U.S. Department of Labor

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

IN THE MATTER OF:

Applicability of Wage Rates Collectively Bargained by Corrections Corporation of America and United Government Security Officers of America, Local 315, Under Contract ODT-5-C-0010 for Detention Guard Services, Elizabeth Detention Center, Elizabeth, New Jersey

ARB CASE NOS. 2016-074
2016-075

ALJ CASE NO. 2015-CBV-00001

DATE: APR 18 2019

Appearances:

***For Corrections Corporation of America*:**
Robert G. Lian, Jr., Esq., Esther G. Lander, Esq., and Frederick L. Conrad III, Esq.; *Akin Gump Strauss Hauer & Feld LLP*; Washington, District of Columbia

***For United Government Security Officers of America, Local 315*:**
Robert B. Kapitan, Esq.; *United Government Security Officers of America, International Union*, Westminster, Colorado

***For the Administrator, Wage and Hour Division*:**
M. Patricia Smith, Esq., Jennifer S. Brand, Esq., William C. Lesser, Esq., Jonathan T. Rees, Esq., and Quinn Philbin, Esq.; *United States Department of Labor,* Washington, District of Columbia

Before: William T. Barto, Chief Administrative Appeals Judge; James A. Haynes and Daniel T. Gresh, Administrative Appeals Judges

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 6701, et seq., (2011) and it's implementing regulations, 29 C.F.R. Parts 4 and 6 (2015). The United Government Security Officers of America (UGSOA) sought a variance from the collectively-bargained wages for detention

officers in a contract between the Corrections Corporation of America (CCA)[1] and the U.S. Department of Homeland Security's Immigration and Customs Enforcement (ICE). On June 16, 2016, a Department of Labor (Department) Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) denying UGSOA's request. For the following reasons, we affirm the ALJ.

BACKGROUND

The ALJ's findings of fact are supported by a preponderance of the record evidence. To summarize, in 2005 CCA entered into Service Contract ODT-5-C-0010 with ICE to provide detention guard services at the Elizabeth Detention Center (EDC) in Elizabeth, New Jersey. In 2009 CCA entered into a collective bargaining agreement (CBA) with the Security, Police, Fire Professionals of America, Local 448 (SPFPA). The 2011 CBA between CCA and SPFPA provided a wage rate of $20.00 per hour for detention officers.

In February 2012, EDC employees elected the UGSOA, Local 315, to replace the SPFPA as their collective bargaining representative. CCA and UGSOA negotiated a new CBA with an effective term of March 25, 2013 to September 24, 2016. This CBA provided for detention officer hourly wage rates of $20.40 in 2013, $20.71 in 2014 and $21.02 in 2015.

On September 16, 2014, UGSOA filed a request with the Wage and Hour Administrator of the United States Department of Labor (Administrator) for a substantial variance hearing with respect to the wage rates for detention officers and transportation detention officers working at EDC. UGSOA asserted that the CBA wage rate was substantially below the prevailing wage for detention officers in EDC's locality. After reviewing the request, the Administrator filed an Order of Reference with the Office of Administrative Law Judges authorizing a hearing. An ALJ conducted the hearing on April 28, 2016.

At the hearing, UGSOA presented wage determinations, Bureau of Labor Statistics (BLS) data, its own CBA wage rates, and wages paid at the Essex County Jail as evidence to establish the existence of a substantial variance. After receiving post-hearing briefs, the ALJ issued a Decision and Order Denying Petition for Substantial Variance. The ALJ concluded that, although UGSOA could utilize the substantial variance process to obtain a higher rate, the union failed to submit

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[1] CCA has since changed its name to CoreCivic, Inc.

evidence providing the required comprehensive mix of hourly wage rates necessary to establish the prevailing wage for workers providing similar services in the same locality as the EDC and, therefore, a substantial variance.[2]

UGSOA filed a petition for review of the ALJ's conclusion that it failed to provide sufficient wage information to prove its claim that there was a substantial variance. CCA filed a separate petition for review of the ALJ's conclusion that the Department of Labor can use the substantial variance regulations to replace a collectively bargained wage rate with a higher rate.

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. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. § 8.1(b) (2018). 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'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 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

1. Governing Law

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. § 6702. The SCA provides that a service contract and bid specification shall contain a

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[2] *See* D. & O. at 4, 27, 29.

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 of Labor 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. § 6703(1)-(2).

The Wage and Hour Division (WHD) Administrator predetermines the wage and fringe-benefit rates. *See* 41 U.S.C. § 6703; 29 C.F.R. § 1.1 (2018). Under the process set out in the Act, the WHD Administrator identifies the following 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. § 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 al., slip op. at 6 (Dep. Sec'y Feb. 4, 1991); *see* 41 U.S.C. § 6707(c). However, Section 4(c) "contemplates circumstances in which the obligation may be suspended." *In re United HealthServ*, 1989-CBV-001, slip op. at 4. That provision reads as follows:

> (c) Preservation of wages and benefits due under predecessor contracts. –
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> (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. § 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*, 1988-CBV-007, slip op. at 4 (Dep. Sec'y Jan. 3, 1989). 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*, 1989-CBV-001, slip op. at 6.

The SCA does not define "substantial variance," but the Department of Labor 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) (AAM No. 166) at 2 (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. § 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,* Civ. A. No. 91–2916, 1992 WL 395510 at 4, 1 Wage & Hour Cas. 2d (BNA) 331 (E.D. La. 1992); citing *In Re Big Boy Facilities*, 1988-CBV-007, slip op. at 15.

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 the following sources: (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.

2. Substantial Variance Procedures May Be Utilized to Raise Rates

CCA argues that Section 4(c) of the SCA "does not permit the Department of Labor to replace the collectively-bargained wage with higher 'prevailing' wages." CCA's Brief in Support of Its Petition for Review at 7. We disagree. The statute does not provide that a substantial variance ruling is only available when collectively bargained rates are greater than those that prevail in the locality. Instead, it states that the process is available whenever the "variance" between wages is "substantial[]." 41 U.S.C. § 6707(c)(2). Accordingly, we hold that the variance can include rates that are both higher and lower than the previously-negotiated rate.

3. UGSOA Did Not Meet Its Burden To Establish A Substantial Variance

The record supports the ALJ's conclusion that the evidence UGSOA submitted was insufficient to establish the existence of a substantial variance.[3] On appeal, UGSOA raised five issues for review. First, UGSOA argues that the ALJ erred by not relying upon evidence related to correctional officers at the Essex County Jail. UGSOA Petition for Review at 2-3. But the ALJ found that the evidence the union submitted failed to include "a description of the Essex County Jail employee's job duties for the base salary or any of the steps" or "other evidence that would establish the character of the duties performed."[4] Thus, the ALJ' properly concluded that UGSOA failed to establish that the services that the

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[3] *See* D. & O. at 21-29 discussing the relevance of: (1) the 2013-2016 CBA between UGSOA and CCA showing hourly wage rates between $20.40 and $21.02 for detention officers (UGSOA Exhibit (CX) 1); (2) Wage Determination No. 2005-2353 (June 19, 2013) showing hourly wage rates of $30.97 (CX 2); (3) the 2009-2012 CBA negotiated by SPFPA showing hourly wage rates between $18.00 and $29.93 (CX 3); (4) an amendment to the 2009-2012 CBA showing hourly wage rates between $20.00 and $24.00 (CX 7); (5) Wage Determination No. 2015-2353 (March 3, 2016) showing hourly wage rates of $30.97 (CX 20); (6) 2012 New Jersey and Pennsylvania information from BLS showing an hourly mean wage between $32.91 and $35.76 for "Correctional Officers and Jailers" (CX 9); (7) 2010 [New York/New Jersey/Connecticut/Pennsylvania] BLS National Compensation Survey data showing an hourly wage rate for "Correctional Officers and Jailers" at $32.35 (CX 11); and (8) 2013 CBA data related to corrections officer at the Essex County Jail.

[4] D. & O. at 27.

correctional officers at the Essex County Jail performed were similar to the services that the EDC detention officers provided.[5]

Second, UGSOA argues that the ALJ erred by identifying the hourly wage rates paid at Delaney Hall, another detention facility in New Jersey, as probative evidence of a prevailing rate. UGSOA Petition for Review at 3. While the ALJ identified Delaney Hall as a facility with employees who performed services similar to the EDC detention officers, he ultimately concluded that "the amount of weight to afford to the Delaney Hall wages is largely irrelevant. UGSOA has not provided enough rates for this tribunal to determine a prevailing rate regardless of whether the Delaney Hall wages are included."[6]

Third, UGSOA asserts that the ALJ "discounted the evidence of non-arm's length negotiation which supported the finding that the wages substantially vary from prevailing rates." UGSOA Petition for Review at 3-4. But the ALJ correctly concluded that "evidence of non-arm's length bargaining is not relevant to this proceeding as 'the absence of arm's length negotiation is not a consideration in substantial variance proceedings unless so designated by the Administrator.'"[7]

UGSOA's fourth contention is that the ALJ's "legal conclusion that the 'relevant locality' is limited to the Newark-Union, [New Jersey-Pennsylvania] area is incorrect." UGSOA Petition for Review at 4. But the union has presented no law or evidence indicating that the ALJ's conclusion was incorrect. Instead, UGSOA cites the SCA regulation at 29 C.F.R. § 4.54(a) indicating that, in this context, "locality" is an "elastic" term.[8] But this regulation also indicates that "[l]ocality is

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5 *Id.*

6 *Id.* at 28, n 32.

7 *Id.* at 27, citing *In re United HealthServ Inc.*, 1989-CBV-001,slip op. at 6 ; *see* 29 C.F.R. §§ 4.10(c), 4.11(c)(1).

8 *See* 29 C.F.R. § 4.54(a) ("Although the term locality has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a "locality" that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that

ordinarily limited geographically to a particular county or cluster of counties," which is what the ALJ concluded in this case.

Finally, UGSOA challenges the ALJ's application of AAM No. 166, arguing that while the various categories of data listed to be submitted in order to establish a substantial variance "are probative," AAM No. 166 "does not state that they are required." UGSOA Petition for Review at 5. But this assertion does nothing to establish why the information the union did submit was sufficient to establish a substantial variance between EDC's hourly wage rates and those prevailing for services of a similar character in EDC's locality.

In sum, the evidentiary record supports the ALJ's determination that UGSOA failed to submit sufficient evidence to establish that the collectively-bargained wages for detention officers at EDC are substantially at variance with wages prevailing in the same locality for services of a similar character.

CONCLUSION

The ALJ's Decision Denying Petition for Substantial Variance is **AFFIRMED** and this case is **DISMISSED**.

SO ORDERED.

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determination. Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area.").