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Issue Date: 19 December 2018

Case No. : 2016-NQW-00001
WHD No.: 1786191

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR,
Petitioner,

v.

METROPOLITAN SECURITY SERVICES, INC., d/b/a WALDEN SECURITY,
Respondent.

DECISION AND ORDER

This matter arises under Executive Order ("EO") 13495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (January 30, 2009); Secretary's Order 05-2010 (Sept. 2, 2010); and the implementing regulations at 29 C.F.R. Part 9.

Background and Procedural History

On September 11, 2015, the U.S. Marshals Service ("USMS") awarded contract number DJM-15-A32-V-0048 (the "Contract") to provide security services for Federal courthouses within the United States Eighth Judicial Circuit to Respondent Metropolitan Security Services, Inc. d/b/a Walden Security ("Walden"). Walden is a Tennessee corporation with its headquarters in Chattanooga. Under the Nondisplacement of Qualified Workers clause included in the Contract, a subsequent contractor is required to provide the incumbent employees "a right of first refusal of employment under the contract *in positions for which they are qualified*." EO 13495 at Section 1 (emphasis added). Approximately 350 Court Security Officers ("CSO") had been employed under the previous contract covering the Eighth Judicial Circuit between the USMS and Akal Security. Of those 350 CSOs, only Rick Dean, a CSO at the Federal Courthouse in Ft. Smith, Arkansas, was not offered a right of first refusal. Walden argues that he did not meet the USMS's qualifications for the CSO position.

In December 2015, Mr. Dean filed a complaint with the Wage and Hour Division ("WHD") alleging that he was qualified for the CSO job he had been performing for the past 19 years and should have been offered a right of first refusal under the Contract. The Administrator's attempt at conciliation failed, and the Administrator, following an investigation of the matter, determined that Mr. Dean should have been offered a right of first refusal and was entitled to back pay.

In accordance with 29 C.F.R. § 9.32, Walden requested a hearing before the Office of Administrative Law Judges. A formal hearing was held before me in Chattanooga, Tennessee, on April 11-12, 2017. At the hearing, I admitted the following evidence:[1] JX 1-43 (TR 10); ALJX 1-5 (TR 56); AX 1-8, 10, 12-16, 18-22 (TR 12-13, 19, 20, 24, 26, 28, 38-40, 211); RX 3-6, 10, 11, 12 (first page), 13-14, and 18 (TR 46-50, 54, 143, 160, 371, 372). The record was kept open for the post-hearing deposition of James Edge. The transcript of that deposition was received on July 25, 2017, and it is admitted into evidence. I take official notice of RX 19, 19-A, 20, and 20-A and those exhibits are admitted into evidence. With the admission of those exhibits the record is closed. Both parties filed post-hearing briefs, the last of which was received on August 11, 2017.

The findings and conclusions that follow are based on my observation of the witnesses who testified at the hearing and a complete review of the entire record in light of the arguments of the parties, applicable statutes and regulations, and pertinent precedent. As explained in more detail below, I find that Walden violated neither EO 13495 nor 29 C.F.R. Part 9 when it did not offer Mr. Dean a right of first refusal for a CSO position because he was not qualified for that position.

Issue

Whether 29 C.F.R. Part 9 required Walden to offer Mr. Dean a right of first refusal of employment under the circumstances. TR 8.

Stipulated Facts

At the hearing, I accepted the parties' stipulations to the following facts (ALJX 4 and 5; TR 56-57):

1. This matter is subject to the jurisdiction of the Office of Administrative Law Judges;

2. Mr. Dean worked under the contracts DJMS-04-D-0003, DJMS-09-D-0033, DJMS-11-D-0007, DJMS-12-D-0023, DJMS-11-D-0508, and DJM-15-A32-V0048;[2]

[1] Citations will be abbreviated as follows: JX – Joint Exhibit; AX – Administrator's Exhibit; RX – Respondent's Exhibit; TR – Hearing Transcript; ALJX – Administrative Law Judge's Exhibit. The pages of some exhibits will be identified with numbers beginning "DL." Mr. Edge's deposition transcript will be cited as "DT."

[2] The parties' stipulation listed contract DJM-15-A32-V-0048 twice. I have made non-substantive edits to certain stipulations.

3. WHD's back wages calculations are correct and accurately reflect the money due to Mr. Dean if I were to deem Mr. Dean qualified under the contract and Respondent required to offer employment to Mr. Dean;

4. The qualifications standards did not appreciably change from the five contracts (DJMS-04-D-0003, DJMS-09-D-0033, DJMS-11-D-0007, DJMS-12-D-0023, and DJMS-11-D-0508) that preceded contract DJM-15-A32-V-0048, with the exception of the sentence "All three (3) years shall have occurred within the last seven (7) years";

5. Respondent is a Tennessee corporation located at 100 East Tenth Street, Ste. 400, Chattanooga, Tennessee 37402 that provides security services to federal government customers, including the USMS;

6. On September 11, 2015, the USMS awarded Respondent contract number DJM-15-A32-V-0048 to provide security services for courthouses within the U.S. Eighth Circuit Court of Appeals;

7. The Nondisplacement of Qualified Workers clause associated with EO 13495 and with 29 C.F.R. Part 9 was in contract number DJM-15-A32-V-0048;

8. The sixth bullet of Section C.4.1 of the Statement of Work of contract number DJM-15-A-32-V-0048[3] does not set forth a minimum number of required training days;

9. Among the available remedies, companies found violating the Nondisplacement of Qualified Workers regulation could be liable for back wages during the time a displaced worker would have been able to work;

