



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

November 12, 2009

Re: [REDACTED]
Our File No. RO-09-0071

Dear [REDACTED]:

Your letter dated May 11, 2009 asks our opinion as to whether the prevailing wage law would apply to a library construction and building rehabilitation project being performed by the [REDACTED] (Library). The Library had occupied rental space in a privately owned bank building. In July of 2005, the Library negotiated a purchase agreement with the private owners of a train station in the Village of Altamont. That property is on the National Register of Historic Places, and the intent was to convert the building for Library use. The purchase was funded by the Town of Guilderland, which issued bonds and took title to the property, leasing the property back to the Library in an amount equal to the bond payments. Subsequently, on April 18, 2009, the Town of Guilderland transferred title to the property to the Library.

Two issues exist in reaching a determination on the applicability of the prevailing wage law. The first is whether the Library itself is a "public library" subject to the prevailing wage law. Libraries are of two varieties: "public libraries," established for public purposes by official action of a municipality and "association" libraries, established and controlled by a group of private individuals as an association, amongst other things. See Education Law Section 253(2). Association libraries could be "free" libraries open to all the people of the community. According to the [REDACTED] Library Charter (1916) that you have provided, the Library is an association library operated by its members.

We have previously determined that even when a school district or other municipality contracts with a free association library to provide services to its residents; such a contract does not change the private character of the library, or otherwise affect its obligations in regard to the payment of prevailing wages. See attached Opinion from Department of Labor Counsel regarding the [REDACTED] Library, dated June 8, 1998. Also instructive in this regard is the case cited therein, *French v. Board of Education of Three Village Central School District*, 99 Misc. 2d 882, regarding the applicability of Section 101 of the General Municipal Law to free

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association libraries. Accordingly, any work performed on this building, after the transfer of title to the Library would not be subject to the prevailing wage law.

The second issue is whether work performed by the Library on real property owned by the Town (during the period from 2005 when the Town acquired title to the property, until the Town transferred title to the property to the Library on April 18, 2009) would be subject to the prevailing wage law. Two conditions must be fulfilled in order for the provisions of Article 8 of the Labor Law (the prevailing wage rate law) to apply to a construction project: (1) a public entity must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) the contract must concern a public work project. (*Matter of Erie County Industrial Development Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983) aff'd 63 N.Y. 2d 810 (1984). "Later, it was stated that contemporary definitions focus upon the public purpose or function of a particular project***. To be public work, the projects primary objective must be to benefit the public" (citations omitted) *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (Third Dept., 1991).

With respect to the first prong of the test, a contract existed between the Town and the Library for the lease of the space at issue. This contract meets the first prong of the public work test enunciated by the courts. With respect to the second prong of the test as to whether this project is a public work project, the *Sarkisian Bros.* case cited above is instructive in this regard. There, a building on the grounds of SUNY Oswego was rehabilitated and turned into a hotel and convention center. The lease of that property provided that the lessee would be responsible for all costs associated with the rehabilitation and conversion of the building to the specified use. The State retained ownership of the property, with lessee having an option to purchase at the conclusion of the lease only upon the State's determination to sell to a non-governmental purchaser. The State retained the right to approve all renovations and design drawings through the Office of General Services and SUNY. Certain uses of the facilities were guaranteed to SUNY. The court held that all of the above were sufficient indicia of public use, ownership and public enjoyment so as to support the Labor Department's determination that the project was one of public purpose sufficient to require the payment of prevailing wage rates under Article 8 of the Labor Law.

When under Town ownership, the [REDACTED] Library project had many of the same characteristics of *Sarkisian*, including public ownership, approval by the Town of any improvements made to the structure by the Library, and use by the general public of the facility. The improvement undertaken by the [REDACTED] Library with regard to the roof replacement (which occurred prior to April 18, 2009), no matter how funded, improved a then publicly owned facility that was intended to be used by the general public for public purposes. Accordingly, it is our opinion that this roof replacement project was a public work project subject to the prevailing wage law. The contractors performing this work for the [REDACTED] Library were required to pay the prevailing rates of wages and supplements to those workers who performed work on real property owned by the Town of Guilderland.

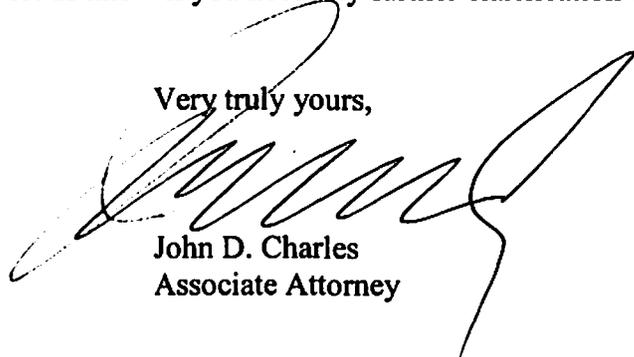
However, as noted above, the analysis changes upon the transfer of the property to the Library. The [REDACTED] Library now owns the building at issue, and we have long

determined that such free association libraries are not municipal entities subject to the prevailing wage law. Therefore, any work performed on the building after the transfer of the property to the Library is not public work subject to the prevailing wage law.

The final result here is that prevailing wages should have been paid to those workers who performed work on the project while the building was in the ownership of the Town of Guilderland, but the obligation to pay workers who perform work after the transfer of the property terminates upon the transfer of ownership to the Library.

This opinion is specific to the facts described in the documents provided and were those facts to vary from those set forth in the documents, or if additional facts and circumstances exist of which we are not currently aware, this opinion could be changed accordingly. I trust that this is responsive to your inquiry. Please let us know if you need any further clarification on this issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "John D. Charles", written over the typed name and title.

John D. Charles
Associate Attorney

Enclosure

cc: Chris Alund
Dave Bouchard
Fred Kelly
Opinion File