



In the Matter of:

**ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669**

ARB CASE NO: 10-123

DATE: June 20, 2012

**Dispute concerning the application of wage
Rate determinations in General Decision
Numbers UT080037 through UT080057
Applied to sprinkler fitters engaged in building
Construction in the State of Utah.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Natalie C. Moffett, Esq., *Osborne Law Offices, P.C.*, Washington, District of Columbia

For Respondent:

**Mary E. McDonald, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq.; Patricia
Smith, Esq.; *U.S. Department of Labor*, Washington, District of Columbia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative
Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*.**

DECISION AND ORDER OF REMAND

This case arises under the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2010), and regulations at 29 C.F.R. Parts 1, 5, and 7 (2010). Road Sprinkler Fitters Local Union No. 669 (Local 669) filed a petition for review of a June 3, 2010 final

determination in which the Deputy Administrator of the Wage and Hour Division (collectively the Administrator)¹ denied a request for reconsideration of a prevailing wage rate for sprinkler fitters covering building projects in several counties of Utah. For the reasons stated below, we remand this case to the Administrator to reconsider the prevailing wage rate for sprinkler fitters in Davis County.

BACKGROUND AND PROCEDURAL HISTORY

The Survey and Published Rates

In 2004, the Administrator performed a wage survey in Utah to set the prevailing wage rate for building projects subject to the DBA requirements in Utah.² The Administrator collected wage data from May 15, 2004, to October 31, 2004.³ The survey efforts yielded wage data observations (reported jobs) for approximately fifty-four (54) sprinkler fitter jobs in Utah, but representing only eight (8) of the twenty-nine (29) counties in Utah.⁴ Contractors and other

¹ We appreciate that wage survey and wage-rate decisions involve many individuals from the Wage and Hour Division, regional and national offices, the Deputy Administrator, and the Administrator. However, to simplify matters, we will use the term “Administrator” to refer to all of these individuals, except in describing the procedural background of Local 669’s reconsideration request.

² According to the Administrator, wage data for the 2004 survey was requested from unions, contractors, and associations in both rural and metropolitan counties throughout the state. Administrator’s Brief, p. 3.

³ See Letter dated June 3, 2010, p. 2. Administrative Record, Tab A (Admin. Rec.). The 1986 Davis-Bacon Construction Wage Determinations: Manual of Operations (1986 Manual) provides some guidance as to which projects would qualify for this reporting period. See pp. 48-50. It is unclear whether all of the wage survey data in the record fell within the reference time.

⁴ This data was scattered through the extensive data contained in Admin. Rec., Tab M. There was no list of all the sprinkler fitter data collected by the Administrator. Nor was there a complete and clear list of all the sprinkler fitter jobs that factored into the published wage rates and which jobs were rejected. As we indicated, we deciphered that Tab M listed 54 total sprinkler fitter jobs from 34 projects. In the table of contents for the exhibits, the Administrator described Tab M as “Project Wage Summaries (Form WD-22a), 2004 Utah Statewide Survey (All counties).” For whatever reasons, the Administrator never discussed Tab M in her appellate brief. Nevertheless, we accept Tab M as the most complete record of the wage survey data collected for the 2004 survey. The Administrator described only 44 sprinkler fitter jobs in her April 28, 2009 letter (see Tab F), which expressly or implicitly included the following sprinkler fitter jobs per county: Cache (2), Davis (3), Salt Lake (24), Tooele (1), Utah (3), Weber (5), Emery (1), and Uintah (5). The difference of ten (10) sprinkler fitter jobs between Tab M and the Administrator’s April 28, 2009 letter can be reconciled by noting that Tab M contained three (3) additional jobs in Salt Lake, one (1) additional

entities from six (6) of the ten (10) metropolitan counties provided sufficient data, while only two of the nineteen rural counties provided sufficient data. Admin. Rec. Tab K. Forty-six (46) of the fifty-four (54) wage observations for sprinkler fitter jobs came from projects in a relatively small geographical core consisting of five contiguous metropolitan counties (Cache, Weber, Davis, Salt Lake, and Utah).

Four years after the wage survey, on July 14 and August 29, 2008, the Administrator published the prevailing wage determination for Utah's sprinkler fitters in the metropolitan and rural counties for 14 of the 29 counties. Admin. Brief, p. 3-4. Ultimately, all the published rates fell into only three different published rates statewide, while some counties had no published rate. Those rates were, respectively:

*Metro Counties*⁵

\$28.35 hourly/\$13.35 fringe (applied to 5 counties)⁶ - Total \$41.70
\$18.95 hourly/\$5.55 fringe (applied to Davis only) - Total \$24.50

Rural Counties

\$17.89 hourly/\$5.59 fringe (applied to 8 counties)⁷ - Total \$23.48

Most of the published rates from metro counties resulted from combining metropolitan counties found within the same Metropolitan Statistical Area (MSA) or rural counties within their geographical groups as previously designated by the Office of Management and Budget.⁸ In fact, only the published rates for Salt Lake County and Davis County were based solely on data submitted for those counties.

job in Tooele, and six (6) in Davis County. In its letter dated March 27, 2009, Local 669 indicated that the statewide survey reflected "28 projects submitted with 43 employees," yet another inconsistency in the record. See Tab G, p. 2.

⁵ There was no county population data in the record. The following counties were designated as metropolitan counties: Cache, Davis, Juab, Morgan, Salt Lake, Summit, Tooele, Utah, Washington, and Weber.

⁶ The five counties were: Morgan, Salt Lake, Summit, Tooele, and Weber Counties. Admin. Rec. Tab G.

⁷ The eight counties were: Boxelder, Carbon, Daggot, Duchesne, Rich, Sanpete, Uintah, and Wasatch. See Admin. Rec. Tab H (attached summary).

⁸ See Administrator's Brief, pp. 17-19, notes 7-9.

Davis County

The Administrator collected wage data for nine sprinkler fitter jobs working on five projects in Davis County.⁹ Specifically, in order of highest rate to lowest, the basic/fringe (and total) rates were:

<u>Project</u>	<u>Basic Rates/Fringe Rates</u>
HAFB Commissary	\$24.95/\$9.15 (\$34.10) (2 workers);
Aircraft Maintenance Complex	\$24.70/\$8.10 (\$32.80) (1 worker);
HAFB C-130 Hangar	\$24.70/\$8.10 (\$32.80) (2 workers);
HAFB Hangar #270	\$23.20/\$8.10 (\$31.30) (2 workers); and
Tanner Clinic	\$18.95/\$5.55 (\$24.50) (2 workers).

The Administrator implicitly¹⁰ rejected six (6) of the wage rates to determine the “prevailing” wage rate for Davis County. Instead, she apparently relied only on the two lowest rates of \$24.50 (the Tanner Clinic jobs) and one other sprinkler fitter job in Davis County. Admin. Rec. Tab M. As a result of the implicit rejection of six reported jobs, the two Tanner Clinic jobs at the same wage rate became the “single rate” paid to a “majority” of the workers of the three jobs considered by the Administrator. The Davis County published rate fell \$17.20 below the other metropolitan county rate (41 percent lower) and exceeded the rural county rate by only \$1.02. Consequently, the lowest rate from one project in Davis County (the two Tanner Clinic jobs) became the published prevailing wage rate for Davis County.

On March 27, 2009, Local 669 requested a review and reconsideration of the wage determinations for Utah’s sprinkler fitters. Admin. Rec. Tab G. Local 669 objected to the fact that the Administrator did not set the rate for Davis County the same way it set the rate for the other two counties in Davis County’s MSA.¹¹ More specifically, the Administrator set the rates

⁹ Pursuant to the record, all except one of the Davis County projects were “completed” before the beginning of the survey. See Tab M (Davis County). The Tanner Medical Clinic Building Project was “completed” on December 31, 2004. Consequently, it is unclear whether any or all of these projects qualified for the survey. See supra note 3.

¹⁰ We say implicit because the Administrator states that she considered only three rates, two of which must have been the Tanner Clinic jobs according to the data in Tab M. Logically, lacking any explanation to the contrary, we infer that six (6) of the Davis County jobs from the 2004 survey data (Tab M) were not considered in determining the Davis County rate. We see no indication in the record of the Administrator’s reasons for rejecting the other six rates.

¹¹ Admin. Rec. Tab G. When the Administrator expands beyond an individual county, it will consider the data from the county’s Metropolitan Statistical Area as established by the Office of Management and Budget and the census.

in Morgan and Weber Counties by using the MSA rate (combining Davis, Morgan, and Weber), but it did not do the same for Davis County. Allegedly, this resulted in a non-union rate in Davis County but a higher, union rate in Morgan and Weber Counties, even though Morgan County had no sprinkler fitter jobs reported in the survey. Local 669 emphasized that Davis County's 2008 wage determination for sprinkler fitters was forty-two percent lower than the previous determination for Davis County.¹² Local 669 asked that Davis County be grouped with Morgan and Weber Counties for purposes of Davis County's wage determination. The Administrator responded that it could only consider contiguous counties in the MSA if insufficient data were obtained from that county. Admin. Rec. Tab A. In this case, relying on its internal procedures, the Administrator concluded that Davis County had sufficient data and refused to expand it to other counties. According to the Administrator's internal guidelines, if the survey response includes at least three workers from at least two contractors ("3/2 Rule") in a particular county, the Administrator considers this sufficient data for the county to set a prevailing wage rate.¹³ The Administrator determined that the survey response from Davis County met the Administrator's 3/2 Rule. As an alternative suggestion, Local 669 requested that state-wide data be used for Davis County. According to Local 669, all previous wage determinations have been at the union rate for all counties in the entire state. Admin. Rec. Tab G (March 27, 2009 letter). The Wage and Hour Division responded that, because sprinkler fitters do not fall into a key classification, Wage and Hour could not use state-wide data. Wage and Hour denied further review.

On May 28, 2009, Local 669 requested that the Administrator reconsider Wage and Hour's denial to review the wage determination. The Administrator denied reconsideration and issued its final determination on June 3, 2010. Local 669 then filed this appeal and ultimately focused only on Davis County.

ISSUE

Did the Administrator abuse her discretion when she denied the request for reconsideration of the minimum wage rate for the sprinkler fitters for Davis County in General Decision UT080037-57?

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations. 29 C.F.R. § 7.1(b); Secretary's Order 1-2010

¹² We did not find an instance in the record where Local 669 asserted what the previous rate was. However, the Administrator does not dispute that there was a drop in the rate.

¹³ See 1986 Manual, p. 63; Admin. Rec. Tab F.

(Delegation of Authority and Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board's review of the Administrator's rulings is in the nature of an appellate proceeding. 29 C.F.R. § 7.1(e). We assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.¹⁴

In matters requiring the Administrator's discretion, the Board generally defers to the Administrator as being "in the best position to interpret [the DBA's implementing regulations] in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside." *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (Sec'y May 10, 1991), citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). In exercising our discretion to hear and decide appeals, we must "consider, among other things, timeliness, the nature of the relief sought, matters of undue hardship or injustice, or the public interest." 29 C.F.R. § 7.1(c).

DISCUSSION

Local 669 limits its objections to only Davis County, generally arguing that the Deputy Administrator allegedly ignored the glaring disparity between prior and current wage determinations for sprinkler fitters in Davis County. According to Local 669, the drastic rate drop of more than forty percent in Davis County caused an undue hardship. 29 C.F.R. § 7.1(c). Local 669 argues, citing *New Mexico Nat'l Elec. Contractors Assoc.*, ARB No. 03-020 (ARB May 28, 2004), that the survey's satisfaction of the 3/2 Rule for Davis County was not enough in this case given the significant drop. Essentially, the Deputy Administrator counters that the prevailing wage rate it set for Davis County was based on sufficient data collected from Davis County. The Administrator also points out that it properly followed up its requests for survey information to ensure the reliability of its data. The Deputy Administrator distinguishes the facts in this case from the facts of *New Mexico Nat'l Elec. Contractors Assoc.* For the reasons that follow, we remand for reconsideration of the Davis County wage rate.

1. The Regulatory Framework for Setting Prevailing Wage Rate

The DBA 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). It requires that the advertised specifications for construction contracts to which the United States is a party contain a provision stating the minimum wages to be paid to the various classifications of mechanics or laborers to

¹⁴ *Miami Elevator Co. & Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (ARB Apr. 25, 2000). See also *Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (ARB May 11, 2000); cf. *Dep't of the Army*, ARB Nos. 98-120, -121, -122, slip op. at 15-16 (ARB Dec. 22, 1999).

be employed under the contract. *Id.* 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. 40 U.S.C.A. § 3142(b).

The DBA itself does not prescribe a method for determining prevailing wages, leading one court to observe that the statute “delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.” *Building & Constr. Trades’ Dep’t, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983). Although subject to ARB review, “the substantive correctness of wage determinations is not subject to judicial review.” *Dep’t of the Army*, ARB Nos. 98-120, -121, -122, slip op. at 25 (citing cases). Courts limit review to “due process claims and claims of noncompliance with statutory directives or applicable regulations.” *Id.*, quoting *Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979).

In the absence of a statutory formula for determining prevailing wages, the DBA’s implementing regulations (1) delegate to the Administrator the Secretary’s DBA functions and (2) “set forth the procedures for making and applying” prevailing wage rates and fringe benefits under the DBA. 29 C.F.R. § 1.1(a) and (b). Immediately following the expressed delegation of authority, the regulations establish only two alternate definitions of the term “prevailing wage.” One definition is a primary definition which is followed by an alternate but subordinate definition. In the primary definition, “prevailing wages” are wages paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area. 29 C.F.R. § 1.2(a)(1). “Majority” means more than 50 percent. *Id.* Alternatively, only where no “majority wage rate” exists within a classification, the Administrator may set the prevailing wage as the weighted average of the wages paid to the workers employed in the relevant classification. *Id.* The regulations provide for no other formula to determine a prevailing wage. Consequently, the Administrator must ultimately strive to determine either a “majority rate” or a weighted average of the relevant laborers. Given that it may be very difficult to discern the wage paid to every relevant laborer in the relevant labor pool, we 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.¹⁵

To determine the prevailing wages, the regulations charge the Administrator with the duty of “conduct[ing] a continuing program for the obtaining and compiling of wage rate information.” 29 C.F.R. § 1.3. The Administrator surveys wages and fringe benefits paid to workers on four types of construction projects: building, residential, highway, and heavy. The Administrator may seek data from many sources, including “contractors, contractors’ associations, labor organizations, public officials and other interested parties” 29 C.F.R. § 1.3(a). Other sources of information include statements showing wage rates paid on projects, signed collective bargaining agreements, wage rates determined for public construction by State

¹⁵ In the 1986 Manual, the Administrator asserts that it would be “rare to obtain ‘perfect information,’” but this does not absolve the Administrator from collecting and relying on a reasonable amount of information.

and local officials under State and local prevailing wage legislation, data from contracting agencies, and telephone contact.¹⁶ These sources can provide the classification's wage rate and the type of construction project and determine whether the project was federally funded or federally assisted under Davis-Bacon Act requirements. 29 C.F.R. § 1.3(a). The Administrator also has discretion to determine the relevant geographic area. The "area" might be the city, town, village, county, or other civil subdivision in which the work is to be performed. 29 C.F.R. § 1.2(b). Under 29 C.F.R. § 1.7, the area will normally be the county of the particular project unless sufficient data is not available for the county, then the relevant area may expand to adjoining counties. The Administrator may expand metropolitan counties to include other surrounding metropolitan counties or expand rural counties to include other surrounding rural counties, but it may not mix metropolitan counties with rural counties. 29 C.F.R. § 1.7(b).

After collecting the data, the Administrator necessarily will determine whether the collected data is sufficient to make the required prevailing wage determination in compliance with the DBA regulations. The regulations do not provide a formal definition for "sufficient" data sets but there is no question that sufficient data is essential to setting a proper prevailing wage rate.¹⁷ Obviously, the data must be sufficient for the Administrator to reliably decipher the "majority rate" or the weighted average of the relevant laborers. As we previously explained, the Administrator relies on an internal guideline known as the 3/2 Rule to determine whether it has sufficient data (at least three workers from at least two contractors). Admin. Rec. Tab F. Where the private projects in the county provide insufficient data, the Administrator may look at wage data from federally funded or assisted projects. 29 C.F.R. § 1.3(d). The regulations also expressly allow the Administrator to expand the geographic locality beyond a county boundary where the county data is insufficient. 29 C.F.R. § 1.7(b) and (c). Nothing in the regulations prohibits the Administrator from perusing the total data in a county, a metropolitan statistical area or even statewide data to determine in particular cases what might be "sufficient" data. In other words, it seems that looking at the total data will better inform the Administrator whether the data collected from private contracts in a particular county will be sufficient data and lead to a reliable result.¹⁸

¹⁶ 29 C.F.R. § 1.3(b); 1986 Manual, p. 38-39.

¹⁷ The ninth step in the Administrator's eleven-step Survey Procedure requires the Administrator determine the "adequacy of the data." See 1986 Manual, p. 44. This step immediately precedes the computation of the prevailing rate. *Id.* We agree with the Manual that the Administrator must collect a "sufficient number of projects to provide a representative data base" and ultimately "produce a sound, objective basis for the issuance of a determination of prevailing rates in the particular locality." 1986 Manual, p. 47.

¹⁸ See, e.g., *Plumbers Local Union No. 27*, ARB No. 97-106, reliance on three private jobs was insufficient and unreliable given the population size of the relevant geographic area and knowledge of several hundred federal workers in the area.

2. Analysis

Under the totality of circumstances in this case, we find that the Administrator abused her discretion in denying Road Sprinkler's request for reconsideration of the Davis County rate. The Administrator erred in the way that she used the survey data and in her ultimate conclusion. First, as to methodology, the Administrator erred by applying the 3/2 Rule to conclude automatically that data from three sprinkler fitter jobs was sufficient to set a prevailing wage rate in Davis County.¹⁹ In reality, because the two Tanner Clinic jobs rates were identical and constituted a majority rate within the three rates considered, the metropolitan Davis County ultimately reflects nothing more than the rate paid to two workers on one project. Second and most importantly, the record in this case disproves the Administrator's finding that Davis County's \$24.50 rate reflects the "prevailing" wage rate as required by the DBA and its implementing regulations. Consequently, on these two bases, we remand this matter to the Administrator for reconsideration of the Davis County rate.

Before turning to the first basis for a remand, we again note that nowhere does the record indicate which sprinkler fitter job was considered along with the Tanner Clinic jobs as part of the Administrator's analysis under the 3/2 Rule. The record reflects that, in addition to the two Tanner Clinic jobs, the Administrator collected data for seven other sprinkler fitter jobs from four other Davis County projects: an Aircraft Maintenance project and three Hill Air Force Base (HAFB) projects. Tab M. We find no indication as to whether they all fell within the relevant time period for the survey and whether they were private or federal projects. Certainly, it is reasonable to surmise that the HAFB projects were federal projects and were excluded for this reason. Pursuant to the letter dated February 4, 2010, from Road Sprinkler's attorney, we infer that the HAFB jobs were not considered. See Tab B (requested that Administrator consider the three HAFB projects). We cannot decipher whether the Aircraft Maintenance project was a private or federal project, but that project and the Tanner Clinic may have been the projects considered by the Administrator in its 3/2 Rule analysis. Despite this missing critical information, we conclude that the Administrator erred in her methodology.

The Davis County Rate was Based on Insufficient Data

The first basis for remanding this matter for reconsideration arises from the Administrator's determination that the published Davis County rate was based on sufficient data. The Administrator did not exercise reasonable discretion in making this decision; instead, she mechanically relied on the 3/2 Rule. Consequently, as an independent basis, we remand for the Administrator to reconsider the Davis County wage rate by using more of the data collected in the 2004 survey.

¹⁹ We have questioned the Administrator's per se application of the 3/2 Rule in two previous cases. See *Plumbers Local Union No. 27*, ARB No. 97-106 (ARB July 30, 1998) and *New Mexico* ARB No. 03-020 (in both cases, the Board found that the Administrator abused his or her discretion in ignoring wage data from federally funded projects).

There is no question that the DBA and its implementing regulations require that the Administrator rely on “sufficient” data to calculate the prevailing wage. The statute does not expressly use the term “sufficient” data but the regulations repeatedly do. For example, pursuant to 29 C.F.R. 1.3(d), the Administrator will consider data from federal or federally assisted projects where the non-federal data is insufficient. Also, pursuant to 29 C.F.R. 1.7(b) and (c), the Administrator may expand the relevant area to surrounding counties or the relevant time period beyond one year where more data is needed. The term “sufficient” is not defined but it is commonly understood to mean “adequate” or “enough.”²⁰ In its wage determination manual, the Administrator expressly set forth deliberate steps that should be repeated until adequate data is collected.²¹ In this case, the Administrator collected data for fifty-four sprinkler fitter jobs, while forty-six of those jobs occurred in only five contiguous metropolitan counties (Cache, Davis, Salt Lake, Utah, and Weber). Our focus is not on the data collected but on the per se application of the 3/2 Rule to use a very small portion of that data.

We appreciate that the 3/2 Rule may be useful in limited instances where the Administrator is attempting to set the prevailing rate for uncommon classifications in sparsely populated areas. However, the 3/2 Rule is merely a guide and must be applied with common sense. The statutory and regulatory mandate is for the Secretary to determine the prevailing wage rate for an area. The per se application of the 3/2 Rule across the country will most likely lead to an improper determination in some cases. For example, in *Plumbers Local Union No. 27*, ARB No. 97-106, it was an abuse of discretion to follow the 3/2 rule for private data in light of the population size of the area and knowledge of several hundred federal workers in the area.

Like the *Plumbers* case, in *New Mexico Nat’l Elec. Contractors Assoc.*, ARB No. 03-020 (ARB May 28, 2004), the Administrator automatically relied on the 3/2 Rule to set a wage for electricians in one specific county. A contractors’ association challenged the wage determination on the grounds of its small sampling and roughly forty-eight percent disparity between the assigned wage and the previous wage for the county at issue. The ARB remanded. A major reason for the remand was a glaring disparity between the wage determination at issue and previous wage determinations for electricians, a fact the ARB stated should have alerted the Administrator to the de facto insufficiency of the survey data. The ARB identified some potential anomalies in the data, specifically that nineteen of twenty-five workers forming the county’s data set were from one contractor, and from a different state with lower pay. The ARB expressly raised a concern that “the Administrator merely attest[ed], in general terms, to the survey’s sufficiency.” *Id.* at 7-8. Aside from ignoring the disparity, the ARB also raised an independent concern that (i) the Deputy Administrator failed to explain why she abandoned the 1986 guidelines contained in the Manual of Operations, (ii) did not comply with the guidelines established in the 1999 U.S. Government Accountability Office Report, and (iii) applied, per se, the 3-worker/2-contractor standard. *Id.* at 4. Finally, the ARB found that the Administrator’s

²⁰ See *Plumbers* at 5.

²¹ 1986 Manual, p. 47. See also page 44 (it is the 10th step in the 11-step process).

labor analysts failed to follow up with contractors that did not respond to the first survey request. *Id.* at 7. Despite the Administrator’s attempt in this case to distinguish *New Mexico*,²² we find relevance in the ARB’s discussion of the per se application of the 3/2 Rule and the drop in the prevailing rate.

In this case, as in *Plumbers* and *New Mexico*, we find that the Administrator abused her discretion by automatically relying on the 3/2 Rule to conclude that three sprinkler fitter jobs was sufficient data. To begin with, other than pointing to its policy, the Administrator did not explain to Local 669 or to us how such de minimis data could be “sufficient” data to publish a prevailing rate in Davis County. Without any explanation from the Administrator, we cannot blindly accept that data from three jobs is statistically sufficient data for metropolitan counties. Presumably, building construction laborers can be readily found in metropolitan counties.²³ In fact, in Davis County, wage data was collected from nine sprinkler fitter jobs but the Administrator inexplicably limited her focus to only three jobs. Arguably, even nine sprinkler jobs may have been insufficient data in this specific case, which would require the Administrator to combine Davis County data with other counties in the same MSA (e.g., Weber County’s five sprinkler fitter jobs). In addition, automatic reliance on the 3/2 Rule in this case resulted in a prevailing rate based entirely on the rate paid to two workers from the same project (the Tanner Clinic jobs). Reliance on such de minimis data clearly contradicts the common sense purpose of the regulations permitting for the use of data from federal projects or surrounding counties where data is insufficient. In other words, without the benefit of the Administrator’s explanation, it seems illogical to conclude that data from merely three workers in a metropolitan county for a common job is “sufficient data” to eliminate the need to expand to other counties or include data from federal jobs, as permitted by the DBA and its implementing regulations.

Aside from the self-evident de minimis amount of data, Local 669’s objection to an alleged forty-two percent drop from the previous wage determinations should have sparked concerns about the sufficiency of the data. Contrary to the Administrator’s characterization, a forty-two percent drop in the prevailing rate is not “merely” a drop in rate; it is a substantial drop. More importantly, absent some economic crisis or other explanation, such a drop in wages seems highly unusual and seems potentially indicative of an error in methodology.

²² The Deputy Administrator contrasts the facts of *New Mexico Nat’l Elec. Contractors Assoc.*, from the facts at hand on two bases. Unlike the *New Mexico* case, there was no influx of out-of-state employees tainting the Utah survey responses and the Administrator engaged in follow-up to ensure the reliability of its survey. Admin. Br. at 24-25. We find that these differences do not diminish the usefulness of *New Mexico* in this case.

²³ See *Plumbers* (ARB placed significance on the fact that the county in question included a large metropolitan city, specifically Pittsburgh).

We note that when faced with such aberrations under the parallel McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C.A. §§ 351-358 (West 1987),²⁴ the Administrator retains current wage rates when new wage survey data indicate that prevailing rates have fallen below current wage rates.²⁵ More specifically, "when presented with survey data showing lower wages, the Administrator usually will not decrease the rates in the wage determination until two BLS [Bureau of Labor Statistics] surveys demonstrate a real downward trend and indicate that the lower rates on one survey were not an aberration." *D.B. Clark III*, ARB No. 98-106, slip op. at 7 (ARB Sept. 8, 1998) (Statement of the Acting Administrator in Opposition to Petition for Review). Importantly, the Administrator offered the following explanation:

There are good reasons for this practice. First, BLS area wage surveys are based on samples, rather than the entire population and therefore have an inherent margin of error. Wage and Hour's experience has demonstrated that regardless of the thoroughness of the survey methodology, data may shift inexplicably from one survey to the next producing great changes upward or downward. Moreover, survey results are dependent upon many factors, including the sample size, the geographic scope of the surveys and the number and nature of the business entities that provide data.

* * *

. . . Strict adherence to survey data could produce wide fluctuations in wage rates received by service workers from year-to-year on SCA-covered contracts. . . . The Department follows instead a reasonable policy of prudently interpreting the survey data so that wages, while reflective of local wage data, are generally subject only to steady, reasonable increases (or decreases) without serious disruption to employees, contractors or the contracting agencies.

Id. at 7-8 (citation omitted). This SCA policy highlights the danger of relying on insufficient data. While it may be true that the Administrator cannot adjust the rate in DBA cases, it can recheck the data to determine whether it was sufficient or whether the methodology materially changed from the last wage survey. After receiving Local 669's objections, it was insufficient to simply check that the 3/2 Rule was applied correctly and automatically conclude that three

²⁴ See *Millwright Local 1755*, ARB No. 98-015, slip op. at 6 (SCA characterized as "parallel prevailing wage statute" as related to DBA); *cf.* 29 C.F.R. § 4.101 (2003) (court decisions under related remedial labor laws including DBA are applicable in construing SCA).

²⁵ When new wage survey data indicate that prevailing rates exceed current wage rates by a certain percentage, the Administrator will cap increases.

sprinkler fitter jobs was sufficient data, especially where the two identical rates (the Tanner Clinic jobs) were from the same project.

In the final analysis as to the sufficiency of data, we find that the regulations prohibit the Administrator from relying on a per se application of the 3/2 Rule where (1) a new wage calculation results in a drop in the prevailing wage rate, and (2) the Administrator knows or could readily ascertain that other data exists. In this case specifically, the Administrator abused her discretion by relying solely on three sprinkler fitter jobs in Davis County, a metropolitan county. The Administrator should have reviewed the data received for Davis County in light of Local 669's objections, particularly the substantial drop in the prevailing rate, and determined whether all of the Davis County data would have created a more reliable finding, or even the data in the MSA containing Davis County. We leave it up to the Administrator to determine how much more data to consider and whether updated information should be considered. We next address the substantive challenge to the validity of the prevailing wage rate actually set for Davis County in this case.

The Davis County Rate was not Prevailing

The DBA requires that all covered contracts pay laborers no less than the "prevailing" wage for the relevant class of laborers. 40 U.S.C.A. § 3142(b). The term "prevailing" is not defined in the statute, but it is commonly understood to mean "having superior force or influence," "most frequent," and "generally current."²⁶ The implementing regulations impose a more specific definition on the term "prevailing." In the regulations, "prevailing" means the single rate paid to a majority of laborers in the relevant class of laborers (more than fifty percent) or, as a secondary alternative, the weighted average of the laborers in the relevant class of laborers. 29 C.F.R. § 1.2(a). The more specific definition of "prevailing" in the regulations ensures that the Administrator's published rate reflects the "most frequent" wage rate. In the end, after exercising her reasonable discretion in collecting data, analyzing data, and publishing a prevailing wage rate, the Administrator must ultimately conclude that it is indeed publishing a rate that "prevails" in the relevant classification. Putting aside the errors in methodology, and focusing on the \$24.50 rate, we now look to the record to determine whether that published rate does, in fact, reflect the "prevailing" or "most frequent" rate in Davis County within the meaning of the DBA.

After searching through *all* of the 2004 survey data in the record evidence, we find no support for the Administrator's conclusion that the Davis County wage rate of \$24.50 "prevailed" or was the "most frequent." First, focusing only on the data received from Davis

²⁶ Webster's Third New International Dictionary of the English Language Unabridged, Merriam Webster (1993). See also 5 U.S. Op. Off. Legal Counsel 174, 176, 1981 WL 30894 (O.L.C.) (June 12, 1981) (understanding 'prevailing' wage as the wage most widely paid is consistent with the general purpose of the DBA, which is to prevent the exploitation of imported labor and the concomitant depression of local wage rates).

County projects, we see that the published Davis County wage rate (\$24.50) was the absolute lowest rate among the five projects (nine workers) that provided wage information for sprinkler fitter jobs in Davis County. Second, the published rate was made up of the lowest basic rate (\$18.95 per hour) and the lowest fringe benefit rate (\$5.55 per hour) among all the Davis County rates. Obviously, then, if the Administrator had considered all nine (9) sprinkler jobs in Davis County (private and federal), the \$24.50 published rate would not have been the majority rate or the weighted average in Davis County. Among the nine (9) jobs, there was no single rate paid to the majority of sprinkler fitter jobs, which means the majority for the nine (9) jobs could only be determined by a weighted average. The weighted average of all nine sprinkler fitter jobs in the 2004 wage survey is \$30.91, obviously higher than the \$24.50 published rate. The only reason that the Tanner Clinic jobs were the majority rate at all was because the Administrator selected only one other sprinkler fitter job for its calculation of the prevailing wage. It is not at all clear how the Administrator justifies selecting a third sprinkler fitter job for the 3/2 Rule without also considering the other sprinkler fitter jobs reported at the same rate in Davis County. In other words every reported rate in Davis County applied to two or three other workers, more specifically as follows: the highest rate (\$34.10) (two workers), second highest (\$32.80) (three workers), the third highest (31.30) (two workers) and the Tanner Clinic rates (\$24.50) (two workers). Had the Administrator paired the lowest rate (the Tanner Clinic rate) with any other rate (along with the jobs reported at that rate), the Tanner Clinic rate would not have been the majority rate; it would have accounted for only two out of the four or five rates. Finding no support in the Davis County data that the Administrator's Davis County rate prevailed, we moved beyond the Davis County survey data to find such support. Notably, it is undisputed that the \$24.50 rate is lower than the published rates for all other metropolitan county rates. In the end, the two Tanner Clinic sprinkler fitter jobs proved to be the lowest rates of all the rates reported in Davis County, lower than the rates in the other counties in the Davis County MSA, and lower than any other metropolitan county prevailing rate. Based on the record before us, we find that the published Davis County rate of \$24.50 fails to satisfy the meaning of "prevailing rate" as intended by the DBA and its implementing regulations.²⁷ Consequently, we remand this matter for reconsideration of the prevailing wage rate.

CONCLUSION

The Administrator abused her discretion by (1) applying the 3/2 Rule per se to determine the sufficiency of the data used to calculate the prevailing wage rate in Davis County and (2) failing to set a prevailing wage rate that is consistent with the DBA and the wage survey data in

²⁷ As mentioned above, "currency" is a common understanding of the term "prevailing." The 1986 Manual also refers to "currency" as a relevant factor. See, 1986 Manual p. 40 ("Wage determinations are based on actual wage and fringe benefit rates currently being paid..."). The fact that the published rate was four years old raises questions about its "currency." We appreciate that a wage survey is too onerous to perform each year or even every two years. Given that we are remanding this matter for reconsideration and to consider updated information, the age of this survey may become moot.

this case. The decision of the Administrator denying petitioner's request for reconsideration is therefore **REVERSED**, and this case is **REMANDED** to the Administrator to reconsider, consistent with this opinion, the minimum wage rate for the sprinkler fitters in Davis County.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge