



**In the Matter of:**

**TENNESSEE VALLEY AUTHORITY,**

**ARB CASE NO. 01-024**

**Petitioner**

**DATE: March 31, 2003**

**In re the ruling of the Wage and Hour Administrator  
concerning the applicability of the Service Contract  
Act to Contract No. 98NNX-224696 with Burns International  
Security Services.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner Tennessee Valley Authority:*

Mary H. Moore, Esq., Michael L. Wills, Esq., Ralph E. Rodgers, Esq., *Tennessee Valley Authority, Knoxville, Tennessee*

*For Respondent Administrator, Wage and Hour Division:*

Roger W. Wilkinson, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Howard J. Radzely, Esq., *U.S. Department of Labor, Washington, D.C.*

**FOR INTERVENOR UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA:**

*Micheal Joyner, UGSOA Local 22, Florence, Alabama*

**FINAL DECISION AND ORDER**

This case arises under the McNamara-O'Hara Service Contract Act, 41 U.S.C.A. §§ 351-358 (West 1994) (the SCA). The Tennessee Valley Authority (TVA) has appealed the ruling of the Administrator, Wage and Hour Division, that the SCA applies to the above-captioned contract between TVA and Burns International Security Services for security services at TVA nuclear power plants located at Browns Ferry, Alabama, and Watts Bar and Sequoyah, Tennessee (the Burns contract).

It is undisputed that the Burns contract meets the threshold requirement for coverage by Section 2(a) of the SCA in that the contract amount exceeds \$2500. Administrative Record (AR), Tab A, Attachment 19; Tab S; *see* 29 C.F.R. §§ 4.6, 4.104, 4.140, 4.161 (1997). Section 2(a) of the SCA mandates that specified clauses, requiring the payment of wages at rates that are

no less than those prevailing in the locality, the provision of fringe benefits and specific workplace conditions, be included in contracts for services entered into by the United States or the District of Columbia. 41 U.S.C.A. § 351(a); *see* 29 C.F.R. §§ 4.6, 4.104.<sup>1</sup> The intervenor in this appeal, the United Government Security Officers of America (UGSOA), initiated the Wage and Hour investigation that culminated in the Administrator's ruling that TVA was covered by the SCA.<sup>2</sup> AR, Tabs Q, R; *see* 29 C.F.R. § 4.191. The issue of SCA coverage of TVA contracts is a matter of first impression for this Board. We affirm the Administrator's ruling.

## BACKGROUND

The Burns contract became effective December 1, 1997. AR, Tab A, Attachment 2; Tab S. The UGSOA filed its complaint with the Wage and Hour Division regarding the multi-year contract in 1999. AR, Tab A, Attachment 1; Tabs H, I, J, L, Q, R. In June 1999, Wage and Hour responded by letter, advising UGSOA that the Burns contract fell outside TVA's independent contracting authority and that it qualified for SCA coverage. AR, Tab L (citing § 3 of the TVA Act, May 18, 1933, ch. 32, 48 Stat. 58, 59, codified at 16 U.S.C. § 831b). In July 1999, Wage and Hour provided similar notice to TVA and directed that agency to follow the procedures delineated at 29 C.F.R. § 4.5(c) to ensure retroactive coverage of the contract. AR, Tab I. TVA responded with a letter outlining its reasons that the SCA did not apply to TVA. AR, Tab H. Following submission of materials regarding the provisions of the Burns contract, the Administrator issued the final ruling letter on October 19, 2000, rejecting TVA's objections to SCA coverage. AR, Tab B.

The final ruling letter noted TVA's reliance on its authority to contract in its own name and on its prevailing wage policy. However, it outlined stronger countervailing factors militating for the conclusion that the SCA applies to TVA contracts. The ruling pointed out that the Department's position was long-standing, citing a 1967 letter from then-Administrator Clarence F. Lundquist to TVA. Both the Lundquist letter and the final ruling letter state that neither the SCA statute nor its legislative history suggest that TVA was to be excluded from coverage. Citing 29 C.F.R. § 4.107(a), the Administrator thus concluded that the Burns contract was covered by the SCA. AR, Tab B.

## THE PARTIES' ARGUMENTS

In support of its position that it is not covered by the SCA, TVA makes three primary arguments. First, TVA relies on its enabling legislation, the TVA Act, Act of May 18, 1933, ch.

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<sup>1</sup> Service contracts that do not qualify for coverage by Section 2(a) of the SCA because they are for \$2500 or less are nonetheless covered by the minimum wage requirements specified in Section 2(b)(1), 41 U.S.C.A. § 351(b)(1). *See* 29 C.F.R. §§ 4.2, 4.104, 4.140.

<sup>2</sup> The UGSOA represents security officers working for TVA under the Burns contract. AR, Tabs D, G.

32, 48 Stat. 59, codified at 16 U.S.C. §§ 831 – 831ee, to argue that, by virtue of its autonomy in contracting and litigation, its contracts are distinguishable from contracts “entered into by the United States” and thus are not covered by the SCA. TVA’s second basic argument also relies on its enabling legislation, urging that the high degree of autonomy and flexibility that legislation provides removes TVA from the ambit of SCA coverage. Specifically, TVA contrasts its statutory scheme with that of the United States Postal Service (USPS) and the Federal Reserve Banks, both of which are cited in Section 4.107 as government entities that are covered by the SCA. Finally, TVA relies on two other labor standards statutes that apply to Federal government contracts, the Walsh-Healey Act, Act of June 30, 1936, ch. 881, 49 Stat. 2036, codified at 41 U.S.C. §§ 35-45, and the Davis-Bacon Act, Act of Mar. 3, 1931, ch. 411, 46 Stat. 1494, currently codified at 40 U.S.C. §§ 3141-3148. TVA contrasts the SCA with the Walsh-Healey Act, which covers TVA, and attempts to draw a favorable comparison between the SCA and the Davis-Bacon Act, which does not cover TVA.<sup>3</sup>

In response, the Administrator urges that nothing in the SCA, its legislative history or its implementing regulations suggest that TVA should be exempted from coverage. The Administrator also challenges TVA’s reliance on its enabling legislation and related case law to distinguish itself from other Federal agencies that are covered by the SCA. Regarding the Davis-Bacon and Walsh-Healey Acts, the Administrator offers contrary interpretations of how those statutes compare or contrast with the SCA.

TVA does not contest the essential facts found by the Administrator in the case, *i.e.*, that the Burns contract is principally for the furnishing of services through the use of service employees at the three TVA nuclear power plants already mentioned. *See* TVA Brief at 1-2, 11.<sup>4</sup> This appeal thus presents only the legal question of whether SCA coverage extends to TVA.

## **JURISDICTION AND STANDARD OF REVIEW**

TVA filed this appeal pursuant to 29 C.F.R. §§ 8.1(b)(6), 8.7(b). The Board’s review of the Administrator’s ruling is governed by 29 C.F.R. §§ 8.1, 8.99. Pursuant to Sections 8.1(b), (c), and the Secretary’s directive, Sec’y Ord. 1-2002, 67 Fed. Reg. 64272 § 4 (Oct. 17, 2002), the

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<sup>3</sup> UGSOA filed a motion for expedited review of TVA’s petition, on November 14, 2001. That motion is hereby rendered moot. TVA filed a letter with the Board on March 25, 2002, to call to the Board’s attention Federal court decisions involving TVA that had recently been issued. We hereby acknowledge receipt of that letter and note that we have considered all relevant court pronouncements in our review of the Administrator’s ruling.

<sup>4</sup> The following abbreviations are used herein to refer to the parties’ briefs: Statement in Support of TVA’s Petition for Review, TVA Brief; Reply Brief in Support of TVA’s Petition for Review, Reply Brief; Statement for the Acting Administrator in Opposition to the Petition for Review, Resp. Brief; Statement for the UGSOA, Local 22, in Support of the Administrator’s Final Determination, Intervenor’s Brief.

Board is bound by duly promulgated Federal regulations, but legal questions beyond the validity of the regulations as written are subject to *de novo* review.

## SCA STATUTORY AND REGULATORY PROVISIONS

The Administrator found that TVA was covered by the SCA implementing regulation at 29 C.F.R. § 4.107. AR, Tab B. The specific issue presented for review is thus whether the Administrator erred in interpreting Section 4.107 to cover the Burns contract. We therefore look not only to the regulatory language and history, but also to the language of the statute, its structure and other interpretive aids to determine whether the Administrator's interpretation of the regulation – rather than the regulation as written – is consistent with the SCA. *See Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 98-087, ALJ No. 97-SDW-7, slip op. at 5-6 (ARB Mar. 30, 2000) (discussing traditional tools of statutory construction).

We begin with an examination of the relevant texts. We have already summarized the prevailing wage and fringe benefits requirements of Section 2(a) of the SCA, 41 U.S.C.A. § 351(a). *See* Background section *supra*. For purposes of our analysis of the language used to define coverage under the SCA, the most relevant passage in that section reads as follows:

Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500, except as provided in Section 7 of this Act [41 U.S.C. § 356], whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees. . . .

Section 2(b)(1) of the SCA, which requires the payment of minimum wages as set pursuant to the Fair Labor Standards Act, 29 U.S.C. § 206(a)(1), expressly covers “any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees.” 41 U.S.C.A. § 351(b)(1). The terms “United States and the District of Columbia” and “Federal Government” were used to define coverage in Sections 2(a) and 2(b)(1) of the SCA as originally enacted in 1965 and have remained unchanged since that time. Pub. L. 89-286, Oct. 22, 1965, 79 Stat. 2034.<sup>5</sup>

The statute also specifically excludes certain contracts from SCA coverage. These exclusions are set forth in Section 7 of the Act, which is referred to in the Section 2(a) excerpt above, and is codified at 41 U.S.C. § 356. Section 7 reads as follows:

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<sup>5</sup> The SCA contains a definition of “United States” that is relevant only to the use of that term in the statute “in a geographical sense.” 41 U.S.C.A. § 357(d). The definition covers the States and the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands, American Samoa, Guam, Wake Island, Eniwetock Atoll, Kwajalein Atoll, Johnston Island, Canton Island, but not “other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.” *Id.*

This chapter [Chapter 6 of Title 41, Service Contract Labor Standards] shall not apply to –

- (1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;
- (2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act;
- (3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;
- (4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;
- (5) any contract for public utility services, including electric light and power, water, steam and gas;
- (6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and
- (7) any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

*See* implementing regulations at 29 C.F.R. §§ 4.115 – 4.122. With the exception of a 1970 amendment to change the name of USPS, Section 7 has remained as enacted in 1965. *See* Pub. L. 91-373, §§ 4(a), 6(o), Aug. 12, 1970, 84 Stat. 773, 783.

The SCA regulation that is central to this appeal, Section 4.107, interprets Section 2(a) and (b) of the statute as covering the following:

[C]ontracts entered into by the United States and contracts with the Federal Government include generally all contracts to which any agency or instrumentality of the U.S. Government becomes a party pursuant to authority derived from the Constitution and laws of the United States. The Act does not authorize any distinction in this respect between such agencies and instrumentalities on the basis of their inclusion in or independence from the executive, legislative, or judicial branches of the Government, the fact that they may be corporate in form, or the fact that payment for the contract services is not made by appropriated funds. Thus, contracts of wholly owned Government corporations, such as the Postal Service, and those of nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces, or of other Federal agencies, such as Federal Reserve Banks, are included among those subject

to the general coverage of the Act. *Brinks, Inc. v. Board of Governors of the Federal Reserve System*, 466 F.Supp. 116 (D.D.C. 1979); 43 Atty. Gen. Ops. \_\_\_\_\_ (September 26, 1978).

29 C.F.R. § 4.107(a). Section 4.107(b) provides further clarification of SCA coverage, stating, in relevant part:

Where a Federal agency exercises its contracting authority to procure services desired by the Government, the method of procurement utilized by the contracting agency is not controlling in determining coverage of the contract as one entered into by the United States. Such contracts may be entered into by the United States either through a direct award by a Federal agency or through the exercise by another agency (whether governmental or private) of authority granted to it to procure services for or on behalf of a Federal agency. Thus, sometimes authority to enter into service contracts of the character described in the Act for and on behalf of the Government and on a cost-reimbursable basis may be delegated, for the convenience of the contracting agency, to a prime contractor which has the responsibility for all work to be done in connection with the operation and management of a Federal plant, installation, facility, or program, together with the legal authority to act as agency for and on behalf of the Government and to obligate Government funds in the procurement of all services and supplies necessary to carry out the entire program of operation. The contracts entered into by such a prime contractor with secondary contractors for and on behalf of the Federal agency pursuant to such delegated authority, which have such services as their principal purpose, are deemed to be contracts entered into by the United States and contracts with the Federal Government within the meaning of the Act. . . .

Both of the foregoing passages excerpted from Section 4.107(a), (b) have remained essentially unchanged since their initial promulgation in 1967. *Compare* 32 Fed. Reg. 10132, 10133-34 (July 8, 1967) *with* 44 Fed. Reg. 77036, 77050-51 (Dec. 28, 1979) *and* 29 C.F.R. § 4.107(a), (b) (1997). As previously noted, Section 4.107 is binding on the Board, and we thus assume that it is consistent with the statute.

Section 4.107(a) provides a detailed description of the Federal governmental entities that are covered by the general terms “United States” and “Federal Government” that are used in the statute to define coverage. Specifically, Section 4.107(a) begins by including “any agency or instrumentality of the U.S. Government” and continues to bolster that expansive definition by explaining that whether an agency or instrumentality is included in or independent from the executive, legislative or judicial branches is irrelevant to the question of SCA coverage. The

regulation then cites the USPS and the Federal Reserve Banks as examples of wholly owned Government corporations and nonappropriated fund instrumentalities that are “subject to the general coverage” of the SCA. TVA is not among the agencies named in Section 4.107(a) as examples of covered entities. Nonetheless, based solely on the foregoing regulatory language and TVA’s acknowledgment that it is a Federal agency and a wholly owned corporation and instrumentality of the Federal government, TVA appears to qualify for coverage under the regulation. On the other hand, use of “generally” in the first sentence defining coverage in Section 4.107 – “generally all contracts to which any agency or instrumentality of the U.S. Government becomes a party . . .” – may be viewed as allowing for exceptions from the expansive coverage definition provided by Section 4.107(a).

Assuming that Section 4.107(a) was drafted to allow for exceptions to its broad coverage rule, the history of Section 4.107 does not favor the conclusion that TVA was among the intended exceptions. The Lundquist letter that accompanied the Administrator’s final ruling letter in this case is dated September 22, 1967, and thus was drafted within months of the promulgation of Section 4.107, *see* 32 Fed. Reg. 10132, 10133-34 (July 8, 1967). AR, Tab B. Consequently, Lundquist’s letter constitutes a contemporaneous interpretation of the statute and regulation by the agency official responsible for the Act’s implementation. Lundquist’s view that SCA coverage extends to TVA is therefore worthy of particular attention.<sup>6</sup> *See United States v. Nat’l Ass’n of Securities Dealers, Inc.*, 422 U.S. 694, 718-19 (1975) and cases there cited.

Writing to TVA’s general counsel in September 1967, Lundquist explained that he and the Solicitor of Labor had considered the arguments advanced by TVA in support of its view that it did not qualify for SCA coverage and concluded that TVA was in fact covered. Lundquist had previously expressed the same view to TVA in a June 1, 1967 letter. Lundquist noted that, “TVA, although a corporation, is a Federal agency and an instrumentality of the United States performing functions of the Federal Government.” In addition, Lundquist stated that neither the SCA nor its legislative history indicated that Congress intended TVA to be exempt from SCA coverage, and he concluded that, “[T]he intent to identify all Federal agencies with the United States in the application of the Service Contract Act seems apparent.” AR, Tab B.

Lundquist also rejected TVA’s argument that the reasons that the Davis-Bacon Act did not apply to TVA were relevant to the SCA coverage issue. Lundquist noted that the TVA Act contained a provision for “participation by the Secretary of Labor in setting prevailing rates of wages for construction activity” and that the DBA contained a provision precluding its application where the setting of specific wage rates were provided for by Federal law. *See* § 3 of the TVA Act, 16 U.S.C. 831b; § 4 of the Davis-Bacon Act, 40 U.S.C. § 3146. Lundquist pointed out that the SCA contained no such limitations provision. AR, Tab B.

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<sup>6</sup> Within the Department of Labor, the Wage and Hour Division is the department component charged with development of SCA policy and implementation of SCA requirements. The Administrator is the chief official of the Division. *See* 29 C.F.R. Part 4.

Lundquist concluded his letter by inviting TVA to offer justification in support of any request for relief under Section 4(b) of the SCA, allowing for approval of variations, tolerances and exemptions when “necessary and proper in the public interest or to avoid the serious impairment of government business,” 41 U.S.C.A. § 353(b).<sup>7</sup>

It is clear from the Lundquist letter that Department of Labor officials who promulgated the SCA regulations after the statute’s 1965 passage construed the statute as requiring TVA coverage and that they intended Section 4.107 to be interpreted to that end. The Administrator’s October 2000 final ruling letter in this case reiterated much of the reasoning laid out in Lundquist’s 1967 letter, thus providing support for the Administrator’s contention that the Wage and Hour Division has adhered to a consistent view regarding SCA coverage of TVA. *See Nat’l Ass’n of Securities Dealers*, 422 U.S. at 718-19.

Six of the seven exemptions contained in Section 7 of the SCA are phrased in terms of categories of contracts, rather than contracting agencies. 41 U.S.C.A. § 356(1)-(6). The seventh exemption covers a particular category of contract for a specific agency, USPS. 41 U.S.C.A. § 356(7). None of the exemptions specifically addresses TVA. Congress obviously could have specified all TVA contracts as exempt from SCA coverage but did not do so.

A well-settled principle of statutory interpretation is that, in the absence of evidence of contrary legislative intent, Congressional enumeration of specific exceptions from statutory coverage precludes the addition of further exceptions by inference. *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-19 (1980); *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 612-19 (1944). Another well-settled principle is that exemptions from remedial labor legislation like the SCA are to be narrowly construed. *See Menlo Serv. Corp. v. United States*, 765 F.2d 805, 809-10 (9th Cir. 1985); *Williams v. U.S. Dep’t of Labor*, 697 F.2d 842, 844 (8th Cir. 1983). Therefore a review of the SCA, on its face, gives no indication that TVA was to be exempt from its provisions.

In addition, we agree with the Administrator’s conclusion that nothing in the House or Senate Reports that accompanied the legislation that was enacted in 1965 indicates an intention to treat TVA, as a wholly owned government corporation, differently from other Federal agencies. *See S. Rep. No. 89-798 (1965), reprinted in 1965 U.S.C.C.A.N. 3737; H.R. Rep. No. 89-948 (1965).*

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<sup>7</sup> Nothing in the record before the Board suggests that TVA has pursued an exemption for a particular contract or category of contracts pursuant to Section 4(b) of the SCA, and TVA has not raised the Section 4(b) exemption issue in this case. *See also* 29 C.F.R. § 4.123 (d), (e) (listing types of contracts that have been deemed to be exempt pursuant to Section 4(b)). Section 4(b) was amended in 1972 to limit the granting of limitations, variations, tolerances or exemptions to those “special circumstances” where such action is not only “necessary and proper in the public interest or to avoid the serious impairment of government business” but also “is in accord with the remedial purpose of this Act to protect prevailing labor standards.” Pub. L. 92-473, § 3, Oct. 9, 1972, 86 Stat. 789.

Furthermore, Section 4.107(b) of the regulations appears to anticipate TVA's argument regarding its atypical procurement process. Section 4.107(b) provides that, notwithstanding an agency's exercise of "its contracting authority to procure services desired by the Government, the method of procurement utilized by the contracting agency is not controlling in determining coverage of the contract as one entered into by the United States." 29 C.F.R. § 4.107(b).

### **TVA'S ARGUMENTS BASED ON TVA ACT PROVISIONS**

In support of its contention that its enabling legislation endowed it with a level of independence unique among Federal agencies in order to facilitate its "responsibility to improve the economy and general welfare of the Tennessee Valley . . .," TVA relies primarily on Sections 1, 4 and 9(b) of the TVA Act, which are codified at 16 U.S.C. §§ 831, 831c, and 831h(b). TVA Brief at 6-8. Section 3 of the TVA Act, which TVA does not address, is also relevant. That provision, codified at 16 U.S.C. § 831b, addresses TVA's rights and obligations as an employer. As we discuss *infra*, both the Administrator's final ruling letter and the 1967 Lundquist letter rely on Section 3 of the TVA Act in rejecting TVA's attempt to draw a favorable comparison between the Davis-Bacon Act, from which TVA is exempt, and the SCA. AR, Tab B; *see* AR, Tab L.

Section 1 of the TVA Act, codified at 16 U.S.C. § 831, describes TVA's mission thus:

For the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation").

Section 4 of the TVA Act authorizes TVA, *inter alia*, to "sue and be sued in its corporate name," and to "make contracts, as herein authorized." 16 U.S.C. § 831c(b), (d). The contracts provision from Section 9(b) of the TVA Act that is cited by TVA, codified at 16 U.S.C. § 831h(b), addresses the relationship between TVA and the General Accounting Office (GAO), and reads as follows:

Nothing in this chapter shall be construed to relieve the Treasurer or other accountable officers or employees of the Corporation from compliance with the provisions of existing law requiring the rendition of accounts for adjustment and settlement pursuant to sections 3526(a) and 3702(a) of Title 31, and accounts for all receipts and disbursements by or for the Corporation shall be rendered accordingly: *Provided*, That, subject only to the provisions of this chapter, the Corporation is authorized to make

such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary to carry out the provisions of this chapter. The Corporation shall determine its own system of administrative accounts and the forms and contents of its contracts and other business documents except as otherwise provided in this chapter.

The foregoing passage was added to the TVA Act in 1941. Act of Nov. 21, 1941, ch. 485, 55 Stat. 775.

We have already mentioned that Section 3 of the TVA Act, codified at 16 U.S.C. § 831b, addresses TVA's rights and obligations as an employer. That section also concerns TVA's contracting authority. Specifically, Section 3 contains the following requirement regarding the setting of "laborers and mechanics" wages:

All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks, or other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics.

In the event any dispute arises as to what are the prevailing rates of wages, the question shall be referred to the Secretary of Labor for determination, and his decision shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates

which have been secured through collective agreement by representatives of employers and employees.

Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract.

The foregoing provisions were included in Section 3 of the TVA Act as enacted in 1933, and have remained essentially unchanged since that time. *See* Act of May 18, 1933, ch. 32, § 3, 48 Stat. 59.

TVA urges that it enjoys a degree of independence and autonomy unparalleled among Federal agencies, thus removing it from the scope of SCA coverage. Stated more specifically, TVA urges that its enabling legislation distinguishes it from "the United States" and "the Federal Government" as those terms are used to define coverage in the SCA, and similarly from the category of government agencies, corporations and instrumentalities specified by Section 4.107.

