U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

The Applicability of Wage Rates Collectively Bargained by Integrity National Corporation and the International Association of Machinists and Aerospace Workers, District Lodge 1786, Under Contract NNJ08JB96C for Custodial Support Services for the National Aeronautics and Space Administration – Lyndon B. Johnson Space Center, 2101 NASA Parkway, Houston, Texas 77058-3696	**ARB CASE NO. 12-027** **ALJ CASE NO. 2011-CBV-003** **DATE: December 19, 2013**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:
Randall T. Suratt, Esq.; ***National Aeronautics and Space Administration,*** **Houston, Texas**

For the Respondent:
Rod Tanner, Esq.; ***Tanner & Associates, P.C.;*** **Fort Worth, Texas**

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; and Lisa Wilson Edwards,** ***Administrative Appeals Judge*****.**

FINAL DECISION AND ORDER

This case arises under the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C.A. § 6701, *et seq.*, (Thomson Reuters 2011) and implementing regulations, 24 C.F.R. Parts 4 and 6 (2013). The National Aeronautics and Space Administration (NASA or agency) sought a variance from the collectively-bargained wages for custodial services in a contract between Integrity National Corporation (INC) and the International Association of Machinists and Aerospace Workers, District Lodge 377, Local Lodge 1786 (Union), and requested a hearing with the Wage and Hour Division (WHD) Administrator. The WHD Administrator determined that there may be a substantial variance and referred the case to the Chief Administrative Law Judge. On December 15, 2011, after a hearing, a Department of Labor Administrative Law

Judge (ALJ) denied NASA's petition for a collective bargaining variance.[1] NASA petitioned the Administrative Review Board (ARB) for review. We affirm.

BACKGROUND

A. Facts

NASA operates the Lyndon B. Johnson Space Center in Houston, Texas. NASA entered into a contract with INC for custodial and janitorial services at the Johnson Space Center. (contract NNJ08JB96C). D. & O. at 2; NASA Exhibit (Exh.) 8. The fixed-price contract had a base period of two years (March 1, 2008, through February 28, 2010), one two-year option (March 1, 2010, through February 28, 2012), and a one-year option (March 1, 2012, through February 29, 2013) when the contract expired.[2] The applicable locality is the greater Harris County, Texas area, which includes Houston. D. & O. at 3. The NASA contract incorporated the wage rates contained in the collective bargaining agreement (CBA) between INC and the Union. See Union Exhs. 6, 7, 8. The contract specified four classes of employees with the following collectively-bargained hourly rates as of March 1, 2011: 1) custodian/janitor service worker ($14.69); (2) custodian/janitor crew leads ($15.44); (3) recycling specialist ($15.80); and 4) warehouse clerk ($15.80). D. & O. at 3-4; see also Union Exh. 8 at 31; NASA Exh. 4 at 31.

B. Proceedings below

On February 25, 2011, NASA requested a substantial variance under SCA Section 4(c), for the collectively-bargained wage rates for custodial services at the Space Center facility. On March 28, 2011, the WHD Administrator determined that a substantial variance within the SCA may exist. Union Exh. 62. The WHD Administrator issued an Order of Reference on August 2, 2011, referring the case to the Chief Administrative Law Judge for a substantial variance hearing pursuant to 29 C.F.R. § 4.10(c). Union Exh. 64. A Department of Labor ALJ held an evidentiary hearing on the substantial variance request on November 2-3, 2011.

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[1] *In re NASA,* ALJ No. 2011-CBV-3 (Dec. 15, 2011) (D. & O.).

[2] NASA Exh. 1, Hearing Transcript (Tr.) at 67-68. The ARB has held that once the contract at issue expired, the case becomes moot because the relief accorded under the SCA is prospective only. See 29 C.F.R. § 4.163(c) ("variance decisions do not have application retroactive to the commencement of the contract."); *In re Ceres Gulf Inc.,* ARB No. 96-192, ALJ Nos. 1993-CBV-001, 1995-CBV-001; slip op. at 2 (ARB Jan. 6, 1998). In this case, NASA's contract with INC expired on February 28, 2013, at the end of the second, one-year option. The ARB has dismissed appeals under the SCA where no practical relief is available because review would be nothing more than an advisory opinion. *In re Am-Gard, Inc.,* ARB Nos. 06-049, -050; ALJ No. 2006-CBV-001, slip op. at 4 n.14 (ARB July 31, 2008). Nonetheless, we will address the issues NASA raises, which are "significant issue[s] of general applicability." 29 C.F.R. § 8.6 (d).

