

MINUTES

Bureau of Labor and Industries
PREVAILING WAGE ADVISORY COMMITTEE
Wednesday, May 4, 2005

Labor and Industries Building, Room 260
350 Winter St. NE
Salem, OR

Committee Chair Dan Gardner called the meeting to order at 2:00 p.m.

Members Present

Jessica Adamson
Daniel P. Boldt
Ed Glad
Norm Malbin
Jay Minor
Shawn Miller
Dan O'Brien
Bob Shiprack
Dick Springer
Karen Williams

Members Absent

Mark Holliday
John Mohlis

Staff Present

Dan Gardner
Annette Talbott
Christie Hammond
Lois Banahene
Mike Kern
Marc Zolton
Susan Drew

Joe McNaught, Dept. of Justice

Minutes of the Previous Meeting

The minutes of the February 17, 2005 meeting of the Prevailing Wage Advisory Committee were reviewed and approved by the committee without comment.

Staff Reports

Commissioner Dan Gardner announced that he was assuming the role of committee chair and that Norm Malbin would act as vice-chair of the committee effectively immediately.

Staff presented a summary of PWR enforcement activities and statistics, including the current list of ineligible, and information relating to currently open cases. A summary of the educational seminars offered for contractors and contracting agencies by BOLI was also presented.

Proposed Policy on Mixed-Use Projects

Commissioner Gardner provided the committee with an overview of "mixed-used" projects, citing the Salem Convention Center/Hotel, Hillsboro Civic Center, and Portland Civic Redevelopment projects as examples.

In response to the increasing number of mixed-use and public/private development projects, Commissioner Gardner said that he had sought the opinion of the Department of Justice regarding his authority to issue multiple wage determinations on a single project, (i.e., “residential” and “commercial” rates), and concluded that he indeed had such authority.

Commissioner Gardner stated that he believed that the issuance of separate wage determinations is appropriate under certain circumstances, and further said he believed that there were some mixed-use projects in which the prevailing wage rate law might only apply to certain parts of the project.

Commissioner Gardner presented a summary of US Department of Labor guidelines pertaining to the issuance of multiple rate determinations on mixed-use projects and suggested that the guidelines might be appropriate for BOLI to apply in determining when the issuance of multiple wage determinations is appropriate.

Norm Malbin expressed concern about using federally-established residential rates on projects subject to the state PWR law, where the rates currently being used are outdated. He pointed out that in some cases, federally published rates are less than the current state minimum wage rate.

Dick Springer asked whether or not BOLI had the authority to conduct its own residential rate survey.

Jessica Adamson stated that having BOLI conduct a residential rate survey wouldn't be cost effective given the proportionally few number of residential projects subject to the PWR law, and said that she believed the agency's resources would be better spent elsewhere. Ms. Adamson suggested that contractors need timely clarification from BOLI regarding whether or not a project is subject to the PWR law, and said she believed that the provision of this information by the agency would be a better use of agency resources.

Shawn Miller asked whether the adoption of the proposed guidelines for issuing multiple rate determinations would be an agency policy or rule.

Commissioner Gardner responded that he believed it would make sense to first adopt the guidelines as an agency policy before adopting them by rule.

Jay Minor moved that BOLI first adopt the federal guidelines as a policy and consider adopting them by rule at a later date. The motion was unanimously accepted by the committee.

Task Force on Public-Private Partnerships

Commissioner Gardner told the committee that he planned to appoint a task force to collaborate and make recommendations to him about how the PWR law should be applied to increasingly complex developments financed through public-private partnerships. Commissioner Gardner indicated that appointments to the task force would include developers, lenders, affordable

housing advocates, representatives of minority-owned and emerging small businesses, public officials, and representatives of the construction industry and building trades.

Commissioner Gardner requested that the advisory committee make recommendations for appointments to the task force.

In response to a question asked by Ed Glad about proposed timelines for the task force, Commissioner Gardner indicated that after selecting a task force facilitator and appointing members to the task force, he would like the task force to begin meeting immediately following the legislative session and complete its work within six to twelve months.

Karen Williams said that she was concerned about how the PWR law would be applied to public-private partnership projects in the meantime; before the task force concluded its work. Ms. Williams reported that there was a “huge furor” in the housing community, and some financial lenders were balking at funding projects because of uncertainties relating to the bureau’s application of the PWR law. Ms. Williams indicated that she was concerned about the potential economic impact created by the perception by some that BOLI was expanding coverage to include projects that it hadn’t previously. She also expressed concern that financial institutions might put off investing in these types of projects until there was some type of resolution, negatively affecting community development. Ms. Williams stated that a major bank outside the state had put a hold on financing a project until this issue was resolved. At the request of Bob Shprack, Ms. Williams agreed to provide the name of the bank if the institution was agreeable.

Ms. Williams also expressed concern that the commissioner’s proposal for a task force set BOLI up as the decision maker/“final arbiter” of the issues, and she suggested that other state agencies should be involved.

Commissioner Gardner responded that perceptions that the agency was attempting to “expand” the law were not valid, and said that there had been neither a shift nor change in policy. Rather, Commissioner Gardner said, the agency was attempting to apply the 1959 law (which was enacted before the advent of mixed use/public-private partnerships) to current conditions in the construction industry. He also pointed out that BOLI is a complaint-driven agency, and does not proactively seek out or monitor projects for compliance with the law. Commissioner Gardner indicated that he was available to meet with any concerned groups to address their concerns.

Jessica Adamson encouraged the commissioner to make sure that all interests have a voice in the process, and further recommended that if indeed banks were backing out of financing construction projects, the commissioner meet with these people to discuss their issues and concerns. Ms. Adamson also said that she believes there is “widespread confusion” about the law in this area.

Shawn Miller said that there had been discussions about whether application of the law to public-private partnerships was a legislative or BOLI policy issue, and indicated that some legislators may be interested in participating in the discussion.

Commissioner Gardner responded that he believed that involving all stakeholders was critical, and it was his intent to do so.

Clarification of Proposed Draft Rule Pertaining to Definition of “Public Funds”

Commissioner Gardner reminded the advisory committee that it had approved a proposed rule revision in 2004 amending the definition of “public funds” to include pass-through revenue bond financing.

By way of background, Commissioner Gardner explained that in order for a project to be covered under the PWR law, it must meet a “two-prong” test: First, it must meet the definition of a “public work” under the law; and second, there must be direct or indirect public funds involved in the project.

Commissioner Gardner said that the agency had been presented with a project last year (reconstruction of the OSU “College Inn”) in which revenue bonds were issued to finance the project. After the Department of Justice reviewed this method of financing, it was determined that although such financing could be defined as “public funds” under the law (ORS 279.357 (c)(A)), the agency’s rules defining “public funds” as currently written did not include this form of financing.

Although BOLI determined that the OSU project was exempt from the PWR law under the current definition of “public funds,” the agency later proposed amending the definition to include pass-through revenue bonds as “public funds” in the future

Assistant Attorney General Joe McNaught summarized the agency’s statutory authority for defining and amending the rule, and explained that he had drafted the proposed rule amendment addressing this form of financing. AAG McNaught also indicated that he attempted to “clean up” other non-substantive language in the rule at the same time, which ultimately led to confusion and misunderstanding by some who interpreted the proposed revisions to be more substantive and far-reaching than they were intended.

Commissioner Gardner explained that this draft rule proposal led to an inaccurate perception by some that the purpose of the proposed rule revision was to expand coverage beyond the issue of revenue bonds, and for this reason, the rule was subsequently put on hold until these issues could be resolved. Commissioner Gardner said that in most cases, when this was explained, people concerned with the proposed rule understood that the rule revision was intended to only address the issue of pass-through revenue bonds.

Commissioner Gardner indicated that it was the agency’s intent to redraft the proposed rule revision for public comment to address pass-through revenue bonds exclusively.

Karen Williams said she had concerns about the language in the rule and significant impacts the rule defining “public funds” could have on affordable housing. Commissioner Gardner

acknowledged her concerns, but said that projects must first be determined to qualify as “public works” before the “public funds” rule would apply.

Deputy Commissioner Annette Talbot pointed out that there was a difference between contracts for *financing*, where the terms of the contract are meant to ensure accountability in connection with the financing, and *construction* contracts.

Ed Glad said that he believed that craftsmen employed on publicly funded projects should not be subject to substandard wages.

Jessica Adamson commented that projects and financing had become increasingly complicated through the years and said there is a need for clarity on the applicable regulations. Ms. Adamson also said that she believed that no one was interesting in “undoing” the PWR law, but there was a need to balance the needs of affordable housing and the law.

Commissioner Gardner concluded the discussion by saying that he had two goals; Supporting affordable housing as well as fair wages.

Bob Shiprack suggested that contracting agencies and developers request BOLI to review contemplated projects and issue “predeterminations.”

Commissioner Gardner agreed that this would be helpful, and indicated that he has offered BOLI as a resource to review proposed projects in advance to determine whether the PWR law applies.

NEXT MEETING DATE / AGENDA

No date was scheduled for the next meeting.

The meeting adjourned at approximately 3:30 p.m.