



In the Matter of:

Disputes concerning the payment of prevailing wage rates and overtime by:

ARB CASE NO. 07-102

DATE: October 29, 2009

**TASKER HOMES I #2807-1
CAMBRIDGE PLAZA PHASE II
2680-4, GENERAL WAGE DECISION
NOS. PA 020025 MOD. 5 – 10/25/02,
PA 030025 MOD. 0 – 6/13/03**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:

Marc Furman, Esq., Philadelphia, Pennsylvania

For the Department, Wage and Hour Division:

Joan Brenner, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Jonathan L. Snare, Esq., Acting Solicitor of Labor, United States Department of Labor, Washington, District of Columbia

FINAL DECISION AND ORDER

Brown & Guarino, Inc., filed a petition for review of a final determination that the Administrator of the Wage and Hour Division issued on June 20, 2007, under the Davis-Bacon and Related Acts.¹ The Administrator's ruling denied the addition of a roofer helper classification and wage rate to two general wage decisions, which were incorporated in construction contracts for two residential building projects in Philadelphia County, Pennsylvania.

After thorough consideration of the record and the parties' positions, we conclude that the Administrator's decision denying Brown & Guarino's request is within the range

¹ 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003); 29 C.F.R. Parts 1, 5 and 7 (2009).

of discretion accorded under the Acts and implementing regulations and is not unreasonable. We accordingly deny Brown & Guarino's petition for review.

BACKGROUND

1. The Legal Framework

The Davis-Bacon Related Acts incorporate the Davis-Bacon Act prevailing wage requirements into contracts between a non-Federal entity, such as a State or local government, and a contractor where the Federal government provides funding indirectly.² It requires that contractors pay a minimum wage to the various classifications of mechanics or laborers they employ under the contract. The Administrator of the Wage and Hour Division is responsible for issuing minimum wage determinations under the Act's implementing regulations.³ The minimum wage rates contained in the determinations derive from rates prevailing in the geographic locality where the work is to be performed or from rates applicable under collective bargaining agreements.⁴ The implementing regulations require that the Administrator classify any class of laborer or mechanic, employed on a project but not listed in a contract wage determination, in conformance with the wage determination.

Contracting agencies obtain wage determinations for their construction projects under either of two different approaches. When wage patterns for a particular type of construction in a locality are established and when a large volume of procurement is anticipated in the area for the construction, the Administrator may furnish notice in the Federal Register of a "general" wage determination.⁵ The Government Printing Office publishes general wage determinations. Contracting agencies may use general wage determinations without notifying the Administrator.⁶ Alternatively, contracting agencies may ask the Administrator to issue a wage determination for particular contracts to cover specified employment classifications on an individual construction project.⁷ The

² 40 U.S.C.A. §§ 3141-3148. The Davis-Bacon Act applies to every contract of the United States in excess of \$2,000 for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States. 40 U.S.C.A. § 3142(a); 29 C.F.R. § 5.1(a).

³ 29 C.F.R. § 1.1(a).

⁴ 29 C.F.R. § 1.3.

⁵ 29 C.F.R. § 1.5(a).

⁶ *Id.*

⁷ 29 C.F.R. § 1.5(b).

Administrator designates these issuances as “project” wage determinations. This case involves one of the Administrator’s general wage determinations.

On occasion, contract performance may require the addition of trade classifications after the period permitted for modification of the wage determination. After a contracting agency awards a contract, the Administrator may add job classifications to the wage determination through a “conformance action,” in which the agency, through its contracting officer, “shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.”⁸

2. Chronology of Events

Brown & Guarino was the roofing contractor on two housing projects, Tasker Homes I #2807-1 and Cambridge Plaza Phase II-2680-4 (Tasker and Cambridge). Both projects were subject to the Davis-Bacon contract labor standards provisions because they were federally assisted by the U.S. Department of Housing and Urban Development (HUD). On June 8, 2005, Terri Brown, President of Brown & Guarino asked Debra Bensala, the Regional Labor Relations Officer for HUD in Philadelphia, for clarification of the procedures necessary for adding a roofer helper classification to the general wage determination applicable to the Tasker and Cambridge projects.⁹ Apparently in response to Brown’s request, Bensala requested that the Administrator add a roofer helper classification to the wage determination.¹⁰

On September 16, 2005, John Frank, Section Chief of the Wage and Hour Division’s Construction Wage Determinations Branch, denied the request, stating that “the supported documentation submitted does not make a clear distinction between the duties of a helper and journeyman to justify adding the helper classification to the wage decision.”¹¹ On November 21, 2005, Bensala informed James Ferraro, Deputy Director of the City of Philadelphia Labor Standards Unit, of the denial of Brown’s request for a roofer helper classification. Bensala also informed Ferraro that if there were wage underpayments on the project, the Wage and Hour Division would require restitution.¹²

⁸ 29 C.F.R. § 5.5(a)(1)(ii)(A), 29 C.F.R. § 1.6(c)(3). Cf. 29 C.F.R. § 1.6(c)(2)(i)(A) (in instances of competitive bidding, modifications received less than 10 days before the opening of bids shall be effective unless insufficient time remains to notify bidders of the modification).

⁹ Administrative Record (AR) Tab B.

¹⁰ AR Tab D.

¹¹ *Id.*

¹² AR Tab E.

On December 21, 2005, Brown wrote to Ferraro, requesting reconsideration of the denial and informing him that Brown & Guarino was “unable to find a written delineation of the Helper[’]s duties under the Residential CBA [collective bargaining agreement].”¹³ She further stated that the Roofers Local 30, United Union of Roofers, Waterproofers, and Allied Workers (Local 30) Residential CBA had recognized roofer helpers for at least thirty years, and that area practice had established that helpers’ duties included unloading roof materials from a truck, removing materials from conveyors that move shingles to a roof and placing shingles on a roof, and assisting journeymen in setting chalk lines, measuring openings, etc. Area practice had also established that journeymen roofers operate the conveyors and install the shingles. Brown further stated, “The Journeymen perform the skilled tasks while the Helper assists him/her and performs the more mundane, manual tasks.”¹⁴

On January 23, 2006, Brown sent Ferraro the following additional information in support of her request for the addition of a roofer helper classification to the wage determination: (1) a letter from Tom Pedrick, Trustee of Local 30, indicating that the contract work was in compliance with Local 30’s residential CBA; (2) a letter from John Biasini, President of the Delaware Valley Roofing Contractors Association (DVRCA), indicating that Local 30’s CBA incorporates rates for helpers, and that the use of helpers has been “recognized as a prevailing practice for a long period of time,” and (3) four letters from area roofing contractors, stating that Local 30’s CBA recognized helpers, and that use of helpers was a prevailing practice in the area.¹⁵

In response to Brown’s letters and submissions to Ferraro, the Administrator issued a final ruling on June 20, 2007, denying the roofer helper classification. The Administrator noted that Local 30’s CBA did not define the duties of the roofer helper, but that the Delaware Valley Roofing Contractors defined roofer helper duties to include cleaning up debris, material handling, material placement, and assisting the journeymen. The Administrator found that none of the evidence Brown submitted was supported by payment evidence. Finally, the Administrator found that Brown’s description of roofer helper duties indicated that the duties are not distinct from those of journeyman roofers. The Administrator therefore denied the addition of the proposed classification because Brown had not established that a roofer helper classification prevails in Philadelphia County, Pennsylvania.¹⁶

¹³ AR Tab G.

¹⁴ AR Tab G at 13.

¹⁵ AR Tabs, I, J, K, L, M and N.

¹⁶ AR Tab A.

JURISDICTION AND STANDARD OF REVIEW

Our review of the Administrator's decision is in the nature of an appellate proceeding.¹⁷ We assess the Administrator's decision to determine whether it is consistent with the statutes and regulations and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon and Related Acts.¹⁸

DISCUSSION

The Davis-Bacon Act regulations regarding wage determination conformance actions assign the Administrator the responsibility to approve, modify or disapprove proposed classifications and wage rates and to issue a ruling after considering the interested parties' views. By design, the Davis-Bacon conformance process is an expedited proceeding created to "fill in the gaps" in the Administrator's wage determinations. The narrow goal is to establish an appropriate wage rate for a trade classification needed to perform a federal construction contract when the Administrator's published wage determination does not already include a classification that performs the work. The limitations built into the conformance procedures are essential to maintaining fairness for all contractors competing for federal construction projects.¹⁹

The regulation governing the use of helper classifications on wage determinations provides that the Administrator will issue a helper classification on a wage determination only when the following criteria are met:

- (i) The duties of the helper are clearly defined and distinct from those of any other classification in the wage determination;
- (ii) The use of such helpers is an established prevailing practice in the area; and
- (iii) The helper is not employed as a trainee in an informal training program . . . [and] the work to be performed by the

¹⁷ 29 C.F.R. § 7.1(e).

¹⁸ *Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (May 11, 2000); *Miami Elevator Co. and Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (Apr. 25, 2000).

¹⁹ *Pizzagalli Constr. Co.*, ARB No. 98-090, slip op. at 5 (May 28, 1999). *See also* 29 C.F.R. § 5.5; 48 C.F.R. Subpart 22.4 (2009).

helper is not performed by a classification in the wage determination.^[20]

The facts of this case support the Administrator's ruling that Brown & Guarino's proposed roofer helper classification did not meet all the criteria for issuing a roofer helper classification. We agree with the Administrator that the contractor failed to show that the proposed helper's duties are clearly defined and distinct from those of the journeyman roofer.

Brown herself admitted that she was unable to find any evidence that specified the duties of a roofer helper.²¹ Nevertheless, she contends on behalf of Brown & Guarino that roofer helper duties are distinct from the journeyman roofer duties in the following ways: (1) helpers unload roof materials while journeyman roofers operate conveyors that move material to the roof, and (2) helpers place shingles on the roof while journeymen install them. In support of its contention that the proposed roofer helper duties are defined and distinct, Brown & Guarino offered four contractors' statements, all containing the following identical description of helper duties: "debris clean up; material handling; material placement; and assisting the Residential Journeymen with tools and material."²² Contractor A. Carotenuto & Sons's letter further states that helper duties include assisting "journeymen in the performance of their duties including but not limited to the operation of all mechanical equipment, installation of the product being installed, including shingle, slate, tile, metal, gutter, siding and other various material installation."²³ Thus, since this evidence indicates that roofer helpers share the duties of journeymen, it supports the Administrator's conclusion that the helper duties are not distinct.

The remaining evidence also does not support Brown & Guarino's contention that the duties of the proposed roofer helper are distinct from those of the journeyman roofer. The DVRCA's letter states summarily that "[t]he Union maintains and protect[s] the distinction of these established duties through the Union Steward appointed to each employer's shop."²⁴ But nowhere does the union reveal what "these established duties" are. In fact, the union CBA contains nothing about the helper duties, and the union's letter merely states its opinion that Brown & Guarino's use of helpers is "in full

²⁰ 29 C.F.R. § 5.2(n)(4).

²¹ AR Tab G (Letter from Terri Brown to James Ferraro), stating inter alia, "After searching both the Employer Association and the Union's archives, we have been unable to find a written delineation of the Helpers duties under the Residential CBA."

²² AR Tabs K, L, and M.

²³ AR Tab N.

²⁴ *Id.*

compliance” with its residential CBA.”²⁵ The residential CBA specifies a helper wage rate of at least fifty percent of the journeyman rate and a one-to-one ratio of helper to journeyman, but does not describe the helper duties. Finally, none of Brown & Guarino’s supporting documents identifies a specific project that employed helpers or provides wage payment data from other projects. For this reason alone, the record supports the Administrator’s decision denying the conformance request.²⁶

We also agree with the Administrator’s second reason for denying the conformance request: there is no evidence in the record that the use of helpers on roofing projects is “an established prevailing practice in the area.”²⁷ None of the four contractors that submitted letters identified any project on which they used helpers. Local 30’s letter merely offered the unsupported conclusion that Brown & Guarino’s use of helpers was in full compliance with its residential CBA.²⁸ Similarly, the DVRCA stated that “the classification of Helper on residential and shingle, slate and tile roofing work has been included in the Union’s CBA and recognized as a prevailing practice on the work in question in this area for well over three decades,” but the DVRCA offered no examples of projects using the classification. The contractors, DVRCA, and union submitted only unsupported assertions on this point. Therefore, like the Administrator, we find that the Brown & Guarino failed to demonstrate that the use of helpers on residential roofing projects is an established prevailing practice in Philadelphia County.

CONCLUSION

In denying the conformance, the Administrator acted in accordance with the applicable regulations and well-settled agency policy and practice. He also acted reasonably within the discretion delegated to him to implement and enforce the Davis-Bacon and Related Acts. We therefore **AFFIRM** the Administrator’s ruling and **DENY** Brown & Guarino’s petition for review.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

²⁵ AR Tab I.

²⁶ We also note that the record does not contain evidence that journeyman roofers do not perform this work.

²⁷ 29 C.F.R. § 5.2(n)(4)(ii).

²⁸ AR Tab I.