BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

In the Matter of:	)	
	)	
PWCA,	)	
	)	
and	)	
	)	
NAPWC,	)	
	)	
Petitioners	)	
	)	
v.	)	ARB CASE Nos. 16-019
	)	16-021
SECRETARY OF LABOR,	)	
	)	
Respondent	)	
	)	
INDIANA-ILLINOIS-IOWA FOUNDATION FOR FAIR CONTRACTING,	)	
	)	
Intervenor	)	
	)	
Re: Annualization of Supplemental Employment Benefits Plans	)	

BRIEF OF INTERVENOR III FFC
IN SPPORT OF THE SECRETARY OF LABOR

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INTEREST OF THE III FFC

The III FFC is a not-for-profit labor-management cooperation committee organized pursuant to Section 302(c)(9) of the Labor Management Relations Act. 29 U.S.C. § 186(c)(9). One of the III FFC's primary activities is to monitor public works projects for compliance with laws impacting the construction industry, including federal and state prevailing wage compliance. The III FFC is comprised, in part, of construction industry employers that are signatory to one or more collective bargaining agreements negotiated by the International Union of Operating Engineers (IUOE), Local 150. Many of these contractors perform work on projects covered under the Davis-Bacon and Related Acts. The III FFC also works closely with other IUOE Locals and labor organizations on prevailing wage and other issues impacting the construction industry.

The III FFC's interest in this matter is that represented contractors remain competitive insofar as ensuring compliance with prevailing wage requirements when bidding construction projects. As set forth below, the III FFC supports the Administrator's determination that contributions to supplemental unemployment benefit (SUB) plans are generally subject to annualization, and that the annualization exception for certain SUB plans should be revoked. The determination should be affirmed to ensure the narrow exception to the annualization principle reserved for certain qualified defined contribution plans not be expanded. The Administrator's determination that contractors must annualize contributions to SUB plans is reasonable because SUBs are continuous in nature and compensation for public as well as private work. Further, the Administrator's determination furthers the purpose of the Davis-Bacon Act to protect employee wages on government construction projects.

BACKGROUND

The purpose of the Davis-Bacon and Related Acts (DBRAs) is to protect local prevailing wages on federally funded or assisted construction projects and to prevent non-local contractors from underbidding on such federal projects. The annualization requirement is consistent with this purpose since it ensures that a contractor does not fund a fringe benefit plan that provides benefits to an employee for all hours he/she works with wages earned solely on Davis-Bacon covered projects. *See* USDOL, Prevailing Wage Resource Book (May 2015), DBA/DBRA Compliance Principles, at 22. Stated differently, it prevents contractors from using Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and compensation for all the employee's work, i.e. for a benefit that is available during both Davis-Bacon covered and non-covered work. USDOL, Wage and Hour Division Field Operations Handbook (10/25/2010) (FOH), Sections 15f11(b) and 15f12(b).

As a general practice, union contractors annualize fringe benefit contributions because they contribute on an hourly basis in accordance with a collective bargaining agreement, regardless of whether the work is performed on a prevailing wage or non-prevailing wage project. Where collectively bargained rates prevail on a Davis-Bacon project, union contractors are at a significant competitive disadvantage if a non-signatory contractor is permitted to meet prevailing wage fringe benefit obligations by receiving full credit for fringe benefit contributions paid only on Davis-Bacon projects. Workers are also harmed because they lose the benefit of full compensation for work performed on a government project.

It is a contractor's choice to bid and perform work on Davis-Bacon projects. This choice comes with a number of obligations, beyond the requirement to pay market rates. Contractors should not be permitted to avoid their obligations on public construction projects by choosing to

fund a year-long benefit primarily with contributions on a Davis-Bacon project, and still receive full credit toward their Davis-Bacon obligations. That said, the III FFC does not oppose contributions to *bona fide* supplemental unemployment benefit (SUB) plans, so long as credit for contributions on Davis-Bacon projects are calculated in accordance with the annualization principle.

With this in mind, in July 2013, the III FFC requested that the USDOL's Wage and Hour Division review its decision to grant an annualization exception to certain SUB plans. A.R. III FFC July 15, 2013 complaint.[1] Specifically, the III FFC requested that the Department revoke the annualization exception granted to the PWCA (formerly the Prevailing Wage Contractors Association, Inc.) SUB Plan, the National Association of Prevailing Wage Contractors (NAPWC) SUB Plan; and the National Association of Prevailing Wage Employers/American Contractors Supplemental Unemployment Benefit Trust (NAPWE/ACT Plan). *Id.* The III FFC's complaint focused on the distinction between the SUB plans and defined contribution plans. It argued that the SUB plans did not operate in the best interest of the workers, did not result in full compensation to employees since significant administrative fees were deducted, and that there was a substantial risk of forfeiture. *Id.* The III FFC also requested that the Department eliminate any annualization exception for SUB plans and require all SUB plans to comply with the annualization principle. *Id.*

