

HABERMEHL ELECTRIC, INC.,
9542 S. 58th Street,
Franklin, Wisconsin, 53132
A Wisconsin corporation,

Plaintiff/Petitioner,

v.

THE STATE OF WISCONSIN,
DEPARTMENT OF WORKFORCE
DEVELOPMENT
201 E. Washington Avenue,
Madison, Wisconsin, 53703, and

THE STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
4802 Sheboygan Avenue,
PO Box 7916,
Madison, WI 53707

Defendants/Respondents.

COMPLAINT/PETITION FOR REVIEW

Case No. _____

03060430

Case Code: 30607—
Administrative Agency Review
30701—Declaratory Judgment

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COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

COMPLAINT FOR DECLARATORY JUDGMENT
AND PETITION FOR JUDICIAL REVIEW

NOW COMES the Plaintiff, Habermehl Electric, Inc., by its attorneys, Hurtado & Dagen,
S.C., and as and for its Complaint and Petition for Judicial Review against the State of
Wisconsin's Department of Workforce Development ("DWD") and State of Wisconsin's
Department of Transportation ("DOT"), alleges to the Court as follows:

1. Plaintiff, Habermehl Electric, Inc. ("Habermehl"), is a Wisconsin corporation and
a certified Disadvantaged Business Enterprise ("DBE"), having its principal office at 9542 S.
58th Street, Franklin, Wisconsin, 53132.

2. Habermehl is one of a small, specialized group of licensed electrical contractors
in the State of Wisconsin that perform outside electrical work, such as installation of light poles

DANE COUNTY, WI
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and traffic signals, ancillary to the construction of Wisconsin roadways ("Outside Electrical Work"). For more than 10 years, Habermehl has been successfully performing Outside Electrical Work for the State of Wisconsin Department of Transportation ("WisDOT"), which makes up approximately 40% of its total work annually.

3. In the completion of its work on public projects, Habermehl is required by State law to pay its workers at prevailing wage rates established annually by the State of Wisconsin Department of Workforce Development ("DWD") and used by various Departments throughout State government, such as WisDOT, that engage in construction activities. These prevailing wage rates are reported annually in the DWD's Prevailing Wage Classifications List (the "List"). Since some State projects are funded by a combination of both state and Federal funding, the List frequently sets forth both a federal prevailing wage rate and its comparable state wage rate. Thus Habermehl is a specially interested party, with standing to sue, because, in part, of its statutorily mandated duty to pay prevailing wage rates under Wisconsin law.

4. For more than thirty (30) years prior to 1997, Habermehl and other electricians specializing in Outdoor Electrical Work used workers classified within a state prevailing wage classification known as "Line Constructors", including five (5) specific subclassifications that had been regularly published in wage rate determinations by DWD prior to 1997 as follows: Heavy Equipment Operator, Light Equipment Operator, Heavy Truck Driver, Light Truck Driver and Groundsman (the "Subclassifications").

5. Habermehl, and the owners of Habermehl individually, are Wisconsin taxpayers whose tax money pays for Wisconsin DOT projects which are awarded to the lowest responsible bidder. As a result, this fact serves as one ground for the standing of Habermehl to bring this action.

6. Defendant, DWD is an agency of the State of Wisconsin with a principal place of business is 201 E. Washington Avenue, Madison, Wisconsin, 53703. DWD is named as a necessary party in this action to the extent they are necessary to afford complete relief to Habermehl.

7. Defendant, DOT, is an agency of the State of Wisconsin with a principal place of business is 4802 Sheboygan Avenue, PO Box 7916, Madison, WI 53707.

8. At all times relevant to this action DWD was, and is, the State agency conferred with the mandatory statutory authority of determining the prevailing wage rates and occupational classifications for State highway construction projects and certifying those wage rates and occupational classifications to the State of Wisconsin Department of Transportation ("DOT") for utilization in the award of public highway construction contracts.

9. In the completion of public highway construction projects, state agencies such as DOT require contractors, such as Habermehl, to use the prevailing wage rates established by the Equal Rights Division, Bureau of Labor Standards, Construction Wage Standards Section of DWD.

10. The DOT has a ministerial duty to enforce the Prevailing Wage Rates only.

11. In April, 1996 the Wisconsin Legislature enacted 1995 Wis. Act 215 (the "Act") to reform the way in which the prevailing wage rates are set in Wisconsin. Specifically, to help insure that meaningful hourly wages for various workers were set based on actual market place costs, DWD was required to engage in a detailed survey of contractors in each specialty trade from a variety of geographic areas throughout the State to establish prevailing wage rates (the "Survey"). The Subclassifications were not exempt from this required statutory analysis.

12. Gary C. Shealy ("Shealy") was, for part of the time relevant to this action, Chief of the Construction Wage Standard Section of the DWD. His conduct during such time was

governed by Wisconsin law, including but not limited to, Chapter 103 of the Wisconsin Statutes and by the administrative rules and regulations that implement Chapter 103.

13. Shealy was designated by DWD to be the primary person responsible for the implementation of the Survey.

14. When the Construction Wage Standards Section of DWD first was assigned to develop, conduct and compile the results of data received from its initial Survey, as required by the Act, Shealy was Chief of that Section.

15. Despite having actual knowledge and information that the Subclassifications were prevailing trades and occupations throughout the State of Wisconsin, in or about August, 1996 Shealy deleted the Subclassifications from the initial survey form that DWD issued to employer/contractors in order to determine the prevailing wages and occupations in the State, and it subsequently issued Dictionary of Occupational Classifications and Work Descriptions (the "Trade Dictionary").

16. Shealy's removal of the Subclassifications from the Survey and Trade Dictionary adversely affected Habermehl and other similarly situated electrical contractors who relied on the existence and utilization of the Subclassifications and their related wage rates in performing on DOT highway construction contracts.

17. In May 1999, more than a year after Habermehl signed subcontracts to perform Outside Electrical Work, Habermehl was first advised that the Subclassifications had been deleted from the State's Trade Dictionary.

18. DOT has no authority to change the classifications in the DWD List.

19. On March 1, 1999, a petition was sought by the head of the National Electrical Contractors Association ("NECA") on behalf of its electrical contractor members requesting the DWD's reinstatement of the Subclassifications to DWD's List. Although several telephone

conferences and a meeting took place to discuss this matter, Shealy, the Director of the DWD, offered no formal explanation for the withdrawal of the Classifications. Shealy retired shortly thereafter without issuing an explanation as to why the Subclassifications were removed. A petition to reinstate the Classifications from the date of their removal was renewed to the new Acting Chair, Pat Hewitt, on June 28, 1999. For a number of months thereafter, no response was received by NECA, on behalf of its members, including Habermehl, to these inquiries.

20. On May 25, 1999, Habermehl was first advised by DOT that it was allegedly violating DWD List rates for prevailing wages because it was paying wages based on the deleted Line Construction Subclassifications. According to DOT, these Subclassifications were not eligible to be used on State projects because the state analog classifications had been withdrawn by DWD. DOT asserted that Habermehl's workers should have been paid at significantly higher Operator/General Laborer classification rates. At the time, DOT sought the payment of approximately \$41,224.04 of additional wages on three different projects from Habermehl. Habermehl, like a number of other electrical contractors, was misled by DOT's ambiguous specification requirements which published the Federal "Line Constructor" Classifications and simply withdrew State "Line Construction" Classifications without notice or comment, making it appear that the Classifications were still valid rates for use on DOT projects.

21. Habermehl made numerous calls to DOT and DWD for approximately four months seeking clarification of why and how the State Classifications had been withdrawn but got no answers from the Acting Chair of the Prevailing Wage Division of DWD, Pat Hewitt, or others within the DWD. In November, 1999, Habermehl formally joined NECA's petition seeking complete reinstatement of the Classifications from the date of their withdrawal by DWD in May of 1997.

22. DWD received from Habermehl repeated verbal and written requests on behalf of Habermehl to reinstate the Subclassifications and to furnish any documents that supported or otherwise justified Shealy's decision to withdraw the Subclassifications after it received DOT's notice.

23. Habermehl requested, and DOT initially granted, an extension of time to pay the additional funds for prevailing wages arising from the change to more costly state prevailing wage classifications pending the decision by DWD regarding Habermehl's petition for reinstatement.

24. As months elapsed on without a response from DWD, DOT determined it would no longer wait to require payment from Habermehl. DOT then advised that Habermehl had to pay the additional funds regardless of the pending Petition before DWD. Habermehl was given no option except to pay if it did not want to be precluded entirely from working on DOT projects. Habermehl then made the payments under protest.

25. Habermehl renewed its requests to DWD for a prompt response to its Petition. Although several meetings were held, no rationale or explanation of a "reasonable basis" for removal of the Subclassifications was provided (other than a general assertion that DWD had the "authority" to remove the subclassifications as it did). After a number of telephone conferences and letters were sent to DWD with no response, Habermehl presumed that its request had been denied and filed the Petition for Review of DWD's denial, dated January 26, 1999.

26. On January 30, 2000, Habermehl received an Initial Determination to Reinstate Wage Classification, dated January 20, 1999, from DWD. (This Initial Determination apparently was mailed on or about the same date Petitioner mailed its Petition for Review to DWD). In the Initial Determination, DWD indicated that it intended to reinstate the Subclassifications if no appeals to the Initial Determination were received within thirty days.

27. On April 6, 2000, a Final Determination to Reinstate Wage Classification was made by DWD – more than nineteen months after the initial request for reinstatement had been made. In that Final Determination, DWD provided evidence that virtually every group and contractor surveyed by them in 1999 had responded favorably to reinstate the Subclassifications. The Subclassifications were reinstated, however, only prospectively: after January 1, 2001. No rationale or explanation was provided in DWD's Final Determination to explain why only a prospective reinstatement was granted.

28. On March 13, 2000, Habermehl met with representatives of DWD to continue its petition to reinstate the Subclassifications from the date of their removal through the date of their reinstatement; in other words, from the period of May, 1997 through January 1, 2001 (the "Interim Period"). No explanation was offered to support why DWD's Final Determination was prospective only, in spite of very pointed questions seeking this information. When settlement alternatives proposed by Habermehl were rejected by DWD, Habermehl renewed its Petition of DWD's denial of reinstatement.

29. Habermehl waited approximately five weeks before a response was received from DWD denying additional reinstatement of the Subclassifications during the Interim Period. It was an additional two months thereafter before Administrative Law Judge John Windrl was appointed to hear Habermehl's Amended Petition for Reinstatement, which was filed on August 12, 2000.

30. During this period of delay, DOT advised Habermehl that any further efforts on its part to withhold paying the differential in wages for workers that were reclassified when the Subclassifications were removed was being treated by DOT as an "intentional and willful" delay. Habermehl responded by proposing to DOT that it hold the disputed overages in trust pending outcome of DWD's Petition hearings in this matter. DOT rejected this proposal and gave

Habermehl until September 1, 2000 to make the additional payment or face additional sanctions by DOT. These additional sanctions at a minimum, included being placed "on probation" for a period of at least one year, and/or a determination that Habermehl would be no longer eligible to bid DOT work whatsoever.

31. On July 20, 2000, Hurtado & Dagen, S.C. conveyed a letter to DOT on behalf of Habermehl making an "open records" request. In this "open records" request, DOT was to provide a basis or rationale for DOT's exclusion of the Classifications on projects on which it sought bids to be submitted in August, 2000 and on its future projects. This "open records" request expressly requested this analysis for each of six separate subclassifications of Line Construction: Linemen, Heavy Equipment Operators, Light Equipment Operators, Heavy Truck Drivers and Groundmen, Light Truck Drivers and Groundmen, and Groundmen.

