U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

SEPTEMBER 16, 1991

MEMORANDUM NO. 156

MEMORANDUM TO: All Contracting Agencies of the Federal Government and the District of Columbia

FROM: John R. Fraser
Acting Administrator

SUBJECT: Updating of Service Contract Act Health and Welfare Benefit Levels

SUMMARY

Effective immediately, most prevailing wage determinations issued under the McNamara-O'Hara Service Contract Act (SCA) are being revised to reflect changes in health and welfare (H&W) contribution requirements. The new levels are:

1. $0.74 per hour for those area-wide wage determinations currently requiring a $0.59 per hour contribution for each employee; and

2. $2.07 per hour for those area-wide wage determinations currently requiring an average cost contribution of $1.84 per hour.

BACKGROUND

The SCA requires the Secretary of Labor to make determinations of minimum monetary wages and fringe benefits to be paid service employees engaged in the performance of covered contracts in accordance with the wage rates and fringe benefits prevailing for such employees in the locality. SCA regulations provide that such determinations will be reviewed periodically; where prevailing wage rates or fringe benefits have changed, these changes are to be reflected in revised wage determinations.

Through 1980, SCA H&W fringe benefit levels payable to employees performing on contracts subject to SCA were updated periodically. In 1979, however, the Bureau of Labor Statistics (BLS) survey program which was the source for this updating was discontinued. As a result, SCA wage determination H&W benefit levels remained unchanged from 1980 to 1985.

In 1986, utilizing newly available BLS Employment Cost Index (ECI) information, the 1980 rates were updated. At that time, it was planned to use a new series of ECI data, to be published for the first time in 1987, as the basis for an annual updating process. However, the data did not correspond to the H&W levels of firms for which SCA fringe benefit levels are applied and, therefore, no further updates were issued.

Over the past two years, Wage and Hour staff have met with interested parties to explore various options for updating SCA H&W levels. Those efforts, and extensive work by the BLS, have resulted in a new data series and methodology which may provide a basis for continued updating of SCA H&W levels.

The new H&W levels now being established are based on 1991 size-of-firm data published by the BLS. Data for firms employing less than 100 employees are being used to set the H&W level for most, and generally routine service contracts. Data for firms employing 100 or more employees are being used to set the H&W level for the following types of non-routine service contracts: (1) major base support contracts; (2) solicitations involving an A-76 (displacement of federal civilian workers) study/action; and (3) solicitations containing terms that require bidders to be large, national corporations, major competitors, or providers of highly technical services.

REQUIRED AGENCY ACTION

In accordance with Regulations 29 CFR 4.5(a)(2), the newly-established H&W levels should be incorporated into the contract wage determination where this notice is received at least ten (10) days prior to bid opening in the case of any invitation for bids (IFB). If this notice is received less than ten (10) days before bid opening, the new rates should be applied unless the Federal agency finds there is not a reasonable time still available to notify bidders of the revision.

In the case of a procurement entered into pursuant to negotiations (RFP), or in the case of a contract option or extension, the new rates are effective if this notice is received before the date of contract award, contract extension, or exercise of option, provided contract performance begins within 30 days of award, contract extension, or exercise of option. If the contract's start of performance is delayed for more than 30

days (or if the contract does not specify a start of performance date which is within 30 days of award), the new rates are effective if this notice is received by the agency not less than 10 days before the start of contract performance.

Use of the new H&W levels under these circumstances will ensure that all relevant contracts (in the referenced procurement stages) are consistent in containing the new H&W requirements regardless of when an initial SCA wage determination was requested.

Since the Wage and Hour Division is not able to track the procurement status of contracts for which wage determinations have recently been issued in response to SF-98 requests, contracting agencies should contact the Division for guidance with respect to current IFB's and RFP's still in the bidding or negotiating stage which do not contain wage determinations reflecting the new H&W requirements. Accordingly, if you have procurement activities which will be affected by these changes, please request a revised wage determination. To expedite the revision of such wage determinations, telephone requests may be made to (FTS or 202) 523-7096; FAX requests may be made to (FTS or 202) 523-9771. These positions will be covered Monday through Friday between the hours of 8:15 a.m. and 4:45 p.m. EST/EDT. Callers and FAX requests should provide the following information:

1. Notice number of the SF-98 originally submitted;

2. Number and revision of the wage determination received in response to the original SF-98; and

3. Name, address, and telephone number (FTS or Commercial --not Autovan) of the individual to whom the amended SF-98 response should be sent.

For those agencies participating in the Blanket Wage Determination Pilot Test Program, revised Blanket Wage Determinations are being prepared and will be transmitted to all Blanket Coordinators.

Your cooperation is appreciated.

U.S. DEPARTMENT OF LABOR

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C.
20210

DATE: February 4, 1991
CASE NOS. 89-CBV-1
89-CBV-5
89-CBV-7
89-CBV-10
89-CBV-11
89-CBV-12
89-CBV-16
89-CBV-17

IN THE MATTER OF

APPLICABILITY OF WAGE RATES COLLECTIVELY BARGAINED BY UNITED HEALTHSERV, INC., AND LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, TO EMPLOYMENT OF SERVICE EMPLOYEES UNDER A CONTRACT FOR HOSPITAL ASEPTIC MANAGEMENT SERVICES AT:

WRIGHT-PATTERSON AIR FORCE BASE IN MONTGOMERY COUNTY, OHIO,
MAXWELL AIR FORCE BASE IN MONTGOMERY COUNTY, ALABAMA,
TYNDALL AIR FORCE BASE IN BAY COUNTY, FLORIDA,
EGLIN AIR FORCE BASE IN OKALOOSA COUNTY, FLORIDA,
SHAW AIR FORCE BASE IN SUMTER COUNTY, SOUTH CAROLINA,
ALTUS AIR FORCE BASE, OKLAHOMA,
CARSWELL AIR FORCE BASE, TEXAS,
LACKLAND (WHILFORD HALL AND MEDIAN ANNEX), RANDOLPH, BROOKS, AND KELLY AIR FORCE BASES, BEXAR COUNTY, TEXAS.

BEFORE: THE DEPUTY SECRETARY OF LABOR [1]

DECISION AND ORDER OF REMAND

This proceeding is before me pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended (MOSCA or the Act),

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[1] The Deputy Secretary has been designated by the Secretary to perform the functions of the Board of Service Contract Appeals pending the appointment of a duly constituted Board. 29 C.F.R. § 8.0 (1989).

41 U.S.C. §§ 351-358 (1988), and its implementing regulations, 29 C.F.R. Parts 4, 6 and 8 (1989). The primary issue on review of Administrative Law Judges (ALJs) Daniel J. Roketenetz's and Alfred Lindeman's Joint Decision and Order (J.D. and O.) of July 21, 1989, is whether the ALJs employed an appropriate standard under MOSCA Section 4(c) in upholding the successorship obligation in these cases.

In granting the Laborers' International Union of North America, AFL-CIO's (LIUNA's) motion for summary decision, the ALJs held that, absent allegations of certain "unusual circumstances" described in the legislative history of Section 4(c), and where the majority of collectively-bargained rates fall between greater Federal wage board rates and lesser area wage rates, there can be no substantial variance. [2/] J.D. and O. at 27. In its Petition for Review, the contracting agency, the Department of the Air Force, argues that the Wage and Hour Administrator's area wage determination [3/] establishes

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[2/] United Healthserv, Inc., provided hospital aseptic management (housekeeping) services at the captioned facilities. Initially, it performed what became predecessor contracts. Thereafter, it became a successor contractor during exercise of contract options. The wage determination for the predecessor contracts incorporated collectively-bargained rates. See J.D. and O. at 3-5.

[3/] In the absence of an applicable collective bargaining agreement, the Administrator, in setting minimum monetary wages and fringe benefits for service contract wage determinations, relies significantly on area surveys conducted by the Bureau of Labor Statistics, U.S. Department of Labor (BLS). 29 C.F.R. § 4.51. By comparison, in Section 4(c) proceedings consideration is not confined to the Administrator's wage determination, BLS surveys, or other factors. See, e.g., In the Matter of

(continued...)

conclusively the prevailing rate in the locality for purposes of determining the existence of a substantial variance.

The ALJs have applied the following standard: (1) a finding of substantial variance requires proof of non-arm's-length negotiation or rates having become disproportionate over a long period of time; and (2) negotiated rates which do not exceed analogous Federal wage board rates occupy a protected zone and cannot be held substantially at variance with prevailing rates absent proof of non-arm's-length negotiation. [4/] While I disagree with this precise formulation, I do not reject the ALJs' analysis in its entirety. Rather, the ALJs are substantially correct in their identification of congressional intent and, in particular, of the roles accorded collectively-bargained and Federal wage board rates under the MOSCA. [5/]

[3/](...continued)
Applicability of Wage Rates Collectively Bargained by Big Boy Facilities, Inc., and the National Maritime Union to Employment of Service Employees under a Contract for Mess Attendant Services at Fort Richardson, Alaska (Big Boy Facilities), Case No. 88-CBV-7, Final Decision and Order of the Dep. Sec. issued January 3, 1989, slip op. at 9-14, 29, Wage & Hour Cas. (BNA) 356, 360-363 (1989).

[4/] This component derives from the ALJ's premise that wages equal to or less than the Federal wage board rate assertedly are "justifiable," and that a finding of "unjustifiability" thus arguably is requisite to a finding of substantial variance.

[5/] While it is not necessary to restate and address each discrete argument advanced by each party, I have considered all aspects of the parties' respective positions thoroughly in rendering my decision.

I. BACKGROUND

A. The Facts of the Case

The Department of the Air Force contracted with United Healthserv to perform housekeeping services at the captioned Air Force bases. These (successor) contracts contained wage determinations which incorporated rates from predecessor contracts for the immediately preceding contract period. The predecessor rates, which had been collectively bargained by the LIUNA on behalf of United Healthserv's employees, generally exceeded the Administrator's area wage rates. The following constituted the collectively-bargained rates, Federal wage board rates, and area wage rates in effect:

	Negotiated Wage Rate	Federal Wage Board Rate	Area Wage Rate
Wright-Patterson AFB Dayton, Ohio			
Housekeeping Aide I	$8.27	$9.56	$7.33
Group Leader	8.77		
Maxwell AFB Montgomery, Alabama			
Housekeeping Aide I	5.50	5.73	4.52
Housekeeping Aide II	5.50		4.88
Group Leader	6.02		
Tyndall AFB Panama City, Florida			
Housekeeping Aide I	6.03	6.89	5.22
Housekeeping Aide II	6.03		5.66
Group Leader	6.57		
Eglin AFB Pensacola, Florida			
Housekeeping Aide I	7.42	7.62	5.22
Group Leader	7.97	9.28	

Shaw AFB			
Sumter, South Carolina			
Housekeeping Aide I	6.39	6.74	4.17
Group Leader	6.99	7.70	
Altus AFB			
Altus, Oklahoma			
Housekeeping Aide I	6.60	6.00	5.69
Group Leader	7.12		
Carswell AFB			
Ft. Worth, Texas			
Housekeeping Aide I	7.47	7.13	5.08
Group Leader	7.99	7.75	
Lackland AFB			
San Antonio, Texas			
Housekeeping Aide I	6.89	7.47	4.48
Housekeeping Aide II	6.89		4.92
Housekeeping Aide III	6.99		
Group Leader	7.21	8.40	

B. Statutory Framework

MOSCA Section 2 requires every Federal government service contract to contain a provision specifying minimum monetary wages to be paid and fringe benefits to be furnished to the various classes of service employees engaged in performing the contract. The wages are "determined by the Secretary . . . in accordance with prevailing rates for such employees in the locality . . . ." The benefits specified are those determined by the Secretary "to be prevailing . . . ." 41 U.S.C. § 351(a)(1) and (2). In addition, the contract must state, inter alia, the Federal wage board rates which would be paid to the classes of employees under the Prevailing Rate Systems Act, 5 U.S.C. §§ 5341-5349 (1988), and the Secretary must "give due consideration to [these] rates in making the wage and fringe benefit determinations specified in this section." 41 U.S.C. § 351(a)(5). However, in the event

that the service employees performing the contract are covered by an arm's-length collective bargaining agreement, this "prevailing rate" procedure does not apply. Instead, the wage determination would specify the negotiated wages and fringe benefits, including any prospective increases, provided by the collective bargaining agreement. 41 U.S.C. § 351(a)(1) and (2).

MOSCA Section 4(c), 41 U.S.C. § 353(c), imposes on successor contracts an obligatory floor for wages and fringe benefits in the event that the predecessor contract has specified collectively-bargained rates. Wages paid and benefits furnished under a successor contract must be greater than or equal to those provided under the predecessor contract. The employer obligation reads:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, 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, to which such service employees would have been entitled if they were employed under the predecessor contract . . . .

Section 4(c) also contemplates circumstances in which the obligation may be suspended. Its proviso specifies that the successorship obligations do not apply "if the Secretary finds after a hearing . . . that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." (Emphasis added.)

