



In the Matter of:

**FORT HOOD BARBERS
ASSOCIATION**

ARB Case No. 96-181

**With respect to review of Wage
Determination No. 74-0110 (Rev. 11)**

(Formerly ARB Case No. 96-132)

DATED: November 12, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

This case is before the Board pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or Act), 41 U.S.C. § 351 *et seq.* (1988) and the implementing regulations at 29 C.F.R. Parts 4, 6, and 8 (1996). Review of a final ruling issued by the Administrator, Wage and Hour Division (Administrator) is sought by the Fort Hood Barbers Association (Association).

On November 19, 1993, the Association filed with the Administrator a request for reconsideration of Wage Determination No. 74-0110 (Revision 11). After making several inquiries and receiving no written response, the Association filed a Petition for Review with the Board of Service Contract Appeals on May 17, 1996. The Administrator responded that she could not locate the November 1993 request and moved that the case be remanded for issuance of a final ruling. By decision dated July 5, 1996, this Board remanded the case, and the Administrator issued a final decision on July 24, 1996. Now pending before the Board is the Association's Amended Petition for Review of the Administrator's decision. The principal issue raised is whether Revision 11 was erroneous in failing to reflect, pursuant to Section 4(c) of the SCA, 41 U.S.C. § 353(c), that the Association's members were entitled to be paid according to the terms of a previously existing Collective Bargaining Agreement (CBA) under a predecessor contract.

^{1/} On April 17, 1996, the Secretary of Labor redelegated authority to issue final agency decisions under this statute and the implementing regulations from the Board of Service Contract Appeals to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions.

BACKGROUND AND RULINGS BELOW

The Army and Air Force Exchange Services (AAFES) awarded a five-year concessionaire contract for barber shop services to Gino Morena Enterprises (GME) on January 31, 1991, with performance to begin on March 21, 1991. Administrative Record Tab E. It is undisputed that the contract was awarded as a multi-year service contract not subject to annual appropriations. A wage determination, WD 74-0110 (Revision 8), which reflected collectively bargained wages and fringe benefits negotiated by the predecessor contractor, was attached to the contract. On November 20, 1991, the contract was amended and Wage Determination WD 74-0110 (Revision 10), which also reflected the previous collectively bargained wages and fringe benefits, was substituted. Tab G. In response to a request by the AAFES for a new wage determination for the two-year period commencing on March 21, 1993, the Wage and Hour Division issued WD 74-0110 (Revision 11). Tabs C and D. This wage determination reflected the rates that Wage and Hour claims were prevailing in the locality. It did not include the collectively bargained fringe benefits contained in Revision 10. GME also implemented a tip credit against commissions payable to the barbers.

The CBA covered the period from July 1, 1988 to July 1, 1992. In May 1992, the union that had negotiated the CBA disclaimed any interest in representing the Fort Hood barbers, and this Association was formed. GME and the Association never negotiated a new CBA.

In its November 1993 request for review the Association argued that Revision 11 was erroneous under Section 4(c) of the SCA because it failed to include the holiday, vacation, sick, and Sunday pay provisions contained in the CBA of the predecessor contract. It argued that GME was violating the SCA by not paying these fringe benefits and by taking a tip credit. In its 1996 petition for review the Association added that the wage rates set in Revision 11 also were not in accordance with prevailing rates in the locality.

The Administrator found that the collectively bargained fringe benefit rates of the predecessor contract applied only to the first two years of GME's contract and accordingly, did not prevent GME from taking a tip credit thereafter. The Administrator also rejected as untimely the argument that the wage determination did not reflect rates prevailing in the locality since the Association did not raise that argument in its 1993 request for review.

On appeal the Association elaborates on its earlier arguments and contends that the Department's regulations are inconsistent with the clear meaning of the SCA. Both the Administrator and GME have filed statements in opposition to the petition for review, and the Association has filed a response brief.

DISCUSSION

Section 4(c) of the SCA specifies that no contractor or subcontractor under a contract that succeeds a contract subject to this Act shall pay service employees less than the "wages and

fringe benefits . . . provided for in a collective bargaining agreement as a result of arms' length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract." 41 U.S.C. § 353(c). This language requires that a successor contractor be liable for the CBA wages and fringe benefits of a predecessor contractor for a period of one "contract" only. See *International Union of Operating Eng'rs*, BSCA Case No. 92-23, Jan. 27, 1993, at p. 5. In *Operating Eng'rs* the Administrator, relying principally on 29 C.F.R. § 4.145(a), treated a multi-year contract with basic year and option periods as separate contracts rather than a single contract and ruled that the predecessor's CBA did not apply to the first option year. The Board affirmed the Administrator's interpretation as reasonable and not inconsistent with the language and purposes of the SCA. Similarly, as explained below, the Administrator's ruling in this case that Section 4(c) did not apply after the first two-year "contract" period is reasonably based on 29 C.F.R. § 4.145(b), as well as Section 4(d) of the Act.

Section 4(d) of the SCA permits five-year service contracts "if each such contract provides for periodic adjustment of wages and fringe benefits pursuant to future determinations, . . . no less often than once every two years during the term of the contract . . ." 41 U.S.C. § 353(d). The implementing regulation provides:

(b) With respect to multi-year service contracts which are not subject to annual appropriations (for example, concession contracts which are funded through the concessionaire's sales . . .), section 4(d) of the Act allows such contracts to be awarded for a period of up to five years on the condition that the multi-year contracts will be amended no less often than once every two years to incorporate any new Service Contract Act wage determination which may be applicable. Accordingly, unless the contracting agency is notified to the contrary . . ., *such contracts are treated as wholly new contracts for purposes of the application of the Act's provisions and regulations thereunder* at the end of the second year and again at the end of the fourth year, etc. . . .

29 C.F.R. § 4.145(b) (emphasis supplied). Under the Association's view, the statutory and regulatory provisions for biennial wage reviews would be meaningless.^{2/}

Consistent with these provisions and the Board's decision in *Operating Eng'rs*, the Administrator reasonably treated GME's contract, which is not subject to annual appropriations, as multiple, wholly new, two-year contracts for purposes of applying Section 4(c). The Administrator applied the CBA to the first two years of GME's contract in accordance with Section 4(c), but at the beginning of the third year when AAFES requested a new wage determination, GME had become its own predecessor contractor with no existing CBA. See 29

^{2/} It is axiomatic that the implementing regulations are binding upon this Board. *Collectively-Bargained Premium Wage Rates at Clear Air Force Base, Alaska*, BSCA Case No. 94-07, Oct. 31, 1994, at p. 5.

C.F.R. § 4.163(e). Thus, Revision 11 was not erroneous in not reflecting the previous collectively bargained terms.^{3/}

The Association argues that even if the CBA is inapplicable, the SCA does not permit the tip credit taken by GME. We disagree and find that the Administrator's allowance of a credit was in accordance with the regulations. The provision at Section 4.6(q) states in pertinent part:

(q) An employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips may have the amount of tips credited by the employer against the minimum wage required by . . . the Act in accordance with . . . the Fair Labor Standards Act [and other provisos]

29 C.F.R. § 4.6(q).

Finally, the Association argues that Revision 11 fails to reflect rates prevailing in the locality as required under 41 U.S.C. § 351(a)(1). The Administrator rejected the challenge as untimely, coming more than three years after the wage determination was issued and after completion of the full five-year contract. The Association implies that the argument should be considered implicit in its 1993 challenge. *See* Response Brief at 11. It argues that its subsequent petitions merely reflected relevant information provided later by the Department.

We do not find this Section 351(a)(1) argument implicit in the Association's 1993 request. It constitutes a distinct alternative to the Association's Section 4(c) argument and could have been raised promptly upon notice of the rates in Revision 11, regardless of subsequent statements made by the Department.^{4/}

^{3/} The Association's reliance on subsections (g) and (h) of 29 C.F.R. § 4.163 is misplaced. Subsection (g) explains that the protection of Section 4(c) extends to new or consolidated contracts created through reconfiguration of *functions*. The phrase in Section 4.163(h), "full term successor contract," refers to contract periods which may have been interrupted for one reason or another. Neither subsection requires application of Section 4(c) to the new contracts described in Section 4.145(b), which are created by wage reviews. Nor do they supplant the clear directive in Section 4.145(b). The Association's reference to a variance hearing is also misplaced. A variance hearing may afford a party relief from the terms of a CBA where, unlike here, Section 4(c) is applicable. 41 U.S.C. § 353; *see* 29 C.F.R. § 4.163(c).

^{4/} In a letter dated October 24, 1995, responding to an inquiry by Senator Phil Gramm on behalf of the Association, the Department stated that the wage rates contained in Revision 11 were based on those being paid by GME due to the lack of survey data for the barber occupation in the locality. It explained that this practice was consistent with the Department's actions under similar non-4(c) barber shop contracts, and that the absence of fringe benefits also was consistent with those other barber shop contracts.

Revision 11 was issued on May 7, 1993 and expired two years later. The argument was not raised until May 1996, well after the wage determination had concluded. In fact, the full five-year contract ended in March 1996. Under these circumstances the Board lacks authority to amend the determination and award relief. This Board's regulations specifically provide that our decision shall not affect the contract after award, exercise of option, or extension. 29 C.F.R. § 8.6(d). On the basis of this regulation, the Board has dismissed earlier cases in which the petitioners requested retroactive relief on a concluded matter. *See Canteen Food and Vending Service*, BSCA Case No. 92-34, Nov. 30, 1992; *Rams Specialized Security Serv., Inc.*, BSCA Case No. 92-25, Sept. 23, 1992.

Accordingly, for all of the foregoing reasons, this matter is **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member