



In the Matter of:

**ARTHUR D. WILLIAMS, RAY F. THOMAS,
AND TALMADGE R. WILSON**

ARB CASE NO. 02-043

DATE: March 28, 2002

**Dispute concerning the proper occupational
classification of instructors employed by
DynCorp, Columbus Air Force Base
Support Division**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL ORDER DISMISSING APPEAL

BACKGROUND

This case arose under the McNamara-O'Hara Service Contract Act ("SCA"), as amended, 41 U.S.C. §351 *et seq.* (1994) and 29 C.F.R. Parts 4 and 6 (2001) when the Petitioners, Arthur Williams, Ray Thomas and Talmadge Wilson, filed an occupational reclassification request with Wage and Hour investigator Larry Fosburg of the Columbus, Mississippi, Department of Labor Office in July 2001. In the request, Petitioners alleged that an increase in the computer-based training at DynCorp, Columbus Air Force Base Support Division required a reclassification of their positions from Instructor (29160) to Computer Based Training Instructor (29035).

On September 20, 2001, Fosburg notified Petitioners in a telephone conversation that their request had been denied because John Bates from the Atlanta, Georgia Wage and Hour Office had determined that the Computer Based Training Instructor classification did not apply to Petitioners because they do not train on simulators. However, Petitioners received no written response to their reclassification request.

Petitioners allege that when Ray Thomas contacted Oliver Peebles in the Birmingham, Alabama Wage and Hour Office, later on September 20, 2001, and asked how to appeal the denial of the reclassification request and for Bates' telephone number so that he could discuss the denial with him, Peebles informed Thomas that he did not know how to appeal the denial and that Thomas would have to find the telephone number for himself. Arthur Williams obtained Bates' telephone number and left a message on his voice mail asking Bates to contact him, but Williams received no reply. Because Wage and Hour failed to confirm its denial of Petitioners' request for reclassification in writing and refused to respond to Petitioners' request for guidance regarding the proper procedure

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

to follow to seek reconsideration of the denial, Petitioners concluded that they had no choice but to file a protective appeal with the Board as provided in 29 C.F.R. §8.2

The Board received Petitioners' "Appeal of job classification" on February 4, 2002, and in response, issued a Notice of Appeal and Order Establishing Briefing Schedule. On February 25, 2002, the Administrator of the Wage and Hour Division moved the Board to dismiss the Petition for Review and suspend the briefing schedule until the Board acted upon the Motion to Dismiss. The Administrator, in support of her Motion to Dismiss, stated that the appeal should be dismissed without prejudice on the grounds that the matter "is not ripe for review because there has not been a final ruling." Administrator's Motion to Dismiss the Petition for Review and to Suspend the Briefing Schedule (Adm. Mot.) at 1. Counsel for the Administrator also asserts that the Wage and Hour Division has agreed to issue a written determination in this matter before the end of March 2002, from which Petitioners may seek a final ruling from the Administrator, if they disagree with the written determination.

By order dated February 27, 2002, the Board issued an Order to Show Cause no later than March 14, 2002, why it should not dismiss the Petitioners' appeal because they have not petitioned the Board to review a final ruling of the Administrator in accordance with 29 C.F.R. §8.1(b). The Board also granted the Administrator's motion to hold the briefing schedule in abeyance pending disposition of her Motion to Dismiss.

DISCUSSION

The regulations addressing the Board's jurisdiction in cases like this one in which there has been a request that Wage and Hour reclassify a position 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 or authorized representative

29 C.F.R. §8.1(b). The Administrator asserts in her Motion to Dismiss that Wage and Hour "does not consider the statements made in the September 20, 2001 telephone conversations to constitute a final ruling. Although the telephone conversations may have indicated an outcome of the review, they did not provide notice of a final ruling on the reclassification request." Adm. Mot. at 4.

The Petitioners, in their response to the Show Cause Order, do not dispute that the Administrator has not yet issued a final order in response to their request for reconsideration of the reclassification request. Thus, pursuant to 29 C.F.R. §8.1(b), we do not have jurisdiction to consider Petitioners' appeal at this time. However, we trust that as Counsel for the Administrator has stated in the Motion to Dismiss, Wage and Hour will provide a written determination to the Petitioners by the end of March 2002. *Id.* Then, as the Administrator acknowledges, if the Petitioners disagree with this written determination, they may seek reconsideration by the Administrator and, if they disagree with the decision on reconsideration, they may appeal this "final" determination to the Board as provided in 29 C.F.R. §8.1(b). *Id.*

Accordingly, we **GRANT** the Administrator's Motion to Dismiss without prejudice and **REMAND** the case to the Administrator for further consideration.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge