



Date Issued: January 23, 2002

Case No. 2001-LCA-31

In the Matter of:

FARGO VA MEDICAL CENTER,
Appellant/Employer

v.

**EMPLOYMENT AND TRAINING
ADMINISTRATION,**
Appellee

Before: JOHN M. VITTONI
Chief Administrative Law Judge

DECISION AND ORDER

This action arises from Fargo VA Medical Center's ("VA") request for a hearing on a wage determination made by the Employment and Training Administration ("ETA") as requested by the Wage and Hour Administration pursuant to 20 C.F.R. § 655.731(d), during the course of an investigation into Appellant's H-1B labor condition application for the position of Cardiologist. Both parties have stipulated that only legal issues remain in the case and jointly request that the hearing be waived and a decision be made on the existing record.

Statement of the Case

In January, 2001, the Department of Labor's Wage and Hour Division began an investigation of the Fargo VA Medical Center, under the H-1B provisions of the Immigration and Nationality Act, due to a complaint made by a nonimmigrant alien employed as a physician at the VA facility. The Wage and Hour Division determined the VA's documentation of the prevailing wage failed to conform with the regulatory criteria and sought a prevailing wage determination from the Employment and Training Administration ("ETA"), pursuant to 20 C.F.R. §655.731(d). The ETA determined the prevailing wage, and on July 2, 2001, the VA requested a hearing before this tribunal as provided for in 20 C.F.R. §658.421.

Issues

The VA has raised two issues before this tribunal. The first is whether the VA, as part of the U.S. Department of Veterans' Affairs, is subject to the prevailing wage requirement for H-1B nonimmigrant aliens contained in 20 C.F.R. Part 655, Subpart H. The second issue is whether the ETA utilized the correct data in arriving at the prevailing wage.

Discussion

Issue 1

The VA has proffered the following arguments to suggest it is not subject to the prevailing wage requirements under 20 C.F.R. Part 655, Subpart H, regarding H-1B nonimmigrant aliens. First, the VA contends it does not qualify as "an employer" under 20 C.F.R. §655.731. The regulations define an employer as "...a person, firm corporation, contractor, or other association or organization in the United States..." The VA argues that as an executive department of the United States, it does not fall under any of these definitions.

Second, the pay scale for the employees of the VA has been specifically set out by Congress in 38 U.S.C. § 7404. According to the VA, this statute represents "a waiver of sovereign immunity" and may only be changed through the legislative process. Furthermore, the VA contends Congress would have stated the VA is subject to the prevailing wage requirements if it had intended for it to be. Instead Congress specifically stated the Secretary of Veterans Affairs will determine employee compensation in the Department of Veterans Affairs and this determination will not be subject to review by any other agency. 38 U.S.C. §7422 (d)(3).

Third, the VA pays all of its employees, whether American citizens or nonimmigrant aliens, according to the set statutory rate. The prevailing wage as set by ETA for the LCA is more than the salary set by statute. 42 U.S.C. § 2000e-2(a)(1) states it is unlawful to discriminate against an individual with respect to his compensation due to his or her national origin. In order to pay nonimmigrant alien physicians the ETA prevailing wage for an LCA, the VA would have to violate the civil rights of its American citizen physicians by paying them a lower salary based solely on their national origin.

The ETA has responded to all of these arguments by challenging this court's authority to determine this issue. The ETA argues this court's role in this case is narrowly defined by the regulations to determine if the ETA made a proper wage determination. Therefore, the issue of whether the VA is an "employer" required to pay the prevailing wage has been improperly brought before this court and should be decided in another forum. The ETA contends the responsibility for the enforcement of employer obligations lies with the Wage & Hour Division, and the issue of employer status should be brought up in the proceeding before that body. Wage & Hour proceedings are placed on hold until a prevailing wage is determined by the ETA.

The ETA concludes by pointing out that a decision by this tribunal regarding "employer status" would be "superfluous" because the Administrative Review Board is currently reviewing a similar case and issue. Specifically, in *Administrator, U.S. Department of Labor, Wage and*

Hour Division v. Dallas Veterans' Affairs Medical Center, 1998-LCA-0003 (June 19, 2001), Administrative Law Judge Kerr discussed a VA medical facility's status as an employer and held that the Dallas VA had to pay the prevailing wage.

After carefully reviewing subparts H and I of Part 655, I find this court's only role at this time and place in the proceeding is to determine if the ETA properly determined the prevailing wage. In §655.731(d)(2) the regulations state:

In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. (See 20 CFR part 658, subpart E.)

In §655.731(d)(2)(i) the regulations state:

Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30 day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system.

The VA has challenged the prevailing wage determination in the instant case, and the regulations make it clear that this is to be a separate proceeding, and the only issue to be determined is whether the ETA determined a proper prevailing wage. *See Drazin v. USDOL, Employment and Training Administration*, 2001-JSA-3, 2001-LCA-9 (ALJ July 5, 2001)(declining to consider arguments that the ETA had ratified an adjustment of the LCA wage and that the equitable considerations should be considered in determining whether to hold Employer to the ETA determined prevailing wage rate.) Therefore, the VA's arguments regarding its status as an "employer" are not relevant.

The VA's arguments challenging the authority of the Department of Labor to enforce its regulations are also irrelevant to the prevailing wage issue and beyond the scope of this court's authority to address. Section 658.425(a)(4), governing the decisions of an administrative law judge during an Employment Service complaint hearing, states an administrative law judge may "[r]ender such other rulings as are appropriate to the issues in question. However, the DOL Administrative Law Judge shall not have jurisdiction to consider the validity or constitutionality of JS regulations or of the Federal statutes under which they are promulgated."(emphasis added). Section 655.840(d), governing the decisions of an administrative law judge during an enforcement proceeding of a labor certification application, states "the administrative law judge shall not render determinations as to the legality of a regulatory provision..." The clear language of these regulations prevents me from ruling on the authority of the Department of Labor to enforce the prevailing wage regulations.

With regard to the possibility that the DOL regulations may conflict with civil rights law, I find that I am again restrained from considering such an issue. In *Dearborn Public Schools*, 1991-INA-222 (Dec. 7, 1993)(*en banc*), the Board of Alien Labor Certification Appeals ("BALCA") held that BALCA is not authorized to rewrite or invalidate a regulation if there is a

conflict with another federal law. Although this is a H-1-B case, I find BALCA decisions to be a persuasive authority due to the similarity of the BALCA regulations.¹

Issue 2

The second issue in the case is whether the ETA utilized the correct data in arriving at the prevailing wage. The VA contends the ETA inappropriately used the salaries for physicians in the Fargo area to compare salaries. The VA argues there is a distinction between private sector and federally employed VA physicians, and the ETA should have used other physicians' salaries that are working within the "Department of Veterans Affairs' network of health care facilities" when it made its prevailing wage determination. The VA's only support for this position is that the Department of Labor apparently did not object to the VA's use of other federal VA physician salaries when it initially filled out the H-1B applications. The VA argues this initial acceptance of this wage calculation method should estop the Department of Labor from presently rejecting it.

In its brief, the ETA challenges the VA's argument that it should be subject to a different prevailing wage determination method than other employers. The ETA cites to two BALCA cases in support of their position.

In *Hathaway Children's Services*, 1991-INA-388 (Feb. 4, 1994)(*en banc*), BALCA held:

the term "similarly employed" does not refer to the nature of the Employer's business as such; on the contrary, it must be determined on the basis of similarity of the skills and knowledge required for the performance of the job offered

In *Hunter Holmes McGuire Veterans Affairs Medical Center*, 1994-INA-00210 (October 7, 1996)(*en banc*), the Board noted the labor certification regulations "do not provide an exception, either express or implied, for a Federal wage schedule..." As in the instant case, *Hunter Holmes* involved the Department of Veterans' Affairs and the hiring of an alien physician.

The VA has pointed to no case law or regulation to support its position, and I find the ETA's authority to be persuasive. In particular, *Hunter Holmes* appears to be directly on point since it also involves a physician employed by the Department of Veterans' Affairs. As to the VA's estoppel argument, I find no case law or regulation that prevents the ETA from making a wage determination at this time. In fact, the ETA appears to be set up as a check for just such a purpose as has occurred in the instant case. Accordingly, the ETA made a proper wage determination in this proceeding.

Finally, ETA's acceptance of the LCA does not create a circumstance supporting application of estoppel against the agency. The regulations make it clear that ETA's role in

¹56 FR 54722 (October 21, 1991) states prevailing wage determinations in H-1B cases shall be made in a like manner as regulations currently governing the permanent alien labor certification program. Accordingly, this court finds BALCA decisions persuasive when determining this issue.

accepting and processing LCA's is primarily ministerial. At section 655.740, ETA's review of the LCA for purposes of issuing the certificate is restricted to determining if the document is incomplete or obviously inaccurate. ETA does not evaluate whether the LCA prevailing wage attestation actually satisfies the actual prevailing requirement. *See Drazin, 2001-JSA-3 (ALJ May 30, 2001).*

Order

For the reasons stated above, I find the ETA correctly calculated the prevailing wage. This case is forwarded to the Wage & Hour Division for the next appropriate action in the enforcement proceeding.

JOHN M. VITTONI
Chief Administrative Law Judge