In the Matter of:

ANDREW AIKEN and all other Similarly Affected Employees of ITS Medical Systems on U.S. Army Reserve Command Contract No. DAKF11-01-C-0005[1] in Fort McCoy, Wisconsin, Fort Gordon, Georgia, and Fort Dix, New Jersey.

ARB CASE NO. 07-017

DATE: April 23, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:
John V. Berry, Esq.; Sara C. Vins, Esq., *Law Firm of John Berry, PLLC,* Washington, D.C.

For the Respondent Administrator, Wage and Hour Division:
Joan Brenner, Esq.; William C. Lesser, Esq.; Steven J. Mandel, Esq.; Jonathan L. Snare, Esq., *U.S. Department of Labor,* Washington, D.C.

ORDER DISMISSING APPEAL WITHOUT PREJUDICE

This case before the Administrative Review Board (Board) arises under the McNamara-O'Hara Service Contract Act (SCA), as amended.[2]

The Petitioners, Andrew Aiken and all other similarly affected employees of ITS Medical Systems on U.S. Army Reserve Command Contract No. DAKF11-01-C-0005 in Fort McCoy, Wisconsin; Fort Gordon, Georgia; and Fort Dix, New Jersey, (Petitioners) appeal the final

[1] This contract is also listed as "DAKF110-01-C-000."

[2] 41 U.S.C.A. § 351 *et seq*. (West 2007) and its implementing regulations at 29 C.F.R. Parts 4 and 8 (2007).

decision of John Bates, Director of Enforcement for the Employment Standards Administration (ESA) as an authorized representative for the Administrator.

The Respondent Administrator, Wage and Hour Division of the U.S. Department of Labor (Administrator), filed a Motion to Dismiss for Lack of Jurisdiction claiming the Administrator has not issued a final decision.

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 October 20, 2006, the Board received the Petitioners' Appeal. The Petitioners are Biomedical Engineering Technicians (BMETs) employed by a contractor under U.S. Army Reserve Command Contract DAKF11-01-C-0005. They were classified as Electronics Technical Maintenance (ETM) in the SCA Directory of Occupations. The contract classification in dispute was awarded on July 12, 2001, and work began on September 1, 2001.[3]

The Petitioners seek to appeal "the final decision of John Bates, Director of Enforcement for the Employment Standards Administration (ESA), [Wage and Hour Division,] WHD, [of the U.S. Department of Labor,] DOL, who acted as the authorized representative of the Administrator" in a "no violation" letter dated August 23, 2006.[4]

On November 13, 2006, the Administrative Review Board issued a Notice of Appeal and Order Establishing Briefing Schedule. On January 8, 2007, the Board received the Administrator's Motion to Dismiss the Petitioners' appeal on the ground that the Board does not have jurisdiction to consider the appeal because the determination appealed from is not a final decision, and the Petitioners have not requested review and reconsideration from the Administrator.[5] In response to the Motion to Dismiss, the Board issued an Order to Show Cause why we should not dismiss its Petition for Review and remand the case to the Administrator because the Petitioners have not petitioned the Board to review a final ruling of the Administrator in accordance with 29 C.F.R. § 8.1(b).

In their response to the Order to Show Cause, the Petitioners identify several communications between the Petitioners and the Department of Labor that date back as far as

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[3] *See* Petitioner's Petition for Review at 2.

[4] *See* Petitioner's Petition of Review at 1; Exhibit Tab U at 187. The Petitioners cite 29 C.F.R. § 8.7(b) ("A petition for review of a final written decision (other than a wage determination) 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."). Petitioner's Petition for Review at 1.

[5] *See* Administrator's Motion to Dismiss at 1.

2003.[6] The Petitioners claim that these communications establish their request for review and reconsideration and that the only response from the Administrator was the Bates communication and thus that communication is the Administrator's final decision.

The record demonstrates the Petitioners' continued efforts to seek review of the classification. After receiving no results from efforts in 2004 and 2005, the Petitioners e-mailed William Gross, Director Division of Wage Determinations, on November 2, 2005, seeking more information about the SCA Directory and the wage classifications.[7] Approximately one month later, on December 2, 2005, Gross replied in a detailed e-mail answering questions on how wage determinations are made and why conformance to existing schedules is used.[8] Gross carbon copied his e-mail to Nila Stovall. Gross's December 2, 2005 e-mail also informed Aiken that "[i]nitial conformance decisions may be appealed to the Administrator of the Wage and Hour Division and a final ruling of the Administrator may be appealed to the Administrative Review Board in accordance with the procedures spelled out in the final ruling."[9] Aiken responded to this e-mail on December 5, 2005, carbon copying Alfred Robinson, Deputy Administrator and Stovall. Gross responded on December 5, also carbon copying Robinson and Stovall. Gross informed Aiken that he "may request reconsideration of that decision by submitting a written request to the Administrator of the Wage and Hour Division, 200 Constitution Avenue, NW, Washington DC 20210. Your request should show how the work performed by the proposed conformed classification is different from the work described in the SCA Directory for the ETM occupations."[10]

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[6] In 2003, in response to concerns raised by employees under the contract, a series of e-mail discussions between Nila Stovall, Chief Branch of Service Contract Wage Determinations, Alfred E. Moreau, Labor Advisor for Department of the Army and Ollen L. Burnette, Army contracting Agency Specialist show Stovall seeking a review of the basis of the wage determination. Exhibit Tab A at 1. In November of 2003, Sandra W. Hamlett, Human Resource Specialist, Branch of Service Contract Wage Determinations responded that, based on their review, the "ETM classification was appropriate for the [BMETs]." Exhibit Tab C at 36-37. In July of 2004, the Petitioners, through their Project Manager wrote a letter to Yvonne Earls, ACA Southern Regional Contracting Center, concerning their classification. Exhibit Tab D at 38. In November of 2004, Tiffany Allen-Holmes, Section Chief Branch of Service Contract Wage Determinations, responded to the Petitioners' letter directing them to contact the Atlanta District Office of the Wage and Hour Division. Exhibit Tab E at 40. The Petitioners did so in December of 2004. Exhibit Tab G at 47. In October of 2005, Stovall responded by denying the request for conformance. Exhibit Tab H at 84.

[7] Exhibit Tab J at 93.

[8] Exhibit Tab J at 90-93; *see* Petitioners' Response to Show Cause Order at 2-3.

[9] Exhibit Tab J at 93.

[10] Exhibit Tab J at 89.

In their Response to the Show Cause Order, the Petitioners claim that they followed the procedure indicated in Gross's e-mail and delivered the appeal to the address indicated.[11] On December 20, 2005, Aiken wrote to Robinson, "[p]er our email correspondence, I wish to submit additional material for your consideration."[12] Aiken's letter to Robinson indicated he wanted to "draw attention to this oversight and rectify the disparity in our wage" and receive "a reasoned justification."[13]

Not receiving any responses, the Petitioners, in January through March 2006 sent several communications to various parties including Robinson, Secretary Chao of the Department of Labor and members of Congress.[14] On February 28, 2006, Stovall responded to the Petitioners indicating that an investigation of the wage determination was in progress.[15] In late March, the Petitioners' attorney sent letter and e-mail correspondence to Stovall requesting the status of the investigation into the wage determination.[16] On April 19, 2006, the Petitioners received notification that John Bates "Wage Hour Regional Wage Specialist" had been assigned to investigate the wage classification.[17]

On August 23, 2006, Bates denied the conformance request.[18] In response, on September 12, 2006, the Petitioners wrote to Bates requesting instructions for further administrative review with the Department of Labor.[19] This letter was carbon copied to Robinson. On September 29, 2006, Bates responded to the Petitioners' September 12, 2006 letter indicating "[t]he regulations, 29 C.F.R. Part 8, do not provide for any further administrative appeal of this no violation finding."[20]

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11 *See* Petitioners' Response to Show Cause at 3.

12 Exhibit Tab K at 96; *see* Petitioners' Response to Show Cause Order at 3.

13 Exhibit Tab K at 96.

14 *See* Petitioners' Response to Show Cause Order at 3-4; Exhibit Tabs L-R at 134-164.

15 *See* Petitioners' Response to Show Cause Order at 4; Exhibit Tab O at 157, Tab Q at 162 (March 15 response from Stovall to Senator Isakson).

16 Exhibit Tab T at 176-77.

17 Exhibit Tab T at 175.

18 Exhibit Tab U at 187.

19 Exhibit Tab W at 202-03.

20 Exhibit Tab X at 204.

After receiving the Petitioners' February 2, 2007 Response to the Order to Show Cause, the Board issued an order permitting the Administrator to respond to the Petitioner's Response. On March 27, the Board received the Administrator's Response renewing his argument that the Board is without jurisdiction to hear the Petitioners appeal.

JURISDICTION AND GOVERNING LAW

The Board has jurisdiction to consider final decisions of the Administrator of the Wage and Hour Division or authorized representative.[21]

The Administrator's January 8 Motion to Dismiss states that the Petitioners "failed to seek a final determination from the Administrator of the denials of their request, notwithstanding that they were advised that they could do so by e-mails dated December 2 and December 5, 2005 from William Gross . . . ."[22] The Petitioners' Response to the Order to Show Cause identifies several communications between Aiken and WHD staff and claims that "[c]ontrary to the assertions in the Administrator's Motion, Petitioners already sought review and reconsideration from the Administrator . . . [in] a letter dated December 20, 2005."[23] The Administrator states that the December 20 letter "did not appear to the Wage and Hour Division . . . [to be] requesting a formal ruling."[24] The regulations grant the Board jurisdiction in terms of reviewing the Administrator's final decision and not in terms of the Petitioner's efforts to seek such a request. Thus, we must determine whether in this case the Administrator or his authorized representative issued a final decision as required by 29 C.F.R. § 8.1(b).

The Petitioners purport to appeal "the final decision of John Bates, Director of Enforcement for the Employment Standards Administration, WHD, DOL, who acted as the authorized representative of the Administrator in this action."[25] The Administrator's Motion to Dismiss states that the "district director involved in this case (like other regional Wage and Hour officials), does not stand in the shoes of the Administrator and has not been delegated the

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21 *See* 29 C.F.R. § 8.1(b) ("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, and from decisions of Administrative Law Judges under subparts B, D, and E of part 6 of this title, arising under the Service Contract Act and the Contract Work Hours and Safety Standards Act where the contract is also subject to the Service Contract Act.").

22 Administrator's Motion to Dismiss at 7.

23 *See* Petitioners' Response to Show Cause Order at 2.

24 Administrator's Response at 2-3.

25 *See* Petitioner's Petition of Review at 1; Exhibit Tab X at 204.

authority to issue final decisions in conformance actions."[26] Thus, the Administrator argues that there has been no final decision by the Administrator complying with 29 C.F.R. § 4.56(a), which provides:

> (1) Any interested party affected by a wage determination . . . may request review and reconsideration by the Administrator. A request for review and reconsideration may be made by the contracting agency or other interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Any such request must be accompanied by supporting evidence. . . .
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> (2) The Administrator shall, upon receipt of a request for reconsideration, review the data sources relied upon as a basis for the wage determination, the evidence furnished by the party requesting review or reconsideration, and, if necessary to resolve the matter, any additional information found to be relevant to determining prevailing wage rates and fringe benefits in a particular locality. The Administrator, pursuant to a review of available information, may issue a new wage determination, may cause the wage determination to be revised, or may affirm the wage determination issued, and will notify the requesting party in writing of the action taken. 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 that additional time is necessary.[[27]]

The Petitioners claim that the Administrator's Motion to Dismiss "does not provide an accurate representation of what has occurred thus far in this matter."[28] Indeed, the Administrator's Motion to Dismiss failed to adequately discuss material communications between the Petitioners and the Department of Labor. Specifically, the Motion to Dismiss discusses the August 23, 2006 letter and the September 29 response from Bates, but barely mentions the September 12, 2006 letter from the Petitioners' attorney which requested further administrative review of the wage classification. This letter stated:

> I received your August 23, 2006 correspondence regarding the denial of the changes requested to the classifications involving BMETs, based on an investigation by the Region. However, your

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26 *See* Administrator's Motion to Dismiss at 8.

27 29 C.F.R. § 4.56(a)(1)-(2).

28 *See* Petitioners' Response to Show Cause Order at 7.

> letter does not specify how further review is obtained through the Department of Labor (DOL). Given our discussions previously, when we discussed the hybrid nature of this matter and the fact that further review could be sought, we are asking that you please provide us with a notice of our options for review by the DOL. It is not clear from your correspondence what the next steps are for further review in this matter.
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> From my initial review of the regulations, it appears that the decision in this case should proceed to the Wage and Hour Administrator in Washington, D.C. for a final decision and then to further review, if necessary, in accord with 29 C.F.R. Part 8, Subpart C, as it appears to involve a review of other proceedings and related matters.
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> [W]e will be seeking review from the Wage and Hour Administrator to reconsider this matter.[29]

Bates's September 29, 2006 response letter failed to outline the Department of Labor instructions on further review. This is not the first time the Board has received premature appeals from parties confronted by poor communication from the Wage and Hour Division.

For example, in *Diversified Collection Servs., Inc.*,[30] the Board refused to grant the Administrator's Motion to Dismiss and proceeded with the appeal where the response from the Wage and Hour Division was taken to be a final decision. In that case the petitioners filed a request seeking "review and reconsideration" of the wage determination to the Acting Administrator. The Acting Administrator delegated the matter to Nila Stovall who denied the request as untimely. The Board wrote:

> We are troubled by the Acting Administrator's handling of this matter. DCS' original December 9, 1997 letter specifically requested "review and reconsideration" of Wage Determination 97-0364. That phrase is a term of art, contained in 29 C.F.R. § 4.56(a). Paragraph (b) of that section provides for appeal to this Board from "[a]ny decision of the Administrator under paragraph (a)."
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> The request for review and reconsideration was addressed directly to the Acting Administrator. The Acting Administrator apparently delegated the matter to Ms. Stovall for action. *See* Stovall decision ("This is in response to your review and reconsideration request . . . . You have requested review and

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29 Exhibit Tab W at 202-03.

30 ARB No. 98-062 (May 8, 1998).

> reconsideration of Wage Determination (WD) 97-0364, issued September 24, 1997."). The Stovall decision's rejection of DCS' request for review and reconsideration as untimely is clear and unambiguous, without any suggestion that further review within the Wage and Hour Division is either available or required. We find it unsurprising that DCS would view the Stovall decision as a "decision of the Administrator" for purposes of 29 C.F.R. § 4.56(b). The only practical difference between the Stovall decision and the Sellers decision is that Ms. Stovall acts with the apparent authority of the Acting Administrator, while Ms. Sellers claims explicit authority.
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> In this case, the Acting Administrator's assertion that the Stovall decision was "not a final decision of the Administrator" . . . merely has served to delay the proceeding, and unfairly has forced the petitioning party to file additional papers with this Board. If the Acting Administrator intends to create multiple levels of review within the Wage and Hour Division prior to issuing a "final" decision, it would be prudent to acknowledge such levels of review clearly so that the parties and this Board will be able to distinguish a preliminary decision from a final decision. Otherwise, the Acting Administrator runs the risk in future appeals that the parties and this Board will accept the apparent finality of correspondences like the Stovall decision at face value, and regard them as final and appealable under 29 C.F.R. § 4.56(b).[31]

As in *Diversified Collection Servs., Inc.*, the Petitioners here received a letter from a Wage and Hour Division staff member who was assigned to investigate the wage classification. A fair reading of Bates's September 29 response letter, like the response in *Diversified Collection Servs, Inc.*, might lead the Petitioners to believe that the Bates letter was a final decision: "[t]he regulations, 29 C.F.R. Part 8, do not provide for any further administrative appeal of this no violation finding."[32] In this case, however, the correspondence of April 19, 2006, plainly indicated that Bates was a "Wage Hour Regional Wage Specialist" – a fact which the Petitioners acknowledge in the title of the addressee in the September 12, 2006 letter. Moreover, in their September 12 letter to Bates responding to his August 23 decision, the Petitioners acknowledge that they "will be seeking review from the Wage and Hour Administrator to reconsider this matter."[33] There is no indication that the Petitioners considered

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31 *Diversified Collection Servs., Inc.*, ARB No. 98-062, slip op. at 2 (ARB May 8, 1998).

32 Exhibit Tab X at 204.

33 Exhibit Tab W at 202-03.

Bates as the authorized representative of the Administrator or that the August 23, 2006 "no violation" letter was a final ruling.[34]

Furthermore, in *Swetman Security Serv. Inc.*, the Board considered a similar situation in which a letter by Nila Stovall was taken by the petitioners in that case to be a final decision by the Administrator.[35] In response to a letter from a party questioning a wage determination, Stovall replied, "Based on our review of the submission of all interested parties in conforming the requested classifications, we determined that the corresponding wage rates appear to be reasonable. Therefore, the conformed wage rate . . . is hereby reaffirmed."[36] On appeal of Stovall's decision, the Board commented on the failure of the Wage and Hour Division to properly instruct the parties on obtaining further administrative review of the wage determinations. Despite this shortcoming, the Board granted the Administrator's Motion to Dismiss where the petitioners were not appealing a final decision by the Administrator.

The facts of this case are analogous to *Swetman Security Serv. Inc.* The Bates letter from the Wage and Hour Division in response to requests for reconsideration might appear to be a final decision, but appearance does not meet the mark. Furthermore, the failure to list further administrative procedures for review of the wage determination did not make the response the Administrator's final decision. In *Swetman Security Serv. Inc.*, the Board commented that the Wage and Hour Division should have indicated in all of its intermediary investigations and correspondence the general procedure for further administrative review, but the absence of such instruction did not make the decision a final decision by the Administrator. Bates's September 29, 2006 statement indicating "[t]he regulations, 29 C.F.R. Part 8, do not provide for any further administrative appeal of this no violation finding" does suggest the finality of his investigation, but as stated above, the Petitioners knew they were not dealing with the Administrator or authorized representative of the Administrator. Therefore, as in *Swetman Security Serv. Inc.*, the Wage and Hour Division's failure to offer better instructions detailing methods for further administrative review does not convert an intermediary investigation into a final decision.

Since the Administrator has not issued a final decision pursuant to 29 C.F.R. § 4.56 and Bates's "no violation" letter was not a final decision by the Administrator, authorized representative or an Administrative Law Judge, the Board does not have jurisdiction to consider the Petitioners' appeal at this time under 29 C.F.R. § 8.1(b). However, as we noted in *Flightsafety Servs. Corp*. and reiterate here:

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[34] Early instructions from William Gross on December 2, 2005, informed the Petitioners that the "final ruling of the Administrator may be appealed to the Administrative Review Board in accordance with the procedures spelled out in the final ruling." Exhibit Tab J at 93. The fact that Bates's letter did not indicate further directions for administrative review suggested that his "no violation" finding was not a final ruling by the Administrator.

[35] ARB No. 98-105 (July 23, 1998).

[36] *Swetman.*, slip op. at 2.

> 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.[37]

The Administrator's Motion to Dismiss indicates that "[t]he Administrator will treat the Petition as a request for a final ruling and will issue a final decision in accordance with the SCA and the conformance regulations."[38] The Administrator further states in his Response to Order, "It is anticipated that a final ruling will be issued by the Administrator as soon as possible."[39] Since the case is pending before the Administrator for a final decision, it is not ripe for review pursuant to 29 C.F.R. § 8.1(b).

Accordingly, we **GRANT** the Administrator's Motion to Dismiss without prejudice and **REMAND** the case to the Administrator for further consideration.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

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37 ARB No. 03-009, slip op. at 4 (ARB Jan. 27, 2003).

38 *See* Administrator's Motion to Dismiss at 11.

39 Administrator's Response to Order at 3. We note that pursuant to 29 C.F.R. 4.56(a), "The Administrator will render a decision within 30 days of the receipt of the request or will notify the requesting party in writing within 30 days of the receipt that additional time is necessary." Thus, in accordance with this regulation, the Administrator will either issue a decision within 30 days of this decision or notify the Petitioners, in writing, that additional time is necessary.