In the Matter of:

U.S. DEPARTMENT OF ENERGY, RICHLAND, WASHINGTON OFFICE'S DAVIS-BACON DETERMINATION FOR PROJECT NO. W-211,

ARB CASE NO: 03-016

DATE: October 6, 2004

Petition by Hanford Atomic Metal Trades Council Seeking Review of the August 27, 2002 Ruling Letter as applied to the Project No. W-211.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner The Hanford Atomic Metal Trades Council:

Daniel M. Katz, Esq., Louise P. Zanar, Esq., Aaron Larks-Stanford, Esq., *Katz & Ranzman, P.C., Washington, D.C.*

For Respondent Administrator, Wage and Hour Division:

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

For Intervening Interested Party The Building and Construction Trades Department, AFL-CIO:

Terry R. Yellig, Esq., *Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.*

ORDER DENYING RECONSIDERATION

In late 2002, the Hanford Atomic Metals Trades Council (HAMTC) timely petitioned for review of an August 27, 2002 ruling by Tammy D. McCutchen, then Administrator of the Employment Standards Administration, Wage and Hour Division. The August 27 "McCutchen ruling" reversed an earlier ruling by the Division's Timothy J. Helm (the Helm ruling). On March 31, 2004, the Administrative Review Board (ARB) issued a Final Decision and Order (D. & O.) granting HAMTC's petition and vacating the McCutchen ruling. The ARB concluded that the Administrator had abused her discretion in her untimely reconsideration and reversal of the Helm ruling.

On April 30, 2004, the Building and Construction Trades Department, AFL-CIO (Building Trades Department) moved for reconsideration of the ARB's March 31 D. & O. On May 7, 2004, Daniel M. Katz, counsel for HAMTC, telephoned the ARB to request until May 28, 2004, in which to file an opposition to the Building Trades Department's motion for reconsideration. He memorialized the telephone conversation in a letter of the same date. The letter concluded:

> [I]t is my understanding that the [ARB] will inform me, in writing, if and when it wishes to receive such a filing on behalf of [HAMTC], and that the Board will not reverse or otherwise modify its Final Decision and Order of March 31, 2004, without providing us the opportunity to file our Opposition. Please let me know as soon as possible if my understanding is incorrect.

On July 19, 2004, the ARB issued an Order granting HAMTC until July 30, 2004, in which to file an Opposition. HAMTC filed an opposition brief on July 22, 2004.

The ARB is authorized to reconsider earlier decisions. *Macktal v. Chao,* 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown and Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-23, slip op. at 2-6 (ARB Nov. 20, 1998). For example, we reconsidered a decision that was based on erroneous information and another in which we employed an incorrect assumption central to our analysis. *Compare Leveille v. New York Air Nat'l Guard,* ARB No. 98-079, ALJ Nos. 94-TSC-3/4, slip op. at 4 (ARB May 16, 2000) *and Macktal,* slip op. at 5 (granting reconsideration) *with Varnadore v. Oak Ridge Nat'l Lab.*, ARB No. 99-121, ALJ Nos. 92-CAA-2/5, 93-CAA-1, 94-CAA-2/3, 95-ERA-1, slip op. at 7, 10-12 (ARB Jul. 14, 2000) (denying reconsideration).

Here, the Building Trades Department moves for reconsideration of a final administrative decision, which is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. *See generally* 16A Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3986.1 (3d ed. 1999). Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ." Fed. R. App. P. 40(a)(2). A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position which may prove more successful. *United States v. Smith,* 781 F.2d 184 (10th Cir. 1986). Likewise, issues not presented in initial briefs or during oral argument are not appropriate subjects for rehearing. *Utahns for Better Transp. v. United States Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill,* 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993). But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome. *Lowry v. Bankers Life & Cas. Ret. Plan,* 871 F.2d 522, 523 n.1, 525-526 (5th Cir.). Raising new facts, however, even in reference to events that occur after initial hearing, is

not appropriate on rehearing. *Armster v. United States Dist. Ct.*, 806 F.2d 1347, 1356-1357 (9th Cir. 1986).

The Building Trades Department's motion also is analogous to requesting reconsideration of a final judgment or appealable interlocutory order under Federal Rules of Civil Procedure 59 or 60(b). Amending judgments may be appropriate under Rule 59 in order (i) to correct manifest errors of law or fact upon which the judgment is based, (ii) to permit the moving party to present newly discovered or previously unavailable evidence, (iii) to prevent manifest injustice, and (iv) to address an intervening change in controlling law. 11 Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2810.1 (2d ed. 1995). Rule 59 amendments may not be used to relitigate issues or to raise arguments or present evidence that the movant could have submitted previously. *Id. See Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998) ("Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite of the apple.'").

Similar standards limit relief from a judgment under Rule 60(b). Relief is available under the rule in limited circumstances, e.g., because of (i) mistake, inadvertence, surprise or excusable neglect, (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59, (iii) an adverse party's fraud, misrepresentation, or misconduct, (iv) or other reasons not relevant here. Wright, Miller & Kane, §§ 2858-2864. Rule 60(b) relief is extraordinary, granted only in exceptional circumstances. *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking, Inc.*, 909 F.2d 1437, 1440 (10th Cir. 1990); *C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984).[1]

The Building Trades Department posits three principal arguments in its bid for reconsideration. First, it argues that it was unaware of the Helm ruling until a year after its issuance, thus rendering reasonable the 18-month delay in requesting reconsideration of the ruling. But the Building Trades Department never, in its previous briefing, developed any of the facts that it now alleges to explain the delay. Furthermore, these facts were uniquely within the purview of Building Trades and do not represent newly discovered evidence. Second, Building Trades construes our decision as finding that the Administrator is estopped from reversing the Helm ruling. It argues that the Administrator is not so estopped. This argument, however, merely presents the delay

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[1] A court may also reconsider its decisions prior to final judgment under limited circumstances. These circumstances are (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision. *See, e.g., Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *Weinstock v. Wilk*, 2004 WL 367618, at *1 (D. Conn. Feb. 25, 2004); *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 582-586 (D. Ariz. 2003).

issue in a new legal context and essentially attempts a "second bite of the apple." Therefore, we reject it. Finally, Building Trades revives its argument that we should apply the equitable doctrine of laches to determine timeliness. We previously considered and implicitly rejected this argument when we applied the doctrine of equitable modification instead.

We agree with HAMTC that the Building Trades Department "either did make or could have made all of its present arguments in its Brief in Opposition to HAMTC's Petition for Review." HAMTC Br. at 5-6. Nor has the Building Trades Department presented any other grounds that persuade us to reconsider our March 31, 2004 D. & O. Therefore, we **DENY** the motion.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge