



In the Matter of:

BIONETICS CORPORATION

ARB CASE NO. 02-094

**Dispute concerning job classification
and wage rates for Bionetics employees
working on Contract F44650-97-D0005
at the Precision Measurement Equipment
Laboratory, Ellsworth Air Force Base,
South Dakota.**

DATE: January 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioners Bionetics Corp. Employees:

James Aune, Charles Eickoff, Nickolas Jenniges, Gregory Larson, Jose Pena, Timothy Sanders, Michael Vasquez, Jonathon Wells, *pro se*, Ellsworth Air Force Base, South Dakota

For Respondent Administrator, Wage and Hour Division:

Ellen R. Edmond, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., Howard J. Radzely, Esq., U.S. Department of Labor, Washington, D.C.

For Intervenor United States Air Force:

Jesus N. Pernas-Giz, Patrick Air Force Base, Florida

DECISION AND ORDER OF REMAND

This case arises under the McNamara-O'Hara Service Contract Act, 29 U.S.C.A. §§ 351-358 (West 1994) (the SCA), as implemented by the regulations at 29 C.F.R. Parts 4 and 8. It involves a contract between Bionetics Corporation and the Air Force for operation of the Ellsworth Air Force Base Precision Measurement Equipment Laboratory (PMEL) from October 1, 1997, through September 30, 2002.¹ The Petitioners are Bionetics employees working in the PMEL at Ellsworth in South Dakota.

¹ The Petitioners have advised the Board that the Ellsworth PMEL is currently being operated under a new contract awarded to the Yulista Corporation. See Board Notice dated Oct. 28, 2002.

The job the Petitioners perform was not included on the wage determination that the Department of Labor's Wage and Hour Division (W&H) issued to cover the Bionetics contract, and W&H later determined that the jobs must be added to the wage determination applicable to the contract. The conformance process ensures that such new classifications and wage rates conform to the standard classifications and corresponding wage rates listed on the wage determination. *See* 29 C.F.R. § 4.6(b)(2)(i) – (vi) (1997). Following an investigation by the W&H District Office, W&H National Office staff issued a preliminary ruling on September 10, 2001, regarding the proper classification and wage rate for the Petitioners' PMEL technician jobs. The Administrator modified that determination in a final ruling issued on June 21, 2002. The Petitioners appeal this final ruling. We remand to the Administrator to further develop the Administrative Record (AR) and to issue an adequately explained ruling.

Background

The start of the conformance action in November 2000

The Petitioners initiated the conformance action by filing a letter on November 16, 2000, with the W&H District Office in which they complained that they were improperly classified and paid under the Electronic Technician, Maintenance II (ETM II) classification from the pertinent wage determination. AR Tab L; *see* Tab I. Following a February 2001 on-site investigation at the Ellsworth AFB, the W&H District Office determined that the PMEL technicians “spent the majority of their time conducting calibrations of specialized equipment. . . [that] was used to measure characteristics of objects, substances, or phenomena, such as but not limited to length, time, mass, temperature, electrical current, luminous intensity, and derived units of physical or chemical measure.” AR Tab I. The District Office investigator further determined that calibration was “the important aspect” of the job because of the sensitivity of the equipment involved and that repair work was secondary as “a support mechanism of the job.”² *Id.* The investigator also compared the PMEL technician jobs with those of other employees who were classified as electronic technicians, and noted that a similar PMEL technician position had been conformed under a contract at Robins AFB in Georgia.³ *Id.* The District Office thus concluded that the job the PMEL technicians performed was materially different from the Maintenance-category position of ETM II, under which the Petitioners were being paid. *Id.* On that basis, the District Office determined that the PMEL technician position

² In addition, the District Office investigator found that the PMEL technicians performed “a wide variety of duties” specifically including complete calibration of test and measurement equipment, comparison of instrument performance to a standard known accuracy, correction adjustment to minimize errors, proper calibration of equipment to meet specifications, relating quantitative information to measurements of physical and/or chemical properties, calibration according to standards traceable to the National Institute of Standards and Technology, and calibrations to “full manufacture” specifications. AR Tab I.

³ As we discuss later, the W&H conformance ruling regarding the PMEL at Robins AFB is relevant to our review of the Administrator's final ruling. Although the AR does not contain a copy of the Robins AFB ruling or identify the date of its issuance, the Administrator's brief states that the ruling was issued on November 24, 1998. Administrator's Statement at 19.

did not fall into any other classification on the pertinent wage determination and must be added pursuant to the conformance process. *Id.*

Documents indicating that the Petitioners had been pursuing the wage rate issue before November 2000

All eight Petitioners signed the November 16, 2000 formal request for a W&H determination regarding the proper classification of their PMEL technician jobs. AR Tab L; *see* Tab I. The letter explains why the employees are filing their conformance request directly with Wage and Hour and refers to documents that were submitted in support of the request.⁴ The letter states that, in August 2000, the Petitioners unsuccessfully attempted to prompt Bionetics to initiate a conformance action regarding their jobs. AR Tab L. The letter also advises W&H that in September 2000 the Petitioners similarly requested the Air Force to initiate the conformance process but that the Air Force contracting office advised the Petitioners that it was necessary that Bionetics initiate the conformance process. *Id.* Finally, the letter states that the Petitioners had been “trying since early 1995 (documentation on request) to remedy the unfair wages and practices enforced by the Air Force . . . in regards to this contract.” *Id.*

Gaps in the history of this case

The relevant regulations require that before employees in unlisted job classifications perform their work, the contractor must initiate the conformance process. 29 C.F.R. § 4.6(b)(2)(i), (ii). Bionetics and the Air Force entered into the October 1997 – September 2002 contract on September 1, 1997. AR Tab I. The record sheds very little light on how Bionetics and the Air Force reached the decision to apply the ETM II classification and wage rate to the Petitioners’ jobs following award of the contract.

When the District Office asked the Air Force and Bionetics in August 2001 for input regarding its recommendation that the PMEL technician position be conformed, both parties disagreed that conformance was necessary, arguing that the ETM II classification encompassed the PMEL work. Even so, each stated that the ETM II wage rates were low for the work performed by the PMEL technicians, and Bionetics proposed adjustments to provide future increases in wages for the ETM classifications and thus for the PMEL technicians.⁵ AR Tab H. Furthermore, in letters written to W&H in October and November 2001, the Air Force stated that it had based its payment of the ETM II wage rate on a May 1996 W&H ruling regarding the PMEL technician position at Maxwell AFB in Alabama. AR Tabs C, G. In the second of those letters, the Air Force emphatically agrees that the PMEL technician position was not covered by the classifications listed on the applicable wage determination and that it *was* necessary to add a classification to cover the job through the conformance process. AR Tab C. The letter then goes on to state that the Air Force disagrees only with the September 10, 2001 W&H National Office staff ruling that applied the Engineering

⁴ The attachments referenced in the Petitioners’ November 16, 2000 letter to W&H are not included in the AR. *See* AR Tab L.

⁵ Discussed at n.13, *infra*.

Technician IV wage rate and the Federal Grade Equivalency of GS-7 to the PMEL technician jobs. *Id.*

Nor is the AR clear as to why the Petitioners' inquiries to W&H did not prompt that agency to advise those employees earlier of the need to formally request a conformance action.⁶ The record contains letters from the Petitioners' Congressional representatives to various W&H officials at the District, Regional, and National Offices pursuing the question of whether the Petitioners were being properly classified and paid for their PMEL technician duties. AR Tabs J, L, M, N, O, P, Q. Although these letters were generated primarily during July and August 2001, they indicate that at least one of the representatives had been corresponding with W&H for "several years without resolution" regarding the wages being paid to the Petitioners for their PMEL technician work, and that the National Office had been processing a conformance ruling for a similar PMEL technician position at Robins AFB in Georgia during the time that it was responding to that representative's inquiries on behalf of the Petitioners.⁷ AR Tab O (July 27, 2001 ltr. from Sen. Johnson to C. Strain, Wage and Hour Nat'l Ofc.). In addition to the Petitioners' November 16, 2000 complaint letter to the District Office, the Petitioners' letters to one Congressional representative in 2001 indicate that they had been pursuing the wage rate issue with W&H "since 1995" but had been advised only in the preceding year that they should pursue a conformance action to establish a new classification to cover their work as PMEL technicians. AR Tabs J, M (July 26, 2001 ltr. from T. Sanders to Sen. Daschle).

