



**In the Matter of:**

**FORFEITURE SUPPORT ASSOCIATES,**

**ARB CASE NO. 06-028**

**Wage Determination No. 1994-2255,  
Boston-Worcester-Lawrence area.**

**DATE: May 27, 2008**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioners:*

Jennifer Donahue, *pro se*, Norton, Massachusetts; Sean Burke, *pro se*, Fairhaven, Massachusetts; Donna Gumbs, *pro se*, West Roxbury, Massachusetts; Anne V. Rothenburg, *pro se*, Hull, Massachusetts; and Heather Zemotel, *pro se*, Plymouth, Massachusetts

*For Respondent Administrator, Wage and Hour Division:*

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

### **FINAL DECISION AND ORDER**

The Petitioners submitted a request to the Acting Administrator, Employment Standards Administration, Wage and Hour Division, (Administrator) for review and reconsideration of Area Wage Determination No. 1994-2255, applicable to contracts in the Boston, Massachusetts area subject to the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or Act).<sup>1</sup> Specifically, the Petitioners requested that the wage rates contained in the wage determination for their occupational or job classification of Paralegal/Legal Assistant II be increased. After the Administrator denied their request for review and reconsideration, they petitioned for review by the Administrative Review

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<sup>1</sup> See 41 U.S.C.A. § 351 *et seq.* (West 1994) and its implementing regulations at 29 C.F.R. Parts 4, 6 and 18 (2007).

Board. After consideration of the record and the parties' positions, we conclude that the Administrator's final ruling, denying the Petitioners' request for review and reconsideration, is in accordance with the SCA and its implementing regulations and is reasonable. We accordingly deny their petition for review.

### **JURISDICTION AND STANDARD OF REVIEW**

Pursuant to 29 C.F.R. § 8.1(b) (2007), the Board has jurisdiction to hear and decide "appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative" rendered under the SCA.<sup>2</sup> The Board's review of the Administrator's final SCA rulings is in the nature of an appellate proceeding.<sup>3</sup> The Board is authorized to modify or set aside the Administrator's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence.<sup>4</sup> The Board reviews questions of law de novo.<sup>5</sup> The Board nonetheless defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with law.<sup>6</sup>

### **REGULATORY FRAMEWORK**

The SCA requires the Secretary of Labor to determine minimum wage and fringe benefit rates for service employees employed on Federal service contracts.<sup>7</sup> The Administrator is charged by regulation with the responsibility for issuing these determinations.<sup>8</sup> Wage determinations are incorporated into contract specifications for each Federal service contract. In the absence of a collective bargaining agreement covering such employees, the Administrator issues a wage determination that reflects

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<sup>2</sup> See also Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>3</sup> 29 C.F.R. § 8.1(d).

<sup>4</sup> 29 C.F.R. § 8.9(b).

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

<sup>6</sup> See *Dep't of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 15-16 (ARB Dec. 22, 1999).

<sup>7</sup> See 41 U.S.C.A. § 351(a)(1)-(2).

<sup>8</sup> 29 C.F.R. § 4.3(a).

wages and benefits prevailing for service employees “in the locality.”<sup>9</sup> The Administrator bases these wage determinations on wage data, including surveys which the Department’s Bureau of Labor Statistics (BLS) compiles.<sup>10</sup> Interested parties affected by wage determinations may request review and reconsideration by the Administrator.<sup>11</sup> Retroactive modification affecting wage determination rates for contemporaneous contract periods is not available, however.<sup>12</sup> The Administrator’s decisions are subject to review by this Board.<sup>13</sup>

### ISSUE

Did the Administrator properly determine the wage rate for the occupational classification of Paralegal/Legal Assistant II in the Boston, Massachusetts area applicable for contracts subject to the SCA?

### BACKGROUND

The Petitioners are employees with Forfeiture Support Services, which has a contract subject to the SCA to provide services for the United States Justice Department in the Boston, Massachusetts area.<sup>14</sup> While their specific job title was Records Examiner/Analyst, the Wage and Hour Division determined that the Petitioners’ job was the equivalent to the SCA job classification of Paralegal/Legal Assistant II.<sup>15</sup> On May 17, 2005, the Petitioners submitted a request to the Administrator for review and reconsideration of Area Wage Determination No. 1994-2255, applicable to SCA

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<sup>9</sup> 41 U.S.C.A. § 351(a)(1) and (2); 29 C.F.R. §§ 4.50, 4.54.

<sup>10</sup> 29 C.F.R. § 4.51.

<sup>11</sup> 29 C.F.R. § 4.56(a)(1) and (2).

<sup>12</sup> *L-3 Commc’ns Joint Operations Group*, ARB No. 02-120, slip op. at 2 (Jan. 30, 2004); *D.B. Clark III*, ARB No. 98-106, slip op. at 9 (ARB Sept. 8, 1998).

<sup>13</sup> 29 C.F.R. § 4.56(b); 29 C.F.R. Part 8.

<sup>14</sup> See Administrative Record Tabs (Tab) C and E.

<sup>15</sup> See Tab K.

contracts in the Boston area.<sup>16</sup> The Petitioners indicated, however, that they were not submitting any additional data in support of their request.<sup>17</sup>

Specifically, the Petitioners contended that the BLS wage data surveys upon which the Administrator relied in determining the wage rates for their job classification of Paralegal/Legal Assistant II, contained in Area Wage Determination No. 1994-2255, actually reflect the lower wage rates for the job classification of Paralegal/Legal Assistant I. In addition, the Petitioners argued that their job classification of Paralegal/Legal Assistant II is equivalent to the higher paid job classification of “white collar excluding sales” level 7 employees contained in the National Compensation Survey (NCS), upon which the Administrator relied in determining wage rates.<sup>18</sup> In subsequent correspondence provided to the Administrator on behalf of the Petitioners from the office of Senator Edward M. Kennedy, the Petitioners reiterated their belief that their wage rate should be increased.<sup>19</sup> Moreover, the Petitioners urged that the Administrator’s policy to cap any wage rate increase at ten percent when issuing a new wage determination should not apply in this case, because they felt that the wage rate they were paid had been wrong for years.<sup>20</sup>

On December 2, 2005, the Administrator issued a final ruling denying the Petitioners’ request for review and reconsideration of Area Wage Determination No. 1994-2255.<sup>21</sup> Initially, in regard to SCA wage determinations in general, the Administrator explained that they are based upon the results of BLS cross-industry surveys indicating the prevailing wages and fringe benefits furnished to service employees “in a specific locality.”<sup>22</sup> The surveys include the NCS, which the Administrator explained “is the primary data source,” and the Occupational Employment Statistics Survey (OES), which is used either to supplement NCS data or as the primary data source for areas the NCS does not survey.<sup>23</sup> According to the Administrator, the

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<sup>16</sup> See Tab E.

<sup>17</sup> *Id.*; see also Tab F and 29 C.F.R. § 4.56 (“[a]ny such request [for review and reconsideration] must be accompanied by supporting evidence”).

<sup>18</sup> *Id.*

<sup>19</sup> See Tab C.

<sup>20</sup> *Id.*

<sup>21</sup> See Tab A.

<sup>22</sup> Tab A at 1; see also 41 U.S.C.A. § 351(a)(1)-(2); 29 C.F.R. §§ 4.50, 4.54.

<sup>23</sup> Tab A at 1; see also 29 C.F.R. § 4.51.

wage rate derived from the surveys “is then placed where it ‘best fits’ within a family of occupational classes.”<sup>24</sup>

Next, the Administrator addressed the specific wage rates for the Paralegal/Legal Assistant II job classification found in the latest revision of Area Wage Determination No. 1994-2255, applicable to service contracts in the Boston area.<sup>25</sup> Because the September 2003 NCS did not contain data for the Paralegal/Legal Assistant job classification, the Administrator explained that the November 2003 OES was used instead, as it did survey wage rate data for the Paralegal/Legal Assistant job.<sup>26</sup> As a result of the November 2003 OES, the Boston area wage determination was revised to reflect over an eight percent hourly wage rate increase for the Paralegal/Legal Assistant II job classification from \$19.02 to \$20.70.<sup>27</sup>

Finally, in regard to the Petitioners’ contention that a Paralegal/Legal Assistant II is equivalent to the higher paid NCS job classification of “white collar excluding sales” level 7 employees, the Administrator noted that the Petitioners “failed to indicate the NCS data” upon which they relied and that, again, the September 2003 NCS did not contain any data for the Paralegal/Legal Assistant job classification or reflect such higher wage rates.<sup>28</sup> The Petitioners ask that we review the Administrator’s final ruling. The Administrator has responded, urging us to affirm his decision.

In their Petition for Review, the Petitioners reiterate the same contentions they made before the Administrator. The Petitioners assert that the Director of the Office of Wage Determinations in the Wage and Hour Division, informed them that the Paralegal/Legal Assistant II job classification is equivalent to the higher paid NCS job classification of “white collar excluding sales” level 7 employees and that the data obtained from the Boston area OES and applied to the Paralegal/Legal Assistant II job classification actually reflected the lower wage rates for the Paralegal/Legal Assistant I job classification. In a subsequent brief, the Petitioners stated that they did not feel that the Boston area wage determination was reasonable, especially when compared to the hourly wage rates paid to the same job classification in other localities across the country. Furthermore, the Petitioners reiterate their contention that the Administrator’s policy to cap any wage rate increase at ten percent when issuing a new wage determination should not apply in this case, because the wage rate they were paid had been incorrect for years.

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<sup>24</sup> Tab A at 1.

<sup>25</sup> See Area Wage Determination No. 1994-2255 (Rev. 24)(May 23, 2005).

<sup>26</sup> Tab A at 1.

<sup>27</sup> *Id.*

<sup>28</sup> Tab A at 1-2.

## DISCUSSION

The Secretary's regulations allow interested parties to challenge the accuracy of a wage determination by submitting a request for review and reconsideration. Any such request must be accompanied by supporting evidence.<sup>29</sup> Upon receiving such a request, the Administrator reviews the wage determination rate in light of: (1) the data originally used for issuing the wage determination, (2) the evidence the party challenging the wage determination produces, and (3) any additional relevant data. After completing this evaluation, the Administrator can issue a new wage determination, revise the existing wage determination, or affirm the existing wage determination.<sup>30</sup>

In regard to the Petitioners' contention that the Paralegal/Legal Assistant II job classification is equivalent to the higher paid NCS job classification of "white collar excluding sales" level 7 employees, the SCA regulations recognize that in some situations the Administrator may not have survey data directly documenting local wage rates for a particular job classification that will be needed on a federal service contract. When this occurs,

[e]stablishment of a prevailing wage rate for certain such classifications may be accomplished through a "slotting" procedure, such as that used under the Federal pay system. Under this procedure, wage rates are derived for a classification based on a comparison of equivalent or similar job duty and skill characteristics between the classifications studied and those for which no survey data is available.<sup>31</sup>

But because the Administrator explained that the latest Boston area wage determination was based on the November 2003 OES which did contain wage rate data for the Paralegal/Legal Assistant job classification, there was no need to resort to the "slotting" procedure to determine the prevailing wage rate for the Paralegal/Legal Assistant job classification. Thus, there was no need to compare the Paralegal/Legal Assistant II job classification with the NCS job classification of "white collar excluding sales" level 7 employees. Moreover, the Petitioners' representation that the Director of the Office of Wage Determinations informed them that a Paralegal/Legal Assistant II is equivalent to the higher paid "white collar excluding sales" level 7 employee is merely hearsay or anecdotal and unsupported by affidavits, job descriptions or other documents that might

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<sup>29</sup> 29 C.F.R. § 4.56(a).

<sup>30</sup> 29 C.F.R. § 4.56(a)(2).

<sup>31</sup> 29 C.F.R. § 4.51(c); *see also Court Sec. Officers*, ARB No. 98-001, slip op. at 5 (Sept. 23, 1998); *D.B. Clark III*, slip op. at 4-5.

warrant consideration. In the end, the Petitioners have not supplied any evidence to justify a different conclusion.<sup>32</sup>

Nevertheless, the Petitioners assert that the data obtained from the Boston area OES, on which the Administrator relied to determine the prevailing wage rate for a Paralegal/Legal Assistant II, actually reflected the lower wage rates for a Paralegal/Legal Assistant I. A review of the record, however, does not reveal that the Administrator abused his discretion by relying on the BLS OES survey for the Boston area. The Administrator routinely employs area surveys, which BLS conducts, in determining wage rates for service contracts within a given locality. Indeed, it is a standard means of determining rates under the regulations.<sup>33</sup> Furthermore, Area Wage Determination No. 1994-2255 for the Boston area, as found in the record, indicates prevailing wage rates for the job classifications of Paralegal/Legal Assistant I through IV.<sup>34</sup> As for any argument that the survey data is flawed, the Petitioners have made no showing nor provided any independent survey or evidence regarding the different job duties between a Paralegal/Legal Assistant II and a Paralegal/Legal Assistant I which would support why they believe the wage determination rates for a Paralegal/Legal Assistant II are incorrect. Absent information that would make it possible for the Administrator to make a comprehensive comparison to determine how the OES wage data was flawed, we too lack a basis for such a finding. The Administrator offered adequate guidance to the Petitioners regarding the type of data that they would need to prevail in a request for reconsideration; however, the Petitioners simply did not submit the necessary data.<sup>35</sup> The Petitioners' assertions, absent any supporting evidence, are insufficient to justify an adjustment to the wage determination rate for a Paralegal/Legal Assistant II in the Boston area and this is reason enough for this Board to uphold the Administrator's decision.

In any event, any argument that because the hourly wage rates paid to a Paralegal/Legal Assistant II in other localities across the country are higher, the wage rates contained in the Boston area wage determination are unreasonable is inapposite. The process of determining wage rates is dependent on the gathering of statistical data

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<sup>32</sup> *D.B. Clark III*, slip op. at 5.

<sup>33</sup> *See e.g.*, 29 C.F.R. § 4.51(a) (pertinent information as to wage rates and fringe benefits "is most frequently derived from area surveys made by [BLS]"); 29 C.F.R. § 4.54 ("[l]ocality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area"); *see also L-3 Commc'ns Joint Operations Group*, slip op. at 4.

<sup>34</sup> *See* Tab M.

<sup>35</sup> *See* Tabs E and F (Criteria for Data Submitted for Review and Reconsideration, including any survey or information the Petitioners gather); *see also* 29 C.F.R. § 4.56 ("[a]ny such request [for review and reconsideration] must be accompanied by supporting evidence").

documenting wage payments in different localities.<sup>36</sup> The prevailing wage rates are locality-based; thus, the wage determination rates for other localities across the country, whether higher or lower, generally are not relevant when evaluating the wage determination rates in the Boston area.<sup>37</sup>

Finally, the Petitioners' contention that the wage rate they were paid was incorrect for years implicitly is a request to review and modify the wage determinations that were part of prior years' procurement contracts, long after the contracts were awarded. The regulations specifically prohibit reconsideration of the rates in a wage determination after a contract has been bid, or less than ten days before the commencement of a contract in the case of an extension.<sup>38</sup> Similarly, the regulation addressing modification clearly precludes retroactive relief, providing that the Board's decision on review of a wage determination "shall not affect the contract" after award, exercise of option, or extension of the contract.<sup>39</sup>

In regard to how wage determinations are adjusted, BLS collects data continuously and less recent data are subject to adjustment.<sup>40</sup> As it becomes available, more recent data may support changes in wage determinations. Specifically, the Administrator explained that "to provide consistency and stability" in the adjustment of wage determinations, the Administrator has a policy of "retaining" existing wage rates when a new BLS survey indicates a wage rate less than the existing wage rate found in a wage determination for an occupation, but when a new BLS survey indicates a wage rate higher than the existing wage determination rate, the Administrator limits increases in wage determination rates to ten percent.<sup>41</sup>

In this case, the record contains evidence indicating that seven revisions of Area Wage Determination No. 1994-2255 for the Boston area occurred between 2001 and 2005 based on updated results of continuous, ongoing OES and NCS surveys.<sup>42</sup> In years when the results of a new BLS survey revealed a wage rate less than the existing wage

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<sup>36</sup> See 29 C.F.R. § 4.54 ("[l]ocality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area").

<sup>37</sup> See *Court Sec. Officers*, slip op. at 5-6.

<sup>38</sup> 29 C.F.R. § 4.55(a).

<sup>39</sup> See 29 C.F.R. § 8.6(d); *L-3Commc'ns Joint Operations Group*, slip op. at 4; *D.B. Clark III*, slip op. at 9.

<sup>40</sup> *L-3 Commc'ns Joint Operations Group*, slip op. at 5.

<sup>41</sup> See Tab F.

<sup>42</sup> See Tabs A, M-P.



rate found in the wage determination for a Paralegal/Legal Assistant II, the higher existing wage rate was retained in the wage determination.<sup>43</sup> Most recently, when the results of the November 2003 OES revealed a wage rate higher than the existing wage rate found in the wage determination for a Paralegal/Legal Assistant II, the Boston area wage determination was revised to reflect over an eight percent hourly wage rate increase for the Paralegal/Legal Assistant II job classification from \$19.02 to \$20.70.<sup>44</sup>

The Board has held that the Administrator's policy of capping succeeding wage determination rate increases at ten percent above the prevailing rates contained in the predecessor wage determination is "legally sound and otherwise reasonable."<sup>45</sup> In any event, because the most recent Boston area wage determination of record was revised to reflect only an eight percent hourly wage rate increase for the Paralegal/Legal Assistant II job classification, the Administrator's policy to cap succeeding wage determination rate increases at ten percent is not at issue in this case.

For the reasons stated above, we find that the Administrator's final ruling, denying the Petitioners' request for review and reconsideration of Area Wage Determination No. 1994-2255, is in accordance with the SCA and its implementing regulations and is reasonable. *Dep't of the Army*, slip op. at 15-16.

#### CONCLUSION

The Petitioners failed to provide any sufficient evidence to justify an adjustment to the wage determination rate for a Paralegal/Legal Assistant II in the Boston area. Accordingly, since the Administrator's determination was reasonable and in accordance with the SCA and its implementing regulations, the Petition for Review is **DENIED** and the Administrator's final ruling letter of December 2, 2005 is **AFFIRMED**.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**DAVID G. DYE**  
**Administrative Appeals Judge**

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<sup>43</sup> See Tab A; compare Tabs M and N.

<sup>44</sup> See Tab A; compare Tabs N and O.

<sup>45</sup> See *Flightsafety Serv. Corp.*, ARB Nos. 02-085 and 03-075, slip op. at 14-15 (Oct. 31, 2004); *D.B. Clark III*, slip op. at 7-8.