



**In the Matter of:**

**JAMES A. MACHOS**  
**Lear Siegler Services, Inc.**

**ARB CASE NO. 98-117**

**DATE: May 31, 2001**

***In re: Wage Determination 94-2526 as applied to  
the Flight Simulator/Instructor (Pilot) job classification  
on a service contract at Sheppard AFB, Texas***

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**Appearances:**

*For the Petitioner:*

James A. Machos, *Lear Siegler Services, Inc., Sheppard AFB, Texas*

*For the Respondent:*

Ellen R. Edmond, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,  
*U.S. Department of Labor, Washington, D.C.*

**DECISION AND ORDER OF REMAND**

Petitioner James A. Machos (Machos) is employed by Lear Siegler Services, Inc. (Lear Siegler) on a Federal service contract at Sheppard Air Force Base (AFB), Texas. Machos supervises employees classified as Flight Simulator/Instructors (Pilot), a classification we refer to in this decision as "Flight Instructor." The contract is subject to the prevailing wage labor standards provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (1994) (SCA or the Act).

In October 1995, the Wage and Hour Division published SCA Wage Determination (WD) 94-2526 (Rev. 6), applicable to service contracts in the locality that included Sheppard AFB. The wage determination contained an hourly wage rate of \$17.96 for Flight Instructors. Administrative Record (AR) Tab Q. It appears that WD 94-2526 (Rev. 6) was not updated during 1996. Subsequent revisions of WD 94-2526 were published in 1997, all with the same \$17.96/hr. wage rate for Flight Instructors.<sup>1/</sup>

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<sup>1/</sup> The hourly wage rate of the 1995 wage determination remained at the same rate of \$17.96 under subsequent revisions through 1997: WD 94-2526, Revision 7, dated May 19, 1997 (AR Tab R); Revision 8, dated July 1, 1997 (AR Tab S); and Revision 9, dated September 1, 1997 (AR Tab T). The  
(continued...)

In January 1997, Machos – then employed as a supervisor by UNC Aviation Services, which initially held the flight training contract<sup>2/</sup> – contacted various members of Congress, asserting that the Flight Instructor wage rate at Sheppard AFB was too low and asking them to intervene with the Wage and Hour Division to increase the rate. AR Tabs P, Q. In a series of letters between Machos and representatives of the Wage and Hour Administrator (Administrator), Machos raised a series of specific arguments challenging the \$17.96/hr. rate (discussed in detail, *infra*). In each instance, the Administrator rejected Machos’ arguments and stated that the Flight Instructor rate would remain unchanged until the Wage and Hour Division received new survey data supporting a different wage rate; however, the Administrator was unable to predict when such new survey information would become available. The correspondence ended in a March 13, 1998 “final decision” letter from the Administrator rejecting all of Machos’ claims, and advising him of his right to seek review before this Board. AR Tab A. In March 1998, the SCA wage rate for Flight Instructors at Sheppard AFB was still \$17.96 per hour, unchanged from the rate that had been in effect in October 1995. This Petition followed. We have jurisdiction pursuant to 29 C.F.R. §§4.56(b) and 8.1(b)(1).

In this decision, we first briefly review the processes for predetermination of prevailing wage rates under the Act and the implementing regulations at 29 C.F.R. Part 4 (2000), including the procedure known as “slotting” used to set the Flight Instructor wage rate challenged in this case. We follow with a review of the correspondence between the parties that led to Machos’ appeal before the Board. Finally, we conclude with our analysis of the parties’ legal issues.

We agree with many of the specific findings made in the Administrator’s March 13, 1998, final ruling letter and his earlier correspondence. However, we ultimately conclude that the Administrator’s response to the overarching concern raised by Machos – the Wage and Hour Division’s repeated failure to provide a wage adjustment for the Flight Instructor classification over a period spanning several years, ostensibly because the Division lacked data that would support modifying the wage rate – is inconsistent with the prevailing wage mandate of the SCA and its implementing regulations. We therefore grant Machos’ Petition for Review and remand this case to the Wage and Hour Administrator for further action consistent with this Decision.

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<sup>1/</sup>(...continued)

subsequent history of Flight Instructor prevailing wage rates at Sheppard AFB since the filing of the instant appeal in 1998 has not been addressed by the parties before the Board. The \$17.96 hourly wage rate was lower than the SCA prevailing rate established for Flight Instructors at other locations outside the immediate Sheppard AFB locality. *See, e.g.*, AR Tab A Chart.

