



In the Matter of:

**INTERNATIONAL UNION OF
BRICKLAYERS & ALLIED CRAFT WORKERS,
LOCAL UNION No. 1 – MD, VA, and DC**

ARB CASE NO. 11-007

DATE: April 27, 2012

**With Respect to Request for Review and Reconsideration
of the Decision To Include a “Pointer, Cleaner, Caulker”
Classification and Wage Rate in Davis-Bacon Wage Det.
General Decision No. DC080004 (as Superseded by
Davis-Bacon Wage Det. General Decision No. DC100004)**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

**Terry R. Yellig, Esq., *Sherman, Cohen, Leifer & Yellig, P.C.*, Washington,
District of Columbia**

For Respondent Administrator, Wage and Hour Division:

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

**BEFORE: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne
Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative
Appeals Judge*.**

FINAL DECISION AND ORDER

This case arises under the Davis-Bacon Act, as amended (DBA or the Act), 40 U.S.C.A. §§ 3141-3148 (West 2010), and the DBA implementing regulations at 29 C.F.R. Parts 1, 5, and 7 (2011), pursuant to which the Administrator of the U.S.

Department of Labor's Wage and Hour Division (Administrator) conducted a wage survey and issued a wage determination for building construction projects in the District of Columbia. Subsequently, in light of resubmitted wage survey response forms that the Administrator had not previously considered, and which the Administrator determined had been originally submitted prior to the wage survey's cut-off date, the Administrator modified the original wage determination by adding the job classification of "Pointer, Caulker, Cleaner . . . (restoration work)." The International Union of Bricklayers & Allied Craft Workers, Local Union No. 1 – MD, VA, and DC, (Bricklayers) complained and asked the Administrator to review and reconsider the revised wage determination because it was based on wage data submitted after the survey's cut-off date. The Administrator denied this request and issued a final determination., The Bricklayers timely appealed this determination to the Administrative Review Board (ARB or the Board). For the following reasons, we affirm the Administrator's determination as a reasonable exercise of the discretion delegated to the Administrator to determine the prevailing wages to be included in the wage determination.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations and to issue final agency decisions under the Act.¹ The Board's review of the Administrator's rulings is in the nature of an appellate proceeding.² 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.³ 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 defers to the Administrator's interpretation.⁴

¹ 29 C.F.R. § 7.1(b). See Secretary's Order 1-2010, (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

² 29 C.F.R. § 7.1(e).

³ *Miami Elevator Co. & Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (Apr. 25, 2000). See also *Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (May 11, 2000); *Dep't of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 16 (Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351 *et seq* (West 1987)), citing *ITT Fed. Servs. Corp. (II)*, ARB No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (Aug. 28, 1992).

⁴ *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

BACKGROUND

1. *The Legal Framework*

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.⁵ 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 be employed under the contract.⁶ The Administrator determines these minimum wages and publishes them as “Wage Determinations.”⁷ The minimum wage rates contained in the wage determinations derive from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements.⁸

Significantly, 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.”⁹ Indeed, “the substantive correctness of wage determinations is not subject to judicial review.”¹⁰ Rather, courts limit review to “due process claims and claims of noncompliance with statutory directives or applicable regulations.”¹¹

Thus, in the absence of a statutory formula for determining prevailing wages, the DBA implementing regulations charge the Administrator with “conduct[ing] a continuing

⁵ 40 U.S.C.A. § 3142(a).

⁶ *Id.*

⁷ 29 C.F.R. Part 1.

⁸ 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

⁹ *Building & Constr. Trades’ Dep’t, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983).

¹⁰ *Dep’t of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 25 (citing cases).

¹¹ *Id.*, quoting *Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979).

program for the obtaining and compiling of wage rate information.”¹² The Wage and Hour Division surveys wages and fringe benefits paid to workers on four types of construction projects: building, residential, highway, and heavy construction. The Administrator may seek data from “contractors, contractors’ associations, labor organizations, public officials and other interested parties”¹³ Other sources of information include statements showing wage rates paid on projects, signed collective bargaining agreements, wage rates determined for public construction by State and local officials under State and local prevailing wage legislation, and data from contracting agencies.¹⁴

When the Administrator has completed the survey, the Department of Labor publishes general wage determinations under the DBA on the Government Internet Web site for Davis-Bacon wage determinations available at <http://www.wdol.gov>.¹⁵ General wage determinations may be modified from time to time.¹⁶

2. Chronology of Events

The Wage and Hour Division conducted a Davis-Bacon wage rate survey for building, residential, highway, and heavy construction projects in the District of Columbia during the period from November 1, 2003, through October 31, 2004.¹⁷ Wage and Hour notified interested parties by letter that any wage data submitted for the survey period “must be postmarked by 8/31/2005 to be included in the survey.”¹⁸

The Department of Labor issued a wage determination based on the wage survey results on June 12, 2009.¹⁹ The wage determination provided that “pointing, caulking

¹² 29 C.F.R. § 1.3.

¹³ 29 C.F.R. § 1.3(a).

¹⁴ 29 C.F.R. § 1.3(b).

¹⁵ 29 C.F.R. §§ 1.2(e), 1.5(a).

¹⁶ 29 C.F.R. § 1.6(c).

¹⁷ Administrative Record (AR), Tab D, Exhibit 5.

¹⁸ *Id.*

¹⁹ AR, Tab D, Exhibit 1; Tab M – General Decision Number DC080004, Modification Number 0.

and cleaning of ALL types of masonry, brick, stone and cement structures” was to be performed by the “Marble/Stone Mason” job classification.²⁰

An attorney representing construction contractors saw the new wage determination and informed the Wage and Hour Division by letter dated July 22, 2009, that the wage determination did not contain wage rate data “from contractors performing Pointer Cleaner Caulker” work based on wage survey response forms the attorney asserted had previously been submitted to Wage and Hour prior to the survey cut-off date.²¹ Based on the apparent representation to the contractors’ attorney by the Wage and Hour Division that it would “reconsider and correct the wage determination upon receipt . . . of proof of mailing the original submissions and copies thereof” prior to the survey cut-off date, the attorney resubmitted copies of letters to the Wage and Hour Division, with the attached wage survey response forms, that were dated before the survey cut-off date, as well as copies of UPS shipping instructions and an invoice indicating the materials were sent prior to the cut-off date.²²

In light of the resubmitted wage survey response forms, the Administrator issued a revised wage determination on October 2, 2009, stating that the “Marble & Stone Mason” job classification was to perform “pointing, caulking and cleaning of ALL types of masonry, brick, stone and cement EXCEPT pointing, caulking, cleaning of existing masonry, brick stone and cement (restoration work).”²³ A new and separate job classification of “Pointer, Caulker, Cleaner” was established that provided for a lower hourly wage rate than the “Marble & Stone Mason” job classification, and which was to perform “pointing, caulking and cleaning of existing masonry, brick, stone and cement structures (restoration work).”²⁴

The Bricklayers sought an explanation for the change in the wage determination and the Wage and Hour Division responded by letter dated November 13, 2009, that the new job classification of “Pointer, Caulker, Cleaner” for restoration work was added to the wage determination based on wage survey response form data “not received in this

²⁰ *Id.* (The prevailing hourly wage rate for the “Marble/Stone Mason” job classification was \$32.00, along with \$12.07 in fringe benefits.)

²¹ AR, Tab L.

²² *Id.*

²³ AR, Tab D, Exhibit 2; Tab K – General Decision Number DC080004, Modification Number 8. (The prevailing hourly wage rate for the “Marble/Stone Mason” job classification was revised to \$32.63, along with \$12.99 in fringe benefits.)

²⁴ *Id.* (The prevailing hourly wage rate for the “Pointer, Caulker, Cleaner” job classification was \$18.88, with no fringe benefits.)

office to the best of their knowledge during the course of the survey.”²⁵ On August 2, 2010, the Bricklayers requested reconsideration of the Wage and Hour Division’s decision to include the new job classification of “Pointer, Caulker, Cleaner” for restoration work in the wage determination.²⁶

3. Administrator’s Final Determination

The Wage and Hour Administrator issued a final determination on September 20, 2010, stating that the “wage information at issue clearly was sent to [the Wage and Hour Division] before the cut-off date,” as indicated by the dates of the re-submitted survey response forms, transmittal letters, and the proof from overnight delivery tracking numbers that indicated that they were timely sent to the Wage and Hour Division’s address.²⁷ Thus, the Administrator concluded that the information “that had originally been timely submitted prior to [the] cut-off date” was reviewed “in accordance with established procedures” and the revised wage determination was issued “in accordance with proper policies and procedures [that] followed the letter and spirit of the law and regulations.”²⁸

DISCUSSION

The Bricklayers contend that the revised wage determination was based on wage data submitted four years after the cut-off date of the wage survey on which it was based. In addition, the Bricklayers argue that there is no indication in the record whether or not the wage response forms were attached to the transmittal letters that were purportedly timely sent to the Wage and Hour Division or whether the forms showed wage rates for the “Pointer, Caulker, Cleaner” job classification. The only proof in the record, the Bricklayers assert, merely indicates that the wage survey response forms “may” have been timely sent, but not that the Wage and Hour Division ever received them. In support, the union cites the Wage and Hour Division’s initial statement that the forms were “not received to the best of their knowledge during the course of the survey.” In light of these vagaries, the Bricklayers argue that the proper standard for considering such wage data after a wage survey cut-off date should require clear and convincing evidence that the data was actually timely delivered to the Wage and Hour Division. Consequently, the Bricklayers contend that it was not a reasonable exercise of the Administrator’s discretion to consider the resubmitted wage survey response forms.

²⁵ AR, Tab C; Tab D, Exhibit 4, Tab H.

²⁶ AR, Tab D.

²⁷ AR, Tab A.

²⁸ *Id.*

In response to the Bricklayers' argument on appeal, the Administrator asserts that consideration of the wage survey response forms was consistent with Wage and Hour Division policy that provides for so doing upon proof that the wage information had been timely sent, thereby creating a rebuttable presumption of timely submission. Because the Bricklayers had provided no evidence that the wage data was not timely sent or that the wage survey response was untrustworthy, and because there is no authority requiring clear and convincing evidence that the wage survey response forms were actually timely delivered to the Wage and Hour Division, the Administrator argues that it was a reasonable exercise of the Administrator's discretion to consider the wage survey forms. Thus, the Administrator argues its wage determination creating the additional job classification should be affirmed. In reply, the Bricklayers contends the Administrator has provided no evidence that it ever had such a "policy" and therefore its consideration of the resubmitted evidence actually strays from its policy not to consider wage data submitted after the cut-off date for a wage survey.

Under the circumstances presented, the Administrator's decision to incorporate the wage survey data in dispute was a reasonable exercise of her discretion. As a general matter, information submitted after the cut-off date for submission of wage data for a wage survey is not properly allowed or considered in that survey.²⁹ However, the Board has recognized under other statutes over which it has jurisdiction that proof of the correct addressing and timely mailing or sending of a letter or communication creates a rebuttable presumption that it was delivered to, and received by, the intended party within the prescribed time period, recognizing that "mail may occasionally be lost or misdelivered, distributed to the wrong office or section of a government agency, lost within the agency, or otherwise misplaced, forgotten or unprocessed."³⁰ Consistent with this case authority, the Administrator reasonably determined that evidence submitted in the form of overnight delivery tracking numbers constituted sufficient proof, in the absence of any rebuttal evidence by the Bricklayers, to establish that the re-submitted wage survey response forms and accompanying transmittal letters were originally timely sent to, and received by, the Wage and Hour Division.³¹

²⁹ *Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers, Local 28*, WAB No. 91-19, slip op. at 3 (July 30, 1990).

³⁰ *Immanuel v. Wyoming Concrete Indus., Inc.*, ARB No. 1996-022, ALJ No. 1995-WPC-003, slip op. at 5, n.5 (ARB May 28, 1997); *Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-035, slip op. at 2 (OAA Apr. 7, 1992).

³¹ As the Administrator concluded, the fact that the attorney representing the construction contractors contacted the Wage and Hour Division on July 22, 2009, very shortly after Wage and Hour originally issued the wage determination based on the wage survey, complaining that Wage and Hour had apparently not considered the wage survey response forms the attorney had submitted prior to the survey cut-off date provides additional support for finding that the wage survey response forms at issue were originally timely sent to the Wage and Hour Division.

The Bricklayers urge the ARB to impose a new standard requiring proof by clear and convincing evidence of timely delivery for wage survey responses in cases where the timeliness of the wage information's submission is challenged. While the Bricklayers' argument that a more rigorous burden of proof is warranted than that which is currently applied may have some merit, nevertheless it is not within the Board's authority to unilaterally impose such a standard. Any such modification must be left to the Administrator to implement. The ARB's jurisdiction is limited to review of whether the Administrator's determination at issue was a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act, and we have found that determination reasonable. As the Board has recognized that proof of the correct addressing and timely mailing or sending of a letter or communication creates the presumption that it was delivered to and timely received by the intended party, we hold that the Administrator's decision to revise the wage determination to include a job classification for "Pointer, Caulker, Cleaner (restoration work)" based upon the wage survey response at issue was a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.

CONCLUSION

Proof in the record indicates that wage survey response forms were timely sent to the Wage and Hour Division, sufficient to establish a presumption that they were delivered to, and received by, the Wage and Hour Division. Thus, the Administrator considered the wage survey response forms to revise the prevailing wages to be included in the wage determination based on the survey. Accordingly, we **AFFIRM** the Administrator's determination as a reasonable exercise of her discretion to determine the prevailing wages to be included in the wage determination.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge