STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
525 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

ADDRESS REPLY TO:
P.O. BOX 603
San Francisco, CA 94101

IN REPLY REFER TO:

June 13, 1987

Ms. Mary Maloney Roberts
Corbett & Kane
Suite 500, Cutter Tower
2200 Powell Street
Oakland, CA 94608

Re: Effect of Federal Service Contract Act on California State Law Regarding Payment of Prorata Vacation Pay

Dear Ms. Roberts:

This letter is intended to reply to your letter of April 16th regarding the above-referenced subject. I apologize for the delay in responding but the issues you raised are very complex and we wanted to do extensive background work before responding.

It is my understanding that your client, AMPB, currently has a contract to provide an armed security guard operation at the Oakland Army Base. Under the terms of the Federal Service Contract Act (41 U.S.C. §350 et seq.) and the Wage Determination adopted to cover the services provided, your client is required to provide a vacation plan providing for at least two weeks after one year of service and three weeks after five years of service.

As you point out, the provisions of 29 C.F.R. §4.173(c) provide that for purposes of complying with the provisions of the Federal Service Contract Act, there need not be any proration of vacation wages. On the other hand, the California Supreme Court in Suastez v. Plastic Dress-Up (1982) 31 Cal.3d 774, has ruled that such proration is necessary in order to comply with the provisions of Labor Code §227.3. Of course, nothing in the Wage Determination precludes your client from prorating vacation pay; it is simply not required under the Determination.

The question then becomes: What effect does California State Law have upon the provisions of the Code of Federal Regulations and the Wage Determination? Is state law preempted or must the contractor abide by the Suastez ruling?

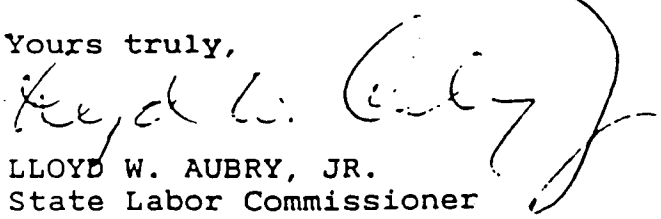
These issues are very complex and, as far as we can determine, are issues of first impression. Accordingly, we have looked to analogous statutes for guidance. The Federal Service Contract Act is silent on the question of preemption. It does, however, provide that the contractor must abide by the provisions of the FLSA where appropriate. The FLSA, of course, does not cover vacation pay, but it does contain a provision that requires employers to comply with state laws which are more stringent than those contained in the FLSA. (29 U.S.C. §218) What is more important, however, is that Congress has failed to clearly manifest its intent that the Service Contract Act should preempt state law.

I believe that the Labor Department should change the vacation portion of the Wage Determination in California to require proration. We have asked the office of the Regional Solicitor of Labor, U.S. Department of Labor, for its views on the question of preemption and are advised that while there are no cases on the subject and the Secretary of Labor has issued no written material regarding the issue, the attorneys in the local office of the Solicitor of Labor have concluded that there is no preemption.

As you know, a provision of the California Constitution, Art. III, §3.5, precludes any state agency from refusing to enforce any law it is mandated to enforce on the grounds that the statute is preempted by federal law unless there is an appellate court decision to that effect. As stated above, we have found no cases on the subject. Moreover, the Service Contract Act does not clearly preempt state law in this matter. Finally, our research further discloses that the State of California shares concurrent jurisdiction with the federal government over the Oakland Army Base. Under these circumstances DLSE is obligated to enforce the provisions of Labor Code §227.3.

By copy of this letter I am instructing the Oakland District Office to proceed with the hearing in cases numbered 07-31719/3 and 07-31719/4.

Yours truly,



LLOYD W. AUBRY, JR.
State Labor Commissioner

cc: H. Thomas Cadell, Jr., Chief Counsel
Linda Tejada, Senior Deputy, Oakland
Regional Managers
Regional Solicitor of Labor