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FILE NO. 93-009

LABOR:
Prevailing Wage Determinations

Ms. Shinae Chun
Director
Illinois Department of Labor
310 South Michigan Avenue, 10th Floor
Chicago, Illinois 60604

Dear Ms. Chun:

I have your letter wherein you inquire whether, pursuant to the provisions of the Prevailing Wage Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-0.01 et seq.; 820 ILCS 130/0.01 et seq. (West 1992)), the Department of Labor is required to determine the "prevailing rate of wages" on public works projects as one aggregate total rate, or as separate prevailing rates for base wages and various forms of fringe benefits. You also inquire whether the prevailing rate or rates of wages, as the case may be, are susceptible to lowering to reflect decreases in wage rates set out in collective bargaining agreements. For the reasons hereinafter stated, it is my opinion, firstly, that the prevailing rate of wages is to be determined on the basis

of separate prevailing rates for hourly cash wages, health and welfare, insurance, vacations and pensions, and, secondly, that because of the statutory procedure set out for determining prevailing rates, a prevailing wage rate is not susceptible to decrease, except in very limited circumstances, if the Act is properly enforced and implemented.

Section 3 of the Prevailing Wage Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-3; 820 ILCS 130/3 (West 1992)) requires that:

> "Not less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed * * * be paid to all laborers, workers and mechanics employed by or on behalf of any public body engaged in the construction of public works."

The term "general prevailing rate of hourly wages" is defined in section 2 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-2; 820 ILCS 130/2 (West 1992)), which provides:

> " * * *
>
> The terms 'general prevailing rate of hourly wages', 'general prevailing rate of wages' or 'prevailing rate of wages' when used in this Act mean the hourly cash wages plus fringe benefits for health and welfare, insurance, vacations and pensions paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character on public works."

The Department is required to investigate and ascertain the prevailing rate of wages for each county in the State annually during the month of June (Ill. Rev. Stat. 1991, ch.

48, par. 39s-9; 820 ILCS 130/9 (West 1992)), and must ascertain the rate for any public body undertaking any public works upon notification from the public body. (Ill. Rev. Stat. 1991, ch. 48, par. 39s-4; 820 ILCS 130/4 (West 1992).) The Department is further directed to "inquire diligently as to any violation of [the] Act, [to] institute actions for penalties and [to] enforce generally the provisions of [the] Act". (Ill. Rev. Stat. 1991, ch. 48, par. 39s-6; 820 ILCS 130/6 (West 1992).)

According to the information your Department has provided, its current practice is, in pertinent part, to determine a prevailing rate of wages for hourly cash wages and separate prevailing rates for health and welfare, for vacations and for pensions. (Although section 2 also lists "insurance" as a separate category of fringe benefits, the Department has never listed a prevailing rate of wages for that category since the fringe benefit portion of the definition was added to the definition in 1967 (1967 Ill. Laws 2392), apparently because wage practices have only provided benefits in the other three categories.) Moreover, the Department interprets the requirement that workers be paid no less than the prevailing rate of wages to mean that the worker must be paid at least or above the prevailing rate for each category of benefits; the prevailing wage requirement cannot be satisfied by paying any combination of cash and fringe benefit hourly rates the sum of which equals the sum total of the rates determined by the Department, even

though cash equivalents may be paid to workers for fringe benefits in lieu of providing the fringe benefits. If, for example, the Department determined that the prevailing wage for a particular craft in a given locality was $18 per hour for cash wages, $1 per hour for health and welfare and $1 per hour for pensions, the requirement that prevailing wages be paid would not be satisfied by paying $12 per hour cash, $4 per hour for health and welfare and $4 per hour for pensions, even though the sum of the various hourly rates is $20 in each case.

The implicit key to the Department's interpretation is that the word "plus", in section 2 of the Act, is not used in its arithmetical sense as represented by the sign "+". If it were, the prevailing wage would simply be the sum of hourly cash wages plus fringe benefits. As the Department recognizes, the word "plus" is not necessarily synonymous with the plus sign. Rather than operating as an invitation to engage in an exercise in addition, it may also be used adjunctively to mean "in addition to", "over and above", "and also" or "on top of". Harvey v. Rolands of Bloomington, Inc. (1968), 94 Ill. App. 3d 444, 449.

In construing a statute, the reason and necessity for the law, the evils to be remedied and the objects and purposes to be obtained should be considered. (People v. Drakeford (1990), 139 Ill. 2d 206, 214.) Proper interpretation of a statutory provision cannot simply be based upon its language;

interpretation must be grounded on the statute's nature and objects and on the consequences that would result from construing it one way or the other. (Mulligan v. Joliet Regional Port District (1988), 123 Ill. 2d 303, 313.) Further:

> " * * *
>
> It is generally recognized that courts will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute. [Citations.] * * *
>
> A significant reason for this deference is that courts appreciate that agencies can make informed judgments upon the issues, based upon their experience and expertise. [Citations.]
>
> This court has recognized that while they are not binding on the court, 'interpretations by administrative agencies express an informed source for ascertaining the legislative intent.' [Citations.] * * *
>
> * * * "
>
> Illinois Consolidated Telephone Co. v. Illinois Commerce Commission (1983), 94 Ill. 2d 142, 152-53.

The definition of "generally prevailing rate of hourly wages" is subject to three possible interpretations: the two previously mentioned (one aggregate rate or five separate rates) or a third that would require the setting of two rates - one for cash wages and one for combined fringe benefits. The third interpretation would be consistent with the Davis-Bacon Act (see U.S.C. § 276a (West 1986); Emerald Maintenance, Inc. v. U.S. (Fed. Cir. 1991), 925 F.2d 1425, 1427), the Federal law

which is analogous to the Illinois Prevailing Wage Act. People ex rel. Bernardi v. City of Highland Park (1988), 121 Ill. 2d 1, 11.

The Department has suggested that its interpretation removes incentives to import less expensive labor from outside the locality and assure quality workmanship. Section 4 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-4; 820 ILCS 130/4 (West 1992)) also requires the Department and other public bodies to ascertain generally prevailing rates for legal holiday and overtime work. The hourly cash wage for overtime is typically paid at a rate of 1.5 times the base hourly cash rate, with fringe benefits paid at the same hourly rate. If the Act required only that the aggregate prevailing wage be paid, then the worker being paid $18 base, $1 health and welfare and $1 pensions on an hourly basis and the worker being paid $12, $4 and $4, respectively, would both be paid a total wage of $20. When overtime was computed, however, the first worker would be paid $27, $1 and $1 for a total of $29 per overtime hour, while the second would be paid $18, $4 and $4 for a total of $26 per hour. If, for example, the first worker was being paid pursuant to a collective bargaining agreement that reflected prevailing rates for each of the three categories, then an employer who was not bound by the agreement could bring in less expensive labor and achieve a competitive advantage by

restructuring the package. The second employer would also have an advantage in that its costs for unemployment insurance, workers compensation and social security would be lower.

One purpose of the Prevailing Wage Act is to assure that people working on public works projects receive a decent wage in order to secure to the State and other public bodies the advantage of having the work performed under conditions which will give some assurance that the work will be completed without interruptions or delay by workmen of average skill. (Hayen v. County of Ogle (1984), 101 Ill. 2d 413, 421.) The Act also serves to protect local workers by removing the incentive to import less expensive labor from areas outside the locality in which the work is performed. (People ex rel. Bernardi v. City of Highland Park (1988), 121 Ill. 2d 1, 10.) The latter purpose could be undermined if limits on the Department's authority to determine the prevailing practices as well as hourly rates would allow some contractors to obtain a competitive advantage by varying the prevailing practice. Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d 31, 41-42 (public body has authority to specify prevailing overtime practices in addition to prevailing overtime rate).

An interpretation that would allow shifts of wages from cash to fringe benefits would also weaken the degree to

which the Act may be enforced, under the appellate court's recent decision in Construction and General Laborers' District Council v. James McHugh Construction Co. (1992), 230 Ill. App. 3d 939, appeal denied, 146 Ill. 2d 625. In that case, the court held that an action by a worker brought under section 11 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-11; 820 ILCS 130/11 (West 1992)) to recover fringe benefits not paid as required by the Act was pre-empted by section 514(a) of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1144(a)), a Federal statute that "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.

The Department's interpretation of section 2 of the Prevailing Wage Act is permissible, is longstanding and should be accorded substantial deference. In accordance therewith, it is my opinion that the phrase "general prevailing rate of hourly wages" should be construed to consist of separate prevailing rates for cash wages, health and welfare, insurance (if wage practices so provide), vacations and pensions.

With respect to your second inquiry, the Department has taken the position that, once ascertained, a prevailing rate of wages may increase but may never decrease. I agree that this is the necessary result of the current statutory mechanism for determination of the prevailing rates of wages, except in the limited circumstances described below.

The general prevailing rate of hourly wages is the rate "paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character on public works". (Ill. Rev. Stat. 1991, ch. 48, par. 39s-2; 820 ILCS 130/2 (West 1992).) The phrase "on public works", which was added to the definition in 1961, excludes wages paid on private construction work from the calculation of the prevailing wage rate, and limits the calculation of the rate to wages generally paid on public works in the locality where the work is to be performed. (Hayen v. County of Ogle (1984), 101 Ill. 2d 413, 417.) Section 4 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-4; 820 ILCS 130/4 (West 1992)) makes it mandatory for contractors and subcontractors on public works projects to pay not less than the prevailing rate, requires the public body entering into a public works contract to insert a stipulation to that effect into the contract, requires that contractors' bonds guarantee the faithful performance of prevailing wage clauses and requires bid specifications to list the prevailing rates for each type of worker needed to execute the contract. It is clear, therefore, that, if the Act is properly enforced, investigations properly made and the evidence thereof presented, the prevailing rates for a particular type of work in a given locality can be increased but not decreased from one determination to another, notwithstanding the

effects of any collective bargaining agreement. That is because each successive determination is based upon the wages paid in the previous year.

Take, for example, a situation described in your letter. The prevailing hourly base rate for engineers in a locality had been determined to be $19.94 and the health and welfare rate to be $1.70. A new collective bargaining agreement between employee and employer representatives called for engineers to be paid $19.69 and $1.95 per hour, respectively. Until such time as a new prevailing wage determination is made, however, any public body entering into a contract that requires the services of engineers must require that the contractor pay at least the rates of $19.94 and $1.70. This is true even after the new collective bargaining agreement takes effect. When the new determination is made, the Department can consider only the rates paid for engineers under contracts for public works projects in the locality. By law, those contracts must have required that engineers be paid at least $19.94 per hour cash and at least $1.70 per hour for health and welfare; paying less than $19.94 per hour would violate the Act. When the Department makes its new investigations, therefore, it should find that all public works contracts in the locality are calling for engineers to be paid at least $19.94 or the contracts will be in violation of the Act. The fact that a new collec-

tive bargaining agreement reduces the wages paid by private employers has no bearing on the matter since wages paid on private construction work is excluded from the calculation of the prevailing wage under Hayen v. County of Ogle. Because all public works contracts in which engineers are required must specify that the most recently determined prevailing wage of $19.94 be paid, the reduction to $19.69 can never be recognized in the prevailing wage determination if the public bodies and contractors comply with the Act. The increase in the health and welfare rate, could, on the other hand, be recognized since nothing prohibits the payment of an amount greater than the generally prevailing rate.

In Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d 31, however, the court seemed to reject the Department's position. There the court held that the Department and other public bodies had the authority to determine not only the prevailing rate at which overtime was paid, but also the authority to determine prevailing overtime practices. (Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d at 42.) In prevailing wage determinations preceding the one at issue in that case, the Department had determined that the practice for certain trades in the locality was to pay overtime for the ninth and tenth hours of the day and

for weekends and holidays. (Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d at 42.) At the hearing on the challenged determinations, the objectors had introduced as evidence a survey, collective bargaining agreements and testimony indicating that actual overtime practices varied among the various trades. Other overtime practices included the practice of allowing work on Saturday at straight time if a weekday was lost to bad weather or allowing work at straight time for four ten hour days in a week. The Department stipulated as to the accuracy of the results of the survey, and no evidence of any investigation made by the Department or the other public bodies involved was submitted in the hearings held on the objections pursuant to section 9 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-9; 820 ILCS 130/9 (West 1992)). (Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d at 34-36.) The Department argued that the alternative overtime practices could not be paid the prevailing wage because they were less advantageous to the worker than the practice ascertained as prevailing in prior determinations, and, citing Bradley v. Casey (1953), 415 Ill. 576, that each year's prevailing wage determination sets a floor for succeeding years. The court responded, "Suffice it to say that Bradley stands for no such proposition", and upheld the trial

court's determination that the overtime practices described in the objectors' evidence were prevailing. Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d at 42.

In order to reconcile the decision in Lake County Contractors with the conclusion I have drawn from the language of the Act, it is only necessary to distinguish the express requirements of the Act from the practical effect of their application. The Act itself does not expressly prohibit decreases in the prevailing wage. In Hayen v. County of Ogle (1984), 101 Ill. 2d 413, contractors argued that the Prevailing Wage Act was unconstitutionally arbitrary and unreasonable, in part because application of the Act would result in the prevailing wage's never falling below the prevailing wage for prior periods no matter what might happen to wages for work on private construction projects. The court did not disagree with the contractors' reading of the Act, but upheld the statute as a question of policy to be decided by the General Assembly. Hayen v. County of Ogle (1984), 101 Ill. 2d at 421-22.

The practical ramifications of the statute notwithstanding, section 9 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-9; 820 ILCS 130/9 (West 1992)) requires the Department to investigate and ascertain the prevailing rate of wages, to publish a notice of its determination and to hold a hearing on

objections to its determination. "At such hearing the public body or Department of Labor shall introduce in evidence the investigation it instituted which formed the basis of its determination", and the various parties may thereafter introduce any material evidence; the Department is to make "such final determination as it believes the evidence warrants * * *". (Emphasis added.) (Ill. Rev. Stat. 1991, ch. 48, par. 39s-9; 820 ILCS 130/9 (West 1992).)

It appears that in the Lake County Contractors case, the Department and the public bodies involved introduced no evidence to support their prevailing wage determination as to overtime practices, relying instead on a prior determination as the floor. The court specifically found that the record was "devoid of any support for the wage rates determined by the Department". (Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d 31 at 39.) On the other hand, the contractors had introduced evidence as to prevailing rates in the form of collective bargaining agreements and wage schedules, and the Department had even stipulated as to the accuracy of the wage schedules. (Lake County Contractors Development Association v. North Shore Sanitary District (1990), 198 Ill. App. 3d at 39-40 and 42.) It must be concluded, therefore, that even though the Department may know that the practical effect of the statute is that

prevailing rates cannot go down, its determinations must be based upon evidence in the record. If the Act is properly enforced, the investigation made and evidence admitted, however, the necessary result will be that the wage cannot decrease.

I note, however, that, at least in theory, the impact of federally-assisted public works projects could bring about the lowering of a prevailing rate in certain circumstances. Section 1 of the Davis-Bacon Act (40 U.S.C. § 276a) requires that laborers and mechanics under contracts to which the United States is a party be paid no less than the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town or other civil subdivision of the State in which the work is to be performed. Unlike the Illinois statute, the Davis-Bacon Act does not preclude the fact finder from considering projects other than public works contracts. Thus, if prevailing wages go down in the private sector on a sufficient number of projects to affect the prevailing wage determination, the federally determined prevailing wage could go down. While the United States is not a public body for purposes of the Illinois Prevailing Wage Act (Ill. Rev. Stat. 1991, ch. 48, par. 39s-2; 820 ILCS 130/2 (West 1992)), prevailing wage determinations made under the Davis-Bacon Act are made applicable to federally-assisted projects under dozens of Federal statutes. (See

29 C.F.R. Part 1, App. 1 (1991).) Moreover, the Illinois Prevailing Wage Act does not apply to Federal construction projects which require a prevailing wage determination by the United States Secretary of Labor. (Ill. Rev. Stat. 1991, ch. 48, par. 39s-11; 820 ILCS 130/11 (West 1992).) In practice, the Department has taken the position that the Illinois Act does not apply any time the U.S. Secretary of Labor makes prevailing wage determinations. It is conceivable, though not necessarily very likely, therefore, that public works projects in which Illinois political subdivisions or State agencies participate could be so prevalent in a particular locality at a given time that the prevailing wage determined by the Illinois Department of Labor could be affected by payment of wages pursuant to lowered Federal minima. Aside from such circumstances, however, it appears that the prevailing wage, as determined by the Illinois Department of Labor, should never decrease.

Respectfully yours,

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