Wage and Hour action after the February 2001 on-site investigation

In August 2001, the District Office referred the investigative file to the Regional Office and recommended that a classification be established through the conformance process to cover the PMEL technician jobs. AR Tab I. The Regional Office forwarded the matter on to the National Office where on September 10, 2001, Clarence Strain, Supervisory Salary and Wage Specialist, ruled that the new classification of Metrology Technician would be added to the applicable wage determination. Strain also ruled that the Metrology Technician position would be conformed to the wage determination classification of Engineering Technician IV, with a hourly rate of \$15.11. AR Tab H. As noted above, the Air Force objected to Strain's determination because it had applied the ETM II classification and wage rate at Ellsworth based on a 1996 ruling regarding the PMEL technician position at Maxwell AFB that Nila Stovall of the National Office had issued. AR Tab G. On October 19, 2001, Strain reiterated that the PMEL technicians did not fall within any of the classifications on the pertinent wage determination. He also added that the Federal Grade Equivalency for the new Metrology Technician was GS-7. In addition, Strain's October 19 letter advised the Air Force that, if the Metrology Technician position were to be continuously used, the Air Force should contact a W&H official who was working on revision of the SCA Directory of

⁶ Upon the "discovery" of a failure by the contractor or the contracting agency to comply with their obligations to initiate a conformance action pursuant to Section 4.6(b)(2)(i)-(v), W&H is required to issue a final determination regarding the position to be conformed and to implement that ruling retroactively to the beginning of performance of the work that is at issue. 29 C.F.R. § 4.6(b)(2)(vi).

⁷ The Administrator has identified the date of issuance of the Robins AFB conformance ruling as November 24, 1998. *See* n.3 *supra*.

Occupations, so that the Metrology Technician classification could be included in the next edition. AR Tab F.

On November 26, 2001, the Air Force filed a further objection to Strain's ruling. Although it agreed that the PMEL technician position needed to be added to the wage determination through conformance, the Air Force also reiterated that it had conformed the Ellsworth PMEL technician position to the ETM II classification and wage rate based on Stovall's 1996 ruling. The Air Force also specifically objected to Strain's assignment of a GS-7 Federal Grade Equivalency to the Metrology Technician as a departure from "previous guidelines." Finally, the Air Force requested that Strain rescind the September 10, 2001 ruling "and allow the Electronics Technician Maintenance II rate to prevail until such time as the SCA Directory of Occupations is revised" to include the PMEL technician classification. AR Tab C.

The Administrator reconsidered Strain's ruling and issued a final ruling on June 21, 2002. The Administrator approved the Air Force's request to pay the Metrology Technician position at Ellsworth the ETM II classification wage rate, which the pertinent wage determination sets at \$12.18 per hour. The Administrator also limited her ruling to the Bionetics contract, noting that the W&H was revising the SCA Directory of Occupations and that adding a new Metrology Technician classification had been proposed. However, continued the Administrator, if the wage determination for the next contract still did not contain a separate classification for Metrology Technician, the contractor and the contracting agency would be required to undertake a conformance action with "full participation by the affected parties, i.e., the contractor, the contracting agency, and the employees performing the work," for contracts involving work under the Metrology Technician position. AR Tab A.

Although the Administrator recognized that the Engineering Technician IV classification had been used on other contracts, she vacated Strain's ruling that the Engineering Technician IV classification and \$15.11 wage rate apply to the PMEL technicians under the Bionetics contract. Instead, the Administrator concluded that Stovall's 1996 determination that conformance of the PMEL technician position to the ETM II classification and wage rate – on which the Air Force asserted it had relied -- was "not unreasonable." AR Tab A.

Jurisdiction and Standard of Review

Pursuant to 29 C.F.R. § 8.1(b), the Board has jurisdiction to hear and decide "appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative" rendered under the SCA. *See also* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The Board's review of the Administrator's final rulings issued pursuant to the SCA is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). The Board is authorized to modify or set aside the Administrator's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. 29 C.F.R. § 8.9(b); *see Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). The Board reviews questions of law de novo. *United Gov't Sec. Officers of America, Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (ARB Sept. 23, 2003); *Kleenist Org. Corp. and Young Park*, ARB No. 00-

042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002). The Board nonetheless defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with law. *See Dep't of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 34-36 (ARB Dec. 22, 1999).

Statement of Issues

1. Should the Board grant the Air Force's motion to dismiss the appeal pursuant to 29 C.F.R. § 8.6?
2. Should the Board affirm the Administrator's final ruling conforming the Metrology Technician classification to the ETM II wage rate?
3. Should the Board strike the additional documents the Petitioners submitted on appeal?

Discussion

Pertinent legal authority

The conformance regulations at 29 C.F.R. § 4.6(b)(2)(i) – (vi) provide both procedural and substantive guidelines for adding a job classification to the wage determination that applies to a particular SCA-covered contract. The job classifications that are listed on the applicable wage determination function as standards for comparison with a proposed classification in two primary ways. First, if the skills and duties required of the proposed classification are encompassed by a classification already listed on the wage determination, the proposal to add the new classification through the conformance process will be denied. *See, e.g., Burnside-Ott*, Case No. 87-SCA-OM-2, slip op. at 6-10 (Dep. Sec'y Jan. 10, 1989).⁸ Secondly, if a proposed classification is determined to be necessary, the classifications and wage rates listed on the wage determination provide standards for comparison in determining the category in which the job falls and setting the proper wage rate for the new classification.⁹ 29 C.F.R. § 4.6(b)(2)(i), (vi)(A); *see COBRO Corp.*, ARB No. 97-104, slip op. at 10 (ARB July 30, 1999); *Russian and East European Partnerships, Inc.*, ARB No. 99-025, slip op. at 15-17 (ARB Oct. 15, 2001); *Rural/Metro Corp.*, BSCA No. 92-27, slip op. at 7-10 (Bd. of Serv. Contract Apps. Mar. 26, 1993). The conformance regulations require that a proposed position be categorized and paid a wage that reflects an "appropriate level of skill comparison" between the position proposed for addition to the wage determination and those classifications already listed on the wage determination. 29 C.F.R. § 4.6(b)(2)(i); *see* 29 C.F.R. § 4.6(b)(2)(iv); *COBRO Corp.*, slip

⁸ 29 C.F.R. § 4.152(c)(1) also precludes using conformance procedures to establish trainee and helper classifications as well as using it to "artificially split or subdivide classifications listed in the wage determination." Those provisions are not relevant to this appeal.

⁹ For example, one category of occupations that is listed on the wage determination applicable to the Bionetics contract, WD No. 1994-2486 (Rev. 12), covers "Mechanics and Maintenance and Repair Occupations" and another category covers "Administrative Support and Clerical Occupations." AR Tab H. We previously noted that the ETM II classification was a Maintenance occupation, and as such it falls under "Mechanics and Maintenance and Repair Occupations." The Engineering Technician IV classification falls under the "Technical Occupations" category. *Id.*

op. at 22-23.

As noted above, the Petitioners agree with the Administrator that a new classification to cover the work performed by the PMEL technician under the Bionetics contract was necessary. Although the Air Force and Bionetics initially disagreed with the W&H District Office's recommendation that it was necessary to conform a new classification to cover the PMEL technician's work, the Air Force does not adhere to that position in this appeal. *See* Statement for the Air Force in Opposition to Petition for Review at 1-6.

Threshold issue – motion to dismiss

The Air Force argues that pursuant to 29 C.F.R. § 8.6(b) the Board should dismiss this appeal because the Petitioners are challenging a wage determination after award of a contract.¹⁰ Motion to Dismiss at 1. The Air Force also argues that the Bionetics contract has been performed and the Petitioners' "case is thus moot." *Id.*; *see* 29 C.F.R. § 8.6(b), (d). These arguments are wholly without merit because we are reviewing a conformance action, not a wage determination. Therefore, Section 8.7(b), not Section 8.6(b), applies.¹¹

¹⁰ 29 C.F.R. § 8.6(b) reads as follows:

Except as provided in paragraphs (c) and (d) of this section, the Board will not review a wage determination after award, exercise of option, or extension of a contract, unless such procurement action was taken without the wage determination required pursuant to §§ 4.4 and 4.5 of part 4 of this title.

¹¹ 29 C.F.R. § 8.7(b) provides, in pertinent part:

A petition for review of a final written decision (other than a wage determination) of the Administrator or authorized representative may be filed by any aggrieved party within 60 days of the date of the decision of which review is sought.

Conformance actions and wage determination are treated differently under the SCA regulations. The regulations require wage determinations to be issued prior to contract award. 29 C.F.R. §§ 4.4, 4.5, 4.55(c), 4.56(a); *but see* 29 C.F.R. §§ 4.4(g), 4.5(a)(2) (providing for substitution of more recent wage determinations in certain circumstances); 29 C.F.R. § 4.5(c)(1), (2) (permitting Administrator to require retroactive application of wage determinations pursuant to § 10 of the SCA, codified at 41 U.S.C. § 358). Incorporating wage determinations in the procurements process provides a firm basis on which both the contracting agency and the prospective contractors can estimate the labor costs of the contract. *See COBRO Corp.*, slip op. at 10-11. In contrast, SCA regulations require that the contracting parties initiate conformance actions, which cover only those job classifications not listed on the wage determination, after contract award. 29 C.F.R. § 4.6(b)(2)((i), (ii).

The Petitioners timely sought review of the Administrator's final decision, on July 2, 2002. *See* 29 C.F.R. § 8.7(b). Therefore, this matter is properly before us. Consequently, the Air Force's motion to dismiss pursuant to Section 8.6(b) is denied.¹²

The merits of the appeal

1. The Petitioners' arguments

The parties are in agreement that a classification must be conformed to cover the work performed by PMEL technicians at Ellsworth AFB. The Petitioners challenge the Administrator's approval of the Air Force's request to apply the ETM II wage rate -- \$12.18 per hour -- to the new Metrology Technician classification. They argue that the Administrator should not have based her decision on the 1996 Stovall ruling because that case did not involve an on-site investigation. The Petitioners urge that the Administrator should have upheld Strain's ruling which conformed the Metrology Technician to the Engineering Technician IV wage rate of \$15.11 per hour, with a Federal Grade Equivalency of GS-7. The Petitioners further contend that the Administrator failed to provide an adequate explanation for modifying Strain's ruling.

To support their position, the Petitioners point to the 1998 Robins AFB ruling that also conforms the PMEL technician position to the Engineering Technician IV classification and wage rate. The Petitioners also cite the August 2001 Air Force and Bionetics statements acknowledging the "abnormally low" wages being paid the PMEL technicians at Ellsworth AFB under the ETM II classification, the GS-7 Federal Grade Equivalency level that Strain assigned to the conformed Metrology Technician classification, and the Wage Grade 10 through 12 levels that Bionetics cited in its August 2001 indexing proposal. Statement for the Employees of Bionetics in Opposition to the Administrator[']s Final Judgment Rendered in Favor of the USAF and Bionetics Position on Job Classification and Wage Rates (Petitioners' brief) at 3, 10-11, 16, 17. In addition, the Petitioners urge that the Administrator's reliance on the ETM II classification and wage rate is at odds with the body of relevant case law and does not meet the Section 4.6(b)(2)(i) mandate that the conformed classification bear a reasonable relationship to the classifications in the applicable wage determination. *Id.* at 10, 11, 12, 16. Finally, the Petitioners argue that the Administrator's ruling is procedurally defective because the Air Force's request for reconsideration was not timely filed and because the Petitioners were not provided an opportunity to respond to that reconsideration request. *Id.* at 8, 14, 15-16.

The Petitioners contend that further investigation by W&H would support their assertion that the Air Force and Bionetics intentionally refused to comply with the requirement that a conformance action be initiated before the PMEL technicians began work under the contract, or at least failed to

¹² Also contrary to the Air Force's contention, back pay awards are authorized in conformance actions. Just as 29 C.F.R. § 4.6(b)(2)(v), (vi) requires that final classification and wage rate rulings on conformance actions be implemented retroactively to the beginning of work under the contract, the Board's authority to award back pay in such cases is not limited. 29 C.F.R. Part 8, Subpart C; *see COBRO Corp.*, slip op. at 27; *Rural/Metro Corp.*, slip op. at 10-11.

act on constructive knowledge of the need to initiate such conformance action under Section 4.6(b)(2)(i), (ii). Petitioners' brief at 4-5. Therefore, the Petitioners request that we remand to the Administrator for further investigation and findings, and, in support of their position, they proffer documents that are not included in the AR. *Id.* at 3, 10.

2. Arguments advanced by the Administrator and the Air Force

The Administrator urges that her final ruling is consistent with the regulations, is reasonable and does not represent an unexplained departure from past determinations. The Administrator emphasizes the broad discretion that she exercises in rendering conformance determinations. Statement for the Administrator in Opposition to Petition for Review (Administrator's brief) at 8-11. Regarding the procedural questions the Petitioners raise, the Administrator contends that, although Section 4.6(b)(2)(i) –(vi) does not provide a process for reconsidering conformance rulings, the Administrator possesses inherent authority to reconsider such rulings. *Id.* at 13-14. She also points out that the Air Force's request for reconsideration was filed within a reasonable time after Strain's denial of the Air Force's initial objections. *Id.* at 14-15.

The Administrator disagrees with the Petitioners that the Stovall ruling regarding the Maxwell AFB PMEL is per se inadequate to support her decision to apply the ETM II wage rate. Administrator's brief at 15-16. She defends her reliance on Stovall's ruling as within her discretion to choose between two alternatives, even if the one chosen may not be appropriate for future application and the other "arguably might be more reasonable." *Id.* at 16-17. The Administrator dismisses the Petitioners' reliance on the 1998 W&H Robins AFB ruling, which conformed the Metrology Technician classification to the Engineering Technician IV classification, by quoting *COBRO Corp.*, slip op. at 23: "Evidence regarding wage determination actions in different locations, or actions involving other job titles in the same location, often have little relevance to [the Board's] evaluation of the reasonableness of the Administrator's determination." Administrator's brief at 19.

The Administrator has also objected to Petitioners proffering documents that are not already contained in the AR. Reply to Statement for the Employees of Bionetics in Response to the Administrator's Statement. She points out that the Board is precluded from considering such extra-record materials in the first instance, although the Board may determine that the Administrator should review such materials on remand. *Id.* at 1-2. She contends, however, that none of the Petitioners' documents warrants a remand because none of them establishes that her ruling was unreasonable or an abuse of discretion. *Id.* at 2.

The Air Force defends the Administrator's final ruling because she properly compared the Metrology Technician's duties with those of the ETM II classification. Statement of the Air Force in Opposition to Petition for Review (Air Force brief) at 1-2, 4. In addition, the Air Force states that Strain's September 10, 2001 ruling conforming the Metrology Technician to the Engineering Technician IV wage rate was based on "misleading and erroneous information submitted with the original conformance request." *Id.* at 3. The Air Force similarly asserts that W&H "based its original decision on the idea that these technicians performed Metrology work when in reality they do not." *Id.* at 4. However, the Air Force has not cited record evidence to support these two contentions.

Likewise, the Air Force claims that a W&H investigation preceded Stovall's 1996 Maxwell AFB ruling. *Id.* at 3. However, the Administrator's brief effectively acknowledges that no on-site investigation was conducted in 1996 at Maxwell. Administrator's brief at 15-16.

3. Disposition

The Administrator exercises broad discretion in setting wage rates for conformed classifications. The Administrator's wage rate decision will be set aside only if it is inconsistent with regulatory guidelines, or if it is "unreasonable in some sense" or represents an unexplained departure from past determinations. *COBRO Corp.*, slip op. at 11 and cases there cited. Although we reject the Petitioners' contentions that the Administrator's final ruling is flawed because of procedural irregularities, we agree that the case be remanded for the Administrator to develop the record and adequately explain the June 21, 2002 final ruling.

a. *The procedure before the Administrator*

The Administrator acted within her discretion in reviewing and ruling on the Air Force's request for reconsideration. Unlike Section 4.55(a), which confers on interested parties a right to seek reconsideration of a wage determination within a limited timeframe, the conformance regulations do not expressly provide for the filing and review of reconsideration requests. *Compare* 29 C.F.R. § 4.55(a) *with* 29 C.F.R. § 4.6(b)(2)(i) – (vi). The right of review provided by Section 4.55(a) does not apply to reconsidering conformance rulings. *See Rural/Metro Corp.*, slip op. at 4-7. Section 4.6(b)(2)(ii) provides a 30-day timeframe for W&H to take final action on a conformance request or to advise the agency contracting officer that additional time is necessary, but that provision has been interpreted as directory rather than jurisdictional. *CACI, Inc.*, No. 86-SCA-OM-5, slip op. at 29 (Dep. Sec'y Mar. 27, 1990).

The Administrator or her designees have routinely entertained such requests to reconsider conformance rulings. *See, e.g., Russian and East European Partnerships*, slip op. at 7-8; *Raymond R. Schafer*, BSCA No. 92-30, slip op. at 3 (Bd. of Serv. Contract Apps. Mar. 26, 1993). To hold that the Administrator does not have authority to entertain a reconsideration request in connection with Section 4.6(b)(2)(ii) would not serve the interests of administrative efficiency. This Board, and its predecessor agencies, have regularly granted motions for remand for the purpose of providing the Administrator an additional opportunity to consider rulings on conformance actions, wage determinations, and other matters. *See, e.g., ITT Fed. Servs. Corp.*, BSCA No. 94-12, Ord. to Remand (Bd. of Serv. Contracts Apps. Jan. 27, 1995); *Contract Servs. Co.*, No. 86-SCA-WD-2, Order (Dep. Sec'y May 8, 1986). Barring the Administrator from reconsidering a conformance ruling while a case is initially before her could lead to a quicker conclusion of the process at that level, but administrative efficiency would not be served when the Administrator could simply file a motion for remand after her determination was appealed to the Board. Instead, a Board disposition of the case on its merits would only be delayed until after the remand proceedings before the Administrator were completed. We thus conclude that the Administrator is not barred from ruling on reconsideration requests filed in regard to conformance rulings.

Furthermore, we hold that the Administrator did not abuse her discretion in addressing the Air Force's November 26, 2001 reconsideration request as timely filed. Although that request was filed more than sixty days after Strain's September 10, 2001 ruling, the November 26 request was nonetheless filed, as the Administrator points out, within a reasonable period of time after Strain's October 19 rejection of the Air Force's initial October 1 reconsideration request. AR Tabs C, F, G, H.

b. *The substance of the Administrator's final ruling*

The regulations require that a conformed position be classified "so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classification and the classifications listed in the wage determination." 29 C.F.R. § 4.6(b)(2)(i). Thus, the skills and duties required of the proposed classification must be measured against those required of classifications listed on the wage determination to decide whether the proposed classification is encompassed by one of those classifications and need not be added. *See Burnside-Ott*, slip op. at 6-10. If the proposed classification must be added, a comparison of the skills and duties required of that classification with the requirements of classifications listed on the wage determination provides critical guidance in setting a wage rate for the new classification. *See Russian and East European Partnerships*, slip op. at 15-17; *Kord's Metro Servs., Inc.*, BSCA No. 94-06 (Bd. of Serv. Contract Apps. Aug. 24, 1994); *Raymond R. Schafer*, slip op. at 2-6.

Section 4.6(b)(2)(iv) provides further guidelines for setting the pay rate for a classification that is to be added to the wage determination. Section 4.6(b)(2)(iv)(A) begins by stating that assigning wage rates to conformed positions "cannot be reduced to any single formula," and then cites Federal employee pay systems, other wage determinations issued for the same locality, and standard wage and salary administration practices that "rank various job classifications by pay grade pursuant to point schemes or other job factors" as sources of guidance. 29 C.F.R. § 4.6(b)(2)(iv)(A);¹³ *COBRO Corp.*, slip op. at 23. The substantive guidelines contained within the conformance regulations thus provide ample latitude for exercise of the Administrator's judgment in setting the pay rate for a position to be added to the wage determination.

To evaluate the reasonableness of the Administrator's ruling, the Board looks to the Administrator's explanation of the ruling. As the Board stated in *COBRO Corp.*:

¹³ Section 4.6(b)(2)(iv)(B) permits a contractor to set the wage rate for a conformed position, in limited circumstances, through a process called "indexing." 29 C.F.R. § 4.6(b)(2)(iv)(B). Nothing in this record suggests that indexing would have been an appropriate means of setting the wage rate for the PMEL technician for the October 1, 1997 – September 30, 2002 Ellsworth AFB contract. *Cf. Russian and East European Partnerships*, slip op. at 10-13, 17-18 (concluding that Section 4.6(b)(2)(iv)(B) criteria to invoke indexing provision not met). Although Bionetics' August 22, 2001 response to the W&H investigation proposed that indexing be used to calculate future increases in PMEL technician wage rates, the Administrator's June 21, 2002 ruling expressly prohibits reliance on indexing to set future wage rates for the PMEL technician under the Ellsworth AFB contract. AR Tabs A, H.

Our review of the Administrator's determination in a conformance action must focus on the *Administrator's* choice, and the rationale that [s]he advances to support it.

COBRO Corp., slip op. at 23 (emphasis in original). Although we agree with the Administrator that she may properly choose between two reasonable alternatives, having the discretion to make that choice does not relieve the Administrator of the obligation to provide a legally sufficient explanation for the choice she has made. Without such explanation, the choice appears to be arbitrary. *COBRO Corp.*, slip op. at 26-27.

In this case, the Administrator's final ruling notes the two approaches that W&H had previously taken: the 1996 Stovall ruling which conforms the PMEL technicians to the ETM II classification; and the 1998 and 2001 Strain rulings conforming the PMEL technicians to the Engineering IV classification. The Administrator's final ruling here indicates that each of these two approaches provides a reasonable means of conforming the PMEL technician position. AR Tab A. However, she then upholds application of Stovall's 1996 ruling without explaining why she favors that approach over the other.

