



In the Matter of:

D.B. CLARK III

ARB Case No. 98-106

***In re: Wage Determination 94-2070, Rev. 7,
for Solano, Napa, and Sonoma Counties, CA,
affecting employees of Raytheon Training, Inc.
(formerly Hughes Training Inc.) at Travis AFB, CA***

DATE: September 8, 1998

DECISION AND ORDER

Petitioner D.B. Clark III (Clark) works for Raytheon Training, Inc. (Raytheon) as a flight simulator/instructor at Travis Air Force Base, California, pursuant to a federal service contract subject to the Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (SCA or Act) (1994). In July 1997 Clark submitted a request for review and reconsideration of the \$20.98 hourly wage rate applicable to his position as a flight instructor, pursuant to 29 C.F.R. §4.56 (1998), arguing that the wage rate was based on a 1992 wage survey conducted by the Bureau of Labor Statistics (BLS) and no longer reflected locally prevailing wage rates. Clark specifically challenged the Acting Administrator's failure to update the wage determination applicable to the Travis AFB contract by using data from a 1994 BLS area wage survey.

In response to Clark's request, the Acting Administrator (Administrator) made a commitment to modify the wage rate based on a newer 1996 BLS survey. On February 2, 1998, a modified wage determination was issued, increasing the wage rate for flight simulators/instructors to \$24.13/hr. The 1996 BLS survey data would have supported an even higher increase in the wage determination rate, but the new rate reflected the Wage and Hour Division's policy of "capping" the wage increase for a job classification at 15 per cent above the level found in the last wage determination issued. Clark was advised of the new wage determination on or about March 4, 1998, and filed a petition for review by letter dated March 11, 1998, asserting that the new wage determination rate for flight instructors still did not reflect prevailing rates. Petition for Review (Petition) at 1.

Clark has not supplied any independent survey data relating to wages paid to flight instructors in the locality, but relies entirely upon the same BLS survey data used by the Wage and Hour Division. Thus, Clark's appeal is a direct challenge to the methodology used by the Division in developing the flight instructor wage determination, specifically the Division's application of the 15 per cent cap on increases for any job classification. While we find that the Division's general use of the 15 per cent limit is a reasonable exercise of the Administrator's discretion under present economic circumstances, we find that Clark's argument with regard to the flight instructor/simulator position has merit in light of the particular facts of this case. For

the reasons discussed below, we grant the petition in part and remand this matter to the Administrator for issuance of a new wage determination.

PROCEDURAL HISTORY

This case arises under the Service Contract Act and its implementing regulations. 41 U.S.C. §351 *et seq.* (1994); 29 C.F.R. Parts 4, 8 (1998). On July 31, 1997, Clark wrote to the headquarters office of the Wage and Hour Division, U.S. Department of Labor, requesting review and reconsideration of the \$20.98/hr. “Flight Simulator/Instructor (Pilot)” (flight instructor) wage rate found in Wage Determination (WD) 94-2070 (Rev. 6), issued June 30, 1997. Administrative Record (AR) F, H. Clark works as a flight instructor for Raytheon at Travis AFB, California, under an Air Force service contract.^{1/}

In his request for reconsideration, Clark asked for confirmation that the wage rate for the flight instructor was not based on wage survey data for workers performing flight instructor work, but instead was based on wage survey data for workers in the Computer Systems Analyst II (Analyst II) job classification using the “slotting” procedures outlined in the Secretary’s regulations at 29 C.F.R. §4.52(c). Assuming this to be the case, Clark observed that the \$20.98/hr. wage rate for the flight instructor job at Travis AFB appeared to be based on the February 1992 BLS Occupational Compensation Survey for the Vallejo-Fairfield-Napa, CA area, which found a mean hourly local wage rate of \$20.98^{2/} for workers in the Computer Systems Analyst II job title. AR F, K. Clark noted that BLS had conducted another survey in 1994, which had found a mean hourly wage rate of \$23.77^{3/} for Computer Systems Analyst II workers. AR F, J. Clark challenged the Wage and Hour Division’s failure to update the applicable wage determination for flight instructors to reflect the data from the 1994 BLS survey for the Analyst II, and the Division’s continued reliance of the 1992 BLS survey when publishing a wage determination five years later in 1997.

