U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 113, Third Party Complaint against KIRA, INC.

ARB CASE NO. 2020-0039

DATE: September 1, 2021

PETITIONER,

v.

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

RESPONDENT.

Appearances:

For the Petitioner:
Terrence A. Johnson, Esq.; Snyder, Colorado

For the Wage and Hour Division:
Elena S. Goldstein, Esq., Jennifer S. Brand, Esq., Sarah K. Marcus, Esq., Jonathan T. Rees, Esq., and Heather Maria Johnson, Esq.; *Office of the Solicitor, U.S. Department of Labor*; Washington, District of Columbia

For KIRA, Inc.:
Todd A. Fredrickson, Esq. and Micah D. Dawson, Esq.; *Fisher & Phillips LLP*; Denver, Colorado

Before: James D. McGinley, *Chief Administrative Appeals Judge*; Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges*

DECISION AND ORDER

PER CURIAM. Petitioner International Brotherhood of Electrical Workers, Local 113 (Petitioner), representing seasonal grounds workers who were employed by KIRA, Inc., filed a complaint with the Wage and Hour Division (WHD), alleging that the workers were not being paid benefits in accordance with the parties' collective bargaining agreement (CBA) as required by the McNamara-O'Hara Service Contract Act of 1965[1] (SCA). After an investigation, a WHD district office (DO) found no violations of the SCA. Petitioner sought review by the WHD Administrator. The Administrator issued a final ruling affirming the DO's determination. Petitioner appealed the ruling. For the reasons discussed below, we affirm the Administrator's final ruling.

BACKGROUND

KIRA provided general maintenance services under contracts with the U.S. Army Corps of Engineers at Fort Carson in Colorado Springs, Colorado.[2] Petitioner was the bargaining representative for all employees employed under KIRA's contract with the Corps.[3] KIRA and Petitioner had entered into a CBA effective from September 30, 2013 to September 29, 2016 that provided the minimum hourly wage rates and fringe benefits contributions for the employees on a contract,[4] as required by the SCA.[5] KIRA and Petitioner had entered into four previous CBAs for the same contract work.[6]

Schedule A of the CBA sets forth the labor rates for the workers. Full-time grounds laborers earned approximately $13.00 per hour, while seasonal grounds laborers earned about $16.50 per hour.[7] Article 21, Section 2 of the CBA provides that full-time employees are required to participate in the company's insurance benefits plans and that KIRA will contribute about $6.00 per hour to their insurance coverage.[8] With respect to part-time or temporary employees, Article 21, Section 6 provides that "Part-Time or Temporary Employees when not eligible for

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1 41 U.S.C. § 6701 et seq. (2011) and its implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (2020).

2 Administrative Record (AR) at 238.

3 Administrator's Final Ruling (Final Ruling) at 2.

4 AR 238.

5 41 U.S.C. § 6703(1)-(2) (2011).

6 AR 3, 136-217.

7 *Id.* at 236.

8 *Id.* at 230. The rates for the wages and fringe benefits contributions increased slightly each year. *Id.* at 230, 236.

the Company benefits plans will receive their applicable fringe benefit monies paid out each pay period."[9] The amount of fringe benefits that temporary employees are entitled to is not specified in the CBA.

On September 16, 2016, Petitioner filed a complaint with the DO, alleging that KIRA was not paying seasonal grounds laborers fringe benefits in accordance with the CBA as required by the SCA.[10] The DO investigated the complaint and initially interpreted the CBA to require KIRA to pay seasonal grounds laborers both their Schedule A labor rate and the hourly fringe benefit contribution rate in Article 21, Section 2 under section 4(c) of the SCA.[11] Based upon this interpretation of the CBA, the WHD investigator calculated that KIRA owed $332,603.43 in back wages under the SCA. After the investigation, the WHD Assistant District Director (ADD) met with a representative of KIRA to advise them of the investigator's initial findings and afforded KIRA an opportunity to respond or provide additional information.[12] The ADD subsequently upheld the initial findings.[13]

However, after considering the CBA in light of the parties' historical practice under the prior CBAs, in which the seasonal workers' fringe benefits were included in their Schedule A labor rates, and a discussion with the regional WHD and Solicitor's offices, the DO determined that the CBA did not require KIRA to pay the Article 21, Section 2 benefit hourly fringe benefit contribution rate to the seasonal workers.[14] The DO therefore concluded that there were no violations of the SCA and closed its investigation.

Petitioner requested a "final ruling" by the Administrator. On January 14, 2020, the Administrator issued a final ruling affirming the DO's conclusion.[15] The Administrator found that the parties historically included the seasonal workers' fringe benefits payments in their Schedule A rates, and that the parties intended to

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9 *Id.* at 231.

10 *Id.* at 80-85.

11 Final Ruling at 3.

12 AR 238-39. In its reply brief, Petitioner expressed concern that the second level conference occurred without its involvement and that the WHD did not apprise it of the meeting until after the final decision. Petitioner's Reply Brief at 7-8. The Administrator addressed this concern in its supplemental brief by explaining that the WHD personnel involved in the investigation were merely following the agency's normal investigative process. Administrator's Supplemental Brief at 11-12. We discern no wrongdoing in the Administrator's actions during the investigation.

13 AR 238-39.

14 *Id.* at 239.

15 Final Ruling at 1.

continue the practice in the operative CBA, as full-time grounds laborers had more responsibilities and were expected to have more experience.[16]

From 2006 to 2013, KIRA provided the same services at Fort Carson that it did from 2013 to 2016.[17] The Administrator reviewed the parties' four previous CBAs. The earliest CBA contained higher schedule A rates for temporary workers than permanent workers, and stated under Article 21, Section 6 that "[i]t is understood and accepted that part-time and/or temporary seasonal employees covered by this Agreement will not be eligible for benefits under this Agreement."[18] The next three CBAs contained the same wage rate disparities and language. Thus, the Administrator observed that under each of these CBAs, (1) seasonal grounds laborers received a higher hourly rate of pay on Schedule A than their full-time counterparts, but (2) full-time grounds laborers received higher aggregate compensation because they received an hourly fringe benefit contribution in addition to their Schedule A pay.[19]

The Administrator also relied on a 2007 email exchange in which the parties calculated the Schedule A rates for seasonal workers by adding the minimum hourly wage rates and fringe benefits rates together.[20] Further, a 2011 CBA addendum demonstrated that the parties set the rate of pay for seasonal tire technicians to include the hourly wage rate and fringe benefits.[21] The Administrator also found that the evidence suggested that the parties intended to continue this practice in the operative CBA.[22] Job descriptions demonstrated that full time grounds workers performed a broader array of essential functions and were expected to have greater experience.[23] The Administrator noted that none of the evidence reflected an intent to pay seasonal workers more than full time workers.[24]

The Administrator then considered whether KIRA had satisfied its obligation to furnish fringe benefits separate from and in addition to the monetary wages, as required by the SCA. The Administrator noted that a contractor can satisfy its

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16 *Id.* at 4-6.

17 *Id.* at 3.

18 *Id.*

19 *Id.*

20 *Id.* at 5. The parties agreed that the seasonal grounds laborers would receive $10.83 in hourly wages and $3.16 for the fringe benefits, resulting in a Schedule A rate of $13.99 per hour. AR 31-34.

21 Final Ruling at 5.

22 *Id.*

23 *Id.*

24 *Id.*

obligation to provide separate fringe benefits if it informs covered employees that it has included fringe benefits in their pay.[25] The Administrator found that KIRA had informed the workers by negotiating the CBA with Petitioner, their legally authorized representative.[26]

The Administrator explained that she issued the final ruling pursuant to her authority to make official rulings and administer the SCA.[27] She disagreed with Petitioner's assertion that it was entitled to a written decision containing a final, reviewable ruling following an investigation, explaining that WHD's decision not to institute an administrative enforcement action is not subject to review.[28]

Petitioner filed a Petition for Review of the Administrator's final ruling with the Administrative Review Board (Board).[29] The Administrator filed a brief in response to the petition, and KIRA filed a brief as an interested party. Petitioner then filed a reply brief.

Upon review of the parties' briefs, the Board determined that additional briefing was necessary to allow it to issue a decision based on a complete administrative record. The Board issued an Order Directing Supplemental Briefing, requesting the Administrator to (1) explain the rationale behind the CBA's change in language, (2) explain whether it considers the language of Article 21 of the CBA ambiguous and, if so, why, (3) respond to Petitioner's concerns regarding the second level conference KIRA had after the initial decision with the ADD, which the WHD did not inform Petitioner of, and (4) provide several forms of missing information the Board had determined was necessary to issue a decision based on a complete administrative record.[30] The Board provided Petitioner and KIRA an opportunity to

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[25] *Id.* at 6.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] "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 . . . arising under the Service Contract Act." 29 C.F.R. § 8.1(b).

[30] Order Directing Supplemental Briefing (ODSB) at 5. Such information included: (1) "Documents and other information relating to the initial determination made by DO, including all records provided and interviews conducted during the course of the DO's investigation"; (2) "documentation and other information related to KIRA's second level conference with the ADD" and "the DO's subsequent meeting with the regional WHD and Solicitor's offices"; and (3) "the breakdown of the Schedule A labor rates for seasonal grounds laborers regarding the portion of the rates that compensate the workers for their labor and the portion that the Administrator and KIRA contends are the fringe benefits." *Id.* at 4-5.

reply to the supplemental brief. The parties all filed timely briefs in response to the Order Directing Supplemental Briefing, as well as a supplemental record.

