

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing:

Order

prior to 4:30 p.m. on February 5, 2014, to the following addresses shown below

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**STATE OF ILLINOIS – DEPARTMENT OF LABOR
CONCILIATION/MEDIATION DIVISION
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IN THE MATTER OF:)	
)	
ILLINOIS CENTRAL SWEEPING, LLC,)	
)	
Petitioner,)	
)	
v.)	State File No. 2014-H-TW07-0030
)	
JOSEPH COSTIGAN, DIRECTOR OF)	
LABOR and the ILLINOIS)	
DEPARTMENT OF LABOR,)	
)	
Respondent,)	
)	
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS, LOCAL 731)	
)	
Intervener.)	

ORDER

THIS MATTER coming on to be heard before Chief Administrative Law Judge Claudia D. Manley, on Complainant’s Requests for Hearing under the Illinois Prevailing Wage Act, 820 ILCS 130/1 *et seq.*, regarding Illinois Central Sweeping Services (Petitioner) objection to the current prevailing wage schedule and classification for street sweepers in Cook County, and Motions to Dismiss filed by the Respondent and Intervener, otherwise being fully advised in the premise the undersigned issues the following Order,

PROCEDURAL HISTORY

On July 15, 2013, Petitioner entered an objection to the current prevailing wage structure and classification for street sweepers in Cook County, as provided for by 820 ILCS 130/9. The remedy being sought is recognition of a separate classification for street sweepers which would effectively change the rate of pay calculated by the Illinois Department of Labor under the Prevailing Wage Act. On July 24, 2013, the International Brotherhood of Teamsters, Local No. 731, “(Intervener)” petitioned to intervene, and that motion was granted by agreement of the parties on September 4, 2013. Respondent and Intervener both filed separate Motions to Dismiss that the undersigned entered and continued pursuant to 56 Ill. Adm. Code 120.300(f)

Background

Illinois Central Sweeping Services, LLC, Petitioner is a private contractor doing business in the State of Illinois. During the time frame of this dispute, Petitioner employed street sweepers in the State of Illinois.

International Brotherhood of Teamsters, Local No. 731, Intervener represents employees for the purposes of establishing rates of pay, hours, and terms and conditions of employment. Local 731 have negotiated many collective bargaining agreements on behalf of its members with employers in Cook County that employ street sweepers and perform associated work on public works projects that are subject to the Act.

Petitioner's Objections

On July 15, 2013, Petitioner filed objections to the current classification and prevailing wage of street sweepers employed in Cook County, and requested a hearing to determine the correct prevailing wage. Petitioner argues that IDOL erred in not investigating the actual prevailing wage, but instead "unlawfully delegates union authority to set wage rates." *Illinois Central Sweeping Services's Objections* (hereinafter "Objections") at 2. Petitioner points to testimony given in an administrative hearing that suggested that IDOL accepts as the prevailing wage the agreed upon union scale for a public works project, and goes on to extrapolate from this that IDOL does not "find" or "ascertain" the prevailing wage as it is required to under the statute. *Id.* Pursuant to *Anderson v. County of Jo Daviess*, the relevant standard is not "union scale" but "public works", though Petitioner acknowledges that at times, the standard for the prevailing wage in public works is at times set by union scale. 81 Ill. App. 3d 354 (2d Dist. 1980).

Petitioner goes on to compare the wage it negotiated with Local 731 for street sweepers to the wages negotiated by M.A.R.B.A. for public work of a similar kind. In Cook County, street sweepers who work for contractors under the M.A.R.B.A. agreement are incorporated into the Truck Driver classification, and are therefore paid \$33.85/hour, and the collective Health and Welfare and Pension benefits (hereinafter "fringe benefits") of \$16.65/hour worked. *Id.* at 3. The agreement that Petitioner reached with Local 731 established a "fringe benefits" rate of \$11.18/hour for employees in the "sweeping" industry. Because the M.A.R.B.A. Agreement contemplates such a significantly higher rate of pay, Petitioner argues that IDOL should recalculate the prevailing wage considering its agreement with Local 731, because, Petitioner argues, that is the local prevailing wage for the public works in question. *Id.* at 3-4.

Petitioner also argues that the current classification of street sweepers as "Truck Drivers" is inappropriate, because the work done by street sweepers is not of a similar character to the work performed by truck drivers. *Id.* at 4, citing *Illinois Landscape Contractor's Association v. Department of Labor*, 372 Ill. App. 3d 912, 917. Petitioner acknowledges that no Illinois county has a specific classification for street sweepers, instead they are placed the category of "Truck Driver". Therefore, it argues that were IDOL to conduct a survey of employees of public bodies, it would find that street sweepers are afforded a significantly lower rate of pay than the one cited by the Department as the prevailing wage set for "Truck Drivers". *Objections* at 5. It is for this reasoning, Petitioner argues that, IDOL should create a new classification for "street sweepers". *Id.* at 5-6.

Motions to Dismiss

Respondent and Intervener both filed Motions to Dismiss. Together they argued that it exceeds the Department's statutory authority to consider public wages and benefits in calculating, setting and recognizing prevailing wage rates. Under *Seybold v. Chicago*, the Act only applies to public works constructed under contract, not to construction projects undertaken by employees of public bodies. 7 Ill. App. 3d 932 (1st Dist. 1972). Furthermore, *Monmouth v. Lorenz* held that comparing public and private employment for the purpose of calculating the "required monetary compensation" under the Act was inappropriate because the two sets of employers were in very different circumstances as it relates to the economic benefits each can confer upon their employees. 30 Ill. 2d 60 (1963).

In response, Petitioner argues that *Monmouth* and *Seybold* held merely that it is inappropriate to require that public bodies pay the same wage as private contractors, and that no Illinois court has ever held that the Department cannot consider public sector wages in the calculation of the prevailing wage. Considering public sector wages, then, would be consistent with the Act's requirement that wages and benefits paid to employees of private contractors on public works match up with those "paid generally . . . to employees engaged in work of a similar character on public works." The Department replies that the argument put forth by Petitioner runs afoul of *Monmouth's* holding that public and private employees cannot be compared for purposes of determining the prevailing wage.

Analysis

The central question is whether it is improper under the Prevailing Wage Act, 820 ILCS 130/1 *et seq.*, to consider wages paid to employees of public bodies in determining the classifications and wages paid to employees of private contractors engaged in the construction of public works. Under a Motion to Dismiss, all facts are considered in favor of the non-moving party, and a cause of action should not be dismissed unless it clearly appears that no set of facts can be proved on the pleadings that would entitle the Petitioner to recover. *American National Bank & Trust Co. v. City of Chicago*, 192 Ill. 2d 274, 279 (2000).

The Act provides, in relevant part, that "[n]ot less than the general prevailing rate of hourly wages for work of a similar character on public works in the locality in which the work is performed, and not less than the general prevailing rate of hourly wages for legal holiday and overtime work, shall be paid to all laborers, workers and mechanics. Petitioner employed by or on behalf of any public body engaged in the construction or demolition of public works." 820 ILCS 130/3. The "general prevailing rate" is defined as "the hourly cash wages plus annualized fringe benefits . . . paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character on public works." 820 ILCS 130/2.

Only public works constructed under contract, and not employment by private bodies, is subject to the Act. *Bradley v. Casey*, 415 Ill. 576 (1953). After *Bradley*, the legislature attempted to amend the Act to incorporate employees of public bodies into the realm of those who had to be paid the prevailing wage. This amendment was struck down in *City of Monmouth v. Lorenz*. 30 Ill. 2d 60 (1963). The Court in *Monmouth* reasoned that the nature of public and private employment was so fundamentally different that to require employees of public and private sector employers be paid the same wage violated the Equal Protection clause of the State and Federal Constitutions. One key difference between public and private employment is that public employment is "generally of a steady nature, and entails fringe benefits," while private sector employment in construction on public works projects is "unusually seasonal," and "does not carry like [fringe] benefits." *Monmouth*, 30 Ill. 2d at 66.

Similarly, in *Seybold v. City of Chicago*, City employees who were paid below the prevailing rate of pay for the locality in which their work was being performed sued, alleging a violation of the Act. 7 Ill. App. 3d 932 (1st Dist. 1972). On appeal, the First District affirmed the dismissal of their lawsuit holding that *Monmouth* stood for the idea that "without limitation and without exception", public and private employers are in such different positions "they cannot and do not confer similar economic benefits on their employees exclusive their rate of pay."

