

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. ~~073374~~

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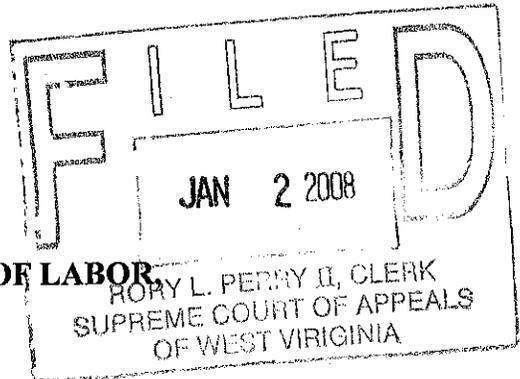
STATE EX REL. THE TUCKER COUNTY SOLID WASTE AUTHORITY,

Petitioner,

v.

WEST VIRGINIA DIVISION OF LABOR,

Respondent.



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THE WEST VIRGINIA DIVISION OF LABOR'S  
RESPONSE AND MEMORANDUM OF LAW TO  
TUCKER COUNTY SOLID WASTE AUTHORITY'S  
PETITION FOR WRIT OF PROHIBITION

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## RESPONSE TO PETITION FOR WRIT OF PROHIBITION

COMES NOW the Respondent, the West Virginia Division of Labor (the "Division"), by counsel, Elizabeth G. Farber, Assistant Attorney General, and pursuant to Rule 14 (b) of the West Virginia Rules of Appellate Procedure, respectfully submits this Response to the Petition for Writ of Prohibition filed by the Tucker County Solid Waste Authority (the "TCSWA"). As will be set forth more fully below, the Division contends that neither it nor the Hearing Examiner exceeded their respective legitimate powers or committed any clear error of law.

The Commissioner (the "Commissioner") of the Division of Labor has the mandatory "... power and authority in the discharge of [his or her] duties, to enter any place of employment or public institution, for the purpose of collecting facts and statistics relating to the employment of workers and of making inspections for the proper enforcement of all labor laws of the State." W. Va. Code § 21-1-3.

If this Court were to grant TCSWA's requested relief and prohibit the Division from enforcing the Wages for Construction of Public Improvements Act (the "prevailing wage act" or the "prevailing wage statute"), W. Va. Code § 21-5A-1, *et seq.*, much of the act would be rendered essentially meaningless. Such a ruling by this Court would permit all public authorities to circumvent purpose of the act by simply hiring employees whenever work on a public improvement construction project was needed, and then terminating them when their work was completed. The cost-saving motivation would simply be too tempting to ignore, and it would be entirely unnecessary for a public authority to enter into a contract for such work.

The language in the prevailing wage act is mandatory, and does not permit a public authority to comply only when it has the available funds to do so. As this Court has already recognized, the

statute was “. . . enacted for the purpose of protecting laborers engaged in construction of public improvements from substandard wages by ensuring the payment, as a minimum, of the prevailing level of wages.” Affiliated Construction Trades Foundation v. University of West Virginia Bd. Of Trustees, 210 W.Va. 456, 466, 557 S.E.2d 863, 873 (2001) (the “ACT case”). The Court further acknowledged “. . . the laudatory policy advanced by the wage act of establishing a floor for the workers engaged in construction for the public's benefit.” *Id.* at 471, 878.

The Division informed the TCSWA that prevailing wages were owed to ten individuals as early as March 8, 2005. Its delay of over two and a half years in filing a writ of prohibition constitutes an apparent concession of the validity of the Division's position, and begs the question of why it waited so long to file. Moreover, TCSWA's argument that the statute only applies when a public works project is “let to contract” fails to recognize or distinguish any of the exceptions found by this Court in the ACT case or in language in the purpose clause of the statute.

For the reasons that will be set forth below, neither the Division's nor the Hearing Examiner's actions should be subject to the extraordinary remedy of prohibition, and the Division respectfully requests that this Honorable Court decline to issue a rule to show cause and permit the underlying administrative process to continue.

### **I. INTRODUCTION.**

In 1961, the Legislature clearly and unambiguously set forth the purpose of the prevailing wage act:

It is hereby declared to be the policy of the State of West Virginia that a wage of no less than **the prevailing hourly rate of wages** for work of a similar character in the locality in this State in which the construction is performed, **shall be paid to all workmen employed by or on behalf of any public authority** engaged in the construction

of public improvements.

W. Va. Code § 21-5A-2. (Emphasis added).

“Under West Virginia Code § 21-5A-2 (1961) (Repl. Vol. 1996), the provisions concerning prevailing wages can only be invoked when a construction project that constitutes a public improvement and which involves workers employed by or on behalf of a public authority is involved.” Syl. Pt. 3, Affiliated Construction Trades Foundation, 210 W.Va. at 458, 557 S.E.2d at 865. Thus, the only requirements necessary to invoke the provisions of the prevailing wage act are a construction project that qualifies as a public improvement<sup>1</sup> and workers employed by or on behalf of a public authority.<sup>2</sup> “The key to defining a ‘public improvement,’ as recognized by an opinion of this state's attorney general and numerous courts, is the interwoven concepts of public use and public benefit. See W.Va. Att'y Gen. Op., No. 10 (Feb. 21, 1989).” *Id.* at 469, 876.

In most instances, the general rule is that there must be a contract between a public authority and a contractor for the construction of a public improvement in order to trigger the application of the prevailing wage act.

However, there are substantial exceptions to this general rule. One exception was recognized

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<sup>1</sup> “The term ‘public improvement,’ as used in this article, shall include all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the State of West Virginia or any political subdivision thereof.” W. Va. Code § 21-5A-1 (4).

<sup>2</sup> “The term ‘public authority,’ as used in this article, shall mean any officer, board or commission or other agency of the State of West Virginia, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement, including any institution supported in whole or in part by public funds of the State of West Virginia or its political subdivisions, and this article shall apply to expenditures of such institutions made in whole or in part from such public funds.” W. Va. Code § 21-5A-1 (1).

in the ACT case. This Court found that “the absence of a ‘public authority’ as signatory” to a contract did not in itself defeat the application of the prevailing wage statute. Syl. Pts. 5 and 6, *Id.* at 466, 873.

The Division has historically and consistently recognized another exception to the general rule - one that concerns the definition of “employee” in the prevailing wage act.<sup>3</sup> In view of the act’s policy clause, which clearly and unambiguously provides that workmen employed by or on behalf of a public authority must be paid prevailing wages, and a 1986 Attorney General Opinion, the Division has construed the exemption in the definition of “employee” to include only those regular or temporary employees already employed by a public authority prior to the undertaking of any construction of a public improvement and whose work on a public improvement project is typical of work done in the ordinary course of their employment.

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<sup>3</sup> “The term ‘employee’ for the purposes of this article, shall not be construed to include such persons as are employed or hired by the public authority on a regular or temporary basis or engaged in making temporary or emergency repairs.” W. Va. Code § 21-5A-1 (7).

TCSWA has never asserted that the excavation work undertaken by the ten employees was for the purpose of responding to an emergency situation. “Emergency” is defined in the prevailing wage legislative rule as “. . . an unforeseen combination of circumstances which calls for immediate action, and is synonymous with crisis, pinch, strait and necessity.” W. Va. Code St. R. §42-7-2.9. “Temporary” is defined in the rule as “. . . lasting for a time only; existing or continuing for a limited time, not permanent.” W. Va. Code St. R. §42-7-2.10.

Any circumstance developing over a period of time, such as a landfill reaching its capacity, is foreseeable and therefore not an emergency for purposes of the prevailing wage statute. Pursuant to the exemption permitted in the definition of “employee,” any employee hired by a public authority to respond to an emergency would be temporarily exempt until the immediate crisis was alleviated. “Although TCSWA characterizes the ten employees as “temporary” employees, and claims that they are therefore exempt from the statute, the definition of “employee” clearly correlates “temporary” with “emergency.”

