



In the Matter of:

**Coalition for Chesapeake Housing
Development**

ARB CASE NO. 12-010

DATE: September 25, 2013

**With Respect to Review and Reconsideration
of Davis-Bacon Wage Det. Nos. VA 0117 and
VA 0124, Residential Construction in
Newport News and Chesapeake Counties.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Maurice Baskin, Esq., *Venable LLP*, Washington, District of Columbia

For Respondent Administrator, Wage and Hour Division:

**Nickole C. Winnett, Esq.; Jonathan T. Rees, Esq.; Jennifer S. Brand, 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 Luis A. Corchado, *Administrative Appeals Judge*.
Deputy Chief Judge Brown dissented.**

FINAL DECISION AND ORDER

This case arises under the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2013), and regulations at 29 C.F.R. Parts 1, 5, and 7 (2013). Coalition for Chesapeake Housing Development (CCHD) filed a petition for review of an August 25, 2011 final determination in which the Deputy Administrator of the Wage and Hour Division (the Administrator) denied a request for reconsideration of Wage Determination Nos. VA 117 and

VA 124, containing rates for residential projects in Newport News and Chesapeake Counties, Virginia.¹

INTRODUCTION

This case involves two challenges to the 2010 wage determination for Newport News and Chesapeake. First, CCHD challenges the use of “super groups” to determine a prevailing wage rate for job classifications covered by the DBA. Specifically, CCHD challenges the wage rates for three classifications resulting from the use of “super groups”: crane operators, plumbers, and truck drivers in Newport News and Chesapeake Counties. The Administrator received no data from Newport News or Chesapeake Counties for the classifications of crane operator and plumber and, therefore, needed to look elsewhere to set the prevailing wage. Data for the classification of truck driver was also insufficient.² As we explain below, we find that the wage rates in question are valid because: (1) there was insufficient county data; (2) they reflect the statewide data as expressly permitted by the regulations; and (3) the regulations implicitly permit the Administrator to use super groups of counties entirely within the state.

The second challenge is that the data for the 2010 wage survey is too old. We find that the statutes and regulations do not establish an expiration date for published prevailing wages. Furthermore, we find that the Petitioner failed to present the kind of evidence that compels us to order a new wage determination.

BACKGROUND

The Wage and Hour Division (WHD) requested wage data for residential construction projects in the state of Virginia during the period from November 1, 2003, through October 31, 2004, with a cutoff point for receiving wage data of August 31, 2005. Admin. Rec. Tab H (final determination, Aug. 25, 2011). The WHD used pre-survey research and follow-up procedures when contractors did not respond to requests for data. WHD claims it contacted 4,000 contractors and other interested parties. Admin. Rec. Tab F (WHD, Jan. 14, 2011).

Residential construction projects contain twelve key classifications. The WHD was able to recommend prevailing wage rates for six of the twelve classifications. Admin. Rec. Tab H. Because the WHD was able to establish wage rates for at least 50% of the key classifications for the construction type, it was able to issue a general wage determination for VA 117 and VA 124 on September 10, 2010. Admin. Br. at 20.

¹ VA 124 combines Chesapeake with Norfolk, Portsmouth, Suffolk, and Virginia Beach. We refer to Chesapeake for convenience.

² Wage data for the truck driver classification was received from Chesapeake County and Chesterfield County (within the Richmond MSA). These two counties were combined to set the prevailing wage for truck drivers. While the Administrator technically used “super groups” to set the truck driver rate, in effect, it seems more accurate to say that the Administrator combined the data from the only two counties that produced data for truck drivers.

The prevailing wage rate for three of the six classifications (carpenter, laborer, and cement mason) was determined from data at the county or surrounding county level. Admin. Br. 20 & n.8. The wage rate for crane operator, plumber, and truck driver classifications was established through the use of a super group of counties, because combining private and federal data at the county and surrounding county group level was insufficient to determine a prevailing wage. Admin. Rec. Tab H. The super group WHD used consisted of all metropolitan counties in eastern Virginia including those from the DC Metropolitan Statistical Area (MSA), the Richmond MSA, and the Norfolk-Virginia MSA. WHD used data from Fairfax and Alexandria counties (within the DC MSA) to derive certain of the wage rates contained in the Newport News and Chesapeake wage determinations. Admin. Rec. Tab H, at 8.

On December 15, 2010, Maurice Baskin, counsel for CCHD, requested a review of the prevailing wage rates. CCHD challenged wage determinations Nos. VA 117 and VA 124 (Newport News and Chesapeake) because some classifications were based on projects located in Alexandria and Fairfax, which are not *surrounding* counties of the local project counties. CCHD argued that there is no regulation that authorizes WHD to import wages from outside surrounding counties to determine the prevailing wages in the local county where the work is to be performed. CCHD also argued that the prevailing wage was based on obsolete and inadequate data.

CCHD asked WHD to remove the wage rates for the challenged classifications due to the absence of data and to recalculate those rates subject to the conformance process. Pet. for Rev. at 13. Alternatively, CCHD argues that the wage determination should use the last published wage rate that was in effect prior to September 2010. Admin. Rec. Tab D, at 2 (Dec. 15, 2010).

On January 14, 2011, the WHD responded to CCHD's initial request for review of wage determinations VA 117 and 124. The WHD answered that under DBA regulations and WHD guidelines, groups and super groups of counties can be used for prevailing wage calculations when local data is insufficient.

On January 31, 2011, CCHD asked for reconsideration. On August 25, 2011, the Administrator issued her final determination. The Administrator responded that the use of super groups is neither arbitrary nor capricious and thus within the broad discretion given to the Secretary to determine prevailing wages. The Administrator explained the use of the "super group" methodology as follows:

In considering survey data from surrounding counties, WHD expands the metropolitan county data to all of the other counties located in the same Metropolitan Statistical Area (MSA), as determined by the Office of Management and Budget (OMB). If private survey data from the established surrounding county group is still insufficient, then WHD will include Federal project data from all the counties in the group.

If both private and Federal data for an established surrounding county group is still insufficient to determine a prevailing wage

rate, then WHD may expand to a “super group” of counties or even to the statewide level. See United States [Government Accountability Office] Report, Davis-Bacon Methodological Expertise Critical for Improving Survey Quality, at 9-10 (March 22, 2011) (2011 GAO Report) (“If data are still insufficient to issue a wage rate, a supergroup is created by combining a rural county’s data with data from additional contiguous rural counties, or a metropolitan county’s data are combined with county data from other MSAs or the consolidated MSA counties. Finally, if this supergroup still does not provide sufficient wage data to issue a wage rate for a job classification, a statewide rate is created by combining data for all rural counties or all metropolitan counties in the state.”). WHD combines several of OMB’s MSAs together in order to form super groups for metropolitan counties. For the eastern part of Virginia, WHD combines all metropolitan counties from the DC MSA, Richmond MSA and the Norfolk-Virginia Beach MSA.³

CCHD appealed the Administrator’s final determination to the Administrative Review Board (ARB or Board).

ISSUES

Whether WHD abused its discretion to determine prevailing wages by using wage data from a super group of MSAs? Whether a 2010 wage determination for residential construction projects may be based on 2003-2005 survey data when there is insufficient evidence that such data was obsolete or inadequate?

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide appeals from the Administrator’s final decisions concerning DBA wage determinations.⁴ DBA proceedings before the ARB are appellate in nature, and the Board will not hear matters de novo except upon a showing of extraordinary circumstances. 29 C.F.R. § 7.1(e). This general prohibition against de novo review means that the Board generally will not conduct an evidentiary hearing, call witnesses, or make credibility determinations but will rely on the record and arguments presented by the parties.⁵ We assess

³ Admin. Rec. Tab H, at 7-8.

⁴ 29 C.F.R. § 7.1(b); see also Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012).

⁵ See *Y-12 Nat’l Sec. Complex*, ARB No. 11-083, slip op. at 5 (Aug. 8, 2013); *Framlau Corp. v. Dembling*, 360 F. Supp. 806, 813 (E.D. Pa. 1973).

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.⁶ In matters requiring the Administrator's discretion and expertise, 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."⁷

DISCUSSION

1. Statutory and Regulatory Background

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.⁸ 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 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."⁹

⁶ See *Y-12 Nat'l Sec. Complex*, ARB No. 11-083, slip op. at 5.

⁷ *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (Sec'y May 10, 1991); see also, *Road Sprinkler Fitters Local Union No. 669*, ARB No. 10-123, slip op. at 6 (June 20, 2012) (citing *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (Sec'y May 10, 1991)). We have also cited to *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), but reliance on *Udall* overstates the deference owed. In *Udall*, the Court spoke of the deference that Article III courts owed to Executive agencies when reviewing agency decisions, not a standard that governs a Department's appellate administrative body reviewing the decisions of intra-Department agencies.

⁸ Regarding the purpose of the Davis-Bacon Act, the Supreme Court has held "[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers." *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954).

⁹ *In re Dep't of the Army*, ARB Nos. 98-120, -121, -122; slip op. at 25 (Dec. 22, 1999) (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)).

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 and local officials under State and local prevailing wage legislation, data from contracting agencies, and telephone contact.¹⁰ 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, at which point the relevant area may expand to surrounding counties. 29 C.F.R. § 1.7(b). The Administrator may expand the data set to include other surrounding counties or use statewide data if lesser subdivisions do not yield sufficient data. Further, “[i]f there has not been sufficient similar construction in surrounding counties or in the State in the past year,” wages from projects completed over a year prior to the survey period may be considered. 29 C.F.R. § 1.7(c). But the Administrator may not mix metropolitan counties with rural counties. 29 C.F.R. § 1.7(b). The Davis-Bacon Operations Manual explains that if a county is located in an area designated by the Office of Management and Budget (OMB) as a Metropolitan Statistical Area (MSA), it should be classified as metropolitan for survey purposes.¹¹ OMB currently defines an MSA as having “at least one urbanized area of 50,000 or greater population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties.”¹²

¹⁰ 29 C.F.R. § 1.3(b); DAVIS-BACON CONSTRUCTION WAGE DETERMINATION MANUAL OF OPERATIONS 38-40 (Dep’t of Labor 1986) (DAVIS-BACON OPERATIONS MANUAL).

¹¹ The WHD follows the OMB classifications for determining MSAs. DAVIS-BACON OPERATIONS MANUAL at 39. OMB periodically revises MSAs. If a county falls within an MSA, it will be designated as “metropolitan” even if it would not be so designated absent its location in an MSA. *Mistick Constr.*, ARB No. 04-051 (Mar. 31, 2006).

¹² OMB Bulletin No. 13-01, Feb. 28, 2013, “Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of these Areas.” Available at <http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf>

2. WHD's Use of Super Groups

The wage determinations CCHD challenged were based upon wage data for residential construction projects collected in the course of statewide Davis-Bacon wage surveys conducted in Virginia for the period of November 1, 2003, through October 31, 2004.¹³ For several key classifications, WHD received insufficient wage data even after combining private with federal data at the county and surrounding county group level. For those classifications, WHD used wage data from the super group level by combining data from several MSAs (as established by OMB) in eastern Virginia – the D.C. MSA, the Richmond MSA, and the Norfolk-Virginia Beach MSA. The wage data received for these classifications represented all data submitted for all metropolitan counties in Virginia.¹⁴

CCHD's objection to WHD's use of super groups in collecting data for the prevailing wage determinations is twofold – CCHD alleges impropriety in the use of data from both geographically remote counties and from those with “dramatically different” labor markets. Pet. for Rev. at 10. First, CCHD claims WHD violated the regulations governing determination of prevailing wages by improperly using wage rates from geographically separate counties. Because Alexandria and Fairfax are over 150 miles distant from both Newport News and Chesapeake, CCHD argues that Alexandria and Fairfax are not part of the same “city, town, village, county or other civil subdivision of the State” as Newport News or Chesapeake. According to the CCHD, WHD is not allowed to vary from the DOL's published regulations and there is no regulation that authorizes using subdivisions outside the surrounding counties for the local county's prevailing wage rate. Pet. for Rev. at 6, 9. Specifically, CCHD challenges the DOL's “recently established” practice of taking data from non-surrounding counties, including super groups. Pet. for Rev. at 10-11.

CCHD's other principal challenge to WHD's use of super groups is that WHD improperly combined wage rates from counties containing different labor markets than the counties subject to the Wage Determinations at issue. Citing the Virginia Government's Bureau of Economic Analysis, CCHD alleges that the separate labor markets of “Alexandria and Fairfax workers have almost double the per capita personal income of workers in Chesapeake and Newport News and almost double the average wages.” Pet. for Rev. at 7. CCHD claims that the use of super groups can be abused if done without regard to other relationships and characteristics in conflict with the local project county. CCHD also argues that there are severe disparities between the newly published rates and the previous rates for crane operators, plumbers, carpenters, and cement masons. Citing *New Mexico*, CCHD contends that further follow up is necessary.

The Administrator responds that Congress gave the Secretary broad authority and discretion in determining the best approach for calculating prevailing wages. Admin. Rec. Tab H; *Building Constr. Trades' Dep't, AFL-CIO*, 712 F.2d at 616 (“In the broadest terms

¹³ Admin. Rec. Tab H, at 2.

¹⁴ Admin. Rec. Tab H, at 8.

imaginable”). The Administrator reasons that while there is some statutory guidance, the intent was for the Secretary to develop the means to determine the prevailing rate. The Administrator argues that it is legally permissible to use surrounding counties, super groups, or even statewide data.¹⁵

With respect to the specific wage determinations at issue, the Administrator points out that the prevailing wage determination for the super groups of crane operator, plumber, and truck driver classifications did not solely use Alexandria and Fairfax Counties but also used other surrounding counties. Admin. Br. at 21. The Administrator further states that the results for the crane operator, truck driver, and plumber classifications would be the same if statewide data were used because the data for the super group included all the state data. The Administrator states that the large disparity between the former rates and the current wage determination should come as no surprise given that the former wage determination was set almost twenty years ago. Admin. Br. at 22-23.

Before discussing the use of “super groups,” we note that the regulations put the public on notice that statewide data may be used to determine a prevailing wage. DBA Regulation 29 C.F.R. § 1.7(c) provides that “[i]f there has not been sufficient similar construction in surrounding counties or in the State in the past year, wages paid on projects completed more than one year prior to the beginning of the survey . . . may be considered.” Although the regulation does not explicitly provide *how* such data can be used, it expressly mentions the use of statewide data. The Administrator has discretion to use such data as necessary. As long as the Administrator has a reasonable basis for using the data, we will defer to her discretionary decisions. Here, it is undisputed that the Administrator had to go outside of Newport News and Chesapeake counties to establish the plumber and crane operator wages. It is also undisputed that she combined only metropolitan counties. Finally, it is undisputed that all the metropolitan data received from the state was used when the Administrator used “super groups.” The published prevailing wage for crane operators, plumbers, and truck drivers in this case thus reflects the statewide wage rate. Consequently, we find that the wage rates are permissible in this case as directly authorized by the regulations. The issue of super groups is effectively a red herring here.

Nevertheless, we share the Administrator’s view that the use of wage data from a super group is a permissible exercise of the broad discretion granted the WHD under the statute and regulations. Admin. Br. at 12-15. The DBA and its regulations instruct that the “area” used for prevailing wage determinations will normally be a county, city, or town. 29 C.F.R. § 1.2(b) (“The term ‘area’ in determining wage rates under the Davis-Bacon Act and the prevailing wage provisions of the other statutes listed in appendix A shall mean the city, town, village, or other civil subdivision of the State in which the work is to be performed.”); 29 C.F.R. § 1.7(a) (“In making a wage determination, the *area* will normally be the county unless sufficient current

¹⁵ Admin Br. at 15, 18. Both the Administrator and CCHD note that in 1981, the use of statewide data was considered an extraordinary method. 46 Fed. Reg. 4306 (Jan. 16, 1981). But now according to the 2011 GAO Report, statewide data is the most prevalent geographical grouping for a wage determination. Admin. Rec. Tab I, at 21; Pet. for Rev. at 11.

wage data is unavailable to make a wage determination.”). However, the broad discretion given to the Secretary does not prevent him from going outside the city, town, or county to find the prevailing wage. 29 C.F.R. §§ 1.7(b), (c) (“(c) If there has not been sufficient similar construction in surrounding counties or in the State in the past year, [older wages] . . . may be considered.”). As we explained recently in *Road Sprinkler Fitters*, even the use of statewide data is permissible: “[t]he 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).”¹⁶ The Davis-Bacon Act does not dictate a particular methodology to be used by the Secretary or his designee, the Administrator, when determining the prevailing wage rate.¹⁷ There is nothing in the regulations that prohibits the Administrator from using the total data in a county, a metropolitan statistical area,¹⁸ super groups of counties, or even statewide data to determine, in particular cases, what might yield “sufficient” data. The WHD has broad deference for determining wages and using data in the event that lesser groupings do not yield sufficient data for a wage determination. In some cases, it might be that looking at the total data from a larger subdivision 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.¹⁹

Nor does the statute or regulations prohibit the collection of data from “different labor markets” as CCHD alleges. The regulations explicitly prohibit the mixing of metropolitan and rural county data, but that did not occur here. The only data at issue in this case was collected from counties contained in MSAs, all of which are considered to be metropolitan counties by WHD and OMB. CCHD’s argument about “labor markets” delves into the area where we would defer to the Administrator’s methodology. CCHD’s argument of disparate labor markets tells us very little and asks us to assume too much to overturn the Administrator. CCHD did not tell us what the wage rates were for crane operators in Newport News or Chesapeake, the most relevant wage rate in question. The wage survey in this case contained no such data for Newport News or Chesapeake. Based on one economic factor among many factors that define a “labor market,” CCHD wants us to assume that the labor markets in Newport News and Chesapeake are substantially more similar to the much smaller counties in their MSAs than to Alexandria and Fairfax. We appreciate CCHD’s objection to the use of data from MSAs with distinctly different average wages, but we are in no position to conduct internet searches, analyze the labor markets, crunch numbers, and ultimately determine that the Administrator’s methodology was statistically unsound to the point that the 2010 wage determination must be overturned.

¹⁶ *Road Sprinkler Fitters Local Union No. 669*, ARB No. 10-123, slip op. at 8.

¹⁷ *See Dep’t of the Army*, ARB No. 98-120, -121, -122; slip op. at 25.

¹⁸ *Supra* note 11.

¹⁹ *Road Sprinkler Fitters Local Union No. 669*, ARB No. 10-123. As recognized in the GAO Report, the ability to augment survey data with data from geographic areas other than counties, e.g., data from MSAs, may improve the survey’s accuracy. Admin. Rec. Tab I. Relevant regional markets, which frequently cross county and state lines, may be more reflective of area wage rates than data from arbitrary geographic divisions. Admin. Rec. Tab I. at 24. Although we do not regard the GAO report as controlling precedent, we find its observations persuasive.

We addressed a comparable challenge to methodology resulting in higher wages under the parallel McNamara-O’Hara Service Contract Act, (SCA), 41 U.S.C.A. §§ 6701-6707 (Thomson Reuters 2010) (formerly codified at 41 U.S.C.A. §§ 351-358).²⁰ In that case, the Army, Air Force, and Navy each challenged WHD’s shift from use of separate urban data to the use of regional Consolidated Metropolitan Statistical Area (CMSA) data for wage determinations.²¹ The petitioners argued that localities contained within the CMSA, in particular the Tacoma and Bremerton-Shelton areas, were economically distinct from the Seattle urban area. Combining wage data from the higher wage rates area of Seattle with the generally lower wages from Tacoma and Bremerton-Shelton resulted in inflated rates for the latter. Acknowledging that the adoption of the CMSA data would produce substantial increases in wage determination rates in certain areas, the Board nevertheless upheld the practice, finding it a reasonable exercise of the Administrator’s broad discretion to issue wage determinations:

[O]nce we conclude that a geographic area manifests sufficient economic integration that the Administrator reasonably may deem it a “locality” under the Act, it is largely irrelevant that wage rates may be higher in some parts of the community than in others. For example, wages for clerical employees working at downtown offices in some cities may be higher than the rates paid for comparable positions in outlying suburban areas, but by itself the disparity in wage rates would not mean that the downtown and suburban locations are different “localities” for SCA purposes.^[22]

Similarly, once the Administrator determines the survey “area” for Davis-Bacon purposes – whether it is composed of surrounding counties, regional super groups of MSAs, or the entire state – fluctuations in wage rates may be irrelevant. The regulations do not prohibit grouping to ascertain a prevailing wage simply because of higher income or pay in one or more of the associated counties. Many factors go into DBA and OMB groupings and those factors are not limited to general income demographics in the respective subdivisions.²³

²⁰ See *Millwright Local 1755*, ARB No. 98-015, slip op. at 6 (May 11, 2000) (SCA characterized as “parallel prevailing wage statute” to DBA); cf. 29 C.F.R. § 4.101 (2003) (court decisions under related remedial labor laws including DBA are applicable in construing SCA).

²¹ See *Dep’t of the Army*, ARB No. 98-120, -121, -122.

²² *Id.*, slip op. at 31.

²³ The ARB in *Mistick*, ARB No. 04-051, noted:

The Federal Office of Management and Budget (OMB) has responsibility for developing a variety of statistical programs. See generally 44 U.S.C. § 3504 (1994). Pursuant to this statutory directive, OMB devises standards for categorizing urban areas throughout the United States. . . .

Here, CCHD has not supported, with data relevant to residential projects, a wage disparity associated with a purported income gap in the counties. Without specific wage information representing more directly probative evidence of the prevailing wages at issue, we will not disturb the Administrator’s chosen methodology as long as it is consistent with the statute and regulations.²⁴

CCHD relies heavily on our ruling in *New Mexico Nat’l Elec. Contractors Assoc.*, ARB No. 03-020 (May 28, 2004), to support its request for invalidating WHD’s wage determinations. But the petitioner in that case, unlike here, supplied the necessary evidentiary basis for remand. In *New Mexico*, a contractors’ association successfully challenged the wage determination by highlighting a “glaring disparity” between the former and the assigned rate. The petitioner challenged the wage determination on the grounds of its own sampling and the roughly forty-eight percent drop in pay between the assigned wage and the previous wage for the county at issue. The ARB remanded primarily because of the unexplained disparity, a fact the ARB stated should have alerted the Administrator to the de facto insufficiency of the survey data. *Id.* at 7; *see also Road Sprinkler Fitters*, ARB No. 10-123 (remanding in part because of an unexplained significant wage disparity between former and assigned rate).

Unlike *New Mexico* and *Road Sprinkler Fitters*, CCHD has made no such similar argument with supporting data. Although CCHD generally alleged a large disparity between the assigned wages and the preceding wage determinations, no specific figures were supplied. Moreover, as the Administrator observed, the “severe” disparity it alludes to (but does not explicitly quantify) makes sense given the twenty-year gap between wage determinations.²⁵

The general concept of a “metropolitan area,” as defined by OMB, is that it includes a core area containing a large population nucleus, together with adjacent communities having a high degree of economic and social integration with the core. Thus a metropolitan area typically includes central cities and their outlying – but integrated – counties. . . .

Under OMB’s [standards], the basic urban unit is the “metropolitan statistical area” (MSA), which typically includes a city or urbanized area of at least 50,000 in population joined by surrounding counties where a sizeable portion of the population commutes to the center.

Id. at 10 (quoting *Dep’t of the Army*, ARB No. 98-120, -121, -122; slip op. at 4-5).

²⁴ Here, we need not further refine the quality or quantity of data required to challenge the Administrator’s discretion because CCHD so clearly failed to provide the necessary data – CCHD offered barely any evidence to support its challenge.

3. Obsolete Survey Data

CCHD claims that the wage data is obsolete because it was collected more than five years prior to issuance of the wage determinations. Pet. for Rev. at 11. CCHD also complains that the data from 2003 and 2005 introduces a bias because these surveys occurred during a peak construction period. The Administrator responded that use of data more than five years old is unfortunate but does not invalidate the data. The Administrator also stated that WHD was scheduled to commence a new wage determination for residential construction in Virginia in 2012.

As we noted in *Road Sprinkler Fitters*, “currency” is commonly understood as relevant to a determination of a “prevailing” wage.²⁶ The fact that the published rate was five years old raises obvious questions about its “currency,” but there is no regulation that establishes an expiration date for wage determinations. Moreover, CCHD has supplied no specific evidence upon which we could base a finding that the assigned rate was not in fact prevailing. CCHD alleges generally that rates were much higher in 2003 than in 2010 but provides no evidence that economic conditions resulted in significantly lower wages.²⁷ Without a much stronger showing of error, we will not invalidate WHD’s determinations based upon a five-year delay.²⁸

CONCLUSION

We find that the use of survey data from super groups of counties to derive the prevailing wages in this case actually reflects a permissible statewide rate and was a permissible exercise of the Administrator’s discretion. CCHD has failed to present sufficient evidence that the wage rates before us are not prevailing to overcome the broad discretion we must accord the Administrator’s wage determinations. In addition, without more evidence demonstrating that the

²⁶ *Road Sprinkler Fitters Local Union No. 669*, slip op. at 14 n.27; DAVIS-BACON OPERATIONS MANUAL at 40 (“Wage determinations are based on actual wage and fringe benefit rates currently being paid . . .”).

²⁷ *See Strategic Petroleum Reserve*, WAB No. 78-11, 1978 WL 22714, at *2 (May 22, 1978)(holding that presumption of correctness attaches to agency action conducted in usual manner and a petitioner challenging such action must present specific evidence demonstrating error).

²⁸ Finally, the choice to update the wage survey is a “discretionary” decision that cannot be compelled absent clear violation of DBA standards. *See, e.g., Barron v. Reich*, 13 F.3d 1370, 1375-1376 (9th Cir. 1994) (“By contrast, the relevant provisions of the SCA, and particularly the permissive language of § 354, strongly indicate that the duty the Barrons seek to enforce is discretionary rather than ministerial.”).

5-year-old survey data did not adequately reflect the prevailing wages in question, we decline to invalidate those wage determinations.²⁹

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority decision in this case. Until today's decision no legal authority existed for the use by the Wage and Hour Division of wage data gathered from "super groups" of counties in making prevailing wage determinations under the Davis Bacon Act.³⁰ For this reason, and because I fear that the majority's unprecedented endorsement of the use of "super groups" could easily result in unanticipated and potentially undesirable consequences in the future for employees and employers alike, I write in dissent.

First and foremost, the majority misconceives the primary issue presented in this case. The majority affirms the prevailing wage rate determinations herein at issue having concluded that the use of survey data from a "super group" of counties to derive a prevailing wage is a permissible exercise of the Administrator's discretion. However, the issue is not whether the Administrator's use of "super groups" is a permissible exercise of the Administrator's discretion, but whether the Wage and Hour Division³¹ exceeded its legal authority in using "super groups."

²⁹ On January 6, 2012, WHD issued new wage determinations for residential construction in Newport News and Chesapeake. According to supplemental briefing by both parties, these "new" wage determinations were exactly the same as the 2010 ones – they were simply renumbered and republished in 2012. Consequently, the wage determinations in current use are based upon 10-year-old data. We share our dissenting colleague's concern that such data may be obsolete. Nevertheless, CCHD supplied us with no probative evidence upon which we could base a decision to set aside WHD's wage determinations.

³⁰ As explained by the Deputy Administrator in her brief on appeal, "A 'super group' is created by combining the metropolitan county's data with county data from other MSAs within the state or from all counties located in the Consolidated Metropolitan Statistical Areas (CMSAs)." Admin. Br. at 3 n.1.

³¹ The terms "Wage and Hour Division," "Administrator," and "Deputy Administrator" are used interchangeably throughout this dissent.

The majority begins its analysis by noting the broad discretion that is delegated to the Secretary of Labor for determining prevailing wages under the Davis-Bacon Act, citing *Building & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983). Within this context, the majority concludes that the Administrator's discretion includes the determination of the relevant geographical area from which wage data may be utilized in making prevailing wage rate determinations. This is correct, but only partially so, for the Administrator's discretion in the selection of the appropriate geographical area is limited by DBA's implementing regulations.

The Davis-Bacon Act requires, in relevant part, that the prescribed minimum wages for mechanics and laborers employed under covered Federal construction contracts "shall be based on the wages the Secretary of Labor 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. . . .*" 40 U.S.C.A. § 3142(b) (emphasis added). The DBA left to the Secretary of Labor the task of providing meaning to the term "prevailing" and the provision "civil subdivision of the State." This the Secretary has done by regulation. The Secretary established that "prevailing wages" are to be derived from the wages paid to laborers and mechanics on similar projects "*in the area,*" 29 C.F.R. § 1.2(a)(1) (emphasis added), and defined "area" to mean "the city, town, village, county or other civil subdivision of the State *in which the work is to be performed.*" 29 C.F.R. § 1.2(b) (emphasis added).

Having thus defined the areas from which wage data is to be derived generally, DBA's implementing regulations further prescribe the considerations to be taken into account in determining the appropriate area from which the wage data is to be derived in a particular case. The area "will normally be the county [in which the work is to be performed] unless sufficient current wage data . . . is unavailable to make a wage determination." 29 C.F.R. § 1.7(a). If sufficient wage data to make a wage determination cannot be obtained from the area in which the work is to be performed, "wages paid on similar construction in surrounding counties may be considered, *Provided* That projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county, and projects in rural counties may not be used as a source of data for a wage determination for a metropolitan county." 29 C.F.R. § 1.7(b). Less clear, but nevertheless considered sufficient authority for utilizing wage data gathered statewide,³² is 29 C.F.R. § 1.7(c), which provides: "If there has not been sufficient similar construction in surrounding counties or in the State in the past year, wages paid on projects completed more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered."

Nowhere in the any of the foregoing is provision made for utilizing wage data from a "super group" of counties as that term has been employed in this case. Nor is definition or reference to "super groups" found in the Department's Davis-Bacon Construction Wage Determinations Manual of Operations.³³ The only documented reference provided by the

³² See 46 Fed. Reg. 4306, 4310 (Jan. 16, 1981).

³³ Had provision been made in the manual for utilizing wage data from "super groups," such provision as an agency interpretation of the DBA would arguably be entitled to deference under

Deputy Administrator to the use by WHD of “super groups” is that found in a 2011 Report by the Government Accountability Office chronicling the emerging practice by WHD of using “super groups,”³⁴ which would require a creative stretch of legal imagination to characterize as authority of any kind for the use of “super groups.”

The majority’s reliance in the instant case upon *Building and Construction Trades*’ is simply misplaced. The focus of the court’s attention was on the discretionary authority delegated under the DBA to the Secretary of Labor in promulgating regulations, which regulations (with the exception of two) the court upheld “as within the broad administrative discretion contemplated by Congress.” 712 F.2d at 613. The distinction drawn by the court, applicable here, is between those situations where the Secretary “act[s] in an area as to which he had some discretion to reach a number of different results” and situations where the Secretary acts in “an area of pure statutory interpretation as to which there is in theory only a single answer.” *Id.* at 619. In the instant case, we are confronted with the latter situation. Petitioners do not challenge the Department’s regulations but the failure of the Administrator and the Wage and Hour Division to follow those regulations. Presented is a straightforward question of law. It is conceivable that the Secretary of Labor could promulgate regulations under the DBA providing for the use of “super groups.” In the absence of doing so, however, the question of law before the Board is whether there exists any legal authority, whether by statute, regulation, or case law, for the use by WHD of wage data from “super groups” of counties in determining prevailing wages. The short answer is: There is no such authority.

Not only does use of “super groups” exceed WHD’s legal authority, in the present case it would appear to violate the very purpose of the Davis-Bacon prevailing wage authority. As the D.C. Court of Appeals noted in *Building and Construction Trades*’, *supra*, “[T]he Davis-Bacon Act was enacted during the Great Depression to ensure that workers on federal construction projects would be paid the wages *prevailing in the area of construction*.” 712 F.2d at 613 (emphasis added). The Act “guarantee[s] to workers on federal construction projects a minimum wage based on locally prevailing wages.” *Id.* Its central purpose is “to ensure that federal contractors pay the wages *prevailing in the locality of the project*.” *Id.* at 619 (emphasis added). In keeping with this purpose, the ARB has sanctioned the use by WHD in certain instances of wage survey data obtained from an OMB Metropolitan Statistical Area (MSA). As the majority notes, *supra* at 6, within an MSA there exists a high degree of social and economic integration

Skidmore v. Swift & Co., 323 U.S. 134 (1944). See *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n. 6 (2002) (“Such interpretations are ‘entitled to respect’ under [*Skidmore*], but only to the extent that those interpretations have the ‘power to persuade.’”). The weight of deference afforded to agency interpretations under *Skidmore* depends upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” 323 U.S. at 140.

³⁴ Admin. Rec. Tab I, U.S. Government Accountability Office Report 11-152, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, at 9-10 (Mar. 2011).

with the urban core.³⁵ While the wage data used in the instant case is from an MSA in Virginia, there is no evidence of record indicating any similarity, socially or economically, between the MSA supplying the wage data and the MSA that includes the locale for which the prevailing wages were determined. Use of “super groups,” at least in the instant case, provides no assurance that workers, for whom the wage determinations are intended, will, consistent with the central purpose of the DBA, be paid the prevailing wage in the intended area of construction.

If anything, it appears that the MSA within the “super group” from which the wage data was derived is distinctly different in a number of key respects from the area and locale for which the wage determination is intended. Petitioners cite to publications prepared by the Commonwealth of Virginia showing the MSA from which the wage data was gathered as comprising a distinctive labor market having almost double the per capita personal income and double the average wages of workers in the MSA encompassing the area for which prevailing wages were determined. The majority acknowledges as much, referring to WHD’s “use of data from MSAs with distinctly different average wages,” *supra* at 9, but dismisses the concern citing the Board’s decision in *Dep’t of the Army*, ARB No. 98-120, -121, -122 (Dec. 22, 1999). *Dep’t of the Army* was a wage determination case under the Service Contract Act in which the ARB upheld WHD’s shift from use of separate urban wage data to the use of wage data derived from a Consolidated Metropolitan Statistical Area. Ironically, the quoted portion of the decision in *Dep’t of the Army* that the majority cites suggests exactly the opposite conclusion to that which the majority has drawn. In *Dep’t of the Army*, we concluded (as the majority quotes) that where “a geographic area manifests sufficient economic integration that the Administrator reasonably may deem it a ‘locality’ under the [Service Contract] Act, it is largely irrelevant that wage rates may be higher in some parts of the community than in others.” The problem *Dep’t of the Army* presents for the majority is that there is no evidence of record in the instant case, let alone any showing by either the Administrator or WHD, that the northern Virginia geographical area from which the wage data was derived “manifests sufficient economic integration” with the locale for which the prevailing wages were determined.

Having concluded that any wage disparity between the locale where the wage data was collected and the locale where the prevailing wage determination was made is irrelevant, the majority nevertheless imposes upon Petitioners the burden of proving the existence of a wage disparity between the two venues. Without such evidence, the majority states, “we will not disturb the Administrator’s chosen methodology as long as it is consistent with the statute and regulations.” *Supra* at 11. Cited in support by the majority are the ARB’s decisions in *New Mexico Nat’l Elec. Contractors Assoc.*, ARB No. 03-020 (May 28, 2004), and *Road Sprinkler Fitters Local No. 669*, ARB No. 10-123 (June 20, 2012). However, both cases are distinguishable from the instant case. Whereas the challenge to the prevailing wage determinations in both was to the *adequacy* of the survey data, in the instant case CCHD does not challenge the adequacy of the survey data but the *legality* of its use. The challenge presented in the present case, and thus the issue before us, is not the adequacy of the wage survey data that

³⁵ For example, an MSA consists of an urban center with economically and socially integrated outlying counties; or, in some cases, a metropolitan area consisting of multiple urban centers and outlying counties with substantial economic and social integration. 55 Fed. Reg. 12154.

was used, but whether the use of that wage data is (in the words of the majority) “consistent with the statute and regulations.” As previously discussed, it is not.

Finally, I am deeply troubled by the stale nature of the wage data that was used in establishing the prevailing wages in this case (the Petitioners’ second basis for challenging the Administrator’s determination). Here, again, I view the issue as one of law, i.e., whether WHD’s determination of the prevailing wages using wage data more than five years old comports with the DBA and its implementing regulations.

As the Board noted in *Road Sprinkler Fitters*, the requirement found at 40 U.S.C.A. § 3142(b) that the minimum wages for DBA-covered construction workers are based on the Secretary of Labor’s determination of “prevailing” wages implies that the wages established be current. *Road Sprinkler Fitters Local Union No. 669*, ARB No. 10-123, slip op. at 13. The regulations are more explicit: The “prevailing wage” that is to be determined is that paid “during the period in question.” 29 C.F.R. § 1.2(a)(1). To be determined are “the prevailing wages *at the time of issuance* of a wage determination.” *Id.* at § 1.2(a)(2) (emphasis added). *See also*, 29 C.F.R. § 1.3(c) (the determination that is required is “of the prevailing wages at the time of issuance of the wage determination”). The prescribed method for securing the wage data refers to the collection of “*current* wage data (data on wages paid on current projects or, where necessary, projects under construction no more than one year prior to the beginning of the survey or the request for a wage determination, as appropriate).” *Id.* at § 1.7(a) (emphasis added).³⁶ While I recognize that in *Road Sprinkler Fitters* evidence was submitted upon which the conclusion could be reached that the wage determination therein at issue was not current, and thus not prevailing, I am not convinced that this Board is precluded from ruling as a matter of law that a wage determination that is not based on current wage data violates the requirements of DBA’s implementing regulations. In the present case, I consider the wage determinations at issue to clearly violate the legal requirement that the wage data upon which those determinations were issued be current.³⁷

For both of the foregoing reasons, I thus dissent.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

³⁶ The DAVIS-BACON OPERATIONS MANUAL similarly refers to the use of “current” wage data: “Wage determinations are based on *actual wage and fringe benefit rates currently being paid*. . . .” Manual at p. 40 (emphasis added). *See Road Sprinkler Fitters Local Union No. 669*, slip op. at 14 n.27.

³⁷ I consider my conclusion buttressed by Wage and Hour Division’s acknowledgement (see majority decision, *supra* note 29) that recent wage determinations issued for residential construction in Newport News and Chesapeake are based upon the same wage data herein at issue.