



In the Matter of:

BALD HILL NURSERIES,  
Petitioner

Case No.: 88-JSA-4

v.

STATE OF RHODE ISLAND  
DEPARTMENT OF EMPLOYMENT  
SECURITY  
Respondent

ORDER DISMISSING APPEAL AND REQUEST FOR HEARING

Jurisdictional History and Background Facts

This action arises from an appeal by the Petitioner Bald Hill Nurseries of an Order issued by the Employment and Training Administration, U.S. Department of Labor (hereinafter "DOL"), denying Petitioner's Job Clearance Order seeking to employ fifty migrant agricultural workers from Puerto Rico to work at its nursery from March 15 to November 15, 1988. A clearance order, dated February 12, 1988, was submitted by the Petitioner to the State of Rhode Island Department of Employment Security (hereinafter "DES") and was rejected by DOL on or about March 7, 1988 on the ground that the Petitioner intended to pay said workers at an hourly rate of \$4.05 an hour rather than the prevailing rate of \$5.75 per hour. By letter dated March 18, 1988, Petitioner appealed the prevailing wage determination to the D E S Board of Appeal and a hearing was conducted on April 7, 1988 at which the Petitioner appeared and presented argument. By decision dated April 20, 1988 the Board of Appeal remanded the matter to DOL for further investigation and resolution. Subsequently, by letter dated August 18, 1988 the Regional Administrator for Employment and Training of DOL transmitted to Petitioner a "Notice of Determination" rejecting Petitioner's appeal from the determination that it was required to pay said workers the prevailing wage of \$5.75 an hour rather than the \$4.05 an hour wage it had previously negotiated with the Commonwealth of Puerto Rico. By letter dated September 13, 1988, Petitioner filed this appeal with the Office of Administrative Law Judges, citing the following reasons in support thereof:

"It is Bald Hill Nurseries' contention that the decision of the State of Rhode Island, Department of Employment Security was unsound and improper as to its determination of the prevailing wage rate to be paid nursery workers in Rhode Island. Specifically, the means by which the prevailing wage rate was determined is arbitrary and oppressive to employers such as Bald Hill Nurseries"

For many years prior to 1988, Petitioner had annually entered into agreements with the Commonwealth of Puerto Rico to transport workers to its nurseries to work in the fields and, in said agreements, had negotiated the hourly rates to be paid said workers and other conditions of employment. In each of those prior years, clearance orders were filed with the State of Rhode Island and were always approved. However, in 1988, Petitioner was informed (as noted above), by letter dated March 7, 1988 (approximately one week before the workers were to arrive) that the proposed hourly rate of \$4.05 was less than the prevailing rate of \$5.75 and that the job clearance order was not approved. The Petitioner appealed this rejection and, while the matter was under appeal, Petitioner renegotiated the contract with the Commonwealth of Puerto Rico to reduce the number of workers to thirty (30) (from the original fifty (50) workers) and to pay those 30 workers the prevailing wage of \$5.75. This renegotiated agreement was subsequently approved and was carried out by the parties according to the amended terms.

At the hearing on April 7, 1988, before the Board of Review of the Rhode Island DES, Petitioner alleged that it had not been properly informed of the requirement that the wage paid to such workers be equal to or above the prevailing wage rate and that it had negotiated such contracts for 28 Consecutive years in the past without any disapproval and had come to rely on this pattern of approval. As a result, Petitioner argued, it was unjust and inequitable to suddenly reject its job clearance order on March 1988, just one week before the 50 workers were due to arrive. Petitioner further contends that it was coerced, due to time, financial and business constraints, to take only 30 workers at the higher prevailing rate. Petitioner further argues, both at the hearing and in its request for hearing before this office, that the means by which the prevailing wage rate for nursery workers was determined was "unsound" and "improper" and was "arbitrary and oppressive to employers such as Bald Hill Nurseries."

#### Governing Statutes and Regulations

This case is governed by the Wagner-Peyser Act (29 U.S.C. §49-49K) which established an interstate employment recruitment system which is a cooperative program administered by DDL and State employment services (such as DES in Rhode Island). Section 49(c) of the Act requires states to formally accept the provisions of the Act in order to obtain federal funds for the state employment systems and the State of Rhode Island has adopted those provisions. The Secretary of Labor is also "authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter" (29 USC §49(k)).

Regulations promulgated by the Secretary relating to migrant and seasonal farm workers pursuant to the Wagner-Peyser Act are set at 20 CFR part 653.100 et seq. The requirements for the acceptance and handling of interstate job clearance orders are set forth at 20 CFR part 653.500 and 653.501. The regulation set forth at 653.501(d)(4) states:

"(d) No local office shall place a job order seeking workers to perform agricultural or food processing work into intrastate clearance unless: . . . (4) The wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended

employment or the applicable Federal or State minimum wage, which ever is higher."

Pursuant to said regulations the determination of the "prevailing wage rate" is made for each area of the country in accordance with guidelines set forth in DOL's ET Handbook NO. 385 which prescribes the frequency and duration of wage surveys and requires that "wage data should be collected often enough to promptly reflect changes in wage rates and to permit current prevailing wage rate findings to be made applicable to the employment of the agricultural workers." In the instant case, it is undisputed that the above procedures were followed, in accordance with said Handbook No. 385, and established a prevailing wage for the workers in question of \$5.75 an hour.

### Discussion and Conclusions

Petitioner's main contention, as set forth in its request for hearing is that DOL and DES used improper and unsound methods to determine the prevailing wage rate for nursery workers in its geographic area and said improper and unsound determinations were arbitrary and oppressive to the Petitioner and caused it to be damaged thereby. However, there is no assertion by the Petitioner that DOL and DES did not follow the procedures prescribed in the law and regulations in arriving at the applicable prevailing wage. It is clear that this tribunal has jurisdiction to decide only whether the law and regulations have been complied with and does not have jurisdiction to consider "The validity or constitutionality of ---[the] regulations or of the Federal statutes under which they are promulgated." See 20 CFR 658.425(a)(4). Therefore, if Petitioner's appeal is based on the allegation, (as it appears to be) that the regulations prescribing the methodology for determining the prevailing wage are "arbitrary" and "oppressive" to the Petitioner, he must seek relief in another forum (probably by way of injunctive relief in the U.S. District Court) since an Administrative Law Judge has no power to make such a determination or to grant such relief.

Assuming, arguendo, that I do have jurisdiction and authority to address this appeal, this tribunal does not have the authority to grant any remedial relief to Petitioner. Certainly, there is no basis for an action against the Federal and State Governmental Agencies for monetary damages due to overpayment of wages. Even more clearly, there is no basis for a claim by Petitioner to recover those excess wages from the 30 employees who were paid the prevailing wage by Petitioner. In this connection, see State of Maine v. U.S. Dept. of Labor, 770 F.2d 236 (1985), where the Court held that it had no power or authority to award monetary damages in a similar situation.

Another reason for dismissing this appeal is that the issues in this case have become "moot". Following the rejection of its original job clearance order for 50 workers, Petitioner amended its application and requested 30 workers instead. These 30 workers were transported to Petitioner's nurseries and worked there through November 1988. They were paid the prevailing rate of \$5.75 for their labor, the contract has now expired and the workers are no longer employed by Petitioner. See Campeños Unidos v. U.S. Dept. of Labor, 803 F.2d 1063. Petitioner also argues that the situation at issue is likely to repeat in the next growing season, i.e. March to November 1989 and that it should be entitled to some sort of prospective remedy or

relief when it seeks to hire migrant agricultural workers in 1989 and beyond. However, aside from the fact that I find no basis in the Statute, Regulations or cases for such relief, there is no evidence that the applicable prevailing wage and other employment conditions will be the same in 1989 as they were in 1988. As stated above, if the Petitioner seeks to employ such workers in 1989 and feels that the application of the law and regulations is unjustly harsh and oppressive, it should promptly seek injunctive relief in the U.S. District Court.

In summary, for all of the reasons discussed above, I conclude that I have no jurisdiction to hear this appeal and request for hearing and therefore, must dismiss this case.

ORDER

Accordingly, pursuant to the provisions of 20 C.F.R. 658.425(a)(1), I rule that there is a lack of jurisdiction over this matter and I hereby ORDER that the appeal and request for hearing be DISMISSED.

GEORGE G. PIERCE  
Administrative Law Judge

Dated: MAR 13 1989  
Boston, Massachusetts  
GGP:dr