However, when a public authority hires new employees for the sole purpose of having them work on a public improvement project and terminates their employment when the project is completed, the Division considers that these new employees are not exempt under the statute and must be paid prevailing wages. To permit otherwise would sanction a circumvention of the clearly stated purpose of the statute.

Rather than ignoring the statute as the TCSWA asserts, the Division has sought to enforce its clearly stated purpose for the benefit of those employees who labored on a public works project for a public authority. After its investigation into the facts and circumstances of these employees' work, the Division determined that a total of ten employees were owed a combined total of \$99,880.15 as the difference between what they were paid by TCSWA and what they should have been paid as prevailing wages.<sup>4</sup>

TCSWA has chosen to ignore the language in the purpose clause of the prevailing wage act and instead argues that those employees who were hired for the sole purpose of excavating a landfill area and were later terminated when their work was completed are exempt regardless of the mandatory language in the policy clause requiring that prevailing wages be paid to those workmen employed by a public authority.

## **II. THE KIND OF PROCEEDING AND THE NATURE OF THE RULINGS BY THE HEARING EXAMINER.**

This case arises out of a prevailing wage investigation undertaken by the Division concerning wages paid by the TCSWA to ten employees specifically hired to excavate a landfill area or cell and

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<sup>4</sup> The prevailing wage act provides for a like amount penalty equal to the wages owed for a violation of the statute. *See* W. Va. Code § 21-5A-9 (b). Accordingly, the actual prevailing wages owed plus a like amount penalty equals \$199,760.30.

then terminated when the excavation was completed. The employees were hired between May and August, 2003 and most were terminated between November, 2003 and January, 2004. Upon the Division's finding that prevailing wages were owed, the TCSWA advised the Division that it was contesting the case. Then-Commissioner James R. Lewis<sup>5</sup> appointed James W. McNeely to serve as the Hearing Examiner in a contested case hearing pursuant to W. Va. Code § 29A-5-4 of the State Administrative Procedures Act and W. Va. Code St. R. § 42-20-8.

On or about October 13, 2006, counsel for both parties thereafter submitted "Joint Stipulations of Fact," attached as **Exhibit 1**, to the Hearing Examiner and also simultaneously submitted proposed conclusions of law and memoranda of law in support of their respective conclusions of law. Both parties also submitted reply briefs on or about October 27, 2006. Hearing Examiner McNeely issued an order dated February 16, 2007, attached as **Exhibit 2**, directing the parties to further brief the issues presented in view of the prevailing wage statute's legislative and regulatory history. A copy of House Bill 255 and a copy of the March 7, 1961 Journal of the Senate entry concerning engrossed House Bill 255 were attached as exhibits to the order. Both parties thereafter submitted Supplemental Memoranda and Responses to the Hearing Examiner, who issued detailed "Preliminary Findings of Fact and Conclusions of Law and Order as to Further Proceedings" dated June 29, 2007, attached as **Exhibit 3**.

Contrary to TCSWA's assertion that the Hearing Examiner "concluded, as a matter of law, that the West Virginia Prevailing Wage Act applies to employees of a public authority who engage in construction of an improvement that was never let to contract" (Petition at 3), the Hearing

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<sup>5</sup> Commissioner Lewis resigned in January, 2007. The current Commissioner is David W. Mullins.

Examiner recognized an “apparent conflict between the public policy purpose of the Act” and certain definitions that “appear to limit the application of the Act to public improvement let to contract.” Exhibit 3, “Conclusions of Law” ¶ 12 at 5.

After reviewing the text of the act, the legislative history, and the federal Davis-Bacon Act (*id.*, ¶¶ 13-22 at 5-9), the Hearing Examiner concluded that the “Act has application not only to bid contracts, but as well to certain contracts of employment between public authorities and individuals” (*id.*, ¶ 17 at 7; *see also* ¶ 21 at 8), finding that such “a reading is necessary to give meaning to the stated purpose of W. Va. Code § 21-5A-2 after application of the employment exemptions stated in W. Va. Code § 21-5A-1 (7).” *Id.*, ¶ 22 at 9.

Finally, the Hearing Examiner cautioned that his conclusions of law were preliminary “in order to narrow the issues to be decided and give guidance to the parties as to further proceedings.” *Id.*, ¶ 27 at 10. Finding that the factual record was not sufficiently developed concerning (1) the employment terms and conditions of the employees at issue, (2) whether there was a failure by the TCSWA to pay prevailing wages, or (3) whether the penalty provisions and the “honest mistake” exception in W. Va. Code § 21-5A-9 (b) are applicable, the Hearing Examiner directed the parties to confer with each other concerning what additional proceedings were necessary. *Id.*, “Order as to Further Proceedings,” ¶¶ 2-3 at 11. TCSWA thereafter filed its writ of prohibition.

The Division asserts that the Hearing Examiner has not misconstrued or misapplied the prevailing wage statute or made any clear errors of law. As clearly stated in his June 29, 2007 order, all findings and conclusions were preliminary because the factual record was not complete.

### **III. STATEMENT OF FACTS.**

The parties have submitted “Joint Stipulations of Fact.” Exhibit 1.

In addition to these agreed upon facts, the ten TCSWA employees in the Division's investigation were paid by the hour and received no benefits. According to the TCSWA's Employee Handbook, full-time employees are eligible to receive paid holidays, paid vacation, and paid sick leave, and to participate in PEIA's health insurance and life insurance programs and the PERS retirement program. The handbook defines full time and part-time employment but does not define "temporary" employment.

#### **IV. STANDARD OF REVIEW FOR ISSUING A WRIT OF PROHIBITION.**

A writ of "[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.' Syllabus Point 1, Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953)." Syl. Pt. 1, State ex rel. Taylor v. Nibert, 220 W.Va. 129, 640 S.E.2d 192 (2006).

This Court has applied the following standard of review when considering whether to issue a writ of prohibition:

'In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the

existence of clear error as a matter of law, should be given substantial weight.' Syllabus Point 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Syl. Pt. 2, Nibert, 640 S.E.2d at 193.

TCSWA has not alleged an absence of jurisdiction, only that the Division has exceeded its legitimate powers. For reasons that will be set forth more fully below, and contrary to TCSWA's assertions, the Division has not applied the prevailing wage statute in a manner that is clearly erroneous in any respect and the Hearing Examiner has not yet issued a recommended order and/or findings of fact and conclusions of law to the Commissioner because he has determined that the factual record has not yet been fully developed with regard to certain important matters. Exhibit 3 at 10-11.

With regard to the other factors enumerated by this Court in considering whether to issue a rule to show cause, TCSWA has other adequate means to obtain relief under the Administrative Procedures Act, W. Va. Code §§ 29A-5-4 and 29A-6-1, including appeal as of right to circuit court of any final order entered by the Commissioner, and further appeal to this Court of any order entered by a circuit court. Damage or prejudice, if any, sustained by TCSWA would therefore be correctable on appeal. The Division has not demonstrated any persistent disregard for either procedural or substantive law. Finally, while the Division considers the challenge raised by TCSWA to be of critical importance, the legislative purpose has already been addressed by the Court in the ACT case.

**V. THE DIVISION OF LABOR HAS NOT EXCEEDED ITS LEGITIMATE POWERS OR COMMITTED ANY CLEAR ERROR AS A MATTER OF LAW.**

The Commissioner is charged with enforcing all labor laws in this State, including the prevailing wage act, and is authorized to make inspections of all employers, including public

authorities, to determine compliance with such laws. W. Va. Code § 21-1-3.

**A. The Division Has Construed the Prevailing Wage Statute According to its Clearly Stated Legislative Purpose.**

As has already been pointed out, the intent of the Legislature in the prevailing wage act is clearly and unambiguously set forth in section two, entitled “Policy declared.” There can be no question that the clear and express language in the policy clause extends its protection not only to workers who are “employed . . . on behalf of” a public authority, but also to those workers “employed . . . by” a public authority. W. Va. Code § 21-5A-2. *See also* Syl. Pt. 3, Affiliated Construction Trades Foundation, 210 W.Va. at 458, 557 S.E.2d at 865.

