



In the Matter of:

**NEW MEXICO NATIONAL ELECTRICAL  
CONTRACTORS ASSOCIATION**

**ARB CASE NO: 03-020**

**DATE: May 28, 2004**

**Dispute concerning the application of  
General Wage Determination NM020005  
to electricians employed by the WIPP Federal  
Nuclear Waste Disposal Site in Eddy County,  
New Mexico.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner New Mexico National Electrical Contractors Association:  
Stanley Bessey, Albuquerque, New Mexico*

*For Respondent Administrator, Wage and Hour Division:  
Mary J. Rieser, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., U.S.  
Department of Labor, Washington, D.C.*

*For Intervening Interested Party International Brotherhood of Electrical Workers, AFL-  
CIO:  
Terry R. Yellig, Esq., Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington,  
D.C.*

### **DECISION AND ORDER OF REMAND**

This case arises under the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003), and regulations at 29 C.F.R. Parts 1, 5, and 7 (2003). The New Mexico Electrical Contractors Association (NECA) petitions for review of the September 30, 2002 ruling by the Administrator, Employment Standards Administration, Wage and Hour Division, that denied a request for reconsideration of the prevailing wage rate for the electrician classification listed in a wage determination, General Decision NM020005, applicable to Eddy County, New Mexico. Intervening interested party International Brotherhood of Electrical Workers, AFL-CIO (IBEW) supports the petition.

The challenged prevailing wage rate for the electrician classification in General Decision NM020005 is \$14.33 per hour with fringe benefits of \$0.51. Former General Decision NM010005, based upon a wage survey conducted in the 1980's, listed a prevailing wage rate for electricians of \$21.50 per hour with fringe benefits of \$7.07.

The \$14.33/\$0.51 electrician wage rate was based upon Wage Compilation Survey 99-NM-801. In her September 30 ruling, the Administrator declined to reverse the results of this survey. NECA and IBEW request that we reverse the Administrator's ruling and remand the case with instructions to delete the electrician classification wage rate from the wage determination. For the reasons stated below, we remand this case to the Administrator to modify the electrician minimum wage rate in General Decision NM020005.

### **JURISDICTION AND STANDARD OF REVIEW**

We have jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations. 29 C.F.R. § 7.1(b). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Our review of the Administrator's decision is in the nature of an appellate proceeding. 29 C.F.R. § 7.1(e). We review the Administrator's decision to determine whether it is consistent with the statute and regulations and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the DBA. *Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (ARB May 11, 2000); *Miami Elevator Co. and Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (ARB Apr. 25, 2000); *Department of the Army*, ARB Nos. 98-120/121/122, slip op. at 16 (ARB Dec. 22, 1999), *citing ITT Fed. Services Corp. (II)*, ARB No. 95-042A (ARB July 25, 1996), and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (BSCA Aug. 28, 1992).

### **BACKGROUND**

The Wage and Hour Division contracted with Construction Resources Analysis (CRA) of the University of Tennessee to conduct Wage Compilation Survey 99-NM-801.<sup>1</sup> CRA surveyed contractors in Eddy County, New Mexico. It requested wage rates from 159 contractors concerning 32 classes of employees. It also requested wage data from 16 national unions, 14 local unions, 30 national associations, and 4 local associations. The Division ultimately used data from 48 responses concerning projects in Eddy County. But the wage compilation survey shows that 17 of the 32 classes of employees were not included in the wage determination because CRA received

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<sup>1</sup> The Wage and Hour Division surveys wages and fringe benefits paid to workers on four types of construction projects: building, residential, highway, and heavy. The type of construction surveyed in Wage Compilation Survey 99-NM-801 was "building." General Decision NM020005, which is based on the wage survey, is a "general" wage determination as provided under 29 C.F.R. §§ 1.5(b), 1.6(c)(1), and 5.2(q).

insufficient data upon which to base a prevailing wage rate. Administrative Record (AR) Tab L. The omitted classes were Insulator (heat and frost), Brick Mason, Drywall Finisher, Electrician Helper, Glazier, Ironworker (reinforcing), Painter (brush and roller), Tiler, Fence Erector, Operator (group II), Laborer (groups I, II, and III), Carpenter Tender, Skilled Lab (utility), Caulker, and Laborer (semi-skilled). *Id.* The Wage and Hour Division included the following classifications in the wage determination because it deemed the survey data sufficient to set prevailing wage rates: Ironworkers (structural), Sheetmetal Workers (HVAC duct work only), Carpenters (acoustical, formwork, and metal stud framing), Cement Masons, Electricians, Laborers (common), Plumbers, Roofers, Sheetmetal Workers, Soft Floor Layers, and Welders.

CRA attempted to contact 14 electrical contractors doing business in Eddy County when it conducted the wage compilation survey. AR Tab K. These contractors maintained offices in Roswell, Carlsbad, Albuquerque, Hobbs, Jal, Mesilla, Artesia, and Alamogordo, New Mexico, and in Lubbock, Texas. *Id.* CRA received responses from only five of the electrical contractors: three private contractors and two contractors working on federally funded projects. Per DBA regulations, the Wage and Hour Division did not consider the data from the contractors on the federal projects. AR Tab L. CRA also requested information from IBEW, NECA, and the Independent Electrical Contractors, but received no response. AR Tabs G and J.

The challenged rate of \$14.33/\$0.51 per hour for electricians is based on data that the three private contractors, employing a total of 25 electricians, submitted. The Texas contractor, using employees brought in from Texas, performed the electrical work on the largest job site surveyed (19 electricians at a Carlsbad, New Mexico, Wal-Mart Supercenter Store). The wage rates for these electricians ranged between \$10.00 and \$16.50 per hour with fringe benefits of \$0.51.<sup>2</sup> With regard to the remaining two (New Mexico) contractors, three electricians at a job site in Carlsbad, New Mexico, received \$12.00 per hour with no fringe benefits, and three electricians at a site in Artesia, New Mexico, received \$20.00 per hour with fringe benefits of \$5.84. *See* AR Tab M.

CRA conducted the wage compilation survey between August 27 and October 26, 1999, and published the results on December 14, 2001. AR Tab H. The Wage and Hour Division issued General Decision NM020005 on March 1, 2002.

Thereafter, NECA petitioned the Wage and Hour regional office and, ultimately, the Administrator for reconsideration of Wage Compilation Survey 99-NM-801 and of General Decision NM020005 as it applied to electricians. AR Tabs H and I. NECA complained about the small sampling the wage rates were based upon and the large disparity between the \$14.33/\$0.51 current rate and the \$21.50/\$7.07 previous rate. *Id.* The regional office denied NECA's complaint and referred NECA to the national office.

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<sup>2</sup> NECA alleges that “[w]ages paid in Texas are well below those paid in New Mexico.” NECA request for review and reconsideration dated July 15, 2002.

Likewise, IBEW complained to the regional office that the Wage and Hour Division had neglected to follow up with non-responding contractors, and it joined NECA in requesting reconsideration of the wage compilation survey and the wage determination as applied to electricians. AR Tabs C, D, and F. The regional office also forwarded IBEW's complaint to the national office. On September 30, 2002, the Administrator affirmed the results of the wage compilation survey, and, thus, the \$14.33/\$0.51 minimum wage rate for electricians in Eddy County. AR Tab A. NECA timely petitioned for review of the Administrator's ruling. IBEW, as intervener, supports NECA's petition.

## ISSUE

Did the Administrator abuse her discretion when she denied the request for reconsideration of the minimum wage rate for the electrician classification in General Decision NM020005?

## DISCUSSION

### 1. The Legal Standard

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. 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 Administrator issues minimum wage determinations. 29 C.F.R. § 1.1(a). 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); 29 C.F.R. § 1.3. "Prevailing" wages are wages paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area. *See* 29 C.F.R. § 1.2(a)(1).

The Administrator has defined "prevailing wage" as the wage paid to the majority of laborers or mechanics in corresponding classifications on similar projects in the area. "Majority" means more than 50 percent. In the event that the same wage is not paid to more than the majority of employees within a classification, the prevailing wage is the average of the wages paid, weighted by the total of those employed in the classification. *See* 29 C.F.R. § 1.2(a)(1).

Significantly, the DBA itself does not prescribe a method for determining prevailing wages, leading one court to observe that the statute "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." *Building & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983). Indeed, "the substantive correctness of wage determinations is not subject to judicial review." *Department of the Army*, ARB Nos. 98-120/121/122, slip op. at 25

(ARB Dec. 22, 1999) (citing cases). Rather, courts limit review to “due process claims and claims of noncompliance with statutory directives or applicable regulations.” *Id.*, quoting *Commonwealth of Va. v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979).

Thus, in the absence of a statutory formula for determining prevailing wages, the DBA implementing regulations charge the Administrator with “conduct[ing] a continuing program for the obtaining and compiling of wage rate information.” 29 C.F.R. § 1.3. She may seek data from “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, and data from contracting agencies. 29 C.F.R. § 1.3(b). For purposes of building and residential construction, the regulations prohibit the Administrator from using data from Federal or federally assisted DBA projects “unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.” 29 C.F.R. § 1.3(d). The county is the designated geographic unit for data collection, although in some instances data may derive from groups of counties. 29 C.F.R. § 1.7.

## 2. The Arguments

NECA and IBEW challenge the manner in which the Administrator determined the prevailing wage for electricians under General Decision NM020005. NECA contends that more than three private contracts involving electricians were in progress when the CRA was surveying Eddy County, New Mexico. Thus, it argues, the CRA wage compilation survey “should have been broader in scope in order to determine a true picture of the prevailing wage in Eddy County.” NECA Letter dated Oct. 30, 2002, at 1. It also argues that CRA and the Wage and Hour Division should have realized that the data obtained from the three contractors were unrepresentative because Federal wage rates in Eddy County were greater, because of the 48 percent disparity between the current and former electrician rates, and because rates for the comparable classifications of Sheetmetal Workers (\$19.99/\$5.81) and Plumbers (\$21.00/\$4.89) were greater. *Id.* at 2.

IBEW challenges the electrician wage rate because, it asserts, the Administrator violated the guidelines contained in her Manual of Operations.<sup>3</sup> IBEW Brief in Support of Petition at 6-13. The Manual of Operations states that when a survey “overall usable response rate” equals at least 25 percent, data from a substantial number of workers in the

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<sup>3</sup> *Davis-Bacon Construction Wage Determinations Manual of Operations* (U.S. Dep’t of Labor, Apr. 1986). See generally *Plumbers Local Union No. 27*, ARB No. 97-106, slip op. at 3-4 (ARB July 30, 1998).

major classes generally will be available.<sup>4</sup> The Manual provides, however, that in counties where data are limited, for example in rural counties where construction activity is sparse, a wage rate for a class of employees may “be recommended only when information on at least six workers is received from three or more contractors, none of which accounts for 60 percent or more of total reported employment.” But “if the overall survey usable response rate is 50 percent or more, data on only three workers, from two contractors may be utilized.” Manual of Operations at 62-63.<sup>5</sup>

IBEW argues that since survey data were limited and one of the contractors employed 76 percent of the electricians, and since the survey usable response rate was only 30 percent, neither of the Manual’s criteria for determining wage rates applied. Therefore, the Administrator should not have included the electrician rate in the wage determination because, according to the Manual, classes of employees not meeting these criteria are not to be recommended for inclusion in a wage determination. *Id.* at 63. Such classes, however, may be added to wage determinations through the conformance process.<sup>6</sup> Thus, IBEW contends that the electrician classification, having met neither criterion, should be included by conformance. NECA’s and IBEW’s appeals consequently represent direct challenges to the methodology the Wage and Hour Division used to develop the electrician wage determination.

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<sup>4</sup> The usable response rate is the number of responses received that provide usable survey data divided by the total number of contacts made with general contractors and subcontractors. Here, CRA received 48 responses from the 159 contractors that it contacted.

<sup>5</sup> The manual attributes the 6-worker/3-contractor/60 percent standard to the Bureau of Labor Statistics (BLS). Beginning in 1966, BLS used the standard in area wage surveys conducted for the Employment Standards Administration under the McNamara-O’Hara Service Contract Act. Manual of Operations at 62.

