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 In the Matter of :
 :
 DAVENPORT FARMS :
 :
 Plaintiff :
 :
 v. :
 :
 EMPLOYMENT AND TRAINING ADMINISTRATION, :
 U.S. DEPARTMENT OF LABOR :
 Defendant :
 :

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 CASE NO. 82-WPA-12

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.

Davenport Farms requested a permanent structural variance from the housing standards set forth at 20 C.F.R. §654.412(b). 1/ Thereafter, the Regional Administrator of the Employment and Training Administration, U.S. Department of Labor, issued his decision denying the request as to six of the thirteen units involved. Davenport Farms then requested a hearing pursuant to 20 C.F.R. §654.402(d) to challenge the denial of its variance request. 1/

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

- (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

1/ Section 654.412(b) provides in relevant part: There shall be a minimum of one showerhead per 15 persons. Showerheads shall be spaced at least 3 feet apart, with a minimum of 9 square feet of floor space per unit.

Except in individual family units, separate shower facilities shall be provided each section.

2/ 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) 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 §654.412(b) for housing which presently fails to comply with the housing standards in the regulation because the showers in thirteen of the plaintiff's units are less than the required nine square feet. The Regional Administrator granted the request for seven units with showers which were 6.7 square feet or larger. The request was denied for two units of 5.8 square feet, one unit of 6.0 square feet and one unit of 6.2 square feet. The plaintiff states that the camp has sixteen showers, while the regulation requires no more than four, and that replacement of these units would be extremely costly and not beneficial to the camp residents.

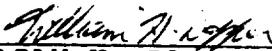
The record, however, does not contain any facts to support the plaintiff's assertions. There is no evidence in the record with respect to the cost of alteration of the units in question. More importantly, the plaintiff has presented no facts which indicate that the camp residents would not benefit from showers which complied with the regulation. Common sense compels another conclusion. The units in question are 64.4%, 66.3% and 68.9% of the size mandated by the regulation. It is reasonable to assume that reduction of 31-35% of shower space will be to the detriment of the camp residents and I cannot accept the employer's unsupported assertions to the contrary.

The employer argues that it should be exempted from the requirements of the regulation since it has sixteen showers in a camp which by regulation need only have four. The problem with this argument is that the plaintiff's showers are not common showers but are part of individual housing units. Thus, it cannot be assumed that all residents will have access to the larger showers. Under these circumstances, all showers should be in compliance even if the result is that the employer must supply more showers than required by the regulation.

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.



WILLIAM H. DAPPER
Administrative Law Judge

JAN 19 1983

Dated: _____
Washington, D.C.

SERVICE SHEET

CASE NAME: Davenport Farms

CASE NO.: 82-WPA-12

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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