



In the Matter of:

**IMMIGRATION AND
NATURALIZATION SERVICE**

ARB Case No. 99-122

DATE: March 31, 2000

***In re: Review and Reconsideration
of Wage Rates for Detention Officers in
Union County, N.J., WD 94-2353, Rev. 9***

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Gerald Riordan, U.S. Department of Justice, Immigration and Naturalization Service, South Burlington, Vermont

For the Respondent:

Roger Wilkinson, Esq.; Douglas Davidson, Esq.; Steven Mandel, Esq., U.S. Department of Labor, Washington, D.C.

For the Intervenor:

Dannie B. Fogleman, Esq., Ford & Harrison, LLP, Washington, D.C.

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board (ARB) pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C. §351 *et seq.* (1994), and implementing regulations set forth at 29 C.F.R. Parts 4 and 8 (1999). Petitioner Immigration and Naturalization Service (the INS) seeks review of a final ruling by the designee of the Labor Department's Wage and Hour Deputy Administrator (Administrator) denying the INS's request for review and reconsideration of the Detention Officer wage rate contained in Service Contract Act Wage Determination (WD) 94-2353 (Rev. 9). We have jurisdiction over the appeal under 29 C.F.R. §§4.56(b) and 8.1(b) (1999).

BACKGROUND

The INS operates a detention facility in Elizabeth, New Jersey, for aliens who are detained temporarily in the agency's custody. On June 19, 1998, the INS submitted a Standard Form (SF)-98, "Notice of Intention to Make a Service Contract and Response to Notice," to the Department of Labor's Wage and Hour Division giving notice that INS was soliciting bids from

private service contractors to operate the facility for the temporary residential care and housing of detained aliens. The SF-98 submitted by the INS specifically indicated that workers in the “Detention Officer” job classification would be employed on the contract. Administrative Record (AR), Tab C, Attachment 1.

In response to the INS’s notice, the Wage and Hour Division issued several wage determinations. Among the wage determinations was Wage Determination 94-2353 (Rev. 9) (6/1/98), applicable to service contracts in the New Jersey Counties of Essex, Hudson, Morris, Sussex and Union. AR Tab D. Elizabeth, New Jersey, is in Union County. This wage determination included a \$21.30/hr. wage rate for the Detention Officer job classification.

WD 94-2353 was based on a 1995 Bureau of Labor Statistics (BLS) Occupational Compensation Survey for the Newark Primary Metropolitan Statistical Area, consisting of Essex, Morris, Sussex and Union Counties. AR Tabs A, E. The BLS Survey did not include published wage data for Detention Officers, one of the primary positions to be utilized in the solicited contract. However, because the Survey did include wage rates for Firefighter (\$20.81/hr.) and Police Officer (\$21.78/hr.) – both protective service occupations with the same Federal grade equivalent 6 rating as Detention Officer – the Wage and Hour Division imputed a wage rate for Detention Officers by averaging the firefighter and police officer rates, using the “slotting” methodology provided in 29 C.F.R. §4.51(c) (1999). This resulted in the wage rate for Detention Officer of \$21.30 per hour. AR Tab A.

After receiving the Labor Department’s wage determination, the INS contracting officer wrote to the Administrator on July 19, 1999, requesting review of the wage rate for Detention Officer. AR Tab C; *see* 29 C.F.R. §4.56(a). INS asserted that the Detention Officer rate should not be slotted with other occupations because the position is specific to the INS. AR Tab C. Among the various materials submitted by INS was an extensive position description for a Detention Officer. AR Tab C, Attachment 2.

In a final ruling letter issued September 2, 1999, by the Administrator’s designee, Charles E. Pugh, Deputy National Office Program Administrator, the Administrator denied the INS’s request for review and reconsideration, explaining that when

a wage survey for a particular locality . . . result[s] in insufficient data for one or more job classifications . . . [e]stablishment of a prevailing wage for certain such classifications may be accomplished through a ‘slotting’ procedure. . . . 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.

AR Tab A. The Administrator noted that the Detention Officer, Firefighter and Police Officer classifications all have Federal grade equivalents of GS-6, that there was no independent wage

data from the BLS survey to establish a wage rate for the Detention Officer classification, and that it therefore was appropriate to derive a rate for the Detention Officer by averaging the Firefighter and Police Officer rates. *Id.*

The INS appealed the Administrator's Final Ruling letter to the ARB on September 21, 1999. Corrections Corporation of America (CCA), which operates the INS's Elizabeth, N.J., detention facility and was the only bidder on the contract, filed a Notice of Intervention on October 19, 1999, and later submitted a brief.