In particular, TVA cites its authority to contract in its own name as support for its argument that the Burns contract does not qualify as a contract entered into by the United States, within the meaning of the SCA and Section 4.107. TVA Brief at 3-6. That is, TVA argues that it contracts in its corporate capacity, not in its capacity as a government instrumentality. In support of this contention, TVA cites Federal court decisions regarding TVA's broad contracting authority and its independent litigating authority under 16 U.S.C. §§ 831c and 831h(b). TVA's argument is not persuasive.

To begin with, we agree with the Administrator that the case law cited by TVA does "not endorse a sweeping definition of the TVA as distinct from the United States." Resp. Brief at 15-16. Although a number of the contracting cases cited by TVA emphasize TVA's broad flexibility in awarding contracts and its autonomy in defending itself in contract disputes, they are largely irrelevant to the case before us. *See, e.g., PRI Pipe Supports v. Tennessee Valley Auth.*, 430 F.Supp. 974, 977 (N.D. Miss. 1980) (rejecting a disappointed bidder's challenge and stating that Section 9 of the TVA Act, 16 U.S.C. § 831h, was "designed to vest in TVA complete discretion in the method of awarding bids."). These cases address only the mechanics of TVA contract and procurement procedures and thus are inapposite. *See Tennessee Valley Auth. v. United States*, 51 Fed. Cl. 284 (2001) (concluding that contract dispute between TVA and Department of Energy, both agencies within the executive branch, was nonetheless justiciable as a concrete controversy between adverse parties); *PRI Pipe Supports*, 494 F.Supp. at 977 (discussing express exemption of TVA from Contract Disputes Act, 41 U.S.C. § 607(h), as an example of legislation intended to maintain TVA's flexibility and independence); *Oman Const. Co. v. Tennessee Valley Auth.*, 486 F.Supp. 375, 381-82 (M.D. Tn. 1979) (applying Federal Property and Administrative Services Act of 1949 provision at 40 U.S.C. § 474(12) that expressly exempts TVA procurements); *Inryco, Inc. v. Tennessee Valley Auth.*, 471 F.Supp. 59, 60-61 (E.D. Tn. 1979) (same).

TVA has cited no cases that address the pertinent issue of what labor standards apply to employees working directly or through contract for TVA. In contrast, the Administrator points to cases where Federal employee laws have been applied to TVA. The Administrator urges that it would be illogical not to apply the SCA to TVA contract employees when TVA is considered to be a Federal employer. Resp. Brief at 12; *see* Intervenor's Brief at 5-6. The cases cited by the Administrator, along with numerous other Federal court decisions, indicate that Congress generally treats TVA like other Federal employers when enacting labor standards legislation and that the courts similarly view TVA as a Federal employer, even when statutory authority is unclear or not at issue.

For example, unless specifically exempted, TVA is subject to Federal statutory labor standards whose coverage is defined by broad terms such as "agencies" or "instrumentalities." *See, e.g., Jones v. Tennessee Valley Auth.*, 948 F.2d 258 (6th Cir. 1991) (Federal Employees' Compensation Act provided TVA employee's exclusive remedy for injury as an employee of "the United States or an instrumentality thereof" under 5 U.S.C. § 8116(c)); *Thurman v. Tennessee Valley Auth.*, 533 F.2d 180 (5th Cir. 1976); (TVA is exempted from the Civil Service laws by 16 U.S.C. § 831b, but, as an "Executive agency," is subject to Veterans' Preference Act pursuant to 5 U.S.C. § 1302(c)). Similarly, like other Federal agencies and instrumentalities,

TVA is exempt from Federal laws governing labor-management relations that apply to private sector employers. See 29 U.S.C. § 142(3) (Incorporating National Labor Relations Act exemption for “the United States or any wholly owned Government corporation . . . .” into the Labor Management Relations Act); 29 U.S.C. § 152(2) (exempting “the United States or any wholly owned Government corporation . . . .” from the National Labor Relations Act); 29 U.S.C. § 402(e) (exempting “the United States or any corporation wholly owned by the Government of the United States . . . .” from coverage by the Labor-Management Reporting and Disclosure Act); see also *Salary Policy Employee Panel v. Tennessee Valley Auth.*, 149 F.3d 485, 490 (6th Cir. 1998) (discussing TVA’s exemption from the three aforesaid statutes). Moreover, in cases involving employee challenges to TVA action under the Constitution, TVA is considered to be a Federal government employer. See *Smith v. White*, 666 F.Supp. 1085 (E.D. Tn. 1987); *McDavid v. Tennessee Valley Auth.*, 555 F.Supp. 72 (E.D. Tn. 1982).

We also agree with the Administrator that the legislative history of the Section 9(b) contracts and audits provision does not support TVA’s suggestion that that provision serves as a broad exemption from other Federal laws, including labor standards legislation. As previously noted, TVA cites the Section 9(b) passage that contains the “[s]ubject only to the provisions of this chapter” limitations language that was added to Section 9(b) of the TVA Act in 1941. TVA Brief at 3; see *id.* at 7. The legislative history of the 1941 amendment indicates that the provision was added solely for the purpose of resolving a dispute between TVA and the GAO. That dispute concerned whether TVA was subject to GAO authority to overrule expenditures under the Budget and Accounting Act of 1921, as well as other aspects of GAO auditing authority. See *Amending the Tennessee Valley Authority Act: Hearings on H.R. 4961 before the House Committee on Military Affairs*, 77th Cong., 1st Sess. (1941). The amending language resolved the dispute by clarifying that GAO could not disallow expenditures that had been declared by the TVA Board of Directors to be necessary and proper. *Id.* at 133; H.R. Rep. No. 77-956, at 3 (1941); S. Rep. No. 77-699, at 2 (1941). Thus, read in context, the language pertains to the manner in which TVA contracts, and to the discretion given TVA’s Board of Directors in determining whether a given expenditure is proper. The language does not indicate that it pertains to the issue of what labor standards apply to employees working directly or through contract for TVA.