NASA submitted as evidence the SCA Directory of Occupations describing the duties of a house-keeping aide (No. 11122), janitor (No. 11150), warehouse specialist (No. 21410), and recycling specialist (No. 99711). NASA Exh. 12 at 30, 70, 144. NASA submitted the Bureau of Labor Statistics (BLS) Alphabetical Index of Occupations, which listed first-line janitorial supervisors, cleaners, refuse and recyclable material collectors, and warehouse clerks, and BLS definitions of the standard occupational classifications (SOC) for janitors and cleaners, stock clerks, and refuse and recyclable materials collectors. NASA Exhs. 13, 14, 21.

The Union argued that the collectively-bargained wages were the proper rates to be paid, that NASA had not made a clear showing of a substantial variance from wages in the locality, and that its request for a variance hearing was untimely.

C. ALJ Decision

On December 15, 2011, the ALJ entered a Decision and Order denying NASA's petition for a variance to the collectively-bargained wages for custodial services at the Johnson Space Center. The ALJ determined that "[w]hile the evidence offered by NASA shows a variance with the collectively bargained wages at issue, the job descriptions or date compilations used to demonstrate such variance are not sufficiently matched to the job duties and job qualifications of the workers in question." D. & O. at 8.

The ALJ observed that NASA relied exclusively on the Statement of Work (SOW) contained in the contract between NASA and INC, and failed to consider "NASA's [w]orkers[']' actual job duties or the uniqueness of the job qualifications or the uniqueness of the environment in which these jobs are performed." *Id.* at 5. The ALJ stated that the SOW "does not delineate or identify any specific job duty or skill for any specific position," and that instead it is "simply a description of the services the contractor has agreed to deliver to NASA." *Id.* The ALJ stated that "NASA ignored significant differences . . . of employees working at NASA as compared to any other known work site in the locality." *Id.* at 6. Based on these observations, the ALJ held that NASA failed to make a clear showing that these "collectively bargained wages are at variance with jobs of a similar character in the locality." *Id.* at 8.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under SCA. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 8.1(b). In this role, "the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning such matters." 29 C.F.R. § 8.1(c). ARB's review of the ALJ's decision under the SCA is an appellate proceeding. 29 C.F.R. § 8.1(d). The ARB's "authority to modify or set aside an ALJ's findings of fact is limited to those instances where the ALJ's findings are not supported by a preponderance of the evidence." *Administrator, Wage & Hour Division v. Tri-County Contractors, Inc.*, ARB No. 11-014, ALJ No. 2008-SCA-017, slip op. at 3(ARB June 29, 2012);

29 C.F.R. § 8.1(d). *See also Dantran, Inc. v. U.S. Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). The ALJ's conclusions of law are reviewed de novo. *Tri-County*, ARB No. 11-014, slip op. at 3.

DISCUSSION

A. Statutory and Regulatory Framework

The SCA requires that whenever the United States enters into a contract in excess of $2,500, the principal purpose of which is to provide services through the use of employees in the United States, the contract must contain a provision that specifies the minimum hourly wage rates that are payable to the various classifications of service employees working under the contract. 41 U.S.C.A. § 6702. The SCA provides that a service contract and bid specification shall contain a provision specifying the minimum wage and fringe benefits to be paid to each class of service employee engaged in the performance of the contract or any subcontract, as determined by the Department in accordance with prevailing rates and/or benefits in the locality, or, where a collective-bargaining agreement covers the service employees, in accordance with the rates and/or benefits provided for in the agreement, including prospective wage and/or benefit increases provided for in the agreement as a result of arm's length negotiations. 41 U.S.C.A. § 6703(1), (2). The WHD Administrator predetermines the wage and fringe-benefit rates. See 41 U.S.C.A. § 6703; 29 C.F.R. § 1.1. Under the process set out in the Act, the WHD Administrator prepares for service contracts: (1) a general wage determination based on the rates that the WHD determines prevail in the particular locality for the various classifications of service employees to be employed on the contract, and (2) wages based on a collective bargaining agreement between the service employees and the employer working on a federal service contract. 41 U.S.C.A. § 6703 (1). The latter applies here.

SCA Section 4(c), as amended, "imposes on successor contracts an obligatory floor for wages and fringe benefits in the event that the predecessor contract has specified collectively bargained rates." *In re United HealthServ Inc.*, 1989-CBV-001, et seq., slip op. at 6 (Sec'y Feb. 4, 1991).[3] See also 41 U.S.C.A. § 6707(c). However, Section 4(c) "contemplates circumstances

[3] The SCA language pertaining to collective bargaining rate alternatives was incorporated in a 1972 amendment. A Senate Report on the 1972 SCA amendment incorporating Section 4(c) "makes clear that Congress intended that the successorship obligation would attach in the usual circumstance." *In re United Healthserv, Inc.*, No. 1989-CBV-001, slip op. at 8. The Senate Report states:

> [A] new subsection (c) has been added to section 4 to explicate the degree of recognition to be accorded collective bargaining agreements covering services employees, in the predetermination of prevailing wages and fringe benefits for future such contracts for services at the same location . . . . The committee appreciates the importance of decasualizing the service contract industry – a labor intensive and otherwise casual and transient industry.

in which the obligation may be suspended." *In re United Healthserv*, No. 1989-CBV-001, slip op. at 4. That provision reads:

> (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.A. § 6707(c); 29 C.F.R. § 4.10(a). The moving party carries the burden of demonstrating that a substantial variance exists with a "clear showing" of evidence." *In re Big Boy Facilities*, No. 1988-CBV-007 (Sec'y Jan. 3, 1989), 1989 WL 549943, *2. That clear showing requires "persuasion by a substantial margin." *Id.* Substantial variance decisions are "highly factual, [and] turn on an evaluation of all evidence presented." *In re United HealthServ*, No. 1989-CBV-001, slip op. at 6.

Id., slip op. at 7 (quoting S. Rep. No. 1131, 92nd Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. at 3537). "Ordinarily where service employees are covered by a collective bargaining agreement, a successor contractor furnishing substantially the same services at the same location will be obligated to pay such service employees no less than wages and fringe benefits required by such agreement." *Id*., slip op. at 8 (citing 1972 U.S.C.C.A.N. at 3537). "The intent of [Section 4(c)] is to prevent the loss of wages and benefits fairly bargained for by the Union." *In re American Guard Servs., Inc.*, 2001-CBV-001, slip op. at 4 (ALJ Apr. 25, 2001). "The finding of a substantial variance should thus be an exceptional situation." *Id.* at 4 (citing S. Rep. No. 1131, 92d Cong. 2d Sess. 5, reprinted in 1972 U.S.C.C.A.N. 3538); see also *In re American Guard Servs.*, 2001-CBV-001, slip op. at 4 (citing *Congressional Oversight Hearings: The Plight of the Service Worker Revisited: Report of the Subcomm. On Labor-Management Relations of the U.S. Congress, House Comm. on Education and Labor*, 94th Cong., 1st Sess. 7-8 (Comm. Print 1975)).

B. A preponderance of evidence supports the ALJ's determination that the agency failed to clearly show that collectively-bargained wages for custodial services at Johnson Space Center are substantially at variance with wages prevailing in the locality for services of a similar character

NASA argues that the ALJ erred in upholding the successorship obligation in the contract for custodial workers at the Johnson Space Center and that the contract's SOW specifying the basic required services is the sole basis for comparing similar services in the locality. Br. at 3-12. NASA also argues that the ALJ erred in determining that NASA misapplied the wage measure charts by comparing an average of wage-based rates and surveys "without regulatory or statutory direction to do so." Br. at 12-13. As explained herein, the ALJ did not err.[4]

1. The agency failed to show that services provided under the collective bargaining agreement are of a similar character in the locality

The SCA does not define "substantial variance," but the Department has made clear that "the plain meaning of the term requires that a considerable disparity in rates must exist before the successorship obligation may be avoided." All Agency Memorandum No. 166 (Acting Administrator, Wage and Hour Division) (Oct. 8, 1992), slip op. at 2 (AAM No. 166) (internal quotations omitted). The Department has determined that "no discrete comparison rate is conclusive," and has "rejected the argument that area wage determinations should serve as the only benchmark for section 4(c) findings." *Id.* (Department states that "collectively bargained rates often can be expected to exceed service industry prevailing rates in these circumstances."). For a movant to succeed, there must be a clear showing of a substantial disparity with "prevailing wages for services of similar character in the locality." 41 U.S.C.A. § 6707(c)(2); 29 C.F.R. § 4.10(a). The term "services of a character similar in the locality," means "job duties and skill characteristics of a related nature," not "an identity of services." *Neeb-Kearney v. Dep't of Labor,* 1992 WL 395510 *4, 1 Wage & Hour Cas. 2d (BNA) 331 (E.D. La. 1992); see also *In Re Big Boy Facilities,* 1989 WL 549943 *6 (Sec'y Jan. 3, 1989).

