



In the Matter of:

**The Applicability of Wage Rates
Collectively Bargained by Systems
and Resource Technologies, Incorporated
(Startech) and the United Government
Security Officers of America (UGSOA)
Local No. 34 for Security Officer Services
in Washington, D.C.**

ARB CASE NO. 05-132

ALJ CASE NO. 2005-CBV-002

DATE: June 30, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

L. Benjamin Young, Jr., Esq., Samar A. Shams, Esq., *United States Department of Agriculture, Washington, District of Columbia*

For Respondent Administrator, Wage and Hour Division:

Lynn S. McIntosh, Esq., Ford F. Newman, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor, Washington, District of Columbia*

For Respondent United Government Security Officers of America Local No. 34:

Jonathon D. Newman, Esq., *Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, District of Columbia*

ORDER DISMISSING APPEAL

Systems and Resource Technologies, Inc. (Startech) entered into a Federal service contract with the United States Department of Agriculture (USDA) to provide security guards at USDA headquarters. The McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or Act)¹ governs this contract. The United Government Security Officers of America International Union, Local No. 34 (UGSOA), representing the security guards

¹ 41 U.S.C.A. § 351 *et seq.* (West 1987); *see* 41 U.S.C.A. § 353(c), as implemented by 29 C.F.R. Parts 6 and 8 (2008).

of Startech, filed a request with the Deputy Administrator, Wage and Hour Division (Administrator) to convene a hearing to determine whether a collective bargaining agreement (CBA) between Startech and UGSOA contained negotiated wage rates “substantially at variance” with the locally prevailing wage rates for similar work within the meaning of the SCA. The USDA has petitioned the Board to review the Administrative Law Judge’s (ALJ) Decision and Order (D. & O.) finding that there is a substantial variance between the CBA wage rates and those prevailing for services of a similar character in the Washington, D.C. area. Because the USDA failed to participate in the proceeding before the ALJ, however, we dismiss the USDA’s petition pursuant to 29 C.F.R. § 6.57 (2008).

BACKGROUND

The USDA entered into a Federal service contract with Startech to provide armed security guard services for its Washington, D.C. headquarters.² The SCA governs this contract. UGSOA is the union representing Startech’s security guards. UGSOA entered into a CBA with Startech, which specified the wages to be paid to its members. On September 30, 2004, pursuant to SCA section 4(c),³ UGSOA requested a hearing to determine whether the wages the CBA specified were substantially at variance with the prevailing wages for the similar services provided by special police officers in the Washington, D.C. area.

Under the Act and its implementing regulations, the Administrator issues wage determinations that are incorporated into the contract specifications for each Federal service contract. Two different types of wage determinations are issued. For service contracts at worksites where an existing CBA governs employee wage and fringe benefit rates, the Administrator issues wage determination rates based on the rates in the labor agreement.⁴ For sites where there is no CBA in effect, the Administrator issues a wage determination that reflects wages and fringe benefits “prevailing . . . for such [service] employees in the locality.”⁵ The Administrator’s “prevailing in the locality” wage determinations are based on wage data, most frequently surveys compiled by the Bureau of Labor Statistics (BLS).⁶ The local prevailing wages for special police officers were substantially higher than the CBA wages.

² Contract No. N-00-600-01-D-0592, USDA Ref. No. 53-3142-1-6042.

³ 41 U.S.C.A. § 353(c).

⁴ 41 U.S.C.A. § 351(a)(1), (2); 29 C.F.R. § 4.53.

⁵ 41 U.S.C.A. § 351(a)(1)(2); 29 C.F.R. § 4.52.

⁶ 29 C.F.R. § 4.52(a).

By letter dated April 27, 2005, the Administrator informed UGSOA that “a substantial variance may exist.” Consequently, the Administrator filed an Order of Reference on May 17, 2005, referring the matter to the Office of Administrative Law Judges for a substantial variance hearing.⁷ Subsequently, on May 20, 2005, the ALJ issued a Notice of Pre-Hearing Conference and Hearing and Pre-Hearing Order, scheduling a pre-hearing conference and, if necessary, a hearing on July 18, 2005.⁸ UGSOA filed its Response to Order of Reference with the ALJ on June 14, 2005, indicating its intention to participate in the pre-hearing conference and, if necessary, the hearing scheduled on July 18, 2005. UGSOA’s response specifically notes that UGSOA is a party to a CBA with Startech covering employees who work as “security officers” at the “USDA” headquarters in Washington D.C. pursuant to “government contract no. N-00-600-01-D-0592, USDA Ref. No. 53-3142-1-6042.”⁹ UGSOA’s response was served on “Mike Johanns, Secretary, U.S. Department of Agriculture.” The USDA did not respond to Order of Reference with the ALJ.

ALJ’s Decision and Order

On July 13, 2005, the ALJ conducted a pre-hearing conference and UGSOA was the only interested party which participated.¹⁰ Representatives for both the Administrator and Startech were present, but they declined to participate.¹¹ USDA did not appear or participate in the proceeding before the ALJ. UGSOA submitted Proposed Findings of Fact and Conclusions of Law, which the ALJ admitted into the record.¹² The ALJ determined that no hearing was necessary to supplement the written evidence.¹³

⁷ The Order of Reference was served on the Secretary of Agriculture. The Order’s certificate of service was addressed to “Ann M. Veneman, Secretary, U.S. Department of Agriculture,” apparently because she had been listed as an interested party on UGSOA’s September 30, 2004 request for a substantial variance hearing. But Michael Johanns had succeeded Ann M. Veneman as the Secretary of USDA at the time that the Order of Reference was issued.

⁸ See Administrative Law Judge’s Exhibit (ALJX) 1. The Notice was served on “Ann M. Veneman, U.S. Department of Agriculture.”

⁹ See UGSOA’s June 14, 2005 Response to Order of Reference at 1.

¹⁰ D. & O. at 1.

¹¹ *Id.*

¹² See ALJX 2.

¹³ See 29 C.F.R. § 6.53(c).

The ALJ both adopted UGSOA's uncontested proposed findings of fact and conclusions of law and also read into the record his own findings of fact and conclusions of law. Based on those findings of fact and conclusions of law, the ALJ found that a substantial variance exists in this case between the rate paid the special police officers Startech employed at the USDA headquarters in Washington, D.C. under contract No. N-00-600-01-D-0592, USDA Ref. No. 53-3142-1-6042, and the prevailing rate set forth in Wage Determination No. 94-2104, Rev. No. 32 for services of a similar character in the Washington, D.C. area. Thus, the ALJ ordered that the special police officers Startech employed at the USDA headquarters in Washington, D.C. be paid the prevailing rate of \$22.74 per hour for police officers in the District of Columbia as required under Wage Determination No. 94-2104, Rev. No. 32. Finally, the ALJ ordered that "the transcript of the pre-hearing conference would constitute my final decision and order."¹⁴

Subsequently, on July 27, 2005, the ALJ issued an "Order Clarifying Decision and Order Dated July 18, 2005." The ALJ ordered that the wage determination issued as a result of his Decision and Order finding a substantial variance in this case shall be effective as of the date upon which his decision becomes final in accordance with 29 C.F.R. § 4.6(d)(2).¹⁵ On July 28, 2005, the USDA filed a petition for review of the ALJ's Decision and Order.

DISCUSSION

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" rendered under the SCA.¹⁶ The Board's review of the Administrator's final rulings issued pursuant to the SCA is in the nature of an appellate proceeding.¹⁷ The Board is authorized to modify or set aside the Administrator's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence.¹⁸ The Board reviews questions of law de

¹⁴ D. & O. at 1-2.

¹⁵ July 27, 2005 Order at 1-2; *see also* 29 C.F.R. §§ 6.56, 6.57.

¹⁶ 29 C.F.R. § 8.1(b); *see also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

¹⁷ 29 C.F.R. § 8.1(d).

¹⁸ 29 C.F.R. § 8.9(b).

novo.¹⁹ The Board nonetheless defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with law.²⁰

The Board has jurisdiction to consider a petition for review of an ALJ's substantial variance decision pursuant to the SCA's implementing regulation at 29 C.F.R. § 6.57.²¹ Section 6.57 provides, in pertinent part:

Within 10 days after the date of the decision of the Administrative Law Judge, *any interested party who participated in the proceedings before the Administrative Law Judge* and desires review of the decision shall file a petition for review by the Administrative Review Board pursuant to 29 CFR part 8.

29 C.F.R. § 6.57 (emphasis added). In this case, the USDA did not participate in the proceedings before the ALJ. Thus, pursuant to 29 C.F.R. § 6.57, the USDA does not have standing to file a petition for review to the Board.

The USDA contends, however, that it has standing to file a petition for review in this case pursuant to 29 C.F.R. § 6.7(b). Section 6.7(b) provides:

Failure to appear. In the event that a party appears at the hearing and no party appears for the opposing side, the presiding Administrative Law Judge is authorized, if such party fails to show good cause for such failure to appear, to dismiss the case or to find the facts as alleged in the complaint and to enter a default judgment containing such findings, conclusions and order as are appropriate. Only where a petition for review of such default judgment cites alleged procedural irregularities in the proceeding below and not the merits of the case shall a non-appearing party be permitted to file such a petition for review.

29 C.F.R. § 6.7(b). The USDA alleges that it received "defective notice" of the proceedings in this case in both the Order of Reference and the ALJ's Notice of Pre-

¹⁹ *United Gov't Sec. Officers of America, Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (ARB Sept. 29, 2003); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 1999-SCA-018, slip op. at 5 (ARB Jan. 25, 2002).

²⁰ *See Dep't of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 15-16 (ARB Dec. 22, 1999).

²¹ *See Sundex, Inc.*, ARB No. 98-130, ALJ No. 1994-DBA-058, slip op. at 2 (ARB Dec. 30, 1999).

Hearing Conference and Hearing and Pre-Hearing Order. Such “defective notice,” the USDA argues, constitutes “alleged procedural irregularities in the proceeding below” permitting the USDA, as a non-appearing party, to file a petition for review.

A review of the ALJ’s D. & O., however, indicates that the ALJ did not address or base his decision on any findings that the USDA failed to show good cause for its failure to appear or enter a “default judgment” against the USDA. To the contrary, the ALJ only addressed the merits of the case and found that a substantial variance existed based on his own findings of fact and conclusions of law.²² Consequently, assuming the ALJ only addressed the merits of the case below, because the USDA did not participate in the proceedings before the ALJ, the USDA does not have standing to file a petition for review to the Board pursuant to 29 C.F.R. § 6.57.²³

²² We note that the ALJ also ordered that “the transcript of the pre-hearing conference would constitute my final decision and order.” D. & O. at 1-2. The record before the Board, however, does not contain any transcript of the pre-hearing conference. The Board delayed issuing its decision in this case in an attempt to obtain a copy of the “transcript” from the Administrator, UGSOA, the USDA or the ALJ. But after the Board’s request, neither the ALJ, the Administrator, UGSOA, nor the USDA could provide a copy of any such “transcript” or indicate that one ever existed. Thus, the Board has proceeded to review this case as if no transcript of the pre-hearing conference exists or is part of the record. Again, a review of the ALJ’s D. & O. indicates that the ALJ did not address or base his decision on the USDA’s failure to appear or enter a “default judgment” against the USDA. As the ALJ’s D. & O. indicates that he found that a substantial variance existed based only on his own findings of fact and conclusions of law, we assume, without any other indication in the record, that the ALJ only addressed the merits of the case.

²³ The USDA relies on the holdings in *Institutional & Envtl. Mgmt., Inc.*, 1988-CBV-004, slip op. at 2 n.6, and at 5 (Sec’y Jan. 11, 1989) and *United States Cold Storage*, SCA-CBV-037, slip op. at 4 (Sec’y Oct. 25, 1985) to argue that its being denied an opportunity to participate in this case because of the alleged “defective notice” that it received is akin to granting a default judgment against it. Thus, the USDA argues that the alleged “defective notice” constitutes “alleged procedural irregularities in the proceeding below” permitting the USDA, as a non-appearing party, to file a petition for review pursuant to 29 C.F.R. § 6.7(b).

But the USDA’s argument is misplaced, as the instant case is distinguishable from the facts in both *Institutional & Envtl. Mgmt.* and *Cold Storage*. In *Institutional & Envtl. Mgmt.*, while an interested party had been present for purposes of participating in the pre-hearing conference and hearing at its originally scheduled time and place, it did not attend the pre-hearing conference and hearing when it was actually held because it had not been served with a notice of the rescheduled hearing for which it bore no responsibility. *Institutional & Envtl. Mgmt.*, slip op. at 2-5. In this case, we note that both the Order of Reference and the Notice of Pre-Hearing Conference and Hearing and Pre-Hearing Order were served on the Secretary of Agriculture. See ALJX 1. In addition, UGSOA’s Response to the Order of Reference, specifically noting that UGSOA is a party to a CBA with Startech covering employees who work as “security officers” at the “USDA” headquarters in Washington D.C.

Consequently, because the USDA does not have standing to file a petition for review to the Board pursuant to 29 C.F.R. § 6.57, the merits of the ALJ's D. & O. finding that a substantial variance exists in this case is not before us. Therefore, the ALJ's determination that the special police officers Startech employed at the USDA headquarters in Washington, D.C. under contract No. N-00-600-01-D-0592, USDA Ref. No. 53-3142-1-6042, be paid the prevailing rate of \$22.74 per hour for police officers in the District of Columbia as required under Wage Determination No. 94-2104, Rev. No. 32, is the final administrative decision in this case.²⁴ Thus, the wage determination the Administrator issued as a result of the ALJ's finding of a substantial variance in this case is effective as of the date the ALJ issued the D. & O., July 18, 2005, until the end of the CBA between Startech and UGSOA.

CONCLUSION

Since the USDA did not participate in the substantial variance proceedings before the ALJ, the USDA does not have standing to file a petition for review to the Board pursuant to 29 C.F.R. § 6.57. Accordingly, the USDA's Petition for Review is **DISMISSED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

pursuant to "government contract no. N-00-600-01-D-0592, USDA Ref. No. 53-3142-1-6042," was served on "Mike Johanns, Secretary, U.S. Department of Agriculture."

In *Cold Storage*, a party that had received notice of a substantial variance hearing and appeared at the hearing was nevertheless excluded by the ALJ from participating in the proceedings before the ALJ. *Cold Storage*, slip op. at 3. In this case, the ALJ did not exclude the USDA from participating in the proceedings before him, but served the Notice of Pre-Hearing Conference and Hearing and Pre-Hearing Order on the Secretary of Agriculture. Moreover, the USDA did not appear at the pre-hearing conference or exhibit any other indication of its intent to participate in the proceedings.

Thus, not only did the ALJ not base his decision on the USDA's failure to appear or enter a "default judgment" against the USDA, but the ALJ's decision cannot be considered akin to granting a default judgment. Unlike *Institutional & Env'tl. Mgmt.* and *Cold Storage*, the USDA was not denied an opportunity to participate in this case either by the ALJ or because it had never been served with any notice of the pre-hearing conference.

²⁴ See 29 C.F.R. § 4.6(d)(2).