In addition to requesting that WD 94-2070 (Rev. 6) be updated to reflect the 1994 BLS survey data, Clark also questioned the Wage and Hour Division’s determination that the Flight Simulator/Instructor (Pilot) job title should be slotted with the Computer Systems Analyst II job position, which is ranked as a GS-11 job title. Clark asserted that the Air Force Reserves employed flight instructors at a nearby site to perform the same flight instructor work as Clark and his colleagues, yet rated these workers at the GS-13 level.

^{1/} At the time of his initial inquiry, Clark’s employer was Hughes Training, Inc. By the time the petition for review was filed in this matter, the contract had been acquired by Raytheon Training, Inc.

^{2/} The 1992 BLS survey documents mean weekly earnings for the Computers Systems Analyst II of \$835, with an average work week of 39.8 hours. AR K p.2.

^{3/} The 1994 BLS survey documents mean weekly earnings of \$951, with an average work week of 40 hours. AR J p.2.

The Wage and Hour Division responded by letter dated September 18, 1997, confirming that the wage rate for the Flight Simulator/Instructor (Pilot) position was slotted to the Computer Systems Analyst II job classification. The Division declined to reconsider the GS-11 grade ranking for the job title, noting that the federal Office of Personnel Management had reviewed and approved the GS-11 job ranking in connection with the publication of the 1993 edition of the Service Contract Act Directory of Occupations. Without commenting on Clark's concerns about the data from the 1994 BLS survey, the Division advised Clark that it would be issuing a revised WD 94-2070 (Rev. 7) based on the "most current" survey data, and would provide a copy to Clark once it was approved.^{4/} AR E.

It is unclear when the Wage and Hour Division issued the updated WD 94-2070 (Rev. 7), or whether it was provided directly to Clark, as the Division had promised. In February 1998 the Acting Administrator received a letter from Congressman Frank Riggs of California, asking for a report on the status of the revised wage determination. The Division responded to Congressman Riggs by letter dated February 26, 1998, enclosing a copy of the new Revision 7. The new wage determination rates were based on a 1996 BLS survey for the expanded San Francisco-Oakland-San Jose, CA Consolidated Metropolitan Area, which showed a mean hourly wage rate of \$26.98 for Analyst II workers, as well as a median hourly wage of \$27.08. AR D, I. However, the hourly wage rates for the Computer Systems Analyst II and Flight Simulator/Instructor (Pilot) job titles that the Wage and Hour Division published in Revision 7 were increased only to \$24.13, *i.e.*, an increase of 15 per cent above the wage rates found in Revision 6. AR G.

Congressman Riggs provided copies of WD 94-2070 (Rev. 7) and the Division's February 26, 1998 letter to Clark. Clark responded with a March 18, 1998 letter addressed to a member of the Congressman's staff, who in turn forwarded the letter to the Division. Clark protested the apparent 15 per cent cap on the wage rate increase for the Flight Simulator/Instructor (Pilot) classification, and also protested the similar cap on the Secretary IV job classification. AR C. It was during this same period that Clark filed his petition for review before the Board contesting both wage rates, and asking that any increase in the wage determination be made retroactive to 1994.^{5/} *See* Petition.

^{4/} In a May 1998 letter to Congressman Frank Riggs, the Division explained that the 1994 BLS survey data was not used to update the Computers Systems Analyst II position because "[t]he frequency of distribution was skewed for the Computer Systems Analyst II. Therefore, the rate of \$20.98 [based on the 1992 BLS survey] would have been retained." AR C.

^{5/} Clark did not express any concern regarding the wage rate for the Secretary IV job classification when submitting his original request for review and reconsideration of the wage determination rate for the flight instructor job classification. *See* AR 5. Because this issue was not addressed to the Acting Administrator for consideration, as required by 29 C.F.R. §4.56, we find that Clark's later challenge to the wage rate for the Secretary IV in WD 94-2070 (Rev. 7) is not properly before the Board.

The Administrator subsequently moved to dismiss Clark's petition, asserting that once the Wage and Hour Division had issued the new wage rate for the Flight Simulator/Instructor (Pilot) in Revision 7, it was necessary for Clark to submit a new request for review and reconsideration to the Administrator under 29 C.F.R. §4.56 before appealing to this Board. By order dated July 20, 1998, the Board denied the Administrator's motion, remanded the matter to the Administrator for a supplemental decision, and ordered briefing. By letter of August 4, 1998, issued by Corlis Sellers, National Office Program Administrator, the Acting Administrator reaffirmed the slotting of the Flight Simulator/Instructor (Pilot) with the Computer Systems Analyst II and the "capped" hourly wage rate of \$24.13 published in WD 94-2070 (Rev. 7). AR A.

DISCUSSION

Clark has presented three issues in this case for review by the Board: (a) the Administrator's "slotting" of the Flight Simulator/Instructor (Pilot) job with the Computer Systems Analyst II position; (b) the appropriateness of the "capped" \$24.13 hourly wage rate in WD 94-2070 (Rev. 7); and (c) whether the wage rates for the flight instructors at Travis AFB should be increased retroactively to incorporate the results of the 1994 BLS survey. We consider each of these questions in turn.

a. Whether the Flight Simulator/Instructor (Pilot) job classification is appropriately "slotted" with the Computer Systems Analyst II.

The process of determining wage rates is dependent on the gathering of statistical data documenting wage payments in different localities. The Wage and Hour Division gathers and considers data from a variety of sources, although the most frequent sources of information are the wage surveys conducted by the Bureau of Labor Statistics. 29 C.F.R. §4.51(a).

The SCA regulations recognize that in some situations, the Division may not have survey data directly documenting local wage rates for a particular job classification that will be needed on a federal service contract. When this occurs,

[e]stablishment of a prevailing wage rate for certain such classifications may be accomplished through a "slotting" procedure, such as that used under the Federal pay system. 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.

29 C.F.R. §4.51(c). Because the BLS does not survey wage rates for workers performing the duties of a Flight Simulator/Instructor (Pilot), the Division relies on the "slotting" procedure for developing a flight instructor wage rate, *i.e.*, the Division issues a flight instructor wage rate based on the wage determination rate for a similar position. The validity of the "slotting"

procedure has been affirmed in prior SCA decisions. *See Kord's Metro Services, Inc.*, BSCA Case No. 94-06 (Aug. 24, 1994) *slip op.* at 5; *Meldick Services, Inc.*, 87-CBV-07, Dep'y Sec'y (Mar. 23, 1990); *Big Boy Facilities, Inc.*, 88-CBV-7, Dep'y Sec'y (Jan. 3, 1989) *slip op.* at 13-14.

For slotting purposes, the Wage and Hour Division has concluded that the Computer Systems Analyst II is a sufficiently similar job classification to the Flight Simulator/Instructor (Pilot). The two job classifications have been found to be equivalent in rank to a federal GS-11 rating. According to the Division, this ranking was examined and affirmed by the Office of Personnel Management during a review of the fourth edition of the Service Contract Act Directory of Occupations (January, 1993). AR E.

Clark asserts that there are Air Reserve Technicians working near his worksite who are classified and paid as GS-13 employees, and who perform work similar to the work performed by the flight instructors at Travis AFB. AR F. However, Clark's representation is anecdotal, unsupported by affidavits, job descriptions or other documents that might warrant consideration by the Administrator. In essence, Clark has supplied no real evidence to justify a different ranking. Moreover, we believe it is significant that the GS-11 rating of the Flight Simulator/Instructor (Pilot) has the concurrence of the Office of Personnel Management, which has substantial expertise in the field of personnel classification. For these reasons, we agree with the Administrator's decision reaffirming the slotting of the Flight Simulator/Instructor (Pilot) job classification with a comparable GS-11 equivalent position, the Computer Systems Analyst II.

b. Whether the \$24.13/hr. "capped" wage determination rate for the Flight Simulator/Instructor (Pilot) is a reasonable exercise of the Acting Administrator's discretion.

The Service Contract Act requires the Secretary to determine locally-prevailing wage rates for the various classes of workers employed on federal service contracts, but does not prescribe any particular method for determining the prevailing rate. *See* 41 U.S.C. §351(a)(1). The SCA regulations indicate that wage determination rates are issued by the Wage and Hour Division after considering "all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made[,]" with a recognition that surveys conducted by the BLS are a primary source of data used by the Wage and Hour Division. 29 C.F.R. §4.51(a). The Administrator exercises broad discretion when issuing wage determinations; the Board reviews the Administrator's decisions to insure that this discretion has been exercised reasonably. *See generally Service Employees Int'l Union, AFL-CIO ("SEIU")*, BSCA Case No. 92-01 (Aug. 28, 1992).

Of necessity, the issuance of wage determinations by the Administrator requires the exercise of significant discretion. The Administrator is required each year to issue wage determinations for thousands of different service worker job classifications throughout the United States. Reliable survey data is not always available for each of these job classifications

on a current basis, compelling the Administrator to devise appropriate guidelines and procedures for implementing the wage determination program, consistent with the statutory mandate that workers on federal service contracts be paid no-less-than the locally prevailing wage and fringe benefit rate.

The February 1992 BLS Occupational Compensation Survey for the Vallejo-Fairfield-Napa, CA area documented a mean hourly wage of \$20.98 for workers in the Computer Systems Analyst II position. AR K. This wage rate was adopted by the Wage and Hour Division as the locally-prevailing rate for both the Analyst II and flight instructor positions. *See* AR H.^{6/}

Two years later, the February 1994 BLS survey documented a mean hourly rate of \$23.77 for the Analyst II job title; however, this higher wage survey data was never incorporated into the Analyst II or flight instructor wage determination because the survey data for the Analyst II was found to be skewed. AR C. Thus, it appears that the \$20.98/hr. wage determination rate both for the Analyst II and flight instructor job categories was unchanged for approximately five years until a new Revision 7 was issued in February 1998, based on the March 1996 BLS survey for the San Francisco-Oakland-San Jose Consolidated Metropolitan Area.

When updating the wage rates in Revision 7, however, the Division did not adopt the full \$26.98/hr. mean wage rate for Computer Systems Analysts, but instead applied a policy of capping any wage increases at 15 per cent of the level in the prior wage determination. Although there are several references in the record to the Acting Administrator's policy of capping wage increases at 15 per cent, nowhere in the record is this policy explained, nor is there a citation to any internal guidelines establishing the policy. The "cap" policy is explained only by counsel in the Statement of the Acting Administrator in Opposition to the Petition (Admin. Statement):

The wage rate for the Computer System Analyst II contained in WD 94-2070 (Rev. 7) represents a 15 percent increase over the rate set forth in the previous wage determination (Rev. 6). It is true that the 1996 BLS survey data, which Wage and Hour viewed as the best available data for determining the wage rates in WD 94-2070 (Rev. 7), show survey rates that are higher than those contained in the wage determination. However, as the Department states in its preamble to the final rules adopting a new methodology for establishing minimum health and welfare benefits requirements under the SCA and allowing a period to phase in the new fringe rates, the Department has the responsibility and discretion under the SCA to determine prevailing wage rates and

^{6/} The earliest wage determination found in the Administrative Record (WD 94-2070 (Rev. 6)) was issued in 1997. It is unclear when the \$20.98/hr. rate from the February 1992 BLS survey was first incorporated into the wage determination applicable to Travis AFB, but we assume that the incorporation of the \$20.98 rate occurred soon after the BLS survey was released in June, 1992.

fringe benefits in a manner “which is administrable and not unduly disruptive for employees, contractors, contracting agencies, and the Department [of Labor].” 29 C.F.R. Part 4, 61 Fed. Reg. 68647, 68654 (December 30, 1996). To meet these ends, the Department, when faced with data showing an increase in wages of more than 15 percent of the previous rate paid on the contract, generally will limit prevailing wage increases to no more than 15 percent for the succeeding contract year. Similarly, when presented with survey data showing lower wages, Wage and Hour usually will not decrease the rates in the wage determination until two BLS surveys demonstrate a real downward trend and indicate that the lower rates on one survey were not an aberration.

There are good reasons for this practice. First, BLS area wage surveys are based on samples, rather than the entire population and therefore, have an inherent margin of error. [footnote omitted] Wage and Hour’s experience has demonstrated that regardless of the thoroughness of the survey methodology, data may shift inexplicably from one survey to the next producing great changes upward or downward. Moreover, survey results are dependent upon many factors, including the sample size, the geographic scope of the surveys and the number and nature of the business entities that provide data.

* * *

. . . Strict adherence to survey data could produce wide fluctuations in wage rates received by service workers from year-to-year on SCA-covered contracts. Clearly, if the Department were to recognize a 30 percent increase, as is sought by Clark in this case, and subsequent survey data were to show such increase to be aberrational, the Department would be placed in the untenable position of having to cut wages, thus causing financial hardship to the employees. . . . The Department follows instead a reasonable policy of prudently interpreting the survey data so that wages, while reflective of local wage data, are generally subject only to steady, reasonable increases (or decreases) without serious disruption to employees, contractors or the contracting agencies.

Admin. Statement at 8-12 (emphasis supplied).

In light of the inherent problems associated with wage surveys and the need for program guidelines that are administrable and produce consistent results, the Administrator’s policy of “generally ... limit[ing] prevailing wage increases to no more than 15 percent for the succeeding

contract year,” *id.*, impresses the Board as being reasonable in most circumstances. However, Clark’s challenge focuses more narrowly on the unique facts of this case, *i.e.*, the Wage and Hour Division’s 1998 decision to apply the 15 per cent cap *combined with* its pre-1997 decision not to incorporate the results of the 1994 BLS survey into the flight instructor wage determination. While a cap on wage determination increases may be a reasonable policy when the “old” wage determination is based on wage information that was reasonably current when the determination was issued, it is obvious that the reasonableness of such a policy comes into doubt when the same cap is applied to an “old” wage determination which itself is based on data that is five years old.

In this case, the Administrator made two reasonable decisions which have produced an unreasonable result. First, when confronted with 1994 BLS survey data for the Computer Systems Analyst II position that was statistically questionable (*i.e.*, skewed data), it was reasonable for the Administrator to reissue a wage determination based on the 1992 BLS survey (*i.e.*, \$20.98/hr.), in the absence of alternative wage data. Second, when confronted with the significantly higher \$26.98/hr. mean wage rate for the Computer Systems Analyst II found in the 1996 BLS survey, we do not find it surprising that the Administrator routinely would apply the 15 per cent cap on increases above the rates in the prior wage determination, thereby resulting in the \$24.13/hr. rate found in WD 94-2070 (Rev. 7) issued in February 1998.

However, once Clark submitted his request for review and reconsideration of the Flight Simulator/Instructor (Pilot) wage determination rate, thereby calling to the Administrator’s attention the fact that the 15 per cent cap was being applied to a wage determination rate based on outdated data, it is our view that the Administrator should have reviewed the challenged \$20.98 /hr. wage rate “based on all available pertinent information.” 29 C.F.R. §4.51(a).

By the time the Administrator responded to Clark by publishing WD 94-2070 (Rev. 7), the Administrator was in possession of both the 1994 BLS survey data and the 1996 BLS survey data. Viewing the available statistical evidence in its totality, the data in the 1996 BLS survey plainly shows that the \$23.77 mean hourly rate for the Analyst II in the 1994 BLS survey was fairly accurate, even if the data observations were skewed. In our view, it was unreasonable for the Administrator to cap a 1998 increase for the Flight Simulator/Instructor (Pilot) to a wage determination based on 1992 survey data for the Computer Systems Analyst II position, when the data before the Administrator in 1998 demonstrated that an intermediate wage increase based on the 1994 data might have been justifiable, with the benefit of hindsight. In 1998, we believe it would have been more reasonable for the Administrator to apply the 15 per cent cap on wage determination increases to the data from the 1994 BLS survey (*i.e.*, the \$23.77/hr. rate), rather than to a wage determination based on the 1992 BLS survey. We therefore will remand this matter to the Administrator for issuance of a new wage determination for the Flight Simulator/Instructor (Pilot) in accordance with this standard.

In issuing this order of remand, the Board recognizes fully that it is the Administrator’s responsibility to determine the prevailing rate of wages, and not the Board’s. However, it is our view that exigent circumstances justify this approach. Based on the pleadings in this case, it

appears that Raytheon's training contract with the Air Force has an October 1 anniversary date. Clark submitted his request for review of the wage determination over a year ago in July 1997, which should have provided sufficient time to receive a response from the Wage and Hour Division before the October 1, 1998 start of the FY 99 fiscal year. However, Clark did not receive a final decision from the Administrator until the publication of WD 94-2070 (Rev. 7) in February, 1998. With a new procurement year impending, we believe it would be manifestly unfair to the flight instructors employed on this procurement contract if the Department did not generate a revised wage determination based on all the available data prior to the beginning of the new procurement year.

As noted above, Clark's petition for review is limited to the specific and unusual facts associated with the Flight Simulator/Instructor (Pilot) wage determination applicable to the flight instructors at Travis AFB, and does not challenge existing Wage and Hour policies and procedures more generally. Similarly, our decision is limited to the facts presented in this case, and does not address general Wage and Hour practices.

c. Whether the Flight Simulator/Instructor (Pilot) wage determinations applicable to the Travis AFB should be modified retroactively, based on the 1994 BLS survey data, with an award of back pay.

Clark's petition also requests that the flight instructors be awarded back pay based on the 1994 BLS survey data. This request must be denied, for two reasons.

First, as we have noted above, we find that it was within the Administrator's discretion to decline to rely on the 1994 BLS survey data when issuing WD 94-2070 (Rev. 6) and its predecessor wage determinations. Because the BLS data was skewed, it was reasonable for the Administrator to question its accuracy, and to rely on the earlier 1992 BLS data.

Second, Clark's request for back pay implicitly is a request to review and modify the wage determinations that were part of prior years' procurement contracts, long after the contracts were awarded. The Secretary's SCA regulations specifically prohibit reconsideration of the rates in a wage determination after a contract has been bid, or less than 10 days before the commencement of a contract in the case of an extension. 29 C.F.R. §4.55(a). Clark's request therefore is untimely. Moreover, even in the event of a timely challenge to a wage determination, the Board is not authorized to issue a decision that will "affect the contract after such award, exercise of option, or extension." 29 C.F.R. §8.6(d). *See also Fort Hood Barbers Assoc.*, ARB Case No. 96-132 (Nov. 12, 1996), *aff'd sub nom. Fort Hood Barbers Assoc. v. Herman*, 137 F.3d 302 (5th Cir. 1998); *Rams Specialized Security Services, Inc.*, BSCA Case No. 92-25 (Sept. 23, 1992).

CONCLUSION

For the foregoing reasons, Clark's petition to reclassify the Flight Simulator/Instructor (Pilot) job title and "slot" it at a higher pay classification is DENIED. Clark's petition for back

pay is DENIED. Clark's petition for review of the Flight Simulator/Instructor (Pilot) wage determination applicable to Travis AFB is GRANTED, and this matter is REMANDED to the Administrator with instructions to issue immediately a revised wage determination consistent with this decision.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member