In the Matter of:

NEW MEXICO NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

ARB CASE NO: 03-020

DATE: October 19, 2004

Dispute concerning the application of General Wage Determination NM020005 to electricians employed by the WIPP Federal Nuclear Waste Disposal Site in Eddy County, New Mexico.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner New Mexico National Electrical Contractors Association:
Stanley Bessey, ***Albuquerque, New Mexico***

For Respondent Administrator, Wage and Hour Division:
Mary J. Rieser, Esq., Ford Newman, Esq.,William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., ***U.S. Department of Labor, Washington, D.C.***

For Intervening Interested Party International Brotherhood of Electrical Workers, AFL-CIO:
Terry R. Yellig, Esq., ***Sherman, Dunn, Cohen, Leifer & Yellig, P.C., Washington, D.C.***

ORDER DENYING RECONSIDERATION

This case arises under the Davis-Bacon Act, as amended (DBA), 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003), and regulations at 29 C.F.R. Parts 1, 5, and 7 (2003). In late 2002, the New Mexico Electrical Contractors Association (NECA) timely petitioned for review of a September 30, 2002 ruling by the Administrator, Employment Standards Administration, Wage and Hour Division, that denied a request for reconsideration of a prevailing wage rate for electricians listed in a wage determination, namely General Decision NM020005 applicable to Eddy County, New Mexico. Intervening interested party International Brotherhood of Electrical Workers, AFL-CIO (IBEW) supported the

petition. On May 28, 2004, the Administrative Review Board (ARB) issued a Decision and Order of Remand (D. & O.) that granted NECA's petition, reversed then Administrator Tammy D. McCutchen's ruling, and remanded the case to the Administrator to reconsider the electrician rate. On July 16, 2004, Acting Administrator Alfred B. Robinson, Jr. moved for reconsideration of ARB's May 28 D. & O.

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 v. Brown and Root, Inc.,* 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 July 14, 2000) (denying reconsideration).

Moving for reconsideration of a final administrative decision 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. Retirement Plan,* 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989). Presenting 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) ("A panel is simply not capable of having *overlooked* or *misapprehended* 'points of . . . fact' occurring *subsequent* to its initial decision" thus rendering consideration of subsequent factual occurrences beyond the scope of a petition for rehearing.) (Emphasis in original).

Such a 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 (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, *supra* §§ 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]

In our May 28, 2004 D. & O., we concluded that the Administrator had abused her discretion (i) by failing to acknowledge, discuss, and explain the disparities among wage rates, (ii) by failing to explain why she abandoned previous guidelines for determining prevailing rates that were contained in a 1986 Wage and Hour Division Manual of Operations, (iii) by failing to comply with current guidelines that are contained in a 1999 General Accounting Office (GAO) Report, and (iv) by rigidly applying a 3-worker/2-contractor standard.

The Wage Disparities

The Acting Administrator argues on reconsideration that the Administrator "did, indeed, recognize the disparity" between survey wage rates and pre-existing rates for electricians, citing the Administrator's September 30, 2002 ruling (Administrative Record (AR) Tab A), but that substantial changes in DBA wage determination rates do not provide a basis for reevaluating data. Motion for Reconsideration at 4-5. The Acting Administrator states that "where the previous rate was a union rate, but the new survey shows that union rates no longer prevail, the resulting wage determination often reflects a 'substantial decrease' in rates." *Id.* at 5. We found, however, that the Administrator never "acknowledge[ed], discuss[ed], or attempt[ed] to explain" *myriad* disparities,

---

[1] A court also may 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).

including but not limited to the "glaring" 48 percent disparity in electrician rates that suggested unrepresentative survey data. D. & O. at 7. On reconsideration, the Acting Administrator has not persuaded us that our finding was erroneous.

Furthermore, in his motion for reconsideration, the Acting Administrator assumes that Eddy County, New Mexico electricians have progressed from union shop ($21.50/$7.07) to open shop ($14.33/$0.51) wages. The Acting Administrator premises this trend on a sampling of electricians imported from Texas, three New Mexican electricians paid $12.00 an hour with no fringe benefits, and three New Mexico electricians paid $20.00 an hour with $5.84 in fringe benefits. We question this sampling given that attachments to NECA's petition for review list construction permits issued for and major projects performed in Eddy County during 1998 and 1999. In any event, the Administrator did not advance the "union-open shop" argument when we considered NECA's petition for review of the Administrator's September 30, 2002 ruling, and, consequently, we will not now consider it on a motion for reconsideration.

Finally, the Acting Administrator explains that IBEW provided the Wage and Hour Division with collective bargaining agreements operative in Eddy County, but that, according to internal guidelines, the Division did not consider the bargaining agreements because the IBEW or signatory contractors did not also provide "specific wage data information . . . showing the payment of union wages to electricians on construction projects during the survey period." The Acting Administrator concludes: "Therefore, the Administrator did not abuse her discretion by failing to conduct adequate survey follow-up procedures in this case." Motion at 13-14; Addendum 1 (Gross Declaration) at 8, par. 11. *But see* 29 C.F.R. § 1.3(b)(2) (Division may consider signed collective bargaining agreements in making wage determinations). But, again, the Administrator did not previously present this internal guideline and its application to rationalize her action. Therefore, considering these new facts and argument on rehearing is inappropriate.

In sum, the Acting Administrator has not persuaded us to reconsider our holding that the Administrator did not adequately explain the wage disparities. Furthermore, new arguments, such as those presented here, are not appropriate grounds for reconsideration.

The Guidelines

The Acting Administrator argues on reconsideration that a rational explanation exists for why the Wage and Hour Division abandoned guidelines contained in the 1986 Manual of Operations. Motion at 9-12. The Acting Administrator also argues that the contractor that conducted the wage survey did indeed implement follow-up procedures consistent with the Wage and Hour Division's current internal guidelines. Motion at 12-14. The Acting Administrator attaches a declaration by William W. Gross, Director of the Office of Wage Determinations, and other addenda to explain why the Division abandoned the 1986 operations manual and what procedures it took to implement the wage survey. But much of what the Acting Administrator posits (Motion at 7-9), especially the Gross declaration, represent new facts that are not appropriate subjects for reconsideration. Because these "new" facts were within the Administrator's purview at

the critical time when she issued the September 30, 2002 ruling denying NECA's petition for reconsideration of the wage determination, they do not constitute newly discovered or previously unavailable evidence. Consequently, we will not consider them now.

The Acting Administrator further argues that because NECA and IBEW did not challenge the wage survey methodology in their arguments to the ARB, the Administrator was unaware that she should defend that methodology. The Acting Administrator in essence argues "surprise" as a reason for reconsideration. Motion at 2, 9-10. But from the inception, NECA and IBEW challenged the Wage and Hour Division's procedures for determining the electrician wage rate. *See* D. & O. at 3-4.

For instance, in its July 15, 2002 letter to the Administrator requesting reconsideration of the wage determination, NECA complained that the wage survey was based on "only three jobs being worked in the area during that period of time." AR Tab I. In response, the Administrator addressed the methodology issues without specificity, relying on what she summarily identified as "longstanding guidelines, practices and procedures." AR Tab A at 2. When NECA appealed the Administrator's ruling to the ARB (29 C.F.R. § 1.9), it complained about the small sampling and asserted that the survey should have been broader in scope. Petition for Review. On January 21, 2003, IBEW, in its brief in support of NECA's petition, also raised the issue of an irregular methodology, arguing that the Wage and Hour Division had violated its 1986 Manual of Operations guidelines. IBEW appended the relevant portions of the Manual to its brief. On February 4, 2003, the Administrator filed a reply memorandum, citing the 3-worker/2-contractor guideline set out in the 1999 GAO report. IBEW filed a sur-reply on February 11, 2003.

Thus, the record clearly establishes that the wage survey methodology was a significant issue before the ARB. Therefore, the Administrator could not have been "surprised" and had ample opportunity to defend her methodology.

"Undermining" The Wage and Hour Administrator

Finally, the Acting Administrator appears to rely on Rule 59's "manifest injustice" criterion in seeking reconsideration. The Acting Administrator states:

> If the Board allows its decision to stand, it will likely encourage challenges to wage determinations each time a wage rate arguably fluctuates significantly, such as when prevailing rates change from union shop to open shop, or visa versa. . . . Such increased challenges at both ends of the spectrum will significantly undermine the ability of the agency to timely effectuate wage determinations, which is contrary to the intent of the statute. Moreover, the Board's decision represents a departure from the broad discretion that the Board has traditionally afforded the Administrator with respect to wage determination matters.

Motion at 6-7.

To the contrary, we continue to accord the Administrator broad discretion as long as he or she resists abusing that discretion, e.g., by failing to proffer a legitimate rationale for agency action. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Insur. Co.*, 461 U.S. 29, 48-49, 56-57 (1983); *Building & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983).

CONCLUSION

On reconsideration, the Acting Administrator first argues that the Wage and Hour Division *did* consider the disparity between current and former electrician wage rates, and that the disparity did not merit reevaluating the wage survey data. But in our May 28, 2004 Decision and Order we found significant the glaring disparity between electrician rates as well as disparities between the current electrician rate and a number of other wage rates that the Division did not explain and that remain unexplained. The Division also offered a new argument on rehearing that we may not now consider. Second, the Acting Administrator argues that the Division adequately explained why it abandoned former guidelines and that it appropriately implemented current guidelines. Here, again, the argument fails because it depends on new facts that are not appropriate subjects for reconsideration. Finally, the Acting Administrator professes great concern that our May 28, 2004 D. & O. will lead to increased challenges and undermine the Division's ability to issue wage determinations. But we routinely accord the Division broad discretion to facilitate administrating the DBA and will continue to do so long as the Administrator does not abuse his discretion. For all these reasons, we **DENY** the motion for reconsideration.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge