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Applicability of the Michigan Prevailing Wage Act to Michigan Community Colleges

Question Presented

Whether the Michigan Prevailing Wage Act is applicable to Michigan Community Colleges?

Discussion

The Michigan Act on "Wages of Persons Working on State Projects" is synonymous with the Michigan Prevailing Wage Act ("PWA") or MCL § 408.551 et seq. Michigan's prevailing wage and fringe benefits rate is an established rate to be paid to construction workers on state projects. *Western Mich. Univ. Bd. of Control v. State*, 455 Mich. 531 (Mich. 1997). The PWA requires the Department of Labor to establish a prevailing wage and fringe benefit rates for construction mechanics on state financed or sponsored projects for which the "contracting agent" is any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor. See MCL §§ 408.551(c), 408.554. The PWA is generally patterned after Davis-Bacon Act, the corresponding federal law relating to prevailing wages. *Western Mich. Univ. v. State*, 455 Mich. 531 at 535.

Michigan PWA protects construction mechanics from substandard wages by establishing uniform criteria for wages in the locality where construction is to occur. *Western Mich. Univ.*, 455 Mich at 533. Therefore, in Michigan the prevailing wage must be paid on contracts on

"State Projects" that are "sponsored or financed in whole or in part by the state." See MCL §§ 408.551 and 408.552. The Supreme Court of Michigan has set forth the criteria in order for the act to apply:

> "To come within the act, a project must: (1) be with a "contracting agent," a term expressly defined in the act; (2) be entered into after advertisement or invitation to bid; (3) be a state project, a term also defined in the act; (4) require the employment of construction mechanics; and (5) be sponsored or financed in whole or in part by the state".

See *Western Mich.*, 455 Mich. 531 at 536.

The PWA does apply generally to construction projects undertaken by state universities, regardless of the source of funding for the projects. Op Atty Gen, June 23, 1992, No. 6723; *Western Mich. Univ. Bd. of Control v. State*, 455 Mich. 531 (1997). In *Western Mich.*, the state university brought a declaratory judgment action to determine whether a construction project was subject to Michigan's Prevailing Wage Act. The Court of Appeals and the trial court determined that the project was not sponsored or financed by the state within the meaning of the act and therefore not subject to the Act. *Id.* at 533. The facts reflected that the university had paid bills relating to the various contracts for the project out of its general fund, which contained commingled state appropriations. *Id.* at 534.

The Supreme Court disagreed with the Court of Appeals and trial court and determined that the four requirements of the act had been met in that 1) the contracts at issue were entered into pursuant to an invitation to bid or that the project required the employment of construction mechanics; 2) that the university was a contracting agent within the plain meaning of the act, because constitutional provisions relating to state universities deemed the university an "institution;" 4) the project undertaken was a "state project" within the plain meaning of the act;

and 5) because the university was a part of state government and its funds were state funds, the project was sponsored and financed by the State of Michigan within the plain meaning of the act. *Western Mich.*, 455 Mich at 546-547.

Regarding the fifth element, the Supreme Court noted that "[d]irect legislative appropriation of funds is not . . . the only means by which a project can be sponsored or financed by the state. *Western Mich.*, 455 Mich at 539. In this regard, where the state acted as a surety for the payment of bonds issued to finance the project this was sufficient to constitute "sponsorship" within the meaning of the prevailing wage act. *Id*. The Court further held that the board of control of a state university assumes responsibility for any construction project undertaken by the university and the university, therefore, is the "sponsor" of the project. *Id*.

Pursuant to the Michigan Const 1963, Article 8, §7[1] and MCL 389.1, et. seq., Michigan Community Colleges are state funded public colleges organized by state law. See also *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (recognizing Community Colleges as state agencies). However, the PWA does not specifically state that the Act is applicable to "community colleges." "Contracting Agent" is specifically defined in the PWA to include a "state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor." See MCLS § 408.551(c).

In addition, no case law has explicitly extended the Act's applicability to community colleges. The only support for the conclusion that the PWA applies to Michigan community

[1] "The legislature shall provide by law for the establishment and financial support of public community and junior colleges which shall be supervised and controlled by locally elected boards."

colleges comes from the Michigan State Wage and Hour Division Enforcement Manual.[2] According to this policy manual, "Michigan's prevailing wage law covers state, public school (including community colleges) and state university projects, paid for by state funds or state backed bonds." However, the Michigan Legislature has not delegated any legislative, policy-making authority to the Department of Labor. *West Ottawa Public Schools v. Babcock*, 107 Mich. App. 237, 245 (Mich. Ct. App. 1981). The Legislature has declared as the policy of the state that construction workers on public projects are to be paid the equivalent of the union wage in the locality. *Id.* The Department is merely authorized to implement what the Legislature has already declared to be the law in Michigan. *Id.* Pursuant to MCLS § 408.551(d), "Commissioner" is defined as the Department of Labor. Pursuant to the Act, the "Commissioner" has the power to determine the prevailing rates of wages and fringe benefits for all classes of construction mechanics called for in the contract (MCL § 408.553) and hold public hearings in the locality in which the work is to be performed to determine the prevailing wage and fringe benefit rates (MCL § 408.554). Nothing in the Act grants the Commissioner the power to define "Contracting Agent." See also *Western Mich. Univ. Bd. of Control v. State*, 455 Mich. 531, 541 (1997) (disregarding Department of Labor's policy in construing the act).

Conclusion

Although the Department of Labor, through the Wage and Hour Division, has espoused a policy to include community colleges as covered by the PWA, this policy is not the law. Whether the act applies to a Michigan community college will depend on the project meeting all five factors as set forth in *Western Mich. Univ. Bd. of Control v. State*, 455 Mich. 531 (1997).

[2] //www.michigan.gov/dleg/0,1607,7-154-27673_27751_30975-179984--,00.html