



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

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April 13, 2009

[REDACTED]

Re: Your Letter to [REDACTED] Director of the Bureau of Public Work  
Our File No. RO-09-0029

Dear [REDACTED]:

Your letter to [REDACTED], regarding the applicability of the Prevailing Wage Law to certain property owned by the Bergen Volunteer Fire Department has been referred to me for response. You ask our opinion as to the applicability of the Prevailing Wage Law to a project involving the lease of approximately 3,600 square feet of space in a building owned by the Bergen Volunteer Fire Department and previously used as the Fire Department's recreation hall. According to your letter, the Town seeks to lease the space from the Fire Department and convert it for use by the Town for a new Town Court facility, the Town Clerk's office, the Town Supervisor's office, and several meeting rooms and necessary accoutrements. It is not clear from your letter whether the Town will be entering into one or more construction contracts for the purpose of carrying out the necessary renovations or whether the Fire Department will be contracting for the work in furtherance of the Town's lease of the space.

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 (4<sup>th</sup> Dept. 1983), *aff'd* 63 NY2d 810 (4<sup>th</sup> Dept. 1984), *see also*, *Matter of National R.R. Passenger Crop. v Hartnett*, 169 AD2d 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, (3<sup>rd</sup> Dept., 1991).

If the Town enters into contracts directly for these renovations, the Town is a public agency that would be entering into contracts involving the employment of laborers, workers or

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mechanics and this contract would clearly meet the first condition of the test. Whether the Fire Department is a public agency that would be a party to a contract involving the employment of laborers, workers or mechanics is a more complicated question, since the Volunteer Fire Company clearly presents a public/private hybrid situation. The Department has revised its position on this subject over the years. Through the 1980s and into the 1990s, the Department considered Volunteer Fire Departments to be subject to the prevailing wage law, a position that was confirmed by a decision in State Supreme Court in *Bayville Fire Company No. 1 v. New York State Department of Labor*, (unpublished decision, September 20, 1989, Goldstein, J.S.C.).

“Concededly, the precise terms of Article 8 of the Labor Law do not apply to a private corporation such as the Bayville Fire Company. Nevertheless, the prevailing wage law must “be liberally construed to carry out its beneficiary purposes” (Matter of Tenlap Constr. Corp. v Roberts, 141 A.D. 2d 81, 84, citation omitted). Interpreting the statute to apply to the petitioner is well within the bounds of such a construction.”

Multiple subsequent opinions of Counsel conformed to that determination. However, on April 16, 1998, another State Supreme Court decision, *Glens Falls Volunteer Fire Department v Department of Labor* (unpublished decision, Dier, J.S.C.), held that volunteer fire departments were not subject to the Prevailing Wage Law. On October 5, 1998, Department Counsel issued a letter stating:

“Based upon these rulings and a review of the statute, we now adopt the position that the Department cannot apply Article 8 to construction projects entered into by not-for-profit volunteer fire department corporations so long as they own the land and the buildings where such work is being performed . Please note that if the property is owned by a municipality and leased to the not-for-profit, the construction project continues to constitute a public work project. Also, construction projects entered into by a fire district (i.e., a municipal corporation) continue to be subject to the provisions of Article 8.”

No appellate court decision exists upon which the Department can rely to remedy the apparent conflict as to the applicability of the Prevailing Wage Law to fire house construction by volunteer fire departments. However, the Department has been asked again to consider the applicability of the Prevailing Wage Law to a construction project being entered into by a volunteer fire department.

There is significant statutory authority and case law which holds that volunteer firefighters are public employees. Volunteer firefighters are entitled to Workers' Compensation benefits for death and injuries incurred in the line of duty under Sections 5 and 6 of the Volunteer Firefighters' Benefits Law; they are entitled to death benefits, disability benefits and reimbursement for the cost of treatment and care for injuries under Sections 7, 8, 9, 10, 11, 15 and 16 of the Volunteer Firefighters' Law; they receive protection from the State against liability for negligence in the performance of their duties under Section 205-b of the General Municipal Law. Real property owned by a Volunteer Fire Corporation is exempt from real property taxes under Section 464 of the Real Property Tax Law. Furthermore, in its decision in *Hartnett v.*

*Village of Ballston Spa*, 152 A.D.2d 83 (3<sup>rd</sup> Dept. 1989), appeal dismissed 75 N.Y.2d 863 (1990), the Third Department held that non-paid volunteer firefighters were public employees covered by Section 27-a of the Labor Law.

It should also be noted that not-for-profit fire companies are intimately involved with government. They are the instrumentality of government responsible for fire protection and fire protection has clearly been viewed as a public function. The not-for-profit fire companies are organized pursuant to Section 1402 of the Not-For-Profit Corporation Law. Section 404(f) of the Not-For-Profit Corporation Law requires that every certificate of incorporation of a fire corporation shall have endorsed thereon or annexed thereto the approval, signed and acknowledged, of the authorities of each city, village, town or fire district in which the corporation proposes to act. The members of a town board cannot consent to the formation of a fire company until the board holds a public hearing on the question of whether the fire company should be incorporated. Section 1402 of the Not-For-Profit Corporation Law provides additional requirements regarding the Certificate of Incorporation of a fire corporation. Specifically, the consent of a majority of the members of a town board to the formation of the fire corporation shall constitute an appointment of the persons named in the certificate of incorporation as town firemen. Thereafter, other eligible persons may be elected as members pursuant to the by-laws of the fire corporation, but the election of a member must be approved by the town board of each town which consented to the formation of the fire corporation (Section 1402(c)(3)). In addition, Section 1402(e) provides that a fire corporation is "under the control of the city, village, fire district or town authorities having, by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations."

It should also be noted that in many of these contracts let by fire companies to renovate or construct firehouses, the projects are undertaken for safety and health reasons. In particular, the health of the firefighters requires a more efficient setup of the firehouse or more efficient access to the equipment stored therein. Many of these safety and health issues fall within the scope of Section 27-a of the Labor Law regarding public employees. Oftentimes, during natural disasters, firehouse facilities also serve as public shelters and evacuation sites for communities in which they are located. While we have no direct information with respect to applicability of these issues to the Bergen Fire Department, we find that these issues present themselves in many projects involving not-for-profit volunteer fire companies.

Finally, these volunteer fire companies contract for fire protection services with the city, town or village in which they are located. These contracts take the form of written agreements between the fire company and the city, town or village. It should also be noted that many of these written agreements for fire protection services place restrictions regarding the use of these funds and even limit the fire companies from purchasing or entering into any binding contracts to purchase real property, or make improvements thereon, without prior approval by resolution of the town board. Many of the payments for fire protection services set forth in these agreements constitute nearly the entire budget of the fire companies. Finally, many of the agreements with these volunteer fire companies provide that in the event of dissolution or cessation of operation of the fire company during the term of the agreement, all assets of the fire company remaining after payment of its debts are to be distributed to the Town.

Based on all of these factors outlined above, the Department of Labor concludes that the Bergen Volunteer Fire Department is a public entity, and if the Fire Department contracts for these renovations to the recreation hall, it will be a party to a contract involving the employment of laborers, workers or mechanics, thereby meeting the first prong of the test discussed above.

With respect to the second prong of the test, the Town is seeking to enter a lease by which it will obtain space for essential Town facilities (Town Court facility, Town Clerk's office, Town Supervisor's office and meeting rooms). The work would not be performed but for the need to create usable space to house Town offices and other facilities that will be used by the public and their elected officials. Therefore, the renovation of the Fire Department facility is clearly intended for a public purpose and meets the second prong of the test. Accordingly, it our conclusion that the project is public work and subject to the provisions of Article 8 of the Labor Law.

Accordingly, the Department is overruling all prior opinions which are inconsistent with this opinion because we find that the prior opinions did not consider the full nature of these not-for-profit fire corporations as public/private hybrids that perform an essential governmental function.

I trust that this is responsive to your inquiry. Please let us know if you need any further clarification on this issue.

Very truly yours,



Maria L. Colavito  
Counsel

cc: Pico Ben-Amotz  
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