

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 19 February 2013**

**BALCA No.:** 2012-PWD-00003  
**ETA No.:** P-100-11223-853753

*In the Matter of:*

**THE SHERWIN-WILLIAMS COMPANY,**  
*Employer*

Center Director: William K. Rabung  
National Prevailing Wage Center

Appearances: Brian J. Halliday, Esquire  
Cleveland, Ohio  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Clarette H. Yen, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **Colwell, Johnson and Reilly**  
Administrative Law Judges

**DECISION AND ORDER**  
**AFFIRMING PREVAILING WAGE DETERMINATION**

**PER CURIAM.** This matter arises from the Employer's appeal pursuant to 20 C.F.R. § 656.41 of the Employment and Training Administration, Office of Foreign Labor Certification, National Prevailing Wage Center's ("NPWC") prevailing wage determination for the position of Oracle Applications Team Lead.

## **BACKGROUND**

On August 12, 2011, The Sherwin-Williams Company filed an ETA Form 9141 Application for Prevailing Wage Determination (“PWD”). (AF 154).<sup>1</sup> The application is in support of an application for permanent alien labor certification for the position of Oracle Applications Team Lead located in Cleveland, Ohio. (AF 149-153). The position involves the supervision of four workers. (AF 150). The minimum requirements for the position are a Bachelor’s degree in Computer Science, Engineering or related major, and 60 months of experience with IT/Oracle applications. (AF 151). The Employer elaborated on the experience requirement: “minimum 60 months’ work experience with Oracle applications, particularly with human capital management modules. Knowledge of Oracle Applications framework, PL/SQL, SQL Plus, Workflow Builder, Oracle Forms and Reports, Unix, and Discoverer.” (AF 153).

The NPWC issued a PWD on October 14, 2011 of \$131,705.60 annually. The PWD was based on the SOC (ONET/OES) occupational title of Computer and Information Systems Managers, an occupational code of 11-3021.00, and a Wage level IV. (AF 152).

On October 25, 2011, the Employer filed a request that the PWD be reconsidered because, “though the position of Oracle Applications Team Lead is a managerial position, it is the lowest-level managerial position in the [Employer’s information technology] department.” (AF 147). The Employer argued that the position should be assigned a Level III rather than a Level IV PWD. The Employer conceded that applying the 5-step procedure for determining wage levels found in the Employment and Training Administration, *Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs* (2009)<sup>2</sup> would almost always result in a Level IV wage for the job, but argued that the guidance states that the 5-step procedure should not be implemented in an automated fashion, that the position at issue is for a neophyte manager, and that the NPWC should take this real-world context into consideration. (AF 147). The Employer attached an organizational chart for its Chief Information Officer’s division to show where the Oracle Applications Team Lead position falls in the hierarchy. (AF 148).

The NPWC reconsidered, but reaffirmed its PWD. (AF 146). The Employer appealed to the NPWC Center Director, arguing that a flawed analysis had resulted in a PWD for a junior-level IT manager that was only one pay grade below the company Vice-President and Chief Information Officer. (AF 60-145).

The Center Director issued his decision on March 2, 2012. The Center Director noted the Employer’s argument, but found that the Employer was requiring five years of experience, and consequently the NPWC’s determination was consistent with the *2009 PWD Guidance*. (AF 57-59). The Employer then requested BALCA review. (AF 1-56).

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

<sup>2</sup> See AF 163-196; [www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

## DISCUSSION

### *Standard of Review*

The Board applies an abuse of discretion standard to the Center Director's decision on an employer's appeal of a prevailing wage determination. *See Emory University*, 2011-PWD-1 and 2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-1 (June 30, 2010). Accordingly, we will review the Center Director's decision in this case to determine whether it was consistent with the applicable regulations and was a reasonable exercise of that discretion. *See RP Consultants*, slip op. at 10.

### *Regulations and Guidelines*

The PERM regulations require an employer filing an application for permanent labor certification after January 1, 2010, to request a prevailing wage determination from the National Prevailing Wage Center. 20 C.F.R. § 656.40(a). The regulations provide several methods by which the prevailing wage is determined.

The Employment and Training Administration's *2009 PWD Guidance* memorandum outlines a step-by-step, standardized approach for determining the appropriate occupational classification under the SOC/O\*Net and appropriate wage level for the job opportunity.

Under the *2009 PWD Guidance*, every occupation begins at Wage level 1, which is considered an entry-level wage. *See PWD Guidance* at 8. The *2009 PWD Guidance* explains that the employer's requirements for experience, education, training, and special skills are compared to those generally required for the occupation as described by O\*Net, and will be used as indicators that the job opportunity is for an experienced (Level 2), qualified (Level 3) or fully competent (Level 4) worker, thereby warranting a PWD at a higher wage level. *Id.* Accordingly, when determining the wage level, a point (or level) is added based on: 1) experience, 2) education, 3) special skills and other requirements, and 4) supervisory duties. *2009 PWD Guidance* at 9-13. The *Guidance*, however, cautions:

The process ... should not be implemented in an automated fashion. The NPWHC must exercise judgment when making prevailing wage determinations. The wage level should be commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity.

*2009 PWD Guidance* at 13.

*Whether the Center Director Abused His Discretion in Affirming the NPWC's Assignment of a Level IV Wage Level*

In the instant case, the Employer conceded that strict application of the *2009 PWD Guidance* results in a level IV wage for the Oracle Applications Team Lead position, but argued that the *2009 PWD Guidance* directs the NPWC not to apply the 5-step procedure in an automated fashion, and that the NPWC's rote determination without taking into consideration the position's level in the Employer's hierarchy exhibited a wholesale failure to exercise the judgment the *2009 PWD Guidance* requires. The Employer argued that its position fits the description of a Level III wage, because its Oracle Applications Team Lead position is a low level managerial position involving some coordination of staff, and only involves "fundamental" project management skills on small and midsize projects. (See AF 150). The Employer argued that the Oracle Applications Team Lead position does not "solve unusual and complex problems" as completed by the Level IV wage level. See *2009 PWD Guidance* at 7.<sup>3</sup>

The Center Director concedes in its appellate brief that the *2009 PWD Guidance* requires the NPWC to exercise judgment in determining the prevailing wage. Nonetheless, the Center Director argued that "in order for the NPWC to reach the employer's desired outcome of a Level III wage, the NPWC would have to disregard the amount of experience the employer requires to perform the job duties in comparison to what is normal for the occupation, which would not be an exercise in judgment but rather a complete abandonment of any judgment at all." (Center Director's Brief at 4). The Center Director argued that the Employer failed to show how the

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<sup>3</sup> The *2009 PWD Guidance* describes Level III and Level IV wage levels as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

NPWC failed to act in accordance with the *2009 PWD Guidance* or otherwise abused its discretion in assigning the Level IV wage to the Employer's job opportunity.<sup>4</sup>

We find that the Center Director did not abuse his discretion in affirming the NPWC's assignment of a Level IV wage level for the PWD. The Employer does not contest the classification of its position under the SOC (ONET/OES) occupational title of Computer and Information Systems Managers, Occupational Code 11-3021.00. That occupation has an O\*Net Job Zone of 4. Job Zone 4 has an SVP range of SVP 7.0, up to but not including SVP 8.0. An SVP of 7.0 equates to over two years up to and including four years. The *2009 PWD Guidance* for Job Zone 4 occupations provides for the assignment of three additional wage levels when the Employer's experience and SVP range exceeds 49 months. Here, the Employer's requirement was for 60 months of experience. Thus, the NPWC clearly applied the *2009 PWD Guidance* correctly to find that the Employer's position required a PWD based on a Level IV wage level based on what is considered normal for the occupation. The Center Director's decision not to reduce the wage level based on the Employer's documentation showing that the Oracle Applications Team Lead position was an entry level management position in its IT division was not an abuse of discretion considering the Employer's five year experience requirement.

The fact that the Employer's description of the job duties states that the incumbent "Handles fundamental project management skills to coordinate tasks across application areas and manage small to mid-size projects" perhaps suggests grounds for considering whether the Level IV wage level was the correct classification for this particular job. But we note that the *2009 PWD Guidance* also says that a "requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered." Here, the experience requirement was not only at the higher range indicated by the applicable Job Zone, but well exceeded that range. Thus, we find no abuse of discretion by the Center Director in not lowering the wage level based on the fact that the position in question only requires "fundamental" project management skills and only involves management of "small to mid-sized projects."

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<sup>4</sup> The Center Director noted that the Employer argued in its request for BALCA review that under the *2009 PWD Guidance*, SVP ranges are not rigid and are fractional in many cases. (Center Director's Brief at 3, citing the Employer's request for BALCA review at AF 18). The Center Director argued that the Employer nonetheless did not show that using "fractional" boundaries for SVP ranges would cause its position to be differently categorized under the *2009 PWD Guidance*. We agree. The Employer's argument seems to be that the NPWC must use the "best available information" when determining the wage level, and because ETA's guidance concedes that SVP cutoffs use integer values rather than fractional boundaries for convenience rather than accuracy, the NPWC should have taken into consideration that the Employer's position arguably fits the lower category when more accurate fractional analysis is used. Assuming that it is true that the Employer's Oracle Application Team Lead position could "arguably" fit into a different SVP stratum because the "best information available" suggests that a fractional analysis would permit such, does not establish that the NPWC abused its discretion it selecting the SVP level based on full integers rather than the Employer's suggested fractional analysis.

## **ORDER**

**IT IS ORDERED** that the prevailing wage determination made by the National Prevailing Wage Center is hereby **AFFIRMED**.

Entered at the direction of the panel by:

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.