



In the Matter of:

**Disputes concerning the payment of
prevailing wage rates and proper
classification by:**

ARB CASE NO. 04-070

ALJ CASE NO. 94-DBA-45

**PEABODY CONSTRUCTION COMPANY,
General Contractor,**

DATE: August 31, 2005

and

**HOVESP TAKESSIAN d/b/a/ JOSEPH'S PAINTING
and d/b/a SEVAN CONTRACTING, INC.,
Subcontractor,**

and

**Proposed debarment for labor standards
violation by:**

**HOVESP TAKESSIAN d/b/a JOSEPH'S PAINTING
and d/b/a SEVAN CONTRACTING, INC.,**

**With respect to laborers and mechanics
employed by the contractor under
Fall River Housing Authority/HUD
Contract No. MA-6-2 for Modernization
of the Harbor Terrace Apartments in
Fall River, MA**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Acting Administrator, Wage and Hour Division

**Carol Arnold, Esq., Paul L. Frieden, Esq., Steven Mandel, Esq., Howard M.
Radzely, Solicitor of Labor, U.S. Department of Labor, Washington, D.C.**

For the Petitioner:

David J. Hopwood, Esq., Pocasset, Massachusetts

FINAL DECISION AND ORDER

BACKGROUND

In 1990, Hovesp Takessian, d/b/a/ Joseph's Painting and d/b/a Sevan Contracting, Inc. (Joseph's), subcontracted with Peabody Construction Co. (Peabody) to perform painting, plastering, and other work under a construction contract involving the U.S. Department of Housing and Urban Development (HUD) and the Fall River Housing Authority to modernize the Harbor Terrace Apartments in Fall River, Massachusetts. The contract was subject to the U.S. Housing Act¹ which applies the labor standards provisions of the Davis-Bacon Act (DBA).² That is, laborers and mechanics working on such a project must be paid at least the wages that are paid to the majority of laborers and mechanics in corresponding classifications on similar projects in the area. The U.S. Department of Labor's Wage and Hour Administrator (the Administrator) determines these minimum wage rates from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements.³

In 1993, the Administrator investigated Joseph's performance under the Fall River contract and under two other contracts with the U.S. Navy. He determined that, on the Fall River project, Joseph's had not paid ten of its employees the required minimum prevailing wage and fringe benefits, had misclassified some of its employees, had not maintained proper records, and had falsified payroll records. The Administrator found that Joseph's owed \$56,384.62 to the ten underpaid employees and requested that the Fall River Housing Authority withhold that amount to compensate those workers.⁴ Furthermore, the Administrator advised Joseph's that these violations were aggravated and willful, thus subjecting Joseph's to debarment from federal construction contracts for up to three years.⁵ The Administrator also found DBA violations on the Navy contracts, but the parties settled those cases.⁶

¹ 42 U.S.C.A. § 1437j (West 2003).

² 40 U.S.C.A. § 3141-3148 (West Supp. 2003).

³ 40 U.S.C.A. § 3142; 29 C.F.R. § 1.3 (2004).

⁴ See 29 C.F.R. §§ 5(a)(2), 5.9.

⁵ July 7, 1993 letter from Richard Daley, Assistant District Director, U.S. Department of Labor, to Hovesp Takessian. See 29 C.F.R. § 5.12(a). On the same day, Daley also advised counsel for Peabody, the prime contractor, that since a prime contractor is responsible for its subcontractor's compliance with the DBA wage requirements, Peabody would be liable for the back wages owed to the Joseph's employees. See 29 C.F.R. § 5.5(a)(6).

By letter to the Administrator dated August 4, 1993, Joseph's denied the violations and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). The Administrator referred the matter to the Office of Administrative Law Judges (OALJ) to designate an ALJ to hear the case.⁷

In March 1995, ALJ Rosenzweig ordered the parties to submit status reports concerning settlement discussions. The Administrator and Joseph's informed the ALJ that settlement negotiations were ongoing. Thereafter, the case remained dormant until July 27, 1998, when Chief Administrative Law Judge Vittone became aware that OALJ had no record of a settlement and the hearing that Joseph's had requested in 1993 had not been scheduled. He therefore ordered the parties to inform him of the status of the case.

The Administrator responded to Judge Vittone's order on August 26, 1998. He indicated that the Navy cases had been settled but that the negotiations concerning the Fall River/HUD wage dispute ended in April 1995 without settlement. The Administrator informed Judge Vittone that he would no longer seek debarment since Joseph's principal had died and the business was no longer operating but that the Fall River Housing Authority still held \$56,384.62 owed to the ten underpaid Joseph's employees. Peabody and Joseph's did not respond to Judge Vittone's order to submit a status report.⁸

Then, after another delay of nearly five years because OALJ mistakenly closed the case, the Administrator requested that OALJ order Peabody and Joseph's to show cause why the funds should not be released to the Joseph's employees.⁹ Associate Chief Administrative Law Judge Burke contacted the attorneys for Peabody and Joseph's to ascertain their positions as to whether the funds held by the Fall River Housing Authority could be released and distributed. Peabody had no objection, but Joseph's objected. ALJ Burke then requested Joseph's to inform him of the basis for objecting to the disbursement of the funds. When counsel for Joseph's did not provide a "substantive basis for the objection," ALJ Burke issued an Order to Show Cause why Joseph's request

⁶ Administrator's Response to Petition for Review (Brief) at 5.

⁷ Order of Reference dated May 31, 1994. *See* 29 C.F.R. § 5.11(b).

⁸ Joseph's later explained that it never received Judge Vittone's order. December 4, 2003 Response to Order to Show Cause/Notice to Dismiss at 3. ALJ Burke, who decided this case, accepted this explanation. February 2, 2004 Decision and Order of Dismissal (D. & O.) at 3.

⁹ D. & O. at 2-3.

for hearing should not be dismissed and the funds disbursed. The Order also required Joseph's to include a legal and factual basis for objecting to disbursing the funds.¹⁰

After being given additional time to respond to the Order to Show Cause, Joseph's did so on December 4, 2003.¹¹ Citing Department of Labor regulations at 29 C.F.R. §§ 500.201, 500.212, 500.221, 500.224(a), (b), (c), 501.15-501.22, and 501.30-501.39, Joseph's argued that because the "Department of Labor" (meaning OALJ) did not comply with "its own rules and regulations," the Order to Show Cause should be "denied" and the case dismissed (and, presumably, the funds that the Fall River Housing Authority held should be disbursed to Joseph's, not the ten employees, notwithstanding the fact that Joseph's was no longer in business). These regulations, Joseph's claimed, require that a hearing be scheduled "not more than sixty (60) days from the date on which the Order of reference is filed." And without citing any statute or case law, Joseph's also argued that the case be dismissed based on "any applicable statute of limitations or repose and case law applicable to delay by an administrative body."¹²

ALJ Burke found that Joseph's did not provide any argument or evidence why the funds should not be disbursed. He noted that the regulations that Joseph's cited as authority that the hearing should have been scheduled within 60 days of the Order of Reference filing do not apply to the Davis-Bacon Act or the U.S. Housing Act under which this case arises.¹³ Furthermore, he found that the delay in scheduling the hearing occurred not only because the parties did not notify OALJ in 1995-1998 that the case had not settled, but also because OALJ had inadvertently closed the case. Therefore, ALJ Burke dismissed Joseph's request for a hearing and ordered the Administrator to disburse the funds that had been withheld from the Fall River Housing Authority/HUD contract to the ten employees. Joseph's petitioned this Board to review the ALJ's decision.¹⁴ We

¹⁰ September 23, 2003 Order to Show Cause at 2-3.

¹¹ Response to Order to Show Cause/Notice to Dismiss. ALJ Burke's D. & O. indicates that Joseph's response is dated December 9, 2003. D. & O. at 3. But the document is dated December 4, 2003.

¹² December 4, 2003 Response to Order to Show Cause/Notice to Dismiss at 4.

¹³ D. & O. at 3. 29 C.F.R. §§ 500.201, 500.212, 500.221, and 500.224 apply to the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C.A. § 1801, *et seq.* 29 C.F.R. §§ 501.15-501.22 and 501.30-501.39 pertain to the Immigration and Control Reform Act, 8 U.S.C.A. § 1101, *et seq.*

¹⁴ *See* 29 C.F.R. § 6.20.

have authority to review the ALJ's decision.¹⁵ We review his findings of fact and conclusions of law de novo.¹⁶

DISCUSSION

Similar to its response to ALJ Burke's Order to Show Cause, Joseph's argues that we should reverse ALJ Burke's decision because OALJ has not complied with Department of Labor rules and regulations contained at 29 C.F.R. §§ 5.11, 8.1(d) and 6.1, which, Joseph's contends, mandate that a hearing must be scheduled within 60 days from the time the Order of Reference is filed.¹⁷ But sections 8.1(d) and 6.1 have nothing to do with hearings concerning Davis-Bacon Act disputes.¹⁸ And, as the Administrator correctly points out, section 5.11 does not specify a time limit for when the hearing must be scheduled or conducted.¹⁹

Joseph's also reiterates its previous argument that it should prevail because "applicable [statutes] of limitation or Repose and case law applicable to delay by an administrative body" exist.²⁰ But again, as it did in responding to ALJ Burke, Joseph's neither identifies an applicable statute of limitation (or "Repose") nor cites case law. Therefore, we will not consider this argument. *See Development Res., Inc.*, ARB No. 02-046 (April 11, 2002) citing *Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (in the Federal Courts of Appeals, it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). Even so, the Administrator convincingly argues that since Joseph's has never even alleged, much less demonstrated, any actual prejudice from OALJ's delay in scheduling a hearing, it may not rely upon the defense of laches.²¹ *See Ray Wilson Co.*, ARB No. 02-086, slip op. at 6-7 (Feb. 27, 2004) (though excessive delay prior to a

¹⁵ Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

¹⁶ *See Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, slip op. at 4 (Aug. 27, 2001).

¹⁷ Petition for Review at 5.

¹⁸ 29 C.F.R. § 8.1(d) describes the Administrative Review Board's appellate authority involving the Service Contract Act, 41 U.S.C.A. § 351, *et seq.* 29 C.F.R. § 6.1 simply alerts the reader that Subpart A of 29 C.F.R. Part 6 applies to the rules of practice for administrative proceedings under the Service Contract Act and the Davis-Bacon and related acts.

¹⁹ Acting Administrator's Response to Petition for Review at 11.

²⁰ Petition for Review at 5.

²¹ Acting Administrator's Response to Petition for Review at 13-14.

hearing may create a presumption of prejudice, contractor must demonstrate actual prejudice to warrant dismissal of charges of DBA prevailing wage violations).

Therefore, since Joseph's has not presented evidence or argument that ALJ Burke erred in ordering that its hearing request be dismissed and that the Administrator disburse the funds to the employees, we **DENY** Joseph's Petition for Review and **AFFIRM** ALJ Burke's February 2, 2004 Order.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge