



Issue Date: 07 March 2006

Case Number: 2006-CBV-00002

In the Matter of:

**THE APPLICABILITY OF WAGE RATES COLLECTIVELY BARGAINED
BY U. S. PROTECT, INC., AND THE UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA (UGSOA) LOCAL NO. 52 UNDER A CONTRACT
FOR SECURITY OFFICERS IN SAN DIEGO, CALIFORNIA**

Appearances

James D. Carney
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United Government Security Officers of America
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For Local 52 of the United Government Security Officers of America

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER

The above-captioned matter arises from a petition by Local 52 of the United Government Security Officers of America (UGSOA) for a hearing under the provisions of subsection 4(c) of the McNamara-O'Hara Service Contract Act, 41 U.S.C. §353 (c), concerning wages paid to its members pursuant to a collective bargaining agreement between Local 52 and US Protect Corporation. The members of Local 52 and US Protect have been providing security services for federal facilities in the vicinity of San Diego, California, since at least September of 2003. Although the procurement contract between the United States and US Protect was originally issued by the General Services Administration, responsibility for administering the contract was subsequently transferred to the Department of Homeland Security (DHS).

On December 14, 2005, the Deputy Administrator of the Employment Standards Administration issued an Order of Reference pursuant to the provisions of 29 C.F.R. §4.10(c) and thereby transmitted the UGSOA's request to the Office of Administrative Law Judges for a hearing. Accordingly, in a notice issued on January 10, 2006 all interested persons, including US Protect and the Department of Homeland Security (DHS), were informed that a pre-hearing

conference and a hearing would be held in San Diego on February 8, 2006. However, when the pre-hearing conference convened, the only entity entering an appearance was the petitioner, UGSOA.¹ After the hearing convened, UGSOA presented the testimony of three witnesses and submitted 25 exhibits, which have been admitted into evidence as Exhibits (EX) 1-25. On February 15, 2006, UGSOA also submitted a post-hearing brief. An expedited transcript of the hearing was received by the Office of Administrative Law Judges on February 27, 2006.

BACKGROUND

In general, the Service Contract Act (“SCA”) requires that every federal government contract in excess of \$2,500 for a principal purpose of procuring services must contain a provision specifying the minimum hourly and fringe benefit amounts that are to be paid to the various categories of service employees working on such a contract. *See* 41 U.S.C. §§351(a)(1), (a)(2). These minimum wages and fringe benefits are predetermined by the Wage and Hour Division of the Employment Standards Administration, which has been designated by the Secretary of Labor to administer the SCA.

Under the SCA, two types of wage schedules (which are also known as “wage determinations”) are prepared for inclusion in service contracts. The first type is a general wage determination, and the wages and fringe benefits contained in such a schedule are based on the rates which Wage and Hour Division surveys have found to be prevailing for the various classifications of service employees to be employed on the contract in the locality where the contract is to be performed. 41 U.S.C. §351(a)(1) and (2). These wage determinations are sometimes called “prevailing in the locality” wage determinations. The second type of wage determination is issued at locations where there is a collective bargaining agreement between the service employees and an employer that has been awarded a procurement contract subject to the SCA. In these circumstances, the Wage and Hour Division is required by the SCA to specify the wage and fringe benefit rates from the collective bargaining agreement (including prospective increases) as the required minimum amounts payable to the service employees working under the terms of the procurement contract. *Id.*

In addition to the foregoing requirements, subsection 4(c) of the SCA contains a special provision that applies when (1) there has been a prior contract involving substantially the same services and (2) the wages for the employees working on the earlier contract were set pursuant to a collective bargaining agreement. In particular, subsection 4(c) specifies that:

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

¹ The failure of the DHS to appear was explained in a January 30, 2006 letter to the undersigned Administrative Law Judge from Aaron T. Marshall, an Associate Legal Advisor in the U.S. Immigration and Customs Enforcement component of the DHS. According to the letter, DHS had received notice of the hearing but elected not to appear because it does not “intervene in labor disputes between agency contractors and their unions.” Although US Protect did not provide a written explanation for its failure to appear, its General Counsel did confirm in a telephone conversation with the undersigned’s law clerk that US Protect had received the hearing notice and had elected not to participate in the hearing.

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) (emphasis added).

ANALYSIS

In this case, the UGSOA argues that the wages and fringe benefits currently being paid to members of Local 52 under the terms of its contract with US Protect are substantially less than the wages and fringe benefits prevailing for other security workers providing comparable services in the vicinity of San Diego.² Thus, the UGSOA contends, the italicized passage from subsection 4(c) entitles the members of Local 52 to have their wages increased to a level equal to the wages prevailing for the other San Diego-area security guards performing comparable work.³ In particular, the union contends that the wages for the members of Local 52 employed by US Protect should be increased from \$18.50 per hour of straight time to \$21.54 per straight-time hour and that their fringe benefit payments should be increased from \$2.56 per hour to \$2.86 per hour. Tr. at 20-22, 36-37, EX 10 to EX 14. Because no other interested party elected to appear at the hearing to oppose this request, it is permissible to grant the request. See 29 C.F.R. §6.7 (b) (specifying that if a party fails to appear at a hearing governed by the provisions of 29 C.F.R. Part 6, the presiding Administrative Law Judge may “find the facts as alleged in the complaint”). Moreover, the UGSOA’s request is well supported by the testimony of three witnesses who described the similarities between the work performed by members of Local 52 and the work performed by other workers who are classified as Security Guard II and Court Security Officers. Tr. at 45-56 (testimony of John Reed), Tr. at 60-71 (testimony of Todd Stillman), Tr. at 72-152

² In this regard, it is noted that the testimony and exhibits indicate that there was at least one predecessor procurement contract involving substantially the same services and that the wages paid under that predecessor contract were less than the wages being paid under the current contract. See EX 6 (collective bargaining agreement) and EX 22 (predecessor contract).

³ It is recognized that the United States Court of Appeals for the Fourth Circuit has determined that subsection 4(c) does not authorize the Secretary of Labor to set aside the wage and benefit provisions of a collective bargaining agreement if, as in this case, the wages and benefits in the agreement are **less** than the prevailing rates in the same locality for similar work. See *Gracy v. International Brotherhood of Electrical Workers, Local Union No. 1340*, 868 F.2d 671 (4th Cir. 1989). It is further recognized that the Administrator of the Wage and Hour Division subsequently adopted the *Gracy* decision’s interpretation of subsection 4(c). However, in 2003 the Administrator’s interpretation was rejected by the Administrative Review Board. See *In re: Substantial Wage Variance Between Local Collective Bargaining Agreement Wage and Local Prevailing Wage Determination No. 94-2419 (Rev. 18)*, ARB No. 02-012 (ARB Sept. 29, 2003). Hence, the ARB follows the *Gracy* holding only in cases arising in the Fourth Circuit and Department of Labor Administrative Law Judges must apply the ARB’s interpretation of subsection 4(c) in cases arising in all the other federal circuits. *Id.* at 8, n. 5. Because the contract in this proceeding concerns services performed in the State of California, this case arises in the Ninth Circuit.

(testimony of Mike Hough). In addition, the prevailing wage suggested by the UGSOA is consistent with the results of Department of Labor surveys showing the wages prevailing for security workers in the vicinity of San Diego. Tr. at 36-37, EX 10 to EX 14. It is further noted that the differential between the current hourly wage and the prevailing hourly wage (16.4 percent or approximately \$6,000 per year) is substantial. Accordingly, it is concluded that UGSOA has made the necessary “clear showing” that the compensation being paid to members of Local 52 for providing services covered by the current procurement contract with US Protect for the San Diego vicinity must be immediately increased to \$21.54 per straight-time hour and that fringe benefits payments for these workers must be simultaneously increased to \$2.86 per hour.

In addition to seeking an immediate adjustment in the wages and fringe benefits being paid to the members of Local 52, UGSOA is also asking that its proposed wage increases be made retroactive to October 1, 2005. As grounds for this request, UGSOA points out that it filed its petition in this case on September 1, 2005, but, despite regulations contemplating that the Administrator will act on such petitions within 30 days, no referral to the Office of Administrative Law Judges was made until December 14, 2005, thereby delaying the hearing in this matter until February of 2006. *See* 29 C.F.R. §4.10 (b)(2). Moreover, the UGSOA argues, its efforts to initiate this proceeding were hampered by a refusal by DHS to provide the union with information concerning the details of its current procurement contract with US Protect. *See* EX 2, EX 3, 29 C.F.R. §4.1b (b)(3).

The UGSOA certainly has good reason to be disappointed by the lack of responsiveness to its legitimate requests by the Department of Homeland Security and the Employment Standards Administration. However, the regulations governing proceedings under subsection 4(c) of the SCA unequivocally indicate that when, as in this case, a procurement contract has already gone into effect, it is clearly impermissible for a new wage determination to be put into effect prior to the date of an Administrative Law Judge’s decision concerning that wage determination. In particular, 29 C.F.R. §4.1b (a) provides in relevant part:

If the contract has been awarded and work begun prior to a finding that the wages and/or fringe benefits in a collective bargaining agreement are substantially at variance with those prevailing in the locality, the payment obligation of such contractor or subcontractor with respect to the wages and fringe benefits contained in the new wage determination shall be applicable as of the date of the Administrative Law Judge’s decision or, where the decision is reviewed by the Administrative Review Board, the date of the decision of the Administrative Review Board. (See also Sec. 4.163 (c).)

Accordingly, the UGSOA’s request that the new wage determination go into effect prior to the date of this Decision and Order must be denied.

ORDER

Pursuant to the provisions of 29 C.F.R. §4.163(c), the Administrator of the Department of Labor's Wage and Hour Division is hereby directed to promptly issue a new wage determination in accordance with this Decision and Order.

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Paul A. Mapes
Administrative Law Judges

NOTICE OF RIGHT TO APPEAL Within 10 days after the date of this Decision and Order, any interested party who participated in the hearing that desires review of the decision must file a petition for review with the Administrative Review Board pursuant to 29 C.F.R. Part 8. The petition shall refer to the specific findings of fact, conclusions of law, or order excepted to and the specific pages of transcript relevant to the petition for review. 29 C.F.R. § 6.57. The Administrative Review Board may be served at: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Ave., N.W., Washington, D.C. 20210. Pursuant to the provisions of 29 C.F.R. §6.7(b), petitions for review of default judgments by a party that did not appear at the hearing are permitted to allege procedural irregularities in the proceeding but are