UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERNATIONAL UNION UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA,

Plaintiff,

v.

ELAINE L. CHAO, et al.,

Defendants.

No. C01-1230Z

ORDER

BACKGROUND

Plaintiff, a labor union representing Court Security Officers ("CSO") working in courthouses in the Ninth Judicial Circuit, filed a complaint for declaratory judgment and injunctive relief in this Court. See Complaint, docket no.1. In the complaint, Plaintiff asks this Court to enter a declaratory judgment that Defendants, the United States Department of Labor ("DOL") and the United States Marshall Service ("USMS"), have violated the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 351 *et seq.* ("SCA," or "the Act"), and DOL regulations promulgated thereunder at 29 C.F.R. part 4 by the USMS's issuance of, and DOL's approval of, a Request for Proposal ("RFP") No. MS-00-R-005 in contravention of Section 4(c) of the SCA, 41 U.S.C. 353(c).

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On September 13, 2000, the USMS awarded contract MS-01-D-0002 for CSO services in the Ninth Circuit to Akal Security, Inc. ("Akal"). See Joint Stipulation of Facts ("JSF"), at ¶ 1, docket no. 23. The contract went into effect on October 1, 2000, and expired on September 30, 2001. JSF at ¶ 3, docket no. 23. The contract provided for an initial term from October 1, 2000, through September 30, 2001, with four one-year option periods running from October 1, 2002, through September 30, 2005, which could be exercised unilaterally by USMS. Id. The SCA was applicable to this contract.

The applicable wage determinations issued by DOL for the first year of the contract reflected the wages and fringe benefits provided by the CBA between United International Investigation Services ("UIIS") and the International Union United Government Security Officers of America ("UGSOA"). See JSF ¶ 5, docket no. 23. UIIS was the contractor performing the contract immediately preceding Akal Security. See JSF ¶ 2, docket no. 23. The collective bargaining agreements ("CBA") between UIIS and UGSOA provided wage rates and fringe benefits for security officers at 28 cities within the area covered by the Ninth Circuit. For each of these cities, the Wage and Hour Division determined and issued wage determinations requiring that the new contractor, Akal, pay no less than the CBA rates of the predecessor contractor, UIIS. JSF at ¶ 16, docket no. 23. These wage determinations applied to the first year of the subject contract. Id.

In March 2001, in the course of its CBA negotiations with UGSOA for wage and fringe benefits rates to be effective beginning October, 1, 2001, (which was the start of the first option period of Contract MS-01-D-0002) Akal proposed rates below those in the CBA between UGSOA and the predecessor contractor, UIIS, at some locations under the contract. See JSF at ¶ 7, docket no. 23. When UGSOA informed Akal of its view that Section 4(c) of the SCA required that wages and fringe benefits for the first option period under the subject contractor be at least equal to those of the predecessor contractor, Akal stated that the USMS 2000 RFP guidelines in RFP No. MS-00-R-005 indicated at Section B-1(e) that "[t]he

contractor will not be required to maintain wages and benefits provided under a [previous] CBA." See JSF at ¶ 8, docket no. 23.

Despite this difference in interpretation of Section 4(c) of the SCA, UGSOA signed a CBA with Akal in May, 2001, agreeing, beginning with the first option period of the contract, to the payment of some wage and fringe benefits below those of the predecessor contractor. See JSF at ¶ 10, docket no. 113.

DISCUSSION

Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the opposing party must show that there is a genuine issue of fact for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must present significant and probative evidence to support its claim or defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991). For purposes of the motion, reasonable doubts as to the existence of material facts are resolved against the moving party and inferences are drawn in the light most favorable to the opposing party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000).

Plaintiff's complaint challenges the Defendants' interpretation of Section 4(c) of the SCA, which is reflected in the regulations implementing the Act. Since this is a purely legal issue, it is particularly appropriate for resolution by summary judgment.

Pursuant to 5 U.S.C. 706(2)(A), this Court may set aside the decision of the Administrative Review Board only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." See Camp v. Pitts, 411 U.S. 138, 142 (1973). Under this standard, a court may not substitute its judgment for that of the agency, but must

affirm the agency's decision if it was reasonable or rationally based. Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974). Morever, under Chevron U.S.A. v. Natural Resource Defense Council, 467 U.S. 837 (1984), judicial deference to an agency's interpretation of a statute committed to it for administration is required if, in the absence of clear and unambiguous indication of Congressional intent, the agency has construed the statute reasonably. Tovar v. United States Postal Serv., 3 F.3d 1271, 1276 (9th Cir. 1993).

Under Chevron, the Court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. 837, 842-843 and n.9. "If the statute is silent or ambiguous" on the issue, then the court must determine "whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. v. Natural Resource Defense Council, 467 U.S. at 843. In the present case, Plaintiff bears the burden of proving that the DOL's interpretation of the applicable statutes and regulations conflicts with the statutory scheme. Id. at 843-44.

A. Is Section 4(c) of the SCA, 41 U.S.C. 353, silent or ambiguous?

Section 4(c) of the SCA states:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of an arm's-length negotiations, to which service employees would have been entitled if they were employees under the predecessor contract: Provided that, in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in locality.

Defendants argue that this provision is ambiguous "given the ambiguity created by the various [other] provisions of the SCA." Defendants' Memorandum at 17, docket no. 22. However, under Chevron, the court must *first* look to "whether Congress has directly spoken

to the precise question at issue" and if "the intent of Congress is clear," the court's inquiry should end, "for the Court as well as the Agency must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-843. Defendants attempt to circumvent the first step of the Chevron analysis by asking the Court to look past the plain language of Section 4(c) and focus on various other provisions of the SCA.

Here, the first issue is whether Congress's intent to require the application of the wages and fringe benefits from pre-existing collective-bargaining agreements as a minimum for wages and fringe benefits is clear and unambiguous on the face of Section 4(c). The answer to this question, based on the language of Section 4(c), is yes. Simply put, the language of Section 4(c) could not more clearly express Congress's intent to prevent the exact type of wage-undercutting that is at issue in this case. In fact, Defendants even concede that the language of 4(c) is unambiguous by stating "[b]y focusing solely on the language in Section 4(c), Plaintiff's argument has some superficial appeal." Defendants' Memorandum at 12, docket no. 22.

Additionally, the regulations, 29 CFR 4.163(a), discuss Section 4(c) of the SCA and state that "[u]nder this provision, the successor contractor's sole obligation is to insure that all service employees are paid no less than the wage and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective bargaining agreement." Further, 29 CFR 4.16(b) emphasizes the clear nature of 4(c)'s mandate stating: "This is a direct statutory obligation and requirement placed on the successor contractor by Section 4(c) and is not contingent or dependant upon the issuance or incorporation in the contract of a wage determination based on predecessor contractor's collective bargaining agreement."

The legislative history surrounding the SCA generally, as well as Section 4(c) specifically, also clearly expresses Congress's intent to prevent wage-undercutting. Specifically, the House and Senate Reports accompanying the Act state:

> Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages. See H.R.Rep. No. 89-948, at 3-4 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3737, 3739.

Plaintiff Amended Motion at 8, docket no. 27.

However, implementation of the SCA was not completely successful early on as new contractors were refusing to recognize existing CBA's and thus existing service employees were being forced to take wage cuts if they wanted to keep their jobs. Plaintiff's Amended Motion, at 8, Appendix A (citing to Congressional Oversight Hearings: The Plight of the Service Worker Revisited, Report of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor House of Representitves, 94th Cong 1, p. 3 (1975), docket no. 27. In order to ensure that employees would not lose their bargained-for benefits, Congress amended the SCA in 1972, adding Section 4(c). Id. (Appendix A, p. 7). Thus, Section 4(c) was enacted to prohibit successor contractors from paying wages lower than those bargained for in a collective bargaining agreement. S.Rep. No. 92-1131 (1972), *reprinted in* 1972 U.S.C.C.A.N, 3534. The Senate Report on the amendments states that Section 4(c) was enacted to "assur[e] that employees working for service contractors under a collective bargaining agreement will have wages and fringe benefits under a new service contract no lower than those under their current agreement." Id. (emphasis added).

Finally, this exact issue has been addressed by the District Court for the District of Columbia in an unpublished opinion, American Maritime Officers v. Hart, C.A. No. 99-1054(WBB) (D.D.C. Oct. 14, 1999; copy attached to Plaintiff's Amended Motion, Appendix B, docket no. 27). In Maritime, the Court asked: "Does Section 4(c) of the SCA, as amended, require a successor contractor to pay wages and fringe benefits no lower than those provided

for in the predecessor contractor's contract for the full term of the contract?" Id. at 6. The Court concluded that the SCA's statutory language and legislative history clearly require a successor contractor to comply with the wages set forth in a predecessor CBA for the full term of the agreement. Id. at 7-8. The Court said, "Section 4(c) speaks in terms of a *contract*. Section 4(d) obviously contemplates the multi-year contract as a single contract when it refers to the periodic adjustment 'every two years during the term of *the contract*.' The successor contract provision obviously provides a floor for the wages and benefits." Id. at 7 (emphasis original).

The Maritime Court recognized that "[t]he legislative history clearly reveals Congress did not want wages cut as the result of a new contract, and Section 4(c) of the statute articulates that determination in unmistakable terms." Id. Thus, the Court concluded that "in accordance with the teaching of Chevron U.S.A. v. Natural Resource Defense Council, 467 U.S. 837, 842 (1983) 'Congress has directly spoken to the precise question at issue,' and 'the intent of Congress is clear,' so the Court's inquiry should be at an end, 'for the Court as well as the Agency must give effect to the unambiguously expressed intent of Congress.' Id. at 842-43." Maritime, at 8.

Defendants counter that Maritime, in addition to being unpublished, failed to address the interplay between sections 2(a), 4(c), and 4(d) of the SCA. Additionally, Defendants cite to the Fifth Circuit's opinion in Fort Hood Barbers Assoc. v. Herman, 137 F.3d 302 (5th Cir. 1998) where the Fifth Circuit found that the Secretary did not act arbitrarily and capriciously in interpreting the SCA regulations so as to find that the service employees were not entitled to wages and benefits provided for in the predecessor's CBA. However, Fort Hood is factually distinguishable from the present case. Fort Hood addressed a wage determination scenario, one of the exemptions to Section 4(c)'s applicability, and not wage-undercutting (as here and in Maritime). Further, as Defendants themselves point out, "[i]nstead of incorporating the wage rates and benefits provided in the predecessor contractor's CBA, the wage determination

reflected prevailing wage rates and benefits for the locality because the successor contractor had not entered into a CBA with its employees during the first two year term." Defendants' Memorandum at 17, docket no. 22.

In the present case, during the first option period[1], Akal paid some wage rates and fringe benefits below those in the CBA previously negotiated between UGSOA and UIIS at some locations. These wages and benefits were also below those paid during the first year of the contract between UGSOA and Akal. This violated Section 4(c) of the SCA as a matter of law.

CONCLUSION

Because Section 4(c) of the Act, 41 U.S.C. 353(c), is a clear and unambiguous expression of Congress's intent to prohibit wage undercutting, the Court GRANTS Plaintiff's motion for summary judgement, docket no. 27, and DENIES Defendants' motion for summary judgment, docket no. 22.

IT IS SO ORDERED.

DATED this 19th day of December, 2002.

THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

[1]Defendants argue that a reading of the SCA as a whole reveals that each option period is to be interpreted as a new contract for purposes of Section 4(c). See Defendants' Memorandum at 12, lines 11-26, docket no. 22. However, regardless of whether an option period is viewed as a new contract, Section 4(c) requires that wages and fringe benefits - at a minimum - equal those under the predecessor contract. Accordingly, the Secretary's argument, in addition to being less than clear, does not require a different result.