

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210



JUL 13 2007

Mr. Andrew Aiken
4140 Eagle Nest Drive
Evans, GA 30809-4810

Dear Mr. Aiken:

This is in response to your request for a final ruling on a proposed conformance under the McNamara-O'Hara Service Contract Act (SCA) for Biomedical Engineering Technicians (BMETs) employed by ITS Medical Systems to perform under U.S. Department of Army Reserve Command (the Army) Contract Number DAKI 10-01-C-0005 at Fort McCoy, Wisconsin; Fort Gordon, Georgia; and Fort Dix, New Jersey. You sought approval of a conformance action to add the BMET classification at \$20.41 per hour and the Senior BMET classification at \$22.95 per hour plus fringe benefits to the wage determination (WD) issued under the SCA for the referenced contract, which was awarded on July 12, 2001 and commenced on September 1, 2001.

As you know, you had sought review of this matter with the Department of Labor's Administrative Review Board (Board), which dismissed your petition on the ground that the Board has no jurisdiction to consider the petition because the petition did not reference a final ruling. *In the Matter of: Andrew Aiken*, ARB No. 07-017, slip op. at 9 (Apr. 23, 2007). As indicated in the Motion to Dismiss, the Wage and Hour Division (WHD) has treated your petition to the Board as a request for a final ruling on the conformance request, and the Board remanded the case to the agency for further consideration. *Id.*

Before addressing the merits of the conformance request in this case, it is important to first consider the framework of the conformance process. Under the SCA, every contract entered into by the United States in excess of \$2,500, the principle purpose of which is to furnish services through the use of service employees, must contain a provision specifying the minimum monetary wages and fringe benefits to be paid the various classes of service employees in the performance of the contract as determined by the Department of Labor in accordance with the prevailing rates for such employees in the locality. 41 U.S.C. § 351(a). Where a class of work is performed on the contract but is not covered by any of the classes of workers listed on the applicable WD, the contractor initiates the conformance process to add the classification to the WD. The conformance regulations at 29 C.F.R. §§ 4.6(b)(2) and 4.152 provide both procedural and substantive guidelines for adding a job classification to a WD that applies to a particular SCA-covered contract.

Two general requirements for any conformance action are particularly relevant to this matter. First, a conformed class may be added to the WD provided that the work to be performed is not within the scope of any classification listed on the WD, regardless of job title. 29 C.F.R. §§ 4.6(b)(2)(i), 4.152(c)(1). Second, a conformance action cannot be used to take two or more

classes listed in the WD and combine them into a new classification to be conformed or propose a new classification that performs only part of the duties of an existing classification. *Id.* at 4.6(b)(2)(i), 4.152(c)(1).

It should be noted at the outset that the WHD never received a properly completed conformance request for this contract. The conformance request that the contracting officer submitted on September 15, 2005, was deficient in several ways.

First, Standard Form (SF) 1444 submitted on September 15, 2005, was deficient as to the locations for which the conformance was sought. The locations listed in section 12 of the SF 1444 included Fort Polk, Louisiana; Fort McCoy, Wisconsin; Camp Parks, California; Fort Gordon, Georgia and Fort Dix, New Jersey. The proposed conformance, however, listed only the WD for Wisconsin, i.e., WD 1994-2577 (Rev. 28). Further, although there was some indication that the proposed conformance was also intended to cover the BMETs working at Fort Gordon, Georgia, the conformance submission did not indicate whether employees at any of the other locations also believed that they were misclassified and that their positions should be conformed. We note that the petitioners' appeal to the Board was only on behalf of similarly affected employees at Fort McCoy, Fort Gordon, and Fort Dix.

Second, the proposed conformed occupations listed in section 13a of the September 15, 2005, SF 1444 (Electronic Technician, Maintenance (ETM) II and III) were classifications listed on the identified WD 1994-2577 (Rev. 28) applicable to Wisconsin. Furthermore, the proposed conformed wage rates were identical to the corresponding wage rates on that WD for ETMs II and III for Wisconsin. Although the SF 1444 contained language requesting that two classifications be listed as "BMET in lieu of ETM II" and "Senior BMET in lieu of ETM III," the SF 1444 did not list any new proposed wage rate for a BMET or a Senior BMET. On October 3, 2005, the Chief of the Branch of Service Contract Wage Determinations, Nila Stovall, denied the proposed conformance for ETMs II and III because it was not demonstrated that the work performed by BMETs was outside the scope of the work of the ETM classification that was already listed on the applicable WD. *See* 29 C.F.R. § 4.6(b)(2).

As the record indicates, the BMETs, in particular those at Fort Gordon, Georgia, were dissatisfied with their wage rates and pressed for further investigation. As a result, the WHD opened an investigation to determine whether the employees at Fort Gordon were properly classified and paid in accordance with the applicable WD. Had the investigation findings indicated that the BMETs at Fort Gordon were misclassified or that their occupations needed to be conformed, the investigation would have been expanded to cover the other locations covered under the contract. In this case, however, the investigation found that the largest percentage of the BMETs' time was spent performing ETM duties. The employees' duties fit within the definition in the *Service Contract Act Directory of Occupations*, 4th Edition, occupational base description for ETM (code 23180), which was in effect at the time of the conformance request and the initial denial dated October 3, 2005. The 4th Edition of the Directory specifically states that the ETM "maintains repairs, troubleshoots, modifies and installs various types of electronic equipment and related devices such as . . . medical . . . equipment." (Emphasis added.)¹ Under the SCA, "a proposed classification need not be conformed merely because it does not fit

¹ The ETM occupational base description is virtually the same in the current (5th) edition of the *Directory*.

precisely within the definitional contours of preexisting wage determination classifications, so long as it is 'within the scope' of any such classification." *In the Matter of CACI, Inc.*, Deputy Secretary of Labor Case No. 86-SCA-OM-5, slip op. at 23 (Mar. 27, 1990). The duties described by the Petitioners and found by the investigation (in addition to work on medical equipment), including knowledge of computer systems, networking and software, and knowledge of medical terminology and human anatomy, fit within the scope of the Directory's ETM occupational base definition, and support a ruling that the BMETs at Fort Gordon are properly classified as ETMs and need not be conformed.

The WHD investigation also revealed that the BMETs' remaining duties were covered by several other classifications listed on the applicable WD. For instance, among the duties listed as applicable to BMETs were "knowledge of refrigeration and heating; installing servicing and repairing blood refrigerators and air conditioning units," which the investigator determined could be classified as "Heating, Refrigeration, and Air Conditioning Mechanic," at a rate of \$17.34 per hour. For the duties listed as "knowledge of machinery and fabrication to repair tempertents and milvans. Use drill presses, calipers, power saws in cutting sheet metal, drilling holes for rivets, grinding metal," the investigator listed as possible classifications, "Sheet Metal Worker," at the rate of \$15.94 per hour or "General Maintenance Worker" at \$17.34 per hour. Under the SCA regulations, if during a workweek a service employee works in different capacities in the performance of the contract and two or more rates of compensation under the WD are applicable to the classes of work that he or she performs, the employee must be paid the highest of such rates for all hours worked unless it is clear from the employer's records or otherwise which of such hours were spent in each class of work. 29 C.F.R. § 4.169. Because the wage rate that Fort Gordon BMETs were paid equaled or exceeded the highest WD rate for all of the occupations under which the various duties were performed--the ETM II and III rates--the conclusion was reached that the employees were properly paid in accordance with 29 C.F.R. § 4.169. Consequently, there were no SCA violations.

In light of the deficiencies in the September 15, 2005, conformance request, the results of the WHD investigation, and in accordance with the SCA and its implementing regulations, I reaffirm the October 3, 2005, denial of the proposed conformance.² This letter constitutes our final ruling on this matter. You may appeal this ruling pursuant to 29 C.F.R. Part 8 to the Administrative Review Board. Any such petition for review should be filed within 60 days of the date of this

²The original petition to the Board also argued that the wage rates of Federal employees should be considered. However, this argument is inapplicable where the classifications at issue do not meet the criteria for conformance action. Wage rates of Federal employees may be considered only *after* it has been determined that a conformance is needed; they may be used as one guide to the appropriate wage rates. See 29 C.F.R. § 4.6(b)(2)(iv)(A). This was explained to you by William Gross, Director, Division of Wage Determinations, in his e-mail of December 2, 2005. Cf. *In the Matter of Cobro Corp.*, ARB No. 997-104, slip op. at 8-9 (July 30, 1999) (describing the process of adding a classification where it has been determined that such is needed).

letter and forwarded to Ms. M. Cynthia Douglass, Chair, Administrative Review Board, U.S.
Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C. 20210.

Sincerely,

A handwritten signature in cursive script that reads "Paul DeCamp".

Paul DeCamp
Administrator

cc: John V. Berry, Esq.
Sara C. Vins, Esq.
Alfred E. Moreau, Labor Advisor
Department of the Army