In the Matter of:

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, EASTERN REGION, and LABORERS LOCAL UNION 199

ARB CASE NO: 04-011

DATE: April 29, 2005

Dispute concerning the application of wage rate determinations in General Decision Numbers DE020002 and DE020005 applied to laborers engaged in heavy and building construction in the State of Delaware.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Petitioner:
Perry F. Goldlust, Esq., Joanne A. Shallcross, Esq., *Aber, Goldlust, Baker & Over, Wilmington, Delaware*

DECISION AND ORDER OF REMAND

In fulfilling her responsibilities under the Davis-Bacon Act (DBA or the Act), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003) and regulations at 29 C.F.R. Part 1 (2003), the Administrator of the U.S. Department of Labor's Wage and Hour Division determined the minimum wage rates for unskilled laborers working on federal construction projects in two Delaware counties. Laborers Local 199 and Laborers International Union of North America Eastern Region (LIUNA) complained and asked the Administrator to reconsider the laborers' wage rate. The Administrator denied this request. The unions appealed to the Administrative Review Board (ARB or the Board).

We remand to the Administrator because she abused her discretion in determining the laborers' wage rate.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations. 29 C.F.R. § 7.1 (b). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002).

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 DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act. *Miami Elevator Co. and Mid-American Elevator Co., Inc.,* ARB Nos. 98-086, 97-145, slip op. at 16 (ARB Apr. 25, 2000). *See also Millwright Local 1755,* ARB No. 98-015, slip op. at 7 (ARB May 11, 2000); *Dep't of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 16 (ARB Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351 *et seq.*), *citing ITT Fed. Servs. Corp. (II)*, ARB No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (Aug. 28, 1992). The Board generally defers to the Administrator as being "in the best position to interpret [the DBA's implementing regulations] 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 Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), *citing Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

BACKGROUND

1. *The Legal Framework*

The DBA applies to every contract of the United States in excess of $2,000 for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States. 40 U.S.C.A. § 3142(a). It requires that the advertised specifications for construction contracts to which the United States is a party contain a provision stating the minimum wages to be paid to the various classifications of mechanics or laborers to be employed under the contract. *Id.* The Administrator determines these minimum wages and publishes them as "Wage Determinations." 29 C.F.R. Part 1. The minimum wage rates contained in the wage determinations derive from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements. 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

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

Significantly, the DBA itself does not prescribe a method for determining prevailing wages, leading one court to observe that the statute "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." *Building & Constr. Trades' Dep't, AFL-CIO v. Donovan,* 712 F.2d 611, 616 (D.C. Cir. 1983). Indeed, "the substantive correctness of wage determinations is not subject to judicial review." *Dep't of the Army,* slip op. at 25 (citing cases). Rather, courts limit review to "due process claims and claims of noncompliance with statutory directives or applicable regulations." *Id.,* quoting *Virginia v. Marshall,* 599 F.2d 588, 592 (4th Cir. 1979).

Thus, in the absence of a statutory formula for determining prevailing wages, the DBA implementing regulations charge the Administrator with "conduct[ing] a continuing program for the obtaining and compiling of wage rate information." 29 C.F.R. § 1.3. The Wage and Hour Division surveys wages and fringe benefits paid to workers on four types of construction projects: building, residential, highway, and heavy. The Administrator may seek data from "contractors, contractors' associations, labor organizations, public officials and other interested parties . . . ." 29 C.F.R. § 1.3(a). Other sources of information include statements showing wage rates paid on projects, signed collective bargaining agreements, wage rates determined for public construction by State and local officials under State and local prevailing wage legislation, and data from contracting agencies. 29 C.F.R. § 1.3(b). The county is the designated geographic unit for data collection, although in some instances data may derive from groups of counties. 29 C.F.R. § 1.7.

When the Administrator has completed the survey, he or she then publishes a "general" wage determination in the Federal Register and, thereafter, every week, the Government Printing Office publishes the general wage determination in a document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts." 29 C.F.R. § 1.5(b). General wage determinations may be modified from time to time. 29 C.F.R. § 1.6(c).

2. *Chronology of Events*

Beginning in August 2000, the Wage and Hour Division office in Philadelphia began to survey wages in Delaware's Kent and New Castle counties to determine the prevailing wages for workers who would be employed on federal construction projects there. Wage and Hour requested wage data from 99 contractors, 30 associations, and 48 labor organizations, including LIUNA. Tab B, C. And on August 31, 2000, to explain

the survey process, Wage and Hour officials met with local union representatives, including one from Local 199. Tab A.

As a result of this survey, the Administrator published, among others, General Decision Number DE020002 and DE020005. DE020002 contains the minimum prevailing wage rates for workers employed on Davis-Bacon "building" construction projects in New Castle, Delaware. The unskilled laborers' wage rate was $11.05 per hour with fringe benefits at $1.65 per hour. Tab L. Under DE020005, which lists wage rates for Davis-Bacon "heavy" construction work in Kent and New Castle counties, the wage for unskilled laborers was $13.17 per hour with fringes at $3.19 per hour. Tab M. Both of these wage determinations were first published on March 1, 2002.

By letter of March 19, 2003, Local 199 requested that George Durbin, Wage and Hour's regional wage specialist in the Philadelphia office, reconsider the laborers' wage rate contained in these two wage determinations. It contended that the laborers' rates were more than 40% below the rates contained in the previous wage determinations for building and heavy construction projects in Kent and New Castle counties.[1] Local 199 pointed out that, in determining the new wage rates, Wage and Hour had not considered the laborers' wage rate contained in its collective bargaining agreement covering building and heavy construction activity in Delaware. Nor had Wage and Hour considered Delaware state and municipal prevailing wage rates when conducting the survey. The union attached copies of its collective bargaining agreement and the most recent state and municipal prevailing wage rates and asked Durbin to consider that information and to modify the laborers' wage rate to accurately reflect the current prevailing wage rate for laborers. It also informed Durbin that it had "additional data on prevailing wage rates in Delaware" that he should consider. Tab G.

Durbin responded by letter on March 28, 2003. He denied Local 199's request that he reconsider the laborers' wage rates. Durbin, whose Philadelphia Wage and Hour office had conducted the survey which led to the wage determinations at issue here, defended the wage decisions on the grounds that the survey had been properly conducted. He wrote that he had notified and requested information from international and local unions, contractors, contractor associations, and other interested parties. Furthermore, said Durbin, according to Department of Labor guidelines, he had received sufficient data to publish the wage rates.

In addition, Durbin informed the union that, though he had been aware of their collective bargaining agreement and the state prevailing wage rates, he had not, and would not now, consider those items. Durbin explained that under "Wage and Hour's

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[1] The record does not include copies of the wage determinations that preceded DE020002 and DE020005. Nevertheless, we take as true that the new wage rates for laborers were more that 40% less than before because the Administrator does not challenge this assertion.

policy," he could not consider that information because the union had not also submitted "supporting payroll data." Instead, in determining the laborers' wage rate, he had solely relied upon "actual payroll data" about laborers' wages that other interested parties and contractors had provided during the survey. In Durbin's words:

> [W]hile we were aware of the existence of Local 199's collective bargaining agreement and of Delaware's prevailing wage rates, we also received payroll data submitted by interested parties and contractors. It is Wage and Hour's policy to rely on the submission of actual payroll data in determining the prevailing wage rates. This information has always overridden the existence of collective bargaining agreements and state prevailing wage decisions without supporting payroll data.

Tab F.

LIUNA now entered the picture. In a June 26, 2003 letter to the Administrator, LIUNA, representing Local 199, requested that she review Durbin's refusal to reconsider the laborers' wage rates under DE020002 and DE020005. It alleged that these wage rates did not reflect the prevailing rates because the survey had excluded union rates and Delaware's prevailing wage rates. LIUNA therefore requested that the Administrator review the laborers' collective bargaining agreement and the state prevailing wage rate data. LIUNA warned that omitting this critical data would "codify misleading information into the calculations resulting in an unreasonably low wage rate." Tab E.

The Administrator responded to LIUNA's request for review and reconsideration by letter dated October 20, 2003. Like Durbin earlier, the Administrator recounted the efforts Durbin's office had made to obtain wage information from all interested parties during the survey process. Again like Durbin, she also noted that despite "significant pre-survey outreach" efforts and the August 31, 2000 meeting with local unions (including LIUNA) to discuss the survey process and answer questions, the union did not submit any wage data. Then, citing 29 C.F.R. § 1.3, she wrote, "Pursuant to Wage Hour regulations and procedures, copies of collective bargaining agreements and state wage determinations unsupported by actual wage data are not includable in the wage survey data base." The Administrator went on to emphasize the fact that Wage and Hour must set a "cut-off" date for receiving wage data to complete wage surveys. Therefore, the Administrator denied LIUNA's request that she review the collective bargaining agreement and the Delaware wage rates. Tab A. Thereafter, LIUNA timely petitioned the ARB to review the Administrator's October 20, 2003 final determination. *See* 29 C.F.R. § 7.2.

DISCUSSION

In this appeal, LIUNA requests that we remand this case to the Administrator and that he then recalculate the laborers' prevailing wage rates in DE020002 and DE020005, or, at least, immediately begin a new survey. LIUNA complains that although both Durbin and the Administrator had the authority to use the collective bargaining agreement and the state prevailing wage data when calculating the laborers' wage rates, neither chose to do so because of the Department of Labor's policy not to use this information when the party proffering it did not submit actual wage data. LIUNA argues that neither the DBA nor its implementing regulations require that collective bargaining rates and state prevailing wage rates need to be supplemented by actual wage data to be considered when the Administrator is determining prevailing wages. Petitioner's Opening Brief at 5-10.

The Administrator counters by arguing that she correctly denied Local 199 and LIUNA's request for reconsideration because Durbin's office "followed long-standing agency policies, practices, and procedures that were consistent with the applicable law and regulations in conducting the Davis-Bacon wage survey and issuing the laborers' prevailing wage rates for New Castle and Kent Counties, Delaware." Statement of The Administrator (Administrator's Brief) at 11. The Administrator defends her decision not to reconsider the laborers' wage rate by noting Durbin's efforts to contact numerous unions, contractors, and other interested parties and his "extensive pre-survey outreach" that included the August 31, 2000 question and answer session with LIUNA and other union representatives. Therefore, she concludes, Wage and Hour conducted the survey according to DBA rules.[2] *Id.* at 11-17. She further points out that LIUNA did not submit

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[2] 29 C.F.R. § 1.3, entitled "Obtaining and compiling wage rate information," reads, in part:

> For the purpose of making wage determinations, the Administrator will conduct a continuing program for the obtaining and compiling of wage rate information. (a) The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. The Administrator may also obtain data from agencies on wage rates paid on construction projects under their jurisdiction. The information submitted should reflect not only the wage rates paid a particular classification in an area, but also the type or types of construction on which such rate or rates are paid, and whether or not such rates were paid on Federal or federally

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actual wage data by the October 27, 2000 cut-off date. And with respect to LIUNA's complaint that the Administrator should have considered the collective bargaining agreement and the state prevailing wage rates, the Administrator contends that "consideration of such items as independent sources is clearly discretionary by the Administrator," and furthermore, that "[a]ny data from projects on which collectively bargained rates were paid, or data from state projects reported as performed during the survey time period, would have been included in the survey data." *Id.* at 18.

We agree with the Administrator that Durbin's office did indeed extensively survey the wage rates existing in Kent and New Castle counties. Moreover, we find that Durbin did explain the survey process and answer questions from unions, including LIUNA, at an August 31, 2000 meeting. Therefore, we agree with the Administrator that she properly encouraged interested parties to submit wage rate data. Moreover, we find that the Administrator acted properly in establishing a reasonable "cut-off" date for interested parties to submit wage information. Furthermore, the record demonstrates that LIUNA did not submit actual wage data before the cut-off date.

Even so, we must remand this matter because both Durbin and the Administrator abused their discretion when, citing Wage and Hour "policy" and "regulations and procedures," they refused to consider the collective bargaining agreement and the Delaware state prevailing wage rates.

The pertinent regulation governing this situation reads in part:

> The following types of information may be considered in making wage rate determinations:
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> (1*) Statements showing wage rates paid on projects.* Such statements should include the names and addresses of contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, whether or not the projects are Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements, the number of workers employed in each classification on each project, and the respective wage rates paid such workers.

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assisted projects subject to Davis-Bacon prevailing wage requirements.

> (2) *Signed collective bargaining agreements.* The Administrator may request the parties to an agreement to submit statements certifying to its scope and application.
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> (3) Wage rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.

29 C.F.R. § 1.3(b).

This rule plainly vests discretion in the Administrator as to whether she will consider collective bargaining agreements or state and local prevailing wage rates in determining DBA prevailing wages. But the rule contains no precondition as to when or whether the Administrator will consider collective bargaining agreements or state wage rates. Nevertheless, both Durbin and the Administrator interpreted this regulation as requiring Local 199 to submit actual wage data during the survey process before they would exercise their discretion to consider the bargaining agreement or the state wage rates. In denying Local 199's request for reconsideration, Durbin explained that according to "Wage and Hour's policy," he could consider collective bargaining agreements and state wage rate decisions only when submitted with "supporting payroll data." Tab F. Likewise, in her October 20, 2003 final determination letter, the Administrator claimed that Wage and Hour regulations and procedures mandated that collective bargaining agreements and state wage determinations "unsupported by actual wage data" could not be included in a wage survey. Tab A at 2.

The Administrator's reference to "regulations and procedures" ostensibly refers to Section 1.3(b), set out above, since earlier in the letter the Administrator had referred to Section 1.3 as providing "the basic parameters for Wage Hour to follow" in obtaining wage rate information. Thus, the Administrator was not referring to an internal policy or guideline that interpreted Section 1.3(b) and prescribed the circumstances under which she would exercise her discretion to consider collective bargaining agreements and state wage rates. That being so, we find that Durbin and the Administrator misapplied the plain language of Section 1.3(b) and have offered no explanation or legal authority for doing so. In effect, before they would consider the collective bargaining agreement and the Delaware wage rates, Durbin and the Administrator imposed a burden on Local 199 that neither the DBA nor the implementing regulations require.

Thus, despite the great deference owed to the Administrator when determining prevailing wage rates, we conclude that Durbin and the Administrator abused their discretion because, in requiring Local 199 to provide actual wage data before they would consider the bargaining agreement and the Delaware wage rates, their actions were inconsistent with, indeed contrary to, the plain language of Section 1.3(b), the governing regulation. *See Dep't of the Army,* slip op. at 16, 25; *Titan IV Mobile Serv. Tower*, slip op. at 7.

CONCLUSION

According to 29 C.F.R. § 1.3(b), when making wage determinations, the Administrator has discretion whether to consider signed collective bargaining agreements and state and municipal prevailing wage rates. But by requiring Local 199 to submit "actual wage data" before exercising this discretion, Regional Wage Specialist Durbin and the Administrator did not act in accordance with that rule. This constitutes an abuse of their discretion. Therefore, we **REMAND** this matter to the Administrator and instruct him to properly exercise his discretion whether to consider the collective bargaining agreement and the Delaware state and municipal prevailing wage rates in determining the laborers' wage rates in DE020002 and DE020005.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge