



In the Matter of:

**The Applicability of Wage Rates
Collectively Bargained by BAE Systems,
Incorporated, and the International
Brotherhood of Electrical Workers,
Local 1260 under Contract
N00604-08-C-0002 for Naval and
Satellite Telecommunications Services
for the Department of the Navy at
NAVSUP Fleet Logistics Center
Pearl Harbor, Joint Base Pearl Harbor,
Hawaii, 96860-4549**

ARB CASE NO. 12-056

ALJ CASE NO. 2012-CBV-001

DATE: May 19, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Jan Michael Whitacre, Esq.; *Department of the Navy, Pearl Harbor, Hawaii*

For the Respondent:

Teresa Morrison, Esq.; *International Brotherhood of Electrical Workers, Local 1260, Honolulu, Hawaii*

**BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.
*Judge Corchado, concurring.***

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 its implementing regulations, 24 C.F.R. Parts 4 and 6 (2013). The Department of the Navy sought a variance from the collectively-bargained wages for telecommunications services in a contract between BAE Systems, Incorporated (BAE), and the International Brotherhood of Electrical Workers, Local 1260 (Union), and

requested a hearing with the Department of Labor's Wage and Hour Division (WHD) Administrator. The WHD Administrator referred the case to the Office of Administrative Law Judges (OALJ). On December 15, 2011, after a hearing, an Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) denying the Navy's petition for a collective bargaining variance. The Navy petitioned the Administrative Review Board (ARB) for review. For the following reasons, the ARB affirms the ALJ's decision.

BACKGROUND

A. Facts

The Navy operates the Naval Computer and Telecommunications Area Master Station Pacific at Pearl Harbor, Hawaii. In October 2007, the Navy entered into a contract with BAE to provide telecommunications and facility support, emergency power, and grounds maintenance for the station (contract N00604-08-C-0002) (BAE contract). D. & O. at 1, citing Exhibit (EX) D-1, Attachment (ATT) 1. The contract ran for a base of one-year with three one-year options, the last of which ended on September 30, 2011, but the contract was extended for six months through March 2012. EX D-1, ATT 1 at (J-29) 000035, Hearing Transcript (TR) at 77. This dispute concerns the wage rates contained in a collective bargaining agreement (CBA) between BAE and the Union that became effective on October 1, 2010. The CBA included 17 wage classifications, raised wages in all classifications, and was set to expire on September 30, 2013. D. & O. at 2, citing EX D-1, ATT 2.

B. Proceedings below

On July 28, 2011, in preparation for solicitation of a successor contract, the Navy requested a substantial variance under SCA section 4(c) for the collectively-bargained wage rates for all 17 classifications (No. 2005-2153 Revision 14). EX D-1.¹ The WHD Administrator determined that a substantial variance within the SCA might exist and issued an Order of Reference on October 12, 2011, referring the case to an ALJ for a substantial variance hearing under 29 C.F.R. § 4.10(c). An ALJ held an evidentiary hearing on the substantial variance request on January 19, 2012.

The Navy argued that the CBA wage rates were substantially at variance with the SCA wage determination and prevailing wages for similar work in Honolulu, Hawaii. D. & O. at 4,

¹ The Navy sought a substantial variance for the following CBA job classifications set out in the BAE contract: Antenna Specialist/Lead, Lead Electronics Tech III, Electronics Technician II, Antenna Mechanic, High Voltage Electrician, Maintenance Electrician, HVAC Technician, Generator Maintenance, Maintenance Mechanic, Supply Technician/Administrative Assistant, Supply Clerk, Electronics Operator/Shift (Midas), BMD/Midas Operator I, BMD/Midas Operator II, Midas Operator III, and Ground Maintenance/Custodian. EX D-1, D. & O. at 4-5 n.9. The facilities supervisor position "is an exempt position and was not considered in the Navy's analysis." D. & O. at 5, n.9, citing TR at 23.

citing EX D-1 at 2. The Navy submitted as evidence, the Administrator's SCA wage determination and wage survey data from the Economic Research Institute (ERI), the SCA Directory of Occupations, and data formulated from Salary.com. EX D-1, ATT. 4; EX D-9, D-10. Based on data from these sources and a comparison of position descriptions in the SCA directory, Salary.com, and the BAE technical proposal, the Navy argued that other employees in the locality are performing similar services. The Union opposed the Navy's petition.²

C. ALJ Decision

At the outset, the ALJ observed that analyzing the Navy's substantial variance petition under 40 U.S.C.A § 6707(c)(2) requires an evaluation of the wage and fringe benefits prevailing in the proper locality. The ALJ found that the county of Honolulu represented about two-thirds of the total population of the state of Hawaii, and that there was "no evidence that the cost of living varies from one island to another." D. & O. at 11-12. The ALJ determined that the proper locality was the state of Hawaii. *Id.* at 12.

The ALJ next observed that "[f]actors considered in determining whether services are of a similar character include the job duties, training, expertise, and experience." *Id.* The ALJ observed that the Navy asserts substantial variance by "comparing position descriptions for labor classifications under the CBA with descriptions of positions in the SCA [directory] and in the Salary.com data" *Id.* The ALJ stated that the Navy "does not compare the work performed by those under the CBA to work performed by other employees working for an actual employer in order to show other employees are performing work of a like character." *Id.*

The ALJ determined that the Navy did not provide position descriptions for four of the labor classifications in the CBA (antenna specialist, high voltage electrician, generator maintenance, and electronic operator shift), and therefore no substantial variance was proven for these positions. Next, the ALJ observed that in advancing its argument as to services similar to those performed under the CBA, the Navy in its brief addressed only the Electronics Technician II (ET II) position.

The ALJ found that BAE's proposal and the work performed under the CBA for the ET II position includes "specific additional duties not reflected in the general position descriptions found in the SCA and Salary.com data." *Id.* The ALJ noted Union witnesses' testimony that ET IIs "are required to climb satellite towers to perform the testing and repair duties," and evidence that ET IIs "are required to obtain and maintain a security clearance given the national security implications associated with their responsibilities." *Id.* at 12-13 n.19. The ALJ further found that ET II positions under the CBA "require a minimum two-year training school, and six years of experience, reflecting the high level of expertise required of ET IIs under the CBA," while the SCA position description "omits any reference to educational or training requirements and the Salary.com position description requires a high school diploma and may require a formal training

² The Union participated in proceedings below, but did not participate in the Navy's appeal now pending before the ARB.

period and 2-5 years of experience.” *Id.* at 13. In addition, the ALJ found that the ET III and Midas operator positions under the CBA require greater responsibilities, expertise, and skills than the comparable positions provided in the SCA directory and Salary.com.

Finally, the ALJ determined that the Navy failed to show a substantial variance. The ALJ rejected the Navy’s argument that the CBA wages should be compared to the ERI and Salary.com data relied on by BAE in preparation for negotiating the CBA with the Union. The ALJ determined that the record “lacked testimony from ERI personnel . . . as to ERI’s processes and methodology” and that the “same is true of Salary.com.” *Id.* at 14. The ALJ ruled that “the Navy’s prevailing-wage evidence does not rise to the level of the ‘comprehensive mix of rates’ required for determining the prevailing wage, as it fails to include other collectively-bargained rates for all labor classifications in the challenged CBA.” *Id.* at 15.

The ALJ rejected the Navy’s argument that a substantial variance is proven based on ERI data because “all of the CBA rates fall at or near the 90th percentile.” *Id.* The ALJ stated:

A review of the ERI data demonstrates that of the twelve labor classifications under the CBA that were analyzed, several do not fall at or near the 90th percentile. Additionally, the evidence here demonstrates that [ET II]s working under the CBA are highly experienced having worked in the field for ten or more years, and could be expected to earn wages at the higher end of the of the pay scale for such positions.

Id. The ALJ further noted that the Navy’s presentation of data “artificially inflate[s] the CBA wage rates by including lead and shift premiums in order to show a ‘worst case scenario,’ that is, one showing the greatest variance in wage rates.” *Id.* at 15-16.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the 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).

The ARB’s review of the ALJ’s decision under the SCA is an appellate proceeding. 29 C.F.R. § 8.1(d). The ARB reviews the ALJ’s findings of fact for clear error, *Dantran, Inc. v. U.S. Dep’t of Labor*, 171 F.3d 58, 71-72 (1st Cir. 1999), and conclusions of law de novo, *Admin., Wage & Hour Div. v. Tri-County Contractors, Inc.*, ARB No. 11-014, ALJ No. 2008-SCA-017 (ARB June 29, 2012), 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. 41 U.S.C.A. § 6703; 29 C.F.R. § 1.1. Under the process set out in the SCA, 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.

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 in which

³ 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 7-8 (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.*, No. 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 Am. Guard Servs.*, No. 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)).

the obligation may be suspended.” *In re United Healthserv*, No. 1989-CBV-001, slip op. at 4. Section 4(c) 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.*; see also *In re Ryan-Walsh*, 1993-CBV-1 and 1995-CBV-1 (ALJ Aug. 13, 1996). 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.

B. The Navy failed to clearly show that collectively-bargained wages for telecommunication services at the Pearl Harbor facility were substantially at variance with wages prevailing in the locality for services of a similar character

The Navy advances its substantial variance argument principally on wage differentials for each of 17 CBA job classifications and very little else. A substantial variance showing requires not only evidence of a wage differential between CBA wages and other local rate wages, but also a prior showing that other employees in the locality are performing services similar in character to those in the CBA. The ALJ correctly determined in this case that the Navy’s evidence falls short. While the Navy sought to advance its case at hearing and in its opening brief before the ARB that a substantial variance existed with respect to ET IIs, the Navy failed to provide any evidence (and failed to advance any argument in its brief to the ARB) that other employees in the locality were performing similar services in character for the remaining 16 CBA job categories, and thus failed to show a relevant mix of rates to determining a prevailing wage. For these reasons, the Navy failed to meet its burden under SCA section 4(a).

1. The ALJ correctly determined that the Navy failed to clearly show that other employees in the locality are performing services similar in character to those performed under the collective bargaining agreement

The Navy argues that the ALJ erred in rejecting the Navy's comparison of the position descriptions in the SCA and Salary.com data with position descriptions for labor classifications in the CBA. Navy Brief at 11. 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). To determine whether the identified jobs in the locality are of similar character, the fact-finder should consider a variety of factors including "training, . . . [and] unique knowledge and duties." *In re Harry Stroh Assocs.*, No. 1987-CBV-002, 1991 WL 733656 (Sec'y Apr. 24, 1991). The burden is on the party seeking a variance to establish that the local services are similar in character to the contract's solicited work. *In re Ryan-Walsh, Inc.*, ALJ No. 1993-CBV-001 (Aug. 31, 1996).

First, the Navy does not dispute the ALJ's determination that the Navy failed to provide position descriptions for four of the labor classifications in the CBA: Antenna Specialist, High Voltage Electrician, Generator Maintenance, and Electronic Operator/Shift. This absence of evidence forecloses the Navy from proving a substantial variance for these four positions.

Next, the Navy argues that workers under the CBA job classifications perform work that is the same or similar to that of other workers in the locality, but advances that argument solely as to the ET II classification.⁴ The Navy does not advance that argument in its brief as to the other 12 remaining worker categories, and, moreover, did not advance that argument before the ALJ.⁵ Since the Navy's "brief contained no argument" as to the similarity of services performed in the locality with respect to the remaining 12 categories of CBA workers, "this argument has been abandoned and thus waived." *Walker v. United Airlines*, ARB No. 05-028, ALJ No. 2008-AIR-17, slip op. at 9 (ARB Mar. 30, 2007). However, even if not waived, the ALJ did not find that the position descriptions set out in the Salary.com data, which were created by comparing the words contained in the 17 CBA position descriptions, were sufficient to establish a prevailing

⁴ *Id.* at 11-13. The 11 worker categories under the CBA that the Navy failed to argue similarity of services in its brief are: Lead Electronics Tech III, Antenna Mechanic, Maintenance Electrician, HVAC Technician, Maintenance Mechanic, Supply Technician/Administrative Assistant, Supply Clerk, BMD/Midas Operator I, BMD/Midas Operator II, Midas Operator III, and Ground Maintenance/Custodian. A 12th worker category, a facilities supervisor position, set out in the CBA is exempt. TR at 90-91.

⁵ D. & O. at 12 (ALJ stating that "[i]n arguing that other employees in the locality are performing services similar to those performed under the CBA, the Navy's brief addresses only the CBA position of Electronics Technician II.").

wage rate based on data from Salary.com.⁶ The U.S. Department of Labor Prevailing Wage Resource Book, 4(c) Hearings, Administrative Hearings Regarding Application of Section 4(c), describes other relevant wage data relevant in a substantial variance proceeding:

(c) Other relevant wage data. For example, rates paid in local hospitals would be appropriate for comparison on contracts for hospital aseptic services, while the rates paid in local schools could be of value in comparison for janitorial or food service workers.

Under this description, the use of Salary.com data would not fall within the scope of other relevant wage data anticipated under the regulations, and indeed Salary.com data has been characterized as an “informal source[] and estimate[].”⁷

The Navy below and on petition for review centers its argument on the claim that there is a similarity of services in the locality for ET IIs. The BAE contracted with the Navy to provide 60 ET IIs. EX D-1, ATT 5 (BAE contract dated July 26, 2011). This category of workers appears to entail the vast majority of CBA workers under the BAE contract. While the Navy contends that ET IIs under the 2011 CBA perform similar services as other ETs in the locality, the ALJ determined that ET IIs under the CBA perform duties *unique* to the contract. D. & O. at 12-13. Substantial evidence supports that determination.

The CBA ET II position correlates to the SCA position description for Electronics Technician, Maintenance II (No. 23182).⁸ EX D-6, ATT 1 at 289. However, as the ALJ found, ET IIs under the CBA have “specific additional duties not reflected in the general position descriptions of the SCA and Salary.com. data.” D. & O. at 12. The CBA description for ET II reads:

⁶ D. & O. at 12 (“The Navy does not compare the work performed by those under the CBA to work performed by other employees working for an actual employer in order to show other employees are performing work of a like character.”).

⁷ *Beyond the Payment Fairness Act: Mandatory Wage Disclosure Laws – A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 432 (Summer 2013); see also “*Money, Sex, and Sunshine: A Market-Based Approach To Pay Discrimination*,” 43 ARIZ. ST. L. J. 951, 990 (Fall 2011) (“Websites such as salary.com and glassdoor.com collect anonymous information about compensation and benefits from employees, but this information is incomplete and often inaccurate.”).

⁸ The SCA position description for Electronic Technician, Maintenance II (No. 23182) reads: “[A]pplies comprehensive technical knowledge to solve complex problems by interpreting manufacturers’ manuals or similar documents. Work requires familiarity with the interrelationships of circuits and judgment in planning work sequence and in selecting tools and testing instruments. Receives technical guidance, as required, from supervisor or higher level technician, and work is reviewed for compliance with accepted practices. May provide technical guidance to lower-level technicians.” Service Contract Act Directory of Occupations (Fourth Edition); see also Exh. D-6, ATT 1. This SCA definition is “a general description for this job category.” TR at 52.

Primary duties include but not limited to: the operation and maintenance of five (5) satellite communications earth terminals and all associated equipment in the SATCOM facility on a 24 hour per day, 7 days per week, 365 days per year basis (Shift Work) operation of electronic test equipment; operation of cryptographic equipment; activation, deactivation and changes to circuits as directed by DISA, NCTAMS PAC TCF or JFTOC; perform and/or assign in circuit troubleshooting, testing and fault isolation as required by DSCSOC, DISA or NCTAMS PAC TCF; monitoring and reporting of any outages as they occur; perform organizational and direct support level maintenance on modems, multiplexers, up converters, down converters, power amplifiers, servo systems, frequency standards, satellite tracking systems, antenna mounted electronics (AME) and ancillary equipment; perform appropriate testing, patching, configuration and reconfiguration of multiplexers, modems, up-converters and down-converters as required; and ensure safety of personnel and equipment.

Jason Thomas, a Navy contract specialist who administered the BAE contract, testified that, as compared to the SCA description, the ET II position description in the CBA “further define[s] what it is that an electronics technician . . . would do on this particular site.” TR at 52. Thomas explained: “The electronics technician position is such a broad category; at any particular site they might have radar that they’re responsible for, a piece of communications equipment . . . there’s no one electronics technician that knows all the gear. So it’s important that they – well, they show a more specific nature of the work at that particular site, once they establish the base work.” *Id.* Thomas admitted that “BAE is necessarily more specific.” TR at 119.

Union witness Keith Lyerson, an ET II for SATCOM military installation, testified that his job responsibilities are to “operate, maintain, configure, troubleshoot, test and analyze, monitor, set up systems, [and do] diagnostic testing, phone isolation, and detection of terrestrial and satellite-based systems.” TR at 242. Other evidence showed that the responsibilities of an ET II included “performing preventive maintenance subsystems or systems,” work on “high powered amplifiers with 15,000 volts” that are tested both energized and de-energized, “climb[ing] several of the satellite dishes.” TR at 169, 172, 189. William Shawl testified that when an individual is hired as an ET II, that employee must get “bucket truck operator qualified . . . fork truck qualified . . . [a] crane operator certificate . . . and also EKMS local element custodian.”). TR at 175-76.

Moreover, ET II workers on the BAE contract require higher training and experience levels. The BAE contract requires that ET IIs possess a minimum “two-year training school [and] six years of experience.” TR at 15. Further Navy witness Richard Shutters testified that current ET IIs have “a good 10 years” of experience. TR at 148. This requirement contrasts with the SCA position description that omitted any reference to educational or training requirements, and the Salary.com position which required a high-school diploma and might

require a formal training period and 2-5 years of experience. D. & O. at 13, citing TR at 157. Indeed, the BAE contract makes clear that contract personnel must meet or *exceed* minimum qualifications. The special personnel requirements for contract workers state: “H.5 PERSONNEL QUALIFICATIONS (a) Personnel assigned to or utilized by the Contractor in the performance of this contract shall, as a minimum, meet the experience, educational, or other background requirements equal to or higher than the personnel requirements as set forth in the contractor’s proposal and shall be fully capable of performing in an efficient, reliable, and professional manner.” EX D-1, ATT 1, Section H-5.

The facts of this case are analogous to those in *In re Am. Guard Servs., Inc.*, ALJ No. 2001-CBV-001, slip op. at 5 (Apr. 25, 2001), where the ALJ determined that the General Services Administration (GSA) failed to “clearly show” that the positions for guard job classifications “are similar enough to the positions covered by the contract in order to base the wage rate on the survey.” In that case, the ALJ determined that the GSA contract required more years of experience and abilities, including “three years of experience as an armed guard,” the ability to “operate and enforce a system of personal identification,” ability to “x-ray packages,” to “discover and detain persons seeking to gain unauthorized access to property through independent aggressive patrol or through operation of security systems,” and other duties of heightened responsibility. *Id.* at 5-6. As in *Am. Guard*, the ET II job requirements under the BAE contract are similarly more demanding than the requirements set out in the job description in the SCA directory.⁹ The ALJ thus reasonably concluded that the Navy failed to prove work similar in character in the locality for any of the 17 job classifications for purposes of the petition for substantial variance.

2. *The ALJ correctly determined that the Navy failed to show a comprehensive mix of rates for establishing a prevailing wage in the locality*

The Navy argues that the ALJ erred in failing to give great weight to the SCA Area Wage Data for determining the prevailing wage in the locality. Navy Brief at 14. Even though the Navy failed to show that the 17 CBA positions are sufficiently similar to those in the locality, the ALJ nonetheless analyzed the evidence and correctly determined that the Navy failed to demonstrate a comprehensive mix of rates that show a prevailing wage in the locality.

The All Agency Memorandum No. 166 (Acting Administrator, Wage and Hour Division) (Oct. 8, 1992) (AAM 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;

⁹ See also *In re Sooner Process & Investigation*, ALJ 2000-CBV-003, slip op. at 6 (July 26, 2001) (ALJ rules that the “Army has not made a clear showing that the positions identified in the wage surveys were sufficiently similar in nature for comparative purposes of the guard position at McAlester [Army Ammunition Plant].”)

- (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.

Id. at 2-3 (emphasis added). The AAM 166 does not limit a comparison to the SCA area wage data in assessing the prevailing wage in a locality for purposes of a substantial variance proceeding. Instead the DOL recognizes that the SCA is a “minimum monetary compensation required to be paid to the various employees . . . usually listed in the wage determination as hourly wage rates.” DOL Prevailing Wage Resource Book 2010 at 3.

The Navy did not advance in the record any other wage rates from collective bargaining agreements or civil wage rates for similar services in the locality. The Navy instead argued that proper comparison data constituted wage data derived from ERI and Salary.com, which the Navy states is “based on the same sort of broad and in-depth economic surveys that form the basis of the AWD.” Navy Brief at 15. The ALJ, however, discredited that evidence, stating: “The record lacks testimony from ERI personnel or from any individual with first-hand knowledge of ERI’s processes and methodology, and the same is true for the Salary.com data.” D. & O. at 14. Since the Navy in its brief does not dispute the ALJ’s ruling on this evidence, we defer to the ALJ’s evidentiary ruling. *Knox v. National Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002, slip op. at 4-5 (ARB Apr. 30, 2012).¹⁰

The Navy argues that a comparison of wage rates must include premiums to portray actual wages paid. Navy Brief at 16. Again, while the Navy failed to show services of similar character performed in the locality, the record nonetheless supports the ALJ’s finding that a shift premium is paid to only one lead employee per shift and that 60 percent of BAE employees under the CBA do not work shifts. Based on that finding, the ALJ reasonably concluded that including premiums “artificially inflated” the CBA wage rate when compared with the SCA rate.

3. The ALJ correctly determined that the Navy failed to clearly show a substantial variance for the 17 CBA worker classifications

Finally, the Navy argues that that there is a substantial variance to the wages set out in the CBA based on wage differentials (comparing CBA hourly wage rates with SCA wage data and data from Salary.com) set out in charts prepared by the Navy. Navy Brief at 17.¹¹ However, the

¹⁰ The Union argued below that rates set out in collective bargaining agreements at other military installations in Hawaii, including the contracts at Hickham Air Force Base in Honolulu County and the Hawaiian Electric Company, are comparable data for comparing the CBA rates in the BAE contract. The ALJ stated, however, that while the CBA rate for ET IIs is reflected in the Hickham contract, the “record lacks information on wage rates under other CBAs for the remaining labor classifications in the CBA” for the BAE contract. D. & O. at 15. Since the Union did not file a brief in this proceeding and thus does not dispute the ALJ’s ruling, we see no reason for disturbing the ALJ’s determination.

¹¹ See also EXs D-9 at 312-314, D-10, D-15.

Navy showed neither similar services being performed by employees in Hawaii, nor a comparable mix of rates for *each* of the 17 job classifications for which the Navy seeks a substantial variance in CBA wages. Thus the charts alone showing wage differentials cannot satisfy the Navy's burden of clearly showing evidence of substantial variance in wages for the 17 job classifications.

CONCLUSION

The ALJ's February 14, 2012, Decision and Order denying the petition for a substantial variance is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado, concurring.

I concur in the result.

LUIS A. CORCHADO
Administrative Appeals Judge