



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

September 2, 2008

[REDACTED]

Re: Green Thumb Environmental Beautification, Inc.
Our File No. RO-08-0105

Dear [REDACTED]:

As you know, we have been asked for an opinion as to the applicability of the Prevailing Wage Law to Green Thumb Environmental Beautification, Inc. (Green Thumb), a long existing program sponsored by the State through which low income senior citizens are employed at various State facilities. We have also reviewed documents related to the program and met with you and other representatives of Green Thumb to discuss issues related to this matter. After considering the facts and the obligations of the parties as established by the prevailing wage law, we are of the opinion that employees of Green Thumb must be paid prevailing wages appropriate to the nature of the work that they perform while working at state and municipal facilities.

In summary, the Green Thumb program is designed to provide an opportunity for low income individuals who are age fifty-five or older to supplement their income by working on state owned facilities in maintenance type work. The funding for the program is provided by a grant from the State through the Governor's annual Executive Budget Request as a Miscellaneous General Fund appropriation. The program has existed since 1974 and State agencies are authorized to contract with Green Thumb pursuant to section 163-a of the Executive Law. For this year and last, the appropriation is \$3,869,000.00, which is used by Green Thumb to provide some 369,390 hours of work, performed by 356 workers at 177 locations. Wages paid to these employees are at the State minimum wage, which for the year 2007 was \$7.15 per hour. While the work can vary from agency to agency, excerpts of contract summaries detailing a sample of the job activities performed by the workers include: "perform grounds maintenance and landscaping..."; "perform grounds maintenance and beautification projects at field installation, fish hatcheries, campsites and education centers, painting and minor repairs of buildings, roving maintenance and upkeep of sites..."; "assist in program services as well as custodial services..."; "remove debris and trash from grounds, sort recyclables, mow lawns, inspect planting to remove damaged growth..."; "perform grounds maintenance and beautification projects at campus locations and community colleges, painting and minor repairs, guide services, watchman duties, office type duties and custodial projects"; "perform grounds

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maintenance, beautification projects, painting staining and minor repairs, custodial services, repair and carpentry, plumbing, masonry and mechanical trades work...". Green Thumb enters into a contract with various agencies to provide the senior citizens who will be performing the work and to pay them for their work. Thus, in effect, Green Thumb acts as a contractor supplying labor for work to be performed on behalf of contracting State agencies.

Section 220 (3) of the Labor Law provides that "the wages to be paid for a legal day's work, as hereinbefore defined to laborers, workmen or mechanics upon such public works, shall not be less than the prevailing rate of wages as hereinafter defined. Serving laborers, helpers, assistants, and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined." The section goes on to state that, "The term 'contract' as used in this article also shall include reconstruction and repair of any such public work..." The repair of a public work is "public work" for purposes of Section 220. *Sewer Environmental Contractors, Inc. v. Goldin*, 98 A.D. 2d 606 (1st Dept., 1983). Section 220 is applicable to persons employed in the construction, maintenance or repair of public works (see *Matter of Pinkwater v. Joseph*, 300 N. Y. 729; *Matter of Dinan v. Joseph*, 304 N. Y. 696; *Matter of Miele v. Joseph*, 305 N. Y. 667).

Section 231 of the Labor Law provides that "every contractor shall pay a service employee under a contract *for building service work* (emphasis added) a wage not less than the prevailing wage for the locality in the craft, trade, or occupation of the service employee." Pursuant to §230(1) of the Labor Law, a "building service employee includes, but is not limited to, a ...building cleaner, porter, handyman, janitor, gardener, groundskeeper...and occupations relating to the collection of garbage or refuse..."

It is well settled law that two conditions must be met before the prevailing wage provisions of Labor Law § 220 will be applied to a particular project: "(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 A.D.2d 532, 537, 465 N.Y.S.2d 301, *affd* 63 N.Y.2d 810, 482 N.Y.S.2d 267, 472 N.E.2d 43; see, *Matter of National R.R. Passenger Corp. v. Hartnett*, 169 A.D.2d 127, 572 N.Y.S.2d 386). Here, both conditions are met; first, a contract authorized by statute (Executive Law Section 163-a) is entered between Green Thumb and State agencies. Second, the work is clearly for a public purpose. The prevailing wage law is predicated on language contained in the State Constitution, Article I, Section 17, and there are no statutory exceptions to the law. We are unable to locate anything in the grant to Green Thumb which could even arguably be interpreted to override the requirements of the prevailing wage law.

The individuals working in the Green Thumb program evidently perform activities that fall under both Articles 8 and 9 of the Labor Law and the prevailing wage law is clear that all such workers must be paid at the prevailing rate of pay for persons similarly employed. It is our view that workers in the Green Thumb program who are employed in performing work that falls under the various prevailing wage rate rates of either Article 8 or Article 9 of the Labor Law must receive the prevailing wage applicable to that occupation. If the worker is working in other capacities, such as performing office work, then the prevailing wage would not apply. Absent such status, workers providing building services identified in Article 9 of the Labor Law or

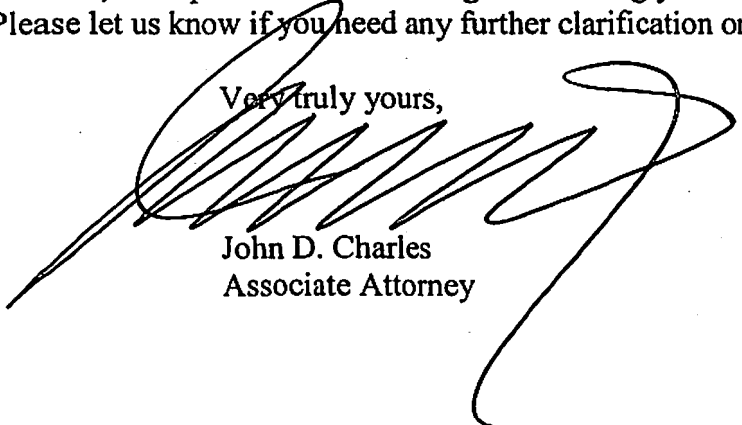
performing construction work covered by Article 8 of the Labor Law must be paid at the prevailing rate of wage as determined by the Bureau of Public Work.

We understand that compliance with the prevailing wage law will have an impact on the ability of Green Thumb to maintain staffing for the various agencies with which it has existing contracts for the number of hours either contained in existing contracts or that have been anticipated in contracts that have not as yet been approved. We further understand that the Comptroller's Office has delayed approval of the Department of Transportation (DOT) contract until such time as this issue is resolved. It is the responsibility of the agencies that have contracted with Green Thumb to make adjustments to those contracts so that Green Thumb can meet its obligations under the prevailing wage law. The DOT contract, and in all likelihood any other State contract, contains language in the standard clause section which requires the payment of prevailing wages when applicable. As noted above, a number of the job duties of the senior workers contained in the contract summaries provided to us require the payment of the prevailing wage. We would hope that any agencies involved with Green Thumb will adjust their contract hours so as to continue the employment of needy senior workers at the appropriate prevailing wage rate or to move such seniors away from activities covered by the prevailing wage law.

Due to the long existing history of this program, the nature of its mission and the fact that this issue has not been previously considered by the Department, the Commissioner has determined that the enforcement of the prevailing wage law in this case shall be prospective only. The Department of Labor will enforce the provisions of the prevailing wage law from the date of this letter forward.

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 this question. Please let us know if you need any further clarification on this issue.

Very truly yours,



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