



In the Matter of:

The United States Army

ARB Case No. 96-133

**With respect to application of
All Agency Memorandum No. 157
under administration of the Davis-Bacon
and Related Acts**

DATE: July 17, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case is before the Board pursuant to the Davis-Bacon and Related Acts (DBA), 40 U.S.C. § 276a *et seq.* (1994). *See* 29 C.F.R. Part 7 (1996). On May 24, 1996, the United States Army filed a Petition for Review of a May 2, 1996 final ruling that was issued by the Administrator of the Wage and Hour Division, United States Department of Labor. For the reasons stated below, we deny the Petition for Review and affirm the Administrator's ruling.

BACKGROUND

On October 23, 1992, the International Brotherhood of Teamsters (Teamsters Union) wrote to the national office of the Department of Labor (DOL) and complained that the Army had failed to include the current DBA wage determination in a multi-year Maintenance Operations Contract at Rock Island Arsenal, Illinois, with the option year beginning November 1, 1992. Tab L. The Union explained that the same problem had occurred previously at the Rock Island Arsenal and that DOL had investigated and found a violation. The Union stated that, if necessary, it would request another DOL investigation.

On November 23, 1992, the Deputy Assistant Administrator of the Wage and Hour Division responded that the Army's actions were improper. DOL's November 1992 letter to the Army states:

According to the information provided, the contract is subject to the McNamara-O'Hara Service Contract Act (SCA), but also involves substantial and segregate construction work to which the provisions of the Davis-Bacon Act are applicable. Although your agency updated the SCA wage determination for the new option

period, it appears that you failed to incorporate a new or revised Davis-Bacon wage determination effective on the date the option was exercised.

As you know, the Davis-Bacon Act applies to “every contract in excess of \$2,000, to which the United States or the District of Columbia is a party, for the construction, alteration, and/or repair, including painting and decorating, of public buildings or public works.” (Emphasis added). It is the Department’s position that multi-year contracts that contain option provisions by which a contracting agency may extend the term of the contract require inclusion of a current wage determination when the option is exercised. As explained in section 4.145(a) of the SCA regulations, 29 CFR Part 4, to exercise such an option requires a contractor to perform work for a period of time for which it would not have been obligated -- and for which the government would not have been required to pay -- under the terms of the original contract. Once a contract option is exercised, then the additional period becomes a new contract for Davis-Bacon purposes as well as for SCA purposes. All such new contracts must contain a current Davis-Bacon wage determination. (See section 4.143(b) of Regulations, Part 4, and section 1.6 of Regulations, 29 CFR Part 1.)

In this regard, please take action to incorporate a revised Davis-Bacon wage determination, effective for the applicable option period in the referenced contract and in any current and future contracts similarly affected. This action will ensure that the employees receive the benefits to which they are entitled under the law. In addition, please provide us with a report of your action in this matter.

See Tab I.^{1/}

Subsequently, on December 9, 1992, the Acting Administrator issued All Agency Memorandum No. 157 (AAM 157). The memorandum elaborated on the Department’s position as set forth in the November letter:

This memorandum clarifies the application of Davis-Bacon wage determinations to federally-funded and assisted construction contracts that contain option clauses, and to federal service contracts which have a substantial and segregable amount of construction work that require the application of the Davis-Bacon Act and which also contain option clauses. . . .

[T]he exercise of such an option requires a contractor to perform work for a period of time for which it would not have been obligated -- and for which the

^{1/} In November 1992, the contractor in this multi-year contract was Serv-Air, Inc. Tab L. In or about January 1996, the Raytheon Corporation purchased Serv-Air, Inc. and succeeded as contractor. Tabs F, D.

government would not have been required to pay -- under the terms of the original contract if the option had not been exercised. Thus, once the option on a contract is exercised, the additional period of performance becomes a new contract.

Accordingly, every federally-funded or assisted multi-year construction contract in excess of \$2,000 that contains a provision to extend an existing contract -- pursuant to an option clause or otherwise -- so that the construction is performed over an extended period of time (as opposed to situations where a contractor is given additional time to complete its original contract commitment), must include a current Davis-Bacon wage determination. . . . [I]f an option in the SCA contract calls for substantial and segregable construction work, then a current Davis-Bacon wage determination must also be incorporated at the exercise of the option.

Tab B.

On May 10, 1993, because the Army had not complied with DOL's November 1992 letter and AAM 157, the Union requested intervention by the Secretary of Labor. Tab I. On July 8, 1993, the Deputy Assistant Administrator answered that he had recently received a report from the Army and, after reviewing the information, would render a final decision within thirty days. Tab H. The report referred to by the Administrator presumably is a letter dated June 7, 1993, in which the Army requests that the Department rescind AAM 157. *See* Tab C.

In January 1996, the Union again complained to DOL about the Army's continued refusal to incorporate current DBA wage determinations into the subject contract. Tab F. On January 29, 1996, the DOL's Wage and Hour Division questioned the Army about the Union's allegation and instructed the Army to look into the matter and report back. Tab E. Following another complaint by the Union to the Secretary of Labor, the Army finally responded to Wage and Hour on April 8, 1996, as follows:

You are correct that new Davis-Bacon Act wage determinations are not being incorporated into the referenced contract at the option periods. The Davis-Bacon Act does not require such incorporations. The All Agency Memorandum (AAM) 157 which you enclose purports to require such incorporations. However, the Army has been on record for some time with the Department of Labor that AAM 157 is unenforceable.

Tab C. The Army enclosed a copy of the June 7, 1993 position letter that it had filed with DOL.

After reexamining the issue, the Administrator issued her ruling of May 2, 1996, declining to rescind AAM 157. Tab A. She added that the Department would be reviewing the Army's pending contracts for compliance.

DISCUSSION

The Army contends that AAM 157 should be rescinded because it is procedurally invalid and legally erroneous. It argues that in issuing AAM 157 the Department promulgated a “rule,” and violated the Administrative Procedure Act, 5 U.S.C. § 551-76, by failing to provide public notice and seek comment.^{2/} The Army also contends that the Department erroneously applied the law in AAM 157.

In her brief before us the Administrator explains that AAM 157 is an “interpretative” rule exempt from the notice and comment rulemaking requirements of the APA. She adds that the guidance provided represents a reasonable interpretation of the DBA, which was favorably cited and relied upon by the Board in *Iowa Dep’t of Transp.*, WAB Case No. 94-11, Oct. 7, 1994.

The Building and Construction Trades Department of the AFL-CIO filed a brief as an interested party, supporting the Administrator’s brief and opposing the Petition for Review. In addition, the Trades Department argues that because agencies such as the Army are explicitly excluded from those “persons” to whom the APA affords notice and the opportunity to comment, the Army is obligated to comply with AAM 157 regardless of whether it was adopted in accordance with the notice and comment requirements of the APA. The Trades Department urges the Board to uphold AAM 157 and the Administrator’s May 1996 final ruling because AAM 157 represents the most reasonable and appropriate construction of the DBA.

The Teamsters Union filed a motion to dismiss the Petition for Review as merely an attempt to avoid the Administrator’s 1992 order. The Union contends that the legislative-interpretive dichotomy is irrelevant to the validity of the November 1992 order and requests that the Board direct the Army to comply with that order, which it has not challenged. The Army replies that the November 1992 letter was not a final ruling by the Administrator.

I. The Army’s Challenge of AAM 157 is Untimely

We agree with the Teamsters Union that the November 1992 letter constituted a final, appealable decision. The letter was not mere advisory enforcement correspondence from a regional office, *see J.E. McAmis, Inc.*, WAB Case No. 92-18, Dec. 30, 1992, but was a fully explained, authoritative order directed specifically to the Army by the Wage and Hour Division’s Deputy Assistant Administrator. As a party aggrieved by the Administrator’s November 1992 ruling, it was incumbent upon the Army to follow administrative procedure for review. It neither sought reconsideration nor appellate review, but chose to ignore an unfavorable ruling that affected its entire multi-year contract.

^{2/} The Army raised this issue as an intervenor in *Modernization of John F. Kennedy Federal Building*, WAB Case No. 94-09, Aug. 19, 1994, and the Board declined to rule on the Army’s allegation because the contract itself stated that current wage rates would be incorporated at the time of exercise of an option.

The Wage Appeals Board held in *Almeda-Sims Sludge Disposal Plant*, WAB Case No. 78-13, Jan. 5, 1979, slip op. at 9, that the Department's issuance of an AAM constituted a final decision of the Administrator reviewable under 29 C.F.R. Part 7. Assuming that AAM 157 also constituted a final decision when issued on December 9, 1992, the Army again failed to timely seek reconsideration or Board review. Only after the Union implored the Secretary of Labor to order the Army to comply did the Army file its June 1993 letter requesting rescission of AAM 157. Under these circumstances, we find that the employees are entitled to enforcement of the Administrator's unchallenged November 1992 order, irrespective of the resolution of the Army's untimely argument that AAM 157 should be rescinded.

II. AAM 157 is an Interpretative Rule

Even if we consider the Army's June 1993 letter to be a timely challenge which remained pending before the Administrator and culminated in this Petition for Review, the arguments raised in the petition are without merit. First, we reject the Army's contention that AAM 157 was issued in violation of the notice and comment requirements of the APA. The distinction between "legislative" rules or statements that are subject to the notice and comment requirements of the APA and "interpretative" rules or statements that are exempt from those procedures is notoriously 'hazy.' *Caraballo v. Reich*, 11 F.3d 186, 194-95 (D.C. Cir. 1993). However, the 'starting point' of the analysis is the agency's characterization of the rule. *Metropolitan Sch. Dist. v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992), *cert. denied*, 507 U.S. 949 (1993). Though not dispositive, the agency's characterization is a relevant factor. Ultimately, an interpretative statement simply indicates an agency's reading of a statute or a rule. It does not intend to create new rights or duties, as substantive or legislative rules would, but only reminds affected parties of existing duties. *Davida*, 969 F.2d at 489-90; *Caraballo*, 11 F.3d at 195. On the other hand, a legislative rule has effects completely independent of the statute. *United Technologies Corp. v. United States EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987).

To assist in ascertaining the agency's intent, the court in *American Mining Congress v. Mine Safety & Health Adm.*, 995 F.2d 1106 (D.C. Cir. 1993), set forth the following four questions and stated that an affirmative answer to any one of the four would indicate "legal effect" and a legislative, not interpretative, rule:

- (1) Whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties,
- (2) Whether the agency has published the rule in the Code of Federal Regulations,
- (3) Whether the agency has explicitly invoked its general legislative authority,
or
- (4) Whether the rule effectively amends a prior legislative rule.

995 F.2d at 1112.

Within this legal framework, it is clear that AAM 157 is an interpretative rule. DOL neither published this rule in the Code of Federal Regulations, nor invoked its general legislative authority. AAM 157 does not repudiate or contradict any earlier legislative rule. *See Caraballo*, 11 F.3d at 196. Although the Army points to 29 C.F.R. § 5.2(h), we find that this section of the regulations lends no support to petitioner's position:

(h) The term *contract* means any prime contract which is subject wholly or in part to the labor standards provisions of any of the acts listed in § 5.1 and any subcontract of any tier thereunder, let under the prime contract.

This provision does nothing more than make clear that subcontracts as well as prime contracts are covered by the DBA.

AAM 157 is intended to remove any doubt that a contracting agency might harbor regarding the application of the DBA to contracts formed pursuant to an agency's exercise of an option. It advises agencies that the Administrator intends to apply traditional contract principles to determine whether a new contract has been formed pursuant to the exercise of an option clause of an existing contract. Under those principles an option is merely a continuing offer and no contract is formed until that offer is accepted. (See Comment (a) to § 25 Restatement of the Law, Second, Contracts (ALI, 1981)). The Administrator's interpretation set out in AAM 157 states that the exercise of any option that extends the life of a contract beyond the period under which the contractor would otherwise be obligated results in the formation of a new contract for which a current wage determination is required. There is nothing novel or surprising in this interpretation. Far from expanding on the statute, it merely restates the contracting agency's statutory obligation in a manner that a contracting agency would be hardpressed to misunderstand. It neither modifies nor expands upon the rights or obligations previously established by the DBA itself.

In alerting agencies under what conditions DOL will determine that the exercise of an option constitutes a new "contract" for purposes of the DBA's requirement that every "contract" contain the applicable prevailing wage rates, AAM 157 is advisory and not rulemaking in character. In setting forth what the Administrator thinks the term "contract" means, AAM 157 relies not only on traditional principles of contract law but also on the language and purpose of the statute and consistency with regulations under the companion Service Contract Act. A statement such as this that seeks to interpret a statutory term and derives its validity solely from the correctness of the agency's interpretation of the statute is the "quintessential example" or the "paradigmatic case" of an interpretative rule. *Caraballo*, 11 F.3d at 195; *David*, 969 F.2d at 492.

The Army argues that AAM 157 constitutes legislative rulemaking because it alters rights and obligations, constitutes a binding mandate, and has significant fiscal ramifications for federal agencies and contractors. As we noted above, we disagree. All rules are binding on the

regulated parties in the sense that the rules set, for the time, the legal minima of behavioral standards. *David*, 969 F.2d at 493. Further, prevailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative. The impact of a rule has no bearing on whether it is legislative or interpretative. *Id.* In any event, AAM 157 has only a minimal legal impact. DOL's enforcement policy with respect to the application of the DBA to contracts formed pursuant to the exercise of an option would be the same whether AAM 157 was ever issued.

Finally, a rule affecting rights and obligations is not *ipso facto* legislative. *Id.* But again we note that AAM 157 did not create any new duties; it simply restated the position espoused by DOL in the November 1992 ruling. *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985) (rule that simply restates agency's practice under statute is interpretative); *cf. Caraballo*, 11 F.3d at 196 (interpretative rules need not merely restate consistent agency practice). The Army's obligation here derives from the DBA itself.^{3/}

III. AAM 157 is a Reasonable Interpretation of the DBA

AAM 157 constitutes a reasonable interpretation of the DBA and is consistent with earlier decisions by DOL, this Board, and its predecessors. *See Patton-Tully Transp. Co.*, WAB Case No 93-13, May 6, 1994 (Board will affirm Administrator's determination if reasonable and consistent with past practice or decisions). The DBA provides that prevailing wages must be paid to laborers and mechanics employed on federally-funded and assisted contracts. *See Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981). The very concept of a prevailing wage necessarily encompasses a current wage. A wage simply cannot be prevailing if it is outdated. *See Iowa Dep't of Transp.*, WAB Case No. 94-11 (Oct. 7, 1994), slip op. at 2; *Modernization of the John F. Kennedy Federal Building*, WAB Case No. 94-09, Aug. 19, 1994, slip op. at 5. The only legitimate reason for not including the most recently issued wage determination in a contract is based upon disruption of the procurement process. *Iowa Dep't of Transp.*, slip op. at 2, citing 47 Fed. Reg. 23646 (May 28, 1982). Thus, by interpreting "contract" to include the exercise of an option in a multi-year contract such as this, the rule in AAM 157 effectuates an important goal of the DBA -- to incorporate current prevailing wages when not disruptive of the procurement process.

DOL consistently has applied these principles and required that new DBA wage determinations be incorporated in analogous situations when contracts are modified beyond the obligations of the original contract. As early as 1953, the Secretary of Labor issued an opinion letter reading the language of the DBA as requiring updated wage rates when special work orders are issued under a contract, *i.e.*, at the time contractual obligations for particular work orders issued under a contract are made specific. Tab O. In 1971 DOL advised the Air Force

^{3/} In view of our ruling that AAM 157 is an interpretative rule, it is unnecessary to address the Construction Trades Department's alternative argument.

that when a contract calls for construction in accordance with specifications to be issued from time to time, a current DBA wage determination should be incorporated into each set of specifications. Tab N. More recently, in *Iowa Dep't of Transp.*, the Board affirmed the Administrator's ruling that an extra work order was a substantial modification to an existing contract so as to be considered a "new" contract requiring an updated DBA wage determination. The Board found AAM 157 supportive of the Administrator's policy. Here, as the Board stated in *Iowa Dep't of Transp.*, "[r]eversal of the Administrator's decision in this case would create a gaping loophole in the enforcement of the DBRA prevailing wage laws." Slip op. at 5. Contracting agencies could utilize option periods to cut procurement costs in contravention of the DBA.

The Army argues that AAM 157 is erroneous because treating the exercise of an option as a new contract conflicts with both common law definitions of contract and with government contracts practice. We agree with the Administrator, however, that treating, as a new contract under the DBA, the exercise of an option that obligates a contractor to perform work for a period of time for which it was not obligated to perform under the terms of the original contract comports rather than conflicts with basic contract principles. Generally speaking, the operative effect of exercising an option is to create a new contract, and we are convinced that under the DBA and these circumstances, the Administrator's ruling is correct. *See supra* at p.6; Administrator's Brief at 18. Furthermore, in addressing this type of construction contract that is similar in nature to a service contract, it was entirely reasonable for the Administrator to issue a rule comporting with SCA regulations. The distinctions raised by the Army do not overcome the similarities that support the Administrator's ruling.

CONCLUSION

DOL is charged with interpreting the DBA and has inherent authority to issue interpretive rules such as AAM 157 informing the public of the standards it intends to apply in exercising

its discretion. After clarifying the language of AAM 157 as indicated in the May 2 final ruling, page 6 n.2, we direct the Wage and Hour Division to publish AAM 157 extensively in the Federal Register consistent with the Board's decision in *Almeda-Sims*, slip op. at 10-11.

Accordingly, the Petition for Review is denied.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member