DBRA-116

May 17, 1978

This is in reply to your letter of February 23, 1978, requesting our opinion as to whether sums withheld from employees employed on a Davis-Bacon project may be used to "purchase" fringe benefits for employees not employed on a Davis-Bacon project. It is our position that sums due employees as prevailing wages on a Davis-Bacon project may not be used to defray the cost of fringe benefits for other employees.

It is the Department's position that a contractor or subcontractor performing work subject to a Davis-Bacon Act prevailing wage decision may discharge his minimum wage obligations for both straight time wages and fringe benefits by paying cash, or making contributions or incurring costs or by any combination thereof for "bona fide" fringe benefits which meet 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. For example, a wage determination might list the following prevailing wage for electricians:

Electricians:

Basic Hourly Rate	$12.00
Pension, Health & Welfare	$2.00
Total	$14.00

A contractor could discharge his obligation to pay this prevailing wage rate to an electrical working on the government project in the following ways:

- a. By paying $14.00 in cash wages.
- b. By paying $12.00 plus $2.00 in pension contributions on behalf of the employee.
- c. By paying $10.00* plus $1.00 in health and welfare and $3.00 in pension contributions or any combination of bona fide fringe benefits on behalf of the employee.
- d. By paying $10.00* plus $4.00 in pension contributions or any combination of bona fide fringe benefits on behalf of the employee.

Although it is true that there is no maximum amount which can be credited for fringe benefits, the amount must represent the costs or contribution rate required to provide benefits for the employee in question. From the time the Davis-Bacon Act was amended to include recognition of fringe benefit contributions as a part of the prevailing wage, it has been the unequivocal position of the Department of Labor that only contributions actually on behalf of

*/Note - overtime must be paid at time and one-half the basic hourly rate of $12.00 or the regular rate, whichever is higher.

a particular employee are creditable towards meeting the employer's obligation to pay that specific employee the prevailing wage rate. Just as the Department does not recognize a cash payment to one employee as meeting a contractor's obligation to pay the prevailing wage rate to a second employee, neither does the Department recognize a fringe benefit contribution on behalf of one employee as meeting the requirement to pay the prevailing wage to a second employee.

We would also like to note that it is the long standing position of the Department that fringe benefit contributions creditable for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of nongovernment work. For example, let us assume a contractor's expense in providing health insurance for a particular employee is computed to be $200 per year. If that employee works 1500 hours of the year on a Davis-Bacon project and 500 hours of the year on another job not covered by the Davis-Bacon provisions, only $150 or 10 cents per hour, would be creditable towards meeting the contractor's obligation to pay the prevailing wage on the Davis-Bacon project.

You state that certain of your client's employees worked on a Davis-Bacon project, and that the difference between what they were paid in cash and the amount of the required prevailing wage was $44,383.03. You indicated that this amount was paid into a fringe benefit trust to purchase various employee benefits. According to your computations, approximately $13,000 was used to purchase benefits for those employees who worked on the Davis-Bacon project. If, as you contend, the $13,000 payment constituted contributions for bona fide fringe benefits within the meaning of the Davis-Bacon Act (40 U.S.C. 276a, et seq.) and regulations of the Department of Labor (29 CFR Part 5), and if, as noted earlier, this payment constitutes contributions made only for periods of government work, then this amount is creditable towards meeting your client's prevailing wage obligations on the Davis-Bacon project. However, the employees who worked on the government project would still be due the difference between $44,383.03 and the $13,000, and should be paid this amount in cash immediately, with the amount for each employee computed in accordance with the credit the employer has attempted to take for that employee.

Further, as indicated in your letter, the Davis-Bacon Act does not provide guidelines for the "pay-out" of pension benefits. Such guidelines are ordinarily provided for in the "bona fide" plan, in accordance with applicable law. For instance, a contractor may make certain contributions to a pension plan on behalf of an employee, but whether the employee ever receives the benefits derived from this contribution will depend on whether the employee meets the plan's vesting requirements. Standards concerning vesting are provided by the Employee Retirement Income Security Act of 1974. The Davis-Bacon Act only requires that a contractor or subcontractor make contributions or incur costs in the applicable specified amounts listed on the wage determination with respect to each individual laborer or mechanic performing covered contract work. However, except during a bona fide waiting period, credit may only be taken for contributions on behalf of employees who are eligible to participate in the plan.

Your letter also states that the monies paid into the fringe benefit trust fund represented monies deducted from actual wages paid employees for work on the Davis-Bacon project. The manner in which you use the term "deductions" is unclear to us and so the following information is provided. The regulations of the Department of Labor clearly distinguish between "payroll

deductions" for fringe benefit plans and "contributions" to fringe benefit plans. See 29 CFR Parts 3 and 5 (copies attached). Among the requirements concerning payroll deductions for bona fide fringe benefits are that such deductions must be "voluntarily consented to by the employee in writing and in advance of the period in which the work is to be done...., or provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees" (29 CFR §3.5(d)). There are no such requirements for employer "contributions" to bona fide fringe benefit plans (29 CFR Part 5).

We have also received copies of related correspondence from you which are attached to the "Motion for Reconsideration" in the case of Collinson Construction Company, WAB Case No. 76-9, filed with the Wage Appeals Board by the Building and Construction Trades Department, AFL-CIO. This correspondence raises similar issues regarding crediting of payments to an apprenticeship fund. The principles discussed above apply here as well. Furthermore, the employer can only take credit for contributions made to a plan approved in accordance with 29 CFR §5.5(a)(4), in which the employer participates, and only with respect to those crafts for which the plan is approved and for which the employer participates. If the plan does not require the employer to make a regular contribution with respect to each employee on government work and on non-government work, it will be necessary to convert the employer's cost of participation to a cents per hour figure, dividing the cost by total hours worked in the craft in question on both government and non-government work. Further, as indicated above, a contractor or subcontractor cannot satisfy his total fringe benefit obligations by payment into an otherwise "bona fide" apprenticeship fund to the extent that such payments exceed the cost per hour for the classifications enrolled in the apprenticeship program. Your advice to *** members and the actions by *** in apparent response to that advice are clearly in error, and therefore, corrective action and restitution to the employees should be effected immediately.

We trust the foregoing will be helpful.

Sincerely,

Dorothy P. Come
Acting Assistant Administrator