In the Matter of:

ADMINISTRATOR,
WAGE AND HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

FARGO VA MEDICAL CENTER,

RESPONDENT.

ARB CASE NO. 03-091

ALJ CASE NO. 02-LCA-013

DATE: September 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Prosecuting Party*:**
Carol B. Feinberg, Esq., Paul L. Frieden, Esq., William C. Lesser, Steven J. Mandel, Esq., Howard M. Radzley, Esq., *U.S. Department of Labor, Washington, D.C.*

***For the Respondent*:**
Alan Duppler, Esq., *U. S. Department of Veterans Affairs, Fargo, North Dakota*

FINAL DECISION AND ORDER

The Fargo VA Medical Center (FVAMC) appealed the U.S. Department of Labor's Wage and Hour Division Administrator's determination that it owed back wages to ten nonimmigrant alien employees because it had failed to pay them the prevailing wage as required by the Immigration and Nationality Act (INA), as amended, 8 U.S.C.A. § 1182(n) (West 1999); 20 C.F.R. § 655, Subparts H and I (2004). The parties stipulated to all relevant facts and requested the Administrative Law Judge (ALJ) to decide the case solely on the legal issues. The ALJ granted summary decision to the Administrator and ordered FVAMC to pay back wages. FVAMC timely appealed to this Board, and we affirm the ALJ's grant of summary decision.

BACKGROUND

Statutory and Regulatory Framework

The H-1B program, authorized under the INA, is a voluntary program that permits employers to temporarily employ nonimmigrants to fill specialized jobs in the United States. 8 U.S.C.A. § 1101(a)(15)(H)(i)(b) (West 1999). An employer seeking to hire an alien on an H-1B visa must first obtain certification by filing a Labor Condition Application (LCA) with the Department of Labor (Department). 20 C.F.R. § 655.730(a). On the LCA, the employer must provide specific information including the number of aliens to be hired, the occupational classification, the required wage rate to be paid, prevailing wage data, the source of the wage data, the date of need, and the period of employment. 20 C.F.R. § 655.731.

The employer must pay an H-1B worker a wage rate which is at least the higher of its actual wage rate and the locally prevailing wage for the occupation. 8 U.S.C.A. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a). The Department has issued detailed guidance on how the employer is to determine and document the required wage rate to be paid to H-1B workers. 20 C.F.R. § 655.731.

To ascertain the "required wage rate," the employer must determine both the "actual wage" and the "prevailing wage" for the occupation in which the alien is to be employed. *Id*. The "actual wage" is the wage rate the employer pays to all other individuals with similar experience and qualifications for the specific employment in question. *Id*. at § 655.731(a)(1). The "prevailing wage" is the wage rate for the occupational classification in the area of intended employment at the time the LCA is filed. *Id*. at § 655.731(a)(2). The employer may obtain prevailing wage information from any of a variety of sources such as the state employment security agency ("SESA"), an independent authoritative source, or some other legitimate source. *Id*. The "wage rate" is the remuneration to be paid to the H-1B employee stated in terms of amount per hour, day, month or year. 20 C.F.R. § 655.715.

The remedies for violations of the statute or regulations include payment of back wages to H-1B nonimmigrants who were underpaid, notification of the Attorney General for debarment of the employer from future employment of aliens, civil money penalties, and further administrative relief as appropriate. 20 C.F.R.§ 655.810.

Factual and Procedural History

The Fargo VA Medical Center, located in Fargo, North Dakota, is a Federally-mandated health care delivery facility established to serve the nation's veterans. FVAMAC Brief at 6-7. FVAMC participated in the H-1B program, and during the relevant period, employed as doctors ten nonimmigrant aliens. Stipulation (Stip) Nos. 1, 2; 8 U.S.C.A. § 1101(a)(15)(H)(i)(b); 20 C.F.R. § 655.700(c)(1). The physicians'

medical specialties included cardiology, hematology/oncology, and neurology. Exhibits (Exhs.) A-1 to A-10.

After receiving a complaint from one of the nonimmigrant aliens, the Department's Wage & Hour Division (W&H) in January 2001 audited the salaries paid to the H-1B doctors on FVAMC's staff. Stip. No. 13, Exh. E. On February 1, 2001, W&H notified FVAMC that its documentation of the prevailing wage failed to meet the regulatory requirements, and accordingly, W&H would obtain the needed data from the Department's Employment and Training Administration (ETA). *Id*. When it received the wage information from ETA, W&H forwarded it to FVAMC, noting that, if it disagreed with the prevailing wage figures, FVAMC could appeal whether ETA had correctly calculated them. 20 C.F.R. § 658.421(d) (2004). FVAMC appealed. Stip. No. 14, Exh. F.

On January 23, 2002, the ALJ ruled that ETA's prevailing wage figures were correctly calculated and forwarded the FVAMC case to the Administrator for enforcement. Stip. No. 16, Exh. H. On March 20, 2002, the Administrator notified FVAMC that its failure to pay the applicable prevailing wage to its nonimmigrant alien employees violated the H-1B regulations. *See* 20 C.F.R. § 655.731. Stip. No. 17, Exh. I. Although he assessed no civil money penalties for the violation, the Administrator ordered FVAMC to pay back wages to the ten nonimmigrant doctors. *Id*.

FVAMC appealed the Administrator's determination, and on March 27, 2003, the ALJ granted summary judgment to the Administrator and ordered FVAMC to pay back wages of $212,499.14.[1] In April 2003, FVAMC petitioned this Board for review of the ALJ's decision.

ISSUES PRESENTED

(1) Does the Department have jurisdiction to determine if FVAMC must meet the H-1B requirements? (2) Is FVAMC an employer within the meaning of the H-1B regulations? (3) And if it is an employer, must it pay the required H-1B wage rate?

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review ALJ decisions in H-1B cases pursuant to 20 C.F.R. § 655.845 and the Secretary's Order No. 1-2002. 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the authority to review cases brought under the statutes listed therein).

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[1] The Administrator originally determined that the back pay owed was $203,797.54. Exh. I. But on April 7, 2003, the Administrator requested that the back pay figure be adjusted to include the wages due for the period up to and including February 16, 2002. The parties stipulated to the additional amount, and on June 16, 2003, the ALJ approved the stipulation and ordered FVAMC to pay the adjusted figure.

Pursuant to 29 C.F.R. § 18.40(d) (2004), an ALJ may issue a summary decision if the evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *See Flor v. United States Dep't of Energy*, ALJ No. 93-TSC-0001, slip op. at 9 (Sec'y Dec. 9, 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The ARB reviews an ALJ's grant of summary decision de novo, i.e., the law that the ALJ applies in initially evaluating a motion for summary decision governs our review. *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ No. 00-ERA-36, slip op. at 4 (ARB Mar. 25 2003). Accordingly, the Board will affirm a summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Johnsen v. Houston Nana, Inc., JV*, ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003); *Stauffer v. Wal-Mart Stores, Inc*., ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999).

DISCUSSION

1. The Department Has Jurisdiction Over H-1B Enforcement Matters.

FVAMC argues that the Department, and therefore the ARB, lacks jurisdiction to determine whether FVAMC must comply with the prevailing wage requirements because Congress has entrusted such decisions solely to the Secretary of the Department of Veterans Affairs (VA). FVAMC Brief at 3-4. According to FVAMC, Congress, in 38 U.S.C.A. § 7421 (West 2002), granted the VA Secretary the authority to determine the hours, conditions of employment and leaves of absence for those individuals hired to work as doctors in VA medical centers. *Id*. FVAMC maintains that this statute gives the VA Secretary unfettered discretion in determining the working conditions of its employees, and that the statute also forbids VA compensation decisions from being "reviewed by another agency." 38 U.S.C.A. § 7422(d)(3) (West 2002). Thus, the ARB cannot interfere with the VA Secretary's authority by requiring FVAMC to pay the H-1B prevailing wage. FVAMC's reliance on this point is misplaced.

Section 7422 of the VA statute does not apply here because it deals only with collective bargaining matters. *See* 38 U.S.C.A. § 7422. The statute permits VA employees to engage in collective bargaining, but prohibits collective bargaining over issues such as the establishment, determination, or adjustment of employee compensation. *Id*. Only the VA Secretary can determine whether an issue concerns employee compensation such that it is not covered by collective bargaining. *Id.* As this case does not deal with collective bargaining and as this Board is not reviewing whether an issue concerns employee compensation, the cited statute is inapplicable.

The INA requires the Secretary of Labor to investigate and dispose of complaints under the H-1B program, and also requires the Secretary to assess and oversee the payment of back wages by any employer found not to have paid the required wages. *See*

8 U.S.C.A. §§ 1182(n)(2)(A) and (D); 20 C.F.R. §§ 655.800, 655.805, 655.810. Therefore, we find that the Department has jurisdiction to determine whether H-1B employers like FVAMC must comply with the prevailing wage requirements.

2. FVAMC is an employer within the meaning of the H-1B regulations.

FVAMC maintains that it is not an "employer" within the meaning of the term in the H-1B regulations. FVAMC Brief at 5-6. An employer is defined as "a person, firm corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s)." 20 C.F.R. § 655.715. FVAMC stipulated that the VA through the FVAMC had an "employment relationship" with the H-1B doctors. Stip. No. 7. Nevertheless, it argued that the VA is not an employer within the meaning of the H-1B regulations because it is an executive department *of* the United States, and not, as prescribed, "a person, corporation, contractor or other association or organization *in* the United States." *See* 38 U.S.C.A. § 301(a) (West 2002) (emphasis added).

In October 2003, we ruled on this specific issue in *United States Dep't of Labor, Admin., Wage & Hour Div., Employment Standards Admin. v. Dallas VA Med. Ctr.*, ARB Nos. 01-077, 01-081, ALJ No. 98-LCA-03, (ARB Oct. 30, 2003). The Dallas VA Medical Center (DVAMC) employed an H-1B physician and then failed to pay that physician the prevailing wage. Although conceding that it had an employment relationship with the H-1B doctor, DVAMC also argued that it was not an employer under the H-1B regulations. We held that an entity that has secured all the benefits available to an employer under the H-1B program, namely, the ability to employ nonimmigrant aliens, is estopped from subsequently denying that it is an employer. *Dallas VA Medical Center*, slip op. at 4. Just as the Dallas VA Medical Center was not excluded from the H-1B definition of employer, neither is the Fargo VA Medical Center.

3. FVAMC Must Pay The H-1B Required Wage Rate.

FVAMC argues that it is exempt from the H-1B wage requirements because, as Congress has set the pay for VA doctors, FVAMC is bound to pay only what Congress authorized under 38 U.S.C.A. § 7404 (West 2002); FVAMC Brief at 9. We reject this argument because, having voluntarily participated in the H-1B program, FVAMC cannot refuse to pay the wages required by the program. Accordingly, FVAMC must pay its H-1B workers the prevailing wage rate.

CONCLUSION

The Administrator is entitled to summary decision because the Department has jurisdiction over H-1B enforcement matters, FVAMC is an employer within the meaning of the H-1B regulations, and as an employer, it must pay the required H-1B wage rate. Therefore, we **ORDER** FVAMC to pay back wages to the ten nonimmigrant physicians

in the amount of $212,499.14. FVAMC is **FURTHER ORDERED** to calculate, using the formula to which the parties agreed, and to pay any additional back wages that may be due to the physicians through the date of payment.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge