



In the Matter of:

BARCO ENTERPRISES, INC.

ARB CASE NO. 13-041

**With respect to workers employed
By the contractor under General Services
Administration (GSA) Contract No.
17001-107 for renovation of GSA
Headquarters in Washington, D.C.**

DATE: July 31, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner, Barco Enterprises, Inc.:

Seth A. Robbins, Esq.; Seeger, P.C.; Washington, District of Columbia

For Respondent Administrator, Wage and Hour Division:

Dean A. Romhilt, Esq.; Jonathan T. Rees, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; U.S. Department of Labor, Washington, District of Columbia

For Whiting-Turner/Walsh Joint Venture, Amicus Curiae:

Ronald W. Taylor, Esq.; Venable LLP, Baltimore, Maryland

Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge. Judge Corchado, concurring. Judge Royce, concurring and dissenting.

DECISION AND ORDER OF REMAND

This case is before the Administrative Review Board pursuant to the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (Thomson/West 2005, Supp. 2015), and its implementing regulations at 29 C.F.R. Parts 1, 5, and 7 (2014). Petitioner Barco Enterprises, Inc., (Barco) seeks review of the decision of the Administrator, Wage and Hour Division, (Administrator), issued February 1, 2013, denying Barco's request for approval to pay its employees at the prevailing wage rate for an existing occupation classification established under

the applicable DBA Wage Determination. Treating Barco's request as a "conformance request" under 29 C.F.R. § 5.5(a)(1)(ii) for approval of an additional classification to the existing wage determination classifications, the Administrator denied Barco's request on the grounds that the work Barco's employees performed was performed by an existing classification in the wage determination. For the following reasons, the Administrative Review Board (ARB or Board) vacates the Administrator's decision and remands this matter for reconsideration consistent with this Decision and Order of Remand.

BACKGROUND¹

The General Services Administration (GSA) entered into a federal government contract subject to the DBA with Whiting Turner/Walsh Joint Venture for the renovation of the GSA headquarters building in Washington, D.C. In August 2011, Barco was awarded a subcontract to perform lead paint abatement at the GSA building. Incorporated into the GSA contract in compliance with the DBA, and thus applicable to Barco's subcontract, was DBA Wage Determination DC20100004, modification 0, published March 12, 2010 (DC4 Wage Determination), a building construction wage determination applicable to the District of Columbia. Pertinent to this case, the DC4 Wage Determination included a "Painter" classification, a "Skilled Laborer" classification, and a "Common or General Laborer" classification. The Painter classification provided a wage rate of \$24.64 per hour and a fringe benefit rate of \$7.86 per hour. The Skilled Laborer classification provided a wage rate of \$20.22 per hour and fringe benefits at \$5.25 per hour. The Common/General Laborer classification provided a wage rate of \$13.04 per hour and fringe benefits at \$2.80 per hour. The Painter and Skilled Laborer rates reflect the determination that the prevailing rates for the two classifications are union rates. The Common/General Laborer rate is based on a non-union prevailing rate.

In October 2011, Wage and Hour initiated an investigation of several contractors working on the GSA project, including Barco. Through its investigation, Wage and Hour determined that Barco was in violation of the DBA for having improperly classified its lead paint abatement employees as Common/General Laborers. The Wage and Hour investigator advised Barco that it was required to pay its employees at the Painter wage and fringe benefits rate under the DC4 Wage Determination, retroactive to the start date of site work, and that Barco owed its employees approximately \$379,000 in back wages.

¹ Unless otherwise noted, the Background Statement is based on the Administrative Record the Deputy Administrator filed with the ARB pursuant to 29 C.F.R. § 7.6. The ARB is generally limited in reaching its decision to review of the record that was before the Administrator. *Id.* at §§ 7.1(e) and 7.8(b). Nevertheless, in certain instances the ARB may consider extra-record evidence for purposes of determining whether remand to the Administrator is warranted "for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence." *Id.* at § 7.1(e). In this case, evidence Barco presented for the first time on appeal, commented upon at footnote 2, warrants the Administrator's consideration to the extent of its relevance upon remand.

Subsequently the GSA, on Barco's behalf, filed Standard Form (SF) 1444 with the Wage and Hour Division. GSA requested that Barco's lead abatement employees, identified in the SF 1444 as "Labor, Environmental Lead Paint Abatement" laborers, be paid at the Common/General Laborer wage and fringe benefits rates established under the DC4 Wage Determination.²

Rather than treat Barco's submission as a request for approval to include the company's lead paint abatement employees within the existing Common/General Laborer classification, Wage and Hour treated the submission as a conformance request seeking to add a new classification to the existing DC4 Wage Determination pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(A). By letter dated April 24, 2012, the Branch Chief for Construction Wage Determinations, Wage and Hour Division, denied Barco's application on the grounds that the workers were already covered by one of the existing job classifications, *i.e.*, Painters. The Branch Chief identified Barco's request as seeking an "additional classification and wage rate [as] Laborer, Environmental Lead Paint Abatement," and explained that the request did not meet the threshold requirement of 29 C.F.R. § 5.5(a)(1)(ii)(A)(1) "because the work to be performed by this classification is performed by a classification included in the wage determination."

Barco sought review by the Wage and Hour Administrator of the Branch Chief's decision, requesting "that the wage rate for lead paint abatement be reconsidered and modified to the Laborer Common/General category." In support of its request for review, Barco submitted documentation that, the company asserted, demonstrated that union painters in the District of Columbia did not perform lead abatement and that the payment of its lead paint abatement employees at the DC4 Wage Determination Common/General Laborer rate was consistent with the practice among environmental abatement contractors in the Washington, D.C. area.

