



In the Matter of:

**CHILDRESS PAINTING
& ASSOC., INC.**

With respect to application of Wage

ARB CASE NO. 96-121

(Formerly WAB Case No. 96-05)

DATE: August 23, 1996

Determination No. KS910008 to construction
of a new multi-purpose facility at Fort
Leavenworth, Leavenworth County, Kansas
(Contract No. DACA41-92-C-0077)

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board on the petition. of Childress Painting & Associates, Inc. (Childress), seeking review of the November 16, 1995 final ruling issued by the Administrator, Wage and Hour Division (Administrator). The Administrator denied Childress's request for conformance of a "Painter" classification at the wage rate predetermined for "Glazier" on the ground that the proposed rate did not "bear a reasonable relationship to wage rates contained in the wage decision" as required by 29 C.F.R. § 5.5(a)(1)(ii)(A)(3). Instead, the Administrator conformed the wage rate to the "Soft Floor Layer" classification rate contained in the applicable wage determination. For the reasons set forth below, the Administrator's ruling is affirmed.

BACKGROUND

McPherson Contractors, Inc. was awarded a contract by the Army Corp of Engineers (ACE) for the construction of a Child Development Center in Fort Leavenworth, Kansas, Contract No. DACA41-92-C-0077, on August 26, 1992. Childress was a subcontractor subject to the provisions of the Davis-Bacon Act (Act), 40 U.S.C. § 276a *et seq.*, the applicable regulations, 29 C.F.R. Part 5, and Wage Determination Number KS910008 (WD). On January 4, 1994, ACE

¹ On April 17, 1996, the Secretary re delegated jurisdiction to issue final agency decisions under, *inter alia*, the Davis- Bacon and Related Acts and their implementing regulations to the newly created Administrative Review Board (the Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization is also attached.

submitted Childress's request for the addition of a Painter classification at the rate specified in the WD for Glazier, \$11.33 with no fringe benefits.

On March 4, 1994, Wage and Hour's Director, Division of Wage Determinations (Director) initially denied the request, but indicated agreement with the conformed classification at the rate specified in the WD for Soft Floor Layer at a basic hourly rate of \$16.68 and \$3.43 in fringe benefits. Administrative Record (AR) Tab D. The Director, citing *M.Z. Contractors, Inc.*, WAB² Case No. 92-23, August 16, 1993, noted that:

if there is a skilled craft listed in the wage decision that is lower than the laborers rate we must look at the craft in the wage decision that is the most similar to the requested additional classification. In the absence of a classification in the wage decision that can perform similar duties, we then look to the lowest skill craft above the laborers.

Director's Letter, March 4, 1994. AR Tab D, Enclosure 2.

On July 19, 1994, ACE forwarded a request for reconsideration to the Administrator. AR Tab D. ACE argued that a later wage determination contained a Glazier classification at \$13.33 hourly and a Brush and Spray Painter classification at \$15.19 hourly with no fringe benefits, and that the skills required of a painter are closer to a Glazier than a Soft Floor Layer.

The Administrator responded in a final ruling letter dated November 6, 1995, that the lowest rate for a skilled craft listed in the applicable WD, above the unskilled laborer rate, was the Soft Floor Layer classification. AR Tab A. The Administrator also noted that all other classifications in the wage determination, except for Glaziers and Laborers, were significantly higher than the rate proposed by Childress. *Id.* at 2. The Director's decision was reaffirmed by the Administrator. By Petition dated December 21, 1995, Childress appealed the Administrator's ruling.

DISCUSSION

The regulations governing conformance set out three criteria at 29 C.F.R. § 5.5(a)(1)(ii)(A) which must be satisfied in order to approve conformed classifications and rates:

- (1) The work to be performed by the classification requested 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. (Emphasis added).

The conformance process is not a *de novo* proceeding to retroactively determine the prevailing wage for a particular classification. *Sumlin & Sons, Inc.*, WAB Case No. 95-08, Nov. 30, 1995. Rather it is a procedure by which the Administrator may establish a wage rate for a classification missing from the wage determination, but necessary to perform the contract. In

² Wage Appeals Board; *see* 29 C.F.R. Part 7 (1995).

establishing a conformed rate the Administrator is given broad discretion. *Clark Mechanical Contractors, Inc.*, WAB Case No. 95-03, Sept. 29, 1995. The Administrator's decision will be reversed only if it is inconsistent with the regulations, or is "unreasonable in some sense or . . . exhibits an unexplained departure from past determinations . . ." *Titan IV Mobile Service Tower*, WAB Case No. 89-14 (May 10, 1991), slip op. at 7.

As first noted by the Director and reaffirmed by the Administrator, Wage Appeals Board decisions have repeatedly held that in order to comply with the reasonable relationship requirement of the conformance regulations, a proposed rate for a skilled classification must be at least equal to the lowest rate for a skilled classification, above the unskilled classification of laborer. *M.Z. Contractors, supra*; *Miller Insulation Co.*, WAB Case No. 94-01, May 2, 1994; *Clark Mechanical Contractors, Inc.*, WAB Case No. 95-03, Sept. 29, 1995. For this reason the Administrator's decision to deny the conformance request at the Glazier rate is well supported by the record. The applicable wage rate for Glaziers is \$11.33 without any fringe benefits. The unskilled laborers rate is \$10.40 plus \$2.70 in fringe benefits, for a total of \$13.10. The conformance regulation, set out with emphasis above, clearly requires that *bona fide* fringe benefits are to be included when deciding the reasonableness of a requested conformance.

Childress's reliance on a later wage determination is misplaced. The Board has adopted the position that a party seeking conformed classifications and rates "may not rely on a wage determination granted to another party regardless of the similarity of the work in question." *Inland Waters Pollution Control, Inc.*, WAB Case No. 94-12, Sep. 30, 1994, slip op. at pp. 7-8. In fact, the Board has ruled that a contractor could not prospectively rely on Wage and Hour's prior approval of conformed classifications and rates for application to a contract performed at the same location. *E&M Sales, Inc.*, WAB Case No. 91-17, Oct. 4, 1991. In short, the holdings in these cases demonstrate that there is no element of equitable reliance available under the conformance procedures.

The decision of the Administrator is AFFIRMED.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member