<sup>6</sup> Job classifications are added to a wage determination after a construction contract has been awarded through a “conformance action” under procedures at 29 C.F.R. Part 5. The regulations provide that the contracting agency, through its contracting officer, “shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination.” 29 C.F.R. § 5.5(a)(1)(v)(A). The wage rates paid to any classification being added must bear a “reasonable relationship to the wage rates contained in the wage determination.” 29 C.F.R. § 5.5(a)(1)(v)(A)(3). *See, e.g., Millwright Local 1755*, ARB No. 98-015, slip op. at 7-8 (ARB May 11, 2000); *M.Z. Contractors Co., Inc.*, WAB No. 92-06, slip op. at 3-4 (WAB Aug. 25, 1992). The Administrator urges use of the lowest classification of skilled worker above unskilled laborer for purposes of conformance, namely the soft floor layer (\$13.75/\$1.66). Admin. Reply Mem. at 3. IBEW responds that the Administrator must consider the comparable sheet metal worker (\$19.99/\$5.81) and plumber (\$21.00/\$4.89) classifications. IBEW Sur-Reply Mem. at 6-8.

The Administrator defends her ruling that the \$14.33/\$0.51 electrician wage rate applies because the wage compilation survey “was conducted and reviewed in accordance with longstanding guidelines, practices and procedures.” AR Tab A. She states that the Wage and Hour Division “no longer strictly adheres to the . . . internal guidelines regarding the adequacy of wage data” set forth in the 1986 Manual of Operations. Admin. Reply Mem. at 4. Rather, it now requires only a 25 percent, not a 50 percent, usable response rate when using the 3-worker/2-contractor standard. And as authority for departing from the 1986 Manual of Operations standard of at least a 50 percent usable response rate when utilizing the 3-worker/2-contractor method, the Administrator cites the United States General Accounting Office Report to Congressional Committees, *Davis-Bacon Act: Labor’s Actions Have Potential to Improve Wage Determinations* (GAO/HEHS-99-97, May 1999) (GAO Report). Captioned “Labor’s Wage Determination Process Under the Davis-Bacon Act,” Appendix I of the GAO Report (pp. 18-25) describes the various stages of the wage determination process, i.e., planning and scheduling survey activity, conducting surveys of participants, clarifying and analyzing respondents’ data, and issuing the wage determinations. In describing stage three (clarifying and analyzing respondents’ data), the report states: “If the overall usable response rate for the survey is 25 percent or more, data on three workers from two contractors are considered sufficient to establish a wage rate for a key occupation.” GAO Report at 24. Thus, argues the Administrator, since the usable response rate for the Eddy County wage compilation survey was greater than 25 percent, she appropriately applied the 3-worker/2-contractor formula in determining the \$14.33/\$0.51 minimum electrician wage. Admin. Reply Mem. at 4-5.

### 3. Analysis

We remand this case to the Administrator because, in several respects, her September 30, 2002 final ruling demonstrates an abuse of discretion.

First, we find that the Administrator abused her discretion by failing to acknowledge the glaring disparity between the current and previous wage rates for electricians in Eddy County. We agree with NECA that, at the very least, the 48 percent disparity between the electrician rates under General Decision NM020005 (\$14.33/\$0.51) and previous General Decision NM010005 (\$21.50/\$7.07) should have alerted the Wage and Hour Division that the survey data likely were unrepresentative and that follow-up was necessary. Further, 19 of the 25 electricians surveyed worked for a single employer at what appear to have been low-end hourly rates (between \$10.00/\$0.51 and \$16.50/\$0.51, with an average rate of \$13.80/\$0.51) compared with three other electricians surveyed (\$20.00/\$5.84) and with the \$19.99/\$5.81 and \$21.00/\$4.89 rates for comparable sheetmetal worker and plumber classifications under General Decision NM020005. But the Administrator never acknowledges, discusses, or attempts to explain these disparities. *See* AR Tab A. Instead, she merely attests, in general terms, to the

survey's sufficiency.<sup>7</sup> Thus, the Administrator failed to adequately consider and decide the request for reconsideration. *See Millwright Local 1755*, ARB No. 98-015, slip op. at 11-12 (ARB May 11, 2000) (remanded when Administrator's two paragraph, abbreviated analysis on request for reconsideration deemed inadequate, if not nonexistent).

We note that when faced with such aberrations under the parallel McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C.A. §§ 351-358 (West 1987),<sup>8</sup> the Administrator has enunciated a policy to address significant decreases (and increases) in wage rates. To provide a degree of consistency in SCA wage rates, the Wage and Hour Division has implemented a policy of retaining current wage rates when new wage survey data indicate that prevailing rates have fallen below current wage rates. Likewise, when new wage survey data indicate that prevailing rates exceed current wage rates by a certain percentage, the Administrator will cap increases. But as the policy pertains to decreases, "when presented with survey data showing lower wages, Wage and Hour usually will not decrease the rates in the wage determination until two BLS [Bureau of Labor Statistics] surveys demonstrate a real downward trend and indicate that the lower rates on one survey were not an aberration." *D.B. Clark III*, ARB No. 98-106, slip op. at 7 (ARB Sept. 8, 1998) (Statement of the Acting Administrator in Opposition to Petition for Review). In further explanation,

There are good reasons for this practice. First, BLS area wage surveys are based on samples, rather than the entire population and therefore have an inherent margin of error. Wage and Hour's experience has demonstrated that regardless of the thoroughness of the survey methodology, data may shift inexplicably from one survey to the next producing great changes upward or downward. Moreover, survey results are dependent upon many factors, including the sample size, the geographic scope of the surveys and the number and nature of the business entities that provide data.

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<sup>7</sup> The Administrator stated: "This survey was conducted and reviewed in accordance with longstanding guidelines, practices and procedures. . . . A survey is considered acceptable when established time frames, construction types, geographic areas, classes, area practices, and accepted procedures for data adequacy, data computation, and survey notification are properly observed." AR Tab A.

<sup>8</sup> *See Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (SCA characterized as "parallel prevailing wage statute" as related to DBA); *cf.* 29 C.F.R. § 4.101 (2003) (court decisions under related remedial labor standards laws including DBA are applicable in construing SCA).

Strict adherence to survey data could produce wide fluctuations in wage rates received by service workers from year-to-year on SCA-covered contracts. . . . The Department follows instead a reasonable policy of prudently interpreting the survey data so that wages, while reflective of local wage data, are generally subject only to steady, reasonable increases (or decreases) without serious disruption to employees, contractors or the contracting agencies.

*Id.* at 7-8 (citation omitted).

In addition to ignoring the disparity between the new and old electrician wage rates, we find that the Administrator also abused her discretion (i) when she failed to explain why she abandoned the 1986 guidelines contained in the Manual of Operations, and (ii) when she did not comply with guidelines contained in the GAO Report which she now admittedly espouses (*see* Admin. Reply Mem. at 4), and (iii) when she applied, *per se*, the 3-worker/2-contractor standard.

We recognize that the DBA empowers the Secretary and the Administrator, as her delegate, to determine which wages are prevailing and that the definition of “prevailing wage” may be adjusted. The court in *Building and Constr. Trades’ Dep’t, AFL-CIO v. Donovan* validated just such an adjustment. There the Secretary proposed eliminating the so-called “thirty-percent” rule because it “[did] not comport with the definition of ‘prevailing,’ that it g[ave] undue weight to collectively bargained rates, and that it [was] inflationary.” 712 F.2d at 616.<sup>9</sup> The court concluded: “The Secretary’s new definition of ‘prevailing’ as, first, the majority rate, and, second, a weighted average, is within a common and reasonable reading of the term. The definition also would not defeat the essential purpose of the statute, which was to ensure that federal wages reflected those generally paid in the area.” *Id.* at 616-617.

*Building and Constr. Trades’ Dep’t* is instructive because it establishes that the Administrator must proffer a rationale for agency action. For example, the Wage and Hour Division may alter its methodology in determining what wage rate prevails. But it must explain why it is doing so. *See, e.g., Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Insur. Co.*, 461 U.S. 29, 48-49, 56-57 (1983) (“[t]here are no findings and no analysis here to justify the choice made, no indication of

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<sup>9</sup> Formerly, determining the prevailing wage involved a three-step analysis: First, if a single wage was paid to a majority of workers in a class, it was deemed prevailing. Second, if no single wage was paid to a majority of workers, the wage paid to at least 30 percent of the workers prevailed. Third, if no single wage was paid to a 30-percent plurality, a weighted average became the prevailing wage. The Secretary proposed to eliminate the second step.

the basis on which the [agency] exercised its expert discretion; [w]e are not prepared to and the Administrative Procedure Act will not permit us to accept such practice; an agency changing its course must supply a reasoned analysis”). Here, the Administrator has not explained why she abandoned the previous formulae set out in the 1986 Manual of Operations for determining prevailing wages. Nor has she adequately explained why a 25 percent usable response rate is preferable in determining prevailing wages.

The Administrator contends that the Eddy County wage survey “was conducted and reviewed in accordance with longstanding guidelines, practices and procedures.” AR Tab A at 2. But we are unable to determine, on this record, whether the Wage and Hour Division actually complied with its regulations and the guidelines contained in the GAO Report for compiling wage survey data. The Administrator’s rulings must be consistent with the statute and regulations and be reasonable exercises of the discretion delegated to the Administrator to implement and enforce the DBA. *Millwright Local 1755*, ARB No. 98-015, slip op. at 7; *Miami Elevator Co.*, ARB Nos. 98-086, 97-145, slip op. at 16; *Department of the Army*, ARB Nos. 98-120/121/122, slip op. at 16. While guidelines admittedly do not constitute duly promulgated regulations, the Administrator has adopted them to assist in implementing and enforcing the statute. Failure to follow such guidelines, thus, is inconsistent with the statute and regulations.

The DBA wage determination process set out in the GAO Report requires follow-up, expanded surveys, and even new surveys in specified circumstances. According to the report, surveys begin when wage reporting forms are sent to contractors requesting information, including a description of the particular project and its location, the contractor’s name and address, the value of the project, the starting and completion dates, the wage rate paid to each worker, and the number of workers employed in each classification during the week of peak activity for that classification. GAO Report at 21. The Wage and Hour Division apparently complied, for the most part, with this guideline. *See, e.g.*, AR Tabs K and M. The agency’s data collection obligations do not end here, however. Labor analysts must send contractors who do not respond to the survey a second reporting form and a follow-up letter. If the contractors still do not respond, analysts must attempt to contact them by telephone to encourage them to participate. GAO Report at 22. Moreover, the report represents that “Labor’s wage analysts review the [wage reporting form] to identify missing information, ambiguities, and inconsistencies that they then attempt to clarify or verify by telephone.” *Id.* This record, however, does not reveal whether or to what extent CRA and the Wage and Hour Division made these follow-up efforts.

In addition, the guidelines charge the analyst with recording and tabulating the data received, but only after “[the] analyst is satisfied that all issues with respect to the data on the [wage reporting forms] for a particular project have been resolved . . .” GAO Report at 23. Again, the record does not indicate that the CRA analyst met this obligation.

Furthermore, according to the GAO Report:

At least 2 weeks before the survey cutoff date, the response rate for the survey is calculated to allow time to take follow-up action if the response rate is determined to be inadequate. For example, [Wage and Hour Division] operational procedures specify that *if data gathered for building or residential surveys provide less than a 25-percent usable response or less than one-half of the required key classes of workers, the analyst will need to obtain data from comparable federally financed projects in the same locality.*

If an analyst has no data on occupations identified by Labor as key classification [sic] of workers for the type of construction being surveyed, Labor's procedures require him or her to call all the subcontractors included in the survey who do that type of work and from whom data are missing, to try to get data. *If the analyst still cannot obtain sufficient data on at least one half of the required key classes, consideration must be given to expanding the scope of the survey geographically to have more crafts represented.*

*Id.* at 23-24 (emphasis added; footnotes omitted). See 29 C.F.R. § 1.7(b) (if construction within a county is insufficient to make a wage determination, wages paid in surrounding counties may be considered). Key classes of workers are those determined necessary for each of the four types of construction surveys, namely building, residential, highway, and heavy. GAO Report at 18, 24. Of the 32 classes surveyed in the instant case, 17 classes were omitted from inclusion in the wage determination because CRA compiled insufficient data. AR Tab L. Fifteen classes were included in the wage determination. *Id.* Thus, CRA was only able to collect data on less than one half of the key classes of workers. And even though it did obtain data from federally funded projects, the Wage and Hour Division did not consider this data in issuing the wage determination. *Id.* See 29 C.F.R. § 1.3(d). Moreover, since the record does not show that the analysts telephoned contractors to secure additional data or that the Wage and Hour Division considered expanding the scope of the survey, we find that CRA did not comply with the GAO Report guidelines.

The GAO Report also provides:

The national office modifies published wage determinations in cases where regional offices, on the basis of evidence provided, recommend that it do so, such as when it has been shown that a wage determination was the result of an error by the regional office. Some of those who

seek to have wage rates revised are told that a new survey will be necessary to resolve the particular issue that they raised. For example, if the wage rates of one segment of the construction industry are not adequately reflected in survey results because of a low rate of participation in the survey by that segment of the industry, a new survey would be necessary to resolve this issue.

GAO Report at 25. Here, the regional office advised NECA summarily that the Wage and Hour Division would not conduct a new survey and that review was available at the national office level. Also, the regional office merely forwarded IBEW's complaint to the national office for reply, apparently without considering whether a new survey would be necessary. AR Tabs C, D, and F. Thus, compliance with this guideline was marginal, at best.

Despite the paucity of data documenting wages paid to electricians in Eddy County, New Mexico, the Administrator rigidly applied the 3-worker/2-contractor standard. The anomalous result is that contract labor from Texas, where wages reportedly are lower, effectively has determined the prevailing wage for electricians in this New Mexico county.<sup>10</sup> As NECA points out, the disparity between the former wage rates for electricians (\$21.50/\$7.07) and current wage rates for electricians (\$14.33/\$0.51) is arresting. Under these circumstances, the 3-worker/2-contractor minimum private sector data is not sufficient, and consideration of additional private sector data and of data on federally funded work is appropriate. See *Plumbers Local Union No. 27*, ARB No. 97-106, slip op. at 5-7 (ARB July 30, 1998) (wholesale reliance on 3-worker/2-contractor formula misplaced; under certain circumstances Administrator must consider *all* wage data from both federally- and privately-funded projects when determining sufficiency of data under 29 C.F.R. § 1.3(d)); *Southeast Idaho Building and Constr. Trades Council, AFL-CIO*, WAB No. 86-22, slip op. at 4 (WAB Feb. 4, 1987) (Administrator must review all relevant wage data, whether from private or public construction projects, before determining sufficiency of data for purposes of 29 C.F.R. § 1.7(b); not until compiling all data can the Administrator determine whether to exclude Federal and federally-assisted projects or whether to examine wage data from surrounding counties). Thus, we find that, under the circumstances of this case, the Administrator's per se application of the 3-worker/2-contractor standard constituted an abuse of discretion.

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<sup>10</sup> As explained in *Building and Constr. Trades' Dep't, AFL-CIO v. Donovan*, a reason for enacting prevailing wage legislation during the Great Depression was to prevent low-bidding contractors from "taking advantage of widespread unemployment in the construction industry and hiring workers at substandard wages, often bringing a low-paid crew in from distant areas." 712 F.2d at 614.

## CONCLUSION

The Wage and Hour Administrator abused her discretion by failing to acknowledge, discuss, and explain the disparity between the new and old wage rates for electricians. She also abused her discretion when she did not explain why she abandoned previous guidelines pertaining to determining prevailing wages, failed to comply with current guidelines, and rigidly applied the 3-worker/2-contractor standard. The decision of the Administrator denying petitioner's request for reconsideration is therefore **REVERSED**, and this case is **REMANDED** to the Administrator to reconsider, consistent with this opinion, the minimum wage rate for the electrician classification under General Decision NM020005.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**