OPINION NO. 97-033

Syllabus:

In carrying out its duty to establish prevailing rates of wages in accordance with R.C. 4115.04 and R.C. 4115.05, the Bureau of Employment Services may include in the prevailing wage rate schedule for a trade or occupation in a particular locality all categories of workers that are created by collective bargaining agreements or understandings (or their successor agreements or understandings) in that locality between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, is made.

To: Debra R. Bowland, Administrator, Ohio Bureau of Employment Services, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, June 23, 1997

You have submitted an opinion request in which you ask about the Bureau's duty to establish prevailing rates of wages for various categories of workers within a trade or occupation. You question whether the Bureau is required to include within a prevailing wage rate schedule certain categories of workers that have been included within collective bargaining agreements for their trades. According to information you have provided, one category of workers with which you are concerned "have too much experience to be classified as [apprentices] yet arguably lack the experience to be journeymen." Those in the other category are used on only a certain type of project, referred to as "residential, light commercial." Each of such categories of workers is paid a rate of wages that is distinct from those paid to other categories of workers covered by the agreements.

Let us begin with a brief examination of the broad statutory scheme set forth in R.C. 4115.03-.16 governing prevailing wages. The general rule is established by R.C. 4115.04, which states in pertinent part:

> *Every public authority* authorized to contract for or construct with its own forces a *public improvement*, before advertising for bids or undertaking such construction with its own forces, shall have the bureau of employment services determine the *prevailing rates of wages of mechanics and laborers* in accordance with section 4115.05 of the Revised Code for the *class of work* called for by the public improvement, *in the locality where the work is to be performed.* Such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. A copy of the bidding blank shall be filed with the bureau before such contract is awarded. A minimum rate of wages for common laborers, on work coming under the jurisdiction of the department of transportation, shall be fixed in each county of the state by said department of transportation, in accordance with section 4115.05 of the Revised Code.[1] (Emphasis and footnote added.)

Thus, prior to beginning construction of a "public improvement," a "public authority" must have the Bureau of Employment Services determine, in accordance with R.C. 4115.05, the "prevailing rates of wages of mechanics and laborers ... for the class of work called for by the public improvement, in the locality where the work is to be performed." As stated in *Robbins Sound, Inc. v. Ohio University*, 70 Ohio App. 3d 212, 219, 590 N.E.2d 877, 882 (Franklin County 1990), "Ohio's Prevailing Wage Law imposes upon public authorities, contractors and subcontractors a duty to ensure that all public improvements within the purview of R.C. Chapter 4115 are constructed by employees who are paid the prevailing wage rate for the locality in which the public improvement is situated." *See generally* R.C. 4115.10(A). Included within this statutory scheme are a number of enforcement mechanisms to ensure compliance with prevailing wage requirements. *See, e.g.*, R.C. 4115.10; R.C. 4115.13-.132; R.C. 4115.14-.16.

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[1] *See generally* R.C. 4115.03 (defining certain terms, as used in R.C. 4115.03-.16, including "public authority," "construction," "public improvement," and "locality").

With this general background in mind, let us now examine the duty imposed upon the Bureau of Employment Services specifically to determine prevailing rates of wages. In carrying out its duties under R.C. 4115.04 to determine the "prevailing rates of wages of mechanics and laborers in accordance with [R.C. 4115.05] for the class of work called for by the public improvement, in the locality where the work is to be performed," the Bureau is governed by R.C. 4115.05, which, in part, establishes the prevailing rate of wages at no less than,

> the prevailing rate of wages then payable in the *same trade or occupation in the locality* where such public work is being performed, *under collective bargaining agreements or understandings* [or their successor agreements or understandings], between employers and bona fide organizations of labor in force at the date the contract for the public work, *relating to the trade or occupation*, was made. (Emphasis added.)