In correspondence dated July 26, 2013, the Department notified the SUB Plans of the III FFC's complaint and requested a position statement. A.R. Wage and Hour Division (WHD) July 26, 2013 letter to NAPWE, PWCA, and NAPWC. The PWCA responded with correspondence to WHD dated August 23, 2013 and the NAPWC responded with correspondence dated September 6, 2013. In correspondence dated October 22, 2015, the Administrator notified the SUB plans that

[1] References to the Administrative Record are indicated by "A.R."

contributions "are subject to annualization because SUBs are continuous in nature and compensation for private and prevailing wage/DBA work." A.R. Administrator's Oct. 22, 2015 ruling letters to PWCA, at 5 and NAPWC, at 7. Petitioners PWCA and NAPWC appealed this ruling.[2]

The Administrator's October 22, 2015 determination states there is no dispute that the plans are *bona fide* and, as such, contributions to the Plans may be credited towards meeting Davis-Bacon prevailing wage obligations. Rather, the issue is whether employer participants are entitled to receive the full cash equivalent of the contributions made to the Plan to meet their Davis-Bacon obligations, or whether the contributions are subject to annualization. Concluding that the annualization principle generally applies to SUB plans, the Administrator stated:

> When a fringe benefit is continuously available and compensates employees for private as well as public work, the employer is effectively providing the benefit for all services rendered during the year. To not annualize such a benefit permits an employer to unduly subsidize the benefit's cost through DBA fringe benefit contributions, whereas compelling annualization produces a fringe benefit figure that is consistent with the actual value of the contribution the employer is making for DBA work. Thus, as with other fringe benefits, applying the traditional requirement will serve to ensure that laborers and mechanics on whose behalf employers make contributions to a SUB plan receive the prevailing wage on DBA jobs.

A.R. Administrator's Oct. 22, 2015 ruling letter to PWCA, at 4 and NAPWC, at 5. As set forth below, the Department's determination is reasonable and should be affirmed.

ARGUMENT

I. The Administrator's determination is reasonable because SUBs are continuous in nature and compensate employees for public as well as private work; therefore, it is appropriate for contractors to annualize contributions to SUB Plans.

[2] The NAWPE/ACT Plan also received a letter ruling dated October 22, 2015, but did not appeal the Administrator's determination.

A. SUB Plans are continuous in nature.

It is appropriate to annualize contributions to supplemental unemployment benefit (SUB) plans because the benefits are continuously available during periods of involuntary unemployment, a common occurrence in the construction industry. The continuous nature of a benefit is a not a new guideline or a "new unrecognized benchmark" for determining whether the annualization principle applies to fringe benefit contributions, as argued by Petitioners. Twenty-five years ago the Eleventh Circuit explained: "If an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit, the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work." *Miree Construction Co. v. Dole,* 930 F.2d 1536, 1546 (11th Cir. 1991). In this matter, it is appropriate for employers to annualize contributions to SUB plans because the record shows that money contributed solely on Davis-Bacon projects disproportionally funds these year-long and ongoing, i.e. continuous, benefits. In fact, contributions on Davis-Bacon work is the primary, if not exclusive, source of funding for the Plans (discussed in Section I.B. below).

Petitioners argue that the benefits are not "continuous in nature" because receipt of the benefit is conditioned upon a qualifying reason such as the employee being involuntarily unable to work. Br. of Petitioner PWCA, at 11. This argument misinterprets what it means for a benefit to be "continuous in nature," that is, available year-round, regardless of whether a worker is performing work on a private project or a Davis-Bacon project. Like health insurance, vacation, holiday, or sick pay benefits, SUBs are continuously available throughout the year and distributed to employees regardless of whether the qualifying reason is the result of a short work period on a private project or Davis-Bacon project. In fact, the "exclusive purpose" of the NAPWC SUB Plan "is to provide income stability to participants who experience a loss of straight time employment

hours in a particular month." A.R. NAPWC Sept. 6, 2013 Response, Ex. "A" (NAPWC Sept. 19, 2006 letter to USDOL at 3, "Question No. 8"). Disbursements to participants are made "the month after hours dip below 173 straight time hours." *Id.*, Ex. "A" (NAPWC Sept. 19, 2006 letter to USDOL at 2, "Question No. 3"). And compensation is triggered by year-round events in the construction industry, such as inclement weather, lay off, and economic downturn. *Id.*, Ex. "A" (NAPWC Sept. 19, 2006 letter to USDOL at 4).

Similarly, PWCA SUB plan benefits are available during "short work periods," defined as working less than 40 hours in a week or less than 173 hours in a month. A.R. III FFC July 15, 2013 complaint, Ex. D-7 ("PWCA misc. information," Frequently Asked Questions). According to PWCA marketing materials the plan: "short week periods can be caused by layoffs, bad weather, illness, lack of work, equipment down time" or any number of reasons. *Id.* Again, benefits may be triggered by any number of ongoing events. Further, the broad scope of triggering events, including "illness" and "equipment down time" raises a separate concern of whether benefits are used to compensate for paid time off, which fall squarely within annualization requirements. *See* FOH, Sections 15f15(d) and 15f16(a). The broad scope of triggering events also highlights the continuous nature of these benefits. Although PWCA argues that benefits are not continuous in nature because "benefits are ***only*** available when an employee is involuntarily unable to work due to cyclical, seasonal or technological causes, discontinuation of a plant or operation or reduction in force or layoff" (Br. of Petitioners PWCA, at 11), such interruptions are ongoing, i.e. continuous, in the construction industry.

