STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

April 15, 2008

Kelly Walsh
Schwabe, Williamson & Wyatt
700 Washington St., Suite 701
Vancouver, WA 98660

Dear Ms. Walsh:

Re: Granite Northwest, Inc. your file # 118952/159932

Thank you for your inquiry about overtime calculations for public work under Washington State law, Chapter 39.12 RCW. You offer considerable analysis on how the federal Davis-Bacon Act functions for such calculations. However, the state law is different.

RCW 39.12 is a remedial statute to be liberally construed for its purpose of worker protection. Further, the state law has some differences in its language from the federal law. These differences preclude using the federal law and its provisions as a mandatory pattern for how the state law is administered. In fact, the Washington State legislature chose to use language that was different from the language used in the Davis-Bacon Act.

Under RCW 39.12.015, the Industrial Statistician shall make all determinations of the prevailing rate of pay. According to RCW 39.12.010, the prevailing rate of pay includes wages, usual benefits and overtime.

Jim Christensen, a previous Industrial Statistician, wrote a determination on February 21, 1997 to Mr. Mel Thoresen on the exact question you have raised. The letter states: "Under state law, there is no such thing as "fringe benefits paid as cash." A copy of that letter is enclosed.

There is no requirement in RCW 3.12 to pay any benefits. If "usual benefits" (as defined in WAC 296-127-014) are paid to the worker, that amount of usual benefits paid, and only that amount, is a credit against the prevailing wage amount. The entire remainder is the wage.

Overtime calculations under the state law are based on the entire wage paid including any so called "cash payment of benefits." The only credit for payment of usual benefits is the actual payment of usual benefits as defined in WAC 296-127-014. That rule reads, in part: "If an employer chooses not to provide such benefits, however, wages paid must be at the full prevailing wage rate..." Overtime will be calculated on the full wage rate paid, not just a portion of the wage rate paid.

Thank you for the opportunity to address your questions.

Sincerely,

David J. Soma
Industrial Statistician
Prevailing Wage Program Manager

Enclosure

cc: Randy Dubigk, WSDOT
Frank Caballero, WSDOT

SCHWABE, WILLIAMSON & WYATT
ATTORNEYS AT LAW

Vancouvercenter, 700 Washington Street, Suite 701, Vancouver, WA 98660 | Phone 360.694.7551 | Fax 360.693.5574 | www.schwabe.com

KELLY M. WALSH
Admitted in Washington and Oregon
Direct Line: 360-905-1432
E-Mail: kwalsh@schwabe.com

March 31, 2008

Dave Soma
Prevailing Wage Program Manager
Washington Department of Labor and Industries
PO Box 44000
Olympia, WA 98504-4000

Re: **Granite Northwest, Inc.**
Frank Gurney, Inc. Contract with WSDOT; Contract No. 7309
Our File No.: 118952/159932

Dear Mr. Soma:

Our firm represents Granite Northwest, Inc., a subcontractor hired by Frank Gurney, Inc. to provide materials and labor on the above-referenced contract. I understand that Frank Caballero, Office Engineer for WSDOT, has raised an issue of whether our client properly calculated (and paid) overtime on this job. It is our opinion that our client accurately calculated, and paid, the overtime due to its employees. Let me explain.

This is a highway improvement project. It is funded, in part, by federal funds allocated by the United States Department of Transportation. Thus the prevailing wage laws of both the state and the federal government are facially applicable. As you know, there are two ways to comply with these statutes. The first is to pay wages as specified in the prevailing wage determination plus qualifying fringe benefits. The other means is to pay the wage as specified and an in lieu payment, with the equivalent value of the fringe benefits. Our client chose the latter option. The issue raised is whether the regular rate of pay includes or excludes the cash equivalent payment for purposes of computing overtime. It is Granite's contention that it must be excluded and, therefore, its payments on this project were fully compliant with the law.

We have exhaustively reviewed Washington's statutes and regulations on overtime and prevailing wage. There is no regulation or statute which discusses this issue. On the other hand, federal law addresses the issue head-on, and therefore should be used as a guide by the Department in determining the correct calculations.

