



**In the Matter of:**

**WATERLOO, IOWA  
WASTEWATER TREATMENT FACILITY**

**ARB Case No. 99-031**

**DATE: March 13, 2001**

***In re:* request for review of the  
Administrator's determination that a  
wastewater treatment construction project  
in Waterloo, Iowa was funded by Congress  
in Fiscal Year 1995 Appropriations  
Act, Pub. L. No. 103-327, 108 Stat. 2398  
under authority of that Act.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Petitioner Building and Construction Trades Dep't, AFL-CIO:*

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

*For the Administrator:*

Ford F. Newman, Esq.; Douglas J. Davidson, Esq.; Steven J. Mandel, Esq., *U.S. Department of  
Labor, Washington, D.C.*

*For the Intervening Interested Party U.S. Environmental Protection Agency:*

Geoffrey Cooper, Esq., *U.S. Environmental Protection Agency, Washington, D.C.*

**DECISION**

The Building and Construction Trades Department, AFL-CIO ("BCTD"), petitions for review of a final ruling by the Wage and Hour Administrator ("the Administrator") issued November 20, 1998. In that ruling, the Administrator rejected BCTD's claim that the Davis-Bacon provisions of the Federal Water Pollution Control Act, 33 U.S.C.A. §1372 (West 1986) (the "Clean Water Act") applied to a \$37,000,000 grant for construction and repair of wastewater infrastructures in Waterloo, Iowa. This construction project had been funded under a section of the Environmental Protection Agency's FY 1995 Appropriations Act providing funds for "needy cities grants." EPA had construed its Appropriations Act, and had concluded that the "needy cities grant" to Waterloo, Iowa, was not authorized pursuant to the Clean Water Act and therefore was not subject to the Davis-Bacon provisions of §1372. In his November 1998 final ruling, the Administrator agreed with

EPA's construction of the Appropriations Act and held that §1372 did not apply to the Waterloo project.

In their initial filings before this Board, all the parties (BCTD, EPA and the Administrator) argued the merits of EPA's construction of its FY 1995 Appropriations Act, assuming without discussion that the Administrator (and this Board) had authority to rule on this question pursuant to Reorganization Plan No. 14 of 1950, which assigns a central role to the Secretary of Labor for developing government-wide policies, interpretations and procedures to implement the Davis-Bacon Act and the Davis-Bacon-type labor standards provisions of other statutes. 5 U.S.C.A. Appendix (West 1986). For the reasons discussed below, we conclude that this assumption was incorrect and that the particular question posed in this case is beyond the authority delegated to the Secretary of Labor under the Reorganization Plan. We therefore lack jurisdiction over this claim.

This appeal is before us pursuant to the review procedures of 29 C.F.R. §7.1 (2000).

## **BACKGROUND**

We begin with certain fundamental propositions: "Authorizing" legislation creates an agency or a program. "Appropriation" legislation provides funds to implement the authorized agencies and programs. Although the practice is disfavored, Congress can both authorize and fund an agency or program within appropriation laws. *United States v. Dickerson*, 310 U.S. 554, 60 S. Ct. 1034 (1940); 1 United States General Accounting Office, Principles of Federal Appropriations Law, Chap. 2 §4 (2d ed. 1991).

In the FY 1995 Appropriations Act for the EPA and other agencies, Congress funded grants for 53 wastewater treatment construction projects. FY 1995 Appropriations Act for the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies, Pub. L. No. 103-327, 108 Stat. 2298 (1994). For some of the grants, Congress expressly relied on the legislative authority of the Clean Water Act. However, for a group of grants totaling \$781,000,000 and referred to as "needy cities grants," Congress was not as clear about whether it was invoking the legislative authority of the Clean Water Act. One of the needy cities grants was earmarked for the Waterloo project, in the amount \$37,000,000.

Shortly after the Appropriations Act was passed, EPA's Director of the Office of Wastewater Management sent an advisory directive to EPA's Municipal Construction Program Managers in the field offices that would be overseeing dispersal of all 53 wastewater grants. The Director advised the Program Managers that the needy city grants were funded pursuant to the legislative authority of the Appropriations Act and not the legislative authority of the Clean Water Act. Admin. Rec. Tab J.

By letter dated March 20, 1997, BCTD asked the Administrator to rule that EPA had misconstrued its 1995 appropriation legislation, and to rule that Congress did rely on the legislative authority of the Clean Water Act when it funded the Waterloo project. Admin. Rec. Tab H.

The Administrator rejected BCTD's request. In his view, EPA had interpreted its FY 1995 Appropriations Act correctly; Congress both funded and authorized the Waterloo project in the Appropriations Act. Admin. Rec. Tab. A.

Whether the Waterloo grant was based on the legislative authority of the Clean Water Act or on the legislative authority of the Appropriations Act is a matter of some import. The Administrator, BCTD, and EPA all agreed that if the Waterloo grant was authorized pursuant to the Clean Water Act, it would be covered by the Act's labor standards provision at §1372. All parties also agreed that if the Waterloo grant was authorized pursuant to the Appropriations Act itself, it would not be subject to any Davis-Bacon labor standard requirements, because the Appropriations Act contained none.

BCTD petitioned for review of the Administrator's determination. The Administrator filed a Statement in Opposition to BCTD's petition, and EPA filed a brief in Support of the Administrator's Statement. All three parties assumed without discussion that the Department of Labor had jurisdiction to decide the merits of BCTD's claim.

On November 2, 2000, we invited the parties to file supplemental briefs on the question: "whether the oversight and coordinating powers assigned to the Secretary of Labor by Reorganization Plan No. 14 include the power to determine whether funds for the Waterloo, Iowa, wastewater treatment facility appropriated in the FY 1995 Appropriations Act were authorized by the Clean Water Act or the FY 1995 Appropriations Act."

## DISCUSSION

The Labor Department's authority over the prevailing wage laws derives from various congressional enactments, and "it is beyond cavil that 'an agency's power is no greater than that delegated by Congress.'" *Railway Labor Executives' Ass'n v. National Mediation Board*, 216 F.3d 122, 139 (D.C. Cir. 1994), quoting *Lyng v. Payne*, 476 U.S. 926, 937, 106 S.Ct. 2333, 2341 (1986). In this case, BCTD asks the Administrator and this Board to determine whether the Waterloo project was authorized under the Clean Water Act, or under the FY 1995 Appropriations Act. In considering this request, we must first determine whether the Labor Department has been delegated authority to decide this type of question.

The Labor Department's authority to decide "Davis-Bacon"-type questions comes from several statutory sources. For example, under the Davis-Bacon Act itself the sole function assigned to the Secretary of Labor directly is the authority to determine locally prevailing wages and fringe benefits. *See* 40 U.S.C.A. §276a *et seq.* (West 1986). The Portal-to-Portal Act gives the Secretary authority to issue binding opinions on Davis-Bacon wage and overtime questions. 29 U.S.C.A. §259 (West 1998). The Secretary has explicit authority to issue regulations implementing the certified payroll program under the Copeland Anti-Kickback Act. 40 U.S.C.A. §276c (West 1986). None of these statutory delegations relates to this case.

Although rarely discussed in the reported cases, probably the greatest source of the Secretary's power over Davis-Bacon-type matters derives from Reorganization Plan No. 14 of 1950. 5 U.S.C.A. Appendix (West 1986).

The Reorganization Plan was enacted to correct significant problems with the administration of the Davis-Bacon Act. As originally enacted in 1931 and amended in 1935, enforcement of the Davis-Bacon Act was left to the various federal contracting agencies. Over time, differing interpretations of the Davis-Bacon statute developed from one contracting agency to another. In order to rationalize the Davis-Bacon enforcement system, in 1950 the Truman Administration proposed placing central authority for Davis-Bacon policy-making within the Labor Department:

In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards as he deems desirable. . . .

#### MESSAGE OF THE PRESIDENT

To the Congress of the United States:

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The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.

In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on [federal projects] by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies and by making such investigations as he deems desirable to assure consistent enforcement. The actual performance of enforcement activities, normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing Federal assistance. . . .

Harry S. Truman

5 U.S.C.A. Appendix. The list of labor standards statutes subject to the Secretary of Labor's oversight authority appears at 29 C.F.R. §5.1(a). Consistent with the Reorganization Plan, along with the authorities delegated under the Davis-Bacon and Copeland Acts, the Secretary of Labor has issued comprehensive implementing regulations at 29 C.F.R. Part 1 ("Procedures for Predetermination of Wage Rates); Part 3 ("Contractors and Subcontractors on Public Building or

Public Work Financed in Whole or in Part by Loans or Grants from the United States”); and Part 5 (“Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”).<sup>1/</sup>

The Labor Department’s authority under the Reorganization Plan to interpret the labor standards provisions of the Davis-Bacon Act and the labor standards provisions of the so-called “Davis-Bacon Related Acts” – including labor standards provisions found in statutes that are administered by other agencies, such as the Clean Water Act – is very broad. This Board and its predecessor, the Wage Appeals Board, have addressed a wide range of important and complex questions under these statutes, providing the kind of coordinated guidance contemplated by the Reorganization Plan. *See, e.g., Bechtel Constructors Corp.*, ARB No. 97-149, ALJ No. 91-DBA-3 (ARB Mar. 25, 1998) (temporary batch plant located virtually adjacent to large public works project was on the “site of the work” for Davis-Bacon purposes); *United States Army*, ARB No. 96-133 (ARB July 17, 1997) (ordering federal agency to incorporate Davis-Bacon labor standards into a service contract where contract called for “substantial and segregable” amount of construction activity); *Aetna Bridge Holding Co.*, ARB No. 96-122 (Oct. 29, 1996) (services provided by tow truck operators under contract to bridge construction firm too remote from actual construction work to establish Davis-Bacon coverage); *Titan IV Mobile Service Tower*, WAB No. 89-14 (May 10, 1991) (offsite fabrication of missile launching tower not covered by Davis-Bacon Act because not performed on the site of the work); *MOTCO HAZMAT Site*, WAB Case No. 91-01 (Aug. 13, 1991) (Davis-Bacon provisions of CERCLA §104 not applicable to Superfund projects implemented by private parties under §122, even though partially funded by Federal monies); *Aleutian Constructors, A Joint Venture*, WAB Case Nos. 91-22 and 91-28 (Sept. 27, 1991) (work of culinary and maintenance workers providing lodging services to construction workers on remote Alaskan island insufficiently related to construction project to establish Davis-Bacon coverage, particularly when work camp was an on-going operation not created for a single project); *Crown Point, Indiana, Outpatient Clinic*, WAB No. 86-33 (June 26, 1987) (finding Davis-Bacon Act applied to construction of clinic privately constructed pursuant to a lease by the Veterans Administration), *aff’d sub nom. Building and Constr. Trades Dep’t, AFL-CIO v. Turnage*, 705 F.Supp. 5 (D.C. Cir. 1988); *Arbor Hill Rehabilitation Project, Albany, New York*, WAB No. 87-04 (Nov. 3, 1987) (finding that Davis-Bacon prevailing wage requirements applied to urban renewal project), *aff’d sub nom. Vulcan Arbor Hill Corp. v. Reich*, 1995 WL 774603 (D.D.C. 1995); *ATCO Constr., Inc.*, WAB No. 86-1 (Aug. 22, 1986) (temporary fabrication facility in Portland, Oregon, for constructing military housing is the “site of the work” and subject to Davis-Bacon labor standards, even though the homes were to be permanently located 3,000 miles away in Alaska); *Military Housing, Ft. Drum, N.Y.*, WAB Case No. 85-16 (Aug. 23, 1985) (finding Davis-Bacon coverage for housing project built by private developer on private land pursuant to long-term leases with the government under the Military Construction Authorization Act of 1984 because leases deemed “contracts for construction” under the Davis-Bacon Act); *G & C Enterprises, Inc.*, WAB No. 83-07 (Feb. 8, 1984) (Davis-Bacon hourly fringe benefit rate must be paid for all hours worked, including overtime hours); *CTL*

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<sup>1/</sup> Federal grant-making agencies have corresponding regulations. *See e.g.*, 40 C.F.R. §31.36(i)(5) (EPA general procurement regulation requiring Davis-Bacon wage specifications in covered EPA grants and contracts); 40 C.F.R. §35.935.5 (EPA regulation concerning compliance with Davis-Bacon Act requirements under the Clean Water Act).

*Engineering*, WAB No. 80-07 (July 22, 1983) (workers drilling pilot holes for relief well system covered by Davis-Bacon Act).

But while the Department's authority is broad, it nonetheless is limited by the terms of the legislative delegation found within the text of the Reorganization Plan itself. *Lyng, supra. Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 471-72 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). In the 37 years of reported decisions of the ARB and WAB, we are unaware of any case that has required either of the two Boards to determine what statute constituted the authorization for a particular construction project. Since this appeared to be a matter of first impression, we ordered the parties to brief the question whether Congress has delegated to the Department of Labor authority to decide the question.

In response to the Board's order, both BCTD and the Administrator argue that this inquiry is within the scope of the Department's power. In its supplemental brief, BCTD argues that its "claim that Section [1372 of the Clean Water Act] was not properly applied to the Waterloo Project is all that is required to invoke the Board's jurisdiction." BCTD Supp. Br. at 6.

If the Board construes Section [1372] as the BCTD claims it should be construed, the laborers and mechanics employed on the Waterloo Project are entitled to be paid Davis-Bacon prevailing wages for that work. *See Steel Co. [v. Citizens for a Better Environment]*, 523 U.S. [83,] at 89[, 118 S.Ct. 1003, 1010 (1998)] (jurisdiction is proper "if the right of petitioners to recover under their complaint will be sustained if the Constitution and the laws of the United States are given one construction and will be defeated if they are given another.").

*Id.* at 10.

In his Supplemental Statement, the Administrator states that his authority to coordinate, interpret and assure consistent application of labor standards pursuant to Reorganization Plan No. 14 includes authority to construe appropriations legislation in order to decide whether funds allocated in an appropriations act were based on the pre-existing authority of another statute. "In order to determine if the grant for the Waterloo project is made under the Clean Water Act, it is necessary to examine the meaning and effect of the appropriations statute under which the grant was made. In other words, in order to construe the meaning of the Davis-Bacon related Act provisions, it may be necessary to examine appropriation or other statutory provisions, which provide the context in which the Davis-Bacon standards are to be applied." Admin. Supp. Br. at 3.

EPA takes the contrary view, stating that, "EPA must now conclude that the Agency, and not the Secretary of Labor [acting through her Administrator] has authority to determine whether the Waterloo grant was authorized under the CWA or the FY 1995 Appropriations Act." EPA Supp. Br. at 5. "Neither Reorganization Plan No. 14 nor traditional principles according deference to agency interpretations of statutes they administer confer authority on the Department [of Labor] to

determine whether a grant was properly awarded under one of two statutes that EPA, not the Department, is responsible for administering.” *Id.*

We conclude that EPA is correct. The Secretary’s oversight authority under the Reorganization Plan pertains only to the application and enforcement of the labor standard provisions contained in statutes administered by other agencies. The Reorganization Plan does not authorize the Secretary to review another agency’s interpretation of its appropriations legislation simply because that interpretation may or may not tie an appropriation to another law that contains a Davis-Bacon labor standard. The interpretive link proposed by the Administrator and BCTD is simply too attenuated to support a conclusion that Congress has invested the Department with such authority. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 307-08; 99 S.Ct. 1705, 1720-21 (1979) (in determining whether agency regulations are lawful, the “reviewing court [must] reasonably be able to conclude that the [congressional] grant of authority contemplates the regulations issued.”).

Nor can BCTD avoid the limits of the Secretary’s authority under the Reorganization Plan by casting the issue as “[w]hether the substantive provisions of the Clean Water Act, *including the Davis-Bacon labor standards provision [at §1372]*, apply to the grant earmarked in the FY 1995 Appropriations Act for improvements in the Waterloo Project.” BCTD Pet. for Rev. at p. 9 (emphasis added). This formulation puts the cart before the horse. The proposition that BCTD actually argues is “whether Congress intended in its 1995 Appropriations Act to rely on the legislative authority of the Clean Water Act in funding the Waterloo project.” This question never touches on the meaning, scope or applicability of the Clean Water Act’s labor standard at §1372 and rests entirely on the meaning of the Appropriations Act.

BCTD’s supplemental argument, that we have jurisdiction to review EPA’s interpretation of the Appropriations Act because Federal courts have jurisdiction whenever “the right of petitioners to recover under their complaint will be sustained if the Constitution and the laws of the United States are given one construction and will be defeated if they are given another,” also fails. The principle BCTD invokes is not applicable when Congress has clearly limited the agency’s authority as to what issues it may decide. The Department of Labor would have no authority over EPA’s administration of the labor standards provision in the Clean Water Act but for the Reorganization Plan. And the Reorganization Plan unmistakably limits the Department of Labor’s oversight authority to the construction of §1372.

We must stress, however, the narrowness of this holding. The jurisdictional issue in this case is an unusual one, and our decision does not effect a retreat from the vast body of decisional law involving the Administrator’s constructions and applications of labor standards. This decision is a very narrow one; it merely rejects an unprecedented reading of the Reorganization Plan.

Nor does this decision touch on the merits of whether it would be a desirable public policy to allow the Administrator to construe EPA’s appropriation law if one possible construction would in effect “incorporate” a Davis-Bacon related statute into the appropriation law. Even if we agreed with BCTD that it would be appropriate to give the Administrator such an oversight power – a matter on which we express no opinion – no agency or court has the power to substitute a potentially desirable legislative method for the one Congress clearly chose, regardless of efficacy. *See, FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161; 120 S.Ct. 1291, 1315 (2000) (“in our

anxiety to effectuate the congressional purpose . . . we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop”) (internal citations omitted); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231; 114 S.Ct. 2223, 2231 n.4 (1994) (court and agency “are bound, not only by the ultimate purpose Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”); *TVA v. Hill*, 437 U.S. 153, 194; 98 S.Ct. 2279, 2302 (1978) (“Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting a statute. \* \* \* We do not sit as a committee of review, nor are we vested with the power of veto.”); *National Coal Ass’n v. Chater*, 81 F.3d 1077, 1082 (11th Cir. 1996) (a “general appeal to statutory purpose” may not “overcome the specific language of the Act, because the text of a statute is the most persuasive evidence of Congress’ intent”)

Accordingly, we **DISMISS** the Petition for Review for lack of jurisdiction.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**CYNTHIA L. ATTWOOD**

Member

**RICHARD A. BEVERLY**

Alternate Member