

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

M.G.M. INSULATION, INC.
now doing business as
TRADESMAN INTERNATIONAL
and
JOSEPH O. WESLEY
an officer and/or shareholder
Subcontractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

**REPORT AND
RECOMMENDATION**

Prevailing Rate Case
08-0024 Steuben County

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

KENNEDY MECHANICAL PLUMBING
and HEATING INC.
and
DIANE SHUTTER
an officer and/or shareholder
Subcontractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Rate Case
08-0019 Steuben County

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

LEHMANN CONSTRUCTION CONSULTANT, INC.
Subcontractor

Prevailing Rate Case
08-0013 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

FINGER LAKES SERVICE GROUP, INC.
and
KENNETH R. HATHAWAY
an officer and/or shareholder
Subcontractor

Prevailing Rate Case
08-0006 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

RMS CONTRACTORS, LLC
Subcontractor

Prevailing Rate Case
08-0005 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

BALTZ CONCRETE CONSTRUCTION, INC
and
THOMAS F. BALTZ
an officer and/or shareholder
Subcontractor

Prevailing Rate Case
06-0015 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

GOFORTH ELECTRIC, INC.
and
LAWRENCE C. GOFORTH,
an officer and/or shareholders

Subcontractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Rate Case
08-0018 Steuben County

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

J&S PROTECTION SYSTEMS, INC.
and
DAVID JENNINGS,
an officer and/or shareholders

Subcontractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Rate Case
08-0015 Steuben County

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

FINGER LAKES PAINTING
and
WALLCOVERING, LLC
and
RICHARD MILHAM
an officer and/or shareholder

Prevailing Rate Case
08-0014 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

CUTAIA TILE, INC
and
ANGELO CUTAIA
an officer and/or shareholder
Subcontractor

Prevailing Rate Case
08-0011 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC

and

JAMES D. TAYLOR

an officer and/or shareholder

Prime Contractor

and

ARK GLASS

and

GLAZING CORP.

and

RICHARD W. KOZYRA

an officer and/or shareholder

Subcontractor

Prevailing Rate Case
08-0007 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC

and

JAMES D. TAYLOR

an officer and/or shareholder

Prime Contractor

and

W.R. DRAKE & SONS, INC.

and

WILLIAM R. DRAKE

an officer and/or shareholder

Subcontractor

Prevailing Rate Case
08-0009 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

McCLAIN ASSOCIATES, INC.
and
NICK McCLAIN
an officer and/or shareholder
Subcontractor

Prevailing Rate Case
08-0017 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

RAYDO, INC d/b/a
OVERHEAD DOOR COMPANY OF ELMIRA
and
RAYMOND L. DOYLE
an officer and/or shareholder
Subcontractor

Prevailing Rate Case
08-0012 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

BILLONE MECHANICAL CONTRACTORS, INC.
and
THOMAS J. BILLONE
an officer and/or shareholder
Subcontractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Rate Case
08-0008 Steuben County

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

PROVVIDENZA CONTRACTING INC.
and
VINCENT PROVVIDENZA, JR.
an officer and/or shareholders

Subcontractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Rate Case
08-0008 Steuben County

IN THE MATTER OF

R-J TAYLOR, GENERAL CONTRACTOR, INC
and
JAMES D. TAYLOR
an officer and/or shareholder
Prime Contractor

and

MAIN-FORD GENERAL SUPPLY CO., INC.
and
CHARLES F. SCHREIBER
an officer and/or shareholder
Subcontractor

Prevailing Rate Case
08-0020 Steuben County

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

To: Honorable Colleen C. Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on October 19, 2010, in Rochester, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether the above-captioned subcontractors of R-J Taylor General Contractors, Inc. ("Taylor"), complied with the requirements of Article 8 of the Labor Law (§§ 220 et seq.) in the performance of a contract involving the construction of the Bath Fire House ("Project") for the Bath Volunteer Fire Department ("Bath VFD").

Prior to the commencement of the hearing, the parties stipulated to bifurcate the hearing to seek a legal determination as to whether the project involved public work for the purposes of Article 8 of the Labor Law. At the opening of the hearing, the Department also stipulated to dismiss the case against Main- Ford General Supply Company, Inc. and Charles F. Schreiber because Main-Ford actually paid prevailing rates on the PRC 08-0020 case. It also agreed to dismiss Tradesman International from the PRC 08-0024 case because it determined that Tradesman only supplied personnel to MGM Insulation. After the hearing, on January 4, 2010, the parties submitted proposed findings of fact and conclusions of law.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (John D. Charles, Senior Attorney, of Counsel). Taylor and the remaining named subcontractors were represented by Gates & Adams, P.C. (Anthony J. Adams, Jr., Esq., of counsel).