This Court has further recognized the prevailing wage act’s “unmistakable policy of this State to secure the payment of the prevailing wage rate for construction performed on public improvements ‘by or on behalf of any public authority.’” *Id.* at 466, 873. Moreover, in the ACT case, this Court consistently returned to the purpose of the statute when analyzing whether the absence of a public authority’s signature on a contract would be sufficient to defeat the application of the statute. Observing that the term “. . . ‘public authority,’ like the term ‘public improvement’ cannot be used as a shield to prevent the wage act from operating when the public entity for whom the construction is being performed is not a party to a contract . . .” the Court concluded that the absence of a public authority as a party to a contract will not in itself be sufficient to defeat the application of the statute. *Id.* at 470-71, 877-78; *see also* Syl Pts. 5 and 6, *id.* at 459, 866. “. . . [I]n the interest of upholding the laudatory policy advanced by the wage act . . . and “. . . to prohibit the clear intent of the statute from being violated. . .” the Court developed a six-part test to determine whether a public authority is involved in the construction of a public improvement even when the

public authority is not a party to a construction contract *Id.* at 470-71, 877-78.

“Traditionally, when this Court is asked to resolve a question regarding a matter of statutory construction, we first consider the intent of the Legislature in enacting the subject provision. ‘The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature. Syl. pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975).” Newark Ins. Co. v. Brown, 218 W.Va. 346, 624 S.E.2d 783, 788 (2005). “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syl. pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951).

TCSWA argues that the language in the W. Va. Code §21-5A-2 policy is modified by the exemption in the definition of the term “employee” because the definition is more specific than the policy, and according to rules of statutory construction, a specific statutory section controls over a more general one. Petition at 13. “The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Syl. Pt. 1, UMWA by Trumka v. Kingdon, 174 W.Va. 330, 331, 325 S.E.2d 120 (1984). In the Trumka analysis, however, the Court was especially mindful that the more specific statute was “completely consistent” with the legislative intent (“... the result we have reached is completely consistent with the legislative intent as evidenced by another provision in the Coal Mine Health and Safety Act, W.Va.Code, 22-1-18.”). *Id.* at 332, 122.

The term “employee” as defined in the prevailing wage statute “shall not be construed to include such persons as are employed or hired by the public authority on a regular or temporary basis or engaged in making temporary or emergency repairs.” W. Va. Code § 21-5A-1 (7). This definition

either directly conflicts with the clear language in the purpose clause in section two of the Act, or the Legislature envisioned other categories or distinguishing characteristics of employee in addition to employees hired on a “regular or temporary basis.” *See* FN 3, *supra*.

In view of the Act’s purpose clause, the Division has historically construed the exemption in the definition of “employee” to apply only to workers already employed by a public authority prior to the initiation of a public improvement project. However, if a public authority hires workers solely for the purpose of working on a public improvement and then terminates them after their part of the public improvement project is completed, the Division takes the position that such workers do not fall within the exemption of the Act, and must be paid prevailing wages.

The Division’s interpretation has been primarily based on an opinion issued by West Virginia Attorney General Charles G. Brown on September 25, 1986, attached as **Exhibit 4**. The Attorney General was asked for an opinion about whether “it would be a violation of the law for a county [school] board to hire new employees to work on such projects,<sup>6</sup> thereby avoiding the letting of bids.” Pursuant to W. Va. Code § 5-22-1 (d) (1), competitive bids are not be required for “work performed on construction or repair projects by regular full-time employees of the state or its subdivisions.”

Recognizing that both the prevailing wage statute and the bidding statute address hiring and bidding practices pertaining to public improvement projects, the Attorney General concluded that, in view of the prevailing wage act, the clear intent of the Legislature was that only those employees already employed on a full-time basis could work on a construction project in order for the project to fit within the bidding exemption of 5-22-1 (d) (1). “The public authority may not hire new

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<sup>6</sup> Those exceeding \$25,000.00 in total cost. W. Va. Code § 5-22-1 (b).

personnel to perform such capital improvements; nor may the public authority evade the law by hiring new personnel to do the work of regular employees ..." Exhibit 4 at 2.

It is well-settled that "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, Security National Bank & Trust Co. v. First W.Va. Bancorp., Inc., [166] W.Va. [775], 277 S.E.2d 613 (1981), *appeal dismissed*, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284 [ (1982) ]. Syl. Pt. 1, Dillon v. Bd. of Educ., 171 W.Va. 631, 301 S.E.2d 588 (1983)." Syl. Pt. 2, Hardy County Board of Education v. West Virginia Division of Labor, 191 W.Va. 251, 445 S.E.2d 192 (1994).

The Division's interpretation of the employee exemption in the prevailing wage statute is entirely consistent with the statute's clearly and unambiguously stated legislative purpose and therefore cannot be erroneous by any standard of proof. To interpret the exemption otherwise would permit public authorities to circumvent the statute in a manner that would directly contradict the statute's clear purpose.

TCSWA hired ten new employees to work on a public improvement project and terminated them when their part of the project was completed. The ten workers were not regular employees of the Tucker County Solid Waste Authority, and did not enjoy the benefits received by regular employees. They were employed by a public authority to perform work for the public's benefit, and they should have been paid prevailing wages for their work.

**B. The Division's Construction of the Prevailing Wage Statute Under Chevron and Appalachian Power Implements the Clearly and Unambiguously Stated Legislative Purpose.**

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken

to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct 2778, 2781-82, 467 U.S. 837, 842-43 (1984), attached as **Exhibit 5**.

This two-step Chevron analysis has been incorporated and applied in West Virginia in the case of Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995). Under the first step of a Chevron and Appalachian Power analysis, reviewing courts and the Division are required to "give effect to the unambiguously expressed intent of" the Legislature. Chevron, 104 S.Ct. at 2782, 467 U.S. at 843; *see also* Syl. Pts. 3 and 4, Appalachian Power, 195 W.Va. at 578. The legislative intent in the statute has been expressly set forth in policy clause, W. Va. Code § 21-5A-2, and has been recognized by this Court as an "unmistakable policy." Affiliated Construction Trades Foundation, 210 W. Va. at 466, 557 S.E.2d at 873. This Court also explicitly recognized that there is no requirement in the purpose clause that a contract must exist in order for the prevailing wage act to apply. *Id.* "Under West Virginia Code § 21-5A-2 (1961) (Repl. Vol. 1996), the provisions concerning prevailing wages can only be invoked when a construction project that constitutes a public improvement and which involves workers employed by or on behalf of a public authority is involved." Syl. Pt. 3, *Id.* at 459, 866.

At issue in this case is the definition of "employee" in the statute, which triggers the second part of a Chevron and Appalachian Power analysis. If the Legislature had intended to create an absolute or broad exemption for all employees of a public authority, why did it modify the exemption

to cover only those employed on a “regular or temporary” basis or those engaged in making “temporary or emergency repairs”? W. Va. Code § 21-5A-1 (7).

Under the second part of a Chevron and Appalachian Power analysis, if a statute is found to be silent or ambiguous with respect to an issue, a court is required to determine whether the Division’s “answer is based on a permissible construction of the statute.” Chevron, 104 S.Ct. at 2782, 467 U.S. at 843; *see also* Syl. Pt. 4, Appalachian Power, 195 W.Va. at 578. In this second stage of analysis, judicial review is “extremely limited . . . [and] involves a high degree of respect for the agency’s role.” Appalachian Power, 195 W.Va. at 588. Courts have “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer. . . unless [it is] arbitrary, capricious or manifestly contrary to the statute.” Chevron, 104 S.Ct. at 2782, 467 U.S. at 844. “Where the language of the statute is of doubtful meaning or ambiguous, rules of construction may be resorted to and the construction of such statute by the person charged with the duty of executing the same is accorded great weight.” Appalachian Power, 195 W.Va. at 587; State by Davis v. Hix, 141 W.Va. 385, 389, 90 S.E.2d 357, 359-60 (1955) (*citations omitted*).

The Division’s interpretation of the employee exemption in the prevailing wage statute implements the statute’s clearly and unambiguously stated legislative purpose and therefore is not arbitrary, capricious or contrary to statute.

**C. The Division’s Interpretation of the Prevailing Wage Statute  
Is Consistent with the Legislative History.**

In dicta concerning the use of tools of statutory construction, Justice Cleckley observed that “[l]egislative history and other tools of statutory construction are subject to many and varied

criticisms, and the uncertainty about their value in general parallels the uncertainty about their value in relation to the *Chevron* doctrine.” Appalachian Power Co., 195 W.Va. at 586.

The 1935 prevailing wage statute was substantially amended in 1961. Attached hereto for reference are the 1935 statute (**Exhibit 6**), H.B. 255 (**Exhibit 7**), an excerpt relating to H.B. 255 from the March 7, 1961 Journal of the Senate (**Exhibit 8**), an excerpt relating to H.B. 255 from the March 10, 1961 Journal of the Senate (**Exhibit 9**), an excerpt relating to H.B. 255 from the March 11, 1961 Journal of the Senate (**Exhibit 10**), and the 1961 statute (**Exhibit 11**). Among the 1961 amendments, most notable for purposes of this case are as follows:

- The addition of the legislative purpose or policy clause which states that “[i]t is hereby declared to be the policy of the State of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in this State in which the construction is performed, shall be paid to all workmen employed by or on behalf of any public authority engaged in the construction of public improvements.” W. Va. Code § 21-5A-2.
- The addition of the definition of the term “employee” which states that “[t]he term ‘employee,’ for the purposes of this article, shall not be construed to include such persons as are employed or hired by the public authority on a regular or temporary basis or engaged in making temporary or emergency repairs.” W. Va. Code § 21-5A-1 (7).
- Amendments to the definition of the term “construction” to include any public improvement “let to contract” and the provision excluding construction for “temporary or emergency repairs.”<sup>7</sup> W. Va. Code § 21-5A-1 (2).

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<sup>7</sup> “The term ‘construction,’ as used in this article, shall mean any construction, reconstruction, improvement, enlargement, painting, decorating, or repair of any public improvement let to contract. The term ‘construction’ shall not be construed to include temporary

• An amendment to the term “public improvement” to encompass any structures “upon which construction may be let to contract.”<sup>8</sup> W. Va. Code § 21-5A-1 (4).

The original purpose clause in H.B. 255, Exhibit 7 at 2, was offered for amendment by Senators Clarence Martin and Davis. Exhibit 9 at 1465-66 (beginning with “on page four, section two, line four...”). Their amendments were limited to inserting the words “in this state” after “locality,” substituting the word “construction” instead of “work,” and substituting the words “authority engaged in the construction of public improvements” instead of “body engaged in public works.” *Id.* These amendments were adopted verbatim, Exhibit 10 at 1455, and were subsequently enacted as it appears in the current statute. Exhibit 11 at 1286. However, the amendments offered and subsequently adopted did not in any way concern the language that requires prevailing wages to be paid to all workmen “employed by” a public authority or contain any reference to a requirement that the statute only applies when a contract exists. Exhibit 9 at 1465-66; Exhibit 10 at 1455; Exhibit 11 at 1286.

Also on March 10, 1961, Senators Martin and Davis first offered the definition of “employee,” which did not appear at all in H.B. 255. Exhibit 7 at 1-2; Exhibit 9 at 1465. The journal excerpts do not contain any further discussion or explanation of the definition, and it was subsequently adopted, Exhibit 10 at 1455, and signed into law, Exhibit 11 at 1286.

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or emergency repairs.” W. Va. Code § 21-5A-1 (2).

<sup>8</sup> “The term ‘public improvement,’ as used in this article, shall include all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures upon which construction may be let to contract by the State of West Virginia or any political subdivision thereof.” W. Va. Code § 21-5A-1 (4).

