

FILED

APR 16 2020

BEFORE THE  
LABOR AND INDUSTRIAL RELATIONS COMMISSION  
JEFFERSON CITY, MISSOURI

LABOR AND INDUSTRIAL  
RELATIONS COMMISSION

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In the Matter of:

Objection filed by United Union of Roofers, Waterproofers and  
Allied Workers Local No. 2 to Annual Wage Order No. 27 Issued for Lincoln County

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**OBJECTOR'S MOTION FOR RECONSIDERATION**

Comes now United Union of Roofers, Waterproofers and Allied Workers Local No. 2 ("Objector") and submits the following brief in support of its position that the Commission should consider the "Roofer" hours submitted by Lakeside Roofing, Co., Inc. in Lincoln County.

**I. Statement of Fact**

Objector is a labor organization which represents workers in the roofing trade. On March 10, 2020, the Division of Labor Standards issued Annual Wage Order No. 27. Annual Wage Order No. 27 determined that the wage rate for the "Roofer" occupational title in Lincoln County was \$23.82. The Division of Labor Standards determined this rate because fewer than 1,000 "Roofer" hours were submitted pursuant to R.S.Mo. § 290.257.2.

On April 3, 2020, Objector filed 2020 Objection No. 008 with the Commission. In 2020 Objection No. 008, Objector argued that Annual Wage Order No. 27 failed to consider 4,647 hours of "Roofer" construction work performed by Lakeside Roofing, Co., Inc. within Lincoln County.

On April 10, 2020, the Commission dismissed 2020 Objection No. 008 and refused to consider the 4,647 hours worked by Lakeside Roofing, Co., Inc. in Lincoln County. The Commission's dismissal relied exclusively upon 8 CSR § 20-5.010(1), reading 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. (emphasis added).**

The Commission found that the hours worked by Lakeside Roofing, Co., Inc. had not been submitted to the Division of Labor Standards before January 31, 2020 and that the Objector had failed to show "good cause" under 8 CSR § 20-5.010(1) why the hours had not been submitted prior to that date. The Commission ignores the facts that statutorily the Objector could not submit hours to the Commission at all, much less before the internally established January 31, 2020 deadline. Further, the Commission ignores the fact the statutory objection scheme does not require 'good faith' but rather mandates a hearing on objections. Finally, even if the Commission is within its authority to require "good faith" the Commission ignores the fact that as a party not allowed to submit hours for prevailing wage purposes, the Objection process's discovery authority under Chapter 536 is the only way to show a contractor acted with, or without, good faith. See, In the matter of Objections Nos. 003-051 for AWO 26, p. 8; n.7. As a party not allowed to submit hours the Objector is in no position to allege or prove 'good faith'.

## **II. Issue**

The Objector asks that the Commission reconsider its dismissal of 2020 Objection No. 008.

## **III. Argument**

2020 Objection No. 008 should be reinstated for three reasons: (1) 8 CSR § 20-5.010(1)'s requirement that a party must show "good cause" to file an objection based on hours submitted after January 31st is contrary to the broad right to object under the Prevailing Wage Law, (2) 8 CSR § 20-5.010(1)'s "good cause" requirement is inapplicable to non-employer objectors, and (3) both the Prevailing Wage Law and 8 CSR § 20-5.010(1) warrant a hearing in this case.

**A. The “Good Cause” Requirement of 8 CSR § 20-5.010(1) is Contrary to the Broad Right to Object Under the Prevailing Wage Law**

Nothing in the Prevailing Wage Law prohibits hours submitted after January 31st from being considered during the objection process. Regarding objections, the Prevailing Wage Law reads:

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.

R.S.Mo. § 290.262(2) (emphasis added). The Prevailing Wage Law broadly permits any affected person to object to a “determination or a part thereof that he or she deems objectionable.” *Id.* (emphasis added). Thus, the plain language of the Prevailing Wage Law explicitly prohibits any restrictions on the types of objections that objectors may file.

Contrary to the Prevailing Wage Law, 8 CSR § 20-5.010(1) creates a barrier to the filing of objections. Specifically, it requires that a party must show “good cause” to file an objection based on hours submitted after January 31st. In this regard, 8 CSR § 20-5.010(1) conflicts with the Prevailing Wage Law’s broad right to file objections.

When a regulation conflicts with statutory language, the statute prevails. See, e.g., Union Elec. Co. v. Dir. of Revenue, 425 S.W.3d 118, 125-26 (Mo. banc 2014). Therefore, the requirement under 8 CSR § 20-5.010(1) that an objector must show “good cause” to file an objection based on hours submitted after January 31st is contrary to the plain meaning of the Prevailing Wage Law. As such, the Objector is permitted a hearing on its objection.

