IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Independent Roofing Contractors Council Apprentice Training Trust Fund *ex rel,* Royal Roofing, Inc.,

Petitioner,

v.

Elaine Chao, in her official capacity as Secretary of Labor, and the United States Department of Labor,

Respondent,

Roofers Union Local No. 81, Intervenor.
_____/

NO. C 05-03605 JW

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND AFFIRMANCE OF THE FINAL ORDER OF THE ADMINISTRATIVE REVIEW BOARD

I. INTRODUCTION

Before the Court is the Respondent's Motion for Summary Judgment and Request for Affirmance of the Final Order of the Administrative Review Board pursuant to Rule 56 of the Federal Rules of Civil Procedure. Based upon the papers submitted to date, the Court GRANTS Respondent's Motion for Summary Judgment.

II. FACTUAL BACKGROUND

Royal Roofing ("Royal"), a non-union roofing contractor, was one of thirty-five members of the Independent Roofing Contractors of California ("IRCC"). Between September 1995 and July 1997, Royal completed work on four federal construction projects located in California. Pursuant to the Davis-Bacon Act ("DBA"), contractors on federally funded projects must pay their employees the prevailing civil subdivision wage rate for their locality, as calculated by the Secretary of Labor.

40 U.S.C. § 3142(b). Federal regulations permit contractors to compensate their registered roofer apprentices at less than the prevailing wage rate when they are hired "pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor..." 29 C.F.R. 5.5(a)(4). Contractors' contributions to an apprenticeship training fund "for defraying the costs of apprenticeship or similar programs" can be credited against the wages owed. 40 U.S.C. § 3141(2)(B).

The IRCC established an Apprenticeship Training Trust Fund ("IRCC Fund") approved by the California Department of Industrial Relations, Division of Apprenticeship Standards ("DAS"), to administer apprentice programs for its member contractors. To progress from apprentice to journeyman (full-employee) status required 144 hours of classroom instruction, correspondence courses, and 4000 hours of on-the-job training. IRCC's thirty-five members had two options for contributing to the IRCC Fund. Method A allowed for contributions of $.20 per hour per employee - whether on DBA or private work, and whether journeyman or apprentice. Method B allowed for contributions based on the number of apprentices enrolled. Contributions to the IRCC Fund (1) were not automatically devoted to training; (2) did not require the approval of the employees on whose behalf they were made; and (3) could be made in excess of the amount calculated by either Plan A or Plan B. Royal elected to follow Plan B and contributed varying amounts deducted from its journeymen's and apprentices' salaries during DBA contract work. It made contributions in excess of the minimum IRCC Fund amount.

An Investigator from the DOL's Wage and Hour Division reviewed Royal's payments under the contracts to determine whether its salaries were in compliance with the DBA's requirements. Royal Roofing Company, Inc., ARB No. 03-127, ALJ No. 1999-DBA-29 (ARB Nov. 30, 2004) at 4 (hereafter, "ARB Decision"). She reached two factual conclusions about Royal's practices: (1) Royal made contributions to the fund on behalf of each journeyman and apprentice, subtracting the hourly salary and health insurance cost per employee from the total amount of wage and fringe benefits that the DBA required. Royal's contributions per hour varied from $0 to $6.99 per hour.

(2) Of Royal's 28 apprentice roofers, only 16 were properly registered with DAS. Id. The Investigator allowed Royal DBA credit for its contributions to the IRCC fund according to an "annualization" principle, under which she divided Royal's 1996 contributions to the IRCC fund by the total number of hours that the employees worked on both public and private jobs during that year. Id. She concluded that Royal was entitled to a DBA credit of $.50 per employee per hour for apprenticeship training. Id. She also concluded that Royal had violated the DBA by failing to pay the twelve unregistered apprentices full journeyman wages. Id. She determined that Royal's total back wage liability was $76,245.55. Id. The Administrator ordered that sum withheld from Royal's contract payments. Id.

III. PROCEDURAL BACKGROUND

Royal requested a review by an Administrative Law Judge ("ALJ"). Id. On June 11, 2003, the ALJ issued his Decision and Order, which affirmed the Investigator's conclusions. Royal next requested review by the DOL's Administrative Review Board ("ARB"), which affirmed the ALJ's Decision and Order. Id. at 4-5. The ARB's November 30, 2004 Final Decision and Order rested on three conclusions: (1) Royal's contributions to the IRCC Plan violated the DBA's prevailing wage requirements; (2) the ALJ correctly held the annualization principle applicable in determining the appropriate DBA credit for Royal; and (3) the twelve unregistered apprentices are entitled to journeyman wages for their DBA work. Id. at 5-10.

The IRCC Fund filed this suit for judicial review of the administrative actions, contending that the ARB's decision should be reserved. Respondents Secretary of Labor and DOL and Intervenor Roofers Union Local No. 81 have separately moved for summary judgment, contending that the ARB's above three conclusions are correct, that the conclusions properly merit the Court's deference, and that no material issues of fact remain to be resolved in this case.

IV. STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex v. Catrett, 477 U.S. 317, 323-24 (1986).

On judicial review of an administrative action, the Administrative Procedure Act provides that the court shall set aside as unlawful agency action, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In the Ninth Circuit, an agency's action is arbitrary and capricious if (1) the agency fails to consider an important aspect of a problem; (2) an agency offers an explanation for the decision that is contradictory to the evidence; (3) the agency's decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; or (4) the agency's decision is contrary to the governing law. Lands Council v. Powell, 379 F.3d 738, 743 (9th Cir. 2004). Review under this standard "is narrow, and a reviewing court may not substitute its judgment for that of the agency." United States v. Snoring Relief Labs, Inc., 210 F.3d 1081, 1085 (9th Cir. 2000).

V. DISCUSSION

A. Royal's Contributions to the IRCC Plan

The ARB found that Royal's contributions to the IRCC plan were excessive, because they were not reasonably related to the costs of apprenticeship training. (ARB Decision at 5-7.) Petitioner contends that this determination was incorrect, offering five reasons that Royal's contributions were reasonable. (Petitioner Independent Roofing Contractors Council Apprenticeship Training Trust Fund *ex rel* Royal Roofing, Inc.'s Opposition to Secretary's Motion for Summary Judgment, hereafter, "Opposition," 6-10, Docket Item No. 19-1.) First, apprentices are used on private works to the detriment of the employer. Id. at 6. Second, it is "actuarially unwise" to limit the contributions into non-union programs due to their immediate cash needs stemming from large apprenticeship programs. Id. at 7. Third, Petitioner has incurred "tremendous legal costs" due to legal challenges to Royal's apprentice programs, which have caused the Petitioner's costs per apprentice in legal fees alone to exceed the amount of annualized contributions. Id. at 7-8. Fourth,

"the base wage is always paid to the employee and any economies over union programs of providing benefits inure to the IRCC rather than to the employer. This is not employee money, because the base wage is paid "on the check." This is employer money, since the employer has provided all the benefits at cheaper costs than Davis-Bacon wage determination amounts." Id. at 8. Fifth, DOL's Pension Benefit Welfare Administration found Royal's "residual method" of contributions lawful. Id. at 9.

Under the DBA, contractors on federal construction projects may meet the prevailing wage rate standard for compensating employees via any combination of wages and bona fide fringe benefits. 40 U.S.C. § 3142(d). Contractors are afforded credit against their DBA wage obligations for their contributions irrevocably made for the purpose of defraying the costs of apprenticeship. 40 U.S.C. §§ 3141(2)(B)(i), 3142(d).

To determine whether Royal's contributions violated the DBA, the ARB looked to the 11th Circuit's decision in Miree Constr. Corp. v. Dole, in which the court analyzed the extent to which a contractor could receive DBA credit for its contributions to an apprenticeship plan. 930 F.2d 1536 (11th Cir. 1991). The Eleventh Circuit's ultimate conclusion in Miree was "whether an employee benefit plan is funded or unfunded, an employer may only receive Davis-Bacon credit for contributions that are reasonably related to the cost of the training provided." Id. at 1543. Royal argued before the ALJ and ARB that Miree should not govern. Rather, Royal contended, Tom Mistick & Sons, Inc. v. Reich, 54 F.3d 900 (D.C. Cir. 1995) should govern. The ARB determined that Miree should apply due to factual similarities. It distinguished Mistick on several grounds:

> In *Mistick*, on the other hand, the contractor established its own Davis-Bacon fringe benefit plan in addition to the other fringe benefits it was required to fund. It made weekly contributions to the plan only for employees working on public (DBA), not private, projects. Its contributions equaled the difference between the DBA prevailing wage and the cash wage it paid to the employees on private work. Like Royal's, its contributions were irrevocable, but unlike Royal's, they were placed in an employee's own interest-bearing trust account. And, unlike Royal's employees, Mistick employees could direct a trustee to disperse funds in their accounts to pay for hospital and medical care, pensions, occupational injuries or illnesses, unemployment benefits, accidents, insurance, etc. Furthermore, when the employee left Mistick, he could withdraw the balance of the trust account in cash.