The Field Operations Handbook for Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act (hereinafter, "FOH") provides a detailed description of the appropriate overtime calculation. Notably, §15f10 is devoted to "crediting of fringe benefit payments." It states that "fringe benefit payments are not included in the basic/regular rate of pay for CWHSSA OT purposes." FOH 15f10(d). The regulations go on to specifically discuss "computation of OT when fringe benefits are involved." FOH 15k06. This provision states that "any SCA or D-B fringe benefit payments which are excludable from the regular rate under Sec. 7(e) of the FLSA, or their cash equivalent, may be excluded in the computation of the basic rate under CWHSSA."

As you know, the Davis-Bacon Act does not make reference to overtime or its computation. In consequence, the Contract Work Hours and Safety Standards Act control. In *In the matter of G & C Enterprises, Inc,* 1984 DOL Wage App. Bd. Lexis 11 (1984), the wage appeals board made two key findings. First, that fringe benefit payments were to be made on all hours worked, not just straight time hours. Second, and critical to the analysis here:

> "[I]t is abundantly clear from both the House and Senate Committee reports that another purpose of the overtime provisions of H.R. 6041 is to avoid penalizing a contractor who elects to meet his obligation under the bill by paying benefits in cash." *See House Report No 308, 88th Cong., 1st Sess., p. 4 (1963) and Senate Report No. 963, 88th Cong., 2nd Sess., p. 7 (1964).*

On the basis of these key findings the Wage Appeal Board concluded that neither fringe benefits purchased by the employer nor in lieu payments would be included in computation of the regular rate of pay.

These clear directives make good sense when read in light of the purpose behind the Davis-Bacon Act. In enacting that Act, Congress intended to create a level competitive field amongst contractors by establishing a mandatory minimum wage and benefit level. As the Court noted in *Westchester Fire Insurance Company* v. *United States,* 52 Fed. Cl. 567 (2002):

> "The Davis-Bacon Act, 40 USC 276a, was enacted to protect local wage standards by preventing contractors and subcontractors in federal construction contracts from paying their workers less than the wages prevailing in the area where the contract is to be performed." *Citations omitted.*

It is clear that the thrust of the legislation was to create a level playing field among employers by forbidding payment of substandard wages. It most certainly was not the intent to give one contractor an advantage over another by discriminatorily imposing a higher labor cost.

If this Department adopts Mr. Caballero's assertion that contractors paying a cash benefit must include that payment in its overtime calculation, the Department creates an uneven playing field. Specifically, the Department will be requiring contractors who choose to pay a portion of their benefit in cash to pay an overall higher rate than those contractors who do not so choose.

This situation is precisely why the Department of Labor chose to exempt cash benefits from the overtime calculation.

Moreover, Washington's Attorney General has echoed the "level playing field" sentiment. *See* AGO 1975 No. 9. While this opinion addresses whether employers are *required* to pay the "usual benefit" defined by Washington law in light of the fringe benefit provisions of Davis-Bacon, a wider reading of the opinion gets right to the heart of the issue for our client. As Attorney General Slade Gorton notes, the underlying principle of the Davis-Bacon Act should be given "real meaning." To give it this meaning, "it was intended that those contractors (and their employees) who pay in the aggregate an hourly wage and benefit increment greater than the hourly wage paid by other contractors without such benefit plans should not be at a disadvantage in bidding and securing public contracts." Mr. Gorton goes on to assert that "the department's interpretation of our state law achieves the purpose in a like manner."

If the Department of Labor & Industries does, indeed, want to achieve the purpose of leveling the playing field, the only way to do so is to exclude cash benefit payments from the overtime calculations. If the cash benefit is not excluded, contractors such as Granite Northwest, will be at a disadvantage because they will have substantially higher labor costs than those contractors with no cash benefit supplement. This clearly is not the result the Department wishes to achieve.

Further, a consistent interpretation of state and federal law makes excellent sense. Inconsistency frequently leads to inadvertent non compliance. Consistency on this issue accords with the carefully reasoned legislative decision of Congress and does not do violence to any statute, regulation, or legislative history surrounding Washington Law.

We would be pleased to discuss this issue further, at your convenience.

Sincerely,

SCHWABE, WILLIAMSON & WYATT, P.C.

Kelly M. Walsh

KMW:had
cc: Bill Schmidt