



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

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April 7, 2010



Re: Request for Opinion  
Alden Winterfest  
RO-09-0139

Dear [REDACTED]:

This letter is written to inform you of the Department's determination that the proposed construction project in relation to the Alden Winterfest event is within the coverage of Article 8 of the Labor Law, which requires, in relevant part, the payment of prevailing wages on public works projects. The Department has ascertained the following information from communications with [REDACTED] as well as other documentation gleaned from public sources. The Town of Alden, in connection with its annual Winterfest event, applied for and acquired a grant covering the cost of materials for the development of a skating rink. The grants were provided in the form of legislative member initiative grants from Assemblywoman Corwin and former Assemblyman Cole. The Winterfest event is put on by a local non-governmental group in conjunction with the Town of Alden.

On January 20, 2009, the Town Board, after receiving an offer from [REDACTED] (a member of Alden's Planning Board and local contractor), entered into an agreement with [REDACTED] to donate his time and services for the construction and installation of the rink. In approving the agreement, the Town Board noted that the Town and [REDACTED] had come to an agreement as to the terms of the donated services and that insurance had been obtained by [REDACTED] for the project in relation to the operation of construction equipment.

The skating rink, which was recently completed, is located outdoors in a Town owned park and will be maintained and operated by the Town with employees of either the Town Parks Department or the Town Highway Department performing such work. Liability insurance for the continued operation of the rink is paid for by the Town. The rink will be available for public use before, during and after the Winterfest event.

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In general, 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 (4<sup>th</sup> Dept. 1983), *aff'd* 63 NY2d 810 (4<sup>th</sup> Dept. 1984), *see also*, Matter of National R.R. Passenger Corp. v Hartnett, 69AD2d 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, (3<sup>rd</sup> Dept., 1991).

With regard to the first condition, the Town has, by agreement between [REDACTED] and the Alden Town Board on January, 20, 2009, entered into a contract involving the employment of laborers, workmen or mechanics. Therefore, the first condition has clearly been met.

As to the second condition, the contract concerns the construction of a skating rink for the use and enjoyment of the Town of Alden. That purpose has been heralded, by the Town Board and [REDACTED], to be of great benefit to the public that is aimed at "maintaining and improving quality of life within [the Town of Alden]." Furthermore, as stated above, the rink will be owned, maintained, operated and insured by the Town and used by its citizens in similar fashion to any other public facility. Accordingly, the second condition has also been met.

While both conditions used to determine whether the project is within the coverage of Article 8 have been met; the fact that the services provided relate to donated labor presents an additional issue in determining whether Article 8 applies. Article 8 of the Labor Law requires the payment of prevailing wages and supplements to all laborers, workers and mechanics employed on a project for the construction, repair, renovation, maintenance (not covered by Article 9) or alteration, to which the State, a municipal corporation or other public body is a party. However, coverage extends only to individuals employed on a public work project, and not to bona fide volunteers. The Department of Labor has established criteria (guidelines) for evaluating when individuals performing work on projects covered by Articles 8 and 9 of the Labor Law are volunteers exempt from prevailing wage and supplement requirements. As stated in those guidelines, which are enclosed for your review, "the prevailing wage and supplement requirements are inapplicable to true volunteer situations, where no employment relationship exists and individuals (or groups of individuals) desire to devote their time, efforts and skills, without any express or implied promise of remuneration, to assist or enhance their communities."

As you can see from a review of those guidelines, the first criterion in those guidelines looks at the type of work being performed; whether it requires special training or expertise, and whether the individuals (or groups) performing the work augment or supplant paid staff or outside employers. If either is the case, then it tends to demonstrate that a true volunteer situation may not exist. In the present situation, it is not entirely clear whether the work requires special training or expertise, or whether the "volunteers" are augmenting or supplanting paid staff or outside employers.

The second criterion set forth in the guidelines is whether any of the individuals performing work are being paid, and, if so, what work are they performing and by whom are they being paid. It matters not to the employees, or to the law, whether an *employer* chooses to perform public work at a profit or at a loss or as a matter of charity. Such an election does not bind the contractor's employees to similarly offer their services on a volunteer basis. While it might be possible for an employee to also donate his time to such an endeavor, such a situation would be closely monitored to insure that the workers were not pressured to agree to do so. In the present situation, the individuals appear to be receiving their normal (non-prevailing wage) pay from the various contractors who have "donated" their services for the project. As such, the application of this criterion tends to demonstrate that a true volunteer situation may not exist.

The third criterion is whether an employer/employee situation exists between any of the paid or unpaid individuals performing work on the project. The fact that the contractors are paying their normal wages to the individuals performing the work demonstrates that an employment relationship exists and, as such, confirms that a true volunteer situation does not exist.

Since this work is being performed by a group, the fourth criterion examines how the group is organized, the circumstances under which the group came to offer its services, whether the group ordinarily performs the same or similar work for remuneration as a business and what relationship, if any, exists between the group and the governmental entity. In this case, a group of contractors has apparently come together under the direction of [REDACTED] to perform this work as a service to the community in which they reside. The contractors may be providing the services individually and through individuals in their employ. Furthermore, [REDACTED], as noted above, has a close relationship with the Town of Alden as he is currently a member of the Town Planning Board. Accordingly, while the contractors' desire to serve the community may be indicative of their personal desire and willingness to volunteer for this purpose, there is no evidence that the persons they employ – who earn their living performing the work they will be engaging in for the project in question – are similarly motivated to perform such service in a volunteer capacity. The workers in question may not necessarily all reside in the Town of Alden, may not have a personal desire to see that the Town has a skating rink for the Winterfest, and do not have a relationship with the Town associated with service on the Planning Board or any other civic body. Therefore, it does not appear that such workers are acting as a group together with their employers in providing volunteer services to the Town. Rather, it appears they are engaging in this project, for pay, as part of their traditional livelihood.

The final two criteria contained in the guidelines look at whether any member of the group performing the work is required to offer his/her services to work for a specific number or a minimum number of days/hours on the project. While nothing in the materials provided by you provides a basis upon which to evaluate this criterion, it is reasonable to assume that the time spent by the workers on the project will be determined by the contractor, as will the terms and conditions of such work.

Taken as a whole, the application of the criteria set forth in the enclosed guidelines to the facts of this case lead to the conclusion that the workers employed by the contractors who will "donate their services" would not be bona fide volunteers. Accordingly, for that reason and

since both conditions for determining the applicability of Article 8 have been met, the subject project is within the coverage of that Article.

If you have any further questions on this issue, please do not hesitate to contact me.

Maria L. Colavito, Counsel

By:

John Charles  
Associate Attorney

Enclosure: Volunteer Guidelines

cc: Pico Ben-Amotz  
Chris Alund  
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Opinion File  
Dayfile

[REDACTED]

**GUIDELINES FOR USE OF VOLUNTEERS**  
**ON PUBLIC WORK AND BUILDING SERVICE PROJECTS**

**A. Purpose**

These guidelines set forth criteria for evaluating when individuals performing work on projects covered by Articles 8 and 9 of the Labor Law are volunteers exempt from prevailing wage and supplement requirements.

**B. Policy**

It is the policy of the Department of Labor to permit individuals to volunteer their services, with no remuneration, and perform certain work on public work and building service projects covered by Labor Law Articles 8 and 9. Although Section 220, subdivision 3 provides for the payment of prevailing wages and supplements to laborers, workers and mechanics on public work projects, and Section 231 provides for similar payment to covered building service employees, these provisions were enacted to assure employees fair wages and to alleviate unfair advantage in the competitive bidding process for governmental contracts. Prevailing wage and supplement requirements are, therefore, inapplicable to true volunteer situations, where no employment relationship exists and individuals (or groups of individuals) desire to devote their time, efforts and skills, without any express or implied promise of remuneration, to assist and enhance their communities.

**C. Criteria \***

To assure that individuals (or groups of individuals) are true volunteers, the following criteria should be evaluated:

**1. Type of work being performed;**

**a. does this work require special training or expertise?**

**b. are the individuals (or groups) performing the work augmenting or supplanting paid staff or outside employees?**

(Where the answers to a. and/or b. are/is "yes", it would tend to demonstrate, in conjunction with other factors, that a true volunteer situation may not exist.)

**2. Are any of the individuals performing work on the project receiving remuneration?**

**a. if other individuals are being paid -**

**i. by whom?**

**ii. what work is being performed by these other individuals?**

(Where certain individuals on a project are being paid and others are not, it would tend to demonstrate, in conjunction with other factors, that a true volunteer situation may not exist.)

**3. Does an employer/employee situation exist between any of the paid or unpaid individuals performing work on the project?**

**\* The criteria will be applied on a case by case basis and a determination will be made based upon the totality of the circumstances.**

(Generally, where such a situation exists, the unpaid workers would not be volunteers. However, other factors and circumstances must be evaluated to reach a determination).

4. Is the work being performed by an individual or by a group?

a. if by an individual -

i. what were the circumstances under which this individual came to offer his/her services?

ii. what relationship, if any, exists between the individual and the governmental entity (e.g. lives in the community; works in the community)?

b. if by a group -

i. how did this group organize?

ii. what were the circumstances under which this group came to offer its services?

iii. does this group ordinarily perform the same or similar work for remuneration as a business or enterprise?

iv. what relationship, if any, exists between the group and the governmental entity?

(The stronger the ties of the individual or group to the community, the more likely a volunteer situation will exist.)

5. Is any individual (or member of a group) being required (i.e. by the use of threats or coercion, either express or implied, or by a limitation upon the exercise of free will and discretion) to offer his/her services?

a. if yes, by whom?

(Generally, where evidence of threats, coercion or limitation on the exercise of free will exists, the worker will not be a volunteer.)

6. Are any of the individuals (or members of a group) required to work specific or a minimum number of days/hours on the project?

i. if yes, who is requiring this?

(Where individuals or groups are free to set their own working conditions, it would generally demonstrate, in conjunction with other factors, that a volunteer situation exists. This would hold true even if the governmental body imposed limited restrictions, so long as the restrictions were imposed in order that the work would not interfere with the normal operations of the entity or facility.)

D. Examples \*\*

1. Where a group of parents decide to construct a playground on property owned by the school which their children attend and the school permits such construction, and may or may not supply necessary materials, the parents are volunteers exempt from prevailing wage and supplement requirements of the Labor Law.

\*\* These examples are for illustration only and are not intended to cover all possible situations which may arise in this area.



2. Where a contractor asks its employees to provide assistance on weekends in the performance of a construction project for a governmental entity, and the contractor has agreed to perform the project at no charge as a "good will" gesture, the employees would not be volunteers and, therefore, must receive prevailing wages and supplements for all work performed.