JURISDICTION AND STANDARD OF REVIEW

The Board reviews questions of law de novo but defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with the law.[31] We defer to the expertise and experience of the Administrator and will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision.[32]

DISCUSSION

Petitioner contests the Administrator's final ruling on appeal, arguing that the Administrator incorrectly interpreted the CBA and that KIRA failed to compensate seasonal workers in accordance with its obligations under the SCA. The SCA requires federal contractors to pay covered service employees no less than specified minimum hourly wage rates and provide such employees certain fringe benefits.[33] If a collective-bargaining agreement covers the employees, the contractor must pay them in accordance with the rates provided for in the agreement.[34] The contractor must furnish the fringe benefits required under the SCA separate from, and in addition to, the specified monetary wages. The contractor may discharge this obligation by paying a cash amount equivalent to the cost of the fringe benefits required.[35]

The central issue of this case is whether the Administrator reasonably interpreted Article 21, Section 6 of the operative CBA in applying the SCA. In the CBAs covering the period from July 1, 2006 through September 29, 2013, Article 21, Section 6 contained hourly fringe benefit contribution rates for eligible employees, but stated: "[i]t is understood and accepted that part-time and/or temporary seasonal employees covered by this Agreement will not be eligible for benefits under this Agreement." In the operable CBA, covering the period from September 30, 2013 through September 29, 2016, this provision was changed to contain hourly fringe benefit contribution rates for full-time employees and now states that: "Part-Time or Temporary Employees when not eligible for the Company benefits plans will receive their applicable fringe benefit monies paid out each pay period."

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31 *Gino Morena Enters., LLC*, ARB Nos. 2017-0010, -0011, ALJ No. 2017-CBV-00001, slip op. at 4 (ARB Feb. 19, 2020).

32 *Ct. Sec. Officers*, ARB No. 1998-0001, slip op. at 4 (ARB Sept. 23, 1998).

33 41 U.S.C. § 6703(1)-(2); 29 CFR § 4.6(b).

34 41 U.S.C. § 6703(1).

35 29 C.F.R. § 4.170(a); § 4.177(c)(1).

Petitioner argues that the change in the language of Article 21, Section 6 plainly demonstrates that the parties renegotiated the CBA to allow seasonal employees to receive the fringe benefits rates for full time employees in Article 21, Section 2. In turn, Section 2 of the CBA states the amount of the fringe benefit contribution KIRA will make to permanent/full-time employees. The Administrator and KIRA, conversely, argue that the new provision only memorializes the parties' past practices of paying out fringe benefits to seasonal workers within the Schedule A rates, rather than making direct contributions.

In the Order Directing Supplemental Briefing, we requested the parties to discuss whether Section 6 was ambiguous and, therefore, that the Administrator correctly considered extrinsic evidence of the parties' intent.[36] The SCA provides that "any interpretation of the wage and fringe benefit provisions of the collective bargaining agreement where its provisions are unclear must be based on the intent of the parties to the collective bargaining agreement."[37]

In its supplemental brief, the Administrator argues that the language of Section 6 is ambiguous, noting that it does not refer to specific fringe benefit amounts, cross-reference any other provision of the CBA, or otherwise explain what is meant by the phrase "their applicable fringe benefit monies."[38] Petitioner does not directly dispute the Administrator's contention. However, Petitioner does argue that "the parties deliberately and voluntarily changed the language in the CBA at issue" and that "[i]t is clear that the parties agreed to start paying the seasonal employees fringe benefits based upon the plain language of the CBA."[39]

We agree with the Administrator that the "applicable fringe benefit monies" phrase is ambiguous. The only clear requirement of Section 6 is that seasonal workers will receive their fringe benefits payments with their paychecks, rather than via contribution to an insurance plan, when they are not on a benefits plan. The provision does not provide the amount of benefits, whether it is just the Schedule A amount or the Schedule A amount plus the amounts specified in Section 2. Therefore, the Administrator did not err in considering extrinsic evidence, including past historical practices, to determine parties' intent on how much the seasonal workers are owed.

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[36] ODSB at 4 (citing *Ruud v. Westinghouse Hanford Co.*, ARB Nos. 1999-0023, 1999-0028, ALJ No. 1988-ERA-00033 (ARB Apr. 18, 2002)).

[37] 29 C.F.R. § 4.163(j).

[38] Administrator's Supplemental Brief at 4.

[39] Petitioner's Supplemental Brief at 6.

In its supplemental brief, Petitioner claims that seasonal workers were never actually paid the required fringe benefits under previous CBAs and that the revisions to the operative CBA allowed them to receive the benefits. Evidence in the record demonstrates that Petitioner's claims are incorrect because the parties did in fact include the fringe benefits monies into the Schedule A rates in past CBAs. For example, a 2007 email exchange between the parties during negotiations for a previous CBA demonstrates that they calculated the Schedule A rates for seasonal workers by adding the minimum hourly wage rates and fringe benefits rates together. Evidence also demonstrates that the parties engaged in the same pay practice for other workers, including seasonal tire technicians. In each of the previous CBAs, the seasonal workers were paid substantially greater Schedule A labor rates, indicating that the parties' past practice was to include the seasonal workers' required fringe benefits monies in their Schedule A rates. The operative CBA's same pay disparity further demonstrates that the parties intended to continue the practice.

Petitioner's interpretation also rests on the faulty assumption that the phrase "their applicable fringe benefit monies" in Article 21, Section 6 refers to the fringe benefit contribution amounts specified in Article 21, Section 2. Section 2 provides that the "Company will contribute the sum per hour paid, up to forty (40) hours per week to each *full time employee* to be used to cover the cost of the employee's insurance" and lists the contribution amounts. Section 2 does not refer to the amounts *seasonal employees* will be paid, nor does any other provision in the CBA describe the amounts KIRA will contribute to a temporary employee receiving insurance. Petitioner alleges that Section 2 provides only that full time employees must use the fringe money to cover the cost of their insurance coverage. However, the plain meaning of this section only imposes a requirement on KIRA to pay the listed amounts to the full time employees' benefits plans.

If the parties intended for temporary employees to be paid contribution amounts in addition to their Schedule A labor rates, the parties would have included such rates in the CBA, as well as lowering the seasonal worker labor rates to be more even or less than the full time employee labor rates. Petitioner provides no persuasive explanation for why the parties would have agreed to pay the seasonal workers substantially more than full time workers who have greater responsibilities and are often more experienced. Though Petitioner suggests the parties negotiated higher rates for seasonal workers because it is more difficult to find quality employees for temporary work, it fails to explain why it did not do so for all of the past CBAs, as well. We therefore affirm the Administrator's interpretation of the CBA.

Petitioner also contests the Administrator's determination that KIRA had satisfied its obligations to pay seasonal workers the cash-equivalent of its required fringe benefits. Petitioner notes the overall compensation that full time grounds

laborers receive is higher than the labor rates that seasonal grounds laborers receive and, therefore, seasonal workers are not receiving the same amount in fringe benefits that full time workers receive in insurance contributions.[40] The SCA requires that the fringe benefit "cash payments must be 'equivalent' to the benefits" the worker would have received in terms of monetary value, if they were eligible for a benefit plan.[41]

The Administrator, however, points out that Petitioner wrongfully assumes that the SCA requires KIRA to provide the same amount in benefits to both the full time and seasonal grounds laborers. Rather, the Administrator determined that the SCA requirement means that the seasonal laborers must receive the cash equivalent of fringe benefits *they* would have received if they were eligible to enroll in benefits plans.

Under the pertinent standard of review, this decision was "a reasonable exercise of the discretion delegated to the Administrator."[42] We therefore **AFFIRM** the Administrator's final ruling affirming the DO's finding that KIRA had not violated the SCA.[43]

SO ORDERED.

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[40] Seasonal employees' labor rates were about $16.50 per hour, while permanent employees' labor rates were around $13.15 per hour, a difference of $3.35. Permanent employees received an additional $6.00 in benefit contributions per hour, as well, so the permanent employees' total hourly pay was around $19.15, which was about $2.65 more than the seasonal employees' total pay.

[41] 29 C.F.R. § 4.177(a)(3) ("When a contractor discharges his fringe benefit obligation by furnishing . . . cash payments . . . the substituted fringe benefits and/or cash payments must be 'equivalent' to the benefits specified in the determination. As used in this subpart, the terms equivalent fringe benefit and cash equivalent mean equal in terms of monetary cost to the contractor.").

[42] *U.S. Postal Serv.*, ARB No. 1998-0131, slip op. at 7 (ARB Aug. 4, 2000).

[43] Petitioner also contested on appeal the Administrator's statement in the final ruling that the "decision not to institute an administrative enforcement action is not subject to review," seemingly claiming that the Administrator would be required to initiate an enforcement action if it found that KIRA had violated the SCA. Because we affirm the Administrator's conclusion that KIRA had not violated the SCA, and that an enforcement action was not warranted, we need not address this contention.