



In the Matter of:

**UNITED GOVERNMENT SECURITY  
OFFICERS OF AMERICA, LOCAL  
NO. 57**

**ARB CASE NO. 98-050**

*In re:* Review and reconsideration  
of a wage determination for Court Security  
Officers, Contract No. MS-94-D-0009  
Sacramento, California

**DATE: September 28, 1998**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**FINAL DECISION AND ORDER**

This matter is before the Administrative Review Board<sup>1/</sup> pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (1994) (SCA) and the regulations at 29 C.F.R. Part 8 (1998). The Acting Administrator, Wage and Hour Division (Administrator), filed a motion to dismiss the Petition for Review on the grounds that the petition was untimely filed and no final and appealable ruling has been issued in this matter. The submissions of the parties to this case have been thoroughly reviewed. For the following reasons, we grant the Administrator's motion to dismiss.

**BACKGROUND**

The United States Marshals Service (USMS) contracted for the services of court security officers at Sacramento, California, under Contract MS-94-D-0009. The commencement date for this contract was October 1, 1993. Wage Determination (WD) No. 86-0679 (Revision 9), dated September 13, 1993, was incorporated in the contract and governed the wages and benefits payable to court security officers during the term of the contract. WD 86-0679 (Rev. 9) required payment of an hourly wage rate of \$8.06 for the classification of Court Security Officers.

On October 17, 1997, Petitioner United Government Security Officers of America, Local No. 57, requested that the Wage and Hour Division review and reconsider the wage

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<sup>1/</sup> The Petition for Review was filed December 8, 1997, and was directed to the Board of Service Contract Appeals (BSCA). On May 3, 1996, the BSCA was abolished pursuant to Secretary's Order 2-96 and its duties were delegated to the Administrative Review Board. 61 Fed. Reg. 19978.

determination included in the USMS contract. Petitioner's Statement, Reply Brief and Opposition to the Acting Administrator's Motion to Dismiss Petition (Petitioner's Statement), Attachment 1. Petitioner contends that the USMS should have utilized WD 86-0669 (Rev. 11), dated June 22, 1993, which purportedly established an hourly rate of \$18.81. Relying on 29 C.F.R. §4.4, Petitioner argues that WD 86-0679 (Rev. 9) was issued too late to be properly used in the USMS contract, because it was issued less than 60 days before the commencement of the procurement contract on October 1, 1993.

In an undated letter,<sup>2/</sup> Nila J. Stovall, Chief, Branch of Service Contract Wage Determinations, Wage and Hour Division, informed Petitioner that the request for review and reconsideration was untimely and declined to review the disputed wage determination. The petition for review in this case was filed on December 8, 1997.

## DISCUSSION

The record plainly demonstrates that Petitioner's underlying request for review and reconsideration of the wage determination was filed with the Wage and Hour Division in an extremely untimely manner,<sup>3/</sup> and Petitioner has not presented any documentation or argument which contradicts this conclusion. The regulation at 29 C.F.R. §4.56(a) specifies the requirements for timely challenges to wage determinations issued under the SCA:

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. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

Supporting documentation attached to Petitioner's Statement clearly shows that no request for reconsideration and review of the disputed wage determination was made to the Administrator until long after commencement of the USMS contract. The Administrator argues that the earliest request for "review and reconsideration" of the wage determination in this case was made by Petitioner on October 17, 1997, which led to Ms. Stovall's undated response, received by Petitioner on November 24, 1997. *See* Petitioner's Statement, Attachment 1. Under this view,

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<sup>2/</sup> Petitioner states that the letter was received on November 24, 1997. Petitioner's Statement, ¶4, Attachment 2.

<sup>3/</sup> The Administrator also contends that there has been no final agency ruling in this matter, and that the Petition for Review should be dismissed for that reason. Because we rule that the Petition was filed untimely, it is not necessary for us to address the Administrator's finality issue. *But see Diversified Collection Services, Inc.*, ARB Case No. 98-062, ARB Order, May 8, 1998, slip op. at p. 3.

the request to review the wage determination was presented more than four years after commencement of the contract.

Petitioner argues that it had “through its President, Mr. James A. Vissar, contacted the Wage and Hour Division, Employment Standards Administration, by letter sometime prior to August 17, 1995 and had in fact been *de facto* trying to obtain the relevant wage determination’s review and reconsideration through United States Department of Labor Regional Offices.”<sup>4/</sup> *Id.* at 4, ¶8. Thus, even in the light most favorable to Petitioner, the National Office of the Wage and Hour Division was not made aware of a challenge to the wage determination until approximately 23 months after commencement of the contract. It is therefore clear that Petitioner did not raise a timely challenge to the wage determination with the Administrator.

This Board’s jurisdiction to review wage determinations is similarly limited. The regulation at 29 C.F.R. §8.6(d) specifies that:

Where a petition for review of a wage determination is filed prior to award, exercise of option, or extension of a contract, the Board may review the wage determination after such award, exercise of option, or extension of a contract if the issue is a significant issue of general applicability. The Board’s decision shall not affect the contract after such award, exercise of option, or extension.

In this case, Petitioner sought the Board’s review on December 8, 1997 -- more than four years after commencement of the USMS contract -- which was clearly too late for us to review a challenge to the wage determination.<sup>5/</sup>

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<sup>4/</sup> In this regard, Petitioner directs our attention to a September 12, 1995 Wage and Hour Division letter (Petitioner’s Statement, Attachment 6) which refers to an August 17, 1995 letter from Petitioner concerning the wage determination dispute for the USMS contract. The September 12 letter references a continuing investigation of the USMS contract by a Wage and Hour Division Regional and District Office. The nature of that investigation is not specified.

<sup>5/</sup> In support of the Administrator’s argument that review of the disputed wage determination is barred by the untimeliness of Petitioner’s request, counsel cites the BSCA’s decision in *Review and Reconsideration of Wage Determination 90-1029 (Rev. 6) as Applied to Service Contracts in Jasper County, Missouri*, BSCA Case No. 94-10, Dec. 30, 1994 (*Jasper Co.*). That case, however, concerned the timeliness of a challenge to a wage determination which had been substituted by the Wage and Hour Division for another wage determination improperly included in a service contract. Although there is no time limitation specified in the regulation allowing for post-commencement substitution -- 29 C.F.R. §4.5(c)(2) -- the BSCA held that challenges to a substituted wage determination must be commenced within “some reasonable time limitation” after commencement of the contract. *Id.*, slip op. at p. 3. Thus, while the *Jasper Co.* decision is not strictly on point with the facts of the instant matter, it does provide general guidance on the question of timeliness of wage determination challenges.

Finally, even if review of the disputed wage determination were possible at this late date, the Board could not provide the relief requested by Petitioner, *i.e.* substitution and retroactive enforcement of the alleged proper wage determination. 29 C.F.R. §8.6(d). *D.B. Clark III*, ARB Case No. 98-106, Dec. and Order, Sep. 8, 1998; *Fort Hood Barbers Assoc.*, ARB Case No. 96-181, Fin. Dec. and Order, Nov. 12, 1996, *aff'd sub nom. Fort Hood Barbers Assoc. v. Herman*, 137 F. 3d 302 (5th Cir. 1998); *Rams Specialized Security Service, Inc.*, BSCA Case No. 92-25, Dec., Sep. 23, 1992.

### **CONCLUSION**

For the foregoing reasons, the Petition for Review is dismissed with prejudice.

**SO ORDERED.**

**PAUL GREENBERG**

Member

**CYNTHIA L. ATTWOOD**

Acting Member