



Issue Date: 21 April 2015

Case No.: 2015-CBV-00001

In the Matter of:

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

Before: Stephen R. Henley
Acting Chief Administrative Law Judge

ORDER DENYING MOTION TO DISMISS

This matter arises from an Order of Reference for a “substantial variance” hearing under Section 4(c) of the McNamara-O’Hara Service Contract Act (“SCA”), 41 U.S.C.A. § 6707(c) and the implementing regulation at 29 C.F.R. § 4.10. The matter presently before the undersigned is Corrections Corporation of America (“CCA”)’s motion to dismiss. The motion is based on the contention that the SCA does not permit the Secretary of Labor to replace a collectively bargained wage with a higher prevailing wage, and therefore the Order of Reference for a substantial variance hearing was not authorized by the SCA under the circumstances of this matter. (CCA motion to dismiss at 1-2) (footnote omitted). The Administrator, United States Department of Labor, Wage and Hour Division (“Administrator”) and the United Government Security Officers of America (“UGSOA”) oppose the Motion to Dismiss.

CCA argues that under 41 U.S.C. § 6707(c), the substantial variance process is only for “situations involving the transition from one service contract to another to ensure that employees receive wages and benefits under a successor contract that are on par with what they received under the predecessor contract.” (CCA motion to dismiss at 2). CCA argues that in the instant matter, the contractor and the Service Contract have not changed, and therefore the substantial variance procedure does not apply. CCA, however, “acknowledges that the Department of Labor regulations consider a ‘new’ contract to come into existence whenever a government agency exercises its right to extend the contract for an option period. *See* 29 C.F.R. § 4.145(a).” (CCA’s motion to dismiss at 7, n.6). CCA’s argument is essentially that the regulations are invalid in regard to how they define successor contracts and contractors. An ALJ does not have inherent or express authority to rule on the validity of a regulation implementing the SCA. *See Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993) (en banc) (BALCA decision applying analysis of *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984)). CCA’s challenge to the

legal validity of the regulations is not a matter I have the authority to decide. Based on the facts as presented in the pleadings, I find that sufficient facts have been alleged to create a justiciable issue on whether a successor contract is subject to modification based on a substantial variance, and to therefore proceed with the substantial variance hearing. *See also Am-Gard, Inc.*, 2006-CBV-1 (ALJ Jan. 19, 2006), slip op. at 12, appeal dismissed on grounds of mootness *Am-Gard, Inc.*, ARB Nos. 06-049, 06-050, ALJ No. 2006-CBV-1 (ARB July 31, 2008) (ALJ's finding that 29 C.F.R. § 4.163(e) explains that section 4.163(c) is applicable to a successor contract without regard to whether the successor contract was also the predecessor contractor, and as such a contractor can be its own successor if it renegotiates its contract with the union).

CCA also argues that the Administrator has the authority to issue an Order of Reference for a substantial variance hearing only where it is alleged that the predecessor wages are above the prevailing wage in the same locality for similar services. CCA relies principally on the decision of the Fourth Circuit in *Gracey v. Int'l Bhd. of Elec. Workers, Local Union No. 1340*, 868 F.2d 671 (4th Cir. 1989). The problem with CCA's argument is that the United States Department of Labor, Administrative Review Board ("ARB") has expressly declined to acquiesce in the *Gracey* decision outside the Fourth Circuit.

In *United Government Security Officers of America, Local 114*, ARB No. 02-012 (ARB Sept. 29, 2003), the Acting Administrator, Wage and Hour Division, had denied UGSOA's request for substantial variance hearings based on the Fourth Circuit's *Gracey* decision under factual circumstances similar to those presented in the instant matter. The ARB refused to give deference to the Acting Administrator's acquiescence to the *Gracey* decision because, other than citing *Gracey*, he had "offer[ed] no explanation as to why the Administrator has abandoned a 'long-standing' policy permitting substantial variance hearings when, as here, the CBA wage rate was lower than the prevailing wage rate." USDOL/OALJ Reporter at 5. The ARB noted that, after the *Gracey* decision had been issued, the ARB's predecessor, the Board of Service Contract Appeals, "held, under essentially similar facts, that union members were entitled to be paid the higher prevailing wage rate. *See Randall*, No. 87-SCA-32, slip op. at 8 (Dec. 9, 1991). Moreover, the BSCA also examined an Administrative Law Judge's finding that only CBA wage rates which exceed the prevailing wage rate are "unjustifiable" and thus subject to a substantial variance finding under Section 4(c). That Board held that the ALJ's finding 'does not comport with the plain meaning of the statute.' *See Applicability of Wage Rates Collectively Bargained by United Healthserv, Inc.*, No. 89-CBV-1, slip op. at 15 (Feb. 4, 1991)." The ARB thus vacated the Acting Administrator's rulings denying UGSOA's requests for substantial variance hearings, and remanded for further proceeding consistent with the ARB's decision.

I am bound by the ARB's decision in *United Government Security Officers of America, Local 114*, ARB No. 02-012. *See* Secretary's Order 02-2012, ¶ 5.b., *Delegation of Authority and Assignment of Responsibility to the Administrative Review Board*; *see also Am-Gard, Inc.*, 2006-CBV-1, *supra*, slip op. at 11-12 (ALJ's finding that he had the authority to decide substantial variance proceeding based on the ARB's rejection of *Gracey* outside the Fourth Circuit); *U.S. Protect, Inc.*, 2006-CBV-2 (ALJ Mar. 7, 2006), slip op. at 3.n.3 (ALJs must apply ARB's interpretation of Section 4(c) in cases outside the Fourth Circuit). I note that CCA's motion to dismiss did not address the ARB's decision in ARB No. 02-012, and contains no argument as to why it is not binding on the Administrator and the undersigned ALJ.

Based on the foregoing, **IT IS ORDERED** that

1. CCA's motion to dismiss is **DENIED**.
2. The stay of the substantial variance hearing is **VACATED**.
3. A Notice of Hearing will be issued forthwith.

SO ORDERED:

STEPHEN R. HENLEY
Acting Chief Administrative Law Judge