



In the Matter of:

The Applicability of Wage Rates and Fringe Benefits Collectively Bargained by Ocean Shipholdings Inc. and American Maritime Officers, Under Contract Number RFP N00033-10-R-3140 for Operations and Maintenance of T-5 Tanker USNS Lawrence H. Gianella, Duval, Duval County, Florida

ARB CASE NO. 11-066

ALJ CASE NO. 2011-CBV-001

DATE: January 23, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Matt Swerdlin, Esq., *Quinn, Connor, Weaver, Davies & Rouco LLP*, Birmingham, Alabama

For Respondents Ocean Ships, Inc. and Ocean Shipholdings, Inc.:

**Linda Auerbach Allerdice, Esq., *Holland & Knight LLP*, Los Angeles, California
Ronald Perlman, Esq., *Holland & Knight LLP*, Washington, District of Columbia
Oliya S. Zamaray, Esq., *Holland & Knight LLP*, McLean, Virginia**

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Royce filed a dissenting opinion.

FINAL DECISION AND ORDER

On July 13, 2011, a Department of Labor Administrative Law Judge (ALJ) ruled that a contractual dispute involving the Marine Engineers' Beneficial Association, AFL-CIO (MEBA), the Military Sealift Command (MSC), and Ocean Ships, Inc. (OSI)¹ was not governed by the

¹ OSI states that it was erroneously named in this case as "Ocean Shipholdings, Inc." OSI is a subsidiary of Ocean Shipholdings, Inc.

McNamara-O’Hara Service Contract Act of 1965, as amended (SCA).² For the following reasons, we affirm the ALJ.

BACKGROUND

MSC is a division of the United States Navy. In 2004, it solicited bids to maintain and operate a fleet of four ships under contract N00033-04-C-5350 (RFP 5350). One of the ships in that fleet was the USNS Gianella, a tanker that carried diesel, gasoline, and jet fuel. OSI prevailed on the contract and operated the four ships on a five-year contract. OSI provided officers to these ships under a collective bargaining agreement with the American Maritime Officers.

On April 9, 2010, MSC issued RFP No. N00033-10-3140 (RFP 3140), a request for proposals for the operation and maintenance of only the Gianella.³ On May 24, 2010, the U.S. Department of Labor’s Wage and Hour Division (Wage and Hour) received an undated request for a substantial variance hearing on RFP 3140 from MEBA, a union that represents mariners on U.S.-flagged vessels. A substantial variance hearing is an administrative proceeding at which a party affected by a wage determination can establish that the wages and fringe benefits applied to a contract “are substantially at variance with those which prevail for services of a character similar in the locality.”⁴ According to MEBA, the wages and fringe benefits in RFP 3140 were “substantially at variance with those which prevail for services of a character similar in the locality and industry.”⁵

On November 24, 2010, MSC issued an “Amendment of Solicitation/Modification of Contract” indicating that the SCA was not applicable to the RFP 3140 because “[t]he ship under this contract is intended to be forward deployed for the entire contract period.”⁶ MSC states that

² 41 U.S.C.A. § 6701 et seq. (Thomson Reuters 2012).

³ The ALJ held that “[t]he RFP stated that the [Gianella] would be prepositioned at the U.S. Naval base in Diego Garcia.” Order Granting Motion of Ocean Ship[s], Inc. to Dismiss Claim of Marine Engineers’ Beneficial Association, AFL-CIO (Order Granting Motion) at 2. OSI’s Motion does not assert this fact, and OSI does not contend that the original version of RFP 3140 clearly indicated that the Gianella would be operating outside of the United States as defined by the SCA. Because the document is not in the record before us, we cannot confirm the clarity of the original version.

⁴ 29 C.F.R. § 4.10 (2012).

⁵ MEBA’s May 24, 2010 Letter to Wage and Hour at 1.

⁶ Motion of Ocean Ships Inc. to Dismiss Claim of Marine Engineers’ Beneficial Association, AFL-CIO (Motion) at 4; Declaration of James McGregor in Support of Motion at 4, Exhibit C.

the Gianella was “put through drydocking and overhaul in a middle east shipyard to comply with regulations for prepositioned service in the Indian Ocean,” and “is part of [the] U.S. Naval Afloat Prepositioned Fleet with operations stationed around the U.S. Navy’s MPSRON2 squadron located at the coral reef island of Diego Garcia,” an atoll located south of the equator in the central Indian Ocean.⁷

MSC also issued an Announcement on November 24, 2010, stating that, although SCA compliance was not applicable to the contract, RFP 3140 offerors would be required to pay “at a minimum the wage and fringe benefit rates contained in the applicable Department of Labor (DoL) Wage Determinations included in Attachment B of the subject RFP.”⁸ Attachment B is a wage determination “that was incorporated as the benchmark for wages and fringe benefits in connection with the Contract Number RFP N00033-10-R-3140.”⁹

In a December 10, 2010 letter, Wage and Hour denied as untimely MEBA’s request for a substantial variance hearing. MEBA submitted a second request on February 1, 2011. On May 16, 2011, Wage and Hour issued a letter stating that the substantial variance in wages MEBA alleged “may have existed,”¹⁰ and referred MEBA’s claim to the Office of Administrative Law Judges (OALJ). The Navy awarded the contract to OSI on April 15, 2011, and OSI began performance on the contract on June 1, 2011.

The OALJ assigned the case to an ALJ. The ALJ conducted a telephone conference to schedule a hearing, during which OSI raised the issue of the SCA’s applicability. The ALJ ordered the parties to file written briefs on the issue. On June 27, 2011, OSI filed a Motion to Dismiss MEBA’s claim (Motion). OSI sought dismissal because “the U.S. Department of Labor (DoL) lacks jurisdiction under the [SCA]” and “the proceedings were initiated by the DoL on the basis of erroneous information.”¹¹ MEBA filed a response in which it addressed both arguments. On July 13, 2011, the ALJ granted OSI’s Motion. The ALJ concluded that the SCA did not apply to RFP 3140 because the work under the contract would be performed outside the United States.¹² MEBA appealed the ALJ’s ruling to the Board.

⁷ Motion at 2-3.

⁸ *Id.* at 5; Declaration of James McGregor in Support of Motion at 5, Exhibit D.

⁹ Declaration of James McGregor in Support of Motion at 7, Exhibit E.

¹⁰ May 16, 2011 Letter from Wage and Hour to MEBA at 1.

¹¹ Motion at 1.

¹² Order Granting Motion at 5.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB her authority to issue final agency decisions under SCA.¹³ The Board reviews conclusions of law de novo.¹⁴

DISCUSSION

The SCA 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.¹⁵ The statute states:

The term “United States”— (A) includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. § 1331 et seq.), American Samoa, Guam, Wake Island, and Johnston Island; but (B) does not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.^{16]}

The regulations governing the SCA provide:

Services to be performed exclusively on a vessel operating in international waters outside the geographic areas named in this paragraph would not be services furnished ‘in the United States’ within the meaning of the Act.^{17]}

¹³ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 8.1(b).

¹⁴ *SuperVan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-014, slip op. at 3 (ARB Sept. 30, 2002); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 1999-SCA-018, slip op. at 5 (ARB Jan. 25, 2002).

¹⁵ See 41 U.S.C.A. § 6702.

¹⁶ 41 U.S.C.A. § 6701(4).

¹⁷ 29 C.F.R. § 4.112(a).

MEBA has not adequately refuted OSI's assertion that the SCA does not govern RFP 3140. OSI stated in its Motion and at the telephone conference that the Gianella would not be providing services within the United States.¹⁸ During the telephone conference, Counsel for MEBA did not dispute that the Gianella would be operating outside of the territory governed by the SCA. Instead, he argued that the SCA applied because the parties agreed to apply SCA wages to the contract.¹⁹ But OSI incorporated a wage determination into RFP 3140 to establish a minimum level of wages successful bidders would be expected to pay to workers. The parties may agree to pay SCA-level wages, but SCA coverage applies only as described in the statute (41 U.S.C.A. 6701(d)), and the implementing regulations (29 C.F.R. 4.112(a)).²⁰

MEBA contends that the SCA applies to RFP 3140 because it is a "successor contract" to RFP 5350, and the ALJ erred "in finding the two contracts independent of each other as a legal and factual matter."²¹ This contention lacks merit. The record fully supports the ALJ's conclusion that RFP 3140 was neither a continuation nor an extension of the 2004 contract awarded under RFP 5350.²² As the ALJ found, it is undisputed that "[RFP 3140] is for one ship rather than the four ships in the earlier contract, and that [RFP 3140] indicates that the USNS Gianella is now part of the prepositioned fleet based in Diego Garcia."²³ But assuming that RFP 3140 is related to RFP 5350 in the manner that MEBA asserts, it would not change the fact that the crew of the Gianella will *not* be performing work within the United States under RFP 3140.²⁴

¹⁸ Motion at 10-11; Transcript of July 12, 2001 Telephone Conference (Tr.) at 7.

¹⁹ See Tr. at 16 (Mr. Swerdlin (Counsel for MEBA): "Judge, I will accept Ms. Allerdice's proffer that the Gianella is not going to be within the territorial waters, but the parties agreed to abide by the SCA.>").

²⁰ See, e.g., *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"); *Pentheny, Ltd. v. Gov't of Virgin Islands*, 360 F.2d 786, 789 (3d Cir. 1966) ("It is well settled that an administrative agency is a tribunal of limited jurisdiction. It may exercise only the powers granted by the statute reposing power in it.") (citing *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419, 428 (1957), and *Civil Aeronautics Bd. v. Delta Air Lines*, 367 U.S. 316 (1961)).

²¹ Legal Brief of Points and Authorities in Support [of] Marine Engineers' Beneficial Association's, AFL-CIO Petition for Review (MEBA Brief) at 3-4; see also Opposition to the Motion at 8 ("OSI cannot avoid its obligations to abide by the SCA when the entire history of the solicitation and bid process for the USNS Gianella establishes that the SCA does apply to the prior and successor contracts.>").

²² Order Granting Motion at 5.

²³ *Id.*

²⁴ MEBA argues that OSI failed to update wage determination information during its performance under RFP 5350, and therefore should have been precluded from bidding on RFP 3140.

MEBA has not cited to any legal authority to establish that the territorial requirements of the SCA are superseded by the current RFP's potential relationship to a prior contract.

MEBA also states that, “[b]ased on publicly available information, the USNS Gianella has been inside U.S. territorial waters during periods of time between 2005 and the present. MEBA [Exhibit] Ex.13.”²⁵ The cited exhibit is a photocopied news article, dated September 2007, entitled “Gianella [R]escues Cuban [R]efugees in Gulf of Mexico.” For purposes of the Motion, we accept the content of the article as true. However, this assertion does not alter the undisputed fact in the record that the Gianella would not be providing services within the United States under the contract in dispute in this case that is required for SCA coverage.²⁶

Finally, we note that OSI also asked the ALJ to dismiss this case because MEBA's request for a substantial variance hearing was based on an erroneous wage comparison table MEBA submitted in conjunction with its second request for the hearing.²⁷ The ALJ concluded that he could not dismiss on those grounds because the information in dispute would require a level of fact-finding more appropriate for a summary decision proceeding.²⁸ We agree with this conclusion, and offer no opinion on the adequacy of the wages in dispute in this case.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's order, and **DISMISS** this case.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE, Administrative Appeals Judge, *dissenting.*

The ALJ ruled that “the SCA does not govern this contract and I do not have jurisdiction under the SCA to hear and decide this case.” Order Granting Motion at 5. I would reverse and

MEBA Brief at 5-6. Our ruling does not address this issue because it is unrelated to the substantial variance issue MEBA raised before Wage and Hour.

²⁵ Opposition to Ocean Ships Inc. Motion to Dismiss (Opposition to the Motion) at 6.

²⁶ See 41 U.S.C.A. § 6701(d); 29 C.F.R. 4.112(a).

²⁷ Motion at 6; Opposition to the Motion at 5-6.

²⁸ Order Granting Motion at 4.

remand for a substantial variance hearing for the following reasons. First, the ALJ erred by considering matters outside the pleadings but failing to convert the motion to one for summary judgment. *See Gordon v. National Youth Work Alliance*, 675 F.2d 356, 360-61 (D.C. Cir. 1982). A motion to dismiss confines a court to the face of a complaint and a court must view the evidence in the light most favorable to the party opposing the motion. The ALJ need not have considered matters outside the pleading in this case but once he did, he should have provided the parties with the requisite procedural safeguards.

Here, after concluding that he had no authority to interpret the contract absent jurisdiction, the ALJ proceeded to do just that. Once he had interpreted the contract, he then based his dismissal on those findings. Order Granting Motion at 4. The ALJ concluded that “contract RFP N00033-10-R-3140 stands on its own and is a distinct contract from the 2004 contract (RFP N00033-04-5350), not a continuation or extension of the previous contract.” Order Granting Motion at 5. But the question of whether the contract was a successor contract or a separate contract was a genuine issue of material fact that the ALJ should not have determined on a motion to dismiss. MEBA alleges that on May 7, 2010, MSC issued an amendment clarifying that the solicitation was based upon a 4(c) Wage Determination directly incorporating the wages and fringe benefit levels found in OSI’s predecessor 2005-2010 CBA. MEBA Ex. 6. Further, given that the wage determination at issue was engendered under Section 4(c) – a section dealing explicitly and solely with successor contracts – it appears that MEBA’s allegation that RFP N00033-10-R-3140 is a successor contract may be correct as a matter of law. In any case, the ALJ erred by granting a motion to dismiss on factual grounds unresolved by the pleadings.

In addition, it is a well-established tenet of law that federal jurisdiction is determined as of the date the complaint is filed and that once subject matter jurisdiction attaches, it is not divested by a subsequent change in fact. *See, e.g., In re Canion*, 196 F.3d 579, 586-587 & n. 29 (5th Cir. 1999); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 n.6 (5th Cir. 1994). The Department of Labor received MEBA’s complaint requesting a substantial variance hearing regarding the wage determination for RFP N00033-10-R-3140 on May 24, 2010, MEBA filed the complaint six months before the November 23, 2010 amendment to the RFP that stated that SCA compliance was not required because the intent was for the Gianella “to be forward deployed for the entire contract period.” The 4(c) Wage Determination governing RFP N00033-10-R-3140 was issued under the SCA and, when the complaint challenging that wage determination was filed, the locality where the 2011 contract would be performed was not designated. Furthermore, the 4(c) Wage Determination applicable to RFP N00033-10-R-3140 explicitly incorporates wage rates and fringe benefits negotiated under the predecessor 2004 contract (RFP N00033-04-5350) performed within U.S. territorial waters. For both these reasons, SCA jurisdiction properly attached when MEBA filed the complaint. MSC’s subsequent decision to operate the ship in international waters was not sufficient to divest jurisdiction.

JOANNE ROYCE
Administrative Appeals Judge