

**SECRETARY OF LABOR
WASHINGTON, D.C. 20210**

Issue Date: July 15, 2022

ARB Case No.: 2020-0035

In the Matter of:

**DISTRICT COUNCIL OF
IRON WORKERS OF THE
STATE OF CALIFORNIA
AND VICINITY,**

Petitioner,

v.

**WAGE AND HOUR
DIVISION, UNITED STATES
DEPARTMENT OF LABOR,**

Respondent.

BEFORE: MARTIN J. WALSH
Secretary of Labor

FINAL AGENCY DECISION AND ORDER

On September 27, 2021, the Administrative Review Board (ARB or Board) issued a Decision and Order in this case arising under the Davis-Bacon Act (Davis-Bacon or DBA). Pursuant to Section 6(b)(2) of Secretary's Order 01-2020, 85 Fed. Reg. 13186, 13188 (Mar. 6, 2020), the Secretary may "[a]t any point during the first 28 calendar days after the date on which a decision was issued . . . in his or her sole discretion, direct the Board to refer such decision to the Secretary for review." On October 25, 2021, I exercised my discretionary authority to undertake further review of the ARB's Decision and Order pursuant to Sections 6(b)(2) and 6(c)(1) of Secretary's Order 01-2020. The ARB thereafter promptly provided the administrative record in accordance with Section 6(c)(1) of Secretary's Order 01-2020.

After a *de novo* review of the record, I now issue this Final Agency Decision and Order reversing the ARB's September 27, 2021 Decision and Order and remanding this matter to the ARB for further proceedings consistent with this decision.

I. Background

A. Davis-Bacon Statutory and Regulatory Background

The Davis-Bacon Act requires the payment of locally prevailing wage rates and fringe benefits to laborers and mechanics working on Federal contracts in excess of \$2,000 for the construction, alteration, or repair of public buildings and public works. *See* 40 U.S.C. § 3142. As the Supreme Court has recognized, the DBA is “a minimum wage law designed for the benefit of construction workers.” *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954). The purpose of the DBA is “to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.” *Universities Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981) (internal quotation marks and citation omitted); *see Bldg. & Constr. Trades’ Dep’t, AFL-CIO v. Donovan*, 712 F.2d 611, 619 (D.C. Cir. 1983) (explaining that the “central purpose” of the DBA is “to ensure that federal contractors pay the wages prevailing in the locality of the project”).

The DBA confers authority upon the Secretary to determine these minimum wage and fringe benefit rates. *See* 40 U.S.C. § 3142. The minimum wages under the DBA are based on the wages that the Secretary “determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed.” *Id.* at § 3142(b). WHD is responsible for administering and enforcing the DBA’s prevailing wage requirements. *See* Secretary’s Order 01-2014, 79 Fed. Reg. 77527 (Dec. 24, 2014).

To effectuate the statutory objectives of the DBA, WHD conducts a prevailing wage survey program. WHD derives DBA prevailing wage rates from survey information voluntarily provided by responding contractors, contractors’ associations, labor organizations, public officials, and other interested parties. *See* 29 C.F.R. §§ 1.1–1.7. In addition to the regulations governing the DBA wage survey program at 29 C.F.R. Part 1, WHD’s wage survey policies and procedures are set forth in guidance documents and reference materials, such as the *Prevailing Wage Resource Book* (2015) (PWRB) and the *Davis-Bacon Construction Wage Determinations Manual of Operations* (1986) (DBA Manual of Operations or Manual).¹

B. Factual Background and Procedural History

¹ WHD is currently engaged in notice-and-comment rulemaking to update the Davis-Bacon regulations. *See Updating the Davis-Bacon and Related Acts Regulations*, Notice of Proposed Rulemaking, 87 Fed. Reg. 15698 (Mar. 18, 2022). Because this decision analyzes the regulations and subregulatory guidance in existence at the time of the 2019 Davis-Bacon ruling letter and wage survey (initiated in 2013) at issue in this case, this decision does not in any way implicate the current rulemaking or impact future regulatory changes or guidance materials that WHD may promulgate in connection with that rulemaking.

In 2013, WHD initiated a DBA prevailing wage survey of residential construction projects in rural counties in California. *See* Administrative Record (AR) 2–3. As a result of the survey, WHD obtained data reflecting that ironwork was performed on seven usable projects. *Id.* at 3, 24–30. Wage information was reported on WD-10 forms, which reflected 18 individual workers on those seven projects. Each form identified the worker’s job classification as “Iron Worker,” and the type of work performed as “Structural/Reinforcing/Ornamental.” *Id.* at 3.

WHD then contacted the contractors for these seven projects to assess what type of ironwork each worker performed. *See* AR 3. Based on the information obtained, WHD determined that three workers employed by two contractors performed reinforcing ironwork, 15 workers employed by two contractors performed structural ironwork, and no workers performed ornamental ironwork. *Id.* Because there was not sufficient wage data for any of these three ironworker classifications to satisfy WHD’s survey sufficiency criteria (which WHD concluded minimally required data for six workers and three contractors in this case), WHD did not publish a prevailing wage rate for any of the ironworker classifications. *Id.* at 3, 6.

On October 13, 2016, the District Council of Iron Workers of the State of California and Vicinity (District Council) requested reconsideration by the WHD Administrator of the residential wage determinations for certain rural counties that did not yield a wage rate for the iron worker classification, pursuant to the procedures set forth in 29 C.F.R. § 1.8. *See* AR 8–219. The District Council argued, *inter alia*, that WHD received sufficient data for a survey-wide wage determination and that WHD erred by dividing the single iron worker classification into three different subclassifications, which the District Council argued did not reflect the ironwork practice as a whole in the relevant locality. *Id.* at 8–19.

The WHD Administrator issued a final ruling letter denying the District Council’s request for reconsideration on July 5, 2019. *See* AR 1–7. In relevant part, the Administrator’s ruling letter explained that WHD has broad discretion to conduct wage surveys, define appropriate job classifications, and determine wage rates under the DBA. *Id.* at 1–2. The Administrator noted that WHD is permitted to “clarify” information that it receives on survey forms. *Id.* at 4–6. The letter further stated that WHD has historically regarded structural, reinforcing, and ornamental ironworkers as separate classifications, and it also noted that, in determining that three ironworker subclassifications were appropriate here, WHD relied on its assessment of the work actually performed by the workers for whom survey data was submitted. *Id.* Finally, the Administrator noted that WHD had interpreted the District Council’s own collective bargaining agreement (CBA) as separating ironworkers into the three job classifications. *Id.* at 4.

On February 25, 2020, the District Council petitioned for review before the ARB pursuant to the procedures set forth in 29 C.F.R. § 7.9. The District Council argued on appeal that, *inter alia*, WHD abused its discretion by failing to follow its own subregulatory guidance and relevant case law regarding the proper survey procedures for determining the local area practice of classifying work. The District Council asserted that WHD improperly disregarded the results of its own wage survey, which the District Council viewed as reflecting that the work in question was performed by a sole ironworker classification rather than three separate ironworker subclassifications in this geographic area, and that these errors resulted in an inability to publish a prevailing wage rate for ironworkers, thereby undermining the purpose of the DBA.

II. The ARB's Decision

On September 27, 2021, the ARB issued a per curiam Decision and Order (DO), affirming the final ruling of the WHD Administrator. *See* DO at 2. The Board explained that it accords very broad discretion to the Administrator and evaluates WHD's rulings to determine whether they are consistent with the DBA and its regulations, and whether they are a reasonable exercise of the discretion delegated to the WHD Administrator to implement and enforce the DBA. *Id.* at 3–5. The ARB further explained that the WHD Administrator also has broad discretion to determine the relevant geographic area in which to collect wage survey data and to determine wage rates. *Id.* at 4–5.

The ARB concluded that the Administrator did not abuse her discretion in this matter. *See* DO at 6–7. The Board determined that the Administrator acted reasonably by recognizing three separate ironworker classifications, and by declining to publish a wage rate for those classifications. *Id.* The Board explained that none of the District Council's arguments demonstrated that the WHD Administrator abused their discretion. *Id.* In its brief analysis, the ARB stated, "In expanding the geographic scope, and dividing ironworkers into three distinct classifications, the Administrator and WHD reasonably followed the prescribed DBA regulations, agency guidance, and past practices in conducting the wage survey. Ultimately, the survey responses did not satisfy WHD's six-worker to three-employer sufficiency requirement, and consequently, WHD did not issue a prevailing wage determination for each ironworker classification." *Id.* at 7. The Board therefore summarily affirmed the Administrator's ruling letter. *Id.*

III. Analysis

The DBA vests the WHD Administrator with significant discretion in conducting prevailing wage surveys and determining wage rates. Here, however, I find that WHD abused that discretion by disregarding its own guidance for determining wage rates such that the fundamental purpose of the DBA itself was contravened. Based on the record, and as described in more detail below, WHD abused its discretion in the conduct of this particular wage survey by failing to adhere to its own Manual and consult with the signatories to the CBA that formed the basis of the wage rate for 17 of the 18 workers covered by the wage data collected. As a result of this decision, the agency did not publish a prevailing wage rate for this work and the central purpose of the DBA was undermined.

I therefore remand this matter back to the ARB for further proceedings consistent with this decision.

A. Standard of Review

The Davis-Bacon Act "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." *Donovan*, 712 F.2d at 616; *see In re Coal. for Chesapeake Housing Dev.*, ARB Case No. 12-010, 2013 WL 5872049, at *4 (ARB Sept. 25, 2013) (same). The ARB has recognized that because it "may be very difficult to discern the wage

paid to every relevant laborer in the relevant labor pool, [it] must read the regulations to require that the Administrator make a reasonable effort and use reasonable discretion to identify the relevant laborers and ultimately publish a realistic prevailing wage.” *In re Road Sprinkler Fitters Local Union No. 669*, ARB Case No. 10-123, 2012 WL 2673228, at *4 (ARB June 20, 2012). Of specific relevance to this case, courts have affirmed WHD’s “broad discretion to recognize and define the various classes of workers for whom the prevailing wage must be determined.” *Associated Builders & Contractors, Inc. v. Herman*, 976 F. Supp. 1, 17 (D.D.C. 1997).

Accordingly, the ARB generally assesses whether the WHD Administrator’s rulings are “consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the [DBA].” *In re Phoenix Field Office*, ARB Case No. 01-010, 2001 WL 767573, at *3 (ARB June 29, 2001); *see, e.g., In re Associated Gen. Contractors of Maine*, ARB Case No. 13-043, 2015 WL 2340493, at *1 (ARB Apr. 30, 2015). Although the Board has explained that it is “reluctant to set the Administrator’s interpretation aside” where a matter requires “the Administrator’s discretion and expertise” and that the Board will typically defer to the Administrator “as being in the best position to interpret [the DBA’s implementing regulations] in the first instance,” the Board has recognized that there are limits to the Administrator’s substantial discretion. *Chesapeake Housing*, 2013 WL 5773492, at *3 (internal quotation marks and citations omitted). For example, the ARB will reverse the Administrator’s interpretation where it “is unreasonable in some sense” or where it “exhibits an unexplained departure from past determinations.” *Id.* (internal quotation marks and citations omitted); *In re Miami Elevator Co.*, ARB Case Nos. 97-145, 98-086, 2000 WL 562698, at *13 (ARB Apr. 25, 2000) (same).

B. Davis-Bacon Classifications and Wage Rates Must Reflect Locally Prevailing Practice

The Davis-Bacon Act’s prevailing wage requirement applies, in relevant part, to “laborers and mechanics.” 40 U.S.C. § 3142(b). Because the DBA “does not identify what classifications of construction workers are encompassed within the universe of ‘laborers and mechanics,’” the “process of analyzing and assessing the various construction classifications” is entrusted to WHD. *Miami Elevator Co.*, 2000 WL 562698, at *3. WHD’s regulations emphasize that the agency may consider a wide range of information in conducting surveys and determining the prevailing wage rates paid to particular classifications under the DBA. *See* 29 C.F.R. § 1.3.

The D.C. Circuit has affirmed that DBA job classifications must be determined based on the prevailing practices in the locality. *See Donovan*, 712 F.2d at 624–26. In *Donovan*, the D.C. Circuit concluded that the fact that a classification could be “identified” in the locality did not mean that the classification actually prevailed in that locality. *Id.* In reaching this conclusion, the *Donovan* court emphasized that the “central purpose” of the DBA is “to ensure that federal contractors pay the wages prevailing in the locality of the project.” *Id.* at 619. The D.C. Circuit explained that “use of a less-than-prevailing classification may result in payment of lower wages than those prevailing in the community for the same work,” and that such a practice is “prohibited” by the DBA. *Id.* at 625. The court emphasized the need for job classifications to “reflect the prevailing practice in the area” in order to effectuate the purposes of the DBA. *Id.* at

629. As the ARB has similarly explained, WHD must ensure that “the classifications in the [wage determination] are generally complete and supported by the prevailing practice in the area and by evidence in the record.” *In re Audio-Video Corp.*, ARB Case Nos. 95-047, 96-117, 96-119, 96-120, 96-149, 96-163, 1997 WL 454062, at *5 (ARB July 17, 1997).²

WHD’s wage survey process is designed to ensure that the agency publishes locally prevailing wage rates for appropriate classifications in the geographic area. The DBA Manual of Operations sets forth a step-by-step chart depicting the general survey process.³ The chart reflects that, after WHD solicits and receives wage data, WHD engages in a step called “Clarify and Analyze Data.” AR 228. Under this step in the survey process, WHD will “[c]all contractors to obtain missing/ambiguous data on returned WD-10’s and resolve area practice issues” prior to closing the survey. *Id.* In the more detailed narrative description of the DBA survey process in the Manual, WHD provides an overview of the “Clarify and Analyze Data” stage. *Id.* at 230–33. The Manual explains that “intensive effort will usually be required to reconcile ambiguities and incompleteness in the data and to investigate thoroughly unique ‘area practice’ issues, if any, that are indicated by the survey responses or other sources.” *Id.* at 230. The Manual expressly states that “[d]etermining the nature of work performed by various occupational classifications reported is an area that often needs clarification” and that, in resolving data ambiguities, WHD often will need to call contractors. *Id.* Later in the description of this survey stage, the Manual provides that “[a]lso in this step an effort should be made to clarify area practice issues. Questions as to the proper classification for the work performed by a laborer or mechanic . . . are resolved by making an area practice determination. Such ‘surveys’, when necessary, are conducted under the guidance of’ WHD staff. *Id.* at 231.

The Manual then explains within that same “Clarify and Analyze Data” section that, based on the WAB’s *Fry Brothers* decision discussed above, “if the applicable wage determination reflected union negotiated rates for the particular classifications in question, it is necessary to determine how the work is classified by those firms who are signatory to the applicable collective bargaining agreements.” AR 231. As explained in the Manual, WHD determines the classification of work performed by contacting the relevant unions and asking if they perform the work in question and confirming that information with management’s collective bargaining representative (e.g., contractor associations). *Id.* According to the Manual, if the relevant union and contractor association agree on the proper classifications, the area practice is established; if

² The ARB and its predecessor tribunal, the Wage Appeals Board (WAB), have long recognized that the proper classification of workers is of critical importance under the DBA. For example, in *In re Fry Bros. Corp.*, WAB Case No. 76-06, 1977 WL 24823 (WAB June 14, 1977), the WAB held that it was impermissible under the DBA for a contractor to divide carpentry work between carpenters and carpenter tenders in order to pay lower wages for some of the work. As the WAB explained, “If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act.” *Id.* at *6.

³ The DBA Manual of Operations states that it sets forth “guidelines, standards and techniques” regarding the wage survey and determination process, AR 222, but acknowledges that “the collection of wage rate information under the Davis-Bacon program is a complex process” and that area practice survey efforts “will vary extensively in scope and intensity of effort depending on the particular situation at hand.” *Id.* at 227.

they do not agree, then WHD must “determine by survey which classification actually performed the work in question on similar projects.” *Id.* at 231–32.

C. Application to the 2013 Wage Survey

As discussed above, in this particular wage survey, WHD received data reflecting that ironwork was performed on seven usable projects. Wage information was reported on WD-10 forms, which reflected 18 individual workers on those seven projects. All of the forms listed the worker’s job classification as “Iron Worker,” and the type of work performed as “Structural/Reinforcing/Ornamental.” Moreover, all but one of the contractors for whom wage data was submitted was a union contractor, and the wages for 17 out of the 18 workers reported were paid in accordance with the applicable labor agreement. *See* AR 24–30; Pet. for Review 4.

After receiving the data, WHD contacted the contractors for these seven projects to assess what type of ironwork each worker performed. Based on the information obtained, WHD determined that three separate ironworker subclassifications were appropriate and that there was not sufficient wage data for any of these subclassifications to publish a wage rate. *See* AR 3. In the 2019 ruling letter defending this wage survey, WHD stated that the agency has historically regarded structural, reinforcing, and ornamental ironworkers as separate classifications, and it also noted that WHD had interpreted the District Council’s own CBA as separating ironworkers into these three job classifications. *See* AR 4–5.

WHD’s decision not to consult with the union as part of its data clarification process, despite evidence that the vast majority of workers at issue were being paid in accordance with a CBA, is inconsistent with the agency’s own guidance. The DBA Manual of Operations explains that “if the applicable wage determination reflected union negotiated rates for the particular classifications in question, it is necessary to determine how the work is classified by those firms who are signatory to the applicable collective bargaining agreements. This is accomplished by contacting the respective unions and asking if they perform the work in question and confirming the information provided by the unions with management’s collective bargaining representative.” AR 231.⁴ If there is no agreement between the unions, or management does not agree with the union, under the Manual, “it is then necessary to determine by survey which classification actually performed the work in question on similar projects . . . in the time period prior to the current project.” *Id.* at 231–32.

WHD’s guidance for conducting surveys is intended to ensure that the agency exercises its best efforts to publish timely, accurate, and comprehensive wage determinations reflective of the

⁴ WHD argues that the District Council has conflated two distinct questions: (1) what type of work was performed (which is the issue that WHD states that it addressed when it clarified whether work reported as “ironwork” in this matter was in fact structural, reinforcing, or ornamental ironwork), and (2) which classification predominantly performs the particular work (a separate issue that WHD says it addresses when it has already determined the type of work performed but still needs to determine, as a matter of local area practice, which classification(s) predominantly perform the work). Administrator’s Response Br. 35. Even if the DBA Manual of Operations could plausibly be read in a manner consistent with this argument, this conclusion is not clearly supported by the agency’s guidance or record evidence; in any event, these two inquiries appear to be intertwined under the specific facts presented in this case.

practices that actually prevail in a particular locality, as required by both the statute and relevant case law. Although WHD may deviate from its procedures or change its prior interpretations where sufficiently explained, *see, e.g., Chesapeake Housing*, 2013 WL 5872049, at *3, the agency has not provided a reasoned explanation for its apparent departure from its longstanding guidance in this matter. WHD’s lack of engagement with the relevant union and contractor association was an abuse of discretion under the facts presented because the wage data received uniformly identified the worker’s job classification as “Iron Worker,” most of the contractors for whom wage data was submitted were union contractors, and the wages for the overwhelming majority of workers reported (17 out of 18) were paid in accordance with the CBA.⁵ Ultimately, WHD determined, without consulting the signatories to the applicable CBA, that it was appropriate to divide the data into three separate ironwork subclassifications and that the agency received insufficient data for each of these subclassifications; as a result, WHD could not publish a prevailing wage rate for this work. If WHD had consulted with the union and contractor organization, it appears likely that WHD would have found that workers in this particular area classified as ironworkers under the CBA were trained to do, and likely did perform, all three types of work.⁶ In such a circumstance, WHD should have published a prevailing wage rate for a unitary ironworker classification.

Ultimately, the publication of prevailing wage rates based on local area practice is the central purpose of the DBA. WHD’s decision in this case to “clarify” the survey data it received but then to only engage in a one-sided consultation process by which the agency contacted the relevant contractors but not the union violated the agency’s own guidance. But even more importantly, WHD’s decision ultimately resulted in the agency’s inability to determine the prevailing local practice involving ironworkers in this case. WHD’s deviation from its procedures here, particularly where the wage data received reflected that the vast majority of ironworkers were paid the same CBA-determined rate and where the District Council presented evidence to WHD that all structural, reinforcement, and ornamental ironwork was classified under one “Ironworker” classification, ultimately contravened the very purpose of the DBA and constituted an abuse of discretion under the facts presented.

⁵ To the extent that WHD based its decision not to consult with the relevant union on what WHD has described as a default or historical practice of issuing wage rates for three separate ironworker subclassifications, such a historical practice does not justify departure from the agency’s own guidance requiring consultation with the relevant union under the facts outlined here. Moreover, the record does not contain clear evidence of such longstanding WHD practice. Notably, prior Davis-Bacon residential wage determinations in California reflected publication of a prevailing wage rate for a unitary “Ironworkers: Ornamental, Reinforcing, and Structural” classification. *See* AR 34–40. WHD states that it typically calculates rates for the three ironworker classifications separately, but then publishes a single rate for a combined classification where all three subclassifications result in the same rate. *See, e.g., id.* at 5. The record does not contain adequate evidence to evaluate this explanation; in any event, regardless of historical practice, the wage data received by the agency here did not identify the relevant work as being performed by three distinct ironworker subclassifications, and the DBA itself requires that such general policies must give way to the realities of the relevant local area practice.

⁶ In the 2019 ruling letter, the Administrator stated that, *inter alia*, three separate ironworker subclassifications were consistent with the District Council’s own characterization of ironwork in the relevant CBA. *See* AR 4. In so concluding, the Administrator cited to one provision of the CBA regarding the union’s jurisdiction. *See id.* (citing to Section 3(C) of the CBA); *see also* AR 75–76. Read as a whole, however, the relevant CBA clearly provides that all ironworkers covered by the CBA (in California and a portion of Nevada) are trained under a single apprenticeship program to perform all of the ironwork duties and are paid at the same rate under the CBA. *See, e.g.,* AR 111–13.

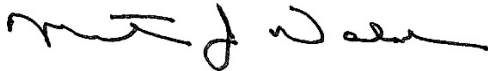
IV. Conclusion

The ARB properly recognized the broad discretion that the DBA has granted to the Secretary and WHD to interpret the DBA and its regulations. Nothing in this decision should be interpreted to narrow that broad discretion. Review was necessary in this case because WHD's departure from established guidance and policy resulted in clear departure from the core mandate under the DBA to ensure that prevailing wage determinations reflect prevailing local practice. *See Donovan*, 712 F.2d at 617 (explaining that the "essential purpose of the [DBA] statute . . . was to ensure that federal wages reflected those generally paid in the area"). For the reasons stated above, I reverse the ARB's Decision and Order and I remand this matter back to the ARB for further proceedings consistent with this decision.

ORDER

1. The ARB's Decision and Order is hereby **REVERSED**.
2. This matter is hereby **REMANDED** to the ARB for further proceedings consistent with this decision.

Signed in Washington, DC, this 15th day of July, 2022,



MARTIN J. WALSH