

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 August 2015

BALCA Case No.: 2015-PWD-00001
ETA Case No.: P-100-14051-653570

In the Matter of:

BILINGUALS INC., d/b/a ACHIEVE BEYOND,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: James Geiger
Forest Hills, NY
For the Employer

Jonathan Waxman, Associate Solicitor
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: Paul R. Almanza, *Administrative Law Judge*; Stephen R. Henley,
Acting Chief Administrative Law Judge; and Larry S. Merck,
Administrative Law Judge

DECISION AND ORDER
REVERSING PREVAILING WAGE DETERMINATION

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's ("OFLC") prevailing wage determination for the position of Speech Language Pathologist.

BACKGROUND

On February 20, 2014, Bilinguals Inc. ("Employer") filed an ETA Form 9142 *Application for Prevailing Wage Determination* in connection with a permanent labor certification application for the position of Speech Language Pathologist. Administrative File

(“AF”) 217. Employer submitted the request using an employer provided wage survey, the Compdata Custom Compensation Survey (“Compdata Survey”), for use in determining the prevailing wage. AF 217. The Compdata Survey provided a median wage (*i.e.*, median wage of all workers surveyed) of \$70,000, and did not provide an arithmetic mean wage (*i.e.*, weighted average wage of surveyed employers). AF 218–38.

On April 9, 2014, the National Prevailing Wage Center (“NPWC”) issued a Request for Information (“RFI”) to the Employer indicating the employer did not submit complete survey documentation with its initial prevailing wage request. AF 216. The RFI directed the Employer to submit the Compdata Survey’s wage data for the area of intended employment, methodology, and mapping of levels. (AF 216).

On April 15, 2014, Employer responded to the request by providing two letters: a letter from the Employer explaining how the survey complied with relevant regulations, and statement from Compdata in response to the information requested in the RFI. (AF 209–15). The latter statement explained the presentation of wage data in the Compdata Survey as follows:

The survey used standard and accepted wage statistical methodology for reporting the wages. The wage data for the number of organizations reporting was used to report a Median (50th percentile) wage. Twenty-fifth percentile and 75th percentile wage figures were also calculated and reported. A weighted average wage figure could not be reported due [sic] specific rules established by the U.S. Department of Justice that no individual provider’s data may represent more than twenty-five percent on a weighted basis of that statistic.

AF 215.¹ In other words, Compdata asserted that it did not publish the arithmetic mean wage for the position because doing so would have violated guidance issued by the Department of Justice (“DOJ”) for “Statements of Antitrust Enforcement Policy in Health Care.”

That same day, the NPWC issued a prevailing wage determination based on the Level II OES wage for Speech-Language Pathologists in New York, New York, which amounted to \$72,799 per year. AF 206. The NPWC rejected the wage proposed by the Employer in the Compdata Survey on the ground that the documentation provided with the Compdata Survey “is not acceptable as the methodology presented does not provide a weighted average of wages paid to workers; it provides the average rate calculated by the number of employers.” AF 206. The Employer then submitted a redetermination request and attached the same information it had provided in response to the RFI.

On June 2, 2014, the NPWC upheld its initial wage determination, stating that pursuant to the November 2009 NPWC Guidance Document, a median wage may not be used in an

¹ Citing *August 1996 Statements of Antitrust Enforcement Policy in Health Care, Issued by the U.S. Department of Justice and the Federal Trade Commission*, available at <http://www.justice.gov/atr/public/guidelines/1791.htm> (last visited July 14, 2015) (requiring that arithmetic mean wages must not be used in healthcare industry related wage surveys if one data provider’s information comprises more than 25% of the total data).

employer provided survey when the survey company normally provides an arithmetic mean wage. AF 198.²

On June 12, 2014, the Employer submitted a request for Center Director Review, arguing that the Compdata Survey was compliant with applicable regulations and the 2009 NPWC Guidance Document, and that an employer-provided survey need not provide an arithmetic mean wage if it provides a median wage. AF 141–144. In addition, the Employer asserted that the weighted mean was not available because publishing this figure under the circumstances, where at least one of the organizations reporting wage data was responsible for more than 25% of the incumbents reported, would violate specific rules established by DOJ for the administration and publication of salary survey data. AF 144.

On August 21, 2014, the Center Director affirmed the initial prevailing wage determination based on the OES level II wage for the Speech Language Pathologist position (now \$73,715). AF 131–133. The Center Director rejected the Employer’s argument that the wage should have been based on the median wage in the Compdata Survey, noting that the employer chose not to provide the weighted average based on restrictions to meet non-DOL standards, and that the employer is not applying those same restrictions to the median wage presented in the survey. AF 132. The Center Director found that the use of the Compdata Survey was not appropriate because the regulations and NPWC guidance “specifically state the median can be used only if the arithmetic mean, or weighted average, is not available.” In concluding that the Compdata Survey was not acceptable, the Center Director noted that the Employer did not attempt to capture a bigger sample size to comply with the DOJ Guidelines, the DOL regulations, and NPWC Guidance, and that the employer could have, for example, expanded the survey’s area beyond the area of employment, New York City, for more data samples if they want to comply with all the DOJ Guidelines, the DOL regulations, and the NPWC Guidance requirements. AF 132. The Employer then appealed to BALCA pursuant to 20 CFR § 656.41(d).

DISCUSSION

Standard of Review

This Board has jurisdiction under 20 C.F.R. § 655.731(a)(2)(ii)(A)(1). We review the prevailing wage determination for an abuse of discretion. *See Emory University*, 2011-PWD-00001/2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-00001 (June 30, 2010). We will affirm the determination if it is consistent with the Immigration and Nationality Act and its implementing regulations and represents a reasonable exercise of the discretion afforded to the NPWC under the Department’s guidance and regulations. *See RP Consultants*, slip op. at 10.

² In ETA’s final affirmation of the NPWC’s prevailing wage determination, the Center Director did not argue that Compdata normally providing arithmetic mean wages was grounds for rejecting the Compdata Survey, nor was the argument raised in the Center Director’s memorandum accompanying the appeal file sent to BALCA. Because this argument was not raised in this appeal, it is not addressed here. Nevertheless, we find that the argument has no merit and is not sufficient to affirm the NPWC’s wage determination.

Regulations and Guidance

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

If the job opportunity is not covered by a [collective bargaining agreement] CBA, *the prevailing wage for labor certification purposes shall be the arithmetic mean, except as provided in paragraph (b)(3) of this section, of the wages of workers similarly employed in the area of intended employment.* The wage component of the DOL Occupational Employment Statistics Survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey under paragraph (g) of this section.

20 C.F.R. § 656.40(b)(2) (emphasis added). The above-referenced exception in paragraph (b)(3) provides:

If the employer provides a survey acceptable under paragraph (g) of this section that provides a median and does not provide an arithmetic mean, the prevailing wage applicable to the employer's job opportunity shall be the median of the wages of workers similarly employed in the area of intended employment.

20 C.F.R. § 656.40(b)(3). The November 2009 NPWC Guidance Document interprets this exception as follows:

The prevailing wage determination should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment. *If the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, the median wage shall be used as the basis for making a prevailing wage determination.*

(emphasis added). And Appendix F of the November 2009 NPWC Guidance Document further elaborates: "The survey should produce an arithmetic mean (weighted average) of wages for workers in the appropriate occupational classification in the area of intended employment. If a mean is not available, a median can be used."

Analysis

The Center Director does not assert that the Compdata Survey is deficient on any grounds under § 656.40(g). AF 131–33. Rather, the NPWC Director rejected the Compdata Survey because it provided a median wage for Speech-Language Pathologists in New York City, and not an arithmetic mean. The issue in this appeal, therefore, is limited to whether the NPWC Director abused his discretion when he affirmed the initial prevailing wage determination based on the level II OES wage for Speech-Language Pathologists in New York City, rather than the median

wage in the Compdata Survey, based solely on the ground that the Compdata Survey could have provided an arithmetic mean but did not.³

Neither the applicable regulations nor the guidance document require an employer-provided survey to offer the arithmetic mean wage whenever the data to do so may be available. There is also no regulation or guidance that requires an employer provided survey to take extra measures to ensure that the arithmetic mean wage is offered. The regulation simply states that if an employer provides a survey acceptable under § 656.40(g), and that survey provides a median and does not provide an arithmetic mean, then the prevailing wage applicable to the employer's job opportunity "shall be the median of the wages of workers similarly employed in the area of intended employment." 20 C.F.R. § 656.40(b)(3). This regulation does not limit or restrict situations in which an employer-provided survey may offer a median instead of an arithmetic mean, as long as the employer-provided survey is acceptable under § 656.40(g). In fact, it appears to limit the NPWC's discretion to reject an employer-provided survey on this basis; it specifies that when an employer-provided survey acceptable under § 656.40(g) provides a median and does not provide an arithmetic mean, then "the prevailing wage applicable to the employer's job opportunity *shall be* the median of the wages of workers similarly employed in the area of intended employment." 20 C.F.R. § 656.40(b)(3) (emphasis added).

Like the applicable regulations, the November 2009 NPWC Guidance Document does not afford the Center Director any discretion to reject an otherwise qualifying employer-provided survey on the basis that it does not provide an arithmetic mean. The NPWC guidance simply states that "if the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, *the median wage shall be used* . . ." November 2009 NPWC Guidance Document at 15 (emphasis added). Appendix F of the guidance instructs that an employer-provided survey "should be based on the arithmetic mean," but it goes on to state that "if a mean is not available, a median can be used." This instruction places no additional requirements or limitations on the use of a median as an alternative to the arithmetic mean.

The Center Director argues that the phrase "not available" in Appendix F should be interpreted to require that an employer-provided survey provide an arithmetic mean whenever the organization that commissioned the survey has access to the data required to calculate the arithmetic mean. (AF 131-33). We decline to defer to this interpretation. The phrase "not available" should not be read to impose an independent, otherwise unmentioned, requirement that an employer-provided survey must offer the arithmetic mean if the NPWC determines that the data to do so is available. Rather, it should be interpreted consistently with the terminology in the regulation at section 656.40(b)(3), which uses the word "provide." The NPWC cannot rely on an appendix to the guidance document to usurp the directive of a regulation promulgated in compliance with formal rulemaking procedures. *See Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (invalidating guidance that significantly broadened rule passed

³ For purposes of a prevailing wage determination, a median wage is the middle wage of all employees surveyed. The arithmetic mean wage is the average wage of all employers surveyed, weighted to account for the relative size of each employer.

under formal rulemaking). Here, the Center Director's interpretation of Appendix F contradicts the clear directive in § 656.40(b)(3) that the median wage in an otherwise qualifying employer-provided survey *shall be used* if that survey does not *provide* an arithmetic mean.

Based on the forgoing, we find that the Center Director abused his discretion in upholding the NPWC's rejection of the employer-provided survey based on the absence of the arithmetic mean wage. There is no basis in the regulations or NPWC guidance for finding that employer-provided surveys are required to offer the arithmetic mean whenever the Center Director concludes that the data needed to do so was available, particularly where, as in this case, the Center Director arrives at this conclusion without an adequate explanation.⁴

ORDER

The prevailing wage determination made by the Center Director is hereby REVERSED, and this matter is REMANDED to the Center Director for further processing consistent with this order.

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

⁴ The Center Director suggested that the employer should have commissioned a survey with an expanded sample size beyond the area of employment, New York City. This would not only have resulted in diluting the wage, but would have not been consistent with the mandate in the regulation that the wage be the arithmetic mean (or median) of the wages of workers similarly employed in the *area of intended employment*, New York City.

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.