

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 June 2016

Case No.: 2015-CBV-00001

In the Matter of:

**Applicability of Wage Rates Collectively Bargained
by Corrections Corporation of America and
United Government Security Officers of America,
Local 315, Under Contract ODT-5-C-0010 for
Detention Guard Services, Elizabeth Detention Center,
Elizabeth, New Jersey.**

Appearances:

**Robert Kapitan, Esq.
Westminster, Colorado
For the Complainant**

**Robert G. Lian, Jr., Esq.
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Washington, D.C.
For the Respondent**

**Before: Stephen R. Henley
Chief Administrative Law Judge**

DECISION AND ORDER DENYING PETITION FOR SUBSTANTIAL VARIANCE

This matter arises from an Order of Reference for a “substantial variance” hearing under Section 4(c) of the McNamara-O’Hara Service Contract Act (“SCA”), 41 U.S.C.A. § 6707(c) and the implementing regulation at 29 C.F.R. § 4.10.

BACKGROUND

A. *The Service Contract and the Collective Bargaining Agreements*¹

In 2005, CCA entered into Service Contract ODT-5-C-0010 with U.S. Immigration and Customs Enforcement (“ICE”) to provide detention guard services at the Elizabeth Detention Center in Elizabeth, New Jersey (“EDC”).² CCA entered into a collective bargaining agreement (“CBA”) with Security, Police, Fire Professionals of America (“SPFPA”) and its associated Local Union 448. This CBA was originally effective April 1, 2009 through October 1, 2013. The CBA was reopened, renegotiated in part, and extended with a new term of September 25, 2011 to September 30, 2014. The amended CBA provided for wages of \$20.00 per hour for Detention Officers. This \$20.00 per hour wage rate was incorporated as the wage determination for the detention guard service contract in Wage Determination No. CBA-2012-5560.³

In February 2012, EDC employees elected the United Government Security Officers of America (UGSOA), Local 315, as their certified collective bargaining representative. CCA and UGSOA negotiated a new CBA with an effective term of March 25, 2013 to September 24, 2016. This CBA provided for Detention Officer hourly wage rates of \$20.40 in 2013, \$20.71 in 2014 and \$21.02 in 2015. These wage rates were incorporated as the wage determination for the detention guard service contract Wage Determination No. CBA-2013-0122, Rev.1.⁴

B. *The Substantial Variance Hearing Request, the Order of Reference and CCA’s Motion to Dismiss*

On September 16, 2014, UGSOA filed a request with the Administrator, United States Department of Labor, Wage and Hour Division (“Administrator”) for a substantial variance hearing regarding the wage rates for Detention Officers and Transportation Detention Officers working under Service Contract ODT-5-C-0010. UGSOA noted that the local prevailing wage for the Detention Officer classification from SCA Wage Determination No. 2005-2353 (Rev. 13) is \$30.97 per hour,⁵ which is substantially higher than the wages from the CBA entered into by UGSOA, Local 315 and CCA. UGSOA alleged that CCA negotiated the current wage rates under threat from ICE that the detention guard service contract was going to be terminated due to costs. (UGSOA Request at 2-3). UGSOA alleged that the current CBA wage rates were accepted by Local 315 only because wages with a “significant variance” were better than no CBA at all. UGSOA noted that comparing the then current CBA rate of \$20.40 to the relevant SCA prevailing wage rate of \$30.97 shows a substantial variance of 54.5%. (UGSOA Request at 3).

Based on the information provided by UGSOA, the Administrator filed an Order of Reference on February 6, 2015 with the U.S. Department of Labor, Office of Administrative

¹ This discussion of the facts is based on the documentation and uncontested statements of the parties.

² CCA of Tennessee, LLC employs the employees relevant to this proceeding. (CCA Motion to Dismiss at 1, n.1.)

³ CCA Motion to Dismiss, Attachment A (from www.wdol.gov/DisplayT4CWD.aspx?WDNo=CBA-2012-5560).

⁴ CCA Motion to Dismiss, Attachment B.

⁵ See www.wdol.gov/wdol/scafiles/archive/sca/05-2353.r13 (valid 06/19/2013; replaced 08/05/2014).

Law Judges (“OALJ”) authorizing a substantial variance hearing under section 4(c) of the SCA, 41 U.S.C. § 6707(c).

On March 16, 2015, CCA filed a *Motion to Dismiss and Stay Substantial Variance Hearing* (“Motion to Dismiss”).⁶ CCA’s motion was based on the argument that the SCA substantial variance procedures “are not available to the UGSOA to attempt to obtain a wage determination rate higher than the one established in its collective bargaining agreement with CCA, and the Administrator erred in issuing the Order of Reference in this matter to set the case for hearing.” (Motion to Dismiss at 1-2) (footnote omitted). CCA argued that under 41 U.S.C. § 6707(c), the substantial variance process is only for “situations involving the transition from one service contract to another to ensure that employees receive wages and benefits under a successor contract that are on par with what they received under the predecessor contract.” (Motion to Dismiss at 2). CCA asserted that the contractor and the service contract have not changed, and therefore the substantial variance procedure does not apply. CCA also argued that the Administrator has the authority to issue an *Order of Reference* for a substantial variance hearing only where it is alleged that the predecessor wages are above the prevailing wage in the same locality for similar services. CCA relied principally on the decision of the Fourth Circuit in *Gracey v. Int’l Bhd. Of Elec. Workers, Local Union No. 1340*, 868 F.2d 671 (4th Cir. 1989).

The Administrator opposed CCA’s Motion to Dismiss on the grounds that the exercise of a contract option results in a new contract for purposes of the SCA, and that section 4(c) permits substantial variance proceedings to increase a predecessor’s collectively bargained rate. By Order issued on April 25, 2015, I denied the Motion to Dismiss, determining that I was bound by the ARB’s decision in *United Government Security Officers of America Local 114*, ARB No. 02—12 (ARB Sept. 29, 2013) (ALJs must apply the ARB’s interpretation of Section 4(c) outside the Fourth Circuit). CCA subsequently filed an action in the United States District Court for the District of New Jersey “seeking, inter alia, to preliminarily, and permanently enjoin the substantial variance hearing in the above captioned matter.” *CCA v. Perez, et al.*, 15-cv-3164. On December 18, 2015, the District Court granted the Department of Labor’s motion to dismiss CCA’s action to enjoin the instant substantial variance hearing. Consistent with the time limits set forth in 29 C.F.R. 6.52, a prehearing conference and hearing were scheduled and held in Washington, D.C. on April 28, 2016. CCA offered *Proposed Findings of Fact and Conclusions of Law* (“Proposed Findings”) at the close of the prehearing conference. CCA offered exhibits 1-14, which were admitted and entered into evidence as RX-1 through RX-14.⁷ UGSOA offered exhibits 1-15 and 20, which were admitted and entered into evidence as CX-1 through CX-14 and CX-20.⁸ (Tr. 9, 20, 182-83.) ALJ exhibits were entered as ALJX-1 through ALJX-3. (Tr. 8-9, 184-85.) The parties were given five days after receipt of the hearing transcript to file post-

⁶ On March 25, 2015, OALJ received the Administrator’s Consent Motion for Extension of Time to respond to CCA’s motion to dismiss. That motion included the parties’ joint request to stay the scheduling of a substantial variance hearing pending a decision on CCA’s Motion to Dismiss. On March 30, 2015, the undersigned granted the Consent Motion, which both provided the Administrator additional time to respond to the Motion to Dismiss, and stayed the scheduling of the hearing. This ruling was communicated to the parties by telephone.

⁷ I will use the following abbreviations: ‘CX’ for a complainant’s exhibit; ‘RX’ for a respondent’s exhibit; ‘ALJX’ for an administrative law judge’s exhibit; and ‘Tr.’ for the official hearing transcript.

⁸ Documents within CX-12 were marked CX-15 through CX-19 for identification during the hearing. However, these exhibits were not separately entered into evidence outside of CX-12. (Tr. 20-22.)

hearing briefs. (Tr. 187.) On May 31, 2016, this Office received briefs from UGSOA, CCA, and the Administrator.⁹

The key issue is whether the comparisons used by UGSOA are appropriate to show a substantial variance between the collectively bargained wage rates and those prevailing for services of a similar character within the same locality.¹⁰ I find UGSOA has failed to provide the required mix of rates necessary to establish the prevailing wage and, for the reasons set forth below, the petition is DENIED.

POSITIONS OF THE PARTIES

A. UGSOA

UGSOA seeks wages to be amended and set at \$30.97, the wage determination for the Detention Officer classification for Essex, Hudson, Morris, Sussex, and Union Counties, New Jersey. (UGSOA Post-Hearing Brief at 15; CX-2.) UGSOA contends that the proper locality is the New York-New Jersey metropolitan area, which falls within the NY-NJ-PA Metropolitan Statistical Area as defined by BLS. (UGSOA Post-Hearing Brief at 13.) UGSOA argues that Dr. Johnson's testimony regarding "the methodology and source data used by BLS was not appropriate," because "the source data is not permitted to be entered into evidence" according to 29 C.F.R. § 6.54(c). (UGSOA Post-Hearing Brief at 15.)

UGSOA contends that the position of Detention Officer at EDC is "nearly identical" to that of a Corrections Officer and that Detention and Transportation Detention Officers are both appropriately classified as Corrections Officers under the BLS and as Detention Officers under the SCA Directory of Occupations. (UGSOA Post-Hearing Brief at 3-4, 12-13.)

UGSOA argues that the collective bargaining negotiations between CCA and SPFPA in 2011 and UGSOA in 2012 and 2014 constitute "unusual circumstances" due to unequal bargaining power and "wages negotiated through collusion." (UGSOA Post-Hearing Brief at 9-10, 14.) It contends that CCA used the threat of closing EDC as a bargaining chip, and furthermore, that "there is no evidence that ICE was threatening to close EDC in 2011" or during negotiations with UGSOA. (UGSOA Post-Hearing Brief at 5-6.)

UGSOA states that it submitted "a FOIA request to ICE to get wage data for similar facilities in the area, such as Bergen County Jail, the Hudson County Correctional Facility, and the Monmouth County Correctional Institution but ICE refused to provide the data." (UGSOA Post-Hearing Brief at 6, 14.)

UGSOA states that Essex County jail is a comparable facility, and quotes an average hourly wage of \$29.66. UGSOA explains that it averaged seven wages contained in the CBA in

⁹ These briefs will be referred to as "CCA Post-Hearing Brief"; "UGSOA Post-Hearing Brief"; and "Administrator Post-Hearing Brief." A member of my staff added page numbers to UGSOA's non-paginated brief to allow for pinpoint citation by this tribunal.

¹⁰ I denied requests by the Administrator and UGSOA that the substantial variance hearing extend to fringe benefits and arm's length negotiations as neither was included in the Order of Reference.

CX-14 after converting the salaries to hourly rates “by dividing the salary by 2080 hours.” (UGSOA Post-Hearing Brief at 14.)

B. Administrator

The Administrator makes four arguments in his brief. First, the Administrator contends that EDC employees are properly classified as Detention Officers under the SCA. (Administrator Post-Hearing Brief at 6-7.) Second, the Administrator urges this tribunal to “place little, if any, weight on the wage rates paid at Delaney Hall” because the Administrator “has concluded that [the employees] were paid less than the wage rate required by the SCA.” (Administrator Post-Hearing Brief at 9.) Third, the Administrator contends that “[e]vidence of collusion, unequal bargaining power and non-arm’s-length negotiations is admissible in a substantial variance proceeding because the presence of these factors might help to explain an asserted disparity in rates.” Additionally, the possibility that this type of evidence may be presented does not require reference to the OALJ by the Administrator. (Administrator Post-Hearing Brief at 10-11.) Fourth, the Administrator argues that a wage determination and “the survey that resulted in inclusion of that rate on the wage determination is not subject to review in this proceeding.” Pursuant to § 2(a) of the SCA, the wage determination is only reviewable if it applies to an SCA contract. The Administrator points out that under 29 C.F.R. 4.56, the proper place to seek review of a wage determination is with the Administrator. (Administrator Post-Hearing Brief at 12-13.) The Administrator explains that even if the wage rate were subject to review, WHD reached that rate through a “slotting” process that utilizes wage grade levels and does not depend upon the respective job duties being identical. (Administrator Post-Hearing Brief at 13-14.)

C. CCA

CCA contends that UGSOA has failed to demonstrate that a substantial variance exists by a clear showing of evidence. (CCA Post-Hearing Brief at 12; Proposed Findings at 13.)

CCA argues that UGSOA has failed to establish the prevailing wage in the appropriate locality. (Proposed Findings at 14.) First, CCA argues that the BLS statistics provided by UGSOA, and the area wage determination that relies on those statistics, are based on dissimilar occupations, facilities, and locations than those of EDC. (CCA Post-Hearing Brief at 13-18.) Second, CCA argues that UGSOA has not met its burden to show a comprehensive mix of rates. (CCA Post-Hearing Brief at 18-21.) While UGSOA offered evidence on the Essex County CBA, the services are of a different character.¹¹ (CCA Post-Hearing Brief at 19.) CCA argues that the 2009 CBA negotiated by SPFPA for EDC did not establish wages in the locality for detention officers both because the wage increases “did not reflect an understanding of the market wage,” and the wage increases “never went into effect because both CCA and [SPFPA] later realized that they negotiated wage rates higher than market wages.” (CCA Post-Hearing Brief at 19-20.) CCA argues that Delaney Hall is the only comparable facility within the relevant locality¹² where

¹¹ CCA also points out that the entry-level wage rate is \$19.45, which is less than the rate at EDC.

¹² CCA asserts that the relevant locality “is limited to Essex and Union Counties,” because “[t]he majority of the EDC detention officers commute to EDC from those two counties.” (Proposed Findings at 15.)

employees are performing services of a similar character,¹³ and that the \$11.07 wage rate at Delaney Hall is lower than that of EDC. (CCA Post-Hearing Brief at 20-21; Proposed Findings at 14.) CCA acknowledges the Administrator’s position that the wages at Delaney Hall are in violation of the SCA, but emphasizes that (i) a final determination has not been made; and (ii) even if Delaney Hall “was required to pay a different wage under the Act,” the wages currently being paid “are evidence of the actual market wages prevailing in the locality for similar services when those services are not covered by the Act.” (CCA Post-Hearing Brief at 25-27.)

CCA points out that arm’s-length negotiations are not at issue in this proceeding, but that if considered, “UGSOA’s evidence is patently deficient to show a lack of arm’s-length negotiation.”¹⁴ (CCA Post-Hearing Brief at 22-25.)¹⁵

DISCUSSION

A. Statutory and Regulatory Framework

1. General Framework

In *BAE Systems*, ARB No. 12-056, ALJ No. 2012-CBV-1 (ARB May 19, 2014), the U.S. Department of Labor, Administrative Review Board (“ARB”) described the statutory framework governing SCA substantial variance hearings. The ARB stated, in pertinent part:

The SCA requires that whenever the United States enters into a contract in excess of \$2,500, the principal purpose of which is to provide services through the use of employees in the United States, the contract must contain a provision that specifies the minimum hourly wage rates that are payable to the various classifications of service employees working under the contract. 41 U.S.C.A. § 6702. The SCA provides that a service contract and bid specification shall contain a provision specifying the minimum wage and fringe benefits to be paid to each class of service employee engaged in the performance of the contract or any subcontract, as determined by the department in accordance with prevailing rates and/or benefits in the locality, or, where a collective-bargaining agreement covers the service employees, in accordance with the rates and/or benefits provided for in the agreement, including prospective wage and/or benefit increases provided for in the agreement as a result of arm’s length negotiations. 41 U.S.C.A. § 6703(1), (2).

The WHD Administrator predetermines the wage-and-fringe benefit rates. 41 U.S.C.A. § 6703; 29 C.F.R. § 1.1. Under the process set out in the SCA, the WHD Administrator prepares for service contracts: (1) a general wage determination based on the rates that the WHD determines prevail in the particular locality for the various

¹³ CCA acknowledges that Delaney Hall Detention Officers only supervise Level 1 detainees, whereas EDC Detention Officers supervise Level 1 and 2 detainees, but states that “there is no difference between the job descriptions” of Detention Officers at EDC who supervise Level 1 and 2 detainees.

¹⁴ CCA explains that “[t]he requirement of arm’s-length negotiation . . . requires only that the two negotiating parties . . . refrain from collusion.” (CCA Post-Hearing Brief at 23-24.)

¹⁵ CCA also renews the argument from its Motion to Dismiss, discussed in detail above, that this hearing is improper under the SCA. (CCA Post-Hearing Brief at 9-12.)

classifications of service employees to be employed on the contract, and (2) wages based on a collective bargaining agreement between the service employees and the employer working on a federal service contract. 41 U.S.C.A. § 6703 (1).

Section 4(c), as amended, “imposes on successor contracts an obligatory floor for wages and fringe benefits in the event that the predecessor contract has specified collectively-bargained rates.” *In re United Healthserv Inc.*, 1989-CBV-001, et seq., slip op. at 6 (Sec’y Feb. 4, 1991) [hereinafter “*United Healthserv*”]. See also 41 U.S.C.A. § 6707(c). However, Section 4(c) “contemplates circumstances in which the obligation may be suspended.” *United Healthserv* at 4. Section 4(c) reads:

(c) Preservation of wages and benefits due under predecessor contracts. –

(1) In general. – Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, 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.

(2) Exception. – This subsection does not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character.

41 U.S.C.A. § 6707(c); 29 C.F.R. § 4.10(a).

USDOL/OALJ Reporter at 5-6 (footnote omitted).

The Department of Labor’s regulations provide at 29 C.F.R. § 4.10:

§4.10 Substantial variance proceedings under section 4(c) of the Act.

(a) *Statutory provision.* Under section 4(c) of the Act, and under corresponding wage determinations made as provided in section 2(a)(1) and (2) of the Act, contractors and subcontractors performing contracts subject to the Act generally are obliged to pay to service employees employed on the contract work wages and fringe benefits not less than those to which they would have been entitled under a collective bargaining agreement if they were employed on like work under a predecessor contract in the same locality. (See §§4.1b, 4.3, 4.6(d)(2).) Section 4(c) of the Act provides, however, that “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.”

(b) *Prerequisites for hearing.* (1)(i) A request for a hearing under this section may be made by the contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210, and shall include the following:

(A) The number of any wage determination at issue, the name of the contracting agency whose contract is involved, and a brief description of the services to be performed under the contract;

(B) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, commencement date of the contract or its follow-up option period;

(C) A statement of the applicant's case, setting forth in detail the reasons why the applicant believes that a substantial variance exists with respect to some or all of the wages and/or fringe benefits, attaching available data concerning wages and/or fringe benefits prevailing in the locality;

(D) Names and addresses (to the extent known) of interested parties.

(ii) If the information in paragraph (b)(1)(i) of this section is not submitted with the request, the Administrator may deny the request or request supplementary information, at his/her discretion. No particular form is prescribed for submission of a request under this section.

(2) The Administrator will respond to the party requesting a hearing within 30 days after receipt, granting or denying the request or advising that additional time is necessary for a decision. No hearing will be provided pursuant to this section and section 4(c) of the Act unless the Administrator determines from information available or submitted with a request for such a hearing that there may be a substantial variance between some or all of the wage rates and/or fringe benefits provided for in a collective bargaining agreement to which the service employees would otherwise be entitled by virtue of the provisions of section 4(c) of the Act, and those which prevail for services of a character similar in the locality.

(3) Pursuant to section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below, except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the initial term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

(c) *Referral to the Chief Administrative Law Judge.* When the Administrator determines from the information available or submitted with a request for a hearing that there may be a substantial variance, the Administrator

on his/her own motion or on application of any interested person will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such a fact finding hearing as may be necessary to render a decision solely on the issue of whether the wages and/or fringe benefits contained in the collective bargaining agreement which was the basis for the wage determination at issue are substantially at variance with those which prevail for services of a character similar in the locality. However, in situations where there is also a question as to whether the collective bargaining agreement was reached as a result of “arm’s-length negotiations” (see §4.11), the referral shall include both issues for resolution in one proceeding. No authority is delegated under this section to hear and/or decide any other issues pertaining to the Service Contract Act. As provided in section 4(a) of the Act, the provisions of section 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding, which shall be conducted in accordance with the procedures set forth at 29 CFR part 6.

(d) The Administrator shall be an interested party and shall have the opportunity to participate in the proceeding to the degree he/she considers appropriate.

29 C.F.R. § 4.10.

2. Determinations of Substantial Variance

The burden of proof is on UGSOA to make a clear showing that a substantial variance exists between the collectively-bargained rate and the prevailing rate for work of a similar character in the same locality. *See, e.g., BAE Systems*, ARB No. 12-056. In order to establish a prevailing rate, UGSOA must compare a comprehensive mix of rates in the relevant locality, where services are of a similar character. *See Requirements for Substantial Variance Proceedings Under Section 4(c) of the Service Contract Act*, U.S. Dep’t of Labor, All Agency Memorandum No. 166 at 2 (Oct. 8, 1992) [hereinafter “AAM 166”]. A mix of rates includes federal wage rates; BLS data; collectively-bargained rates; and other wage data from private employers. *Id.* at 3.

Same Locality. Locality determinations are dependent on the facts and circumstances unique to each case. The regulations at 29 C.F.R. § 4.54(a) explain that

[a]lthough the term locality has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a “locality” that would be relevant or appropriate for the determination of prevailing wage rates Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area.

The regulations offer additional guidance where a predecessor contract's collectively bargained wages are recorded in a wage determination. In that case, locality "is typically described as the geographic area in which the predecessor contract was performed. The determination applies to any successor contractor which performs the contract in the same locality." 29 C.F.R. § 4.54(c).

Services of a Similar Character. Job duties and skill characteristics of a related nature are found to be similar in character; an identity of services is unnecessary. The focus is on actual duties and skills, rather than written job descriptions. Training, expertise, and required experience are all factors to be considered. *See, e.g., National Aeronautics and Space Administration*, ARB No. 12-027, ALJ No. 2011-CBV-003 (ARB Dec. 19, 2013), pdf at 5.

Substantial Variance. The term substantial variance is not defined by statute or regulation; no numerical threshold is indicated or agreed upon by caselaw. A considerable disparity in rates must be proven. *See, e.g., United Healthserv* at 13. A request for hearing is required to include information on the following: (i) federal wage board rates and surveys; (ii) relevant BLS surveys and comparable SCA wage determinations; (iii) other relevant wage data such as what other employers pay for similar services; and (iv) other collectively-bargained wages and benefits in the locality. If a petitioner lacks the above information "at the time the hearing request is made," the request "must adequately demonstrate the effort made to obtain or develop such information." AAM 166 at 2-3. However, a petitioner in such circumstances is merely afforded an extension of time in order to gather the additional data,¹⁶ and must provide such data during the hearing proceedings in order to meet its burden. *Id.*

B. *Stipulations and Issues Not In Dispute*

The parties have stipulated to the following:

1. "[I]f there is a final agency decision adjusting wages as a result of the substantial variance hearing, CCA will make the wage adjustment retroactive by two months to account for the delay caused by rescheduling the hearing."¹⁷
2. "As of 2013, the employees who supervised and cared for Level 1 Detainees at the Delaney Hall detention facility in Essex County, New Jersey, were being paid an hourly rate of \$11.07 per hour."¹⁸

¹⁶ Allowing petitioners to continue developing data after a hearing request is sensible given that there are time constraints on granting requests for hearing. *See* 29 C.F.R. 4.10(b)(3) ("requests for a hearing shall not be considered unless received . . . prior to ten days before the award of the contract" for advertised contracts; and "prior to the commencement date of the contract or the follow-up option period" for negotiated contracts or contracts extended by option).

¹⁷ At the time that this stipulation was agreed to, the hearing was scheduled for February 29, 2016, and CCA moved for a continuance to March 16, 2016. UGSOA opposed the continuance. This stipulation is entered into evidence as ALJX-1.

¹⁸ CCA and UGSOA agreed to this stipulation, and the Department of Labor does not object. This stipulation is entered into evidence as ALJX-2. (Tr. 184-85.)

3. “The WHD Administrator has concluded that employees performing Detention Officer functions at Delaney Hall in 2013 were paid less than the wage rate required by the Service Contract Act. However, there has not yet been a final adjudication of the Service Contract wage rate for employees performing Detention Officer functions at Delaney Hall in 2013.”¹⁹
4. The parties have agreed that this tribunal is not making a determination on whether arm’s-length negotiations took place during the collective bargaining process.²⁰

C. Evidence

1. Summary of Testimony²¹

Jeffrey Miller (Tr. 16-65)

Mr. Miller is employed by the UGSOA International Union as the Union International Director. (Tr. 16-17.) Mr. Miller “facilitate[s] coordination, supervision, training, and case management” for “charter member locals for bargaining, grievance handling, and their day-to-day operations.” Mr. Miller acts as the chief negotiator to “facilitate collective bargaining” on behalf of local organizations, and also “assist[s] and process[es] their grievances and arbitrations” and “case-manage[s] any interactions with” the NLRB or the Department of Labor. Mr. Miller has responsibility for Local 315 and submitted a request for a variance hearing in this matter. (Tr. 17.)

Representation by SPFPA

Before UGSOA, Local 315 was represented by SPFPA. (Tr. 22.) “When they first unionized with a 9(b)(3) union . . . they started off around \$18 an hour. In that collective bargaining agreement there was a three-year progression of wages that eventually ended in . . . 28.93. And in 2011-12, the federal prevailing wage in that area was published at 28.93.” Mr. Miller viewed that CBA “as an attempt to facilitate movement toward the federal wage determination rate.” (Tr. 24.) However, “the following year there were some discussions with [SPFPA] that altered that collective bargaining agreement and brought them below” the initially negotiated wage rates. When UGSOA began its representation, the wage rate was \$20 an hour and UGSOA was “forced to bargain from that rate from the last known collective bargaining agreement CCA provided the Union at that time.” (Tr. 25.)

Representation by UGSOA

Mr. Miller became involved with Local 315 at the end of 2011 or beginning of 2012. (Tr. 22.) Local 315 wanted UGSOA to correct the wages in place pursuant to representation by

¹⁹ This stipulation is entered into evidence as ALJX-3. (Tr. 184-85.)

²⁰ However, the parties disagreed in the April 28, 2016 prehearing conference over whether evidence of a lack of arm’s-length negotiations should be considered for the purpose of explaining why a substantial variance might exist.

²¹ The summary of the hearing testimony is not intended to be a verbatim transcript but merely to highlight certain relevant portions.

SPFFPA. (Tr. 23.) Mr. Miller “was the chief negotiator for the international, representing the charter local.” (Tr. 23, 25.)

Negotiations took “just over nine months,” and were contentious. (Tr. 23.) The Union took the position in the negotiations that what it “believed to be the federal guidance in the establishment of the federal wage determination” meant “that the employees should, by the nature of the negotiations, reach what was then the published rate of 30.97.” (Tr. 25.) CCA’s position was that ICE had communicated “that there was an effort to reduce costs . . . and they were being compelled to keep rates lower” because ICE was “trying to establish a national bed rate throughout the country.” (Tr. 25-26.) “They didn’t specify any type of numbers, just that in the past they had reached the \$20 an hour with previous contractors and their efforts were not to, per se, upset the apple cart and go to 30.97 without ICE’s cooperation and blessing, per se.” (Tr. 26.)

In an email sent August 7, Mark Floyd told Mr. Miller that he had “no reason to believe that ICE’s position has changed from last year.” (Tr. 27; CX-12.) Mr. Miller “was simply told ICE won’t allow that . . . wage increase or the offer of it, and if . . . CCA included that in their collective bargaining agreement, that either ICE would close the facility . . . or they would just cancel CCA’s contract in its entirety.” (Tr. 27-28.) [EDC] had been classified as a Level 1 facility as “a detainee immigration status deportation processing center.” CCA “indicated [to ICE] that they had the facilities, . . . manpower, . . . staffing, . . . and . . . training to make [EDC] . . . a Level 2 facility.” (Tr. 28.) CCA “indicated that they were given some confinements by ICE that even though they were lengthening the term of contracts, there was still some levels that CCA couldn’t change or alter in that relationship, specifically the price that ICE would pay for each of the bed spaces.” Having to “make arguments with a ghost figure that’s not present, that has lots of power and influence over the actions of the parties . . . greatly restricts the offers that we can make” and “the leverage that we have from our position.” (Tr. 29.)

Mr. Miller received a certified WARN notice on August 13, 2012, two or three months into negotiations, the purpose of which was to give notice of “an anticipated closure or shutdown of an employment facility.” (Tr. 30.) Mr. Miller explains that “a determination was made for CCA to make a request to ICE asking . . . in writing their position as to their pending actions if we were to agree to a CBA that included the 30.97 wage rate.” (Tr. 31.) Mr. Floyd “agreed to make the notification to ICE with the understanding that they would, to safeguard their position of payment of wages beyond a closure, notify the employees of the potential action as a result of our request of the employer.” (Tr. 31-32.)

Mr. Miller received an email from Mr. Floyd on August 27, 2012 which included information regarding the per diem rate that ICE was prepared to pay. (Tr. 56-58, CX-12.)

Mr. Miller explained that “[t]he equitable adjustment window is an area where we can bargain changes in prospective rates of pay or compensation or fringe benefits” during a 30-day window. (Tr. 32-33.) In the August 27, 2012 email, Mr. Floyd recounted three options that [Mr. Floyd and Mr. Miller] had spoken about during a conversation in the hallway in what Mr. Miller “would characterize as an off-the-record discussion of future possibilities.” (Tr. 34.) One of those options, as Mr. Floyd described in the email, was to “sign a contract with the company’s

proposed 2% wage increase enabling the unit employees to get a raise while not affecting the Union's right to continue to pursue the variance process with the DOL." (Tr. 35, CX-12.)

In March 2013, a finalized CBA was presented to and ratified by the membership. (Tr. 36.) The agreement provided for wage levels for detention officers of \$20.40 an hour. It was presented in March 2013 because "[w]e were coming up on . . . what would've been our first option period opportunity to have wages and fringe benefits submitted to the government vendor. . . ." (Tr. 36.) The deadline was April 1, 2013. (Tr. 50.) The next opportunity for bargained-for changes to take effect was a year away. (Tr. 36.)

In an effort to establish the prevailing wage rate, Mr. Miller "challenged the local to go with some of their contacts with known agencies in the area" with similar duties to detention or corrections officers. (Tr. 38-39.) Mr. Miller stated that "[t]he only comparable facility that we were actually able to secure data from was the Essex County Jail because it is, by nature, a confinement facility: it restricts movements, it uses confining devices like handcuffs, leg irons, similar to what" EDC Detention Officers do. Mr. Miller is aware that "CCA has contracts of a similar nature in the area" which he included with his request for a substantial variance hearing in the form of the response he received from a FOIA request to ICE. (Tr. 39, CX-14.) Mr. Miller states that he "couldn't really make heads or tails" of the response to the FOIA request, and that the data he was looking for "wasn't there." (Tr. 40.) In Mr. Miller's FOIA request, he requested wage levels at the Bergen County Jail; the Hudson County Correctional Facility; and the Monmouth County Correctional Institution (Tr. 47, CX-13.) Mr. Miller "was able to publicly determine" that other immigration-related detention facilities were in the area, but was unable to acquire wage information for any of them. (Tr. 53-54.) Mr. Miller testified that he does not "have direct knowledge" of whether there are any other detention facilities or correctional facilities where UGSOA represents employees within the multistate area of Connecticut, New York, New Jersey, and Pennsylvania. (Tr. 64.)

Mr. Miller testified that he believes there was unequal bargaining power between the Union and the employer. (Tr. 45.) In the industry in which UGSOA represents employees, there is unequal bargaining power between the Union and management. (Tr. 46.) However, in the "close to 75 plus" negotiations that Mr. Miller has handled, an employer has not threatened to close a facility or issued a WARN notice. (Tr. 41, 61-62.)

Mr. Miller stated that the relevant locality is "specified by the county that the work location is seated in," which he recalls is Essex County. (Tr. 48.)

UGSOA filed unfair labor practice charges with the NLRB asserting that CCA had engaged in bad-faith negotiations. Those charges were dismissed. (Tr. 54-55.) The Department of Labor's standard for arm's-length negotiations is different than the NLRB's standard for bad-faith negotiations. Mr. Miller stated that he "should have probably filed a complaint with DOL over that issue." (Tr. 55.)

Robin Gibbs (Tr. 65-96)

Ms. Gibbs is employed as a Detention Officer with CCA at EDC. (Tr. 66.) Ms. Gibbs worked as a Detention Officer at the North Georgia Facility in Gainesville, North Georgia beginning in July 2009, and transferred to EDC in March 2010. (Tr. 66-67.) Ms. Gibbs has been the President of Local UGSOA Union since 2012. (Tr. 68.)

Elizabeth Detention Center

EDC is a dormitory environment, with three dormitory styles that house 20 detainees each; one that houses 29 detainees; and the rest housing around 40 detainees. Inside the dormitory environments are beds, tables, television, telephones, and board games. (Tr. 88-89.) EDC houses Level 1 and 2 detainees for ICE. (Tr. 68.) Detainees, on average, stay “a little over a year.” The detainees are not serving prison sentences pursuant to criminal convictions while at EDC. (Tr. 89.) EDC has been a Level 2 facility since around 2012. (Tr. 68.) Ms. Gibbs was at EDC when it transitioned to a Level 2 facility. CCA installed security fences along the perimeter; “an outside perimeter post where the detention officer is mandated to search vehicles entering the facility”; and extra telephones in each dorm. (Tr. 69.)

Ms. Gibbs is not aware of any employees that work at EDC who live in Connecticut or Pennsylvania. (Tr. 91-92.)

Duties of Detention Officers at EDC

Detention Officers at EDC screen visitors and packages with metal detectors, hand wands, and x-ray machines. (Tr. 69.) Detention Officers also participate in intake processing, where detainees are classified by Detention Officers as Level 1 or Level 2 and their property is searched and inventoried. (Tr. 70.) Level 1 and Level 2 detainees are not housed in the same dormitories; “[t]he Level 2s are high-risk detainees. They’re more prone to escape and be violent.” (Tr. 70.) Detention Officers are “responsible for ensuring that [detainees] do not cause any harm to themselves” or other detainees. Detention Officers “conduct physical bed searches; physical searches of the detainees”; “search the facility grounds for any breaches of security”; and “use restraints.” Detention Officers escort detainees “in every situation from [detainees] leaving the dorms to any location within or outside the facility,” such as “medical, visitation, indoor recreation, outdoor recreation,” work locations, laundry, sanitation, and any special detainee assignments. (Tr. 71.) Detention Officers “have direct surveillance, observation.” The control room has cameras and monitors and Detention Officers utilize radio communications “to help maintain the security and safety of the facility and the detainees.” (Tr. 72.) Detention Officers maintain order; “keep[] the place secure; mak[e] sure there’s minimal possibility of escape; ensur[e] that no unauthorized materials enter the facility.” Detention Officers also have to “make direct observations [of detainees],” document any injuries, and refer them for medical care. Detention Officers monitor detainees during work details. (Tr. 73.)

Similarities Between Duties as an EDC Detention Officers and a Corrections Officer in Previous Employment

Ms. Gibbs worked at the Department of Juvenile Justice in Georgia before becoming employed at CCA, where her duties were “to safeguard the children, . . . to provide them with security.” Ms. Gibbs also has experience working as a Corrections Officer at the Virginia Department of Corrections in State Farm, Virginia, from 1997 to 1999. (Tr. 67.) That facility is a medium security state prison, with a “cell block environment,” containing typical prison cells as well as “dormitory style sections” where an inmate might be placed for good behavior. (Tr. 83, 84.) The individuals housed there are serving prison sentences for committing crimes. (Tr. 84.) The inmates were serving sentences from eight months to life. (Tr. 85.) During her time at the Virginia Department of Corrections, Ms. Gibbs’ duties were “to maintain control over the inmates, search them, . . . escort [inmates] from their cells to chow halls, recreations, educational programs, medical department. And . . . to put them in full restraints, handcuffs, belly chains and leg irons, and transport them to the local appointment or a hospital that they were going to” if “called for outside duty transportation.” (Tr. 67-68.)

Ms. Gibbs stated that “the job description [for an EDC Detention Officer] is pretty much identical in how we govern the safety, security, and custody of the detainees” to that of a Corrections Officer at Ms. Gibbs’ previous jobs. Ms. Gibbs emphasized that the same equipment is used, and that in both jobs “[w]e go through . . . pretty much the same type of locations within and outside of the facility.” (Tr. 82.)

Duties and Qualifications of EDC Transportation Detention Officers

Transportation Detention Officers, also referred to as Transportation Officers, escort detainees outside the facility: to or from the airport; to process paperwork for asylum; or to the hospital. (Tr. 72.) Transportation Officers have different qualifications from Detention Officers. They must have “holograms to enter into airport facilities”; are “mandated to be in compliance with the Department of Transportation regulations and rules”; must have commercial driver’s license; must carry firearms; and must complete training for all of those requirements. (Tr. 74-75.) Transportation Officers can fill in for Detention Officers if there are no runs or pickups for them. In those circumstances, the Transportation Officer would fill in somewhere: “maybe calls, maybe be a rover, or be an extra utility on the floor.” (Tr. 75.) Transportation Officers have transported detainees housed at Delaney Hall, and do asylum runs for Delaney Hall. (Tr. 76.) They travel to Newark Airport and JFK. (Tr. 74.)

UGSOA-Negotiated Wage Rate

Ms. Gibbs testified that she participated in the negotiation of the CBA between CCA and Local 315, as President of Local UGSOA and a member of the bargaining committee. Her responsibility was “to express the concerns of the officers” over wage rate and job duties. The major concern of Local 315 was rate of pay. (Tr. 76.) Ms. Gibbs stated: “we discovered that we were being underpaid . . . the previous union there, SPFPA, who had wages up to \$29, and prior to that contract expiring, our employer took money away from us, instead of proceeding with the next level of wages for that term year.” (Tr. 77.) Local 315 ratified a CBA, but Ms. Gibbs states

that she voted against it because she “knew in [her] heart that the company was wrong and that they were being mean, basically, and beating up on us.” (Tr. 81.)

SPFPA-Negotiated Wage Rates

CCA “said that ICE wanted to lower their bed costs” for EDC, and that “they couldn’t afford to pay us the wage determination rate for our area that we were seeking.” (Tr. 78-79.) CCA “said that if they were forced to pay the wage determination rate, that they would have to close the facility because ICE was not going to pay the difference it would cost the company to bring us up to wage standards of the wage determination rate.” (Tr. 79; CX-12.) The warden of EDC, Orlando Rodriguez, sent out a letter to all EDC employees “explaining CCA’s position basically about our negotiations and ICE’s position.” Ms. Gibbs states that when she received this letter, she felt “threatened” by CCA, and that CCA “was bullying the employees there and not being accountable for their responsibility to [employees]; it was a very intimidating time for the employees.” (Tr. 80.) The threat was that the facility would close if CCA had to pay the wage determination rates, which would result in everyone losing their jobs. (Tr. 80-81.) At the time the letter was put out, there was no indication that it was not true. (Tr. 90-91.) “It came later.” (Tr. 91.) When CCA “sent out the WARN notice, it was true that they were willing to close the facility if they had to pay those wages” However, the WARN notice was eventually withdrawn. (Tr. 95.)

Mark Floyd (Tr. 97-140)

Mr. Floyd was employed by CCA in human resources for almost 10 years, as the Managing Director of Employee Relations and Facility Human Resources. Mr. Floyd’s responsibilities included human resources and employee relations, including labor relations and collective bargaining relationships. (Tr. 98-99.) Mr. Floyd had responsibility for “anything that touched the collective bargaining relationship,” handling “initial indications of union organizing . . . ; the day-to-day administration of the contracts . . . ; grievances, arbitrations . . . ; NLRB complaints, charges; the authorization elections, decertification elections.” (Tr. 99.) Mr. Floyd was the chief spokesperson for CCA during all negotiations after 2007. Mr. Floyd “handled all things related to” the collective bargaining relationship at EDC. (Tr. 100.)

Elizabeth Detention Center

EDC is a couple of miles south of the Newark airport. “It holds about 300 beds, max.” Level 1 and 2 detainees are housed at EDC. (Tr. 101.) The average length of stay for an EDC detainee is 90 days, based on an analysis done by CCA. (Tr. 102.) Mr. Floyd testified that he would not characterize EDC as a correctional facility because it does not house criminals. He explained:

Level 1 detainees are there because of an alleged violation of the immigration rules. Level 2 detainees are there because their immigration status has been called into question as a result of a minor offense and have been brought there pending adjudication of the underlying minor offense. Nor are they convicted . . . of any existing crime.
(Tr. 102.)

SPFPA-Negotiated Agreements

In 2007, both security and non-security employees at EDC were represented by one union, which was not an NLRB-certified guard union. (Tr. 103.) In 2008 SPFPA successfully petitioned to become the certified representative of the Detention Officers. CCA then negotiated with SPFPA for a new contract. (Tr. 104.) The new contract, entered into in 2009, provided for increases in each of three years, with the wage in the third year bringing the Detention Officers to the area wage determination rate. (Tr. 105, 106.) However, those wage levels did not go into effect. (Tr. 106.)

Toward the end of the summer of 2011, “ICE advised [CCA] that it would not be exercising their option for the new year, that there was a competing facility with larger bed space and the per diem was lower.” (Tr. 105, 106.) In other words, the contract “would have come to an end. The facility would have closed.” (Tr. 105.) EDC is not structured to hold other types of inmates and “it could not be retrofitted” to become a correctional setting. (Tr. 105-106.) In response, CCA “began putting in place the steps that [it] normally take[s]” to close a facility. (Tr. 106.) At the same time, CCA began negotiations with ICE in order to “try to figure out a way to keep the facility open.” (Tr. 106-107.) CCA’s “contract attorney, the partnership development team, our CEO, they were all in direct contact with ICE trying to figure out a way to save that facility.” (Tr. 131-32.) Mr. Floyd stated that he was told that “ICE was going to consolidate the population in Delaney Hall, there was a lower per diem and a lower wage rate, and that unless [CCA] could come up with a way to cut to match it, [ICE] was going to pull it.” (Tr. 132.) RX-1 is the WARN notice dated September 14, 2011. RX-2 is the closure protocol. Mr. Floyd testified that CCA did not use ICE’s indication that it would not be exercising its option as a bargaining strategy with SPFPA. Mr. Floyd stated that he notified the unions that ICE had decided not to exercise its option, but that CCA was “still trying to find a way to keep the facility open and work with ICE in that regard.” (Tr. 107.) Mr. Floyd testified that CCA did not send the WARN notice because an agreement with SPFPA had been reached that allowed CCA to reduce the per diem by 30%, which was satisfactory to ICE. (Tr. 108.) “ICE still pulled [EDC’s] Level 1 detainees out in 2011, but they provided [EDC] with Level 2 detainees,” which allowed EDC to stay open. (Tr. 108, 110, 126.) The detainees were moved from EDC to the Delaney Hall facility in Essex county. (Tr. 110-11, 126.) The negotiations leading to the agreement were “hard” and “very tense.” (Tr. 112.) The management team also took similar cuts in wages, as demanded by SPFPA during negotiations. (Tr. 111.) CX-7 is the CBA that CCA reached with SPFPA. (Tr. 109.) It set wage levels for the first year at \$20 for a Detention Officer and \$24 for a Senior Detention Officer and “agreed to reopeners in years two and three . . . so in August of 2012 and August of 2013 . . . we could come back and reexamine the wage rates . . . and then negotiate any changes to those rates.” Those wage levels were then incorporated into the ICE contract and approved by the Department of Labor. RX-5 is an amendment to CCA’s contract with ICE that incorporated the new SPFPA contract after it had been reviewed by the Department of Labor. (Tr. 110.)

Negotiations with UGSOA

In 2012, the UGSOA became the certified representative of the Detention Officers, the SPFPA contract “came to an end,” and CCA began negotiating a new contract with UGSOA. (Tr. 113.) UGSOA’s “position was that [CCA was] obligated to pay [the] wage determination.” CCA’s position was that it was “not obligated to pay wage determination.” Mr. Floyd testified that he thinks “there was growing pressure among their committee people to . . . get an agreement once they knew there was a wage proposal on the table.” Mr. Floyd also stated that he “had taken the position with Mr. Miller . . . that in our opinion he should sign the agreement, allow their membership to get a wage rate increase . . . and that that didn’t preclude him from pursuing . . . other avenues . . . through the Department of Labor.” (Tr. 116.) RX-6 is the CBA that was reached. (Tr. 114.) “[T]here was a wage increase negotiated for each of the three years plus a wage reopener in years two and . . . three.” Wages were \$20.40 an hour for 2013. The CBA “was submitted, reviewed, approved [by the Department of Labor], and incorporated into [CCA’s] contract with ICE.” (Tr. 115.)

In 2014, reopener negotiations occurred during the first reopener period. However, no agreement was reached. (Tr. 117.) Negotiations were taking place “as the option period was expiring. There was no collective bargaining agreement in place.” ICE had been afraid that if there was no agreement in place, “the area wage determination would come into effect as the appropriate wage determination rate.” As a result, CCA issued the WARN notices, but “advised both the Union and the workforce that this was being done as a precautionary compliance issue” and that they could be withdrawn. Later, CCA learned through the Department of Labor that the “status quo would be maintained for one more option period” if there was not a CBA. CCA then withdrew the WARN notices. (Tr. 118.) CCA had previously lost a contract with ICE and had to close the North Georgia facility in Gainesville, Georgia. (Tr. 118-19.) Mr. Floyd testified that his belief that ICE would not continue the contract was based on “what had happened with the SPFPA situation in 2011 and that contract, what [he] had been told by [CCA’s] partnership development team, what [he] had been told by [CCA’s] contract team, and what [he] had been told by [CCA’s] leadership team.” (Tr. 131.)

CCA’s Contract with ICE

CCA is compensated per diem under its contract with ICE, a daily rate based either on the number of beds being used or guaranteed. (Tr. 103.) Additional security measures were put in place when EDC began housing Level 2 detainees. (Tr. 128.) CCA added a “back fence”; “put bars above a rec yard”; and put bars on one of the dorms that faced outward. (Tr. 128-29.)

Delaney Hall Facility

Delaney Hall houses Level 1 detainees for ICE and the facility has a “fairly similar . . . makeup to what [EDC has] with regard to facilities.” Delaney Hall is much bigger than EDC, but has “a dorm setting,” with “far less restrictions” than a correctional setting. (Tr. 137-38.) CCA provided transportation services for ICE to and from Delaney Hall. Delaney Hall detainees were transported to the airport, to asylum, to medical, and between Delaney Hall and EDC. (Tr. 139.) Delaney Hall did not have a contract with ICE to transport detainees. (Tr. 140.)

Transportation Detention Officers

“Transport is a post under the . . . detention officer contract.” About one sixth of the Detention Officers “are qualified to perform transportation services.” Transportation Officers are “put into the general population and perform normal Detention Officer duties” when they are not performing transportation duties. (Tr. 140.)

Bennie Ray Elrod, Jr. (Tr. 141-53)

Mr. Elrod is the Managing Director of Human Resources for CCA. Mr. Elrod “focus[es] on the documentation of work through job descriptions”; “perform[s] market analyses to ensure that [CCA is] paying market-competitive pay rates”; “look[s] at creating incentive and bonus plans”; and conducts compensation surveys. (Tr. 142.) Compensation surveys are conducted “generally once a year.” (Tr. 143.) The geographic scope of those surveys depends upon the size of the recruiting radius. (Tr. 143-44.) Compensation surveys were conducted for Detention Officers at EDC in 2012, 2013, and 2015. (Tr. 144.) Delaney Hall was the only detention facility used in those compensation surveys. (Tr. 145.) Other comparators were local jails. (Tr. 144.) Agreed-upon wages in the collective bargaining agreement are one cost component of the per diem. The finance team uses that component as well as “other fixed and variable operating costs” to calculate the per diem. (Tr. 146.) In 2011, the finance team “reverse-engineer[ed] a wage rate for the Detention Officers” in order to “find a per diem that would fit ICE’s needs.” CCA also reduced its profits. CCA reduced the per diem from around \$170 to around \$120. (Tr. 147.) Mr. Elrod testified that he is “very certain” that CCA would have lost the contract if wages had not dropped as a result of “a number of conversations with ICE,” ICE’s public statements, and prior experience in other detention facilities. (Tr. 148.) Mr. Elrod did not communicate directly with ICE, but was told by members of CCA’s partnership development and executive teams. (Tr. 148-49.)

Detention Officers dealing with Level 1 and Level 2 detainees have the same job descriptions, the same qualifications, and the same duties. (Tr. 149-50.)

Dr. John Johnson (Tr. 153-81)

Dr. Johnson is the president and CEO of Edgeworth Economics, an economic consulting firm. He holds a bachelor’s degree in economics from the University of Rochester and a Ph.D. in economics, with a specialization in labor economics, from MIT. (Tr. 154.) This tribunal allowed him to give expert testimony after determining that he is qualified as an expert in labor economics. (Tr. 156.)

The Calculation of Area Wage Determinations

The Department of Labor has used the National Compensation Survey and the Occupational Employment Statistics, from the Bureau of Labor Statistics, to make wage determinations. (Tr. 157, 172.) “The government has lots of functions they have used [the BLS] data for.” (Tr. 172.) The June 19, 2013 wage determination in CX-2 for New Jersey counties Essex, Hudson, Morris, Sussex, and Union is based on the National Compensation Survey. (Tr.

157.) There is not a separate category within the National Compensation Survey for Corrections Officer and Detention Officer. However, the area wage determination in CX-2 has two separate categories for Corrections Officer and Detention Officer. Both categories are based upon the Corrections Officer data from the Bureau of Labor Statistics. (Tr. 158.)

RX-14 is from the SCA Directory on the Department of Labor's website. It gives descriptions for different occupations that apply to the area wage determination in CX-2. The descriptions for Corrections Officers and Detention Officers are different. The description for Corrections Officers "talks about inmates in a prison or local jail" and the Detention Officer description mentions "violators of immigration laws, detainees." Dr. Johnson testified that those are different contexts, in his opinion. (Tr. 159, 173-74.)

CX-11 is the National Compensation Survey dated May 2010 for the New York-Newark-Bridgeport, New York-New Jersey-Connecticut-Pennsylvania area. It is based on the Locality Pay Survey, which was discontinued in 2011. (Tr. 159.) RX-11 is a chart compiled by Dr. Johnson on the "differences between the NCS estimates for the Corrections Officers and jailers in this particular statistical area." (Tr. 161.) It gives "some limitations of this particular dataset for this purpose." One of those limitations is that the Locality Pay Survey has been discontinued, and so does "not have any current estimates for correction officers that match this particular geographic area." (Tr. 162.) Second, the information that was collected "is not available for individual work levels or different establishment sizes." Third, "a particular combined statistical area tier covers 30 counties in four different states." (Tr. 163.) Dr. Johnson stated that "[f]or the purposes of determining a wage for detention center officers in Elizabeth, New Jersey, this data is too broad and does not match occupationally with the job" of Detention Officers in Elizabeth. (Tr. 164.) Additionally, the NCS data did not include private sector employers. (Tr. 164-65.)

RX-12 is a map created by Dr. Johnson which marks the home addresses of EDC employees compared to the geographic area covered by the NCS data. "This particular NCS data draws from a much larger scope of counties than where the employees are actually coming from." Dr. Johnson testified that the geographic area covered is not within the same locality as EDC. (Tr. 166.) Dr. Johnson further testified that he is "not aware of any other public source," including from the BLS, that would provide a more appropriate geographic area than the New York-New Jersey-Connecticut-Pennsylvania area in CX-11, although he believes that "now the OES data has slightly narrower than these . . . 30 counties." (Tr. 174-75.)

CX-9 is the Occupational Employment Statistics (OES). (Tr. 167.) RX-9 is a table created by Dr. Johnson that gives limitations of the OES data. It summarizes limitations given by BLS. Some limitations include: "the level of work performed could vary and the BLS data has to combine all of those together; the age and experience of the workers will likely be different"; "cost of living can be different"; "work schedules can be different"; "whether they're unionized or not." (Tr. 168.) "There is a mismatch when one looks at the geographic scope and the title, the Corrections Officers and Jailers, as well as these other factors . . . make[] it a poor match" for EDC. It is not suitable for determining an hourly wage for services of a similar character to CCA's Detention Officers at EDC. (Tr. 169.) Dr. Johnson testified that he does "not know of other public data for the geographic area of Elizabeth, New Jersey," including BLS data. (Tr. 176.)

RX-10 is a map similar to RX-12, which shows the counties in the OES data and the home addresses of EDC employees. (Tr. 169.)

“The area wage determination is based on the NCS data for the category Corrections Officers and Jailers,” a geographic area composed of 30 counties in four states, and which included only public sector employers. (Tr. 170.) Dr. Johnson stated that “each of these datasets is inappropriate as a benchmark or as a measure of wages for the [EDC] employees because of the geographic mismatch, . . . the occupational mismatch, and the other reasons described” above. (Tr. 171.)

Exhibits

CX-1

CX-1 includes the CBA between UGSOA and CCA, effective March 26, 2013 through September 24, 2016. The wage rates for Detention Officers were specified as follows:

2013	2014	2015
\$20.40	\$20.71	\$21.02

(CX-1 at 18.)

CX-2

CX-2 is Wage Determination No. 2005-2353 Revision 13, dated June 19, 2013. Detention Officer, Occupation Code 27040, has a wage rate of \$30.97. Corrections Officer, Occupation Code 27008, also has a wage rate of \$30.97. (p. 5.)

CX-3

CX-3 is the CBA negotiated by SPFPA that became effective April 1, 2009. The following wages were agreed to for Detention Officers, with the exception of ten employees who received a higher wage for the 2009-2010 year:

10/2009	10/2010	10/2011	10/2012
\$18.00	\$22.00	\$24.00	\$29.93

(p. 16.)

CX-7

CX-7 contains the negotiated amendment to the CBA in CX-3, which became effective September 30, 2011. The modification established the wage rate for Detention Officers at \$20.00 and Senior Detention Officers at \$24.00, (p. 16), and was only signed by the international

union representative of SPFPA and a CCA representative, (p. 26). The wage rate published by the Department of Labor reflects that CBA 1 was amended on September 30, 2011.²²

CX-9

CX-9 includes information from the U.S. Bureau of Labor Statistics (BLS) from May 2012. The BLS description of labor classification 33-3012, Correctional Officers and Jailers is as follows:

Guard inmates in penal or rehabilitative institutions in accordance with established regulations and procedures. May guard prisoners in transit between jail, courtroom, prison, or other point. Includes deputy sheriffs and police who spend the majority of their time guarding prisoners in correctional institutions. Illustrative examples: Prison Guard, Juvenile Corrections Officer, Certified Detention Deputy.

National estimates for Correctional Officers and Jailers are included, as well as Occupational Employment and Wage Estimates (OES) for the state of New Jersey and for certain metropolitan areas. Correctional Officers and Jailers in New Jersey had an hourly mean wage of \$35.76. Correctional Officers and Jailers in Newark-Union, NJ-PA had an hourly mean wage of \$32.91.

CX-10

CX-10 is printouts from the webpage www.bestplaces.net, with cost of living comparisons between Elizabeth, New Jersey and Newark; Jersey City; and Passaic. A salary of \$50,000.00 in each of the following cities would be equivalent to the corresponding amount in Elizabeth, New Jersey:

\$50,000.00 salary in	Newark	Jersey City	Passaic
Equivalent required to maintain that standard of living in Elizabeth	\$50,970.00	\$46,213.00	\$47,261.00

CX-11

CX-11 is the BLS New York-Newark-Bridgeport, NY-NJ-CT-PA National Compensation Survey (NCS), May 2010. Bailiffs, correctional officers, and jailers' mean wage rate is listed at \$32.65. Correctional officers and jailers' mean wage rate is listed at \$32.35. (CX-11 at 29.) Hourly wage percentiles are given as follows:

²² This Register of Wage Determination is included as the first document in CX-3. It is Wage Determination No. CBA-2012-5560, and reflects that the CBA was amended on September 30, 2011.

	Wage Rate by Percentile				
	10 th	25 th	50 th (median)	75 th	90 th
Bailiffs, correctional officers, and jailers	\$22.55	\$26.17	\$35.36	\$35.36	\$40.07
Correctional officers and jailers	\$22.55	\$26.17	\$35.36	\$35.36	\$40.07

CX-13

CX-13 contains a FOIA request to ICE from Jeffrey Miller, in the form of emails sent February 6, 10, and 11, 2014. The emails request information on the ICE contract at EDC, as well as information regarding Bergen County Jail, Delaney Hall Detention Facility, Essex County Correctional Facility, Hudson County Correctional Facility, and Monmouth County Correctional Institution. Mr. Miller requested:

If Detention, Correction, or Transportation Officer job classifications are part of the Contracted Services. Copy of recognized wage determination rate for any of these classifications if utilized and if pursuant to the Federal Wage Determination Guidelines or a Collective Bargaining Agreement Wage Determination and corresponding Wage Determination numbers.

By letter dated February 19, 2014, a FOIA Officer acknowledged receipt of the FOIA request. The letter also informed Mr. Miller to expect a delay in processing the request because of the large volume of FOIA requests received by the office.

A FOIA Officer responded to the request on September 4, 2014. The cover letter stated that it was in response to a request for “[t]he status of procurement and estimated procurement, bid opening, contract award and wage determination regarding Contract Number ODT-5-C-0010 at the Elizabeth Contract Detention Facility.” The letter also details the FOIA Appeals process.

The 192 pages that follow appear to relate only to EDC.

CX-14

CX-14 includes emails from Robin Gibbs with job descriptions for security counselors at Toler and the Delaney Federal Program in Newark, NJ. Delaney Federal Program’s description states that the primary duties of an Operations Counselor

include, but are not limited to, the care and control of detainees. Duties and Responsibilities: Supervise detainees in their living areas, during recreational activities, and visitation. Serves as the control center monitor, coordinates and monitors detainee movement and facilitates emergency response as needed. Serves as perimeter, utility check point monitor as required. Responds to all

facility unusual occurrences and provides emergency response as needed. Prepares reports and maintains daily checks for contraband materials either individually or as part of a specialized team. orderliness, and cleanliness throughout the facility. Reports and provides written documentation for all accidents, behavioral incidents, and headcounts.

Also included is a CBA between Essex County and Essex County Corrections Officers New Jersey State Policeman’s Benevolent Association, Local No. 382, effective January 1, 2008 through December 31, 2013. Compensation effective January 1, 2013 started at a base salary of \$40,448, and increased in six steps to \$82,974. Hand-written numbers, which appear to be conversions of an annual salary into an hourly rate,²³ are written corresponding to steps one through six.

Base	\$40,448	
Step 1	\$47,536	22.85
Step 2	\$54,624	26.26
Step 3	\$61,712	29.67
Step 4	\$68,800	33.08
Step 5	\$75,888	36.48
Step 6	\$82,974	39.89

(CX-14, CBA at 7.) The agreement does not appear to give job descriptions corresponding to the given salaries. However, the job titles are described as “County Correction Officer, County Correction Sergeant, County Correction Lieutenant, and County Correction Captain.” (CX-14, CBA at 42.)

CX-20

CX-20 is Wage Determination No. 2015-2353, Revision 1, dated March 3, 2016. The wage rates that apply to New Jersey Counties of Essex, Morris, Sussex, and Union for both Corrections Officer and Detention Officer are listed at \$30.97.

RX-4

RX-4 is a description of EDC, located at 625 Evans Street in Elizabeth, New Jersey. The accommodations for detainees are described as “dayrooms with dormitory sleeping arrangements.” The sheet states that EDC provides “approximately 160 jobs” in Elizabeth.

RX-9

RX-9 is a table with reasons why wages may be different than the BLS OES estimates for the Newark-Union, NJ-PA area. Explanations are provided from both BLS and Respondent’s expert in labor economics, John Johnson. Respondents point out that the BLS data include:

²³ Annual salary is easily converted into hourly rate when the amount of paid time off is known. UGSOA takes the position in its post-hearing brief that the Essex County jail has an average hourly wage of \$29.66, calculated by dividing each salary by 2080 hours and then averaging the rates. (UGSOA Post-Hearing Brief at 14.)

- i. positions that require specialized responsibilities, as well as positions from establishments with various levels of security (such as maximum security);
- ii. all levels of experience, as well as federal, state, and private-sector positions;
- iii. positions “from a variety of different locations within the Newark-Union NJ-PA Metropolitan Division”;
- iv. facilities of all sizes;
- v. full and part-time positions; and
- vi. unionized and non-unionized workers.

RX-10

RX-10 is a map with EDC employees’ home addresses plotted on it. The map also highlights the Newark-Union, NJ-PA Metropolitan Division, as designated by BLS.

RX-11

RX-11 is a table with reasons why wages may be different than the BLS NCS estimates for the New York-Newark-Bridgeport, NY-NJ-CT-PA area. As in RX-9, explanations are provided from both BLS and Respondent’s expert in labor economics. Respondents point out that

- i. wage data is not current because BLS no longer reports local wage data through the NCS (and has not since May 2010);
- ii. “the data may include positions that entail specialized responsibilities,” as well as positions from establishments with various levels of security; and
- iii. the data cover a large geographical area, with “a variety of different locations across four different states and 30 counties.”

RX-12

RX-12 is a map with EDC employees’ home addresses plotted on it. The map also highlights the New York-Newark-Bridgeport, NY-NJ-CT-PA statistical area, as designated by BLS’s National Compensation Survey in May 2010.

RX-13

RX-13 is a description of the Detention Officer Position at EDC. The Detention Officer will

maintain order and provide for the security, care and direct supervision of inmates/residents in housing units, at meals, during recreation, on work

assignments and during all other phases of activity in a correctional facility. May employ weapons or force to maintain discipline and order. Must be able to work any post assignment on any shift. This position reports to a Senior Detention Officer or above.

Essential functions include “[a]ssigning inmates/residents to and supervis[ing] inmates/residents during work/program activities”; “[c]onduct[ing] visual and audio surveillance for extended periods of time, including the reliable repetitive identification of inmates/residents by visual means”; “[e]scort[ing] inmates/residents to and from different areas for questioning, programs/activities, medical treatment, work and meals; use handcuffs and other appropriate restraints when necessary or required”; “[b]reak[ing] up fights,” including restraining and subduing inmates; “[a]iding in preventing escapes”; “[p]erform[ing] searches of people, objects capable of concealing contraband, buildings and outdoor areas.”

Required qualifications include completion of “pre-service correctional officer training and, where applicable,” must be a “non-commissioned security officer licensed by the state of employment.”

RX-14

RX-14 are descriptions from the SCA Directory of Occupations. The following is the Corrections Officer description:

Maintains order among inmates in a prison or local jail. Performs routine duties in accordance with established policies, regulations, and procedures to guard and supervise inmates in cells, at meals, during recreation, and on work assignments. May, if necessary, employ weapons or force to maintain discipline and order. Typical duties include: taking periodic inmate counts; searching inmates and cells for contraband articles; inspecting locks, windows, bars, grills, doors, and grates for tampering; aiding in prevention of escapes and taking part in searches for escaped inmates; and escorting inmates to and from different areas for questioning, medical treatment, work and meals. May act as outside wall guard, usually on rotation.

The following is the description for Detention Officer:

Performs various duties related to detention, safeguarding, security and escort of violators of immigration laws. Exercises surveillance over detainees, and maintains order and discipline. Attends to sheltering, feeding, and physical well-being of detainees; and counseling of alien detainees on personal matters. Guards detainees at deportation or exclusion hearings. Recognizes potentially hazardous health, safety, security, or discipline problems. Supervises voluntary work details, and encourages participation in organized recreational activities.

D. *Essential Findings of Fact and Conclusions of Law*

The majority of the hearing testimony unnecessarily focused on the nature and character of the 2011, 2012, and 2014 collective bargaining agreement negotiations in an attempt to demonstrate the apparent unequal bargaining power of the respective parties and the parties cite *United Healthserv* to define the role that unusual circumstances, collusion, or unequal bargaining power may play in a substantial variance hearing.²⁴ I find that evidence of non-arm's length bargaining is not relevant to this proceeding as "the absence of arm's-length negotiation is not a consideration in substantial variance proceedings unless so designated by the Administrator." *United Healthserv* at 14. The parties concede that the Administrator did not designate arm's-length negotiation as an issue in this matter. Moreover, even if unusual circumstances could be used to *explain* a disparity, as UGSOA and the Administrator urge, such circumstances cannot *establish* either a disparity or the prevailing rate and I find UGSOA has failed to establish such a disparity. Accordingly, I evaluate only that evidence pertaining to wage rates below and ultimately find that UGSOA has failed to provide the required mix of rates necessary to establish the prevailing wage.²⁵

i. Essex County Jail and Delaney Hall

Although Essex County Jail is in the relevant locality,²⁶ UGSOA has not submitted a description of the Essex County Jail employees' job duties for the base salary or any of the steps.²⁷ Nor has UGSOA provided other evidence that would establish the character of the duties performed.²⁸ Accordingly, I find that UGSOA has not established that these services are of a similar character to those services provided by the Detention Officers of EDC. For that reason, it cannot be used for comparison with the wages at EDC.

²⁴ UGSOA contends that unequal bargaining power and threats of closure of the EDC facility constitute unusual circumstances. CCA argues that arm's-length negotiation is not at issue, but that if it were, UGSOA's contentions of unequal bargaining power are not the type of situation that is covered. I decline to make a ruling on whether collusion between the negotiating parties to set wage rates lower than the prevailing wage could be non-arm's length bargaining as defined by 29 C.F.R. § 4.11. Although UGSOA has not explicitly argued that this type of collusion existed, it appears to question SPFPA's 2011 negotiations. Additionally, UGSOA appears to be arguing that collusion existed between CCA and the contracting agency, ICE. See UGSOA Post-Hearing Brief at 14.

²⁵ Although not necessary to the resolution of this case, I find the Newark-Union, NJ-PA Metropolitan Division, comprised of Essex, Hunterdon, Morris, Sussex, Union, and Pike County, is within the proper locality. I further find that the counties of Passaic, Bergen, Hudson, and Middlesex are within the proper locality. The above counties are in reasonably close geographic proximity to EDC, and encompass most of the Detention Officers' home addresses. See RX-10. Although UGSOA has provided cost of living comparisons between Elizabeth, New Jersey and Newark, Jersey City, and Passaic from www.bestplaces.net, (CX-10), I note that I have not based my finding on locality on that information as there is no indication of the methodology utilized by the website.

²⁶ The parties agree that Essex and Union counties are both in the relevant locality.

²⁷ I note that the Detention Officer description for EDC indicates that Detention Officers would be supervised by more experienced detention officers. See RX-13 (stating that the EDC Detention Officer "reports to a Senior Detention Officer or above"). It appears that may also be the case at Essex County Jail, where the job titles are County Correction Officer, County Correction Sergeant, County Correction Lieutenant, and County Correction Captain. It seems likely that the pay levels correspond with the job titles and supervisory duties in some way. See CX-14, CBA at 42. Additionally, it appears that the base hourly wage at Essex County Jail would be around \$19.44, which is lower than EDC Detention Officers' hourly rate. See CX-14, CBA at 7.

²⁸ Ms. Gibbs testified that the job description of an EDC Detention Officer is "pretty much identical" to that of a Corrections Officer where she was previously employed. However, this testimony does not establish job duties specific to the Essex County Jail.

I find that the Delaney Hall employees who supervise Level 1 Detainees²⁹ performed services similar in character to EDC Detention Officers. UGSOA has provided a written job description for Security Counselors at this facility and CCA takes the position that the work is of a similar character.³⁰ The description provided is quite similar to the description of the EDC Detention Officers and Robin Gibbs' testimony of the services performed. Additionally, UGSOA does not argue that the Delaney Hall employees are not performing similar services. Instead, UGSOA argues only that the Delaney Hall wages fall below those required by the SCA, as determined by the Administrator, although there has not been a final adjudication.³¹

I find that the Delaney Hall wage rate of \$11.07 is probative evidence of the prevailing rate, while taking notice that the Administrator's allegations are pending adjudication.³²

ii. 2009 and 2011 SPFPA-Negotiated CBA

I find that both the 2009 SPFPA-negotiated CBA (setting wages at \$18.00 for 2009; \$22.00 for 2010; \$24.00 for 2011; and \$29.93 for 2012) and the 2011 amendment to the CBA (setting wages at \$20.00) are probative evidence of the wage rate. I give the 2011 negotiated amendment greater weight because it is more recent, and the rates negotiated in 2009 for the 2011 and 2012 years ultimately were not paid.³³

iii. BLS Data and SCA Wage Determinations

I find that EDC Detention Officers and Transportation Detention Officers are properly classified as Correctional Officers and Jailers under the BLS labor classifications. I find, after a comparison to the written EDC job description and Ms. Gibbs' testimony of job duties, that the BLS classification encompasses EDC Detention Officers. The overarching task in each description is to maintain security over detained individuals. *See* CX-9, RX-13, Tr. 69-74. Additionally, BLS lists "Certified Detention Deputy" as an illustrative example of the type of occupation included. Additionally, I find that EDC Detention Officers are properly classified under the Detention Officer occupation in the SCA Directory of Occupations. The description tracks closely with the written EDC job description as well as Ms. Gibbs' testimony of job duties. *See* RX-14, RX-13, Tr. 69-74.

²⁹ The parties stipulated that "[a]s of 2013, the employees who supervised and cared for Level 1 Detainees at the Delaney Hall detention facility in Essex County, New Jersey, were being paid an hourly rate of \$11.07 per hour."

³⁰ *See* CX-14.

³¹ In its stipulation, the Administrator describes the Delaney Hall employees as performing "Detention Officer functions." (Tr. 184-85.)

³² The wages are properly evaluated as part of a comprehensive mix of rates, one rate to consider amongst many. However, the amount of weight to afford to the Delaney Hall wages is largely irrelevant. UGSOA has not provided enough rates for this tribunal to determine a prevailing rate regardless of whether the Delaney Hall wages are included.

³³ UGSOA appears to view the 2011 amendment as illegal. *See* Tr. 49-50 (Mr. Miller commenting that he views the 2011 modification "as an illegal CBA because of the modification of a previous wage determination that violated 4(c)"); *see also supra* note 23 for a discussion of UGSOA's theory of unusual circumstances and unequal bargaining power.

I find that the state of New Jersey in its entirety, as well as the combined statistical area of New York-Newark-Bridgeport, NY-NJ-CT-PA, include many geographical areas outside of the relevant locality. As a result, the BLS data for the entire state of New Jersey, (CX-9); and New York-Newark-Bridgeport, NY-NJ-CT-PA, (CX-11), has little probative value.

I find that the following provide relevant, probative evidence of the prevailing wage:

- Wage Determinations: No. 2005-2353, Rev. 13, (CX-2), and No. 2015-2353, Rev. 1, (CX-20), both reflecting a rate of \$30.97; and
- BLS Data: 2012 Newark-Union, NJ-PA, with a mean wage of \$32.91 (CX-9).

The source data for the Wage Determination and the BLS surveys is not reviewable in this proceeding. 29 C.F.R. § 6.54(c) provides that

[u]nder no circumstances shall source data obtained by the Bureau of Labor Statistics, U.S. Department of Labor, or the names of establishments contacted by the Bureau be submitted into evidence *or otherwise disclosed*. Where the Bureau has conducted a survey, the published summary of the data may be submitted into evidence.

(emphasis added). To the extent that Dr. Johnson's testimony discloses source data,³⁴ I will not be considering it. However, much of Dr. Johnson's testimony simply reiterates limitations that BLS acknowledges regarding its data. In general, non-geographic limitations result from relevant differences that may exist between EDC and facilities in the source data.³⁵ See RX-11, RX-9, Tr. 159-69.

E. Conclusion

Area wage determinations and BLS data cannot be the only benchmark to establish a prevailing wage. UGSOA has not provided wage rates at comparable facilities. Accordingly, as UGSOA has failed to provide the requisite mix of rates and has not established the prevailing rate, it has not met its burden to establish a substantial variance.

³⁴ The majority of Dr. Johnson's testimony does not disclose source data. However, one of CCA's underlying arguments is that the SCA Directory of Occupations differentiates between Corrections Officer and Detention Officer, and that a wage determination for workers engaged as Detention Officers is not an accurate reflection of wages if it is based upon source data derived from Corrections Officers. I did not consider Dr. Johnson's statement that both Corrections Officer and Detention Officer occupation classifications in Wage Determination No. 2005-2353, Rev. 13 are based on the Corrections Officer source data from BLS. See Tr. 20.

³⁵ Requiring petitioners to present a range of evidence, including BLS data and actual wages paid at comparable facilities, reflects both that BLS data is relevant and that it has inherent limitations.

ORDER

UGSOA's request for a finding of a substantial variance is hereby DENIED and this matter is DISMISSED with prejudice.

SO ORDERED:

STEPHEN R. HENLEY

Chief Administrative Law Judge

NOTICE OF REVIEW: To appeal, you must file a written petition for review with the Administrative Review Board ("ARB") pursuant to 29 C.F.R. Part 8 within 10 days after the date of this decision. 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. *See* 29 C.F.R. § 6.57.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.