In the Matter of:

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

ARB NO. 11-073

DATE: January 25, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the International Association of Machinists and Aerospace Workers:
William H. Haller, *Associate General Counsel*, Upper Marlboro, Maryland

For Petitioner/Respondent Administrator, Wage and Hour Division:
Joan Brenner, 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 Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DISMISSING APPEAL WITHOUT PREJUDICE AND FORWARDING THIS CASE TO THE DEPUTY ADMINISTRATOR TO ISSUE A FINAL APPEALABLE ORDER

BACKGROUND

On August 26, 2011, the Administrative Review Board issued a Notice of Appeal and Order Establishing Briefing Schedule in this case arising under the McNamara-O'Hara Service Contract Act.[1] In response, the Deputy Administrator of the Wage and

[1] 41 U.S.C.A. § 6701 (West Supp. 2011)(SCA). The regulations that implement the Act are found at 29 C.F.R. Part 4 (2011). The Secretary of Labor has delegated her authority

Hour Division moved the Board to dismiss the Petition for Review filed by the Petitioner, without prejudice, on the grounds that the matter was not ripe for review because "there has not been a final ruling" in this matter.[2]

According to the Deputy Administrator, on August 3, 2009, the International Association of Machinists and Aerospace Workers (IAM) wrote to Timothy J. Helm, Chief of the Wage and Hour Division's Branch of Government Contracts Enforcement, Division of Enforcement Policy and Procedures, concerning an alleged SCA violation. The IAM requested an investigation into Lockheed Martin's payment of wages to Flight Service Specialists employed in several locations throughout the United States. After an investigation, Helm informed the IAM that the Flight Service Specialists were properly classified and that Lockheed Martin had complied with SCA requirements. Helm further stated that he trusted that his response was sufficient and that if he could be of any further assistance, the IAM should not hesitate to contact him.[3]

In response, the IAM filed a Petition for Review with the ARB. The regulations addressing the Board's jurisdiction provide in pertinent part, "The Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division.[4] The Administrator contends:

> Mr. Helm's letter was not a final decision of the Deputy Administrator, nor is there any indication that Mr. Helm was the "authorized representative" to speak for the Deputy Administrator concerning this matter. The letter does not include any language indicating that it is a final ruling or informing IAM of its appeal rights, as is customary in final determinations of the Deputy Administrator. Rather, the letter simply invited the IAM to contact Mr. Helm if the Wage and Hour Division could be of further assistance concerning the matter. The Deputy Administrator, who has the authority to issue final decisions, does not consider Mr. Helm's June 8, 2011 letter to be a final decision. . . .

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to issue final agency decisions under the SCA to the Administrative Review Board. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

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

[3] Letter from Timothy J. Helm to Christopher Corson of the IAM (June 8, 2011).

[4] 29 C.F.R. § 8.1(b).

> In the absence of a final ruling in this matter, IAM's Petition is not ripe for review, and the Board therefore lacks jurisdiction to review IAM's complaint.[5]

Accordingly, the Board ordered the IAM to show cause why it should not dismiss the Petition for Review without prejudice because it failed to obtain a final decision from the Administrator as required by 29 C.F.R. § 7.9.

The IAM's Response to Show Cause Order

In response to the show cause order, the IAM cited to a decision from the United States District Court, District of Columbia in *Hanford Atomic Metal Trades Council, Inc. v. United States Dep't of Energy.*[6] The IAM avers that in this case, the court held that a letter signed by Timothy J. Helm, the author of the letter in question in its case before the Board, was a final decision of the Department of Labor. In support of that holding, the court cited to the Board's decisions in *In re*: *Diversified Collection Servs., Inc.*[7] and *In re: Hanford Atomic Metal Trades Council*.[8]

In particular, the court noted that in *Diversified*, the Board "went on to state quite explicitly that absence of any statement by the Wage and Hour Division regarding the non-finality of the decision would give rise to a presumption by the petitioning party and the ARB that the decision was, in fact, final."[9] The court continued, "The ARB further noted that the Wage and Hour Divisions [sic] failure to clearly set forth the finality or non-finality of its determinations delays proceedings and is unfair to the petitioning party."[10] Finally, the court concluded, "The decision in *Diversified* is significant in that it clearly puts the Wage and Hour Division on notice that intermediate decisions must be labeled accordingly, otherwise they will be treated as final. Accordingly, one would rationally expect all decisions intended to be non-final to state as much in light of the ARB's admonition in the *Diversified* opinion."[11]

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5 Mot. at 4 (citations and footnote omitted).

6 Civil Action No. 99-3402 (June 20, 2001)(mem.).

7 ARB No. 98-062 (May 8, 1998).

8 ARB No. 98-138 (Sept. 23, 1998).

9 *Hanford*, mem. op. at 8.

10 *Id.*

11 *Id.*

The court also noted that in the ARB's initial decision in *In re: Hanford Atomic Metal Trades Council*, the Board held that despite the Administrator's assertion that the letter from a WHD employee was not intended to be final, "the ARB concluded that [the letter] was sufficiently final to vest the ARB with jurisdiction to consider [the] appeal of that decision."[12]

In addition to its reliance on the court's *Hanford* decision, the IAM also contended, "Furthermore, it should be noted that the Deputy Administrator's argument is nothing short of cynical, as the Deputy Administrator is well aware that no vehicle exists for the IAM to obtain any further review from the Division and that it has striven for nearly a year-and-a-half simply to obtain *any* written determination in this matter."[13]

While we acknowledged that recently there have been a number of cases that the Administrator could cite to in which the Board has not held the Administrator to the standard it announced in its *Diversified* and *Hanford* opinions; neither has it specifically reversed those opinions. Consequently, we requested the Administrator to file a reply to the IAM's response, in particular addressing whether the Board should follow its *Diversified* and *Hanford* opinions and if not, why not.

Administrator's Reply

In reply to the IAM's response to the Show Cause Order, the Deputy Administrator argues that *Diversified* and *Hanford* are inapplicable to this case because they were decided on facts significantly different from this case's facts and therefore, the Board should remand the case to the Administrator for a final decision. In *Diversified*, the Deputy Administrator avers the petitioner specifically requested review and reconsideration by WHD's Acting Administrator pursuant to 29 C.F.R. § 4.56. In *Hanford*, the Deputy Administrator states that the petitioner made a formal request for a determination that was directed to the WHD Administrator. The Administrator distinguishes *Diversified* and *Hanford* from this case, asserting that "IAM's request was not addressed to the Administrator, but rather was directed to Mr. Helm in his capacity as a 'Team Leader' within WHD."[14] The Administrator also contends

> Mr. Haller's letter did not specifically request a definitive, final ruling that could be appealed to the Board, but rather asked that the WHD "conduct an investigation and institute

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[12] *Id.*

[13] Response of Petitioner to Order to Show Cause at 1. We note that Helm wrote in the letter to the IAM, that is the subject of this appeal, "I regret the delay in responding to your inquiry." Letter from Timothy J. Helm (June 8, 2011).

[14] Deputy Administrator's Response to the Administrative Review Board's December 5, 2011 Order Requesting Response at 4.

> such proceedings as are necessary to remedy the [alleged] statutory violation." Indeed, in requesting the assistance of Mr. Helm and his team, Mr. Haller did not refer to any regulation that called for issuance of final rulings. Instead, Mr. Haller's letter appears to have been submitted pursuant to 29 C.F.R. 4.191, which provides for the filing of complaints concerning alleged Service Contract Act violations with the WHD, but which does not specify any particular action that WHD must take in response.[15]

Furthermore, the Deputy Administrator maintains that it is clear Haller did not request, nor did Helm provide a final ruling:

> not only did Mr. Helm properly characterize Mr. Haller's letter as an "inquiry" rather than as a request for a final ruling, Mr. Helm also made clear that the IAM should not hesitate to contact Mr. Helm if the WHD could be of further assistance concerning the matter, an offer that plainly encompassed a willingness to consider any additional information that the IAM might wish to submit to the WHD regarding the matter. Nothing in Mr. Helm's letter indicated that it reflected a final ruling by an "authorized representative" of the Administrator.[16]

The Deputy Administrator also claims that in light of *Diversified* and *Hanford* the WHD is aware of the importance of specifying whether particular determinations are or are not final. The Deputy Administrator cites the recent decision in *City Center* as an example of a case in which Helm specifically notified the parties when he issued an initial ruling that they could request reconsideration, and the Administrator informed the parties in the final ruling that they could appeal to the Board.

Finally, the Deputy Administrator avows that in recognition of the IAM's desire for a final ruling, it will treat its August 5, 2011 Petition to the Board as a request for such ruling and **"will issue such a ruling within 60 days of any remand by the Board."**[17]

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15 *Id.* at 5.

16 *Id.*

17 *Id.* at 6-7 (emphasis added).

DISCUSSION

The Board's review of the Administrator's SCA final rulings is in the nature of an appellate proceeding. We are authorized to modify or set aside the Administrator's findings of fact only when we determine that those findings are not supported by a preponderance of the evidence. The Board reviews questions of law de novo. Given the Administrator's expertise in interpreting and overseeing the SCA for the Department of Labor, we defer to the Administrator's interpretation of the SCA when it is reasonable and consistent with law.[18] Obviously, the Board cannot perform its authorized review function, if it does not first have a final decision of the Administrator to review.

While the Board is fully cognizant of and sympathetic to the length of time that has passed since the IAM first engaged the WHD on the issue presented for review, the Board agrees with the Administrator that under the facts presented here, the Board does not yet have a final decision of the Administrator or his or her authorized representative as is required for the Board to exercise its review authority. Therefore, , we **DISMISS** the IAM's appeal without prejudice and return the case to the Deputy Administrator in reliance upon her pledge to issue a final appealable decision within 60 days of the date on which this decision is issued.

In closing, we note that although the Deputy Administrator contends that the WHD is mindful of its obligation to specify whether particular decisions are or are not final, since October of 2010, the Deputy Administrator has requested the Board to dismiss three appeals because the petitioners had not yet obtained final orders.[19] Thus, the WHD's efforts to so inform the parties has not been as successful as is necessary to prevent the waste of the Department's and the parties' resources in bringing, responding to, and disposing of these fruitless appeals. The Board therefore would strongly urge the WHD to redouble its efforts to fully inform the parties before it of the status of its determinations and the proper procedures for obtaining appealable final orders.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

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[18] *Andrew Aiken*, ARB No. 08-009, slip op. at 5 (Apr. 30, 2009).

[19] *See Caroma Construction*, ARB No. 11-045 (July 26, 2011); *Donald J. Murray*, ARB No. 11-042 (July 14, 2011); *Painters District Council No. 2*, ARB No. 10-125 (Oct. 15, 2010).