

Ohio Supreme Court Addresses Prevailing Wage Law

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Ohio's Prevailing Wage Law, R.C. 4115.03, *et seq.*, generally requires that construction trades employees performing work on public construction projects be paid at the prevailing rates. Initially enacted as a "Little Davis-Bacon Act" in 1931,¹ the law is designed "to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector."² Recently, the Ohio Supreme Court has issued a number of decisions interpreting and applying the prevailing wage law, which, collectively, have a significant impact on the enforcement of that law.

In *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*,³ the Court reaffirmed its ruling from the early days of the prevailing wage law, and held that the prevailing wage law applied "only to persons whose work is performed directly on the site of the public improvement project."⁴ The Court rejected the assertion that the General Assembly's 1935 amendment requiring payment of prevailing wages to workers "upon any material to be used in or in connection with the public work"⁵ operated to "legislatively supersede[]" its prior holding.⁶ Holding otherwise, the Court reasoned, would be contrary to industry custom and practice and might well prove "unworkable."

The Court also held in *Gene's Refrigeration* that a union that has received written authorization to represent an employee who performed work on a public improvement project "does not have standing as an 'interested party' under R.C. 4115.03(F) to pursue violations of the prevailing-wage law on behalf of any other employee on the project."⁸ The court concluded that "one employee's authorization does not extend to all remaining employees," and thus rejected the notion that such written authorization conferred "interested-party status" upon the union "on a projectwide basis."

Two weeks after the decision in *Gene's Refrigeration*, the Court issued its decision in *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*¹⁰ in which it rejected the notion that the use of public money on an otherwise private construction project required the payment of prevailing wages on the project, at least in the absence of a specific legislative indication that the law was to be applied to particular projects or classes of projects. In *Northwestern Ohio BCTC*, the Court considered the application of the law to a private renovation project funded, in part, by loans from the county and a county improvement corporation. The loan from the county was from federal funds disbursed by the Ohio Department of Development, and the loan from the CIC was from real estate conveyance fees collected by the county. All of the public funds were used to purchase the property, building, and equipment, and none of the funds were used for the actual construction.

The Court further rejected the argument that the expenditure of public funds by an "institution supported in whole or in part by public funds"-in this case, the CIC-automatically subjected the project to the prevailing wage law.¹¹ Instead, applying the definitions of "public improvement" and "public authority," the Court concluded "that the prevailing-wage law applies only when a public

authority, including an institution, spends public funds to construct a ‘public improvement,’ which by definition must be constructed by a public authority or must benefit a public authority.”¹²

Significantly, the Court did not consider in *Northwestern Ohio BCTC*, any of the particular statutes that expressly provide for the application of the prevailing wage law when public money is used for otherwise private construction projects. Such provisions can be found throughout the Revised Code, and most of them are collected in R.C. 4115.032.¹³ Indeed, the Supreme Court noted in *Northwestern Ohio BCTC* that the trial court had ruled that the project involved in the case “did not qualify as a public improvement to which the prevailing wage automatically applies under R.C. 4115.032, which designates certain types of projects that are subject to R.C. Chapter 4115.”¹⁴

In early March, 2010, the Court issued its decision in *Bergman v. Monarch Constr. Co.*¹⁵ in which it held that, in a successful action instituted by an underpaid employee, the statutory penalties set forth in R.C. 4115.10(A) are mandatory. R.C. 4115.10(A) provides that an underpaid employee on a public improvement project may recover the amount of the underpayment, plus a penalty in the amount of 25% of the underpayment. In addition, the statute provides for a penalty in the amount of 75% of the underpayment to be paid to the Director of the Department of Commerce for the department’s “penalty enforcement fund.” The court of appeals in *Bergman* had concluded that the award of the 25% penalty was within the trial court’s discretion and that the underpaid employees lacked standing to assert the department’s entitlement to the 75% penalty.

The Supreme Court disagreed and ruled that the General Assembly’s use of the phrase “may recover” in R.C. 4115.10(A) “vests with the employee the discretion of whether to commence an action for restitution of the underpayment,” and that once the employee prevails, “then the statutory penalties follow as a matter of course and are mandatory.”¹⁶ With regard to the 75% penalty, the Court concluded that the use of the word “shall” expresses a “‘clear and unequivocal legislative intent’ . . . that the 75 percent penalty is to be paid whenever the director of commerce determines that there has been a prevailing-wage underpayment and the determination becomes final.”¹⁷ Finally, the Court noted that the only exception to the mandatory nature of the penalties was when the Director determines “that a wage underpayment is the result of a misinterpretation⁸ of the prevailing-wage statutes or an erroneous preparation of the payroll documents”

In late March, 2010, the Court issued its fourth significant prevailing wage decision in ten months, *State ex rel. Associated Builders & Contrs. of Cent. Ohio v. Franklin Cty. Bd. of Commrs.*,¹⁹ in which it held that a public authority could adopt a policy establishing criteria for evaluating bidders on public works projects-including the bidders’ history of non-compliance with the prevailing wage law-as long it applies “its evaluation criteria in a manner consistent with the exercise of sound discretion.”²⁰ In *ABC of Central Ohio*, the public authority’s adopted criteria required bidders to provide information indicating that “Bidder has not been debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years.”²¹ An apparent low bidder was disqualified under this criterion because the Department of Commerce had administratively determined that the bidder had failed to pay prevailing wages on numerous projects within the policy’s time limits.²² The Court concluded that the public authority abused its discretion in disqualifying the bidder.

The Court began its analysis by noting that the public authority had not defined the term "violated," and, in the absence of such definition, the Court would interpret the term as referring "to the situation in which the director makes a formal finding that a contractor or subcontractor intentionally violated the prevailing wage laws, and all appeals are exhausted."²³ Because the disqualified bidder had not been formally found to have intentionally violated the prevailing wage law, and because it had not evaluated the bid under its other criteria, the court concluded that public authority had "misapplied" its "evaluation criteria," thereby abusing its discretion.²⁴ Significantly, the Court did not purport to preclude public authorities from adopting bid criteria that defined a "violation" as something other than an "intentional violation."

¹ H.B. No. 3, 114 Ohio Laws 116.

² State, ex rel. Evans v. Moore (1982), 69 Ohio St.2d 88, 91.

³ 122 Ohio St.3d 248, 2009-Ohio-2747.

⁴ Id. (syllabus) (citing Clymer v. Zane (1934), 128 Ohio St. 359).

⁵ G.C. 17-4a, as enacted in Am.S.B. No. 294, 116 Ohio Laws 206, 207.

⁶ 122 Ohio St.3d at 257, 2009-Ohio-2747 at ¶ 43.

⁷ 122 Ohio St.3d at 255-57, 2009-Ohio-2747 at ¶¶ 39-43.

⁸ 122 Ohio St.3d 248, 2009-Ohio-2747 (syllabus).

⁹ 122 Ohio St.3d at 252, 2009-Ohio-2747 at ¶ 24.

¹⁰ 122 Ohio St.3d 283, 2009-Ohio-2957.

¹¹ 122 Ohio St.3d at 287-88, 2009-Ohio-2757 at ¶ 19.

¹² 122 Ohio St.3d at 288, 2009-Ohio-27547 at ¶ 20 (citations omitted).

¹³ See, eg., R.C. 166.02(E) ("No financial assistance for project facilities shall be provided under this chapter unless the provisions of the agreement providing for such assistance specify that all wages paid to laborers and mechanics employed on such project facilities for which the assistance is granted shall be paid at the prevailing rates of wages of laborers and mechanics for the class of work called for by such project facilities . . .").

¹⁴ 122 Ohio St.3d at 286, 2009-Ohio-2757 at ¶ 10.

¹⁵ 124 Ohio St.3d 534, 2010-Ohio-622.

¹⁶ 124 Ohio St.3d at 538, 2010-Ohio-622 at ¶ 14.

¹⁷ 124 Ohio St.3d at 539, 2010-Ohio-622 at ¶ 16.

¹⁸ 124 Ohio St.3d at 539, 2010-Ohio-622 at ¶ 17 (citing R.C. 4115.13(C)).

¹⁹ 125 Ohio St.3d 112, 2010-Ohio-1199.

²⁰ 125 Ohio St.3d at 112, 2010-Ohio-1199 (syllabus).

²¹ 125 Ohio St.3d at 118, 2010-Ohio-1199 at ¶ 27.

²² 125 Ohio St.3d at 121, 2010-Ohio-1199 at ¶ 39.

²³ 125 Ohio St.3d at 119, 2010-Ohio-1199 at ¶ 29.

²⁴ 125 Ohio St.3d at 120, 2010-Ohio-1199 at ¶¶ 35-36.