



In the Matter of:

**FLIGHTSAFETY SERVICES
CORPORATION**

ARB CASE NOS. 02-085

03-075

DATE: October 31, 2003

*In re: Wage Determinations 94-0282, 94-2526,
94-2098, 94-2070, 94-2262, 94-2380, 94-2522,
94-2566, 94-2408, 94-2196, 94-2126, 94-2054,
94-2216, 94-2300, 94-2582, 94-2340, 94-2140,
94-2310*

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Iwana Rademaekers, Esq., Jackson, Lewis, Schnitzler & Krupman, L.L.P., Dallas, Texas

For Respondent Administrator, Wage and Hour Division:

Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

These disputes concern wage determinations issued pursuant to the McNamara-O'Hara Service Contract Act of 1965 (SCA or Act), as amended, 41 U.S.C.A. § 351 *et seq.* (West 1987). The wage determinations prescribe the minimum wages and fringe benefits FlightSafety Services Corporation (FSSC) employees are entitled to receive under FSSC's service contracts with the U.S. Department of Defense. The Administrator, Wage and Hour Division (WHD), U.S. Department of Labor, denied most of FSSC's requests that the wage determinations be changed. FSSC now petitions the Administrative Review Board (ARB or Board) to review the Administrator's rulings. We dismiss FSSC's Petition for Review in Case No. 02-085. In Case No. 03-075, we affirm the Administrator's final ruling denying FSSC's request that the wage determinations be modified.

BACKGROUND

FSSC is a Federal government service contractor. It contracts with the United States Department of Defense, Air Force Mobility Command to provide “academic and simulator instruction to student aircrew for the KC-135 and C-5 aircraft at various Air Force Bases across the country.” Case No. 02-085 Petition for Review (Pet. for Rev.) at 3-4. FSSC’s government contracts are subject to the prevailing wage requirements contained in the SCA and its implementing regulations found at 29 C.F.R. Part 4 (2003).

The Secretary of Labor has delegated administration of the SCA to the Administrator of the Wage and Hour Division (WHD). The Administrator is responsible for determining the minimum hourly wage and fringe benefit rates to be paid to various classifications of service workers who may be employed on service procurement contracts in excess of \$2,500 entered into by the United States or the District of Columbia, the principal purpose of which is to provide services through the use of service employees in the United States. *See* 41 U.S.C.A. § 351(a). These rates are listed in wage determinations that are then included in Federal service procurement contracts as the required minimum wage payments due service employees. *Id.*; *See* 29 C.F.R. § 4.3.

Wage determinations are based either on locally prevailing rates for service employees (“prevailing in the locality” determinations; *see* 29 C.F.R. § 4.51), or the rates in any collective bargaining agreements that may already be in effect governing the pay of the workforce at the contract facility. *See* 41 U.S.C.A. § 351(a). After a contracting agency notifies WHD of the classification of workers it will employ on the service contract, the WHD issues one of the two types of wage determinations, identifying the minimum hourly wage rates and fringe benefits payable to the various service employee classifications to be employed under the contract. 29 C.F.R. § 4.3.

“Prevailing in the locality” wage determinations applied to FSSC’s contracts at the various Air Force bases. These locality wage determinations are “based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made.” 29 C.F.R. § 4.51(a). The Administrator usually relies on wage information that is “derived from area surveys conducted by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel.” *Id.* The WHD then subjects the available pertinent information to various statistical and analytical methodologies deemed proper under the facts of each wage determination and establishes the locality prevailing rates for the service employee classifications.

If, however, a wage survey for a particular locality results in insufficient data to determine wages for a job classification, the Administrator establishes the prevailing wage rate through the “slotting” procedure, described below. *See* 29 C.F.R. § 4.51(c).

Case No. 02-085

In a September 19, 2001 letter, FSSC requested that the Administrator review and reconsider various wage determinations that were applicable to its employees under a contract option period scheduled to begin on October 1, 2001.¹ Pet. for Rev., Appendix Exhibit G. Specifically, FSSC challenged the various methodologies the WHD employed to determine the prevailing rates applicable to several classifications of FSSC's service employees.

The Administrator responded by issuing a final ruling on FSSC's request on May 29, 2002.² She began by conceding that FSSC's requests for review and reconsideration of the wage determinations had possibly been received by the WHD "ten or eleven days before exercise of the option and commencement of the [October 1, 2001] option period." Administrative Record (AR), Tab A at 1. However, the Administrator noted that since the requests were date-stamped as received by the WHD on October 11, 2001, they were not timely filed.³ Under these circumstances, the Administrator concluded that "it was impossible for the Wage and Hour Division to take any action with respect to the challenged wage determinations as applied to the contract period beginning October 1, 2001." *Id.* Despite finding that the requests were untimely filed, the Administrator nevertheless proceeded to address the merits of the requests on the basis that the issues FSSC raised "may have an impact on subsequent wage determinations issued for this and other procurements." *Id.* at 2.

FSSC had requested review and reconsideration of the wage determinations because it objected to the federal grade equivalency (FGE) the Administrator assigned to certain classifications of its service employees.⁴ In support of its position, FSSC presented the

¹ "Any interested party affected by a wage determination issued under section 2(a) of the Act may request review and reconsideration by the Administrator." 29 C.F.R. § 4.56 (a)(1).

² The Administrator shall, upon receipt of a request for reconsideration, review the data sources relied upon as a basis for the wage determination, the evidence furnished by the party requesting review or reconsideration, and, if necessary to resolve the matter, any additional information found to be relevant to determining prevailing wage rates and fringe benefits in a particular locality. The Administrator, pursuant to a review of available information, may issue a new wage determination, may cause the wage determination to be revised, or may affirm the wage determination issued, and will notify the requesting party in writing of the action taken. 29 C.F.R. § 4.56 (a)(2).

³ "In no event shall the Administrator review a wage determination or its applicability after the opening of bids in the case of a competitively advertised procurement, or, later than 10 days before commencement of a contract in the case of a negotiated procurement, exercise of a contract option or extension." 29 C.F.R. § 4.56 (a)(1).

⁴ Generally, where there is insufficient BLS wage data, the WHD resorts to "slotting:"

Continued . . .

Administrator with employee affidavits attesting to the nature of their work and their opinions concerning what the proper FGE assigned each position should be. FSSC argued that the FGEs assigned to the disputed classifications should be higher.

The Administrator refused to reconsider the wage rates for the Flight Simulator/Instructor (Pilot) and Instructor classifications. FSSC contended that higher FGE ratings were appropriate for the Flight Simulator/Instructor (Pilot) and Instructor classifications because these employees performed higher-level duties, possessed additional qualifications and required greater expertise and skills than those listed for the classifications by the WHD in its guideline publication, the *Service Contract Act Directory of Occupations (SCA Directory)*, which the Administrator uses to properly categorize the work of service employees into standardized service employee classifications. The Administrator rejected that argument because these purported distinctions were not included in the WHD's own occupational definitions for the disputed classifications as contained in the *SCA Directory*. AR, Tab A at 2-3. Accordingly, referring to the Flight Simulator/Instructor (Pilot) classification, the Administrator noted: "While performance of these higher level duties would not be precluded by the SCA definition, they clearly are not required." *Id.* As for the Instructor classification, she again determined that although the higher-level duties would not be precluded by the *SCA Directory* occupational definition, "the fact that they may be performed does not justify increasing the FGE for the Instructor occupation" *Id.* In other words, FSSC failed to persuade the Administrator that these purported higher skill and duty levels amounted to a material difference from the basic job descriptions in the *SCA Directory*.

The Administrator also declined to reconsider the wage rates for the three subclasses of workers within the Electronic Technician, Maintenance (ETM) classification series (levels I, II, and III). FSSC had argued for higher FGE ratings for these classes, again based on purported higher-level duties and skills. The Administrator refused to accept this argument, noting that FSSC's ETM descriptions "reflect more closely the duties and responsibilities of the SCA Engineering Technician job family than the duties and responsibilities of the ETM job family."

Under this procedure, wage rates are derived for a classification based on a comparison of equivalent or similar job duty and skill characteristics between the classifications studied and those for which no survey data is available. As an example, a wage rate found prevailing for the janitorial classification may be adopted for the classification of mess attendant if the skill and duties are known to be rated similarly under pay classification schemes. (Both classifications are assigned the same wage grade under the Coordinated Federal Wage System and are paid at the Wage Board grade 2 when hired directly by a Federal agency.)

29 C.F.R. § 4.51(C).

Id. at 4.⁵ Thus, with respect to the ETM series, the Administrator concluded that FSSC's descriptions were outside the *SCA Directory's* definition of the ETM series positions.

Case No. 03-075

The Administrator issued a final ruling on February 26, 2003, in response to FSSC's October 28, 2002 request for review and reconsideration.⁶ The Administrator denied FSSC's request for review and reconsideration of the wage determinations applicable to its flight training contract work for the period commencing October 1, 2003. AR, Tab A. The Administrator first rejected FSSC's objection to the methodology employed for determining the prevailing rate for the Instructor classification. She noted that the WHD had switched its methodology (since issuance of the wage determinations applicable to the October 1, 2001 contract period at issue in Case No. 02-085). The WHD now based the prevailing wage rate for this classification, explained the Administrator, on wage survey data compiled and provided by the United States Department of Labor's Bureau of Labor Statistics (BLS). The Administrator also declined to reconsider her determination that wage increases for Flight Simulator/Instructor (Pilot) and Computer Based Training (CBT) Specialist/Instructor be capped at 10% above the wage rates listed in the predecessor wage determinations. *Id.* at 4.

In this second set of requests for review and reconsideration, FSSC repeated its earlier contention that the Administrator had inappropriately slotted the Flight Simulator/Instructor (Pilot), Instructor, and the ETM classifications. The Administrator did not rule on these reiterated requests for reconsideration on the basis that she had previously ruled on those issues and that a decision on them was already pending in our Case No. 02-085. *Id.* at 2. She also declined to rule on these three disputed classifications because FSSC had raised no new arguments or presented any fresh information that might have led to a different conclusion than she had reached in the first set of requests for review and reconsideration. *Id.*

Case Nos. 02-085 and 03-075 concern the same petitioner, wage determinations, contract services and issues. Accordingly, the Board, *sua sponte*, consolidates the two Petitions for

⁵ The Administrator granted FSSC's requests for reconsideration concerning instances where the WHD had inadvertently failed to include in the wage determinations increases for Flight Simulator/Instructor (Pilot), Instructor, and CBT Specialist/Instructor. The Administrator noted, however, that the revised wage rates could not be applied retroactively.

⁶ FSSC had filed similar requests on August 28, 2002, but had mistakenly referenced their application to the contract period commencing October 1, 2001, instead of October 1, 2002. The August 28 requests were denied as untimely by letter dated September 20, 2002. AR, Tab C. This ruling was appealed to the Board in Case No. 03-009. On the Administrator's motion, the Board remanded the case for issuance of a new ruling. In the meantime, FSSC submitted another request for reconsideration dated October 28, 2002. This request culminated in the Administrator's February 26, 2003 final ruling and the filing of Case No. 03-075.

Review for disposition by this single Final Decision and Order.⁷

JURISDICTION AND STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 8.1(b), the Board has jurisdiction to hear and decide “appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative” involving the SCA. *See also* Secretary’s Order 1-2002, 67 Fed Reg. 64,272 (Oct. 17, 2002). The Board’s review of the Administrator’s decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). The Board shall modify or set aside the Administrator’s findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b). *See Dantran, Inc. v. United States Dep’t of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed de novo. *United Gov’t Sec. Officers of America, Local 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (ARB Sept. 29, 2003); *United Kleenist Org. Corp. and Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002). The Board defers to the Administrator’s interpretation of the Act when it is reasonable and consistent with law. *See Department of the Army*, ARB Nos. 98-120, -121, -122, slip op. at 34-36 (ARB Dec. 22, 1999) and the cases cited therein.

STATEMENT OF ISSUES

- I. *Whether, in ARB Case No. 02-085, the Board may review the Administrator’s May 29, 2002 final ruling; whether FSSC’s requests for review and reconsideration were untimely; and whether certain revisions to wage determinations may be retroactively applied.*
- II. *Whether the Administrator acted reasonably in establishing the prevailing rates applicable to the Flight Simulator/Instructor (Pilot), Instructor, and Electronic Technician, Maintenance I, II, and III classifications.*
- III. *Whether the Administrator acted reasonably in capping wage increases for affected classifications at 10% above rates in the predecessor wage determinations.*

⁷ Pursuant to the Board’s regulations, “[u]pon its own initiative [sic] . . . the Board may consolidate any proceeding or concurrently consider two or more appeals which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or concurrent review will contribute to a proper dispatch of its business and to the ends of justice” 29 C.F.R. § 8.14.

DISCUSSION

- I. *The Board may not review the Administrator's May 29, 2002 final ruling. FSSC's requests to the Administrator for review and reconsideration of the wage determinations were untimely. Retroactive revision of the wage determinations is not permitted.*

A. *FSSC's Petition for Review in Case No. 02-085*

We must decline to review the Administrator's May 29, 2002 final ruling. The regulation governing the Board's review of wage determinations states:

Except as provided in paragraph (c) and (d) of this section, the Board will not review a wage determination after award, exercise of option, or extension of a contract, unless such procurement action was taken without the wage determination required pursuant to §§ 4.4 and 4.5 of part 4 of this title.

29 C.F.R. § 8.6(b).

Here, the contract option was exercised (and option period commenced) on October 1, 2001. AR Tab A, p. 1. Since the Board did not receive FSSC's Petition for Review until June 18, 2002, we could not have acted before the October 1, 2001 deadline. Thus, because FSSC's contracts contained wage determinations as required, we may review the disputed wage determinations only if one or both of the exceptions apply. Neither exception applies here.

The Board may review wage determinations after exercise of a contract option in certain situations involving a collective bargaining agreement. *See* 29 C.F.R. § 8.6(c). But FSSC employees were not working under collectively bargained wage rates and this exception does not apply. The other exception applies "[w]here a petition for review of a wage determination is filed **prior to award, exercise of option, or extension of a contract,**" and "the issue is a significant issue of general applicability." 29 C.F.R. § 8.6(d) (emphasis added). But, as noted, FSSC filed its Petition for Review well after exercising the contract option. Therefore, we dismiss FSSC's Petition for Review in Case No. 02-085. Accord *EG&G Technical Services, Inc.*, ARB No. 02-006 (June 28, 2002). Nevertheless, we discuss two remaining issues.

B. *FSSC's Requests for Review and Reconsideration in Case No. 02-085*

In Case No. 02-085, the Administrator ruled that FSSC did not timely submit its requests for review and reconsideration of the wage determinations. We agree that FSSC's requests for

review and reconsideration were untimely and note that the Administrator should therefore have properly declined to address the merits of those requests.⁸

Federal Express delivered FSSC's requests for review and reconsideration to the WHD on September 20, 2001, although the Administrator contends that delivery occurred later.⁹ FSSC's contract option period commenced October 1, 2001, only eleven days after the request for reconsideration was filed with the Administrator. By letter dated October 17, 2001, the WHD acknowledged receipt of the requests for reconsideration and notified FSSC that additional time would be required to issue a decision on the requests. AR, Tab G. Petitioner supplemented its requests with additional information on six occasions: October 12, 15, 18, 24, 26 and 30, 2001. AR at Tabs I, H, F, E, D and C, respectively.

Section 4.56(a)(1) of 29 C.F.R. governs filing requests for review and reconsideration of wage determinations. This regulation states:

Any interested party affected by a wage determination issued under section 2(a) of the Act may request review and reconsideration by the Administrator. A request for review and reconsideration may be made by the contracting agency or other interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Any such request must be accompanied by supporting evidence. *In no event shall the Administrator review a wage determination or its applicability after the opening of bids in the case of a competitively advertised procurement, or, later than 10 days before commencement of a contract in the case of a negotiated procurement, exercise of option or extension. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.*

(Emphasis added).

⁸ Although the Administrator found the requests untimely, she proceeded to address FSSC's arguments and supporting information because she found that the requests raised issues that "may have an impact on subsequent wage determinations issued for this and other procurements." AR, Tab A at 2.

⁹ Pet. Brief, Appendix Exh. G. Counsel for the Administrator avers that the "documents were not date-stamped as received by the Wage and Hour Division until October 11, 2001." Adm. Stmt. in Opp. to Pet. for Rev. at 3. Counsel further suggests that the "events of September 11 may have played a part in this delay." *Id.*

Thus, though FSSC filed its requests with the WHD 11 days prior to the exercise of the contract option, the Administrator could not possibly consider these complex requests for review and reconsideration and substantively respond in the single day between the 11th and 10th days prior to exercise of the contract option.

We addressed this very same situation in *EG&G Technical Services, Inc.*, ARB No. 02-006 (ARB June 28, 2002). There, the service contractor submitted a request for review and reconsideration of a wage determination 11 days prior to the exercise of a new contract option period. The Board noted that in order to comply with the “10 days before . . . exercise of option” requirement, the Administrator would have had to act on the request on the same day that it had been received. The Board concluded that “[g]iven this abbreviated length of response time, the Administrator’s inability to fully consider and respond to EG&G’s request for reconsideration was quite reasonable, especially in light of 29 C.F.R. § 4.56(a)(2), which provides that the Administrator shall respond to such requests within thirty days.” *EG&G*, slip op. at 6-7.

Therefore, absent compelling circumstances (which do not exist here), an interested person filing an eleventh-hour complex request for review and reconsideration may not complain, as FSSC appears to do, that the Administrator should have ruled on its request more than 10 days before the contract period begins or the option is exercised or extended. Furthermore, unlike here, a late filer should also expect that the Administrator will not rule on its request. *See* 29 C.F.R. § 4.56(a)(1) (“In no event shall the Administrator review a wage determination . . . later than 10 days before commencement of a contract . . . , exercise of a contract option or extension.”)

Therefore, we conclude that though FSSC’s requests were filed one day before the regulation specifically requires, they were filed too late for the Administrator “to review, analyze, and reach a decision concerning [FSSC’s] requests, and notify the contracting agency about any possible revisions, prior to the October 1st date.” AR I, Tab A at 1-2.

C. Retroactive Relief

FSSC contends that the “ARB has it in its power to remedy” the Administrator’s “error” when she refused to apply the corrected wage determinations retroactively. *See* note 5, *supra*. Pet. Brief at 9. But we do not have the “power” to do this. Even if FSSC had filed timely requests for review and reconsideration and, pursuant to section 8.6(b), the Board had reviewed the wage determinations before FSSC exercised the option, we could not order retroactive relief even if we ruled in FSSC’s favor. Section 8.6(d) of 29 C.F.R. specifically limits the effect of Board decisions on wage determinations: “The Board’s decision shall not affect the contract after such award, exercise of option, or extension.”

In support of its argument that we should order retroactive application of the corrected wage determinations, FSSC relies on our decision in *James A. Machos*, ARB No. 98-117 (May 31, 2001). In *Machos*, the Board was also presented with a petition seeking review of the Administrator’s methodology in determining the wage rate for the Flight Simulator/Instructor

(Pilot) classification. Under that methodology, the Administrator had not applied any wage increase to the classification for two contract periods, based on a lack of wage data. The Board remanded the case to the Administrator to reconsider the Flight Simulator/Instructor (Pilot) wage rate in light of all other sources of wage data reflective of wage trends that could indicate patterns of wage increases in the particular locality. But the Board did not order retroactive application of the wage rates (in the event the Administrator, on remand, concluded that the wage rates be adjusted). Therefore, *Machos* does not compel us to order the retroactive relief FSSC seeks.

II. In Case No. 03-075, The Administrator exercised reasonable discretion in determining prevailing rates by using BLS data for the Instructor classification and by slotting FGE levels for the Flight Instructor, CBT Specialist/Instructor, and ETM series classifications.

We noted that in her February 26, 2003 final determination, the Administrator declined to rule on FSSC's challenges to the accuracy of the FGE levels assigned to the Flight Simulator/Instructor (Pilot), Instructor, and ETM series classifications. She did so because she had fully addressed these issues in her May 29, 2002, final ruling and because FSSC had not presented new information. AR, Tab A at 2. However, in the February 26, 2003 determination, the Administrator in effect reaffirmed her earlier May 29, 2002 conclusions regarding the merits of FSSC's allegations. We will therefore address FSSC's arguments concerning the merits raised in Case No. 02-085, as applied to the contract period at issue in Case No. 03-075.

The Administrator's first choice of methodology for determining prevailing wages is to rely on wage data that the Bureau of Labor Statistics (BLS), U.S. Department of Labor collects. Although other information may be consulted, regulations governing the procedures for making wage determinations make it clear that use of BLS data is the preferred methodology:

The minimum monetary wages and fringe benefits set forth in determinations of the Secretary are based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made. *Such information is most frequently derived from area surveys made by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel.*

29 C.F.R. § 4.51(a) (emphasis added).

Prior to FSSC's second round of requests for review and reconsideration (at issue in Case No. 03-075), the Administrator did not use BLS data for determining the prevailing rate for the Instructor classification. Rather, she used the "slotting" method, wherein the wage rate for the Instructor classification was derived from the rate assigned to the Computer System Analyst I position. However, for the Instructor classification, the WHD now uses BLS wage survey

information “for occupations that fall within the category of ‘Training and Development Specialists’ who ‘conduct training and development programs for employees.’” AR, Tab A at 2.

FSSC objects to this change in methodology. It argues that the Training and Development Specialist occupational category is not appropriate for determining the prevailing wage of the SCA Instructor classification. It claims that the WHD did not take into consideration “the technical expertise and knowledge required to fulfill the Instructor position, as described in the SCA Directory.” Pet. for Rev. at 7.

The duties of the SCA Instructor classification and the BLS Training and Development Specialist are not congruent. However, the duties ascribed to the Instructor classification in the *SCA Directory* are those of a standard instructor whose central responsibility is to conduct generic instructional or training programs. The SCA Directory provides that an Instructor:

Teaches courses in one or more subjects in commercial, governmental, industrial or service establishments. Prepares instructional program in accordance with training or other course requirements, assembling materials to be presented. Instructs students in the theoretical and practical aspects covering the subjects being taught. Utilizes such teaching methods as individual coaching, group discussions, lectures, demonstrations, seminars, and workshops. Selects or develops teaching aids such as wall charts, prepared notes, tape recordings, radio, television, films, film strips, and training handbooks. Supervises practical work carried out by students, and assists them at points of difficulty. Tests students to evaluate their learning progress and to evaluate effectiveness of instruction. Compiles assessment report regarding each student. May arrange visits to or periods of employment in real-work situations to reinforce instruction.

AR, Tab X. Given this guideline describing the duties of an Instructor, we agree with the Administrator that the position is one that “essentially conducts a training or development program.” Stmt. of Adm. in Opp. to Pet. for Rev. at 12. Thus, the Instructor position is functionally the same as that of the BLS-surveyed position of Training and Development Specialist, since that category of worker similarly conducts training and development, i.e. teaches and instructs a broad variety of material organized into course work or other training and learning exercises.

Other than pointing to the technical nature of the material handled by its Instructors (as well as attesting by affidavits to their higher levels of skill, training duties and experience), FSSC did not demonstrate either before the Administrator or this Board, that the skills and duties of an Instructor are either materially greater than or different from those of the BLS-surveyed Training and Development Specialist. Having failed to make such a showing, we conclude that the Administrator acted well within the broad discretion afforded her in administering the Act and

reasonably declined to reconsider her decision to use the BLS data regarding the Training and Development Specialist for determining the Instructor classification's prevailing wage rate.

FSSC argues that the Administrator is violating a long-standing practice by rejecting the methodology she previously used for the Instructor classification in favor of using the BLS data, which information, FSSC contends, has been available since 1999. Whether BLS data was previously available and not used by the Administrator is not a relevant consideration. By using the BLS data, the Administrator has merely employed the wage information which is preferred, i.e. that which BLS collects. Here, the BLS data for the Training and Development Specialist is appropriate for determining the Instructor's prevailing wage because both classifications train and instruct, and the Training and Development Specialist wage data collected by BLS is specific to geographical localities as required by the SCA. *See* 41 U.S.C.A. § 351(a)(1).

