



In the Matter of:

MIAMI ELEVATOR COMPANY

ARB CASE NO. 98-086
(Formerly ARB Case No. 97-092)

**With respect to request for conformance
of employee classification under Wage
Determination No. FL940002 applicable to
Contract No. GS-04P-94EX-C0046
(U.S. Courthouse II, New Construction)**

and

**MID-AMERICAN ELEVATOR
COMPANY, INC.**

ARB CASE NO. 97-145

DATE: April 25, 2000

**With respect to application of Wage
Determination No. IL950009 to Chicago
Housing Authority Contract No. 8486-CG
(Henry Horner Homes, Chicago, Illinois)**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner Miami Elevator Company:

Maurice Baskin, Esq., *Venable, Baetjer, Howard & Civiletti, LLP, Washington, D.C.*

For Petitioner Mid-American Elevator, Inc.:

Irving M. Geslewitz, Esq., *Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C.,
Chicago, Illinois*

For the Respondent:

Leif G. Jorgenson, Esq.; Douglas J. Davidson, Esq.; Steven J. Mandel, Esq.,
U.S. Department of Labor, Washington, D.C.

For Intervenor International Union of Elevator Constructors, AFL-CIO:

Robert Matisoff, Esq.; Benjamin Davis, Esq., *O'Donoghue & O'Donoghue, Washington, D.C.*

FINAL DECISION AND ORDER

In this case, we consider the Wage and Hour Administrator's decision to end the long-standing recognition of the "elevator constructor helper" job classification on construction projects subject to the Davis-Bacon and Related Acts.

The “elevator constructor helper” job classification is widely used by employers in the elevator construction industry, and is part of the Standard Agreement between the International Union of Elevator Constructors and its signatory employers throughout the United States. For decades, the Administrator of the Wage and Hour Division recognized the elevator constructor helper as a separate job classification under the Davis-Bacon Act (along with the journeyman-level elevator mechanic) and routinely issued Davis-Bacon wage determinations that included wage and fringe benefit rates for the helper classification. However, in the early 1990’s the Administrator concluded that he would no longer recognize the elevator constructor helper classification for purposes of the Davis-Bacon Act, and ceased publishing helper wage rates as part of the Davis-Bacon wage determinations applied to federally-funded construction projects.

The petitioners in these two consolidated cases – Miami Elevator Company (Miami) and Mid-American Elevator Co., Inc. (Mid-American) – are elevator construction companies performing contracts subject to Davis-Bacon requirements. Both companies requested that the Administrator add an elevator constructor helper job classification to the wage determinations applicable to their projects, invoking the Davis-Bacon conformance procedures for adding new job classifications found at 29 C.F.R. §5.5(a)(1999). In final ruling letters issued January 12, 1998, and August 13, 1997, the Administrator denied both requests, based on his decision to end the Division’s routine recognition of the elevator constructor helper classification for Davis-Bacon purposes. These appeals followed. We have jurisdiction pursuant to the Davis-Bacon Act, as amended, 40 U.S.C.A. §276a *et seq.*(1999); the Related Acts, *see* 29 C.F.R. §5.1; and 29 C.F.R. Part 7 (1999).

Based on the record before us, we conclude that the final rulings denying the two conformance requests are within the range of discretion afforded the Administrator by the applicable law and regulations, and deny the Petitions.

I. REGULATORY OVERVIEW

The Administrator’s changing position with regard to the elevator constructor helper classification, and his refusal to issue conformed helper wage rates to the Petitioners in these two cases, only can be understood fully within the broader framework of the Davis-Bacon Act wage determination and conformance process. We review this background first, with an emphasis on helper classifications generally and the elevator constructor helper particularly, before turning to the specific facts of these cases.

A. The Davis-Bacon Act, wage determinations and classifications of construction workers recognized on Davis-Bacon projects prior to 1982.

The Davis-Bacon Act (DBA, or Act) was enacted in 1931 to insure that federal construction projects did not undercut local wage standards.^{1/} As amended, the Act requires that any federal contract

for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia . . . which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there

40 U.S.C. §276a.

Although the Davis-Bacon Act, by its terms, applies only to construction contracts *directly* entered into between the federal government and a contractor, many statutes that provide federal funding to non-federal entities (*e.g.*, state and local governments, universities, public housing authorities, water and sewer districts, etc.) include provisions incorporating Davis-Bacon prevailing wage requirements into federal grants that are used to fund construction projects. As a result, the labor standards provisions of the Davis-Bacon Act frequently apply to construction projects that receive some form of federal financial assistance. See 29 C.F.R. §5.1 for a list of statutes incorporating the Act’s provisions. These statutes commonly are referred to as “Davis-Bacon Related Acts,” because the prevailing wage features of the Davis-Bacon Act and its regulations (prevailing wage rates, payroll reporting requirements, etc.) follow the federal monies and therefore apply to federally-assisted construction projects, even though the federal government itself is not directly a party to the contract.

The Davis-Bacon Act directs the Secretary to establish a schedule of “the minimum wages to be paid various classes of *laborers and mechanics*” to be employed on covered construction projects. 40 U.S.C. §276a. The statute itself does not identify what classifications of construction

^{1/} Prevailing wage legislation applicable to federal contracts was adopted only after similar labor standards legislation had been enacted by many states, often decades earlier. For example, a law requiring that employees working on public contracts be paid wages “not less than the current rate of per diem wages in the locality where the work is performed” was enacted in Kansas in 1891. 1891 Kan. Sess. Laws c. 114, *quoted in State ex rel. Ives v. Martindale*, 47 Kan. 147, 27 P. 852 (1891).

workers are encompassed within the universe of “laborers and mechanics”; this process of analyzing and assessing the various construction classifications is left to the Secretary, who in turn has delegated the responsibility to the Administrator of the Wage and Hour Division. The Administrator is charged with compiling schedules of wages and fringe benefits that prevail for various classifications of laborers and mechanics in localities where covered construction projects are performed. The procedures for predetermining wages and fringe benefits are found at 29 C.F.R. Part 1. The wage and fringe benefit rates established under these procedures are published in wage determinations; in turn, these wage determinations are incorporated by contracting agencies into the bid packages and contracts of construction projects covered by the Act. *See* 29 C.F.R. §5.5(a); *see also* 48 C.F.R. §36.213-3(c)(1999).

Although the Administrator determines the classes of laborers and mechanics (and the associated prevailing wage) on a locality-by-locality basis, two general classes of subjourneyman workers are recognized by regulation. The primary subjourneyman classification consists of workers who are enrolled in formal apprenticeship programs registered with federal or state agencies. 29 C.F.R. §5.5(a)(4)(i). This special recognition of apprentices dates back to the first promulgation of the Davis-Bacon Act regulations in 1951. 16 Fed. Reg. 4430 (May 12, 1951). In addition to the apprentice classification, since 1971 the Administrator has allowed trainees participating in certain federally-approved programs to work on Davis-Bacon jobs at their normal wage rate (*i.e.*, a rate less than the journeyman rate for their craft). 29 C.F.R. §5.5(a)(4)(ii).^{2/}

Thus, under the Davis-Bacon regulations a construction contractor is entitled to employ workers in either of these two “subjourneyman” classifications on federally-funded projects “as a matter of right”; there is no need for the Administrator to include special wage and fringe benefit rates for these classifications of workers in the wage determination.

^{2/} The trainee classification was added to the Davis-Bacon regulations in 1971 pursuant to Presidential directive as a complement to the long-recognized apprenticeship programs. Trainees could be employed on projects subject to DBA standards if they were enrolled in on-the-job training programs approved by the Labor Department. 36 Fed. Reg. 19304 (Oct. 2, 1971).

The trainee program provision was designed to address several problems. During the period of the war in Vietnam, there were significant manpower shortages in the construction industry in the United States, producing wage inflation. The Labor Department’s manpower training programs already had 30,000 construction trainees enrolled in non-apprenticeship programs nationwide; modifying the Davis-Bacon regulations to allow these trainees to work on DBA-covered projects created job opportunities for the trainees while expanding the overall construction labor pool. In addition, the expanded employment of minority workers enrolled in DOL-approved “hometown” training plans (modeled on the “Philadelphia Plan”) was viewed as a vehicle to promote equal employment opportunity in the construction industry under Executive Order 11246. The program also anticipated using the trainee classification for introducing returning Vietnam veterans into the construction labor force. *See* “Combating Construction Inflation and Meeting Future Construction Needs,” 6 Weekly Comp. of Pres. Doc. 376 (Mar. 17, 1970). When the trainee regulation was first promulgated in 1971, it required federal agencies to include a requirement in their construction contracts that apprentices and trainees be employed on federal construction projects, and that 25% of these workers be in their first year of training. 36 Fed. Reg. 19304, 305.

In addition to allowing apprentices and trainees in registered programs to work on Davis-Bacon jobs at wages below the journeyman rate for their craft, by the late 1970's the Administrator also had developed an uncodified practice of recognizing some job classifications under the Act that were denominated as “helpers” (or “tenders”), and publishing these helper classifications in the wage determinations along with the other classifications of “mechanics and laborers.” The circumstances under which a helper classification would be approved (and therefore included in a wage determination) were limited. The standard for such approval was developed in a series of policy statements and decisions. The Wage Appeals Board used the following language when characterizing the standard in a case upholding the Administrator’s refusal to publish a “roofer’s helper” rate:

Petitioner [*i.e.*, the construction contractor] provided Wage and Hour with a description of the duties to be performed by the roofer's helpers but Wage and Hour denied the request stating that rates for helpers would be issued only when it could be shown that employment of helpers was a prevailing practice, the scope of their duties was defined and the helper's duties were distinguishable from journeyman's or laborer's duties.

De Narde Construction Co., WAB Case No. 78-3 (May 14, 1979), slip op. at 2; *accord*, *Pacific West Constructors*, WAB Case No. 78-02 (Sept. 18, 1978) (request for a “roofer’s helper” denied because duties of helper were not distinct from journeyman’s); *Prime Roofing, Inc.*, WAB Case No. 78-20 (Jan. 11, 1979) (same). This articulation of the helper standard was echoed by the Administrator when promulgating new helper standards in 1982 (discussed below), with the Administrator characterizing the pre-1982 practice using this language:

The Department currently recognizes a helper classification only where it is a separate and distinct class of workers, which prevails in the area, and where the helpers’ scope of duties can be differentiated from those of journeymen.

47 Fed. Reg. 23658, 659 (May 28, 1982).

Wage Appeals Board cases from the pre-1982 period made an additional distinction, apparently based on arguments advanced by the Wage and Hour Division, that if a helper classification was to be recognized on Davis-Bacon projects, it could not be a class of workers who were learning a trade through an informal (*i.e.*, unregistered) training program:

It seems to the [Wage Appeals] Board that it is a misnomer to label the employees . . . under consideration [in this case] “helpers.” Traditionally, helpers do not learn the trade with a view of ultimately becoming journeymen. There is merit to the view of Wage and Hour, and Petitioner itself admits, that the employees were trainees and it does not appear from the record that they are registered in a training program that is approved or registered as required by the applicable

regulations. Duly registered apprentices or trainees are the only employees covered by the labor standards provisions of the Davis-Bacon and related Acts and regulations applicable thereto who may be paid less than the predetermined wage rate for the work they perform.

Soule Glass and Glazing Co., Portland, MA, WAB Case No. 78-18 (Feb. 8, 1979), slip op. at 2. *See also Fry Brothers Corp.*, WAB Case No. 76-06 (June 14, 1977) (helper classification not recognized when workers functioned as informal apprentices or trainees); *Clevenger Roofing and Sheet Metal Co.*, WAB Case No. 79-14 (Aug. 20, 1980)(conformance request for a “roofer’s helper” denied because helper effectively functioned as an informal trainee). Thus, before 1982, it appears to have been well-established that at least three elements were required of a helper classification before it would be recognized by the Division and included in a wage determination:

1. A helper classification needed to have duties distinct and differentiable from the tasks performed by journeymen.
2. Use of the helper classification needed to reflect prevailing local practice.
3. Helpers would not be recognized if they were merely informal (*i.e.*, unregistered) trainees or apprentices learning a trade.

See De Narde Construction Co., supra, (articulating in a single formulation all the elements of the 3-part helper test).

We also note an additional factor that sometimes appears to have been considered by the Division when deciding whether to issue helper classifications in communities: whether the helper classification was found in a union agreement. In communities where union wage rates and practices prevailed, and where the Davis-Bacon wage determinations therefore reflected negotiated wages, it appears that the Wage and Hour Division and the Wage Appeals Board sometimes looked to whether a helper classification existed in the local collective bargaining agreements. *See Fry Brothers Corp., supra* (declining to recognize helper classification, but suggesting in *dicta* that where union collectively-bargained rates are found prevailing and the labor agreement includes a helper classification, the Wage and Hour Division would recognize the helper classification); Opinion WH-202 (Mar. 1, 1973), *available at* BNA WH Manual 99:1113 (same). However, the Division’s expressed interest in simply adopting helper classifications directly from labor agreements was not consistent, and never appears to have become an element of the standard test used by the Division to decide whether to publish a helper classification as part of a wage determination. In fact, the historical record suggests that the Wage Appeals Board uniformly refused to direct the Administrator to adopt helper classifications that did not meet the 3-part helper test – even helper classifications that appeared in collective bargaining agreements. *See Pacific West Constructors, supra; Prime Roofing, Inc., supra; De Narde Construction Co., supra; Clevenger Roofing and Sheet Metal Co., supra.*

It is uncontested that during the pre-1982 period, the Wage and Hour Division routinely recognized elevator constructor helpers as a separate construction trade classification, and included wage and fringe benefit rates for the elevator constructor helper classification in Davis-Bacon wage determinations.

B. The Davis-Bacon rule revisions and the helper regulation, 1981 - 1990.^{3/}

At the close of the Carter Administration, the Department of Labor conducted a rulemaking proceeding to revise the Davis-Bacon regulations. Final regulations were published January 16, 1981, to become effective in February 1981. 46 Fed. Reg. 4306 and 4380 (Jan. 16, 1981). Apprentice and trainee provisions were modified, but the 1981 regulations did not include any provisions revising (or codifying) the policy on helper classifications. However, implementation of the 1981 Davis-Bacon regulations was suspended at the direction of President Reagan soon after taking office (46 Fed. Reg. 11253, Feb. 6, 1981), and another major reexamination of the Davis-Bacon regulations generally – and the helper issue specifically – ensued.

On May 28, 1982, the Wage and Hour Division issued new Davis-Bacon regulations, changing a number of long-standing policies and procedures. Significantly, the regulations codified a new definition of the term “helper” and rules that would allow much broader use of helpers on Davis-Bacon jobs. Whereas the pre-1982 practice of the Division defined helpers by the *tasks* that they performed (“a separate and distinct class of workers . . . where the helpers’ scope of duties can be differentiated from those of journeyman” (*see* 47 Fed. Reg. 23659)), under the new regulations a helper classification would be defined and recognized based primarily on the helper’s *supervision* by a journeyman:

A helper is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

29 C.F.R. §5.2(n)(4)(1982); *see also* 47 Fed. Reg. 23658 (May 28, 1982). Under this new definition, helpers (characterized as “semi-skilled” workers) could perform the same tasks as the journeyman, so long as they were under a journeyman's supervision.

^{3/} Detailed histories of the 1982 helper regulation can be found at 62 Fed. Reg. 68641 (Dec. 30, 1996) and 64 Fed. Reg. 17442 (Apr. 9, 1999).

The 1982 Davis-Bacon regulations, including the portion dealing with the "helper" definition, were challenged in a lawsuit brought by several labor organizations. In a decision issued in 1983, the U.S. Court of Appeals for the District of Columbia Circuit approved the Department's new "helper" definition, to be codified as 29 C.F.R. §5.2(n), and upheld generally the Department's authority to allow the increased use of helpers under the Davis-Bacon Act. *Building and Construction Trades Department, AFL-CIO, et al. v. Donovan, et al.*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1983). However, the court disapproved the specific portion of the new regulations prescribing the circumstances under which helper classifications would be authorized. *Id.* Without such provisions, there effectively was no implementation of the broader "helper" concept of the 1982 rulemaking, even though the 1982 definition of the term "helper" was approved by the court and had become formally part of the Code of Federal Regulations.

New procedures and standards for allowing expanded use of helpers on Davis-Bacon jobs were finalized in 1989. 54 Fed. Reg. 4234 (Jan. 27, 1989). Although the new regulations again were challenged by several of the unions before the courts, they were implemented briefly beginning February 4, 1991. 55 Fed. Reg. 50148 (Dec. 4, 1990).

C. The suspension of the "helper" regulation, the return to the 3-part test for issuing helper classifications in wage determinations, and application of the 3-part test to elevator constructor helpers.

In April 1991, Congress enacted and President Bush signed a supplemental appropriations bill that, *inter alia*, barred the Department of Labor from expending any funds to implement or administer the new helper regulations. Dire Emergency Supplemental Appropriations Act of 1991, P.L. 102-27 (105 Stat. 130) Section 303. After FY 1991 concluded (as well as several continuing resolutions that funded government operations into the beginning of FY 1992), the Administrator instructed the contracting agencies to implement the helper rule in January 1992.

Soon afterward, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in the unions' challenge to the 1989 version of the helper regulation. Much of the new version of the helper regulation was approved by the court, but a provision dealing with journeyman-to-helper ratios was invalidated. *Building and Construction Trades Dep't, AFL-CIO et al v. Martin et al*, 961 F.2d 269 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 915 (1992). The court decision was issued in April 1992; in June 1992 the Department issued a notice in the Federal Register removing the ratio provision. 57 Fed. Reg. 28776 (June 26, 1992).

President Clinton took office at the beginning of 1993. That year, Congress again acted to prevent the Department from implementing the helper regulation, with the FY 1994 Department of Labor Appropriations Act, P.L. 102-112, prohibiting the Department from implementing or administering the revised rule. In response to the congressional spending ban, on November 5, 1993, the Department issued a Notice in the Federal Register suspending the 1982 and 1989 helper regulations indefinitely and reinstating the Department's pre-1982 helper policy, which was characterized with this language:

Prior to promulgation of the [1982-1989] helper regulations which are being suspended by this notice, it was the policy of the Department that a helper classification would be approved only if it was a separate and distinct class of worker, that prevailed in the area, to perform duties that could be differentiated from the duties of journeylevel workers in the classification, as well as other classifications on the wage determination. Helpers could not ordinarily use “tools of the trade,” nor could they be used as informal apprentices or trainees.

The suspension of these [1982 - 1989] helper regulations reinstates this prior practice of the Department.

58 Fed. Reg. 58954 (Nov. 5, 1993). The Wage and Hour Division subsequently issued All Agency Memorandum 174, providing instructions to contracting agencies regarding the effect of the new suspension of the helper regulations. See AAM 174, AR^{4/} Mid-Am Tab E. The indefinite suspension issued in November 1993 was continued by publication of a Final Rule on December 30, 1996, which is still in effect.^{5/} 61 Fed. Reg. 68641.

D. The Administrator’s reevaluation of the elevator constructor helper classification under the 3-part helper test.

As noted above, the “traditional” 3-part standard for deciding whether to recognize a helper classification under the Davis-Bacon Act regulations was fairly well established by the late 1970’s. At its core, the central concept of the 3-part test was that a helper would be recognized by the Wage and Hour Division only if the job classification performed a distinct set of tasks different from the work of the mechanic (journeyman). In a sense, then, one of the key features of the helper job classifications that were recognized by the Administrator under the 3-part test was that they were *not* subjourneyman classifications of a trade, *i.e.*, workers performing the same work of a trade as the mechanics, only with less skill and at a lower wage rate. Instead, the recognized helper classifications independently were separate occupations with a specific set of duties. If a helper classification performed tasks which were the same or similar to those performed by journeymen,

^{4/} Each of these two consolidated appeals has a separate Administrative Record (AR). Throughout this decision, materials in the Administrative Record accompanying Case No. 97-145 (Mid-American Elevator Co., Inc.) will be referred to as “AR Mid-Am Tab ___.” Materials in the Administrative Record for Case No. 98-086 (Miami Elevator Co.) will be referred to as “AR Miami Tab ___.”

^{5/} The 1996 Final Rule was challenged in the courts. On July 23, 1997, the U.S. District Court for the District of Columbia upheld the Department’s final rule suspending the helper regulations until a new rulemaking proceeding is completed, or the Department decides to reinstate the regulations. *Associated Builders & Contractors, Inc. v. Herman*, 976 F.Supp. 1 (D.D.C. 1997). In 1999, the Wage and Hour Division published a Notice of Proposed Rulemaking stating its intent to permanently re-establish its policy allowing the use of helpers only where their duties are clearly defined and distinct from journeymen. 64 Fed. Reg. 17441 (Apr. 1, 1999).

but at a lower wage rate, the classification would not be recognized by the Division, and no wage or fringe benefit rates would be published in the wage determinations.

The concept of a helper under the now-repealed 1982-1989 helper regulation was dramatically different. The helper that would have been recognized under the 1982 regulation was a straightforward subjourneyman classification, performing the same work as the journeyman, but subject to a journeyman's supervision. We note, however, that between the multiple court challenges and various appropriations bills prohibiting implementation of the helper regulation, this broader 1982 approach to recognizing helpers on Davis-Bacon projects was implemented only for brief periods. It appears, therefore, that the "traditional" (if uncodified) 3-part helper test has been in effect almost continuously since the 1970's.

On the record before us, there does not appear to be any dispute that it is commonplace throughout most of the elevator construction industry to employ crews that include both elevator mechanics and elevator constructor helpers (also known as elevator mechanic helpers). It also appears that until sometime in the early 1990's, the Administrator routinely recognized the elevator constructor helper classification, and included the classification and associated wage/fringe benefit rates in Davis-Bacon wage determinations. It is unclear precisely when the Administrator decided to reexamine the work performed by elevator constructor helpers, but at some point in the early 1990's the Administrator concluded that the classification did not meet the 3-part helper test, and stopped including the helper classification in wage determinations. Based on this changed approach, the wage determinations applicable to Miami Elevator's and Mid-American Elevator's projects included wage rates for elevator mechanics, but not elevator constructor helpers.

II. MID-AMERICAN AND MIAMI ELEVATORS' CONFORMANCE REQUESTS: BACKGROUND, THE ADMINISTRATOR'S DECISIONS AND PROCEDURAL HISTORY

A. Mid-American Elevator's conformance request (ARB Case No. 97-145).

Sometime prior to June 1, 1995, Mid-American (apparently in a joint venture with a second firm, Rainbow Elevator) submitted a winning bid to the Chicago Housing Authority (CHA) for construction of seven traction elevators at the Henry Horner Homes in Chicago. AR Mid-Am Tab D. Although the contract was with a local public housing agency, and was not a direct contract with the federal government, it is undisputed that it was subject to the prevailing wage requirements of the Davis-Bacon Act and its regulations.

The wage determination applicable to the CHA elevator contract was General Decision IL 95009. *Id.* This wage determination included wage and fringe benefit rates for the elevator mechanic classification (\$25.29/hr. wages, and more than \$6.12/hr. in fringe benefits), but did not include the elevator constructor helper classification and associated rates. AR Mid-Am Tab I at 3. Mid-American was awarded the contract on June 29, 1995. AR Mid-Am Tab D.

In February 1997 – more than 20 months later – Mid-American asked that two additional job classifications be added to the wage determination for the CHA project, using the Davis-Bacon conformance procedures at 29 C.F.R. §5.5. The requested classifications were an Elevator Constructor Helper (\$17.70/hr. wages plus \$6.12/hr. fringe benefits) and an Elevator Constructor Probationary Helper (\$12.645/hr. wages and no fringe benefits). The request initially was submitted by Mid-American to the Chicago Housing Authority’s contracting officer using the Labor Department’s Standard Form (SF) 1444. The SF 1444 includes a section in which the employee representative (in this case, Elevator Constructors Local 2) indicates whether it concurs with the proposed additional classification and wage rates. In this instance, the union did not concur with adding the helper rates. AR Mid-Am Tab D.

The Davis-Bacon regulations require that when the employer and the employee representative disagree on additional classifications, the contracting officer must transmit the conformance request to the Administrator for review. 29 C.F.R. §5.5(a)(1)(v)(C). In this case, the request was transmitted by Phil Poirier, a Labor Relations Specialist with the U.S. Department of Housing and Urban Development (HUD) in Chicago. Poirier noted that Mid-American requested the two additional classifications based on the company’s labor agreement with the International Union of Elevator Constructors, and attached a copy of the labor agreement.^{6/} However, he noted that the union did not agree with the addition of the two classifications, and stated that the proposal “is not consistent with DOL practice with respect to Helpers and Probationary Helpers.” AR Mid-Am Tab D.

Terry Sullivan, the Wage and Hour Division’s Section Chief, Construction Wage Determinations, responded by letter dated March 13, 1997, denying the conformance request. AR Mid-Am Tab C. In announcing this decision, the Section Chief first cited the section of the Davis-Bacon regulations dealing generally with conformance requests, 29 C.F.R. §5.5.(a)(1)(v), noting that this section includes “established criteria” for adding classifications to wage determinations. In addition, the Section Chief noted the uncodified 3-part test that applies uniquely to helper classifications to determine whether the Wage and Hour Division will consider issuing a helper wage rate, either as part of an initial wage determination, or as part of a conformance request:

^{6/} Although Poirier’s letter indicates that a copy of the labor agreement was forwarded to the Wage and Hour Division as an attachment to the conformance request on the CHA elevator contract, the agreement is not found at Tab D of the Administrative Record. However, copies of the labor agreement are found at Tabs E and G of the Mid-American Administrative Record. In both instances, they are associated with correspondence relating to conformance requests by Mid-American on construction contracts with the Chicago Transit Authority (CTA). It is unclear why the materials from the CTA contract are included in the Administrative Record in this case, because Mid-American’s Petition for Review was limited to the Chicago Housing Authority contract only and did not ask the Board to address possible problems with Transit Authority contracts. A December 27, 1996, letter from then-Section Chief Nila Stovall to Mid-American in connection with the CTA conformance requests also is found in the Administrative Record in this case at Tab F.

It is unclear whether similar materials from Mid-American’s CHA conformance request may have been omitted from the Administrative Record in this case. We note, however, that none of the parties have suggested that the Record is incomplete.

Helper classifications may be added to a wage determination only where (a) the duties of the helpers are clearly defined and distinct from those of the journeyman classification and from the laborer, (b) the use of such helpers is an established prevailing practice in the area, and (c) the term “helper” is not synonymous with “trainee” in an informal training program.

AR Mid-Am Tab C. The letter closed by observing that “[n]o information has been submitted [to the Division] to suggest that these tests are met with regard to the helper classification proposed in the case.” *Id.*

Through its attorney, Mid-American requested by letter dated May 6, 1997, that the Division reconsider the Section Chief’s decision denying the conformance request. AR Mid-Am Tab B. According to counsel’s letter, Mid-American forwarded copies of earlier correspondence addressing the question whether the elevator constructor helper classification met the 3-part test, expressing concern that the materials may never have been routed properly to the Section Chief, and that his March 1997 decision therefore may not have taken this information into account. Apparently believing that the earlier denial had been based solely on the first element of the 3-part helper test (*i.e.*, whether the helper performs duties that are clearly defined and distinct from those of the journeyman classification and from the laborer), Mid-American argued that under its labor agreement with the IUEC, helpers are a distinct classification distinguishable from the elevator mechanics:

Based on previous correspondence and communications, we understand the Branch of Construction Wage Determinations does not seriously dispute that the Elevator Constructor Helpers meet parts (ii) and (iii) of the test. Rather, it believes that the Helpers do not meet part (i) of the test, i.e. that they do not perform duties separate and distinct from those of the Mechanics. As we understand the Branch’s rationale, it is based on the rationale that Helpers perform many of the same actual work tasks that a Mechanic will perform.

We submit this is a facile and unworkable premise that does not take into account that a Helper cannot do the more skilled tasks a Mechanic performs unless closely supervised and directed by a Mechanic. For example, Helpers are not allowed to work unsupervised or to have their own tools. They might be able to do a particular less complex work assignment that a Mechanic will do, but they must be told what to do and how to do it by the Mechanic, who is responsible for reviewing and making sure the Helper is doing right. A Helper is never allowed to work on an assignment or project without a Mechanic being present and working with him.

AR Mid-Am Tab B at 2 (emphasis supplied).

Mid-American's request for reconsideration was reviewed by the Administrator's designee, the National Office Program Administrator, who issued a final decision denying the conformance request on August 13, 1997. AR Mid-Am Tab A. Through this representative, the Administrator acknowledged that prior to issuing the helper regulations in 1982, the Division had published wage determinations that included the elevator constructor helper classification. "However, that practice was reviewed, and it has been discontinued." *Id.* at 3. In explaining this changed practice,^{2/} the Administrator cited the language of Article X of the collective bargaining agreement, which states that "there shall be no restrictions placed on the character of work which a helper may perform under the direction of a Mechanic." In the Administrator's view, this language plainly suggested that the tasks performed by the elevator constructor helper were not "clearly defined and distinct from those of the mechanic," as required by the first element of the 3-part helper. *Id.* The Administrator also justified the changed practice by pointing to the third element of the 3-part test, *i.e.*, that helper classifications will not be recognized if the helpers are trainees in an informal training program, rather than the registered apprentices or trainees who are allowed on Davis-Bacon jobs at less-than-journeyman wage rates pursuant to 29 C.F.R. §5.5(a)(4). The Administrator noted that management and the union in the unionized-sector of the elevator construction industry had considered registering an apprenticeship program at some point in the past, but that these efforts had been abandoned. In the Administrator's view, the elevator constructor helper could not be recognized because the classification constituted the kind of informal training program not sanctioned for use on projects subject to the Davis-Bacon prevailing wage requirements.

After receiving this Final Decision, Mid-American filed a petition for review with the Board on September 11, 1997.

B. Miami Elevator's conformance request (ARB Case No. 98-086).

Miami Elevator Company was a subcontractor on a General Services Administration (GSA) construction contract to build a federal courthouse and parking garage in Tampa, Florida. Under the subcontract, Miami was responsible for construction of the elevators on the project. The wage determination applicable to the contract was FL 940002. *See* AR Miami, Tab H. Like the wage determination involved in the Mid-American case, wage determination FL 940002 included wage rates (\$15.17/hr.) and fringe benefit rates (in excess of \$4.32/hr.) for the elevator mechanic classification, but no classification of elevator constructor helper or probationary helper. *Id.*

On November 11, 1996, Miami Elevator and Clark Construction Group (the prime contractor on the project) asked GSA to approve a conformed rate for the elevator helper classification at an hourly wage rate of \$12.35 (plus fringe benefits), pursuant to the Davis-Bacon conformance procedures. AR Miami Tab F. Attached to Miami's submission was a memorandum ("rationale") explaining the justification for adding the helper classification, noting that the elevator constructor helper classification is recognized under the IUEC union agreement and observing that the wage

^{2/} Like the Section Chief earlier, the National Office Program Administrator again merged her discussion of the uncodified 3-part helper test with the general conformance requirements found in the Davis-Bacon regulations at 29 C.F.R. §5.5(a). *Id.* at 2.

determination rate for the elevator mechanic on the courthouse project was based on the IUEC negotiated rate. *Id.* Also attached was a copy of Wage and Hour Opinion No. 202 (Mar. 1, 1973), in which the then-Assistant Administrator had suggested that if the local prevailing rate for a job classification (in that instance, carpenters) was the union rate, and if the union labor agreement included a “helper” job classification, then the Department would recognize such a helper classification.^{8/}

GSA’s contracting officer forwarded the conformance request to the Wage and Hour Division. *Id.* By letter dated April 4, 1997, GSA advised Clark Construction Group that the Wage and Hour Division orally had denied the conformance request. In turn, Miami filed a Petition for Review with this Board on April 30, 1997, based on the letter from GSA to Clark. This appeal was docketed as ARB Case No. 97-092. AR Miami Tab D. Noting specifically that it believed that the elevator constructor helper should be recognized under the “old” 3-part helper test, Miami attached a tabulation illustrating the respective tasks performed by elevator mechanics and elevator helpers on the Tampa courthouse job, along with an affidavit from a company official. Based on this tabulation, as well as WH Opinion 202, Miami argued that the duties of the helper were distinct from those of the mechanic, and noted that the helper was a classification established under the prevailing collective bargaining agreement. *Id.*

Because the GSA letter to Clark did not constitute a final (and appealable) determination of the Administrator, the Administrator moved to dismiss the petition, arguing that the appeal was not ripe. The Board concurred with the Administrator, and dismissed the petition without prejudice. AR Miami Tab B.

The Administrator formally denied Miami’s conformance request in a letter to GSA dated May 27, 1997. This letter was substantially identical to the letter issued to HUD denying Mid-American’s conformance request. *Compare* AR Miami Tab E with AR Mid-Am, Tab C. As noted previously, the primary rationale for denying the conformance request was language in the Standard Agreement indicating that there would be no restriction on the tasks that could be performed by an elevator constructor helper under the supervision of an elevator mechanic.

Through counsel, Miami wrote to the Administrator seeking reconsideration of the May 27 decision. AR Miami Tab D. Miami again argued that the elevator constructor helper classification should be approved because it conformed with the 3-part helper test, again attaching a tabulation purporting to show the differences between the tasks performed by helpers and mechanics on the Federal Courthouse job in Tampa. *Id.* Alternatively, Miami suggested that if the Administrator would not issue a conformed helper wage rate, the workers that the company classified as elevator constructor helpers might appropriately be deemed to be “skilled laborers” under the wage determination, and paid at the laborer wage rate. *Id.* at unnumbered p. 4.

^{8/} The same Opinion letter states that “[t]he Department will not, absent a clear showing of prevailing practice, issue or approve helper classifications when in local usage this classification is actually an informal trainee position.” *Id.*

The Administrator (through his designee) responded with an extended letter dated January 23, 1998, reviewing the history of helper classifications under the Davis-Bacon Act and again denying the conformance. AR Miami Tab A. The Administrator again relied on the language in the Standard Agreement between the IUEC and elevator contractors declaring that helpers were not restricted in the work that they could perform on an elevator construction project and that their duties therefore overlapped with the tasks performed by mechanics. Noting that the elevator mechanic wage rate in the Tampa wage determination was based on the union-negotiated scale, the Administrator cited the Wage Appeals Board's seminal decision in *Fry Brothers Corp.*, WAB Case No. 75-6 (June 14, 1977), which stands generally for the proposition that collectively-bargained trade classification practices are followed in situations where the wage determination rate for a job classification is the negotiated rate. With specific regard to Miami's tabulation of the allegedly distinct duties performed by elevator constructor helpers and mechanics, the Administrator noted that there was no evidence that union contractors who performed elevator construction work in Hillsborough County (Tampa) restricted the duties of elevator constructor helpers in the manner that Miami claimed to have employed on the Tampa project, *i.e.*, with helpers allegedly not performing any of the tasks of elevator mechanics. AR Miami Tab A. Miami submitted a petition for review to this Board, which was docketed as ARB Case No. 98-086.

C. Procedural history before the Administrative Review Board.

Miami filed a request that the above-captioned cases be consolidated, and Mid-American filed a notice of intent to participate and brief in Miami's appeal, ARB Case No. 98-086. In light of the common evidence and issues presented, and in the interest of administrative economy, these cases were consolidated by Order of the Board issued on May 8, 1998. *See* Fed. R. Civ. P. 42(a), as made applicable by 29 C.F.R. §18.1(a) (1997) and Fed. R. App. P. 3(b). The International Union of Elevator Constructors, AFL-CIO (IUEC), intervened and filed briefs in both matters. All four parties – Miami Elevator, Mid-American Elevator, the IUEC, and the Administrator – participated in oral argument before the Board on June 4, 1998.^{2/}

III. STANDARD OF REVIEW

The Board's review of the Administrator's rulings is in the nature of an appellate proceeding. 29 C.F.R. §7.1(e). We assess the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act. *Dep't of the Army*, ARB Case Nos. 98-120, 98-

^{2/} In connection with the Board's hearing in June 1998, the Board was given a copy of an arbitration decision issued by arbitrator Stephen L. Hayford on March 2, 1998, *Mid-American Elevator Co., Inc. v. Int'l Union of Elevator Constructors, Local No. 2*, FMCS Case No. 97-13958. The arbitration related to a claim by Mid-American that IUEC Local 2 failed to cooperate in the company's efforts to obtain approval of the Davis-Bacon helper conformance, and that the alleged lack of cooperation was a violation of the labor agreement. We have reviewed Arbitrator Hayford's decision, but conclude that it is irrelevant to the specific issues presented to the Board in these cases, *i.e.* whether the elevator constructor helper classification meets the Administrator's express standard.

121, 98-122 (Dec. 22, 1999), slip op. at 16 (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C. §351 *et seq.*), *citing ITT Federal Services Corp. (II)*, ARB Case No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA Case No. 92-01 (Aug. 28, 1992). The Board generally defers to the Administrator as being “in the best position to interpret those rules in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator’s interpretation aside.” *Titan IV Mobile Service Tower*, WAB Case No. 89-14 (May 10, 1991), slip op. at 7, *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

V. DISCUSSION

In this discussion, we consider the following issues:

(1) Whether the Acting Administrator erred in concluding that the elevator constructor helper classification cannot be recognized under the 3-part helper test because:

(a) the duties of elevator constructor helpers are not distinguishable from the duties performed by elevator constructor mechanics; and

(b) elevator constructor helpers are trainees in an informal training program.

(2) Whether the Administrator’s conclusion that the elevator constructor helpers could not be classified and paid as “skilled laborers” is consistent with the statute and regulations, and reasonable.

(3) Whether the Administrator's decision not to recognize the elevator constructor helper classification is consistent with the Davis-Bacon Act, when the use of elevator constructor helpers is a locally prevailing practice and the Administrator’s decision arguably represents a change in longstanding practice when issuing DBA wage determinations.

A. Whether the Acting Administrator erred in concluding that the elevator constructor helper classification cannot be recognized under the 3-part helper test because the duties of elevator constructor helpers are not distinguishable from the duties performed by elevator constructor mechanics, and/or elevator constructor helpers are trainees in an informal training program.

As discussed in detail above, prior to 1982 the Administrator developed an uncodified 3-part test for determining when to recognize a helper classification and publish the job title and wage rate in a Davis-Bacon wage determination (separate and distinct duties, prevailing practice in the locality, and not an informal trainee program). This standard had been sanctioned as reasonable in a series of Wage Appeals Board rulings. *See pp. 5-7, supra.* From 1982 until the early 1990's, the Department attempted to implement a different, supervision-based approach to recognizing helpers. Under this approach, it was not necessary that the helpers’ duties be distinct from the tasks

performed by journeymen; instead, helpers would be recognized on Davis-Bacon jobs and could perform many of the same tasks as journeymen, so long as they were *supervised* by journeymen. *Supra*, pp.7-8. By 1993, however, the Department abandoned efforts to implement the 1982 helper regulation, and reverted to the earlier 3-part helper test. *Supra*, pp. 8-9.

In their submissions to the Administrator and to the Board, both Miami and Mid-American have conceded that the issue is whether the elevator constructor helper classification meets all the elements of the 3-part helper test. Moreover, there is no dispute among the parties that employing helpers is the prevailing practice among elevator contractors in the two localities (Chicago and Tampa); thus, the “second prong” of the 3-part helper test is not at issue here. In this section of the discussion, we review the arguments advanced by the parties concerning (1) whether the helpers’ tasks are “clearly defined and distinct” from the tasks performed by mechanics (the first element of the test), and (2) whether the helpers are trainees in an informal training program (the third element). We then follow with our analysis of these issues.

1. Whether elevator constructor helpers perform tasks that are “clearly defined and distinct” from the tasks performed by elevator mechanics.

In the final decision letters issued to each of the two contractors, the Administrator (through his designee) offered the following explanation for his conclusion that the duties of the elevator constructor helper were not “clearly defined and distinct” from those of the mechanic:

The Standard Agreement between the National Elevator Industry Inc. (NEII) and the International Union of Elevator Constructors (IUEC), which provides the context for determining the prevailing practices of union contractors in the elevator construction sector of the construction industry, discusses helpers in “Article X.” Paragraph 1 of Article X, entitled, “Designation of Helper’s Work and Qualifications,” states that “there shall be no restrictions placed on the character of work which a Helper may perform under the direction of a Mechanic.” Further provisions in Article X allude to training modules which may be completed before a helper becomes a fully qualified mechanic, and conditions under which some helpers who have not completed all of these modules may be employed as “Temporary Mechanics.” Thus, the collective bargaining agreement indicates that the duties of helpers employed by union contractors who are signatories to the Agreement may overlap [with the duties of elevator mechanics].

AR Miami Tab A at 3-4; AR Mid-Am Tab A at 3. Significantly, this language from the Standard Agreement is the sole basis articulated for the Administrator’s conclusion that the duties of elevator mechanics and helpers overlap.^{10/}

Both Mid-American and Miami challenge the Administrator’s conclusion, albeit taking different approaches.

Mid-American’s Petition for Review – In its Petition for Review, Mid-American relies on the arguments it raised earlier to the Administrator. Mid-American challenges the Administrator’s *interpretation* of the language found in Article X of the Standard Agreement:

There is no way . . . that one can look at Article X as a whole – or for that matter the agreement as a whole – and logically conclude that the Helpers do not have clearly defined and distinct duties from those of the Mechanic classification. While the Mechanics are free to delegate whatever duties they see fit to the Helpers, the Helpers simply cannot do the same skilled tasks unless closely supervised and directed by a Mechanic. In fact, the agreement makes clear that Helpers are not allowed to do anything without supervision by a Mechanic, nor are they allowed to have their own tools. Even with respect to the less complex work assignments they may be delegated, they must be told what to do and how to do it by the Mechanics, who are responsible for overseeing and making sure the Helpers are doing the assigned task right.

^{10/} Because Miami Elevator earlier had submitted to the Administrator a document purporting to list the differing duties that the company had assigned to elevator helpers and mechanics on the Tampa courthouse project, the Administrator’s final decision letter to Miami also addressed Miami’s material. However, the Administrator discounted Miami’s data submission by relying on the same language from the Standard Agreement quoted above, observing also that he (the Administrator) had “no evidence to suggest that it was the practice among union contractors who performed elevator construction work. . . [in Tampa] to restrict the duties of elevator constructor helpers” along the lines implemented by Miami Elevator. *See* AR Miami Tab A at 3-4.

PR Mid-Am^{11/} at 2. In arguing that the helper job is distinct from the mechanic position, Mid-American analogizes the relationship to the distinction made between doctors and nurses or paramedics:

Taken to its logical extension, the Department’s position that the Mechanics and Helpers are indistinguishable because the Helpers perform some of the same tasks as the Mechanics is the same as saying that a paramedic’s or nurse’s duties are indistinguishable from those of a physician because they do many of the same functions in administering health care. But clearly physicians perform at a higher level of skill because they have the superior training and experience and comprehend the theory and science behind their craft. That advanced knowledge and skill is recognized by their licensure. Physicians know how to diagnose a medical problem and know what medical treatment to prescribe. The fact that the nurse may then administer that prescribed treatment just as the physician himself might would not make the nurse’s duties indistinguishable from the physician’s.

PR Mid-Am at 3.

Miami Elevator’s Petition for Review – In its Petition, Miami notes the Administrator’s long-standing recognition of the elevator constructor helper classification, pointing out that the Department explicitly had mentioned the prevalence of the elevator constructor helper classification

^{11/} In this decision, the submissions of the parties are abbreviated as follows:

Mid-American Elevator Co., Inc.’s Petition for Review (Sept. 11, 1997)	PR Mid-Am
Miami Elevator Company’s Petition for Review and Request for Consolidation (Feb. 28, 1998)	PR Miami
Acting Administrator’s Response to Petition for Review (Mid-American Elevator case, Oct. 20, 1997)	Admin Resp - Mid-Am
Acting Administrator’s Response to Petition for Review (Miami Elevator case, Apr. 17, 1998)	Admin Resp - Miami
Reply Brief of Intervenor International Union of Elevator Constructors (Mid-American Elevator case, Nov. 4, 1997)	IUEC Reply - Mid-Am
Reply Brief of Intervenor International Union of Elevator Constructors (Miami Elevator case, May 4, 1998)	IUEC Reply - Miami
Petitioner’s Reply Brief in Support of Petition for Review (Mid-American Elevator case, Nov. 18, 1998)	Reply - Mid-Am
Petitioner’s Reply (Miami Elevator, May 4, 1998)	Reply - Miami

when issuing the final rule in 1996 suspending the 1982 helper regulations. PR Miami at 4; *see* 61 Fed. Reg. 68641, 44 n.3 (Dec. 30, 1996) (“Fifteen of the 21 union help [sic] classifications were elevator constructor helpers – a classification historically recognized nationwide in the union sector of the elevator constructor trade.”) (emphasis added). Miami also points to its earlier tabulation of the claimed “separate and distinct” job duties of helpers and mechanics on the Tampa courthouse job (AR Miami Tab D), submitted to the Administrator as part of the conformance request, as further evidence in support of its claim that the helpers perform tasks different from the mechanics.

Administrator’s Reply Briefs – The Administrator submitted similar, very brief statements in response to each of the two Petitions. Citing the Wage Appeals Board’s decision in *Rost Electric Co., Inc.*, WAB Case No. 90-10 (May 24, 1991), the Administrator emphasizes the primacy of the 3-part helper test and argues that the elevator constructor helper’s duties are not “clearly distinct” from those of elevator mechanics, based on the language from the Standard Agreement (quoted *supra* at 18). Admin Resp - Mid-Am; Admin Resp - Miami.^{12/}

In response to Miami’s arguments that the company (Miami) segregated the tasks performed by helpers and mechanics on the Tampa courthouse job, the Administrator questions the legal significance of the company’s claim. Citing *Fry Brothers Corp.*, WAB Case No. 76-6 (June 14, 1977), the Administrator suggests that the *specific* practices of Miami Elevator on the Tampa courthouse project are not controlling; instead, when the rates in a wage determination are based on a collective bargaining agreement (as is the case with the elevator mechanic classification in Tampa), it is the *general* union work practices under the labor agreement that must be followed on jobs subject to the Davis-Bacon Act. Admin Resp - Miami at 6.

Reply briefs of Intervenor International Union of Elevator Constructors, and the Petitioners’ Responses – The International Union of Elevator Constructors submitted reply briefs in both cases. Although the IUEC does not express unqualified support for the Administrator’s policy, the union asserts that both Miami and Mid-American misrepresent the facts when claiming that the duties performed by elevator constructor helpers on the Chicago and Tampa construction projects are “separate and distinct” from the work performed by the elevator mechanics:

For many years, the collective bargaining agreements negotiated by the IUEC have recognized a helper classification, which is paid at a lesser rate than the mechanic. Thus, the Union can hardly object in principle to the use of helpers on construction projects. What the Union does object to, and what it seeks to address in this reply brief, is Mid-American’s distortion of the facts in order to squeeze itself into the Procrustean bed of DOL’s established test for recognizing a helper classification. The IUEC did not urge DOL to adopt that particular test; but as long as it is to be employed, the Union believes

^{12/} With regard to Mid-American’s claim that the Administrator misconstrues the Standard Agreement, the Administrator specifically charges that Mid-American’s argument is based on an incomplete quotation from Article IX, Paragraph 2 of the Standard Agreement – a quotation the Administrator asserts is misleading. Admin Resp Mid-Am at 6.

it should be administered fairly and with due regard to the evidence. The evidence in this case does not support the conclusion that under DOL's test, an elevator constructor helper classification should be recognized on this particular [Chicago Housing Authority] job.

IUEC Reply - Mid-Am at 9; *accord*, IUEC Reply - Miami at unnumbered p.8. In support of this proposition, the IUEC attached a series of affidavits to its Reply Briefs, including an affidavit of the union's former Director of Organizing, John Quackenbush, and individual affidavits from elevator mechanics who worked for Miami and Mid-American on the two construction projects at issue in these conformance cases. In all instances, the affidavits support the proposition that although there is a hierarchy of responsibility among the elevator crew on the projects (mechanics being in charge, and helpers assisting in a subordinate capacity), the two classifications are substantially integrated in their work and there is substantial overlap in the tasks they perform. *Id.*, *see attachments*.

Mid-American submitted a reply in response to the briefs of the Administrator and the IUEC. Mid-American asserted that the instant dispute is similar to the situation considered by the Wage Appeals Board in *Hawk View Apartments*, WAB Case No. 85-20 (Apr. 24 1986), and that the Administrator's decision not to recognize the elevator constructor helper neither "advances or even reflects the basic purposes of the Davis-Bacon Act, *i.e.*, to 'hold . . . a mirror up to local prevailing wage conditions and reflect . . . them.'" Reply - Mid-Am at 4, *quoting Hawk View*, slip op. at 8. In rebuttal to the IUEC's affidavits, Mid-American submitted an affidavit by the company president, Robert R. Bailey III, contesting the premise of the IUEC affidavits that the tasks performed by helpers on the CHA project did not differ from the work of the mechanics. *See generally* Reply - Mid-Am.

Miami similarly submitted a short response to the Administrator's brief in its appeal, noting alleged weaknesses in the Administrator's efforts to explain away the documents Miami had proffered with its Petition (*i.e.*, Opinion WH-202, the *Hawk View* decision, and a copy of a conformance decision issued by the Division to the Rome Housing Authority in July 1997). *See generally* Reply - Miami.

2. Whether elevator constructor helpers are trainees in an informal training program.

In his final decision letters, the Administrator expressed the view that the helper classification is an informal (*i.e.*, unregistered) training program, and its participants therefore are informal trainees. Under this reasoning, the classification fails the third element of the 3-part test. AR Mid-A, Tab A at 3-4; AR Miami Tab A at 5. The Administrator noted that the Standard Agreement refers to a national training program for elevator constructor helpers, but that the program has never been registered as an apprentice or trainee program with federal or state agencies. *Id.*

Neither Mid-American nor Miami argues that the elevator constructor helper classification meets the requirements of the formally-recognized apprentice or trainee programs. Instead, Mid-American asserts that the Administrator's reasoning on the "informal trainee" issue is circuitous, essentially the result of an incorrect conclusion regarding the "separate and distinct duties" test.

Under Mid-American's argument, the "informal trainee" issue disappears once the elevator constructor helper is correctly recognized as an entirely separate class of worker "whose function is to assist the Mechanics." PR Mid-Am at 3.

Miami offers an argument on this point that focuses on history, declaring that the helper classification and training program existed during the many years when the Wage and Hour Division recognized the job title, yet the existence of the training program had never been viewed as an impediment to approving the helper position under the 3-part test. Moreover, Miami represents that many helpers do not seek training to become journeymen and do not go through the steps required to become mechanics. PR Miami at 6-7. In its Reply brief, Miami asserts that the company "has no requirement that its helpers participate in any training program" and that "many" of its helpers have worked in the classification for years, with no desire to become a mechanic. Reply Miami at 4.

The IUEC does not offer argument with regard to the training issue, but notes in its Reply to the Mid-American Petition that the Standard Agreement (Art. X, ¶4) provides that helpers are eligible to become mechanics only after working in the trade for three years and completing the training courses and an examination. IUEC Reply Mid-Am at 3-4; *see also* AR Mid-Am, Tab E (Standard Agreement).

Analysis – Mid-American and Miami each argue that elevator constructor helpers perform duties that are separate and distinct from the duties performed by elevator mechanics, and are not trainees in an informal (*i.e.*, unregistered) training program. In his final decision letters, the Administrator has concluded otherwise; the Administrator's position regarding the duties of the helpers and mechanics is endorsed by the IUEC, the Intervenor. Based upon the record before us, it is clear that the Administrator has reached the better conclusion.

"Clearly defined and distinct duties" issue– At the outset, it must be acknowledged that the Administrator's own efforts to justify his decision are conspicuously weak. The initial letters from Wage and Hour Division Section Chief Sullivan to the contracting agencies (GSA, HUD) merely cite to the DBA conformance regulations and restate the 3-part test for recognizing helper classifications, then conclude with the bald declaration that "[n]o information has been submitted to suggest that these tests are met with regard to the helper classification proposed in the case." AR Miami Tab E, AR Mid-Am Tab C. The Section Chief offers no meaningful analysis of his reasons for rejecting the Petitioners' arguments, notwithstanding the fact that Miami Elevator had submitted a copy of the 1973 Opinion WH-202 (seeming to suggest that a helper classification found in a collective bargaining agreement presumptively would be approved), and Mid-American had noted that these same elevator constructor helpers routinely had been recognized on Davis-Bacon projects in the past. AR Miami Tab F; AR Mid-Am Tab E.

The Administrator's final decision letters are not much more enlightening. By the time the Administrator issued his final decisions in these cases, Miami had augmented its evidence with an extended tabulation of the responsibilities of elevator helpers and mechanics on the Tampa courthouse job. AR Miami Tab D. Mid-American again had questioned why the elevator helper had been recognized routinely for many years under the 3-part test, but now was deemed not to meet the

same test; in support of its conformance request, it had offered a concise justification for its view that the duties assigned to the helper classification were distinct from mechanics' duties. AR Mid-Am Tab B.

In the final decision letters, the Administrator admits that the Wage and Hour Division had a long tradition of recognizing the elevator helper classification, but merely declares without explanation that the “practice was reviewed, and it has been discontinued.” AR Miami Tab A, AR Mid-Am Tab A. Nowhere is there a discussion suggesting that changed work practices in the elevator construction industry prompted the shift in practice, nor is there any explicit claim that the Administrator had reassessed the relationship between the helpers and mechanics and concluded that his prior practice had been in error.

The sole argument advanced by the Administrator in support of his conclusion that the duties of the elevator helper overlap with those of the elevator mechanic (thereby precluding recognition under the 3-part helper test) is the Administrator's interpretation of Article X of the Elevator Industry's Standard Agreement. The Administrator does not cite any facts regarding actual field practices to support his interpretation of the labor contract, nor does he claim that his conclusion was based on the general experience of the Wage and Hour Division. We have reservations about using this approach (*i.e.*, interpreting collective bargaining agreement language) as the sole justification for changing a Wage and Hour Division practice having broad implications nationwide to a major segment of the construction industry.^{13/} Although the text of a labor agreement may be of some value in reaching conclusions about the relationship between the elevator mechanics and elevator helpers, the phraseology of a collective bargaining agreement often involves subtle industry-specific concerns that may be clear to the parties to the contract, but may not be apparent to outsiders. Indeed, Miami and Mid-American – both parties to the Agreement, and who operate under it daily – flatly dispute the Administrator's interpretation of the Standard Agreement provisions. Although the Administrator and the Wage and Hour Division can lay claim to extensive expertise on construction industry practices based on their DBA enforcement activities, we are uncertain that the Administrator can claim similar expertise in the area of interpreting work assignment language found in a collective bargaining agreement. Under the existing DBA regulatory scheme, decisions regarding appropriate job classifications under the Davis-Bacon Act ultimately should be centered on some form of fact-based analysis (for example, area practice data, reliance on the Administrator's expertise, or other data); parsing the clauses of a collective bargaining agreement is an imperfect substitute for an analysis based on evidence of duties actually performed.^{14/}

Although we would have reservations about the Administrator's final decisions if they were supported in the record solely by the text of the labor agreement, the materials submitted by the

^{13/} In the Administrator's defense, we note that the Wage Appeals Board also relied heavily on interpreting labor agreement texts in two cases relating to helper classifications. See *De Narde Construction Co.*, WAB Case No. 78-03 (May 14, 1979), slip op. at 4; *Clevenger Roofing and Sheet Metal Co.*, WAB Case No. 79-14 (Aug. 20, 1980), slip op at 4.

^{14/} In making this observation, we do not diminish the continuing vitality of the Wage Appeals Board's decision in *Fry Brothers Corp.*, which provides a mechanism for determining the content of various job classifications already found in a wage determination.

Petitioners and their accompanying argument make clear that the Administrator's ultimate conclusion is correct, *i.e.*, that the elevator helper classification cannot be recognized under the 3-part test because there is substantial overlap between the tasks performed by helpers and mechanics. For example, Miami's tabulation of 21 phases of elevator construction work (AR Miami Tab D), purporting to demonstrate that helpers perform separate tasks from mechanics, is more plausibly interpreted as supporting the Administrator's conclusion. In virtually every instance, the elevator helper is described by Miami as assisting the elevator mechanic in performing the work of the trade, or the helper is described as performing work of the trade at the direction of the mechanic (*e.g.*, preparing hardware, connecting wiring systems, mounting electrical boxes, working with mechanics in moving materials and beams, etc.). While the tabulation plainly points to the hierarchical nature of the relationship (mechanics in charge, helpers performing as directed), and also suggests that higher-skilled work is performed by the mechanics, the overall message is that the mechanics and helpers essentially are working as a 2-person team on all major tasks.

Similarly, Mid-American declares that

a Helper cannot do the more skilled tasks a Mechanic performs *unless closely supervised and directed by a Mechanic*. For example, Helpers are not allowed to work unsupervised or to have their own tools. *They might be able to do a particular less complex work assignment that a Mechanic will do*, but they must be told what to do and how to do it by the Mechanic, who is responsible for reviewing and making sure the Helper is doing right. A Helper is never allowed to work on an assignment or project without a Mechanic being present and working with him.

AR Mid-Am Tab B at 2 (underscore in original, italics added). Here again, the contractor plainly is indicating that the helper is performing work of the elevator constructor craft as part of a team, with the key demarcation between the mechanic and helper classifications being the relative levels of skill and responsibility. This relationship is consistent with the type of supervision-based helper that would have been recognized under the now-superseded 1982-89 DBA helper regulation, but it is inconsistent with the "separate and distinct duties" element of the Administrator's 3-part test for recognizing helpers that currently is in effect.

In addition, Mid-American notes that helpers who have completed certain training modules may be allowed to work as Temporary Mechanics; this observation also suggests a significant overlap between the work of helpers and mechanics, because if helpers were *not* performing many of the duties of mechanics, it is implausible that they would be sufficiently skilled to move immediately into \$25.29/hr. mechanic positions based merely upon classroom instruction. PR Mid-

Am at 2-3.^{15/} In sum, it is apparent that the Administrator's conclusion that the work of the helper is not distinct from tasks performed by the mechanic is correct.^{16/}

“Trainees in an informal training program” issue – Our review of the record in connection with the “informal training program” issue similarly leads us to conclude that the Administrator is correct. In its brief to the Board, Miami notes that the Wage and Hour Division recognized the elevator helper classification on Davis-Bacon jobs for many years without expressing concern that the classification failed to meet the third element of the 3-part test. Moreover, Miami notes that “[m]any helpers never seek any training to become journeymen and have no desire to go through the steps necessary to enter that classification.” PR Miami at 6. Similarly, Mid-American observes that “. . . a helper does not have to complete a training program as a condition of continued employment. A helper can become a 'permanent' helper.” Reply Mid-Am at 8. Mid-American also is critical of the Administrator's observation in the final decision letters that the IUEC and the management side of the elevator construction industry once considered registering an apprenticeship program, but declined to do so; Mid-American argues that the decision not to register an apprenticeship program does not by itself imply that helpers are, perforce, informal trainees. PR Mid-Am at 3; AR Miami Tab A; AR Mid-Am Tab A.

We agree with Mid-American that the elevator industry's decision not to register an apprenticeship program does not *per se* mean that helpers are participants in an informal training program. We could not reach such a conclusion, because the record is silent on the content such an apprenticeship program would include and what relationship, if any, an apprenticeship program would have to the elevator helper classification. However, the Administrator is correct that the Standard Agreement describes repeatedly the training function that is associated with the elevator helper classification, which is the entry-level classification in the industry. It is apparent that new workers ordinarily are hired as helpers, are provided with training and experience, and at some point

^{15/} Both the IUEC and Mid-American attached evidentiary materials to their briefs that were not considered by the Administrator during his deliberations, and therefore are not part of the Administrative Record in this case. In reviewing final decisions of the Administrator in Davis-Bacon Act cases, the Administrative Review Board's role is to provide appellate review of the Administrator's decisions “on the basis of the entire record before it.” 29 C.F.R. §§7.1(3), 7.9(f). Our primary focus is on the record that was developed before the Administrator, which informed the Administrator's deliberations. To the extent that we review extra-record materials that accompany a petition for review or other pleadings – *i.e.*, materials that were not previously submitted to the Administrator – our limited concern is to decide whether they raise questions that warrant a remand to the Administrator for additional evaluation. See *Dep't of the Army*, slip op. at 11, n. 10 (under the Service Contract Act); *COBRO Corp.*, ARB Case No. 97-104 (July 30, 1999), slip op. at 12, n.10 and cases cited therein (same); see also 29 C.F.R. §7.1(e). In this case, we have examined the extra-record submissions and conclude that they tend to confirm the Administrator's decision, and that no remand is warranted.

^{16/} Mid-American's attempt to analogize the relationship of elevator mechanics and helpers under the DBA to the relationship between medical doctors and paramedics/nurses with regard to the FLSA's professional exemption (PR Mid-Am at 3) is inapposite. The two statutes have different objectives and enforcement schemes. We agree with the Administrator that the analogy is invalid, and therefore does not merit extended discussion here.

are allowed to rise to journeyman level by taking an examination. And Miami's assertion that some trainees never rise to the journeyman mechanic level serves to support the very distinction that the Administrator makes – *i.e.*, that the helpers essentially are participating in an informal training program – because one of the hallmarks of the registered apprenticeship and trainee classifications that are approved for Davis-Bacon purposes is that the workers who participate in these organized programs of instruction ultimately complete the programs and move onward to higher-level classifications; the apprentice and trainee positions are not terminal classification in themselves. *See, e.g.*, 29 C.F.R. §29.5. Although the record on this question is slim, we find that it too supports the Administrator's final decisions that the elevator helper classification does not meet the requirements of the third element of the Administrator's 3-part test.

B. Whether the Administrator's conclusion that the elevator constructor helpers could not be classified and paid as "skilled laborers" is consistent with the statute and regulations and reasonable.

Citing language found in All Agency Memorandum No. 174, Miami Elevator argues that if the Administrator does not approve the conformance request, then the proper remedy is to reclassify its elevator constructor helpers as "skilled laborers." PR Miami at 7; AR Miami Tab D at unnumbered p. 4. Miami relies upon the following text from the Wage and Hour Division's 1993 directive to contracting agencies:

The Department will continue to take action to ensure that workers erroneously classified as helpers are reclassified as journey-level workers or laborers in accordance with the work performed (those cases, for example, where employees perform work solely of a skilled nature, where individuals do not work under the supervision and direction of a journey-level classification, or where workers perform duties beyond the duties performed by helpers pursuant to the practice in the area).

AAM No. 174 at 3.

Miami misconstrues the language and intent of the All Agency Memorandum. The laborer classification is not a default option that automatically is available to construction contractors in the event that a helper classification is not recognized. Just as the various mechanic classifications each have well-defined collections of tasks that in the aggregate define "the trade" under the Act and the regulations, so too does the laborer craft have its own distinctive duties in each locality. Based on Miami's tabulation of the tasks performed by elevator constructor helpers (AR Miami Tab D), it is clear that the helpers are engaged actively in performing the work of the elevator construction trade and, absent their participation in a registered apprentice or trainee program, must be paid as elevator mechanics pursuant to 29 C.F.R. §5.5(a)(4). The Administrator therefore is correct in finding that the elevator helpers are not to be classified as "skilled laborers."

C. Whether the Administrator's decision not to recognize the elevator constructor helper classification is consistent with the Davis-Bacon Act, when the use of elevator

constructor helpers is a locally prevailing practice and the Administrator’s decision arguably represents a change in longstanding practice when issuing DBA wage determinations.

In addition to its fact-based argument that elevator helpers perform duties that are distinct from those of mechanics, both Petitioners assert more general legal arguments challenging the Administrator’s decision. Mid-American focuses on the undisputed fact that using helpers in the elevator industry is prevailing local practice, arguing that the Administrator’s decision results in classification practices that do not “hold . . . a mirror up to local prevailing wage conditions and reflect . . . them.” Reply - Mid-Am at 4, *quoting Hawk View*, slip op. at 8.

Miami raises arguments tied to three Labor Department documents relating to the recognition of helpers on Davis-Bacon jobs that it views as precedential: (1) the Wage Appeals Board’s 1986 decision in *Hawk View Apartments*; (2) a July 1997 conformance decision involving elevator mechanic helper job classifications issued by the Wage and Hour Division for a Rome Housing Authority (New York) construction project; and (3) a 1973 opinion letter issued by the Wage and Hour Division, Opinion WH-202 (Mar. 1, 1973), *available at* BNA WH Manual 99:1113.

Hawk View Apartments – As today, the 1986 *Hawk View* decision was issued by the WAB during a period when the 3-part helper test was the standard being used by the Wage and Hour Division. The *Hawk View* dispute arose on a low-income housing project in Reno, NV, which was subject to both the labor standards provisions of the Davis-Bacon Act and the Nevada state prevailing wage law. The Labor Department’s DBA wage schedule included “plumber” and “sheet metal worker” classifications and wage rates that were based on the local union rates; however, the DBA wage determination did not include classifications and wage rates for “plumber’s helpers,” “irrigation plumber’s helpers” or “utility man,” even though the collective bargaining agreements included these subjourneyman classifications. In contrast to the DBA wage determinations, however, the Nevada state prevailing wage determination recognized these classifications. Both the DBA and the Nevada wage determinations were included in the specifications applicable to the housing project.

The prime contractor on the project and the Reno Housing Authority submitted conformance requests to the Wage and Hour Division seeking to add the helper and utility man classifications; the requests were denied. The Housing Agency began withholding funds from the contractor in connection with wage underpayments to the helpers and utility men.

An appeal to the Wage Appeals Board followed, and the Board reversed the Administrator’s decision and approved the conformance of the helper classifications in a 2-member majority opinion, joined by a separate concurrence by Member Thomas Dunn. The Board’s 2-member majority opined that under the specific facts of the *Hawk View* case,

it would not effectuate the purposes of the Act to assess a remedy as though the basic purposes of the Davis-Bacon Act had been violated. . . . The Board will not go on to consider whether there may have been fine technical violations of the Department of Labor’s

regulations – regulations which may be out of touch with the applicable Nevada local practice.

Hawk View, slip op. at 5. The majority was heavily swayed by the fact that the use of plumber’s helpers and utility men reflected local practice as evidenced by the Nevada state prevailing wage determination, and that all the local bidders on the project probably would have used the same staffing patterns. In the Board’s words:

In this case, the majority concludes that any local area contractor conforming to local practice as well as local negotiated agreements who bid the instant job would not have done it any differently than the way that it was performed here.

One of the classical statements oft repeated with respect to the Davis-Bacon Act is that the Act holds a mirror up to local prevailing wage conditions and reflects them. The majority concludes that it would not effectuate the purposes of the Act to establish a double standard; one which pertains to local area practice established by the State of Nevada under its Prevailing Wage Law derived wholly from negotiations between crafts and employers in the construction industry for private construction without Davis-Bacon Act funds, and another set of standards that applies only to federally financed or federally aided programs subject to the Davis-Bacon Act.

Id., slip op. at 7-8.

Member Dunn reached the same result in his concurrence (*i.e.*, reversing the Administrator and approving the addition of the helper rates), but through a different analysis. In Dunn’s view, it was appropriate to approve the helper and utility man wage rates simply because the *journeyman* wage rates in the wage determination were based on union scale, and the underlying *collective bargaining agreements* recognized the subjourneyman classifications:

In this case there is no dispute that the helper and other subjourneyman classifications requested by the petitioner reflect locally prevailing practice in the Reno, Nevada, area. The impediment to their approval by the Assistant Administrator was that the scope of duties of each of the proposed classifications was not clearly defined and distinct from the journeyman’s duties. All that is held in this case is that *where the Wage and Hour Division determines that the prevailing rate for a classification of laborer and mechanic is equivalent to the wage rate negotiated in a collective bargaining agreement applicable to the same classification of laborer and mechanic in the locality, the work practices adopted in that agreement, including recognition of helper and other subjourneyman classifications, shall also be recognized as prevailing.*

Id., concurrence of Member Dunn, at 12 (emphasis added).

In its Petition, Miami calls to the Board's attention both the majority opinion and the concurrence in *Hawk View*, asserting that these opinions offer strong support for its view that the Administrator should have recognized the elevator helper classification because such recognition would be consistent with the "basic principles of the Act," and specifically with Member Dunn's view that the presence of the helper classification in the collective bargaining agreement – the source of the prevailing elevator mechanic wage rate – should be sufficient to merit publication of the negotiated helper wage rate. PR Miami at 4-5.

Wage and Hour Division's Rome Housing Authority conformance action (July 24, 1997) – Miami also notes that in July 1997 (*i.e.*, roughly during the same time period when Miami and Mid-American were seeking to add the helper classifications through the conformance process), the Wage and Hour Division issued a conformance decision to the Rome (New York) Housing Authority approving the addition of an "Elevator Mechanic" classification to a wage determination at the wage rate normally paid to the elevator constructor *helper*. AR Miami Tab C. Miami asserts that the Administrator's decision denying the conformance request for the Tampa courthouse project is a "departure from the precedent established only last summer by the Rome, New York conformance approval." PR Miami at 6.

Neither Miami nor the other parties to this proceeding offers any explanation of the events leading up to the Rome Housing Authority conformance action. However, we note that the Rome Housing Authority requested that *both* Elevator Mechanic (\$22/hr., plus benefits) and Elevator Mechanic, Helper (\$15.40/hr., plus benefits) job classifications be added to the wage determination applicable to the housing project. If the wage determination had included an elevator mechanic classification and wage rate, there would have been no need to ask that a mechanic rate be added through the conformance process. Thus, we infer that the original wage determination did not include *any* job classification for performing elevator construction work (*i.e.*, neither the elevator mechanic or the elevator helper position).

In response to the conformance request, the Wage and Hour Division declared that a helper classification would not be approved unless it met the 3-part test, and that the requested Elevator Mechanic, Helper classification would not be approved without a showing by the Housing Authority that the position met all the criteria of the test. However, the Wage and Hour Division expressed a willingness to establish the Elevator Mechanic *at the lower wage rate that had been proposed for the Helper* (*i.e.*, \$15.40/hr. plus benefits). As a result, the conformance action technically *denied* the addition of the Helper job classification, but *approved* the conformance of the Mechanic classification at the lower wage rate normally paid to the Helper. Miami argues that the Administrator's denial of its conformance request on the Tampa project is inconsistent with the Administrator's willingness to publish an elevator *mechanic* classification at an elevator *helper* wage rate in the Rome Housing Authority action.

Opinion WH-202 – In support of its Petition, Miami also cites Opinion WH-202 (BNA WH Manual 99:1113), an opinion letter issued by the Assistant Wage and Hour Administrator in 1973, which addresses the circumstances under which the Division would recognize a helper classification

under the Davis-Bacon Act. PR Miami at 5. In relevant part, the Opinion provided the following guidance, apparently addressed to the Department of Housing and Urban Development:

“Carpenter’s helper” and other such subclassifications are included in construction wage determinations . . . when the information available indicates that a practice of using such a classification prevails in the area. . . .

When information available to the Department shows the prevailing rate for carpenters, for example, to be the same as the local union rate, the Department will conform to union negotiated practice insofar as any subclassification such as helper is concerned. If such a classification is included in the negotiated agreement, the Department will include the classification in applicable decisions. The duties ascribed to the position by the Department will be the same as those contemplated in the agreement.

With the exception of a situation where negotiated rates prevail as described in the preceding paragraph, specific statements with universal application cannot be made regarding the proper distinction between a “helper” and a “laborer” or the extent to which either may use “tools of the trade.” . . .

* * *

The Department will not, without a clear showing of prevailing practice, issue or approve helper classifications when in local usage this classification is actually an informal trainee position. [The Davis-Bacon] Regulations . . . provide for the use of apprentices and trainees on projects subject to Davis-Bacon requirements. Such classifications are not, and need not be, included in the wage determination.

Id. Miami argues its requested elevator constructor helper classification fits squarely within the standard articulated by Opinion WH-202. In Miami’s view, if the Department is to “conform to union negotiated practice insofar as any subclassification such as helper is concerned[,]” *id.*, it follows that the elevator constructor helper classification should be recognized in connection with the wage determination applicable to the Tampa project because it is undisputed that the employment of the helper classification prevails in the locality, and the prevailing wage rate for the elevator mechanic is based on the collectively-bargained rate.

Administrator’s Reply—In response to Miami’s legal arguments, the Administrator discounts the significance of the documents cited by Miami. Admin Resp - Miami at 7-8. The Administrator characterizes the Wage Appeals Board’s decision in *Hawk View* as “a questionable anomaly,” incorrect legally because the decision (a) was inconsistent with the Department’s Davis-Bacon

regulations and (b) was based upon unusual facts. *Id.* With regard to Opinion WH-202, the Administrator asserts that the document “merely repeats the longstanding position . . . that helpers will be recognized if their use is an established prevailing practice in the area,” and declares further that “to the extent that a 25-year old opinion may be construed to be at odds with current regulations, the regulations are obviously controlling.” *Id.* at 8. The Rome Housing Authority conformance decision is distinguished from the instant conformance request, with the Administrator observing that his decision in the New York conformance case “did not allow the addition of a helper classification, but merely allowed a lower rate to be conformed to the wage determination for the mechanic classification.” *Id.* at 6 n.3.

Analysis – There can be little question that the Administrator’s decision to stop issuing elevator constructor helper wage rates as part of the Davis-Bacon wage determination process represented a notable change from long-standing practice. Although this Board (like its predecessor, the Wage Appeals Board) extends broad deference to the Administrator in interpreting the statute and regulations, the level of deference is diminished if “an interpretation [of the Administrator] . . . 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, *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). The Supreme Court has held that heightened scrutiny is merited by an adjudicator where an agency’s interpretation of a statute or regulation is a departure from prior interpretations. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30.

Although the Administrator’s decision to stop recognizing the elevator helper constructor classification might appear at first to fall within this category of “changed interpretation,” on closer examination it is clear that the core elements of the Administrator’s *policy* regarding the 3-part helper test did not change at all in these cases. Leaving aside the period when the 1982-1989 helper regulation was being developed and implemented, the Administrator’s articulation of the three elements of the helper test has been unchanged since the 1970’s, if not before. Certainly by the time the 1982-89 helper regulation was suspended in 1993, the Administrator’s articulation of the 3-part test was crystal clear. *See* 58 Fed. Reg. 58954 (Nov. 5, 1993). Thus, we are not really confronted in these cases with a change of policy, but with a reexamination of the facts and circumstances surrounding the elevator constructor helper classification, and how the 3-part test applies.

We consider first Mid-American’s argument that the Administrator’s decisions not to conform the elevator helper classification result in a staffing pattern that is inconsistent with locally prevailing practice. All of the elevator industry parties (Mid-American, Miami and IUEC) appear to be in agreement about the basic organization of elevator construction work, which most often revolves around paired crews of mechanics and helpers. Accepting this as true, and even accepting Mid-American’s argument that the Administrator’s denial of the conformance request produces a staffing pattern that is out-of-sync with prevailing practice, it does not follow that the Administrator’s decision is in conflict with either the statute or regulations and must be reversed.

In this regard, we note that the oft-repeated declaration that the purpose of the Davis-Bacon Act is to “hold . . . a mirror up to local prevailing wage conditions and reflect . . . them” on federal construction projects is a simplistic and inaccurate characterization of the statute. Reply - Mid-Am

at 4, quoting *Hawk View*, slip op. at 8. The statute is more complex than this. The goal of the Davis-Bacon Act is to ensure that the federal government’s construction program does not subvert local wage structures. To accomplish this objective, Congress has mandated that laborers and mechanics working on federal construction contracts must be paid no less than the local prevailing wage for their job classification, as determined by the Secretary of Labor. 40 U.S.C. §276a. Within the federal government, the Secretary is designated as the central authority responsible for devising the Act’s overall enforcement scheme. Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix.

From a purely logical standpoint, the underlying premise of the Davis-Bacon prevailing wage law is inconsistent with Mid-American’s claim that wage patterns on federal construction projects simply should “mirror” local wage rates. After all, it is virtually inevitable that *some* laborers and mechanics who work in a given jurisdiction are paid *less* than the prevailing wage rates determined by the Secretary, yet the congressionally-mandated prevailing wage scheme requires that *all* construction workers be paid not-less-than the prevailing rate when employed on a federal construction contract – even those workers who might otherwise be employed on non-Federal projects in the local construction industry at lower pay scales. The goal of the Act is not merely to replicate (or “mirror”) the full range of local pay scales, but to require that workers be paid at least the prevailing rate.

Moreover, the Davis-Bacon Act does not even address the issue of workers in training positions or subjourneyman classifications. Although it is clear that the Secretary has authority in some instances to include subjourneyman classifications within the overall prevailing wage scheme, particularly in light of the appellate court decisions in *Building and Construction Trades Dep’t, AFL-CIO v. Donovan, supra*, and *Building and Construction Trades Dep’t, AFL-CIO v. Martin, supra*, the historical record suggests that since the inception of the Act in 1935, the Secretary at all times has been highly selective in determining what subjourneyman classifications would be recognized on Federal construction projects, and at what wage and fringe benefit rates. Under the existing DBA regulations, only two subjourneyman classifications are recognized – apprentices and trainees – and in both cases, workers in these training classifications are allowed to be paid less than the prevailing laborer or mechanic wage for their craft *only* if they participate in training programs that have been approved by government agencies.^{17/}

In sum, the prevailing wage mechanism chosen by Congress always has included the possibility that some construction workers in a locality who normally earn less than the prevailing wage might earn more when employed on a project subject to the Act; similarly, the Secretary and the Administrator have a long history of limiting the circumstances under which workers in a training mode would be allowed to work on federally-funded projects, generally insisting that such workers be enrolled in government-approved training programs designed to promote quality training and prevent abuse. The fact that these forces combine to produce a staffing pattern that may not

^{17/} As discussed *supra* at 10, the helper classifications that can be recognized under the traditional 3-part helper test are not truly subjourneyman classifications, because the duties of such helpers are distinct from the duties of the journeyman. Conceptually, the helpers that are recognized under the 3-part test are closer to being a separate, specialized trade that functions in a serving capacity.

“mirror” local practice does not mean that the Administrator’s decisions are incorrect, either under the law or regulations.

With regard to the Labor Department documents cited by Miami, we agree that if two of them (the Wage Appeals Board’s 1986 *Hawk View* decision and the 1973 Opinion WH-202) were viewed as precedent binding on the Administrator and this Board, then the Administrator’s decision to stop issuing elevator helper wage rates would raise serious concern. Miami is correct in asserting that these documents both seem to suggest that when a union rate for a particular craft prevails in a locality, and the underlying collective bargaining agreement includes a helper classification, then the Wage and Hour Division automatically should recognize the collectively-bargained helper classification and publish a helper wage rate – arguably, without a detailed evaluation of the classification under the 3-part helper test. If this were the Administrator’s policy, then a strong argument could be made that the elevator helper classification should be recognized. However, when viewed in the broader context, we agree with the Administrator that neither *Hawk View* nor Opinion WH-202 compels a reversal of the Administrator’s decisions in these cases.

Leaving aside the period when the 1982-1989 helper regulation was at issue, it is clear that the Administrator’s articulated 3-part test for recognizing helpers has been unchanged for more than 20 years, and this test repeatedly was endorsed by the Wage Appeals Board acting on behalf of the Secretary. *See* cases cited at p. 5, *supra*. Moreover, although not formally codified, the 3-part test explicitly is declared as the Administrator’s standard in the 1993 notice suspending the helper regulations. 58 Fed. Reg. 58954 (Nov. 5, 1993). In light of this history, we share the Administrator’s view that the majority opinion in *Hawk View* must be viewed as an aberration tied to the specific facts confronting the Board in the case, and not precedential. As best we can determine, *Hawk View* is the *only* decision of the Wage Appeals Board or the Administrative Review Board which adopts a helper classification because it is found within a prevailing collective bargaining agreement; as such, it stands in sharp contrast both to earlier and later decisions in which collectively-bargained helper classifications are rejected if they do not meet the standards of the 3-part helper test. The Board’s decision in *Hawk View* reflects a level of deference to privately-negotiated arrangements between employers and labor unions that is inconsistent with the Administrator’s declared policy on helpers, a policy that is not dependent in any way on the existence or non-existence of collectively-bargained helper rates. We need not decide here whether or under what circumstances the Administrator might lawfully adopt a policy of recognizing helper job classifications simply because they appear in collective bargaining agreements; the question is not presented in these cases. What is significant, however, is that the Wage Appeals Board in *Hawk View* accorded insufficient deference to the Administrator’s lawful policy.

The Davis-Bacon Act offers little guidance regarding the methodology to be used by the Secretary when determining the classifications of laborers and mechanics and the associated prevailing wage rates, other than a specific statutory definition for the term “locality.” Because the statute is so spare in providing direction to the Secretary, rarely are there interpretive questions that can be determined directly by an adjudicator based on the traditional tools of statutory interpretation; instead, the more common function of the Board is to review the Administrator’s interpretation of the statute to determine whether the Administrator’s construction is a permissible construction of the statute, so long as it is consistent with congressional intent. *Chevron U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). This evaluation of the agency's action relies upon such factors as the statutory scheme, structure and goals; legislative intent, the quality of the agency's reasoning, and the agency's consistency (or, if the agency interpretation represents a change of policy, its reasons for making the change). *OFCCP v. Keebler*, ARB Case No. 97-127, ALJ Case No. 87-OFC-20 (Dec. 21, 1999), slip op. at 17, *citing Morton v. Ruiz*, 415 U.S. 199, 237 (1974). In our view, this was the task confronting the Wage Appeals Board in reviewing the Administrator's conformance decision in *Hawk View*.

Because the Board in *Hawk View* did not repudiate the Administrator's basic standard for approving helper classifications, the decision reversing the Administrator only can be explained as being limited to the peculiar facts of the case.

With regard to the concurring opinion of Member Dunn, which apparently would direct the Administrator to adopt *any* helper classification that appears in a collective bargaining agreement in situations where union wage rates are found to prevail, we note our disagreement. In light of the Administrator's declared policy on helpers when the decision was issued in 1986 (*i.e.*, a period when the 1982 helper regulation was not being enforced, and the 3-part test effectively was the Administrator's enforcement policy), the concurrence reflects a significant overreaching in its view of the Board's role.

Opinion WH-202 – The 1973 Wage and Hour Division opinion letter cited by Miami is ambiguous. Like the Dunn concurrence in *Hawk View*, the opinion letter suggests that for crafts in which the local union wage rate prevails, the Division will publish a helper wage rate when it appears as part of the (prevailing) collective bargaining agreement. However, akin to the 3-part helper test, the opinion letter also notes that a helper rate will not be recognized if it is determined that the helper is a participant in an informal training program.

Advisory opinions issued by the Wage and Hour Division have limited precedential significance. They can be relied upon by employers as a defense to an enforcement action until such time as they are “rescinded, modified, or determined by judicial authority to be invalid.” 29 C.F.R. §790.17(h). One court has observed that such advisory opinions are “expressly issued subject to change by the Administrator,” and the advice offered is not valid for any period after the Administrator has announced a change in policy. *Taylor-Callahan-Coleman Counties District Adult Probation Dep't v. Dole*, 948 F.2d 953, 957 (5th Cir. 1991), *citing* 29 C.F.R. §790.17(h) - (i).

We note first that the two cases before this Board are denials of conformance requests, and are not enforcement actions. This difference plainly diminishes any precedential significance that Opinion WH-202 might otherwise possess. But more important, excepting for the moment the period when the 1982-1989 helper regulation was at issue, since the mid-1970s both the Administrator and the Board repeatedly have stated that the controlling standard for recognizing helpers is the 3-part test, including the definitive policy statement in the 1993 suspension regulation. We therefore agree with the Administrator that the 1973 opinion letter effectively has been rescinded by subsequent DOL policy declarations on this issue.

With regard to the Rome Housing Authority conformance matter, we agree with the Administrator that it is distinguishable from these cases. In the Miami and Mid-American cases, the wage determinations already included a prevailing wage rate for the elevator mechanic classification, and the contractors requested the addition of the elevator constructor helper classification. In contrast, the Rome Housing Authority matter involved a request that *both* a mechanic and helper rate be added to the wage determination. The Administrator declined to conform the helper classification, observing that it did not meet the 3-part test, but agreed to add the *mechanic* classification at the *helper* wage rate. Although we are unclear why this choice was made, the fact is that the Administrator's application of the 3-part test in the Rome Housing Authority matter was no different from his actions in these cases. We note also that the Board has consistently held that a party seeking a conformed rate may not rely on a wage determination granted to another party, regardless of the similarity of work in question. *See, e.g., J.A. Languet Construction Company*, WAB Case No. 94-18 (Apr. 27, 1995).

VII. CONCLUSION

The Administrator's decisions denying the conformance requests in these two cases are within the range of discretion accorded under the Act and its implementing regulations and are reasonable. The Petitions for Review are **DENIED**.^{18/}

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

^{18/} Board Member E. Cooper Brown did not participate in the consideration of this case.