BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

* *

BRIEF OF PETITIONER PWCA
IN SUPPORT OF ITS PETITION FOR REVIEW

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INTRODUCTION

The PWCA (formerly the Prevailing Wage Contractors Association, Inc.) sponsors the Prevailing Wage Contractors Association Inc. Members Welfare Benefit Plan, which offers a Supplemental Unemployment Benefit program to participating employer members (hereafter the "PWCA SUB Plan" or simply the "Plan"). The Plan benefits employees by providing cash equivalent benefits during involuntary work interruptions. In 2002, the Administrator ruled that contributing employers should receive full (non-annualized) credit for their contributions to the Plan because the Plan provides for immediate vesting and participation by employees and irrevocable contributions by employers, ensuring that almost every employee participant will receive the full cash benefit of contributions made on their behalf. For more than thirteen (13) years, participating employers and employees in the Plan have relied upon the Administrator's ruling that contributions to the Plan are not subject to any annualization requirement.

On October 22, 2015, however, a new ruling issued by the Administrator revoked the Administrator's previous ruling by imposing annualization on contributions to the PWCA SUB Plan, based upon a new and erroneous finding that the Plan is "continuous in nature" and that this false criterion requires annualization, even where the Plan's benefits are immediately and fully vested in employee accounts on a cash equivalent basis. Because there is no clear way to apply annualization to employer contributions to the Plan, the effect of the Administrator's new ruling will be to deprive employees of this important benefit during times of need, resulting in serious financial harm to the employees. The stated reasons for the Administrator's new ruling are wrong as a matter of fact and law and violate the DBA and the Administrative Procedure Act. As further explained below, the Administrator's new ruling must be set aside.

ISSUE PRESENTED FOR REVIEW

Whether the Administrator's ruling denying employers' full credit under the Davis-Bacon Act (DBA) for their contributions to the SUB Plan offered by PWCA (by "annualizing" such contributions) is arbitrary and capricious and violates the DBA and/or the Administrative Procedure Act.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to decide appeals from the Administrator's final decisions concerning the application of the DBA to covered fringe benefits. 29 C.F.R. § 7.9. "In considering matters arising under the Davis-Bacon Act within the scope of its jurisdiction, the Board acts as fully and finally as might the Secretary of Labor concerning such matters. 29 C.F.R. § 7.1(d)." *Barco Enterprises, Inc.*, ARB Case No. 13-041, at p. 4 (July 31, 2015). "Where appeal is from a ruling of the Administrator of the Wage and Hour Division, the Board will assess the Administrator's ruling to determine whether it is consistent with the applicable statute and regulations, and a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act." *Id., citing In re Spencer Tile Co.*, ARB No. 01-052, 2001 WL 1173805 (ARB Sept. 28, 2001). PWCA is an aggrieved party with standing to petition the Board from the Administrator's final ruling dated October 22, 2015.

STATEMENT OF THE CASE AND FACTS

I. Description of the PWCA SUB Plan.

For more than thirteen years, the PWCA has sponsored the PWCA SUB Plan, which offers a supplemental unemployment benefit program to participating employer members. It is undisputed that the PWCA SUB Plan is a bona fide fringe benefit plan within the meaning and plain language of the DBA, which includes "unemployment benefits" within the types of fringe benefit plans or programs recognized as "bona fide." *See* Administrator's Ruling at p. 1; see also

41 U.S.C. 3141(2)(B); 29 C.F.R. 5.29(a).

Under the terms of the PWCA SUB Plan, employers who employ individuals on projects covered by the DBA, the Service Contract Act (SCA), and/or state prevailing wage laws are permitted to contribute funds for the benefit of those employees who are performing work on such prevailing wage projects. The Plan provides for immediate participation by the employees, for whom the contributed funds are held by the Plan in trust, and who are entitled to access the funds whenever they become involuntarily unable to work due to cyclical, seasonal or similar conditions. *See* A.R., PWCA Aug. 23, 2013 Response to Ill FFC Complaint. All employer contributions to the PWCA SUB Plan are irrevocably made to individual employee accounts that immediately and fully vest to the employees for whom they are made. *Id.* Each employee's account balance is tracked and disclosed to the employee participants. *Id.*