We review the Administrator's final rulings under the Service Contract Act to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of discretion. *Dep't of the Army*, ARB Case Nos. 98-120, 121, and 122 (Dec. 22, 1999), slip op. at 16.

DISCUSSION

The Secretary has the responsibility under the SCA to determine "the minimum monetary wages to be paid the various classes of service employees in the performance of" Federal service contracts in excess of \$2,500. 41 U.S.C. §351(a)(1). The usual method employed by the Secretary to determine wage rates for a service contract is to rely on information in area surveys conducted by the Bureau of Labor Statistics. 29 C.F.R. §4.51(a). When wage data on a specific job classification is not included in a BLS survey, the Department of Labor's SCA regulations provide a method for dealing with this omission called "slotting":

(c) *Slotting wage rates.* In some instances, a wage survey for a particular locality may result in insufficient data for one or more job classifications that are required in the performance of a contract. Establishment 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 [by BLS] and those for which no survey data is available.

29 C.F.R. §4.51(c). The Administrator's slotting methodology frequently has been reviewed by this Board and its predecessors, and has been found to be an appropriate tool for developing wage determination rates under the Act. *See Court Security Officers [of Austin Texas]*, ARB Case No. 98-001 (Sept. 23, 1998), slip op. at 5; *D.B. Clarke III*, ARB Case No. 98-106 (Sept. 8, 1998), slip op. at 4-5; *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. It has been held that "[s]lotting is a necessary tool used by the Wage and Hour Division in coping with the need to issue large numbers of wage determinations on a timely basis." *Richard L. Roudebush VA*

Medical Center, Case No. 90-SCA-1, Dep’y Sec’y Dec. (Jan. 21, 1992), slip op. at 4. In addition, the Board has held more generally that when reviewing wage determinations, it will “ordinarily defer to the expertise and experience of the Administrator, and will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision, taking into account the applicable law and the facts of the case.” *Court Security Officers [of Austin Texas]*, slip op. at 4.

In its Request for Review and Reconsideration, the INS made two major arguments. First, the agency argued that it is inappropriate to slot the Detention Officer with the police office or firefighter classifications, because the duties of the Detention Officer are “specific” to the INS. AR Tab C at 1. Second, the INS questioned the appropriateness of the \$21.30/hr. wage rate because it is substantially higher than the rates that allegedly would be paid to Federal employees performing this work. *Id.* Attached to the INS submission were a variety of SCA wage determinations for the New York and New Jersey areas, along with the INS’s position description for Detention Officers and a brief tabulation compiled by the INS of the salary levels paid to Federal employees performing this work. *Id.*, Attachments 1, 2, and 3.

Before the ARB, the INS offers additional information and argument in support of its claim that the \$21.30/hr. wage rate for Detention Officers is excessive. The agency asserts that this work historically has been performed by Federal employees in GS-5 through GS-7 grades, and that the Federal salaries for these grades in the New York – New Jersey area range from \$14.11/hr. to \$16.06/hr. Petition for Review (PR) at 2. INS represents that unionized Detention Officers employed by INS contractors at a separate facility in the New York area are paid a rate of \$13.50/hr., and that similarly unionized Detention Officers at a Miami, Florida, facility earn \$12.97/hr. *Id.* In addition, the INS notes that the Wage and Hour Division’s wage determination rates for Detention Officers in the Newark area have increased from \$11.02/hr. in 1995 to \$21.30/hr. in 1999; the agency states that “prior to the establishment of the Detention Officer classification, INS contracted for approximately one hundred fifty nine (159) full time equivalent employees for detention services within the Elizabeth, New Jersey area at a rate of \$12.50/hr. vs. the current WD 94-2353 rate of \$21.30/hr.” *Id.*^{1/} In addition to this information concerning the *rate* of wages paid to Detention Officers in various locales, the agency reasserts that the Detention Officer classification is unique to the INS, and adds that the corps of Detention Officers employed at its facilities “comprises over 90 percent of the individuals employed within this specific occupation field in the New York/New Jersey area.” *Id.* The INS summarizes its petition by stating that:

It is apparent that the wage contained in the Determination does not reflect a reasonable correlation to actual wages being paid with the Detention Officer occupation. I can only attribute such

^{1/} Nowhere in its pleading does the INS declare specifically what job classification was assigned to these workers, who apparently provided “detention services” without being classified as Detention Officers.

difference to the methodology utilized in determining these rates. I am requesting that the Department of Labor utilize actual survey data to arrive at the prevailing wage rate for Detention Officers. The Immigration and Naturalization [Service] is prepared to assist the Department of Labor in obtain[ing] any wage data your office feels is necessary to be included in an actual survey of the Detention Officer occupation.

Id.

In its Reply Brief, Corrections Corporation of America criticizes the Administrator's decision to "slot" the Detention Officers' wage rate based on the other protective service classifications (*i.e.*, firefighters, police officers) rather than generate direct wage data by conducting a survey. CCA asserts that independent wage data on Detention Officers' pay rates were readily available and should have been obtained by the Division. Reply Brief of Intervenor Corrections Corporation of America (CCA Brief) at 2. CCA attaches a list of pay rates for corrections personnel in New Jersey showing salaries for corrections officers ranging from \$15,283/yr. to \$53,732/yr., accompanied by an affidavit of the company's Personnel Coordinator describing his methodology in assembling the data. *Id.*, Declaration of Robert Barry. In addition, CCA argues that the Detention Officer position simply is not comparable in its level of responsibility to the work of police officer or firefighter. *Id.* at 5-7. CCA asserts, *inter alia*, that whereas police officers arrest criminals and typically are armed, Detention Officers do not arrest criminals and typically are not armed.

We have considered the arguments raised by the INS and CCA carefully, and join the Administrator in concluding that they are unpersuasive.

At the outset, we note an important procedural consideration in our evaluation of the Administrator's decision. In Service Contract Act cases, the Administrative Review Board's role is to provide appellate review of the Administrator's decisions "on the basis of the entire record before it." 29 C.F.R. §8.1(b). The "Review and Reconsideration" procedure of the SCA regulations requires that any party asserting that the Administrator's wage determination rates are incorrect must submit evidence in support of its claim *at the time it requests reconsideration*. 29 C.F.R. §4.56(a) ("Any such request must be accompanied by supporting evidence"). When submitting materials to the Board for review, a petitioning party is directed to declare that "all data or other evidence submitted [to the Board] have previously been submitted to the Administrator." 29 C.F.R. §8.4(a)(7).

Our primary focus, then, must be on the record that was developed before the Administrator. *See* 29 C.F.R. §8.1(c), (d). To the extent that we review extra-record materials that accompany a petition for review or other pleadings – *i.e.*, materials that were not previously submitted to the Administrator – our limited concern is to decide whether they raise questions that warrant a remand to the Administrator for additional evaluation. 29 C.F.R. §8.1(d) (ARB "may remand with appropriate instructions any case for the taking of additional evidence and

the making of new or modified findings by reason of the additional evidence”); *Dep’t of the Army*, slip op. at 11, n. 10; *see also COBRO Corp.*, ARB Case No. 97-104 (July 30, 1999), slip op. at 12, n.10 and cases cited therein.

We address first the two arguments that the INS made in its Request for Review and Reconsideration: (a) the disparity between the wage determination rate for Detention Officer and the rates allegedly paid to Federal employees performing similar work, and (b) the allegedly INS-specific characteristics of the Detention Officer position.

The fact that the Detention Officer wage rate in the wage determination may be higher than the comparable rates for Federal employees performing the same task does not, in itself, require reversal of the wage determination. Under the Service Contract Act, the Secretary is responsible for developing wage schedules that reflect locally prevailing wage rates. 41 U.S.C. §351. The Secretary’s discretion in the wage determination process is extraordinarily broad. *See Dep’t of the Army*, slip op. at 25 and cases cited therein. While it is true that the Secretary is required to give “due consideration” to the wage rates that would be paid Federal employees when issuing wage determinations (41 U.S.C. §351(d)), the legislative goal of this 1972 provision is to encourage the Secretary to take steps to “narrow[] the gap” between the wage rates and fringe benefits for service employees and the higher rates that typically were found to exist for Federal workers performing similar work. *See* 29 C.F.R. §4.52(d). In this case, the wage rates for the police officer and firefighter job classifications are based on unchallenged BLS survey data specifically gathered from the Newark locality, whereas the Federal pay rates of the GS schedule are nationally-based rates with a modest locality pay adjustment tied to local economic conditions. Thus, the BLS data on police officers and fire fighters is more closely tied to actual local wage conditions. We find that it was fully appropriate for the Administrator to use the slotting procedure to develop a wage rate for the Detention Officer classification based on the local wage data for other protective service occupations at the equivalent level, rather than rely on pay rates for Federal employees that primarily reflect national pay levels.