32. On August 8, 2000, William Bauer, Chief of Construction Operations Management for DOT responded by letter to the "open records" request. His rationale for asserting that the Subclassifications are inapplicable to DOT work was that DOT "does not contract for the construction of lines."

33. DOT's own records produced in response to Habermehl's "open records" request show that DOT was given actual notice by DWD on or about March 6, 2000 that Line Construction Subclassifications include more than "high power line" installation, or in other words, that it includes the installation of traffic signals and light poles, the exact work performed by Habermehl under WisDOT subcontracts.

34. Neither in DOT's "open records" response nor in any other document or discussion held with DOT subsequently, has DOT explained its substantive basis for excluding five of the six "Line Constructor" subcategories from DOT projects: namely, Heavy Equipment

Operators, Light Equipment Operators, Heavy Truck Drivers and Groundmen, Light Truck Drivers and Groundmen, and Groundmen.

35. Since the issuance of Mr. Bauer's "open records" responses, WisDOT has been repeatedly advised by DOT that (a) the Subclassifications are more broadly defined than the installation of high power lines, (b) the Subclassifications include the construction of light poles and traffic signals, (c) that these Subclassifications have been used by DOT and its electrical contractors performing Outside Electrical Work for decades; (d) that the reinstated Subclassifications already restored by DWD after January 1, 2001 have not modified or reduced these broader definitions; (e) that the actual Subclassification definitions are contrary to and broader than Mr. Bauer's understanding of the Subclassifications as expressed in his August 8, 2000 "open records" response; and (f) that the effect of DOT's actions is to compel electrical contractors on its projects, including Habermehl, to use prevailing wage rates that are at a substantially higher cost to Wisconsin taxpayers than the actual industry prevailing rates for groundsmen and equipment operator work, with no efficiency or improvement in quality of work or other substantive justification for compelling the increase.

36. Habermehl and DWD had advised WisDOT that serious substantive discussions for settlement of Habermehl's petition are currently being undertaken, in which DWD has indicated that it is willing to reinstate the Classifications during the Interim Period from May, 1999 to January, 2001.

37. DOT has advised that it is "irrelevant what DWD does" in reinstating the Subclassifications, whether prospectively from January 1, 2001 forward, or during the Interim Period; that DOT does not have to withdraw its demand for payment from Habermehl if DWD reinstates the Classifications; that DOT will continue to demand payment from Habermehl for the differential in prevailing wages it has asserted is correct for the Interim Period; and that

Habermehl and other electrical contractors may not use the Subclassifications even after January 1, 2001 because they are "inapplicable to DOT work."

38. DOT has acknowledged that the prevailing wage rates DOT wants to apply are higher than the Line Construction Classifications rates, but has not, to date, furnished any other rationale for this direction of means and methods in the performance of its contractors' work.

39. DOT has advised Habermehl several times that they are to come into compliance with DOT payment demands by September 1, 2000 regardless of any actions taken by DWD regarding reinstatement of the Subclassifications. DOT further has threatened that if Habermehl does not make the additional payment that DOT is requiring, Habermehl will face sanctions from DOT, which at a minimum, include being placed "on probation" for a period of at least one year, and a threatened determination that Habermehl would no longer be eligible to bid DOT work.

40. Habermehl filed a lawsuit against the DOT in Dane County Circuit Court as Case No. 00CV2407 on August 31, 2000, seeking declaratory judgment, and a judicial review of the administrative decisions of the DOT along with other claims.

41. On January 9, 2002, Honorable David Flanagan granted DOT's Motions for Summary Judgment and denied Habermehl's Motion for Summary Judgment and Motion for Leave to Amend Pleadings on procedural grounds while finding merit in Habermehl's claim for DWD's wrongful conduct and breach of duty by DWD.

42. On the same day as the Court's decision the DOT issued 21 enforcement actions on projects where Habermehl provided labor and materials in the years 2000 and 2001, including 11 new actions which were not previously brought by the DOT.

