



In the Matter of:

**ADMINISTRATOR, WAGE AND
HOUR DIVISION, UNITED STATES
DEPARTMENT OF LABOR,**

ARB CASE NO. 14-075

ALJ CASE NO. 2009-SCA-011

PROSECUTING PARTY,

DATE: January 21, 2016

v.

**MESA MAIL SERVICE, LLC,
RICHARD EDWARDS,
MARY EDWARDS,
Individually and Jointly,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Respondents:

Richard and Mary Edwards, *pro se*, Lake Charles, Louisiana

For the Administrator, Wage and Hour Division:

**Mary J. Rieser, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq.;
Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor,*
Washington, District of Columbia**

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

FINAL DECISION AND ORDER OF REMAND

The Administrator, Wage and Hour Division, United States Department of Labor (Administrator) filed a complaint alleging that Respondents violated the provisions of the McNamara-O’Hara Service Contract Act (SCA), 41 U.S.C.A. § 6701, *et seq.* (Thomson Reuters 2015), and its implementing regulations under 29 C.F.R. Parts 4 and 6 (2015). Complaint (June 23, 2009). The Respondents filed an Answer, asking for a trial. Answer (July 17, 2009). The case was assigned to the Administrative Law Judge (ALJ), who rescheduled many hearings in light of the parties’ settlement efforts.

Those efforts failed. In April 2013, Richard and Mary Edwards filed a Motion To Schedule And Conduct A Dispositive Hearing (Apr. 4, 2013). The record contains no ruling on this hearing request.

Subsequently, the ALJ rescheduled a September hearing for November. Order Rescheduling Hearing (Aug. 9, 2013). On November 12, 2013, the ALJ cancelled that hearing because, he indicated, both parties had agreed at a November 11 telephone conference to waive their right to appear before him and to submit the case on the written record. Scheduling Order And Cancelling Hearing (Nov. 12, 2013).¹ The record contains no transcript of this teleconference.

In February, the Administrator filed “Secretary’s Post-Hearing Brief” (Feb. 7, 2014) and the Respondents filed “Response To Joint Stipulated Facts As Prepared By DOL (Feb. 25, 2014). Respondents attached a document entitled “Our Counter To Allegations By DOL” (undated), which they signed. Their first sentence reads: “POST-HEARING? NEVER HAD A HEARING!!!” Their last sentence reads: “FURTHERMORE, UNDER DUE PROCESS, WE HAVE A RIGHT TO BE HEARD BY THE JUDGE IN THIS CASE.” The record contains no ruling on this hearing request.

Given the oral waiver of a right to a hearing, the ALJ decided this case on a written record. He found that Respondents violated the SCA and were subject to debarment. Decision and Order (D. & O.) (June 2, 2014). Respondents appealed to the Administrative Review Board (ARB or Board). Pertinent to this disposition, they assert:

The Respondents clearly made it known to Mr. Strobel and the Office of the ALJ that they desired a live hearing before the ALJ, and they were entitled to such a hearing. *See* 29 C.F.R. [§] 18.43. However, Mr. Strobel effectively waived Respondents’ right to appear and present evidence at a

¹ Don Strobel, a lay representative, represented Respondents at the time of this order. We note with concern that the address listed for Respondents contains discrepancies. *Compare* Scheduling Order And Cancelling Hearing (Nov. 12, 2013) with Respondents’ Brief (Sept. 29, 2014). It is not evident what Respondents actually received.

hearing against the best interests of the Respondents, and/or wrongfully induced Respondents to do so based on the alleged fact that the ALJ could properly adjudicate the case upon a paper hearing. Cf. 29 C.F.R. [§] 18.39.

Respondents' Brief at 8. Respondents allege that prejudice resulted. They assert, "Respondents were denied the opportunity to demonstrate a good faith compliance defense that may have existed in regard to their situation. . . . Respondents were also denied the opportunity, through an in-court hearing, to demonstrate 'unusual circumstances' in order to avoid debarment." *Id.* at 8-9.

The Administrator urges the Board to affirm the ALJ's decision.² For the following reasons, we vacate the ALJ's D. & O. and remand. Given that Respondents raise issues of fact, the ALJ must hold an evidentiary hearing unless Respondents validly waive an evidentiary hearing.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review enforcement actions involving violations of the SCA pursuant to 29 C.F.R. § 8.1(b)(3) (2015), *see* 29 C.F.R. § 6.20. In the review of an ALJ's decision under the SCA, the Administrative Review Board serves as an "appellate body," 29 C.F.R. § 8.1(d), empowered to "modify or set aside" an ALJ's findings of fact "only when it determines that those findings are not supported by a preponderance of the evidence," 29 C.F.R. § 8.9(b).

DISCUSSION

We address one issue because it is determinative, namely the ALJ's decision not to hold a hearing.³ The SCA provides the Secretary of Labor with authority to hold hearings. 41 U.S.C.A. §§ 6506, 6507, 6705(d), 6707(a)-(d). Department of Labor regulations provide that the rules of practice and procedure at 29 C.F.R. Parts 6 and 8 apply to these proceedings. 29 C.F.R. § 4.189. Once served with a complaint, the Respondent shall file an answer which "may contain a waiver of hearing." 29 C.F.R. § 6.16(b). The regulation in effect when the ALJ cancelled the hearing required that a

² In her brief, the Administrator's attorney characterizes the ALJ's decision as a summary decision. Administrator's Response Brief at 1, 1 at n.3, 2, 3, 9, 13, 14, 24. The characterization is incorrect; the ALJ ruled on the merits after reviewing the documentary evidence.

³ We note that other concerning issues were raised by the Edwards related to unsatisfactory representation, but we need not address any other issues given our remand.

party's waiver of his or her right to present evidence at a hearing be submitted in writing. 29 C.F.R. § 18.39 (2013). Thus, absent a valid written waiver, the ALJ must hold a hearing, given the factual disputes in this matter.

Under this statutory and regulatory scheme, Respondents were entitled to a hearing before the ALJ. The record is plain that Respondents repeatedly requested a hearing - in their Answer of July 2009, in their motion of April 2013, and in their filing in February 2014. The record contains no indication that the ALJ ruled on the February 2014 hearing request. The November 2013 oral waiver of Respondents' right to appear at a hearing was ineffective under 29 C.F.R. § 18.39(a). Without an effective waiver of the Respondents' right to a hearing, we conclude that the hearing was not validly waived.

Respondents persuasively argue that being denied a hearing prejudiced their case because they were denied the opportunity to testify about circumstances that may warrant relief from any debarment order under the SCA. Because the denial of Respondents' right to a hearing presents procedural due process concerns, we vacate the ALJ's Decision and Order on the written record.⁴ We remand this case for an evidentiary hearing. *Francisco v. Barnhart*, 2003 WL 548870 (S.D.N.Y Feb. 25, 2003); see *Stiver v. Shalala*, 879 F .Supp. 1021 (D. Neb.1995).

CONCLUSION

Because there was no effective waiver of Respondents' right to a hearing, we **VACATE** the ALJ's Decision and Order. We **REMAND** the case to the ALJ for an evidentiary hearing absent a valid written waiver.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

⁴ Because we vacate the ALJ's decision, we deny as moot Respondents' request for a copy of the record.