The matters raised by Senator Martin on March 7, 1961, Exhibit 8, largely concern his desire to exempt school boards from the provisions of the prevailing wage act, questions about the definition of locality, and numerous questions about how the minimum rate wage board would operate, the appeals process, the penalties for a violation, and the effective date of the amendments.

Given Senator Martin's detailed and meticulous criticisms of the language and scope of H.B. 255 in Exhibit 9, in which he addressed the engrossed bill line by line, and his and Senator Davis's exhaustive amendments to the engrossed bill three days later, it is reasonable to conclude that if they had intended to exempt all employees of public authorities from the statute, they would have amended the purpose clause to include the requirement of a contract. Because Senator Martin's criticisms of the engrossed bill were so exhaustive and refined, it is hard to fathom that such an omission was simply an oversight.

In addition, if the senators had intended to offer a blanket exemption for all employees of a public authority, they would have offered the definition of "employee" to read simply that "an employee, for purposes of this article, shall not be construed to include such persons as are employed or hired by the public authority." H.B. 255 did not have a definition of "employee." Exhibit 7. This definition was entirely their own. Exhibit 9 at 1465.

TCSWA asserts that Senator Tompos' remarks, Exhibit 8 at 1258, referring to the 1961 H.B. 255 as a "little Bacon-Davis act" demonstrates "that the legislative intent was to enact requirements for State contracts that mimicked those required by the federal government in the Davis Bacon Act." Petition at 22.

This assertion is not borne out by the language of the purpose clause in H.B.255 or the amendments to that section that were proposed by Senator Martin. Exhibit 7; Exhibit 9 at 1465-66.

The original purpose clause in H.B. 255 stated that “[i]t is hereby declared to be the policy of the state of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed, shall be paid to all workmen employed by or on behalf of any public body engaged in public works.” Exhibit 7 at 2. The amendments to this section proposed by Senator Martin were to strike “out the words ‘body engaged in public works’ and inserting in lieu thereof the following: ‘authority engaged in the construction of public improvements.’” Exhibit 9 at 1465-66.

The Davis-Bacon Act originally stated that it was “[a]n Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and District of Columbia by contractors or subcontractors . . .” 40 U.S.C.A. § 276a, now codified at 40 U.S.C.A. §§ 3141 - 3144, 3146-3147. If Senators Martin and Tompos and the West Virginia Legislature wished to mirror the federal statute, they would have drafted a policy statement something like “[i]t is hereby declared to be the policy of the State of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in this State in which the construction is performed, shall be paid to all workmen employed by any contractor or subcontractor engaged in the construction of a public improvement authorized by or on behalf of a public authority.”

“Absent explicatory legislative history for an ambiguous statute . . . , this Court is obligated to consider the . . . overarching design of the statute.” Appalachian Power Co., 95 W.Va. at 587 Because the legislative history does not resolve the ambiguity in construing the purpose clause of the prevailing wage statute in light of the exemption of employees of a public authority, “the statute is subject to reasonable construction by the administrative agency charged with the duty to carry out

these statutory objectives.” Appalachian Power, 195 W.Va. at 590.

Accordingly, in view of the statute’s purpose, the Division has reasonably construed the statute to mean that when a public authority hires new employees for the sole purpose performing work on a public improvement and then terminates them when the work is completed, such employees must be paid prevailing wages.

**VI. CONCLUSION.**

WHEREFORE, based upon the foregoing, the Respondent respectfully requests that this Court reject the Petition for Writ of Prohibition filed in this matter.

Respectfully submitted,

WEST VIRGINIA DIVISION OF LABOR  
By counsel

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



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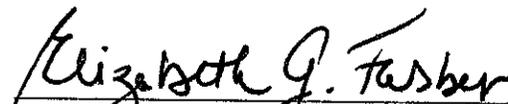
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**CERTIFICATE OF SERVICE**

I, Elizabeth G. Farber, Assistant Attorney General for the State of West Virginia, do hereby certify that a copy of the foregoing "Response to Petition for Writ of Prohibition" was served on this 2nd day of January, 2008, by depositing it in the United States mail, first class postage pre-paid addressed as follows:

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