

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 14 July 2014

ALJ No. 2014-DBA-00015
WHD Complaint File No. 1674426

In the Matter of

**CLARK CONSTRUCTION;
SHIRLEY CONTRACTING COMPANY, LLC;
and
SHIRLEY CONTRACTING LLC d/b/a METROEARTHWORKS,**
Employers

With Respect to Projects at the Smithsonian National Museum of African American History and City Market at O Street,

BEFORE: **STEPHEN L. PURCELL**
Chief Administrative Law Judge

ORDER OF DISMISSAL

This matter purportedly arises under the Davis-Bacon Act (DBA), as amended (40 U.S.C. § 3141, *et seq.*) and the applicable regulations issued thereunder at 29 C.F.R. Parts 5 and 6.

On June 2, 2014, Brian Keith Smith Dubois (“Complainant” or “Dubois”) filed a document with the Office of Administrative Law Judges (“OALJ” or “Office”) dated May 29, 2014 entitled “Petition for Review and Request for Hearing/Order of Reference; Complaint File No. 1674426; National Museum of African American History and Culture in Washington, D.C. and City Market O Projects.”

This petition purports to be an appeal of a Department of Labor (“DOL”) Wage and Hour Division decision on Complaint File No. 1674426 relating to the Complainant’s allegations that the above-referenced Employers failed to pay Dubois a basic rate of pay, fringe benefits, or overtime pay in accordance with the Davis-Bacon Act, 40 U.S.C. § 3141-3148. Shirley Contracting Company (“Shirley”) and Shirley Contracting LLC d/b/a MetroEarthworks (“Shirley-Metro”) are subsidiary contractors of the primary contractor Clark Construction.

Mr. Dubois states he held several positions with Shirley and Shirley-Metro between April 2012 and August 2012 under the City Market at O Street project and between August 27, 2012 and November 13, 2012 under the National Museum of African American History (“NMAAH”)

project. According to the Complainant, the contracts to construct the Smithsonian NMAAH and City Market at O Street are partially funded by the federal government.

I issued a Notice of Docketing and Order to Show Cause on June 4, 2014 directing the parties to show cause why this matter should not be dismissed for lack of jurisdiction. On June 12, 2014, Elizabeth Lopes Beason filed a Notice of Appearance on behalf of the Administrator of the Department's Wage and Hour Division. That same date, Complainant and the Administrator filed a Joint Motion for Extension of Time to Respond to Order to Show Cause, and on June 16, 2014, I issued an Order granting the request. On July 7, 2014, Complainant, through counsel, filed a Motion for Voluntary Dismissal Without Prejudice. On July 8, 2014, Alexander J. Passatino from Seyfarth Shaw LLP noted his appearance for Clark Construction, a named employer in this case.

In my June 4, 2014 Order to Show Cause I questioned Complainant's authority to seek review by OALJ of the decision in this matter since, as the Administrative Review Board has previously noted: "The Office of Administrative Law Judges is an administrative tribunal that exercises authority *only* as defined by statute or regulation." *Entergy Services, Inc.*, ARB No. 13-025, ALJ No. 2013-OFC-1, slip op. at 3 (ARB May 19, 2014) (affirming Chief ALJ's dismissal of petition for declaratory relief filed by an employer seeking relief from OFCCP compliance review because the regulations grant only OFCCP the authority to file a complaint to initiate an OALJ proceeding) (italics added).

Davis-Bacon Act hearings are initiated before OALJ through an Order of Reference from the Administrator of the Wage and Hour Division. *See* 29 C.F.R. § 5.11. In the instant case, Dubois seeks review of the Administrator's determination, yet there has been no Order of Reference filed by the Administrator. Although Complainant broadly asserts that he has standing to bring the appeal as an "interested party employee" under 29 C.F.R. Parts 5, 6 and 7, his petition fails to cite any specific regulation which vests OALJ with jurisdiction to entertain his appeal. Instead, rather than responding specifically to the questions raised in my June 4, 2014 Order to Show Cause, Complainant simply filed a pleading captioned "Motion for Voluntary Dismissal Without Prejudice" in which he states: "Complainant, hereby, through undersigned counsel, respectfully requests voluntary dismissal of Case no. 204-DBA-00015 without prejudice."

Applicable regulations in 29 C.F.R. Parts 5 and 6, provide the sole mechanism by which matters arising under the DBA come before this Office. Specifically, the procedures contained in 29 C.F.R. Part 5 governing actions involving disputes under the DBA over prevailing wages, overtime pay or worker classification, require initiation of an enforcement action by the Administrator, either on his own motion, after referral of a dispute by a Federal agency, or at the request of a contractor or subcontractor. 29 C.F.R. 5.11. Once the Administrator completes his investigation, he notifies the affected contractor and subcontractors (if any) of his findings. 29 C.F.R. §5.11(b)(1). If a contractor or subcontractor thereafter requests a hearing on the Administrator's findings, it must notify the Administrator, and the Administrator then refers the case to OALJ. 29 C.F.R. §5.11(b)(2)-(3). If, however, it "appears that there are no relevant facts at issue, and where there is not at the time reasonable cause to institute debarment proceedings," the Administrator issues a ruling on the matter and notifies the contractor and subcontractors of

his findings. 29 C.F.R. 5.11(c)(1). If a contractor or subcontractor disagrees with the findings, it must advise the Administrator of the specific facts disputed. 29 C.F.R. 5.11(c)(2)(i). In response, the Administrator issues a second determination. 29 C.F.R. 5.11(c)(2)(ii). If he determines that there is a relevant issue of fact in dispute, the Administrator will then refer the case to OALJ for a hearing. In contrast, if the Administrator determines there is no relevant issue of fact disputed, he “shall so rule and advise the contractor and subcontractor(s) (if any) accordingly.” *Ibid.* Any contractor or subcontractor seeking further review must “file a petition for review thereof *with the Administrative Review Board* within 30 days of the ruling.” 29 C.F.R. 5.11(c)(3) (italics added).

In this case, Dubois appears to have orally filed a complaint with the Wage and Hour Division of DOL alleging that he was “not paid a basic rate of pay, fringe pay, or overtime in accordance with the Davis-Bacon Act.” Petition for Review and Request for Hearing/Order of Reference (“Pet.”) at 2. Dubois received acknowledgment of the complaint on November 14, 2012. *See* Pet. Exhibit (PX) 18. His case was assigned Complaint File No. 1674426 and a DOL investigator, Margaret Samotyj, reviewed and investigated the complaint. Pet. at 6. On or around August 2013, Dubois was informed by Samotyj that she had determined the complaint failed to establish entitlement to continued DOL action. Pet. at 7. On April 29, 2014, according to Complainant, he also received a phone call from DOL Assistant Director Christopher Silva who informed him that “Shirley and Shirley-MetroEarthworks had not violated the Davis-Bacon Act” and the Administrator’s decision was final. *Ibid.*

As noted above, OALJ “is an administrative tribunal that exercises authority *only* as defined by statute or regulation.” *Entergy Services, Inc., supra*, slip op. at 3; *see also Matthews v. Leavitt*, 452 F.3d 145, 152 (2d Cir. 2006) (“The authority of an ALJ is circumscribed by the appointing agency’s enabling statutes and its regulations.”). Under the DBA, violations are referred to this Office by the Administrator *only* after a contractor or subcontractor seeks a hearing and the Administrator determines there is a genuine dispute over an issue of fact. Dubois is neither a contractor nor subcontractor, and there has been no determination by the Administrator that there is any genuine dispute over an issue of fact requiring a referral to OALJ via an Order of Reference. Inasmuch as Complainant has failed to cite any statute or regulation which allows him to seek review by OALJ of the Administrator’s decision under the DBA, his “Petition for Review and Request for Hearing/Order of Reference; Complaint File No. 1674426; National Museum of African American History and Culture in Washington, D.C. and City Market O Projects” is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

STEPHEN L. PURCELL
Chief Administrative Law Judge