

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 October 2014

BALCA Case No.: 2014-PWD-00012

ETA Case No.: P-100-13266-070456

In the Matter of:

HONEYWELL INTERNATIONAL, INC.,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: Timothy Nelson, Esquire
Fragomen, Del Rey, Bernsen & Loewy, LLP
Matawan, New Jersey
For the Employer

Harry L. Sheinfeld, Counsel for Litigation
Office of the Solicitor
Washington, D.C.
For the Center Director

Before: **Price, Kennington, and Romero**
Administrative Law Judges

DECISION AND ORDER

This matter arises from a request for review of a prevailing wage determination pursuant to 20 C.F.R. § 656.41(d).

BACKGROUND

On November 8, 2011, Honeywell International, Inc. (Employer) submitted a prevailing wage request for the position of “Project Engineer IV” to the National Prevailing Wage Center (NPWC). (AF 313-17).¹ Employer suggested Occupational Informational Network (O*NET) Standard Occupational Classification (SOC) Code 17-2041, Chemical Engineers. Employer requested use of an alternate salary survey of the Houston, Texas area for 2010/2011 from Towers Watson. The Employer pointed to the survey information relative to Project Manager, Code 2022. (AF 11).

¹ In this decision, AF is an abbreviation for “Appeal File.”

On January 9, 2012, the NPWC issued a prevailing wage determination (PWD) of \$84,800 with the classification of Chemical Engineers, SOC Code 17-2041, accepting the Employer suggestion and using the provided Towers Watson survey documentation. (AF 316). Accordingly, Employer filed ETA Form 9089 for PERM certification and submitted the same survey documentation used to issue the PWD. Because the PERM application was slated to enter a period of supervised recruitment, on September 10, 2013, the Certifying Officer requested additional information because the survey documentation previously submitted had been updated. As such, the Employer was required to submit the updated job description, wage data, methodology, mapping of levels, and survey participants. (AF 318-19).

On September 11, 2013, the Employer responded to the Certifying Officer's request and submitted the recent 2013 version of the Towers Watson survey. (AF 207-317). The 2013 survey no longer held the job classification of Project Manager, Code 2022. The Employer supplied the survey information applicable to Project/Program Management Generalist/Multidiscipline, Code APM000. (AF 276).

On September 23, 2013, an updated PWD was requested using the 2013 survey provided by the Employer. The NPWC again applied the classification of Chemical Engineers, SOC Code 17-2041. However, the NPWC rejected the Employer's submitted survey information, determining that "the duties described by the survey are not a reasonable match to those listed on the application." Thus, the NPWC relied on the O*NET classification to determine a prevailing wage of \$162,074.² (AF 203).

On November 6, 2013, the PERM Certifying Officer requested information in accordance with the supervised recruitment process. The Employer was notified at that time that an updated PWD had been received from the NPWC. (AF 195-99). On November 8, 2013, the Employer requested review of the updated PWD. The Employer argued that the 2013 Towers Watson survey should have been accepted as the closest available job description to the previously accepted classification. The prevailing wage under that survey, if accepted, would be \$88,000. Alternatively, the Employer argued that an alternate survey, the Dietrich 2013 Spring Engineering Salary Survey, should be applied. The prevailing wage for Engineer 5 under the Dietrich survey would be \$90,719. (AF 77-194).

The NPWC denied the redetermination request on April 30, 2014. The denial reiterated that the job duties in the provided updated Towers Watson survey were not demonstrative of those listed on the PWD application. The NPWC also rejected the alternate Dietrich survey. The denial noted that the NPWC does not accept requests to use a new survey in a request for redetermination. (AF 75-76).

² The NPWC relied on the FLC Data Center Online Wage Library wage levels for the time period of July 2013 to June 2014. The FLC applied the following wage levels to Chemical Engineers, SOC Code 17-2041: Level 1 Wage: \$35.43 hour - \$73,694 year; Level 2 Wage: \$49.59 hour - \$103,147 year; Level 3 Wage: \$63.76 hour - \$132,621 year; Level 4 Wage: \$77.92 hour - \$162,074 year.

On May 29, 2014, the Employer requested review by the Center Director. The Employer argued that concepts of fundamental fairness require the acceptance of the alternate Dietrich survey under the circumstances of this case. The Employer further argued that the delay in the supervised recruitment process caused the initially submitted survey to lapse. Because the new survey from the same publisher did not contain the relied upon job description, Employer argued, the Department of Labor unfairly refused to consider the alternate Dietrich survey. (AF 42-74).

On June 13, 2014, the Center Director rejected the Employer's arguments. The Center Director upheld the PWD, finding that the NPWC appropriately rejected the 2013 Towers Watson survey job description and the alternate Dietrich survey. The Towers Watson job description was not representative of the Employer's job duties, and the Employer inappropriately submitted a survey from a different publisher (Dietrich) rather than submit alternative job descriptions from the same survey publisher (Towers Watson).

On June 24, 2014, the Employer requested review by the Board of Alien Labor Certification Appeals (BALCA) under 20 C.F.R. § 656.41(d). (AF 1-38). In its request for review, the Employer argued that concepts of fundamental fairness require that it deserved the opportunity to have its alternate Dietrich survey considered.

The appeal file was received and docketed on July 15, 2014. The Center Director filed a brief on October 8, 2014. The CD argued that he was prohibited from considering the Dietrich survey as it was newly submitted after the PWD had been made and that a delay of one year in processing an application does not violate concepts of fundamental fairness.

DISCUSSION

BALCA 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 CD's decision in this case to determine whether it was consistent with the applicable regulations and is a reasonable exercise of that discretion. *See RP Consultants*, slip op. at 10.

A. Whether the Center Director Should Have Considered the New Survey Evidence Submitted by the Employer

PERM regulations require an employer filing an application for permanent labor certification after January 1, 2010 to request a prevailing wage determination from the NPWC. 20 C.F.R. § 656.40(a). The regulations provide several methods by which the prevailing wage is determined. Section 656.40(b)(2) states that if there is no CBA for the job opportunity, the prevailing wage shall be the mean of the wages of workers similarly employed in the area of intended employment, as determined by the OES Survey, unless the employer provides an acceptable survey under Section 656.40(g).

If the NPWC rejects an employer's survey, as it did here, the employer has an opportunity to submit supplemental information to the NPWC pursuant to Section 656.40(h).

Under the regulations, the NPWC will consider one supplemental submission about the employer's survey. 20 C.F.R. § 656.40(h)(2). If the NPWC does not accept the survey after considering the employer's supplemental information, the employer may appeal the PWD to the CD. *Id.*

20 C.F.R. 656.41 governs reviews of prevailing wage determinations. It instructs the Center Director to "review the PWD solely on the basis upon which the PWD was made and, upon the request for review, may either affirm or modify the PWD." 20 C.F.R. § 656.41(c). Furthermore, upon BALCA review, an employer must provide "only legal arguments and only such evidence that was within the record upon which the director made his/her affirmation of the PWD." 20 C.F.R. § 656.41(d)(1).

In this case, the Certifying Officer notified the Employer on September 10, 2013 that the submitted survey was no longer valid. Rather than notifying the CO that the 2013 survey omitted the relied upon job description or providing well-matched descriptions, the Employer provided a survey job description significantly unlike its own. Further, the alternate Dietrich survey was not submitted until after the NPWC issued the updated PWD and after the Employer had the opportunity to produce its one-time supplemental submission.

As the regulations only allow one supplemental submission of evidence and the CD may only review the PWD on the basis upon which the PWD was made, anything submitted subsequently to the prevailing wage determination could not have been considered under the regulations. *See* 20 C.F.R. §§ 656.27(c), 656.40(h)(2), 656.41(c), (d)(1). In this spirit, the preamble to the regulations notes:

[T]he appeal stage of the process is not intended to serve as an avenue for the employer to submit new materials relating to a prevailing wage determination. The employer's submittal of an employer provided alternative survey... and the single opportunity to submit supplemental information to the SWA, represent the employer's only opportunities beyond the initial filing to include materials in the record that will be before the CO in the event of an employer request for review under § 656.41.

ETA Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77326, 77373 (December 27, 2004).

Accordingly, the CD properly refused to consider the Dietrich survey submitted with the Employer's request for redetermination and, as such, did not abuse his discretion.

B. Whether Concepts of Fundamental Fairness Allow Consideration of the New Survey Evidence

The Employer argued that the DOL's delay in processing the PWD and PERM applications led to the lapse of the 2010/2011 Towers Watson survey and an increase in the PWD by 91% within the course of one year. The Employer argued that the survey lapse and 91% increase violate concepts of fundamental fairness and are unreasonable.

Where supervised recruitment is directed by the CO following the CO's review of an audit response, the CO may direct the employer to obtain a current PWD. *Palm City Palms & Tropicals, Inc.*, 2011-PER-00231, slip op. at 8 (Dec. 19, 2013). Moreover, BALCA has determined that a one-year delay is not so extreme as to violate due process. *Sunshine Restaurants, LLC*, 2011-PER-01406, slip op. at 2 (Mar. 16, 2012).

Here, the Employer's application was placed in supervised recruitment approximately one year after the audit notice. Following BALCA precedent, that delay was not unreasonable. Furthermore, at that time, the Employer had the opportunity to provide appropriate recent survey information. Instead, it submitted a job description so unlike its own that the NPWC had to rely on FLC Data Center Online Wage Library to determine the prevailing wage.

We, thus, find that the processing of the Employer's PWD and PERM applications did not violate concepts of fundamental fairness.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that the appeal is **DISMISSED**.

For the Panel:

LARRY W. PRICE
Administrative Law Judge