> In *Mistick*, the court noted the "critically different facts in *Miree* and refused to apply its "reasonable relationship" test because Mistick's contributions did not exceed, but equaled the benefits the employees received. "The one-to-one ratio between employer contributions on behalf of an employee and value received by the employee cannot be deemed unreasonable." *Id*. at 904.
>
> Therefore, since the fringe benefit plan in *Mistick* and the IRCC apprenticeship Plan here are significantly different, we have applied the *Miree* "reasonable relationship" standard.

(ARB Decision at 6-7.) The Court finds that the ALJ and ARB concluded reasonably that the Miree standard should apply to this case. The only remaining question is whether the ARB's conclusion that Royal's contributions to the IRCC Fund were excessive (i.e. not reasonably related to the cost of the apprenticeship program), was arbitrary, capricious, or an abuse of discretion. To reach its conclusion, the ARB looked to two factual ways in which there was no reasonable relation between Royal's expenditures on the training program and its contributions to the IRCC Fund. First, Royal was one of thirty-five contractor-members of the IRCC and employed only ten percent of the apprentices enrolled in the program overall. Id. at 6. However, Royal's 1996 and 1997 contributions to the IRCC Fund represented one-third of the Plan's total expenditures and 90 percent of its actual training costs. Id. Second, Royal's contributions were "erratic and disorganized," ranging from 0 to $6.99 per hour for employees purportedly paid the same hourly rate. Id.

Petitioner has raised no adequate challenge to these findings. Petitioner's first three contentions are simply irrelevant to the question of whether it complied with the DBA's requirements. Petitioner's fourth contention - that savings in fringe benefits programs inure to its benefit rather than the apprentices' benefit - is incorrect as a matter of law. Under the DBA, the salary due an employee is the prevailing wage, which may be met by any combination of wages directly paid and fringe benefits. 40 U.S.C. § 3142. No provision of the DBA provides for fringe benefits to revert to the employer. Lastly, Petitioner has included as Exhibit I a letter from the DOL's Pension Welfare Benefit Administration, contending, "The PWBA conducted an extensive audit of the IRCC Training Trust Fund and found nothing unlawful." (Declaration of Mark R. Thierman in Support of Plaintiff-Practitioner's Opposition to Intervenor's Motion for Summary Judgment, Exh. I, at 2.) PWBA's letter merely states, "This is to advise you that our investigation is

now concluded and no further action by PWBA is contemplated at this time." Id. The second and final page of the exhibit, which is largely illegible, notes that the DOL concluded on March 13, 1997 that no action was necessary. Id. at 3. The exhibit does not indicate whether the PWBA investigation was in any way related to violations of the DBA. More importantly for purposes of this summary judgment motion, nothing in this exhibit suggests that the ARB acted arbitrarily, capriciously, or in an abuse of its discretion when it concluded that Royal's contributions to the IRCC Fund bore no reasonable relation to the apprenticeship expenditures. The Court holds that the ARB did not.

B. Annualization

The ALJ and ARB held that Royal's DBA credit was to be determined by the annualization principle. (ARB Decision at 8.) Annualization involves the division of the employer's contributions to an apprentice training fund reasonably related to the cost of the training, by the total hours that the apprentices and journeymen worked on all projects. Id. The DOL has previously used this methodology to determine DBA contributions. Cody-Zeigler, Inc. v. Administrator, Wage and Hour Div., ARB Nos. 01-014, 015, ALJ No. 97-DBA-17, slip op. at 16-18 (ARB Dec. 19, 2003). The ARB's justification for annualization was: "Royal funded the apprenticeship Plan solely from wages the journeymen and apprentices earned on DBA projects. But the Plan's costs and benefits did not occur solely during DBA work. Rather, the Plan provided continuous, year-round training to the apprentices. Therefore, Royal was paying a disproportionate amount of the Plan's cost out of wages earned on DBA work, thus underpaying the workers for DBA work." (ARB Decision at 7-8.) The ARB rejected Royal's argument that annualization should not apply because the apprenticeship program is not a yearly benefit, to any one employee, noting, "[T]his argument has no merit since the IRCC plan, with its 4,000 hour on-the-job training and 144 hour classroom instruction requirements, clearly contemplates year-round training. It benefits apprentices who aspire to journeyman status. And it benefits the journeymen because non-union employers like Royal, by applying apprentices at lower wages, are able to compete with union roofers and thus successfully

