

04-081

Motion on Clearinghouse Rule 04-081

Assembly Committee on Labor Executive Session October 26, 2004

Move that the Assembly Committee on Labor object, pursuant to s. 227.19 (4) (d) 6., Stats., to the promulgation of Clearinghouse Rule 04-081, relating to prevailing wage rates on public works projects, as the proposed rule is arbitrary and capricious and imposes an undue hardship.

(Motion adopted on a 5-1 vote with three members absent.)

Rationale for the Motion:

-The committee originally scheduled a public hearing to take testimony on the proposed rule change, specifically the issue of statutory authority and legislative intent.

-At the public hearing on October 6, 2004, the committee learned that other concerns regarding the rule change existed. These included:

- 1.) Concerns of municipal governments over the impact of this change on the cost of public works projects covered by the state prevailing wage rates law. **In fact, the Wisconsin Alliance of Cities made a specific request that the committee object to the rule. The League of Municipalities registered against the rule.**

The chairman has pointed out inconsistencies between the fiscal estimate filed with the rule and other communications from the agency regarding the costs associated with the change. The fiscal estimate filed with the rule states that there will be cost increases associated with the change, but a specific estimation of those costs can't be computed. After the Assembly public hearing, the agency sent a letter stating that the costs would be minimal to local governments, but provided no specifics on how they could now determine the costs to be minimal.

- 2.) The rule change doesn't clearly account for how overtime will be factored into the new process for calculating prevailing wage rates. Both union representatives and contractors have asked for a definitive answer in writing on this aspect of the rule change. This matter should probably be resolved in the rule and not by agency internal policy.

3.) There are still concerns regarding the statutory authority and the agency's interpretation of legislative intent. Should the agency seek legislation?

The current methodology being used to calculate the prevailing wage was created by administrative rule after enactment of the Prevailing Wage Law in 1997. However, at that time the agency assembled a working group of people representing contractors, unions and local governments to help develop an outline for how the new prevailing wage law would be carried out through administrative rule, including how to calculate the prevailing wage rates.

CHR 04-081 is not the product of such a collaborative process amongst all of the interested parties. **The agency admitted before the Assembly Labor Committee that one union requested the change in methodology.** That union made the request because of the financial concerns surrounding their health care fund.

The chairman attempted to work with the agency to resolve this issue without having the committee object to the rule. On October 18, 2004, I sent a letter requesting the agency to withdraw the rule and put together a working group to resolve all of the questions.

On October 20, 2004, the agency responded that it wouldn't withdraw the rule and offered no hopes of compromise. In fact, the only suggestion the agency made in its response was to ignore the testimony gathered at the Assembly hearing and instead encouraged the committee to focus on the more favorable testimony gathered at the agency's public hearing in August 2004.

Finally, my office also contacted both Rep. Sinicki's Office (Ranking Minority Member on the Assembly Labor Committee) and the Governor's Office to seek assistance in getting the agency to withdraw the rule and find compromise on the issue. Those efforts unfortunately failed.

It is the agency that has left the committee with only one option—objection to CHR 04-081.



ELECTRICAL CONTRACTORS ASSOCIATION

Milwaukee Chapter NECA, Inc.

Two Honey Creek Corporate Center • 115 S. 84th Street, Suite 110 • Milwaukee, WI 53214

Telephone: 414.778.0305 • Fax: 414.778.0224 • E-mail: neca@neca-milw.org

December 15, 2004

VIA FACSIMILE

Co-Chairman Joseph Leibham
 Co-Chairman Glenn Grothmann
 Joint Committee for Review of Administrative Rules
 Room 409 South, State Capitol
 P.O. Box 7882
 Madison, Wisconsin 53707

Re: Clearinghouse Rule 04-081

Dear Co-Chairmen Leibham and Grothmann,

The Electrical Contractors Association (NECA) urges you to oppose an effort to reject Clearinghouse Rule 04-081 – a small, but important technical change which seeks to correct prevailing wage rates to actual market conditions.

