



In the Matter of:

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

ARB CASE NO. 06-008

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 In a recently decided case involving the same parties and issue, we held 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.⁴ Accordingly, we conclude that we must dismiss Local #50's petition for review.

BACKGROUND

On August 30, 2005, Local #50 filed a request for a substantial variance hearing.⁵ The Wage and Hour Division received the request on August 31, 2005. Wage and Hour did not respond to the request by denying, granting or advising of a need for additional time within 30 days as provided by the regulations.⁶ On October 17, 2005, Local #50 filed Petitioner's Motion for Summary Judgment with the Board.⁷ 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. 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."⁸ Therefore, Local #50 requests the Board to

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)(2005).

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 *United Gov't Security Officers, Local # 50*, ARB 05-157 (Dec. 29, 2005).

⁵ For an overview of the SCA's wage determination and substantial variance hearing procedures see *United Gov't Security Officers, Local # 50*, ARB 05-157, slip op. at 2-4.

⁶ 29 C.F.R. § 4.10(b)(2).

⁷ Local #50 filed a corrected copy of the Motion for Summary Judgment with the Board on October 24, 2005.

⁸ Petitioner's Motion for Summary Judgment (Pet. Mot.) at 5.

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.[⁹]

In response to Local #50's motion, the Board ordered the Deputy Administrator to show cause why the Board should not grant it. The Deputy Administrator avers that on October 25, 2005, he informed Local #50 that in response to the union's July 29 and August 30, 2005 requests for a substantial variance hearing that Wage and Hour "is proceeding with the necessary action to facilitate a hearing in accordance with the provisions set forth in the Regulations at 29 CFR Part 4.10."¹⁰ The Deputy Administrator states that Wage and Hour has treated Wage Determination No. 94-2079, which was the subject of Local #50's appeal in ARB No. 05-157, and Wage Determination Nos. 94-2081 and 94-2083, the subjects of this appeal as a single request for a substantial variance hearing, since the data provided and the basis for the requests are "virtually the same for the three Wage Determinations."¹¹ Further, "[i]t has taken some additional time to prepare and finalize the Order of reference in this case, due to the large volume of materials submitted by Local 50."¹² In any event the Deputy Administrator transferred the Order of Reference and a large number of attachments to the Office of Administrative Law Judges for a substantial variance hearing, as Local 50 requested, on November 7, 2005.¹³ Since the matter has been referred for a hearing and for the reasons upon which the Deputy Administrator relied for opposing Local # 50's summary judgment motion in ARB No. 05-157, the Deputy Administrator urges the Board to deny Local #50's request for summary judgment.

Local #50 filed a rebuttal to the Deputy Administrator's response arguing essentially that the Deputy Administrator's October 25, 2005 letter and November 7, 2005 referral are too little and too late and that it too relies on the arguments it raised in

⁹ Pet. Mot. at 7-8.

¹⁰ Response of the Deputy Administrator to the Administrative Review Board's Order to Show Cause at 2 (D. A. Resp.).

¹¹ *Id.*

¹² *Id.* at 2-3.

¹³ *Id.* at 2.

support of its appeal in ARB No. 05-157. In the alternative, Local #50 requests that if the Board holds that it does not have authority to consider the appeal at this time, we “reserve jurisdiction over the matter until completion of the ALJ’s variance proceedings.”¹⁴

DISCUSSION

In ARB No. 05-157, we held that we did not have authority to grant summary judgment as Local #50 requested.¹⁵ As we determined:

The Secretary’s delegation of authority to act is limited: the Board may review final judgments of the Administrator and ALJs. Admittedly there has been no such final order in this case. Furthermore, the plain language of the statute¹⁶ and its interpretive regulations, which we are bound to uphold, 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.¹⁷

Thus, in accordance with our decision in ARB 05-157, we **DISMISS** Local #50’s petition for review in this case. Furthermore, we **DENY** Local #50’s motion that we maintain jurisdiction of this case pending the substantial variance hearing. If at the conclusion of the hearing, Local #50 is dissatisfied with the ALJ’s decision, it may file a new petition for review as provided in 29 C.F.R. §§ 6.57, 8.7(b).

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

¹⁴ Petitioner’s Memorandum in Reply to the Response of the Administrator at 3-4.

¹⁵ *United Gov’t Security Officers, Local # 50*, ARB 05-157, slip op. at 7-8.

¹⁶ 41 U.S.C.A. § 353(c) (West 1994).

¹⁷ *United Gov’t Security Officers, Local # 50*, ARB 05-157, slip op. at 7 (citations omitted).