The objections brought by Petitioner necessarily entail exactly the kind of limitation rejected by the *Monmouth* and *Seybold* courts. Petitioner argues that, while it would be unconstitutional to require that public bodies pay the same wage as private employers, it would not be similarly unconstitutional to consider the rate that public employees are paid solely for the purposes of determining the prevailing wage. *Petitioner's Opposition to Motions to Dismiss* at 3. But, as *Seybold* made clear, the differences between public

and private sector employment are stark, and cannot be limited to wages and fringe benefits. It is, therefore, still inaccurate to compare wages and benefits paid by a public body to those paid by a private contractor for the purposes of determining the prevailing wage. Petitioner's reading of *Monmouth* and *Seybold* are impermissibly narrow, ignoring any distinction between public and private sector employment that exists outside of wages and fringe benefits and is rejected.

Even if public sector wages should be considered in determining the prevailing wage, Petitioner has still not met its burden of proving that "street sweepers" should have their own classification for prevailing wage purposes. Section 1 of the Act states the policy of the State of Illinois as being that the prevailing wage should be paid "for work of a similar character on public works in the locality in which the work is being performed," but provides no definition for "work of a similar character." The same phrase appears in Sections 2 and 3, but again provides no independent basis for definition or clarification.

In *Ill. Landscape Contractors Ass'n (ILCA) v. Dept. of Labor*, the Second District held that private sector wages could not be considered for determining job classifications as defined by the Prevailing Wage Act. 372 Ill. App. 3d 912 (2d Dist. 2007). The Petitioners in that case were an employer's association, filing a Section 9 objection requesting that landscape workers be treated as its own classification for prevailing wage purposes, as opposed to the current classification of "general laborers". In support of its argument, the organization cited private sector wage data, and United States Department of Labor classifications. The *ILCA* court rejected this argument, holding that the Prevailing Wage Act considers only work performed "of a similar character on public works", and because of this, could not consider wages paid in the private sector on non-public works. See *Hayen v. Ogle County*, 101 Ill. 2d 413 (1984) (holding that the Prevailing Wage Act is constitutional to the extent that it requires private contractors to pay the prevailing wage, defined as the prevailing rate of wages paid on "public works").

The *ILCA* court reasoned that it was not required to consider USDOL determinations, which treat landscape workers as a separate distinct classification. USDOL classifications are required by law to consider both public and private sector wages into consideration, whereas Illinois law limits consideration to that of wages paid to employees of private contractors on "public works". The court then turned to the question of whether, under Illinois law, landscape workers should be a separate classification from general laborers. Turning to the definition of the word "similar", and looking to United States Supreme Court jurisprudence, the *ILCA* court found that a new classification was warranted if the sets of employees have differing skills, training, and knowledge. *ILCA*, 372 Ill. App. 3d at 923, citing *Corning Glass Works v. Brennan*, 417 U.S. 88 (1974). It found that landscape workers did not require their own classification, because they did not have skills, knowledge, or abilities that general laborers did not have, and therefore performed "work of a similar character" to the already existing class of general laborers.

In this case, Petitioner does not argue that street sweepers have skills, knowledge, or abilities that differentiate them from the classification of "Truck Drivers". It simply argues that the wages generally paid to street sweepers by public bodies is so different to that paid to "Truck Drivers" employed by private contractors on public works is so different that a reclassification, and subsequent re-calculation of the prevailing wage, is required by law. This argument cannot be supported by the text of the Act, or any case law arising out of the Act. As a matter of law, Petitioner's July 15, 2013 objections are dismissed.

IT IS HEREBY ORDERED:

Respondent's and Intervener's Motions to Dismiss are granted and the matter is dismissed. Oral argument previously ordered for February 11, 2014 is cancelled.

The order is final and subject to appeal in accordance with the Administrative Review Law.

Entered: February 5, 2014

By: /s/ Claudia D. Manley

Chief Administrative Law Judge

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Chief Administrative Law Judge
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