



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

June 28, 2010



Re: Request for Opinion
Article 8 Applicability
Dutchess Stadium
RO-10-0059

Dear [REDACTED]:

This letter is written in response to your letter dated April 13, 2010, in which you request an opinion as to the applicability of Article 8 of the Labor Law to improvements to Dutchess Stadium in the Town of Fishkill, County of Dutchess. The land on which the stadium is located is leased to Dutchess County from Beacon City School District, and the stadium itself is owned by the County. The County has a lease agreement with a professional baseball club which provides for the club to play class A minor league baseball at the stadium. That lease agreement permits the club to "make alterations and improvements to the Stadium, subject to the prior written approval of the County and a written agreement between the parties on the manner in which the alterations and improvements shall be accomplished." Your letter seeks an opinion as to the applicability of Article 8 of the Labor Law in the event the club decides to make an alteration or improvement to the stadium.

The test for determining whether Article 8 of the Labor Law applies to a particular public contract "focuses on the nature, or the direct or primary objective, purpose and function, of the work product of the contract," (*Erie County Industrial Dev. Agency v. Roberts*, 94 AD2d 532 (4th Dep't 1983), aff'd 63 NY2d 810.) With that in mind, a two-pronged test is generally used to determine whether a construction project is subject to Article 8 of the Labor Law: "(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." (*See, Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3d Dept., 1991); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009).) [emphasis added] "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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As to the first prong, whether a public agency has entered into a contract involving the employment of laborers, workmen and mechanics, the identity of the parties and the terms of the agreement to the present project are dispositive on that issue. Effective October 27, 2007, Section 220 (3) of the Labor Law reads as follows:

“Contract” now also includes “reconstruction and repair of any such public work, and any public work performed under a lease, permit, or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance...” Labor Law §220 (3).

The lease agreement in the present case certainly meets the first prong of the public work test enunciated by the courts and now established by the statute. It matters not that the County is not directly contracting to have such work performed since the lease agreement permits the club to contract for such work to be performed, with the written approval by the County. The County, through its third party contracts, is engaging contractors who will hire laborers, workmen, and mechanics to perform the work. Therefore, the first prong in the test for determining whether Article 8 applies has been satisfied.

As to the second prong of the test, i.e. whether the contract concerns a public works project, the primary consideration, as stated above, is whether the project's primary objective is to benefit the public. There are several cases that are helpful and relevant to the present situation in that regard, and the specific factual circumstances surrounding the holdings in those cases are helpful in rendering a determination.

In *Sarkisian Brothers*, a building on the grounds of SUNY Oswego was rehabilitated and turned into a hotel and convention center. (172 A.D. 2d 895.) The lease of that property provided that the lessee would be responsible for all costs associated with the rehabilitation and conversion of the building to the specified use. The State retained ownership of the property, with lessee having an option to purchase at the conclusion of the lease only upon the State's determination to sell to a non-governmental purchaser. The State retained the right to approve all renovations and design drawings through the Office of General Services and SUNY. Certain usages of the facilities were guaranteed to SUNY. The Court held that all of the above circumstances were sufficient indices of public use, ownership, and public enjoyment so as to support the Labor Department's determination that the project was one of public purpose sufficient to satisfy the second prong of the test for determining whether a particular project is subject to Article 8 of the Labor Law.

In *National R.R. Corp. v Hartnett*, 169 A.D.2d 127 ((Third Dept., 1991), the Third Department stated that the inquiry must focus “on the nature, or the direct or primary objective, purpose and function of the work product of the contract.” In *National*, the question was whether the construction of a \$50 million rail line by Amtrak needed to transfer all Empire Corridor rail service to Pennsylvania Station from Grand Central Station was a public work project. The Court determined it was not, based upon the primary purpose and function of the

project itself. While the Court conceded the overall public purpose of improving rail service as an overall benefit to the public, it noted that Amtrak was created to fulfill a function that was not historically that of government, but rather of private common railroad carriers. Following that line of logic, the Court determined that Amtrak's purpose in entering into the contract with the State was to enhance its non-governmental function of providing efficient and, eventually, profitable rail service. While the Court ultimately determined that the project was not a public work, that determination was based in large measure on the fact that Amtrak "retains ownership of the lines to be installed in the project, bears the risk of future financial losses or physical destruction, is entitled to all profits from its operations over the lines, and retains the authority to condition the public's use and enjoyment of its facilities upon the purchase of a passenger ticket. These are factors that have repeatedly been held sufficient to preclude any determination that a given project constitutes a public works for purposes of applying Labor Law §220 (citing cases)".

Using these precedents as a guide, it is the opinion of this Department that any projects for the alteration or improvement of the stadium undertaken by the club or the County would satisfy the second prong of the test for determining whether Article 8 applies. The work is being performed on a publicly-owned facility located on public land. Use of the stadium is governed by the terms of a lease with a public entity and improvements to or modifications involving the land or the stadium is subject to the prior written approval of the County and a written agreement between the parties regarding the manner in which the alterations and improvements shall be accomplished. Since ownership of the land and stadium remain public, all improvements made to the property will ultimately inure to the public benefit. Consequently, the project is clearly for a public purpose since it confers both a benefit to the public entity owners, and to the public by enhancing the value and usefulness of public lands and facilities.

Accordingly, the improvement or alteration projects described in your letter are within Article 8 of the Labor Law which requires the payment of prevailing wages and supplements in connection to any work performed in connection with it.

This opinion is based exclusively on the facts and circumstances described in your letters, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter 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,
Maria L. Colavito, Counsel

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