As we discuss *infra*, TVA attempts to distinguish itself from the USPS for purposes of SCA coverage based on each agency’s enabling legislation. In view of that argument, the fact that the Postal Service Reorganization Act of 1970 contains a “subject only to the laws of this chapter” provision similar to that found in TVA’s Section 9(b) is particularly significant.<sup>8</sup>

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<sup>8</sup> The Postal Reorganization Act of 1970, Pub. L. 91-375, § 2, Aug. 12, 1970, 84 Stat. 741, codified at 39 U.S.C. § 2008 (c), provides in relevant part:

Subject only to the provisions of this chapter [ Chap. 20, Finance, of Title 39, Postal Service], the Postal Service is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it deems necessary, including the final settlement of all claims and

However, the Postal Service Reorganization Act also contains a further provision limiting application of other Federal laws regarding “contracts, property, works, officers, employees, budgets, or funds,” and listing the specific statutes that do apply to USPS operations.<sup>9</sup> If the “subject only to the laws of this chapter” provision that is common to TVA’s Section 9(b) and the Postal Reorganization Act were as sweeping as TVA urges, Congress would not have drafted the second provision limiting the applicability of other laws to USPS operations.

Section 3 of the TVA Act is also relevant in considering TVA’s argument that the application of SCA requirements is inconsistent with Congress’ intent that TVA be a flexible, unique enterprise. In addition to requiring payment of prevailing wages for laborers and mechanics, Section 3 is the source of TVA’s authority to enter into collective bargaining agreements with its employees. 16 U.S.C. § 831b; *Int’l Ass’n of Machinists and Aerospace Workers v. Tennessee Valley Auth.*, 108 F.3d 658, 663 (6th Cir. 1997). Section 3 was cited in both Lundquist’s 1967 letter and the Administrator’s final ruling letter as a basis for distinguishing the Davis-Bacon Act – which is inapplicable to TVA – from the SCA. AR, Tab B; *see* discussion regarding the Davis-Bacon Act *infra*. Both Lundquist and the Administrator referred to the Section 3 requirement that no less than prevailing wage rates be paid to “laborers and mechanics” performing TVA work, whether employed directly or through contract by TVA, and the mandate that the Secretary of Labor act as the final arbiter in disputes regarding the setting of such wages. AR, Tab B; *see* Section 3 of the TVA Act, 16 U.S.C. § 831b excerpt *supra*; *Chaney v. Tennessee Valley Auth.*, 265 F.3d 1325 (11th Cir. 2001).

Congress thus clearly provided for involvement by the Secretary in determining prevailing rates of pay for laborers and mechanics performing TVA work. In light of this statutory mandate for the Secretary’s intervention regarding wages for TVA construction workers, the Administrator’s involvement in setting prevailing wages for service personnel pursuant to the SCA is not inconsistent with the TVA statutory scheme. Particularly in view of the involvement by the Secretary that is contemplated by Section 3, TVA has failed to

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litigation against the Postal Service.

<sup>9</sup> Section 2 of the Postal Reorganization Act, codified at 39 U.S.C. § 410 (a), (b), reads in relevant part:

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

\* \* \*

(b) the following provisions shall apply to the Postal Service:

\* \* \*

demonstrate how application of the SCA would undermine the flexibility and autonomy necessary to TVA's fulfillment of its statutory mission. TVA has similarly failed to demonstrate how the protection of locally prevailing wage rates under the SCA is at odds with TVA's statutory mandate of encouraging regional economic development. Indeed, the purpose of the SCA, to ensure payment of wages at a rate no less than that prevailing in the locality, is wholly consistent with TVA's economic development mission.

## **TVA'S ARGUMENTS BASED ON OTHER STATUTES**

### **TVA's arguments that it is distinguishable from the USPS and the Federal Reserve Banks**

#### **1. USPS**

In support of its argument that it is distinguishable from USPS for purposes of SCA coverage and thus outside the class of "wholly owned Government corporations" covered by Section 4.107, TVA attempts to contrast the TVA Act with the Postal Reorganization Act of 1970. Specifically, TVA points to Section 2 of the Postal Reorganization Act, which explicitly states that the SCA is applicable to USPS contracts, and to the lack of a similar provision in the TVA Act.<sup>10</sup> TVA's argument is not persuasive. TVA has failed to draw a meaningful comparison between the USPS legislation and its own statute because the two statutes are not similarly structured. The USPS provision codified at 39 U.S.C. § 410 begins with the broad proviso that no laws regarding "contracts, property, works, officers, employees, budgets, or funds" apply to USPS operations except those specifically cited therein. In contrast, the TVA Act includes no provision containing such a broad ban. Instead, the issue of the applicability of other laws regarding contracts, property, works, officers, employees, budgets or funds to TVA operations is specifically addressed in various sections of the TVA Act. *See, e.g.*, 16 U.S.C. § 831b (exempting TVA from Civil Service laws regarding employee appointments); 16 U.S.C. § 831m-1(e) (exempting TVA from least-cost planning requirements of 16 U.S.C. § 2621(d)). Consequently, the TVA Act contains no one provision listing the applicable laws as Section 2 of the Postal Reorganization Act does for USPS.

We also agree with the Administrator that the SCA exemption for certain USPS contracts does not support TVA's contention that it falls outside SCA coverage while USPS does not. As already discussed, Section 7 of the SCA names seven types of contracts that are exempt from coverage. 41 U.S.C.A. § 356(1)-(7). The last category covers contracts with USPS that are principally for the operation of postal contract stations. 41 U.S.C.A. § 356(7). As the

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<sup>10</sup> We have already discussed the USPS provision that is cited by TVA, which is codified at 39 U.S.C. § 410(a), (b). *See* text accompanying n.9 *supra*. The subsection that expressly names the SCA as applicable to the USPS is found at 39 U.S.C. § 410(b)(5)(B).

Administrator urges, TVA had existed for decades when the SCA was enacted in 1965. Had Congress intended to exempt all TVA contracts from coverage, it could have included such provision among the exemptions stated in Section 7 of the SCA.

## 2. The Federal Reserve Banks

Section 4.107 identifies the Federal Reserve Banks as an example of instrumentalities covered by the SCA. The regulation cites as supporting authority the Department of Justice's Office of Legal Counsel opinion and a decision of the United States District Court for the District of Columbia, which concluded that the Banks were covered by the SCA. *Brinks, Inc. v. Bd. of Governors of the Federal Reserve Sys.*, 466 F.Supp. 116 (D.D.C. 1979); 2 U.S. Op.Off. Legal Counsel 211 (1978). To distinguish itself from the Banks, TVA contends that it does not share the "close connection, if not the identity" with the United States that the *Brinks* court found. TVA bases this argument primarily on its authority to contract in its own name. TVA Brief at 11-12.

We disagree with TVA that its authority to contract in its own name precludes application of the *Brinks* rationale here. In rejecting the Richmond Federal Reserve Bank's contention that it was exempt from the SCA as "essentially a private banking corporation," the *Brinks* court relied on three factors. First, the court noted that the Banks, as corporate instrumentalities of the Federal government, were established to serve an important governmental function and that various courts had found them to qualify for certain privileges based on the Banks' assertion of their "governmental character." 466 F.Supp. at 119. The *Brinks* court also determined that the terms used to define SCA coverage – "the United States" and "the Federal Government" – must be "liberally construed to effectuate the Act's humanitarian purposes . . ." *Id.* at 120. The court also relied on the Office of Legal Counsel opinion, which was based on consideration of the SCA, its legislative history and purpose. 466 F.Supp. at 119-120.

TVA has failed to demonstrate that the factors cited by the *Brinks* court are not equally applicable to TVA. Indeed, TVA acknowledges that it performs important government functions. TVA Brief at 11. As the Administrator points out, TVA, like the Banks, regularly relies on its identity as a Federal agency when it is in TVA's interest to do so. *See, e.g., Queen v. Tennessee Valley Auth.*, 689 F.2d 80, 85-86 (6th Cir. 1982) and cases there cited. Obviously, the reasoning of the *Brinks* court and the Office of Legal Counsel opinion concerning the need to "liberally construe" SCA coverage applies equally to TVA. As to TVA's authority to contract in its own name, we have already discussed how that authority pertains to the mechanics of TVA's contracting process and is not dispositive of the SCA coverage question, particularly in view of the implementing regulation at Section 4.107(b). TVA has thus provided no legitimate basis to distinguish itself from the Banks and to remove itself from the class of government instrumentalities described in Section 4.107.

## Regarding the Walsh-Healey and Davis-Bacon Acts

### 1. The Walsh-Healey Act

In support of its contention that the Administrator's ruling in this case constitutes an improper expansion of SCA coverage, TVA attempts to contrast what it characterizes as the "broad coverage" language of the Walsh-Healey Act with the definition of coverage under the SCA. Specifically, TVA argues that Congress could have used the same language that was used to define Walsh-Healey coverage in 1936 rather than "the more restrictive coverage language" that it used to define SCA coverage when the SCA was enacted in 1965. TVA Brief at 10-11; Reply Brief at 6. We reject TVA's argument for the following reasons.

The Walsh-Healey Act imposes specified labor standards on government contracts for "the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000 . . . ." § 1 of the Walsh-Healey Act, codified at 41 U.S.C. § 35. The Walsh-Healey Act covers such contracts entered into:

[B]y any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States . . . .

We disagree with TVA's characterization of the foregoing language as broader than the terms "the United States" and "the Federal Government," which are used in the SCA statute to define its coverage. Although the Walsh-Healey statutory language is more detailed, the phrases used by Congress to define SCA coverage are clearly susceptible of interpretations that are equally expansive. For example, Congress simply used the phrase "Federal agency" to define the coverage of the Endangered Species Act, which unquestionably covers TVA. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (applying § 7 of the Endangered Species Act, Pub. L. 93-205, Dec. 28, 1973, 87 Stat. 892, codified at 16 U.S.C. § 1536). TVA has provided no basis for us to conclude that Congress' use of a less detailed coverage definition in the SCA than that which was used decades before to define Walsh-Healey coverage is significant.<sup>11</sup>

The Office of Legal Counsel opinion cited in *Brinks* pointed out that Congress had not utilized a "consistent drafting technique" to clearly indicate when it intended the Federal Reserve Banks to be covered by a particular statute. 2 U.S. Op. Off. Legal Counsel at 216; *see* Resp. Brief at 19. Review of the various statutes applicable to TVA that are involved in the cases we have discussed demonstrates that a similar lack of consistency exists in defining coverage in

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<sup>11</sup> Some provisions of the Walsh-Healey Act were relied on by Congress in drafting the SCA. Section 4 (a) of the SCA incorporates Sections 4 and 5 of the Walsh-Healey Act, codified at 41 U.S.C. §§ 38, 39, to "govern the Secretary's authority to enforce this Act, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder." 41 U.S.C. § 353(a).

statutes that extend to TVA. *Compare* Veterans' Preference Act, 5 U.S.C. § 1302(c) (coverage extends to "Executive agencies") with Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (coverage extends to "the United States or an instrumentality thereof"), discussed respectively in *Thurman v. Tennessee Valley Auth.*, 533 F.2d 180 (5th Cir. 1976) and *Jones v. Tennessee Valley Auth.*, 948 F.2d 258 (6th Cir. 1991).