In contrast, benefits received by employees from a defined contribution plan are not continuous in nature because distribution is based on an isolated qualifying event, such as retirement, disability, termination of employment, divorce, or death. Because distribution is

typically triggered by an isolated event, the Department correctly characterizes defined contribution plans as "fundamentally deferred, non-continuous nature" to contrast SUB Plans, which are paid out throughout the course of an individual's employment during seasonal lay-offs and short weeks. A.R. Administrator's Oct. 22, 2015 ruling letters to PWCA at 5, and NAPWC at 7.

Given the continuous nature of SUBs, providing year-round benefits for all services rendered, it is appropriate to annualize contributions to these plans and the Administrator's ruling is reasonable.

B. The record in this matter shows that Petitioners' SUB Plans are funded primarily, if not exclusively, by compensation earned on Davis-Bacon projects, supporting the Administrator's determination that the annualization requirements should apply and distinguishing these plans from *Mistick*.

The annualization principle ensures that that a disproportionate amount of a year-long benefit is not paid for out of wages earned on Davis-Bacon projects. *Miree*, 930 F.2d at 1546. Because Petitioners' SUB plans provide year-long benefits that are disproportionately, if not exclusively, paid for out of wages earned on Davis-Bacon projects, the contributions must be annualized. Further, the SUB plans in this matter are distinguishable from the fringe benefit plan at issue in *Mistick v. Reich*, where there was no evidence on the record to show that the fringe benefit plan was funded primarily by Davis-Bacon contributions. 54 F.3d 900, 905 n.4 (D.C. Cir. 1995).

As an initial matter, the *Mistick* Court reviewed the issue of whether the company's Davis-Bacon fringe benefit plan (FBP) was *bona fide*. Reversing the Administrator, the Court concluded that the plan was *bona fide* because contributions made by the contractor were "reasonably related" to the value of the benefits received by employees. 54 F.3d at 903-4. The Court discussed a one-to-one ratio in support of its conclusion that the FBP was *bona fide* because there was a reasonable

relationship between the employer's contributions to the plan and the value of the benefits to employees. *Id.* at 904. However, this cash equivalent analysis was not determinative, or even relevant to, the annualization issue.

Mistick did not create a cash equivalent test to determine whether contributions must be annualized; therefore, use of a "cash equivalent" test in this matter is taken out of context. Br. of Petitioner PWCA, at 15; NAPWC Nov. 20, 2015 Appeal, at 2-3. The Court rejected the Department's position requiring annualization of the contributions because the facts did not support that the Davis-Bacon contributions were the disproportionate or exclusive source of funding for benefits that were continuous in nature and compensation for all the employee's work, on both public and private projects. *Mistick*, 54 F.3d at 905 n.4.

The Court also observed that the cost of administering the FBP and managing trust accounts were not deducted from the funds in the accounts. *Id.* at 902, 904. In the present matter, it is employees who bear the cost of administering the plan with fees as high as 7-9% (discussed at page 18 below). Even if the fees charged are reasonable, employees do not receive "the economic equivalent of cash" from the plan since administrative expenses are deducted. In addition, an employee cannot take money from a SUB account upon termination of employment, thus an individual risks leaving cash in the account at the end of employment. *Cf. Mistick* 54 F.3d at 904 ("Each employee received the full value of each dollar contributed by Mistick, either as an enumerated benefit purchased with FBP or in cash at the end of his employment").

Significant to the annualization issue, the *Mistick* Court determined that the employer "made separate contributions to a non-Davis-Bacon plan for is employees' private work." 54 F.3d at 905. Thus, the concern that compensation for work performed on Davis-Bacon projects

subsidized benefits for private work was diminished. *Id.* In its review of the annualization issue, the Court concluded that:

> [T]he Administrator has not shown that Mistick's contributions to its FBP for Davis-Bacon work financed benefits which were used by employees during private work periods and which would have been funded by a separate fringe benefit plan for private work but for the FBP. It was therefore unreasonable for the Administrator to annualize Mistick's contributions to its FBP.

Id. Accordingly, the record did not establish "that the fringe benefits used by Mistick's employees during periods of private work were financed primarily by Davis-Bacon contributions. [And] *the rationale for annualizing an employer's contributions therefore does not apply.*" *Id.* at 905 n.4 (emphasis added).

In this matter, the record shows that SUB benefits are funded primarily, if not exclusively by work performed on Davis-Bacon projects. It is exactly this type of subsidy that the annualization principle seeks to cure. FOH, Section 15f11(b) ("Normally, contributions made to a fringe benefit plan for Government work generally may not be used to fund the plan for periods of non-government work.").

Employer participants in the PWCA Plan make contributions exclusively on Davis-Bacon or state prevailing wage projects. Br. of Petitioner PWCA, at 13 ("employers contribute to the SUB Plan only so long as the employee is working on a DBA-covered project"). *See also* III FFC July 15, 2013 complaint, Ex. D-7 ("PWCA misc. information"). The PWCA attempts to argue around this fact stating "PWCA has already shown that no private work of PWCA employer members is being financed by the SUB Plan." Br. of Petitioner PWCA, at 16. This is simply not true; due to the continuous nature of the benefits, the PWCA plan subsidizes both public and private work during periods of unemployment. In addition, the supplemental benefit hours, i.e. "missed hours," are calculated based on employee's total hours worked, prevailing wage and non-

prevailing wage, further supporting the continuous nature of the benefits. A.R. III FFC July 15, 2013 complaint, Ex. D-7 ("PWCA misc. information").

And while the NAPWC plan offers options to employers to make contributions on behalf of employees engaged in prevailing wage construction projects, employees engaged in private construction projects, or both (A.R. NAPWC Sept. 6, 2013 response letter, at 2), there is no evidence that employers participating in the NAPWC plan contribute during work on private projects. In fact, the NAPWC Plan is marketed as a "prevailing wage product," and "the most advantageous cash plan" for merit shop employers. A.R. III FFC July 15, 2013 complaint, Ex. D-4 ("NAPWC misc. information"). Because the record shows that benefits used by employees during periods of private work are financed primarily, if not exclusively, by Davis-Bacon contributions, the SUB plans are distinguishable from the FBP in *Mistick*.

Even if *Mistick* broadened the scope of fringe benefit plans eligible for an annualization exception beyond contributions made to certain defined contribution plans, this exception must be narrowly construed. Nothing in *Mistick* rejects the Department's policy that compensation for Davis-Bacon work should not subsidize non-Davis-Bacon work. In fact, the Court refers to *Miree* in support of the annualization requirement ensuring that, where an employer chooses to provide a year-long (i.e. continuous) benefit, "the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work." *Mistick,* 54 F.3d at 905 n. 4 (citing *Miree*, 930 F.2d at 1546).

The record shows that a disproportionate, if not exclusive, amount of SUBs are paid for out of wages earned on Davis-Bacon work. And these benefits make up compensation for missed hours based on the total of prevailing wage and non-prevailing wage hours worked. Accordingly,

the Administrator's decision that SUB contributions must be annualized is reasonable and should be affirmed.

C. SUB Plans are inherently different from defined contribution plans; any exception to the annualization principle must be narrowly construed.

There are significant differences between SUB plans and defined contribution plans. Principally, SUBs are continuous in nature, while defined contribution benefits are fundamentally deferred. Accordingly, the limited exception to annualization for certain defined contribution plans does not apply to SUB plans and the Administrator's decision that contributions to SUB plans are subject to annualization should be affirmed.

The annualization exception for certain defined contribution plans is discussed in a June 6, 1985 letter ruling from the Department concerning the Dyad Construction, Inc. Pension Plan (Appendix A, at 1), explaining:

> Employers are prohibited by the Department from using contributions made for work covered by the Davis-Bacon Act to fund their pension plans for periods of non-Davis-Bacon work. Thus, where a contractor makes contributions to a pension plan on behalf of employees at different rates for their hours of work on Davis-Bacon and non-Davis-Bacon projects, the Department generally has taken the position that the contractor is only permitted Davis-Bacon prevailing wage credit based on the "effective annual rate" of contributions made to the pension plan for all hours worked. However, in the past, the Department has permitted full Davis-Bacon prevailing wage credit for contributions made to defined contribution plans which provide for immediate participation and immediate full vesting.

While the Department initially advised the Dyad plan that it would only be permitted to take credit based on an annualized basis, upon review, the Department concluded:

> we will no longer apply the 'effective annual rate' calculation rule to defined contribution pension plans, such as the Dyad Construction, Inc. Pension Plan, which provide for immediate participation and *essentially immediate* vesting (100% vesting after an employee works 500 or fewer hours).

USDOL June 6, 1985 letter ruling to Dyad Construction, Inc., at 2. Thus, with the Dyad determination, the Department expanded the annualization exception for defined contribution

plans from plans that provide for "immediate full vesting" to also include defined contribution plans which provide for "essentially immediate vesting." The Department also noted that employees became fully vested upon occurrence of death, total and permanent disability, or attainment of age 65. *Id.*

In contrast, the continuous nature of supplemental unemployment benefits is a strong argument that these benefits are compensation for all an employee's hours of service under such plans. As discussed above, the benefits are calculated based on total hours worked, prevailing wage and non-prevailing wage. And an employee may receive benefits for missed hours work or a short work period at any time during employment. Thus, the principle argument supporting annualization stands: preventing an employer from using Davis-Bacon contributions as the disproportionate or exclusive source of funding for a fringe benefit that represents compensation for all an employee's service hours with an employer.

Arguing they are similar to a defined contribution plan, Petitioners focus on immediate participation and immediate or essentially immediately vesting. Br. of Petitioner PWCA, at 9). While contributions may be irrevocably made to the SUB Plans, and such contributions may "fully vest" to the plan, the record does not show that they are 100% vested to individual participants in the same way as contributions to a defined contribution plan. In a defined contribution plan, the money vests to the plan and to the employee; in this matter, money vests only to the SUB plan, with a very real possibility that an employee may not receive the full benefit from the plan, e.g. if the account contains contributions at retirement or death.

Specifically, balances may be forfeited when a participant retires, dies, is incarcerated, or is discharged for cause:

> Under IRS regulations, participants who voluntarily terminate their employment are not eligible for supplemental unemployment benefits. (26 C.F.R. §1.501(c)(17)-1(b).) Because their account balances are not forfeited, however, any remaining amount in the account balance would be held until such time as the individual is eligible for distribution, *i.e.* experiences involuntary unemployment (without cause) or reduction in work hours, or until such time as the remaining account balance, if any, is forfeited under the terms of the Plan due to retirement, death or incarceration.

A.R. NAPWC Sept. 6, 2013 response letter, at 11. *See also* A.R. NAPWC Sept. 6, 2013 response letter, Summary Plan Description (rev. 11-4-10), at 9 (forfeiture may occur, and benefits lost, "if you are incarcerated, discharged from your employment for cause, or if you die or retire before your account balance is distributed to you."). Since becoming eligible for distribution would require re-employment by the employer, or another plan participant, forfeiture appears the more likely result. The PWCA Plan also describes the numerous circumstances under which a participant may lose a SUB account balance, including termination, death, or employer withdrawal. A.R. III FFC July 15, 2013 complaint, Ex. D-7 ("PWCA misc. information," Summary Plan Description, B.16). The fact that certain SUB distribution restrictions may be required by the IRS merely highlights how SUB plans differ substantially from qualified defined contribution plans.

Thus, in the case of retirement, death, termination for cause and, in some cases, voluntarily termination, funds in an employee's account would not be distributed to the individual, but would remain in the plan for eventual forfeiture and distribution to other employees. Significant to the issue of whether employees are 100% vested, the record shows that an individual may never receive full compensation for work performed on Davis-Bacon projects. That forfeitures to date may have been limited, an argument hinted at in the PWCA brief by providing such amounts for a single two-year period (Br. of Petitioner PWCA, at 3 n.1), does not address the fact that funds

would not typically be forfeited until a participant retires, i.e. at age 65. So it is not surprising that the narrow window of time given by the PWCA shows few forfeitures.

The substantial risk of forfeiture also highlights the importance of eliminating any annualization exception for SUB plans generally, rather than allowing an exception for a few plans and risk expanding the exception as participation in the plans increases, or other SUB plans seek to avoid Davis-Bacon obligations this way. When an annualization exception is permitted for SUB plans, employees bear the long term risk of losing compensation for work performed on Davis-Bacon projects, while contractors receive the immediate benefit of receiving full credit towards their Davis-Bacon obligations.

Another distinction between SUB plans and defined contribution plans is that employees have little, if any control over distribution. Generally, whether an employee will be eligible for benefits is controlled by the employer's layoff decision. In fact, the PWCA Plan was marketed as "the only bona fide benefit payout left in control of the employer." *See* III FFC July 15, 2013 complaint, Ex. D-7 ("PWCA misc. information"). Conversely, employees generally have control over distribution of defined contribution benefits upon their decision to retire.

Trying to draw similarities to the annualization exception for defined contribution plans, Petitioners argue that SUB plans have no fixed annual cost, and benefits are not guaranteed at any specific level. However, Petitioners cite no authority that these two conditions justify an exception to annualization. Rather, the Department's annualization analysis is based upon well-established guidelines that consider whether benefits are continuous in nature and compensation for private as well as public/DBA work.

Finally, Petitioners seek to further confuse the issue by arguing:

> Contrary to this ruling, PWCA's SUB Plan is ***not*** unemployment insurance; nor does the Plan insure against loss of any work, private or public. Indeed, if the

> PWCA SUB Plan were a form of unemployment insurance, then the Plan would not be a recognized fringe benefit under the DBA at all.

In fact, the Administrator does *not* rule, or even suggest, that Petitioners' plans are "unemployment insurance." It is undisputed that contractors may not take credit for a fringe benefit required by federal, state, or local law, such as workers compensation, unemployment compensation, and social security contributions. USDOL, Prevailing Wage Resource Book (May 2015), DBA/DBRA Compliance Principles, at 18. The Department never argues otherwise; rather, the Administrator unequivocally states in the first page of the revocation letter that the parties do not dispute that the plans are bona fide and that contributions made to the SUB plans are creditable toward meeting Davis-Bacon wage obligations. The issue is whether they are creditable for the full amount of the contribution, or whether the credit must be annualized.

Because SUBs are continuous in nature and compensation for private and prevailing wage/Davis-Bacon work, contributions should be annualized. In addition, based on the significant differences between SUB Plans and defined contribution plans, the limited exception for immediate participation and essentially immediate vesting defined contribution plans does not apply. Accordingly, the Administrator's determination should be affirmed.