NASA argues that the ALJ is limited to the SOW job description in assessing the services of a character similar in the locality. In support of that argument, NASA relies on *In re Ryan-Walsh, Inc.,* ALJ No. 1993-CBV-001 (Aug. 31, 1996). NASA's reliance, however, is misplaced. While the ALJ in *In re Ryan-Walsh* analyzed the description of contract services, the ALJ did not hold that such an assessment is limited to the written contract description of services provided. *Id.,* slip op. at 14. The ALJ in *In re Ryan-Walsh* made clear that the "Service Contract Act focuses on whether work of a character similar is being performed in the locality by a sufficient number of employees at lower wages. The sole focus is on *actual duties and skills*." *Id.* (emphasis added).

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[4] The Union argued that NASA's February 25, 2011, request to the WHD Administrator for a variance to the collectively-bargained wages was untimely. Br. at 29. The Union argued that under 29 C.F.R. § 4.10(b)(3), an exercised contract option is treated as a successor contract under section 4(c), requiring that a wage variance request be submitted prior to the beginning of the option period, which was March 1, 2010. The ALJ did not address that issue, and in view of our decision affirming the ALJ Decision and Order, we decline to address that issue as well.

In *In re Harry Stroh Assocs.*, No. 1987-CBV-002, 1991 WL 733656 (Sec'y Apr. 24, 1991), the Secretary affirmed an ALJ decision and order that the agency "did not meet its burden of proof that the services being compared represented 'services of a character similar,' and therefore that a substantial variance was not proven." Slip op. at 2. In *Stroh*, the movant compared minimum wage rates for Housekeeping Aides, and argued that the agency's Area Wage Survey and BLS Area Wage Survey was dispositive of a substantial variance. *Id*. However, the Secretary held that the work the service workers performed under the collective bargaining agreement "d[id] not sufficiently match the job performed by janitors, porters, cleaners or housekeeping aides for purposes of a substantial variance finding." *Id.* The Secretary relied, in part, on evidence in the record of "extensive training required" for the service workers who performed the duties on the contract, and "their unique knowledge and duties which are not performed by the janitors, porters and cleaner surveyed by BLS or by housekeeping aides." *Id.* at 2.

Based on the Secretary's holdings in *In re Stroh*, an ALJ conducting a Section 4(c) hearing for a variance to collectively-bargained wages can consider factors that include job duties, training, expertise, and experience required for union workers who are doing the work. *See*, *e.g.*, *In re Sooner Process & Investigation*, ALJ No. 2000-CBV- 003,slip op. 5 (July 26, 2001) (ALJ rejects comparative wage survey evidence because it is "of little probative value due to the lack of similarity between jobs"); *In re American Guard Servs., Inc.*, ALJ No. 2001-CBV-001, slip op. at 5 (Apr. 25, 2001) (ALJ holds that agency "failed to clearly show that the positions discussed in the survey are similar enough to the positions covered by the contract in order to base the wage rate on the survey."). Thus, contrary to NASA's contention, the Act permits the ALJ to analyze the *actual* job duties and skills of custodial workers employed at NASA for purposes of determining "services of a character similar in the locality." 41 U.S.C.A. § 6707(c).

The SOW lists basic services expected for custodial workers at the Johnson Space Center. Union Exh. 3 at C-5. The services listed include:

> drinking fountain and wash station cleaning; mirror and glass cleaning; elevator cleaning; dusting/cleaning entrances, hallways, and carpeted areas; clean and service restrooms, medical office and laboratories; machine scrub restroom floors; clean inside stairs, stairwells, ramps and landings; clean inside/outside entrance area floors; hard floor cleaning; vacuum carpet and rugs; spray buffing in hallways; dusting/cleaning; clean exterior glass surfaces/window frames and interior windows/window area/Venetian blinds; recycling program; solid waste removal; strip, seal and wax/finish hard floor; steam clean carpet/rugs; pest control; emergency services and special events.

Union Exh. 3 at C-5; see also Union Exh. 3 at C-16 to C-25; NASA Ex. 2 at C-5, C-16 to C-25. The duties set out in the SOW contain the "essential functions" for custodial work. Tr. at 183-

184 (Candler). By relying solely on the contract's SOW, the ALJ determined that NASA's substantial variance request ignores "significant differences such as security clearance, language proficiency, reading/writing ability, education requirements, and people skills" required of custodial personnel employed at NASA, as compared to any other known work site in the locality. D. & O. at 6. The ALJ stated that NASA failed to account for the uniqueness of the NASA workplace as compared to other employers in the locality and the impact of NASA's "thorough security requirements and workplace environment on the skill level of the custodial workers." *Id.* A preponderance of evidence supports these ALJ findings.

First, the administrative record contains evidence that the duties and responsibilities of custodial workers at the Johnson Space Center include specialized training and experience beyond basic janitorial functions. For example, NASA Contracting Officer Steven Candler testified that custodial worker responsibilities and duties at the Johnson Space Center included managing building pest control, emergency clean-ups of blood spills and flooding, and special events coverage. Tr. at 114-120, 138 (Candler); see also Tr. at 119 (Candler testifying that the agency "provide[s] a number of custodial service items for every special event. This might be a President coming to visit or it could be an astronaut crew return out of Ellington Field."). Because of these job duties, custodial workers are trained on approved policies and procedures, and provided training specific to Johnson Space Center safety, fire duration, hazardous materials, and blood-borne pathogens. *Id.*; see also Tr. at 119 (Candler) (testifying that janitors under the facilities services contract may clean up blood "8 to 15 times a year."); Tr. at 305-306 (INC Operations Manager Hugo Galatiore) (testifying that workers are trained on cleaning blood spills).

Second, NASA has safety training programs required of employees that INC custodial workers attend, and INC has in-house safety training for workers assigned to the Johnson Space Center. Tr. at 307-308 (Galatiore) (testifying that "the level of safety training at NASA is the highest I've seen in the industry"). Custodial employees work predominantly during day time hours at NASA. See NASA Exh. 2 at C-6 (specifying Space Center work hours as 5:00 a.m. to 5:30 p.m., Monday through Friday). As a result, INC requires employees to be proficient in English, attain a high school education, and have five years of prior cleaning experience. Tr. at 299, 309 (Galatiore). The Johnson Space Center covers about 1,600 acres, and includes an additional training facility, a neutral buoyancy laboratory for astronauts, an airfield with hangars, and 300 elevators. Tr. at 81-82 (Candler). Given the size of the facility, custodial workers at Johnson Space Center may also be required to drive between service buildings at the facility site; INC thus requires most workers at the Johnson Space Center to have a valid driver's license. Tr. at 302 (Galatiore). The INC performs a Division of Motor Vehicles check through its insurance company. Tr. at 302-303 (Galatiore).[5] The Space Center employs more than 70 INC employees

[5] The ALJ found that the SOW required custodial workers to speak English. The SOW states that custodial managers and supervisors employed at the Space Center read, write, and speak in English, NASA Exh. 2 at C-13, but does not require custodial workers to speak English, Tr. at 139 (Candler). The evidence shows, however, that given the job expectations, and since work is done during normal business hours, there is a reasonable expectation that INC hire custodial workers for the Johnson Space Center facility who are proficient in English. Tr. at 299 (Galatiore).

and managers who are responsible for cleaning the building complexes, including an astronaut quarantine facility. Tr.at at 81-84, 89-92, 97 (Candler); see also NASA Exhs. 9-11.

Third, custodial workers at NASA (including INC employees) are required to undergo a background investigation prior to employment at the Johnson Space Center. Tr. at 139-141 (Candler) ("all employees of NASA are required to have a badge that allows them access to the center. . . . There's a background investigation pending being badged to be onsite."). NASA's background investigation is intended to "make sure that . . . employees are safe and that people that come on site are not a hazard to facilities or other employees." Tr. at 140 (Candler). In its survey, NASA did not assess whether other entities, such as local universities and school districts, required background checks of custodial workers. Tr. at 139-40, 185 (Candler).

Based on the evidence, the ALJ determined that NASA failed to account for the character of the INC work force and the "impact of NASA's thorough security requirements and workplace environment on the skill level of the custodial workers [who] can be hired and retained to work in such a facility." D. & O. at 6. The record reflects that, contrary to most custodial services, there was little turnover among the INC workforce. INC Operations Manager Galatoire testified that NASA facilities are unique and the workers were the most exceptionally skilled in the industry. Galatorie testified that INC was a "leader in the industry" with high standards for hiring custodians and other employees for NASA because of the nature of the workplace and the skills required. Tr. at 298-317 (Galatoire). INC Chief Executive Officer Antonius Hines testified that the company's ability to "attract, retain, and train the most highly-qualified person predicates our success," Tr. at 369, and that INC assigns custodial workers based on "a number of factors" for purpose of "preserv[ing] the [professional] environment and culture at NASA." Tr. at 370-371.

Accordingly, a preponderance of evidence supports the ALJ's determination that NASA failed to compare the services of INC custodial workers at the Johnson Space Center with jobs of a similar character in the locality as required by the Act.

2. The ALJ correctly determined that NASA failed to make a clear showing of substantial variance because of the use of inadequate wage measurement charts

NASA argues that the ALJ erred in ruling that the agency misapplied the wage rate survey charts. Br. at 12-13. NASA asserts that there is no set statutory or regulatory methodology required to prove substantial variance. The ALJ did not err.

First, AAM No. 166 directs parties seeking a wage variance to include information and analysis concerning the differences between the collectively-bargained rates issued and the rates contained in:

> (1) federal wage board rates and surveys;
> (2) relevant BLS surveys and comparable SCA wage determinations;

> (3) other relevant wage data such as what other employers pay for similar services; and
> (4) other collectively-bargained wages and benefits in the locality.

AAM No. 166 at 2-3. The Department recognizes that a party seeking a variance "may not be able to submit complete data at the time the hearing request is made," but the Department expects that this information will be available prior to a decision on the variance request. *Id.* at 3. "Merely providing a statement that data is not available is not sufficient." *Id.* "The request must adequately demonstrate the effort made to obtain or develop such information." *Id.*

Despite the requirement set out in AAM No. 166, NASA witnesses testified that the agency could not obtain any collectively-bargained wage rates in the Houston locality. Mandy Kuehn, a NASA contract specialist, testified that she obtained wage data from the University of Houston and the Houston Independent School District but that she did not specify collectively-bargained wage rates. Tr. at 261. NASA Contracting Officer Stephanie Hunter testified that she did not retrieve wage information from any other collective bargaining agreement (Tr. at 186-187), and was unaware that the Bureau of National Affairs publishes data relating to union wage rates and labor agreements (Tr. at 232-233). NASA employee C. Diane Truman testified that she attempted to retrieve wage information from two unions prior to the administrative hearing, but did not obtain any such data. Tr. at 268-272.

Second, labor economist expert Dr. Charles North testified that NASA relied on measures of central tendency to compare wage rates of custodial service employees at the Space Center with the average wage rates of custodial employees in the locality. Dr. North testified that this resulted in a misleading conclusion with respect to assessing a substantial variance. Tr. at 402-412 (North); see also Union Exh. 67 (Dr. Charles North: Report on Wages of Custodial and Other Staff of INC at Johnson Space Center). Dr. North explained in his report:

> None of these measures considers the overall variation of the wages of janitors in the Houston area. Similarly, the wages [Johnson Space Center] cites are drawn from all industries, not just public sector employers such as [Johnson Space Center]. Instead we should examine the overall wage distribution for janitors in the public sector. Examining the overall wage distribution allows us to assess the normal variance in wages within the labor market, while limiting the industry to public sector employers provides greater assurance that the services whose wages are being compared are of similar character as required by law. . . . . When we limit the data to just public sector employers (which would be more comparable to employment connected to [Johnson Space Center], a federal government entity), the . . . wage for custodians specified in the [collective bargaining agreement] is between 50th to 75th percentile of public sector workers in the Janitors and Cleaners occupation in Houston.

Union Exh. 67 at 6-7. Dr. North further testified that NASA's evidence "inherently compar[es] collectively-bargained wages at NASA with a market that is generously 85 percent non-unionized" and "most people recognize that collectively-bargained wages are generally higher than non-collectively bargained wages." Tr. at 414; *see also generally* Tr. at 414-418 (North).

This preponderance of evidence supports the ALJ's determination that NASA relied on inadequate wage measurement charts, and thus failed to clearly show a substantial variance to the collectively-bargained rates in dispute.

CONCLUSION

The ALJ's Decision and Order denying NASA's petition for collective bargaining variance is **AFFIRMED**, and this case is **DISMISSED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge