



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

---

July 13, 2009

[REDACTED]

Re: Request for Opinion

[REDACTED]  
Liens on Funds

Our File No: RO-09-0094

Dear [REDACTED]:

This letter is written in response to your letters dated June 9, 2009 and June 30, 2009 in which you request that this Department provide notice to Erie County that the liens imposed by this Department on [REDACTED] and [REDACTED] do not apply to funds being withheld by Erie County from your client, [REDACTED]. The relevant facts as they are described in your letter, are as follows: Erie County contracted with [REDACTED] as part of the cleanup process after a storm in October 2006. [REDACTED] in turn subcontracted with [REDACTED] and your client, [REDACTED]. An "irrevocable assignment of funds" was filed in the amount of \$200,000 with the Erie County Comptroller payable to your client, [REDACTED], presumably from [REDACTED]. This Department subsequently issued a notice to withhold payment to Erie County for [REDACTED] and [REDACTED] and, because of that notice, you state that Erie County will not release the funds to American Site Developers which are owed to your client, [REDACTED].

Although not noted in your letter, please be aware that on April 2, 2009, this Department issued a notice to Erie County to release payment in the amount of \$221,428.11 of the \$277,500.00 previously withheld from [REDACTED] and [REDACTED], leaving \$56,071.89 currently subject to the withholding. A separate notice for \$83,246.38 from [REDACTED], and [REDACTED], has been issued to Erie County for violations arising under the same contract described above. Copies of the most recent documents submitted to Erie County in regard to these withholdings are enclosed for your information.

Phone: (518) 457-3665 Fax: (518) 485-1819  
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

While our withholding is now substantially smaller than the amount mentioned in your letter, your client, which is trying to settle a claim for Workers' Compensation through the use of these funds, nonetheless asks that this Department provide notice to Erie County that the direct withholding notice should not apply to any funds assigned to your client . Please be advised that the notice of direct withholding is superior to all other liens of assignments and that this Department cannot issue the notice requested in your letter.

Labor Law Section 220(3) mandates that contractors on public works projects pay their employees at a rate not less than the prevailing rate for wages and supplements, as defined within that Section, for such work. Labor Law Section 220-b(2)(a)(1) provides that when an interested person makes a written complaint alleging unpaid wages or supplements on a public works project, or when an investigation reveals that wages and supplements may be due, the fiscal officer, in this case the Commissioner of Labor, must immediately notify the public agency involved to withhold from any payment due to or earned by the contractor or subcontractor executing any public improvements, sufficient moneys to satisfy said wages and supplements, including interest and civil penalties. Funds being withheld pursuant to Labor Law §220-b constitute a "statutory trust for the benefit of the workers employed on said public improvement and for payment of any civil penalty that may be assessed." (Labor Law §220-b(2)(b).) Those funds, pursuant to Section 220-b(2)(b), may not be used "for any other purpose except upon court order."

In your letter, you essentially request that the funds withheld pursuant to Labor Law §220-b be dispersed so that your client may settle a workers' compensation claim and receive the monies owed to it under its subcontract. As stated above, funds withheld pursuant to Section 220-b are setup as a statutory trust for the benefit of the workers and such funds may not be used for any other purpose except upon court order. To send notice to Erie County to disperse such funds would authorize the violation of Section 220-b(2)(b) by allowing the use of funds for some other purpose.

Your letter further states that the lien should not apply to monies set aside for the compensation claim and payment to your client, [REDACTED], since that assignment was "made and filed long before the Department of Labor lien notices." Lien Law §25(3) provides that "[l]aborers for daily or weekly wages having liens under a contract for a public improvement, shall have preference as a class for the full amount of their unpaid wages over all other lienors having liens arising under the same contract and without reference to the time when such laborers shall have filed their notices of liens." Accordingly, as the Department's notice of withholding payment is a lien to collect wages owed to laborers under a contract for public improvement, such notice is superior to all other liens or assignments, including your client's. Furthermore, since an assignment of funds may not grant rights greater than those the assignor has, your client, the assignee, cannot claim such an assignment removes the funds from the Department's lien merely by virtue of the fact that it was filed prior to the lien.

The Department will not release the withholding on those funds which are needed to secure payment of underpayments of prevailing wages. However, it has already provided to Erie

County a notice to release all funds to which it does not have a statutory withholding entitlement. As mentioned, that notice releases \$221,428.11 of the \$277,500 funds previously withheld. The Department has no additional authority compel the release of the funds held by the by the County. While part two of the notice to release payment to [REDACTED] indicates that the County is withholding \$200,000 as a result of this notice, it states that the difference in the amount withheld is "Per County Attorney." I suggest you contact the office of the Erie County Attorney to inquire as to the reasons for the difference in the amount of the withholding.

This opinion is based on the information provided your facsimile dated June 17, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me. If you have any further questions, please do not hesitate to contact me.

Very truly yours,



Maria Colavito  
Counsel

Enclosures