § 4.10 (b), (c).

³³ 29 C.F.R. § 8.1(b).

³⁴ While it is unnecessary, given our holding, to discuss the potential applicability of *Pierce County* to this case, we note that it appears that the Deputy Administrator has misinterpreted *Pierce County*'s holding. The Court did not hold, as stated by the Deputy Administrator, that government agencies do not forfeit jurisdiction for failure to comply with statutory time limits unless the statute "specifies a consequence for failure to comply with the provision." (Citation omitted . . .). Deputy Administrator's Response at 4 (D. A. Resp.). To the contrary, the Court explained in holding that the Secretary had not forfeited its jurisdiction under the facts of the case:

We need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute. In this case, we need not go beyond the normal indicia of congressional intent to conclude the § 106(b) permits the Secretary to

Finally, while we understand Local #50's frustration at the Deputy Administrator's failure to timely respond to its request for a substantial variance hearing, we note that its claim of potential prejudice appears to be based on an assumption that it has an absolute right to an answer granting or denying its request for a substantial variance hearing within thirty days. It does not.³⁵ While the Deputy Administrator has not explained his inability to respond to Local #50 within thirty days advising it that he needed additional time for his decision, he did have that option under the regulation. Local #50 has not claimed that the Deputy Administrator's failure to advise it that he needed additional time to make his decision has prejudiced him, only that it was potentially prejudiced by his failure to either grant or deny his request within thirty days, which under the terms of regulation, he was not required to do.

Accordingly, because we do not have authority to consider Local #50's appeal, we **DISMISS** its petition for review.³⁶

SO ORDERED.

M. CYNTHIA DOUGLASS

Chief Administrative Appeals Judge

WAYNE C. BEYER

Administrative Appeals Judge

recover misspent funds after the 120-day deadline has expired.

476 U.S. 253, 262 n.9. The quotation, upon which the Deputy Administrator relies in support of his argument that the statute must specify a consequence for failure to comply, D. A. Resp. at 4, is simply an acknowledgement by the Court of the appellate precedent upon which the Secretary relied; it is not a statement of the Court's holding in the case. *See* 476 U.S. 253, 259.

³⁵ 29 C.F.R. § 4.10(b)(2).

³⁶ On December 28, 2004, the Board received Petitioner's Amended Motion for Revoking Dismissal and its Amended Motion for Summary Judgment. In this amended motion, Local 50 states that the Administrator has forward the case to the Office of Administrative Law Judges for a hearing and requests the Board to "reserve jurisdiction" of the case should it determine that it did not have authority to consider Local 50's Motion for Summary Judgment. Amended Motion at 2. As held above, the Board will not consider Local 50's motion; however, it is not necessary for the Board to reserve jurisdiction because if Local 50 disagrees with the ALJ's decision, it may simply file an appeal with the Board of that decision. *See* 29 C.F.R. §§ 6.57, 8.7.