FSSC also challenges the FGE ratings the Administrator assigned to the Flight Simulator/Instructor (Pilot), CBT Specialist/Instructor and the three Electronic Technician, Maintenance (ETM) classifications.¹⁰ The wage determinations for these classifications are not determined according to BLS data, the WHD's preferred source for determining prevailing wages. Where BLS data is unavailable or insufficient for the WHD to directly document local wage rates for a particular job classification, the Administrator resorts to the wage determination procedure known as "slotting."¹¹ Under the slotting procedure, "wage rates are derived for a classification based on a comparison of equivalent or similar job duty and skill characteristics between the classifications studied and those for which no survey data is available." 29 C.F.R. § 4.51(c).

The WHD has long slotted the Flight Simulator/Instructor (Pilot) classification (which is not surveyed by BLS) to the SCA Directory classification of Computer Systems Analyst (CSA) II, based on the Administrator's determination that these two classifications' levels of job skills and duties are similar. AR, Tab A at 2. CBT Specialist/Instructor (and Instructor, before the change to reliance on BLS data) was slotted to the CSA I classification, in order to maintain the relationship between the skill, duty and pay levels of the three types of FSSC instructors and trainers. *Id.*

¹⁰ FGE ratings are derived from two sources. The first is the General Schedule (GS) that contains the rates of wages applicable to Federal white-collar employees. The other is the Wage Grade (WG) that establishes the wages payable to blue-collar employees. The WHD presently assigns an FGE rating of GS-11 to the Flight Simulator/Instructor (Pilot) classification; the ETM subclassifications are assigned WG ratings of WG-10, WG-9, and WG-8 for ETM I, II, and III, respectively. FSSC contends that the Flight Simulator/Instructor (Pilot) classification should be rated as a GS-12 and that the proper FGEs for ETM I, II, and III should be GS-11, -9 and -7, respectively.

¹¹ Discussed more fully at n. 4.

The issue concerning the proper FGE rating for Flight Simulator/Instructor (Pilot) has been before the Board twice. In both cases the Board rejected arguments that the Administrator abused her discretion in setting the FGE rating of the disputed classification at the CSA II level, i.e. GS-11.

In *James A. Machos*, ARB No. 98-117 (ARB May 31, 2001), after noting that the slotting procedure, in general, has long been approved in SCA cases, the Board revisited its earlier opinion in *D.B. Clark III*, ARB No. 98-106 (ARB Sept. 8, 1998):

[I]n *D.B. Clark III* this Board was presented with precisely the same question concerning the Wage and Hour Division's having slotted the Flight Instructor classification at the GS-11 level. In that case, the petitioner had argued as does Machos here that the level of skills and training of the Flight Instructors [Flight Simulator/Instructor (Pilot)] required by the employer exceeded those of the GS-11 FGE of Computer Systems Analyst II, and that the Wage and Hour Division should therefore have slotted the Flight Instructor classification at a higher FGE level. However, as correctly noted by the Administrator before the Board in this case, "SCA wage rates are not based upon the training, experience, or education that an employer requires of an employee, but rather are based upon the duties and responsibilities required by the classifications at issue." [Citation omitted.] Machos' argument regarding slotting does not address the applicable legal standard under the SCA regulations.

Moreover, not only has the Wage and Hour Division determined that Flight Instructors are appropriately classified at GS-11 level, but this ranking has the concurrence of the Office of Personnel Management (OPM), "which has substantial expertise in the field of personnel classification." *D.B. Clark III* at 5. The classification of job categories to FGE levels by OPM is based on objective and professional rating criteria; an OPM classification therefore provides very strong support for the Administrator's determination that slotting the Flight Instructor pay level to another position at the FGE level of GS-11 was proper, especially in the face of Machos' relatively "soft" and anecdotal information. Accordingly, we reaffirm our previous finding in *D.B. Clark III* that the GS-11 FGE classification of Computer Systems Analyst II is a proper level at which to slot the Flight Instructor classification.

Machos, slip op. at 8.

FSSC has not persuaded us that the Administrator acted unreasonably in slotting the Flight Simulator/Instructor (Pilot) classification at the GS-11 level. To support its argument that the FGE levels are too low, FSSC attempts to embellish the job descriptions of its employees by adding duties and responsibilities not included in the definition of the classification contained in the SCA Directory. Pet. for Rev., Appendix Exhibits Q, R, S, T, U, V. However, these arguments miss the mark by not addressing the Flight Simulator/Instructor (Pilot) duties and responsibilities as listed in the SCA Directory referenced above. In short, FSSC's attempt to add duties (or assert higher levels of experience and training on the part of its service employees) does not explain why the disputed classifications' duties do not fit within the WHD's definitions in the SCA Directory. Again, SCA wage rates are not based on training, experience, or education but upon the duties and responsibilities the classification requires. See *Machos*, slip op. at 8; 29 C.F.R. § 4.51(c).

We also conclude that the Administrator's methodology in slotting the CBT Specialist/Instructor classification to the CSA I classification to maintain a pay relationship was reasonable. In her May 29, 2002 ruling, the Administrator noted that FSSC had "not challenged the FGE for the SCA occupations" which included the CBT Specialist/Instructor. AR, Tab A at 4.

FSSC's arguments regarding the Electronic Technician, Maintenance (ETM) series of jobs fail for reasons similar to those discussed concerning the Flight Simulator/Instructor (Pilot). FSSC relies upon the Engineering Technician occupational series in support of its request for increasing the FGE assigned to the ETM classifications. However, the Engineering series occupations are not properly comparable because, as the Administrator noted, the "SCA ETM job family is a blue-collar series included within the SCA maintenance and repair occupations." AR I, Tab A at 3-4. On the other hand, the Administrator points out that "the Engineering Technician VI (FGE-GS 11) ... is required to exercise 'creativity and judgment... and make decisions in situations where standard engineering methods, procedures, and techniques may not be applicable.'" *Id.*

Therefore, the Administrator acted reasonably when she assigned the FGE ratings for the Flight Simulator/Instructor (Pilot), CBT Specialist/Instructor, and the ETM classifications because she properly compared and matched the duty and skill characteristics of those classifications to those classifications the BLS studied.

III. Capping wage increases at 10% was a reasonable exercise of the Administrator's discretion.

FSSC also challenges the Administrator's decision to cap wage determination rate increases at 10% above the prevailing rates contained in the predecessor wage determinations. FSSC argues that a 10% cap is "arbitrary" and "flies in the face of the requirement . . . that wages reflect those prevailing in the community." Pet. Brief II, at 7-8.

The Administrator supported her ruling by stating that the 10% capping policy was implemented “in order to minimize disruption and promote predictability in the procurement process.” AR, Tab A at 3. She also noted that this Board has previously affirmed the “general policy of capping wage increases to minimize the impact of new wage data . . .” *Id.*

Indeed, we have held that the Administrator’s policy of generally limiting wage increases to 15% in succeeding wage determinations was “reasonable in most circumstances.” *D.B. Clark, III*, slip op. at 8. And in affirming another 15% cap, the Board found that “the Administrator’s 15% cap methodology is a reasonable transitional tool that is consistent with the Administrator’s discretion under the Act, and also promotes a useful predictability in the procurement process.” *Dep’t of the Army*, slip op. at 26.

Therefore, because we find that the Administrator’s decision to impose a 10% cap is legally sound and otherwise reasonable, we must affirm her determination to cap wage increases at 10%. *See Dep’t of the Army*, slip op. at 34-36.

CONCLUSION AND ORDER

FSSC’s Petition for Review in Case No. 02-085 is **DISMISSED** because Department of Labor regulations implementing the Act preclude us from reviewing a wage determination after the underlying contract option has been exercised. The Petition for Review in Case No. 03-075 is **DENIED** because the Administrator acted reasonably in determining the prevailing wage rates for the disputed classifications and in capping the rates at 10% above rates in the preceding wage determination.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge