ADMINISTRATIVE REVIEW BOARD
UNITED STATES EPARTMENT OF LABOR
WASHINGTON, D.C.

IN THE MATTER OF:	)	
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FARGO VA MEDICAL CENTER,	)	ARB Case No. 03-091
	)	
	)	ALJ Case No. 02-LCA-13
Petitioner,	)	
	)	
v.	)	
	)	
ADMINISTRATOR, WAGE & HOUR DIVISION, EMPOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR,	)	
	)	
Respondent.	)	

ADMINISTRATOR'S RESPONSE BRIEF

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ADMINISTRATOR'S RESPONSE BRIEF

Pursuant to the Administrative Review Board's ("Board" or "ARB") Order dated May 20, 2003, the Administrator of the Wage and Hour Division ("Administrator") submits her brief seeking affirmance of the Decision and Order ("D & O") of Chief Administrative Law Judge John M. Vittone ("ALJ"), dated March 27, 2003.[1] This matter arises under the Immigration and Nationality Act ("INA" or "the Act" or "Immigration Act") H-1B visa program, 8 U.S.C. 1101(a)(15)(H)(i)(b) and 1182(n), and the implementing

[1]On April 7, 2003, the Administrator filed a Motion to Amend Judgment to update the back wage computations. The parties stipulated to the updated amount (Stipulation 61), and on June 16, 2003, Judge Vittone issued a Supplemental Decision and Order Approving Stipulation.

regulations at 20 C.F.R. 655, Subparts H and I.[2]

ISSUES PRESENTED

(1) Whether the Department of Labor has jurisdiction to determine whether the Fargo VA Medical Center is subject to and must comply with the wage requirements of 8 U.S.C. 1182(n)(1)(A).

(2) If the Board has such jurisdiction, whether the Fargo VA Medical Center is subject to and must comply with the wage requirements of 8 U.S.C. 1182(n)(1)(A) when, as a participant in the H-1B program, it files Labor Condition Applications ("LCAs") to enable it to employ non-immigrant physicians.

STATEMENT OF THE CASE

A. Course of Proceedings

The Department of Veterans Affairs Medical Center in Fargo, North Dakota ("Fargo VAMC" or "hospital") employed ten non-immigrant physicians under the H-1B visa program, beginning in 1999 and 2000. (Administrator's Brief in Support of Summary Judgment ("Admin. Br."), Stipulation ("Stip.") 1, 2, 26, 56).[3]

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[2]The implementing regulations were amended on December 20, 2000. See Department of Labor ("DOL") Interim Final Rule, 65 Fed. Reg. 80110 (December 20, 2000). The violations in this case occurred during the effective periods of both regulations. Unless otherwise noted, the citation to the amended regulations is provided, since there are no material differences between the portions of the two that are applicable to this case.

[3]The doctors included one cardiologist, five internist-primary care physicians, one neurologist, one infectious disease specialist, and two hematologist/oncologists. The doctors worked full-time performing their respective medical specialties (Stip. 26).

After the doctors began working for the Fargo VAMC under the H-1B program, the DOL's Wage and Hour Division ("Wage-Hour") received a complaint and conducted an investigation. On February 1, 2001, Wage-Hour notified the Fargo VAMC that its documentation of the prevailing wage failed to conform with the regulatory criteria (Stip. 13; Admin. Br. Exhibit ("Exh.") E). The correct State Employment Security Agency ("SESA") prevailing wage determinations were provided by DOL to the Fargo VAMC.[4] (Stips. 12, 13; Exh. C, D, E).

On February 14, 2001, pursuant to 20 C.F.R. 655.731(d)(2), the Fargo VAMC appealed the prevailing wage determinations to DOL's Employment and Training Administration ("ETA") (Stip. 14; Exh. F). On June 7, 2001, ETA denied the appeal and offered the Fargo VAMC an opportunity to request a hearing before DOL's Office of Administrative Law Judges (Stip. 15; Exh. G). The Fargo VAMC requested a hearing, and on January 23, 2002, the ALJ issued a final ruling under 20 C.F.R. 655.731(d) concluding that the SESA rates are the correct prevailing wage rates (Stip. 16; Exh. H).[5]

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[4]The Fargo VAMC had obtained the correct prevailing wage determination for cardiologists, but did not utilize it in setting the wage of its H-1B cardiologist (Stip. 10; Exh. C).

[5]The parties have stipulated that, pursuant to 20 C.F.R. 655.731(d)(2), the above-listed SESA prevailing wage determinations are the final determinations regarding the applicable prevailing wages (Stips. 16, 19; Exh. C, D).

Wage and Hour completed its investigation and, on March 20, 2002, issued a determination letter finding that the Fargo VAMC failed to pay wages as required in violation of 20 C.F.R. 655.731. (Stip. 17; Exh. I).[6] Specifically, the doctors were paid less than the applicable prevailing wage (Stips. 19, 20, 57). The Fargo VAMC appealed the determination on grounds that it is not subject to the H-1B prevailing wage requirements (Exh. J). The Administrator and Fargo VAMC stipulated to material facts, including the back wage computations and the fact that the SESA-determined rates are the applicable prevailing wage rates under the H-1B program (Stips. 16, 19-22, 57-59; Exh. C, D, K, X). Back wages totaled $212,449.14 as of February 16, 2002 (Stip. 59). In June 2002, the parties filed cross-motions for summary judgment. On March 27, 2003, the ALJ ruled in the Administrator's favor and ordered the Fargo VAMC to pay the doctors back wages totaling $212,499.14.[7]

B. Statement of Facts

Prior to hiring each doctor, the Fargo VAMC submitted an LCA to ETA. On the LCA, the Fargo VAMC identified itself as the

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[6]Fargo VAMC was also cited for failure to provide notice of the LCA filings, and failure to make the LCA and other public documents available for public examination. Civil money penalties were not assessed, and these violations were not appealed (Exh. I, J).

[7]The back wage amount due the doctors after February 16, 2002 totals $5,101.68, and was the subject of the Supplemental Decision and Order Approving Stipulation.

employer of the doctor, and checked the box "to indicate that the employer will comply with" the following statement:

> H-1B nonimmigrants will be paid at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupation in the area of employment, whichever is higher.

(Stips. 3, 4; Exh. A-1 through A-10, items 1-5, item 8, box (a)) (emphases in original). Fargo VAMC Hospital Director Douglas M. Kenyon also signed the following attestation on the LCAs:

> DECLARATION OF EMPLOYER. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the information provided on this form is true and correct. In addition, I declare that I will comply with the Department of Labor regulations governing this program, and, in particular, that I will make this application, supporting documentation, and other records, files and documents available to officials of the Department of Labor, upon such official's request, during any investigation, under this application of the Immigration and Nationality Act.

(Exh. A-1 through A-10, item 9) (emphasis added).

The Fargo VAMC also submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Immigration and Naturalization Service ("INS") with respect to each of the doctors (Stip. 5; Exh. B-1 through B-10). The Fargo VAMC is identified as the employer on the I-129s (Stip. 6; Exh. B-1 through B-10, Parts 1 and 5). Hospital Director Kenyon signed the following attestation on each petition:

> By filing this petition, I agree to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment.

(Exh. B-1 through B-10, Supplement to Form I-129, Section 1). Mr. Kenyon made the following statement in the H-1B petition extension letter filed on behalf of Dr. Belamkar, one of the ten doctors at issue:

> We are an established and responsible United States employer, maintaining an unbroken record of full compliance to all immigration requirements. Certainly, this policy will apply fully to our employment of Dr. Belamkar.

(Exh. W-2).

The Fargo VAMC does not dispute that it paid the ten doctors less than the applicable prevailing wage rate (Stips. 16, 19-22, 57-61; Exh. C, D, K, L-1 through L-10, X, Y). The Fargo VAMC also admits that the applicable prevailing wage rates are below the maximum that a Department of Veterans Affairs ("DVA") physician could be paid under 38 U.S.C. Chapter 74 ("the VA statute") (Stip. 49). Specifically, nine of the ten prevailing wage rates were either $124,280 or $124,446 per year, and one was $165,000 per year (Stip. 19). Although the doctors were hired at pay rates ranging between $101,788 and $117,846 annually, the Fargo VAMC had the discretion to pay the doctors a maximum salary of $170,000 per year through February 14, 2001, and up to $190,000 per year beginning February 15, 2001 (Stips. 20, 39, 42; Exh. L-1 through L-10).[8]

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[8]These facts and those that follow, regarding compensation allowed by the VA statute, are set out to show that, contrary to the Fargo VAMC's contention, there is no tension whatsoever between that statute and the requisite prevailing wage under the INA. See

The physicians' annual rates were computed by combining a base pay based on a government scale, along with "Special Pay" authorized under the VA statute (Stip. 24a).[9] One component of Special Pay is that up to $17,000 per year may be authorized for physicians working in a geographic location in which there are recruitment problems; the Fargo VAMC had the discretion to approve this amount (Stips. 27, 43; Exh. L-1 through L-10, P, p. 3B-App. D-1). Another is that up to $40,000 per year may be authorized for physicians working in medical specialties with respect to which there are recruitment or retention difficulties ("scarce specialty pay"); the Fargo VAMC had the discretion to approve this amount, too (Stips. 27, 43; Exh. L-1 through L-10, P, p. 3B-App. F).[10] Scarce medical specialties may be authorized on a nationwide basis or on a facility-specific basis (Exh. P, p. 3B-App. F-1).[11]

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infra.

[9]The Fargo VAMC Professional Standards Board, an internal committee comprised of Fargo VAMC staff members, initially determined the pay grade, step, and Special Pay of the doctors, and the Fargo VAMC hospital director had the discretion to accept or reject the Board's recommendations. He accepted the Board's recommendations (Stip. 40).

[10]Other components of Special Pay for most of the doctors included $9,000 for full-time status and $2,000 for board certification (Stips. 25, 29; Exh. L-1 through L-10).

[11]Both cardiology and primary care were deemed nationwide scarce specialties during the tenure of the doctors (Stip. 33, Exh. P, p. 3B-App. F-3). Six of the ten doctors worked in one of these two specialties (Stip. 26). A May 27, 1994 VA memorandum allowed the hospital's executive committee to immediately authorize up to

Although the Fargo VAMC had the discretion to pay the doctors up to $17,000 in geographic pay and $40,000 in scarce specialty pay, it did not pay these maximum amounts to any doctor at issue here, except for Dr. Mehdi (a hematologist/oncologist), who received $17,000 geographic pay but no scarce specialty pay (Stips. 25, 29, 43; Exh. L-1 through L-10). One doctor received no geographic pay and the others were paid between $3,000 and $10,000 of such pay (Stip. 25, 29; Exh. L-1 through L-10). Three doctors received no scarce specialty pay and the others were paid between $8,000 and $17,809. Id.

Additionally, the Fargo VAMC had the discretion to start the doctors at a higher pay grade and step than those at which they were started (Stip. 41). Specifically, the base pay rates for the ten doctors ranged from a low of $77,361 for GS-15 step 3, to a high of $90,549 for GS-15 step 6, even though the GS-15 grade has ten steps, and there are two higher grades, which have ten and nine steps, respectively (Stip. 24a,b,c; Tables at Exh. A-1, A-2, A-3, A-10, O; L-1 through L-10).[12]

$15,000 in scarce specialty pay for physicians working in primary care (Stip. 38, Exh. V). All of the primary care doctors here received less than the $15,000 authorized nationwide (Exh. L-2, L-3, L-5, L-7, L-10).

[12]The hospital also had authority to recommend that the doctors receive Quality Step Increases, which immediately raise the doctor's pay to the next pay step (Stip. 44). Only two doctors received these increases. Id. Additionally, the hospital had the discretion to award eligible doctors up to $15,000 annually for

C. The ALJ's Decision

The ALJ held that DOL has jurisdiction to review whether an H-1B employer has paid the prevailing wage ("D & O" 6-7). Specifically, by filing the LCAs and taking advantage of the H-1B program, the Fargo VAMC voluntarily subjected itself to such jurisdiction and review. In addition, the ALJ concluded that the VA statute's collective bargaining provision is inapplicable to this case, and does not prohibit DOL from reviewing whether the Fargo VAMC complied with the H-1B prevailing wage regulations.

The ALJ also held that the Fargo VAMC is an employer under the H-1B regulations (D & O 4-5). In reaching this conclusion, the ALJ rejected the Fargo VAMC's argument that, as an agency of the United States, it cannot qualify as an employer under 20 C.F.R. 655.715, which defines employer to include "a person, firm, corporation, contractor, or other association or organization in the United States." 20 C.F.R. 655.715 (emphases added). The ALJ concluded that the DVA's status as an executive department of the United States does not exclude it from coverage (D & O 4). The ALJ also rejected the argument that the VA hospital is inherently different from other H-1B hospital-employers because it serves only a select

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"Responsibility Pay" and, with headquarters' approval, up to $45,000 annually (Stip. 53). VA headquarters may further approve up to $15,000 annually for "Exceptional Qualifications Pay." (Stip. 55). None of the ten doctors in question received these types of pay (Exh. L-1 through L-10).

group of the general population (D & O 5). To the contrary, the VA hospital shares many characteristics with other hospital-employers, such as employing physicians to practice medicine at its facility and paying their salaries. Id.

Most significantly in this regard, the ALJ stated that the Fargo VAMC acknowledged its status as an employer under the H-1B regulations when it filed the LCAs on behalf of the doctors (D & O, p. 5). Hence, the Fargo VAMC "is not entitled to reap the benefits of the H-1B program without shouldering the burden of compliance with the requirements of that program. It cannot utilize certain H-1B regulations while at the same time claim exemptions from others. Accordingly, Respondent is an employer under the regulations." Id.

The ALJ also rejected other exemption arguments presented by the Fargo VAMC. For instance, the Fargo VAMC claimed that it is exempt from paying the prevailing wage because it subscribes to a Federal wage schedule (D & O 6). The ALJ disagreed, citing an analogous Board of Alien Labor Certification Appeals case involving a VA hospital (D & O 6). Fargo VAMC also argued that by approving the LCA, DOL approved the wage listed on the LCA by the hospital. Id. The ALJ disagreed, noting that under 20 C.F.R. 655.740(c), DOL's approval of the LCA is not an endorsement of the wages listed therein. Id. The ALJ also rejected the argument that paying the prevailing wage to H-1B doctors would force the Fargo VAMC to

violate the civil rights of U.S. doctors who are paid less than the prevailing wage (D & O 7). Specifically, stated the ALJ, the hospital could have used its Special Pay authorization to pay all physicians the prevailing wage, without distinguishing between physicians of different national origin. In fact, the VA statute encourages the payment of rates comparable to those paid in the private sector. In sum, the ALJ concluded that the Fargo VAMC voluntarily chose to participate in the H-1B program and therefore must comply with the requirements of that program. Id.[13]

ARGUMENT

THE DOL HAS JURISDICTION TO DETERMINE WHETHER THE FARGO VAMC MUST COMPLY WITH THE PREVAILING WAGE REQUIREMENTS OF THE H-1B PROGRAM AND THE FARGO VAMC IS SUBJECT TO THOSE REQUIREMENTS

A. Standard of Review

The Board reviews the ALJ's findings of fact and legal conclusions de novo. See U.S. Dept. of Labor v. Alden Management Services, Inc., ARB Case Nos. 00-020; 00-021 (Aug. 30, 2002); U.S. Dept. of Labor v. Beverly Enterprises, Inc., ARB Case No. 99-050 (July 31, 2002). See also 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except it may limit the issues on notice or by rule.").

[13]The ALJ had previously rejected the argument that ETA's calculation of the prevailing wage was erroneous (D & O 6). The parties stipulated that this determination was final (Stip. 16).

B. Statutory and Regulatory Framework

The H-1B visa program is a voluntary program that permits employers to temporarily secure and employ nonimmigrants to fill specialized jobs in the United States. See INA, 8 U.S.C. 1101(a)(15)(H)(i)(b). The INA requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage. See 8 U.S.C. 1182(n)(1)(A). The prevailing wage provisions safeguard against the erosion of U.S. workers' wages and moderate any economic incentive or advantage in hiring temporary foreign workers. See, e.g., H.R. Rep. No. 106-692, at *12 (2000) (discussion of DOL's 1996 Office of Inspector General report). Under the INA, as amended by the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978, and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA"), Pub. L. No. 102-232, 105. Stat. 1733, an employer seeking to hire an alien in a specialty occupation,[14] or as a fashion model of distinguished merit and ability, must seek and get permission from the DOL before the alien may obtain an H-1B visa from the State Department.[15] Specifically, the statute

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[14]The INA defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. See 8 U.S.C. 1184(i)(1).

[15]Section 212(n) of the INA, 8 U.S.C. 1182(n), was again amended by the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Title IV of Pub. L. No. 105-277, 112 Stat.

requires an employer seeking to employ an H-1B worker to submit an LCA to the DOL. See 8 U.S.C. 1182(n)(1).

In filing the LCA with the Department, the employer attests that:

> (A) The employer -
>
> > (I) is offering and will offer [the H-1B worker] during the period of authorized employment . . . wages that are at least -
> >
> > > (I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or
> > >
> > > (II) the prevailing wage level for the occupational classification in the area of employment,
> >
> > whichever is greater, based on the best information available as of the time of filing the application.

8 U.S.C. 1182(n)(1)(A) (emphases added). The statute requires DOL to certify the application within seven days unless it is incomplete or contains "obvious inaccuracies." 8 U.S.C. 1182(n)(1), unmarked paragraph preceding 8 U.S.C. 1182(n)(2). Only after the employer receives the Department's certification of its LCA, may the Bureau of Citizenship and Immigration Services ("BCIS")[16] approve an H-1B petition seeking authorization to employ

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2681 (Oct. 21, 1998).

[16]Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 at 2194-2196 (November 25, 2002), the adjudication of immigrant visa petitions was transferred from INS to the BCIS.

a specific nonimmigrant worker. See 8 U.S.C. 1101(a)(15)(H)(i)(b); 20 C.F.R. 655.700(a)(3).

The statute also prescribes a framework for enforcement proceedings and sanctions, directing the Department to

> establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under [this Act] or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). . . . The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

8 U.S.C. 1182(n)(2)(A). The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. See 20 C.F.R. 655.700 et seq. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid. See 8 U.S.C. 1182(n)(2)(D); 20 C.F.R. 655.810.

C. DOL has jurisdiction to determine whether the Fargo VAMC must comply with the prevailing wage requirements of the H-1B program.

1. The INA provides DOL with the jurisdiction to determine whether H-1B employers like Fargo VAMC must comply with the prevailing wage requirements. Specifically, the INA requires the Secretary of Labor to establish a process for investigation and disposition of complaints under the H-1B program, and requires the Secretary to order an employer that has not paid the required wage

to pay back wages. See 8 U.S.C. 1182(n)(2)(A),(D).[17] In this case, Fargo VAMC voluntarily decided to participate in the H-1B program which vests DOL with jurisdiction to resolve complaints. Fargo VAMC signed the LCAs which state in bold lettering that "[c]omplaints alleging . . . failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor," and the hospital signed a declaration that it "will comply with Department of Labor regulations governing this program." (Exh. A-1 through A-10). Fargo VAMC also certified on the visa petitions that it "agree[s] to the terms of the labor condition application." (Exh. B-1 through B-10).

The Fargo VAMC proposes that DOL's enforcement of the prevailing wage provisions of the INA against the VA "is an attempt by another agency to review salary determinations made by the Secretary of the Department of Veterans Affairs." (Fargo brief ("br."), p. 4). To the contrary, DOL is not reviewing the DVA's compensation determinations; rather, DOL is reviewing whether the Fargo VAMC complied with its voluntary certification under the INA that it would pay the doctors at least the actual or prevailing wage, whichever is greater. The case of Hanlin v. United States,

[17]Pursuant to this authority, the ARB has jurisdiction to review the ALJ's decision and determine whether Fargo VAMC is subject to and must comply with the prevailing wage requirements. See 5 U.S.C. 557(b) and 20 C.F.R. 655.845.