ISSUE

Was the contract between the Bath VFD and Taylor for the construction of the new firehouse subject to the requirements Article 8 of the Labor Law?

PRELIMINARY STATEMENT

This case involves 17 separate investigations made by the Bureau on the same Project. The only issue involved in this bifurcated hearing is the legal issue of whether the Project was covered by Article 8 of the Labor Law. The separate Bureau determinations concerning work classifications, hours worked and underpayments found in each of the 17 cases will not be addressed in this report and were not addressed at the bifurcated hearing. The report will focus only on those facts that relate to the issue of whether the Project is covered by Labor Law Article 8.

FINDINGS OF FACT

Taylor entered into a contract with the Bath VFD to furnish the labor, tools and equipment necessary to construct a new firehouse in the Village of Bath (“Village”), Stuben County, New York (Dept. Ex. 10). The contract was awarded on September 27, 2006 (Dept. Ex. 9).

The Bath VFD is a Not-for-Profit fire corporation—a special form of a Type B corporation—under Not-for-Profit Corporation Law §1402. Among its corporate purposes is the promotion of “... the welfare of the community and its citizens through active participation in fire prevention and fire fighting.” (Dept. Ex. 3, p 6) To that end, it is authorized to “purchase and hold real estate,” to “borrow money on notes, bonds and mortgages,” and “to do all things deemed necessary, advisable and proper by its members... to accomplish and effectuate its corporate purposes.” (*Id.* at pp. 6-7) As a Not-for-Profit Corporation, the Bath VFD is not one of the public entities specifically identified in Labor Law §220 as being a party to a contract necessary to subject the contract to Article 8 coverage. Municipal corporations are specifically identified, however, and the Bath VFD is subject to the control of the Village of Bath pursuant to §1402 (e) of the Not-for Profit Corporation law. Its primary source of revenue is contract payments made by the Town and Village of Bath and the Town of Wheeler pursuant to written agreements for the provision of fire protection services (Dept. Exs. 11, 12; T. 45, 133). The amount of the contract payments was negotiated each year between the Bath VFD fire chief and the Village Mayor, based upon the Bath VFD’s estimate of costs it would incur in the ensuing year for the provision of fire services (T. 47-50, 65-68).

Prior to 2007, the Bath VFD operated out of a Village owned building (T. 50). The major fire fighting vehicles were also owned by the Village and were made available for the Bath VFD’s use (T. 94-95, 99-100). The Bath VFD does make recommendations to the Village regarding major fire equipment purchases (T. 99). By 2002, the Bath VFD had determined that the Village owned facilities were inadequate (T. 51-52). After the Village Board of Trustees declined to build a new fire station, the Bath VFD began exploring options to build its own station (T. 51-52). Over the Village’s objection, the Bath VFD commissioned a feasibility study that determined it would need \$2.6 million to build a new station (T. 53-54; Dept. Ex. 1). It thereafter learned of a U.S. Department of Agriculture (“USDA”) program that provided loans for such projects and, with the assistance of a consulting engineer whom it paid for with its own funds, it applied to the USDA to finance the new station (T. 55-56, 79; Resp. Ex. 2). At the same time, the Bath VFD identified possible sites for the new station and ultimately decided on a location on Morris Street in the Village comprised of three privately owned parcels which it, at its

own expense, purchased (T. 57, 60-61; Dept. Ex. 5). On August 18, 2004 USDA approved a loan to the Bath VFD in the amount of \$2,510,000.00 (Dept Ex 6). That loan required that the project be substantially completed before it would be funded (T. 59). Interim financing to purchase the land and finance construction was arranged with the Chemung Canal Trust Company (T. 59-60, 62-63; Dept. Ex 18; Resp. Exs. 4, 5, 6, 7), and that financing was paid off with the USDA loan (T. 59).¹

The Bath VFD anticipated that the project costs would be funded primarily through contract payments for fire service protection made by the various municipalities (Dept. Exs. 13, 14[Minutes of Village and Town Boards]). Approximately 80% of the Bath VFD budget is generated from those sources (T. 133). Prior to the construction of the new firehouse, the Village routinely paid vendors on behalf of the Bath VFD (T. 70-71). By at least July 2004, the Bath VFD was aware that the annual loan repayments on USDA loan would total \$158,658.00 (T. 102; Dept Ex. 6[July 30, 2004 USDA letter]). It was further understood that the Village could raise the annual contract payment by \$150,000.00 without increasing taxes, since \$150,000.00 that had been budgeted annually by the Village for payment on municipal garage constructions bonds was about to become available as the bonds were about to satisfied (T. 50, 57-58, 66-67, 74-75). Village and Town residents were concerned that the construction of a new firehouse would result in increased taxes (T.151). At a June 2004 Town Board meeting, the Bath VFD informed the Town Board of its plans to construct a new firehouse (T. 149). Based on an agreement the Bath VFD had with the Village Mayor that payments for the new station would not exceed \$150,000.00 a year, the fire chief assured the Town Board that taxes would not have to be increased to construct the new station (T. 66-67, 150-151). The Village and Town increased payments to the Bath VFD by approximately \$150,000.00 (T. 50, 151). The Bath VFD contracted with Hunt Engineers for the preparation of construction documents and construction administration services (T. 78-80; Resp. Ex. 9). It contracted with Richard Fitzwater to provide construction management services (T. 79-80; Resp. Ex. 9). Thereafter the Bath VFD invited bids for

¹ During the Bath VFD's search for financing, the Village agreed to provide a loan guarantee to another local bank to assist the Bath VFD in obtaining financing, but no such guarantee was ever made as the Chemung Canal Trust Company did not require that additional security (T. 61-62).

the construction of the new fire station and RJ Taylor was awarded the contract in September 2006 based on its having submitted the lowest bid (T. 82; Dept Ex. 10). Neither the Village nor any other municipality had any role in the bidding or awarding of these contracts (T. 78-82).

Hunt Engineering took minutes of formal meetings concerning construction of the firehouse (Dept. Ex. 19). These minutes reflect that the subject of prevailing wages was discussed in November and December of 2004 (Dept. Ex. 19). At a December 12, 2005 meeting of the Village Board, the fire chief advised the Board that the Bath VFD would take ownership of the project during construction “to secure lower labor rates,” but would then turn ownership over to the Village once the project was completed (Dept. Ex. 13). At the request of attorneys representing the International Brotherhood of Electrical Workers Local Union No. 139, and after a reply to that request by the attorneys representing the Bath VFD, Counsel’s Office of the Department opined, in a June 6, 2006 memorandum, that the prevailing rate statute was applicable to the Project (Dept. Ex. 27). The Bath VFD, relying on its own counsel’s opinion, elected to ignore the Department’s opinion and agreed to indemnify its contractors in the event it was determined that prevailing rates were required to be paid on the Project (T. 86; Dept. Ex. 26). The Bath VFD also began paying its vendors directly, rather than having the Village pay on its behalf and, on the advice of counsel, made various documentary changes to presumably clarify its independence from the municipal entities (T. 71, 84, 94-95, 98-99, 115-116, 161-162).

Construction on the Project began in September 2006, but was then delayed for several months when a controversy arose with the Department as to whether prevailing wages were required to be paid. RJ Taylor’s subcontractors, who had previously been advised by the Bath VFD that prevailing wages were not required to be paid on the Project, would not continue with their work until, on December 7, 2006, the Bath VFD distributed a letter agreeing to indemnify the contractors in the event it were ultimately determined that prevailing wages were required to be paid (T. 85-87; Dept Ex 25). Work was completed in late 2007 or early 2008 (T. 93). Throughout the construction period, the Bath VFD made progress payments with the interim financing that had been provided

by the Chemung Canal Trust Company (T. 59-60, 62-63; Resp. Exs. 6,7). The interim financing was ultimately satisfied by the USDA financing (T. 59).

Although the Village had no active supervisory role in the construction process (T. 82), the record evidences considerable consultation among the Bath VFD, the Town and the Village concerning the Project and its financing (T. 127-128, 130-132, 134-136, 138-140, 143-144, 146-155; Dept. Exs. 13, 14), as well as the provision of direct support for the Project from the Village in the form of a \$10,000.00 building fund contribution (T. 130-132), site development work (T. 139-140, 170), equipment donations (T. 83, 170-171) and Project approvals required by the USDA (T. 60, 132-133).

The major pieces of fire equipment are owned by the Village and are paid for by the Village and Town and are therefore not an expense of the Bath VFD (T. 69, 94, 99, 125-126; Dept. Ex. 16). The Bath VFD makes up the difference between the \$150,000.00 annual increased contract payments and the \$158,658.00 annual USDA payment through banquet room rental and fund raising (T. 76, 88). It is clear that the cost for the construction of the new firehouse was and is being mainly borne by the municipalities through the increased contract payments.

CONCLUSIONS OF LAW

Jurisdiction of Article 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. *Labor Law* §§ 220, *et seq.* “Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing ‘supplements’ paid in the locality.” *Matter of Beltrone Constr. Co. v McGowan*, 260 A.D.2d 870, 871-872 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an

investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

Article 8 of the Labor Law applies to a contract when two conditions are satisfied: (1) a party to a contract that may involve the employment of laborers, workers or mechanics is one of the specified public entities named in Labor Law §220, and (2) the contract concerns a “public works” project. *See, Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984); *Matter of New York Charter School Association v. Smith*, 61 AD3d 1091, 1093 (3d Dept 2009); *Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285 (3d Dept. 1996). With regard to the first condition, Respondent maintains that a not-for-profit volunteer fire corporation is not one of the enumerated public entities identified in Labor law § 220 as being a necessary party, and therefore the construction contract, to which the Bath VFD is a party, does not satisfy the public agency contracting party requirement of Article 8. *Respondent’s Proposed Findings of Fact and Conclusions of Law* (hereinafter “RPF”), p. 10, 16-19). Furthermore, the Respondent maintains that the only contract to which an enumerated public entity, a municipality, is a party involves the provision of fire services, which does not entail the employment of laborers, workers or mechanics. Respondent therefore maintains that there is no contract involved in this case that could satisfy the first prong of the Article 8 test. *Id.* at 16-19.

In support of its position that private member volunteer fire corporations do not satisfy the “public agency” test, Respondent relies particularly on the Third Department’s recent decision in *Matter of New York Charter School Assn v. Smith*, 61 AD3d 1091 (3d Dept. 2009). In that decision, the Court found that charter schools do not satisfy the “public agency” test because the statute, by its terms, does not specifically apply to educational corporations such as charter schools, and because of the fact that charter schools originate from applications submitted by private individuals, who in many instances continue to be involved in the operation of the charter school after it is approved. *Id.* at 1094

Moreover, Respondent maintains that even if the first prong of the test could be satisfied, Article 8 would still not apply because the Project itself is not a “public works”

project. *RPF* at 19-20. Since the firehouse was constructed for the private use of the Bath VFD members, on privately owned land, with limited public access to its community room by private lease agreement for which a fee is charged, its public service activities should not convert its private ownership and use of the building into public works. *Id.* In support of that proposition, Respondent relies particularly on the Appellate Division's decision in *Matter of National Railroad Passenger Corporation v. Hartnett*, 169 AD2d 127 (3d Dept. 1991). The court in *National Railroad Passenger Corporation* held that although Amtrak was created by Congress to foster low cost rail service, it was not a quasi-public entity, since rail service is not a function historically that of the government. Therefore, the West Side Connection Project, which involved the construction of a new railway line into Pennsylvania station to consolidate Amtrak's rail service there, was not a "public works" project. *Id.* at 131. The court held that substantial governmental funding of the project was insufficient to convert the private project into a public works project. *Id.* at 132.

The gravamen of the *Matter of National Railroad Passenger Corporation* decision, that rail service is not historically a governmental function, is precisely what distinguishes the decision from the issue presented in this case. In *Janusaitis v. Middlebury Fire Department*, 607 F. 2d 17 (2d Cir. 1979), the United States Court of Appeals for the Second Circuit specifically addressed the question of "whether fire protection is a function so traditionally associated with sovereignty that its performance, even by an otherwise 'private' entity, constitutes state action." *Id.* at 22. The Court found that it was. The New York Court of Appeals has likewise held that fighting fires is a governmental function. *Harland Enterprises v. Commander Oil Corp.*, 64 NY2d 708, 709 (1984). These holdings impact both prongs of the *Erie County* test.

With regard to the first prong of the test, private membership volunteer fire departments have been held to be the equivalent of government agencies in a number of contexts, including that of satisfying the "public agency" prong of the Article 8 test. *Bayville Fire Co. No. 1 v. New York State DOL*, Index #2215/89 (Supreme Ct., Nassau Co., Sept. 20, 1989, annexed to *Department's Proposed Findings of Fact and Conclusions of Law* (hereinafter "DPF")). In *Bayville*, the Court found that since voluntary fire companies enjoyed the same immunity from liability in fighting fires as

municipalities, they should be held subject to the same obligations, including the obligation to pay prevailing wages. *Bayville Fire Co. No. 1 v. New York State DOL, Id.* The Court drew further support for its conclusion from the fact that fire protection services are a historically governmental function and the fact the municipalities which these organizations serve “exercise substantial control over [the volunteer fire company’s] internal regulations and its expenditures (see, e.g., Not-For Profit Corporation Law §1402 [e]).” *Id.* As a consequence, the Court found that private membership volunteer fire departments, although not expressly covered by the precise terms of Article 8, nevertheless satisfied the first prong of the *Erie County* test. The Court further held, with regard to the second prong of the test, that “[a] firehouse rehabilitation project clearly qualifies as that which is considered “public work.” *Id.*

Since the immunity from liability principles for negligence in extinguishing fires applicable to district and municipal fire corporations are “equally applicable” to volunteer fire corporations (*see, Helman v. County of Warren*, 114 AD 2d 573[3d Dept. 1985]); since their members enjoy many of the benefits of public service employees (Volunteer Firefighter’s Benefits Law §§ 5,6[workers’ compensation] 7-11, 15,16[death and disability benefits and reimbursement for treatment costs and care for injuries]; General Municipal Law Article 11-A [pension service credits]; Labor Law § 27-A[Public Employee Safety and Health Act Coverage]²) and enjoy immunity from liability for negligence in the performance of their duties(General Municipal Law §205-b); that in providing fire protection services, volunteer fire departments are performing an essential governmental function (*Janusaitis v. Middlebury Fire Department*, 607 F. 2d 17, 22 [2d Cir. 1979]; *Harland Enters. v. Commander Oil Corp.*, 64 NY2d 708, 709[1984]; *Helman v. County of Warren*, 114 AD 2d 573[3d Dept. 1985]); and since Volunteer Fire Corporations are statutorily under the supervision of the municipality they serve (Not-for Profit Corporation Law §1402 [e]), it appears that volunteer fire corporations are the functional equivalent of municipal department. As such, particularly when considering that Article 8 is to be liberally construed in order to effectuate its beneficial purposes (*Matter of Telnap Constr. Corp. v. Roberts*, 141 AD2d 81, 84[2d Dept. 1988]), private

² *Hartnett v. Village of Ballston Spa*, 152 AD2d 83(3d Dept. 1989)

membership volunteer fire corporations satisfy the “public agency” test. *Bayville Fire Co. No. 1 v. New York State DOL, Id.*

This conclusion is not inconsistent with the Third Department’s recent *Charter School* decision. In that decision, the Third Department held that the facilities provision in the charter agreements was tangential to its overall purpose, and that the charter agreements do not constitute contracts which involve the employment of laborers, workers, or mechanics on a public works project. In contrast, the transactions at issue in the current case are squarely related to construction necessitating the employment of laborers, workers, or mechanics on a public works project. Moreover, the decisional history finding volunteer fire corporations to be performing a governmental function, and finding that its services to be so associated with sovereignty as to constitute state action even when performed by a private entity, clearly distinguish volunteer fire corporations from the charter schools that have been held not to satisfy the *Erie County* “public agency” test. *cf., Bayville Fire Co. No. 1 v. New York State DOL, supra; Matter of New York Charter School Assn v. Smith*, 61 AD3d 1091. Furthermore, in the *Charter School* decision, the Third Department specifically noted that its decision was consistent with the legislative history of the 2007 amendments to Labor Law § 220 (2), since there was no indication of an intent to extend the prevailing wage law to projects undertaken by either educational corporations or charter schools, and that in fact bills were introduced to accomplish that very fact and none were enacted. *Id.* at 1095. The court stated: “We decline to take measures that the Legislature has expressed an unwillingness to do on its own.” *Id.* Unlike charter schools, volunteer fire corporations have been held subject to the prevailing wage law, and have been treated the equivalent of public agencies in other contexts, and no evidence has been offered that anyone thought it necessary to introduce bills to extend coverage to public work projects undertaken by volunteer fire corporations. Moreover, it would appear that those 2007 amendments would indeed subject volunteer fire corporations engaged in the construction of a firehouse to the

requirements of Article 8, since volunteer fire corporation act for the benefit of the municipalities they serve pursuant to the fire protection services agreements.³

In fact, on the particulars of this case, even if voluntary fire corporations do not generally satisfy the public agency test, the fire protection service agreements here involved between the Bath VFD and the municipalities would be nevertheless be sufficient to satisfy the first prong of the *Erie County* test. There is no statutory requirement that a public agency be a direct party to the construction contract. *Bridgestone/Firestone, Inc. v. Hartnett*, 175 AD2d 495, 497 (3d Dept. 1991). The Third Department has found that a county's agreement to lease a new building to be constructed necessarily involved the employment of workers to construct the building, and that lease agreement was therefore sufficient to satisfy the first prong of the test. *60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207 (3d Dept. 1990). Likewise, in its *National Railroad Passenger* decision, the Third Department found that the financing and implementation agreements that allowed Amtrak to consolidate its lines in New York's Penn Station "rather easily satisfied" the first prong of the *Erie County* test. *Matter of National Railroad Passenger Corporation v. Hartnett*, 169 AD2d 127, 129-130. Here, the municipalities, being aware of and supporting the construction of a new firehouse, specifically agreed to increase the payments under the fire protection service agreement in amounts sufficient to fund its construction and loan amortization. That construction obviously necessitated the employment of workers. As a consequence, the public agency requirement of the *Erie County* test would be satisfied in any event on the basis of the fire protection service agreements involved in this case. *National Railroad Passenger Corporation v. Hartnett*, 169 AD2d 127, 129-130; *60 Market Street Assocs. v. Hartnett*, 153 AD2d at 207.

With regard to the second prong of the test, whether the construction of a new firehouse constituted a "public works," the court in *Erie County* held that, although Labor

³ The statute was amended in 2007 in response to the Third Department's decision in *Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285 (3d Dept. 1996). In an effort to close what was perceived as a loophole created by that decision, the Legislature amended the statute to apply not only to contracts where the public entity was the party, but to "any contract for public work entered into by a third party acting in the place of, on behalf of and for the benefit of such public entity pursuant to any...agreement between such third party and the public entity." *NY Labor Law* § 220 (2). See, *Matter of New York Charter School Assn v. Smith*, 61 AD3d 1091, 1093

Law § 220 does not define the term, the term has a generally accepted plain meaning that should be given effect. *Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d at 538. The court looked to the meaning ascribed by lexicographers and found that the definitions “focus on the purpose or function of the works for ‘public use or enjoyment.’” *Id.* As the project was authorized and supported by the municipality, and has as its object the public function of providing fire protection services for the community, the project is clearly of public benefit and constitutes a public works project. *Id.*; *Matter of Long Is. Light Co. v. Industrial Comr. of N.Y. State*, 40 AD2d 1003 (2d Dept. 1972), *app dsmd* 32 NY2d 646 (1973), *affd* 34 NY2d 725 (1974); *Bayville Fire Co. No. 1 v. New York State DOL*, *supra*.

As both requirements of the *Erie County* test are satisfied, Article 8 of the Labor Law applies and prevailing wages and supplements were required to be paid on the Project. *Labor Law § 220 (2)*; *see, Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532, *affd* 63 N.Y.2d 810 (1984); *Matter of Long Is. Light Co. v. Industrial Comr. of N.Y. State*, 40 AD2d 1003, *app dsmd* 32 NY2d 646, *affd* 34 NY2d 725; *Bayville Fire Co. No. 1 v. New York State DOL*, *supra*.

RECOMMENDATIONS

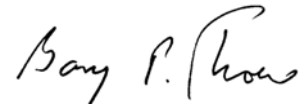
I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner’s determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that the Contract entered into between the Bath VFD and Taylor to provide labor, material and equipment necessary for the construction of a new firehouse was covered by Article 8 of the Labor Law; and

ORDER that this matter continue to hearing on the remaining issues raised by the Department’s investigation of this matter.

Dated: July 15, 2010
Albany, New York

Respectfully submitted,

A handwritten signature in black ink that reads "Gary P. Troue". The signature is written in a cursive style with a large, prominent initial "G".

Gary P. Troue
Hearing Officer