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In the Matter of .....  
A. GOODE & SONS  
Plaintiff  
v.  
EMPLOYMENT AND TRAINING ADMINISTRATION,  
U.S. DEPARTMENT OF LABOR  
Defendant  
.....

CASE NO. 82-WPA-5

DECISION AND ORDER

This is a proceeding filed under Section 12 of the Wagner-Peyser Act, 29 U.S.C. §49k, and the regulations set forth at 20 C.F.R. §654.400 et seq.

A. Goode & Sons 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(b) and denying the request in part as to §654.407(h). A. Goode & Sons then requested a hearing pursuant to 20 C.F.R. §654.402(d). 1/

A. Goode & Sons, the plaintiff herein, challenges the denial of his variance request with respect to §654.407(h). 2/

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

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 in-doors, 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."

(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 with the housing standards in the regulation because the housing in question has a shortage of 32 square feet of window space in a room with 871 square feet of floor, and a shortage of 8 square feet of window space in a room with 204 square feet of floor.

In support of its application, the plaintiff recites the following facts. The large room has an overhead garage door which can be opened to provide 100 square feet of light and ventilation in good weather. In addition, at the request of the State Health Department, the plaintiff has installed 16 feet of fluorescent lighting to compensate for the lack of natural light. As for the smaller room, the plaintiff contends that the only means to remedy the deficiency would involve jack-hammering a hole in the concrete block wall so that an additional window could be installed.

While the plaintiff has put forward some facts which tend to show that the variance is necessary to prevent a practical difficulty or unnecessary hardship, I am not convinced that the facts show that the employer has taken alternative measures which have achieved the same result as that mandated by the regulation. In a room of 871 square feet, the regulation requires 87 square feet of window area. The plaintiff's unit contains only 55 square feet if the overhead door is excluded, thus providing only 63 percent of the light and ventilation required by the regulation. Even assuming the fluorescent lighting remedies the lighting deficiency, there remains a serious ventilation shortage. The overhead door could not be used in inclement weather and the plaintiff has not cited any other means for providing additional ventilation.

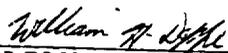
With regard to the smaller room, the regulation requires 20 square feet of window area for a room of 204 square feet. The room in question in the plaintiff's housing contains only 12.2 square feet which is approximately 60 percent of the

requirement. It is reasonable to assume that a 40 percent reduction in window area will result in a measurable reduction in ventilation and light. The plaintiff has presented no facts to the contrary and candidly admits that it seeks the variance only because of the hardship which alternation of the housing unit would create.

The plaintiff has the burden of proving the essential elements of its 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.

  
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WILLIAM H. DAPPER  
Administrative Law Judge

Dated: **JAN 19 1983**  
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Washington, D.C.

SERVICE SHEET

CASE NAME: A. Goode & Sons

CASE NO.: 82-WPA-5

TITLE OF DOCUMENT: DECISION AND ORDER

A copy of the above document was sent to the following parties

on JAN 19 1983

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