



In the Matter of:

**ARM'S-LENGTH PROCEEDINGS
REGARDING COLLECTIVE
BARGAINING BETWEEN GINO
MORENA ENTERPRISES, LLC
AND FORT BLISS BARBERS
ASSOCIATION FOR WORK
PERFORMED AT FORT BLISS,
TEXAS AND MCGREGOR
RANGE, NEW MEXICO UNDER A
CONTRACT WITH THE ARMY
AND AIR FORCE EXCHANGE
SERVICE**

**ARB CASE NOS. 2017-0010
2017-0011**

ALJ CASE NO. 2017-CBV-001

DATE: FEB 19 2020

Appearances:

For Petitioner Army and Air Force Exchange Service:

**Ranti Okunoren, Esq.; *Army and Air Force Exchange Service*; Dallas,
Texas**

For Petitioner Sheffield Barbers, LLC:

**Kevin J. Dolley, Esq.; David Nowakowski, Esq.; *Law Offices of Kevin
J. Dolley, LLC*; St. Louis, Missouri**

For Statement of Administrator, Wage and Hour Division:

**M. Patricia Smith, Esq., Solicitor of Labor; Jennifer S. Brand, Esq.,
Associate Solicitor of Labor; William C. Lesser, Esq., Deputy
Associate Solicitor of Labor; Jonathan T. Rees, Esq., Counsel for
Contract Labor Standards; Mary E. McDonald, Esq.; *United States
Department of Labor*; Washington, District of Columbia**

For Respondent, Gino Morena Enterprises, LLC:

**David A. Grant, Esq.; Marc A. Antonetti, Esq.; Louis J. Cannon, Esq.;
Baker & Hostetler LLP; Washington, District of Columbia**

Before: Thomas H. Bnrrell, *Acting Chief Administrative Appeals Judge* and James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

This case arises under Section 4(c) of the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. § 6701, *et seq.* (2011) ("SCA"), and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2016). The applicant, the Army and Air Force Exchange Service (AAFES), petitioned the Administrator, Wage and Hour Division of the Department of Labor for an inquiry into negotiations underlying a collective bargaining agreement (CBA) between Gino Morena Enterprises, LLC, and Fort Bliss Barbers Association. In a final ruling, the Administrator granted the request and issued an Order of Reference for an arm's-length hearing to the Chief Administrative Law Judge (ALJ) pursuant to the procedures set out in 29 C.F.R. §§ 4.11(c), (d). The ALJ assigned to the case determined that the request for a hearing was untimely filed and that the Administrator failed to discuss or rule upon the issue of extraordinary circumstances. Petitioners AAFES and Sheffield Barbers each filed a petition for review with the Administrative Review Board (ARB or Board). We consolidate the petitions and affirm the ALJ.

BACKGROUND¹

A. April 16, 2015 Collective Bargaining Agreement

Gino Morena Enterprises (GME) and the Fort Bliss Barbers Association (Association) entered into a CBA in 2011, which was incorporated into a January 27, 2012 wage determination. On April 16, 2015, GME and the Association entered into a new CBA. AAFES claims that it received the new CBA from GME on April 21, 2015, and submitted it to the Department of Labor that same day.

On April 30, 2015, AAFES issued a bid solicitation No. PS 14-004-15-208 for the contract to manage barber services at Fort Bliss in Texas and McGregor Range in New Mexico. AAFES attached to the bid solicitation the April 16, 2015 CBA with a notice that this was in lieu of a wage determination. Proposals on the contract were due on May 21, 2015.² AAFES's contracting officer awarded contract BLS # 15-208 to GME on June 6, 2015.

¹ We take these undisputed facts from the parties' claims and the ALJ's Decision and Order. We make no findings of fact.

² The ALJ indicates that May 21 was the date bids opened. D. & O. at 2. AAFES states that May 21 is the date proposals were due. AAFES PFR at 3. We adopt AAFES's characterization of the date.

On June 12, 2015, Sheffield Barbers, an unsuccessful bidder, submitted a protest letter to AAFES. Claiming that the CBA does not comply with the SCA, Sheffield asserted that the Association was orchestrated and directed by Morena and that the “fictitious CBA” was drafted for Morena’s benefit. D. & O. at 2. Sheffield’s protest letter also claims that GME’s tip credits procedure does not comport with the SCA or the CBA. AAFES’s Request for a Hearing, Att. Six. AAFES investigated and submitted an arm’s-length hearing request on July 21, 2015, to the Administrator per 29 C.F.R. § 4.11(b). On September 20, 2016, the Administrator issued an Order of Reference to the Chief Administrative Law Judge for a hearing to determine whether there were arm’s-length negotiations. 29 C.F.R. §§ 4.11(c), (d).

