



In the Matter of:

KELLY RIGGERS,

ARB CASE NO. 99-006

COMPLAINANT,

ALJ CASE NO. 98-MIS-1

v.

DATE: October 13, 2000

ARGUS SYSTEMS, INC.,

and

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

RESPONDENTS.^{1/}

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

C. Mark Casey, Esq., Mullin, Cronin, Casey & Blair, P.S. Spokane, Washington

For the Administrator:

Mary J. Rieser, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., U.S. Department of Labor, Washington, D.C.

For the Intervenor:

C. Diane Truman, Command Labor Advisor, Department of the Navy, Washington, D.C.

DECISION AND ORDER

This matter arises under Executive Order No. 12,933, 59 Fed. Reg. 53,559 (1994) ("Executive Order" or "E.O."). In certain circumstances, the Executive Order requires that when a federal agency changes service contractors at "public buildings," the new contractor must offer a right of first refusal to workers who previously worked at the installation for the predecessor

^{1/} This case has been recaptioned to identify the employer as the primary respondent.

contractor. “Military installations” are explicitly excluded from the Executive Order’s definition of a “public building” and therefore its protections. Kelly Riggers filed a complaint that Argus Systems, Inc. (Argus) failed to comply with the Executive Order when it did not offer employees of the previous contractor at the Department of the Navy’s Acoustic Research Detachment (ARD)^{2/} the right of first refusal to employment under Argus’ follow-on contract. The Department of Labor’s Wage and Hour Division conducted an investigation and determined that the Executive Order did not apply to Argus’ contract because the ARD is a military installation. The issue before the Board is whether the ARD is a military installation within the terms of the Executive Order. We AFFIRM the determination of the Division.

BACKGROUND

Executive Order No. 12,933.

On October 20, 1994, President Clinton signed Executive Order No. 12,933, “Nondisplacement of Qualified Workers Under Certain Contracts.” The Executive Order requires

that solicitations and building service contracts for public buildings shall include a clause that requires the contractor under a contract that succeeds a contract for performance of similar services at the same public building to offer those employees (other than managerial or supervisory employees) under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal to employment under the contract in positions for which they are qualified.

Exec. Order No. 12,933 §1, 59 Fed. Reg. 53,559. The purpose of the Executive Order is to prevent hardships to individuals who would otherwise have been displaced when a follow-on contractor hires a new work force to perform the contract. *Id.*

The Executive Order excludes from the definition of a “public building” any Government-owned building “on military installations (including any fort, camp, post, naval training station, airfield, proving ground, military supply depot, military school, or any similar facility of the Department of Defense).” Exec. Order No. 12,933 §2(a)(H).

^{2/} The site where the contract was to be performed, which is located in Bayview, Idaho, has also been called the Acoustic Trials Detachment.

Factual Background.^{3/}

Prior to May 1997, guard services at the ARD were provided by the Watson Agency, Riggers' employer. On April 16, 1997, the Naval Surface Warfare Center, Carderock Division awarded Argus a contract to provide unarmed guard services at the ARD. The contract period of performance was May 1, 1997, through April 30, 1998. Argus did not offer a right of first refusal to the guards who previously worked for the Watson Agency, including Riggers.

The ARD is within the Naval Surface Warfare Center, under the Naval Sea Systems Command. It is located on twenty-two acres of land owned and controlled by the U.S. Department of Defense, Department of the Navy. The Navy also leases additional property, at another location, from the U.S. Forest Service. The ARD is the Navy's premier laboratory for the demonstration of submarine stealth technology.

Procedural Background.

On May 22, 1997, Riggers wrote to the local Wage and Hour Division (Division) office complaining that Argus had not offered the right of first refusal to employees of the Watson Agency. As noted above, military installations are not covered by the Executive Order. To bring his complaint under the Executive Order, Riggers claimed that instead of a military installation, the ARD was actually a Defense research facility as defined in 10 U.S.C. §2364^{4/} or a Federal laboratory as defined in 10 U.S.C. §2491.^{5/} He also claimed that the ARD was not a military installation because its personnel were predominately civilian with only one Navy officer and it had no weapons, armaments or combat capability. A Division Investigator advised Riggers, by letter dated October 8, 1997, that the Executive Order did not apply to the ARD because it was included within the phrase "or any similar facility of the Department of Defense" contained in the Executive Order's definition of a military installation.

Later, in a letter dated December 16, 1997, a designee of the Administrator wrote: "the Acoustic Research Detachment is a military installation, and not a 'public building,' within the meaning of the Public Buildings Act, and thus, the Executive Order would not have application

^{3/} These facts are based upon the Statement of Facts contained in the Statement of the Acting Administrator in Opposition to Petition for Review which was accepted and incorporated into the Statement of Complainant in Support of Petition for Review.

^{4/} "The term 'Defense research facility' means a Department of Defense facility which performs or contracts for the performance of—(A) basic research; or (B) applied research known as exploratory development." 10 U.S.C. §2364(c)(1) (1994).

^{5/} "The terms 'Federal laboratory' and 'laboratory' have the meanings given the term 'laboratory' in . . . 15 U.S.C. 3710a(d)(2)." 10 U.S.C. §2491(5) (1994) (renumbered as 10 U.S.C. §2500(5) by Pub. L. 105-85, Div. A, Title III, §371(c)(4), 111 Stat. 1705 (1997)).

in this instance.” She pointed to the fact that the definition of the term “public building” included in the Executive Order was patterned after the definition of public building in section 13 of the Public Buildings Act of 1959^{6/} which had a similar exclusion for military installations.

Riggers disputed the December 16 determination and requested a hearing. Without holding a hearing an ALJ remanded the case to the Division because the December 16 letter was not a final determination issued after an investigation as required by the regulations.^{7/}

After conducting an investigation a designee of the Administrator again advised Riggers that the ARD is “a ‘military installation’ or ‘similar facility of the Department of Defense,’ expressly excluded from coverage under Executive Order 12933.” She reached this conclusion based on the following facts:

[The ARD] is a facility within the Naval Surface Warfare Center, under the Naval Sea Systems Command. The facility provides research, development, testing and evaluation of projects, including submarine stealth technology. The installation is owned and controlled by the U.S. Department of Defense, Department of the Navy, under the direction of a commanding officer.

Riggers was advised to request a formal hearing “[i]f you disagree with the factual findings or believe there are facts in dispute.”

Riggers directed his hearing request to the Chief Administrative Law Judge who referred it to the Division to determine whether there was any relevant issue of fact. Because Riggers had not identified any relevant fact in dispute the Division advised Riggers to file an appeal directly with this Board. *See* 29 C.F.R. §9.103(b) (2000).

STANDARD OF REVIEW

The Administrative Review Board has the authority “to hear and decide in its discretion appeals concerning questions of law and fact from determinations of the Administrator.” 29

^{6/} “The term ‘public building’ means any building . . . which is generally suitable for office or storage space or both for the use of one or more Federal agencies . . . but shall not include any such building and construction projects: . . . (G) on military installations (including any fort, camp, post, naval training station, airfield, proving ground, military supply depot, military school, or any similar facility of the Department of Defense).” Pub. L. 86-249, §13(1), 73 Stat. 479, 482 (1959), codified at 40 U.S.C. §612(a) (1994).

^{7/} “Upon completion of the investigation, the Administrator shall issue a written determination of whether a violation has occurred which contain [sic] a statement of findings and conclusions.” 29 C.F.R. §9.102(c) (2000).

C.F.R. §9.107(a); *see also* Secretary's Order No. 2-96, 61 Fed. Reg. 19,978 (May 3, 1996). In reviewing the Administrator's decision the Board acts "as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary" in matters under its jurisdiction. 29 C.F.R. §9.107(g). Accordingly, the Board is not bound by either the Administrator's findings or his conclusions of law, but reviews both *de novo*.

ISSUE

Whether the Acoustic Research Detachment in Bayview, Idaho, is a military installation and therefore not covered by Executive Order No. 12,933.

DISCUSSION

Riggers disputes the Division's determination that the ARD is a military installation and makes several arguments in support of his claim that the Executive Order applies to the ARD. These arguments seek to distinguish the ARD from the other facilities enumerated in the Executive Order's list of military installations. However, Riggers' arguments are unsuccessful for several reasons.

As noted above, Riggers' May 22 complaint argues that the ARD is not a "military installation" as defined in the Executive Order but is actually a Defense research facility or a Federal laboratory. This argument fails because it incorrectly assumes that the ARD cannot be both a Defense research facility or laboratory and a military installation.

Riggers also argues that the ARD is not a military installation because it has no traditional military capability such as weapons or the ability to provide support for combat operations. But these factors cannot be the *sine qua non* of a military installation. For example, under the Executive Order a military school is a "military installation" yet military schools such as the Naval Academy or the Army War College do not possess traditional military capability.

Finally, Riggers offers two arguments which try to bring the ARD within the Executive Order's broad definition of a "public building" as "any Government-owned building . . . which is generally suitable for office or storage space or both." First, Riggers claims that the ARD is used for research, storage, warehousing and office space and, therefore, is a public building as defined in §§2(a)(5) and (6) of the Executive Order.^{8/} This argument is flawed because it overlooks the plain language of the Executive Order which states that the term "public building" "shall not include any such buildings . . . on military installations (including any fort, camp, post, naval training station, airfield, proving ground, military supply depot, military school, or any

^{8/} "Public building" . . . shall include the following: . . . (5) warehouses; (6) records centers."

similar facility of the Department of Defense).” Exec. Order No. 12,933 §2(a)(H) (emphasis added).

Riggers then argues by analogy that, because the Pentagon, which is expressly excluded from the definition of a “military installation” contained in the Division’s implementing regulations,^{9/} shares some attributes with the ARD, *e.g.*, both are large facilities which contain office and storage space, the ARD similarly should be excluded from the definition of term “military installation.” However, this argument overlooks the fact that the Division’s regulations do not apply to the contract at issue in this appeal which was awarded prior to the regulations’ effective date.^{10/} Assuming *arguendo* that the implementing regulations did apply to this contract the Division has provided a reasonable explanation for treating the Pentagon as a “public building” covered by the Executive Order.^{11/}

The essence of the Administrator’s position is that the ARD is a military installation because it is owned and controlled by the Department of Defense and is operated by the Department of the Navy for the military purpose of developing, testing and evaluating submarine stealth technology. Statement of the Acting Administrator in Opposition to the Petition for Review at 15. We do not in this decision purport to define the limits of the “military installation” exemption in the Executive Order; however, based upon the record in this case, it is our conclusion that the ARD is a “military installation,” and therefore outside the coverage of the Executive Order’s protections.

CONCLUSION

^{9/} “[M]ilitary installations (including any fort, camp, post, naval training station, airfield, proving ground, military supply depot, military school, or any similar facility of the Department of Defense, but not including the Pentagon).” 29 C. F. R. §9. 4(b)(2)(vii) (2000).

^{10/} On May 22, 1997, the Division published its final regulations to implement the Executive Order. 62 Fed. Reg. 28,176. These regulations became effective July 21, 1997. *Id.* The regulations applied to all contracts awarded after the effective date and to all contracts previously awarded which contained the contract clauses set forth in §4 of the Executive Order. 62 Fed. Reg. 28,184. The contract at issue in this case was awarded prior to the effective date of the regulations and did not contain the clauses from §4 of the Executive Order.

^{11/} As the Division explained in the preamble to its final regulations: “Originally, the Pentagon was considered a ‘public building’ within the scope of the Public Buildings Act (not an exempt ‘military installation’). Subsequently, section 2804 of the National Defense Authorization for FY 1991 (10 U.S.C. §2674) removed the Pentagon from GSA’s authority under the Public Buildings Act; however, that legislation did not change the Public Buildings Act’s definition of a public building.” 62 Fed. Reg. 28,176; 28,177 (1997). Although the Pentagon is under military authority it remains a “public building” within the meaning of the Public Buildings Act and therefore “a ‘public building’ within the meaning of the Executive Order.” *Id.*

We AFFIRM the Division's determination that the Department of Navy's Acoustic Research Detachment is a military installation within the meaning of Executive Order No. 12,933, and thus the facilities herein at issue are not covered by the Executive Order.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

I concur in the result.

CYNTHIA L. ATTWOOD
Member