The Administrator's failure to explain her reliance on Stovall's 1996 ETM II ruling is particularly problematic because she admits she is "not convinced" that the ETM II wage rate would be the best approach for any future conformance of Metrology Technician positions. AR Tab A. The Administrator limits application of the ETM II classification to "this instance," and states that her ruling "may not be used as precedent for any future conformance action on this or other similar contracts." *Id.* She also prohibits using the ruling in conjunction with the indexing procedures in Section 4.6(b)(2)(iv)(B). The Administrator further states that until the SCA Directory of Occupations is revised and a Metrology Technician classification added to the wage determination, a conformance action "with full participation by the affected parties" should be initiated. *Id.*

The Administrator suggests, but does not adequately explain, that she chose the ETM II rate because the Air Force claims it had relied on Stovall's ETM II ruling since 1996. AR Tab A; *see* Tabs C, G. She states only that the Stovall approach is "not unreasonable." AR Tab A. And, even though she found that "the contractor [Bionetics] did not follow the conformance procedures outlined in the Regulations," she approves the Air Force's request that Bionetics' classification and payment of the PMEL technicians at the ETM II rate be upheld. *Id.*

The Air Force's assertion that it relied on Stovall's 1996 ETM II ruling implies that applying the Engineering IV wage rate would be inequitable because the Air Force had relied to its detriment on the 1996 ETM II ruling, with its lower wage rate. Assuming that the contracting agency, the Air Force, could assert an equitable theory such as detrimental reliance, that defense is clearly not warranted here because the record contains no indication that the Air Force and Bionetics followed the regulatory mandates of Section 4.6(b)(2)(i), (ii) before the PMEL contract at Ellsworth AFB began on October 1, 1997. *See generally Russian and East European Partnerships*, slip op. at 18-19 (discussing limited circumstances in which equitable estoppel could conceivably apply to relieve contractor of obligation to implement W&H conformance ruling); *CACI, Inc.*, slip op. at 28-31

(discussing equitable arguments including detrimental reliance the contractor raised against W&H and observing that detrimental reliance must be reasonable to sustain the equitable estoppel defense). Consequently, we find that the record does not support the Air Force's argument that the 1996 Stovall ruling should apply.

The Petitioners and the Air Force also question whether the Administrator had an adequate evidentiary basis on which to render her decision. Petitioners' brief at 1-3, 8-16; Air Force brief at 3, 4. Setting a wage rate for a conformed classification requires consideration of a wide variety of factors pursuant to Section 4.6(b)(2)(i), (ii) and (iv). Citing the lack of an opportunity to participate in the reconsideration process, the Petitioners have offered documents and requested a remand for further development of the record. Petitioners' brief at 3, 8, 10, 14-16; *see generally Harbert Int'l, Inc.*, No. 91-SCA-OM-5, slip op. at 7 (Sec'y May 5, 1992) (summarizing circumstances that may warrant remand for further findings and consideration of newly offered evidence by the Administrator).

Although the record does not demonstrate that either the Air Force or Bionetics took steps to comply with Section 4.6(b)(2)(i), (ii) immediately after the contract was awarded, it is unclear regarding how and when the Ellsworth AFB conformance question was initially brought to W&H's attention, thus prompting action pursuant to Section 4.6(b)(2)(vi). *See* discussion in Background section *supra*. Accordingly, on remand, the Administrator should further develop the record to address this question as well as the various factors that are relevant to setting the wage rate under Sections 4.6(b)(2)(i), (ii) and (iv). To that end, the Administrator should consider the documents the Petitioners have proffered on appeal to determine whether they are relevant, as well as allow the opposing parties to offer documents in response. *See* 29 C.F.R. § 8.1(d); *Russian and East European Partnerships*, slip op. at 8-9 (discussing options available to Board for disposing of extra-record materials offered on appeal).¹⁴

CONCLUSION AND ORDER

The Administrator's final ruling lacks an adequate explanation for her choice of Stovall's 1996 ETM II conformance ruling regarding Maxwell AFB over Strain's Engineering Technician IV ruling regarding the Ellsworth AFB PMEL. The Administrative Record does not demonstrate that either the Air Force or Bionetics took any steps to comply with Section 4.6(b)(2)(i), (ii) immediately after contract award, and also fails to indicate how and when W&H first discovered the conformance issue, within the meaning of Section 4.6(b)(2)(vi). Both the Air Force and the Petitioners question the evidentiary basis of the Administrator's ruling, and the Petitioners request a remand for consideration of further evidence that they have proffered on appeal.

¹⁴ We have not reviewed the substance of the materials the Petitioners have proffered. In addition, because of our remand for further evidentiary development and findings by the Administrator, it is unnecessary for us to address a number of the specific factors the Petitioners cite in support of their challenge to the final ruling.

Accordingly, we **VACATE** the Administrator's June 21, 2002 final ruling conforming the Metrology Technician position to the ETM II classification and wage rate. This matter is **REMANDED** to the Administrator for further action consistent with this opinion, the SCA, and the implementing regulations.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge