



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

VIA Email, Fax and Regular Mail

December 16, 2009



Re: Request for Opinion
Article 8 Applicability
[REDACTED]
RO-09-0125
RO-09-0137

Dear [REDACTED]:

This letter is written in response to your letter of September 30, 2009, and to your subsequent letter to [REDACTED] on November 30, 2009, in which you request an opinion regarding the applicability of the prevailing wage requirements in Article 8 of the Labor Law to a project undertaken by a citizens group. Please accept my apology for the delay in responding to your request which was due to a miscommunication between this office and the Bureau of Public Work. A response had been written as early as October 22, 2009, but unfortunately it was not sent out.

In your letter, you ask our opinion as to the applicability of the prevailing wage law to an improvement project for two county owned parks within the City of Norwich. An organization known as "[REDACTED]" is proposing to construct a new permanent stage in East Park, relocate and reconfigure a Gazebo there, replace existing electrical service, set new light fixtures in both the East and West Parks, upgrade water service to both parks, upgrade and reconfigure sidewalks, install Civil War replica cannons, remove overgrown trees and shrubs, and plant new shrubbery in both parks. All of the work is proposed to be performed by "[REDACTED]", which has recruited several local contractors who will "donate their services."

Tel: (518) 457-3665, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

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*, 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, (3rd Dept., 1991).)

Your request suggests that *Pyramid Co. of Onondaga v. NYS Dept. of Labor*, 223 AD2d 285 (Third Dept., 1996) is applicable to this project. It is not, and in any event that case has been overridden by the provisions of Chapter 678 of the Laws of 2007, which read as follows:

"Contract" now also includes "reconstruction and repair of any such public work, and any public work performed under a lease, permit, or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance..." Labor Law §220 (3) (effective October 27, 2007).

Under the law as amended, any agreement, in whatever form, between the County and [REDACTED] is a contract for purposes of the prevailing wage law. There is also no question that significant repairs and upgrades to a publicly owned park facility would be public work as that term is defined under the cases that have interpreted the statute. (*See, Sarkisian*, *supra*.)

Article 8 of the Labor Law, Section 220 et seq., 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. Article 8's coverage extends only to individuals employed on a public work project. Accordingly, the provisions of Article 8 do not apply to bona fide volunteers. The Department of Labor has established 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. I am enclosing a copy of these guidelines for your information.

In reviewing the enclosed guidelines governing the use of volunteers on prevailing wage projects, we look first to the type of work being performed to determine

how much special training and expertise is involved and whether the volunteer work would supplant paid staff or outside employees. In this case, much of the work would involve work in skilled trades such as electrical and plumbing that require special training and expertise. In addition, it is probable that the work would supplant paid staff or outside employees, i.e. if this work was not performed by volunteers, it would have to be performed by County employees or contractors. We must then examine whether there are any individuals performing work on the project who will receive remuneration. In the facts presented to us, the project involves a major refurbishing of existing parks. Therefore, it appears that in this case, at the very least, County employees will be required to supervise the work. Where certain individuals on a project are being paid and others are not, this tends to demonstrate, in conjunction with other factors, that a true volunteer situation does not exist.

The first certainty in this area is that the employees of any contractor who is "donating their services" are entitled to prevailing wages for the time that they work on the project. 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. Accordingly, it is likely that we would find that employees who are performing tasks for which they are normally paid would be entitled to prevailing wages in such a situation absent clear proof that the employees were not pressured to agree to "donate" their time.

Since this work is being performed by a group, we also examine how the group is organized, the circumstances under which the group came to offer its services, whether the group ordinarily performs this 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, we do not know the extent of the relationship between the [REDACTED] and the County. However, it appears that the individuals who will be performing the work may not be members of the group, but rather individuals employed by contractors working with [REDACTED] to refurbish the parks. While we understand a number of contractors may have agreed to work with "[REDACTED]" to improve the parks, there is no indication that the individual employees of the contractors are members of "[REDACTED]", are sympathetic to the goals and work of "[REDACTED]", or have made a voluntary decision to support the work of [REDACTED] in this manner. This is critical to the analysis of the final two guidelines for making a determination regarding the volunteer status of these individuals. These guidelines involve questions of whether any "volunteer" is being *required* to offer his services and whether any "volunteer" is required to work specific or a minimum number of days/hours on the project. While we have been provided no specific facts concerning these issues, it would appear reasonable to assume that such work will be supervised by County employees and that, therefore, work schedules and deadlines with regard to the conduct of the project would apply.

Taken as a whole, our review of the various criteria found in the guidelines and their application to the facts of this case lead to the opinion that the workers employed by the contractors who will "donate their services" would not be bona fide volunteers. Therefore, Article 8 is applicable to this project and would require the payment of prevailing wages and supplements with respect to these employees.

As to the members of "[REDACTED]" who may be performing work in addition to the work performed by contractors who are donating their time, those individuals, or the group as a whole, would be volunteers or employees based upon a consideration of all of the factors contained in the attached guidelines.

This opinion is based on the information provided in your letter of September 30, 2009. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,



Maria L. Colavito
Counsel

Enclosure: Guidelines for the Use of Volunteers

cc: Dave Bouchard
Pico Ben-Amotz
Fred Kelley
Christopher Alund
John Charles
Opinion File
Dayfile

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.