Recent dramatic increases in the cost of health insurance have caused the Department of Workforce Development (DWD) to review its interpretation of the methodology for determining the prevailing wage rates. At present, the department calculates a jurisdiction's prevailing wage rate for public work in any trade and job classification as the hourly wage rate and fringe benefits which was paid on a majority of all construction projects (private and public) during an annual reporting period. If no one rate prevails, DWD calculates a weighted average of all rates. DWD proposes to change their methodology of separately counting unique wage rate and fringe benefit hours to counting unique combined wage/fringe rate hours.

To meet skyrocketing health insurance costs, many construction labor unions have been forced in mid-year to reallocate collectively bargained wage/fringe packages. This reallocation reduces the dollar amount paid to employees on their checks, but the combined wage/fringe labor cost to signatory contractor employers (like the electrical contractors NECA represents) remains the same. The table below is an example.

	Wage Rate Rate	Fringe Package	Wage/Fringe Package	# of Hours
Union Rate A	\$20	\$5	\$25	2,750
Union Rate B	\$18	\$7	\$25	2,750
Non-Union Rate	\$16	\$4	\$20	4,500

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Using the preceding example table, despite the fact that union signatory contractors control 55% of the marketplace and have clearly set a prevailing market labor cost of \$25 per hour, DWD is compelled under the current rules to state that there is no prevailing wage rate in the jurisdiction and to calculate a weighted average "prevailing" wage rate of \$17.65 with a fringe benefit of \$5.10. Under DWD's proposed change, the union's combined wage/fringe rate of \$25 would be viewed as "prevailing" and the prevailing wage rate and fringe benefit would be set at \$19 and \$6 respectively.

In this example, I've oversimplified the Non-Union Rate and made it a uniform or average rate. In reality, there can be literally hundreds of non-union electrician wages and benefits within any one jurisdiction. Clearly, the DWD's proposed change would result in a fairer and far less complex computation of the prevailing wage and fringe rates.

Prevailing wage rates are something of a misnomer anyways. Wage rates on current projects reflect wage rates paid during the previous year and not what is currently being paid. In fact, in jurisdictions where the union controls a majority of the hours reported and assuming an annual union wage/fringe package increase of 3% per year, the state prevailing wage/fringe rate that is required to be paid on state projects can be as much as 6.9% less than the wages and fringes that a union contractor actually pays to the employees as required under their current labor management collective bargaining agreement.

Without DWD's proposed change, state prevailing wage rates could be artificially driven lower as shown in the example and this hourly labor rate margin between the actual market wage rate and the phony-baloney state "prevailing" wage rate would grow even larger. Opponents of the rule change – including the Wisconsin Alliance of Cities and other municipal government groups – think this is a good idea. They have expressed concerns that the rule change will have an upward impact on overall costs of public work projects. In reality, prevailing wage rates have, at best, a de minimus impact on the overall cost of the projects.

Whether in public or private construction competing contractors provide bids to their customers. The goal of any contractor is to submit bids which maximize the contractor's profit while remaining at least one dollar lower than other competing bids. The amount of competition on a project is the controlling factor of cost.

If union labor rates can be almost 7% higher than the so-called prevailing state rate and, perhaps, as much as 10-15% higher than the average non-union labor rates, how are union contractors able to win any qualified lowest bidder contracts? I would argue that union contractors and their labor force must be more uniformly trained and productive than their non-union counterparts. It's either that or the non-union contractors are obscenely marking up their profit margins in their bids.

There are some dangers for the public works entities if DWD's proposed change is blocked. If the wage rates are allowed to continue to remain artificially lower than both the current market rate or even a properly

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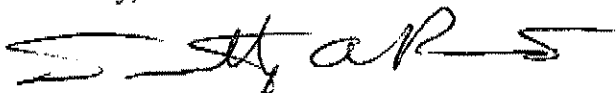
calculated prevailing wage rate, eventually union contractors may become unable or unwilling to bid on state projects. Without competition from union contractors, non-union contractors would be free to mark up their bids. Some non-union contractors might even seek to further maximize their margins by choosing to send their lower-skilled and lower-paid workers onto state projects. If the "prevailing" wage is more accurately set, there is greater incentive for non-union contractors to send their more highly skilled and higher paid employees.

Beyond the union/non-union debate, an artificially low "prevailing" wage rate may also lock out local contractors from any public work in their own counties and communities because a contractor from another state or area has an actual wage rate that more closely matches the artificial "prevailing" wage rate. Accurate prevailing wage rates keep jobs in that community. Inaccurate wage rates that bring in contractors from other areas can end up diverting money in wages and contractor payments back to the home communities of these traveling contractors and away from the local economy of the community where the project is actually being built.

