No. 4

In the Matter of M.G.M. Insulation, Inc., et al.,
Appellants,
v.
Colleen C. Gardner, &c.,
Respondent.

Anthony J. Adams, Jr., for appellants.

Zainab A. Chaudhry, for respondent.

Associated General Contractors of New York State, LLC; Empire State Chapter of the Associated Builders and Contractors, Inc.; Firemen's Association of the State of New York; New York State Council of the National Electrical Contractors Association Chapters, amici curiae.

PIGOTT, J.:

In this CPLR article 78 proceeding, we are asked to determine whether the prevailing wage requirement of Labor Law § 220 is applicable to a construction contract entered into by the Bath Volunteer Fire Department (BVFD). We hold that because no public agency, as contemplated by the statute, is a party to the

contract, the prevailing wage law does not apply.

The Bath Volunteer Fire Department is a not-for-profit fire corporation under Not-for-Profit Corporation Law § 1402. Historically, it operated from a building owned by the Village of Bath. Sometime prior to 2002, it determined that the facility was inadequate for its needs. After the Village declined to build it a new firehouse, BVFD commissioned a feasibility study and obtained its own financing for the construction of one. It acquired land and invited contractors to bid for the construction work. In September 2006, it hired petitioner R-J Taylor General Contractors, Inc. (Taylor) as the general contractor. Taylor subsequently hired a number of subcontractors to construct the various portions of the firehouse.

After an investigation, the Department of Labor (DOL) issued an opinion letter, concluding that the firehouse project was a public work subject to the prevailing wage law. Once the subcontractors learned of the DOL's determination, work on the project halted. In December 2006, BVFD agreed to indemnify Taylor and its subcontractors against any liability resulting from their failure to pay the prevailing wages, and construction resumed and the project was completed.

In the meantime, an administrative hearing was held on the question of the applicability of the prevailing wage law to the firehouse project. The Hearing Officer determined that the project was subject to the prevailing wage law, concluding that

the firehouse project satisfied both prongs of the so-called Erie County test for prevailing wage law applicability (see Matter of Erie County Indus. Dev. Agency v Roberts, 94 AD2d 532 [1983], affd for reasons stated below 63 NY2d 810 [1984]). Specifically, the Hearing Officer concluded that volunteer fire corporations, such as BVFD, are the "functional equivalent[s]" of municipal corporations and are therefore "covered entities" under Labor Law § 220. In the alternative, the Hearing Officer reasoned that even if a volunteer fire corporation did not generally satisfy the public entity test, the protection services agreement between BVFD and the Village of Bath satisfied the first prong of the test. Further, because the Village authorized and supported the firehouse project, and the object of the project entailed provision of fire protection services for the community, the project satisfied the "public works" requirement.

Petitioners commenced this article 78 proceeding for review of that determination. The Appellate Division confirmed the determination and dismissed the petition (86 AD3d 812 [3d Dept 2011]). This Court granted petitioners' motion for leave to appeal and we now reverse.

We begin by considering whether the first prong of the Erie County test - the public agency prong - has been met. The prevailing wage law covers contracts involving each of four specific public entities: the state, a public benefit corporation, a municipal corporation or a commission appointed

pursuant to law (see Labor Law § 220 [2]). It is undisputed that BVFD is a fire corporation as defined by the Not-For-Profit Corporation Law, and it is not one of the public entities named in the statute. Nevertheless, the Commissioner determined that BVFD could be "deemed the functional equivalent" of a "municipal corporation" within the meaning of the Labor Law. In doing so, the Commissioner considered, among other things, that volunteer fire corporations receive immunity for negligence in extinguishing fires just like district and municipal fire corporations; members of volunteer fire corporations enjoy many of the same benefits as public service employees, including immunity from liability in performance of their duties; and volunteer fire corporations are statutorily under the supervision of the municipality they service.

The "functional equivalent" test, however, was rejected by this Court in Matter of New York Charter School Assn v Smith (15 NY3d 403 [2010]). There, the DOL deemed charter schools "public benefit corporations" because the schools serve a valuable public purpose and their existence is the result of a charter issued by a state or local municipal entity. Given those factors, the DOL determined that charter schools met the requirements established by the courts of this State for public work projects. We rejected that argument because while charter schools, like volunteer fire corporations, may be "quasi-public" in nature, they are not a specified public entity and thus, do

not fit within the ambit of the statute (id. at 410).

Had the Legislature intended to include volunteer fire corporations under the statute, it could easily have done so. Notably, in 2007, the Legislature expanded the statute's coverage to include contracts involving other types of entities, but only when it can be shown they were acting on behalf of the public entity (Labor Law § 220(2); see Charter Schools, 15 NY3d at 410). Indeed, certain volunteer fire department contracts may fall under the prevailing wage law based on the amendment language. At the time of this contract, however, the 2007 amendment of the prevailing wage law did not exist.

The Commissioner argues alternatively that the service agreements entered into with the Village trigger the prevailing wage requirement. However, these contracts are for emergency services pursuant to Village Law § 4-412 (9). That provision empowers a village to contract with the local fire corporation for the "furnishing of fire protection within the village." The service agreements do not include any provision contemplating the work involved here: the construction of a new firehouse (see Charter Schools, 15 NY3d at 409). Thus, the service agreements are not a contract for public work within the meaning of the prevailing wage law.

Because of our determination, we need not reach the issue of whether the construction project meets the criteria of a "public work" under the second prong of the prevailing wage law

test.

Accordingly, the judgment of the Appellate Division should be reversed, with costs, the petition should be granted and respondent's determination should be annulled.

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LIPPMAN, Chief Judge (dissenting):

Article 1, section 17 of our State Constitution commands that

> “[n]o laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work . . . [shall] be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used."

The provision says absolutely nothing about public agency contracting; it simply requires that the prevailing wage be paid to workers engaged in the performance of "any public work." Conditioning payment of the prevailing wage upon the existence of a contract with a public agency, is an interpolation traceable instead to the legislature, which, in implementing article 1, section 17, provided that "[e]ach contract [for a public work] to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party . . . and which may involve the employment of laborers, workers or mechanics" would trigger the prevailing wage requirement (Labor Law § 220 [2], [3]). Although this language could have been understood differently, it was judicially read as limiting the prevailing wage requirement to work contracted for

by a public agency (see Matter of Erie County Indus. Dev. Agency v Roberts 94 AD2d 532 [4th Dept 1983], affd 63 NY2d 810 [1984]). And, while this construction was dicta in Erie County -- a case which turned entirely upon whether the contracted for project qualified as a public work (94 AD2d at 537-540) -- it has stuck, with results, likely unforeseen, that are now generally acknowledged to have been incompatible with the categorical constitutional command that workers employed on public works be paid the prevailing wage. In Matter of Pyramid Co. of Onondaga v New York State Dept. of Labor (223 AD2d 285 [1996]), the most commonly cited example of this disjunction, a highway ramp constructed by a private party pursuant to a state Department of Transportation permit was found to be a public work (id. at 287), but the Appellate Division was constrained to deem it immune from § 220's prevailing wage requirement because, notwithstanding the state permit and the contemplated state ownership of the ramp once completed, the State had not itself contracted for the improvement (id. at 288).

To address what is now commonly referred to as the "loophole" created by section 220's original public agency contract requirement, the statute was amended in 2007 to provide, in substance, that that requirement could be met not only by the already specifically enumerated public entities, but also by third parties contracting for a public work on a public entity's behalf (see Labor Law § 220 [2] [as amended by L 2007, ch 678]).

The contract for the construction of the new Bath firehouse was entered into by the Bath Volunteer Fire Department (the BVFD) and R-J Taylor General Contractors, Inc. in 2006. It was, then, not subject to section 220's "loophole" closing amendment. Had it been, it is clear that it would have qualified as a prevailing wage trigger, since it was plainly a contract for a public work -- a firehouse having as its purpose the provision of a quintessentially governmental service under municipal control (see Not-For-Profit Corporations Law § 1402 [e] [1][1]) -- and was executed by a party (the BVFD) duly found by the Commissioner, after an evidentiary hearing at which the Village of Bath's close financial and consultative involvement with the firehouse construction project was set upon the record, to have been contracting on behalf of a municipal entity.

The question thus arising is whether respondent Commissioner should be deemed to have erred when, in September 2010 -- that is to say, subsequent to section 220's remedial amendment and the attendant recognition of the pre-amendment statute's inadequacy (see Governor's Mem approving L 2007, ch 678, 2007 NY Legis Ann at 425) -- she construed the pre-amendment statute to capture, as an entity capable of triggering the

[1] This provision states in relevant part that special Type B "fire corporations," such as the BVFD, are subject to "the control of the city, village, fire district or town authorities having, by law, control over the prevention or extinguishment of fires therein."

prevailing wage requirement, a fire corporation, clearly acting in the stead of and for the benefit of a statutorily covered municipal entity, and doing so for the frankly acknowledged purpose of avoiding the prevailing wage requirement.[2] While plugging a legislative loophole is ordinarily a legislative task and, as such, not one appropriate for an administrative agency, the situation confronting the Commissioner was not so clear-cut. The Commissioner was charged with enforcing a statute that in its pre-amendment form was, as it had been read, demonstrably unequal to and, indeed, an occasional impediment to achieving the constitutional objective of assuring that workers employed on public works projects would be paid the prevailing wage. The liberty that the Commissioner took with the statute's application -- employing the concept of functional equivalency to treat the BVFD as a municipal entity within the statutory enumeration -- does not in this unusual legal and temporal context appear at all unreasonable as a means of achieving what the statute, in implementing article 1, section 17 of the State Constitution, was supposed to, but sometimes failed to, accomplish because of its legislatively acknowledged "loophole."

Having said this, I acknowledge that the rules of statutory construction, a-contextually deployed, plausibly support the result the Court has reached. The statute said what

[2] The Chief of the BVFD acknowledged at the administrative hearing that "the reason we [the BVFD] were owning the station [was] because we could significantly lower the labor rates ...."

it said in 2006 and its enumeration of entities capable of triggering the prevailing wage requirement admits of being understood as exclusive, if one's understanding is guided solely by the commonly applied statutory construction maxim that what the legislature did not include when it undertook to describe the situations to which an enactment would apply, it intended to omit (see e.g. Walker v Town of Hempstead, 84 NY2d 360, 367 [1994]; Patrolmen's Benevolent Assn. of City of N.Y. v City of New York, 41 NY2d 205, 208-209 [1976]).

But, leaving aside the circumstance that, as has been clear since the statute's 2007 "loophole" patching amendment, the omission which the Court now vests with decisive import, was not intentional but simply attributable to a failure to anticipate a device by which the prevailing wage mandate could and would be circumvented by public agencies, application of the relied upon maxim does not require today's constitutionally dissonant, redux of the Pyramid anomaly. This is because it is clear that, as the Commissioner found, the Village of Bath -- a municipal entity indisputably covered by the unamended statute's enumeration -- itself triggered the prevailing wage requirement when, in the annual contract pursuant to which it retained the services of the BVFD, it agreed to increase BVFD's fee by $150,000 -- an uncommonly large ongoing commitment for a small municipality -- for the clearly understood purpose of amortizing the debt to be assumed by the BVFD in connection with its financing of the

construction of the Bath firehouse. While it is the majority's view that the subject services contract was for services only, and it is true that the contract did not expressly provide that the additional funding was to be applied to pay for the firehouse, the factual record made at the administrative hearing leaves not the slightest doubt that the contract did contemplate in a most concrete way the construction of the new village firehouse.

The chartering of a school, this Court has held, is not an agreement susceptible of description pursuant to Labor Law § 220 (2) as one "which may involve the employment of laborers, workers or mechanics" and thus may not occasion the applicability of the prevailing wage (Matter of New York Charter School Assn. v Smith, 15 NY3d 403, 409 [2010]). But, as the Court simultaneously acknowledged, an agreement pursuant to which money is paid for contemplated construction is quite different (id. citing Matter of 60 Mkt. St. Assoc. v Hartnett, 153 AD2d 205 [3d Dept 1990], affd 76 NY2d 993 [1990]; Matter of National R.R. Passenger Corp. v Hartnett, 169 AD2d 127 [3d Dept 1991]). When public entities enter into agreements involving, even remotely, public payment for construction, the threshold for public entity contracting within the description of Labor Law § 220 (2) has been deemed to have been crossed (see e.g. Bridgestone/Firestone, Inc. v Hartnett, 175 AD2d 495 [3d Dept 1991] [warranty purchased on the State's behalf and eventually used to pay for a roof

repair held to satisfy the public agency contracting requirement]). And, this is in keeping with the often adverted to admonition that section 220 "is to be interpreted with the degree of liberality essential to the attainment of the end in view," namely, that the State's territorial subdivisions will be held "to a standard of social justice in their dealings with laborers, workmen and mechanics" (Bucci v Village of Port Chester, 22 NY2d 195, 201 [1968] [quotation marks and citation omitted]). It cannot be consistent with that admonition for the Court to hold, as it now does, that service agreements requiring annual payments by a municipality of public monies in substantial additional increments, explicable and explained in the extensive administrative record only as amounts necessary to service debt incurred in the construction of a Village firehouse, are not contracts which "may involve the employment of laborers, workers or mechanics," and thus are not contracts for public work within the meaning of the Labor Law.

The confirmed factual finding of the Administrative Hearing Officer was that "the municipalities, [while] aware of and supporting the construction of a new firehouse, specifically agreed to increase the payments under the fire protection service agreement in amounts sufficient to fund its construction and loan amortization." It is only by overlooking this unreviewable finding (see Matter Pell v Board of Educ., 34 NY2d 222, 230 [1974] ["the doctrine is well settled, that neither the Appellate

Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact"] [internal quotation marks and citation omitted]), that the Court today manages to grant a state subdivision a dispensation from the prevailing wage law.

I would affirm the well-considered decision and order of the Appellate Division confirming the Commissioner's determination and dismissing the petition.

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Judgment reversed, with costs, petition granted and respondent's determination annulled. Opinion by Judge Pigott. Judges Graffeo, Read and Smith concur. Chief Judge Lippman dissents and votes to affirm in an opinion. Judge Rivera took no part.

Decided February 19, 2013