



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

December 21, 2010



Re: Request for Opinion
Sullivan County Community College
Dormitory Construction Project
RO-10-0106

Dear [REDACTED]:

I have been asked to respond to your letter of June 30, 2010, addressed to Christopher Alund in which you request an opinion as to the applicability of Article 8 of the Labor Law to a dormitory construction project at Sullivan County Community College (the College) by the Sullivan County Community College Dormitory Corporation (SCCCDC). Your letter included copies of news articles relating to the project, Department of State entity information for SCCDC, copies of deeds showing the acquisition of the property by the County of Sullivan and subsequently, SCCDC, as well as a copy of Section 6306 of the State Education Law. The project involves the construction of townhouse style dormitories on land owned by SCCDC for the use of students at the College. It appears that the construction was undertaken by a private development company, the [REDACTED], under contract with SCCDC, and that the dormitories will be managed by another private company, Longley Jones, which currently manages SCCDC's existing dormitories.

Two conditions must be fulfilled in order for the statutory scheme of Article 8 of the Labor Law (the prevailing wage provisions) to apply to a project: "(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 (4th Dept. 1983), *aff'd* 63 NY2d 810 (4th Dept. 1984), *see also*, *Matter of National R.R. Passenger Corp. v Hartnett*, 69 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 project's primary objective must be to benefit the public" (citations omitted) *Sarkisian Brothers, Inc. v Hartnett*, 172 A.D. 2d 895, (3rd Dept., 1991).

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In analyzing the first prong of the test for determining whether the present dormitory project is within the applicability of Article 8 of the Labor Law, it is necessary to determine whether a public agency was a party to a contract in relation to the project. Since the college is not directly contracting with the [REDACTED], the Department must analyze whether SCCCDC, the entity that is contracting with [REDACTED], is either an alter-ego of the College or acting as a third party within the meaning of Article 8, thereby bringing any contracts entered into by SCCCDC within the coverage of the prevailing wage law.

In connection with the first question, i.e. whether SCCCDC can be considered to be acting as an alter ego to the College for purposes of this transaction, the Department obtained and reviewed copies of SCCCDC's records on file with the Department of State. This review reveals that SCCCDC was formed and continues to operate for the exclusive benefit of the College and its students. The stated purposes for which SCCCDC was formed include the construction and operation of dormitories at the College, and to "promote and cultivate social relations among the students and faculty of [the College]." Upon dissolution of SCCCDC, all property of the organization is assigned to Sullivan County. A review of SCCCDC's most recently available Form 990 Tax Return, along with the minutes of the College's Board of Trustees available on the College's website, revealed that four of the six directors for SCCCDC were also on the College's Board of Trustees, and that the secretary to SCCCDC's Board was also secretary to the College's Board of Trustees.¹

Further evidence supporting the conclusion that SCCCDC can be considered an alter ego of the College is found in the characterizations on the College's website of SCCCDC as a public entity in relation to this project.² This Department is also aware of at least one resolution passed by the College requiring all first-time, full-time, freshmen students to reside in SCCCDC's facilities.³ Currently, the College requires freshmen students whose parents or legal guardians do not reside within a fifty mile radius of the school to live on campus.⁴

A contract for housing in a SCCCDC dormitory is available on the College's website and the link is labeled "housing contract," without any clarification that it is a contract with an entity other than the College.⁵ That contract, insofar as it is relevant to this letter, limits the liability of the College for damages, despite the fact that the College is not named as a party to that agreement and grants authorized staff of the College the right to enter students' rooms to "inspect, maintain, and repair the premises and furnishings." The College's policies and guidelines regarding student behavior and conduct are referenced in the contract and made enforceable upon the residents through that document. Room changes in the dormitories must be made through the College's Department of Housing and Residential Life, and the contract may be modified or terminated for cause, should such cause be determined to exist by one of the Deans of the College. Moreover, there is a strong financial connection between the College and

¹ The SCCCDC directors that appear to be on the Colleges Board of Trustees were [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED], and the Secretary for both the College's Board of Trustees and SCCCDC appears to be [REDACTED].

² See Article Online at: http://www.sunysullivan.edu/news/2010/20100618_RubyGrpHousing.php

³ Resolution No. 049-00.

⁴ <http://www.sunysullivan.edu/campuslife/housing/pdf/Housing%20Exemption%20Request%20Form.pdf>

⁵ <http://www.sunysullivan.edu/campuslife/housing/pdf/Housing%20Contract.pdf>

SCCCDC with regard to the transmittal of board payments from financial aid packages. Students are responsible for any additional lease monies owed that are not covered by financial aid awards, indicating that the College remits, at the least, financial aid money to the SCCDC on behalf of the students for the cost of the housing. All of these factors support a conclusion that the College and the SCCDC are acting as one in both the construction and maintenance of the building and in connection with ensuring the total occupancy of the building.⁶

The sum of the provisions, agreements, and documents set forth above leads to the inescapable conclusion that the SCCDC is acting as the alter ego of the College for the purpose of constructing, operating, and maintaining student housing to support the work of the College. Accordingly, for the purposes of Article 8 of the Labor Law, the Department considers the actions of SCCDC in entering into contracts for the construction of the dormitories under discussion to be those of the College.

The second prong of the test requires that the contract concern a public work. To be a public work, the project's primary objective must be to benefit the public. The project in question is for the direct and straightforward purpose of providing dormitory housing to students at a public college. Such housing plays a direct supportive role in the college's effort to attract and retain students. That the opportunity to have students reside at the college benefits the College is clearly demonstrated by the fact the College, as noted above, has *required* many students to live in the dormitories during their first year at the College. The desirability of on-campus housing is also demonstrated by the fact that a review of the housing contract conditions eligibility to reside in such housing on the student maintaining a 2.0 grade point average, having an unblemished disciplinary record, and fulfilling all prior financial obligations to the college. Attracting and retaining students through the offer of on-campus housing increases the financial stability of the College, strengthens its community presence, and provides an overall public benefit by supporting affordable public education at the post-secondary level. These purposes clearly meet the public purposes test; therefore, the second prong has been satisfied since the primary purpose of the project is for the benefit of the public.

Accordingly, it is the opinion of this Department that the project in question is within the coverage of Article 8 of the Labor Law and, as such, this matter has been referred to the Department's Bureau of Public Work for investigation. The Department notes that it had previously opined that another dormitory project at the College was not subject to the prevailing wage law. This former opinion, however, was based exclusively on that facts of that case which the previous opinion acknowledged were "complicated, difficult to determine, and unlikely to be repeated." It is unknown whether the Department had the benefit of the information and material considered in reaching the instant opinion at the time the former opinion was issued as that opinion is silent as to the information relied upon. In any case, that opinion has no bearing on the instant opinion which is limited to the facts before the Department in connection with this particular project.⁶

⁶ Furthermore, the contract's terms refer to SCCDC and the College as a single institution wherein it states, "Sullivan County Community College and the SCCDC is an equal opportunity institution."

⁶ That opinion, which found that no contract within the meaning of Article 8 of the Labor Law existed in that there was no contract between the College and the contractor performing the dormitory construction was issued prior to the enactment of the so-called "third party language" added to Article 8 of the Labor Law long after this opinion

This opinion is based on the information contained in your letter as well as the information obtained by the Department that was described above. Existence of any other factual or historical background not described above might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
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was issued. We have not, in this opinion, specifically addressed the issue of whether the relationship between SCCDC and the College triggers third party coverage as we feel that the finding that SCCDC acted as an alter ego for the College in connection with this project is sufficient to meet the first prong of the two-part public work test.