New York State Department of Labor
David A. Paterson, *Governor*
Colleen C. Gardner, *Commissioner*

July 1, 2010

[redacted]

Re: Request for Opinion
Article 8 Applicability
[redacted]
RO-09-0144 (Follow-Up)
PW2010-002

Dear [redacted]:

This letter is written in response to your letter dated January 25, 2010, in which you provide additional information for the Department's consideration of the applicability of Article 8 to the Department of Correctional Services' (DOCS) [redacted] facility at [redacted]. Your letter was written in response to your receipt of a memorandum from Maria Colavito, Counsel to the Department, to [redacted], Assistant Director of Public Works, which advises [redacted] that based on the information presented, Article 8 of the Labor Law is not applicable to the above-referenced project. As you point out in your letter, that memorandum closes by stating that it is specific to the facts described and the documents provided, and that it could be changed upon additional or changed facts.

Your letter offers, as additional information that was not known to Counsel's Office at the time that memorandum was written, the fact that the facility was constructed in accordance with specific, significant improvements to the property required by the lease in order for it to be acceptable to the state. You also mention that the building has been leased to DOCS since 1986 and that, by virtue of a clause in the lease agreement that allows for extension without further contract, the lease may continue until 2029.

With regard to the first additional fact set forth above, at the time it issued its original opinion the Department was cognizant of the fact that the work done on the facility had to meet exacting state specifications. This is, in fact, true of all state contracts that we have seen. Courts have recognized that, as a purchaser of services, the state would have the right to control to a large degree the types of materials used in construction or renovation of its buildings and the methods employed for construction. They have not found that these requirements are sufficient to overcome a finding that the premises to be leased were being constructed for a non-public purpose, i.e. private commercial income for the builder. If the leased property was being built to specifications that made it unusable for other commercial purposes without significant modification, we might be able to find, despite legal precedent to the contrary, that the leased premises met the second prong of the public work test. However, we do not see facts supporting such a conclusion in this case.

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Also, the previous memorandum opined that the initial ten year lease term is not so long as to imply that DOCS is a constructive owner of the property, and that the ownership of the property was indistinguishable from the holding of the Third Department in *60 Market Street v. Hartnett.*[1] (153 A.D. 2d 205.) You indicate that the total length of the combined leases from the time DOCS originally entered the premises through all possible extensions of the current lease, is 43 years. However, for our analysis, the length of the lease term in connection with this particular project should include only the period of the lease connected with this particular renovation since that lease, after all, involves the work for which we are trying to determine if there is a public purpose. Looking at that lease alone, it appears the term will be no more than 20 years and less if discretionary extensions are not elected. We would not consider such a lease term to be the equivalent of constructive ownership.

Finally, your letter points to standards promulgated by the Financial Accounting Standards Board (FASB) which classify certain types of leaseholds as "capital leases," which are required to be accounted for in the same fashion that assets are accounted for, and that such standard should be used to bring certain projects within the applicability of Article 8 of the Labor Law. (FASB Standard No. 13.) While those standards are of interest, based upon our discussion above relative to the length of the lease term attributable to this particular renovation/lease, we do not believe we could rely upon the FASB standard in this instance to overcome controlling legal precedent.

Accordingly, while the Department appreciates your time and the additional information provided with your letter, please be advised that, in the opinion of this office, Article 8 of the Labor Law is not applicable to the present project. The Department will continue to look closely at projects involving facilities leased to public entities so as to ensure that projects within the coverage of Article 8 of the Labor Law are properly classified as such, and projects performed in connection with a lease to a public entity are closely scrutinized to determine if a public purpose is present sufficient enough to warrant the application of Article 8 of the Labor Law.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

Michael Paglialonga

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[1] The Court in *60 Market Street* held that a project for the construction of properties to be leased to a public entity was not a public work project since it failed to be for a public purpose, thereby failing to satisfy the second prong of the test for determining whether Article 8 of the Labor Law applies. Rather, the Court pointed to the nature of the project, its use, and the relationship of the parties as factors in considering whether a project involving property leased to the state has as its primary function a private or a public purpose.