

MAY 20 2020

ORDER OF COMMISSIONSECRETARY OF STATE  
COMMISSIONS DIVISION

In the matter of a Motion to Reconsider the dismissal of Objection No. 001-007 filed by Local 513, International Union of Operating Engineers, on April 16, 2020, to Annual Wage Order No. 27 issued by the Department of Labor and Industrial Relations, Division of Labor Standards, filed with the Missouri Secretary of State on March 10, 2020, pertaining to the wage rate for the occupational title of Operating Engineer in the Missouri Counties of Boone – Section 010, Callaway – Section 014, Iron – Section 047, Madison– Section 062, Marion – Section 064, New Madrid – Section 072, and Stoddard – Section 107.

On March 10, 2020, the Division of Labor Standards (Division) filed with the Secretary of State a certified copy of Annual Wage Order No. 27 (AWO) containing its initial determinations of the prevailing hourly rates of wages for each occupational title and, where applicable, the public works contracting minimum wage, within every locality. As relevant to this matter and because fewer than 1,000 hours were reported for Missouri Counties of Boone, Callaway, Iron, Madison, Marion, New Madrid, and Stoddard, the Division set the rate for Operating Engineer at the public works contracting minimum wage (PWCMW), pursuant to § 290.257.2, RSMo, of \$27.06 in Boone County; \$26.10 in Callaway County, \$22.69 in Iron County; \$18.14 in Madison County; \$54.86 in Marion County, \$21.53 in New Madrid County; and \$21.43 in Stoddard County.

On April 3, 2020, the Labor and Industrial Relations Commission (Commission) received objections filed on behalf of Local 513, International Union of Operating Engineers (Objector).<sup>1</sup> In its objections, Objector identified hours designated as Operating Engineer construction work in these seven counties at various rates in excess of the PWCMW, amounting to more than 1,000 hours per county for the 2019 calendar year.

On April 10, 2020, the Commission dismissed the objections because they failed to meet the requirements of Commission Rule 8 CSR 20-5.010(1), which provides, in relevant part:

If the objection is premised, in whole or in part, upon hours that were not previously reported to the Division of Labor Standards on or before January 31 of the year in which the objection is filed, the commission will consider the objection only if the objector is able to allege and prove a good cause why the hours were not previously reported to the Division of Labor Standards. If the objector fails to identify and allege such good cause in the written objection, the objection may be dismissed by the commission without a hearing. For purposes of this rule, "good cause" shall mean those circumstances in which the objector acted in good faith and reasonably under all the circumstances.

8 CSR 20-5.010(1).

<sup>1</sup> On April 1, 2020, the Division filed a Motion to Amend the AWO. This Motion does not affect the rates at issue in this objection.

Specifically, each dismissal order stated that “the Objector did not explain why those hours were not reported to the Division prior to January 31, 2020. Pursuant to 8 CSR 20-5.010(1), the Commission is to “consider objections *only* if the objector is able to allege and prove a good cause why the hours were not previously reported to the Division[.]” *Dismissal Order*, p.2.

On April 16, 2020, the Objector requests that the Commission reconsider. The Objector argues that employers are the only entities that may report hours to the Division and that unions are not permitted to report hours. With that premise, 8 CSR 20-5.010(1) impermissibly restricts unions from objecting when they have no information as to why employers fail to report pertinent hours prior to January 31 of any given year. As the basis for this argument, the Objector cites § 290.257.5, RSMo, which provides:

5. For purposes of this section, the term “reportable hours” shall mean hours reported by a contractor for work performed under such contractor in a particular occupational title within a particular locality.

Although § 290.257.5, RSMo, does not include unions as entities who can report hours to the Division, “to the extent objector wishes to challenge the choices made by the legislature or the public policy implications of the relevant section, this is not a matter the Commission has authority to consider. However, the Commission does not need to reach that issue.

Furthermore, the issue the Objector wishes the Commission to resolve, that of a contractor’s failure to report hours, is a contractual issue and not an issue for the Commission. Essentially, the union and the contractor enter into contractual agreements whether in a collective bargaining agreement or elsewhere that require the contractor to report the hours to the Division. Any failure of the contractor to report such hours would be a breach of contract and not a due process issue for the Division or Commission.

The issue here for the Commission is whether the Objector abided by the provisions of Commission Rule 8 CSR 20-5.010(1). As 8 CSR 20-5.010(1) was duly promulgated by the Commission, it has the force and effect of law. “Rules duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding on the agency adopting them.” *State ex rel. Stewart v. Civil Serv. Comm’n*, 120 S.W.3d 279, 285 (Mo. App. 2003).

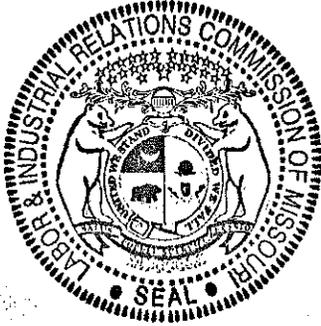
Pursuant to 8 CSR 20-5.010(1), the Commission is to “consider objections *only* if the objector is able to allege and prove a good cause why the hours were not previously reported to the Division[.]” (emphasis added). The Objector did not allege or prove good cause. The Objector also failed to provide support to establish that the alleged hours were reportable, such as wage reports.

Therefore, the Commission was bound to dismiss the objection because it did not comply with the regulation.

**Order**

We deny Objector's Motion to Reconsider.

Given at Jefferson City, State of Missouri, this 27th day of April 2020.



LABOR AND INDUSTRIAL RELATIONS COMMISSION

*R. Cornejo*

Robert W. Cornejo, Chairman

*Reid K. Forrester*

Reid K. Forrester, Member

DISSENTING OPINION FILED

Shalonn K. Curls, Member

Attest:

Pamela M. Hofmann / MK  
Secretary

### DISSENTING OPINION

I disagree with the Commission majority's decision to not reconsider the objections. I am concerned with the apparent inability of unions to object to an annual wage order or have any say in the process that they are statutorily entitled to participate in as affected entities.

As the majority pointed out, unions are not included in the list of those who are able to report hours to the Division. Section § 290.257.5, RSMo, defines "reportable hours" to be "hours reported by a contractor for work performed under such contractor in a particular occupational title within a particular locality."

Similarly, Division Regulations do not permit unions to report hours, but only contractors and subcontractors.

The department will consider hours submitted for use in its initial determination of the prevailing wage rates to be included in a particular year's wage order only if those hours are received from a *contractor*, by either paper submission on a form provided by the department or in electronic format, no later than January 31 of that year. Handwritten submissions will not be accepted. For purposes of submitting reportable hours, *the term "contractor" shall include a "subcontractor."* The department will not include the following hours in the calculation of the annual wage order:

(A) Hours not readily identifiable as being submitted by a *contractor*[.]

8 CSR 30-3.010(4) (emphasis added).

Accordingly, the only way for unions to participate in the annual wage order process is to file an objection with this Commission. This is permissible pursuant to statute for any person affected by the annual wage order.

At any time within thirty days after the certified copies of the determinations have been filed with the secretary of state and the department, *any person who is affected thereby may object* in writing to a determination or a part thereof that he or she deems objectionable by filing a written notice with the department, stating the specific grounds of the objection. If no objection is filed, the determination is final after thirty days.

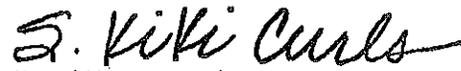
§ 290.262.2, RSMo (emphasis added). Continuing, the statute provides: "After the receipt of the objection, the department *shall* set a date for a hearing on the objection." § 290.262.3, RSMo (emphasis added). Therefore, the statutes provide the objection process as the only way for unions to not only object to annual wage orders, but also to be heard at a hearing. This hearing requirement appears mandatory for such objections.

However, the majority decision invalidates any objection from any entity who is not "able to allege and prove a good cause why the hours were not previously reported to the Division." Only contractors and subcontractors have the direct ability to allege and

prove good cause as to why the hours were not reported to the Division. Unions do not have such knowledge or control over if or when contractors and subcontractors report hours to the Division.

Therefore, the provisions of 8 CSR 20-5.010(1) in this regard appear to deny due process to unions by effectively preventing unions from filing objections to annual wage orders, and hence, from participating in the hearing process based off of those objections.

Accordingly, I would allow the Objector's Motion to Reconsider. Because the Commission majority has decided otherwise, I respectfully dissent.



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Shalonn K. Curls, Member