B. The ALJ’s Decision

GME argued before the ALJ that AAFES’s July 21, 2015 request for a hearing was untimely because it was not issued prior to ten days before the June 6, 2015 contract award and no “extraordinary circumstances” exist under 29 C.F.R. § 4.11(b)(2) to justify a late filing. Regulation 29 C.F.R. § 4.11(b)(2) provides the following:

- (2) Pursuant to section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below except in those situations where the Administrator determines that extraordinary circumstances exist:
 - (i) For advertised contracts, prior to ten days before the award of the contract;
 - (ii) For negotiated contracts and for contracts with provisions extending the term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

In response, the ALJ issued a Show Cause Order asking why the matter should not be dismissed as untimely. AAFES responded, conceding that the request was submitted after the contract award and is untimely. AAFES argued that the Administrator implicitly excused the untimeliness by issuing the Order of Reference and that the ALJ should have deferred to the Administrator’s discretion to do so. AAFES claimed that it was impossible for it to submit a timely request because it did not have the necessary information by § 4.11(b)(2)(i)’s ten-day cut-off date. AAFES PFR at 5.

The Administrator also responded to the Show Cause Order, agreeing with AAFES and arguing that “extraordinary circumstances” justify the untimely filing. Prior to May 27, 2015, the last day to file a timely request, AAFES did not have

evidence of Morena's alleged control of the Association, which it first learned of on June 12, 2015, and investigated after that time. Because AAFES did not have the information, the Administrator argues that a showing of "extraordinary circumstances" was met.

On November 23, 2016, the ALJ found that the request for a hearing was untimely. The ALJ noted that the Administrator's Order of Reference did not discuss timeliness and did not mention "extraordinary circumstances." D. & O. at 2. The ALJ observed that the law governing arm's-length requests specifies that such requests shall be made "prior to ten days before the award of the contract" unless there are "extraordinary circumstances" excusing untimely filings. 29 C.F.R. § 4.11(b)(2). The ALJ concluded that because the Order of Reference contained no analysis on timeliness or exceptional circumstances, the Administrator did not make this determination. D. & O. at 2-3. The ALJ found, in the alternative, that Sheffield had the necessary information before the ten-day cut off, citing *U.S. Dep't of State*, ARB No. 98-114 (ARB Feb. 16, 2000). Both AAFES and Sheffield appealed the ALJ's decision to the ARB.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 8.1(b), the Board has jurisdiction to hear and decide "appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative, and from decisions of Administrative Law Judges" rendered under the SCA and its implementing regulations. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019). The Board's review of the ALJ's final ruling is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). In review of final Administrator determinations, the Board is authorized to modify or set aside the decision under review. 29 C.F.R. § 8.6(e). The Board reviews questions of law de novo. 29 C.F.R. § 8.1(c); *United Gov't Sec. Officers of Am., Loc. 114*, ARB Nos. 02-012, -020, at 4-5 (ARB Sept. 29, 2003). The Board nonetheless defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with the law. *V-Tech Servs., Inc.*, ARB No. 05-100 (ARB Sept. 28, 2007).

DISCUSSION

A. Overview of the SCA's Wage-Determination and Arm's-Length-Hearing Procedures

The SCA generally requires that every contract in excess of \$2,500 entered into by the federal government or the District of Columbia, the principal purpose of which is to provide services through the use of service employees in the United States, must contain a provision that specifies the minimum hourly wage and fringe

benefit rates that are payable to the various classifications of service employees working on such a contract. 41 U.S.C. §§ 6702(a), 6703. These wage and fringe benefit rates are predetermined by the Wage and Hour Division acting under the authority of the Administrator, who has been designated by the Secretary of Labor to administer the Act.

The Administrator specifies the minimum monetary wages and fringe benefits to be paid under the Act in two types of determinations. The first type is set by the minimum monetary and fringe benefits determined to be prevailing in the locality. 29 C.F.R. § 4.3, subpart B. A second type of wage determination is issued at locations when there is a CBA between the service employees and an employer working on a federal service contract. In this second type of determination, Section 4(c) of the SCA requires that a successor contractor, subject to the SCA and providing substantially the same services, pay at least the wages and fringe benefits the employees would have received under the predecessor's contract, including accrued wages and fringe benefits and prospective increases provided for in a CBA. Section 4(c) provides the following:

(c) Preservation of wages and benefits due under predecessor contracts.--

(1) In general.--Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations.

(2) Exception.--This subsection does not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character.

