



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

December 14, 2009

[REDACTED]

Re: Request for Opinion
Article 8 Applicability
Palisades Interstate Park Commission
RO-09-0138

Dear [REDACTED]:

This letter is written in response to your letter dated October 1, 2009, to [REDACTED] in which you request a determination as to whether the Palisades Interstate Park Commission is covered by Article 8 of the New York State Labor Law. Your letter states that the Commission was established pursuant to an act of Congress as a joint corporate municipal instrumentality to hold and manage interstate park properties in New York and New Jersey. (Compact between New York and New Jersey providing for the creation of the Palisades Interstate Park Commission, 75th Cong., 1st Sess., August 19, 1937, 50 Stat. 719.) Most of the projects undertaken by the Commission in New York State are funded by the State Office of Parks, Recreation and Historic Preservation. Recently, a Notice to Withhold Payment from the firm [REDACTED] was received by the Commission for a project that was not funded by the State of New York but was administered solely by the Commission. Investigators from the Department's Bureau of Public Work have, as you know, obtained a copy of the contract at issue, as well as some related documentation, and provided it to this office. While the Commission is withholding payments on the contract pending a response, your letter asks for a determination as to whether the project undertaken by the Commission is within the coverage of Article 8 of the Labor Law.

Unlike the Federal Davis Bacon Act, government funding alone does not make a project subject to Article 8 of the Labor Law. (*See, Cattaraugus Community Action v. Hartnett*, 166 AD2d 891 (4th Dep't 1990); *see also, Matter of Vulcan Affordable Housing Corp. v. Hartnett*, 151 AD2d 84 (3rd Dep't 1989).) Rather, the question of whether a particular project is a public works project "focuses on the nature, or the direct or primary objective, purpose and function, of the work product of the contract," (*Erie County Industrial Dev. Agency v. Roberts*, 94 AD2d 532 (4th Dep't 1983), *aff'd* 63 NY2d 810.) Accordingly, a

Tel: (518) 457-0208, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

two-pronged test is generally used to determine whether a construction project is subject to Article 8 of the Labor Law: “(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.*” (See, *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3d Dept., 1991); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep’t 2009).) [emphasis added]

Public Agency Must be Party to a Contract

For Article 8 of the Labor Law to apply, “the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law” must be a party to a contract for the employment of laborers, workingmen or mechanics. (Labor Law §220(2).) The Commission was created under federal law and, therefore, it is clearly within the included groups as a “commission appointed pursuant to law.” Since the Commission was created under federal law, it is worth discussing whether that fact preempts the applicability of Article 8 to its activities. In *Stephens and Rankin, Inc. v. Hartnett*, 160 AD2d 1201 (3rd Dep’t 1990), the Third Department held a Niagara Falls Bridge Commission construction contract was within the coverage of Article 8 of the Labor Law, despite the fact that the Commission was established by act of Congress. In its holding, the Court pointed to New York’s strong public policy for requiring the payment of prevailing wages on public work contracts requires that the provisions of Article 8 be liberally construed to be more inclusive of contracts with governmental entities. (*Id.* at 1202.) However, the Court’s decision in *Stephens and Rankin* did not specifically address the issue of whether the act of Congress preempted the application of Article 8 of the Labor Law since the contractor in that case conceded that it did before the Court could render judgment. (*Id.* at 1203.)

The New York State Court of Appeals has looked at the issue of whether the application of Article 8 of the Labor law is preempted by the federal law establishing an entity. The Court has held that individuals employed by an entity created through interstate compact and act of Congress are outside of the coverage of Article 8 of the Labor Law. (*Agesen v. Catherwood*, 26 NY2d 521 (1970).) In rendering the decision in *Agesen*, the Court of Appeals noted, however, that the State nevertheless had authority over the *external* activities of entities created by act of Congress. (*Id.* at 526-527.) It is the opinion of this Department that the external operations of the Commission include public work contracts requiring the employment of workmen, mechanics, and laborers. Accordingly, while the “direct employees” of the Commission are outside of the coverage of Article 8 of the Labor Law, the employees of those who contract with the Commission, such as those of [REDACTED], are within its coverage.

That conclusion is further supported by the terms of the congressional Act creating the Commission insofar as it demonstrates the clear intention that the Commission be subject to the laws of the State of New York through the use of the following language:

Either the State of New York or the State of New Jersey may by law applicable to parks or park commissions generally within such state, or by law specifically applicable to the commission or to any of the parks within such state under its jurisdiction,

and without concurrence of the other state, withdraw, modify, alter or amend any of the functions, jurisdiction, rights, powers and duties transferred to the commission * * * but such action by one state shall be effective only within the territorial limits of such state. (50 Stat. 719, Art. III.)

The contract and materials obtained by the Department confirm that the Commission and [REDACTED] entered into an agreement on or about January 20, 2009, involving the employment of workmen, mechanics, or laborers in relation to the heating system at the [REDACTED]. Therefore, it is the opinion of this Department that the project at issue satisfies the first prong in the test for determining whether Article 8 applies.

Public Works Project

The second prong of the two-pronged test is whether the contract concerns a public works project. (See, cases cited above.) The Third Department in *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895 (1991) explained that “[t]o be public work, the project’s primary objective must be to benefit the public.” *Sarkisian Brothers* dealt with the renovation of a building owned by the New York State Office of General Services but leased to a private company as a hotel/conference center. (*Id.*) The Court in that case ruled that since the renovation project provided a benefit to the state in form of revenue relating to the lease, restoration of a landmark site, and the compatibility with the community and campus, the renovation project was for a public purpose thereby satisfying the second prong of the test. (*Id.*) The present project is related to the installation of boilers and related mechanicals in the [REDACTED] in connection with a large scale renovation project. While the Inn will be operated by [REDACTED], a private hospitality company, it is owned by the Palisades Park Commission and located on Commission land in New York. Additionally, , the renovation of the Inn will provide a benefit to the Commission in that it will result in an updated, improved, and more comfortable building for visitors and staff of the Inn. This work will not only improve the revenue received from the lease by making the Inn a more profitable enterprise, it will also add to the overall restoration of a building listed in the National Register of Historic Places, the benefit of which will undoubtedly inure to the Park. Therefore, it is the opinion of this Department that the facts of this case are sufficiently similar to those in *Sarkisian Brothers* to establish that the project serves a public purpose and satisfies the second prong in the test for determining whether Article 8 applies.

* * *

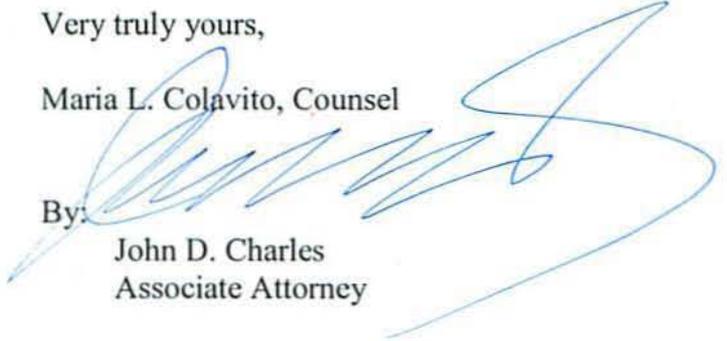
Since both prongs for determining whether Article 8 of the Labor Law applies have, in the opinion of this Department, been satisfied, the project is within the coverage of that Article. Additionally, it is worth noting that page 6 of the General Conditions section of the contract requires the payment of prevailing wages in accordance with Article 8 of the Labor Law a condition of the contract. (Contract No. 08-0003 fka D003857.)

This opinion is based on the information provided in your letter of October 1, 2009 to [REDACTED] of the Department’s Bureau of Public works. A different opinion might

result if the circumstances outlined in your letter changed, if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

By: 

John D. Charles
Associate Attorney

JDC:mp