February 15, 1994

In Re: WAGE DETERMINATION APPEAL

DENNIS-YARMOUTH REGIONAL SCHOOL DISTRICT, and

TOWN OF YARMOUTH

DECISION OF THE DEPARTMENT OF LABOR AND INDUSTRIES

APPEARANCES

Robert Prezioso, Department of Labor and Industries

Donald Johnson, Dennis-Yarmouth Regional School District

Robert Lawton, Town of Yarmouth

Donald Siegel, Counsel for Massachusetts Building Trades Council

Leo Reed, Counsel for New England Mechanical Contractors Association

Ken McClay, Associated Elevator Company

Deborah Bouvette, Payne Elevator Company

Lawrence Whelan, Tilcon Mass, Inc.

JURISDICTION

Pursuant to M.G.L. c. 149, § 27A, the undersigned, as designee of the Commissioner of the Department of Labor and Industries ("DLI"), conducted a hearing on February 3, 1994 at the Barnstable County Courthouse, Barnstable, Massachusetts. The subject of the hearing concerned appeals brought by the Town of Yarmouth and the Dennis-Yarmouth Regional School District (collectively, the "Appealing Parties") contesting certain wage determinations made by DLI for two public projects described below. The issue presented is whether the minimum wage determinations rendered by

DLI are in compliance with Massachusetts law as set forth in M.G.L. c. 149, §§ 26-27H. Upon the request of the Appealing Parties, two separate appeals under M.G.L. c. 149, § 27A were consolidated for hearing and a consolidated decision is hereby rendered. With the consent of the Appealing Parties, the time for issuing a decision was extended until February 15, 1994.

STATEMENT OF FACTS

On or about October 12, 1993, DLI issued minimum wage rates and classifications of employment, pursuant to M.G.L. c. 149, §§ 26-27H, as requested by the Dennis-Yarmouth Regional School District for the construction of an elementary school to be located in South Yarmouth. On or about October 26, 1993, DLI issued minimum wage rates and classifications of employment, pursuant to M.G.L. c. 149, §§ 26-27H, as requested by the Town of Yarmouth for the construction of bath houses to be located at Parker's River Beach in Yarmouth. Robert Prezioso, appearing on behalf of DLI, testified that the minimum wage rates for these projects were set by reference to the wage rates found in applicable collective bargaining agreements that had jurisdiction in the Town of Yarmouth.

In November of 1993, the Dennis-Yarmouth Regional School District and the Town of Yarmouth appealed to the Commissioner of DLI the determination of the minimum wage rates rendered for these projects. The appeals were taken pursuant to M.G.L. c. 149, § 27A which provides in pertinent part that "the awarding officer or official...may appeal to the commissioner or his designee from a wage determination, or a classification of employment as made by the commissioner."

In support of their appeal and as set forth in Exhibits 1 and 2, the Appealing Parties argue that the rates set by DLI are significantly higher than "prevailing wages" in the local area. As an example, the Appealing Parties note that laborers are required to be paid $23.90 per hour under the wage schedules furnished by DLI while laborers employed by the Town of Yarmouth pursuant to a collective bargaining agreement are paid only $13.07 per hour. Furthermore, the Appealing Parties point to language contained in M.G.L. c. 149, § 26 which states in part that the minimum wage rates shall not be less than wages "paid to laborers in the municipal service of the town or towns where said works are to be constructed." Finally, the Appealing Parties note that the federal government compiles wage rates by city and town and suggest that this compilation could serve as a basis for a local survey to more accurately reflect local area wage rates.

A number of witnesses testified in opposition to the position of the Appealing Parties and in support of the methodology used by DLI in setting the minimum wage

rates for the instant projects. Leo Reed, Ken McClay, Deborah Bouvette, and Lawrence Whelan all testified on behalf of private sector employers. Briefly summarized, these witnesses testified that employers had performed work in the Town of Yarmouth and in surrounding towns on Cape Cod and the Islands, and that such work was performed under the terms, conditions, and wage rates of applicable collective bargaining agreements. The collective bargaining agreements under which work was performed in the local area include, but are not limited to, agreements with unions representing Laborers, Teamsters, Operating Engineers, and Elevator Constructors. Attorney Siegel also noted that a major public sector job, the Yarmouth Wastewater Treatment Project, and a private sector job, the Super Stop & Shop, were constructed in the Town of Yarmouth under the terms and conditions of collective bargaining agreements covering various building trades. Written evidence was also introduced indicating that numerous construction projects had been performed in Yarmouth and the surrounding area under the terms of union agreements. See Exhibits 3A, 4A, 8A, 8B, 8C, 11A, 12A, 12B, 13A, 14A.

Attorney Siegel introduced into evidence fifteen (15) collective bargaining agreements covering the major building trades. All of these agreements include the Town of Yarmouth and surrounding towns on Cape Cod and the Islands in their territorial jurisdiction. See Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

ANALYSIS

In determining the minimum wage for employees engaged in the construction of public works, DLI is governed by c. 149, § 26 which provides in pertinent part as follows:

> The rate per hour of the wages paid...in the construction of public works shall not be less than the rate or rates of wages to be determined by the [DLI] commissioner as hereinafter provided; **[first]** provided, that the wages paid to laborers employed on said works shall not be less than those paid to laborers in the municipal service of the town or towns where said works are being constructed; **[second]** provided, further, that where the same public work is to be constructed in two or more towns, the wages paid to laborers shall not be less than those paid to laborers in the municipal service of the town paying the highest rate; **[third]** provided further, that if, in any of the towns where the works are to be constructed, a wage rate or wage rates have been established in certain trades and occupations by collective agreements or understandings in the private construction industry between organized labor and employers, the rate or rates to be paid on said works shall not be less than the rates so established; **[fourth]** provided further, that in towns where no such rate or rates have been so established, the wages paid...shall not be less than the wages paid to the employees in the same trades and occupations by private employers engaged in the construction industry....

For purposes of analysis, it is helpful to view this statutory scheme as containing four provisos that are to be applied by DLI depending on the circumstances presented. In those circumstances where wages rates have been "established" by collective agreements between organized labor and employers in "any of the towns where the works are to be constructed," DLI is compelled by the third proviso of the statute to apply those wage rates as the minimum rates for the public project in question.

Accordingly, the critical inquiry in the instant case is whether wage rates have been established in the Town of Yarmouth within the meaning of the third proviso. In answering this inquiry, two types of crucial evidence were presented at the hearing. First, it is clear from the testimony of employers and related written evidence submitted that there has been work performed in Yarmouth by private construction companies pursuant to terms and conditions of collective bargaining agreements. There does not appear to be any requirement in the statute or in the case law that there be a specified frequency or volume of unionized work to meet the definition of "established," but it is noted that the evidence shows there has been a substantial amount of unionized construction work performed in the locality.

Second, without reference to actual work performed, evidence was introduced to show that there are agreements in effect "between organized labor and employers" with agreed upon wage rates that include the Town of Yarmouth within their jurisdiction.

Furthermore, there was testimony presented that certain employers subject to collective bargaining agreements have bid work in Yarmouth and the surrounding areas, and were not awarded such work. This evidence suggests that there may be instances where collective bargaining agreements set specified wage rates, but work may not be performed under the agreements in certain localities either due to lack of work or unsuccessful bids.

I conclude that the existence of these agreements, with Yarmouth included in their territorial jurisdiction, as well as evidence of work performed in the area under the terms of collective bargaining agreements, support DLI's determination that wage rates were "established' within the meaning of the third proviso, thereby justifying DLI's methodology in setting minimum wage rates for the instant public projects by reference to rates contained in relevant collective bargaining agreements.

DLI is constrained by governing law in setting minimum wage rates. The points posed by the Appealing Parties concerning the use of federal surveys and other comparisons to determine accurate local wage rates are interesting from a policy perspective, but the existing statutory scheme does not appear to envision such an exercise, at least in those cases where the third proviso applies.

Accordingly, the appeals are denied and the wage rates for the instant public projects as issued by DLI are upheld.

DEPARTMENT OF LABOR AND INDUSTRIES

BY: _____

Terence P. McCourt, Deputy Secretary and General Counsel

Massachusetts Executive Office of Labor

DATE: 15 Feb. 1994

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