AB-442
LRB 05-2926/1

Joint Committee for Review of Administrative Rules

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- **Clearinghouse Rule 04-081**

Report to the Legislature
Clearinghouse Rule 04-081

The Joint Committee for Administrative Rules
Produced pursuant to 227.19(6)(a), Stats.

Clearinghouse Rule 04-081, promulgated by the Department of Workforce Development (DWD), is an administrative rule relating to prevailing wage rates on public works projects.

Sections 66.0903(1)(g) and 103.49(1)(d), Stats., specify how the DWD determines the prevailing wage rates for a trade or occupation on a public works project. The department conducts a wage survey to collect data on hourly wage rates and hourly fringe benefit equivalent rates for a trade or occupation in the area. If there is a majority of hours worked at a particular wage rate plus fringe benefit rate, those rates become the prevailing wage rate for that trade. If there is not rate at which a majority of hours worked in that trade is paid, a weighted average methodology applies based on the pay of the highest-paid 51% of hours worked in that trade or occupation on projects in that area.

Description of the Problem

1995 Wisconsin Act 215, enacted April 29, 1996, was a compromise, developed with input from a wide range of parties interested in the prevailing wage law. The act gave the DWD the authority to promulgate rules to implement the legislation. The administrative rules that were promulgated were also a part of the compromise, and were agreed to by the interested parties.

Since enactment of 1995 Wisconsin Act 215, the DWD has had an informal policy of looking at hourly wage rate and hourly fringe benefit equivalent rate as separate figures, and has required an exact match of both the hourly rate and the hourly fringe benefit equivalent rate in determining whether there is a majority of hours worked in a trade or an occupation at a particular rate. The department believes that requiring an exact match of both the hourly wage rate and the hourly fringe benefit equivalent rate has resulted in situations that do not seem to comply with the intent of the prevailing wage law. If a collective bargaining agreement is renegotiated and the hourly wage rate is reduced to cover the increased cost of health insurance, the hours worked under two agreements are considered hours worked at different rates, even though the total economic benefit and liability is the same. Counting the rates under both the original and the renegotiated collective bargaining agreements with the same total economic benefit and liability as different rates means that the union rates might not be selected as the prevailing wage rates, even if a majority of the hours worked in a trade were by union workers.

To resolve this concern, the department is changing the method of calculating the prevailing wage rate. Instead of calculating the wage and fringe benefit costs separately, the department has decided to make the calculation by using a new method that sums the hourly wage and the hourly fringe benefit equivalent.

In CR 04-081, the DWD has promulgated a rule that lacks unanimous support of those affected by the rule, unlike the compromise embodied in 1995 Act 215 and the administrative rule changes promulgated to implement it.

The Assembly Committee on Labor held a public hearing on CR 04-081 on October 6, 2005. The Chair of the Assembly Labor Committee asked the DWD to withdraw the rule. The agency declined to do so. On October 26, 2005, pursuant to s.227.19(4)(d)6., Stats., the committee voted, 5 to 1, to object to CR 04-081, on the grounds that the rule is arbitrary, capricious, and imposes an undue hardship.

Arguments in Favor of Objection

- 1995 Wisconsin Act 215 and the rules that were promulgated to implement it were a compromise. This policy was not a part of that compromise.

- The Legislature did not intend to enact the policy promulgated in this rule.
- The Legislative Council Rules Clearinghouse questioned the agency's assertion that this rule "more closely complies with legislative intent", asking for evidence that supported this statement. The agency provided none.
- This rule may increase the cost of some public works projects because it increases the likelihood that future increases in union contracts will be included in a prevailing wage determination.
- This rule was promulgated to address a problem created by a change in a collective bargaining agreement. That agreement was negotiated, and agreed to, by labor and management. The state should not change the administrative code to provide a financial advantage to one party in a collective bargaining agreement.

Arguments Against Objection

- The department believes that using this new method of calculating the prevailing wage more closely complies with statutory intent.
- The statutes are ambiguous, leaving the department to develop a specific interpretation.

Action by Joint Committee for Administrative Rules

On December 16, 2004, the Joint Committee for Review of Administrative Rules (JCRAR), on a vote of 6 to 4, requested modifications to the rule. On December 23, 2004, the agency agreed to consider making modifications. On April 14, 2005, the agency refused to make modifications to the rule. On April 27, 2005, the JCRAR held a public hearing and executive session on CR 04-081. The committee passed a motion on a 6 to 4 vote, pursuant to s. 227.19(4)(d)6., and (5)(d), Stats., to object to CR 04-081 on the basis that it is arbitrary, capricious or imposes an undue hardship.