Opinion No. 70-61

September 8, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Oliver E. Payne Chief Counsel New Mexico State Highway Department P.O. Box 1149 Santa Fe, New Mexico 87501

QUESTIONS

FACTS

Minimum wage rates for workers employed in the construction of highways in New Mexico are presently established by the State Labor Commissioner, acting under authority of the Public Works Minimum Wage Act, Sections 6-6-6 through 6-6-10, N.M.S.A., 1953 Compilation. Included in the general program of highway construction in this state are roads financed entirely by state moneys, as well as highways financed in whole or in part by the United States Government under the terms of the Federal-Aid Highway Act, 23 U.S.C. 101, **et seq.** On those projects financed under the terms of the Federal-Aid Highway Act, certain equal-opportunity skill-training programs are required by the federal legislation to be implemented by the contractors involved.

QUESTIONS

1. To what extent has the federal government superseded the authority of the State Labor Commissioner in the determination of minimum wage rates to be paid workers employed on federally-financed highway projects?

2. Are the minimum wage rates to be paid to employees of the skill-training programs subject to determination by the State Labor Commissioner, or by the appropriate federal official?

CONCLUSIONS

1. Under the explicit terms of the Federal-Aid Highway Act, the Secretary of Labor of the United States enjoys the authority to determine minimum wage rates for workers employed on highways financed under the terms of the Act.

2. The State Labor Commissioner enjoys the authority to determine, pursuant to the Public Works Minimum Wage Act, **supra,** the minimum wage rate to be paid employees of equal-opportunity skill-training programs carried on by contractors engaged in highway construction subject to the Federal-Aid Highway Act and certified by the Secretary of Transportation of the United States.

OPINION

*{*102}* **ANALYSIS**

The program of federal aid in the construction of highways is a massive and comprehensive one. The allocation of federal funds to assist the states' highway construction programs is authorized by the Federal-Aid Highway Act, 23 U.S.C. 101, **et seq.** Section 103 of that Act establishes three classifications of federal-aid highway programs: the first, the Interstate Highway System; the second, the federally-aided primary system; the third, the federally-aided secondary system.

For highways constructed under the three programs, Section 113 (a) and (b) of the Act provide in part:

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors on the initial construction work performed on highway projects on the Federal-aid systems, primary and secondary, as well as their extensions in urban areas, and the Interstate System, authorized under the highway laws providing for the expenditure of Federal funds upon the Federal-aid systems, shall be paid wages at rates not less than those prevailing on the same type of work *{*103}* on similar construction in the immediate locality as determined by the Secretary of Labor in accordance with the Act of August 30, 1935, known as the Davis-Bacon Act (40 U.S.C. 264a)

(b) In carrying out the duties of subsection (a) of this section, the Secretary of Labor shall consult with the highway department of the State in which a project on any of the Federal-aid systems is to be performed. After giving due regard to the information thus obtained, he shall make a predetermination of the minimum wages to be paid laborers and mechanics in accordance with the provisions of subsection (a) of this section which shall be set out in each project advertisement for bids and in each bid proposal form and shall be made a part of the contract covering the project.

It is to be noted that the inclusion of primary- and secondary-highway construction wage rates are the result of a 1968 amendment to the Act. The Act had been formerly implemented so as to make only Interstate Highway System wage rates subject to determination by the Secretary. The reasons for the amendment of the Act are set forth in the Report of the Senate Committee on Public Works, 1968 **United States Code Congressional and Administration News,** p. 3497:

At present the wage protection provided by the Davis-Bacon Act extends to construction workers on virtually all Federal construction programs. This is true whether the Federal Government is paying 90 percent in the case of the Interstate Highway program or 30 percent under the Federal Airport Act, or where no actual Federal funds are expended but the Federal Government guarantees construction loans.

The major exception, however, is the regular Federal-aid highway construction program. The committee can find no reasonable basis for this exception. Therefore, the

committee recommends that the provisions of the Davis-Bacon Act be extended to cover the construction workers on the ABC highway system.

The committee realizes that this action might increase administrative problems to some degree, and realize also that it may tend to raise the cost of building ABC roads. However, the need to place Federal construction programs and the wages of the workers on a comparable and equitable basis with other Federal construction practices far outweighs the cost and possible administrative difficulties.

The committee further recommends amendment of the application of the Davis-Bacon Act to all Federal-aid highway projects by withholding its application to apprentices or those in skill improvement programs operated in connection with the equal opportunity program.

In view of the explicitly-stated legislative purpose in amending the Federal-Aid Highway Act, it seems clear that the Secretary of Labor enjoys the authority to establish minimum wage rates for workers employed on projects financed under its terms. It would further appear that the federal legislation vesting this authority in the Secretary has, through the doctrine of pre-emption, removed all authority to establish wage-rates on federally-aided highway projects from the New Mexico Commissioner of Labor. The aim of the federal legislation being "comparable and equitable" wage scales, it is apparent that the uniformity desired requires that the Secretary be the sole officer responsible for the wage determinations in question.

Section 105 of the Act establishes a number of requirements which govern the approval of federal-aid highway projects. They include a grant of priority to projects incorporating certain safety-oriented features, the requirement that local and state authorities shall have cooperated in the planning and location of the projects, and a grant of priority to projects important to the national defense. In addition to these factors, Section 140 of the Act requires that a state agency seeking federal funds for the construction of highways offer assurances that fair employment practices will be exercised on the projects, and grants the Secretary of Labor of the United States authority to require that the *{*104}* projects incorporate skill-training programs to aid in equal-opportunity employment:

Prior to approving any programs for projects as provided for in subsection (a) of section 105 of this title, the Secretary shall require assurances from any State desiring to avail itself of the benefits of this chapter that employment in connection with proposed projects will be provided without regard to race, color, creed or national origin. He shall require that each State shall include in the advertised specifications, notification of the specific equal employment opportunity responsibilities of the successful bidder. In approving programs for projects on any of the Federal aid systems, The Secretary shall, where he considers it necessary to assure equal employment opportunity, require certification by any State desiring to avail itself of the benefits of this chapter that there are in existence and available on a regional, statewide, or local basis, apprenticeship, skill improvement or other upgrading programs, registered with the Department of Labor

or the appropriate State agency, if any, which provide equal opportunity for training and employment without regard to race, color, creed or national origin. The Secretary shall periodically obtain from the Secretary of Labor and the respective State highway departments information which will enable him to judge compliance with the requirements of this section and the Secretary of Labor shall render to the Secretary such assistance and information as he shall deem necessary to carry out the equal employment opportunity program required hereunder.

Added Pub. L. 90-495, **§** 22(a), Aug. 23, 1968, 82 Stat. 826.

With respect to the wages to be paid trainees engaged in the skill-training programs, Section 113(c) of the Act declares:

(c) The provisions of the section shall not be applicable to employment pursuant to apprenticeship and skill training programs which have been certified by the Secretary of Transportation as promoting equal employment opportunity in connection with Federal-aid highway construction programs. (See subsections (a) and (b) of Section 113, **supra)**. See the last paragraph of **Comments Report of the Senate Committee on Public Works** quoted above for the expressed purpose of this exemption of apprenticeship programs from the provisions of the Davis-Bacon Act)

It may thus be seen that unless the Secretary of Transportation's authority in certifying the skill-training programs includes the authority to determine wage rates, the determination of those rates lies with the State Labor Commissioner, under the terms of the Public Works Minimum Wage Act, **supra.** There is no language in Section 140 of the Federal-Aid Highway Act which suggests that the actual wage rate paid to trainees is a matter of federal concern. The sphere of interest of the federal authorities seems limited to insuring that equal wage provisions exist for all workers in the same classifications, regardless or race, ethnic origin, or creed. More specific provisions concerning the authority of federal officials is to be found in **Exec. Order** No. 11246, 3 C.F.R. 339 (1964-1965 Comp.). In pertinent part, that Order provides for the certification of equal-opportunity skill-training programs along certain guidelines:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination, rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, *{*105}* notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

Another section of the order applies the standards to state agencies seeking to receive federal funds to assist in construction programs:

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligation thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under **Part I,** Subpart D, of this Order.

It would appear from the provisions of the Act and the Executive Order that the approval and certification by the Secretary of Transportation, who assumed the duties originally exercised by the Secretary of Labor concerning equal opportunity employment pursuant to Public Law 89-670, 80 Stat. 931, are confined to matters that may be described as affecting the equal treatment of persons hired to work on construction projects. It does not appear that the approval of minimum wage rates is a necessary part of this duty, and consequently, it does not appear that the doctrine of federal pre-emption applies to divest state authority from determining wage-rates for trainees.

The Public Works Minimum Wage Act, therefore, must be regarded as applying to wage rate determinations not covered by the Federal-Aid Highway Act. Since the wages to be paid trainees under skill-training programs are exempted from the federal statute, it remains within the authority of the State Labor Commissioner to determine those minimum wage rates according to the procedures set forth by New Mexico statutes.

By: Richard J. Smith

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