The PWCA SUB Plan has an established track record of paying out the full cash benefit of the contributions made by employers, on a dollar-for-dollar basis, to almost every employee for whom such contributions are made. *Id.* at p.6; *see also* Administrator's Ruling at p. 4.[1] The Plan does not provide "insurance" as that term is commonly defined, *i.e.*, the employers do not pay regular "premiums" and the benefits offered are not defined by the measure of a specific

[1] According to the Administrator's own findings, the PWCA SUB Plan made benefit payments constituting 89%, 96%, 93%, 94%, 90%, 87%, and 87.5% of contributions for the plan years 2005 through 2011. *See* Administrator's Ruling at p.4. Under the established Plan procedures, PWCA's third party plan administrator makes every effort to update addresses and forward benefit checks to those participants who relocate, and to otherwise locate missing employees so that new benefit checks can be issued to them if the original check is returned due to an incorrect address. The total amount of forfeitures over the period ending in 2010-2011 was only $4,977, out of contributions amounting to $17,149,711, a *de minimis* amount (0.029% of total contributions). *See* A.R. PWCA Aug. 23, 2013 Response at p. 6.

injury or medical condition.[2] Rather, the Plan provides ready access to cash in whatever amount is in the employee's account, for withdrawal by the employee, at any time when the employee is involuntarily unable to work. Also unlike insurance plans, the PWCA SUB Plan does not have an "annual cost," nor is it "continuously" funded by any employer. Instead, employers pay into the Plan only in the amounts needed to fund the fringe benefit portion of DBA or SCA wage determinations, which vary from project to project and even within projects depending on individual job duties that may change from day to day. *See* A.R. PWCA Aug. 23, 2013 Response.

II. Application of the Annualization Principle Generally, and the Administrator's 2002 Ruling That Annualization Does Not Apply to Contributions to the PWCA SUB Plan.

As noted above, the DBA expressly permits employers to receive credit for fringe benefits provided at either the "rate of contribution irrevocably made" to a fringe benefit plan or at the "rate of costs" an employer "may reasonably anticipate in providing benefits" to covered individuals. 40 U.S.C. 3141(2)(B) (i)-(ii). The word "annualization" does not appear in the Act. However, sometime during the 1970s, the Department established the concept in response to contractors seeking DBA credit for the entire annual cost of purchasing unfunded health insurance for their employees who worked on both government and private work. *See* WHD Davis-Bacon Resource Book (2010), DBA Compliance Principles at p. 21. As further explained therein:

> The Department took the position in opinion letters that the cost of such unfunded health insurance was appropriately apportioned among all hours worked by the employees, and that therefore the hourly Davis-Bacon credit would be derived by dividing the total annual cost of the health insurance by the total number of hours worked by employees on both Davis-Bacon and private work during the year.

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[2] *See* Google.com definition of "insurance: "a practice or arrangement by which a company or government agency provides a guarantee of compensation for specified loss, damage, illness, or death in return for payment of a premium."

According to the Department's Resource Book, the annualization principle was later applied to other fringe benefit plans such as "apprenticeship and training plans, vacation plans, and most pension plans under which contractors sought to receive Davis-Bacon credit for the entire cost of the plans." *Id.* at p. 22. The Department's Resource Book does not make reference to any previous application of the annualization principle to supplemental unemployment benefit plans generally, and there is no record of any such application of annualization to a funded SUB plan featuring immediate and 100% vesting of fully funded benefits for the benefit of employees.

The Department has long held that annualization should not be applied to employer contributions made to defined contribution pension plans ("DCPPs") which provide for immediate participation and immediate or essentially immediate vesting schedules, regardless of whether the contractor makes contributions to the plan when working on non-Davis-Bacon projects. *Id.* at p. 23; see also Field Operations Handbook 15f11(b). As to such plans, the Department has stated that annualization should not apply because "contributions are irrevocably made by the contractor; most, if not all, of the workers will become fully vested in the plan; and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account." *Id.* Each of these features applies to the PWCA SUB Plan.[3]

The foregoing recognition that annualization does not apply to irrevocable contributions to bona fide fringe benefit plans, so long as they are immediately and fully vested with the employees, has not been limited to DCPPs. In the seminal case of *Tom Mistick & Sons, Inc. v. Reich*, 54 F.3d 900 (D.C. Cir. 1995) (discussed at greater length below), the D.C. Circuit enjoined the Department from seeking to annualize irrevocable employer contributions to a *bona*

[3] As further discussed below, the PWCA SUB Plan actually provides a superior benefit to employees than a DCPP does under many circumstances, because employees in the Plan are not forced to pay early withdrawal penalties or taxes during periods when they are involuntarily unable to work, as would typically be imposed under a DCPP.

fide fringe benefit plan that was not a DCPP.[4] In *Mistick*, an employer established a trust into which the employer made irrevocable contributions that immediately vested on behalf of employees working on prevailing wage projects. Under the terms of the Mistick plan, employees could use the contributed funds to purchase approved fringe benefits or could receive the funds upon termination of employment. The court found that there was a "one-to-one ratio between employer contributions on behalf of an employee and value received by the employee." *Id.* at 904. The Court specifically rejected the Department's denial of DBA credit for such employer contributions "merely because they could underwrite fringe benefits used by an employee during private work periods." *Id.* at 905. To hold otherwise, the Court said, would "*dis*advantage employees." *Id.* The Court also rejected the Department's argument that annualization was necessary to prevent an employer from using Davis-Bacon work as the source of funding for benefits that are in fact "continuous in nature." *Id.*

In accordance with the foregoing principles, shortly after the formation of the PWCA SUB Plan, PWCA applied to the Administrator for a ruling regarding the *bona fide* nature of the Plan and the extent to which contributing employers should receive full (non-annualized) credit for their contributions to the Plan. On September 16, 2002, Administrator Tammy D. McCutchen issued such a ruling, which reads in pertinent part as follows:

> After a careful review of the plan documents and your commitments to make the additional revisions [discussed previously in the ruling], I have concluded that the PWCA Welfare Benefit plan, to the extent of its provision for supplemental unemployment benefits, is a bona fide fringe benefit plan for Davis-Bacon purposes. In addition, I have concluded that employers participating in the plan may receive full credit, for Davis-Bacon work. I believe that this is appropriate in the circumstances present here in light of the amendments made to the plan to ensure that almost every employee will in fact receive the full cash benefit of the contributions made on the employee's behalf.

The PWCA Plan has operated in compliance with the foregoing ruling from 2002 to the

[4] Present counsel for PWCA in this proceeding also represented Mistick.

present. *See* A.R., PWCA Aug. 13, 2013 Response.

III. Events Leading To Reversal of the 2002 Ruling and the Present Petition.

On July 15, 2013, the Indiana-Illinois-Iowa Foundation For Fair Contracting (Ill FFC) filed a complaint asking the Administrator to revoke the "exception from annualization" previously provided to PWCA. A.R., Ill FFC Complaint. The Department's Wage and Hour Division solicited a response to the Complaint from PWCA, which was submitted on Aug. 23, 2013. *Id.*

While the Ill FFC complaint was pending, the Department made an unannounced change to the WHD's on-line Davis-Bacon Resource Book. Whereas the previous 2010 edition of the Book indicated that for "certain supplemental unemployment benefit plans" a "contractor may take Davis-Bacon credit at the hourly rate specified by the plan," the May 2015 edition of the Resource Book deleted this language without explanation, notice or public comment. *See* Administrator's Ruling at p. 5.

Subsequently, on October 22, 2015, the Administrator issued a ruling that purports to overrule the 2002 Administrator's ruling by declaring that effective 90 days later, all contributions to the PWCA SUB Plan will be "subject to annualization because SUBs are continuous in nature and compensation for private and prevailing wage/DBA work."[5]

SUMMARY OF ARGUMENT

The Administrator's ruling violates the plain language of the DBA and the Administrative Procedure Act by overturning the Department's longstanding allowance of full credit to employers contributing to SUB Plans on an irrevocable, 100% immediately vested basis. Contrary to the Administrator's ruling, the PWCA SUB Plan cannot be subject to

[5] On January 29, 2016, the WHD informed PWCA that the effective date of the Administrator's ruling will be delayed until May 19, 2016.

annualization, because it meets all of the settled criteria for full credit and provides much needed cash equivalent benefits, on a dollar-for-dollar basis, to employees who are involuntarily unable to work due to cyclical, seasonal, or technological reasons.

