

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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MISTICK PBT d/b/a MISTICK))
CONSTRUCTION,))
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Plaintiff,))
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v.)	Civil Action No. 03-1767 (RCL)
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ELAINE CHAO, SECRETARY,))
U.S. DEPARTMENT OF LABOR))
))
Defendant.))
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MEMORANDUM OPINION

This matter comes before the court on defendant United States Secretary of Labor’s Motion to Dismiss and for Summary Judgment, and Plaintiff Mistick Construction’s (“Mistick”) Cross-Motion for Summary Judgment. Upon consideration of the parties’ filings, the administrative record and the facts of this case, this Court finds that the defendant’s motion to dismiss should be GRANTED in accordance with this memorandum opinion.

I. Background

Mistick, a Pennsylvania contractor, brings this action for declaratory and injunctive relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 and Federal Question Jurisdiction, 28 U.S.C. § 1331 to overturn the final decision of the Department of Labor’s Administrative Review Board (“Board”) in a case arising under the Davis-Bacon Act, as amended 40 U.S.C. §§ 3141-4, 3146, 3147 (formerly 40 U.S.C. § 276a). The Board’s decision addressed Mistick’s request for reconsideration of proposed classifications and wage rates to be added to Davis-Bacon Wage Determination No. PA970013. The classifications at issue in this

case are six power equipment operator classifications that were not included in the Department's published wage determination. The central dispute in this case is whether the Board violated 29 C.F.R. 5.5(a)(1)(ii)(A)(3), the Department's conformance regulation requiring added wage rates to bear a reasonable relationship to wage rates already contained in the wage determination.

Mistick was the general contractor on a residential construction project in Pittsburgh, Pennsylvania. The project was administered by the Urban Redevelopment Authority of Pittsburgh ("URA") and received federal funding from the U.S. Department of Housing and Urban Development ("HUD") pursuant to the Labor Standards provisions of the Davis-Bacon Act, as incorporated by the related act known as the Housing and Community Development Act of 1974, as amended 42 U.S.C. §§ 5301-5321. Under the Davis-Bacon Act, 42 U.S.C. § 5310, contractors working on federally funded construction projects must pay their employees wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor.

Mistick's project was subject to Wage Determination No. PA970013, a schedule of prevailing wages governing residential construction in Allegheny County, Pennsylvania. Wage Determination No. PA970013 listed a number of classification of workers including three classifications of power equipment operators – Bulldozer, Compactor, and Scraper. The classifications and wage rates included in Wage Determination No. PA970013 were based on the results of a wage survey completed on July 18, 1996. Mistick and its subcontractor employed workers operating backhoes, bobcats, excavators, hi-lifts, rollers, graders, and pavers – pieces of power equipment not listed in Wage Determination No. PA970013. In a March 4, 1998 letter, Mistick requested that URA add the excluded equipment operator classifications to the wage determination at hourly rates based on Wage Determination No. PA950013, an earlier wage

determination for residential construction for Allegheny County. Wage Determination No. PA950013 included classifications and wage rates based on the results of a wage survey completed on November 1, 1992. Mistick's request included the following proposed classifications and wage rates:

	Basic Hourly Rate	Fringe Benefits
Backhoe	9.50	5.09
Bobcat	9.50	5.09
Excavator	9.50	5.09
Hi-Lift	11.26	5.09
Roller Operator	12.64	2.98
Grader	13.42	3.68
Paver	12.75	3.68

On April 3, 1998, URA forwarded a request to the Department of Labor recommending that with the exception of the bobcat, all of the power equipment classifications could be classified according to the bulldozer classification included in Wage Determination No. PA970013. The wage rate for the bulldozer classification was \$14.85 per hour plus fringe benefits of \$7.02. The URA recommended that the drywall finisher rate be approved for the bobcat classification. The drywall finisher rate was included in Wage Determination No. PA970013 at the wage rate of \$9.75 per hour.

In response to URA's recommendations, Mistick sent an April 30, 1998 letter to URA requesting reconsideration of its proposed rates. The letter asserted that the classifications included in Wage Determination PA970013 reflect large scale "heavy" commercial land development as opposed to lighter residential development that would be required for the project's completion. On May 29, 1998, Timothy M. Fisher, Mistick's Project Manager, submitted a modified request for wage rates for the classifications in question. Mistick proposed

a wage rate of \$9.75 with no fringe benefits for the roller operator and \$11.50 plus \$1.86 in fringe benefits for the backhoe, excavator, hi-lift, grader and paver classifications. The letter stated that the proposed rates were reasonably related to the drywall finisher and ironworker classifications including in Wage Determination No. PA950013. Mr. Fisher further stated that the newly proposed rates “would correspond to and bear a reasonable relationship to the skill required to operate the machinery” needed to complete the project. The letter also noted that the proposed “rates are in conformance with the rates paid by excavators in the residential construction industry in Pittsburgh.”

URA’s requests were approved by the Branch of Construction Wage Determinations on June 9, 1998. Mistick unsuccessfully appealed to the administrator before filing a petition for review before the Administrative Review Board where the decision was affirmed. Mistick now seeks judicial review of the Board’s ruling.

II. Legal Standards

Defendant moves to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules for Civil Procedure on the grounds that the Court lacks subject matter jurisdiction. In evaluating whether subject matter jurisdiction exists, the court construes the complaint liberally, accepts all uncontroverted, well-pleaded factual allegations as true, and views all reasonable inferences in plaintiff’s favor. See Scheuer v. Rhodes, 416 U.S. 232, (1974). Pursuant to Rule 12(b)(1), a district court should dismiss an action for lack of subject matter jurisdiction when the facts and allegations before the court belie the plaintiff’s formal averment that federal jurisdiction exists. See FED. R. CIV. P. 12(b)(1).

Alternatively, the defendant moves for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. Plaintiff has also filed a cross-motion for summary judgment

under rule 56(c). Rule 56(c) states that summary judgment is appropriate when examination of the record as a whole reveals “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” After examining the record, the court must view all inferences in the light most favorable to the non-moving party. Mahsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. Analysis

The department’s conformance regulation, 29 C.F.R. 5.5(a)(1)(ii)(A) outlines the procedure for adding classifications and wage rates not listed in the wage determination. The conformance regulation provides that additional classifications and wage rates and fringe benefits shall be approved when

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

Mistick challenges part three of the Department’s conformance regulation arguing that “the Department misapplied and did not adhere to its own regulation with regard to whether the proposed wage rate bears a reasonable relationship to the wage rates contained in the wage determination.” (Pl. Compl. ¶ 18). Specifically, Mistick argues that the Board’s decision violates the Department’s conformance procedure because the Board refused “to consider the reasonable relationship of the requested equipment operator rates to any category of worker other than the narrow category of other equipment operators already contained in the wage determination.” (Pl. Compl. ¶ 19).

Mistick makes two main arguments to support its claim that the Board's decision is in violation of the Department's conformance regulation. First, Mistick asserts that the bulldozer operator is a more highly skilled heavy equipment classification than any of the equipment operator positions Mistick requested in the conformance. In its appeal before the Board Mistick argued "that the skill levels of the equipment operators in question were more comparable to residential drywall finishers and/or ironworkers and/or bobcat operators than the heavy equipment bulldozer operator rate" (Pl. Compl. ¶ 19). Second, Mistick argues that its proposed rates rather than those approved by the Department, satisfy the reasonable relationship standard described in part three of the conformance criterion. Mistick repeatedly asserts that it does not seek review of the classification of the equipment operators or the wage rates assigned to each of the six classifications in question. Yet, Mistick asks that this court direct the Department to approve *Mistick's requested conformance* in accordance with the Department's published regulations. Furthermore, Mistick offers specific suggestions to the court regarding how the equipment operators should have been classified.¹