<sup>2/</sup> UNC Aviation Services merged with Lear Siegler Services around October 1997. *See* AR Tab D, handwritten note. In this decision, we refer to the flight training contract simply as the “Lear Siegler contract” without distinguishing between the two corporate names.

## BACKGROUND

### I. *General overview of SCA wage determination procedures and the initial wage determination for Sheppard AFB.*

Under the SCA, the Secretary of Labor is responsible for determining the minimum hourly wage and fringe benefit rates to be paid to various classifications of service workers who may be employed on service procurement contracts in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of service employees in the United States. These contracts are subject to the SCA's labor standards provisions. 41 U.S.C. §351. The minimum wage and fringe benefit rates are based either on the locally prevailing rates for service workers (known as "prevailing in the locality" determinations; *see* 29 C.F.R. §4.51), or the rates in any collective bargaining agreements that may already be in effect governing the pay of the workforce at the contract facility.<sup>3/</sup> *Id.*

Prior to entering into a service contract, a contracting agency is required to notify the Wage and Hour Division of the various classifications of workers that will be employed on the procurement, typically submitting a Standard Form (SF-)98 (Notice of Intention to Make a Service Contract) and SF-98A. 29 C.F.R. §4.4 (1998). In response to the contracting agency's request, the Division issues one of the two types of wage determinations, identifying the minimum hourly wage and fringe benefits that must be provided to the classifications of service employees to be employed on the contract. 29 C.F.R. §4.3.

A "prevailing in the locality"-type determination applied to Lear Siegler's contract at Sheppard AFB.<sup>4/</sup> Such locality wage determinations are "based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made." 29 C.F.R. §4.51(a). "Most frequently," the Division resorts to information "derived from area surveys conducted by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel." *Id.* The Wage and Hour Division uses the "available pertinent information," subjecting it to various statistical methodologies deemed proper under the facts of each determination, and establishes the rates which prevail for the various service employee classifications in a locality.

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<sup>3/</sup> Where there is a collective bargaining agreement between an employer and the service employees working on a Federal service procurement contract, the Administrator is required under the Act to issue the collective bargaining agreement wage and fringe benefit rates (including prospective increases) as the minimum required rates payable to the service employees working under that contract. 41 U.S.C. §353(c).

<sup>4/</sup> Similarly, with no applicable collective bargaining agreements applicable to the other Lear Siegler sites of contract performance, "prevailing in the locality" determinations were issued by the Wage and Hour Division for application at these locations.

However, sometimes “a wage survey for a particular locality may result in insufficient data for one or more job classifications that are required for performance of a contract.” 29 C.F.R. §4.51(c). In those instances,

[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. As an example, a wage rate found prevailing for the janitorial classification may be adopted for the classification of mess attendant if the skill and duties attributed to each classification are known to be rated similarly under pay classification schemes. (Both classifications are assigned the same wage grade under the Coordinated Federal Wage System and are paid at the Wage Board grade 2 when hired directly by a Federal agency.)

*Id.*

The Wage and Hour Division issued WD No. 94-2526 (Rev. 6) on October 26, 1995.<sup>5/</sup> This general area wage determination was applicable to the portion of Lear Siegler’s contract – No. F41689-95-C-0705 – that called for the company to provide academic instruction to United States Air Force and other pilots (such as those enrolled in the EURO-NATO Jet Pilot Training program) at Sheppard AFB in Texas. (Lear Siegler’s contracts also required that it provide Flight Instructor services at Columbus AFB (near Jackson, MS), Laughlin and Randolph AFBs (near San Antonio, TX), and Vance and Tinker AFBs (near Oklahoma City, OK). AR Tabs E, P.)<sup>6/</sup>

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<sup>5/</sup> WD No. 94-2526 (Rev. 6) was applicable to the Oklahoma counties of Comanche, Cotton, Greer, Harmon, Jackson, Jefferson, Kiowa, Stephens and Tillman, and the Texas counties of Archer, Saylor, Clay, Wichita, and Wilbarger.

<sup>6/</sup> The specific duties of Flight Instructors are specified in the Wage and Hour Division’s SCA Directory of Occupations (Rev. 1997) as being:

Responsible to the Pilot Supervisor for the accomplishment of ground-based training of pilots. Instructs and measures training progress of pilot students who train in the established air crew training curriculum. Conducts briefings and debriefings and counsels with pilots to develop and maintain a high level of proficiency. Provides inputs for courseware corrections and modifications and to update training policies and procedures. Assists in projects and development work as assigned.

(continued...)

