SCA-119

April 19, 1977

The Under Secretary has asked me to reply to your letter of February 8, 1977, requesting that a review be made of the Department's recommendation that an appeal be taken from the district court's decision in Trinity Services, Inc., et al., USDC D.C., Civil Action No. 76-1993. Subsequent to the receipt of your letter, representatives of the Office of the Solicitor conferred with John Zalusky of your organization regarding this matter.

The provision at issue in the Trinity case seeks to impose on a successor contractor the obligation either to hire the predecessor contractor's employees or to pay them severance, notwithstanding the absence of an employment relationship between the successor and such individuals. The principle of imposing upon a successor the obligation to pay fringe benefits to another employer's work force, which he does not choose to retain, appears to be clearly beyond the scope of the Service Contract Act. By its express terms, Section 4(c) only protects those fringe benefits "to which such service employees would have been entitled if they were employed under the predecessor contract." The contractual provision at issue does not confer a "bona fide fringe benefit" to which the Act applies because it imposes no obligation on the incumbent contractor to which its employees are entitled. In other words, under Section 4(c) a successor contractor cannot pay employees less than they were entitled to receive from their former employer. But under the disputed provision contained in the contract between Trinity and the union, the employees were not entitled to receive severance pay from Trinity if Trinity were to lose the contract.

In your letter, you indicated that it has been the practice of the Department of Labor not to include severance pay provisions as fringe benefits in wage determinations issued under Section 4(c) of the Service Contract Act. This statement is not entirely accurate. Where severance pay constitutes a bona fide fringe benefit which has been bargained for at arms length, the Department's practice has been to include such benefit in wage determinations issued under the Act. Thus, where a contractor has agreed to pay its employees a severance indemnity in specified circumstances, the Department issues a wage determination for the successor contract containing the severance provisions. In such circumstances, the successor contractor may not pay severance benefits less than those provided for in the predecessor contractor's collective bargaining agreement.

Moreover, as was expressly recognized by Congressman Thompson's Subcommittee on Labor-Management Relations in its 1975 report entitled "The Plight of the Service Worker Revisited," Section 4(c) imposes no obligation on a successor contractor to retain any of the predecessor contractor's employees, and until the successor hires an individual, thereby creating an employment relationship, the Act does not require the successor to pay fringe benefits provided in the predecessor's collective bargaining agreement. Although the Subcommittee recognized that an amendment to the Act would be necessary in order for the successor to be required to hire the predecessor's employees, no such amendment has been enacted.

We agree that continuity of employment and job security within the service industry are legitimate and meritorious goals. However, until Congress amends the Act in accordance with the Subcommittee's recommendations, we are obligated to administer and enforce the statute as it is presently written.

I trust that the foregoing discussion serves to clarify the reasons for the appeal in the instant case. If you would like to discuss the possibility of legislative relieve, please let me know.

Sincerely,

Donald Elisburg
Assistant Secretary

NOTE: This letter pre-dates the 1994 Executive Order requiring successor contractors to hire predecessor's employees under some circumstances.