² On appeal, Barco proffers the affidavit of its president, along with supporting documentation, in which he attests that the Wage and Hour investigator, after initially informing Barco that it was in violation of the DBA, subsequently advised the company that the Wage and Hour Division had changed its position regarding the appropriate classification, and agreed that the proper classification was Common and General Laborers. The investigator provided Barco with SF 1444, the form for requesting an additional classification to an existing Wage Determination, and advised Barco to submit it to Wage and Hour requesting that the Department of Labor add Barco's employees' work to the Common/General Laborer classification. By e-mail the investigator advised Barco: "The U.S. DOL has requested that Barco submit a request to conform or add the lead abatement duties to the unskilled laborer classification. The conformance would modify the wage determination for this contract only." See Exhibits 13-15 attached to Barco's Reply Brief. For purposes of the ARB's present review, we do not take into consideration the Barco President's affidavit and the referenced e-mail from the Wage and Hour investigator. It is nevertheless evidence, along with other exhibits and declarations that Barco has submitted for the first time on appeal, that the Administrator should consider upon remand.

In a final ruling issued February 1, 2013, the Administrator upheld the Branch Chief's denial of Barco's request, treating it as a conformance request under 29 C.F.R. § 5.5(a)(1)(ii)(A). The Administrator explained that "Barco's request for the addition of a lead paint abatement classification to DC4 fails to satisfy the first criterion for conformance approval—that a classification cannot be conformed if the work is performed by a classification already on the wage determination." In support, the Administrator cited the results of a Wage and Hour local area practice survey (LAPS) indicating that painters performed lead paint abatement work in building construction in the District of Columbia.

On February 21, 2013, Barco filed a timely petition for review of the Administrator's ruling with the Administrative Review Board.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals from final decisions under 29 C.F.R. Parts 1, 3, and 5. Secretary of Labor Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 7.1(b). As essentially an appellate agency, the Board will not hear matters *de novo* except upon a showing of extraordinary circumstances, and may remand any case for the taking of additional evidence and the making of new or modified findings by reason of the additional evidence. 29 C.F.R. § 7.1(e).

In considering matters arising under the Davis-Bacon Act within the scope of its jurisdiction, the Board acts as fully and finally as might the Secretary of Labor concerning such matters. 29 C.F.R. § 7.1(d). Where appeal is from a ruling of the Administrator of the Wage and Hour Division, the Board will assess the Administrator's ruling to determine whether it is consistent with the applicable statute and regulations, and a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act. *In re Spencer Tile Co.*, ARB No. 01-052, 2001 WL 1173805 (ARB Sept. 28, 2001).

DISCUSSION

The Davis Bacon Act (DBA) requires that laborers employed on covered federal construction projects be paid wages and fringe benefits at rates at least equal to the locally prevailing rates for similar work. See 40 U.S.C.A. § 3142. Under the DBA, the Department of Labor's Wage and Hour Division (WHD) issues wage determinations that reflect locally prevailing rates for job classifications used on construction projects. *See id.*; *see also* 29 C.F.R. Part 1. The minimum rates in wage determinations are based on the rates determined by WHD "to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the [applicable locality]." 49 U.S.C.A. § 3142(b). If the DBA covers a construction project, the applicable wage determination is incorporated into

the governing contract and provides the minimum rates for workers in the job classifications who work on the project.

Occasionally a class of laborers or mechanics is required on a construction project that is not found in the wage determination. In such instances, the Wage and Hour Division is authorized to add an additional job classification and wage rate after the award of the construction contract through a process known as a *conformance*. “The conformance procedure is designed to be a simple, expedited process for adding wage rates needed for job classifications not found in the wage determination. To protect the integrity of the competitive bidding system, the requirements for the addition of a conformed classification and wage rate are narrowly limited, and a conformed classification will be recognized only if it meets the following three-part test: (1) The work to be performed by the classification is not performed by a classification in the wage determination; and (2) The classification is utilized in the area by the construction industry; and (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.”³

The conformance process is narrow in scope and has the limited purpose of establishing a new classification when it is necessary to do so because work needed to perform the contract is not performed by an existing classification.⁴ Accordingly, the WHD will not add a new classification through a conformance action unless the first criterion for issuance of a conformance is satisfied, *i.e.* the proposed work in question is not performed by any existing classification in the wage determination.

WHD will initially decide a conformance request under 29 C.F.R. § 5.5(a)(1)(ii)(B) or (ii)(C), depending upon whether or not the contractor, the laborers to be employed in the classification (if known), or their representatives, and the contracting officer agree or disagree to the proposed classification,⁵ with reconsideration by the Administrator provided pursuant to 29

³ *In re Pizzagalli Constr. Co.*, ARB No. 98-090, slip op. at 5-6 (May 28, 1999) (citing 29 C.F.R. § 5.5(a)(1)(ii)(A)(1)-(3)).

⁴ *In re Am. Bldg. Automation, Inc.*, ARB No. 00-067, 2001 WL 328123, at *3 (Mar. 30, 2001). See *In re Cambridge Plaza*, ARB No. 07-102 (Oct. 29, 2009). As the WAB noted in *In re J.A. Languet*, WAB No. 94-018 (Apr. 27, 1995), the conformance process affords the Administrator discretion to alleviate the hardship imposed by a classification that the contractor could not have anticipated at the time of bidding.

⁵ A conformance action is effected in one of two ways, depending upon whether the contractor, the employees being classified in conformance with the wage determination, and the contracting officer agree or disagree as to the classification and wage rate. If the contractor and the employees, or their representatives, and the contracting officer agree on the additional classification and wage rate, the contracting officer submits a report of the action to the Administrator who then will approve, modify or disapprove of the conformance. 29 C.F.R. § 5.5(a)(1)(ii)(B). If the principals disagree, “the contracting officer shall refer the questions, including the views of all interested parties and the

C.F.R. § 1.8. Disputes in connection with conformances are to be resolved in accordance with the procedures set forth under 29 C.F.R. § 5.11.⁶ Appeal from a final decision by the Administrator is provided at 29 C.F.R. §§ 1.9 and 7.1.

Alternatively, as the Wage & Appeals Board noted in *In re Fry Bros. Corp.*, WAB No. 76-06, 1977 WL 24823, *7 (June 14, 1977), where a question arises concerning the *proper classification* of disputed work *within the existing classifications* of a wage determination, a contractor or subcontractor may request “an authoritative ruling” from the Administrator as provided in 29 C.F.R. § 5.13.⁷ Section 5.13 provides “a means for contractors to obtain clarification from the Department about the proper scope of jobs under [DBA] wage determinations.”⁸ Thus, for example, in *In re North Country Constructors of Watertown*, WAB No. 92-22, 1993 WL 374956 (Sept. 3, 1993), a subcontractor invoked 29 C.F.R. § 5.13 in challenging a Wage and Hour determination that its employees should have been classified and paid under the electrician classification rather than as laborers under the applicable wage determination.⁹

recommendation of the contracting officer, to the Administrator for determination.” 29 C.F.R. § 5.5(a)(1)(ii)(C). Even if parties agree to the proposed conformance, the Administrator must approve the additional classification.

⁶ See 29 C.F.R. § 5.5(a)(9); 29 C.F.R. § 5.11(a).

⁷ *Fry Brothers*, which was decided in 1977, cited to 29 C.F.R. § 5.12, the predecessor provision to what is now 29 C.F.R. § 5.13. The two provisions are virtually identical. Former section 5.12 provided in pertinent part: “All questions arising in any agency relating to the application and interpretation of the rules contained in this part and in parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the statutes listed in § 5.1, shall be referred to the Secretary for appropriate ruling or interpretation.” See 29 Fed. Reg. 103 (Jan. 4, 1964). Current section 5.13 provides in pertinent part: “All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to part 1 of this subtitle, of the rules contained in this part and in parts 1 and 3, and of the labor standards provisions of any of the statutes listed in § 5.1, shall be referred to the Administrator for appropriate ruling or interpretation.”

⁸ *Abhe & Svoboda v. Chao*, 508 F.3d 1052, 1062 (D.C. Cir. 2007). See also *Universities Research Ass’n v. Coutu*, 450 U.S. 754, 761 (1981).

⁹ See also *In re Phoenix Storm Drain Tunnels*, WAB No. 87-40, 1989 WL 40473 (Feb. 22, 1989), in which a union sought a ruling from the Administrator as to the proper wage classification of disputed work upon challenging WHD’s classification of that work based upon a local area practice survey.

29 C.F.R. § 5.13, like section 5.5, contemplates the procedures established under section 5.11 for seeking such clarification.¹⁰ Section 5.13, however, does not limit who may refer classification questions to the Administrator for determination. Upon a request for a ruling from the Administrator, should factual issues be found to exist, the Administrator is required to refer the case to the Department of Labor's Office of Administrative Law Judges for hearing and resolution under 29 C.F.R. § 5.11(b) and (c).¹¹

The distinction in whether a party seeks a conformance under 29 C.F.R. § 5.5 or the clarification of classifications pursuant to 29 C.F.R. § 5.13 is highly significant. A request pursuant to 29 C.F.R. § 5.5 for "new classifications to be employed on the project" is distinguishable from a "question of area practice as to what classification in an existing wage determination performs the work."¹² Cases concerning disputes "about which of two classifications and rates in a wage determination are applicable to certain duties performed by laborers or mechanics employed to work on a federal construction project covered by the Davis-Bacon Act . . . present a different issue" from "whether a classification and wage rate should be added to a wage determination."¹³

If the petition is treated as a conformance request under 29 C.F.R. § 5.5, ARB and WAB case authority have held that criterion #1 thereunder ("work to be performed by the classification is not performed by a classification in the wage determination") is not met where the work to be performed by the requested classification is performed by any classification already listed in the wage determination. ARB precedent establishes that where the addition of a new classification is sought pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(A), the conformance request will be denied under the first criterion of the three-part test if the work in question is performed in the area by workers

¹⁰ 29 C.F.R. § 5.11(a) provides: "This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s)."

¹¹ See, e.g., *In re North Country Constructors of Watertown*, WAB No. 92-22, in which the WAB, in addressing the conflicting data generated as a result of the local area practice survey that was performed, stated that rather than the Administrator resolving this conflict, "a more appropriate solution would have been referral of the factual dispute to an administrative law judge for taking of evidence, credibility resolutions, and determination of the issue. In fact, so many conflicts in the overall evidence collected by Wage and Hour existed that it would have been more reasonable to submit the entire dispute to an administrative law judge for decision." 1993 WL 374956, at *7.

¹² *In re Rite Landscape Constr.*, WAB No. 83-03, slip op. at 8 (Oct. 18, 1983).

¹³ *In re Elmer Davis*, WAB No. 80-08, 1984 WL 161736, at *4 (May 4, 1984) (Dunn, dissenting).

within one of the existing wage determination classifications.¹⁴ It is not necessary to establish which classification of workers listed in the wage determination predominantly performs the work in question. “Board precedent makes clear that in applying the first criterion it need not be established that the classification listed in the wage determination is the prevailing practice, but only that the work in question is performed in that area by that classification of worker.”¹⁵ As the WAB stated in *In re Pizzagalli Constr. Co.*, ARB No. 98-090 (May 28, 1999):

In regard to the first prong of the conformance test . . . *prevailing practice* is not controlling. All that is necessary is a demonstration that *some* classification within the wage determination performs the tasks that would be assigned to the conformed job classification that has been requested. [citation omitted] Therefore, a finding that the work to be performed by the proposed classification is performed in the pertinent locality by a classification already included in the wage determination, *regardless of whether that practice prevails in the area*, will sustain the denial of a conformance request under Section 5.5(a)(1)(v)(A)(1).

Slip op. at 8.

On the other hand, if the question is whether the disputed work belongs in one of several existing wage determination classifications, what is required is a determination, based on a local area practice survey, as to which classification of workers listed in the wage determination predominantly performs work in the area of a character similar to the work in dispute. A prime example of a case addressing this question is *In re North Country Constructors of Watertown*, WAB No. 92-22, 1993 WL 374956. In rejecting WHD’s determination that the local area practice supported finding that the electrician classification, and not the laborer classification, performed the disputed work, the WAB cited to and relied upon the procedures found in Wage and Hour’s Field Operations Handbook (FOH) (Oct. 25, 2010) at section 15f05(d)(4) for considering data gathered pursuant to a local area practice survey:

¹⁴ E.g., *In re More Drywall, Inc.*, WAB No. 90-20 (Apr. 21, 1991).

¹⁵ *In re Iron Workers II*, WAB No. 90-26, 1992 WL 465692 at *3 (Mar. 20, 1992) (citing *TRL Systems*, WAB No. 86-08 (Aug. 7, 1986) and *Warren Oliver Co.*, WAB No. 84-08 (Nov. 20, 1984)). *Accord In re U.S. Fire Prot.*, ARB No. 99-008, 1999 WL 702413, at *4 (Aug. 30, 1999); *In re Audio-Video Corp.*, ARB No. 95-047, 1997 WL 454061, at *4 (July 17, 1997) (“for purposes of the conformance process the use of a classification need not be the prevailing classification doing a specific job”); *In re J.A. Languet Constr.*, WAB No. 94-18, 1995 WL 256780, at *5 (Apr. 27, 1995) (“our precedent does not require conformed classifications or denials to be based on prevailing practice”).

Compile all information received and total the number of employees in each classification which performed the work in question. The classification which has the clear majority of employees performing the work in question is the proper classification. However, if it is found that only 51% to 60% of the employees in a classification performed the work in question, contact the RO [Regional Office] for guidance. The RO should contact the NO [National Office], if necessary. If no common, single classification practice is found to be predominant in the area or if no project involving work of a similar character is found, we will not take exception to the contractor's particular practices.

From the foregoing, the WAB concluded: "A margin of one employee is not a 'clear majority.' With only 52% of the survey represented by electricians—and in light of Wage and Hour's FOH directives—the Board cannot conclude that Wage and Hour has demonstrated that electricians were predominant in the area."¹⁶ Accordingly, the Board held "that the evidence of record supports only a determination that there was no predominant classification performing the work of a character similar to that in dispute, and concludes that the decision of the Wage and Hour Division must be reversed."¹⁷

Here, Barco asserts that it was seeking WHD approval to include its lead paint abatement employees within the existing DC4 Wage Determination classification of Common/General Laborer, notwithstanding the fact that GSA initiated Barco's request by the filing of SF 1444, the form used to initiate conformance requests under 29 C.F.R. § 5.5(a)(1)(ii)(A). Interestingly, on this point the Administrator appears to agree with Barco, noting that "Barco's conformance request did not seek to add a new classification to the DC4 Wage Determination, but instead sought to have its employees who were performing lead paint abatement work paid at the Common or General Laborer rate already existing in the DC4 Wage Determination."¹⁸ "Barco repeatedly asserted in its request for review and reconsideration by the Administrator that lead paint abatement work is performed by Common or General Laborers."¹⁹ Moreover, on appeal to the ARB, the Administrator notes that Barco's argument as to the nature of its request remains consistent: "Barco's petition for review makes no argument that its lead paint abatement employees are a new classification that is not included in—and thus needs to be added to—the DC4 Wage Determination. Instead, Barco argues that the Common or General Laborer

¹⁶ *In re North Country Constructors*, WAB No. 92-22, 1993 WL 374956, at *6.

¹⁷ *Id.* at *8.

¹⁸ Statement of the Acting Deputy Administrator in Response to Petition for Review, at p. 8.

¹⁹ *Id.*

classification already existing in the DC4 Wage Determination is the correct classification for its employees as opposed to the Painter classification.”²⁰

Nevertheless, for whatever reason (perhaps because of the use of Standard Form 1444 to initiate proceedings before WHD) the Administrator treated Barco’s petition as a conformance request under 29 C.F.R. § 5.5(a)(1)(ii) seeking the addition of a classification to the existing DC4 Wage Determination classifications. As a result, the Administrator denied Barco’s request because it failed to meet the first of the three criteria for adding a new classification set forth at 29 C.F.R. § 5.5(a)(1)(ii)(A), *i.e.*, that the work to be performed by the requested classification is not performed by an existing classification in the wage determination.²¹

The Administrator asserts on appeal that Barco may argue that its lead paint abatement employees should be classified as Common/General Laborers, or as Skilled Laborers, under the DC4 Wage Determination, but only in response to a Wage and Hour enforcement action.²² While Barco surely would have the right to defend in response to any enforcement action by arguing that its employees fall within an existing Wage Determination classification, such right does not preclude Barco from invoking the procedures under 29 C.F.R. § 5.11 as part of a request for clarification pursuant to 29 C.F.R. § 5.13 of whether its employees are properly classified within an existing classification under the DC4 Wage Determination, and thus subject to the prevailing wage rate for that existing classification.²³ In this regard, the case before us is little different from that in *In re Double Eagle Constr.*, ALJ No. 1993-DBA-014 (June 13, 1994). The issue in *Double Eagle Constr.*, involved the proper classification within existing wage determination classifications of the company’s employees as either common laborers (paid at non-union rates) or, as WHD contended, roofers (paid at union rates). WHD ultimately prevailed following hearing before a Department of Labor Administrative Law Judge, but only

²⁰ *Id.* at p. 9.

²¹ Denial of Barco’s request for failure to meet the first criteria under 29 C.F.R. § 5.5(a)(1)(ii)(A) does not necessarily resolve the question of the proper wage rate that is to be paid Barco’s employees, particularly where there is evidence suggesting that more than one of the existing wage determination classifications may do lead paint abatement work. See Administrative Record, Exhibit 4 (Barco’s May 3, 2012 Request for Review and Reconsideration), at Attachment D (attestation of Whiting-Turner/Walsh JV (May 3, 2012)). See also Exhibits 10 and 12 attached to Barco’s Petition for Review.

²² *Id.* at p. 10 n.3.

²³ It is true that at one time the procedures under 29 C.F.R. § 5.11 could only be invoked by the Secretary of Labor. See 29 Fed. Reg. 103 (Jan. 4, 1964), as amended at 40 Fed. Reg. 30,482 (July 21, 1975). However, Section 5.11 in its current form provides that the procedures thereunder may be invoked by, among others, DBA contractors and subcontractors. 29 C.F.R. § 5.11(a).

after the Administrator determined, based upon WHD's local area practice, which determination Double Eagle Construction challenged without waiting for an enforcement action to ensue.

Treating Barco's initial request to the Wage and Hour Division as a conformance request because it was initiated by the filing of SF 1444, irrespective of the substance of Barco's request, would seemingly exalt form over substance, something we are unwilling to countenance. Nevertheless, and notwithstanding the Administrator's apparent agreement on appeal with Barco's assertions as to what it was in fact seeking, the administrative record currently before the Board is not completely clear on this point. Thus, we remand this case to the Administrator for a determination in the first instance—consistent with this decision and after clarification from Barco as to what it in fact seeks—of whether Barco's request should be treated as a “conformance request” under 29 C.F.R. § 5.5, or considered pursuant to 29 C.F.R. § 5.13 (and the procedures established under 29 C.F.R. § 5.11) as a request seeking clarification of which classification within the existing classifications of the DC4 Wage Determination its employees are to be classified and compensated.²⁴ If the Administrator determines that it is the latter, and further finds upon investigation that no relevant facts are at issue, the Administrator may issue a ruling addressing the question of whether Barco's paint abatement employees are properly classified as Common/General Laborers, Skilled Laborers, or Painters under the DC4 Wage Determination. If, on the other hand, the Administrator determines that relevant facts are at issue, the Administrator shall refer the case to the Department of Labor's Office of Administrative Law Judges for hearing and resolution.²⁵

Finally, regardless of whether upon remand the Administrator again treats Barco's request as a “conformance request” under 29 C.F.R. § 5.5, or instead as a request seeking clarification pursuant to 29 C.F.R. § 5.13 as to which classification within the existing classifications of the DC4 Wage Determination the company's paint abatement employees properly belong, a local area practice survey (LAPS) consistent with Section 15f05 of Wage and Hour's Field Operations Handbook²⁶ will necessarily be required.²⁷ This is so, notwithstanding the fact that a significantly different test is applicable where the question for resolution is

²⁴ On the need for remand to the Administrator for reconsideration of Barco's request seeking to include its employees under an existing occupation classification of the applicable DBA wage determination Judge Royce concurs. See *infra*, p. 17.

²⁵ Another factor under 29 C.F.R. § 5.11 for determining whether or not a dispute should be referred to an administrative law judge for resolution is whether reasonable cause exists for instituting debarment proceedings. Our review of the record in this case indicates that debarment is neither at issue nor warranted.

²⁶ See FOH § 15f05(a), (b).

²⁷ On the necessity of conducting a new LAPS on remand Judge Corchado concurs, for the reasons he sets forth. See *infra*, pp. 14-16.

whether the disputed work is performed by any existing classification in the wage determination, as opposed to the proper classification of a company's employees within the existing classifications of a wage determination.

In addressing the question of which classification within existing classifications of an applicable wage determination a company's employees belong, it is necessary to establish through a local area practice survey which classification of workers listed in the wage determination predominantly performs work in the area of a character similar to the work in dispute.²⁸ Accordingly, if upon remand the Administrator determines it appropriate to treat Barco's request as a request pursuant to 29 C.F.R. § 5.13 (and 29 C.F.R. § 5.11) seeking clarification as to which classification within the existing classifications of the DC4 Wage Determination the company's employees properly belong, a local area practice survey consistent with Section 15f05 of Wage and Hour's Field Operations Handbook will be required.

If, on the other hand, the Administrator again treats Barco's request, upon remand, as a "conformance request" under 29 C.F.R. § 5.5, a new local area practice survey will nevertheless be required given the errors in the conduct of the previous local area practice survey.²⁹ As previously noted, where the issue involves whether or not a new classification of workers should be added to a wage determination pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(A), Board precedent makes clear that it is not necessary to establish that a classification listed in the wage determination is the predominant practice, but only that the work in question is performed in that area by workers within one of the existing classifications.³⁰ Consequently, as the WAB noted in *Pizzagalli Constr.*, ARB No. 98-090, legal precedent does not dictate that a local area practice survey be conducted as a prerequisite to granting or denying a conformance request. In such cases, the decision on whether a LAPS is required is generally left to the discretion of the Administrator, depending upon the circumstances of the particular case.³¹ In this case, the Administrator approved the conduct by the Wage and Hour Division of a local area practice survey to determine whether the work in question (lead paint removal) was performed by workers within the existing DC4 Wage Determination classifications. The parties do not dispute the necessity of conducting the area practice survey. Nor do we find fault in the Administrator's decision to conduct the survey, particularly where the relevant facts of this case are distinguishable from those in *Pizzagalli*, where the WAB held that a local area practice survey

²⁸ *In re North Country Constructors of Watertown*, WAB No. 92-22, 1993 WL 374956, **6, 8. See *In re Phoenix Storm Drain Tunnels*, WAB No. 87-40 (area practice survey conducted to determine appropriate classification within DBA wage determination of the disputed work).

²⁹ See discussion, *infra*, pp. 12-13.

³⁰ See, e.g., *In re U.S. Fire Prot.*, ARB No. 99-008; *In re Audio-Video Corp.*, ARB No. 95-047; *In re Iron Workers II*, WAB No. 90-26.

³¹ *Pizzagalli Constr.*, ARB No. 98-090, slip op. at 8.

was not warranted in conjunction with the conformance request in that case, and more closely align with the facts of the cases distinguished in *Pizzagalli*, where local area surveys were conducted.³² Thus, we will not second-guess the Administrator's determination as to the necessity of a LAPS in this case. We will, however, insist that any LAPS undertaken be conducted consistent with the requirements set forth in Wage and Hour's Field Operations Handbook.