With regard to the INS’s contention that the work of its Detention Officers is agency-specific, the argument is simply misplaced. When requesting a wage determination for the service contract at the Elizabeth, NJ, site, the INS identified “Detention Officer” as one of the required job categories. In order to be consistent when issuing wage determinations nationwide, the Wage and Hour Division has developed a Service Contract Act Directory of Occupations with job descriptions for a wide variety of classifications. *See* AR Tab F. The Directory, which is available on the Internet at the Division’s website, provides the following position description (PD) for the Detention Officer classification:

27040 DETENTION OFFICER

Performs various duties related to detention, safeguarding, security and escort of violators of immigration laws. Exercises surveillance over detainees, and maintains order and discipline. Attends to sheltering, feeding, and physical well-being of

detainees; and counseling of alien detainees on personal matters. Guards detainees at deportation or exclusion hearings. Recognizes potentially hazardous health, safety, security, or discipline problems. Supervises voluntary work details, and encourages participation in organized recreational activities.

Id. This is the standard description used by the Division to develop the wage determination rate for the Detention Officer that was requested by the INS in the SF-98 submission. The Wage and Hour Division provided precisely what the INS asked for.

If the INS believed that the employees at the Elizabeth facility are performing work that is substantially different from this standard job description, it should not have identified the workers as “Detention Officers” and requested a Detention Officer SCA wage rate. However, we note that as part of its Request for Review and Reconsideration, the INS submitted its own detailed position description for the Detention Officer job. *See* AR Tab C, Attachment 2. The lengthy INS PD is fully consistent with the job description quoted above; if anything, the INS position description suggests that the responsibilities of the INS Detention Officers are even *greater* than those listed in the SCA Directory of Occupations definition, declaring that “a majority of detainees . . . [the Detention Officer] deals with are or have been convicted of various criminal acts and have served time in maximum type penal institutions and could pose an extreme threat to safety and security.” *Id.* at ¶4. We note also that under the INS’s PD, the Detention Officer “must be proficient in the use of firearms and must maintain a satisfactory competency with such weapons.” *Id.* at §IV. Based on the record before us, we find no reason to conclude that a special wage rate for the INS Detention Officer is required.

We have reviewed the additional extra-record information provided by the INS and CCA, and have not identified any materials that would lead us to remand the case to the Administrator for further consideration. The INS representations about collectively-bargained rates in other localities (New York, Miami) simply are not germane to the prevailing wage rate in the locality that the Administrator has found to be appropriate, *i.e.*, the Newark, N.J., area. And although the raw pay scales compiled by CCA for corrections officers and detention officers in New Jersey are interesting, many of the pay rates for these officials appear to *higher* than the Detention Officer rate determined by the Administrator.^{2/} In sum, even if we were to accept CCA’s data, which is submitted outside the formal Administrative Record of the case, we would

^{2/} The CCA data does not include key information that normally would be needed to evaluate its relationship to a locally “prevailing rate,” such as position descriptions and detailed information concerning the number of workers employed at the various pay levels. The “review and reconsideration” procedure contemplates that this kind of *complete* presentation would be submitted in the first instance to the Administrator, in which case it also would become part of the record considered by the Board on appeal. As noted, the Board is precluded from basing its decision on extra-record materials; however, when reliable data is presented calling into question the Administrator’s decision, the Board has discretion to consider a remand. 29 C.F.R. §8.1(d); *COBRO Corp., supra*.

see no compelling reason to require the Administrator to revisit the wage determination.^{3/} *Dep't of the Army, supra; COBRO Corp., supra.*

Under the slotting procedure, “wage rates are derived for a classification based on a comparison of *equivalent or similar* job duty and *skill characteristics . . .*” 29 C.F.R. §4.51(c) (emphasis added). The Administrator acted within his discretion in comparing Detention Officers and Police Officers and Firefighters – all Federal Grade 6 equivalents – where the jobs have equivalent or similar duties and skill characteristics, even if they are not identical. Furthermore, the regulations provide that information to be considered in determining the prevailing rate in the locality “*may . . . be obtained . . . from . . . other sources,*” 29 C.F.R. §4.51(a), or “*establishment of a prevailing wage rate . . . may be accomplished through a ‘slotting’ procedure . . .*” 29 C.F.R. §4.51(c) (emphasis added). The Administrator therefore had discretion to utilize the slotting procedure rather than seek out other wage rate data for the locality, and we defer to this exercise of discretion where it was reasonable, consistent with the regulations, and not an unexplained departure from past determinations.

For the reasons discussed above, the INS’s petition is **DENIED**.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member

^{3/} We note also that some of the assertions in CCA’s brief concerning the work performed by its Detention Officers are flatly contradicted by the rigorous requirements found in the INS’s position description.