41 U.S.C. § 6707(c).

Section 4(c) restricts the applicability of a predecessor's CBA in two cases. First, collectively bargained wage rates and fringe benefits must have been reached "as a result of arm's-length negotiations." *Id.* A party may challenge the *bona fides* of a collective bargaining agreement by requesting an "arm's-length hearing." 29

C.F.R. § 4.11 (procedure for arm's-length determinations). The purpose of an arm's-length hearing is to determine whether a CBA containing negotiated wage and fringe benefit rates was reached by willing signatories, avoiding "collusive arrangements intended to take advantage of the SCA scheme." 48 Fed. Reg. 49,736, 49,740 (Oct. 27, 1983).

Second, the SCA's Section 4(c) proviso states that wages and fringe benefits contained in a CBA shall not apply to a successor service contract "if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character." 41 U.S.C. § 6707(c); 29 C.F.R. § 4.10 (procedure for substantial-variance determinations).

The regulations governing both requests for arm's-length and substantial-variance hearings include explicit time limitations for filing a hearing request. The arm's-length-hearing provision at 29 C.F.R. § 4.11(b)(2) states, in pertinent part:

- (2) . . . [R]equests for a hearing shall not be considered unless received as specified below, except in those situations where the Administrator determines that extraordinary circumstances exist:
- (i) For advertised contracts, prior to ten days before the award of the contract;
 - (ii) For negotiated contracts and for contracts with provisions extending the initial term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

The time limitation provision for requesting a substantial-variance hearing is the same. See 29 C.F.R. § 4.10(b)(3). For either a substantial-variance or arm's-length-hearing request to be considered timely in connection with an advertised contract, such as the contract at issue in this case, the request must be made ten days before the award of the contract. The Administrator, however, may approve an untimely hearing request when the Administrator "determines that extraordinary circumstances exist" to justify a late filing. 29 C.F.R. § 4.11(b)(2); § 4.10(b)(3); *U.S. Dep't of State*, ARB No. 98-114, at 13. Neither the statute nor the regulations define "extraordinary circumstances." The ARB has held that the term "extraordinary circumstances" relates specifically to whether an applicant had adequate information within sufficient time to request an arm's-length hearing. *U.S. Dep't of State*, ARB No. 98-114, at 9, 12-14; *V-Tech Servs., Inc.*, ARB No. 05-100.

B. The Administrator's Order of Reference was Untimely and the Administrator Failed to Discuss "Extraordinary Circumstances"

Under 29 C.F.R. § 4.11(b)(2), the last day to timely file a request for an arm's-length hearing was May 27, 2015, which was ten days before the contract award. AAFES filed its request on July 21, 2015, subsequent to Sheffield's June 12, 2015 protest and after conducting further investigation. It is undisputed that AAFES's request was untimely. The Administrator issued its Order of Reference on September 20, 2016. The ALJ noted that the Administrator's Order of Reference did not discuss AAFES's untimely request and did not analyze or mention "extraordinary circumstances."³ Dismissing the case, the ALJ concluded that because the Administrator's Order of Reference contained no analysis on timeliness or exceptional circumstances, the Administrator did not make a determination on extraordinary circumstances to justify a late filing. D. & O. at 2-3.

1. The ALJ's Authority to Review Timeliness and Extraordinary Circumstances

As a preliminary to our discussion of the Administrator's Order of Reference and the ALJ's decision and order, we address Sheffield and AAFES's argument that the ALJ was not permitted to review the timeliness question because 29 C.F.R. § 4.11(c) provides for the designation of "an Administrative Law Judge, who shall conduct such hearings as may be necessary to render a decision solely on the issue of arm's-length negotiations." Sheffield and AAFES argue that the regulations permit the ALJ to consider solely whether arm's-length negotiations took place and no other matter including the timeliness of the Administrator's Order of Reference.

We conclude that this argument is misguided as the language in question merely precludes the ALJ from considering other SCA issues. As noted above, the timing language is included in both the substantial-variance and the arm's-length-hearing provisions. The language "solely on the issue" is more fully explained in the 1983 Final Rule for 29 C.F.R. Part 4, 48 Fed. Reg. 49,736 (Oct. 27, 1983), concerning the scope of substantial-variance hearings, 29 C.F.R. § 4.10.

(c) Referral to the Chief Administrative Law Judge. When the Administrator determines from the information available or submitted with a request for a hearing that there may be a substantial variance, the Administrator on his/her own motion or on application of any interested person will by order refer the issue to the Chief

³ D. & O. at 2. AAFES did not raise timeliness or extraordinary circumstances in its untimely July 21, 2015 request for hearing. AAFES Reply Br. Ex. 2 (AAFES's Request for a Hearing). GME raised the timeliness issue on October 17, 2016, when it first became aware of AAFES's request and had the opportunity to do so. GME Opposition Br. at 14.

Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such a fact finding hearing as may be necessary to render a decision solely on the issue of whether the wages and/or fringe benefits contained in the collective bargaining agreement which was the basis for the wage determination at issue are substantially at variance with those which prevail for services of a character similar in the locality. However, in situations where there is also a question as to whether the collective bargaining agreement was reached as a result of "arm's-length negotiations" (see § 4.11), the referral shall include both issues for resolution in one proceeding. No authority is delegated under this section to hear and/or decide any other issues pertaining to the Service Contract Act.

48 Fed. Reg. 49,771. This paragraph is an excerpt from the substantial-variance procedure, but the language "solely on the issue" is also contained in the arm's-length-hearing provision, § 4.11, of the same regulation. *Id.* at 49,771 (designation of an "Administrative Law Judge, who shall conduct such hearings as may be necessary to render a decision solely on the issue of arm's-length negotiations"). This language survives in the current SCA regulations.

Considered in context, the language "solely on the issue" for substantial-variance and arm's-length-hearing requests was intended to restrict the ALJ from adjudicating other SCA matters unrelated to the Order of Reference. Accordingly, the SCA regulations providing for arm's-length hearings do not prohibit the ALJ from considering timeliness and extraordinary circumstances and disposing of the case on these grounds. The express timing requirement is part and parcel of the hearing request and becomes a matter of record before the ALJ and the ARB on review. *In re Sys. Engineering Assocs. Corp. (SEACOR)*, 87-SCA-OM-3 (Sec'y July 26, 1988) (adjudicating timeliness of requests for hearing); *U.S. Dep't of State*, ARB No. 98-114 (same).

2. The Need for Explicit Findings in the Administrator's Order of Reference

The Administrator, AAFES, and Sheffield argue on appeal that the Administrator implicitly determined that "extraordinary circumstances" were demonstrated when it submitted the Order of Reference. For Sheffield, the Administrator's omission of language deciding and explaining "extraordinary circumstances" was a clerical error. The Administrator filed a statement with the ARB indicating that it was not required to state its holdings on timeliness or give reasons supporting "extraordinary circumstances."

We find that the Administrator's lack of written explanation delineating its reasoning on timing and extraordinary circumstances raises concerns. The regulations concerning "extraordinary circumstances" provide that a request for a hearing "shall not be considered" unless received prior to ten days before the contract award or extraordinary circumstances justify a delay. 29 C.F.R. § 4.11(b)(2). The acceptance of an untimely filing is a legal determination that is subject to legal process and appeal like any other determination of the Administrator. Under the arm's-length procedure, parties may appeal the Administrator's decision to an ALJ. The ALJ's hearing and determination follow the Administrator's initial determination in the nature of an appellate process. 29 C.F.R. §§ 4.11(c), 6.51. If the Administrator's decision is appealed to the ALJ, regulation 29 C.F.R. Part 6 provides that that the Administrator submit to the Chief Administrative Law Judge attachments including the material submitted by the applicant, other material the Administrator considers relevant, and a copy of the Administrator's findings concerning the party's request for an arm's-length hearing. § 6.51. Section 6.56, provides that "[t]he decision of the Administrative Law Judge shall be based upon consideration of the whole record, and shall be in accordance with the regulations and rulings contained in part 4 and other pertinent parts of this title." The Administrative Procedure Act requires that the administrative record show the ruling on each finding, conclusion, or exception presented. All decisions are part of the record and shall include a statement of findings and reasons on all material issues of fact. 5 U.S.C. § 557(c) (2016). The ALJ's decision in turn is appealable to the ARB. We find nothing excluding timeliness rulings from the appealable content concerning arm's-length hearings.

The Administrator asks in the alternative that if the ARB determines that findings of fact on "extraordinary circumstances" are necessary, that we remand the Order of Reference back to the Administrator so that he may reissue the Order of Reference with full support of its reasons, which will give the ARB a basis to review. We decline to do so. The regulation provides that "requests for a hearing shall not be considered unless received as specified below, except in those situations where the Administrator determines that extraordinary circumstances exist." 29 C.F.R. § 4.11(b)(2). Stated another way, the Administrator had an affirmative obligation to show extraordinary circumstances when hearing requests are untimely filed. This finding of extraordinary circumstances would then enable the Office of Administrative Law Judges to move forward with a hearing and failure to do so proves fatal to the Administrator's case. Remand is not appropriate in this circumstance.

CONCLUSION

The ALJ's decision and order is **AFFIRMED** and the Petitioners' petitions for review are **DENIED**.

SO ORDERED.