

PREVAILING WAGE ADVISORY COMMITTEE

Meeting Minutes

Wednesday, September 17, 2008

Portland State Office Building
Room 1D
800 NE Oregon Street
Portland, OR

Members Present

Daniel Bonham
Mark Holliday
Norm Malbin
Greg Miller
Shawn Miller
John Mohlis
Carl Redman
Bob Shiprack

Members Absent

Jessica Adamson
Patrick O'Brien
Pete Savage

Staff Present

Christie Hammond
Mike Kern
Gerhard Taeubel
Debbie Sluyter
Susan Wooley
Hannah Wood
Kate Newhall

Co-chair Bob Shiprack called the meeting to order at 1:30 PM.

Introduction of New Member

Carl Redman, Vice-President of Bear Electric, was introduced as the newly-appointed member of the advisory committee, replacing ex-committee member John Killin.

Minutes of Last Meeting of May 21, 2008

Norman Malbin requested that the minutes of the previous meeting of May 21, 2008 be amended to reflect that a committee vote in connection with recommendations relating to the affordable housing exemption under the PWR law was not a unanimous committee vote, but rather, a unanimous vote of the committee members *present* at the meeting. The committee members approved the draft minutes of the May 21, 2008 meeting with the amendment requested by Norm Malbin.

Quarterly Statistical Reports

Steve Simms, Administrator of BOLI's Apprenticeship and Training Division, reported on the status of the diversity project being conducted by the agency as required by ORS 279C.807. This statute requires BOLI to develop and adopt a plan to increase diversity statewide among workers employed on projects subject to the state's prevailing wage rate laws. The first report regarding this project is due to the Legislature by January 2009.

Mr. Simms advised the committee that BOLI was contracting with a consultant to research available information and conduct interviews of interested parties, including contractors, developers and members of the advisory committee. Mr. Simms indicated that a draft report was expected from the consultant in December.

Ms. Hammond reviewed several staff reports, including a summary of the PWR unit's enforcement and educational activities and its quarterly performance measures.

Ms. Hammond reminded the committee members that today was the filing deadline for the annual Construction Industry Occupational Wage Survey. Denise Voll from the Oregon Employment Department reported that to date, the department had received responses from approximately half of the surveyed population and that a reminder postcard would be mailed to those who have yet to respond.

Ms. Voll said that in addition to the regular annual survey, the Employment Department is conducting a special survey for BOLI, related to the classification of work involved in HVAC testing and balancing (TAB). The data from this survey is expected to be available mid-October.

Proposed Legislative Concepts for 2009

Kate Newhall was introduced as BOLI's legislative and communications director. Ms. Newhall indicated she was in attendance to assist in answering questions relating to the agency's proposed legislative concepts. Ms. Hammond summarized six different legislative concepts (LCs) she said the agency was considering:

LC 821 would extend the deadline for filing a notice of claim against a contractor's bond from 120 days to 180 days; thereby allowing BOLI to file a more accurate claim.

There was some confusion expressed by committee members regarding the current date which triggers the deadline for filing a notice of claim (NOC) against a contractor's bond. It was explained that currently, the NOC must be filed no later than 120 days from the last day each individual worker performed work on the project. Because the number of days varies by worker, in order not to lose the ability to pursue the claim of any individual, BOLI must file a NOC based on the earliest date any individual worker employed by the contractor last performed work on the project. This often requires BOLI to estimate wages owed to other workers in order to preserve their claims against the bond. BOLI's initial proposal was to base the NOC on the last day of work any individual performed work on the project, but the general consensus of this committee was that this would provide an excessive period of time, particularly for subcontractors who had been on the project months or even years earlier. It was previously generally agreed by the committee that it was more appropriate to just extend the number of days per worker for filing a NOC.

Other options were discussed such as using the completion date of a project on the certificate of occupancy or substantial completion date, or tying the deadline to the last date a contractor employed workers on a project, rather than to individual workers. Another possibility suggested was using the later of the substantial completion date of the project or the last day a worker

performed work on the project. The committee agreed that the date of substantial completion or the occupancy date would be appropriate and should be used.

Mr. Shiprack questioned how the NOC requirement would apply to certain projects in which there are typically no certificates of substantial completion being issued. He suggested forming a group of interested parties to discuss this issue further and directed anyone with an interest in this particular issue to contact Ms. Hammond or Ms. Newhall.

Ms. Newhall noted that any changes to the LC draft would have to be made through a bill amendment. Shawn Miller said he believed that the committee could work something out on the LC draft relating to the NOC requirement.

LC 822 would establish a PWR calculator/formula to automatically increase or decrease the amount of PWR fees required to be paid by public agencies on public works contracts. This concept would eliminate the need to ask the legislature every session for either an increase or decrease in the minimum or maximum fees assessed.

Shawn Miller asked for information relating to the bureau's budget projections for the next session and whether or not the current fees were set close to where the agency needed them to be.

Greg Miller stated that he thought the PWR Unit had a biennium worth of revenue in reserve. Ms. Hammond responded that the projection, based on current fee collections, shows that the fees would only barely fund the program through the next biennium and that they would not be sufficient to fund the program for the 2011-2013 biennium.

Shawn Miller asked if the concept would allow for fees to be adjusted during the middle of a biennium to respond to anticipated shortfalls. Ms. Newhall responded that it would not, and said the bureau was aware that public agencies need to know the fee amount in advance so that they can set their budgets accordingly. Ms. Newhall said she believed the key is to balance giving the agencies enough notice to set their budgets and to come close enough to knowing what the ending PWR fund balance will be in order to make necessary adjustments. This might be a full biennium ahead of time.

LC 823 would provide the authority to the Construction Contractors Board (CCB) to revoke, suspend, or refuse to issue a CCB license if there is an unpaid judgment against the contractor by the state for civil penalties or wages.

Discussion ensued as to whether this should be limited to a judgment for unpaid wages from the state, and why it shouldn't apply to any judgment, including a private judgment for unpaid wages owed by a contractor. Ms. Hammond pointed out that BOLI can accept private judgments for unpaid wages obtained privately for collection; but cannot pursue collection of associated court costs or attorney fees even when they are part of the judgment. Norman Malbin suggested that the legislation incorporate language to this effect. Daniel Bonham said he thought it should be made clear that if a liable individual reincorporates, the revocation of or refusal to issue a CCB license would extend to the new business.

LC 824 is meant to address housekeeping items brought about by legislation enacted last session. The first fix would clarify that wages on PWR projects must be paid in a timely manner. This piece is necessary because the current PWR law does not require payment of PWR wages in any particular timeframe. The second fix would delete an out-dated reference to required contract language for public works projects. The third fix would align the date for the payment of the PWR fee by the public agency to match the due date for the notice of award of a public works contract.

LC 826 would change the certified payroll reporting requirement from “actual wages paid” in a given week to “gross wages earned” in that week. Employers are currently required to report/certify that they paid PWR wages on a weekly basis even when they may actually be paying employees pursuant to a different pay schedule. This concept would amend the requirement to more accurately reflect what was earned rather than paid during the reporting period.

LC 827 would add the intentional falsification of certified statements (payroll records) as grounds for placing a contractor on the list of contractors ineligible to receive public works contracts.

Members of the committee discussed what the burden of proof would be in a case involving the falsification of certified payroll information and why the term “intent” was even included, considering the difficulty in proving intent. Ms. Hammond provided possible examples of what might constitute “intent,” such as a situation in which a bookkeeper was instructed to intentionally falsify certified payroll information or where, during the course of an investigation, a contractor was unable to satisfactorily explain why amounts on pay stub records do not match the contractor’s certified payroll reports.

Non-BOLI LC: Committee member John Mohlis stated that a legislative concept would likely be introduced by State Representative Paul Holvey that would cover the fabrication of non-standard items under the prevailing wage rate law. He asked Ms. Newhall what the timelines were for introducing new legislation. She responded that BOLI’s deadline for submitting legislation had already passed, but that a legislator could be drafting bills all the way through the session.

Mr. Malbin asked if this proposed legislation was similar to the law in Washington State and received an affirmative response.

Shawn Miller said that a similar bill was introduced last session and described how broadly that bill was written in relation to non-standard items. Mr. Miller stated that in Washington, a detailed list consisting of many pages of non-standard items is utilized, which poses some problems for contractors in understanding the list or knowing what is on the list.

Mr. Shiprack suggested that another meeting of the advisory committee be held in November to discuss legislative concepts, and said that he believed that Jessica Adamson would like to present AGC’s legislative agenda at the next meeting.

Ms. Newhall recommended that the committee tackle each legislative concept separately to allow the group to systematically move through the concepts. She also explained that the bureau has a window that allows for ten days to review and make changes to the drafts.

Proposal to Revise Definition of “Residential Construction Project” in Administrative Rules

Ms. Hammond reminded the committee that at its last meeting, a joint proposal was presented from the Building Trades Council, AGC, and Community Development Network to clarify and amend the definition of “residential construction” as used in the statutory exemption for affordable housing in the PWR law, particularly with regard to “mixed-use” projects with both residential and commercial space. The committee members in attendance at the meeting requested that BOLI review the proposal and determine whether the recommended revisions could be done by rule or would require legislation.

Ms. Hammond advised the committee that as indicated in a memo dated June 6, 2008 to the committee members from Commissioner Avakian, BOLI had determined that it did not have the statutory authority to amend its rules to adopt the provisions of the proposal relating to the affordable housing exemption, but that it would be possible to amend the agency’s rule defining “residential construction project” not in the context of the statutory affordable housing exemption. Ms. Hammond further reported that since the committee’s last meeting, she had met with committee members Bob Shiprack and Jessica Adamson to discuss possible amendments to the rule defining “residential construction project,” and that Commissioner Avakian was interested in hearing whether the committee supported amending the rule.

Bob Shiprack said that there were some outstanding issues to be resolved before any further action was taken relating to the rule defining residential construction, and that the City of Portland was in the process of redefining its definition of residential construction. Mr. Shiprack said that he would like to see BOLI’s rules conform to whatever the city has in place in this regard and stated that he does not agree with BOLI’s interpretation of the statute relating to mixed-use projects.

Some committee and audience members voiced their concerns: Don Kool from UA Steamfitters and Pipefitters said he believed that “the feds have it right,” defining residential construction as four stories or under, and indicated that he would be concerned with efforts to redefine it. Mr. Kool said that there are already lower wage rates that apply on residential projects under the PWR law, and expressed concern that the affordable housing community was not satisfied with using these rates, but wanted an exemption under the law. Mr. Kool said that he was very concerned about increasing the number of floors currently allowed in the definition of residential construction and raising the threshold under the PWR law. Mr. Kool stated his belief that if these projects are subsidized with public money, the PWR law should apply.

Bob Shiprack said he didn’t want to debate the issue and the fact was that the legislation was meant to recognize definitions in city codes.

Michael Anderson (from the Community Development Network) stated that he was not interested in redefining residential construction other than as it applies to projects with affordable housing, and said that he was primarily interested in a narrow exemption that could help those rural projects where agencies were not receiving bids on projects because the jobs were so small.

Kate Newhall, BOLI's legislative director, explained that BOLI is limited in what can be changed by rule, and that redefining the definition of "residential construction" as it specifically applies to affordable housing is something that will require a statutory change. She said that the commissioner would like to hear from the committee if there is consensus about revising the general definition of residential construction in the rules, because at the last advisory committee meeting it appeared that there was support to change the definition of residential construction to include five stories of residential space over one floor of commercial space.

Mr. Malbin asked whether the issue was about the definition of residential construction only as it relates to the number of floors of affordable housing or the definition of floors for all residential construction under Oregon's PWR law.

Bob Shiprack responded that he thought both were at issue.

Ms. Hammond explained that there is a definition for residential construction in the administrative rules that has nothing to do with affordable housing. If a project meets the definition of residential construction as it is currently defined in BOLI's rules, that project is eligible to use the federal residential rates rather than the commercial rates. She told the committee that when the legislation for the affordable housing exemption was crafted, it incorporated the language in the rule defining residential construction generally within the definition of affordable housing, and that is why BOLI is unable to change the statutory definition of affordable housing by rule.

Mr. Malbin said that he objected to amending the current rule defining residential construction. Mark Holliday also voiced his opinion that there was not support for revising the definition of residential construction.

Mr. Shiprack suggested that the matter be deferred until the City of Portland took action and commented that "mixed-used" projects were a different issue.

Daniel Bonham said that he believed the committee's prior agreement to consider revisions to the rules had to do with mixed-use developments only.

Mr. Shiprack said the next step would be to meet with BOLI staff regarding areas of disagreement and bring the issue back to the committee.

Carl Redman said that he thought the issue of occupancy timing standards needed to be addressed when reviewing this issue.

Use of Forklifts by Crafts Other than Operating Engineers

Ms. Hammond advised the committee that there was an issue regarding the appropriate classification of workers operating forklifts by crafts other than operating engineers. This matter came to light during the course of a PWR investigation, in which a contractor's workers, who were moving iron for an ironworker subcontractor, were being paid as laborers and power equipment operators. Ms. Hammond said that it was the agency's understanding that under these

circumstances, ironworker rates should be paid to the workers moving material for the ironworker contractor.

Based on conversations with several trades, Ms. Hammond reported, it appears that there is a prevailing practice that crafts use forklifts to move their own material on the site of work, if such work is on an intermittent basis and incidental to the work they are performing. When doing so, they pay the rate of pay associated with the classification of the craft performing the work. Ms. Hammond explained that committee member Mark Holliday, representing the Operating Engineers, had contacted BOLI to voice his concerns regarding the agency's application of the law for such incidental use of a forklift.

Norm Malbin noted that it had long been a BOLI policy not to attempt to resolve jurisdictional disputes between crafts. He also said that a primary consideration in determining the correct classification for the performance of certain duties is an analysis of whether the workers have the knowledge, skills, and abilities to perform the duties in question. Mr. Malbin pointed out that electricians used forklifts, as do a number of other trades. He said if a contractor doesn't have a worker to operate a forklift, one would be hired and should be paid the applicable published rate for forklift operation.

Mr. Holliday acknowledged that it was customary for a specialty contractor signatory to a single craft to operate a piece of equipment or to perform another craft's work and to continue to be paid the rate of their craft because that rate is frequently higher than the prevailing wage rate of the other craft. He stated that BOLI should only be concerned with making sure that the predetermined rate for a specific craft is being paid.

After further discussion about this topic, the following points were made by representatives of certain trades present at the meeting:

- Tom Rios, a business representative for the Ironworkers Local 29, stated that the Ironworkers have never hired an operator to come on site to help in the unloading of structural steel, or to move rebar. They do the work themselves.
- Gary Moore, representing the Laborers Local 296, stated that when a laborer is working as a hod carrier, they always pay the hod carrier rate for moving materials in support of both mason and plasterer contractors. He also explained that very seldom do you see an operator on a forklift; most of the time the use of a forklift to move materials is performed by laborers or by the specific craft.
- Matt Bromley, a mason contractor, stated that his company has always used a hod carrier classification in situations where the masons have utilized a forklift to move their supplies.
- Kevin Jensen, representing the Ironworkers Local 29, stated that the duty of moving rebar is listed under the "Ironworker" classification in the Definitions of Covered Occupations publication and that moving such material should be classified as "Ironworker" regardless of whether the contractor is signatory to the Ironworkers' union.

- Jack (last name unknown) stated that when he worked for the Fair Contracting Foundation, they would classify the incidental use of a forklift according to the trade being assisted.
- Scott Everist, a mason contractor, stated that hod carriers move and supply the bricklayers working for their company and that it would not be feasible for their company to add another classification to a job just so that they can have someone sitting on the forklift for two hours a day.

It was noted that the work scopes of many crafts include the movement of the materials of the craft.

John Mohlis said that he assumed that the contractor in question was an open shop contractor and had they been signatory to the Ironworkers, this would not have been an issue. He suggested that the traditional scope of work for the craft should be the determining factor per the classifications provided in the BOLI book.

Ms. Hammond asked if there was a consensus on the advisory committee's part about appropriate classification of incidental use of a forklift by crafts other than operating engineers to move materials.

Mr. Malbin stated he believed that further analysis was needed to determine whether the determinative issue should be *what was being moved* or *what was being operated* in moving the material.

Daniel Bonham asked Mr. Holliday what he wanted to see happen concerning this issue. Mr. Holliday responded that operating engineers operate power driven equipment and that a forklift is power driven. He explained there was an agreement between the Laborers and Power Equipment Operators that laborers can operate forklifts, and that this jurisdictional assignment had been in place for many years, but otherwise, workers operating forklifts should be paid the applicable power equipment operator rate.

Mr. Shiprack suggested that the issue of how to classify the use of a forklift should be reviewed on a case by case basis; after looking at the facts of each case.

Next Meeting/Meeting Schedule

The next PWR Advisory Committee meeting was scheduled for November 19, 2008.

The meeting adjourned at approximately 3:30 PM.