Labor Dept. *v.* Titan Construction
Cite as 11 *N.J.A.R.* 559

DEPARTMENT OF LABOR,
Petitioner,
v.
TITAN CONSTRUCTION COMPANY, THOMAS TSILIVITIS, GEORGE SARIOTIS, and GUS SMILIOS,
Respondents.

Initial Decision: October 28, 1983
Final Agency Decision: December 16, 1983
Supreme Court of New Jersey Decision Appears at:
102 *N.J.* 1 (1985)

SYNOPSIS

The Commissioner of the Department of Labor proposed to debar respondents for alleged violations of the Prevailing Wage Act. Respondents requested a hearing and the matter was transmitted to the Office of Administrative Law.

Petitioner filed a motion for summary decision, arguing that a violation occurred and debarment is mandatory whenever there is a violation. The administrative law judge assigned to the case found that the Prevailing Wage Act did apply to manual work done by principals of the company performing the work and, therefore, there had been a violation of the Act. The judge also concluded that the Act requires debarment when there is a violation. Nonetheless, the Commissioner's prosecutorial discretion may be exercised in two ways. First, the Commissioner has discretion not to pursue a debarment proceeding against a contractor when the Commissioner believes debarment is not justified, such as when there is only a minor infraction of the law. Also, the Commissioner may choose to settle a debarment case prior to the rendering of a final decision.

The administrative law judge granted the motion for summary judgment and issued an initial decision concluding the case. This initial decision was adopted by silence by the Commissioner of the Department of Labor.

The Appellate Division affirmed the decision of the administrative law judge per curiam. (A-2329-83T5, Nov. 15, 1984). The New Jersey Supreme Court affirmed in part and reversed in part.

Lewis A. Scheindlin, Deputy Attorney General, for petitioner (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)
Thomas J. Hirsch, Esq., for respondents (Crawford and Hirsch, attorneys)

MASIN, ALJ:

The Commissioner of the Department of Labor proposes to debar the respondents for alleged violations of the Prevailing Wage Act, *N.J.S.A.* 34:11-56.25 *et seq*. The respondents, who are the corporation and its principals, requested a hearing on the proposal and the matter was transferred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held before Administrative Law Judge Robert S. Miller on August 12, 1983 and a Prehearing Order was issued on August 17, 1983. Thereafter, the petitioner filed a motion for summary decision on September 16, 1983.

Respondent filed his brief in opposition to the motion on October 17 and the petitioner filed a responsive memorandum on October 19. The matter was scheduled for hearing on October 20 and on that date Administrative Law Judge Jeff S. Masin heard argument on the motion.

For purposes of the motion, the petitioner relies upon its claim that the respondents violated the provisions of the Prevailing Wage Act in connection with a project for the Middletown Board of Education. Although the petitioner also claims that the respondent was guilty of violations of the Act in connection with other projects, it does not claim to be entitled to summary decision in connection with those alleged violations. Therefore, for purposes of this determination of the motion for summary decision, only the alleged violations of the Middletown project will be considered.

THE ALLEGED VIOLATIONS

Petitioner contends that the respondent violated the Prevailing Wage Act in that (1) it failed to pay the three named principals of the corporation pursuant to the wage rates mandated by the Act despite the fact that they performed physical labor on the Middletown project; (2) the alleged failure of the corporation to pay overtime to employees who worked on Saturday and/or Sunday, as required by

the Act; and (3) the failure of the respondent to maintain the appropriate ratio of journeymen roofers to apprentice roofers, as purportedly required under the Act.

At the argument on the motion, respondents conceded that they had not paid prevailing wage rates to the principals who had indeed performed physical labor in connection with the roofing portion of the Middletown project. Respondent argued that this did not constitute a violation of the Act. Petitioner contends that the Act does require that prevailing wage rates be paid to such employer-workman. Petitioner relies on *Cugliotta Bros., Inc. v. N.J. Dep't. of Labor and Indus., et al*, 168 *N.J. Super.* 556 (App. Div. 1979). In that decision the court dealt with the "single issue" of "whether the recordkeeping and wage requirements of the Prevailing Wage Act . . . applied to officers and directors of corporate contractors who perform work on public projects to which the Act is applicable." The court, after considering the argument that the Act did not apply to "owner-operators of small family run businesses" found that there was no such exclusion in the statute. The definition of "workman" as contained in the Act stated that:

> 'Workman' includes laborer, mechanic, skilled or semi-skilled laborer and apprentices or helpers employed by any contractor or subcontractor and engaged in the performance of services directly upon a public work, regardless of whether their work becomes a component part thereof, but does not include material suppliers or their employees who do not perform services at the job site.

The court rejected the concept that principal stockholders, directors and officers of a closely held construction corporation, who were the policy setting decision-makers, did not properly come within the definition of "workman" where they participated in "some of the manual work of their business."

Although the *Cugliotta* decision dealt with a situation where there was a refusal by the company to produce time and payroll records for the president and secretary-treasurer, both of whom had participated in the "manual work," the language of the decision, particularly the court's designation of the "single issue" on appeal, indicates that the court was not only dealing with the record-keeping requirement, but also with the wage requirements of the Act. The court could find no distinction in the Act between the treatment to be given to non-owner workmen and owner-workmen. Thus, I **CONCLUDE** that where principals of the company performing the work do actual work on the project other than supervision and management related actions,

they must be treated the same as any other worker on the project with regard to the payment of wages commensurate with the requirements of the Prevailing Wage Act. While recognizing that this may create some difficulty for employers in determining when they are acting in a supervisory as compared to a mere employee status, the language of the Act and the determination of the Appellate Division in *Cugliotta Bros.* appear to compel the result.

Since the respondents herein concede that the employer-workmen were not paid in accordance with the requirements of the Prevailing Wage Act, a violation has been established. There are no disputes of material fact in connection with this question. Therefore, since a violation has occurred, the determination which must be made is whether the Act requires the imposition of the debarment penalty which the respondent seeks.

IS DEBARMENT MANDATORY?

N.J.S.A. 34:11-56.37 states that:

> In the event that the commissioner shall determine, after investigation, that any contractor or subcontractor has failed to pay the prevailing wage he shall thereupon list and keep on record the name of such contractor or subcontractor and forthwith give notice by mail of such list to any public body who shall request the commissioner so to do. Where the person responsible denies that a failure to pay the prevailing wage has occurred, he shall have the right to apply to the commissioner for a hearing . . .

N.J.S.A. 34:11-56.38 states:

> The public body awarding any contract for a public work or otherwise undertaking any public work shall first ascertain from the commissioner the list of names of contractors or subcontractors who have failed to pay prevailing wages as determined in section 14 of this act, and no contract shall be awarded to such contractor or subcontractor, or to any firm, corporation or partnership in which such contractor or subcontractor has an interest until three years have elapsed from the date of listing as determined in section 14 of this act.

The Attorney General argues that since a violation of the Act has been established the Commissioner had no alternative but to list the respondent as a violator and therefore invoke the prohibition against the award of public contracts to the respondent for three years. Respondent argues that the debarment penalty is not mandatory and that the Commissioner has discretion as to whether to invoke the severe penalty of debarment or some lesser sanction.

The parties agree that only one case has been reported which deals with the issue of the debarment penalty. In *Dep't. of Labor and Indus. v. Union Paving and Constr.*, 168 *N.J. Super.* (App. Div. 1979), the court considered an argument by the respondent Union Paving that the debarment clause was mandatory on its face, had to be imposed "regardless of the amount of wages underpaid or the intent involved," and was therefore prone to "producing arbitrary and overly harsh results for minor infractions." The court noted that the Act, which stated that the Commissioner "shall thereupon list and keep on record the name of such contractor or subcontractor," was "mandatory in tone." The court proceeded to review the facts of the *Union Paving* case. These revealed that there had been a series of violations by the company over a period of several years. Some of these had been brought to the company's attention by the Department prior to the dates when other violations occurred and were subsequently discovered. No debarment proceedings have been instituted in connection with the earlier incidents. The court concluded from this history that it was obvious that the practice was not to summarily apply the debarment clause. The court noted that:

> If debarment were automatically applied, Union would have been 'listed' immediately upon the field's examiner's audit in 1972, revealing wage violations on two projects. In fact, no 'listing' or other administrative enforcement procedures were instituted until later investigations disclosed violations on four more jobs. It is clear that the application of the debarment sanction has been left to the commissioner's discretion and, as the statute states, 'after investigation.'

The language of *Union Paving* raises some question as to exactly what the court meant. As it concedes, the Act does mandate the Commissioner to list and keep on record the names of violators of the statute. However, the court goes on to say that following investigation the Commissioner can use his discretion in applying the sanction. It is unclear whether the court is saying that the Commissioner can choose not to debar or whether he can merely chose not to attempt to debar. As the Attorney General sees the question, the Commissioner has the authority to exercise prosecutorial discretion in that he can, after investigating evidence of violations, determine not to bring an action for debarment. On the other hand, according to the Attorney General's position, where such an action is brought, the Commissioner has no choice but to debar where the violation is proven after a hearing. This viewpoint does not preclude the Commissioner from agreeing to the settlement of a debarment proceeding

prior to the Commissioner's rendering a final decision on the contested case (presumably prior to the rendering of an initial decision by an administrative law judge).

Respondent points out that the Department has adopted regulations which govern the debarment process in connection with debarment from contracting with state agencies on state construction projects. These regulations are contained at *N.J.A.C.* 12:3-1.3 and 1.4. In connection with these matters a company can be debarred where it has violated prevailing wage standards and where the Commissioner determines, within the exercise of his discretion, that the best interests of the state require debarment and that mitigating factors do not indicate that debarment is not warranted. These regulations are not controlling in this matter, which does not involve a state construction project.

It seems obvious that situations can occur where the imposition of the sanction of debarment, if mandatory, will impose a severe hardship on companies which may be guilty of only minor violations of the Act. Presumably, the Appellate Division had some concern for this possibility when it expressed its review that despite the mandatory language of the Act the Commissioner had discretion in determining when to apply the debarment. However, despite the court's language, it does not appear that one can ignore the fact that the statute does specify that the listing "shall" occur and that where the name has been placed on the list "no contract shall be awarded . . . until three years have elapsed from the date of listing."

As the *Union Paving* court noted, the tone of the act is mandatory, and there may be good reason for that. Since the Prevailing Wage Act sets standards which are incorporated within bidding requirements for public construction projects, and since the Act is intended to

> establish a prevailing wage level for workmen engaged in public works in order to safeguard their efficiency and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being, *N.J.S.A.* 34:11-56.25,

a strict construction of the Act appears to be warranted. While the Commissioner may well have the discretion not to bring a debarment proceeding against a contractor who has been guilty of only a minor infraction, or for other reasons deemed appropriate, where such an action is brought, it does not appear that the language of the Act

on its face would permit the Commissioner, in the face of proof of a violation, to do anything except list the violator. To hold otherwise would be to read into the statute lesser sanctions for violations, which reduced penalties are not authorized by the language adopted by the legislature.

It is recognized that there is a potential for abuse of the Commissioner's prosecutorial discretion. This potential does not, however, in any way affect the obligations imposed on the Commissioner with regard to his role as final decision maker in a contested case. In addition, the fact that the department may choose to settle cases where it has initially sought debarment, prior to the rendering of a final decision by the Commissioner, is not a ground for holding that the Commissioner has discretion where no settlement is agreed upon. Settlements are favored both in the courts and in the administrative process as a means of disposing of the heavy caseload and achieving fair, expeditious disposition of important matters without the necessity of the expenditure of time and financial resources necessary for a full trial. The fact that settlements are permitted and the penalty therein may be something short of debarment does not change the fact that where no settlement is agreed upon the Legislature has mandated the Commissioner's action where the violations have been established. I cannot find any justification for ignoring the requirement to impose the debarment penalty where violations are established at a hearing.

As noted, the Prevailing Wage Act and the requirement for compliance therein are fundamental considerations for contractors who bid on public construction projects. The necessity for the rigid enforcement of bidding procedures, as noted by the court in decisions in the area of bid requirements, would seem to be applicable herein as well. *Hillside Twp. v. Sternin,* 25 *N.J.* 317 (1957); *Marvec Allstate, Inc. v. Gray & Fear, Inc.,* 148 *N.J. Super.* 481 (App. Div. 1977).

At least as far as matters that are contested and which are not settled, it seems that the legislature has insisted that in order to assure fair treatment to all who bid on projects and comply with the law, those who do not comply must be, as a matter of mandatory policy, severely sanctioned. The fact that the violations may have been inadvertent and without intent does not serve as a defense to the charge. *Union Paving,* at 25-29.

Given the above, I **CONCLUDE** that since the respondents are guilty of having violated the Act, they must be debarred, pursuant to *N.J.S.A.* 34:11-56.37 and 38.

THE OTHER ASSERTED VIOLATIONS

Petitioner's claims that the respondents also violated the Act by not paying overtime for Saturday and Sunday work and by failing to maintain the journeyman-apprentice ratio of five to one need not be determined in order to conclude the case, as the previously reviewed violation is sufficient to support a debarment. However, as for the ratio issue, at oral argument the Deputy Attorney General conceded that the ratio requirement was not a part of the statute itself, nor was it contained in the contract between Middletown Board of Education and Titan. It was contained in a prevailing wage rate determination issued for a project in Asbury Park in October 1982, a determination which the petitioner asserts was applicable to the Middletown project as well. The Attorney General also contends that the ratio is part of a significant number of union contracts which establish what the prevailing standards are. Proofs on this issue are insufficient to permit a summary decision, as material facts remain unproven and/or in dispute. Therefore, I cannot grant a summary decision finding a violation on the ratio issue.

As for the weekend overtime issue, there was a conceded error in a number of wage determinations issued by the Department which indicated that the requirement to pay overtime for Saturday and Sunday work was for "Saturday and Sunday after 8 hours," when in fact the obligation is asserted to be for any weekend work. The petitioner argues that the respondents should have checked further to determine the actual requirement and should have realized the error. Issues of reasonable reliance, estoppel and the relevance of any such defenses may be proper to consider. The issue appears best left for plenary hearing, if such should ever be necessary.

CONCLUSION

For the reasons expressed in connection with the employer-workmen wage issue, the petitioner's request to debar respondents is granted. They shall be listed in accordance with *N.J.S.A.* 34:11-56.37.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF LABOR ROGER A. BODMAN,** who by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE COMMISSIONER OF THE DEPARTMENT OF LABOR, ROGER A. BODMAN:

(The Commissioner did not act on the initial decision within 45 days. Therefore, the recommended decision became the final decision in accordance with *N.J.S.A.* 52:14B-10).

Adopted by silence, December 16, 1983.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.