10. Respondent did not offer Mr. Dean a right of first refusal under contract number DJM-15-A32-V-0048;[4] and

11. The USMS drafted contract number DJM-15-A32-V-0048.

Findings of Fact and Conclusions of Law

Factual Findings

Mr. Dean was a CSO at the Federal Courthouse in Ft. Smith, Arkansas, from May 7, 1996 through November 30, 2015. After graduating from high school he worked at several jobs, including one installing telecommunications equipment, which were unrelated to law enforcement. Sometime in 1990, he began working for the Barling (Arkansas) Police Department as an Auxiliary Police Officer. TR 70-72. As part of his work for the Barling Police Department, Mr. Dean completed an Auxiliary Police Course in Van Buren, Arkansas, sponsored

[3] The parties' stipulation states the contract number was "DJM-J 5-A32-V-0048." I find the parties meant the same contract previously discussed, DJM-15-A32-V-0048, and have amended the stipulation accordingly.
[4] *See* footnote 3.

by the Crawford County Sheriff's Department. TR 73-74; AX 1-2.[5] The course consisted of 104 hours of training given over a period of more than two months, ending on September 27, 1990. AX 2. Mr. Dean testified that this course included classroom training, "hands on felony police stops, high risk stops, working together, firearms training . . . just everything that generally you would run into as a police officer." TR 74. Mr. Dean received a certificate documenting this training. AX 1. He testified that as a Barling Auxiliary Police Officer, after a probationary period, "you were given assignments, and the same as any other officer on duty at certain times and places, received calls, patrol traffic, just normal everyday things an officer would do." TR 72. He added that he had authority to make arrests in that position. TR 72-73.

Mr. Dean testified that while still working for the Barling Police Department he was deputized as a Deputy U.S. Marshal in connection with a raid that was being conducted on Valentine's Day, 1991, at a compound of buildings controlled by a known criminal. TR 78. Due to Mr. Dean's previous telecommunications experience, he was asked to help take out the communications in the compound. TR 76. After the raid, he stayed on as a Deputy U.S. Marshal for about two months.[6] TR 79. He then became an Intermittent Deputy U.S. Marshal ("IDUSM"), a position he retained until he became a guard for USMS in November 1995. TR 80, 100. Mr. Dean testified that as an IDUSM, his job responsibilities were identical to those of a regular Deputy United States Marshal. TR 81. He stated that he had the authority to make arrests of people who refused to comply with misdemeanor or bench warrants he was serving, but would not intervene in situations that fell under the auspices of local law enforcement unless someone was in imminent danger, in which case he stated he could make an arrest. TR 82-84. The position description for the IDUSM position, admitted into evidence as JX 16, states that IDUSMs have the authority to execute warrants of arrest. No arrest authority other than in connection with serving warrants is indicated.

In regard to his other duties as an IDUSM, Mr. Dean testified that he helped track down a suspect, which required him and two other deputies to travel to Illinois to investigate his whereabouts (TR 95-97); and was sent to New York to help transport prisoners to and from court in a major murder trial (TR 86). The only training course Mr. Dean attended as an IDUSM was at the Federal Law Enforcement Training Center in Glynco, Georgia, over the period November 30 - December 9, 1992. *See* AX 22; TR 90-91. Mr. Dean testified that as an IDUSM he worked full time. TR 90. But in his interview statement with WHD written on April 18, 2016, he stated that, as the job title implies, this work was intermittent. JX 41, at DOL 003065. Consistent with this, James Edge, the Chief of Court Security for Judicial Security Division, USMS, testified that Mr. Dean could not have worked full time as an IDUSM because it is not a full-time position. DT 56. Mr. Dean also testified that the IDUSM position was abolished, but he remained with the USMS as a guard. TR 101-02. He was still working as a guard when he was hired as a CSO. TR 102.

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[5] Although Mr. Dean testified that he received this training while working for the Barling Police Department, the "Notice of Course Completion" from the Van Buren Police Department states that Mr. Dean was working for the Lavaca Police Department. *See* AX 2. For the purposes of this decision, this inconsistency is unimportant.

[6] It is unclear from the record when Mr. Dean stopped working for the Barling Police Department or whether he continued working for that department while also working as a Deputy U.S. Marshal.

Under the "Statement of Work" in the Contract that is the subject of this case, "court security services . . . include but [are] not limited to: entrance control; roving patrol; stationary post assignments; escort duties; securing courtrooms; law and order; preserve order; and enforc[ing] federal law while performing their duties." JX 25, at DOL 003092. The five USMS contracts with Akal, the previous contractor, that are in evidence list essentially similar duties for the CSOs. *See* JX 1-5.[7] Mr. Dean's testimony regarding his duties as a CSO is consistent with these contracts. TR 103. Mr. Dean testified that in 2007 he became the senior Lead CSO ("LCSO"), and remained in that position until sometime in 2012, when he voluntarily relinquished that position and resumed a regular CSO position. TR 105-06. An LCSO is a full-time CSO who has additional administrative duties. It is not a management position. TR 106. Mr. Dean testified that when he was the senior LCSO there was no district supervisor for the Western District of Arkansas, so he essentially performed the duties of that position in Ft. Smith and the sub-offices. TR 104. He was responsible for assuring that the CSOs underwent their mandatory training and for hiring new employees. TR 105. When a new office was being opened in Texarkana, he hired the new LCSO and the other CSOs. TR 105. Mr. Dean added that, as a CSO, his qualifications were never called into question. TR 106.

The Contract was to take effect on December 1, 2015. The Federal Courthouse in Ft. Smith, Arkansas, where Mr. Dean worked as a CSO is within the Eighth Circuit and falls under the Contract. Mr. Dean had been employed as a CSO under the previous contract with Akal Security. Overall, Mr. Dean had been a CSO under contracts between the USMS and Akal, and the contractor before Akal, since May 7, 1996.

In compliance with the procedures set out in the regulations, Akal provided Walden with a list of the incumbent CSOs employed at the Ft. Smith courthouse and the rest of the Eighth Circuit. JX 7; *see* TR 303. Mr. Dean was one of the most senior of the 350 or so CSOs included on the list. Walden then set up what it refers to as a town hall, where the incumbent CSOs who wanted to be retained under the new contract came to meet the Walden transition team. TR 304-07. The flier distributed by Walden announcing the town hall meeting for the incumbent CSOs in the Ft. Smith and Fayetteville area (JX 43) stated that they would be completing an employment application. They were told to bring, among other things, a "copy of your POST certification from the Law Enforcement Academy."[8] In the afternoon prior to the town hall meeting, which was scheduled for the evening of October 15, 2015, Mick Sharp, Walden's General Manager of its Federal Services Division (TR 299), and apparently one or two other Walden employees,[9] met with the U.S. Marshal and the chief deputy in the district. TR 307. At that meeting, they were told that one individual, Mr. Dean, was not qualified to be on the contract. TR 308-09.

Mr. Dean attended the town hall, where he spoke to Mr. Sharp and Walden's Human Resources Manager, Abi Browning. TR 108. He was interviewed by Mr. Sharp. Mr. Sharp testified that during the interviews he used a form that lists all the paperwork Walden needed

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[7] The differences in the scopes of work for CSOs in these contracts are insignificant, and have no effect on this case.
[8] POST is an acronym for Peace Officer Standards and Training. It will be discussed in more detail *infra*.
[9] Mr. Sharp testified that "we" arrived mid-afternoon, could not check into "our" hotel, and "we" attended the meeting. Mr. Dean identified two other Walden employees, Abi Browning and Dana Smith, as attending the town hall along with Mr. Sharp. *See* TR 108; JX 41, at DOL 003064.

from the incumbent CSOs. The form at the first page of RX 13 is the checklist Mr. Sharp used in his interview with Mr. Dean. TR 310-11. On the bottom of the form is a box to be checked for "Documentation of Applicant's Official Law Enforcement Training/Certification." Mr. Sharp testified that on Mr. Dean's form, that box is circled, not checked, because Mr. Dean did not bring such documentation to the town hall. TR 311. He added that during the interview Mr. Dean told him "he never graduated from a law enforcement agency academy nor did he work for a law enforcement agency." TR 315. Mr. Dean told him that he might have documentation at home that may suffice. *Id*.

On October 23, 2015, Walden sent a letter to all the incumbent CSOs officially informing them that it was awarded the new contract and that they will offer employment to the incumbent CSOs "at the same job location in positions for which they are qualified." JX 18.

After the town hall, Mr. Dean found the certificate he received for completing the "Intermittent Deputy U.S. Marshal Training #301." AX 22. The certificate states that the training was from November 30 - December 9, 1992. JX 10 is the email Mr. Dean sent to Ms. Browning on November 8, 2015, in which he attached this certificate. TR 111. On November 9, 2015, Ms. Browning emailed Mr. Dean that the certificate he submitted did not meet the training requirement since it was neither a POST certification nor a completion or graduation certificate from a police academy. JX 36. On November 23, 2015, Mr. Dean received an email from Mr. Sharp warning him that "you have failed to provide evidence of any Law Enforcement Agency POST certification . . . which is required." JX 35. Mr. Dean did not submit any additional certificates verifying law enforcement training to Walden prior to the commencement of the contract. TR 266.

The Administrator submitted a certificate stating that on September 27, 1990, Mr. Dean completed a 104 hour Auxiliary Police Course conducted by the Crawford County Sheriff's Department. AX 1. This course was certified by the Arkansas Commission of Law Enforcement Standards and Training. AX 2. Arkansas law provides that an auxiliary law enforcement officer only has the authority of a police officer when working "under the direct supervision of a full-time certified law enforcement officer." RX 19, 19-A (Ark. Code. Ann. § 12-9-303(a) (in effect since 1983)). Arkansas law further specifies that "nothing in this subchapter [subchapter 3, Auxiliary Law Enforcement Officers] shall be construed as defining an auxiliary law enforcement officer as a full-time certified law enforcement officer, a part-time certified law enforcement officer, or a specialized certified officer…." RX 19, 19-A (Ark. Code Ann. § 12-9-303(d)). Although in his interview statement with Roger Raney, the WHD Investigator, Mr. Dean stated that he submitted this certificate to Walden prior to November 30, 2015, JX 41, at DOL 003065, the Administrator does not contend that this certificate was submitted to Walden before the Contract went into effect. *See* Administrator's Brief ("A. Br.") at 22-24.

On November 30, 2015, Dickie Wong, the Vice President of Walden's Federal Services Division, sent a letter to Mr. Dean informing him that he would not be retained as a CSO because he failed to provide proof that he "graduated from a certified Federal, state, county, local or military law enforcement training academy or program." AX 14. The letter concluded that there may be other positions with Walden that Mr. Dean might qualify for. Moreover, the letter stated

that if Mr. Dean later obtained proof that he meets the training certification requirements, he should reapply for any open CSO positions.

After Mr. Dean left his employment as a CSO, he did not look for other employment for six to eight months because he hoped he would be reinstated as a CSO. TR 133. At that time he made inquiries regarding security and loss prevention positions at Walmart and Tyson's Food. But Mr. Dean never applied for a job with Walmart, and it is unclear from the record whether he applied for a job with Tyson's Food. TR 133-34. Mr. Dean testified that he works around his farm, and he has a cattle company. TR 118-19.

Analysis

Governing Law

It should be noted that there is little to no relevant case law. Neither party has cited any other cases arising under EO 13495, although the Administrator cited two cases under a predecessor EO, EO 12933. Administrator's Brief ("A. Br.") at 15-16. I have found only one case under EO 13495, *Moss et al. v. Sabre88 LLC*, 2015-NQW-00001, 00002, 00003 (ALJ Oct. 16, 2015). In that case, the workers' contention that they should have been retained under a successor contract was rejected because the successor contract had more stringent educational requirements. *Moss* is not germane to this case.

Given the lack of relevant case law, the controlling law here is limited to EO 13495 and 29 C.F.R. Part 9. At the risk of stating the obvious, while of course Walden was obligated to perform certain tasks as required by the Contract, Walden's duties under the Contract were imposed neither by EO 13495 nor by 29 C.F.R. Part 9. Similarly, the USMS's duties under the Contract were imposed neither by EO 13495 nor by 29 C.F.R. Part 9.

Walden Had To Consider "Other Credible Evidence" Besides the List of Predecessor Employees in Determining Whether Mr. Dean Was Entitled to a Job Offer

The Administrator takes the position that since Mr. Dean was listed on the certified list of employees provided by the prior contractor, Walden should not have taken any other steps to determine whether he was entitled to a job offer. A. Br. at 20. The Administrator argues the "regulations explicitly state how successor contractors may assess its [sic] predecessor's employees['] qualifications: contractors must look at the certified lists supplied by the predecessor." A. Br. at 20. This argument, to the extent it implies that the successor contractor may not look beyond that certified list, is inconsistent with the regulations.

Specifically, the regulations make clear that, in certain circumstances, a successor contractor must look beyond the certified list to determine whether a person is entitled to a job offer:

> *Determining Eligibility.* While a person's entitlement to a job offer under this part <u>usually</u> will be based on whether he or she is named on the certified list of all service employees working under the predecessor's contract…, a contractor <u>must</u>

> also accept other credible evidence of an employee's entitlement to a job offer under this part. For example, even if a person's name does not appear on the list of employees on the predecessor contract, an employee's assertion of an assignment to work on a contract during the predecessor's last month of performance coupled with contracting agency staff verification could constitute credible evidence of an employee's entitlement to a job offer, as otherwise provided for in this part. Similarly, a employee could demonstrate eligibility by producing a paycheck stub identifying the work location and hours worked.

29 C.F.R. § 9.12(a)(3) (italics in original, underscore added).

The underscored portions of this paragraph demonstrate that the Administrator's argument is not supported by the regulations. First, the use of "usually" in the first sentence of this paragraph indicates that there are circumstances in which merely looking at a certified list of a predecessor contractor's employees is not sufficient for a successor contractor to determine if a person is eligible for a job offer. Second, the use of "must also accept other credible evidence" indicates that if there is credible evidence of a person's entitlement to a job offer besides the certified list, a successor contractor must consider it. Third, the use of "coupled with contracting agency staff verification" in the example indicates that input from the contracting agency may be considered in determining whether there is credible evidence of a person's entitlement to a job offer.[10]

I recognize that both examples in the paragraph are of cases where a person is not on the certified list of employees of the predecessor contractor, and both examples show ways to establish credible evidence of eligibility to a job offer. The regulation does not, however, indicate that these examples are exhaustive. Nor does the regulation state that "other credible evidence" may only be considered to establish that a person is eligible. Indeed, the heading of the section ("*Determining Eligibility*") indicates that the section explains how a successor contractor is to determine whether a person is eligible for a job offer. I thus find that the successor's use of "other credible evidence" is not limited to establishing that a person is eligible for a job offer, but rather includes determining whether a person is eligible for a job offer or not.

The Administrator also argues:

[10] Moreover, the regulations explicitly recognize, when discussing a job offer for a position differing from the position a person held for a predecessor contractor, and when discussing exceptions to the requirement to provide a job offer, that "credible information" includes that "provided by a knowledgeable source such as … the contracting agency." 29 C.F.R. §§ 9.12(b)(4) (different job position), (c)(3)(ii) (exception), (c)(4)(ii)(A) (exception), and (c)(5)(ii) and (iii) (exception). I need not decide whether the explicit recognition that information provided by a contracting agency may be credible information in these provisions means that the lack of such explicit recognition in 29 C.F.R. § 9.12(a)(3) is an indication that, for purposes of determining a person's entitlement to a job offer generally, information provided by a contracting agency is not credible information. This is because the language of 29 C.F.R. § 9.12(a)(3) itself – namely, the reference to verification of information by contracting agency staff – indicates that information provided by a contracting agency may be "other credible evidence" for purposes of 29 C.F.R. § 9.12(a)(3). I thus find that information provided by a contracting agency "could constitute" "other credible evidence of an employee's entitlement to a job offer under this part." 29 C.F.R. § 9.12(a)(3).

> EO 13495's enforcing regulations list a federal contractor's responsibilities when taking over a contract. One such responsibility is to make the offer of first refusal to qualified predecessor employees. The regulations place this responsibility squarely on the federal contractor and make no mention of determining employee qualifications.

A. Br. at 27.

While 29 C.F.R. § 9.11 places certain requirements on the contracting agency, none of those requirements includes making an offer of employment to qualified employees of the predecessor contractor. Accordingly, the Administrator is correct that the obligation to make that offer is placed solely on the successor contractor. *See* 29 C.F.R. § 9.12(a)(1).

The Administrator is not correct, however, in arguing that "the regulations make no mention of determining employee qualifications." As explained above, 29 C.F.R. § 9.12(a)(3) explains what a successor contractor must consider when determining whether a person is entitled to a job offer. Whether a person is, or is not, entitled to a job offer under 29 C.F.R. § 9.12(a)(1) requires a determination as to whether that person is qualified for the position. Therefore, a determination as to whether a person is, or is not, entitled to a job offer necessarily requires a determination as to whether that person is qualified for the position. Moreover, as the regulation discusses contracting agency staff verifying information in one of the examples, it contemplates a role by the contracting agency in assisting the successor contractor determine whether a person is, or is not, entitled to a job offer.

I thus find that Walden was required by the regulations to consider credible evidence as to whether Mr. Dean was entitled to a job offer or not, even if Mr. Dean was listed on the certified list of the predecessor contractor's employees. 29 C.F.R. § 9.12(a)(3).

Walden Had to Consider"Other Credible Evidence" Provided by the USMS as to Mr. Dean's Qualifications for the CSO Position

Two authorities – the Contract and the regulations – required Walden to consider information provided by the USMS as to Mr. Dean's qualifications. Walden thus complied with contractual and regulatory requirements in considering that information.

Under the contract, the USMS manages the CSO program and reserves the right to determine whether any Walden employee is qualified to serve as a CSO. JX 25. Specifically, "[t]he Contractor shall not permit an individual to perform in any capacity until ... [t]he individual has passed all qualification requirements as stated in the Statement of Work[] [and] [t]he individual has been determined by the Government to be suitable to perform in such capacity." JX 25, para. C.11.1, at DOL 003120. It is thus beyond doubt that pursuant to the Contract, Walden could not employ a person unless the USMS approved his or her qualifications. Under the Contract, then, Walden had to consider the USMS's position as to Mr. Dean's qualifications because the USMS had final say under the Contract as to whether a person was qualified for the CSO position.

Under the regulations, "other credible evidence" as to whether a person is entitled to a job offer may be provided by a contracting agency. *See* fn. 10 and accompanying text. Given that 29 C.F.R. § 9.12(a)(3) states that "a contractor must also accept [such] other credible evidence," Walden had to consider such evidence when provided by the USMS in making its determination as to whether Mr. Dean was entitled to a job offer under 29 C.F.R. Part 9.

The Administrator argues that Walden must comply with the requirements of EO 13495 regardless of the USMS's position that Mr. Dean was unqualified for the CSO position. A. Br. at 28-29. After correctly recognizing that EO 13495 "cannot [be] enforce[d] against the contracting agency, as the legal obligation to comply only applies to the contractor," the Administrator states that "[t]he federal contractor must be the final word on qualifications – otherwise EO 13495 would be toothless." A. Br. at 29.

As outlined above, 29 C.F.R. § 9.12(a)(3) required Walden to consider credible evidence concerning whether Mr. Dean was entitled to a job offer or not, even if Mr. Dean was listed on the certified list of the predecessor contractor's employees. Accordingly, if the credible evidence Walden was required to consider was provided by the USMS as the contracting agency, Walden could not possibly have violated 29 C.F.R. § 9.12(a)(3) in considering it. The Administrator's argument thus fails.

Moreover, if the Administrator's argument were accepted, 29 C.F.R. Part 9 would require a federal government contractor to hire a person under a contract and pay him, even though the contractor could never place the person in service under that contract due to the contracting agency's determination that the person was not qualified for a position under the contract. This would result in the contractor being forced to pay a person without being able to charge the contracting agency for that person's services. After reviewing 29 C.F.R. Part 9, and after reviewing the Preamble to the Final Rule issuing those regulations, I find nothing that requires this illogical result. *See* Nondisplacement of Qualified Workers Under Service Contracts, 76 Fed. Reg. 53,720-53,762 (Aug. 29, 2011).

I thus respectfully decline the Administrator's invitation to read 29 C.F.R. Part 9 to require Walden to ignore information provided by the USMS concerning Mr. Dean's qualifications. Such a reading would directly conflict with 29 C.F.R. § 9.12(a)(3) as Walden was required to consider "other credible evidence of an employee's entitlement to a job offer under this part." Simply put, the Administrator's position is inconsistent with the plain text of 29 C.F.R. § 9.12(a)(3).

The USMS Provided Walden Credible Evidence as to Whether Mr. Dean Was Entitled to a Job Offer

Mr. Sharp testified that before Walden held the town hall meeting, he was part of a Walden team that met with the U.S. Marshal and the Chief Deputy Marshal face-to-face, and one of the things USMS wanted to tell Walden "was they were told and [were] under the impression that" Mr. Dean was not qualified to be on the contract. TR 307-09. Additionally, Mr. Wong testified that in a conference call (the timing of which is unclear) the USMS contracting officer told Walden that Mr. Dean was not qualified due, in part, to his not having attended "a certified

training academy or program." TR 217-18. On July 14, 2016, USMS stated by letter that Mr. Dean "does not meet the law enforcement training requirements" for the CSO position because his training as an IDUSM did not meet the requirement that he have "completed … a 'certified Federal, state, county or military law enforcement academy…. [and that t]he certificate … be recognized by a Federal, state, county, local or military authority, and provide evidence that an individual is eligible for employment as a law enforcement officer.'" RX 4. After pointing out that Deputy U.S. Marshals ("DUSM") receive 5 ½ months of instruction, the letter concluded,

> In no way does Mr. Dean's mere one week of training compare to a full law enforcement training program, such as those completed by DUSMs or by full-time state and local law enforcement officers. This is the type of training that is required in order to meet the USMS' qualification requirements for the CSO position.

RX 4.

To sum up: (1) under the Contract, the USMS had final say as to whether a person was qualified for a CSO position; (2) before the town hall, the U.S. Marshal and the Chief Deputy Marshal told Walden that Mr. Dean was not qualified for the job; (3) at some point, USMS told Walden in a conference call that Mr. Dean was not qualified for the job; and (4) in July 2016, the USMS sent Walden a letter stating that Mr. Dean was not qualified for the job. Under these facts, I find that USMS provided credible evidence that Mr. Dean was not qualified for the job.

Moreover, as outlined above, whether a person is qualified for a job is necessarily part of determining whether that person is, or is not, entitled to a job offer under 29 C.F.R. Part 9. I thus find that, in informing Walden that Mr. Dean was not qualified for the CSO position, the USMS provided Walden credible evidence as to whether Mr. Dean was entitled to a job offer or not.

Mr. Dean Was Not Eligible for a Job Offer Because He Was Not Qualified for the CSO Position

We now turn to the central point of contention in this case: whether Mr. Dean met the qualifications for the CSO position contained in the Contract. The Contract, at pages C-10-11, contains nine qualification standards, each set off by a bullet under section C.4.1, CSO/LCSO Qualification Standards. The two standards primarily at issue here are the sixth and seventh listed in the section. The parties have referred to these standards as Bullet Six and Bullet Seven, and to avoid confusion I will do the same in this decision.

Bullet Six states:

> Ensure each individual designated to perform as a CSO has successfully completed or graduated from a certified Federal, state, county, local or military law enforcement training academy or program that provided instruction on the use of police powers in an armed capacity while dealing with the public. The certificate shall be recognized by a Federal, state, county, local or military authority, and provide evidence that an individual is eligible for employment as a

> law enforcement officer. In cases where a CSO applicant did not receive a certificate, the Contractor shall provide a signed statement from a supervisory official of the department or agency indicating that an applicant was employed as a law enforcement officer and that no certificate or diploma was issued. The statement shall include all dates of employment the individual served in a law enforcement capacity. The Contractor shall also include a copy of the signed statement with the CSO application.

JX 25.

Bullet Seven states:

> Have at least three (3) years of verifiable experience as a certified law enforcement officer or its military equivalency. Military equivalency can be verified through the applicant's DD-214 *Certificate of Release or Discharge from Active Duty*. The experience will have included general arrest authority (this experience does not have to be consecutive). All three (3) years shall have occurred within the last seven (7) years. *(Note: this requirement is not applicable to CSOs currently serving in the capacity of a CSO for the USMS or under the preceding USMS contract, and may be waived in remote geographic locations following a case-by-case review by the OCS.)* This requirement is waived for separated or returning CSOs provided they have served under this or a prior CSO contract within the previous three (3) years. General arrest authority is defined as the authority conveyed upon a person to make felony arrests of persons not under a custodian arrangement (prisoner, probation or parole violator) throughout a valid jurisdiction. The state or federal codes specific to the person's qualifying experience shall be used to determine the CSO applicant's arrest authority. The Contractor shall verify the CSO applicant's arrest authority prior to submitting the application for approval.

JX 25 (emphasis in original).

I first address whether Mr. Dean met the training requirements of Bullet Six.

The Administrator argues that that the Contract's training requirement did not state a minimum number of hours, and that both Mr. Wong and Mr. Edge stated that 43 hours of training (the amount on the training certificate Mr. Farley submitted) was insufficient to meet this requirement. A. Br. at 10-11. The Administrator then argues that since Walden hired Mr. Farley, whose "training certificate … was described by Walden as inadequate," "Walden neglected to follow the same rigorous reevaluation standard for each of its predecessor's employees" and "[s]uch inconsistency highlights that Walden has entered into an area of evaluation into which it should not have strayed." A. Br. at 21.

Walden argues that Mr. Dean did not provide sufficient evidence prior to the start of the Contract that would meet these qualifications, and that even after the Contract went into effect he has not provided such evidence. Walden contends that the Intermittent Deputy U.S. Marshal

training course Mr. Dean completed in 1992 was not "a certified Federal, state, county, local or military law enforcement training academy or program that provided instruction on the use of police powers in an armed capacity while dealing with the public." Accordingly, it argues that the certificate Mr. Dean provided on November 8, 2015, was inadequate to meet this qualification. *See* TR 180-81; Respondent's Brief ("R. Br.") at 31-33.

Both Walden and USMS interpret this provision as requiring POST certification or its equivalent. *See, e.g.*, TR 181; DT 47. As explained in more detail below, POST certification is the training requirement described in Bullet Six. TR 334-35. Reed Trone, the Assistant District Director of WHD (and who was the only Department of Labor witness to testify in this case), conceded that it was Mr. Dean's duty to provide this evidence to Walden. TR 281.

Mr. Dean testified that the certificate he submitted to Walden shows that he completed the Intermittent Deputy Marshal training. This training was conducted at the Federal Law Enforcement Training Center in Glynco, Georgia. Mr. Dean stated that it was condensed training which provided a general oversight of the position, including such things as how to charge time and courtroom attire as well as courtroom security. TR 91-92. In his interview statement to WHD on April 18, 2016, he stated that the course included weapons qualification, fitness testing and a written exam. JX 41, at DOL 003065. As compared to the seven to ten days of training Mr. Dean received as an Intermittent Deputy Marshal, which the USMS describes as "rudimentary" (RX 4), the Deputy U.S. Marshals Training Academy is somewhere between a 16 and 21 ½ week course. JX 24, at DOL 003044; DT at 12. Mr. Edge testified that most certified law enforcement training programs are at least 500 hours long. DT at 50.

Mr. Trone conceded that the face of the certificate does not provide evidence that makes Mr. Dean eligible as a certified law enforcement officer. TR 268. WHD's conclusion that this training made Mr. Dean eligible for the CSO position apparently was based on several factors, none of which withstand scrutiny.

First, there were conversations Mr. Raney had with Mr. Dean about this training. TR 269. However, Mr. Trone's testimony provides little detail about what Mr. Raney was told about this training that would show it met the training requirements set out in Bullet Six.

Second, the Administrator takes the position that that since the term "POST certification" does not appear in Bullet Six, it is not required. *See, e.g.*, TR 232-33. But, as Mr. Sharp testified, POST certification is just a shorthand way used among people in law enforcement, including USMS, of stating "a certified Federal, state, county, local or military law enforcement training academy or program that provided instruction on the use of police powers in an armed capacity while dealing with the public." TR 314; TR 334-36.[11] Mr. Edge also referred to POST certification, stating that the IDUSM training Mr. Dean received from the USMS "is nowhere comparable to a POST certified training that is required for a court security officer position" and, in response to a question asking if POST certified training were required, responded that "POST is acceptable or anything that is similar in nature." DT 47. Morevever, the Bureau of Justice

[11] Mr. Sharp explained, "POST certification is a term used within the industry. It's not just this particular contract. It's on our commercial side as well. POST certificiation, it's just a general, common term that's used. And the Marshal Service uses it as well." TR 336.

Statistics of the U.S. Department of Justice states the following, which is consistent with Mr. Sharp's testimony: "State Peace Officer Standards and Training (POST) Commissions[are] the agencies typically responsible for certifying law enforcement officers in each state…." RX 3, at DOL 002425. Based on this evidence, I find that POST certification is a term used among people in law enforcement, including the two parties to the Contract, USMS and Walden, to describe the training requirements of Bullet Six. The USMS and Walden knew what they were agreeing to in Bullet Six – training requirements that go by the shorthand common in their industry of POST certification. I further find that either POST certification, or, based on Mr. Edge's testimony, "anything that is similar in nature" to POST certification, is required to meet the training requirements of Bullet Six.

Third, the Administrator argues that Mr. Dean's training meets the requirements of Bullet Six because Bullet Six does not have a minimum hours requirement for a qualifying training course. TR 233. This argument is not well taken. As the USMS stated in its July 2016 letter, "[i]n no way does Mr. Dean's mere one week of training compare to a full law enforcement training program, such as those completed by DUSMs or by full-time state and local law enforcement officers. This is the type of training that is required in order to meet the USMS's qualification requirements for the CSO position." RX 4. It is particularly important to remember that the USMS not only conducted the IDUSM training, it drafted the Contract and also has the final say under the Contract in whether a person is qualified to serve as a CSO. I cannot imagine any source of information more authoritative than the USMS on the issue of whether Mr. Dean's IDUSM training satisfied the requirements of Bullet Six.

Nor does Mr. Dean's 104 hour Auxiliary Police Course, AX 1, satisfy the training requirements of Bullet Six.[12] As Mr. Edge testified, most certified law enforcement training programs are at least 500 hours long. DT at 50. The 104 hour course is far shorter than the training required to receive POST certification. More importantly, while the 104 hour course was certified by the Arkansas Commission of Law Enforcement Standards and Training, AX 2, Arkansas law itself makes clear that auxiliary law enforcement officers are not to be considered full-time, part-time, or specialized certified law enforcement officers. RX 19, 19-A (Ark. Code. Ann. § 12-9-303(a)). Indeed, under Arkansas law an auxiliary law enforcement officer only has the authority of a police officer when working "under the direct supervision of a full-time certified law enforcement officer." RX 19, 19-A (Ark. Code. Ann. § 12-9-303(a)). Under these facts, I cannot conclude that Mr. Dean's 104 hour Auxiliary Police Course satisfies the requirements of Bullet Six, especially in light of the fact that the IDUSM training does not meet this requirement because it "[i]n no way … compare[s] to a full law enforcement training program, such as those completed by DUSMs or by full-time state and local law enforcement officers." RX 4. Obviously, Arkansas itself does not consider the 104 hour Auxiliary Police Course sufficient for a graduate to be considered a full-time (or part-time, for that matter) certified law enforcement officer. I decline to find otherwise. Accordingly, I find that Mr.

[12] On this record, I am unable to make a determination as to when, or even if, Mr. Dean submitted this certificate to Walden before this litigation commenced, other than to find that he did not submit this certificate before Walden started performing under the Contract on December 1, 2015. I need not, and do not, make any finding on the issue of how long after a successor contract begins an employee under the predecessor contract may submit proof of qualifications to the successor contractor to establish his or her entitlement to a job offer under 29 C.F.R. Part 9.

Dean's 104 hour Auxiliary Police Course, like his IDUSM training, does not satisfy the training requirements of Bullet Six.

