ARB CASE NO. 97-064
(ALJ CASE NO. 96-DBA-18)
DATE: October 31, 1997

In the Matter of:

BILL J. COPELAND
Prime Contractor

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This case arises under the provisions of the Davis-Bacon Act (DBA), 40 U.S.C. §§276a-276a-7, 276c, the Contract Work Hours and Safety Standards Act (CWHSSA), as amended, 40 U.S.C. §§327-332, and the regulations at 29 C.F.R. Parts 5 and 6 (1997). The Acting Administrator (Administrator), Wage and Hour Division (WHD), Employment Standards Administration, U.S. Department of Labor timely petitioned for review of the Decision and Order (D. and O.) of the Administrative Law Judge (ALJ) issued January 28, 1997. The ALJ dismissed the Administrator's Order of Reference charging Bill J. Copeland (Copeland) with violations of the DBA and the CWHSSA. The ALJ's decision is affirmed in part and reversed in part and remanded for proceedings consistent with this decision for the reasons stated below.

BACKGROUND

The Administrator seeks review of the ALJ's decision dismissing the Administrator's back wage and debarment action against Copeland. The ALJ's dismissal was issued without a determination as to the merits of the action, but was based on a determination that Copeland was prejudiced by "the extreme and inexcusable administrative delay in bringing this matter to a hearing." D. and O. at 17.

The facts on appeal are not in dispute. Copeland was awarded two contracts by the United States Forest Service to do various trail and construction work in the San Bernardino National Forest in 1991. The work on the first contract, to clear a trail, was expected to take about seven months to complete, and the second contract, to construct a comfort station, was to take about four months to complete. Government's Response to Prehearing Order (Response), Exhibits (Ex.) A and B. Copeland does not dispute that the contracts were covered by the DBA and the CWHHSA. Ex. A at 54; Ex. B at 55; Prehearing Conference Transcript (Tr.) at 51.

In March 1992, certain of Copeland's employees alleged that they were not being paid the prevailing wage rate as required by the DBA. In July 1994, consequent to its investigation of the allegations, WHD charged Copeland with violations of the DBA and the CWHSSA. In August 1994, Copeland timely filed a request for a hearing to challenge the charges. The WHD failed to issue an Order of Reference to the Office of Administrative Law Judges (OALJ), which is the procedural step necessary to bring the matter to a hearing. Copeland petitioned our predecessor appellate body, the Wage Appeals Board (WAB) in November 1994, seeking among other things, an order directing the Administrator to issue an Order of Reference to the OALJ.

The WAB granted the Administrator's motion to dismiss Copeland's petition, agreeing that since there had not been a hearing and consequently an appealable ALJ decision, the case was not properly before the WAB. In dismissing the petition, however, the WAB recognized Copeland's frustration to get a hearing on the merits and "urges . . . [the Administrator] to expeditiously issue an Order of Reference in this matter." In the Matter of Copeland Construction Company (Copeland I), WAB Case No. 94-20, Decision, Jan. 31, 1995, slip op. at 4.

The Administrator did not issue an Order of Reference, but in March 1995, issued an amended charging letter to Copeland, alleging that the violations required debarment. Copeland again timely requested a hearing to contest the charges in the amended charging letter, and ten months later, in February 1996, the Administrator sent an Order of Reference to the OALJ.

A prehearing conference was held in December 1996, at which time counsel for the Administrator advised the ALJ that the Government would not be able to proceed to a hearing on the merits until June 1, 1997. On January 28, 1997, the ALJ issued a decision granting Copeland's motion to dismiss, without a determination on the merits of the case. The Administrator petitioned this Board for review of the dismissal order.

This Board granted the Administrator's request for review on March 10, 1997. Our review of the case record indicated unwarranted delay on the part of the Administrator in bringing this matter to resolution and on September 25, 1997, an order was issued requiring the Administrator to provide to the Board and the parties, a list of witnesses certified to be available and willing to testify at a hearing on the merits of this case.

The Administrator responded on October 14, 1997, and indicated three available witnesses for a hearing: the WHD investigator and two complaining former employees, Mayberry and Patterson. Current, validated addresses of the witnesses were provided which should obviate the difficulty Copeland alleged he encountered in his previous attempt at prehearing discovery. *See* Copeland's statement in Opposition to Administrator's Petition at 18-19.

DISCUSSION

The Administrator's various delays in failing to respond to Copeland's request for hearings after the first and amended charging letters, as well as to the WAB's urging to act expeditiously is inexplicable. Even in the pleadings before us, neither the Administrator nor

counsel proffer any explanation for the Administrator's failure to act other than to note that "the Administrator regrets the delay ....." Administrator's Statement in Support of Petition at 16 n.9. While the ALJ's impatience with the Administrator's evident indifference in moving this matter to resolution is understandable, his dismissal of the matter with prejudice without any factual investigation and a consequent determination on the merits of the case, or even a determination as to how Copeland was prejudiced by the delay, is inappropriate.

Although the pertinent regulations do not specify a time frame within which the Administrator is to refer the matter to the OALJ, the Administrator's nineteen-month delay in issuing an Order of Reference in this case exhibits an unseemly indifference to an orderly and timely disposition of the case. *See* 29 C.F.R. §§5.11(b)(3); 5.12(d)(4); 6.30(a).

The issue of inordinate delay by WHD in bringing a matter to a timely hearing was addressed by the WAB in *The Matter of J. Slotnick Company et al.*, WAB Case No. 80-05, Decision, Mar. 22, 1983, slip op. at 8-9. In *Slotnick*, the WAB was concerned that the Administrator's inexcusable delay burdened both the employees who might have been wronged and could possibly be equally unfair to the contractor if it turned out that the employees had not been wronged, for in either situation, interested persons were denied access to withheld funds. *Id.* Although the WAB stated that extreme delay may create a presumption of improper treatment with or without the showing of palpable injury to the contractor, the WAB did not dismiss the complaint in recognition that such dismissal could ultimately be to the detriment of the employees. The decision reminded administering agencies of their responsibility to act expeditiously. *Id.* at 9.

The WAB addressed the matter of extreme delay in processing a complaint in *The Matter of Gemini Construction Co.*, WAB Case No. 91-23, Decision, Sep. 12, 1991. In *Gemini*, the WAB affirmed the ALJ's determination that the contractor had not been prejudiced by a four-year delay since the contractor was aware of the results of WHD's investigation, was in control and possession of its own records and could rebut the allegations of violations. In *Gemini*, the contractor, as in the case before us, was faced with the problem of a potential witness dying before the case was heard, but did not indicate how the witness' testimony could have resulted in a different outcome, vis a vis the alleged wrongful payment. *Id.* at 4. In the case before us, Copeland is likewise aware of the allegations of his former employees and has control of his original records. The purported testimony of the deceased witness will be subject to the ALJ's determination as to its relevance in Copeland's defense.

The issue of extraordinary delay by the WHD arose again in *The Matter of Tom Rob, Inc.*, WAB Case No. 94-03, Decision, Jun. 21, 1994. In *Tom Rob*, the ALJ determined that a delay of four years and eleven months denied the contractor due process and dismissed the complaint. The WAB rejected the ALJ's finding of prejudice solely on elapsed time and relied on the four-factor analytical framework set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1927), followed by *United States v. $8,850*, 561 U.S. 555 (1983). The *Barker* analysis assists a court in determining if an individual's rights have been violated in a civil proceeding due to a delay in holding a hearing. The *Barker* factors are: (1) the length of the delay; (2) the reason for

the delay; (3) the defendants' assertion of rights to the procedure; and (4) prejudice to the defendants. Id. at 6.

The WAB in *Tom Rob* found that mere allegations of prejudice are not sufficient to satisfy the fourth requirement and, citing *Gemini*, determined that there must be a showing of actual prejudice. The WAB professed its reluctance to grant a motion to dismiss on the basis of presumed prejudice in an administrative hearing, and that a more prudent course would be to require the ALJ to proceed with a hearing on the merits and then sort out the evidence which he or she deemed pertinent to the case, disregarding testimony or evidence deemed improper or prejudicial, citing *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377 (8th Cir. 1950). *Id.* at 9-10. In this manner, an ALJ could determine if the contractor had actually been prejudiced by not being able to produce witnesses directly attributable to the delay.

In *The Matter of Public Developers Corp. (PDC)*, WAB Case No. 94-02, Decision, July 29, 1994, the WAB reversed an ALJ's dismissal of WHD's complaint against the contractor pursuant to a laches theory, based on the inordinate delay in processing the case. In *PDC*, the delay stretched over a period of eight years, from commencement to Order of Reference, including a three-year delay from the investigation to the issuance of the charging letter. Id. at 3-5. The ALJ held a fact finding hearing in *PDC*, from which he determined that the contractor had been prejudiced by the extreme delay by the government. However, the ALJ did not rule on the merits of WHD's claims against PDC, nor did he identify a specific reason for finding of prejudice. The WAB ruling rejected the dismissal on a laches theory because the ALJ failed to find specific facts to support his conclusion that PDC was prejudiced in its ability to present a defense.

The WAB, at the time of the *PDC* decision had only two sitting members, and although both members agreed to the remand in an effort to hasten the resolution of the case, one member wrote a concurring opinion. The concurring member stated that he would affirm the ALJ because the *PDC* case record supported the ALJ's finding of prejudice against the contractor, even though the ALJ failed to indicate a specific basis for such finding. *Id.* at 15-16.

In the case before us, the ALJ did not hold a fact finding hearing, but only a prehearing conference. No evidence was offered other than Copeland's statements at the prehearing conference that three witnesses that he intended to call would not be available to appear in person at a hearing. The most extreme instance was the death of a potential witness, although the other two witnesses who live out of state could presumably be available by deposition or other methods.

We note that the case record contains a fairly complete documentary record. Although the Response was not admitted into evidence, certain issues of fact are apparent which negate the appropriateness of a dismissal without a hearing on the merits. The Administrator's Response includes sworn statements by the complaining employees which contain assertions that directly contradict documents submitted by Copeland to the Forest Service, as well as his statements at the prehearing conference.

These disparities pertain to hours claimed to have been worked by Mallie, Glen Copeland, Mayberry, Patterson, Ramirez, Wooley and Brose, Exhibits T, U, V, W, X, Y and Z, respectively; and the time sheets submitted by Copeland regarding the days and hours worked, Exhibits F and G. Pursuant to restrictions in this Order, only those statements by Mayberry and Patterson are directly germane to the hearing on the merits. The statements also pertain to the method of compensation being linked to work product indices up to a specified amount rather than an hourly wage as set forth in the Forest Service contract.

Since the ALJ did not conduct a fact finding hearing, our review of the record merely notes these inconsistencies between Copeland's comments and the employees' sworn statements. Because a documentary review is not satisfactory as a means of determining witness credibility, we remand this case so the ALJ can benefit from personal observation of the witnesses at a hearing.

Our main concern in this decision is to protect the rights of employees who may have been wrongfully underpaid pursuant to the DBA and the CWHSSA. But we must also assure Copeland of a fair opportunity to respond to the Administrator's allegations. In trying to balance the rights of the parties in this case, notably Copeland and the claiming employees who are available to testify at the hearing, we appreciate the fact that the agency which bears the responsibility for the inordinate delay in moving this case to resolution is insulated from the consequences of its inaction. Although such dilatoriness in the private sector which resulted in a dismissal might provide aggrieved complainants with an opportunity for redress, that is not a viable alternative in this case.

We find that the Administrator's unwarranted delay, combined with Copeland's inability to conduct prehearing discovery with former complaining employees who were not certified to be witnesses at the hearing, is prejudicial to Copeland with regard to their claims in this case. Therefore, we bar recovery of their potential claims against Copeland, and the Order of Reference with regard to the claims of these claimants is dismissed. *See Slotnick* at 9.

We therefore adopt the administrative guidance set out in *PDC*, and remand the case to the ALJ to first determine after a fact finding hearing if a case against Copeland can be made.[1] The ALJ can determine after a hearing if Copeland has been actually prejudiced in his defense on the merits with regard to the claims of employees Patterson and Mayberry, and whether such prejudice is directly attributable to the procedural delay.

ORDER

For such reasons as stated above, the decision of the ALJ IS **AFFIRMED** in part and **REVERSED** in part, and the case **REMANDED** for hearing consistent with this Decision and

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[1] Although the Administrator's four year delay in issuing an Order of Reference from the commencement of the action in this case represents a 50% improvement compared to the unwarranted delay in PDC, we take little comfort in the improvement.

Order of Remand. The administrative proceedings below shall be completed as soon as practicable giving full consideration to the interests of the Complainant and consonant with the work load of the presiding ALJ. The Administrator is restricted to calling only the certified witnesses at the hearing on the merits.

Further, to the extent possible at this time, the Administrator is ORDERED to determine the probable amounts of back pay that might be owing to Patterson and Mayberry, and lift the hold, save for such amount, on the those funds presently held by the U.S. Department of Agriculture (Forest Service), pursuant to letters sent by the Regional WHD Office on July 10, 1992 and June 7, 1993, and request that such funds be remitted to Copeland forthwith.

SO ORDERED.

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

Opinion by David A. O'Brien, **CONCURRING** in the Board's analysis, but **DISSENTING** in the outcome of the case on other grounds.

I concur in the reasoning of the Board with regard to the finding of prejudice to Copeland resulting from the Administrator's unreasonable delay in pursuing this case. The holding of the Board based on that analysis is entirely appropriate. However, I would affirm the ALJ's decision and dismiss the Order of Reference due to the Administrator's blatant disregard of the relevant regulations which provide that: "[u]pon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference . . . . " 29 C.F.R. §5.11(b)(3) (emphasis added). That language is virtually repeated in 29 C.F.R. §6.30(a).

The Respondent is given thirty days to respond to the Administrator's charging letter. 29 C.F.R. §5.11(b)(2). The Administrator is directed "upon receipt" of that response to take a purely ministerial act, forwarding the charging letter together with the response thereto to the Chief ALJ. Sending the Order of Reference is not a matter of discretion. Taking this mandated action "upon receipt" cannot be reasonably stretched to include the taking of that action some nineteen months later, especially in light of the Respondent's repeated attempts to force the Administrator to comply with the regulations. I deem the Administrator's delay in this case, in the face Copeland's timely and extraordinary efforts to move this case to a hearing and resolution, and in

disregard of the explicit language of the Wage Appeal Board's decision in *Copeland I,* to be an unwarranted and indefensible violation of the applicable regulations. On that basis I would affirm the ALJ's decision to dismiss this matter.

DAVID A. O'BRIEN
Chair