STATE OF CALIFORNIA GAVIN NEWSOM, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
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March 7, 2024

Edward Kunnes, Hearing Officer
Office of the Director – Legal Unit
Department of Industrial Relations
1515 Clay Street, Suite 701
Oakland, California 94612

Re: Public Works Case No. 2023-001
Kern Medical Center Solar Project
Kern County Hospital Authority

Dear Mr. Kunnes:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Labor Code section 1773.5[1] and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Kern Medical Center Solar Project for the Kern County Hospital Authority is a public work subject to prevailing wage requirements.

Facts

A. Kern County Hospital Authority.

The Kern County Hospital Authority (Hospital Authority) was established by Assembly Bill No. 2546 (2014), which added the Kern County Hospital Authority Act to the Health and Safety Code and also added a number of other provisions to the Government Code. (See Stats. 2014, ch. 613.) The Hospital Authority "shall be a public agency that is a local unit of government separate and apart from the county and any other public entity for all purposes." (Health & Saf. Code, § 101853, subd. (a).) Its purpose is to operate the Kern Medical Center and may acquire or improve real property to carry out its purpose. (Health & Saf. Code, §§ 101853, 101855, subd. (a)(5).)

Kern Medical Center describes the Hospital Authority using similar language. According to Kern Medical Center's website: "A Hospital Authority is a public entity whose

[1] Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

sole purpose is to operate a hospital, clinics and provide health care services to the entire community. It is run by an independent Board of Governors and continues to be a designated public hospital."

B. The Kern Medical Center Solar Project.

The following facts about the Kern Medical Center Solar Project are taken almost exclusively from a submission by the Division of Labor Standards Enforcement (DLSE)[2] in response to a request from the Department. The other interested parties, which include the Hospital Authority, SCP 35 LLC, and Alpha Energy Management, Inc. (AEM) failed to respond to the Department's request. AEM finally submitted a response only after it received DLSE's submission. As explained recently in another coverage determination, the Department's regulations set forth the responsibilities of interested parties to a coverage determination and represent "a quasi-legislative exercise of authority provided by statute." (PW 2022-009, *Mountain View Estates Mobile Home Park Expansion – Housing Authority of the County of Riverside* (Aug. 13, 2023).) Awarding bodies have a duty to forward to the Director within 15 days "any documents, arguments, or authorities it wishes to have considered in the coverage determination process." (Cal. Code Regs., tit. 8, § 16001, subd. (a)(2).) All parties to a coverage determination have a "continuing duty" to provide the Director "with relevant documents in their possession or control, until a determination is made." (Cal. Code Regs., tit. 8, § 16001, subd. (a)(3).) "Where any party or parties' agent has a document in their possession, but refuses to release a copy, the Department shall consider that the documents, if released, would contain information adverse to the withholding party's position and may close the record and render a decision on the basis of that inference and the information received." (*Ibid.*)

On February 8, 2019, the Hospital Authority entered into a $245,700 contract with Western Pacific Roofing Corp. to recoat the existing roofing system at 1111 Columbus Street in Bakersfield. The contract included this language: "**Prevailing Wage:** YES"

On February 20, 2019, the Hospital Authority entered into a Solar Power Purchase Agreement (PPA) with SCP 35 LLC in an amount not to exceed $4.8 million over 25 years. The $4.8 million was for the "[d]esign, engineering, permitting, installation, monitoring, rebate application and paperwork processing of the System" located at 1111 Columbus Street. In addition, "Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, all of the electric energy generated by the System during the Initial Term and any Additional Term . . . ." The "System" refers to the solar photovoltaic system that is the focus of the PPA. In conjunction with the PPA, the Hospital Authority also granted SCP 35 LLC an easement to allow the construction of the System and its related parts, such as the necessary infrastructure to connect the Hospital Authority's electric system with the utility's electric distribution system.

[2] As authorized by section 1741, DLSE conducted an investigation and issued a civil wage and penalty assessment against the contractors. After coverage of the work under the prevailing wage law was disputed in a section 1742 proceeding to review the assessment, the matter was referred for a coverage determination.

On March 20, 2019, the Hospital Authority contracted with AEM to provide roof repairs as described in its February 8, 2019, roofing contract with Western Pacific Roofing Corporation: to procure, manage, and fund the roofing Contractor, Western Pacific Roofing Corporation; to include the roofing in the project funding of the solar project referred to as the System; and to begin the roofing as the solar project progresses.

On March 26, 2019, AEM entered into an Engineering, Procurement, and Construction Service Agreement with MPE Solar Carports, Inc. to perform all work to engineer, design, construct and install the project, a 617.10 kWp (DC)/518.4 kWp (AC) rooftop and carport array at 1111 Columbus Street, which will be interconnected with the local utility and all the necessary ancillary systems. An exhibit to the agreement describes the project as a "prevailing wage project."

Discussion

All workers employed on public works projects must be paid at least the applicable prevailing wage rates. (§ 1771.) Section 1720, subdivision (a)(1) (hereafter section 1720(a)(1)) defines "public works" to mean: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds . . . ." "There are three basic elements to a 'public work' under section 1720(a)(1): (1) 'construction, alteration, demolition, installation, or repair work'; (2) that is done under contract; and (3) is paid for in whole or in part out of public funds." (*Busker v. Wabtec Corporation* (2021) 11 Cal.5th 1147, 1157 (*Busker*).)

Separately, section 1720.6 provides that "public works" also includes any construction, alteration, demolition, installation, or repair work done under private contract when the following conditions exist:

> (a) The work is performed in connection with the construction or maintenance of renewable energy generating capacity or energy efficiency improvements.
>
> (b) The work is performed on the property of the state or a political subdivision of the state.
>
> (c) Either of the following conditions exists:
>
> (1) More than 50 percent of the energy generated is purchased or will be purchased by the state or a political subdivision of the state.
>
> (2) The energy efficiency improvements are primarily intended to reduce energy costs that would otherwise be incurred by the state or a political subdivision of the state.

A. The Contentions of the Parties.

AEM contends that the Hospital Authority "is not a political subdivision for purposes of the Prevailing Wage Law," and so "no prevailing wage was required to be

paid in connection with the renewable-energy project at issue." AEM does not appear to dispute the presence of public funds or that all the other elements of section 1720.6 of the Labor Code are met.

Labor Code section 1721 provides that "'political subdivision' includes any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts."

AEM appears to argue that section 1721, which defines "political subdivision" for the purposes of the prevailing wage law, does not include "hospital authority" in its non-exhaustive list. And because "political subdivision" as used in section 1721 does not include "hospital authority," the Hospital Authority is not a political subdivision – a key element for the application of the prevailing wage law to this or any other project.

DLSE focuses on the fact that section 1721 lists "district" and "public agency of the state" as political subdivisions and makes various arguments tied to that fact. First, DLSE contends that several provisions in the Government Code make the Hospital Authority both a "district" and a "public agency" of the state. Next, DLSE argues that the Hospital Authority's enabling act, the Kern County Hospital Authority Act (codified at Health & Saf. Code, § 101852, et seq.) itself clearly shows that the Hospital Authority is a "political subdivision." In fact, the Legislature expressly found and declared: "This chapter is necessary to allow the formation of a new political subdivision, a public hospital authority, for the purposes described above." (Health & Saf. Code, § 101852, subd. (b)(5).)

In response, AEM states the use of "political subdivision" in the Hospital Authority's enabling act is different than in section 1721. AEM cites a number of statutes that use and define "political subdivision" in different ways. AEM also notes that the Hospital Authority's enabling act never defines "political subdivision." AEM also cites a pair of Court of Appeal cases which essentially held that "political subdivision" as a term could mean different things when used in different contexts. (See *Haytasingh v. City of San Diego* (2021) 66 Cal.App.5th 429 (*Haytasingh*); *Gomez v. Regents of Univ. of California* (2021) 63 Cal.App.5th 386 (*Gomez*).) Separately, AEM relies on *Stone v. Alameda Health System* (2023) 88 Cal.App.5th 84 (*Stone*), which briefly analyzed the meaning of "political subdivision" in Wage Order No. 5 for the purpose of determining whether there were "positive indicia of a legislative intent" in the statute to exempt governmental agencies.

B. The Hospital Authority is a Political Subdivision for Purposes of the Prevailing Wage Law.

The parties do not dispute, and are therefore assumed to concede, that the other requirements of section 1720(a)(1) and section 1720.6 are met. The sole issue in this case is whether the Hospital Authority is a political subdivision for the purposes of the prevailing wage law.

AEM's arguments that political subdivision means different things when used in different contexts are not particularly helpful. Nor are the cases AEM cites.

In *Haytasingh,* the court emphasized the difference between county and city, and reinforced the principle that a county is a political subdivision, while a city, unless expressly mentioned, generally is not. (*Haytasingh, supra,* 66 Cal.App.5th at pp. 459-461.) *Haytasingh* had nothing to do with the prevailing wage law or the Hospital Authority. Here, the Hospital Authority was not established by a city – it was established by a county, which, under *Haytasingh*, is a political subdivision.

In both *Gomez* and *Stone*, the Courts of Appeal were interpreting the language of the Industrial Welfare Commission's Wage Orders, which are not at issue here. In *Gomez*, the court held that the University of California was not a "political subdivision" as the term was used in Wage Order No. 4, largely owing to its special constitutional status. (*Gomez, supra*, 63 Cal.App.5th at pp. 398-400.) The Hospital Authority has no special constitutional status. It is a creature of state statute. In *Stone*, the court engaged in the second part of a three-part inquiry to determine whether Wage Order No. 5 was applicable to the Alameda Health System Hospital Authority. (*Stone, supra,* 88 Cal.App.5th at pp. 93-94.) The *Stone* court stated that Wage Order No. 5's express exemptions were not "positive indicia of a legislative intent" to exempt Alameda Health System from liability under the Wage Order. (*Id.* at p. 94.) The *Stone* court noted that the plaintiff did not work *directly* for the county, but for the Alameda Health System, which was established by the county under authorization from the state. (*Ibid.*) Again, while the Alameda Health System is a similar type of hospital authority, *Stone* dealt with a Wage Order that is not at issue here, and which has nothing to do with the prevailing wage law.

DLSE's cited authority suggests that the Legislature believed the Hospital Authority would be a political subdivision, even if not a political subdivision expressly for the purposes of the prevailing wage law. (Health & Saf. Code, § 101852, subd. (b)(5).)

Neither party, however, delved into the purpose, structure, and language of the prevailing wage law. When interpreting statutory language, the California Supreme Court has instructed that the "fundamental task is to ascertain the Legislature's intent and effectuate the law's purpose, giving the statutory language its plain and commonsense meaning." (*Busker, supra*, 11 Cal.5th at p. 1157.) That task requires an examination of the language in the "context of the entire statutory framework to discern its scope and purpose and to harmonize the various parts of the enactment." (*Ibid.*) The competing interpretations from the parties suggest that the language "permits more than one reasonable interpretation," in which case, the "wider historical circumstances of a law's enactment may also assist in ascertaining legislative intent, supplying context for otherwise ambiguous language." (*Id.* at pp. 1157-1158.)