See generally R.C. 4115.03(E) (setting forth the elements of compensation that are included in computing "prevailing wages" for purposes of R.C. 4115.03-.16). Thus, the Bureau must determine the class or classes of work called for by the public improvement and establish prevailing wage rates for mechanics, laborers, and workmen within each trade or occupation, as those wages have been determined by a collective bargaining agreement or understanding that exists between an employer and a bona fide labor organization at the time the contract for the public improvement project is made.[2]

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[2] The requirements of R.C. 4115.05 are amplified by 9 Ohio Admin. Code 4101:9-4-09, which states in pertinent part:

> (B) To determine the prevailing rate of wages, the director shall consider the following information:
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> (1) Signed collective bargaining agreements or understandings between employers and bona fide organizations of labor, in force at the date of the contract for the public improvement;
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> (2) Signed collective bargaining agreements or understandings which are successor to those mentioned in paragraph (B)(1) of this rule. For purposes of this rule, successor collective bargaining agreements or understandings include collective bargaining agreements or understandings previously in existence but subsequently brought to the attention of the department, and collective bargaining agreements or understandings which come into existence subsequent to an initial request by a public authority for a fixing of the prevailing wage schedule.
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> (C) When determining the prevailing rate of wages, the director shall look first to the locality of the project under consideration for prevailing wage rate information. In the event there is no collective bargaining agreement or understanding in the immediate locality for a particular occupation, then the prevailing rates of wages in the nearest locality in which such collective bargaining agreements or understandings are in effect shall apply.
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> (D) When determining the prevailing rate of wages, the director will not recognize special project rates or percentage of scale agreements.
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> (E) The director shall make a wage rate schedule in accordance with the criteria set forth in [R.C. 4115.03(E), R.C. 4115.04, and R.C. 4115.05] and these rules.

The manner in which the Bureau[3] is to proceed in determining prevailing wage rates was summarized in 1981 Op. Att'y Gen. No. 81-081 at 2-320 through 2-321, in part, as follows:

> [I]t is the duty of the [Bureau] to tell the contracting authority *exactly* what the prevailing wage rate is for each job which will be performed in the construction of the public improvement. To make this determination, the [Bureau] must first look to the functional nature of the work to be performed and determine which collective bargaining agreements customarily cover that "class of work" in the immediate locality, or if no such agreements exist in the immediate locality, in the nearest locality in which such agreements are in effect. R.C. 4115.05. If it is unclear which craft normally performs the work or which of its collective bargaining agreements applies, the [Bureau] must make an appropriate investigation and bring to bear its expertise and resolve such questions....
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> In determining which union craftsmen typically perform the sort of work required for the public improvement, it is the task of the [Bureau] to determine which craft *has* performed such work, not which craft *should* perform it. Hence, the key information to be obtained by the [Bureau] relates to past industry practices in the locale (*i.e.*, which union has traditionally done this kind of work). If the work contemplated for the public improvement is not precisely the same as that traditionally performed by union craftsmen,the [Bureau] must analyze the similarity of the work to past processes and substituted functions and determine which unionized craft has performed in the past work having a substantial similarity to the type of work to be performed on the public improvement. That craft's contract rate should be utilized.
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> Once the [Bureau] has identified which unionized craft has traditionally performed substantially similar work, a problem may arise if that craft has more than one collective bargaining agreement in force in that locality and such agreements contain different wage rates. In that situation, the [Bureau] must analyze the contracts and determine which controls the type of job which the public improvement represents. Collective bargaining agreements in the construction industry typically contain elaborate descriptions of the type(s) of work covered by the agreement. Once the appropriate craft is identified based upon industry past practices, it is usually relatively clear which of that craft's collective bargaining agreements apply. Despite any difficulty the [Bureau] may have in choosing which agreement applies, a decision must be made before work on the public improvement is advertised for bids or actually begun. (Footnote and citation omitted.)

See also 9 Ohio Admin. Code 4101:9-4-10(A) (requiring public authorities to have the Bureau determine "the prevailing rate of wages to be paid to laborers, workmen, and mechanics for the *class* or *classes* of work called for in the construction of the public improvement" (emphasis added)).

[3] In Am. Sub. S.B. 162, 121st Gen. A. (1995) (eff. Oct. 25, 1995), the General Assembly transferred the prevailing wage duties of the Department of Industrial Relations and its Director to the Bureau of Employment Services and its Administrator.

Focusing now on your particular concern, *i.e.*, the categorization of workers within a particular trade or occupation and the establishment of prevailing wage rates for each such category, it is useful to note that R.C. 4115.05 grants the Bureau authority, in large part, to formulate criteria for determining prevailing rates of wages, with few statutory requirements or limitations on the manner in which such determinations will be made.[4] This broad grant of statutory authority to determine what constitutes the prevailing rate of wages in a particular case is repeated in 9 Ohio Admin. Code 4101:9-4-09, *see* note two, *supra*, which merely requires the Director (now Administrator) to "consider," among other things, signed collective bargaining agreements or understandings in force at the time, or their successors, in the locality of the public improvement project. The interpretation of the terms of a collective bargaining agreement and the categories of workers it creates for prevailing wage purposes within this broad statutory framework, however, is a matter left to the discretion of the Bureau and the Administrator.[5]

I turn now to examination of the statutory language addressing the categorization of workers within a trade or occupation for prevailing wage rate purposes. Specifically, R.C. 4115.05 states, in pertinent part:

> *Serving laborers, helpers, assistants and apprentices* shall not be classified as common labor and shall be paid not less at any time during the life of a contract for the public work than the prevailing rate of wages then payable for *such labor* in the locality where the public work is being performed, under or as a result of collective bargaining agreements or understandings between employers and bona fide organizations of labor in force at the date the contract for the public work, requiring the employment of serving laborers, helpers, assistants, or apprentices, was made, and collective bargaining agreements or understandings successor thereto.
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> *Apprentices* will be permitted to work only under a bona fide apprenticeship program if such program exists and is registered with the Ohio apprenticeship council.
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> The allowable ratio of *apprentices to skilled workers* permitted to work shall not be greater than the ratio allowed the contractor or subcontractor in the

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[4] For example R.C. 4115.05 requires prevailing wage rates to be established for each trade or occupation, within each "locality," as determined by the appropriate collective bargaining agreements or understandings or the successors thereto. In addition, R.C. 4115.05 prohibits serving laborers, helpers, assistants, and apprentices from being classified as common labor and requires that they be paid the prevailing rate of wages for such labor in the locality where they are working.

[5] To the extent the answer to your question depends upon the meaning of particular contractual provisions, your question cannot be resolved by means of an opinion of the Attorney General. *See, e.g.*, 1983 Op. Att'y Gen. No. 83-087 at 2-342 (the Attorney General is "without authority to render an opinion interpreting a particular agreement or contract"); 1981 Op. Att'y Gen. No. 81-081 at 2-319 (declining to opine as to which classifications and wage rates were appropriate for a particular public improvement project because "it is the [Bureau's] statutory task to apply the facts of a particular project to the law in question"). Moreover, "[w]here discretion has been delegated to another governmental officer, I have no authority to exercise such discretion on behalf of that governmental officer." 1989 Op. Att'y Gen. No. 89-090 at 2-429.

> collective bargaining agreement or understanding referred to in this section under which the work is being performed. (Emphasis added.)

This portion of R.C. 4115.05 is further explained by 9 Ohio Admin. Code 4101:9-4-16, which allows apprentices, serving laborers, assistants, trainees, and helpers to be so categorized in their trades, and to be paid less than the prevailing rates of wages for qualified laborers, workmen, or mechanics in those trades, but only if there is in force at the time work is being performed under a contract for the public improvement project, in the locality of such project, a collective bargaining agreement or understanding between employers or, with respect to trainees, between employees, and bona fide organizations of labor which authorizes the employment of such labor.[6]

It is clear, therefore, that the prevailing wage scheme not only recognizes the existence of various categories of workers within a trade or occupation, but also specifies the circumstances and ratios in which such categories of workers may be used and how their wages are to be set. Whether the persons about whom you ask constitute such separate categories is again a matter of discretion for your determination.

According to information provided by a member of your staff, it has been the Bureau's practice to include in prevailing wage rate schedules all categories of workers recognized in collective bargaining agreements. It is our understanding that the Bureau has included within the prevailing wage rate schedule for workers in a particular trade in a particular locality each category of worker created by a collective bargaining agreement or understanding between an employer and a bona fide organization of labor in force on the date the contract for the public improvement is made. With respect to this practice of the Bureau, it is well established that an agency's interpretation of the statutes it enforces are to be accorded due deference. *See* 1993 Op. Att'y Gen. No. 93-014 at 2-80 ("[a]s a general matter, a governmental agency ... has broad authority to interpret its own governing statutes and the administrative regulations it has promulgated thereunder"); 1986 Op. Att'y Gen. No. 86-076 (an administrative body may exercise its discretion in adopting any reasonable interpretation of a statute that it has the duty of implementing).

Having examined the statutory requirements of R.C. 4115.03-.16 and 9 Ohio Admin. Code Chapter 4101:9-4, and bearing in mind the underlying purpose of Ohio's prevailing wage scheme,

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[6] 9 Ohio Admin. Code 4101:9-4-09 states in pertinent part:

> (H) No employer shall classify or pay any employee as an apprentice, helper, serving laborer, trainee or assistant unless the director, as part of the prevailing wage rate schedule, designates such *classifications* as being applicable to the locality.
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> (I) No employer shall classify or pay any employee as an apprentice, helper, serving laborer, trainee or assistant in excess of the ratio of apprentices, helpers, serving laborers, trainees or assistants to journeymen or skilled workers as indicated in the prevailing wage rate schedule issued by the director for the locality. (Emphasis added.)

See generally 9 Ohio Admin. Code 4101:9-4-02(E) (defining "classification" as meaning "the level of experience within an occupation, trade or craft").

i.e., ensuring that workers on public improvement projects are paid "the prevailing wage rate enjoyed by similar employees working on private projects in a given locality, " *Robbins Sound, Inc. v. Ohio University*, 70 Ohio App. 3d at 220, 590 N.E.2d at 883 (emphasis added),[7] I can find no basis for concluding that the Bureau's practice of including within the prevailing wage rate schedule for a particular trade or occupation all categories of workers created by a collective bargaining agreement for that trade or occupation is an unreasonable exercise of its discretion. Rather, inclusion of such categories and corresponding wage rates would appear to result in the wages paid to workers on public improvement projects more accurately reflecting the rates of wages actually paid to their counterparts in the private construction sector.[8] I must, therefore, defer to the Bureau's interpretation of its duties under R.C. 4115.04 and R.C. 4115.05.

Based upon the foregoing, it is my opinion, and you are hereby advised that, in carrying out its duty to establish prevailing rates of wages in accordance with R.C. 4115.04 and R.C. 4115.05, the Bureau of Employment Services may include in the prevailing wage rate schedule for a trade or occupation in a particular locality all categories of workers that are created by collective bargaining agreements or understandings (or their successor agreements or understandings) in that locality between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, is made.

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[7] *See also State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 91, 431 N.E.2d 311, 313 (1982) ("the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector").

[8] *See generally Donahue v. Cardinal Construction Co.*, 11 Ohio App. 3d 204, 206-07, 463 N.E.2d 1300, 1303 (Wayne County 1983) ("[t]he law expresses the policy that wages equal to union scale are to be paid to both union and nonunion workers on public projects. The legislature did not confer on the union or employers the power to set the prevailing wage rate for public contracts. It merely adopted, as the critical standard to be used by the Department of Industrial Relations in determining the minimum prevailing wage, the wage rate arrived at through a collective bargaining process").