



In the Matter of:

TEAMSTERS LOCAL 639

ARB CASE NO. 99-010

***In re:* request for review and reconsideration
of Wage Determination 94-2104 (Rev. 9), with
prospective application to Food Service Workers
in the Washington, D.C. area**

DATE: May 30, 2002

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Derek J. Baxter, Esq., Barbara L. Camens, Esq., *Barr & Camens, Washington, D.C.*

For the Respondent:

Steven J. Mandel, Esq., Douglas J. Davidson, Esq., Marva M. Peace-Jackson, Esq., *U. S. Department of Labor, Washington, D.C.*

FINAL DECISION AND ORDER

Teamsters Local 639 represents District of Columbia public school employees who work in the Food Service Worker (Cafeteria Worker) classification. Concerned that at some point this work may be contracted out, Local 639 requested review and reconsideration on July 31, 1997, of Wage Determination 94-2104, Rev. 9, issued under the McNamara-O'Hara Service Contract Act, as amended, (SCA), 41 U.S.C. §§ 351-358 (1994), on May 19, 1997. Administrative Record (AR) Tab B. Local 639 requested modification of the wage rate for this job title from \$7.23 an hour to \$9.36 an hour. Local 639's request noted that the \$7.23 rate apparently was derived through the use of the "slotting" procedure provided for in 29 C.F.R. § 4.51(c) (2001). *See* AR Tab D. The Department of Labor's Wage and Hour Division ("Wage and Hour") denied the request on January 9, 1998, AR Tab F; Local 639 requested reconsideration of that denial on March 2, 1998, AR Tab G; and Wage and Hour denied the request for reconsideration on October 13, 1998. This appeal followed.

Since the time this appeal was filed, there have been several developments in SCA regulatory activities relevant to this case. A new Occupational Employment Statistics survey for the Washington, D.C.-Maryland-Virginia-West Virginia Primary Metropolitan Statistical Area was issued in 1999, and a new revision of Wage Determination No. 1994-2104, Rev. 17, was issued on May 30, 2001, by the Wage and Hour Division, replacing Revision 9. The new Wage Determination sets the wage for Food Service Worker at \$9.01 an hour.

Statutory and Regulatory Context

The SCA's primary purpose is to ensure that employees on a federal service contract are paid no less than locally prevailing wage rates. 41 U.S.C. § 351(a)(1), (2). The Secretary of Labor's regulations allow interested parties to challenge the accuracy of a wage determination by submitting a request for review and reconsideration. Any such request must be accompanied by supporting evidence. 29 C.F.R. § 4.56(a). Upon receiving such a request, the Wage and Hour Administrator ("Administrator") reviews the wage determination rate in light of (1) the data originally used for issuing the wage determination, (2) the evidence produced by the party challenging the wage determination, and (3) any additional data found relevant. After completing this evaluation, the Administrator can issue a new wage determination, revise the existing wage determination, or affirm the existing wage determination. 29 C.F.R. § 4.56(a)(2).

Scope of Review

The Wage and Hour Administrator is the primary interpreter of the SCA-implementing regulations, with the Administrative Review Board ("ARB" or "Board") acting in an appellate capacity. 29 C.F.R. § 8.1 (2001). The Board exercises the full authority of the Secretary under the SCA, 29 C.F.R. § 8.1(c), and has the authority to "decline review of any case whenever in its judgment a review would be inappropriate or because of lack of timeliness, the nature of the relief sought, or other reasons." 29 C.F.R. § 8.6(a).

Background

In support of its July 31, 1997 request for review and reconsideration of the Food Service Worker (Cafeteria Worker) classification in Wage Determination 94-2104, Rev. 9, Local 639 submitted wage data compiled by the Labor Bureau, Inc., a Washington-based research organization, on food service personnel employed by the District of Columbia and the Arlington County, Virginia; Fairfax County, Virginia; Montgomery County, Maryland; and Prince George's County, Maryland school systems. The Labor Bureau's data showed an average wage for those workers of \$9.36 an hour. AR Tab D, attachment A1-A8. On December 8, 1997, Local 639 renewed its request for modification of the Food Service Worker wage and supplemented the information previously provided with an August 1997 survey by the Federal Wage System, conducted for purposes of establishing the federal "wage grade" pay schedule for the Washington, D.C. area, showing a mean wage for Food Service Worker of \$9.83 an hour. AR Tab E.

Wage and Hour denied the request for reconsideration on January 9, 1998. Wage and Hour concluded that "we must rely on the BLS survey data that are used consistently for every metropolitan statistical area in the country." AR Tab F. Local 639 made additional arguments to Wage and Hour which were rejected on October 13, 1998.

Order to Show Cause

On March 14, 2002, the newly appointed ARB issued an Order to Show Cause ("OTSC") directing Local 639 to show cause why the ARB should not decline to review this case under 29

C.F.R. § 8.6(a), in light of more recent Bureau of Labor Statistics wage surveys and the issuance of a new Wage Determination for the area in question. Local 639 responded to the OTSC, and the Administrator replied to that response.

Local 639's Position in Response to the OTSC

Local 639 argues that, in the new Wage Determination, Wage and Hour continues to ignore federal wage rates, and continues to use the slotting procedure, setting the wage for Food Service Workers at the rate for Janitors.^{1/} Local 639 also asserts that the Board should not dismiss this petition as moot because it falls within a class of cases described by the courts as "capable of repetition yet evading review." That is, because Wage and Hour periodically revises its wage determinations, to dismiss a petition for review due to the fact that, while the petition was pending, a new wage determination was issued, would often make it impossible for affected parties to obtain review of what they claim was improper Wage and Hour methodology in setting the wage rates.

Administrator's Reply to Local 639's Response

The Administrator argues that the Board should dismiss Local 639's petition as moot. Wage and Hour no longer uses the slotting procedure for establishing the wage for Food Service Worker; rather, Wage and Hour uses BLS survey data for workers in the Food Preparation Worker classification in the Washington, DC-MD-VA-WV Primary Metropolitan Statistical Area. A more recent BLS National Compensation Survey for the Washington-Baltimore Consolidated Metropolitan Statistical Area, referred to in the OTSC, also does not support a higher wage.

Discussion

The Administrator has represented to the Board, and a review of the BLS survey submitted by the Administrator confirms, that the Food Service Worker wage rate was based on cross-industry data in the BLS survey, not the slotting procedure. See Bureau of Labor Statistics 1999 Metropolitan Area Occupational Employment and Wage Estimates, Washington, DC-MD-VA-WV PMSA, attachment 2 to Administrator's Reply. This methodology has previously been approved by the

^{1/} In determining wage rates for a locality, the regulations provide that:

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 and those for which no survey data is available.

29 C.F.R. § 4.51(c).

Board. For example, in a recent case raising similar questions of what data may appropriately be used by the Administrator in setting SCA wages for a metropolitan area, the Board approved the Administrator's use of BLS surveys of an entire metropolitan area. *See In the Matter of the Department of the Army*, ARB Case Nos. 98-120, 121, 122, slip op. at 24 (Dec. 22, 1999) ("We . . . find the Administrator's reliance on BLS wage survey data from the Seattle CMSA when developing the challenged Tacoma and Bremerton-Shelton wage determinations to be a reasonable exercise of his discretion under the Act and its implementing regulations. It is supported by government data documenting the work-home relationships within the Puget Sound labor market, and also by OMB's criteria for designating CMSA units.")

On page 18 of the Washington, D.C. survey, upon which the Administrator relied, BLS stated that 8,920 workers in the Food Preparation Worker occupation had been surveyed and their mean hourly wage was \$9.01 an hour, the rate established by Wage Determination No. 1994-2104, Rev. 17, for Food Service Workers. In addition, the more recent BLS survey in the April 2001 Washington-Baltimore, DC-MD-VA-WV National Compensation Survey, does not support the higher wage proposed by Local 639. See pp. 5, 8, 25, and 33. We therefore reject Local 639's assertion that Wage and Hour continues to use the slotting procedure, comparing Janitors to Food Service Workers, in setting the Food Service Worker wage, and we reject Local 639's assertion that the data it submitted with its request for review and reconsideration are a better measure of the Food Service Worker wage.

Because Wage and Hour no longer uses the slotting procedure for setting the Food Service Worker wage, but uses area surveys by BLS, as provided in 29 C.F.R. § 4.51(a), Local 639's petition for review is denied. With respect to Local 639's claim that its challenge to Wage and Hour's methodology for establishing wage rates for this classification is capable of repetition but will evade review if the Board takes no action now, we would point out first, that Wage and Hour no longer uses the methodology challenged by this petition; and second, that in the event the District of Columbia schools actually propose to contract out the food service, Local 639 would not be precluded from seeking review and reconsideration of the applicable Wage Determination at that time. We note that the Board disfavors engaging in speculative adjudication of challenges to wage determinations where no agency has proposed to enter into a service contract or no bids have been solicited. 29 C.F.R. § 8.6(a).

Accordingly, Local 639's petition for review of Wage Determination 94-2104, Rev. 9, is **DENIED**.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER C. TRANSUE
Administrative Appeals Judge