II. Revocation of the annualization exception will not cause undue hardship to contractors or harm employees because there are reasonable alternatives.

Elimination of the annualization exception for Petitioners, and any other SUB Plan, will not result in undue hardship to contractors or harm to employees. Petitioners' argue that there is no clear way to apply annualization to employer contributions, that it is "unworkable," or "imposes unacceptable uncertainties." Br. of Petitioner PWCA, at 1, 8. And if employer participants are required to annualize contributions, SUB plans will be replaced with defined contribution plans, allegedly depriving employees of supplemental unemployment benefits, and resulting in serious

financial harm to employees. Br. of Petitioner PWCA, at 17-18. In fact, there are numerous options for contractors contributing to SUB plans to ensure compliance with their Davis-Bacon obligations and the annualization principle.

For example, a contractor could contribute the same hourly amount to the SUB plan on all hours worked. This could be in the same amount previously contributed on prevailing wage jobs, or a smaller amount, with the additional prevailing wage fringe obligations met with contributions to a defined contribution plan, a higher hourly wage, or both. These options would allow the contractor to provide SUB benefits, and simplify the annualization calculation, since it would be a standard hourly contribution. Further, the net result for the employees would be a wider range of benefits and/or a higher wage, not serious financial harm.

Contractors could also pay any shortage in prevailing wage fringe rates as cash, leaving employees the option of using the higher wage to decide for themselves how much to save for periods of unemployment, or how much to contribute to a defined contribution plan. The contractor would face high ancillary costs, but such labor costs are consistent across the field of contractors choosing to perform work on public projects. More importantly, the purpose of the Davis-Bacon Act is to protect employees, and this option provides higher wages and more choices to the benefit of employees.

Finally, a contractor could continue to contribute larger hourly amounts on prevailing wage jobs, with no contributions on private work hours. Such a varied contribution scheme is not disallowed by the Department; the prohibition is against taking a full credit for prevailing wage obligations based on the higher contributions. In this case, the contractor would need to calculate the allowed fringe benefit credit by totaling the amount contributed, and dividing that by the total of all hours worked, a calculation to be done for each employee over a reasonable period of time.

A "reasonable" time period is discussed in detail in both the Prevailing Wage Resource Book and Field Operations Handbook, which provide a number of options. USDOL, Prevailing Wage Resource Book (May 2015), DBA/DBRA Compliance Principles, at 15-2; FOH, Sections 15f07 to 15f19. Neither the calculations nor the overall process is as burdensome as Petitioners assert.

Converting contributions to an hourly fringe credit requires some work by the contractor, but it is a task the contractor chooses by making varied contributions. Moreover, the rule exists for a valid reason, "the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work." *Miree Construction Co. v. Dole,* 930 F.2d at 1546. Public policy requires it, and the contractor chooses it. Petitioners' dissatisfaction with the annualization principle is not a valid reason to erode it with exceptions.

Finally, the PWCA asserts that due to the cyclical and seasonal nature of construction work, "the employee will treat the defined contribution retirement plan as a de facto supplemental unemployment benefit plan," while paying a penalty and losing investment gains, acts that "will result in serious financial harm to the employees." PWCA Petition for Review, at 2-3. Petitioners offer no evidence that such withdrawals are common, in spite of the widespread use of defined contribution plans by union and non-union contractors in the construction industry. As discussed above, defined contribution plans better ensure that employees are 100% vested and will receive full compensation for work performed on Davis-Bacon projects, as compared to SUB plans where employees risk losing compensation due to deductions for administrative fees and the substantial risk of forfeiture.

It is also worth noting that Petitioners do not address the losses incurred by employees due to administrative fees charged by SUB Plans. Administrative fees charged by the PWCA may be as high as 7.65%. A.R. III FFC July 15, 2013 complaint, Ex. D-7 ("PWCA misc. information").

And administrative fees charged by the NAPWC may be up to 9% or more. A.R. NAPWC Sept. 6, 2013 Response, Ex. D ("NAPWC Summary Plan Description" (rev. 11-4-10), at 9). By contrast, administrative costs arising from defined contribution plans are typically closer to 1%, depending on the size of the plan.[3]

III. Revocation of the annualization exemption for certain SUB Plans, and revision to the annualization guidelines in the Prevailing Wage Resource Book, does not violate the Administrative Procedures Act.

It is not uncommon for an interpretive rule to change over time. With regard to the SUB issue, a 1998 letter to the NAPEWE/ACT Plan shows that the Administrator concluded that the SUB Plan was *bona fide*, but denied the Plan's request for an annualization exception, finding that "fringe benefit contributions for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of non-government work." WHD Oct. 7, 1998 letter to NAPWE, at 2 (Appendix B). In 2001, upon further review and following a number of changes to the NAPWC/ACT Plan, the Administrator granted an exception to the annualization requirement. A.R. III FFC July 15, 2013 complaint, Ex. A-1. Similar annualization exceptions were granted to the PWCA Plan in 2002, and NAPWC Plan in 2007, after a number of changes were made to these plans *Id.*, at Ex. A-2, A-3. In 2015, the Department returned to its previous interpretation, revoking the annualization exception for all three plans, concluding: "To not annualize such a benefit permits an employer to unduly subsidize the benefit's cost through DBA fringe benefit contributions, whereas compelling annualization produces a fringe benefit figure that is consistent with the actual value of the contribution the employer is making for DBA work." A.R. Administrator's Oct. 22, 2015 letters to PWCA, at 4 and NAPWC, at 5.

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[3] *See Inside the Structure of Defined Contribution/401(k) Plan Fees, 2013: A study assessing the mechanics of the 'all-in' fee;* Deloitte Consulting LLP for the Investment Company Institute (Aug. 2014), https://www.ici.org/pdf/rpt_14_dc_401k_fee_study.pdf (identifying a median "all-in" fee, including administrative, recordkeeping and investment fees, of 0.67% based on a 2013 survey of 361 plans).

The Administrator's 2015 determination, amending an interpretive rule, affected a few SUB plans found to be deficient. The Administrator's ruling was clear that the decision applied prospectively, requiring annualization of contributions as of 90 days from the date of the letter. A.R. Administrator's Oct. 22, 2015 ruling letters to PWCA, at 6 and NAPWC, at 7. Thus, no employer participant would be penalized for past reliance on the annualization exception. And the Petitioners were given 90 days to resolve any issues pertaining to annualization of SUB contributions, or choose an alternative way to meet Davis-Bacon obligations. *Id.* As discussed above, the Administrator's 2015 decision that contributions to SUB plans must be annualized is reasonable because the SUB plans provide benefits that are continuous in nature and provide compensation for all the employee's work. The decision also furthers the goal of the Davis-Bacon Act to protect employee wages on government construction projects.

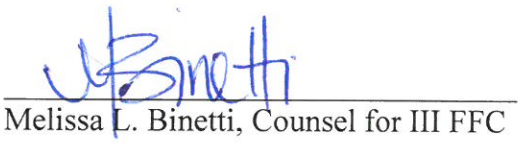
Finally, the Department's changes to the annualization provisions in the Prevailing Wage Resource Book in May 2015 was not a legislative rule with the force and effect of law. In fact, the Legal Disclaimer at the front of the Prevailing Wage Resource Book since at least November 2002 expressly states that it is intended to provide practical guidance and not legal advice.[4] Because the interpretive rulings and changes to the Prevailing Wage Resource Book in May 2015 did not amend or repeal a legislative rule of general applicability, the Department was not required to follow the notice and comment procedures of the Administrative Procedures Act. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1206 (2015).

[4] USDOL, Prevailing Wage Resource Book (Nov. 2002), online at http://www.wdol.gov/docs/wrb2002.pdf.

CONCLUSION

For the reasons discussed above, the Administrator correctly concluded that SUB plans, providing benefits that are continuous in nature and compensation for all the employee's work are subject to annualization. This conclusion is consistent with the reasoning set forth in *Miree* twenty-five years ago, that a year-long benefit should not be disproportionately funded by compensation earned on Davis-Bacon projects.

To further the purpose of the Davis-Bacon and Related Acts to protect local prevailing wages and to prevent non-local contractors from underbidding on such federal projects, and to prevent erosion of the annualization principle intended to further these goals, the Administrator's October 22, 2015 ruling should be affirmed.



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Attorneys for Intervenor

APPENDIX

DB220.652

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

JUN 6 1985

Robert J. Shaw, Esquire
Short & Cressman
30th Floor, First Interstate
Center
999 Third Avenue
Seattle, Washington 98104

Dear Mr. Shaw:

This is in reference to our ruling of June 15, 1984, wherein you were advised that Dyad Construction, Inc., would only be permitted credit, for Davis-Bacon prevailing wage purposes, based on the effective annual rate of contributions made to the Dyad Construction, Inc. Pension Plan.

You appealed this ruling to the Department's Wage Appeals Board and the case was subsequently remanded by the Board for reconsideration. We have reviewed our position on "effective annual rate" again and have given careful consideration to all of the information and arguments submitted on this issue.

Employers are prohibited by the Department from using contributions made for work covered by the Davis-Bacon Act to fund their pension plans for periods of non-Davis-Bacon work. Thus, where a contractor makes contributions to a pension plan on behalf of employees at different rates for their hours of work on Davis-Bacon and non-Davis-Bacon projects, the Department generally has taken the position that the contractor is only permitted Davis-Bacon prevailing wage credit based on the "effective annual rate" of contributions made to the pension plan for all hours worked. However, in the past, the Department has permitted full Davis-Bacon prevailing wage credit for contributions made to defined contribution pension plans which provide for immediate participation and immediate full vesting.

The Dyad plan, in section 5.1, provides that "(f)or each plan year the company shall make a contribution to the Trust Fund plus an additional contribution to the Trust Fund for each Hour of Service performed on contracts covered by the Davis-Bacon Act." An employee who has completed one year of service, which

is defined by the plan as 500 hours of service with the company (whether on Davis-Bacon or private projects) within a 12-month period, becomes 100% vested in the amounts allocated to his or her individual account. An employee also becomes fully vested upon occurrence of death, total and permanent disability, or attainment of age 65.

As a result of reviewing our position on annualization, we have concluded that we will no longer apply the "effective annual rate" calculation rule to defined contribution pension plans, such as the Dyad Construction, Inc. Pension Plan, which provide for immediate participation and essentially immediate vesting (100% vesting after an employee works 500 or fewer hours). It is clear from the terms and conditions of the Dyad plan that contributions are irrevocably made by the contractor to the Trust Fund and that most, if not all, of the employees for whom contributions are made will become fully vested in the plan. In addition, it is clear that the higher contributions made on behalf of employees working on Davis-Bacon projects increase the value of their individual pension accounts. Therefore, Dyad may take credit, for Davis-Bacon prevailing wage purposes, at the hourly rate which it contributes to the plan for Davis-Bacon covered work. Of course, the amount of such contributions should not exceed the limit imposed by the plan of 25% of an employee's annual compensation, which is in conformance with limitations imposed by the Internal Revenue Code.

This constitutes a final ruling under section 5.13 of Regulations, 29 CFR Part 5. In accordance with section 7.9 of Regulations, 29 CFR Part 7, this ruling may be appealed by any interested party to the Wage Appeals Board within 60 days.

Sincerely,

Herbert J. Cohen

Herbert J. Cohen
Deputy Administrator

cc: Mr. Brock Meylin
David Shapiro, Esq.
David W. Northland, Esq.
Mrs. Dolores Ranger
Mr. Robert Georgine
Terry R. Tellig, Esq.
Kelley Guest, Esq.

cc: Gen. File, Subj. File, Chron, Cohen, Conti

ESA/WH DConti/cc 5/24/85
Rm. S-3518 FHP Ext. 37541

Dallas

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

OCT 7 1998

1998

Mr. E. B. Cogswell, Jr.
President
National Association of Prevailing Wage Employers
P.O. Box 2022
Great Falls, Montana 59405

Dear Mr. Cogswell:

This is in response to your correspondence, with enclosures, requesting our review of the American Contractors Trust Plan for purposes of determining whether contributions made thereto would be creditable towards prevailing wage obligations under the Davis-Bacon and related Acts and the McNamara-O'Hara Service Contracts Act. [1]

In general, irrevocable contributions to a fringe benefit trust for one of the fringe benefits enumerated in section 1(b)2(B) of the Davis-Bacon Act are considered "bona fide" within the meaning of the Act. And, if the plan or program meets the requirements of section 1(b)2 of the Davis-Bacon Act and the standards set forth in Regulations, 29 CFR Part 5, Subpart B, contributions thereto would be creditable. Unemployment benefits are among the bona fide benefits listed in the Davis-Bacon Act.

However, the amount of Davis-Bacon credit a contractor claims as an offset against its prevailing wage obligation is as significant in determining Davis-Bacon compliance as whether the fringe benefit plan is bona fide under the Act. A particular fringe benefit plan may well be bona fide within the meaning of the regulations and the statute, but a contractor may nonetheless incur a back wage liability if, for example, the firm claims excess prevailing wage credit either by using Davis-Bacon contributions to essentially fund the plan for periods of non-government work, or by making contributions which do not bear a reasonable relationship to the benefits provided by the plan.

[1] Although your original submission requested consideration under both the Davis-Bacon Act and Service Contracts Act, we note that Amendment Number 2 to the Plan limits the use of the Plan to "heavy highway or building construction work". Based on this additional language, it seems unlikely that any of the described work requirements would be subject to the Service Contract requirements. Thus, we have limited our review of the Plan to the Davis-Bacon Act requirements.

We note that the Trust and Plan documents provided with your submission prescribes that the amount of the employer contributions to the Plan shall be such amount as is in compliance with the prevailing wage contract that governs the project being performed. However, the plan does not provide for contributions to be made when an employee is employed on non-government work during the course of the year. As indicated earlier, fringe benefit contributions for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of non-government work. For example, let's consider an employee who worked a total of 1,500 hours on Davis-Bacon work last year, but also worked 500 hours on non-government work, for a total of 2,000 hours for the year. The employer made a $2.00 an hour Plan contribution for each of the government work hours for a total contribution of $3,000 for the year. However, the employer did not make any contributions for the non-government work. In this example, the employer would be entitled to claim an hourly credit on the Davis-Bacon jobs of $1.50.

We trust this responds to your inquiry. Please feel free to share this important information with your Plan members. If we may be of further assistance, please do not hesitate to contact us.

Sincerely,

Ethel P. Miller

Ethel P. Miller
Government Contracts Team
Office of Enforcement Policy

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2016, I caused a copy of the foregoing **Brief of Intervenor, III FFC in Support of the Secretary of Labor** to be served on the following individuals at their respective addresses listed below via UPS delivery:

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Dr. David Weil, Administrator
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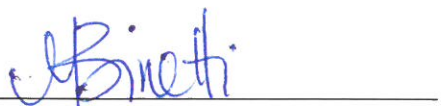

Melissa L. Binetti, Counsel for III FFC