TVA acknowledges that it is covered by the Walsh-Healey Act. TVA Brief at 10. Significantly, Section 4.107's use of detailed terminology to describe the government entities that are covered by the SCA – specifying agencies, instrumentalities and Government owned corporations – is similar to that used in the Walsh-Healey Act. As we have already discussed, the question before us is whether the Administrator properly interpreted Section 4.107 as applicable to TVA, not whether Section 4.107 goes beyond what Congress intended in enacting the SCA.

## 2. The Davis-Bacon Act

TVA also attempts to draw a favorable comparison between the Davis-Bacon Act and the SCA. TVA argues that the Davis-Bacon Act is not applicable to it because it has independent contracting authority. It contends that the SCA thus should be similarly construed as inapplicable. As support for its argument, TVA cites remarks regarding TVA's contracting authority that were made in the 1963 Congressional hearings on the Davis-Bacon Act by then-Solicitor of Labor Donahue. TVA does acknowledge that, in addition to TVA's independent contracting authority, Donahue cited Section 4 of the Davis-Bacon Act, currently codified at 40 U.S.C. § 3146, which precludes application of the Davis-Bacon Act to "supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates." The Administrator objects to TVA's reliance on Donahue's remarks, which were made two years before the SCA was enacted, and points out that since 1983 the agency's regulations interpreting Davis-Bacon Act coverage have specifically applied that Act to Federal corporations. The Administrator also urges that TVA has failed to draw a meaningful comparison between the SCA and DBA because the statutes are structured differently.

We agree with the Administrator that the 1963 Congressional hearing remarks regarding the Davis-Bacon Act provide very weak support for TVA's attempt to rely on its independent contracting authority as a basis for SCA exemption. We also agree with the Administrator that the limitation on Davis-Bacon applicability that is contained in Section 4 of that statute is key to evaluating TVA's argument.<sup>12</sup>

As noted by the Administrator in the final ruling letter and by Lundquist in 1967, Section 3 of the TVA Act is TVA's own provision regarding the payment of no less than prevailing wages to construction workers. See § 3 of the TVA Act excerpt *supra*. Section 3 of the TVA Act removes TVA from application of the Davis-Bacon Act, because of the very explicit

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<sup>12</sup> Indeed, Donahue's reliance on Section 4 casts doubt on the significance he placed on TVA's independent contracting authority as it pertains to the inapplicability of the Davis-Bacon Act to TVA.

exemption provided in the Davis-Bacon Act's Section 4. AR, Tab B. Since the SCA contains no limitations provision similar to Section 4 of the Davis-Bacon Act, comparison of the two statutes sheds little light on the SCA coverage issue that is before us. We therefore reject TVA's attempt to use the Davis-Bacon Act as support for its argument that its independent contracting authority removes it from the scope of SCA coverage.

## CONCLUSION

In order to determine whether the Administrator properly interpreted the implementing regulation at Section 4.107 as covering TVA, we have examined the language used to define coverage in that regulation as well as in the SCA itself. We have also considered the history of the regulation, including its promulgation soon after passage of the SCA, and the long-standing position that Wage and Hour Administrators have maintained regarding TVA coverage. To further illuminate the question of whether the Administrator properly interpreted the regulation to cover TVA, we have reviewed the legislative history of the SCA, as well as the purpose of the statute. We have also carefully considered TVA's arguments that it is distinguishable from "the United States" as used in the SCA to define coverage and from the category of government corporations and instrumentalities that are designated for coverage by Section 4.107. Finally, we have considered the arguments advanced by TVA in its attempt to draw support from comparisons between the SCA and the Davis-Bacon and Walsh-Healey Acts. None of these authorities provides a reasoned basis for reversing the Administrator's ruling.

To the contrary, our review reveals ample support for the conclusion that TVA qualifies for SCA coverage. The SCA, the implementing regulation at Section 4.107, and their histories are devoid of any indication that TVA should be treated as exempt. In addition, the statutory provisions and case law relevant to TVA operations do not support a distinction between TVA and other Federal agencies for purposes of SCA coverage. Indeed, the picture that emerges from review of TVA's enabling legislation and the relevant case law is that TVA is for all practical purposes a Federal employer. Furthermore, although TVA is not subject to Davis-Bacon Act coverage, TVA is expressly subject to determinations by the Secretary regarding the payment of prevailing wages to construction workers. TVA has thus not demonstrated that application of the SCA to its contracting process will unduly interfere with the autonomy and flexibility that is necessary to fulfill its statutory mission. Moreover, the purpose served by the SCA – to protect locally prevailing wages – is completely consistent with TVA's statutory mandate to further regional economic development.

Like the court in *Brinks*, we have discerned no basis for departing from the well-settled principal that remedial legislation like the SCA must be "liberally construed to effectuate the Act's humanitarian purposes . . ." 466 F.Supp at 120; see *Midwest Maint. & Const. Co. v. Vela*, 621 F.2d 1046, 1050 (10th Cir. 1980); see also *Menlo Serv. Corp. v. United States*, 765 F.2d 805, 809-10 (9th Cir. 1985) (applying the "well-settled rule that while terms of remedial labor legislation are to be liberally construed, exemptions in such statutes should be read narrowly"); *Williams v. U.S. Dep't of Labor*, 697 F.2d 842, 844 (8th Cir. 1983) (holding that exemptions from SCA must be narrowly construed against the party asserting the exemption). We therefore

affirm the Administrator's ruling that the SCA applies to TVA as based on a reasonable interpretation of the regulation at Section 4.107. *See Superior Paving and Materials, Inc.*, ARB No. 99-065, ALJ No. 98-DBA-11, slip op. at 7-8 (ARB June 12, 2002).

Accordingly, we **AFFIRM** the Administrator's decision that the Burns contract entered into by the Tennessee Valley Authority is covered by the Service Contract Act.

**SO ORDERED.**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**