In the Matter of:

DONALD J. MURRAY
Request for additional wages payable pursuant to the Davis-Bacon Act on contract GS-07f6106P

ARB NO. 11-042

DATE: July 14, 2011

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Donald J. Murray, *pro se,* Seaside, Oregon

For Petitioner/Respondent Administrator, Wage and Hour Division:
Roger W. Wilkinson, Esq.; Jonathan T. Rees, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; *United States Department of Labor, Washington,* District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DENYING MOTION FOR STAY AND DISMISSING PETITION FOR REVIEW

On April 5, 2011, Donald J. Murray filed a "Wage Determination Petition for Review" with the Administrative Review Board in this case arising under the Davis-Bacon Act (DBA or the Act).[1] On April 15, 2011, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule. In response, the Acting Administrator of the Wage and Hour Division moved the Board to dismiss Murray's petition for review. The Administrator avers that the Board should dismiss the petition without prejudice on the

[1] 40 U.S.C.A. §§ 3141-3148 (West 2010). The regulations that implement the Act are found at 29 C.F.R. Part 1 (2010).

grounds that the matter is not ripe for review because "there has not been a final ruling" in this matter.[2]

According to the Acting Administrator, on October 12, 2010, Murray filed a complaint with Wage and Hour alleging that he had been misclassified and underpaid for work performed on a project for the delivery and installation of a mezzanine system at Camp Riley, Oregon. The Oregon National Guard and Toyota-Lift of Minnesota, Inc., entered into the prime contract GS-07f6106P. Toyota-Lift subsequently contracted with Spacesaver Specialists, Inc. to serve as a trade contractor, and Spacesaver Specialists, in turn, contracted with Seaside Temps LLC for workers to deliver and install the mezzanine system. Murray worked for Seaside on the project.

In response to Murray's complaint, Wage and Hour determined that Seaside had underpaid Murray and two other workers. Consequently Seaside issued checks to each of the workers for the unpaid back wages that Wage and Hour had calculated.

Subsequently, Murray wrote to Wage and Hour investigator Michael Mortland seeking review and modification of Wage and Hour's calculation of the back wage amount due him for certain work performed on the project. Murray claimed that Seaside should have paid him at the DBA rate for an ironworker, rather than at a rate under the Service Contract Act[3] for 52 hours of work on the project.

Wage and Hour responded to Murray's complaint by a telephone call, rather than in writing. Assistant District Director Thomas Silva explained to Murray that because the case was closed and the SCA contract had been completed and checks for additional wages issued to him and other workers, Wage and Hour lacked the authority to pursue his claim that he should have been paid at a DBA rate for a portion of his work on the project.

In response, Murray filed a petition for review with the ARB. The regulations addressing the Board's jurisdiction provide in pertinent part, "[a]ny party or aggrieved person shall have a right to file a petition for review with the Board . . . from any final decision in any agency action under part 1, 3, or 5 of this subtitle."[4]

In response to Murray's petition for review, the Acting Administrator contends in her Motion to Dismiss:

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[2] Acting Administrator's Motion to Dismiss the Petition for Review and to Suspend the Briefing Schedule (Mot.) at 1.

[3] 41 U.S.C. § 6701, et seq.

[4] 29 C.F.R. § 7.9; *see also* 29 C.F.R. § 7.1(b).

> Wage and Hour, which has the authority to issue final rulings, does not consider the statements made in the March 23, 2011 telephone conversation to constitute a final ruling. Although the Wage and Hour Assistant District Director provided his opinion concerning Wage and Hour's authority to review and modify its back wage calculation, and to seek additional wages from Seaside , as requested in Murray's February 21, 2011 letter, the Assistant District Director did not indicate during the telephone conversation that his opinion was a final ruling, nor did he send a subsequent written response to Murray or inform him of his appeal rights, as is customary in final rulings. Moreover, the oral statements of which the complainant seeks review were not made by the Acting Administrator of Wage and Hour, and no request has been made to the Acting Administrator for a ruling pursuant to 29 CFR 5.13. . . .
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> Without a "final decision" subject to review by it, the Board lacks jurisdiction to render a decision and, therefore, this matter should be dismissed without prejudice.[5]

Accordingly, the Board ordered Murray to show cause no later than July 12, 2011, why we should not dismiss his petition for review without prejudice because he has failed to obtain a final decision from the Administrator as required by 29 C.F.R. § 7.9.[6]

On July 6, 2011, Murray filed a Motion for Stay and Extension of Time. In this motion, Murray informed the Board that he had filed a request with the Acting Administrator on June 1, 2011, asking her to "reconsider the outcome of the investigation by Mr. Michael Mortland and his refusal to obtain the proper Davis-Bacon wages . . . ."[7] Further, Murray requests the Board to "grant him an extension of time, to and including August 8, 2011, in which the Board will stay the Complainant's Petition for Review for the intention and dependent upon the response from the Acting [Administrator]."[8]

The Acting Administrator moved to dismiss Murray's petition for review on the grounds that the Board did not have authority under the applicable regulations to consider Murray's appeal because he had not obtained a final decision from the Acting Administrator prior to filing it. We construe Murray's request to the Acting

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5 Mot. at 5 (citations and footnote omitted).

6 We also suspended the briefing schedule pending disposition of the Motion to Dismiss.

7 Motion for Stay and Extension of Time at 1.

8 *Id.*

Administrator to issue a final decision as a concession that he had not previously obtained a final order as the regulations require, and his motion for a stay and extension of time as a response to the Board's Order to Show Cause. As demonstrated by Murray's June 1, 2011 request to the Acting Administrator, Murray did not satisfy the requirement of obtaining a final order on April 5, 2011, when he attempted to invoke the Board's review authority by filing a petition for review. Accordingly, we **DENY** Murray's motion for a stay and **DISMISS** his petition for review without prejudice. Murray may file a petition for review from the Acting Administrator's final decision once issued, should he find it necessary to do so.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge