



Issue Date: 19 January 2006

CASE NO. 2006-CBV-00001

In the Matter of:

APPLICABILITY OF WAGE RATES
COLLECTIVELY BARGAINED BY
AM-GARD, INC., AND THE UNITED
GOVERNMENT SECURITY OFFICERS
OF AMERICA, LOCAL NO. 50, UNDER
A CONTRACT FOR COURT SECURITY
OFFICERS IN DENVER, PUEBLO, AND
COLORADO SPRINGS, COLORADO

Before: RUSSELL D. PULVER
Administrative Law Judge

DECISION AND ORDER

This is a collective bargaining variance proceeding arising under the McNamara-O'Hara Service Contract Act, 41 U.S.C.A. §§351-58 (hereinafter "the Act"), and its implementing regulations at 29 C.F.R. §§4 and 6.2. The United Government Security Officers of America ("the Union"), and Am-gard, Inc. ("Am-gard") entered into a collective bargaining agreement ("CBA") that determined wages for security guard services at federal court houses in Colorado. On July 29, 2005, the Union petitioned the Department of Labor to be relieved from the wages in this agreement on the grounds that a substantial variance exists between the collectively-negotiated wages and those wages which prevail for similar services in the applicable locality.¹

In response to the Union's requests for review, the Administrator issued an *Order of Reference* on October 21, 2005.² Consistent with the time limits set out in 29 C.F.R. § 6.52, the

¹ The Union submitted a second request on August 30, 2005, that was based upon wage determination No. 94-2081 (Denver and surrounding counties), and wage determination No. 94-2083 (Pueblo and extended southern Colorado counties), that were previously excluded in the first request. UX 1B.

² The certificate of service attached to the *Order of Reference* was undated. Apparently there was some confusion with the service of this document. TR at 20-21. For purposes of this proceeding, I find that the date of service is October 27, 2005, although the Order was not received at the Office of Administrative Law Judges in San Francisco until November 9, 2005. TR at 21.

pre-hearing conference and hearing were scheduled for and held on December 20, 2005, in Denver, Colorado. At that time, I denied the Union's motion for summary decision. I also denied the Union's request to limit Am-gard's participation in the hearing because of late submissions. Based on 29 C.F.R. § 6.52, I denied Am-gard and the United States Immigration and Customs Enforcement's separate requests for continuances. This provision requires that I hold a pre-hearing conference with a hearing immediately following, on a date "not more than 60 days from the date on which the certificate of service indicated the *Order of Reference* was mailed."³

Am-gard and the Union were the only interested parties who appeared for the hearing. Ronald Smith, Ryszard Zurek, and Patricia Wood testified on behalf of the Union; Patricia Larson testified on behalf of Am-gard. The Union's exhibits ("UX") 1 (A and B) through 32; Am-gard's exhibits ("AX") 1 through 3; and the ALJ exhibits ("ALJ") 1 through 5 were admitted into evidence. I received the hearing transcript on January 4, 2005, and as provided by 29 C.F.R. § 6.56, my decision had to be issued within 15 days of receipt of the transcript. On January 6, 2006, the parties filed post-hearing briefs. The Union filed a reply brief on January 11, 2006, and Am-gard responded on January 17, 2006.

The key issues are whether this proceeding was properly brought under the Act, and whether the comparisons used by the Union are appropriate to show a substantial variance. The Union seeks wages for Colorado Springs to be amended and set at \$17.14 per hour; for Denver, including Boulder, at \$19.18 per hour; and for Pueblo/Southern Colorado at \$15.75 per hour.

For reasons stated below, the petition is DENIED.

FINDINGS OF FACT

A. Background

The United States Department of Homeland Security ("DHS") awarded a contract to Am-gard to provide security officer services for federal buildings in Colorado. The Union represents the security officers of Am-gard, who work in Colorado. In 2003, the Union entered into a CBA with Am-gard, which set the wages for security officers in Colorado Springs, the Denver metropolitan area; and the Pueblo/Southern Colorado area. The parties stipulated that they reached this agreement following arms-length negotiations. TR at 42.

The initial CBA was a three-year agreement that was set to expire on September 30, 2006.⁴ The wage rates set in this initial agreement are unknown because the parties submitted in

³ Am-gard verbally requested a continuance on December 7, 2005, and the United States Immigration and Customs Enforcement faxed a request for a continuance on December 19, 2005.

⁴ The parties supplied the modified CBA that runs from March 31, 2004 through September 30, 2007 as UX 3 and AX 1. In the Union's first request for a substantial variance hearing, it speaks of the parties entering a CBA in 2003, which was modified in 2004. UX 1A In its second request for a hearing, the Union explained that the CBA was

their exhibits only the modified CBA, which covers the dates of March 31, 2004, through September 30, 2007. Based on this modification, the wage rates were set at \$11.50 per hour for Colorado Springs; \$13.34 per hour for Denver; \$9.50 per hour for Pueblo/Southern Colorado; and \$10.00 per hour for Durango. A wage-opener negotiation in March of 2005 increased the wages to \$11.95 per hour for Colorado Springs; \$14.56 per hour for Denver; \$10.02 per hour for Pueblo/Southern Colorado; and \$10.25 per hour for Durango. UX 3. No wage increases resulted from the most recent wage negotiations between Am-gard and the Union. UX 1B.

At the heart of this dispute is whether the security officers covered by this CBA should be classified as Guard II, or something greater. Based on the Department of Labor's Service Contract Act Directory of Occupations for protective service classes, a Guard II has the following duties:

Enforces regulations designed to prevent breaches of security. Exercises judgment and uses discretion in dealing with whether first response should be to intervene directly (asking for assistance when deemed necessary and time allows), to keep situation under surveillance, or to report situation so that it can be handled by appropriate authority. Duties require specialized training in methods and techniques of protecting security areas. Commonly, the guard is required to demonstrate continuing physical fitness and proficiency with firearms or other special weapons.⁵

The Union argues that its security officers are not Guard II, but have more duties and responsibilities that entitle them to higher wages. It further contends that its security officers fill a position that does not fit neatly into any of the jobs listed on the Department of Labor's wage determination charts.⁶ As such, the Union used a slotting technique that averaged the wages of different positions in order to find a more suitable wage for the actual duties performed. Specifically, the Union averaged the Court Security Officer ("CSO") wage with the Guard II wage.

Am-gard takes issue with the Union's methods because it asserts that the security officers are correctly characterized as Guard II, but even if they perform duties greater than those found in the Guard II position, they are not like a CSO, which is most often the highest paid position

modified in March of 2005, and that it expires on September 30, 2006, although the exhibits provided (UX 3 and AX 1) show that the CBA runs through September 30, 2007. UX 1B.

⁵ This description of the Guard II position can be found on the Department of Labor's website for the Service Contract Act Directory of Occupations: <http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm>.

⁶ Wage determination 94-2079 (Colorado Springs) offers the following classifications for protective services:

Police Officer	12.85
Alarm Monitor	11.52
Corrections Officer	15.55
CSO	12.85
Detention Officer	15.55
Firefighter	12.85
Guard I	9.72
Guard II	11.95. UX 10.

found in the protective services category of the wage determination index. Am-gard argues that proposals submitted during arms-length negotiations of this CBA were for wages always within the range of the Guard II level. AX 2. Am-gard's first proposal, dated July 25, 2005, listed a wage rate for Colorado Springs at \$11.95; Denver/Boulder at \$15.56; Pueblo at \$10.50; and Durango at \$10.50. *Id.* The Union countered with wages for Colorado Springs at \$17.74; Denver/Boulder at \$17.76; Pueblo at \$15.00; and Durango at \$15.93.⁷ *Id.* Am-gard's's best and final offer, dated August 5, 2005, proposed wages for Colorado Springs at \$11.95; Denver/Boulder at \$16.02; Pueblo at \$11.02; and Durango at \$11.02. *Id.*

Neither the level nor title of the security officers covered by the CBA is specified. UX 3. The Union concedes that the security officers are not CSOs, but that they are more like security police officers – a classification that does not exist on the wage determination index. The CBA states that the security officers require training, but the type of training is not included. Instead, only Am-gard's obligation to schedule training, and the rate by which the training would be paid is listed. The CBA does not speak of the level of experience required or of particular duties, but the Union contends that the scope of the security guard duties is contained in the GSA Contract Guard Information Manual. UX 31. An excerpt from the manual reads:

[y]our primary responsibilities are to control access to Federal property; to assist in ensuring the safety of employees and visitors...and to assist in ensuring the safety of Federal property. Access control includes checking visitor and employee identification; operating security equipment such as x-rays and magnetometers to screen for prohibited materials; operating and monitoring security cameras and/or alarms; and reporting crimes and incidents.⁸

Id.