**B. The “Good Cause” Requirement of 8 CSR § 20-5.010(1) is Inapplicable to Non-Employer Objectors**

Because the Objector is a labor organization, the “good cause” requirement of 8 CSR § 20-5.010(1) does not apply to it. Instead, the “good cause” requirement rationally only applies only to employer objectors who are able to submit hours before the Commission’s internal deadline.

Any party affected by a wage determination may file an objection under the Prevailing Wage Law. R.S.Mo. § 290.262(2). However, the Prevailing Wage Law only permits employers to report hours. R.S.Mo. § 290.257(5). Non-employer parties, such as labor organizations and individuals, are not permitted to report hours.

As noted above, 8 CSR § 20-5.010(1) requires that a party must show “good cause” to file an objection based on hours submitted after January 31st. However, the language of 8 CSR § 20-5.010(1) makes it clear that the “good cause” requirement does not apply to non-employer objectors. Under 8 CSR § 20-5.010(1), “good cause” is defined as “those circumstances in which the objector acted in good faith and reasonably under all the circumstances.” (emphasis added). This interpretation makes sense, because a non-employer objector would not have first-hand knowledge why an employer had failed to report hours by January 31st.

However, in its April 10, 2020 order, the Commission placed the burden on the Objector to show why Lakeside Roofing, Co., Inc. did not report its hours before January 31st. See April 10, 2020 order (“However, the Objector did not explain why those hours were not reported to the Division prior to January 31, 2020.”). This is contrary to the regulations, which only require that the Objector acted in good faith. Nothing in the April 10, 2020 order disputes that the Objector acted in good faith in filing the instant objection. Therefore, the Objector is permitted to a hearing on its objection.

### **C. The Objector is Entitled to a Hearing Under the Prevailing Wage Law**

The Objector is further entitled to a hearing for two reasons. First, hearings are mandatory under the Prevailing Wage Law. Second, even if 8 CSR § 20-5.010(1) properly limits hearings, a hearing is appropriate under the circumstances presented here.

#### **1. Hearings are Mandatory Under the Prevailing Wage Law**

Hearings over objections are mandatory under the Prevailing Wage Law. Indeed, R.S.Mo. § 290.260(4) reads: "Within thirty days of the receipt of the objection, the department shall set a date for a hearing on the objection." (emphasis added). Likewise, R.S.Mo. § 290.262(3) reads: "After the receipt of the objection, the department shall set a date for a hearing on the objection. The date for the hearing shall be within sixty days of the receipt of the objection." (emphasis added). 8 CSR § 20-5.010(1) abridges the right to a hearing by permitting the prehearing dismissal of objections based on hours submitted after January 31st. In this regard, 8 CSR § 20-5.010(1) conflicts with an objector's right to a hearing under the Prevailing Wage Law.

#### **2. A Hearing is Appropriate Under These Circumstances**

But even assuming arguendo that the Prevailing Wage Law gives the Commission the authority to deny a hearing under certain circumstances, it is inappropriate to deny a hearing in the instant matter.

As noted above, only an employer may report hours under the Prevailing Wage Law. R.S.Mo. § 290.257(5). As such, a non-employer objector will generally lack first-hand knowledge why an employer failed to report hours by January 31st. When a non-employer objector lacks this knowledge, it is critical that the non-employer objector have access to the hearing process. At a hearing, the non-employer objector may issue subpoenas. R.S.Mo. § 536.077. This permits a non-

employer objector to obtain discovery on why the employer failed to submit hours prior to January 31, 2020.

Finally, it is important to note that the language of 8 CSR § 20-5.010(1) does not mandate dismissal absent a hearing. It reads in relevant part: "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." Id. (emphasis added).

Without access to a hearing and the subpoena process, non-employer objectors are essentially prohibited from objecting over hours submitted after January 31st. This result is contrary to the Prevailing Wage Law, which broadly permits "any affected person" to object over a "determination or a part thereof that he or she deems objectionable." R.S.Mo. § 290.262(2). For these reasons, the Objector is permitted to a hearing on its objection.

**IV. Conclusion**

For the above reasons, the Objector requests that the Commission permit a hearing on 2020 Objection No. 008.

Respectfully submitted,

HARTNETT REYES-JONES, LLC



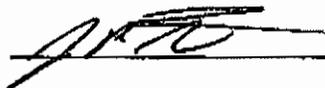
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**CERTIFICATE OF SERVICE**

On April 16, 2020, a copy of the foregoing was served on the Administrative Secretary, Labor and Industrial Relations Commission, 3315 West Truman Boulevard, P.O. Box 599, Jefferson City, MO 65102-0599, *via facsimile* at 573-751-7806 and by U.S. Mail; and copies were served on the following by placing same in the U.S. Mail on April 15, 2020: Andrea Follett, Assistant General Counsel, Missouri Department of Labor and Industrial Relations, Division of Labor Standards, 421 East Dunklin Street, P.O. Box 59, Jefferson City, Missouri 65104-0059.



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