Finally, as noted above, the Administrator contends that another incumbent CSO who did not provide evidence that he met the training requirements of Bullet Six by November 30, 2015, was retained by Walden, and the evidence supports this contention. Mr. Farley submitted a certificate from the Arkansas Law Enforcement Training Academy for a 43 hour Part-Time Reserve/Auxiliary Basic Training Course. AX 16. Mr. Wong admitted that this certificate is inadequate to meet the Bullet Six qualifications. TR 197. Yet Mr. Farley was retained by Walden.[13]

Unlike the situation with Mr. Dean, there is no evidence in the record that USMS provided Walden "other credible evidence" regarding Mr. Farley's entitlement to a job offer, such as information that Mr. Farley was not qualified for the position. Accordingly, there is no evidence that Walden had any obligation under the regulations to examine Mr. Farley's qualifications beyond reviewing the certified list of the predecessor contractor's employees. In contrast, as explained above, under 29 C.F.R. § 9.12(a)(3) Walden had to accept the credible evidence provided by USMS concerning Mr. Dean's entitlement to a job offer.

I recognize that an argument can certainly be made that Mr. Farley was not qualified for the CSO position for the same reason Mr. Dean was not qualified – he did not meet the training requirements of Bullet Six. Nevertheless, assuming *arguendo* that Walden erroneously retained one CSO who did not meet the Bullet Six training requirements, such erroneous retention would not compel a finding that those requirements were waived for other incumbent CSOs who did not meet the requirements, and the Administrator did not argue that such waiver should apply.

The unstated crux of the Administrator's argument is that, as an incumbent CSO with 19 years of experience in that position, Mr. Dean should have been offered a right of first refusal by Walden. As the Administrator stated in its brief, "Walden should not have looked beyond the certified lists when evaluating the qualifications of predecessor employees." A. Br. at 20. At first blush, it would indeed seem that Mr. Dean must have been qualified to perform the CSO job – after all, he had been doing it for 19 years. But a review of the record indicates that Mr. Dean may not have been qualified to serve as a CSO under the terms of the predecessor contracts, which had training requirements substantially the same as that in the Contract (*see* Stipulation 4), because he did not meet the training requirements of Bullet Six.[14]

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[13] Almost a year later, Walden received a letter from El Dorado, Arkansas Chief of Police stating that Mr. Farley was POST certified. AX 15. This letter substantially satisfied the alternate requirement of Bullet Six that "[i]n cases where a CSO applicant did not receive a[n otherwise qualifying] certificate, the Contractor shall provide a signed statement from a supervisory official of the department or agency indicating that an applicant was employed as a law enforcement officer and that no certificate or diploma was issued. The statement shall include all dates of employment the individual served in a law enforcement capacity." It thus appears that Mr. Farley was, in fact, qualified to be a CSO under the alternate requirement of Bullet Six.

[14] I need not, and do not, make any findings as to whether Mr. Dean was in fact qualified to perform the job under the predecessor contracts. I simply raise this possibility to demonstrate that the mere fact that Mr. Dean had performed the job for 19 years does not necessarily mean that he was, in fact, qualified to perform the job under the Contract.

Mr. Dean's employment by the predecessor contractor notwithstanding, there simply is no requirement – whether in EO 13495, 29 C.F.R. Part 9, or in the Nondisplacement of Qualified Workers clause incorporated by reference into the contract – that *all* of the predecessor contractor's employees be offered employment on the successor contract. The only requirement is that the predecessor's employees *who are qualified for the positions* be offered employment. If the Administrator's argument were accepted, an employee employed under a predecessor contract who had no qualifications whatsoever for the position, but who erroneously was employed by the predecessor contractor, would automatically receive a job offer on the successor contract as long as his or her name was on the certified list of the predecessor contractor's employees. This result would be inconsistent with the text of EO 13495 and 29 C.F.R. Part 9, which limits the right of first refusal to employees qualified for the position.

As outlined above, Bullet Six of the contract between the USMS and Walden requires CSOs to have what has been referred to as POST certification. Mr. Dean has not provided evidence, either before the Walden contract went into effect or thereafter, that he had POST certification despite being given every opportunity to do so. Therefore, I find that Walden was not required to provide Mr. Dean with a right of first refusal for the CSO positions under the Contract with the USMS because Mr. Dean did not meet the training requirement of Bullet Six.

Given this finding, I need not address the parties' positions in regard to Bullet Seven.

Conclusion

For the foregoing reasons, I find that the Administrator has failed to establish that Walden violated EO 13495 or its implementing regulations at 29 C.F.R. Part 9 in failing to offer Mr. Dean employment as a CSO under contract number DJM-15-A32-V-0048. Because Mr. Dean did not meet the training requirement in Bullet Six, paragraph C.4.1, of the Contract, Walden violated neither EO 13495 nor 29 C.F.R. Part 9 by failing to offer him a right of first refusal.

ORDER

The Administrator's Determination in this matter dated June 24, 2016, is **VACATED** and this matter is **DISMISSED.**

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a written Petition for Review ("Petition") with the Administrative Review Board ("Board") within twenty (20) days of the date of issuance of the administrative law judge's decision.

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.

A copy of any such Petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Labor, 800 K Street NW, Washington, DC 20001-8002. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue.

The Board's Rules of Practice further require that the petitioner provide to the Board an original and four copies of the Petition and any other papers submitted to the Board. 29 C.F.R. § 8.10(b). However, if you e-File the Petition, only one copy need be uploaded.

Service is to be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete upon mailing, and the Petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The Petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).

A copy of the Petition is also required to be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).

See also 29 C.F.R. § 9.32(b)(2) (regulations concerning appeal to the Administrative Review Board).