It is well established law that the correctness of departmental decisions regarding proper classification of workers and wage determinations is not susceptible to judicial review. See Tele-Sentry Security, Inc. v. Secretary of Labor, 119 Lab. Cas. (CCH) ¶ 35,534, 1991 WL 178135, at *4 (D.D.C. Aug. 30, 1991); Nello L. Teer Co. v. United States, 348 F.2d 533, 539 (Ct. Cl. 1965) (explaining that determinations of proper job classifications are not subject to judicial review

¹Mistick outlines its objection to the wage rates specified in the URA/HUD conformance proposal: ". . . the roller operator should be the same as the drywall finishers The other operator classifications, backhoe, excavator, hi-lift, grader, and paver, should be the same as those of ironworkers" See Pl.'s Opp'n at 6.

because such determinations are considered part of the wage determination process). See also Universities Research Ass'n v. Coutu, 450 U.S. 754, 761 n.10 (1981) (citing United States v. Binghamton Constr. Co., 347 U.S. 171, 177 (1954)) (stating that the “correctness of the Secretary [of Labor’s] determination [under the Davis -Bacon Act] is not open to attack on judicial review”). In discussing the availability of judicial review of wage determinations, the Court of Appeals for this Circuit has explained that the Davis-Bacon Act “delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.” Tele-Sentry, 119 Lab. Cas. (CCH) ¶ 35,534, 1991 WL 178135, at *4 (D.D.C. Aug. 30, 1991) (quoting Bldg. & Constr. Trades’ Dept. v. Donovan, 712 F.2d 611, 616 (D.C. Cir. 1983)).

Mistick’s arguments for judicial review do not merit federal jurisdiction. Mistick contends that six equipment operators in question were improperly classified under the bulldozer classification and wage rate. Mistick acknowledges that there is no judicial review available for challenges to departmental classifications and wage determinations.² Instead, judicial review of Davis-Bacon Act provisions is limited to due process claims and claims of noncompliance with statutory directives or applicable regulations. Tele-Sentry, 119 Lab. Cas. (CCH) ¶ 35,534, 1991 WL 178135 at *4 (D.D.C. Aug. 30, 1991) (discussing Califano v. Sanders, 430 U.S. 99 (1977)). See also Carabetta Enterprises Inc. v. Harris, 86 Lab. Cas. ¶ 33,786 (CCH), 1979 WL 1907 (D.D.C. 1979) (noting that judicial review of proper job classifications and the wage determination process is limited to reviewing compliance with agency procedures and challenges

²In its Memorandum in Opposition to Defendant Motion to Dismiss and in Support of Plaintiff’s Cross-Motion for Summary Judgment, Mistick asserts that it does not seek “review of an unreviewable Departmental ‘wage determination.’” In a later pleading, Mistick further contends that it “is not challenging [the Department’s] classification of the equipment operators and is not challenging any aspect of the wage determination itself.”

to those procedures).

Mistick's claim does not fall into either of the two categories where judicial review is available. First, Mistick makes no substantive claims of the denial of due process. Second, Mistick's claim that the department was noncompliant with the conformance regulation lacks merit. The noncompliance claim at issue in this case rests on Mistick's own belief that the classifications and wage determinations set for the six omitted equipment operators is unreasonably related to those already in the wage determination.³ Thus, the essence of Mistick's challenge falls upon the correctness of the Department's decision rather than the actual procedure that the Board employed. Mistick makes no claim that the Department failed to comply with any procedural or administrative steps in the conformance procedure other than deviating from Mistick's own interpretation of what constitutes a reasonable relationship between proposed and existing wage rates. For the purposes of Mistick's claim, it is important to emphasize the distinction between challenging the *process* of determination and the *correctness* of the determination.⁴ Mistick argues that its challenge merits judicial review because it falls within the

³Mistick also asserts that the classifications and wage determinations do not reflect the prevailing rates for the same residential equipment operator classifications in the Allegheny County area. The purpose of the Davis-Bacon Act is to serve as "a minimum wage law designed for the benefit of construction workers." United States v. Binghamton Constr. Co., 347 U.S. 171, 178 (1954); Walsh v. Schlect, 429 U.S. 401, 411 (1977). Mistick's request that this court direct the Secretary to approve Mistick's proposed rates undermines the very purpose of the act. Specifically, Mistick's proposed rates are substantially lower than those being challenged and based on a wage survey conducted in 1992.

⁴See Framlau Corp. v. Dembling, 360 F. Supp. 806, 809 (E.D. Pa. 1973) (highlighting the distinction between procedural and substantive challenges to wage determinations). The plaintiff in Framlau sought review of the alleged absence of due process in making the determination rather than a review of the substantive content of the Department's decision. Specifically, the plaintiff alleged that the procedure employed during a hearing before the Wage Appeals Board was unconstitutional. In the instant matter, Mistick makes no such "purely" procedural

former category. However, federal jurisdiction does not properly exist where unreviewable substantive allegations belie a formal averment of the court's federal jurisdiction. See e.g., Gibbs v. Buck, 307 U.S. 66, 72 (1939); Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990).

Even if this court were to accept Mistick's noncompliance allegation as legitimate, Mistick's prayer for relief ultimately requires a re-classification of the six equipment operators in question. The court agrees that the "decision of the Secretary of Labor regarding the scope of a classification is part of the wage determination process and exclusively within [her] jurisdiction . . ." Framlau Corp. v. Dembling, 360 F. Supp. 806, 809 (E.D. Pa. 1973). Whether workers operating backhoes, bobcats, excavators, hi-lifts, rollers, graders, and pavers should be classified under the bulldozer or drywall finisher classifications goes to the proper classification of workers and is therefore not properly before this court.

Furthermore, in the event that the Board's decision was properly before the court, judicial review is limited to whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. 706(2)(A). See also United States v. Meade Corp., 533 U.S. 218, 231-32 (2001); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). The arbitrary and capricious standard of review is highly deferential to the administrative agency. Sierra Club v. Marsh, 976 F.2d 763, 769 (1st Cir. 1991); Conservation Law Found. of New England, Inc. v. Secretary of Interior, 864 F.2d 954, 957 (1st Cir. 1989).

In the instant matter, the record does not reflect that the Board's decision is arbitrary,

allegation.

capricious, an abuse of agency discretion, or otherwise not in accordance with the law. In reviewing the Administrator's refusal to conform the six power equipment operator classes to non-power equipment operators as Mistick requested, the Board highlighted the department's reluctance to conform power equipment classifications to non-power equipment classifications. See Tower Constr., W.A.B. No. 94-17, slip-op. at 3-7 (W.A.B. Feb. 28, 1995); Bryan Elect. Constr., WAB No. 94-17 (W.A.B. Dec. 30, 1994); M.Z. Contractors Co. Inc., W.A.B. No. 92-06 (W.A.B. Aug. 25, 1992). In addition, the Board recognized the Department's "longstanding policy . . . to require that the proposed rate for a skilled classification be equal to or exceed the lowest rate in the determination." Tower Constr., slip op. at 3. The bulldozer classification represented the lowest power equipment operator rate included in Wage Determination PA970013 and thus, the Department's conformance of the six omitted power equipment operators to the bulldozer classification is in accordance with agency procedures and not to be considered arbitrary and capricious. Given the level of deference to the Department, this court finds no reason to deviate from the Board's decision.

III. CONCLUSION

For the reasons stated above, the Court shall GRANT defendant's Motion to Dismiss and in the Alternative for Summary Judgment. The Court shall DENY the plaintiff's Cross-Motion for Summary Judgment. Plaintiff's suit is hereby dismissed with prejudice.

The Court will issue a separate order consistent with this opinion.

Signed by Royce C. Lamberth, United States District Judge on July 27, 2004.