The stated reasons for the Administrator's ruling are erroneous and arbitrary. The PWCA SUB Plan is not an "insurance" plan, nor is it similar to any type of fringe benefit to which annualization has previously been applied. Rather, the PWCA SUB Plan is much more similar to a defined contribution pension plan to which annualization clearly does not apply. The PWCA SUB Plan is also materially indistinguishable from the fringe benefit plan that was at issue in the *Mistick* case.

The Administrator erred in ruling that the PWCA SUB Plan was "continuous" in nature, which it is not, and in imposing this criterion at all. The Administrator's change in policy, without public notice or comment and without any rational justification, must be found to be arbitrary and capricious under the Supreme Court's *State Farm* standard for making such determinations.

Failure to reverse the Administrator's ruling here will deny employees access to a valuable fringe benefit. Annualization of the PWCA SUB Plan is unworkable and imposes unacceptable uncertainties and risks on employer contributors, the result of which will be that they will not contribute to the plan at all, to the disadvantage of employees. For all of these reasons, as further described below, the Administrator's ruling should be vacated and employers who contribute to the PWCA SUB Plan for the benefit of their employees should be given full credit for their contributions under the DBA.

ARGUMENT

I. The Administrator's Ruling Denying Employers Full Credit for Their Contributions to the PWCA SUB Plan Is Arbitrary and Capricious and Violates Both the DBA and the APA.

A. The Principle of Annualization Has No Application to PWCA's Irrevocably Funded and Immediately Vested SUB Plan.

As explained above, the annualization concept was developed by the Department, in its own words: "in response to contractors seeking DBA credit for the entire annual cost of purchasing [unfunded] health insurance for their employees who work on both government and private work." *See* WHD Prevailing Wage Resource Book, DBA Compliance Principles, at p. 21. Though the practice has since been extended to other unfunded fringe benefits similar to health insurance, where employers might otherwise be viewed as financing periods of their employees' private work with contributions made on Davis-Bacon projects, annualization has not previously been applied to fully funded fringe benefit plans comparable to the PWCA SUB Plan.

To the contrary, the PWCA SUB Plan at issue here meets all of the previously recognized criteria for allowing employers to receive full credit for their contributions to a funded fringe benefit plan. As noted above, the Plan provides for immediate participation, and employer contributions to the Plan are made irrevocably on an hourly basis to a funded plan, where they are held in trust by an entity independent of the employer solely for the benefit of participating employees. The amounts contributed by employers to the Plan are deposited into individual employee accounts that vest immediately with each such employee. Employees are entitled to access their fund benefits when they become involuntarily unable to work due to cyclical, seasonal or similar conditions. The amounts of the benefits are dollar for dollar the same as the amount of each employer's contributions. Finally, the PWCA SUB Plan is never used to

underwrite fringe benefits used by an employee during a period of private work – indeed, employee access to their SUB Plan benefits is contingent on their ***not working at all***, *i.e.*, they must be missing hours of work under involuntary circumstances in order to qualify for the benefits.

With regard to each of the foregoing aspects, as the WHD itself previously recognized in its Prevailing Wage Resource Book until arbitrarily deleting that recognition in 2015, the PWCA SUB Plan is materially indistinguishable from the DCPPs which the Department has consistently declared to be exempt from annualization. *See* Field Operations Handbook 15d11; WHD Prevailing Wage Resource Book, Compliance Principles, at p. 22. The PWCA SUB Plan is also materially indistinguishable from the fringe benefit plan which the D.C. Circuit declared to be exempt from annualization in *Tom Mistick & Sons, supra,* 54 F.3d 900. Finally, the plain language of the DBA requires the Department to credit fully the "rate of contribution irrevocably made" to a funded fringe benefit plan such as the PWCA SUB Plan. 40 U.S.C. 3141(2)(B). For each of these reasons, the Administrator was correct to declare in 2002 that employer contributions to the PWCA SUB Plan are entitled to full credit under the DBA; and the current Administrator's overruling of the 2002 decision in the new ruling presently under review is arbitrary and capricious and violates the plain language of the DBA.

In attempting to explain his new decision overruling the 2002 ruling, the Administrator has relied on a series of erroneous findings to support the conclusion that contributions to the PWCA SUB Plan should be annualized. First, the Administrator incorrectly found that "SUBs like those provided by PWCA participating employers are available to participants on an uninterrupted basis throughout the year." (Administrator's Ruling at p.5). To the contrary, it is undisputed that the supplemental unemployment benefits offered by the PWCA SUB Plan are

not available on an uninterrupted basis throughout the year. The 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. Thus, the availability of benefits is frequently interrupted, *i.e.*, every time the individuals return to a normal work schedule; and such interruptions are a regular occurrence in the construction industry.

For similar reasons, the Administrator's ruling is mistaken in finding that PWCA's supplemental unemployment benefits are "continuous in nature." (*Id.* at p.5). Again, contrary to the Administrator's ruling, the benefits can only be used when the conditions of the Plan are met, *i.e.*, when an employee becomes involuntarily unable to work due to the qualifying reasons, just as the funds contributed to a defined contribution pension plan can only be accessed upon the occurrence of a specific distributable event, such as death, disability, termination of employment or retirement. The Administrator's ruling offers no principled reason to treat PWCA's SUB Plan as "continuous" when the Department treats defined contribution pension plans as "non-continuous."

Likewise, the Administrator's ruling erroneously characterizes the SUB Plan as "unemployment insurance." See Administrator's Ruling at p.5. ("As the supplemental unemployment benefit is equally available to insure against loss of private work as it is to insure against loss of prevailing wage/DB A work, SUBs compensate an employee for all service performed in a given year."). 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. *See* Prevailing Wage Resource Book at p. 21 (excluding unemployment insurance from the list of qualified fringe benefits under the DBA).

No one has made that contention here. The SUB Plan is thus not insurance and is instead a "supplemental unemployment benefit," expressly recognized by the Act, and intended to provide dollar-for-dollar cash to employees at the time of the employees' greatest need.

The Administrator's ruling further errs in concluding that a SUB is "similar to health insurance benefits, which WHD has long annualized." *See* Administrator's Ruling at p. 5. To the contrary, as noted above, the PWCA SUB Plan does not provide "insurance" at all. Rather, the Plan provides ready access to vested cash in the employee's account, for withdrawal in amounts unrelated to the extent of the employee's "injury" (to use an inapplicable insurance term), at any time when the employee is involuntarily unable to work. Also unlike insurance plans, the PWCA SUB Plan does not have an "annual cost," nor is the Plan "continuously" funded at guaranteed rates by any employer, unlike health insurance premiums which are truly continuous. Instead, employers pay into the Plan only in the amounts needed to fund the fringe benefit portion of DBA or SCA wage determinations, which vary from project to project and even within projects depending on individual job duties that may change from day to day.

The non-continuous aspect of the PWCA SUB Plan leads to another important distinction from typical health insurance plans: Specifically, when an employer stops paying continuous insurance premiums, the employee's insurance coverage is soon thereafter *lost*, absent election by the employee to take on the employer's share of insurance premium under the COBRA insurance continuation statute. By contrast, under the PWCA SUB Plan, a stoppage of contributions by the employer does not deprive the employee of the benefit already accrued in the employee's account. Unlike insurance, the money previously contributed remains fully vested and usable by the employee whenever the employee is involuntarily unable to work.

The Administrator's ruling also errs in rejecting "any reliance on immediate participation

and essentially immediate vesting for an exception to annualization" because such reliance "mistakenly equates SUBs with defined contribution pension benefits." *Id.* at p.5. According to the Administrator, the "narrow" annualization exception for DCPP benefits "emanates from the benefits' fundamentally deferred, non-continuous nature – not shared by SUBs." The Administrator cites no authority for this novel proposition, and there is none. The Administrator's own Resource Book identifies only the following justifications for not annualizing DCPP contributions: that they "provide for immediate participation and immediate or essentially immediate vesting." *Id.* at p. 21. These qualities are shared by PWCA's SUB Plan, as the Administrator previously recognized.

But even if the Administrator were correct in asserting that DCPP benefits are exempt from annualization only because they are "fundamentally deferred" and "non-continuous," this would be no justification for applying annualization to the PWCA SUB Plan, because the Plan shares both of these qualities also. Like the DCPP plans, the SUB Plan benefit is "fundamentally deferred" because it cannot be used by an employee until the employee experiences a distributable event when the employee becomes involuntarily unable to work. Similarly, the PWCA SUB plan is no more "continuous" than a DCPP plan. Exactly like the DCPP plan, employers contribute to the SUB Plan only so long as the employee is working on a DBA-covered project. The money is not "continuously" paid into any employee's account when the employee is not working; and the benefits are not paid continuously to any employee when they are in fact working. Only when the employee becomes involuntarily unable to work, just as in the case of the DCPP plan when the employee terminates employment, does the employee have access to the SUB benefits under the Plan. The Administrator's ruling to the contrary is irrational and arbitrary.

It must be reiterated that the types of benefits that the Department has previously determined to be "continuous in nature" are benefits that are guaranteed to be provided to participants at a certain level of payment for a certain period of time. For example, health insurance benefits are guaranteed to be provided to participants at a certain level of coverage if monthly premiums are continuously paid. Similarly, unemployment insurance benefits are guaranteed to be provided to participants during the entire period of unemployment at a certain level of coverage if monthly premiums are paid. Likewise, defined benefit pension benefits are guaranteed to be provided to participants upon retirement at certain monthly annuity amounts and the employer has the obligation to make plan contributions required to satisfy this guaranteed benefit obligation.

In contrast, defined contribution pension benefits and SUB benefits are <u>not</u> provided at a guaranteed level of benefit payment. Instead, in DCPPs, benefits are dependent upon the amount of contributions made to the plan on behalf of the plan participant and on any investment gains and losses on those contributions credited to the participant's plan account. The PWCA SUB Plan is fundamentally similar to the defined contribution pension plan structure, in as much as the benefits available to a participant under the PWCA SUB Plan are determined solely by the amount of contributions made on behalf of the participant to the Plan, NOT based on how "continuous" such payments are. Therefore, the Administrator has erred in claiming that there is any material difference between defined contribution pension plans and the PWCA SUB Plan with regard to the reasons for annualization.

B. The Administrator's Ruling Violates the D.C. Circuit's Holding in the *Mistick* Case.

As noted above, in the *Mistick* case, 54 F.3d 900, the Administrator attempted to impose the annualization requirement on a fringe benefit plan that, like the PWCA SUB Plan, created a

trust into which the employer irrevocably contributed money for hours worked under the DBA, to be withdrawn by employees upon their termination of employment. *Id.* at 904. As the D.C. Circuit found, there was a "one-for-one ratio between employer contributions on behalf of an employee and value received," just as is the case under the PWCA SUB Plan. "Each employee received the full value of each dollar contributed by Mistick, either as an enumerated benefit purchased with [Plan] funds or in cash at the end of his employment." *Id.*

Also, just as in the present case, the Administrator argued in *Mistick* that "because part of the employees' compensation for Davis-Bacon work paid for fringe benefits used by them during periods of private work, the Department concludes that they did not receive the prevailing wage for their Davis-Bacon work." The Court "reject[ed] this argument." *Id.* The D.C. Circuit further held as follows:

> If we uphold the invalidation of a plan because employer contributions to it could finance fringe benefits used during private work, employers would then have to limit employees' use of their Davis-Bacon trust accounts to only those fringe benefits used during Davis-Bacon work. Such a result would disadvantage employees. We decline, therefore, to uphold the Department's denial of Davis-Bacon credit for Mistick's contributions to the [Plan] merely because they could underwrite fringe benefits used by an employee during private work periods.

The court went on to reject the identical argument for annualization that the Administrator has made in the ruling against the PWCA SUB Plan, as follows:

> We reject annualization of Mistick's contributions for the same reasons. Mistick made contributions to the [Plan] only for the Davis-Bacon work performed by its employees whereas Mistick employees could draw on the funds in their trust accounts whether they were performing Davis-Bacon work or private work. The Administrator concluded that even if Mistick's [plan] were bona fide, Mistick would receive only annualized credit. * * * The Administrator explained that annualization ensures that an employer does not receive Davis-Bacon credit for contributions made for Davis-Bacon work but which pay for benefits used by an employee while performing private work. But the Administrator has not shown that Mistick's contributions to its [plan] 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

> [plan]. It was therefore unreasonable for the Administrator to annualize Mistick's contributions to its [plan].

Contrary to the Administrator's ruling, the existence of an additional fringe benefit plan did not determine the outcome in the *Mistick* case. This is confirmed by the Court's footnote distinguishing the annualization of apprenticeship benefits in *Miree Construction Co. v. Dole*, 930 F.2d 1536 (11th Cir. 1991). The *Mistick* court held:

> The Department emphasized that annualization "prevents [an employer from] using the Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are in fact continuous in nature and compensation for all the employee's work, both Davis-Bacon and private." (citation omitted). It has not established, however, that the fringe benefits used by Mistick's employees during periods of private work were financed primarily by Davis-Bacon contributions. The rationale for annualizing an employer's contributions therefore does not apply.

In the present case, Petitioner PWCA has already shown that no private work of PWCA employer members is being financed by the SUB Plan. This is so because participating employees cannot receive any SUB benefits unless they are in fact involuntarily *unable to work* for qualifying reasons. The Administrator's argument for annualizing PWCA's SUB Plan contributions is therefore even weaker than it was in *Mistick*, and the holding of the D.C. Circuit compels the reversal of the Administrator's ruling.6

C. The Administrator's Ruling Effectively Deprives Employees of a Valuable Fringe Benefit, Contrary To the Intent of Congress under the DBA.

As discussed above, the ability of employees to access SUB Plan funds in addition to or instead of funds that are vested in a DCPP is highly beneficial to the employees, because it

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[6] It must also be noted that in *Mistick*, the Court placed the burden on the Department to prove that benefits received during private work were not funded by an unidentified private fringe benefit plan to which Mistick allegedly contributed, and there was no such evidence in the Administrative Record. Here also, the Administrator has failed to establish that individual employers who contribute to the PWCA SUB Plan do not also provide separate fringe benefits for their employees on private work. Indeed, there is no evidence in the record on this point at all. For this reason as well, the Administrator's ruling must be reversed.

allows them to avoid withdrawal penalties and taxes that are imposed on early withdrawals from DCPPs. Unfortunately, the practical effect of the Administrator's ruling imposing annualization on PWCA's SUB Plan is to deprive employees of access to this or any similar plan due to the uncertainties and risk created by the annualization process.

The concept of annualization assumes that there is an "annual cost" of the particular benefit at issue. That is not the case with employer contributions to the PWCA SUB Plan. There are no set premiums, and there is no ability to predict how much money any employer will contribute to any employee's account. The amount contributed varies by project, by employee and by the employee's job duties from day to day, or even within individual days. As a result, the unwarranted imposition of annualization on employer contributions to the PWCA SUB Plan will result (and already has resulted) in tremendous uncertainty and risk to employers. In particular, employers contributing to the Plan will be unable to determine their costs of performing work on Davis-Bacon projects until after the project has been completed. Alternatively, employers who make such contributions for employees on public projects will have no way of knowing how much time such employees will spend working on private projects and therefore what portion of employer contributions will receive reduced (annualized) credits.

Faced with this dilemma, most if not all employers will choose instead to make contributions only to DCPP's, for which no annualization is required. Employees will thereby be deprived of one of the fringe benefits authorized by the DBA, because without employer contributions the PWCA SUB Plan cannot continue to function. PWCA has already been advised by numerous employers that they will be unable to offer the SUB Plan benefit to their employees if annualization is required. PWCA has been further advised by a union, the United Steelworkers Union (USW), that the employers with whom they collectively bargain cannot

continue to contribute to the SUB Plan while bearing the risk that they will not receive credit for every dollar contributed to the Plan. Approximately 660 members of the USW currently participate in the Plan and rely on the Plan to provide them with income during the portion of the year when weather makes their work difficult and often impossible, resulting in significant periods of missed hours of work.

As noted above, the PWCA SUB Plan offers a benefit that is more advantageous to employees than a DCPP, while otherwise sharing the identical features of irrevocable contributions and immediate, 100% vesting. The D.C. Circuit has held that it is unreasonable to interpret the fringe benefit provisions of the DBA in such a way as to "disadvantage employees." *Mistick*, 54 F.3d at 905. For the same reason, the Administrator's new ruling should be found to be contrary to legislative intent, and should be overturned for the benefit of employees who will otherwise be unable to receive this important benefit during times of need.

D. The Administrator's Decision to Overrule the WHD's Previous Ruling That Annualization Has No Application to the PWCA SUB Plan Violates the Administrative Procedure Act.

As noted above, the Administrator's ruling in this case overturned a longstanding declaration of WHD policy *not* to require annualization of employer contributions to SUB Plans in general, and PWCA's SUB Plan in particular. In such circumstances the Supreme Court has held that the agency bears the burden to explain and justify its reversal of policy. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (reaffirming this holding).

Under *State Farm*, an agency action is deemed to be arbitrary and capricious if any of the

following are met: (1) the agency relied on factors which Congress has not intended it to consider; (2) the agency entirely failed to consider an important aspect of the problem; (3) the agency offered an explanation for its decision that runs counter to the evidence; or (4) the agency's explanation is so implausible that it could not be ascribed to agency expertise. In the present case all of these indicators of arbitrary and capricious conduct by the Administrator are present: (1) The plain language and legislative history of the fringe benefits section of the DBA show that Congress intended to allow employers to take full credit for irrevocable contributions to funded fringe benefit plans like the PWCA SUB Plan; (2) The Administrator failed to consider how employees would be disadvantaged by reversing course and requiring annualization of Plan contributions; (3) The Administrator offered explanations for the decision that run counter to the undisputed evidence, including the fact that the benefit does not fund private work by employees because they cannot access it unless they are involuntarily *unable* to work, as well as the claim that the Plan is more like insurance than it is like a DCPP, and the failure to adhere to the plain holding of the *Mistick* case; and (4) The Administrator's explanation is so implausible that it cannot be ascribed to agency expertise.

It must also be noted that the WHD significantly revised the annualization guidelines in the Wage and Hour Prevailing Wage Resource Book with no public notice or comment when it republished the revised Prevailing Wage Resource Book in May 2015. Neither PWCA nor any of its participating employers received notice of or had any opportunity to comment on the annualization changes made in the revised Prevailing Wage Resource Book 2015. The changes made to the annualization exception guidelines in the Prevailing Wage Resource Book 2015 included the removal of the reference that the annualization exception could also apply to "certain supplemental unemployment benefit plans" and the addition of a statement that wrongly

implies that annualization must occur for "benefits that are continuous in nature and compensation for all the employee's work (*e.g.*, for a benefit that is in effect during both Davis-Bacon covered and non-covered work)". In the ruling presently under review, the Administrator relied upon this additional, unsupported statement, and interpreted the statement as a requirement that annualization must occur for benefits that are continuous in nature and compensation for all of the employee's work. Because this additional "continuous in nature" statement was not included in the Prevailing Wage Resource Book guidelines at the time PWCA submitted its report to WHD on August 23, 2013 and because this issue was not specifically raised by the III FFC in the contentions it raised in its request for review letter of July 15, 2013, PWCA did not address in its report whether or not the PWCA SUB Plan is "continuous in nature" and compensation for all the employee's work. For this reason as well, the Administrator's October 22 ruling should be set aside.

CONCLUSION

For the reasons set forth above and in PWCA's Petition, the October 22, 2015 ruling of the Administrator should be vacated and the Board should hold that annualization does not apply to employer contributions to PWCA's SUB Plan.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2016, I caused a copy of the foregoing Brief in Support of Petition for Review to be served by electronic mail, on the following:

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