



In the Matter of:

ANDREW AIKEN

ARB CASE NO. 08-009

and

DATE: April 30, 2009

**All Other Similarly Affected Employees of
ITS Medical Systems on U.S. Army Reserve
Command Contract No. DAKF110-01-C-0005
In Fort McCoy, Wisconsin; Fort Gordon,
Georgia; and Fort Dix, New Jersey**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

John V. Berry, Esq., *John Berry, P.L.L.C.*, Washington, District of Columbia

For Respondent Administrator, Wage and Hour Division:

Joan Brenner, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Gregory F. Jacob, Esq., *United States Department of Labor*, Washington, District of Columbia

FINAL DECISION AND ORDER

This case involves a contract that the United States Army Reserve Command awarded to ITS Medical Systems (ITS) on July 12, 2001. The contract called for ITS to provide medical equipment services, including installation, maintenance, and calibration of medical, dental, and veterinary equipment at Fort Gordon, Georgia (Ft. Gordon), Fort Dix, New Jersey (Ft. Dix), and Fort McCoy, Wisconsin (Ft. McCoy). The contract is governed by the McNamara-O'Hara Service Contract Act (SCA), which applies to contracts in excess of \$2,500 entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services to the United States. The SCA requires contractors and subcontractors to pay their employees no less than the wage rates and fringe benefits that prevail in the locality or the rates (including

prospective increases) contained in a collective bargaining agreement.¹ The Petitioners have asked us to determine whether a final ruling of the Labor Department's Wage and Hour Division is reasonable. We conclude that it is.

BACKGROUND

The Petitioners are ITS employees working as Biomedical Engineering Technicians (BMETs) and Senior BMETs.² In 2003, Andrew Aiken, on behalf of himself and other BMETs, sought review of the classification of BMETs and Senior BMETs under the contract as Electronics Technician, Maintenance (ETM) on the applicable wage determination that the Wage and Hour Division issued to cover the SCA contract. Wage determinations set forth the minimum wages and fringe benefits that SCA contracts must contain.³ In response to the employees' request, Nila Stovall, Chief of the Wage and Hour Division's Branch of Service Contract Wage Determinations, sought the views of Aldred E. Moreau, Labor Advisor for the Department of the Army, and Ollen L. Burnette, Army Contracting Agency Specialist, concerning the basis of the wage determination.⁴ In November 2003, Sandra Hamlett, Human Resource Specialist, Branch of Service Contract Wage Determinations, responded that, based on the Wage and Hour Division's review, the "ETM classification was appropriate for the employees performing Bio-Medical Technician duties."⁵

On December 1, 2004, Robert Carpenter, ITS Project Manager, requested that the Atlanta District Office of the Wage and Hour Division, initiate an investigation to determine whether the ETM classification was appropriate for the BMETs. On April 15, 2005, Carpenter submitted Standard Form 1444 (SF 1444), Request for Authorization of Additional Classification, to add new classifications and wage rates for the Petitioners' jobs to the applicable wage determination, Wage Determination 1994-2135 (Revision 27). Along with the SF 1444, Carpenter submitted information in support of his request that the Administrator conform a new classification for BMETs and Senior BMETs. Carpenter re-submitted the SF 1444 on April 6, 2005.⁶

¹ 41 U.S.C.A. §§ 351-358 (West 2008).

² Administrative Record (AR), Tab F.

³ 29 C.F.R. § 4.3(a) (2008).

⁴ AR, Tab A, 1.

⁵ AR, Tab C, 36.

⁶ AR, Tab F.

On October 3, 2005, Stovall denied the proposed conformance, stating that “conformance procedures may only be used if the work that an employee is to perform under the contract is not within the scope of work of any classification listed on the [wage determination].”⁷ After Stovall’s initial denial of the conformance request, the Wage and Hour Division conducted an investigation in response to Carpenter’s SF 1444 to determine whether to create an additional classification on the applicable wage determination. A Wage and Hour investigator interviewed several employees who performed work as BMETs and Senior BMETs at Ft. Gordon, where Aiken worked, and reviewed relevant information, including existing job information and information that the Petitioners had submitted.

On August 23, 2006, John Bates, Director of Enforcement for the Atlanta, Georgia, District Office of the Wage and Hour Division, informed the employees that a conformance was unnecessary because the Petitioners were properly classified. According to Bates, the investigation revealed that BMETs “assemble, service, calibrate and repair medical, dental, and veterinary equipment” as well as “maintain on-site field medical equipment at Ft. Gordon, provide medical equipment training, conduct physical inventories, operate material handling equipment, prepare reports on equipment conditions, and maintain records on serviced equipment.” The investigation concluded that the BMETs’ job duties were covered by no less than ten different classifications of workers listed on the applicable wage determination and that 20 to 35 percent of the BMETs’ job duties fell within the ETM classification.⁸

Bates noted that the regulation at 29 C.F.R. § 4.169 provides that employees who work in different capacities and at two or more wage rates during a workweek in the performance of an SCA contract “must be paid the highest of such rates for all hours worked in the workweek unless it appears from the employer’s records or other affirmative proof which of such hours were included in the periods spent in each class of work.”⁹ Since the ETM classification had the highest wage rates among the

⁷ AR, Tab H.

⁸ AR, Tab U.

⁹ 29 C.F.R. § 4.169. The regulation provides, in pertinent part,

If an employee during a workweek works in different capacities in the performance of the contract and two or more rates of compensation under section 2 of the Act are applicable to the classes of work which he or she performs, the employee must be paid the highest of such rates for all hours worked in the workweek unless it appears from the employer’s records or other affirmative proof which of such hours were included in the periods spent in each class of work.

classifications that covered the BMETs' job duties, Bates concluded that the Petitioners were appropriately paid at the ETM II and ETM III classification rates. On September 29, 2006, in response to two letters from the Petitioners' counsel, Bates restated his recommendation that the Petitioners were properly paid as ETM II and III.¹⁰

Aiken petitioned the Administrative Review Board (ARB or Board) to reverse Bates's determination. But the Board dismissed the petition without prejudice on April 23, 2007, on the ground that the Bates letters were not a final ruling.¹¹ The Administrator issued a final ruling on July 13, 2007, concluding that the BMETs at Ft. Gordon were properly classified as ETMs and that a conformance was unnecessary.¹²

In his ruling letter, the Administrator reaffirmed Stovall's initial determination that the BMETs' duties fit within the ETM classification. The Administrator relied on the description for "ETM" in the *Service Contract Act Directory of Occupations*, 4th Edition (*SCA Directory*), which states that the ETM "maintains, repairs, troubleshoots, modifies and installs various types of electronic equipment and related devices such as . . . medical . . . equipment."¹³

The Administrator also addressed defects in the SF 1444 that ITS submitted, noting that although ITS had listed Ft. Gordon and Ft. Dix on their proposal, the form addressed only the wage determination for Ft. McCoy (WD 1994-2577 (Rev. 28)). The Administrator also noted that the SF 1444 did not indicate whether the employees at Ft. Gordon and Ft. Dix agreed with the conformance request. Finally, the Administrator stated that the SF 1444 did not list any new proposed wage rate for the proposed classifications. Moreover, the wage rates for the requested classifications of BMET and Senior BMET were the same as those listed in the wage determination for ETM II and ETM III in the wage determination. The Petitioners requested that we review the Administrator's ruling.

JURISDICTION AND STANDARD OF REVIEW

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

¹⁰ AR, Tab X.

¹¹ On July 27, 2007, the Board dismissed without prejudice a second request by the Petitioners for the Board to review the non-final decision.

¹² Supplemental Administrative Record (SAR), Tab AA.

¹³ Ruling Letter, 3.

authorized representative” rendered under the SCA.¹⁴ The Board’s review of the Administrator’s SCA final rulings is in the nature of an appellate proceeding.¹⁵ We are authorized to modify or set aside the Administrator’s findings of fact only when we determine that those findings are not supported by a preponderance of the evidence.¹⁶ The Board reviews questions of law de novo.¹⁷ We nonetheless defer to the Administrator’s interpretation of the SCA when it is reasonable and consistent with law.¹⁸

DISCUSSION

The Legal Standard

The conformance regulations provide both procedural and substantive guidelines for adding a job classification to the wage determination that applies to a particular SCA-covered contract.¹⁹ The job classifications that are listed on the applicable wage determination function as standards for comparison with a proposed classification in two primary ways. First, if the skills and duties required for the proposed classification are encompassed by a classification already listed on the wage determination, the proposal to add the new classification through the conformance process will be denied.²⁰ Second, if a proposed classification is determined to be necessary, the classifications and wage rates listed on the wage determination provide standards for comparison in determining the category into which the job falls and the proper wage rate for the new classification.²¹ The conformance regulations require that a proposed position be categorized and paid a

¹⁴ 29 C.F.R. § 8.1(b) (2008); *see also* Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

¹⁵ 29 C.F.R. § 8.1(d).

¹⁶ 29 C.F.R. § 8.9(b).

¹⁷ *United Gov’t Sec. Officers of America, Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (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).

¹⁸ *See Dep’t of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 15-16 (Dec. 22, 1999).

¹⁹ 29 C.F.R. § 4.6(b) (2) (i) – (vi)); *see Dep’t of the Army*, slip op. at 15-16.

²⁰ *See, e.g., Burnside-Ott*, No. 1987-SCA-OM-002, slip op. at 6-10 (Dep. Sec’y Jan. 10, 1989).

²¹ 29 C.F.R. § 4.6(b)(2)(i), (vi)(A); *see Russian & East European P’ships, Inc.*, ARB No. 99-025, slip op. at 15-17 (Oct. 15, 2001); *COBRO Corp.*, ARB No. 97-104, slip op. at 10 (July 30, 1999).

wage that reflects an “appropriate level of skill comparison” between the position proposed for addition to the wage determination and those classifications already listed on the wage determination.²²

The Administrator is accorded broad discretion in establishing a conformed rate, “and his or her decisions will be reversed only if inconsistent with the regulations, or if they are ‘unreasonable in some sense, or . . . exhibit[] an unexplained departure from past determinations’”²³ When reviewing the Administrator’s determination in a conformance action, we must focus on the *Administrator’s* choice and the rationale advanced to support it.²⁴ In challenging the Administrator’s conformance action, the burden on a petitioner is not merely to prove that other choices were available – or perhaps even preferable – but to demonstrate affirmatively that the Administrator’s choice was unreasonable.²⁵

The Petitioners’ Arguments

The Petitioners contend that a preponderance of the evidence does not support the Administrator’s decision denying their request for a conformance. Specifically, they argue that the Administrator’s action was unreasonable because the BMETs’ duties are more complex than those of the ETM classification listed on the wage determination. They also contend that the Administrator has waived his authority to consider ITS’s improper formatting of the conformance request because the Administrator failed to inform ITS of defects on the SF 1444.²⁶ Finally, they contend that we must overturn the Administrator’s ruling because the procedural process here was flawed and fraught with delay.²⁷

²² 29 C.F.R. § 4.6(b)(2)(i); *see* 29 C.F.R. § 4.6(b)(2)(iv); *COBRO*, slip op. at 22-23.

²³ *Environmental Chem. Corp.*, ARB No. 96-113, slip op. at 3 (Feb. 6, 1998) (quoting *Titan IV Mobile Serv. Tower*, WAB No. 98-14 (May 10, 1991); *see also COBRO*, slip op. at 11.

²⁴ *COBRO*, slip op. at 23.

²⁵ *Id.*

²⁶ Petition, 16-18.

²⁷ *Id.*

1. Because the BMET job duties fall within the scope of the duties of the ETM classification, the Administrator’s denial of Aiken’s conformance request was reasonable.

The regulations governing the SCA authorize the Administrator to add an additional job classification and wage rate only if the proposed classification meets the following test:

- 1) The work to be performed by the classification is not within the scope of any classification listed on the wage determination; and
- 2) the conformance does not combine two or more classes listed in the wage determination into a new classification to be conformed or propose a new classification that performs only part of the duties of an existing classification; and
- 3) the conformed rate must bear a reasonable relationship to those classifications listed in the applicable wage determination with comparable skills and duties.²⁸

The Administrator denied the conformance request because the Petitioners did not meet the first prong of the test – they failed to prove that the work performed by the proposed BMET classification was not within the scope of any classification listed on the wage determination. Relying on the description of the ETM in the *SCA Directory*, the Administrator concluded that the ETM “maintains, repairs, troubleshoots, modifies and installs various types of electronic equipment and related devices such as . . . medical . . . equipment.”²⁹ With regard to the BMETs’ duties, the Administrator noted that the Wage and Hour Division’s investigation determined that BMETs “assemble, service, calibrate and repair medical, dental, and veterinary equipment” as well as “maintain on-site field medical equipment at Ft. Gordon, provide medical equipment training, conduct physical inventories, operate material handling equipment, prepare reports on equipment conditions, and maintain records on serviced equipment.”³⁰ The Administrator therefore concluded that the work performed by the proposed classification was within the scope of the ETM classification.

As stated earlier, our review of the Administrator’s determination in a conformance action must focus on the Administrator’s choice, and the rationale that he advanced to support it. In challenging the Administrator’s conformance, the burden on a petitioner is not merely to prove that another choice was available – or perhaps even preferable – but to demonstrate affirmatively that the Administrator’s choice was

²⁸ 29 C.F.R. §§ 4.6(b)(2)(i), 4.152(c)(1).

²⁹ Ruling Letter, 3.

³⁰ AR, Tab U.

unreasonable.³¹ Moreover, “the conformance process does not require the exactitude that might be achieved in a de novo determination of prevailing wage rates.”³² Here, the similarity between the ETMs’ skills and duties as described in the *SCA Directory* and the BMETs’ skills and duties as revealed in the investigation demonstrates that the Administrator’s determination was reasonable.

The Petitioners, however, argue before the Board (as they did before the Administrator) that a separate classification and wage rate for BMETs is justified because the Petitioners’ work differs substantially from the work ETMs perform. But the Petitioners have presented no convincing argument or factual support that would demonstrate that the levels of skill, experience, education, and training required of the BMET are so dissimilar from those of the ETM that the Administrator’s choice of classification was unreasonable. In fact, the Petitioners admit that their duties “fit within the definition of the SCA Directory of Occupations, Fourth Edition, occupational base description for ETM (code 23180), which was in effect at the time of the conformance request and the initial denial dated October 3, 2005.”³³ They stress the “medical” nature of the BMETs’ work, but the ETMs also perform medical work.

With regard to the Administrator’s assessment of the skills required of the BMETs and ETMs, we simply note that the Administrator conducted an investigation, which included employee interviews and a review of evidence that the Petitioners submitted. The Petitioners thus had ample opportunity to offer their evidence concerning the content of the various jobs. Viewing the record as a whole, we see no reason to overturn the Administrator’s ruling. Moreover, a proposed classification need not be conformed merely because the duties of the classification do not fit precisely within the definitional contours of preexisting wage determination classifications, so long as it is “within the scope” of the classification.³⁴

³¹ *COBRO*, slip op. at 22.

³² *Biospherics, Inc.*, ARB Nos. 98-141, 97-086, slip op. at 19 (May 28, 1999).

³³ Petition for Review, 10.

³⁴ The Petitioners also rely on the description of BMET duties in a job announcement published by the Department of Health and Human Services and job descriptions for BMETs from the Department’s Employment Training Administration’s O*Net website (<http://online.onetcenter.org/link/summary/17-2031.00>, retrieved Sept. 11, 2007) to support their contention that the scope of their duties requires a separate BMET classification. Petition, 2-3. The fact that other agencies have created a BMET classification for their particular purposes, however, has little relevance to our evaluation of the reasonableness of the Administrator’s determination in an individual case. *COBRO*, slip op. at 22. Only the Administrator has authority to determine whether a conformance is necessary under the SCA.

Based upon the guidelines contained in 29 C.F.R. § 4.152(c)(1), we agree with the Administrator that the denial of the conformance request was reasonable because the duties of the BMET classification were within the scope of work in the ETM classification.

2. Alleged flaws in the Administrator’s conformance procedures do not justify setting aside the Administrator’s decision.

The Petitioners contend before the Board that “[t]he entire administrative process was fatally flawed.”³⁵ They argue that they received inadequate and incorrect guidance and the wrong appeal information, and that they were not notified of defects in their SF 1444. Therefore, they argue, the Administrator waived his right to consider the defects, which included omission of other locations and failure to include applicable wage determination rates. This contention – that the Petitioners should be excused from the regulatory standards governing conformance because the Wage and Hour Division never notified them of defects in their SF 1444 – is without merit. The language of the conformance regulations is clear and sufficient to place the Petitioners on notice of their obligations and options in requesting conformance.³⁶ Moreover, ITS and the Petitioners were clearly on notice of the requirements for submission of a conformance request because along with the conformance request, ITS submitted copies of Wage and Hour Division guidance on conformance procedures, downloaded from the Wage and Hour Division website.³⁷ In any event, the Administrator’s decision to deny the conformance had nothing to do with the flaws in the SF 1444 that the Administrator discussed in his ruling letter. As noted in the Administrator’s ruling, “Had the investigation found that the BMETs at Ft. Gordon were misclassified or that their occupations needed to be conformed, the investigation would have been expanded to cover the other locations [i.e., those omitted from the SF 1444] covered under the contract.”³⁸

Finally, the Petitioners contend that Wage and Hour Division staff relied on “outdated and incorrect” advice from Army Labor Advisor Moreau and Contracting Agency Specialist Burnette. But the Administrator, who alone has authority in these matters, made the ultimate decision to deny the request. His ruling, as deciding official, rather than the purported views of Moreau and others, is at issue here.³⁹

³⁵ Petitioners’ Reply, 3.

³⁶ *Russian & East European P’ships, Inc.*, slip op. at 18.

³⁷ AR, Tab B, 18-20.

³⁸ Administrator’s Ruling, 2.

³⁹ After submitting their reply brief, the Petitioners filed a Motion To Seek Leave To Amend Requested Relief, requesting for the first time on appeal “reclassification to the classification of Engineering Technician V or VI.” The Board’s review of the Administrator’s final rulings issued pursuant to the SCA is in the nature of an appellate

CONCLUSION

The ITS employees' petition for review is **DENIED**, and the Administrator's final conformance ruling of July 13, 2007, is **AFFIRMED** because the decision is reasonable, consistent with the regulations and not an unexplained departure from past determinations.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER TRANSUE
Administrative Appeals Judge

proceeding. *See* 29 C.F.R. § 8.1(b) (ARB has jurisdiction to hear and decide appeals from final decisions of the Administrator). Since the Petitioners did not present the issue of a reclassification to Engineering Technician to the Administrator, it is not appropriately before us. *U.S. Dep't of State*, ARB No. 98-114, slip op. at 20 (Feb. 16, 2000) (declining to consider wage determination issue presented for the first time on appeal to the Board, which the Administrator had not previously addressed and decided).