



**In the Matter of:**

**YATES CONSTRUCTION COMPANY, INC.**  
**(General Wage Decision Number**  
**NC140085, Rockingham County,**  
**North, Carolina),**

**ARB CASE NO. 15-056**

**DATE: August 12, 2015**

**PETITIONER.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Petitioner:*

**Timothy R. Wyatt, Esq.; Conner Gwyn Schenck PLLC; Greensboro, North Carolina**

*For the Respondent, Administrator, Wage and Hour Division:*

**M. Patricia Smith, Esq.; Jennifer S. Brand, Esq.; Jonathan T. Rees, Esq.; and David J. Rutenberg, Esq.; United States Department of Labor, Washington, District of Columbia**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge**

**FINAL DECISION AND ORDER DISMISSING APPEAL**

The Petitioner, Yates Construction Co., Inc. filed a petition under the Davis-Bacon Act (DBA or the Act),<sup>1</sup> seeking review of General Wage Decision NC140085 as applied to multiple utility improvement contracts with the City of Eden, Rockingham County, North Carolina, including the “East Kuder Street Basin Sanitary Sewer

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<sup>1</sup> 40 U.S.C.A. §§ 3141-3148 (West Supp. 2015). The regulations that implement the Act are found at 29 C.F.R. Part 1 (2014).

Improvements” and the “Tanyard Branch Sanitary Sewer Improvements” projects. Petitioner attached to its petition a copy of a letter dated September 18, 2014, requesting the Wage and Hour Administrator to review and reconsider the wage rates. After receiving no response after six months, Petitioner again wrote to the Administrator in a letter dated March 26, 2015, requesting review and reconsideration. Although Petitioner received an e-mail from a Wage & Hour Government Contracts Enforcement Specialist on April 2, 2015, stating that “[y]ou should be hearing from Ms. Upshaw or a member of her team **in the very near future,**” (emphasis added), as of May 4, 2015, eight months after Petitioner first requested review and reconsideration, it has received no substantive communication from the Wage and Hour Administrator.

The Board has “jurisdiction” under the Davis-Bacon Act to “hear and decide in its discretion appeals concerning questions of law and fact from **final** decisions under [29 C.F.R. Part 1].”<sup>2</sup> Furthermore, “[a]ny interested person may appeal to the Administrative Review Board for a review of a wage determination or its application made under [Part 1], **after reconsideration has been sought pursuant to § 1.8 and denied.**”<sup>3</sup> Section 1.8 requires the Administrator to respond to a motion for reconsideration within 30 days or to notify the requestor within the 30-day period that additional time is necessary. The Administrator has not complied with the regulations in this case.

Given the Administrator’s failure to adhere to the applicable regulations and to provide Petitioner with a response to the request for review and reconsideration or notice that additional time was necessary, we issued an Order to Show Cause on June 12, 2015, requiring the Administrator to show cause why the Board should not conclude that the Wage and Hour Division’s decision in this case is sufficiently final to vest the ARB with jurisdiction to consider Petitioner’s appeal.

On June 30, 2015, the Administrator wrote to Petitioner notifying it that pursuant to 29 C.F.R. § 1.8 of the governing regulations, additional time was necessary to review Petitioner’s request for reconsideration. Further, the Administrator stated, “The Wage and Hour Division anticipates completing that review by no later than August 2015, barring unforeseen circumstances, and will notify you of its decision as soon as possible.”

## DISCUSSION

The Wage and Hour Division (WHD) failed to respond to Petitioner’s request for reconsideration within 30 days and failed to notify Petitioner within 30 days that it needed additional time to respond to the request. The issue before the Board is whether the WHD’s failure to adhere to the DBA’s implementing regulations provides the Board

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<sup>2</sup> 29 C.F.R. § 7.1(b) (emphasis supplied).

<sup>3</sup> 29 C.F.R. § 1.9 (emphasis supplied).

with authority to hear Petitioner's appeal in the absence of a final decision of the Administrator.

The Administrator argues in his response to the Board's Show Cause Order that because the DBA's implementing regulations confer jurisdiction upon the Board to hear appeals from **final** decisions of the Administrator and then, only after the Administrator has been requested to reconsider a decision and reconsideration has been denied, that the Board must dismiss Petitioner's appeal because it does not have authority to hear it.<sup>4</sup>

The Administrator distinguished two cases<sup>5</sup> in which the Board considered whether opinions the WHD issued, after requests for a final decision had been made, constituted final decisions of the Administrator as required by the DBA's implementing regulations, even though the Administrator subsequently argued to the Board that the letters were not, in fact, final Administrator decisions.<sup>6</sup> The Administrator averred that in this case,

Here there is no letter or other communication suggesting that WHD has made a final decision on Petitioner's request for review and reconsideration of General Wage Decision Number NC 140085. Indeed, as noted Petitioner's instant petition for review does not rest its basis for the Board's jurisdiction on any decision issued by WHD purporting to be a final decision. Simply put, the Board does not have the authority to exercise jurisdiction over DBA matters, such as this one, in which WHD has not issued a final decision denying a request for review and reconsideration.<sup>[7]</sup>

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<sup>4</sup> Administrator's Response to the Administrative Review Board's June 12, 2015 Order to Show Cause at 3-4 (Admin. Res.).

<sup>5</sup> *In re: Hanford Atomic Metal Trades Council*, ARB No. 98-138 (Sept. 23, 1998); *In re: Diversified Collection Servs., Inc.*, ARB No. 98-062 (May 8, 1998).

<sup>6</sup> Admin Res. at 5-6.

<sup>7</sup> *Id.* at 5-6 (citing 29 C.F.R. § 7.1(b); *In re: Fireproof Contractors, Inc.*, ARB Case No. 03-021, 2003 WL 21269148, at \*1 (ARB May 27, 2003) ("Unless the Administrator had issued a final order upon reconsideration of the wage determination, the Board does not have jurisdiction to consider an appeal of the wage determination.")).

Petitioner does not dispute the Administrator’s interpretation of the Board’s precedent, and we agree that the two cases are distinguishable from this case in which Petitioner has conceded that the Administrator has failed to issue a final order.<sup>8</sup>

The Administrator further contends that contrary to Petitioner’s argument, “**any**”<sup>9</sup> delay in issuing a final appealable decision does not constitute an alternate basis for the Board to exercise jurisdiction in this matter.<sup>10</sup> The Administrator points out that neither the statute, implementing regulations, or Board precedent supports Petitioner’s argument that 29 C.F.R. § 1.8 provides an alternate basis for the Board to exercise jurisdiction over a petition for review when the Administrator has failed to issue a timely final decision or notice of the necessity of additional time to do so as required by that regulation.

Petitioner argues that “[u]nreasonable delay by an administrative agency in performing a required function effectively constitutes a denial of relief subject to judicial action.”<sup>11</sup> However in this case, Petitioner has failed to establish that the delay is so unreasonable as to render the decision final given the length of the delay and the Administrator’s assurances that he will issue a final decision on reconsideration by the end of August, barring unforeseen circumstances.<sup>12</sup>

Accordingly, we **DISMISS** the petition for review **WITHOUT PREJUDICE**. We expect that, as the Administrator has stated, barring unforeseen circumstances, he

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<sup>8</sup> See Petitioner’s Reply to Wage and Hour Administrator’s Response to Administrative Review Board’s Order to Show Cause (Pet. Rep.) at 1.

<sup>9</sup> Admin. Res. at 6 (emphasis added). Considering that section 1.8 requires the Administrator to respond to a motion for reconsideration within 30 days or to notify the requestor within the 30-day period that additional time is necessary, and that the Administrator failed to meet either deadline, the Administrator’s suggestion that there might not have been a delay is difficult to fathom.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> Petitioner’s Reply to Wage and Hour Administrator’s Response to Administrative Review Board’s Order to Show Cause (Pet. Rep.) at 1 (citations omitted).

<sup>12</sup> *Cf. In re: Amprite Elec. Co.*, ARB No. 09-075 (July 30, 2009)(ARB dismissed petition for review based on exceptional circumstances pursuant to 29 C.F.R. § 7.1, in the absence of a final decision of the Administrator upon reconsideration, even though Administrator failed to meet section 1.8 deadlines).

will complete the reconsideration by the end of August and will notify Petitioner of the final decision on reconsideration as soon as possible.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**