Under the provisions of Wage and Hour's Field Operations Handbook, to determine the proper classification of the disputed work will require, depending on the facts of the particular case, either a limited area practice survey consistent with Section 15f05(d) or a full area practice survey consistent with Section 15f05(e). As noted at FOH § 15f05(c)(5), in accord with *Fry Bros. Corp.*, WAB No. 76-06, a local area practice survey (whether "limited" or "full") is to consider information from parties whose wage rates were found to be prevailing in the area and thus incorporated into the applicable wage determination. Where all parties contacted as part of a limited area practice survey agree as to the proper classification, the area practice is thus established. However, if (as appears to be the situation here) all of the contacted parties do not agree, or if there is no clear majority in agreement, a full local area practice survey must be conducted. In such event, the proper classification for the disputed work will be the classification within the wage determination "which has the clear majority of employees performing the work in question."³³

Where a combination of union and non-union rates are listed in the wage determination for classification that may perform the work in question, the local area practice survey must take into consideration information from both union contractors for the classifications for which union rates are listed in the applicable wage determination, and non-union contractors for the classifications for which non-union rates are listed.³⁴ This is so whether a "limited" or a "full" local area practice survey is conducted.³⁵ The Wage and Hour Division failed to meet this requirement here by limiting the conduct of its area practice survey to only the union-based "Painter" and "Skilled Laborer" classifications in the DC4 Wage Determination, in disregard of the non-union based Common/General Laborer classification. Wage and Hour's rationale for not surveying non-union contractors to determine whether common/general laborers performed lead

³² See *Pizzagalli Constr.*, ARB No. 98-090 at n.4 and decisions cited therein (e.g., *In re J.A. Languet Constr. Co.*, WAB No. 94-18 (Apr. 27, 1995); *In re Inland Waters Pollution Control, Inc.*, WAB No. 94-12 (Sept. 30, 1994); *In re More Drywall, Inc.*, WAB No. 90-20 (Apr. 29, 1991)).

³³ FOH § 15f05(e)(4). See discussion, *supra*, p. 8

³⁴ FOH § 15f05(c)(5). See *In re Elmer Davis*, WAB No. 80-08, 1984 WL 161736, at *2 ("where the craft in question reflects both negotiated and open shop rates, both sectors of the industry must be consulted to determine the prevailing practice of the craft").

³⁵ See FOH §§ 15f05(d)(3) and 15f05(e)(2).

paint abatement work in the area was based on the assertion that, “[a]s a general practice in the construction industry, a common/general laborer performs only menial tasks” and the determination that, based upon the training and certifications of Barco’s employees, “lead paint removal work requires training and skill exceeding that of a common/general laborer.”³⁶ Notwithstanding recognition that the lead paint abatement work did not require the training and certifications that Barco’s employees possessed, Wage and Hour cited especially the employees’ certifications in concluding that lead paint abatement was not work undertaken by common/general laborers.³⁷ However, the issue is not the training or certifications of the workers employed to do the disputed work. The question is whether workers employed as common/general laborers within the D.C. area perform lead paint abatement work and, if so, which of the three relevant classifications in the DC4 Wage Determination predominantly performs such work. A broad and sweeping assertion that “as a general practice in the construction industry” common/general laborers perform “only menial tasks” neither addresses this question, nor satisfies the requirement that a survey be conducted of the actual practice of common/general laborers employed in the area.

Nor, for that matter, is the Administrator’s conclusion here that skilled laborers in the D.C. area do not perform lead paint abatement work supportable based on the mere “advice” of the skilled laborers’ union that (as noted in the Deputy Admin Letter, at pg. 3) lead paint removal is not covered under the scope of work of the union’s skilled laborers. Clearly, upon remand, more is required by way of evidentiary development in a survey of the work performed by the Skilled Laborers classification.³⁸ Moreover, in determining which of the three classifications in the DC4 Wage Determination predominantly performs lead paint abatement work consistent with that performed by Barco’s employees, it is not enough that the abatement work performed by workers within a DC4 classification is merely incidental to the work regularly performed by the classification. The lead paint abatement work must be performed on a regular basis.³⁹

CONCLUSION

Accordingly, this case is **REMANDED** to the Administrator, Wage and Hour Division, for further consideration consistent with this Decision and Order of Remand. In remanding this

³⁶ Deputy Administrator’s Determination Letter of February 1, 2013, at pg. 2. AR Ex. 6.

³⁷ *Id.*

³⁸ *Cf. In re Audio-Video Corporation*, 1997 WL 454061, at *3 (Evidence relied upon to deny conformance request “must consist of more than a bare assertion by a single party that the classification in question has performed the work . . . especially where record evidence refutes rather than supports the assertion of the party.”).

³⁹ *Id.*

matter, we refer to the Administrator for consideration the evidence Barco presented to the Administrative Review Board for the first time on appeal (see footnote 2, *supra*), pursuant to 29 C.F.R. § 7.1(e), for the making of new or modified findings as warranted by reason of the additional evidence.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Judge Corchado concurring:

I concur in remanding this matter because the record fails to sufficiently demonstrate the painters' wage class constituted the "prevailing" wages in the industry for "lead paint abatement" work in this case. For DBA-covered contracts, the DBA expressly requires that contractors pay the minimum (prevailing) wage for "classes of laborers and mechanics." 40 U.S.C.A. § 3142(b). In this case, we face a substantive question about which classification applies to lead paint abatement work: common laborer, skilled laborer, or painter.

Preliminarily, in my view, the parties did not raise issues about the procedural steps in the review process for us to address, such as the procedural processes described in sections 5.11 and 5.13. I reserve my opinion about those procedural provisions for another day.

Turning back to the substantive question about classifying lead paint abatement work, it is undisputed that the DC4 Wage Determination does not expressly place lead paint abatement work in any of its classifications. If the D4 Wage Determination had more historical detail of the duties for each of the classifications, showing that a particular wage rate included or excluded the duties of lead paint abatement, then the Administrator might have been able to easily rule out or rule in classes of laborers as options in this case. But, inexplicably, the D4 Wage Determination has very little detail about the work performed by each classification and this begins the confusion. Nevertheless, as dictated by 29 C.F.R. § 5.5(a)(1), Barco was required to either choose an appropriate wage rate in the DC4 Wage Determination to pay its workers or seek to add a new classification for a different wage rate.

Relying on its understanding of the industry practice, Barco determined that the common laborer wage was the prevailing wage for lead paint abatement, began paying common laborer wages, and, then after wage classification questions arose, it asked the Administrator to determine that lead paint abatement duties fit in the common laborers class of laborers. Neither

the statute nor the regulations provide clear guidance on how the Administrator should determine the prevailing wage rate that should apply to a class of work not listed in the relevant Wage Determination. The regulation *does* discuss the process for adding a “new classification” after a construction project started, but that was not Barco’s request. Consequently, the question of adding a “new classification” is not before us and, in my view, all discussions about how to add a classification in this case go beyond the issues in this case and are not controlling.

Despite the confusion in this case, it seems indisputable that the Administrator has some discretion on how to classify duties, while keeping in mind the relevant published regulations as well as publicly known agency policies. The Administrator exercised reasonable discretion in performing a LAPS, particularly where its policies contain substantial discussion about the use of LAPS to make wage determinations. Having relied on a LAPS in this case, to determine whether Barco complied with the DBA mandate to pay the prevailing wage, the question is whether the LAPS sufficiently demonstrated that the “prevailing wage” for lead paint abatement is the painters’ wage rate in the Wage Determination. As I explain below, I believe that more information is needed.

Given the age of this case, I will briefly describe the three reasons I agree to a remand. First, in my view, the record provides insufficient support for the Administrator’s decision that the “prevailing practice” in the relevant area did not treat lead paint abatement as unskilled workers. The Administrator’s decision to exclude the common laborers’ class has common sense appeal, but the DBA law is more demanding and requires proof of the “prevailing” practice in the relevant geographical area. More importantly, the record as a whole has competing evidence on this point: (1) it is unclear whether lead paint abatement workers needed to be certified; (2) no non-union contractors were contacted regarding this issue; (3) no painters bid on the project; and (4) Barco’s position was corroborated by another contractor.

Second, without sufficient record evidence supporting the exclusion of the common laborers’ classification and the lack of a nationwide DBA standard classification dictionary, I agree with Judge Brown that both union and non-union contractors should have been contacted as described in the Administrator’s policies. After contacting unions and non-unions to determine the local area practice, it is not clear to me whether the prevailing practice must be a simple majority (more than half) or a clear majority (predominate or substantially more than half). This is a point discussed by Judge Brown and a question for the Administrator to address and explain after our remand.

Third, even if Barco’s request was to “add a new classification,” I am not convinced that the first criteria for “adding a new classification” simply intends to ask whether *any* classification does the work in question rather than whether any *sufficiently similar* class of laborers performs this work. *See* 29 C.F.R. § 5.5(a)(1)(A)(i). This interpretation makes more sense when a contractor sees a classification in a wage determination that performs similar work and can construct a bid with that classification in mind. This was the case in *Pizzagalli Constr. Co.* where the contractor argued that “reinforced ironworkers” should have been a separate class

despite the fact that the relevant wage determination expressly included a wage class for ironworkers. Similarly, in *In re U.S. Fire Prot.*, the relevant wage determination contained a classification for “sprinkler fitters,” but the contractor unsuccessfully sought to add a new classification for “residential sprinkler fitters.” For Barco there was no obviously controlling classification and, arguably, removing lead paint substantially differs from painting. Saying that lead paint abatement should be paid at painters’ wages because painters do such work, seems similar to saying that paralegals should be paid attorney wages because attorneys also perform paralegal work. More importantly, there is evidence in the record that both painters and non-painters perform lead paint abatement. Again, this issue of adding a classification is not before us. Because we should apply regulations as written, I am not settled on this question but merely point out that I have fundamental concerns with such a literal interpretation of the first criteria for “adding a classification” in this case where it might lead to unsupportable results. I appreciate that the Department must be careful not to improperly subdivide the duties of a class of laborers. I also appreciate that contractors should err on the side of caution when deciding on their own what to pay employees whose duties are not expressly identified in the wage determination. Perhaps that is the point, had Barco exercised more caution, it would have obtained clarification of this issue before submitting a bid and found out that it would have been required to pay the painters’ wage rate. In the end, the Administrator exercised its discretion to perform a LAPS to resolve the classification question and it performed the LAPS contrary to its policy manual.

Ultimately, as to the substantive question of proper classification, our decision results in a remand for the Administrator to reconsider its decision to classify the lead paint abatement work as belonging in the painters’ wage class. Upon a close reading, only two of us agree that the Administrator conducted the LAPS incorrectly by failing to call non-union contractors, keeping in mind that I was not convinced by the Administrator’s explanation for excluding the common laborers class. In my view, with all due respect, Judge Royce effectively affirms the Administrator’s decision by affirming the exclusion of the common laborers’ class. Removing the common laborers’ class from consideration means it was proper for the Administrator to call only union contractors for only the painters and skilled laborers class and the result would be the same, even if “prevailing” meant “clear majority.” If Judge Royce’s decision is really an affirmance of the result, it would seem that our decision is a narrow remand governed by the limited overlap between Judge Brown’s opinion and my opinion. But, regardless of how this decision is viewed, many important questions have been raised in our respective opinions that the parties may find useful to address in this matter. Because this case is extremely old, I find it necessary to end my concurrence, so that this case may move forward.

LUIS A. CORCHADO
Administrative Appeals Judge

Judge Royce, concurring in part and dissenting in part:

I concur with Deputy Chief Judge Brown’s ruling requiring remand of this case to the Administrator for reconsideration of Barco’s request seeking to include its employees under an existing occupation classification of the applicable DBA wage determination, for the reasons Judge Brown explains. I also concur with Judge Brown that a new local area practice survey (LAPS) is required upon remand, regardless of whether the Administrator treats Barco’s request as a conformance request pursuant to 29 C.F.R. § 5.5(a)(1)(ii)(A), or a request seeking clarification of disputed work within an existing wage determination classification pursuant to 29 C.F.R. § 5.13. However, I disagree with Judge Brown regarding the extent of the LAPS that is required in this case. I would limit the scope of a new LAPS upon remand to only the Painter and Skilled Laborer classifications, and write separately to explain why, contrary to the opinion of my colleagues, I would affirm WHD’s determination that the lead paint abatement work at issue did not fall within the Common/General Laborer classification in the DC4 Wage Determination.

My colleagues have concluded that WHD erred by limiting the conduct of its local area practice survey to only the union-based Painter and Skilled Laborer classifications, in disregard of the non-union based Common/General Laborer classification. WHD’s rationale for not surveying non-union contractors to determine whether common/general laborers performed lead paint abatement work in the area was based on the assertion that, “[a]s a general practice in the construction industry, a common/general laborer performs only menial tasks” and the determination that, based upon its observation of the duties of Barco’s employees, “lead paint removal work requires training and skill exceeding that of a common/general laborer.”⁴⁰ In my view, this reasoned decision by WHD, based upon the evidentiary record, was consistent with the DBA’s remedial purposes and the governing regulations, and a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA. *In re Spencer Tile Co.*, ARB No. 01-052, 2001 WL 1173805 (Sept. 28, 2001).

Classifications in DBA wage determinations fall into one of four general “categories”—laborers, skilled crafts, power equipment operators, or truck drivers.⁴¹ Neither the DBA nor its implementing regulations explicitly identify the process for determining into which “category” any given occupation falls. In this case, WHD determined that, given the skill, training and certifications of the workers involved, the lead paint abatement work fell into the higher-paid, skilled category rather than the unskilled laborer category.

⁴⁰ Deputy Administrator’s Determination Letter of February 1, 2013, at pg. 2. AR Ex. 6.

⁴¹ Administrator’s All Agency Memorandum (AAM) No. 213 (Mar. 22, 2013).

This determination accords with the spirit, if not the letter, of the DBA. As the Supreme Court explained in *U.S. v. Binghamton*, “[t]he language of the Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects.” *United States v. Binghamton*, 347 U.S. 171, 176-77 (1954). As our predecessor Board recognized nearly 40 years ago in *In re Fry Bros. Corp.*, WAB No. 76-06, 1977 WL 24823, *6 (June 14, 1977), if contractors are free to classify or reclassify traditional craft work by breaking it down into subcomponents and paying at the lowest laborer rate, “[t]here will be little left to the Davis-Bacon Act.” Not long after *Fry Brothers*, the D.C. Circuit Court of Appeals similarly recognized, in *Bldg. & Constr. Trades’ Dept., AFL-CIO v. Donovan*, 712 F.3d 611 (D.C. Cir. 1983), that one of the DBA’s principle objectives was to address the practice of under classification whereby contractors whittle away at prevailing wages by reclassifying craft work into subgrades and then paying employees lower wages for performing tasks that are routinely performed by the craft. In *Donovan*, the D.C. Circuit Court examined DBA legislative history in support of its conclusion that under classification is prohibited by the Act:

Congress in 1935 was quite clear that it understood that “prevailing wage scales [could be] broken down by intermediate classification,” S. REP. NO. 332, *supra* p. 4, pt. 3, at 12, and that such “underclassifi[cation],” *id.*, was an evasion of the Act. The Senate committee reviewing the operation of the law in 1935 described the problem as follows: “The act also fails to be explicit on the matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts.” *Id.* pt. 2, at 5; *see also id.* at 2 (listing creation of “arbitrary classifications known as semiskilled labor” as a method or device “to underpay labor” engaged on public works programs). . . .

What is clear is that Congress regarded under classification as contrary to the purposes, and most probably the terms, of the Act.

Donovan, 712 F.3d at 625.

Here Barco attempted to reduce labor costs by paying the lower, laborer rate to employees performing duties integral to jobs claimed by painters (or other skilled laborers). Such practices can eviscerate DBA as readily as evading prevailing wages. The WHD acted properly in rejecting Barco’s attempt to under classify its employees.

The facts in *Fry Brothers* are analogous to the facts before us and lend further support for the reasonableness of WHD’s determination that Barco misclassified the lead paint abatement

workers as laborers.⁴² In *Fry Brothers*, the relevant wage determination contained a carpenter classification reflecting union wage rates. The prime contractor requested a new classification of “carpenter helper” under the conformance regulations. The classification of “carpenter helper” was recognized in the construction industry as an intermediate, semi-skilled subclassification of the carpenter classification; however, the Department of Labor denied the request. The subcontractor (Fry Brothers) then classified those workers (performing the duties of “carpenter helpers”) as laborers, rather than carpenters. The Wage Appeals Board ultimately ruled that the workers performing the duties of carpenter helpers should be classified as carpenters not laborers, where the wage determination contained negotiated rates for carpenters and there was no intermediate classification of “carpenter helpers.” In the case before us, the wage determination contained negotiated rates for both painters and skilled workers but no intermediate classification for lead paint abatement workers. The subcontractor (Barco) improperly placed the semi-skilled lead paint abatement workers in the laborer category, rather than the skilled laborer or painter classifications, both of which reflected negotiated wages. This conduct, as explained in *Fry Brothers*, is classic misclassification:

Under established principles of Davis-Bacon Act administration, when the wage predetermination schedule contains only one wage rate for the carpenter classification without intermediate rates, it is not permissible for contractors who come on the project site, whether organized or unorganized, to divide work customarily considered to be the work of carpenters’ craft into several parts measured according to the contractor by his assessment of the degree of skill of the employee and to pay for such division of the work at less than the specified rate for carpenters’ craft.

Fry Bros. Corp., 1977 WL 24823, at *6.

The Department of Labor, in *Fry Brothers*, concluded that Fry Brothers improperly placed certain laborers into the unskilled laborer category rather than the skilled workers category (which included carpenter), based upon the Department’s examination of the duties and skill of the workers involved. Likewise, in this case, WHD determined that the lead paint abatement work at issue required training and skill exceeding that of a common/general laborer. WHD reasonably exercised its discretion in rejecting Barco’s attempt to under classify its employees by placing them in the lowest-paid laborer category.

JOANNE ROYCE
Administrative Appeals Judge

⁴² *Fry Bros. Corp.*, 1977 WL 24823, at **2-6.