



In the Matter of

Date Issued: SEP 19 1988

APPLICABILITY OF WAGE RATES BARGAINED  
BY HYDE SECURITY SERVICES, INC. AND  
INTERNATIONAL GUARDS UNION OF AMERICA,  
LOCAL UNION NO. 75 TO EMPLOYMENT OF  
SERVICE EMPLOYEES UNDER A CONTRACT FOR  
SECURITY SERVICES AT FORT KNOX IN  
HARDIN COUNTY, KENTUCKY

Case No. 88-CBV-5

APPEARANCES:

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BEFORE: RUDOLF L. JANSEN  
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act of 1965, as amended, at 41 U.S.C. §351 *et seq.* (hereinafter referred to as the Act) and 29 C.F.R. §4.10(b) and Part 6, Subpart E of the applicable regulations.

The dispute results from a request made on December 17, 1987 by the Department of the Army for a Section 4(c) variance hearing relating to compensation paid for guard services at the Fort

Knox Military Installation. The request pertained to the contract period beginning October 1, 1988. The Administrator, Wage and Hour Division, issued an Order of Reference authorizing the hearing, which was held in this case on June 7, 1988 in New Albany, Indiana.

The formal hearing in this case offered the parties a full opportunity to present evidence and argument pertaining to the merits of their positions. This Decision and Order is based upon the record made at that hearing, arguments of the parties, and applicable law.

### ISSUE

Whether a substantial variance exists between the collectively bargained wage rates paid to gate guards and alarms monitors and the rates which prevail for services of a character similar in the locality.

### FINDINGS OF FACT

On November 1, 1986, the Small Business Administration (SBA) entered into Contract No. DABT 23-87-C-0048 with the Directorate of Contracting, Fort Knox, Kentucky to furnish security guard services at both entrance and exit checkpoints and also to serve in the alarms monitor room. Hyde Security Services, Inc. (hereinafter referred to as Hyde) is the Subcontractor of that award. The International Guards Union of America, Local Union No. 75 (hereinafter referred to as Union), is the exclusive bargaining representative of the employees of Hyde. The base period of the primary contract expired on September 30, 1987 and the first-year option of the contract is in progress and it will expire on September 30, 1988. The contract also contains a second-year option which will be effective October 1, 1988 through September 30, 1989.

Under the subcontract. Hyde is required to furnish gate guards and alarm monitors for the installation of the Department of the Army (hereinafter referred to as DOA) which is located at Fort Knox, which is in Hardin County, Kentucky. On November 1, 1987, Hyde entered into a Collective Bargaining Agreement (CBA) with the Union providing for the payment of wages and fringe benefits. The contract extended through October 31, 1989. The agreement-at Article XII provides for the payment of the following wages:

1. Probation thru 1 year service - \$6.30 per hour;
2. One (1) year thru 2 years service - \$6.60 per hour;
3. After two (2) years of service - \$7.00 per hour.

No essential disagreement exists between the parties as to the responsibilities of the guards at Fort Knox. The military installation known as Fort Knox is located outside the small town of Radcliff, Kentucky, and is approximately thirty-five miles from Louisville, Kentucky. The post has approximately twenty square miles of training area. The gold vault or gold bullion depository is also located on the Fort Knox military reservation. However, the gold vault is a tenant activity on the

reservation for which the U.S. Treasury Department has sole responsibility. Hyde has no responsibility for any involvement with respect to the protection of the gold bullion.

The guards provided by Hyde Security perform essentially two functions. About seven or eight of the guards work as alarms monitors and a substantially larger group work as gate guards. The alarms monitoring personnel work in the alarms room which is located in the basement of the police station on the reservation. The gate guards were originally located at five ingress and egress checkpoints on the installation. However, one of those points has recently been closed.

The alarms monitors are responsible for monitoring approximately one-hundred seventy-five alarms, including those associated with the Joint Services Interior Intrusion Detection System (hereinafter referred to as JSIIDS). There are other alarms located at the bank, commissaries, the PX, freight units, arms rooms, a golf course pro-shop, and a hospital. At the commencement of each shift, the alarms monitor performs a function check on all of the alarms and repeats the check every four hours. In the event one of the alarms is activated while a building is in close status, the alarms operator contacts the military police, who then proceed to do a security check. The alarms monitor is responsible for performing a variety of paperwork tasks, and for maintaining telephone and tape records of conversations relating to the security of the premises.

A system is established whereby an individual entering an alarmed area must alert the alarms monitor beforehand by entering a code and other information into the system. When the individual leaves the protected area, the alarms monitor must also be notified at that time. In addition to the alarms monitoring activity, these individuals also operate the National Crime Information Center Law Information Network of Kentucky (hereinafter referred to as NCIC LINK System). This is a computerized system containing a wide variety of information relating to criminal activity. The alarms monitors are required to input information into the system.

The gate guards perform a variety of tasks. The four gates which were open at the time of the hearing allow ingress and egress for approximately 17,000 to 18,000 cars per day. The gate guards serve as public relations agents and informational centers for visitors to the base. Visitors are registered and directed to various buildings and offices on the post. The guards are trained to check for proper vehicle registration, inspection for decals, issuance of traffic citations, identification of invalid automobile registration certificates, and the writing of tickets for expired drivers' licenses or other violations.

In addition to the general responsibilities associated with the meeting and directing of visitors to the base, the gate guards are also on the alert for weapons being brought upon the reservation or illegal drugs. Also, any individual acting in a suspicious manner or a driver who may appear to be intoxicated or a driver operating a vehicle in a reckless manner are stopped and the military police called. These circumstances can result in bodily harm being inflicted upon a gate guard and, in fact, a gate guard was killed while on duty by an individual recklessly driving her automobile. The guards are also alerted by the dispatch office to watch for a stolen vehicle or a prisoner who may have escaped from the stockade or for other similar type problems. The guards are also required to perform a variety of paperwork associated with these jobs.

An applicant for one of these positions must be eighteen years of age, have a high school education or equivalency, pass a drug test, a physical fitness test, a criminal background check, and also demonstrate proficiency in the use of a 38 caliber pistol. The individual must also provide references. Following a parties' hiring as a guard, the individual is given pre-job training which includes instruction on document and report writing, first aid, court procedures, safety, use of deadly force, radio equipment, self-defense, fire-fighting and fire prevention, and explosive chemical and radiological hazards. The contract calls for the updating of training on an annual basis. The alarms room monitors also engage in the same or similar pre-job training as would an individual listed as a gate guard. It does occur on occasion when alarms monitors are used as gate guards, but that is only done if the alarms monitor has been properly trained.

The U.S. Department of Labor has rated the Hyde Security guards with a classification of Guard II. Tr. 73-76) The Area Wage Survey, U. S. Department of Labor, Bureau of Labor Statistics, defines a Guard II employee as one who:

Enforces regulations designed to prevent breaches of security. Exercises judgment and uses discretion in dealing with emergencies and security violations encountered. Determines 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.

(DOA Exhibit B, page 29)

That is the identical definition for a Guard II position contained within the Service Contract Act, Directory of Occupations, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Second Edition, July 1986. (DOA Exhibit F)

On July 20, 1987, the U.S. Department of Labor. Employment Standards Administration, Wage and Hour Division, issued a register of wage determinations under the Service Contract Act. (DOA Exhibit C) That determination discloses that a minimum hourly wage for a Guard II position is \$5.85. These area wage determinations of the Wage and Hour Division are applicable to employees impacted by the Service Contract Act and for which a collective bargaining agreement is not involved. The Wage and Hour Division makes no distinction between manufacturing and non-manufacturing classifications, but rather utilizes the all industry source data compiled by the Bureau of Labor Statistics in its area wage surveys. For our purposes here, I will assume the area wage determination of \$5.85 for Guards II is the minimum compensation figure for comparison purposes. Since the collectively bargained agreement provides for first year compensation of \$6.30 per hour, second year compensation of \$6.60 per hour and third year compensation of \$7.00 per hour, the compensation variance would appear to be 7.2 percent, 11.4 percent, and 16.5 percent.

DOA produced the testimony of the base contracting officer representative in the Provost

Marshall's Office. His basic responsibility was to monitor the compliance with the terms of the contract. The contracting officer conducted a telephone survey of the pay scales of local guard companies. He contacted by telephone ten separate companies in November of 1987, explained the differences between a Guard I position and a Guard II position, and he inquired as to whether there was any pay difference for the two groups of employees within their company. Only one company indicated there was a pay differential. The results of this telephone survey indicated that one company paid a starting compensation of \$3.45 per hour to a top pay of \$5.25 per hour while all of the others ranged from a low of \$3.35 per hour to a high of \$4.00 per hour. The companies indicated that there was no pay difference between armed and unarmed guards. The contracting officer's representative could not recall at the time of the hearing the names of any of the parties he had spoken to nor any of their positions within those companies. He did not know if any of the companies actually placed individuals in Guard II positions, but he presumed they had. He did not know the type of guard duty they performed, whether the employees were required to pass physical examinations, whether they were required to carry weapons, nor did he know how many guards the company employed. He indicated that the telephone conversations lasted between ten and thirty minutes. He did not inquire as to whether any of the other guards were required to pass a security screening test, a urinalysis test, or a criminal history check. Nor did he inquire concerning the guard's training in the areas of first aid, courtroom procedures, or weapons qualifications. He also was unaware as to whether any of these guards were required to be capable of using the NCIC LINK System. His telephone survey also did not include any of the local military installations to determine if private guards were used on those reservations.

#### CONCLUSIONS OF LAW

Section 4(c) of the Service Contract Act of 1965, as amended, reads as follows:

No contractor or subcontractor under a contract, which succeeds a contract subject to this Act 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.

This provision is not intended to guarantee specific union wage rates to employees, but rather is intended to lower the wage rates where the union rates are excessive by comparison to rates prevailing in the locality. Expedient Services, Inc. v. Beggs, 95 LC Par. 34,293 (M.D. Fla. 1982); Nasa Hugh L. Dryden Flight Research Center Edwards, CA, Case Nos. SCA-CBV-20 ABC and D (August 24, 1979). The DOA contends that the collectively bargained wage rates of \$6.30 per hour for the first year,

\$6.60 per hour for the second year, and \$7.00 per hour for the third year of employment in the Guard II position are substantially at variance with those prevailing for services of a character similar in the locality. The DOA seeks a finding to that effect as a prerequisite to the issuance of a new wage determination lowering the hourly rate, in question.

In resolving the ultimate issue as to whether a substantial variance exists, it is the DOA as the moving party who must carry the burden of establishing the presence of a substantial variance in the wages paid to the Hyde employees categorized as holding Guard II positions. It is the party seeking a substantial variance ruling who must affirmatively prove its case. In the Matter of Jacobs Transfer. (Decision of the Administrative Law Judge, May 20, 1981); In the Matter of McChord Air Force Base/Ft. Lewis, Washington, 84-CBV-1 (Decision of the Administrative Law Judge. April 19, 1985); In the Matter of Dyess Air Force Base. 87-CBV-4 (Decision of the Administrative Law Judge. April 21, 1988, currently on appeal to Deputy Secretary). The moving party must present evidence that ... "discloses by a clear showing" that the contractual wages and fringe benefits are substantially at variance. S. Rep. No. 92-1131, 92d Cong. 2d Sess. 4-5. There is ambiguity associated with this burden standard, but it seems to me as though the burden should be no greater than establishing by a preponderance of the evidence that a substantial variance exists.

In deciding the issue of substantial variance, four factors derived from the statute must be considered. Those factors are:

1. Locality;
2. Whether other employees in the locality are performing services of a character similar to those performed by the service employees;
3. The prevailing wage rate for similar services in the locality; and
4. Whether the variance between the prevailing rate and the contract rate is substantial.

Meldick Services, Inc., 87-CBV-4 (Opinion of Administrative Law Judge. April 21, 1988).

Neither the Act nor the Regulations provide a precise definition for the term "locality". Other Administrative Law Judges have interpreted the absence of specific guidelines in the interpretation of that term as conferring flexibility upon the Secretary in making wage determinations that will best insure satisfaction of congressional intent with respect to the entire piece of legislation. Moody Air Force Base, Georgia, SCA-CBV (Decision of Administrative Law Judge, May 15, 1975); Patrick Air Force Base, Florida, SCA-CBV-3 (Decision of Administrative Law Judge, August 6, 1973); Elite Linen Supply Co., SCA-CBV-23 (Decision of Administrative Law Judge, January 29, 1981). Other courts have interpreted the term "locality" as used in the Service Contract Act as being the Standard Metropolitan Statistical Area, if available, or the specific county, where the bidding parties' plant or facility is located. Southern Packaging and Storage Co., Inc. v. United States of America, et al., 458 F.Supp. 726 (U.S.D.C. for the District of South Carolina), aff'd 618 Fed. 2d 1088 (4th Cir. 1980). The Union in this case argues that the term locality should extend beyond the Louisville, Kentucky metropolitan area since there are an inadequate number of comparable employers who provide similar services in that vicinity. The DOA, on the other hand, argues that there was no evidence presented

which justifies expanding the scope of the locality considered beyond the Bureau of Labor Statistics area survey. In considering the Act, the basis for the protections offered by this Act, the legislative history, and the interpretation of the term locality by other judges, it is my belief that the term should be provided an elastic meaning based upon the factual situation in each individual case. As will become obvious later in this Decision, the question of the interpretation of the term is strictly academic here. For purposes of this case, I would convey a sufficiently broad interpretation to the term to include areas outside of the Louisville, Kentucky Standard Metropolitan Statistical Area.

The second factor to be considered is whether other employees in the locality are performing services of a character similar to those performed by the service employees. In considering all of the evidence in this record relating to this factor, I must conclude that DOA has failed to carry its burden in this regard. The telephone survey upon which DOA so heavily relies can be accorded little weight. The Contracting Officer's Representative was not aware of either the names or positions held of any of the parties to whom he spoke. He did not know whether any of the guard companies actually employed individuals in Guard II capacities. He did not know what type of work they performed, whether they were required to pass physicals, whether they were required to carry weapons, nor was he aware as to how many actual guards were working. No consideration was given in his survey to the questions of security screening, urinalysis tests, criminal history checks, nor did he inquire as to whether the employees of these companies required training in the areas of first aid, courtroom procedures, or weapons qualifications. I also believe that it is important that the Guard II employees of Hyde were required to be trained in the usage of the NCIC LINK System. Because of all of these variables with respect to the Guard II position maintained by the Hyde employees, and in absence of information with respect to any of these areas concerning the other employees surveyed, I cannot determine whether any of the employees surveyed were performing services of a character similar to those performed by the Hyde guards. For this reason, I must conclude that DOA has failed to carry its burden of proof with respect to this issue. Additionally, because of the problems associated with the survey evidence, it is impossible for me to make a finding with respect to a prevailing wage rate for similar services performed in the locality. Therefore, DOA has also failed to carry its burden with respect to that factor. Since wage rates could not be determined, obviously, I cannot make a finding as to whether there existed a substantial variance.

ORDER

I hereby find, based upon this record, that the wages contained in the Collective Bargaining Agreement are not substantially at variance with those which prevail for services of a character similar in the locality and, therefore, IT IS ORDERED that the collectively bargained wage provisions shall continue to be paid by the Department of the Army.

RUDOLF L. JANSEN  
Administrative Law Judge