



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

June 18, 2010



Re: South Bay Fire Dept. Project
Our File No. RO-10-0091

Dear [REDACTED]:

You requested a determination as to the applicability of the prevailing wage law (Labor Law Article 8) and the Wicks Law (General Municipal Law Section 101, Labor Law Section 224) to a project being bid by the South Bay Fire Department. Unfortunately, we are asked to make a determination in a short time period, having received your letter on June 14, 2010 and the background material on June 15, 2010, for a project that was to receive bids by June 17, 2010. As a result, we have not had an opportunity to obtain a complete understanding of the facts in the matter, but in an effort to provide some guidance, we are providing this opinion subject to the possible receipt of further information.

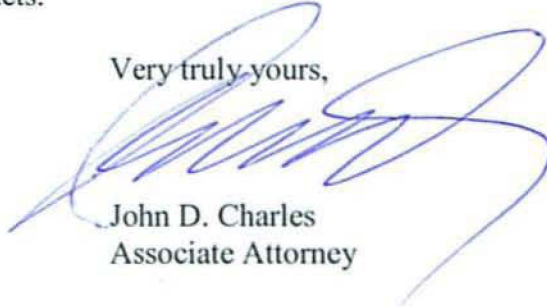
Counsel's Office has already issued an opinion with respect to the applicability of the prevailing wage law to work performed by not-for-profit volunteer fire departments (Churchville Volunteer Fire Dept. April 24, 2009, attached hereto) and will follow that opinion with regard to this project. Work performed with regard to the construction of the South Bay project is subject to the prevailing wage law.

With regard to the Wicks issue, it is Counsel's opinion that a not-for-profit volunteer fire department is not an entity subject to Section 101 of the General Municipal Law (GML), which relates to "Every officer, board or agency of a political subdivision or of any district therein..." In our view, a fire district would fall under the above definition and be subject to the requirements of GML Section 101, while a volunteer fire department that is a private not-for-profit corporation, would not. GML Section 101 does not contain any language analogous to the "third party" language that has been included in Section 220 of the Labor Law by Chapter 678 of the Laws of 2007 so as to extend the applicability of the law to any party other than those identified in the statute. It would appear that such a distinction was intentional on the part of the legislature and compels the result herein. The private bid by invitation only process and the design-bid-build delivery system does not appear to violate the Wicks Law in these circumstances as we currently understand the facts of this matter.

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Please advise if you have any further information that you may want to submit in this regard. If there are significant factual matters of which we are not aware, we will review the matter again in light of those changed facts.

Very truly yours,

A handwritten signature in blue ink, appearing to read "John D. Charles", is written over the closing "Very truly yours,".

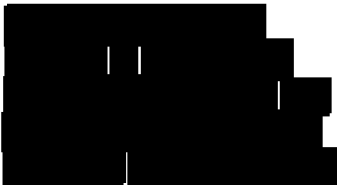
John D. Charles
Associate Attorney

cc: William F. Taylor Architects
South Bay Fire Department
Pico Ben-Amotz
Chris Alund
David Bouchard
Fred Kelley
Opinion File
Dayfile



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

April 24, 2009



Re: Churchville Volunteer Firehouse
Our File No. RO-08-0165

Dear [REDACTED]:

You ask Counsel's Office for an opinion as to whether the construction of a new firehouse in the Village of Churchville, by a Not-for-Profit Volunteer Fire Department is public work subject to the jurisdiction of Article 8 of the Labor Law (the Prevailing Wage Law). You have provided this Office with certain news articles related to the project, an informational release from the Fire Department itself and a summary of the Town of Riga's assessments for the last four years indicating a significant increase in fire protection services in the last year. According to the Fire Department, some eighteen acres of land was acquired from the Town of Riga, and later annexed to the Village of Churchville. Apparently, the Fire Department retains ownership of the real property upon which it is constructing the new firehouse. Based upon the facts that have been provided, Counsel's Office believes that the Prevailing Wage Law applies to the Churchville project.

In determining whether a construction project is public work, two conditions must be fulfilled in order for the statutory scheme of Article 8 of the Labor Law to apply (the Prevailing Wage provisions): "(1) the public agency must be a party to a contract involving the employment of laborers, workmen or mechanics, and (2) the contract must concern a public works project" *Matter of Erie County Indus. Dev. Agency v Roberts*, 94 AD 2d 532, 537 (4th Dept. 1983), *aff'd* 63 NY2d 810 (4th Dept. 1984), *see also*, *Matter of National R.R. Passenger Corp. v Hartnett*, 169 AD2d 127. "Later, it was stated that contemporary definitions focus upon the public purpose or function of a particular project***. To be public work, the projects primary objective must be to benefit the public" (citations omitted) *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3rd Dept., 1991).

If the Town or a Fire District were to directly enter into contracts for the construction of a new firehouse, the Town or its Fire District would be a public agency entering into contracts

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involving the employment of laborers, workers or mechanics and such a contract would clearly meet the first condition of the test. Whether the Fire Department is a public agency that would be a party to a contract involving the employment of laborers, workers or mechanics is a more complicated question, since the volunteer fire company clearly presents a public/private hybrid situation. The Department has revised its position on this subject over the years. Through the 1980s and into the 1990s, the Department considered volunteer fire departments to be subject to the Prevailing Wage Law, a position that was confirmed by a decision in State Supreme Court in *Bayville Fire Company No. 1 v. New York State Department of Labor*, (unpublished decision, September 20, 1989, Goldstein, J.S.C.).

"Concededly, the precise terms of Article 8 of the Labor Law do not apply to a private corporation such as the Bayville Fire Company. Nevertheless, the prevailing wage law must "be liberally construed to carry out its beneficiary purposes" (Matter of Tenlap Constr. Corp. v Roberts, 141 A.D. 2d 81, 84, citation omitted). Interpreting the statute to apply to the petitioner is well within the bounds of such a construction."

Multiple subsequent opinions of Counsel conformed to that determination. However, on April 16, 1998, another State Supreme Court decision, *Glens Falls Volunteer Fire Department v Department of Labor* (unpublished decision, Dier, J.S.C.), held that volunteer fire departments were not subject to the Prevailing Wage Law. On October 5, 1998, Department Counsel issued a letter stating:

"Based upon these rulings and a review of the statute, we now adopt the position that the Department cannot apply Article 8 to construction projects entered into by not-for-profit volunteer fire department corporations so long as they own the land and the buildings where such work is being performed. Please note that, if the property is owned by a municipality and leased to the not-for-profit, the construction project continues to constitute a public work project. Also, construction projects entered into by a fire district (i.e., a municipal corporation) continue to be subject to the provisions of Article 8."

No Appellate Court decision exists upon which the Department can rely to remedy the apparent conflict as to the applicability of the Prevailing Wage Law to firehouse construction by volunteer fire departments. However, the Department has been asked again to consider the applicability of the Prevailing Wage Law to a construction project being entered into by a volunteer fire department.

There is significant statutory authority and case law which holds that volunteer firefighters are public employees. Volunteer firefighters are entitled to Workers' Compensation benefits for death and injuries incurred in the line of duty under Sections 5 and 6 of the Volunteer Firefighters' Benefits Law; they are entitled to death benefits, disability benefits and reimbursement for the cost of treatment and care for injuries under Sections 7, 8, 9, 10, 11, 15 and 16 of the Volunteer Firefighters' Law; they receive protection from the State against liability for negligence in the performance of their duties under Section 205-b of the General Municipal Law. Real property owned by a volunteer fire corporation is exempt from real property taxes

under Section 464 of the Real Property Tax Law. Furthermore, in its decision in Hartnett v. Village of Ballston Spa, 152 A.D.2d 83 (3rd Dept. 1989), appeal dismissed 75 N.Y.2d 863 (1990), the Third Department held that non-paid volunteer firefighters were public employees covered by Section 27-a of the Labor Law.

It should also be noted that not-for-profit fire companies are intimately involved with government. They are the instrumentality of government responsible for fire protection and fire protection has clearly been viewed as a public function. The not-for-profit fire companies are organized pursuant to Section 1402 of the Not-for-Profit Corporation Law. Section 404(f) of the Not-for-Profit Corporation Law requires that every certificate of incorporation of a fire corporation shall have endorsed thereon or annexed thereto the approval, signed and acknowledged, of the authorities of each city, village, town or fire district in which the corporation proposes to act. The members of a town board cannot consent to the formation of a fire company until the board holds a public hearing on the question of whether the fire company should be incorporated. Section 1402 of the Not-for-Profit Corporation Law provides additional requirements regarding the Certificate of Incorporation of a fire corporation. Specifically, the consent of a majority of the members of a town board to the formation of the fire corporation shall constitute an appointment of the persons named in the certificate of incorporation as town firemen. Thereafter, other eligible persons may be elected as members pursuant to the by-laws of the fire corporation, but the election of a member must be approved by the town board of each town which consented to the formation of the fire corporation (Section 1402(c)(3)). In addition, Section 1402(e) provides that a fire corporation is "under the control of the city, village, fire district or town authorities having, by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations."

It should also be noted that in many of these contracts let by fire companies to renovate or construct firehouses, the projects are undertaken for safety and health reasons. In particular, the health of the firefighters requires a more efficient setup of the firehouse or more efficient access to the equipment stored therein. Many of these safety and health issues fall within the scope of Section 27-a of the Labor Law regarding public employees. Oftentimes, during natural disasters, firehouse facilities also serve as public shelters and evacuation sites for communities in which they are located. While we have no direct information with respect to applicability of these issues to the Churchville Fire Department, we find that these issues present themselves in many projects involving not-for-profit volunteer fire companies.

Finally, these volunteer fire companies contract for fire protection services with the city, town or village in which they are located. These contracts take the form of written agreements between the fire company and the city, town or village. It should also be noted that many of these written agreements for fire protection services place restrictions regarding the use of these funds and even limit the fire companies from purchasing or entering into any binding contracts to purchase real property, or make improvements thereon, without prior approval by resolution of the town board. Many of the payments for fire protection services set forth in these agreements constitute nearly the entire budget of the fire companies. Finally, many of the agreements with these volunteer fire companies provide that in the event of dissolution or cessation of operation

of the fire company during the term of the agreement, all assets of the fire company remaining after payment of its debts are to be distributed to the town.

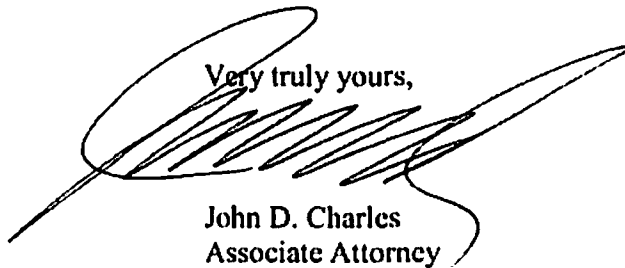
Based on all of these factors outlined above, the Department of Labor concludes that the Churchville Volunteer Fire Department is a public entity, and if the Fire Department contracts for the construction of a new fire station, it will be a party to a contract involving the employment of laborers, workers or mechanics, thereby meeting the first prong of the test discussed above.

With respect to the second prong of the test, in seeking to construct a new fire station, Churchville Volunteer Fire Department is entering a contract by which it will construct space for essential Town facilities (the fire station itself). The work would not be performed but for the need to create facilities that will be used by the public for the public purpose of fire protection.. Therefore, the construction of the new Churchville fire facility is clearly intended for a public purpose and meets the second prong of the test. It our conclusion that the project is public work and subject to the provisions of Article 8 of the Labor Law.

Accordingly, the Department recently overruled all prior opinions which are inconsistent with this opinion because we find that the prior opinions did not consider the full nature of these not-for-profit fire corporations as public/private hybrids that perform an essential governmental function.

This opinion is specific to the facts described in the documents provided and, were those facts to vary from those set forth in the documents, or if additional facts and circumstances exist of which we are not currently aware, this opinion could be changed accordingly. I trust that this is responsive to your inquiry. Please let us know if you need any further clarification on this issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "John D. Charles", with a large, sweeping flourish extending from the end of the signature.

John D. Charles
Associate Attorney

cc: Pico Ben-Amotz
Chris Alund
Fred Kelley
Opinion File
Dayfile