No. 22-12974-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOSE PEREZ, *et al.*,

Plaintiffs-Appellants,

v.

OWL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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JOSE PEREZ, *et al.* v. OWL, INC., Case No. 22-12974-JJ

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

To the Secretary's knowledge at this time, the following persons and entities have or may have an interest in the outcome of this appeal:

1. Administrative Review Board, U.S. Dep't of Labor
2. Ausley & McMullen, PA (Attorneys for Defendant-Appellee)
3. Baker, David A. (U.S. Magistrate Judge)
4. Brand, Jennifer S. (Associate Solicitor, U.S. Dep't of Labor)
5. Bremer, Celeste F. (U.S. Magistrate Judge)
6. Britt, Marci Elaine (Attorney for Defendant-Appellee)
7. Burrell, Thomas H. (Administrative Appeals Judge, Administrative Review Board, U.S. Dep't of Labor)
8. Cotney Attorneys & Consultants (Attorneys for Defendant-Appellee)
9. Dorminey, Elizabeth K. (Attorney for Defendant-Appellee)
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12. Goldberg, Rachel (Counsel for Appellate Litigation, U.S. Dep't of Labor)
13. Haynes, James A. (former Administrative Appeals Judge, Administrative Review Board, U.S. Dep't of Labor)
14. Heffner, Katherine A. (Attorney for Defendant-Appellee)
15. Kelly, Gregory J. (U.S. Magistrate Judge)

16. Leslie, Heather C. (former Administrative Appeals Judge, Administrative Review Board, U.S. Dep't of Labor)
17. Lichten & Liss-Riordan, PC (Attorneys for Plaintiffs-Appellants)
18. Lindstrom, Eric Jacob (Attorney for Plaintiffs-Appellants)
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20. Marcus, Sarah K. (Deputy Associate Solicitor, U.S. Dep't of Labor)
21. Mendoza, Carlos Eduardo (U.S. District Court Judge)
22. MLB Transportation, Inc.
23. Nanda, Seema (Solicitor, U.S. Dep't of Labor)
24. Owl, Inc. (Defendant-Appellee)
25. Perez, Jose (Plaintiff-Appellant)
26. Pinilla, Gabriel Damian (Attorney for Defendant-Appellee)
27. Prelogar, Elizabeth (Solicitor General, U.S. Dep't of Justice)
28. Richey, Douglas (Plaintiff-Appellant)
29. Romhilt, Dean A. (Senior Attorney, U.S. Dep't of Labor)
30. Santos, Alfredo (Plaintiff-Appellant)
31. Schneider, Les A. (Attorney for Defendant-Appellee)
32. Solomon Law Group, PA (Attorneys for Defendant-Appellee)
33. Stine, James Larry (Attorney for Defendant-Appellee)
34. Tilton, Anthony (Attorney for Defendant-Appellee)
35. Wage & Hour Division, U.S. Dep't of Labor

36. Walsh, Martin J. (Secretary of Labor & potential *amicus curiae*)

37. Weber, Ben (Attorney for Plaintiffs-Appellants)

38. Weil, David (former Administrator, Wage & Hour Division, U.S. Dep't of Labor)

39. Wimberly Lawson Steckel Schneider & Stine, PC (Attorneys for Defendant-Appellee)

To the Secretary's knowledge at this time, no publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ Dean A. Romhilt
DEAN A. ROMHILT

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

The Secretary of Labor ("Secretary") files this brief as *amicus curiae* in support of Plaintiffs-Appellants. This Court should reverse the district court's ruling on a motion in limine that Plaintiffs-Appellants were prohibited from arguing that the applicable Service Contract Act wage rate for the work that they performed was their "regular rate" of pay for purposes of calculating the overtime pay due them under the Fair Labor Standards Act.

INTEREST AND AUTHORITY

The McNamara-O'Hara Service Contract Act ("SCA") requires that employers that enter into covered contracts with the federal government to perform services pay employees performing the service work at least the prevailing wage rates for the work. The Secretary or his delegate determines those prevailing wage rates, 41 U.S.C. 6703(1), and the Secretary generally administers and enforces the SCA, 41 U.S.C. 6707 (there is no private right of action). The Fair Labor Standards Act ("FLSA") requires covered employers to pay non-exempt employees who work over 40 hours in a workweek overtime pay "at a rate not less than one and one-half times the regular rate at which [the employees are] employed" for those hours worked over 40. 29 U.S.C. 207(a)(1). The Secretary generally administers and enforces the FLSA, 29 U.S.C. 204, 211(a), 216(c), 217, (private parties may also bring enforcement actions, 29 U.S.C. 216(b)). The FLSA's overtime pay requirements apply to non-exempt employees who work on SCA-covered contracts.

One issue in this appeal is the district court's ruling on a motion in limine that Plaintiffs-Appellants may not argue that the applicable SCA wage rate for the work that they performed was their "regular rate" of pay for purposes of calculating the overtime pay due them under the FLSA. Because the Secretary administers and enforces both the FLSA and the SCA, he has a strong interest in

the proper judicial interpretation of these statutes. The longstanding position of the Department of Labor ("Department") – set forth in its regulations and sub-regulatory guidance – is that an employee's regular rate used to calculate overtime pay due under the FLSA cannot be lower than any minimum wage to the which the employee is entitled under any applicable federal, state, or local law, including the SCA. The district court's ruling on the motion in limine, however, did not address, and was contrary to, the Department's position. In this circumstance, the Secretary has a strong interest in ensuring that the Department's position, as well as the reasons why the district court's ruling was erroneous, are before this Court as it considers this appeal.

Federal Rule of Appellate Procedure 29(a) authorizes the Secretary to file this brief.

STATEMENT OF THE ISSUE

Whether the regular rate used to calculate overtime pay due under the FLSA to employees working on an SCA-covered contract is the statutorily-required prevailing wage due them under the SCA, as determined by the Department for the work performed, when that prevailing wage is higher than the wage actually paid to them.

STATEMENT OF THE CASE

Defendant-Appellee Owl, Inc. ("Owl") contracts with the Department of Veterans Affairs ("VA") to provide non-emergency transportation services to patients, at least some of whom are in wheelchairs or require stretchers, to and from VA medical facilities. Owl's contracts are covered by the SCA. Owl employs drivers to provide these services using minivans or vans supplied by Owl, at least some of which have been specially outfitted to accommodate patients in wheelchairs or on stretchers. Plaintiffs-Appellants are or were drivers for Owl. Owl provides the drivers with their scheduled assignments for the day either the evening before or the morning of, and occasionally there are same-day changes to the schedule. Owl treated the drivers as "taxi drivers" for purposes of the SCA and paid the drivers at the prevailing wage rate for taxi drivers (about $10 to $11 per hour). Owl did not pay the drivers the overtime pay required by the FLSA when they worked over 40 hours in a workweek.

1. The Department's Determination that the Drivers Should Be Classified as Shuttle Bus Drivers under the SCA.

Following an investigation, the Department made a final determination that Owl incorrectly classified its drivers in the Atlanta area as "taxi drivers" under the SCA and should have instead classified them as "shuttle bus drivers (van drivers)," who are entitled to a higher SCA prevailing wage rate than taxi drivers.

Specifically, the Department's Wage and Hour Division ("WHD") investigated the Atlanta-area operations of Owl and MLB Transportation, Inc. ("MLB"), a related company that also employed drivers on contracts with the VA. WHD determined that the companies' drivers there were improperly classified as taxi drivers for purposes of determining the applicable SCA prevailing wage and should be classified as "shuttle bus drivers (van drivers)," who were entitled to a higher prevailing wage under the applicable SCA wage determination (about $15 per hour). Owl and MLB sought review of that determination by WHD's Branch of Service Contract Act Wage Determinations ("Branch"). In their submissions to the Branch, Owl and MLB argued that the drivers should be classified as taxi drivers and raised several other issues. The Branch affirmed the determination that the drivers should be classified as shuttle bus drivers and rejected the other arguments raised. Owl and MLB sought review and reconsideration of the Branch's decision by the WHD Administrator, arguing in their submissions that the drivers should be classified as taxi drivers under the SCA, among other arguments.

On June 17, 2016, the WHD Administrator issued a decision ("WHD Administrator Decision") affirming that the drivers should be classified as shuttle bus drivers and not taxi drivers and rejecting the other arguments raised by Owl

and MLB.[1] In the decision, the WHD Administrator reviewed the descriptions for the "taxi driver" and "shuttle bus driver (van driver)" classifications in the SCA Directory of Occupations published by the Department. WHD Administrator Decision at 5-6.[2] Comparing these descriptions to the drivers' duties, the WHD Administrator affirmed that the shuttle bus driver classification was the "most appropriate" classification because it was "plainly . . . a better fit given the overlap between the drivers' duties and the duties for shuttle bus driver listed in the Directory of Occupations." *Id.* at 6. The WHD Administrator noted that he had more information before him regarding MLB's contract with the VA, but the WHD Administrator explained that "nothing in the more limited record regarding Owl warrants a different conclusion" regarding its drivers' classification. *Id.*[3]

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[1] A copy of the WHD Administrator Decision is available in the Addendum to this brief.

[2] The SCA Directory of Occupations is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/SCADirectVers5.pdf (the relevant classifications are on page 123). Excerpts from the Directory of Occupations, including page 123, can also be found at ECF No. 107-4.

[3] Under the SCA, the Department periodically issues and updates wage determinations setting forth the prevailing wage rates for various job classifications in various geographic areas. Because the applicable wage determination in the Atlanta area did not contain a prevailing wage rate for the shuttle bus driver classification, the Branch had applied to the drivers the prevailing wage rate for the "light truck driver" classification contained in the wage determination. The WHD Administrator affirmed the Branch's application of the prevailing wage rate for light truck drivers because shuttle bus drivers and light truck drivers were in the same occupational category and were treated as the same grade under the Federal Wage Grade System. WHD Administrator Decision at 8-9.

Owl and MLB sought review of the WHD Administrator Decision by the Department's Administrative Review Board ("Board" or "ARB"), to which the Secretary has delegated authority to issue final decisions on his behalf in SCA matters. Secretary's Order No. 01-2020 (Feb. 21, 2020), 85 Fed. Reg. 13,186 (Mar. 6, 2020) (delegating such authority to the Board); *see also* 29 C.F.R. 4.56(b). On February 13, 2020, following briefing, the Board issued a final decision, ruling that the WHD Administrator's conclusion that the "drivers' duties overlap[] with that of Shuttle Bus Driver is reasonable." *MLB Transp., Inc. & Owl, Inc. v. Administrator, Wage & Hour Div.*, No. 2016-0078, 2020 WL 1151010, at *5 (ARB Feb. 13, 2020) (citing the descriptions of the taxi driver and shuttle bus driver classifications in the SCA Directory of Occupations). The Board added that, "[c]omparing the duties listed with those in [the shuttle bus driver classification], we cannot conclude that the Administrator erred in refusing to reclassify [the] drivers as taxi drivers." *Id*. Owl and MLB have not sought judicial review of the Board's final decision.

2. The Drivers' Lawsuit and the District Court's Ruling.

In 2017, several drivers filed a nationwide collective action and class action lawsuit against Owl in the district court seeking to recover pay due them and other drivers pursuant to the FLSA's overtime pay requirements and pursuant to a breach of contract claim. ECF No. 1. The drivers who filed the lawsuit performed work

on an SCA-covered contract between Owl and the VA in the Orlando area, but the drivers sought to include, and represent as a collective and a class, Owl's drivers nationwide, including drivers who worked on Owl's contracts in Georgia. *Id.* at ¶¶ 1, 3, 8-11, 13, 36, 40-41. Throughout the proceedings, the parties and the district court repeatedly characterized the drivers as providing non-emergency transportation of patients, at least some of whom were in wheelchairs or on stretchers, to and from VA facilities. *See*, *e.g.*, ECF No. 107 at 6; ECF No. 108 at 1, 3-4; ECF No. 151 at 1. Moreover, Owl has acknowledged that "[t]he SCA occupational classification issue and the VA's scope of services in the Atlanta contract by MLB and [the] Orlando contracts by Owl are the same." ECF No. 107 at 10; *see also id.* at 24 (again acknowledging that they are "the same").

The drivers alleged that Owl violated the FLSA by failing to pay them overtime, and as part of that claim, they specifically asserted that the regular rate for purposes of calculating the overtime pay due them should be the correct prevailing wage rate applicable to them under the SCA for the work performed. ECF No. 1 at ¶¶ 46-55. The drivers also alleged that the SCA's prevailing wage requirements were part of their employment contracts with Owl and that Owl breached those contracts by failing to pay them the SCA prevailing wage for the "ambulance driver" classification (about $17 per hour), which the drivers asserted was the correct classification for them. *Id.* at ¶¶ 56-63.

The parties filed summary judgment motions (ECF Nos. 107 & 108), and Owl also filed a motion in limine seeking to prohibit the drivers from submitting "evidence of any rate other than the rate actually paid and received during their employment with Owl" in support of their claim for overtime pay under the FLSA, ECF No. 117 at 1. On May 17, 2019, the district court issued an order deciding the motions. ECF No. 151. The district court granted summary judgment to Owl on the drivers' breach of contract claim. *Id.* at 3-6. The district court found that: Owl promised to pay the drivers at the specific taxi driver rate, Owl's promise did not incorporate the requirements of the SCA, Owl paid them at the taxi driver rate, and thus Owl did not breach the contracts. *Id.* at 4-5. The drivers argued that Owl's promise could not be enforced because the taxi driver rate was lower than the rate required by the SCA. In rejecting this argument, the district court recognized that a contract cannot abrogate an employee's right to receive statutory wages due but explained that an employee's recourse in that circumstance is the remedy available under the statute, in this case the SCA. *Id*. at 5-6. Because the SCA may only be enforced by the Department and does not allow for a private right of action, the district court found that the drivers were "limited to enforcing the terms of their employment agreements, which [did] not incorporate the SCA." *Id.* at 6; *see also id.* at 5-6 ("[The drivers] may be correct that, if the Department of Labor opted to enforce a mis-categorization under the SCA, the employment agreements could not

abrogate the SCA's requirements. But, [the drivers] are not permitted to bring such an enforcement action.").

Regarding the drivers' FLSA claim, Owl asserted that some drivers were exempt from the FLSA's overtime pay requirements, and the drivers sought summary judgment that they were not exempt. ECF No. 151 at 6-7. The district court ruled that there were disputed facts on this issue and denied summary judgment. *Id*.

The district court granted Owl's motion in limine seeking to prohibit the drivers "at trial from arguing that the rate that should be used to calculate any overtime is the SCA rate, instead of the rate that they were actually paid." ECF No. 151 at 8. The district court's rationale for granting the motion in limine consisted of the following two sentences: "In light of the Court's analysis on [the drivers'] breach of contract claim, the Court agrees with [Owl]. [The drivers] do not have the ability to enforce the SCA rates, and therefore, they cannot use such rates as the basis of their overtime claims." *Id.* The district court's ruling effectively meant that any overtime pay under the FLSA awarded by the court would be calculated using the taxi driver rate as the regular rate.[4]

[4] At the time of the district court's decision, the Department's administrative determination that the drivers should be classified as shuttle bus drivers under the SCA was on appeal at the Board. In their summary judgment filings, the drivers argued that they should have been classified and paid as ambulance drivers under the SCA. ECF No. 108 at 12-14. And Owl argued that the Department's

Following the district court's decision, the drivers sought interlocutory review by this Court of the grant of summary judgment against them on their breach of contract claim. The district court certified their request for interlocutory review, ECF No. 157, but this Court denied their petition for permission to appeal with one dissent, ECF No. 158.[5] The parties then engaged in further discovery, trial preparation, and lengthy settlement discussions that ultimately culminated in a settlement. Pursuant to the settlement, Owl agreed to pay $350,000 in unpaid overtime and liquidated damages under the FLSA and attorneys' fees, and the parties agreed that the drivers could preserve and pursue on appeal their arguments that the district court erred in granting Owl's motion in limine and in granting summary judgment to Owl on the breach of contract claim. ECF No. 216. The district court approved the settlement, ECF No. 218, and entered judgment consistent with the settlement, ECF No. 219. The drivers filed a timely notice of appeal. ECF No. 220.

SUMMARY OF ARGUMENT

The Department's longstanding position – set forth in 29 C.F.R. 778.5 and sub-regulatory guidance and applied by numerous courts – is that an employee's

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administrative proceeding would moot the drivers' breach of contract claim if the Board were to rule that the drivers should be classified and paid as taxi drivers under the SCA. ECF No. 107 at 9-10, 24-25.

[5] This Court's case number for the drivers' petition for permission to pursue an interlocutory appeal was 19-00011-E.

regular rate used to calculate overtime pay due under the FLSA cannot be lower than any minimum wage to the which the employee is entitled under any applicable federal, state, or local law, including the SCA. In other words, an employee's regular rate when calculating overtime pay due under the FLSA is the wage rate at which the employee is lawfully employed. Thus, if an employee is actually paid a wage that is less than the SCA prevailing wage rate to which the employee is entitled, as was the case here, the employee's regular rate when calculating FLSA overtime pay due must be the SCA prevailing wage rate. When an employer violates the law by failing to pay both the minimum wage to which its employees are entitled and the overtime pay required by the FLSA, the employer should not get the benefit of its minimum wage violation when calculating the overtime that it owes to its employees for the FLSA violation. To conclude otherwise, as the district court did, would reward an employer for violating the SCA by carrying that unlawful wage rate over to overtime pay calculations under the FLSA, and thereby deprive employees of the full overtime compensation to which they are due under the FLSA. Such a result would be contrary to the statutory purposes of the FLSA.

The district court erred in ruling that the drivers may not use the SCA prevailing wage rate applicable to them as "the basis" of their FLSA overtime pay claims. Contrary to the district court's suggestion, the drivers' overtime pay

claims are entirely based in the FLSA, and using the SCA prevailing wage rate as the FLSA regular rate in this case is based solely on the general FLSA principle that an employee's regular rate cannot be lower than the minimum wage due under any applicable federal, state, or local law. Moreover, the district court's rationale – that the SCA lacks a private right of action – provides no support for its ruling. There is no reason why the calculation of the regular rate under the FLSA for purposes of an employee's FLSA overtime pay claim hinges on whether the employee has a separate private right of action under the statute that prescribes the applicable minimum wage, particularly where, as here, the Department has determined the applicable minimum wage under that statute.

ARGUMENT

1. The Regular Rate for Purposes of Calculating Employees' Overtime Pay under the FLSA May Not Be Less than the Minimum Wage Required under Any Applicable Federal, State, or Local Law, Including the SCA.

The SCA does not require payment of overtime but recognizes that employees covered by the SCA may be entitled to overtime pay under other laws, such as the FLSA. 41 U.S.C. 6707(e) (providing that "fringe benefit" payments required by the SCA "are excluded from the definition of 'regular rate'" under the FLSA when "determining any overtime pay to which a service employee is entitled"); *see also* 29 C.F.R. 4.180 (The SCA "does not provide for compensation of covered employees at premium rates for overtime hours of work. [It]

recognizes, however, that other Federal laws may require such compensation to be paid to employees working on or in connection with contracts subject to the [SCA]."); 29 C.F.R. 4.181(a) ("[C]ontractors and subcontractors performing contracts subject to the McNamara-O'Hara Service Contract Act may be required to compensate their employees working on or in connection with such contracts for overtime work pursuant to the overtime pay standards of the Fair Labor Standards Act."); *Lee v. Flightsafety Servs. Corp.*, 20 F.3d 428, 431 (11th Cir. 1994) (rejecting argument that the FLSA does not apply to SCA-covered employees and holding that "Congress intended that the FLSA overlap with other federal legislation" and "[t]he FLSA and other statutes are not mutually exclusive").

The FLSA provides that overtime pay due an employee shall be paid at a rate "not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(1). The FLSA defines "the 'regular rate' at which an employee is employed" to "include all remuneration for employment" paid to the employee except eight specific categories of payments not at issue here. 29 U.S.C. 207(e).

The Department has issued interpretive regulations providing guidance on determining the regular rate and calculating overtime pay due employees under the

FLSA. 29 C.F.R. Part 778.[6] Although the regular rate is usually the rate "actually paid" to the employee, 29 C.F.R. 778.108, and for an employee "employed solely on the basis of a single hourly rate," it is generally that hourly rate, 29 C.F.R. 778.110(a), the employee's regular rate must be at least the FLSA's minimum wage even if the employee is actually paid a lower wage, 29 C.F.R. 778.107. And for situations where there is an applicable law requiring payment of a higher minimum wage, the Department's regulations clearly provide that the regular rate may not be lower than the minimum wage to which the employee is entitled under any federal, state, or local law that requires payment of the higher minimum wage:

> Various Federal, State, and local laws require the payment of minimum hourly, daily or weekly wages different from the minimum set forth in the Fair Labor Standards Act . . . . Compliance with other applicable legislation does not excuse noncompliance with the Fair

[6] The Department's interpretations of the FLSA in these regulations and related sub-regulatory guidance should be given deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (The Department's rulings, interpretations, and opinions under the FLSA, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *see also Gelber v. Akal Security, Inc.*, 14 F.4th 1279, 1281 & n.1 (11th Cir. 2021) (FLSA interpretive regulations issued by the Department concerning hours worked, which are analogous to 29 C.F.R. Part 778, "are entitled to *Skidmore* deference—that is, the deference owed to the Department . . . based on its 'body of experience and informed judgment.'") (quoting *Skidmore*, 323 U.S. at 140); *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001) (finding WHD's Field Operations Handbook to be "persuasive" although "not entitled to *Chevron* deference").

> Labor Standards Act. Where a higher minimum wage than that set in the Fair Labor Standards Act is applicable to an employee by virtue of such other legislation, the regular rate of the employee, as the term is used in the Fair Labor Standards Act, cannot be lower than such applicable minimum, for the words "regular rate at which he is employed" as used in section 7 must be construed to mean the regular rate at which he is lawfully employed.

29 C.F.R. 778.5 (emphasis added).[7] Thus, an employee's regular rate is the higher of the hourly wage at which the employee is actually paid or the minimum hourly wage required by any applicable federal, state, or local law. This regulation expressly contemplates that a federal law (other than the FLSA) or a state or local law may require payment of a minimum wage to an employee that is higher than the wage that the employee actually receives, and provides that the employee's regular rate in that circumstance is the higher wage required by applicable law.[8]

Although this FLSA principle applies generally to federal, state, and local laws setting minimum wages, the most common laws requiring higher minimum wages are federal prevailing wage laws and state minimum wage laws. The Department has repeatedly advised that an employee's regular rate cannot be lower

[7] The Department promulgated 29 C.F.R. 778.5 in 1965, 30 Fed. Reg. 1076 (Feb. 2, 1965), and it has remained unchanged since then. The Department had promulgated a prior version as 29 C.F.R. 778.1 in 1950 that was substantively the same as 29 C.F.R. 778.5. 15 Fed. Reg. 623 (Feb. 4, 1950).

[8] *See also* 29 C.F.R. 778.315 (Overtime compensation due under the FLSA "cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours . . . under any applicable statute has been paid.").

than the minimum wages in such laws, consistent with 29 C.F.R. 778.5. For example, Chapter 32 of WHD's Field Operations Handbook ("FOH"), "Overtime", states that in situations "where different rates are applicable under the FLSA . . . and McNamara-O'Hara Service Contract Act (SCA), . . . the regular rate of pay under the FLSA . . . cannot be lower than the highest minimum wage rate applicable." FOH 32j00.[9] The Department has similarly advised in its regulations implementing the Davis-Bacon Act ("DBA"), a federal statute requiring the payment of prevailing wages to certain workers on covered construction contracts, that "[i]t is clear from the legislative history that in no event can the regular . . . rate upon which premium pay for overtime is calculated under the [FLSA] be less than the amount determined by the Secretary of Labor as the basic hourly rate (i.e. cash rate) under [the DBA]." 29 C.F.R. 5.32(a). With respect to state minimum wage laws, FOH Chapter 32 states that "[t]he regular rate can never be less than the highest applicable minimum wage" and explains that, for example, "in a state with a state minimum wage of $9.00, the regular rate cannot be less than $9.00 per hour." FOH 32j18(e) (citing 29 C.F.R. 778.5); *see also* FOH 32j01 ("If overtime has been worked, the regular rate of pay for overtime purposes under the FLSA . . .

[9] The FOH "is an operations manual that provides [WHD] investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance." *See* https://www.dol.gov/agencies/whd/field-operations-handbook
FOH Chapter 32 is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch32.pdf.

cannot be lower than the applicable state, territorial, or federal minimum wage, whichever is higher."). FOH Chapter 32 also states that, "if the regular rate so determined is less than the legal minimum, the regular rate for overtime purposes shall be the legal minimum." FOH 32b00a(b). And WHD's Fact Sheet #56A, "Overview of the Regular Rate of Pay Under the Fair Labor Standards Act (FLSA)," states that "[t]he regular rate may not be lower than the FLSA minimum wage or, where applicable, a higher state or local minimum wage."[10]

Courts have repeatedly upheld the principle set forth in 29 C.F.R. 778.5 in FLSA enforcement actions brought by the Secretary. *See*, *e.g.*, *Walsh v. Dependable Care LLC*, No. 19-CV-1081 (RPK) (ST), 2022 WL 4301033, at *6 (E.D.N.Y. Aug. 1, 2022) (approving the Secretary's calculation of "overtime back wages, pursuant to 29 C.F.R. § 778.5," at the New York "minimum legal hourly wage rate . . . , which was higher than the federal minimum wage"); *Walsh v. Dayemi Org., Inc.*, --- F. Supp.3d ----, No. 21-cv-56-SMY, 2022 WL 2291706, at *5 (S.D. Ill. Jun. 24, 2022) ("In Illinois, where the legal minimum wage exceeds $7.25 per hour, FLSA mandates that the regular rate cannot be lower than the state minimum wage, as 'regular rate' as used in the [FLSA] is 'construed to mean the regular rate at which he is lawfully employed.'") (quoting 29 C.F.R. 778.5); *Walsh v. Sofia & Gicelle, Inc.*, No. TDC-19-0934, 2021 WL 3472649, at *12 (D. Md.

[10] Fact Sheet #56A is available at https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate.

Aug. 5, 2021) (citing 29 C.F.R. 778.5 and approving the Secretary's calculation of overtime pay due using higher minimum wages required by state and county as the regular rate); *Solis v. SCA Rest. Corp.*, 938 F. Supp.2d 380, 395 (E.D.N.Y. 2013) (finding that the employer violated the FLSA's overtime pay requirements by paying employees at "a reconstructed regular hourly rate" lower than the applicable state minimum wage) (citing 29 C.F.R. 778.5). Courts in private actions similarly rely on 29 C.F.R. 778.5 to calculate overtime pay due employees under the FLSA using the state minimum wage as the regular rate when the employees have been paid a lower wage. *See*, *e.g.*, *Nunez v. Broadway Beauty Wholesale Inc.*, No. 19-CV-362, 2020 WL 6063536, at *4 (S.D.N.Y. Oct. 14, 2020); *Pau v. Chen*, No. 3:14cv841(JBA), 2015 WL 6386508, at *8 (D. Conn. Oct. 21, 2015); *Telles v. Li*, No. 5:11-CV-01470-LHK, 2013 WL 5199811, at *12 (N.D. Cal. Sept. 16, 2013).

Furthermore, courts have applied this principle from 29 C.F.R. 778.5 in private actions involving prevailing wage requirements where the employees were paid less than the prevailing wage. For example, in *Moodie v. Kiawah Island Inn Co., LLC*, 124 F. Supp.3d 711, 720-21 (D.S.C. 2015), the court cited 29 C.F.R. 778.5 and recognized that "the prevailing wage is the 'regular rate' of pay for purposes of the FLSA overtime" pay due workers who were required to receive prevailing wages determined by the Department as part of its administration of the

H-2B temporary foreign worker program. In *Siquic v. Star Forestry, LLC*, No. 3:13CV00043, 2016 WL1117627, at *3 (W.D. Va. Mar. 17, 2016), the court likewise cited 29 C.F.R. 778.5 and ruled that the H-2B "prevailing wage will apply for purposes of the FLSA minimum wage and overtime pay requirements." And in *Amezguita v. Dynasty Insulation, Inc.*, No. CV 10-1153 MV/CG, 2012 WL 12973893, at *4 (D.N.M. Sept. 14, 2012), the court cited 29 C.F.R. 778.5 and calculated the overtime pay due the employees under the FLSA using the prevailing wage required by the New Mexico Public Works Minimum Wage Act as the regular rate.

And although it did not cite 29 C.F.R. 778.5, the Fourth Circuit reached the same result with respect to FLSA overtime pay claims brought by workers on a DBA-covered contract. *Amaya v. Power Design, Inc.*, 833 F.3d 440 (4th Cir. 2016). The district court in *Amaya* had ruled that the workers could not bring FLSA claims because they worked on a federal government contract that incorporated federal prevailing wage standards (including DBA standards) that did not allow for private rights of action. *Id.* at 442. The Fourth Circuit reversed that ruling as lacking any basis in the text or history of the FLSA or the DBA, among other prevailing wage statutes. *Id.* at 442-47. In so ruling, the Fourth Circuit explained that the FLSA and DBA are harmonious in situations where a worker works overtime and is paid a wage different than the DBA prevailing wage

because the higher wage is the employee's regular rate. *Id.* at 447-48 (citing DBA regulations). Determining the higher wage presents no conflict between the FLSA and DBA and is simply "an issue of proof." *Id.* at 448-49.[11]

The Second Circuit's decision in *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2d Cir. 2003), is not to the contrary. In that case, the Second Circuit held that "the district court properly limited the plaintiffs' claims under the FLSA for unpaid overtime compensation to one-and-a-half times the hourly rates actually paid." *Id.* at 87. However, there was no basis in the record to find that those workers were entitled to higher DBA prevailing wage rates. Indeed, the district court decision that the Second Circuit affirmed discussed 29 C.F.R. 778.5 and recognized its applicability if there was a basis for finding that the workers were entitled to DBA prevailing wages. *Grochowski v. Ajet Constr. Corp.*, No. 97 CIV 6269(NRB), 2000 WL 1159640, at *6 (S.D.N.Y. Aug. 16, 2000). After quoting 29 C.F.R. 778.5, the district court explained:

> Thus, if plaintiffs were indeed entitled to earn pay in accord with the prevailing wage standard for federally funded contracts as set forth in the Davis-Bacon Act, the "regular rate" used in computing overtime pay must

[11] The Secretary participated as amicus in *Amaya* and advocated for reversal of the district court's decision. The Secretary's brief explained that "the Secretary construes the term 'regular rate' under the FLSA to mean the pay rate at which an employee 'is lawfully employed'" (quoting 29 C.F.R. 778.5), and that a DBA-covered worker's regular rate when calculating FLSA overtime pay due is the higher of the applicable DBA prevailing wage or the wage actually paid to the worker. Brief for the Sec'y of Labor as Amicus Curiae, *Amaya v. Power Design, Inc.* (4th Cir. No. 15-1691), 2015 WL 7353470, at *29 n.6.

> reflect that statutory requirement and must be not only equal to at least the minimum wage provided by the FLSA but also to at least the applicable statutory wage.

Id. Thus, rather than precluding plaintiffs from even arguing that the regular rate should be based on the required prevailing wage – as the district court did here – the district court in *Grochowski* expressly considered plaintiffs' contention that their regular rate was a higher DBA prevailing wage instead of the lower wage that they were actually paid. Although the record did not ultimately support such a finding in that case, *id*., here, by contrast, the Department has determined that the drivers should be classified as shuttle bus drivers under the SCA, which provides for a higher wage than the wage that they were actually paid. Thus, the only difference between *Grochowski* and this case is factual, and the Secretary's legal position here is consistent with *Grochowski*.

* * *

The Department's longstanding interpretation of the FLSA's regular rate requirement in 29 C.F.R. 778.5 and the results of the above cases are consistent with the statutory purpose of the FLSA. In addition to its own minimum wage requirement, the FLSA requires that overtime be calculated based on "the regular rate at which [the employee] is employed." 29 U.S.C. 207(a)(1). Using a wage as the FLSA regular rate that is lower than, for example, the minimum wage required by a federal prevailing wage law like the SCA is contrary to the purpose of the

FLSA. It would reward an employer that is paying an unlawfully low wage by carrying that violation over to the FLSA and allowing the employer to reap further benefit from paying the unlawful wage by using it as the regular rate for calculating pay due under the FLSA's overtime requirements. And it would magnify the harm of the SCA violation to the employees by also taking away overtime pay to which they are legally entitled under the FLSA. This result is directly contrary to the FLSA's stated goal of remedying "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a); *see also* 29 U.S.C. 218(a) ("No provision of [the FLSA] shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under [the FLSA]."); *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp.2d 253, 291 (S.D.N.Y. 2011) ("[I]t is inconsistent with the purposes of the FLSA and 29 C.F.R. § 778.5 to allow defendants to use an illegal 'regular rate of pay' to calculate overtime pay."); *Sobczak v. AWL Indus., Inc.*, 540 F. Supp.2d 354, 361 (E.D.N.Y. 2007) (An employer may not "circumvent the FLSA simply by breaching" its prevailing wage obligations, "paying overtime on the improperly reduced" wages paid, and claiming that it "paid overtime on the artificial 'regular rate.'").

2. The District Court Erred in Granting the Motion in Limine.

For all of the above reasons, the district court erred in ruling that the drivers cannot use an SCA prevailing wage rate that is higher than the rate actually paid to them as the regular rate for purposes of their FLSA overtime claim. The district court's extremely brief rationale for its ruling did not grapple with or otherwise account for the Department's longstanding position in 29 C.F.R. 778.5 and related guidance that the regular rate cannot be lower than any minimum wage required by applicable law, the cases applying 29 C.F.R. 778.5, or the clear policy reasons behind the Department's position.

The district court's explanation that the drivers "do not have the ability to enforce the SCA rates" (i.e., there is no private right of action under the SCA) and therefore "cannot use such rates as the basis for their overtime claims[,]" ECF No. 151 at 8, is misplaced. The drivers did not bring claims under the SCA and are not seeking to use the FLSA as a means to assert violations of the SCA; rather, they seek to enforce the FLSA's own substantive requirement that time-and-a-half be paid to employees covered by the FLSA for hours that they work over 40 in a workweek. That remedy is not available under the SCA, which does not provide for recovery of overtime pay. Likewise, if the drivers are successful in recovering overtime pay under the FLSA, such recovery would not make them whole for violations of the SCA because, for example, they would remain underpaid for any

non-overtime workweeks in which they were paid less than the applicable SCA prevailing wage rate. Accordingly, using the applicable SCA prevailing wage as the regular rate to calculate pay due in private actions for FLSA overtime violations complements the Department's enforcement of the SCA and is not inconsistent with the SCA's lack of a private right of action. By contrast, the district court's ruling would deprive the drivers of pay due for violations of the FLSA's overtime pay requirements by sanctioning an unlawfully low wage as the regular rate. In sum, the SCA's lack of a private right of action is of no import to FLSA claims because the two statutes "are not mutually exclusive," they may both apply, and the FLSA allows for private actions "even though the SCA does not." *Lee*, 20 F.3d at 431.

In addition, any use of an SCA prevailing wage as the FLSA regular rate arises as a function of employees' rights under the FLSA. The Department's FLSA regulation at 29 C.F.R. 778.5 interprets "the regular rate at which [an employee] is employed" in FLSA section 207(a)(1) to mean the regular rate at which the employee is lawfully employed. This regulation explains that the FLSA regular rate cannot be lower than any applicable statutorily-required minimum wage. 29 C.F.R. 778.5. Thus, the Department is explaining a general principle of how the FLSA relates to other laws and is not singling out the SCA or minimum wage laws that lack private rights of action. Indeed, section 778.5 applies to both

laws that do not allow private rights of action, such as the SCA, and laws that do, such as many state minimum wage laws. There is simply no basis for the applicability of section 778.5 to be contingent on whether the minimum or prevailing wage law allows or does not allow a private right of action. The district court's focus on the SCA's lack of a private right of action in granting the motion in limine was unwarranted for these reasons too.

Finally, the Department undertook an administrative proceeding relating to the drivers as contemplated by the SCA. The Department investigated and determined that the drivers should be classified as shuttle bus drivers under the SCA. Owl, through counsel, pressed its argument that the drivers should be classified as taxi drivers, and Owl sought and received review of the determination that the drivers are instead properly classified as shuttle bus drivers by the Branch, the WHD Administrator, and the Board (and has not pursued judicial review of the Board's decision). Consistent with 29 C.F.R. 778.5, courts should, as the facts of their cases warrant, consider such properly-issued SCA administrative decisions when determining employees' regular rates to calculate overtime pay due under the FLSA – not bar the use of SCA prevailing wages as the district court did here.[12]

[12] The Secretary recognizes that the parties made conflicting arguments to the district court as to the SCA prevailing wage rate applicable to the drivers, that those arguments conflicted with the Department's determination of the correct rate, and that the Department's determination of the correct rate was being administratively appealed when the district court granted the motion in limine.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court reverse the district court's ruling on a motion in limine that the drivers cannot use the SCA wage rate that applies to their work as the regular rate for purposes of determining the overtime pay due them under the FLSA.

However, those circumstances were no basis for the district court to completely prohibit the drivers from arguing that a higher SCA prevailing wage rate should be their regular rate under the FLSA, especially considering that the Department had determined – and did determine as a final matter – that a higher SCA rate applies to them.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants:

(1) was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font; and

(2) complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,837 words excluding the items listed in Federal Rule of Appellate Procedure 32(f).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants was served this 20th day of December, 2022, via the Court's ECF system on each attorney who has appeared in this case and is registered for electronic filing, and via overnight delivery on each of the following attorneys:

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ADDENDUM

U.S. Department of Labor

Wage and Hour Division
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JUN 17 2016

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Dear Mr. Schneider:

This is in response to your letter dated December 9, 2014 on behalf of two transportation companies, MLB Transportation, Inc. ("MLB") and Owl, Inc. ("OWL"), that provide non-emergency medical transportation ("NEMT") services to the Department of Veterans Affairs ("VA") facility in DeKalb County, Georgia, under contracts subject to the Service Contract Act ("SCA"), 41 U.S.C. §§ 6701, *et seq*. In your December 9, 2014 letter, you requested review and reconsideration of April 16 and November 20, 2014 decisions of the Wage and Hour Division's ("WHD") Branch of Service Contract Act Wage Determinations ("Branch"). Those decisions concluded that drivers on the NEMT contracts should be classified as shuttle bus drivers and rejected your challenge to the wage rate for that classification on the applicable wage determination.

I. Background

On March 6, 2014, you submitted a letter to the Branch requesting its assistance in reviewing the appropriate wage classification and wage rate for the drivers on the NEMT contracts between your clients and the VA in DeKalb County. In that letter, you contended both that the drivers should not be classified as shuttle bus drivers and that the wage rate for shuttle bus drivers on the applicable wage determination, Wage Determination ("WD") 05-2133, did not reflect the prevailing wage rate in the relevant locality. You therefore requested that the Branch: (a) "resurvey and reconstitute" the shuttle bus classification, (b) "utilize a different wage classification for the services that are being performed," or (c) create a new "patient transporter" classification. Although you did not identify your clients in either your March 6 letter or the May 8 and December 9, 2014 letters discussed below, we were eventually informed that your letters were sent on behalf of MLB and OWL. We understand that MLB entered into an SCA-covered contract with the VA to provide wheelchair van transportation services between patients' residences and the VA Medical Center in Decatur, Georgia. We also understand that your March 6 letter was prompted at least in part by the fact that WHD recently had conducted an investigation of MLB's compliance with the SCA under this contract and had concluded that MLB's drivers were improperly classified as taxi drivers rather than shuttle bus drivers. We did not receive similarly detailed information regarding the contract between the VA and OWL, and the remainder of this letter therefore focuses primarily on MLB.

In its April 16, 2014 response, the Branch declined to create a new "patient transporter" classification for WD05-2133 on the grounds that, pursuant to 29 C.F.R. § 4.152(c)(1),

conformances are appropriate only where the work the employee is to perform under the contract does not fall within the scope of any classification listed on the WD in the contract. Upon review of the duties of the NEMT drivers at issue, the Branch found that their duties fell within multiple occupational classifications listed in WD05-2133, including the shuttle bus driver and taxi driver classifications. The Branch further noted that employees need not perform all of the duties described under an occupational classification in order for the classification to apply. In response to your stated concerns about the wage rate for the shuttle bus driver classification, the Branch noted that when there is no survey data available for a classification, WHD applies the "slotting" procedure set forth in 29 C.F.R. § 4.51(c), under which the wage rate for an occupation that was not surveyed is determined through comparison to surveyed occupations with similar duties, skills, and federal grade equivalencies. The Branch further explained that the shuttle bus driver classification was not surveyed, and it summarized the manner in which the shuttle bus driver classification was slotted to the light truck driver classification, which is a surveyed occupation.

On May 8, 2014, you submitted a second letter to the Branch, in which you again asserted that the drivers at issue should be classified as taxi drivers rather than as shuttle bus drivers. Specifically, you contended that the drivers' duties are much closer to the duties of the taxi driver classification than the light truck driver classification (to which, as noted, the shuttle bus driver classification is slotted), because the employees drive cars and minivans that do not require a commercial driver's license. You also inquired whether WHD would challenge a conclusion by the VA and your clients that the jobs in question are "best classified" as taxi driver.

The Branch's November 20, 2014 response reiterated that the NEMT drivers at issue have responsibilities that fall under multiple classifications on WD 05-2133. In response to your argument that the light truck driver classification requires a commercial driver's license, the Branch explained that the requirement of a certification and/or degree is not a factor when developing wage rates, although it may be a factor in a contractor's determination of eligibility for a job. Recognizing that the classification issues addressed in your letters stemmed at least in part from WHD's investigation of MLB, the Branch advised that if you were dissatisfied with the findings of that investigation, you could contact the WHD's Southeast Regional Office to further discuss your concerns. The Branch also stated that review and reconsideration by the WHD Administrator could be requested in accordance with 29 C.F.R. § 4.56 of the SCA's regulations.

On December 9, 2014, you submitted a letter seeking review and reconsideration of the Branch's decisions in this matter. Specifically, you requested that the Branch apply the taxi driver wage rate to your clients' contracts or, alternatively, "resurvey and reconstitute" the WD for shuttle bus driver by slotting to the taxi driver classification rather than the light truck driver classification. You explained that transportation services are being provided to the VA using mini-vans and ten-seat passenger vans, and that these vehicles only require the drivers to have a standard driver's license and not a commercial driver's license, which is normally associated with shuttle bus drivers who transport in excess of 15 passengers. You also asserted that the job description for one of your client's contracts is closest to the taxi driver classification, though you also acknowledged that it does not neatly fit into a particular category. You added that the job description for your other client's contract requires round trip service to patients, some of

whom require wheelchair service. With respect to both contracts, you concluded that the services provided are "more like" taxi service than shuttle bus service.[1]

Regarding the shuttle bus driver rate, you argued that the current wage for that classification on WD05-2133, which is $15.38 per hour, is not the prevailing wage for those services in DeKalb County. In support of this contention, you asserted that the Branch should not have slotted the shuttle bus driver category to the light truck driver category because the job functions are not sufficiently comparable, in part because the drivers at issue here do not need commercial driver's licenses and "BLS equates the job duties of shuttle bus drivers to those of taxicab drivers and chauffeurs." You further asserted that the prevailing rate for light truck driver was improperly determined based on the available Occupational Employment Statistics survey data. You also argued that a 2012 Georgia Wage Survey directed by the Georgia Department of Labor, which does not specifically list shuttle bus drivers, indicates that the average wage rates for ambulance drivers and attendants (excluding EMTs), "special client" bus drivers, and taxi drivers and chauffeurs all were below the shuttle bus driver wage rate on WD05-2133. Finally, in further support of your contention that the shuttle bus driver rate does not reflect prevailing rates, you provided your own informal list of the starting wages for three agencies providing patient transportation in the Atlanta area, as well as the results of your own informal survey of transportation companies.

II. Response[2]

A. The Proper Classification of NEMT Drivers on the Contracts at Issue

[1] As noted previously, you did not identify MLB or OWL in your December 9, 2014 letter, nor did you identify which job description related to which company. More generally, the correspondence to the Branch discussed above did not include the contracts at issue or otherwise provide a complete statement of the scope of work under the contracts. As noted earlier, this letter focuses primarily on MLB, as we obtained a copy of MLB's contract number VA247-P-0957 and related factual information regarding that contract independent of the letters to the Branch identified above. To the extent additional factual information regarding OWL's contract might warrant further discussion or analysis of the relevant issues, any right to such further consideration has been waived due to your failure to submit supporting documentation. We note, however, that we have carefully considered and addressed below each of the issues raised in your December 9 letter, and we have no reason to believe that the OWL contract or similar documentation would alter the conclusions reached herein.

[2] In a letter dated February 16, 2016, you stated your understanding that the VA "believes it should not provide any input" regarding the classification and wage rate issues you have raised, and you therefore requested "that the DOL make a written request to the VA to provide input with regard to the appropriate wage classification and wage rate for [MLB's and OWL's] drivers and for the VA to appropriately respond." We decline the request because supplementation of the record in the manner you proposed is not necessary to address the issues you have raised, particularly given WHD's responsibilities for classification and wage rate determinations under the SCA.

The SCA generally applies to every contract entered into by the United States that "has as its principal purpose the furnishing of services in the United States through the use of service employees." 41 U.S.C. § 6702(a)(3). Contractors and subcontractors performing on covered service contracts in excess of $2,500 must, among other obligations, pay service employees at a rate not less than the applicable prevailing minimum wage and fringe benefit rates. *See* 41 U.S.C. §§ 6702(a)(2), 6703(1)-(2); 29 C.F.R. § 4.5(a). Every covered contract must contain contractual clauses setting forth the contractor's obligations under the SCA and must attach a wage determination issued by WHD. *See* 41 U.S.C. § 6703; 29 C.F.R. § 4.6. The wage determination sets forth for the various classes of service employees to be employed on the contract the minimum monetary wage rates to be paid and minimum fringe benefits to be furnished them during the periods when they are engaged in the performance of the contract. 29 C.F.R. § 4.3(c).

Under the SCA, "[t]he duties which an employee actually performs govern the classification and the rate of pay to which the employee is entitled under the applicable wage determination." 29 C.F.R. § 4.152(b). Any work within the scope of a classification listed in the wage determination shall be compensated at no less than the rate specified in the wage determination. *Kord's Metro Servs.*, BSCA No. 94-06, 1994 WL 897731 (Aug. 24, 1994). The determination of whether service employees performing on an SCA-covered contract fall within a particular classification thus turns on whether the employees actually "perform duties that are substantially the same as or identical to" those listed on the wage determination. *Id.*

In *Kord's*, for example, the Board of Service Contract Appeals, a predecessor of the Department of Labor's Administrative Review Board (collectively, "Board"), considered whether the WHD Administrator reasonably determined that employees performing the duties of "stretcher van operator" and "wheelchair van operator" on a contract with the Department of Veterans Affairs fell within the scope of the "ambulance driver" classification on the applicable wage determination. In determining that the Administrator was not in error when she concluded that the stretcher and wheelchair van operators were properly classified as ambulance drivers, the Board held that "to fall within a particular classification, an employee need not perform all the duties listed in a wage determination. It is sufficient that the duties performed are within the scope of the listed classification." *Id.*; *see also In re: Andrew Aiken*, ARB No. 08-009, 2009 WL 1176485, at *5 (April 30, 2009) (a classification may be appropriate as long as the workers' actual duties are "'within the scope' of the classification.") (quoting 29 C.F.R. § 4.152(c)). The Board in *Kord's* further noted that the principal task of stretcher and wheelchair van operators (transporting incapacitated persons by motor vehicle) was indistinguishable from the principal task of ambulance drivers, and that certain "secondary duties" of the van operators, including transferring individuals in and out of the stretcher or wheelchair and securing them in the vehicle, were "within the scope of duties" of the ambulance driver classification. *Kord's*, 1994 WL 897731.

The focus on whether service employees' duties under a contract fall within the scope of duties of a classification on the wage determination also is reflected in the SCA's implementing regulations governing conformance procedures. Those procedures may be used to add a classification to a wage determination where "the work to be performed [on the contract] is not

performed by *any* classification listed in the wage determination." 29 C.F.R. § 4.6(b)(2)(i) (emphasis added). *See also, e.g., In re: COBRO Corp.*, ARB No. 97-104, 1999 WL 708169, at *12 (July 30, 1999) ("A position will warrant conformance as a classification separate from job titles on the wage determination only if the duties of the job classification being conformed do not fall within the scope of the duties of any of the classifications already listed in the wage determination."). Accordingly, conformance is not appropriate where the work to be performed falls under existing classifications on the wage determination. Moreover, a conformance may not "combine two or more classes listed in the wage determination into a new classification to be conformed or propose a new classification that performs only part of the duties of an existing classification." *Andrew Aiken*, 2009 WL 1176485, at *5. Instead, the work should be classified by identifying a reasonable fit among the classifications listed on the WD. *See In Re Serv-Air, Inc.*, BSCA No. 94-02, 1994 WL 897729 (May 27, 1994) (affirming the Administrator's ruling that conformance was not appropriate where the duties of the jobs at issue were performed by classifications on the WD); *see also In Re Raymond R. Schafer*, BSCA Case No. 92-30, 1993 WL 832135 (BSCA Mar. 26, 1993) (finding conformance appropriate where the relevant duties of the job at issue were not performed by any classification listed on the WD).

In light of these principles, and based on a review of the record, the Administrator concludes that the drivers under the MLB contract at issue (contract number VA247-P-0957) are properly classified as shuttle bus drivers. The SCA Directory of Occupations (Fifth Edition) describes the taxi driver and shuttle bus driver classifications as follows:

> 31290 SHUTTLE BUS DRIVER (Van Driver)
> The Shuttle Bus Driver (Van Driver) drives minibus or van to transport clients, trainees, or company personnel; drives vehicle from individual or central loading area to social services or rehabilitation center, training location, job site, or other destination according to assigned schedule. This driver may assist disabled passengers into and out of vehicle, secure passengers' wheelchairs to restraining devices to stabilize wheelchairs during trip; may operate radio or similar device to communicate with base station or other vehicles to report disruption of service, clean and/or service vehicle with fuel, lubricants, and accessories, keep records of trips and/or behavior of passengers, and perform other duties when not driving such as, custodial and building maintenance tasks.
>
> 31310 TAXI DRIVER
> The Taxi Driver drives motor vehicle, with or without a taximeter, to transport passengers for a fee, picks up passengers while cruising streets or in response to radio or telephone relayed request for service, collects fee recorded on taximeter or based on mileage or time factor, records transaction on log, and reports by radio or telephone to central location on completion of trip.

The description of work in contract VA247-P-0957 specifies that the contractor will provide wheelchair van and sedan services for VA beneficiaries "to the Atlanta Veterans Administration Medical Center (Atlanta VAMC) in Decatur, Georgia." The contract further specifies that wheelchair vehicles must have wheelchair tie-down straps and devices to secure the wheelchair and passenger, and that drivers must ensure wheelchair locks are secured and seat belts and

shoulder harnesses are in place before the vehicle is driven. The contract also provides that drivers may be asked to transport two beneficiaries, plus companions, in one trip, but that they may not solicit or accept tips. We understand that the VA sends the schedule for the next day's trips to MLB by 4:00 p.m. on the previous day, and may also make same-day additions to the schedule. In addition, you have advised that the vehicles used to perform these services are five to ten passenger mini-vans or vans.

The description of work further provides that drivers are required to: "transport and deliver beneficiary to the specific clinic where the beneficiary's treatment is being provided. This includes transports at any location (i.e. clinic or ward area at the Atlanta VA Nursing Homes and private residences). In no instance will the Contractor drop beneficiaries off in the hall or entrance of the VA." In addition, all drivers must report to the VA Travel Clerk on duty when a beneficiary is delivered to the VA medical center and give the Travel Clerk the trip ticket for that trip within a specified period of time. When drivers are required to take a beneficiary from the Atlanta VA Medical Center to an airport, the driver may be required to assist the beneficiary and/or the VA attendant at the airport and park if necessary.

Based on a comparison of the description of driver duties in MLB's contract with the descriptions for the shuttle bus driver and taxi driver classifications set forth in the SCA Directory of Occupations, we affirm that the shuttle bus driver classification is most appropriate for the duties performed under this contract. Although several of the drivers' duties may be viewed as encompassed in both of the relevant classifications, the contract also identifies multiple driver duties that are *not* encompassed within the taxi driver classification, some of which *are* referenced in the shuttle bus driver classification. These include securing wheelchairs in the vehicle, assisting disabled passengers, informing the VA travel clerk when a beneficiary is delivered to the medical center, and assisting a disabled passenger into the airport. The fact that the service employees at issue drive a van or mini-van according to a schedule assigned by the VA each day further supports the conclusion that the employees' duties fall within the scope of the shuttle bus driver classification. In contrast, the drivers' duties are much harder to square with the taxi driver classification, particularly since the drivers do not perform the type of fee-based, ad hoc transportation services contemplated by the taxi driver classification.

As discussed above, an existing classification merely needs to be a reasonable fit based on the actual job duties performed. *See* 29 C.F.R. § 4.152(b); *Andrew Aiken*, 2009 WL 1176485, at *5. Because the shuttle bus driver classification plainly is a better fit given the overlap between the drivers' duties and the duties for shuttle bus driver listed in the Directory of Occupations, we conclude that it would not be appropriate to conform a new classification to the wage determination, that the drivers on the MLB contract at issue are appropriately classified as shuttle bus drivers, and that nothing in the more limited record regarding OWL warrants a different conclusion.

B. The Challenge to the Shuttle Bus Driver Wage Rate on WD05-2133

1. Timeliness of the Request for Review and Reconsideration

The SCA's implementing regulations provide that the Administrator shall not review a wage determination or its applicability within 10 days of the exercise of a contract option or extension:

> *In no event shall the Administrator review a wage determination or its applicability* after the opening of bids in the case of a competitively advertised procurement, or, *later than 10 days before commencement of a contract in the case of a negotiated procurement, exercise of a contract option or extension.* This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

29 C.F.R. § 4.56(a) (emphasis added). The time limits under section 4.56(a) have been interpreted by the Board to "unambiguously establish[] a deadline precluding the Administrator from reviewing a wage determination later than 10 days before . . t exercise of a contract option or extension, regardless of when the request for review was filed." *In re: EG&G Technical Servs., Inc.*, ARB Case No. 02-006 (June 28, 2002) (internal citations and quotation marks omitted); *see also In re: United Food & Commercial Workers Local No. 1105*, BSCA No. 94-08 (Oct. 28, 1994) (ruling that the Administrator properly declined to review the substantive correctness of a wage determination where the petitioner did not seek reconsideration until more than five months after that contract commenced).

Contract number VA247-P-0957 between the VA and MLB began on October 1, 2009, and Option Year 4 for the contract was effective beginning October 1, 2013. Under 29 C.F.R. § 4.56(a), your letters dated March 6 and December 9, 2014 are untimely requests for review and reconsideration of the wage determination incorporated in Option Year 4 and earlier contract periods because neither letter was received by WHD at least 10 days before the exercise of Option Year 4. Moreover, Wage and Hour Investigator Jennifer Kelley informed MLB on September 9, 2013 – before Option Period 4 commenced and seven months prior to your March 6, 2014 letter – that WHD had concluded that MLB's drivers were misclassified as taxi drivers and should have been classified and paid as shuttle bus drivers under WD05-2133.

We note, however, that MLB and the VA subsequently signed a six-month extension of contract number VA247-P-0957 from October 1, 2014 to March 30, 2015.[3] Although your December 9, 2014 request for review and reconsideration is untimely with respect to the six-month extension period on VA247-P-0957, WHD will consider your March 6, 2014 letter as a timely request for review and reconsideration with respect to the extension period because even though that letter did not explicitly request review and reconsideration under 29 C.F.R. § 4.56(a) (and even though the parties may not have been expecting in March 2014 to extend the contract), your March 6 letter generally raises the same issues as are reflected in your December 2014 request for review and reconsideration. *See Kord's*, 1994 WL 897731 (although request for review and reconsideration of SCA wage determination was untimely, the request was prompted by a WHD compliance investigation, and it was within "the discretion of the Administrator to review job classifications and wage rates to determine proper application" of the SCA); *cf. Diversified Collection Servs., Inc.*, ARB Case No. 98-062, 1998 WL 686619, at *2 (ARB Sept. 25, 1998) (where a wage determination is incorporated into a contract post-award, the contractor must

[3] We also understand that MLB entered into a new contract, number VA247-15-D-0272 (solicitation number VA247-150-R-0992), beginning April 1, 2015.

request review and reconsideration of the wage determination within a reasonable period of time).[4]

2. Analysis of the Shuttle Bus Driver Wage Rate

A considerable part of your request for review and reconsideration is your contention that, assuming the shuttle bus driver classification applies here, the shuttle bus driver wage rate of $15.38 on WD05-2133 (Revs. 12–14) is not the correct prevailing wage for that classification in DeKalb County, Georgia. Your argument consists of two separate but related assertions: (a) that WHD improperly slotted the shuttle bus driver classification to the light truck driverclassification, and (b) that the light truck driver wage rate was improperly determined on the WD. Although we have concluded above that this request generally is untimely, we nonetheless have considered the information you submitted and responded below with respect to MLB's six-month contract extension period.

a. Slotting of the Shuttle Bus Driver Rate

The SCA regulations regarding the determination of prevailing wages provide that all pertinent information may be used to derive wage rates, and that the data "most frequently" used is from surveys conducted by the Bureau of Labor Statistics ("BLS"). 29 C.F.R. § 4.51(a). Where a wage survey for a particular locality is not available or results in insufficient data, a prevailing wage rate may be established by a "slotting" process. *Id.* § 4.51(c). Through the slotting process, WHD derives a wage rate for a classification for which there is insufficient survey data by comparing it to the wage rates for classifications with "equivalent or similar job duty and skill characteristics." *Id.*; *see, e.g., D.B. Clark III*, ARB Case No. 98-106, 1998 WL 787318, at *4 (ARB Sept. 8, 1998) (affirming the Administrator's use of slotting to determine a wage rate for a position not included in the BLS survey, and noting that numerous prior decisions had approved the validity of slotting); *Richard L. Roudebush VA Medical Center*, BSCA Case No. 90-SCA-WD-1, 1992 WL 752877 (BSCA Jan 21, 1992) (WHD may properly use wage grade equivalent positions for slotting).

Slotting is appropriate for the shuttle bus driver classification on WD05-2133 because neither of the two BLS surveys on which WHD has relied in determining prevailing wage rates under the SCA (the National Compensation Survey Locality Pay Survey ("NCS") and the Occupational Employment Statistics ("OES") survey) contain a surveyed wage rate specific to the shuttle bus driver classification. The appropriate classification for slotting in this case was determined by considering which occupational classification in the SCA Directory of Occupations has equivalent or similar job duties or skill levels, as reflected in wage grade equivalencies. On WD05-2133, the shuttle bus driver classification is under the broad occupational category

[4] As noted previously, the record does not contain the contract between the VA and OWL or other information regarding when the contract was awarded or whether it contained option periods. Given that the contract apparently was awarded before any of your letters in this matter, however, we conclude that OWL's request for review of the wage rate at issue is untimely. In any event, as explained below, we also conclude that the wage rate at issue was properly determined.

("BOC") of Transportation/Mobile Equipment Operation. The Federal Wage System Job Grading Standard for Motor Vehicle Operating indicates that, within that BOC, the duties of both shuttle bus driver and light truck driver fall under wage grade 6 (WG-6), whereas bus driver is rated as WG-7 and taxi driver is rated as WG-5.[5] Thus, it is reasonable to slot the shuttle bus driver classification to the light truck driver rate because those are the only classifications in the Transportation/Mobile Equipment Operation BOC that are rated as WG-6 positions, thereby indicating that the positions involve a similar skill level and would be compensated at the same level under the Federal Wage Grade System.[6] *See, e.g.*, *In re: Machos*, ARB No. 98-117, 2001 WL 611238 (ARB May 31, 2001) (affirming that it was appropriate to slot a flight instructor classification to a computer systems analyst II position because it was the same Federal grade and in a similar "technical field"); *Meldick Servs., Inc.*, BSCA No. 87-CBV-07, 1990 WL 656133 (BSCA Mar. 23, 1990).

b. The Light Truck Driver Wage Rate

Having established that it was reasonable to slot the shuttle bus driver rate to the light truck driver rate on WD05-2133, the remaining issue concerns the wage rate for light truck driver on this WD. Specifically, you question WHD's decision to increase the wage rate for the light truck driver classification from $13.00 to $14.30 on WD05-2133, Revision 1, as well as WHD's decision to increase the $14.30 rate to $15.38 on WD05-2133, Revision 9. Each of these increases is addressed below.

In challenging the increase from $13.00 to $14.30, you note that the mean rate in the Atlanta area for the "Truck Diver, Light" classification in the 2005 NCS survey data from December 2005 was $10.60, and, on that basis, you dispute the Branch's statement in a June 22, 2012 response to a Freedom of Information Act request from your law firm that "[t]he rate of $14.30 was derived by increasing the [existing] rate of $13.00 by 10 percent to more closely reflect the 2005 NCS

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[5] WHD includes the wage grade equivalence of each classification in the SCA Directory of Occupations.
See https://www.dol.gov/whd/regs/compliance/wage/SCADirV5/Vers5SCAIndex.pdf

[6] Although you point to certain differences in the duties and skills of shuttle bus and light truck drivers (such as that the light truck driver classification requires a commercial driver's license), the distinctions to which you point are immaterial for purposes of slotting, particularly given that both the shuttle bus driver and light truck driver classifications are classified within the same wage grade level. *See, e.g.*, *Meldick Servs., Inc.*, BSCA No. 87-CBV-07, 1990 WL 656133 (BSCA Mar. 23, 1990) (notwithstanding distinct duties of mess attendants and janitors, porters and cleaners, slotting of mess attendant classification to janitor, porter and cleaner wage rate was not unreasonable where both classifications were rated at the Wage Grade 2 level under the Federal Wage Board pay system); *cf. Kord's*, 1994 WL 897731 (finding a reasonable relationship for wage-setting purposes between the skills and duties of a "Housekeeping Aide II" and a stretcher van attendant on a VA transportation contract). Similarly, your assertion that BLS equates shuttle bus drivers and taxi drivers is not established by the exhibit to which you cite, and, furthermore, is not germane given the particular duties of the shuttle bus driver classification set forth in the SCA Directory of Occupations and reflected in MLB's contract.

survey rate of $14.46 associated with the position of truck driver." However, the December 2005 NCS data to which you refer was not used to establish the $14.30 rate on Revision 1 – indeed, that data was not published until *after* WHD had issued the $14.30 rate. Specifically, WHD used January 2005 NCS data, which was published in September 2005 and which reflected a rate of $14.46 for the truck driver classification, to determine that the existing $13.00 rate for the light truck driver classification should be increased by 10 percent (due to WHD's 10 percent capping policy) to $14.30. In contrast, the $10.60 rate for the truck driver, light classification was not published by BLS until October 2006, one month after WHD had updated the light truck driver rate on WD05-2133, Revision 1 based on what was at the time the most recent NCS data for the truck driver classification.[7] WHD properly increased the light truck driver wage rate to $14.30, and properly did not reduce that rate after the December 2005 NCS data became available, because as the ARB has recognized, in order "to provide consistency and stability in the adjustment of wage determinations, the Administrator has a policy of retaining existing wage rates when a new BLS survey indicates a wage rate less than the existing wage rate found in a wage determination for an occupation, but when a new BLS survey indicates a wage rate higher than the existing wage determination rate, the Administrator limits increases in wage determination rates to ten percent." *In re Forfeiture Support Associates*, ARB Case No. 06-028, 2008 WL 2265203, at *5 (ARB May 27, 2008) (internal quotation marks omitted).

As for the increase in the light truck driver wage rate from $14.30 to $15.38 in 2010, you contend simply that there is "no rational relationship" between the $15.38 rate and "the survey upon which DOL relied." In fact, however, the May 2008 OES survey for Atlanta-Sandy Springs, Marietta, GA reflected the $15.38 mean wage rate that was adopted on Revision 9. Your letter does not dispute that WHD may appropriately consider mean wage rates in circumstances such as those presented in this case. *See* 29 C.F.R. § 4.51(b) (identifying various circumstances under which mean wage rates may be used). Moreover, although the NCS served for many years as the primary data source for determining prevailing wage rates under the SCA, the OES survey served as a secondary data source for determining SCA wage rates between 2001 and 2010, either by supplementing NCS data or serving as the primary data source for areas or classifications not covered by NCS. In this case, the Branch deemed it appropriate to consider and adopt the May 2008 OES mean rate for the light truck driver classification rather than continue to use NCS data, particularly since the wage rate for the light truck driver classification had not increased in the four years between issuance of Revisions 1 and 9, whereas certain other wage rates in the Transportation/Mobile Equipment Operation BOC had increased. Although the Branch's decision is defensible for these and other reasons, we conclude that it also would have been appropriate to retain the $14.30 rate in 2010, and we will treat the $14.30 rate as the operative rate with respect to the six-month extension period on VA247-P-0957 as well as contract number VA247-15-D-0272 (solicitation number VA247-150-R-0992), which we understand began April 1, 2015.[8]

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[7] The January 2005 NCS data on which WHD relied did not contain a wage rate for "Truck Driver, Light."

[8] On December 8, 2015, WHD announced a new process for updating prevailing wage determinations in accordance with the SCA that relies on OES data as the primary data source. *See* www.wdol.gov/aam/aam218.pdf. On March 30, 2016, BLS published a 2015 OES median light truck driver rate of $15.13. Consistent with WHD's new process for updating SCA wage

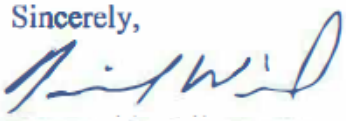
Finally, the 2012 Georgia Wage Survey on which you rely does not support lowering the wage rate at issue. That survey identified the wages for Light Truck or Delivery Services Drivers as $16.75 (mean) and $14.63 (median). Because these wage rates are generally in parity with the OES data set forth above, the survey does not justify any change to the light truck driver (or shuttle bus driver) rate. Likewise, the informal survey data you provided in your letters does not contain data that WHD could use to determine the wage rates on WD05-2133 because it does not specify the geographic area that it covers and does not match the geographic scope of WD05-2133. Furthermore, your survey only collected wage data from a small number of employers and for positions that do not all fall under the shuttle bus driver classification, and thus it lacks the statistical rigor necessary to be the basis for determining the appropriate SCA wage rate.

III. Appeals Process

You or any other interested party may consider this letter to be a final determination in accordance with 29 C.F.R. §§ 4.56(b) and 8.2(a) that may be appealed pursuant to the procedures outlined in 29 C.F.R. Part 8. Any such appeal should be initiated by filing a petition for review with the Administrative Review Board within 20 days of issuance of this decision. The Board's address is:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220
Washington, D.C. 20210

Sincerely,



Dr. David Weil
Administrator

cc: Harold Askins
U.S. Department of Veterans Affairs
Ralph H. Johnson VA Medical Center
Office of Regional Counsel
109 Bee Street
Charleston, SC 29403-5799

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determinations, WHD is publishing an updated wage determination that reflects this OES rate as the wage rate for the light truck driver and shuttle bus classifications. This updated rate will apply to SCA-covered contracts in accordance with the SCA's implementing regulations.