In order to demonstrate an alleged substantial variance in the wage rate, the Union compiled comparisons of localities both in- and outside of the state of Colorado. The localities chosen outside of Colorado were under similar federal contracts for DHS. The Union also offered a comparison of wages paid by a private company which provides protective services in Colorado; statistical information from the Bureau of Labor Statistics and Salary.com; and the testimony of security guards who work in various positions.

B. Localities

The information below was provided by the Union in its argument or exhibits. The Union did not specify which numbers – current rates or wage determination rates – were used in its averages and substantial variances. Therefore, all of the Union's formulas had to be extrapolated by this court.⁹

⁷ Within this counter-offer, the Union contended that "Colorado Springs needs a serious increase." AX 2.

⁸ This manual also includes information on the difference between certain crimes, as well as procedure in the event of terrorism.

⁹ I have noted where there is a deviance between the figures argued by the Union and the result calculated here.

Fort Collins – based on Wage Determination 94-3009 Revision #14. UX 16.

The CBA does not cover Fort Collins. The Union included wage information on Fort Collins to compare it to the localities covered by the CBA. It argues that Guard II wage rates in Fort Collins have increased by 64% between 2000 and 2005, but the wages for Colorado Springs have not increased. UX 16, 17, 29.

Guard II	\$17.74
CSO	\$21.92
Cost of Living ¹⁰	100.3%

Denver – based on Wage Determination 94-2081 Revision #27. UX 12.

Guard II	\$16.02 (but they are currently making \$14.56)
CSO	\$21.47 ¹¹
Cost of Living	105.7%
Averaged wage of Guard II and CSO, based on Wage Determination Rates	\$18.75
Substantial variance between currently paid rate and average of wage determination rates: \$14.56 and \$18.75	28.7%
Wage of Guard II factoring in cost of living using Ft. Collins as the measuring wage and cost of living	\$17.74 [wage of Ft. Collins Guard II] * 5.4% [difference between cost of living] = .957 .957 + \$17.74 = <u>\$18.70</u>
Substantial variance using weighted wage of \$18.70	28.4%
Bureau of Labor Statistics reported wage for “Security Guard” ¹²	\$11.72 to \$12.87

Colorado Springs – based on Wage Determination 94-2079. UX 10.

Guard II	\$11.95
CSO	\$12.85 (but they are currently paid \$21.47) ¹³

¹⁰ All Colorado cost of living information for in-state comparisons was cited from UX 23.

¹¹ The Union offered proof that the wage rate for CSOs became \$22.33 under a contract between AKAL and the USGOA Local #53. UX 5. Using \$22.33 instead of \$21.47 above, the average wage becomes \$19.18 per hour, which is 31.7% higher than the current wage of \$14.56.

¹² UX 27.

¹³ In its post-hearing brief, the Union argues that the CSO wage rate is now \$22.33. See fn 11, *supra*. Based on this figure, the average wage of Guard II and CSO is \$17.14 and the substantial variance increases to 43.4%.

Cost of Living	97.3%
Averaged wage of Guard II and CSO, based on current rate of pay	\$16.71
Substantial variance between \$11.95 and \$16.71	39.8%.
Wages factoring in cost of living using Ft. Collins as the measuring wage and cost of living	\$17.74 [wage of Ft. Collins Guard II] *-3 % [difference between cost of living] = -.532. -.532 + \$17.74 = \$17.21
Substantial variance using weighted wage of \$17.21	44%

Pueblo/Southern Colorado – based on wage determination 94-2083 Revision #23. UX 14.

Guard II	\$11.02 (but they are currently making between 10.02-10.25 per hour).
CSO	\$20.47
Cost of Living	90.3%
Average wage of Guard II and CSO, based on Wage Determination Rates	\$15.75
Substantial variance between \$10.02 and \$15.75	28.7% ¹⁴
Wages factoring in cost of living using Ft. Collins as the measuring wage	\$17.74 [wage of Ft. Collins Guard II] *-11.3% [difference between cost of living] = -2.00 -2.00 + \$17.74 = <u>\$15.74</u>
Substantial variance using weighted wage of \$15.74	57% ¹⁵

The Union argues that the following out-of-state localities are relevant because there are few government contracts that cover this type of work. TR at 57. It urges that these out-of-state comparisons be accepted because there are not very many government contracts within the state of Colorado.

Dallas, TX – based on Wage Determination 94-2509, Revision #26. UX 19.

Here, the Union used the Denver cost of living at 102.9% as its measure against other out-of-state localities. Above, however, the Union listed Denver’s cost of living as 105.7%.¹⁶ See UX 23, 24.

¹⁴ It is unclear how the Union arrived at 28.7%. The only possible variances are: $(15.75-11.02)/11.02= 42.9\%$; $(15.75-10.25)/10.25 = 53.6\%$; $(15.75-10.02)/10.02 = 57.1\%$

¹⁵ In its post-hearing brief, the Union argued that this number is 57.2%.

¹⁶ The Union does not explain why it relied on the Fort Collins cost of living when comparing in-state-localities, but then chose Denver’s cost of living when comparing out-of-state localities. It appears from the CBAs between Amgard and various local unions in Colorado Springs and Oklahoma that Denver is the site listed for base wages, which

Guard II	\$16.68
CSO	\$19.11
Cost of Living	98%
Average	\$17.90
Substantial variance between \$16.68 and \$17.90	7%
Wages factoring in the Denver cost of living	\$17.90 [average between Dallas Guard II and CSO] * 4.8% = .877 .877 + \$17.90 = <u>\$18.76</u>
Substantial variance between <i>Denver's actual wage of \$14.56</i> and Dallas' weighted wage of \$18.76	28.8%

Fort Worth, TX – based on Wage Determination 94-2514, Revision #26. UX 21.

Guard II	\$16.68
CSO	\$19.11 ¹⁷
Cost of Living	98% ¹⁸
Average	\$18.48
Substantial variance	14.5%
Wages factoring in the Denver cost of living	\$18.48 [the average between Fort Worth Guard II and CSO] *4.9 = .905 .905 + \$18.48 = <u>\$19.37</u>
Substantial variance between <i>Denver's actual wage of \$14.56</i> and Ft. Worth's weighted wage \$19.37	33%

Houston, TX – based on Wage Determination 94-2515, Revision #32. UX 20

Guard II	\$17.90
CSO	18.04
Cost of Living	NA
Average	17.97
Substantial variance	1%
Substantial variance between <i>Denver's actual wage of \$14.56</i> and Houston's average of \$17.97	23.4%

might explain why the Union relied on Denver. UX 5-7. It does not explain, however, why the Union used Fort Collins, rather than Denver, when calculating rates for localities within Colorado.

¹⁷ The Union offered a third classification here, one for a Security Officer at a wage rate of \$19.65 under the CBA between Coastal International Security and USGOA Local #201. UX 7.

¹⁸ The Union used the cost of living index for Dallas.

Oklahoma City, OK – based on Wage Determination 94-2431, Revision #26. UX 18.

Guard II	\$15.03
CSO	\$17.42 ¹⁹
Cost of Living	89.3%
Average	\$17.61
Substantial variance	17%
Wages factoring in the Denver cost of living percentage difference as the measuring wage	\$17.61 [average between Oklahoma Guard II and CSO] *15.2% = 2.68 2.68 + \$17.61 = <u>\$20.29</u>
Substantial variance between <i>Denver's actual wage of \$14.56</i> and the weighted wage of \$20.29	39.3%

Alaska

The Union provided evidence that security officers near Juneau made the following wages: \$21.25 for the period of October 1, 2004 through September 30, 2005; and \$22.31 from October 1, 2005 to September 30, 2006. UX 9. The cost of living index lists Juneau at 128.6%. UX 24. The information provided by the Union does not specify the type of security officers covered by this contract.

Private company

Wackenhut

Wackenhut Services, Inc. contracted with Union Local #1 for security services at the Rocky Flats Environmental Technology Site in Colorado. UX 8. Security officer wages at this facility were listed as \$14.57; security police officers earned \$16.07. *Id.* Am-gard contends that Wackenhut pays Guard II at a rate of \$12.50, which does not substantially vary from \$11.95.

Salary.com

According to the website Salary.com, the median-expected salary for a “Typical Security Guard, Sr.” in Pueblo is \$16.92. In Denver, the wages for a “Security Guard” is \$15.33; for a “Security Guard Sr.” is \$18.71; and for a CSO is \$21.47. UX 22. This website does not include any job characteristics with the wage information. Am-gard contends that the data on Salary.com supports the CBA wage rate for Denver because there is only a 5% difference between the negotiated rate of \$14.56, and \$15.33 - the median wage for a Security Guard.

¹⁹ The Union asserts that CSOs under an AKAL and USGOA Local #130 CBA have a wage rate of \$19.06, and that there is a “Security Officer” classification that is compensated at \$17.50, pursuant to a CBA between SCG and UGSOA Local #201.

C. Testimony

Patricia Larson

Ms. Larson is currently the contract manager for Am-gard. She previously worked as a sergeant and as a government security officer for the company. TR at 47-48. She testified that the wage determination governing the security officers in this case is applicable to Guard II. TR at 134. She explained that CSOs must have at least three years of prior law enforcement with arrest powers. TR at 135. Ms. Larson testified that CSOs are “sworn as special deputies under the United States Marshall, so they have arrest powers, they have bailiff powers, they have transport powers. Am-gard does not arrest.” *Id.* She defined the qualifications for Guard II as having “three years of prior law enforcement, military, or armed security” experience – but that experience need not include arrest power. TR at 136.

Ron Smith

Mr. Smith is a director within the Union who was formerly a contract security officer in Fort Worth. TR at 54. Mr. Smith testified that he worked in Fort Worth pursuant to a CBA between his employer, Security Consultants Group, and the Fort Worth Union Local 203. TR at 56. He claimed that the type of contract governing his job was “exactly the same” as the one at issue. TR at 55.

Ryszard Zurek

The record shows only that Mr. Zurek has been with Am-gard for six years, but not what he does within the company. He explained that the security officers in Fort Collins are under the same government contract between DHS and Am-gard, but that the Fort Collins officers are non-union. TR at 69. He testified that he has a friend who worked for Am-gard in Fort Collins who did not have to carry a weapon because he had a biohazard post where weapons were not allowed. TR at 70.

Mr. Zurek was present during the negotiations between the Union and Am-gard in 2004, and he confirmed that the Union did not gain any additional fringe benefits, personal days, sick days, bonuses, additional holidays, shift-differential pay, or weekend premiums during these negotiations. TR at 73-74. He conceded, however, that the Union rejected Am-gard's offers of health insurance and a “401.” TR at 93. He opined that he did not feel that Am-gard's proposals for wages were competitive, and that the security officers here were more like police officers rather than security guards at an apartment building. TR at 76, 91. He compared the CBA between a different contractor – AKAL – and the Union Local 53 for CSO services with the CBA in this case and found that the CSOs received better vacation times. TR at 82.

He further testified that every security officer working on a federal contract uses the Contract Guard Information Manual for training purposes. TR at 84. Appendix 4 from this manual authorizes the use of deadly force when the officer perceives an imminent danger of death or serious physical injury. TR at 90. Mr. Zurek also opined that he had to complete a weapons training that was the same as local police. TR at 107.

Patricia Wood

Ms. Wood was a Denver police officer before she worked on the DHS contract under Am-gard for about five years. TR at 114. She left her job with Am-gard to take a position at a processing detention center under the Immigrations and Customs Enforcement agency. TR at 115. She testified that her wages at the detention center are \$19.21, but it is not governed by any CBA. She compared her job as a detention officer with the security officer position at Am-gard and found, “the only difference in this is that I am unarmed making more money.” TR at 120. Yet she explained that with Am-gard, “we were dealing with government employees,” while in her current position, “we’re dealing with people who are . . . waiting to determine their immigration status, it’s not a jail until they determine if . . . their visas are correct. . . . [s]o it’s a different set of duties.” TR at 121.

Ms. Wood also offered a comparison of her understanding of the similarities between security officers and CSOs. She explained, “They’re not exactly the same because, obviously, they come into courtrooms and they have other things they have to do, but there’s a certain amount of similarity in the two jobs.” TR at 125. She conceded that CSOs protect judges, witnesses, and the entire judicial system. TR at 126.

Conclusions of Law

The Act provides:

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. § 353 (c).

Under the Act and its implementing regulations, wage determinations are incorporated into the contract specifications for each Federal service contract. *See In the Matter of United Government Security Officers of America, Local 114*, ARB No. 02-012 (ARB Sept. 29, 2003). For service contracts at worksites where an existing CBA governs employee wage and fringe benefit rates, the wage determination rates are based on the rates in the labor agreement. 41 U.S.C. § 351(a)(1), (2); 29 C.F.R. § 4.53. Where a CBA does not exist, the Administrator issues a wage determination that reflects wages that prevail in the locality. 29 C.F.R. § 4.52. Here, the Union argues that the prevailing wage rates in Fort Collins, Colorado are “extraordinarily” higher than those paid in Colorado Springs, Denver, or Pueblo/Southern Colorado. It also argues

that the Department of Labor's wage determination rates should not govern because Am-gard's security guards perform jobs with greater responsibilities than Guard II.

A. Burden of Proof

The burden of proof that a substantial variance exists rests upon the moving party. *In the Matter of Applicability of Wage Rates Collectively Bargained by Medlick Services, Inc., et al.*, 1987-CBV-7 (March 23, 1990). The negotiated wage should not be disturbed unless there is a "clear showing" that the rate is a substantial variance from the local prevailing wage. *In the Matter of Applicability of Wage Rates Collectively Bargained by American Guard Services, Inc., et al.*, 2001-CBV-1 (April 25, 2001). A "clear showing" requires that the party bearing the burden prove its case by a substantial margin. *See In the matter of applicability of Wage Rates Collectively Bargained by Big Boy Facilities, Inc., et al.*, 88-CBV-7 slip op. at 16-19 (Jan. 3, 1989) (finding where the negotiated rates are "out of line" with the rest of the wage rates, then a substantial variance may exist).

Here, the Union petitioned for this proceeding. Therefore, the burden is on the Union to make a clear showing that a substantial variance exists between the collectively-negotiated wages and those wages which prevail for similar services in the applicable locality.

B. Authority

Am-gard disputes that I have authority to determine this claim because the United States Court of Appeal for the Fourth Circuit determined that the Department of Labor cannot hold variance hearings where the wages collectively bargained for are lower than those in the locality but higher than the predecessor contract. *Gracey v. Internat'l Broth. of Elec. Workers, Local Union No. 1340*, 868 F.2d 671 (4th Cir. 1989). In *Gracey*, the Court explained that subsection 353(c) addressed only the situation where wages and benefits in a successor agreement were below those contained in the predecessor agreement. Finding that the successor agreement actually raised wages, the Court held that the Secretary was not empowered to disregard the bargain reached by the parties. *Id.* at 673.

The *Gracey* decision supports the rationale that Congress intended the Act to readjust "exorbitant union wages binding on a successor contractor." *Fort Hood Barbers Association v. Herman*, 137 F.3d 302, 309 (5th Cir. 1998). Yet legislative history provides that the purpose of that Act is to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies." S.Rep. No. 798, 89th Cong., 1st Sess. (1965), (*reprinted in* 1965 U.S. Code Cong. & Admin. News 3737) 1965 WL 4604. It is reasonable to interpret the Act as intending to protect both parties to a Federal service contract. Instead of readjusting a contract either in favor of the government contractor or the unions, the bargain itself should be considered in terms of reasonableness. Where the terms are "so atypical that their continuation under the successor contract would be unreasonable" a finding of a substantial variance is justified. *See In the Matter of Applicability of Wage Rates Collectively Bargained by United Healthserv, Inc.*, 89-CBV-1, 5, 7, 10, 11, 12, 16, 17 (Feb 4, 1991).

The Administrative Review Board has held that *Gracey* does not control substantial variance proceedings outside of the Fourth Circuit. *In the Matter of United Government Security Officers of America, Local 114*, ARB No. 02-012, slip. op. at 8, (ARB Sept. 29, 2003). In limiting the application of *Gracey*, the Board remarked that the Administrator has had a “long-standing” policy of holding substantial variance hearings to determine whether CBA wage rates were below prevailing wage rates. *Id.* at slip op. 7, n. 3; *see also U.S. Dep’t of State*, ARB No. 98-114, slip op. at 15-16 n.8 (ARB Feb. 16, 2000). Therefore, I have the authority to decide this proceeding.

Am-gard further contends that a substantial variance proceeding is the improper arena for the Union’s dispute. It argues that the facts here involve one contract, but that the Act regulates situations where there are at least two contracts – a new contract must succeed a prior agreement. Moreover, it urges that a substantial variance proceeding should not disrupt the terms of an existing CBA, and that its contract with DHS cannot be affected by an order giving retroactive effect. 29 C.F.R. § 4.163 (c); *Northern Virginia Service Corp.*, BSCA No. 92-18, 1992 WL 752889 (1992).

29 C.F.R. § 4.163(e) explains that section (c) is applicable to a successor contract without regard to whether the successor contract was also the predecessor contractor. As such, Am-gard can be its own successor if it renegotiates its contract with the Union. Here, it appears that there were at least two contracts. The parties entered into an initial CBA in 2003, which was a three-year agreement that was set to expire on September 30, 2006. The parties are currently bound by an agreement that began on March 31, 2004 and extends through September 30, 2007. The wages were modified during wage-opener negotiations in March of 2005. Although the parties did not supply the initial CBA in their exhibits, there is sufficient evidence that a predecessor contract was renegotiated by the parties, thereby satisfying the requirement under the Act.²⁰

The purpose of the Act is to change the terms of a contract, such as an existing CBA, that does not comport with wage restrictions. Upon a finding of substantial variance, therefore, the CBA in this case could be disrupted regardless of Am-gard’s contract with DHS.

C. Standing

Any interested party may apply for a wage variance hearing where collectively bargained wages are substantially at variance with those which prevail for services of a character similar in the locality. 29 C.F.R. § 4.10(b)(1)(i). Pursuant to the regulations, the Union has standing to request this hearing. *See also International Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Hodgson*, 515 F.2d 373, 377 (D.C. Cir. 1975) (finding that a union had standing to challenge a decision of Secretary of Labor not to issue pervasive wage determination where the

²⁰ It gives me pause that the parties did not supply the first CBA. Evidence of the document is found in the Union’s initial request for a substantial variance hearing. UX 1A. Even assuming, however, that there was but one final CBA – which covers the time period of March 31, 2004 through September 30, 2007 – this agreement was modified. The Act gives no guidance whether a modification is enough to qualify for a substantial variance proceeding. It would appear to defeat the purpose of the Act, however, to allow parties to contract for wages that comply with wage determinations only later to allow them to modify wages with impunity, outside the purview of the Act.

union contended that the contractor paid lower wages than those paid to same employees by preceding contract, and that wage rates were less than those prevailing in locality).

D. Locality

The locality used to determine a substantial variance is not defined by the Act or the regulations. *Applicability of Wage Rates Collectively Bargained by American Guard Services, Inc., et al.* 2001-CBV-1 (April 25, 2001). The ARB has held that the term is rather fluid, and should be decided on a case-by-case basis. *In the Matter of Department of the Army re Request for Review of Wage Determinations*, ARB No. 98-120, slip. op. at 2-3 (December 22, 1999).

Here, the Union supplied information on Guard II and CSO wage rates in Fort Collins, Denver, Colorado Springs, and Pueblo, Colorado. It also included the wage rates of Guard II and CSO in Dallas, Fort Worth and Houston, Texas, Oklahoma City, Oklahoma, and the wage rates for Security Officers in Fort Worth and Oklahoma City. Finally, it offered evidence of wage rates for security officers in Juneau, Alaska. The Union argues that the out-of-state areas provide a useful comparison because there are so few federal contracts in Colorado. Am-gard argues that the Union's use of wage data from outside the localities in question is improper because sufficient evidence of local prevailing rates exist.

The fact that there are just a few contracts within Colorado does not make the contracts outside the state good comparisons. The Union provides no evidence whether these locations present different risks, which would justify higher or lower wages. Further, there is little evidence that the security guard positions held outside of Colorado, but under similar contracts with DHS, are the same as the positions held by Am-gard's security guards. The Union only offered the testimony of Ron Smith, who claimed that his position in Fort Worth was "exactly the same" as those in Colorado. This evidence weighs in the Union's favor, but it does not provide a clear showing that the jobs in Colorado are "exactly the same" as in Fort Worth. It is unknown what kinds of buildings are guarded, or what kinds of individuals must be encountered. Although Mr. Smith holds a position of authority with the Union, it was not confirmed whether he had the appropriate experience to know the sameness of the two jobs.

Even if I were to consider the out-of-state contracts because there are so few federal service contracts for security guards, the calculations used to compare the wages within the contracts would have to be consistent. The Union compares wages within Colorado by using Fort Collins' cost of living, and used the wages in Fort Collins as the measuring factor. Outside of Colorado, the Union did not use Fort Collins, but rather Denver's cost of living and Denver's wages when comparing Colorado's wages with Dallas, Fort Worth, Houston, and Oklahoma City. To confuse matters further, the Union listed Denver's cost of living as 105.3% when conducting in-state comparisons, but as 102.9% for out-of-state. For two cities, Fort Worth and Oklahoma, the Union gave three comparable positions, but for all the others, it gave only two. Consequently, the Union's results are inconsistent and a clear comparison cannot be made. For purposes of this case, the only relevant localities are those within the state of Colorado.

D. Classification of the security guards

The Union used calculations that average the wages of Guard II and CSOs in order to show a substantial variance. The Union argues that averaging these two wages is appropriate because its members perform duties greater than those attributed to Guard II. The Union does not contend that its members are CSOs, but rather that CSO is the closest classification that exists on the Department of Labor's wage determination charts. Am-gard argues that the slotting technique that averages CSO and Guard II wages is improper because the Union's members are appropriately classified as Guard II.

Slotting is a gap-filling method that provides a prevailing wage rate where there is insufficient data for one or more job classifications in a particular locality. 29 C.F.R. § 4.51(c); *Meldick Services, Inc.*, *supra*, 87-CBV-07. By slotting, 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 available. *Id.* Section 4.51(c), however, does not preclude an ALJ from finding that one of the positions chosen for averaging is too dissimilar for a slotting procedure. *Id.* Here, Am-gard argues that the CSO position is too dissimilar to be averaged with the Guard II classification. I agree.

The Union offered the testimony of Ryszard Zurek to support its position that its members perform duties greater than Guard II. Mr. Zurek testified that a security guard in Fort Collins, who is classified as Guard II, did not carry a weapon. The Union asserts that all of its members under this CBA receive training for weapons, and therefore they must be at a level higher than this Guard II at Fort Collins. Yet this guard worked at a biohazard post where weapons were not allowed. Thus, the fact that he did not carry a weapon may be explained for safety reasons rather than job level.

The Union also offered evidence that its guards have the authority to use deadly force, they receive training for carrying weapons, and they have a level of gun proficiency. Yet the Guard II description provided by the Department of Labor calls for "proficiency with firearms or other special weapons." Moreover, it was not clearly shown that the weapons duties of the Union's are greater than they were in the past. Mr. Zurek testified that he had to go through the same weapons training as the local police. Yet Patricia Larson testified that the new target practice was easier. Thus, it was not clearly shown that there has been a definite increase in duties that merits higher wages.

The Union emphasizes, however, that its duties are more like a "special police," or "security police" officer, than like a security guard. This begs the question why they did not average police officer rates, rather than CSO rates, with Guard II. CSOs generally make more than police officers, which increases the average wage, but that is obviously not an appropriate factor for finding a substantial variance. Am-gard argues that the Union members are not like CSOs or police officers because police officers must have the power to arrest. The security guards covered by this CBA can only detain. The Union offers no evidence that any of its officers ever made an arrest; instead, it relies on the government contract with Am-gard as evidence that that an arrest power has been authorized. It refers to page 117 of the contract which reads, "[h]ave each employee appointed as a constable, special policeman, or conservator

of the peace *with sufficient authority to detain or make arrests.*” UX 32. This directive contains an option – detain *or* make arrests – rather than a conclusive grant of arrest authority. Therefore, the Union has not clearly shown that the security guards are more like police officers.

Finally, the Union relies on the testimony of Patricia Wood, who claimed that the only differences between her job as a detention officer and a security-officer position with Am-gard is that she does not carry a weapon but is paid more. A detention officer, however, has to detain potential deportees. A security officer with Am-gard deals with government employees. Common sense dictates that the risks involved in these two positions are quite different, which merits different wages.

Although the Union provides some evidence that its members may have duties greater than those included in the Guard II description – they are trained to recognize terrorism, for example – it does not give enough evidence that the duties are close to those of CSOs, who are sworn as special deputies under the United States Marshals, and who have other duties within federal courtrooms. It also does not give enough evidence that they are like police officers, who have arrest power. Further evidence that weighs against a finding that Am-gard intended to contract for security officers other than Guard II is that all of Am-gard’s proposals hover around the wages paid to Guard II. Taken together, the Union has not made a clear showing that its members perform duties like CSOs or police officers.

Consequently, the slotting technique cannot be used in this case. By rejecting the Union’s averages, I find that the wage rates in the current CBA track current wage determinations for the Guard II position. Therefore, the CBA rates are not substantially below prevailing wage rates.

F. Substantial variance

Am-gard contends that “every calculation of wage rate variance submitted by the Union either averages in rates from non-similar, higher paid job classes or utilizes data from outside the locality.” This is not necessarily so, but in most cases it was difficult to follow the Union’s formulations. The Union presented the wages in Fort Collins as “extraordinary,” yet it used these wages as a benchmark for in-state comparisons. Without explanation, the Union then chose Denver wages to calculate a variance for the out-of-state comparisons. The Union supplied three different cost of living indices for Denver, but none for Fort Worth. When it would result in a higher average, the Union used the Department of Labor’s wage determination rates, but it rejecting them when actual rates of pay were higher. These mathematical deviations rendered unclear any comparison of wage rates. Thus, the Union has failed to meet its burden of a clear showing of a substantial variance.

ORDER

I hereby order this case **DISMISSED**.

A

Russell D. Pulver
Administrative Law Judge