bid on more jobs." Id. at 8. Petitioner also contends that "true multi-employer apprenticeship" is not a "private work benefit" to the employer, saying that it is a "cost, not a benefit," to use apprentices on private works. (Opposition at 15.) Whether it is financially feasible for the Petitioner's contractors to use apprentices in light of DBA requirements is a determination that it must make. However, so long as the ARB did not act arbitrarily or capriciously in selecting annualization as the method under which to calculate Royal's DBA credit, the Court must affirm. Under the applicable standard of review, the Court finds that the ARB's use of the annualization technique was reasonable.

The Petitioner further contends that the ALJ's and ARB's methodology was improper, alleging use of "fuzzy math." (Opposition at 18.) However, as the ARB found, to the extent that "fuzzy math" was used, it inured to Royal's benefit. (ARB Decision at 8-9.) The Investigator did not have sufficient information at the time of her calculation to determine which of Royal's contributions reasonably related to the apprentice training costs. Instead, she counted *all* of Royal's contributions in making the annualization calculation, despite significant evidence that Royal had made disproportionate contributions to the IRCC Fund. Id. at 8. The ALJ accepted this determination, even though he was better positioned to count only Royal's contributions reasonably related to the cost of training. Id. As the ARB highlighted, this resulted in a "very generous" credit to Royal, since ordinarily "an employer should receive DBA credit only for contributions reasonably related to the cost of the fringe benefit, not estimates thereof." Id. at 9. The Court holds that the ARB did not abuse its discretion, but rather, used that discretion to Royal's substantial benefit. The annualization calculation is appropriate.

C. The Twelve Unregistered Apprentices

As discussed above, DBA employers must pay the prevailing wage rate. 40 U.S.C. § 3142(b). An exception to this rule exists for apprentices that are officially registered with the U.S. Department of Labor or a federally recognized State Apprenticeship Agency. 29 C.F.R. § 5.5(a)(4)(I). The Investigator requested DAS to inform her whether Royal's twenty-eight claimed

apprentices were properly registered as apprentices with the state. (ARB Decision at 9.) DAS informed her that only sixteen of the apprentices were registered during the relevant time period. Id. The Investigator concluded that the remaining twelve workers should have been paid the journeyman rate, but offered Royal the chance to show that they were registered apprentices when the Davis-Bacon work was performed. Id. Royal and the Petitioner repeatedly failed to provide sufficient proof to the Investigator or the ALJ that the employees were registered as apprentices with DAS. (ARB Decision at 10.)

The Petitioner contends that "the state of California records were simply inaccurate or incomplete." However, Royal bore the burden of proof to demonstrate proper registration. Tollefson Plumbing and Heating Co., WAB No. 78-17 (Sept. 24, 1979). In the Ninth Circuit, this requirement is strictly construed. North Star Indus. v. Reich, 1995 U.S. App. LEXIS 28343, *11 (9th Cir. Oct. 2, 1995). As the Ninth Circuit has held, "public policy concerns militate against creating a good faith exception [to the statute's registration requirements], which could easily undermine the Davis-Bacon Act." Id. Accordingly, Royal's failure to establish that the twelve employees of disputed status were properly registered as apprentices is dispositive. The Court finds that the ARB did not act arbitrarily or capriciously in determining that Royal failed to carry its burden to demonstrate proper registration.

VI. CONCLUSION

The Court GRANTS Respondent's Motion for Summary Judgment and Request for Affirmance of the Final Order of the Administrative Review Board.

Dated: September 18, 2006

JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: September 18, 2006

Richard W. Wieking, Clerk

By: /s/ JW Chambers
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Courtroom Deputy