



In the Matter of:

**DIVERSIFIED COLLECTION
SERVICES, INC.**

ARB CASE NO. 98-062

DATE: May 8, 1998

***In re* request for review and
reconsideration of Wage Determination
No. 97-0364**

ORDER

On January 7, 1998, Diversified Collection Services, Inc. (DCS) filed an appeal with this Board seeking review of a decision issued December 18, 1997, by Nila Stovall, Chief, Branch of Service Contract Wage Determinations (the "Stovall decision"). The Stovall decision advised DCS that its September 24, 1997 Request for Review and Reconsideration of Wage Determination 97-0364 was untimely.

On January 21, 1998, the Administrative Review Board issued a Notice of Appeal and Order Establishing Briefing Schedule, in which the Wage and Hour Administrator was ordered to file the administrative record and a brief on or before February 19, 1998. Petitioner and other parties and Interested Persons were authorized to file reply briefs on or before March 22, 1998.

The Acting Administrator did not file the brief and the administrative record, as required by the Board's order. Instead, on February 13, 1998, the Acting Administrator filed a Motion to Dismiss Petition, arguing that the Stovall decision "does not purport to be and is not the final decision of the Acting Administrator in this matter." Motion at 3. The Acting Administrator stated that he "will treat [DCS'] petition as a request for a final decision, and will issue a final decision within 30 days of the date of this motion." Motion at 1. DCS opposed that motion, and the Acting Administrator replied to DCS' opposition.

On March 13, 1998, Corlis L. Sellers, National Office Program Administrator, Wage and Hour Division, sent DCS' attorney a letter (the "Sellers decision"): (a) reaffirming the Stovall decision's December 18, 1997 finding that DCS' request for review and reconsideration of Wage Determination 97-0364 was untimely; (b) notifying DCS that the March 13 letter constituted the Administrator's final ruling on the matter; and (c) informing DCS of its appeal rights pursuant to 29 C.F.R. Part 8.

On April 2, 1998, DCS filed a Notice and Protective Appeal of the Sellers decision. DCS argued that the Stovall decision in December "was unambiguously the final decision of an authorized representative of the Acting Administrator and, therefore, was properly appealed to the Board under

the Board's regulations." Notice at p. 2. DCS requested that the Board rule on its original Petition, filed in January:

Since the Acting Administrator has failed to controvert -- or, indeed, even to address -- the points made by DCS in its Petition for Review, the Board should grant DCS' petition for Review and remand this matter to the Acting Administrator with instructions to review DCS' request on its merits and issue a decision thereon within ten (10) days thereafter.

Notice at 2. In the alternative, DCS asked that its Notice be treated as a petition for review of the March 13 Sellers decision.

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)."

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 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.

In this case, the Acting Administrator's assertion that the Stovall decision was "not a final decision of the Administrator" (Motion at 1) 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).

In addition to delaying this proceeding by asserting that the Stovall decision was not "final," we note with disfavor that the Acting Administrator simply failed to comply with the timetable of the Board's January 21, 1998 Order. The Acting Administrator's failure to comply with the Board's order prompted DCS to request (in its opposition to the Motion to Dismiss, noted *supra*) that the Board proceed directly to a decision on the merits based on DCS' pleadings. We decline to take that step in this instance. Instead, we will order the Administrator to file the administrative record of this

case and a brief -- not to exceed 30 double-spaced pages -- in response to the Petition for Review on or before **May 26, 1998**.

Petitioner and all other parties and Interested Persons may file a reply brief -- not to exceed 30 double-spaced typed pages -- on or before **June 25, 1998**. All other terms of our January 21, 1998 Notice and Order shall remain in effect.

SO ORDERED.

KARL J. SANDSTROM
Chair

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Acting Member