THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY

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October 15, 1999

Geoffrey C. Beckwith
Executive Director
Massachusetts Municipal Association
Sixty Temple Place
Boston, MA 02111

Re: Prevailing Wage Rates: Snow Plowing

Dear Mr. Beckwith:

This letter responds to your October 5, 1999 request for a written determination on the question of whether the Massachusetts prevailing wage law, M.G.L. ch. 149, § 27F, applies to contracts or arrangements for "snow removal"[1] by awarding authorities in the commonwealth.

The issue of whether the prevailing wage law applies to snow removal has been an open question before the Division of Occupational Safety (formerly titled the Department of Labor and Industries) for many years. As your letter illustrates, M.G.L. ch. 149, § 27F is a difficult section of the prevailing wage law to interpret. By its use of the undefined term "public works," section 27F fails to provide clear guidance on the categories of work that are covered. Although the courts have ruled on particular categories of work such as street sweeping and trash removal, there is no clear definition of "public works" as there is for the more specific term "public works construction" that is provided in section 27D of the prevailing wage law. See Commonwealth v. W. Barrington, 5 Mass. App. Ct. 416, 418-421 (Mass. App. 1977); and Perlera v. Vining Disposal, 47 Mass. App. Ct. 491, 493-496 (Mass. App. 1999). Thus it remains particularly difficult to weigh the arguments for and against the inclusion of snow removal under section 27F.

[1] For purposes of this letter, "snow removal" will include snow plowing, sanding, salting, ice removal, and all other activities that involve the operation of a "truck or any automotive or other vehicle or equipment" (see M.G.L. ch. 149, § 27F) in the moving of snow.

Historically, the Division of Occupational Safety ("DOS") has issued prevailing wage schedules for snow removal when requested to do so by awarding authorities. DOS has also answered affirmatively when asked whether a prevailing wage schedule could be requested for upcoming snow removal work. However, to my knowledge, there has never been an enforcement action initiated pertaining to snow removal – neither since 1993 when the OAG assumed responsibility, nor prior to 1993 when DOS was responsible – because it was never clearly covered under the statute.

As you know, earlier this year Barbara A. Piselli, then Chief of the Attorney General's Fair Labor and Business Practices Division, issued a letter to all awarding authorities (dated January 22, 1999) stating that prevailing wage rates must be paid for snow removal. No such determination had been issued by DOS at that time or since. As a result, there has been great confusion among awarding officials about the authority behind Ms. Piselli's letter and about DOS's official position.

Subsequently, Ms. Piselli issued a follow-up letter to all awarding authorities (dated February 22, 1999) acknowledging that there is a lack of clarity on this issue and declaring that the OAG "w[ould] not impose any liability on municipalities which have failed to comply with the prevailing wage statute this year." The letter went on to clarify that the earlier letter had been sent based on DOS's position "as presently understood by the Office of the Attorney General," which highlighted the need for DOS to make its position more clear.

The follow-up letter also contained a statement that unless DOS or the legislature acts affirmatively to declare that snow removal is not covered by the prevailing wage law, the OAG "will require full compliance with the law by all parties beginning with the next snow season" (meaning the 1999-2000 snow season). This, in addition to having received many inquiries from awarding officials, compels DOS to issue a written determination in order to provide clear guidance to awarding authorities, contractors, and employees that are involved with snow removal.

Acting responsibly, any agency charged with making an administrative decision that carries criminal penalties for non-compliance, such as the prevailing wage law, must carefully oversee the implementation of that decision, including its enforcement. In this case, DOS is not comfortable with the current posture toward enforcement and will not hold awarding authorities and contractors to the requirements and potential penalties of a statute that does not unquestionably apply to them. As such, DOS is unable to determine categorically that the prevailing wage law, M.G.L. ch. 149, § 27F, applies to snow removal until such time as the legislature or the courts provide some guidance on whether this particular category of work is covered under the law.

Prevailing wage schedules will no longer be issued by DOS for snow removal and all awarding authorities that have already received prevailing wage schedules for the upcoming snow season will be notified to disregard them. The OAG will promptly be notified of this determination.

If you have any further questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Robert J. Prezioso
Deputy Director

cc: Angelo Buonopane, Director, DLWD
Linda Hamel, General Counsel, DOS
David Nalvin, Office of the Attorney General
All awarding authorities