The collective-bargaining rate alternatives were incorporated into Section 2(a)(1) and (2) through the MOSCA's 1972 amendment, and Section 4(c) also was enacted at that time. The Senate Report explains:

> Section 2(a)(1) and 2(a)(2) of the act have been amended, and a new subsection (c) has been added to section 4 to explicate the degree of recognition to be accorded collective bargaining agreements covering service employees, in the predetermination of prevailing wages and fringe benefits for future such contracts for services at the same location. . . .
>
> The committee appreciates the importance of decasualizing the service contract industry--a labor intensive and otherwise casual and transient industry.

S. Rep. No. 1131, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News (USCAN) at 3537 (emphasis omitted). [6/] Thus wages and benefits in effect as the result of arm's-length negotiation initially govern Section 2(a) wage predeterminations.

[6/] The Senate Report states: "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme. It is the intention of the committee that sections 2(a)(1) and 2(a)(2) and 4(c) be so construed that the proviso in section 4(c) applies equally to the above provisions." Accordingly, in the event that successor rates, based on predecessor collectively-bargained rates, are found to be substantially at variance with those prevailing in the locality, the wage determination contained in the successor contract would be altered in accordance with prevailing rates. If the wage determination "minimum" rate is reduced below the collectively-bargained rate, the contractor certainly could continue to honor his labor agreement by paying the negotiated rate. However, upon resolicitation of the service contract, other contractors could submit bids based on the new minimum rates specified in the wage determination because the obligation to pay at least the predecessor rate would no longer apply.

The Senate Report also makes clear that Congress intended that the successorship obligation would attach in the usual circumstance.

> 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 to such service employees no less than wages and fringe benefits required by such agreement. This requirement would likewise apply to prospective wages and fringe benefits.
>
> The term "accrued . . . fringe benefits" is interpreted to mean those benefits, such as accrued vacation pay or sick leave, to which an employee has become entitled by virtue of employment on predecessor contracts . . . .
>
> There are certain unusual circumstances where predetermination of wages and fringe benefits contained in such a collective agreement might not be in the best interest of the worker or the public.
>
> Thus, service employees should be protected against instances where the parties may not negotiate at arms length.

Id. (emphasis added). The report thereafter cites circumstances resulting from collusion or unequal bargaining power and observes that predetermined rates possibly might tend to deviate substantially from actual prevailing rates "over a long period of time . . . ." It concludes by stating that the dual objectives of protecting service contract workers and safeguarding other legitimate government interests is best achieved by requiring the Secretary to predetermine collectively-bargained wages and fringe benefits, except where she finds, after notice to interested parties and a hearing, a "clear showing" of substantial

variance.[7] Big Boy Facilities, slip op. at 3-10, 29 Wage & Hour Cas. (BNA) at 358-360.

Imposition of a successorship obligation pertaining both to wages and fringe benefits was exceptional, in light of the judicially circumscribed treatment accorded this principle under the National Labor Relations Act. Burns Detective Agency v. NLRB, 406 U.S. 272 (1972) (successor employer obliged to bargain

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[7] After conducting five days of oversight hearings in 1974, the House subcommittee reported continued problems in the operation of Section 4(c). The subcommittee's discussion reinforces the case for construing the successorship obligations as the ordinary circumstance.

> In order to maintain continuity of service to the Federal government and to ensure that employees would not lose their bargained-for benefits, the Congress enacted section 4(c) . . . . The clear intent of the Congress was to prevent wage undercutting by establishing a wage and fringe benefit floor--the predecessor collective bargaining agreement--for successor contractors.
>
> Mr. O'HARA. It is that sort of problem [wage undercutting] which prompted us to include in the bill that in no event shall the new contractor be permitted to pay less than what the existing rate was under the old contract. . . .
>
> Despite the passage of § 4(c), problems still remain. The GAO has advanced an interpretation . . . that [§ 4(c)] is to be applied only where the same employees and the same locality continue under a succeeding contract . . . . The Subcommittee rejects this interpretation . . . . The Subcommittee also rejects any interpretation of § 4(c) which places a time limit on the duration of the successorship requirements.

Congressional Oversight Hearings: The Plight of the Service Worker Revisited; Report of the Subcommittee on Labor-Management Relations of the U.S. Congress, House Committee on Education and Labor (Plight Revisited), 94th Cong., 1st Sess. 7-8 (Comm. Print 1975).

with predecessor union only if hiring substantial number of predecessor workforce; even so, successor not obliged to honor predecessor collective bargaining agreement).

> Section 4(c) overruled Burns to the extent that the Supreme Court refused to impose any of the terms of a prior contract on a successor employer. While Burns is based upon a policy of not imposing terms of an agreement upon parties who have not themselves bargained for those terms, the Congress recognized that this policy must give way in the field of service contracts to achieve any degree of labor stability and economic security for employees who most often face a new employer annually.

Plight Revisited at 8.

C. Prior Proceedings

The captioned cases arose when the Air Force requested that the Administrator initiate Section 4(c) proceedings. The Air Force alleged the existence of substantial variances between wage rates prevailing in the locality for similar housekeeping services and those collectively bargained between the LIUNA and United Healthserv, incorporated in the instant wage determinations. The Administrator issued an Order of Reference in each case upon determining that there may have been a substantial variance between prevailing rates and some or all of the collectively-bargained rates, 29 C.F.R. § 4.10(b)(2), and the cases were referred to the Chief Administrative Law Judge for hearing.

The cases were consolidated, with five being assigned to ALJ Roketenetz and three being assigned to ALJ Lindeman. The ALJs scheduled a consolidated prehearing conference for April 25,

1989. On March 7, the LIUNA filed a motion to dismiss and a motion for continuance of hearing pending consideration of the dismissal motion. ALJ Roketenetz denied the motion for continuance on March 8. The LIUNA then filed a motion for summary decision on March 10 and a supplemental memorandum in support of its dispositive motions on March 16. On March 29, the Air Force filed a motion for summary decision, and the LIUNA filed a motion for continuance of the evidentiary hearings pending consideration of the dispositive motions. The Administrator responded to the LIUNA's motions to dismiss and for summary decision on April 6. On May 6, the LIUNA's motion for continuance was granted by joint ALJ order.

On July 21, 1989, the ALJs issued a Joint Decision and Order on Motion to Dismiss and Cross Motions for Summary Decision (J.D. and O.). That decision denied the motion to dismiss and granted the LIUNA's motion for summary decision. The ALJs held that, as a matter of law, substantial variances did not exist in the cases because (1) arm's-length negotiations had taken place between United Healthserv and the LIUNA, and there were no "unusual circumstances" affecting the bargaining process; and (2) six of the eight sets of collectively-bargained wage rates involved were less than the Federal wage board rates for the locality in which the contracts were performed. The ALJs constructed this standard with reference to portions of the MOSCA's legislative history, after they determined that the statutory language of the Section 4(c) proviso was "ambiguous at best and contain[ed] such inherent

difficulty . . . as to be almost meaningless." J.D. and O. at 14. The Air Force thereafter petitioned for review of the ALJs' J.D. and O.

II. ANALYSIS

The ALJs' standard for showing the existence of a substantial variance contemplates first the presence of the "unusual circumstances" mentioned in the 1972 Senate Report's Section 4(c) discussion. Two of these circumstances were cited in that report as "example[s]" of non-arm's-length negotiation, in particular that:

> a union and an employer may enter into a contract, calling for wages and fringe benefits substantially lower than the rates presently prevailing for similar services in the locality [and that] a union and employer may reach an agreement providing for future increases substantially in excess of any justifiable increases in the industry.

1972 USCAN at 3537. [8/] The third unusual circumstance cited in the report embodies the observation that "it is possible that over a long period of time, predetermined contractual rates might become substantially at variance with those actually prevailing . . . ." Id.

The MOSCA does not define the term substantial variance, specifying only that the Secretary must find, after a hearing in accordance with her regulations, "that such [negotiated] wages

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[8/] The ALJs also state: "An example of an 'unusual circumstance' that would trigger invocation of the substantial variance proviso . . . would be an assertion and proof that the collectively-bargained wage rate was agreed to by a 'lame duck' contractor, near the end of its contract, in order to avoid a strike or workforce slowdown." J.D. and O. at 28.

and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." The plain meaning of these terms is that a considerable disparity in rates must exist before the successorship obligation may be avoided.

Accordingly, I disagree with the ALJs that Section 4(c) is incomprehensible. Its language contemplates a comparison of the negotiated rates with those which prevail in the locality. Substantial variance determinations are highly factual, turning on an evaluation of all evidence presented. See Big Boy Facilities, slip op. at 10-14, 29 Wage & Hour Cas. (BNA) at 360-361. No discrete comparison rate is conclusive. Rather, if upon comprehensive examination the negotiated rates are shown to be out of line with the rest of the rates, then a substantial variance may well exist. See infra at 16-19.

The focus then, in gauging the propriety of the ALJs' initial criterion, is on the degree to which the examples of unusual circumstances may establish a variation between negotiated and prevailing rates. At most, the correlation is inferential in the sense that collusion, unequal bargaining power, or the passage of time might tend to explain disparity. On the other hand, an explanation is not strictly necessary. A large difference is itself evidence that rates are "out of line." 118 Cong. Rec. 31,282 (daily ed. September 19, 1972) (statement of Senator Gurney). To elevate these illustrations to requisite

elements of proof would be arbitrary, and I decline to do so. I reject this aspect of the ALJs' standard.

Of course, proof of non-arm's-length negotiation could strengthen a case that wage rates are "substantially" substandard, that increases "substantially" exceed those common in the industry, or that predetermined increases have deviated "substantially" over time. See 1972 USCAN at 3537. However, whether arm's-length negotiation has occurred is a separate issue. Compare 29 C.F.R. § 4.10 with 29 C.F.R. § 4.11. As the Administrator correctly notes, Admin. Statement at 22-23, that consideration bears on imposition of the successorship obligation in the first instance, rather than arising under Section 4(c)'s proviso which creates an exception to the obligation. See Trinity Services, Inc. v. Marshall, 593 F.2d 1250, 1259 (D.C. Cir. 1978). Additionally, under the Department's regulations the absence of arm's-length negotiation is not a consideration in substantial variance proceedings unless so designated by the Administrator. 29 C.F.R. §§ 4.10(c), 4.11(c)(1). Since a substantial variance may be found in the absence of irregular bargaining, the ALJs' standard would contravene the regulations.

The ALJs' remaining criterion incorporates the Federal wage board rates. In particular, under the ALJs' standard a presumption of legitimacy would extend to negotiated rates equal to the Federal rates or to wage rates falling between the Federal rates and the rates otherwise predetermined by the Secretary

under Section 2(a) in accordance with prevailing rates in the locality. The ALJs state:

> we hold that it would be antithetical to the intent of Congress in enacting Section [4(c)] to find that a wage equal to or less than the Federal Wage Board rate is "unjustifiable," and [we hold] that such a finding [of unjustifiability] is required for a "substantial variance" to exist. . . .
>
> To allow wages at or below the Federal Wage Board level to be challenged, and possibly rolled back even lower, would call into question the validity of wage rates set by Congress for work of the same description. Moreover, since the intent of Congress was explicitly to narrow or eliminate the wage gap between federal employees and service contract employees performing the same work, we hold that wages falling within the parameters of those rates are in a protected zone and cannot be substantially at variance with prevailing wages . . . absent an allegation of less than arm's length negotiation.

J.D. and O. at 27-28. Under this criterion only collectively-bargained rates which exceed Federal wage board rates are "unjustifiable" and thus subject to a substantial variance finding.

Again, the ALJs' formulation does not comport with the plain meaning of the statute. The impetus under the Section 4(c) proviso is <u>disparity</u> between negotiated rates and rates prevailing in the locality for similar services. Like the examples of "unusual circumstances," "unjustifiability" vis-a-vis Federal wage board rates is not strictly requisite to a showing of substantial variance, and I do not approve this aspect of their standard. However, I am persuaded that Federal wage rates constitute evidence of prevailing rates and that they warrant consideration in the Section 4(c) context. Moreover, I reject

emphatically the Air Force position that Section 2(a) area wage determinations should serve as the only benchmark for Section 4(c) findings. [9/]

Since the inception of the MOSCA, congressional attention has focused on the wages paid service workers employed directly by the Federal government.

> Mr. O'Hara, the author of the act in the House, described during a colloquy with a witness the situation at the time the subcommittee first considered this legislation, and the way in which the Government's purchasing power was being used to depress wage levels.
>
> Mr. O'Hara. [The practice] of service contracting did not begin really until the 1950's; until then the Government did very little contracting-out of services on Federal installations. [The] practice . . . came to my attention in the late 1950's. What disturbed me . . . was that it appeared to me that almost invariably when a function that had been performed by Federal blue-collar wage board employees was shifted over to a service contractor, the people that ended up doing the work would be getting less than the blue-collar wage board employees they replaced. The savings to the Government were due almost entirely to the fact that they were paying the people who worked there less than they used to pay the wage board . . . employees.

The Plight of Service Workers under Government Contracts; Report of the Special Subcommittee on Labor of the U.S. Congress, House

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[9/] The Administrator's area wage determination sets a minimum rate in accordance with that which prevails among a largely unorganized workforce. Prevailing rates can result from unequal bargaining postures, i.e., individual employees "negotiating" terms with their employers or prospective employers. As the ALJs point out, J.D. and O. at 10-11, collectively-bargained rates often can be expected to exceed service industry "prevailing" rates in these circumstances. Here, where some variance should be the norm, a finding of "substantial" variance would require a collectively-bargained rate clearly to fall out of line when compared to a comprehensive mix of rates, including those achieved after full and free interaction of market forces. See J.D. and O. at 9-10.

Committee on Education and Labor (Plight), 92nd Cong., 1st Sess. 2-3 (Comm. Print 1971). See also Plight Revisited at 1. Prior to passage of the 1972 amendments, the subcommittee commented on a perceived increase in the gap between Federal wage board and service contract rates, reiterating its original intent.

> The rates of pay for blue-collar Federal employees are determined under the coordinated Federal wage system, a mechanism for determining the prevailing rates for similar work in private industry. When we passed the Service Contract Act, we intended to bring about a rough equivalence between the pay rates of these Wage Board employees and the pay rates of service contract workers.

Plight at 18. After nine days of oversight hearings, the subcommittee issued, as one of its major findings: "Wage Board employees and service contract employees doing similar work were receiving markedly different wages and fringe benefits. The Department's failure to issue determinations had served to depress the wages of service contract employees, while those of Wage Board employees had kept pace with the rest of the economy." Plight Revisited at 3. The congressional intent in providing the "due consideration" mechanism set forth in section 2(a)(5) was to eliminate the differential. Id. at 6-7, 15.

Under the Prevailing Rate Systems Act, 5 U.S.C. §§ 5341-5349 (1988), pay rates periodically are fixed and adjusted in accordance with prevailing rates, an object being "equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions in all agencies within the same local wage area . . . ." 5 U.S.C. § 5341(1). Rate levels

are to be "maintained in line with prevailing levels for comparable work within a local wage area . . . ." 5 U.S.C. § 5341(3). Surveys are taken of private industry in the local labor market area within a certain radius of Government activity. S. Rep. No. 791, 92nd Cong., 2d Sess., 1972 USCAN at 2981-2982. Full-scale wage surveys must be scheduled every two years with interim surveys scheduled more frequently. 5 U.S.C. § 5343(b).

Differences in BLS and Federal wage board surveys engendered discussion during the 1974 MOSCA oversight hearings:

> Prevailing wage determinations under the [MOSCA] begin with wage and fringe benefit data collected annually by the Bureau of Labor Statistics in 85 metropolitan areas . . . . BLS surveys jobs in a number of fields: office clerical, professional and technical, maintenance and powerplant, and custodial and material movement. The Bureau [collects] data about workers . . . in six types of industry: manufacturing and transportation; communications and public utilities; wholesale trade; retail trade; finance, insurance and real estate; and services.

Oversight Hearings on Service Contract Act of 1965 as amended; Hearings before the Special Subcommittee on Labor of the U.S. Congress, House Committee on Education and Labor on H.R. 14371, 93rd Cong., 2d Sess. 219 (1974) (statement of Richard F. Schubert, Under Secretary of Labor). Federal wage board rates reportedly are based on annual surveys conducted within 137 defined localities.

> Certain nonmanufacturing industries, including service industries, are excluded from the scope of wage board surveys. This results in a greater representation of data from the high wage manufacturing sector. . . . Wage schedules developed from the . . . localities may be extended beyond the specific surveyed locality. The area of application of a particular schedule usually includes some counties contiguous to the survey area

> and, where the surveyed areas are widely separated, may include many counties or an entire State. . . . The actual survey data [are] refined in order to arrive at uniform pay differentials that can be applied to successive wage board pay levels.

Id. at 219-220.

Differences notwithstanding, the Federal wage board rates and surveys represent an important measure in gauging whether a given variance is "substantial," as do the BLS surveys and other relevant wage data, including evidence of other collectively-bargained wages and fringe benefits. For purposes of Section 4(c) determinations, it would appear necessary to examine at least this combination of information. If a comparison of the predecessor negotiated rates with such information clearly shows the former to be "out of line," then a finding of substantial variance could be appropriate. [10/] In reaching this conclusion, I have considered of particular import the special significance attached by Congress to successorship in attempting to "decasualize" the service contract industry so that workers may preserve gains previously achieved. See 118 Cong. Rec. 24,813 (daily ed. July 21, 1972) (statement of Senator Gurney on behalf of himself and Senator Williams, cosponsor of legislation and (then) chairman of Senate Committee on Labor and Public Welfare).

I do not address here any "due consideration" issue pertaining to the Administrator's use of Federal wage board rates

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[10/] This result assumes lack of a successful showing that the surveys are outdated or imprecise, that a different locality should be considered, that other data should be accorded greater weight, or that classifications are incomparable.

in making wage and fringe benefit determinations under Section 2(a) of the Act. Moreover, whatever consideration the Administrator deems due these rates in making these determinations would not reasonably delimit their use and that of their underlying surveys in Section 4(c) proceedings. This conclusion derives from the different language and objects of the wage determination and successorship provisions, respectively.

The statutory language supports use of the Federal wage board information under Section 4(c). If service employees are subject to a wage agreement, the Administrator is required to predetermine the collectively-bargained terms. Otherwise, the Administrator makes a determination in accordance with prevailing rates for "such" employees, giving Federal wage board rates "due consideration." 29 C.F.R. § 4.51(d). The pertinent language under Section 2(a)(1), for example, is that the service contract must contain "[a] provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary . . . in accordance with prevailing rates for such employees in the locality . . . ."

In contrast, the Section 4(c) inquiry requires measurement of negotiated levels against wages and fringe benefits which prevail for similar services. Specifically, in order for the successor obligation to lapse, the Secretary must find that the predecessor "wages and fringe benefits are substantially at variance with those which prevail for services of a character

similar in the locality." No reference appears here to rates which prevail exclusively as among service contract employees or in the service industry. Rather, Section 4(c) focuses on the character or nature of the services, including the type of work performed. In other words, a janitor at a private manufacturing plant likely performs services similar in character to those performed by a janitor working under a service contract at a similar defense manufacturing facility. This construction comports with the general definition of "service" in terms of "employment" and "work done or dut[ies] performed for another . . . ." Webster's New World Dictionary (3d College ed. 1988) at 1226. Accordingly, the Section 4(c) language does not militate against comparative use of data derived from nonservice industries.

The primary purpose of Section 2(a)(1) and (2) is to ensure that employees under a given service contract are compensated in accordance with prevailing industry standards, whereas Section 4(c) is directed at achieving a degree of "labor stability and economic security" for employees frequently confronting replacement contracts and contractors. Separate considerations understandably bear on (1) providing a threshold standard, and (2) maintaining bargained-for levels in the provision of ongoing services in the peculiar circumstance of successive contracts and employers. See J.D. and O. at 11-12. A fundamental Section 4(c) consideration is whether the bargained terms are so atypical that

their continuation under a successor contract would be unreasonable.

Reference to Federal wage board information appears appropriate in gauging deviation. The Federal wage board rates and surveys provide a measure of rates which prevail among the private industry employees surveyed and among the Federal employees who are not displaced by service contracts and who are compensated according to these rate schedules. These rates and surveys are significant in establishing a frame of reference against which to assess whether a variance exists and, if so, whether it is substantial. Moreover, this function of identifying variation differs from the wage determination function of reaching a discrete number, and the use of the various rates and surveys in each of these processes similarly may differ.

Accordingly, the ALJs' Joint Decision and Order on Motion to Dismiss and Cross Motions for Summary Decision IS REVERSED, and

these consolidated cases are remanded for any appropriate further proceedings, in accordance with this Decision and Order. [11]

SO ORDERED.

Deputy Secretary of Labor

Washington, D.C.

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[11] The Administrator represents that "a remand is not appropriate in light of the expiration of the contracts at issue." Admin. Statement at 4 n.2. Examination of the record, however, reveals a lack of definitive evidence that all contracts in fact have expired, and, I thus am unable to adopt the Administrator's suggestion.

CERTIFICATE OF SERVICE

Case Name: Applicability of Wage Rates Collectively Bargained by United Healthserv, Inc. and Laborers' International Union of North America, AFL-CIO, to Employment of Service Employees Under a Contract for Hospital Aseptic Management Services at:

Wright-Patterson Air Force Base In Montgomery County, Ohio
Maxwell Air Force Base In Montgomery County, Alabama
Tyndall Air Force Base In Bay County, Florida
Eglin Air Force Base In Okaloosa County, Florida
Shaw Air Force Base In Sumter County, South Carolina
Altus Air Force Base, Oklahoma
Carswell Air Force Base, Texas
Lackland (Whilford Hall and Median Annex) Randolph, Brooks, and Kelly Air Force Bases, Bexar County, Texas

Case Nos.: 89-CBV-1, 89-CBV-5, 89-CBV-7, 89-CBV-10, 89-CBV-11, 89-CBV-12, 89-CBV-16, 89-CBV-17

Document : Decision and Order of Remand

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