U.S. Department of Labor

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In the Matter of

C & M FRUIT GROWERS
Plaintiff

v.

EMPLOYMENT AND TRAINING ADMINISTRATION,
U.S. DEPARTMENT OF LABOR
Defendant

CASE NO. 82-WPA-17

DECISION AND ORDER

This is a proceeding filed under Section 12 of the Wagner-Peyser Act, 29 U.S.C. §349k, and the regulations set forth at 20 C.F.R. §654.400 et seq.

C & M Fruit Growers requested a permanent structural variance from the housing standards set forth at 20 C.F.R. §§654.412(b) and 654.407(h). Thereafter, the Regional Administrator of the Employment and Training Administration, U.S. Department of Labor, issued his decision granting the request as to §654.412 and denying the request as to §654.407(h). C & M Fruit Growers then requested a hearing pursuant to 20 C.F.R. §654.402(d). 1/

C & M Fruit Growers, the plaintiff herein, challenges the denial of his variance request with respect to §654.407(h). 2/

1/ By order dated October 4, 1982, the Judge indicated that the issues can be resolved on the basis of the written record and an evidentiary hearing is not required. The parties were given 20 days from the date of the order to indicate contrary views. No pleadings were filed and hence, as stated in the October 4, 1982 order, this matter will be decided on the basis of the written record and without an evidentiary hearing.

2/ Section 654.407(h) provides that: "Each habitable room (not including partitioned areas) shall have at least one window or skylight opening directly to the out-of-doors. The minimum total window or skylight area, including windows indoors, shall equal at least 10 percent of the usable floor area. The total openable area shall equal at least 45 percent of the minimum window or skylight area required, except where comparably adequate ventilation is supplied by mechanical or some other method."

To qualify for a permanent structural variance, the employer must:

> (1) Show that the variance is necessary to obtain a beneficial use of an existing facility and to prevent a practical difficulty or unnecessary hardship; and
>
> (2) set forth the specific alternative measures which the employer has taken to protect the health and safety of workers and adequately show that such alternative measures have achieved the same result as the standards from which the employer seeks a variance (§654.402(a)).

The plaintiff in this matter seeks an exemption from the provisions of §654.407(h) for housing which presently fails to comply the housing standards in the regulation because the housing in question has a shortage of 4.2 square feet of window space in a room with 144 square feet of floor. The plaintiff states that the room is well lit and ventilated and that correction would be costly and difficult.

The record, however, does not contain any facts to support the plaintiff's assertion that correction of window space shortage would be costly and difficult. The plaintiff alleges that the room is well lit but fails to specify the source of the light or its output or intensity. Similarly, the record contains no facts which would support the plaintiff's allegation that the rooms are well ventilated. In a room with 144 square feet, the regulation requires 14.4 square of window area. The room in question in the plantiff's housing contains only 9.8 square feet which is only 68 percent of the requirement. It is reasonable to assume that a 32 percent reduction in window area will result in a measurable reduction in ventilation and light. Since the plaintiff has presented no facts to the contrary, I cannot accept its unsupported assertions that the room is well lit and ventilated.

The regulation requires the plaintiff to show that the same result has been achieved by alternate means but also that the variance is necessary "to prevent a practical difficulty or unnecessary hardship." The plaintiff's submission does not recite facts which substantiate the claim that compliance with the regulation would be unduly burdensome or impracticable.

The plaintiff has the burden of proving the essential elements of his case and an applicant for a waiver from a regulation "has the burden of convincing the agency that it

should depart from the general rules and of demonstrating to the reviewing court that the agency's reasons for refusing to do so were so insubstantial as to amount to an abuse of discretion." Ashland Exploration v. Federal Energy Regulatory Commission, 631 F.2d 817 (D.C. Cir. 1980)

As detailed above, the plaintiff has not sustained his burden of proof and accordingly is not entitled to prevail, notwithstanding the fact that the Regional Administrator's denial was in conclusory form and the defendant did not make a separate evidentiary presentation.

Accordingly, the Regional Administrator's decision is affirmed and this appeal is hereby dismissed.

William H. Dapper

WILLIAM H. DAPPER
Administrative Law Judge

Dated: NOV 29 1982
Washington, D.C.

SERVICE SHEET

CASE NAME: C & M Fruit Growers

CASE NO.: 82-WPA-17

TITLE OF DOCUMENT: DECISION AND ORDER

A copy of the above document was sent to the following parties on NOV 29 1982.

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