



In the Matter of:

**DISTRICT COUNCIL OF IRON
WORKERS OF THE STATE OF
CALIFORNIA AND VICINITY,**

ARB CASE NO. 2020-0035

DATE: September 27, 2021

PETITIONER,

v.

**WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT
OF LABOR,**

RESPONDENT.

Appearances:

For the Petitioner:

Terry R. Yellig, Esq.; North Potomac, Maryland

For the Respondent:

**Kate O'Scannlain, Esq., Jennifer S. Brand, Esq., Sarah Kay Marcus,
Esq., Jonathan T. Rees, Esq., and Susannah M. Maltz, Esq.; *Office of
the Solicitor, United States Department of Labor; Washington,
District of Columbia***

**Before: James D. McGinley, *Chief Administrative Appeals Judge*, Randel
K. Johnson and Stephen M. Godek, *Administrative Appeals Judges***

DECISION AND ORDER

PER CURIAM. This case arises under the provisions of the Davis-Bacon Act (DBA) and its applicable and implementing regulations.¹ The District Council of Iron Workers of the State of California and Vicinity (District Council or Petitioner) seeks review of a determination by the Administrator of the United States

¹ 40 U.S.C. §§ 3141-3148; 29 C.F.R. Parts 1, 5, and 7.

Department of Labor's Wage and Hour Division (WHD) that recognized three distinct classifications for ironworkers, rather than a single ironworker classification, in wage determination surveys. As discussed below, we affirm the Administrator's final ruling.

BACKGROUND

In 2013, WHD initiated a survey of prevailing wage rates on residential construction in rural counties in California.² Through its wage survey, WHD sought wage data for residential construction projects that were active from January 1, 2012, to June 30, 2013.³ WHD contacted numerous interested parties, including relevant construction contractors and several international unions, seeking wage data from them and notifying them that the data collection period would end on April 30, 2014.⁴

In response to WHD's requests for wage data, it received data reflecting that some type of ironwork was performed on twelve projects.⁵ WHD determined that the data submitted for five projects were not usable because either the project did not involve residential construction or the project did not involve construction during the survey period.⁶ The remaining seven projects were reported on Standard Form WD-10, which identified eighteen individual workers on those projects.⁷ Each form identified the worker's job classification as "Iron Worker," and the global type of work performed as "Structural/Reinforcing/Ornamental."⁸

WHD contacted the contractors for each of the seven projects in order to determine what kind of ironwork each worker performed.⁹ Based on these follow-up inquiries, WHD determined that the workers performed only structural or reinforcing ironwork, and that none of the workers performed any ornamental ironwork. Specifically, WHD determined that three workers employed by two contractors had performed reinforcing ironwork, fifteen workers employed by two contractors performed structural ironwork, and zero workers performed ornamental

² Administrative Record (AR) at 2.

³ AR at 2.

⁴ *Id.* at 2-3.

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

ironwork.¹⁰ Because none of the three ironworker classifications satisfied WHD’s six-worker to three-contractor sufficiency criteria, WHD did not publish a prevailing wage rate for each classification.¹¹

On October 13, 2016, District Council requested reconsideration of the residential wage determinations for the survey at issue.¹² The Administrator issued a final ruling denying Petitioner’s request for reconsideration on July 5, 2019.¹³

On February 25, 2020, the Administrative Review Board (ARB or Board) received District Council’s Petition for Review. For the reasons discussed below, we affirm the Administrator’s final ruling.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear appeals concerning questions of law or fact from the Administrator’s final decisions under the DBA.¹⁴ The ARB assesses the Administrator’s rulings to determine whether they are consistent with the DBA and its implementing regulations, and whether they are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.¹⁵ The Board generally defers to the Administrator as in the best position to interpret the DBA’s implementing regulations, 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.”¹⁶

DISCUSSION

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

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 8-19.

¹³ *Id.* at 1-7.

¹⁴ Secretary’s Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary’s discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

¹⁵ *The Residences at Boland Place*, ARB No. 2020-0031, slip op. at 6 (ARB Apr. 30, 2021) (citation omitted); Secretary’s Order 01-2014, Delegations of Authority and Assignment of Responsibility, 79 Fed. Reg. 77527, 5(A); 29 C.F.R. §§ 1.1(a), 1.3.

¹⁶ *Coal. for Chesapeake Hous. Dev.*, ARB No. 2012-0010, slip op. at 5 (ARB Sept. 25, 2013) (quoting *Titan IV Mobile Serv. Tower*, WAB No. 1989-0014, slip op. at 7 (Sec’y May 10, 1991)).

buildings or public works in the United States.¹⁷ 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 employed under the contract.¹⁸ 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.¹⁹

The DBA does not prescribe any single method for determining prevailing wages—thus, the statute “delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.”²⁰ Thus, in the absence of a statutory formula for determining prevailing wages, the DBA’s implementing regulations charge the Administrator with “conduct[ing] a continuing program for the obtaining and compiling of a wage rate information.”²¹

The Administrator surveys wages and fringe benefits paid to workers on four types of construction projects: building, residential, highway, and heavy. In surveying wages and fringe benefits, the Administrator may seek data from “contractors, contractors’ associations, labor organizations, public officials and other interested parties”²² Other sources of information may include “statements showing wage rates paid on projects that are similar in nature and character, 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.”²³ WHD will publish a wage rate for a classification only if the data for that classification meets its sufficiency requirements.²⁴ Although a prevailing wage determination is subject

¹⁷ 40 U.S.C. § 3142(a).

¹⁸ *Id.*

¹⁹ 40 U.S.C. § 3142(b).

²⁰ *See Coal. for Chesapeake Hous. Dev.*, ARB No. 2012-0010, slip op. at 5 (ARB Sept. 25, 2013) (quoting *Bldg. & Constr. Trades’ Dep’t, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983)).

²¹ 29 C.F.R. § 1.3.

²² 29 C.F.R. § 1.3(a).

²³ *Coal. for Chesapeake Hous. Dev.*, ARB No. 2012-0010, slip op. at 6 (ARB Sept. 25, 2013); 29 C.F.R. § 1.3(b); Davis-Bacon Construction Wage Determination Manual of Operations 38-40 (Department of Labor 1986) (Davis-Bacon Operations Manual).

²⁴ *Road Sprinkler Fitters Local Union No. 669*, ARB No. 2010-0123, slip op. at 9-13 (ARB June 20, 2012); Davis-Bacon Operations Manual at 82-83; AR at 148.

to ARB review, “the substantive correctness of wage determinations is not subject to judicial review.”²⁵

The Administrator also has discretion to determine the relevant geographic area in which to collect survey data.²⁶ The “area” “shall mean the city, town, village, county, or other civil subdivision of the State where the work is to be performed.”²⁷ Under the regulations, the area will normally be the county of the particular project unless sufficient data is not available.²⁸ In such instances, the Administrator may expand the data set to include other surrounding counties or use statewide data if the lesser subdivisions do not yield sufficient data. However, the Administrator may not mix survey data from metropolitan counties with data from rural counties.²⁹

District Council sought reconsideration of WHD’s August 2015 residential wage determinations for certain rural counties in California that did not yield a wage determination for the ironworker classification.³⁰ District Council argued that WHD received sufficient data for a survey-wide determination, and that WHD erred by dividing the single ironworker classification into three different ironworker classifications—structural, reinforcing, and ornamental—which it believes did not reflect the ironwork practice area as a whole.^{31, 32}

Upon review and reconsideration, the Administrator denied District Council’s request.³³ The Administrator explained that in exercising her authority to designate ironworkers into three distinct classifications, WHD has historically regarded structural, reinforcing, and ornamental ironworkers as separate classifications.³⁴ The Administrator also relied upon the work actually performed by the workers for

²⁵ *Coal. for Chesapeake Hous. Dev.*, ARB No. 2012-0010, slip op. at 5 (ARB Sept. 25, 2013) (quoting *In re Dep’t of the Army*, ARB Nos. 1998-0120, -0121, -0122, slip op. at 25 (ARB Dec. 22, 1999) (citations omitted)).

²⁶ 29 C.F.R. § 1.2(b).

²⁷ *Id.*

²⁸ 29 C.F.R. § 1.7.

²⁹ 29 C.F.R. § 1.7(b).

³⁰ AR at 8.

³¹ *Id.*

³² The District Council also originally disputed WHD’s “Craft/Rate Sufficiency Criteria: Data [must be] received on at least 6 employees from 3 contractors with no more than 60% from any one contractor.” AR at 17-18. However, in its Petition for Review, the District Council notes that it is no longer challenging WHD’s use of that sufficiency standard. District Council’s Petition for Review (Pet.) at 2.

³³ AR at 1.

³⁴ *Id.* at 4.

whom wage data was submitted during the survey process.³⁵ Finally, the Administrator relied upon the District Council’s collective bargaining agreement, which distinctly separated ironworkers into the same three “job classifications.”³⁶

District Council argues on appeal that the Administrator abused her discretion when she: (1) affirmed WHD’s decision to expand the geographic scope of the survey³⁷ and seek clarification for the specific type of work performed by each ironworker in the survey;³⁸ (2) recognized the ironworker three sub-classifications as “key classes;”³⁹ and (3) failed to set a prevailing wage rate for a single “ironworker” classification.⁴⁰

Upon consideration of the parties’ briefs on appeal,⁴¹ and having reviewed the evidentiary record as a whole, we conclude the Administrator did not abuse her discretion by recognizing three distinct ironworker classifications, and by not publishing a wage determination for each of the three ironworker classifications. None of District Council’s arguments demonstrate that the Administrator abused

³⁵ *Id.* at 3.

³⁶ *Id.* at 5.

³⁷ Pet. at 8-10.

³⁸ *Id.*; District Council’s Reply Brief (Reply Br.) at 15-22.

³⁹ Reply Br. at 15-22.

⁴⁰ Pet. at 11-18; Reply Br. at 24-27.

⁴¹ The Administrator argues that the District Council’s Petition for Review, filed almost eight months after the Administrator’s final ruling, was untimely. Administrator’s Response Brief at 13. Under 29 C.F.R. § 7.9(a), a party is required to file its petition for review “within a reasonable time from” the Administrator’s final ruling. Under ARB precedent, “within a reasonable time” is based upon the specific circumstances of the case. *See Pizzagalli Constr. Co.*, ARB No. 1998-0090, slip op. at 4, n.2 (ARB May 28, 1999) (finding that filing a petition for review nine months and two weeks after the Administrator issued her final ruling satisfied the “reasonable time” requirement “under the specific circumstances of this case[.]”). In explaining why it waited almost eight months to contest the final ruling, District Council notes it needed additional information, and that it requested such information from WHD via several telephone calls and letters, and then, submitted a Freedom of Information Act (FOIA) request. WHD finally responded to the FOIA request almost nine months later, but the information did not provide District Council with the additional information that explained WHD’s actions during the California wage survey. Moreover, District Council also requested reconsideration from the Administrator in December 2016 and did not receive a final ruling until two years, eight months, and twenty-two days later. WHD does not contest that these delays in responding to the District Council occurred. While we are mindful of the need for challenges to prevailing wage rates be filed as soon as possible so that the matters can be efficiently resolved and contract terms settled, we find that the Petition for Review was filed in a reasonable time based on the facts of this case.

her discretion to set a prevailing wage rate. In expanding the geographic scope, and dividing ironworkers into three distinct classifications, the Administrator and WHD reasonably followed the prescribed DBA regulations, agency guidance, and past practices in conducting the wage survey. Ultimately, the survey responses did not satisfy WHD's six-worker to three-employer sufficiency requirement, and consequently, WHD did not issue a prevailing wage determination for each ironworker classification.

In sum, we find the Administrator acted reasonably and within her discretion in designating structural, reinforcing, and ornamental ironwork into three separate and distinct job classifications. Accordingly, we summarily **AFFIRM** the Administrator's final ruling.

SO ORDERED.