U.S. Department of Labor

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

In the Matter of:

RONALD R. BRADBURY **ARB CASE NO. 01-100**

Dispute concerning the payment of prevailing wage rates by RLH Flooring and TLT Construction Corporation on a United States Navy construction project for the improvement of naval facilities in Rhode Island

DATE: November 9, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:
Charles. S. Kirwan, Esq., *Charles S. Kirwan & Associates, Pawtucket, Rhode Island*

For the Respondent:
Barbara E. Racine, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

ORDER DISMISSING PETITION FOR REVIEW

During 1998 and 1999, petitioner Ronald R. Bradbury performed construction work for Dick Hudson d/b/a RLH Flooring, a subcontractor on a Navy construction project in Rhode Island. The prime contractor on the project was TLT Construction Corporation. RLH Flooring was dismissed from the project sometime around February 1999, and Bradbury subsequently worked directly for the prime contractor, TLT Construction. The project was subject to the prevailing wage requirements of the Davis-Bacon Act, 40 U.S.C.A. §276a (West 1986).

Bradbury asserts that he was paid less than the prevailing wage rate specified in the Davis-Bacon wage determination applicable to the project, and therefore is owed back wages. Around June 1999 Bradbury notified TLT Construction that he was filing a claim against the company's payment bond under the Miller Act, 40 U.S.C.A. §270a (West 1986), seeking to recoup the wage

underpayment. Bradbury subsequently filed a lawsuit under the Miller Act against TLT Construction, Richard Hudson[1/] and Reliance Insurance Company.

Before the district court, TLT Construction filed a motion to dismiss the lawsuit pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Bradbury had failed to state a claim upon which relief could be granted. The court denied the motion to dismiss in a decision issued in March 2001; however, the court also found that before Bradbury can recover under the Miller Act payment bond, he first must secure an administrative determination by the Labor Department of the amount of back wages, if any, he is owed under the Davis-Bacon Act. *United States ex rel. Bradbury v. TLT Construction Corp.*, 138 F. Supp. 2d 237, 245 (D.R.I. 2001). The court subsequently granted Bradbury's motion to stay the court proceedings until December 3, 2001, so that the Labor Department "may make the requisite administrative findings pursuant to the Davis-Bacon Act." *United States ex rel. Bradbury v. TLT Construction Corp.*, C.A. No. 00-025(1) (June 13, 2001).

Acting on the court's directive, Bradbury apparently contacted the Wage and Hour Division in order to obtain a determination of the amount of the alleged wage underpayment. In a letter dated July 23, 2001, a District Director of the Division wrote to Bradbury stating:

> [A]n investigation was initiated and it was discovered that RLH Flooring is no longer in business. Investigator Cowan then conferred with Kenneth Tarbell, Executive Vice-President, TLT Construction, Inc., the Prime Contractor. Mr. Cowan's investigation disclosed that sufficient evidence could not be obtained to sustain your client's allegation that he was paid in violation of the prevailing wage provisions of the DBRA.
>
> Consequently, I regret that no further action can be taken on your client's behalf.

After receiving this letter, Bradbury petitioned the Board for review, invoking the 29 C.F.R. Part 7 (2000) regulations governing Davis-Bacon Act appeals. In his petition, Bradbury stated that he consented to his appeal being decided by a single member of the Board, as authorized by 29 C.F.R. §7.9(b).

The Acting Administrator submitted a motion asking the Board to dismiss Bradbury's Petition for Review without prejudice, stating that the matter was not ripe for review by the Board because the Wage and Hour Division has not issued a final order in this matter, citing 29 C.F.R. §7.9(a). In addition, the Acting Administrator declared that no request has been made to the Administrator for a ruling pursuant to 29 C.F.R. § 5.13. The Board responded to the motion by issuing a notice to show cause why the petition should not be dismissed. Bradbury submitted objections to the Acting Administrator's motion. A conference call was held with counsel for both parties on November 6, 2001.

[1/] Hudson is now deceased.

DISCUSSION

The Davis-Bacon regulations at 29 C.F.R. Part 7 Subpart C ("Review of Other Proceedings and Related Matters") provide that "[a]ny party or aggrieved person shall have a right to file a petition for review with the Board . . . within a reasonable time from any *final decision* in any agency action under part 1, 3, or 5 of this subtitle." 29 C.F.R. §7.9(a) (emphasis added). Final agency decisions ordinarily are issued by the Administrator or her authorized representative. 29 C.F.R. §§5.2(b), 5.13. In practice, these 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. *See, e.g.*, *City of Lansing*, ARB No. 01-099 (Oct. 31, 2001); *H.K. Griffith, Inc.*, ARB No. 97-098 (July 25, 1997); *Thyssen Security Elevator*, ARB No. 99-113 (Oct. 29, 1999); *Moody's of Dayton, Inc.*, WAB No. 94-14 (Aug. 26, 1994). The letter from the Division's District Director is not a final agency decision; accordingly, Bradbury's petition is **DISMISSED** without prejudice.

Through counsel, the Acting Administrator has expressed a willingness to entertain a request from Bradbury to review the District Director's July 23 decision, and has committed to providing Bradbury with a final agency decision. It is clear from Bradbury's petition to this Board that he is seeking such a reexamination and final decision from the Acting Administrator, inasmuch as the district court proceeding has been stayed pending precisely such a decision. Accordingly, the Acting Administrator is directed to consider expeditiously Bradbury's request to review the District Director's decision and to issue a final agency decision in this matter as soon as possible.

SO ORDERED.

PAUL GREENBERG
Chair