



**In the Matter of:**

**TALON MANUFACTURING CO.,  
INC., HERNDON, WYOMING COUNTY,  
WV**

**ARB CASE NO. 05-116**

**DATE: November 30, 2007**

**Contracts:**

**DAAA09-93-C-0425 Ammunition Demilitarization and Resource Recovery  
DAAA09-96-C-0003 Demilitarization of Various Fuzes  
DAAA09-97-C-0089 Demilitarization of Medium Caliber (40mm)  
DAAA09-96-D-0002 Ammunition Demilitarization/Resource Recovery**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For Petitioners Mike Seaton, Patrick Canada, Tim Lusk, and Tony Hall:  
Philip J. Tissue, Esq., Oak Hill, West Virginia***

***For Respondent Deputy Administrator, Wage and Hour Division:  
Mary J. Rieser, Esq.; Ford F. Newman, Esq., Counsel for Contract Standards;  
William C. Lesser, Esq., Deputy Associate Solicitor of Labor; Steven J. Mandel,  
Esq., Associate Solicitor of Labor; Howard M. Radzely, Esq., Solicitor of Labor,  
United States Department of Labor, Washington, District of Columbia.***

**FINAL DECISION AND ORDER**

Four employees of Talon Manufacturing Co., Inc. (Talon), namely Mike Seaton, Patrick Canada, Tim Lusk and Tony Hall, the Petitioners herein, requested that the Deputy Administrator, Wage and Hour Division (the Administrator), convene a hearing to determine whether a collective-bargaining agreement (CBA) between Talon and the International Union, United Mine Workers of America (UMWA), (1) contained negotiated wage rates “substantially at variance with those which prevail for services of a character similar in the locality,” and (2) provided for wages and fringe benefits “as a

result of arm's-length negotiations," within the meaning of the McNamara-O'Hara Service Contract of 1965, as amended (SCA or Act), 41 U.S.C.A. § 351 *et seq.* (West 1987); *see* 41 U.S.C.A. § 353(c). In a final ruling, the Administrator denied the hearing requests because they had not been timely filed under the regulations implementing the SCA at 29 C.F.R. §§ 4.10(b)(3)(ii), 4.11(b)(2)(ii) (2005). The Petitioners filed a Petition for Review by the Administrative Review Board. We find that the Petitioners failed to allege any factual circumstance sufficient to establish that "extraordinary circumstances" existed to justify an exception from the timeliness requirement imposed by 29 C.F.R. §§ 4.10(b)(3)(ii), 4.11(b)(2)(ii). Therefore, we conclude that the Petitioners have not met the standard for the Administrator's consideration of their untimely requests for substantial variance and arm's-length hearings.

### **JURISDICTION AND STANDARD OF REVIEW**

Pursuant to 29 C.F.R. § 8.1(b) (2006), 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" rendered under the SCA. *See also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Board's review of the Administrator's final SCA rulings is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). The Board is authorized to modify or set aside the Administrator's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b). The Board reviews questions of law *de novo*. *United Gov't Sec. Officers of America, Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (Sept. 29, 2003); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 1999-SCA-018, slip op. at 5 (ARB Jan. 25, 2002). The Board nonetheless defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with law. *See Dep't of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 15-16 (Dec. 22, 1999).

### **BACKGROUND**

#### **I. Overview of the SCA's wage determination procedures and substantial variance and arm's-length hearing procedures**

The SCA generally requires that every contract 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, must contain a provision that specifies the minimum hourly wage and fringe benefit rates that are payable to the various classifications of service employees working on such a contract. *See* 41 U.S.C.A. § 351(a)(1)-(2). These wage and fringe benefit rates are predetermined by the Wage and Hour Division acting under the authority of the Administrator, who has been designated by the Secretary of Labor to administer the Act.

Under the Act, there are two types of SCA wage schedules, also known as wage determinations that are prepared for inclusion in service contracts. The first type is a general wage determination, and the wages and fringe benefits contained in such a schedule are based on the rates that the Wage and Hour Division determines prevail in the particular locality for the various classifications of service employees to be employed on the contract. 41 U.S.C.A. § 351(a)(1)-(2). These wage determinations sometimes are referred to as “prevailing in the locality” wage determinations.

A second type of wage determination is issued at locations where there is a CBA between the service employees and an employer working on a Federal service contract. Under these circumstances, the SCA mandates that the Wage and Hour Division specify the wage and fringe benefit rates from the CBA (including prospective increases) as the required minimum rates payable to the service employee classifications to be employed on the procurement contract. *Id.* In addition, Section 4(c) of the Act requires generally that the negotiated wage rates (and prospective increases) must be incorporated into a successor contract’s wage determination in those instances where a labor agreement has been negotiated between the service employees and a contractor’s predecessor. 41 U.S.C.A. § 353(c).

Section 4(c), however, contains provisions that restrict the applicability of CBA-based wage and fringe benefit rates in wage determinations:

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) (emphases added). As interpreted by the Secretary under the SCA regulations, the successor provisions of Section 4(c) are subject to two limitations, both of which involve hearings before Department of Labor Administrative Law Judges.

First, collectively-bargained wage rates may only be incorporated into a covered service contract if such rates were reached “as a result of arm’s-length negotiations ....” *Id.* A challenge to the bona fides of a collective bargaining agreement can be brought

by requesting a so-called “arm’s-length hearing.” See 29 C.F.R. § 4.11. The purpose of an arm’s-length hearing is to determine whether a CBA containing negotiated wage and fringe benefit rates was reached by willing signatories, avoiding “collusive arrangements intended to take advantage of the SCA scheme.” 48 Fed. Reg. 49,740 (Oct. 27, 1983).

Second, the SCA’s Section 4(c) proviso states that wages and fringe benefits contained in a CBA shall not apply to a service contract “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). Therefore, the collectively-bargained wage or fringe benefit rates negotiated between a Federal service contractor and the union representing its employees may not be applied to a successor procurement period if, following a challenge and hearing, it is determined that the negotiated wages are substantially different from locally-prevailing rates for similar work. See 29 C.F.R. § 4.10.

Both the regulations governing requests for arm’s length and substantial variance hearings include explicit procedural time limitations for filing a hearing request. For example, the substantial variance hearing provision at 29 C.F.R. § 4.10(b)(3) states, in pertinent part:

(3) . . . [R]equests for a hearing shall not be considered unless received as specified below, *except in those situations where the Administrator determines that extraordinary circumstances exist:*

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the initial term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

29 C.F.R. § 4.10(b)(3) (emphasis added). The time limitation provision for requesting an arm’s-length hearing is the same. See 29 C.F.R. § 4.11(b)(2). Therefore, for a substantial variance or arm’s-length hearing request to be considered timely in connection with a *negotiated contract*, such as the contract at issue in this case, the request ordinarily must be made before the commencement date of the contract or before the commencement date of any follow-up option period. 29 C.F.R. § 4.10(b)(3)(ii). The Administrator, however, has discretion to approve an untimely hearing request where the Administrator “determines that extraordinary circumstances exist.” 29 C.F.R. §§ 4.10(b)(3), 4.11(b)(2); *U.S. Dep’t of State*, ARB No. 98-114, slip op. at 13 (Feb. 16, 2000).

## II. Factual and procedural background

The Administrator provided the Board with a summation of the procedural history and facts of the case, Administrator's Brief at 2-5, which the Petitioners do not challenge. The United States Department of the Army (the Army) awarded four contracts to Talon to provide demilitarization and resource recovery services. Tab B. Contract No. DAAA09-93-0425 became effective in 1993 and closed in 1999; Contract No. DAAA09-96-C-0003 became effective in 1995 and closed in 1999; Contract No. DAAA09-97-C-0089 became effective in 1997 and was completed in 2000; and Contract No. DAAA-09-96-0002 became effective March 19, 1996, and closed at an unspecified date in December 2005. *Id.*

On December 29, 2004, the four Talon employees who are the Petitioners herein, submitted to the Administrator both a request for a substantial variance hearing under 29 C.F.R. § 4.10 and a separate request for an arm's-length hearing under 29 C.F.R. § 4.11. Tabs B, C. In their request for a substantial variance hearing, the Petitioners detailed the four contracts at issue, noting that all but the DAAA-09-96-0002 contract had been completed. Tab B. at 2. The Petitioners stated:

Accordingly, none of the above dates, i.e. procurement dates etc., apply. The problem here is, however, that the conformance process which is designed to ensure that there is no substantial variance in the wages that are paid and those that prevail in the particular locality, simply was not observed by the company Talon, by the enforcing agencies, by the United States Department of the Army, and/or the Department of Labor. If the process of conformance had been followed, then gross disparity in wages would not have occurred.

*Id.* The Petitioners argued that because "no conformance process was followed," they were misclassified as "Recycling Workers" whereas their jobs are "closest in duties and responsibilities to 'Unexploded Ordinance Technician.'" *Id.* at 3. The Petitioners additionally claimed they should have received more fringe benefits. *Id.*

Similarly, in their December 29, 2004 request for an arm's-length hearing pursuant to 29 C.F.R. § 4.11, the Petitioners claimed, (1) that wage determinations associated with the four contracts "were not in conformance with the prevailing wage rate set forth in the SCA," and (2) that the CBA was not the result of arm's-length negotiations because what they were actually paid substantially varied from what they should have been paid. Tab C. at 1. The Petitioners also referred to their May 20, 2004 hearing request filed with the Administrator. *Id.* at 1, 2. In their May request, the Petitioners asserted that "*extraordinary circumstances* exist such as to justify a hearing in this matter in that the [SCA] was not followed procedurally or substantively during the contracts herein set forth." Tab D at 2 (emphasis added). The Petitioners argued that Talon's failure to follow the conformance process resulted in their jobs being

misclassified and in their being paid “grossly low wages” and low fringe benefits. *Id.* at 1. The Petitioners also argued that the UMWA was either unaware of the job misclassifications or, if aware, failed to engage in arm’s-length negotiations with Talon. *Id.*

On May 31, 2005, the Administrator issued a final ruling denying the Petitioners’ hearing requests. Tab A. The Administrator initially noted, “At issue are the wage rates and fringe benefits that are contained in the collective bargaining agreement between Talon ... and [UMWA].” *Id.* at 1. The Administrator then discussed the timeliness requirements for hearing requests made pursuant to 29 C.F.R. §§ 4.10(b)(3) and 4.11(b)(2) pertinent to advertised or negotiated contracts. *Id.* Responding to the Petitioners’ hearing requests pertaining to the CBA, the Administrator determined, “Your requests, however, do not identify a single procurement that would fall within the regulatory time frames such that it could be referred for a variance hearing or arm’s-length proceedings.” *Id.* The Administrator added that because he denied the Petitioners’ requests on the basis of timeliness, he did not address their “substantive aspects.” *Id.* Therefore, the Administrator denied the Petitioners’ hearing requests on the basis of the timeliness requirements of 29 C.F.R. §§4.10(b)(3) and 4.11(b)(2), without addressing whether there existed “extraordinary circumstances” sufficient to warrant an exception from those requirements.

### **III. The Parties’ Arguments on Appeal**

The Petitioners ask that we review the Administrator’s final ruling. The Petitioners do not contest the fact that their hearing requests were untimely. Rather, the Petitioners argue two new reasons why their hearing requests should be excepted from the timeliness requirements of 29 C.F.R. §§ 4.10(b)(3)(i)-(ii), 4.11(b)(2). First, the Petitioners assert that Talon failed to write a report regarding the wage rates and job classifications under the CBA or to submit any such report to the Administrator. Petition for Review at 2; Supporting Brief at 4. The Petitioners argue that as a result, that they were given no notice of decisions regarding their wage rates or job classifications under the CBA and, therefore, their right to due process was violated. Petition for Review at 2-3; Supporting Brief at 1-5. Secondly, the Petitioners assert that Talon did not comply with the regulation at 29 C.F.R. § 4.6(e), requiring that a contractor either notify each service employee commencing work under the contract of the “minimum monetary wage and any fringe benefits required to be paid” or post the wage determination attached to the contract. Petitioners’ Supporting Brief at 3. The Petitioners argue that Talon’s failure “to observe the procedural safeguards of the SCA” made it impossible for them to timely file their hearing requests. *Id.* at 5.

The Administrator urges the ARB to affirm the Administrator’s ruling denying the Petitioners’ hearing requests as untimely filed under 29 C.F.R. §§ 4.10, 4.11. Administrator’s Brief at 5-7.<sup>1</sup>

---

<sup>1</sup> In response to the Petitioners’ argument that their jobs were misclassified, the Administrator notes that the CBA governed their job classifications. Administrator’s Brief at

The two arguments that the Petitioners make to the ARB were never articulated to the Administrator for his consideration and ruling. The Board has previously ruled that failure to raise a defense in a timely manner constitutes a waiver of that claim. *See e.g. Swanson Group, Inc.*, BSCA No. 94-05 (May 31, 1995), slip op. at 5, citing *Thompson Brothers, Inc.*, BSCA No. 92-32 (Jan. 29, 1993), slip op. at 7. Therefore, the Petitioners waived any right to now raise these issues: (1) whether Talon failed to write a report regarding the wage rates and job classifications under the CBA or to submit any such report to the Administrator resulting in a violation of the Petitioners' right to due process, and (2) whether Talon complied with the notification requirements of 29 C.F.R. § 4.6(e), having failed to do so before the Administrator.

Both parties agree that the Petitioners' hearing requests were untimely filed under 29 C.F.R. §§ 4.10(b)(3)(iii), 4.11(b)(2)(ii), and we note that the Administrator denied these requests as untimely without addressing the issue of "extraordinary circumstances."<sup>2</sup> Therefore, we will determine de novo whether the Petitioners' arguments made before the Administrator established that there existed "extraordinary circumstances" within the meaning of 29 C.F.R. §§ 4.10(b)(3)(i)-(ii), 4.11(b)(2), justifying an exception from the timeliness requirements and warranting the Administrator's consideration of the hearing requests.

**IV. The Petitioners' arguments made before the Administrator fail to establish that there existed "extraordinary circumstances" sufficient to justify an exception from the timeliness requirements imposed by 29 C.F.R. §§ 4.10(b)(3), 4.11(b)(2) warranting consideration of their untimely hearing requests.**

The regulatory term "extraordinary circumstances" under 29 C.F.R. §§ 4.10(b)(3) and 4.11(b)(2) relates specifically to whether or not a complainant literally had adequate information within sufficient time to file a timely request for a substantial variance hearing or arm's-length proceedings. *U.S. Dep't of State*, slip op. at 9, 12-13. The proper focus in determining whether the Petitioners' untimely hearing requests were properly denied, is whether extraordinary factual circumstances, outside the alleged merits of the case, prevented the Petitioners from filing their hearing requests in a timely manner. *Id.* at 13, 14.

The Petitioners argued in their December 29, 2004 hearing requests filed with the Administrator that the conformance process was not followed, which resulted in their

---

<sup>4</sup> n.3. The Administrator further indicates that the Petitioners' "allegations of misclassification have been referred to the local office of the Wage and Hour Division." *Id.* at 9 n.4.

<sup>2</sup> Counsel for the Administrator writes in her brief to the ARB, "The Deputy Administrator did not find extraordinary circumstances here." Administrator's Brief at 9. Counsel's statement is misleading where the Administrator did not address the issue. Tab A.

jobs being misclassified and, in turn, in their receiving lower wages and fringe benefits. Critically, the Petitioners did not assert therein any factual circumstance in the conformance process that precluded them from obtaining necessary notice and information and prevented them from filing their hearing requests under 29 C.F.R. §§ 4.10(b)(3)(ii), 4.11(b)(2)(ii) in a timely manner. Tabs B, C.

The Petitioners did assert in their May 20, 2004 request for a hearing on the merits that “extraordinary circumstances exist such as to justify a hearing in this matter.” Tab D. But the Petitioners argued that the hearing was due them because “the [SCA] was not followed procedurally or substantively during the contracts herein set forth.” *Id.* The May 2004 hearing request contains no allegation of any factual circumstance preventing the Petitioners from timely filing a request for a substantial variance or arm’s-length hearing. Moreover, we have previously held that that the term “extraordinary circumstances” as used in 29 C.F.R. §§ 4.10(b)(3)(ii) and 4.11(b)(2)(ii) is a reference to time constraints under which a hearing request is made and not a reference to the underlying merits of the case. *U.S. Dep’t of State*, ARB No. 98-114, slip op. at 13, 14 (Feb. 16, 2000); *see also Systems Eng’g Assocs. Corp., (SEACOR)*, No. 87-SCA-OM-3, (Dep. Sec’y July 26, 1988). To the extent that the Petitioners argue the merits of their case in asserting the existence of “extraordinary circumstances,” their argument is unavailing.

Further, Petitioners submitted no supporting evidence to establish that they lacked adequate information within sufficient time to file a timely request for a substantial variance or arm’s-length hearing. *U.S. Dep’t of State*, slip op. at 9, 12-13. The Petitioners began working with Talon in 1994 and 1995. Petitioners’ Reply Brief at 9. Work on the four contracts at issue began in 1993, 1995, 1996, and 1997. Tab B. Further, the CBA, a contract negotiated between Talon and the UMWA representing Talon’s employees, includes an hourly wage schedule which plainly sets forth the hourly wage rates applicable to the covered service employees. Tab F at 8, 24. Therefore, the record shows that the Petitioners labored, were paid, and collected their pay and fringe benefits under specified contract terms for *several* years prior to filing their hearing requests in December 2004. Tab B; Petitioners’ Reply Brief at 9, 10. On this record, we find that the Petitioners fail to establish any factual circumstance that deprived them of adequate information regarding their job classifications, wages, and fringe benefits, which was sufficient to prevent them from filing their hearing requests in a timely manner.

In sum, we find that the Petitioners have not proven any factual circumstance that deprived them of adequate information and prevented them from timely filing hearing requests in this case. Therefore, we conclude that the Petitioners have not met the standard for the Administrator’s consideration of their untimely requests for substantial variance and arm’s-length hearings.



## CONCLUSION

The Petitioners have not established that “extraordinary circumstances” existed within the meaning of 29 C.F.R. §§ 4.10(b)(3) and 4.11(b)(2) sufficient to justify an exception to the timeliness requirement for hearing requests filed thereunder, warranting consideration of their untimely hearing requests. The Administrator’s final ruling is **AFFIRMED** and the Petitioners’ Petition for Review is **DENIED**.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**DAVID G. DYE**  
**Administrative Appeals Judge**