214 F.3d 1319 (Fed. Cir. 2000) is instructive in this regard. Hanlin involved the DVA's contention that it cannot be subject to the jurisdiction of the Court of Federal Claims for breach of contract under the Tucker Act at 28 U.S.C. 1491(a)(1) because the DVA statute at 38 U.S.C. 511(a) provides the VA with exclusive jurisdiction over the contract claim. The court held that DVA's interpretation would in effect repeal 28 U.S.C. 1491(a)(1), and that repeal by implication is disfavored unless two statutes are irreconcilable:

> [W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

Hanlin, 214 F. 3d at 1321 (citing Morton v. Mancari, 417 U.S. 535 at 551 (1974)). As discussed in greater detail infra, the VA statute is totally consistent with the prevailing wage provisions of the INA.[18]

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[18]Fargo VAMC also states that "[p]erhaps the visas in question were improvidently granted." (Fargo br. p. 5). As noted earlier, DOL must certify an LCA within seven days unless it is incomplete or obviously inaccurate. Fargo VAMC attested that it will pay the higher of the actual wage or the prevailing wage level for the occupation in the area of employment. The bottom of each LCA signed by Fargo VAMC contains the following statement from 20 C.F.R. 655.740(c): "The Department of Labor is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor application." (Exh. A-1 through A-10). DOL is authorized to investigate non-obvious errors on LCAs only in enforcement actions, such as this one. See 20 C.F.R. 655.805. As the legislative history states,

> Because of the need of employers to bring H-1B aliens on board in the shortest possible time, the H-1B program's mechanism

2. Fargo VAMC argues that DOL lacks jurisdiction because 38 U.S.C. 7421 of the VA statute provides the Veterans Affairs Secretary with the sole authority to determine the hours, conditions of employment, and leaves of absence for individuals hired under Title 38 (Fargo br., p. 3). In support, the hospital cites Colorado Nurses Association v. Federal Labor Relations Authority, 851 F.2d 1486 (D.C. Cir. 1988), in which the court held that the VA is not required to engage in collective bargaining pursuant to 5 U.S.C. 7101, because of the VA's exclusive authority to prescribe working conditions of medical employees. However, the court noted that the "exclusivity" provision[19] does not preclude the VA from choosing to negotiate about particular matters. Id. at 1491. Subsequent to the decision in Colorado Nurses, the Eighth Circuit ruled that the Fargo VAMC used its authority, despite the exclusivity provision, to voluntarily enter into a collective

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> for protecting American workers is not a lengthy pre-arrival review of the availability of suitable American workers (such as the labor certification process necessary to obtain most employer-sponsored immigrant visas). Instead, an employer files a "labor condition application" with the Department of Labor making certain basic attestations (promises) and the Department then investigates complaints alleging noncompliance.

H.R. Rep. No. 106-1048, *171, 106th Cong., 2d Sess. (2001), 2001 WL 67919, p. 464 of 618.

[19]The exclusivity provision at 38 U.S.C. 7421 was previously codified at 38 U.S.C. 4108(a) -- the section analyzed in Colorado Nurses. See 38 U.S.C.A. 7421, Revision Notes and Legislative Reports.

bargaining agreement with the union, and thereby subjected itself to the jurisdiction of the Federal Labor Relations Authority ("FLRA"):

> In short, there is nothing in the [DVA] statute which conflicts with the FLRA's assertion of jurisdiction over a collective bargaining agreement the VA has voluntarily agreed to abide by.

American Federation of Government Employees, AFL-CIO, Local 3884 v. Federal Labor Relations Authority, 930 F.2d 1315, 1327-29 (8th Cir. 1991). Similarly, in this case, the Fargo VAMC exercised its authority and voluntarily signed the LCAs and petitions, thereby subjecting itself to DOL's jurisdiction.

3. The Fargo VAMC also contends that "the [VA] statute has even been found to preclude coverage of the Whistleblowers Protection Act for doctors," and cites Alvarez v. Department of Veterans Affairs, 49 MSPR 682 (M.S.P.B. 1991), in support (Fargo br. p. 3). Alvarez, relied on 38 U.S.C. 4119 (now codified at 38 U.S.C. 7425(b)), which precludes any provision of Title 5 or law pertaining to the civil service system that is inconsistent with any provision of the VA statute from superseding, overriding, or modifying the VA statute, unless the law specifically provides that the VA provision may be superseded, overridden, or modified. Unlike the INA, however, the Whistleblower Protection Act is codified in Title 5. Id. at 685-86 n. 6. Furthermore, the INA is consistent with the VA statute, which, in fact, encourages and

provides for payment of the prevailing wage. See discussion infra. Finally, since Alvarez, the law has been amended to provide whistleblower coverage to DVA physicians. See United States Office of Special Counsel, Merit Systems Protection Board: Authorization, Pub. L. No. 103-424, Section 7 (1994), codified at 5 U.S.C. 2105(f).[20]

4. The Fargo VAMC inexplicably argues in the same vein that 38 U.S.C. 7422(d)(3) precludes DOL from enforcing the prevailing wage in this case (Fargo br. p. 4). The statute at 38 U.S.C. 7422 is entitled "Collective Bargaining." This section of the VA statute permits employees to engage in collective bargaining pursuant to Title 5, but does not allow collective bargaining over, among other things, the establishment, determination, or adjustment of employee compensation. Specifically, 38 U.S.C. 7422(d)(3) provides that "[a]n issue of whether a matter or question concerns or arises out of . . . (3) the establishment, determination or

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[20]In an analogous case, the Supreme Court held that 38 U.S.C. 211(a), which provided the VA with final decision-making authority "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans," does not foreclose judicial review of the issue of whether a Veterans Administration regulation violates the Rehabilitation Act of 1973, 29 U.S.C. 794. See Traynor v. Turnage, 485 U.S. 535, 541-45 (1988). The Court reasoned that there is no "reason to believe that the Veterans' Administration has any special expertise in assessing the validity of its regulations construing veterans' benefits statutes under a later passed statute of general application [i.e., the Rehabilitation Act]." Id. at 544. Congress later replaced 38 U.S.C. 211(a) with 38 U.S.C. 511. See Sugrue v. Derwinski, 26 F.3d 8,11, n.2 (2d Cir. 1994), cert. denied, 515 U.S. 1102 (1995).

adjustment of employee compensation under [Title 38] shall be decided by the Secretary [of Veterans Affairs] and is not subject to collective bargaining and may not be reviewed by any other agency." Subsection (d)(3), therefore, provides the Veterans Affairs Secretary with authority to determine whether the matter arises out of the establishment, determination, or adjustment of employee compensation, and the Secretary's decision on this matter is not subject to collective bargaining or review. See National Federation of Federal Employees Local 589 v. Federal Labor Relations Authority, 73 F.3d 390, 393 (D.C. Cir. 1996) ("§7422 deals only with collective bargaining rights, however defined.") Simply put, the instant case does not involve the issue of collective bargaining.

5. In sum, Fargo VAMC has not put forward any argument that would deny DOL jurisdiction over the issue of whether Fargo VAMC has met the prevailing wage requirements of the INA, something that is uniquely within DOL's province.

D. Fargo VAMC is subject to and must comply with the wage requirements of 8 U.S.C. 1182(n)(1)(A) when, as a participant in the H-1B program, it files LCAs to employ non-immigrant physicians.

1. As held in Administrator, Wage and Hour Division v. Native Technologies, Inc., ARB Case No. 98-034, 1999 WL 377285, at *6 (ARB May 28, 1999), a party's status as "H-1B employer" under the INA exists by operation of law:

As the *intended employer*. . . Native Technologies' filing of

> [the LCA and INS petition] was the necessary precondition for the INS's issuance of [complainant's] H-1B visa; in other words, if Native Technologies had not represented that it would employ [complainant] for the period stated on the LCA, [complainant] would not have been permitted to enter the country on the H-1B visa.

Indeed, the Fargo VAMC acknowledged its status as an employer on both the LCAs and the visa petitions, each of which required specific information to be completed by the "employer," and contained a detailed description of the employer's obligations (Stips. 4, 6; Exh. A-1 through A-10, B-1 through B-10). Fargo VAMC also told the INS in an H-1B extension letter filed on behalf of one of the doctors that "[w]e are an established and responsible United States employer, maintaining an unbroken record of full compliance to all immigration requirements." (Exh. W-2). Without the filing and approval of the LCAs and the visa petitions, and absent representing that it was an employer and that it would comply with the attestation requirements, the Fargo VAMC could not have hired the doctors. Fargo VAMC should not be permitted to now claim that it is not an "employer" under the Act and therefore is not subject to the prevailing wage requirements.

The case of U.S. Dept. of Labor v. Alden Management Services, Inc., ARB Case Nos. 00-020; 00-021 (Aug. 30, 2002) is instructive in this regard. There, the Board reviewed an analogous claim under the Immigration Nursing Relief Act of 1989, 8 U.S.C. 1182(m) et seq. ("INRA"), in which the employer was given permission to hire

nonimmigrant nurses after filing required attestations with the Department of Labor and petitions with INS. The employer failed to pay the nurses the prevailing wage as required by INRA. The employer claimed that it did not meet the definitional requirement necessary to be covered by INRA (i.e., that it was a "facility"), so that DOL had no authority to enforce back wages under the statute. In rejecting this argument, the Board noted that since the employer secured the benefits of the Act -- the permission for alien registered nurses to provide services as its employees -- it was estopped from denying that it was a facility (Alden at page 8). Similarly, Fargo VAMC should not be permitted to avail itself of the H-1B program by holding itself out as an employer, and then deny that status (and coverage) when it is found to be in violation of the prevailing wage requirements.

2. Moreover, contrary to Fargo VAMC's argument on appeal, the statutory definition of "employer" covers the Fargo VAMC. The 1995 DOL regulations define "employer" as "a person, firm, corporation, contractor, or other association or organization in the United States:

> (1) Which suffers or permits a person to work within the United States;
>
> (2) Which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(3) Which has an Internal Revenue Service tax identification number."

20 C.F.R. 655.715 (1995).

The 2001 regulations define employer as "a person, firm, corporation, contractor, or other association or organization in the United States which has an employment relationship with H-1B nonimmigrants and/or U.S. worker(s). The person, firm, contractor, or other association or organization in the United States which files a petition on behalf of an H-1B nonimmigrant is deemed to be the employer of that nonimmigrant." 20 C.F.R. 655.715.

As noted earlier, the violations occurred during the effective period of both regulations. It is undisputed that Fargo VAMC meets the functional regulatory criteria under both sets of regulations, i.e., that it suffers or permits the doctors to work, that it has the authority to hire, pay, fire, supervise or otherwise control the work of the doctors, and that it has an Internal Revenue tax identification number (Stips. 7-9). The Fargo VAMC has an employment relationship with the doctors and filed the INS petitions on their behalf (Stips. 4-7; Exh. A-1 through A-10, B-1 through B-10).

Fargo VAMC, however, contends that it is not an employer within the meaning of the INA because it is an executive department of the United States and not, as prescribed in the regulations, "a person, firm, corporation, contractor, or other association or

organization in the United States." (Fargo br. pp. 5-6). There is nothing in the INA that limits the definition of "employer" as Fargo VAMC advocates. The fact that the VA is an executive department of the United States is not mutually exclusive with the fact that it is an organization in the United States. Indeed, Congress clearly intended the H-1B program to apply to Federal executive agencies. For example, pursuant to 8 U.S.C. 1101(a)(15)(H)(i)(b), the H-1B provisions apply to "alien[s] subject to [8 U.S.C.] 1182(j)(2)." Section 1182(j)(2) refers, in turn, to an "agency in the United States" as a permissible H-1B employer of alien medical school graduates.[21] Additionally, 8 U.S.C. 1182 was amended by the ACWIA to provide a specific method for computing the prevailing wage under the H-1B program for employees of "a Governmental research organization." See Section 415 of Title IV of Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998), as codified in 8 U.S.C. 1182(p). If government agencies

[21]In its Reply to the Administrator's Motion for Summary Judgment filed with the ALJ, Fargo VAMC argued that pursuant to section 1182(j)(2), Congress intended the INA to apply only to U.S. agencies that employ doctors who teach or conduct research. The statute at 8 U.S.C. 1182(j)(2)(A) does limit the type of employer that may employ a foreign medical graduate to work as a teacher or researcher to "a public or nonprofit private educational or research institution or agency in the United States." Section 1182(j)(2)(B), however, places no limitation on the type of employer that may employ foreign medical graduates (be they teachers, researchers, or practitioners) who have passed the appropriate licensing examination, and who are either competent in English or have graduated from an accredited medical school.

could not be employers, Congress would not have instituted a special prevailing wage methodology for governmental research organizations. As an administrative law judge stated in Administrator, Wage and Hour Division v. Dallas Veterans' Affairs Medical Center, 1998-LCA-00003 (June 19, 2001), p. 3, appeals docketed, Nos. 01-077, 01-081 (ARB, July 18 and 19, 2001):

> [T]he mere fact that Respondent is a government agency does not preclude it from being an employer under the H-1B regulations. Neither the regulations nor the amendments contain any prohibition against government agencies being "employers."

3. Fargo VAMC further argues that it cannot be an employer subject to the prevailing wage because the "prevailing wage" refers to the wage for the occupational classification in the "area of intended employment," which is defined in the regulations as "the area within normal commuting distance of the place of employment." Fargo VAMC contends that here the area of intended employment is "the Department of Veterans Affairs' network of health care facilities," with a "potential patient population" from "anyplace in the nation." (Fargo br. pp. 6-7). Fargo VAMC thus proposes that "[t]he only logical method of calculating the 'prevailing wage' should be to look to those salaries paid to other VA physicians." Id.[22]

[22]In fact, the prevailing wage is based on the occupational classification in the area of intended employment, not the customer base. See 20 C.F.R. 731(a)(2). In the instant case, DOL correctly compared the proposed wages of the VA physicians at issue with the

First, the definition of prevailing wage has nothing to do with whether an entity is an employer. Second, even if it did, the question of whether the correct data was used in determining the prevailing wage was finally determined in the ETA proceeding and is not an issue in this case (Stips. 16, 19; Exh. H). See 20 C.F.R. 655.731(d)(2)(i).[23]

4. Finally, Congress intended, and the VA statute encourages, payment to doctors at prevailing wage levels:

> [I]t is the policy of Congress to ensure that the levels of total pay for physicians . . . of the Veterans Health Administration are fixed at levels reasonably comparable . . . with the income of non-Federal physicians.

38 U.S.C. 7439(a). See also S. Rep. No. 96-747, at p. *29, 96th Cong. 2nd Sess. (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 2463 at 2467 (1980 Senate bill to amend Title 38 "authorize[s] the [VA] administrator to adjust minimum and maximum rates of pay for department of medicine . . . personnel employed under Title 38 . . . when necessary to (1) provide pay competitive with that being paid in non federal health-care facilities in the same area . . .")

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prevailing wage of physicians in the area performing the same specialties -- cardiology, internist/primary care, neurology, infectious diseases, hematologist/oncologist (Exh. C, D). "VA doctor" is not a medical specialty.

[23]Fargo VAMC stipulated that the prevailing wage determinations used to determine the back wages in this case are final as to the applicable prevailing wage (Stip. 16, 19).

(emphasis added).[24]

In Matter of Hunter Holmes McGuire Veterans Affairs Medical Center, 94-INA-00210, 1996 WL 616606 at p. *1 (Bd. Alien Lab. Cert. App., Oct. 7, 1996)(en banc), a case involving the Department of Veterans' Affairs and its hiring of an alien physician, the Board of Alien Labor Certification Appeals ("BALCA") held that the VA statute provides a mechanism, at 38 U.S.C. 7439,[25] for seeking to modify the special pay rates of physicians when the VA is unable to recruit well-qualified physicians because current rates are not competitive with those of non-VA physicians. The BALCA also said

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[24]The VHA policy manual also contemplates payment of above-minimum entrance rates to "[e]nable VA to recruit or retain well-qualified employees . . . where recruitment or retention problems are being caused by higher non-Federal (nonovertime) rates of pay" and to "[p]rovide basic pay in amounts competitive with . . . the amount of the same type of pay paid to the same category of health-care personnel in the same labor market." (Exh. P, p. 3D-2, section 4, para. c(1)(a),(b)) (emphases added).

[25]The components of Special Pay are outlined in 38 U.S.C. 7433 and, as noted above, include scarce specialty pay up to $40,000 annually "for service in a medical specialty with respect to which there are extraordinary difficulties (on a nationwide basis or on the basis of the needs of a specific medical facility) in the recruitment or retention of qualified physicians," and geographic pay up to $17,00 annually "for service in a specific geographic location with respect to which there are extraordinary difficulties in the recruitment or retention of qualified physicians in a specific category of physicians." 38 U.S.C. 7433 (b)(3)(A) and (b)(6). The factors that go into determining whether scarce medical specialty pay is warranted include "[s]alary comparisons with non-Federal employers," and "any other locally specific factors which bear on the facility's ability to recruit and retain individuals in the scarce medical . . . specialty." (Exh. P, p. 3B-App. F-6, para. g and i) (emphases added).

at the same time that the labor certification regulations "do not provide an exception, either express or implied, for a Federal wage schedule."[26]

As discussed in detail in the Administrator's Brief in Support of Summary Judgment (pp. 23-32), and in the statement of facts in this brief, Fargo VAMC could have followed its own statute and complied with the prevailing wage requirements. Indeed, Fargo VAMC admits that the applicable prevailing wage rates are below the maximum that a DVA physician could be paid under the VA statute, that it had the discretion to pay geographic location Special Pay up to $17,000 annually per doctor and scarce specialty pay up to $40,000 per doctor, and that it could have started the doctors at a higher pay grade and step than those at which they were started (Stips. 41, 43, 49). It also could have utilized other types of Special Pay, such as responsibility pay or exceptional qualifications pay. Fargo VAMC documented that Special Pay was warranted, yet chose not to pay the higher amounts that would have allowed it to meet the prevailing wage requirements (Exh. L-1 to L-10; W-1, W-4, W-6; Stip. 27-29, 39-44, 49, 53-55).[27] In sum, Fargo

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[26] Hunter Holmes involved the permanent alien certification program at 20 C.F.R. Part 656. See 8 U.S.C. 1182(a)(5)(A). The H-1B prevailing wage determinations are to be interpreted by DOL in a "like manner" to the permanent program. See H.R. Conf. Rep. No. 101-955, 101st Cong. 2nd Sess. (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 6784, at 6787, 1990 WL 201613.

[27] For example, Fargo VAMC paid H-1B doctor Rajeev Kaul no

VAMC was clearly subject to the applicable prevailing wage requirements, and was just as clearly in a position to meet them.

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geographic pay and only $10,000 in scarce specialty pay, even though it noted the following in his Special Pay Authorization form (Exh. L-5):

> Scarce specialty pay is imperative if we are to compete with higher community salaries to recruit and retain Dr. Kaul as part of a core group of essential primary care physicians and continue to serve our veterans with timely medical care.

CONCLUSION

For the reasons stated above, the Administrator respectfully requests that the Board affirm the ALJ's Decision and Order in its entirety.

Respectfully submitted,

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This is to certify that a copy of the foregoing Administrator's Response Brief was served to the following on this 24th day of September 2003, by Federal Express, overnight mail, postage prepaid:

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