43. Even though DOT was or should have been aware of all projects Habermehl worked on it did not seek to enforcement on any of the 11 new projects prior to or during the pendency of Case No. 00CV2407. As a result, DOT has waived its right to seek enforcement on

those projects now. Copies of the Enforcement Actions are attached to this Complaint as Group Exhibit "A" and are incorporated by reference herein.

44. Thirty (30) days have not elapsed since DOT issued the 21 enforcement actions against Habermehl.

45. Habermehl has inquired of DOT as to administrative review procedures within the DOT and has been advised by the DOT that DOT does not have administrative review procedures in place.

46. Habermehl has been unfairly singled out by the DOT and has been treated differently than other Outside Electrical Work Contractors in the enforcement practices of DOT.

47. The enforcement actions issued by DOT are retaliatory, are beyond standard DOT enforcement procedures and are being issued with the intent of harassing and punishing Habermehl for pursuing lawful relief for damages caused by the improper removal of prevailing wage subclassifications and is an attempt to coerce Habermehl into withdrawing from the assertion of its rights under Wisconsin law.

FIRST CAUSE OF ACTION - DECLARATORY JUDGMENT AGAINST DWD

48. Plaintiff hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 47 of this Complaint as if fully set forth herein.

49. It is respectfully submitted that the conduct of DWD referenced herein constitutes a violation of Wisconsin Statutes Section 103.50.

50. The conduct of the DWD as it relates to Habermehl, and similarly situated electrical contractors performing Outside Electrical Work, and DOT's interpretation of Wisconsin Law, has impaired and threatens to impair and interfere with the legal rights and privileges of the Plaintiff. The rights of the Plaintiff cannot be adequately protected at law unless

the Defendant is enjoined in both a temporary and permanent basis from interfering with, obstructing and/or failing to recognize the DWD Classifications for Line Construction.

51. The Plaintiff will sustain permanent and irreparable injury, including loss of business, loss of contracts, damage to business reputation and severe and legally unsustainable fines and/or penalties issued by DOT in the event Defendant is permitted to continue its course of action. Protection of the status quo relating to Habermehl and the Classifications can only be maintained by way of temporary and permanent injunctive relief.

52. As a result of Defendant's actions Plaintiff is entitled to seek declaratory judgment pursuant to Wisconsin Statutes Sections 227.01(13)(t) and 227.40.

SECOND CAUSE OF ACTION – DECLARATORY JUDGMENT AGAINST DOT

53. Plaintiff hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 52 of this Complaint as if fully set forth herein.

54. The DWD removal of the Subclassifications, and its failure to comply with Section 103.50, along with its threatened application by DOT interferes with or impairs, and/or threatens to interfere with or impair the legal rights and privileges of Habermehl.

55. It is respectfully submitted that the conduct of DWD referenced herein constitutes a violation of Wisconsin Statutes Section 103.50. As a result, the attempts by DOT to enforce the illegal acts of DWD must be declared to be invalid.

56. The conduct of the DWD as it relates to Habermehl, and similarly situated electrical contractors performing Outside Electrical Work, and DOT's interpretation of Wisconsin Law, has impaired and threatens to impair and interfere with the legal rights and privileges of the Plaintiff. The rights of the Plaintiff cannot be adequately protected at law unless DOT is enjoined in both a temporary and permanent basis from attempting to enforce illegal and improper wage rate classifications for line constructors.

57. The Plaintiff will sustain permanent and irreparable injury, including loss of business, loss of contracts, damage to business reputation and severe and legally unsustainable fines and/or penalties issued by DOT in the event DOT is permitted to continue its course of action. Protection of the status quo relating to Habermehl and the Classifications can only be maintained by way of temporary and permanent injunctive relief.

58. As a result of DOT's enforcement actions Plaintiff is entitled to seek declaratory judgment pursuant to Wisconsin Statutes Sections 227.01(13)(t) and 227.40.

THIRD CAUSE OF ACTION – PETITION FOR JUDICIAL REVIEW OF DOT ACTION

59. Plaintiff hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 58 of this Complaint as if fully set forth herein.

60. The actions of DOT constitute administrative decisions that adversely affect the substantial interests of the Plaintiff in DOT's failure to recognize the illegal acts of DWD respecting Line Construction Classifications issued by the DWD.

61. Plaintiff is an "aggrieved party" as defined in Wisconsin Statutes section 227.53, whereas DOT is in the process of compelling Plaintiff to pay unfair, improper and illegal fines, wages and fees and, further, has threatened to place Plaintiff on probationary or other status which would affect the eligibility of Plaintiff regarding DOT work.

62. As a result of DOT's actions, Plaintiff is entitled to judicial review of the administrative decisions that have adversely affected Plaintiff pursuant to Wisconsin Statutes Sections 227.52 and 227.53.

63. The rights of the Plaintiff cannot be adequately protected at law unless the Defendant is enjoined in both a temporary and permanent basis from interfering with, obstructing and/or failing to recognize the DWD Classifications for Line Constructor.

64. The Plaintiff will sustain permanent and irreparable injury, including loss of business, loss of contracts, damage to business reputation and severe and legally unsustainable fines and/or penalties issued by DOT in the event Defendant is permitted to continue its course of action. Therefore, it is respectfully submitted that the status quo be maintained by way of temporary and permanent injunctive relief and the Court must, ultimately, overturn the enforcement actions pursued by DOT.

FOURTH CAUSE OF ACTION - PETITION FOR JUDICIAL REVIEW OF DWD

ACTION

65. Plaintiff hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 64 of this Complaint as if fully set forth herein.

66. The actions of DWD constitute administrative decisions that adversely affect the substantial interests of the Plaintiff and have resulted in DOT's failure to recognize the Line Construction Classifications issued by the DWD.

67. Plaintiff is an "aggrieved party" as defined in Wisconsin Statutes section 227.53, whereas DOT is in the process of compelling Plaintiff to pay unfair, improper and illegal fines, wages and fees and, further, has threatened to place Plaintiff on probationary or other status which would affect the eligibility of Plaintiff from obtaining DOT work.

68. As a result of DWD's actions, Plaintiff is entitled to judicial review of the administrative decisions that have adversely affected Plaintiff pursuant to Wisconsin Statutes Sections 227.52 and 227.53. Further, the failure of Administrative Law Judge Winderl to follow the requirements of Wis. Stats. Sec. 227.48 in his Decision provides jurisdiction over this issue. The applicable time periods have not yet begun to run, pursuant to Section 222.7.48(2), Wis. Stats., because ALJ Winderl's decision did not, and still does not, comply with the statutory requirements.

69. The rights of the Plaintiff cannot be adequately protected at law unless the Defendant is enjoined in both a temporary and permanent basis from interfering with, obstructing and/or failing to recognize the DWD Classifications for Line Constructor.

70. The Plaintiff will sustain permanent and irreparable injury, including loss of business, loss of contracts, damage to business reputation and severe and legally unsustainable fines and/or penalties issued by DOT in the event Defendant is permitted to continue its course of action. Therefore, it is respectfully submitted that the status quo be maintained by way of temporary and permanent injunctive relief.

WHEREFORE, Plaintiff, Habermehl Electric, Inc., respectfully demands judgment as follows:

- A. A Declaratory Judgment finding the actions of DWD in removing the pertinent classifications to be illegal and in violation of the Wisconsin Statutes.
- B. A Declaratory Judgment finding the enforcement actions of DOT to be illegal, based on the illegal acts of DWD, and in violation of the Wisconsin Statutes and, thus invalid;
- C. For relief on the Third and Fourth Causes of Action as the Court deems just and equitable.
- D. For an award of attorneys fees and costs; and
- E. For such other relief that the Court deems just and equitable.

Dated this 8 day of February, 2002.

HURTADO & DAGEN, S.C.,
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