This brings the argument back to the basic public policy debate regarding prevailing wages. The State of Wisconsin has viewed the establishment of prevailing wage rates as good public policy. The intent of prevailing wage has always been to protect the wages of competent and skilled local workers and to safeguard the ability of the state and other public entities to have properly built construction projects.

DWD's proposed change seeks to maintain that basic intent. The Electrical Contractors Association (NECA) wholeheartedly endorses DWD's effort to make prevailing wage rates more accurately reflect local market rates with Clearinghouse Rule 04-081. If you have any questions regarding NECA's position on this issue, please do not hesitate to contact me at the Association office at (414)778-0305.

Sincerely,



Timothy A. Penno
Director of Government Affairs

c: Sen. Mary Lazich (R-New Berlin)
Sen. Judy Robson (D-Beloit)
Sen. Spencer Coggs (D-Milwaukee)
Rep. Scott Gunderson (R-Waterford)
Rep. Lorraine Seratti (R-Florence)
Rep. Tom Hebl (D-Sun Prairie)
Rep. Spencer Black (D-Madison)



P.O. Box 7882
MADISON, WI 53707-7882
(608) 266-2056

P.O. Box 8952
MADISON, WI 53708-8952
(608) 264-8486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

Concurrence Motion Form

December 16, 2004
State Capitol

Moved by Grothman, Seconded by Lazich

THAT, pursuant to s. 227.19(4)(d)6, stats. the Joint Committee for Review of Administrative Rules concurs with the Assembly Labor Committee's motion to object to proposed Clearinghouse Rule 04-081.

*DWD Meet w/ interested parties & make modifications
5pm Dec. 23, 2004*

COMMITTEE MEMBER	Aye	No	Absent
1. Senator LEIBHAM	✓		
2. Senator LAZICH	✓		
3. Senator REYNOLDS	✓		
4. Senator ROBSON		✓	
5. Senator COGGS			
6. Representative GROTHMAN	✓		
7. Representative SERATTI	✓		
8. Representative GUNDERSON	✓		
9. Representative BLACK		✓	
10. Representative HEBL		✓	
Totals			

Motion Carried

Motion Failed



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(608) 266-2056

P.O. Box 8952
MADISON, WI 53708-8952
(608) 264-8486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

December 17, 2004

Roberta Gassman, Secretary
Department of Workforce Development
201 East Washington Avenue
Madison, WI 53707-7946

Dear Secretary Gassman:

The Joint Committee for the Review of Administrative Rules met in Executive Session on December 16, 2004 and adopted the following motion:

Clearinghouse Rule 04-081 Relating to prevailing wage rates on public works projects and affecting small business.

That, the Joint Committee for Review of Administrative Rules:


1. Requests, pursuant to s. 227.19 (5) (b) 2. Stats., that the Department of Workforce Development consider making modifications to Clearinghouse Rule 04-081.
2. Objects, pursuant to s. 227.19 (4) (d) 6. and (5) (d), Stats., to Clearinghouse Rule 04-081 if the Department of Workforce Development does not agree, by 5:00 p.m. of December 23, 2004, to consider making modifications to the rule.

Motion Carried 6 Ayes, 4 Noes

Pursuant to s. 227.24(2)(c) Stats, we are notifying the Secretary of State and the Revisor of Statutes of the Committee's action through copies of this letter.

Sincerely,


Joseph Leibham
Senate Co-Chair


Glenn Grothman
Assembly Co-Chair

JKL:GSG:mjg

cc:Secretary of State Doug LaFollette, Revisor of Statutes Gary Poulson



P.O. Box 7882
MADISON, WI 53707-7882
(608) 266-2056

P.O. Box 8952
MADISON, WI 53708-8952
(608) 264-8486

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

December 17, 2004

The Honorable Alan Lasee
Senate President
State Capitol Building, Room 220 South
Madison, WI 53702

The Honorable John Gard
Assembly Speaker
State Capitol Building, Room 211 West
Madison, WI 53702

Dear President Lasee and Speaker Gard:

The Joint Committee for the Review of Administrative Rules met in Executive Session on December 16, 2004 and adopted the following motions:

Clearinghouse Rule 04-069 Relating to prorating under the Milwaukee School Choice Program.

THAT, pursuant to s. 227.19 (4) (d) 6 and 5 (d), stats. the Joint Committee for Review of Administrative Rules objects to proposed Clearinghouse Rule 04-069.

Motion Carried 6 Ayes, 4 Noes

Clearinghouse Rule 04-081 Relating to prevailing wage rates on public works projects and affecting small business.

That, the Joint Committee for Review of Administrative Rules:

1. Requests, pursuant to s. 227.19 (5) (b) 2. Stats., that the Department of Workforce Development consider making modifications to Clearinghouse Rule 04-081.
2. Objects, pursuant to s. 227.19 (4) (d) 6. and (5) (d), Stats., to Clearinghouse Rule 04-081 if the Department of Workforce Development does not agree, by 5:00 p.m. of December 23, 2004, to consider making modifications to the rule.

Motion Carried 6 Ayes, 4 Noes

THAT, pursuant to s. 227.24(2)(a), stats. the Joint Committee for Review of Administrative Rules extends the effective period of emergency rules NR 10, NR 1.05, 1.06 and 1.07, NR 310, NR 320, NR 329, NR 343, NR 345, NR 328, Tax 2.99, Tax 3.04, PI 35, RL 31.035 (1m) et al for 60 days at the request of the Departments of Natural Resources, Revenue, Regulation and Licensing, and Public Instruction.

Motion Carried 10 Ayes, 0 Noes

Pursuant to s. 227.24(2)(c), stats., as treated by 1997 Wisconsin Act 185, please forward a copy of this notice to the chairperson of the standing committee in your respective house most likely to have jurisdiction over the Clearinghouse Rule corresponding to this emergency rule.

Sincerely,



Senator Joseph Leibham
Senate Co-Chair



Representative Glenn Grothman
Assembly Co-Chair

JKL:GSG:mjd

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Proposed Prevailing Wage Rules

JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES SCHEDULES HEARING

The Legislature's Joint Committee for Review of Administrative Rules (JCRAR) has scheduled a hearing to consider DWD 290 (Proposed Rules Relating to Prevailing Wage). If JCRAR votes to object to the proposed prevailing wage rule, a bill to prevent promulgation of the rule will be introduced when the legislative floor period begins in January 2005.

The hearing has been scheduled for: **Thursday December 16, 2004**
10:00 am
Room 411-S, State Capitol
Madison

The public is invited to attend.

On October 26, the Assembly Committee on Labor voted 5-1 to object to the proposed prevailing wage rule.

On October 6, the department provided testimony before the committee in support of the proposed rule to amend the methodology used in setting the prevailing wage rates on public works projects. At the time, the Assembly Labor Committee adjourned the hearing without voting on the proposed change. On October 18, the Chair of the Assembly Committee on Labor (State Rep. Stephen L. Nass) requested that the department withdraw its proposed rule. On October 20 the department submitted a letter to the committee refusing this request.

To view the October 18 letter from Representative Nass to the Department [click here](#)

To view the October 20 letter from Department to Representative Nass [click here](#)

On August 31, 2004, the Department submitted the following proposed rules to the Legislature for their review. Recent dramatic increases in the cost of health insurance have necessitated that the Department review its interpretation of the methodology for determining the prevailing wage rates. The Department proposes to determine whether there is a majority of hours reported that receive a total economic benefit that is the sum or the hourly rate of pay and the hourly fringe equivalent rather than requiring an exact match of the figures separately. The proposed methodology will not penalize unions that agree to a lower rate of pay during the contract period to cover the increased cost of health insurance. For information on this proposed rule go to:

Proposed Rules Relating to Prevailing Wage Rates Chapter DWD 290/CR 04-081

- [Rules Analysis for Legislative Review](#)
- [Final Proposed Rule](#)
- [Public Hearing Summary](#)
- [Legislative Council Comments](#)
- [Response to Legislative Council Comments](#)

The rule promulgation process is described in [Chapter 227, Stats.](#) The section on legislative review prior to promulgation is at s. 227.19, Stats.

Updated December 02, 2004 by the [Equal Rights Division](#)
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