



In the Matter of:

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 114**

ARB CASE NO: 02-012

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2419 (Rev. 18)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 56**

ARB CASE NO: 02-013

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2415 (Rev. 19)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 85**

ARB CASE NO: 02-014

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2517 (Rev. 21)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 68**

ARB CASE NO: 02-015

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2497 (Rev. 17)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 112**

ARB CASE NO: 02-016

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2165 (Rev. 17)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 94**

ARB CASE NO: 02-017

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2401 (Rev. 20)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 85**

ARB CASE NO: 02-018

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2521 (Rev. 22)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 130**

ARB CASE NO: 02-019

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2431 (Rev. 18)**

**UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL 137
and INDEPENDENT COURT SECURITY
OFFICERS, LOCAL UNION 142**

ARB CASE NO: 02-020

DATE: September 29, 2003

**In re: Substantial Wage Variance
Between Local Collective Bargaining
Agreement Wage and Local
Prevailing Wage Determination
No. 94-2413 (Rev. 15)**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Leslie Deak, Esq., Washington, D.C.

For Respondent Administrator, Wage and Hour Division:

**Lois R. Zuckerman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,
Howard M. Radzely, Esq., Acting Solicitor, U.S. Department of Labor,
Washington, D.C.**

For Intervenor The International Brotherhood of Electrical Workers:

**Terry R. Yellig, Esq., Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington,
D.C.**

FINAL DECISION AND ORDER

This case concerns the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C.A. § 351 *et seq.* (West 1994) (SCA) and 29 C.F.R. Parts 6 and 8 (2002). The United Government Security Officers of America International Union (UGSOA), on behalf of nine local unions, petitions the Administrative Review Board ("ARB" or "Board") to review the November 1, 2001 and the November 5, 2001 final rulings of William W. Gross, Director, Office of Wage Determinations, Employment Standards Division. Gross was acting on behalf of the Acting Administrator, Wage and Hour Division (Administrator). In view of the similarity of issues and in the interest of judicial and administrative economy, the nine petitions have been consolidated for review and decision. We vacate the Administrator's final rulings that denied UGSOA's request for substantial variance hearings pursuant to Section 4(c) of the SCA.

BACKGROUND

The parties do not dispute the facts. The United States Marshall Service entered into government contracts with AKAL Security, Inc. (AKAL) to provide court security officer services for federal buildings located within the jurisdiction of the United States Courts of Appeals for the Fifth, Sixth and Tenth Circuits. The Marshall Service also contracted with United International Investigative Services, Inc. (United International) for court security officer services for federal buildings located within the Fourth Circuit and with Knight Protective Service, Inc. (Knight) to provide court security officer services for federal buildings located within the jurisdiction of the Seventh Circuit. The

SCA governs these contracts. UGSOA is the union representing the court security officers of AKAL, United International, and Knight. UGSOA's local unions entered into collective bargaining agreements with AKAL, United International, and Knight. These agreements specified the wages to be paid to their members.¹

Between August 22, 2001, and September 26, 2001, pursuant to 41 U.S.C.A. § 353(c), UGSOA requested the Administrator to schedule hearings to determine whether the wages specified in the collective bargaining agreements (CBA) were substantially at variance with the prevailing wages for similar services in the nine union localities. Under the Act and its implementing regulations, wage determinations are incorporated into the contract specifications for each Federal service contract. Two different types of wage determinations are issued. For service contracts at worksites where an existing CBA governs employee wage and fringe benefit rates, the wage determination rates are based on the rates in the labor agreement. 41 U.S.C.A. § 351(a)(1), (2); 29 C.F.R. § 4.53. For sites where a CBA does not exist, i.e., non-union labor, the Administrator issues a wage determination that reflects wages and fringe benefits "prevailing . . . for such [service] employees in the locality." 41 U.S.C.A. § 351(a)(1)(2); 29 C.F.R. § 4.52. The Administrator's "prevailing in the locality" wage determinations are based on wage data the Bureau of Labor Statistics (BLS) compiles from conducting surveys. 29 C.F.R. § 4.52(a). In 2001 the non-collectively bargained prevailing wage rates among the nine localities involved here ranged from \$1.24 to \$4.83 higher than the collectively bargained rates. *Compare* Record Tabs B1, D1, F1, H1, L1, P1, T1, X1, BB1-2 *with* Record Tabs B2, D2, F2, H2, L2, P2, T2, X2, BB3.

By letters dated November 1, 2001, and November 5, 2001, Gross responded to UGSOA's requests for hearings. He wrote that the 1989 Fourth Circuit Court of Appeals decision in *Gracey v. International Brotherhood of Electrical Workers, Local Union No. 1340*, 868 F.2d 671 (4th Cir. 1989)(Phillips, J., dissenting) "indicates that substantial variance proceedings may only be utilized if the collective bargaining rate is higher than the prevailing rate." Accordingly, Gross denied UGSOA's requests for substantial variance hearings.

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, 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

¹ The parties do not dispute that the collective bargaining agreements were negotiated at arm's-length. Furthermore, although the record does not contain any predecessor contracts, the parties also do not dispute that the collectively bargained wage rates at issue here are not less than those contained in predecessor contracts. *See* 41 U.S.C.A. § 353(c).

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. U.S. Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed de novo. *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 *Dep't of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 34-36 (ARB Dec. 22, 1999).

STATEMENT OF ISSUE

Whether the Administrator reasonably exercised her authority under the SCA in denying UGSOA's requests for substantial variance hearings.

DISCUSSION

Statutory Background

Section 4(c) of the SCA provides:

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided*, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

41 U.S.C.A. § 353(c).

Gracey

In *Gracey*, the Fourth Circuit majority held, that under Section 4(c), if the wage and benefit levels of a CBA are at least the same as those of its predecessor, "no power vests in the Secretary to set aside an arms-length collective bargaining agreement solely

because wages are below the prevailing rate.” *Gracey*, 868 F.2d at 677. In his dissent, Judge Phillips stated that because he found Section 4(c) was patently ambiguous, he would defer to the Secretary’s “consistent” and “long-standing contrary interpretation” that permitted a substantial variance hearing when CBA wages were below the prevailing rate. *Gracey*, 868 F.2d at 677, 680-681. The Secretary of Labor, however, did not file a brief or participate in the Fourth Circuit proceedings. *Gracey*, 868 F.2d at 673, 677, 681 n.4.

Degree of Deference Owed to the Administrator’s Final Rulings

Although the Board is delegated authority and assigned responsibility to act for the Secretary of Labor in issuing final agency decisions in matters arising under the SCA, Secretary’s Order 1-2002, Fed. Reg. 64,272 (Oct. 17, 2002), the Administrator, not the Board, has primary responsibility for implementing and enforcing the SCA. *See Dep’t of the Army*, slip op. at 34. To that end, the Board and its predecessor agencies have extended broad deference to the Administrator’s interpretations of the Act and its implementing regulations, so long as the Administrator’s interpretation of the Act, policies, and determinations are consistent with the law and are reasonable. *Dep’t of the Army*, slip op. at 34-36.

Administrative interpretation or implementation of a particular statutory provision qualifies for deference when:

it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

U.S. v. Mead Corp., 533 U.S. 218, 226-227 (2001). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Even if the administering agency does not have any express delegation of authority on a particular question, “agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered.” *Mead*, 533 U.S. at 227.

The measure of deference to an agency administering its own statute, absent an express delegation of authority on a particular question, has been understood to “vary with circumstances.” *Mead*, 533 U.S. at 228. The reasonableness of the agency’s view is judged according to many factors, including the quality of the agency’s reasoning, the degree of the agency’s care, its formality, relative expertness, whether the agency is being consistent or, if not, its reasons for making a change, and the persuasiveness of the

agency's position. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944). *See also Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *OFCCP v. Keebler*, ARB No. 97-127, ALJ No. 87-OFC-20, slip op. at 17 (ARB Dec. 21, 1999). "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. *See also, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

The Board employs these same analytical considerations when, as here, we are determining whether the Administrator's interpretation of Section 4(c) is reasonable. "[T]hese principles are equally applicable to agency adjudications when the department head has allocated agency functions in a manner similar to the allocations of functions among Article III courts, the Legislative Branch, and the Executive Branch." *Keebler*, slip op. at 20.² Therefore, the Board will defer to the Administrator's interpretation of Section 4(c) only if the Administrator provided a reasonable and persuasive explanation for her position, *see Skidmore*, 323 U.S. at 140, and not merely an unexamined interpretation of a court decision. *Keebler*, slip op. at 22.

Decision

Preliminarily, we note that since the Administrator's rulings here were not intended to carry the force of law, we do not apply *Chevron* deference. *Mead*, 533 U.S. at 221, 226-227; *Chevron*, 467 U.S. at 843-844. Furthermore, the Administrator's final rulings denying UGSOA's requests for substantial variance hearings do not deserve *Skidmore* deference since they were not based on any of the factors delineated in *Skidmore*. Instead, the Administrator explained her rulings merely by citing *Gracey*. The final ruling letters offer no explanation as to why the Administrator has abandoned a "long-standing" policy permitting substantial variance hearings when, as here, the CBA wage rate was lower than the prevailing wage rate. *See Gracey*, 868 F.2d at 677, 680-681.³ Thus, in light of this inconsistency, we are not persuaded by the Administrator's explanation. *See Skidmore*, 323 U.S. at 140.

² The Administrative Review Board provides the same "adjudicative service" for the Department of Labor's Wage and Hour Division that "reviewing courts ... provide...." *Keebler*, slip op. at 21.

³ In his dissent in *Gracey*, Judge Phillips relied upon evidence in the record before the Fourth Circuit that between 1972, when Section 4(c) was enacted, and 1988, it had been the consistent policy of the Administrator to hold substantial variance hearings for the purpose of determining whether CBA wage rates are below prevailing wage rates. *Gracey*, 868 F.2d at 681. Also, as the Board recently noted, during the first years immediately following enactment of Section 4(c), several substantial variance hearings involving CBA wage rates that were less than the prevailing wage rates were actually tried before Department of Labor

Finally, Department of Labor case law precedent militates against the Administrator's rulings. In 1991, after *Gracey*, the Board of Service Contract Appeals (BSCA)⁴ held, under essentially similar facts, that union members were entitled to be paid the higher prevailing wage rate. See *Randall*, No. 87-SCA-32, slip op. at 8 (Dec. 9, 1991). Moreover, the BSCA also examined an Administrative Law Judge's finding that only CBA wage rates which exceed the prevailing wage rate are "unjustifiable" and thus subject to a substantial variance finding under Section 4(c). That Board held that the ALJ's finding "does not comport with the plain meaning of the statute." See *Applicability of Wage Rates Collectively Bargained by United Healthserv, Inc.*, No. 89-CBV-1, slip op. at 15 (Feb. 4, 1991).

CONCLUSION

The Administrator offered no explanation for her rulings. They are also inconsistent with previous Department of Labor policy and the *Randall* and *United Healthserv* precedent. Consequently, we do not defer to her interpretation of Section 4 (c), and we vacate the Administrator's rulings denying UGSOA's requests for substantial variance hearings.⁵

For the foregoing reasons, the Administrator's November 1, 2001 and November 5, 2001 final rulings denying UGSOA's requests for substantial variance hearings pursuant to Section 4(c) of the SCA are **VACATED**. Accordingly, the Petitions for Review are **GRANTED** and these matters are **REMANDED** to the Administrator for further action consistent with this opinion, the SCA, and its implementing regulations.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

Administrative Law Judges. See *U.S. Dep't of State*, ARB No. 98-114, slip op. at 15-16 n.8 (ARB Feb. 16, 2000).

⁴ Prior to the establishment of the ARB, the BSCA issued SCA final decisions (1992-1996), and before the BSCA was created, the Deputy Secretary of Labor rendered final decisions.

⁵ We are aware that one of these appeals was filed on behalf of court security officer members employed within the jurisdiction of the Fourth Circuit in which *Gracey* was decided. See ARB No. 02-017. We acknowledge that the Fourth Circuit's decision in *Gracey* controls the disposition of ARB No. 02-017.