Section 1721's definitional provision states that "political subdivision" *includes* the enumerated list of entities. As one of AEM's cited cases stated, "[t]he use of the word 'including' makes clear that the [list] is not exhaustive of what may constitute a political subdivision." (*Gomez, supra,* 63 Cal.App.5th at p. 398.) The use of "includes" in section 1721 is in contrast with the use elsewhere in the prevailing wage law of the term "means," which is "a term accepted as one of limitation, not enlargement." (*State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 309.) "[W]here the word 'include' is used to refer to specified items, it may be expanded to cover other items. [Citation.]" (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th

1209, 1227.) But whether section 1721's list may be expanded to cover hospital authorities is a question of legislative intent. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717.)

The legislative history of section 1721 is sparse. First codified when the Labor Code itself was codified in 1937, section 1721's list originally included "townships" and excluded "public housing authorities." Since then, the list has gone through only two amendments: Once to add public housing authorities (Stats. 1953, ch. 1283, § 1), and the second time to remove townships. (Stats. 1985, ch. 239, §1.) Section 1721's list covers local entities like a city and a county. It also covers any "district, public housing authority, or public agency of the state," but it also includes "assessment or improvement districts," even though that inclusion seems duplicative, as "district" is already on the list. By employing such a varied, and at times, duplicative list, the Legislature appears to have attempted to cover as many entities as it can while leaving open the possibility other entities not listed would also be covered. However, as the legislative history does not yield a clear answer, the Department looks to the overall purpose of the prevailing wage law and whether the Hospital Authority is similar to the types of entities listed in section 1721. (See *People v. Aguirre* (2021) 64 Cal.App.5th 652, 662, n. 11.)

"The overarching purpose of the prevailing wage law is to 'protect and benefit employees on public works projects.'" (*Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 166 (*Kaanaana*), quoting *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) "It protects those who work under contract for covered districts from substandard wages, benefits the public through the superior efficiency of well-compensated workers, and results in higher wages to make up for lack of job security and benefits that normally attach to public employment." (*Kaanaana, supra*, 11 Cal.5th at p. 172.) The prevailing wage law is construed liberally to fulfill the law's various purposes. (*Id.* at p. 166.)

Regardless of whether contract workers on a publicly-funded project perform work for a hospital district or for a hospital authority, those workers do not enjoy the same job security and benefits that normally attach to public employment. And regardless of whether the work is done for a city, a transportation authority, or a hospital authority, the public likewise benefits through the superior efficiency of well-compensated workers. There is no relevant difference under the prevailing wage law between a hospital authority, which AEM contends is not a covered political subdivision, with a hospital district, which AEM must concede is a covered political subdivision. In short, unless there is a specific expression from the Legislature to the contrary, there is no reason to treat the Hospital Authority any differently under the prevailing wage law than any other state or local public entity that is expending public funds for construction. Because workers would be paid prevailing wages under the interpretation that defines political subdivision to include hospital authorities, "[t]hat interpretation serves the prevailing wage law's purposes." (*Kaanaana, supra,* 11 Cal.5th at p. 172.) Although the Supreme Court has cautioned that liberal construction "is a different enterprise from rewriting the law to have it read as we think best," (*Mendoza v. Fonseca McElroy Grinding Co., Inc*11 Cal.5th 1118, 1142), reading political subdivision to include hospital authority in this instance is consistent with the statutory framework and the law's purposes.

This conclusion is bolstered by the fact that the California Supreme Court recently deemed a project being done by the Southern California Regional Rail Authority[3] to be public works subject to the prevailing wage law, even though the Rail Authority is not specifically enumerated in section 1721. (*Busker, supra,* 11 Cal.5th at p. 1171.) There was no question that a public entity expending public funds on construction was subject to the prevailing wage law, regardless of how the public entity happened to be named.

Conclusion

For the foregoing reasons, the Kern Medical Center Solar Project for the Kern County Hospital Authority is a public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Katrina S. Hagen
Director of Industrial Relations

[3] The Southern California Regional Rail Authority is a joint powers authority comprised of several local transportation commissions. Neither the Rail Authority nor its member transportation commissions are expressly listed in section 1721.