

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 27 March 2012

BALCA Case No.: 2011-PWD-00003

ETA Case No.: P-200-1101-238963

In the Matter of:

UNIVERSITY OF WISCONSIN-OSHKOSH,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: Matthew J. Lind, Esquire
Office of General Counsel, University of Wisconsin
Madison, Wisconsin
For the Employer

Gary M. Buff, Associate Solicitor
Stephen R. Jones, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **Colwell, Johnson and Vittone**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING PREVAILING WAGE DETERMINATIONS

PER CURIAM. This matter arises from the Employer's appeal pursuant to 20 C.F.R. §§ 655.731(a)(2)(ii)(A)(1) and 656.41 of the Employment and Training Administration,

Office of Foreign Labor Certification's prevailing wage determination relating to the Employer's application for H-1B temporary labor certification.

BACKGROUND

On January 11, 2011, the University of Wisconsin-Oshkosh ("Employer") filed a prevailing wage determination ("PWD") request with the Office of Foreign Labor Certification National Prevailing Wage Center ("NPWC") for the position of "Psychologist/Lecturer." (AF 86-105).¹ The Employer provided the suggested Standard Occupational Classification ("SOC")/ Occupational Informational Network ("O*Net") code as 25-1066.00, corresponding to the occupation title "Psychology Teachers, Postsecondary." (AF 86). The Employer provided the following summary of the position's duties:

Teach a course in Multicultural Counseling in Psych. Department and other courses as assigned for a total of six courses/year. Provide direct psychological services for university students: assessment services, mental health, career and academic, and multi-cultural counseling. Provide crisis intervention services for students presenting urgent needs, provide EAP services for employees, expertise and consultation to Center staff re: multicultural issues related to counseling services and outreach; assist in keeping Center staff updated re: standards in the field with regard to multicultural counseling; train center staff periodically on multicultural and diversity issues; supervise graduate practicum students when requested by the coordinator of training; serve as a liaison between Psychology and Counseling Center to enhance dialogue and collaboration; provide group counseling services as needed; assist Office of International Education with orientation, trouble-shooting and communicating with the families of International Students; evaluate professional instruments and tools for addressing the needs of women and multicultural students.

(AF 87). The Employer stated that the position required a Doctorate degree, 48 months of training, and 12 months of experience. (AF 88). In an addendum to its PWD request, the Employer stated that the training that was required was "a completed PhD from an APA accredited training doctoral program in clinical or counseling psychology and an APA accredited internship." (AF 90). The Employer stated that the occupation

¹ In this decision, AF is an abbreviation for Appeal File.

experience required “includes a one year full-time paid internship and several (often unpaid) one or two semester training internships.” *Id.*

The Employer also attached a letter to its PWD request, urging that the position be classified either as “Clinical, Counseling, and School Psychologists,” (O*Net SOC Code 19-3031) or “Psychology Teachers, Postsecondary” (SOC Code 25-1066). (AF 91-92). The Employer argued that both of these occupations fall within Job Zone Five, which requires extensive preparation, and that the wage level that should be assigned to this position is a Level 2. (AF 91). The Employer added that although the position involves supervision, an extra wage level should not be added, because the supervision is of graduate students, which is a clinical teaching function. *Id.*

The Certifying Officer (“CO”) issued a PWD on February 2, 2011. (AF 78). The CO assigned the position the SOC (ONET/OES) occupation title “Clinical, Counseling, and School Psychologists,” SOC (ONET/OES) code 19-3031.00. *Id.* The CO determined that the wage level for the position was level 3, with a prevailing wage of \$64,900 per year. *Id.* The CO indicated that because the occupation code 19-3031 did not have an American Competitiveness and Workforce Improvement Act (“ACWIA”) Higher Education wage available through OES, the wage for “Psychology Teachers, Postsecondary” was used, because is the closest occupation with an ACWIA Higher Education wage entry. *Id.*

On February 28, 2011, the Employer submitted a redetermination request for the prevailing wage, arguing that the PWD for the Psychologist/Lecturer position should be a level 2 wage. (AF 72-73). On March 16, 2011, the CO affirmed the PWD. (AF 66-71). The CO determined that the job duties encompass both teaching and practicing psychologist duties and therefore are a combination of the “Clinical, Counseling, and School Psychologist” occupation and “Psychology Teachers, Postsecondary” occupation. (AF 66). The CO determined that pursuant to the Department of Labor’s *Prevailing Wage Determination Policy Guidance, November 2009* (“2009 PWD Guidance” or “PWD Guidance Letter”), the occupation with the highest wage is used to assign the wage and SOC code. *Id.* The CO also determined that an additional wage level is added because the position entails a combination of duties, and another wage level is added

because the Employer's training and experience requirement is at the low end of the experience range. *Id.*

The Employer submitted a request for review to the Center Director ("CD") on March 22, 2011. (AF 43-65). The Employer argued that the CO improperly added a wage level based on the amount of training required for the position. (AF 43-44). The Employer argued that the position requires no more education or training than a clinical Ph.D., which requires approximately 48 months of vocational training. (AF 44). The Employer contended that the position should either be assigned a level 1 or level 2 wage. (AF 45).

The CD affirmed the CO's determination on June 7, 2011, finding that a level 3 wage was properly assigned. (AF 41-42). The CD found that an additional wage level was properly added to the level 1 base wage level because the position entails a combination of duties. Additionally, the CD stated that another wage level was properly added because the position requires a total of 60 months of non-educational preparation. *Id.* As 60 months is on the low end of the experience range for Job Zone Five, an additional wage level was properly added, for a total wage level of 3. *Id.*

On July 5, 2011, the Employer requested BALCA review of the CD's determination. (AF 1-40). The CD forwarded the administrative file to the Board on August 3, 2011, and BALCA issued a Notice of Docketing on September 12, 2011. The Employer and counsel for the CD filed their legal briefs on October 12, 2011.

On appeal, the Employer reiterates its argument that the 48 months of training that is required is part of the required coursework for a clinical or counseling psychology Ph.D. program. Similarly, the Employer reiterates that the 12-month experience requirement is also a requirement to obtaining a doctoral degree, so should not be counted as "non-educational preparation." Accordingly, the Employer requests a level 2 wage.

Counsel for the CD contends that the CD properly determined that the Employer's 48-month training requirement and 12-month experience requirement were separate from the doctoral education requirement. The CD argues that the Employer has not presented any evidence that the training or experience were components of the Ph.D. program for psychology. Because the 60 months of required training and experience are at the low

end of the specific vocational preparation (“SVP”) range, the CD asserts that it was proper to add an additional wage level. In addition, the CD argues that it was proper to add another wage level because the job duties are combination of the two occupations and constitute “Special Skills.”

DISCUSSION

Standard of Review

The Board applies an abuse of discretion standard to the Center Director’s or Administrator’s decision on an employer’s appeal of a prevailing wage determination. *See Emory University*, 2011-PWD-1 and 2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-1 (June 30, 2010). Accordingly, we will review the CD’s decision in this case to determine whether it was consistent with the applicable regulations and is a reasonable exercise of that discretion. *See RP Consultants*, slip op. at 10.

CD’s Determination Regarding the Wage Level

The Employment and Training Administration (“ETA”) has issued *2009 PWD Guidance*, which outlines a step-by-step, standardized approach for determining the appropriate wage level for the job opportunity.²

The Employer contends that the CD’s assignment of Wage Level 3 is erroneous. According to the procedure provided in the *2009 PWD Guidance*, every occupation begins at wage level 1, which is considered an entry-level wage. *See PWD Guidance Letter* at 8. The *2009 PWD Guidance* explains that the employer’s requirements for experience, education, training, and special skills are compared to those generally

² Although both parties have framed their positions in terms of the process outlined in the *2009 PWD Guidance Letter*, the document was not included in the Appeal File. The *Guidance Letter* is issued by ETA and is made available to the public. We find that it is appropriate to take administrative notice of the *Guidance Letter*. 29 C.F.R. §§ 18.45 and 18.201; *Albert Einstein Medical Center*, 2009-PER-379, slip op. at 9-13 (Nov. 21, 2011)(en banc); Employment and Training Administration, Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs (2009), www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

required for the occupation as described by O*Net,³ and will be used as indicators that the job opportunity is for an experienced (Level 2), qualified (Level 3) or fully competent (Level 4) worker, thereby warranting a PWD at a higher wage level. *Id.* Accordingly, when determining the wage level, a point (or level) is added based on: 1) experience, 2) education, 3) special skills and other requirements, and 4) supervisory duties. *2009 PWD Guidance* at 9-13.

1. Experience

The *PWD Guidance Letter* states that for Job Zones 2 through 5, the wage level is not increased if the experiential requirements of the position are at or below the level of experience and SVP range. *2009 PWD Guidance* at 10. The wage level is increased by one if the employer requires experience in the low end of the experience and SVP range and increased by two if the employer requires experience in the high end of experience and SVP range. *Id.* The wage level is increased by three if the employer's experience requirement is greater than the experience and SVP range. *Id.*

In this case, the occupation of "Clinical, Counseling, and School Psychologists"⁴ is classified as O*Net Job Zone 5, and the SVP range for the position is 8.0 and above. (AF 103). The PERM regulations provide that an SVP level of 8 corresponds to "over 4 years up to and including 10 years" of experience. 20 C.F.R. § 656.3. The Employer in this case requires 48 months of training and 12 months of experience, for a total of 60

³ O*Net is a database containing information on hundreds of standardized and occupation-specific descriptors. O*Net job descriptions contain several standard elements, one of which is a "Job Zone." An O*Net Job Zone "is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work." The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. Each Job Zone level specifies the applicable specific vocational preparation ("SVP"). See www.onetonline.org/help/online/zones. SVP is defined under the PERM regulations as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation." 20 C.F.R. § 656.3.

⁴ Although the CO assigned occupation title "Clinical, Counseling, and School Psychologists," SOC code 19-3031 to the position, the CO stated that because there was no ACWIA Higher Education Act wage data for this occupation, the wage would be based on the occupation title "Psychology Teachers, Postsecondary," SOC code 25-1066, because an ACWIA wage exists for this occupation. (AF 89).

months of experience. This requirement is on the low end of the O*Net experience and SVP range, necessitating an increase in the wage level by one point.

While the Employer argues that the 48-month training requirement and 12-month experience requirement are requisites for a Ph.D. in psychology, there is no evidence in the record to support the Employer's position. Without any documentation demonstrating that the 12-month experience requirement and 48-month training requirement are components of the doctoral degree, the Employer's argument is unavailing.⁵ See *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(en banc) (Bare assertions without supporting reasoning or evidence are generally insufficient to carry and employer's burden of proof).

Based on the foregoing, we find that the CD properly increased the initial wage level by one, resulting in a level 2 wage.

2. Education

The PWD Guidance Letter refers to Appendix A to the preamble of the PERM regulations as a reference for determining how much education is generally required for a professional position. *2009 PWD Guidance* at 10. The *PWD Guidance Letter* provides that for professional occupations, if the education required is equal to or less than the usual education contained in Appendix D of the *PWD Guidance Letter*, no points are added for education. *Id.* Appendix D states that a doctoral degree is normal for the occupation of "Clinical, counseling, and school psychologists." As the Employer's position requires a Ph.D. in Counseling or Clinical Psychology, no additional points are added for education. *Id.*

3. Special Skills and Other Requirements

The *PWD Guidance Letter* provides that an additional wage level can be added if a job requires skills that are beyond those of an entry-level worker. *2009 PWD Guidance* at 11-12. Specifically, the Guidance Letter provides:

⁵ Assuming the Employer's position is correct, it is not clear why the Employer felt it was necessary to include both the Ph.D. requirement and the training and experience requirements on the PWD Request form.

In situations where the employer's requirements are not listed in the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, then the requirements should be evaluated to determine if they represent special skills. The requirement of a special skill not listed in the O*NET does not necessitate that a point be added. If the specific skills required for the job are generally encompassed by the O*NET description for the position, no point should be added. However, if it is determined that the requirements are indicators of skills beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column.

Id. Here, the CD stated that it added a wage level because the Employer's duties are combination of the "Psychology Teachers, Postsecondary" and of "Clinical, counseling, and school psychologists."

The Employer's "Psychologist/Lecturer" position involves both teaching six academic courses per year and providing direct psychological services. Neither the "Psychology Teachers, Postsecondary" nor the "Clinical, counseling, and school psychologists" occupations encompass both of these specific skills. We find that because the teaching job duties and skills are not encompassed by the "Clinical, counseling, and school psychologists" occupation, the CO did not abuse his discretion in determining that special skills are required for this position. Accordingly, it was proper to add a wage level for the additional teaching duties.

4. Supervisory Duties

Under the *2009 PWD Guidance Letter*, one point is added if the job opportunity entails supervision of workers, unless supervision is a customary duty for the O*Net occupation, *e.g.*, managerial positions. *2009 PWD Guidance* at 13. This position only involves supervision of students, not workers, and it was proper that the CD did not add an additional wage level based on supervisory duties.

Based on the foregoing, we affirm the CD's PWD determination in this matter.

ORDER

IT IS ORDERED that the prevailing wage determination made by the Certifying Officer is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

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

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.