Generally, the wage rates contained in the Sheppard AFB wage determination were based on wage payment data compiled in a Bureau of Labor Statistics (BLS) Occupational Compensation Survey published in February 1995. *See* AR Tab A at 1. However, the BLS survey did not contain wage data for the classification of Flight Instructor. In fact, BLS does not conduct wage surveys of the Flight Instructor classification at all. Therefore the Wage and Hour Division set the wage rate for Flight Instructors at Sheppard AFB using the wage “slotting” procedure described at 29 C.F.R. §4.51(c). Because Flight Instructors are ranked as GS-11 jobs within the Federal pay classification system, the Division “slotted” the job classification with another GS-11 job classification in a technical field that had been surveyed by BLS for the Sheppard AFB locality – the Computer Systems Analyst II position. The BLS survey had produced an hourly wage rate of \$17.96 for the Computer Systems Analyst II job, and this same wage rate therefore was applied to the Flight Instructor position.

## II. *Correspondence and procedural history.*

By correspondence addressed to the Wage and Hour Division dated July 9, 1997, Machos requested review and reconsideration of the \$17.96 hourly wage rate for the Flight Instructor classification in WD No. 94-2526 (Rev. 6).<sup>7/</sup> AR Tab M. Machos’ principal contention was (as it now is before the Board) that the Sheppard AFB Flight Instructor wage rate of \$17.96 per hour was incorrect. *See* AR Tab B at 2. He raised several arguments to support his claim that the Wage and Hour Division’s methodology upon which this rate is based was flawed. Machos argued that:

(1) in making the initial wage determination, the Wage and Hour Division improperly compared the Flight Instructor classification to another, less skilled classification (*i.e.*, the Computer Systems Analyst II);

(2) Flight Instructors working at the other Lear Siegler SCA contract sites received higher prevailing wage rates than that applicable at Sheppard AFB; and

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<sup>6/</sup>(...continued)

Conducts simulator and other ground training of pilot crew members in Tanker operating procedures, including diagnosis and remediation of student problems. Performs administrative duties relative to training such as record keeping, monitoring student progress, counseling, training development and maintenance of training programs. Serves as aircraft type Pilot Subject Matter Expert for students and other personnel as required. Maintains a high level of subject knowledge, capability and expertise.

<sup>7/</sup> Machos subsequently submitted several additional requests for review of the Flight Instructor wage rate to the Wage and Hour Division after July 1997, the concerns of which are incorporated into the discussion that follows.

(3) another classification under the Sheppard AFB wage determination (*i.e.*, Secretary II) received a wage increase over the course of the contested contract periods, yet the Flight Instructors received no increase.

On August 6, 1997, the Wage and Hour Division's Chief for Branch of Service Contract Wage Determinations (Branch Chief) responded to Machos' request for review and reconsideration. AR Tab L. Citing the SCA regulation at 29 C.F.R. §4.55, the Branch Chief denied the request for review of the initial wage determination as untimely because the contract period already had commenced. *Id.* at 1. Further, the Branch Chief explained the "slotting" methodology that the Wage and Hour Division used to establish the Flight Instructor wage rate – by comparing the position with the Computer Systems Analyst II, which has a Federal Grade Equivalency (FGE) of GS-11.<sup>8/</sup> *Id.* Finally, the Branch Chief noted the fact that the disparate SCA wage rates paid Flight Instructors in other localities were not relevant, since the Act and the regulations require that wage rates be issued for specific localities. *Id.*

Dissatisfied with the Wage and Hour Division's response, Machos again protested the wage rate for Flight Instructors at Sheppard AFB on September 9, 1997. AR Tab K. Citing the contract option period that commenced October 1, 1997, Machos essentially raised the same arguments as he had before – but this time asserted *prospectively* that the \$17.96 hourly wage rate that would be applied in the upcoming contract period was substandard. In addition, he complained that during the passage of the nearly two year period since the initial SCA wage determination for the Flight Instructor classification at Sheppard AFB, wage rates for Flight Instructors at the other Air Force bases covered by the Lear Siegler contract had increased, as had the rate for comparable jobs in the Wichita Falls/Sheppard AFB area, while the wage rate for the Sheppard AFB Flight Instructor position remained stagnant. *Id.* at 1-2.

The Wage and Hour Division responded to Machos' renewed complaint by correspondence dated September 23, 1997. AR Tab I. Again, the Division emphasized that the Flight Instructor wage rate for Sheppard AFB had been properly slotted to a comparable GS-11-level position found in the wage determination. In addition, it was pointed out that this same methodology had been utilized for the other Air Force bases cited by Machos, and the Division's obligation to issue prevailing wage rates for each locality based on BLS survey data. At the same time, the Division invited Machos to submit additional data in support of review and reconsideration of the Flight Instructor wage rate, subject to the following provisos: (1) the survey data had to be current; (2) the source of the data had to be referenced and the underlying "statistical and analytical techniques" which were utilized had to be indicated; (3) the survey had to concern the appropriate locality; (4) the survey had to be based on a proper statistical sample; (5) the survey data had to cover the appropriate occupational class; (6) a statement as to whether the mean or median was used to determine the wage rate had to be indicated; and (7) information

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<sup>8/</sup> The GS pay schedule establishes the wages payable to Federal "white collar" employees.

as to whether the data was obtained from a cross-industry sampling had to be indicated.<sup>9/</sup> *Id.* at 2.

Machos again objected to the Flight Instructor wage rate in a letter dated October 8, 1997, but did not provide the wage data requested by the Division. AR Tab F. In a separate letter – also dated October 8, 1997 – Machos requested a “formal response” to his inquiries. AR Tab E. In another communication dated October 27, 1997, Machos reiterated his general complaint over the stagnant wage rate for Flight Instructors at Sheppard AFB. AR Tab D. Yet another response by the Wage and Hour Division was made on November 7, 1997 (AR Tab C), and Machos responded with an additional inquiry on November 25, 1997 (AR Tab B). By correspondence dated March 13, 1998, the Division responded in full to all issues and concerns Machos had previously raised, essentially reiterating its prior position, and further informing him that this correspondence constituted the Administrator’s “final ruling on this matter.” AR Tab A.

Machos has appealed the Administrator’s March 13, 1998 decision to this Board, essentially raising the same issues he argued previously to the Administrator. As relief, Machos requests that the Board direct the Administrator to conduct a new survey of wages for the Sheppard AFB locality. He also appears to seek retroactive adjustment of the wages paid to Sheppard AFB Flight Instructors during the affected periods of contract performance. *See* Statement for the Administrator at 1.

## DISCUSSION

In our consideration of whether the Administrator’s final determinations under the SCA are proper, the Board serves as the authorized representative of the Secretary of Labor and is charged with acting “as fully and finally as might the Secretary of Labor concerning such matters.” 29 C.F.R. §8.1(c). This Board’s review is in the nature of an appellate proceeding. 29 C.F.R. §8.1(d). We review the Administrator’s rulings in order to determine whether they are consistent with the Act and its implementing regulations, and whether the rulings are a reasonable exercise of the discretion delegated to the Administrator. *Dep’t of the Army*, ARB Case Nos. 98-120 through 98-122, Dec. 22, 1999, slip op. at 16 (citing *ITT Federal Servs. Corp. (II)*), ARB Case No. 95-042A, Jul. 25, 1996).

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<sup>9/</sup> These are the criteria generally employed by the Wage and Hour Division in making wage determinations. *See* 29 C.F.R. §4.51. Although Machos never submitted any such wage survey data, at one point he stated that prior to the outsourcing of the Flight Instructor duties, the positions were filled by Air Force captains and majors whom he contended were “comparable to a GS-13 level . . .” AR Tab M at 2.

**I. *The Administrator appropriately “slotted” the Flight Instructor classification with the classification of Computer Systems Analyst II.***

As noted earlier in our discussion of the facts and SCA wage determination procedures, WD No. 94-2526 (Rev. 6) (Oct. 26, 1995), the subject of this proceeding, is a general wage determination. Because BLS did not survey wage data for the classification of Flight Instructor, the Wage and Hour Division employed the slotting procedure to supplement the BLS survey data and determine the prevailing wage rate for Flight Instructors at Sheppard AFB.

The Administrator’s use of the slotting procedure has long been approved in SCA cases. See *D.B. Clark III*, ARB Case No. 98-106, Sept. 8, 1998; *Kord’s Metro Services, Inc.*, Board of Service Contract Appeals (BSCA)<sup>10/</sup> Case No. 94-06, Aug. 24, 1994, slip op. at 5; *Big Boy Facilities, Inc.*, Case No. 88-CBV-7, Dep. Sec., Jan. 3, 1989, slip op. at 13-14. In fact, in *D.B. Clark III* this Board was presented with precisely the same question concerning the Wage and Hour Division’s having slotted the Flight Instructor classification at the GS-11 level. In that case, the petitioner had argued – as does Machos here – that the level of skills and training of the Flight Instructors required by the employer exceeded those of the GS-11 FGE of Computer Systems Analyst II, and that the Wage and Hour Division should therefore have slotted the Flight Instructor classification at a higher FGE level. However, as correctly noted by the Administrator before the Board in this case, “SCA wage rates are not based upon the training, experience, or education that an employer requires of an employee, but rather are based upon the duties and responsibilities required by the classifications at issue.” Statement for the Administrator at 13. Machos’ argument regarding slotting does not address the applicable legal standard under the SCA regulations.

Moreover, not only has the Wage and Hour Division determined that Flight Instructors are appropriately classified at GS-11 level, but this ranking has the concurrence of the Office of Personnel Management (OPM), “which has substantial expertise in the field of personnel classification.” *D.B. Clark III* at 5. The classification of job categories to FGE levels by OPM is based on objective and professional rating criteria; an OPM classification therefore provides very strong support for the Administrator’s determination that slotting the Flight Instructor pay level to another position at the FGE level of GS-11 was proper, especially in the face of Machos’ relatively “soft” and anecdotal information. Accordingly, we reaffirm our previous finding in *D.B. Clark III* that the GS-11 FGE classification of Computer Systems Analyst II is a proper level at which to slot the Flight Instructor classification.

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<sup>10/</sup> Before the BSCA was appointed in 1992, the Deputy Secretary of Labor was authorized to issue final SCA decisions. The BSCA issued final agency decisions under the Act from 1992 until the Administrative Review Board was established in May 1996.

## II. *Disparities between the prevailing wage rate for Flight Instructors at Sheppard AFB and other localities.*

Machos challenges the Administrator’s methodology in predetermining Flight Instructor prevailing wages because the process has resulted in SCA wage rates for Lear Siegler Flight Instructors at Sheppard AFB that are lower than Flight Instructor wage rates at other locations in Texas and Oklahoma, specifically Laughlin and Randolph AFBs (near San Antonio, TX); Tinker and Vance AFBs (near Oklahoma City, OK); and Reese AFB (in the Northwest Texas area). *See* AR Tab A, Chart Attachment. This argument is unavailing.

The SCA charges the Secretary of Labor – and, by delegation of authority, the Administrator – with establishing the “minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder . . . in accordance with prevailing rates for such employees *in the locality . . .*” 41 U.S.C. §351(a)(1); emphasis added. *See also* 29 C.F.R. §4.3(b) (“Such wage determinations will set forth for the various classes of service employees to be employed in furnishing services under such contracts *in the appropriate localities*, minimum monetary wage rates to be paid . . .” Emphasis added.) Thus, the clear terms of the Act and the implementing regulation contemplate that wage rates may differ for the same classification of service employees depending on the locality in which the services are performed.

The BSCA strongly endorsed the Administrator’s principle of adhering to the Act’s requirement that wages be determined on a locality basis. In *Raymond R. Schafer*, BSCA Case No. 92-30, Mar. 26, 1993, the Administrator was faced with the need to issue conformed classifications<sup>11/</sup> and wage rates for the same service employee classification at several different localities under a Federal service procurement contract. The Wage and Hour Division conformed the classifications to each of the several wage determinations, which contained differing wage rates for the same classification, given the different localities and wage structures which had been determined to prevail. The petitioner, an employee, objected to the resulting differences in the prevailing rate. The BSCA affirmed the Administrator’s final determination, stating: “Any other interpretation would be unreasonable and inconsistent **S** on these facts – with the basic SCA requirement that employees are to be paid the prevailing rate ‘in the **locality**.’” *Id.*, slip op. at 4; emphasis in original.

On a surface level, the disparities among wage rates for Flight Instructors at different locations could seem to have an element of unfairness. However, these varying wage rates for the same classification of Flight Instructor at different locations are understandable – and even

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<sup>11/</sup> When a service employee classification necessary to the performance of an SCA-covered contract is not contained in a wage determination, the Wage and Hour Division “conforms” such classification and wage rate. The procedure is not a *de novo* determination of a prevailing wage rate; rather the process is designed to “provide a reasonable relationship . . . between such unlisted classification and the classifications listed in the wage determination.” 29 C.F.R. §4.6(2)(b)(2) (2000). For a discussion of the conformance process, *see Raytheon Sys. Co.*, ARB Case No. 98-157, Apr. 26, 2000; *COBRO Corp.*, ARB Case No. 97-104, July 30, 1999.

required on these facts – given the Act’s requirement that prevailing wages be determined by the Administrator on a locality basis.<sup>12/</sup>

### **III. *Effect of other service employee classifications receiving prevailing wage increases at Sheppard AFB.***

In a further challenge to the validity of the Administrator’s methodologies under which Sheppard AFB Flight Instructors received no wage increase, Machos cites the Wage and Hour Division’s treatment of another classification listed in the wage determinations applicable to Sheppard AFB, “Secretary II.” Machos notes that in FY 1997 the wage rate for the Secretary II classification increased from \$9.77 per hour to \$11.24 per hour;<sup>13/</sup> however, there was no prevailing rate increase of any kind for the Flight Instructor position.

Although there again is a superficial impression of unfairness in the decreasing margin between the Secretary II and the Flight Instructor wage rates as they evolved under Revisions 5 and 6 of WD No. 94-2526, the Administrator’s actions were rational and are upheld. As the Administrator explained, no wage increase for Sheppard AFB Flight Instructors was included in WD No. 94-2526 (Rev. 6) because there was no available BLS data available on which to base such an adjustment. On the other hand, BLS had conducted a February 1995 survey for the Wichita Falls – Lawton – Altus – TX – OK area (in which Sheppard AFB is located) and this survey *did* produce data which supported the wage increase for the Secretary III classification.<sup>14/</sup> The Secretary III classification is very closely related in skills and duties to the Secretary II; both classifications are, in fact, listed under the same “Occupation Code” series for purposes of preparing SCA wage determinations. *See* AR Tab Q at 1. When increasing the prevailing wage rate for the Secretary III category based on the BLS wage survey data, the Administrator used this same information to provide a proportional increase in the Secretary II rate.

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<sup>12/</sup> Of course, there is another reason for the continuing and increasing disparity between the Flight Instructor prevailing wage rate at Sheppard AFB and the other localities. During the period encompassed by Machos’ challenge when the Flight Instructor wage rate at Sheppard AFB remained stagnant because BLS did not develop new wage survey data, BLS wage surveys were being conducted in these other locations. These updated surveys produced wage data that supported increases in the prevailing wage rates for Computer Systems Analyst II; using the slotting procedure, this data also was used to increase the Flight Instructor wage rate. *See* AR Tab A, Chart.

<sup>13/</sup> Revision 5 of the wage determination is not contained in the record; however, both Machos and the Administrator agree that \$9.77 was the hourly rate for the Secretary II classification during the effective period for Revision 5.

<sup>14/</sup> Wage determinations are issued for application to contract years, which most often coincide with the Federal government’s fiscal year which begins October 1. Revision 6 was issued on October 26, 1995; therefore, the wage increase for Secretary II was not applicable to the Sheppard AFB contract until the contract year commencing October 1, 1996.

Unlike the Secretary job series, however, the Administrator did not have data from the February 1995 BLS wage survey regarding the Computer Systems Analyst II job, and therefore the Administrator did not increase either the Computer Systems Analyst rate or the slotted Flight Instructor wage rate. This decision certainly was within the range of discretion afforded the Administrator. Quite simply, there is no *per se* requirement for the Administrator to increase the wage rates for *all* job classifications in a wage determination merely because the Administrator receives data that supports an increase for one job category.

The wage determination process is a complicated one, requiring the Administrator to make a tremendous variety of judgment calls. Here, the Administrator concluded that it was not necessary to increase the Computer Systems Analyst II position merely because the wage rates of a job in the Secretarial job series increased. Although we do not rule out the possibility that the Administrator could rely upon this data as justifying increased wage rates for other positions within the wage determination, the two job classification series (Secretary *vs.* Computer Systems Analyst) are sufficiently dissimilar that the Administrator was not *required* to increase the Flight Instructor rate based solely, or even primarily, on the updated Secretary III wage data from the BLS survey. We therefore reject Machos' contention that the increase in the Secretary II classification in Revision 6 of the wage determination (compared with Revision 5) is grounds for reversing the Administrator's final determination.

#### **IV. *Machos' request that the Board order the Administrator to conduct a new wage survey.***

Machos has requested that the Board direct the Wage and Hour Division to conduct a new wage survey in the Sheppard AFB locality immediately. Such a survey would, presumably, report new, higher wage information on the classification of Computer Systems Analyst II which data could, in turn, be used to update the wage determination rate of pay for Flight Instructors. While a new survey might be helpful in providing current local wage data, we decline to compel the Administrator to take the requested action.

This Board has adhered to the principle that the Administrator generally has broad discretion in his or her administration of the SCA. This discretion extends to questions of program resources, such as the timing for conducting wage surveys, the appropriateness of the geographic areas that constitute "localities," and the determination of what job classifications should be recognized. *See Dep't of the Army, supra*, slip op. at 22, 25; *Raytheon Sys. Co., supra*, slip op. at 17; *Dep't of the Air Force SAF/AQCR Eastern Reg'l Office*, ARB Case No. 98-125, May 26, 2000. Generally, the Board will defer to the Administrator's reasonable exercise of such discretion under the SCA. The Board has similarly deferred to the Wage and Hour Division in administering the SCA's "sister" prevailing wage statute, the Davis-Bacon Act (DBA), 40 U.S.C. §276a *et seq.*, with regard to the timing of wage surveys, and has declined to order the Administrator to conduct a new Davis-Bacon Act wage survey absent legal error or an abuse of discretion. *Washington, D.C., Nat'l Elec. Contractors Ass'n*, ARB Case No. 98-054, June 30, 1999; *Greater Kansas City Automatic Sprinkler Contractors Ass'n*, ARB Case No. 97-107, Sept. 30 1997, slip op. at 1-2. *See also Ass'n of Court Security Officers of New York v. Reich*, 1997

WL 433405, \*3 (E.D.N.Y., July 31, 1997) (emphasizing the Administrator's broad discretion in enforcing the SCA in a reasonable manner).

In this case, we do not find a clear legal error or abuse of discretion by the Administrator with regard to scheduling wage surveys. We therefore deny Machos' request that the Board order the Administrator to conduct a new wage survey.

**V. *The Administrator's decision not to adjust the Flight Instructor wage determination rate over several years because of an alleged lack of data.***

Having affirmed certain key elements of the Administrator's final ruling in this case and having rejected Machos' arguments regarding alleged deficiencies in the wage determination process, the Board's task might appear to be at an end. However, given the unique facts in this case, the Board is compelled to reject the Administrator's final ruling in this matter to the extent that it stands for the proposition that the multi-year wage stagnation at the Sheppard AFB contract site for Flight Instructors is acceptable under the Act and its implementing regulations.

Congress' goal in enacting the SCA was "to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies." S. Rep. No. 798 at 1 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3737. The vehicle chosen by Congress to attain this objective was a mandate that service workers on Federal procurements be paid no less than locally prevailing wages, as determined by the Secretary of Labor. ("Persons covered by the bill must be paid no less than the prevailing rate in the locality as determined by the Secretary, including fringe benefits as an element of the wages." *Id.*). This was the same prevailing wage approach relied upon previously under the Walsh-Healey Act (applicable to Federal purchases of goods, 41 U.S.C. §35 *et seq.* (1994)) and the Davis-Bacon Act (applicable to Federal construction contracts, 40 U.S.C. §276a (1994)).

Several years after the SCA was enacted, congressional oversight hearings were conducted into the Act's implementation. A number of significant problems surfaced at the hearings that were documented in a report entitled *The Plight of Service Workers Under Federal Contracts*. REPORT OF THE SPECIAL SUBCOMM. ON LABOR OF THE [HOUSE] COMM. ON EDUCATION AND LABOR, 92d Cong., 1st Sess. (Comm. Print 1971). One of the areas targeted for concern by Congress was the problem of SCA wage determinations based on outdated data. *Id.* at 19.

The hearings provided the impetus for the 1972 amendments to the Act. In the House Education and Labor Committee's report accompanying the 1972 legislation, the Committee noted that the use of wage determinations based on outdated data presented difficult problems both for workers and for Federal contractors. From the standpoint of workers, outdated wage determinations often meant that they were being paid less than the locally-prevailing rate. On the contractor side, the Committee recognized that reputable contractors that paid good wages would have a difficult time competing for Federal service contractors if other bidders were allowed to base their contract price on a substandard wage rate. H.R. Rep. 92-1251 at 3 (1972).

Significant changes were made to the Act to address this and other problems, including a requirement that new wage determinations be issued for multi-year procurements at least every two years<sup>15/</sup> and a directive to the Secretary to give “due consideration” to the wages that would be paid to Federal employees performing the same job when setting the prevailing wage rates. *See* 41 U.S.C. §§351(a)(5), 353(d). In addition, since the Secretary had fallen behind in issuing SCA wage determinations, Congress mandated a schedule for issuing new wage determinations so that the Labor Department would catch up with the demands of the SCA program, and so that all Federal service contracts would be covered by a current wage determination. *See* 41 U.S.C. §358.

At the time Machos filed this matter with the Board in March 1998, Flight Instructors at Sheppard AFB had already gone without a wage adjustment under the Lear Siegler contract over the course of two contract periods, *i.e.*, more than two years. This phenomenon of stagnant wages persisted, even though the Administrator had issued occasional revisions to the local wage determination. The Administrator does not claim that actual wage rates in the locality were static during this period, but instead merely justifies the prolonged delay in adjusting the Flight Instructor wage rate by stating that there is no new BLS data wage survey data upon which a wage adjustment could be based.

We are not unsympathetic to the Administrator’s plight in a situation like this, in which BLS has not generated the local wage survey data that might be most useful for updating wage rates for a particular job title. Admittedly, the service employee classification of “Flight Instructor” is not common, and there may not even be sufficient numbers of the chosen “slotted” occupation – Computer Systems Analysts II – for BLS to generate reliable wage data in the Sheppard AFB locality.<sup>16/</sup> However, the fact that the Administrator lacks current *particularized* wage survey data on these two occupations does not justify taking no action at all under the facts in this case, in light of the clear congressional directive that the Secretary update wage determination rates on a regular basis. The failure to take appropriate steps to provide regular and timely adjustments in the Division’s wage determinations is at odds with the underlying goal of the Act itself, *i.e.*, that service employees on Federal contracts receive no less than the current locally-prevailing wage. Moreover, delaying needed wage adjustments for several years can create significant dislocations in the procurement system. Stagnant wage rates make it difficult for contractors to recruit and retain talented employees. For procurement agencies, the cycle of SCA wage rate stagnation followed by abrupt and dramatic jumps in wage determination rates adds an unacceptable (and unnecessary) level of uncertainty to the budget and procurement processes.

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<sup>15/</sup> For typical 1-year service contracts, or contracts that include an initial period of performance followed by multiple option years, each contract period is viewed as if it were a new procurement for SCA purposes and a new wage determination must be issued by the Administrator and incorporated into the procurement contract. *See* 29 C.F.R. §4.4(a).

<sup>16/</sup> We note, however, that Computer Systems Analysts II were not surveyed by BLS during the period in question.

The Administrator is under the regulatory obligation to utilize “all available pertinent information” in compiling and updating SCA wage determinations. 29 C.F.R. §4.51(a). The mere fact that there is no current BLS wage survey data available for a *particular* job in a locality does not mean that there is no information “available” and “pertinent” that could form the basis for revising wage rates. We do not here suggest any particular data or methodology that the Administrator might use; these matters plainly are within the Administrator’s province in the first instance. However, we note that there are many sources of information readily available to the Administrator. For example, BLS routinely publishes generalized information documenting increases in employment costs. Under the direction of the Office of Personnel Management, the Federal Wage System regularly surveys various blue collar occupations in localities throughout the country pursuant to 5 U.S.C. §5342 (1994), which may provide useful information on local wage trends. The Wage and Hour Division itself sometimes has incorporated elements of the Federal General Schedule (applicable to white collar employees) when calculating SCA prevailing wage rates. *See, e.g., Biospherics, Inc.*, ARB Case Nos. 98-141 and 97-086, May 28, 1999.<sup>17/</sup> Even in the wage determination applicable to the Sheppard AFB procurement, rates for some job classifications increased during the 1995-1998 time period based on wage surveys; it is possible that this data might be viewed as reflecting general wage trends in the locality, and serve as the basis for reexamining the Flight Instructor wage rate. In addition, there may be reliable data from state agencies or private sources that might be useful to the Administrator in determining a current wage rate for Flight Instructors, even in the absence of the BLS wage survey data normally relied upon.

We thus remand this case to the Administrator to reconsider the Flight Instructor wage rate at Sheppard AFB in light of “all available pertinent information” within the meaning of 29 C.F.R. §4.51(a). We again emphasize that we do not direct what methodology is to be used, nor do we here prescribe the limits of the information that the Administrator may consider. We also do not direct any particular outcome from this reconsideration. However, in light of the Act’s legislative history and the Secretary’s implementing regulations, we find that the Administrator erred by failing to reexamine the Flight Instructor wage rate in light of “all available pertinent information” for a period that exceeded two years.

## CONCLUSION

For the foregoing reasons we grant Machos’ Petition for Review and remand this matter to the Administrator to reconsider the wage determination rate for Flight Instructors at Sheppard AFB in WD No. 94-2526 for the procurement period commencing October 1, 1997. On remand, the Administrator shall take into consideration “all available pertinent information” when determining the locally prevailing wage for Flight Instructors. The Administrator shall complete

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<sup>17/</sup> The statutory directive to give “due consideration” to Federal employee wage rates when issuing wage determinations (41 U.S.C. §351(a)(5)) arguably provides some legislative support for relying on Federal employee wage data.

his reconsideration of the Flight Instructor wage rate within 90 days of the date of Decision and Order of Remand, unless extended for good cause shown.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**E. COOPER BROWN**

Member

**CYNTHIA L. ATTWOOD**

Member