

958

PAYMENT OF WAGES OF FULL-TIME SALARIED EMPLOYEES OF COUNTY ENGINEERING DEPT., WHERE SUCH EMPLOYEES ARE CONSTRUCTING PUBLIC IMPROVEMENT REGULATED BY § §4115.03 TO 4115.06, R.C.

SYLLABUS:

The provisions of Sections 4115.03 to 4115.06, inclusive, Revised Code, are applicable to full-time regular salaried employees of a county engineering department where such employees are constructing a public improvement within the meaning of Sections 4115.03 to 4115.06, Revised Code.

Columbus, Ohio, November 24, 1959

Hon. Everett Burton, Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“The Board of County Commissioners of this County has requested an opinion concerning the payment of wages to regularly employed persons with the County Engineer’s Department, in the following situations:

“(a) In the repairing or construction of a bridge; specifically, in this case, the Bear Creek Bridge in Scioto County, Ohio.

“(b) The County Engineer, through his employees, constructed two buildings on County-owned property to be used for housing County equipment.

“In each of the above cases, the question has arisen as to whether or not the County Engineer is required to pay the prevailing wage scale, as set forth in Sections 4115.03 to 4115.06 inclusive, of the Revised Code of Ohio.

“We have examined the Attorney General’s Opinion, which is found in the 1957 Ohio Attorney General’s Opinions Number 1151, which deals with these same problems, but we are unable, after reading the same, to determine exactly in which situations the prevailing wage scale must be paid, and in which situations the County Engineer can use his regularly employed personnel to perform the work involved at their existing wages.”

Regarding the payment of the prevailing wage rate, Section 4115.04, Revised Code, states in part:

“Every public authority authorized to contract for or *construct with its own forces a public improvement*, before advertising for bids or undertaking such construction with its own forces, shall have the department of industrial relations determine the *prevailing rates* of wages of mechanics and laborers for the class of work called for by the *public improvement, in the locality* where the work is to be performed. * * *” (Emphasis added).

In Section 4115.05, Revised Code, it is stated:

“The wages to be paid for a legal day’s work, as prescribed in section 4115.04 of the Revised Code, to laborers, workmen, or mechanics *upon public works* shall not be less than the wages paid in the same trade or occupation in the locality where such public work is being performed, * * *. The wages to be paid for a legal day’s work, to laborers, workmen, or mechanics, upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day’s work in the same trade or occupation in the locality *within the state where such public work on*, about or in connection with such labor is performed in its final or completed form is to be situated, erected, or used * * *.”

(Emphasis added)

Also, in Section 4115.06, Revised Code:

* * *

* * *

* * *

“Where a public authority constructs a public improvement *with its own forces* such public authority shall pay a rate of wages which shall *not be less* than the rate rate of wages fixed as provided in section 4115.04 of the Revised Code. * * *.”

(Emphasis added)

Section 4115.03, Revised Code, defines "public authority," "construction," "public improvement," and "locality," reading as follows:

"As used in sections 4115.03 to 4115.10 inclusive, of the Revised Code:

"(A) 'Public authority' means any officer, board, or commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions made in whole or in part from public funds.

"(B) 'Construction' means any construction, reconstruction, improvement, enlargement, alteration, or repair of any public improvement fairly estimated to cost more than three hundred dollars.

"(C) 'Public improvement' includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by the state or any political subdivision thereof.

"(D) 'Locality' means the county wherein the physical work upon any public improvement is being performed."

In Opinion No. 1151, Opinions of the Attorney General for 1957, page 553, paragraph one of the syllabus reads:

"The provisions of Section 4115.03 to 4115.06, inclusive, Revised Code, are not applicable to full time regular salaried employees of a county engineering department so long as such employees are not engaged in constructing a public improvement within the meaning of Sections 4115.03 to 4115.06, Revised Code."

At page 556, said Opinion No. 1151 states:

"In the situation you present the regular employees of the county engineering department are engaged in projects being carried on by force account. I do not consider such employees to have been hired 'to construct a public improvement.' Furthermore, I do not consider the county in such a situation to be a "public authority" constructing a public improvement 'by the direct employment of labor.' These sections deal with situations where: (1) the county contracts with a person or corporation for the "construction" of a 'public improvement'; and (2) those instances in which the county directly employs labor for the "construction" of a 'public improvement.' Regular county employees can hardly be termed laborers or mechanics employed directly by

the county for the "construction" of a 'public improvement' conducted by force account. From the defining language of Section 4115.03 (A), Revised Code, I conclude that the regular employees of the county engineering department are not employees of a "public authority" 'authorized to construct' a public improvement "by direct employment of labor" so that the wages paid full time regular employees are subject to the provisions of Sections 4115.03 to 4115.06, Revised Code.

"However, when the county 'constructs' a "public improvement" by using its own forces as provided in Section 4115.06, *supra*, the county must pay the wages prescribed by the Department of Industrial Relations, Sections 4115.03, *et seq.*, Revised Code."

On reading the syllabus of Opinion No. 1151, *supra*, and the reasoning in the text of said opinion, it appears to me that there is a conflict. The text holds that the regular employees of the county engineering department are not employees of a public authority authorized to construct a public improvement by the direct employment of labor and so could not come within the prevailing wage law. The syllabus implies that there might be some instances where such employees could come within the provisions of the prevailing wage law.

It would appear to follow that, if the regular employees engaging in constructing a public improvement by force account are not covered by the prevailing wage law because they have not been directly hired "to construct a public improvement," then there could never be an instance in which such employees would be covered by such law. Thus, if I were to answer your request on the basis of Opinion No. 1151, *supra*, I would be forced to conclude that the county engineer should never pay his regular employees under the prevailing wage scale. On reviewing the pertinent sections of law involved, however, I find that I am compelled to disagree with the conclusion reached by my predecessor in Opinion No. 1151, *supra*.

In each of the instances at hand, a "public improvement" is involved. Also, the county is "constructing" such public improvements with its own forces. While such forces have not been directly employed to construct a public improvement, I do not believe that such is necessary under the statutes herein discussed. There can be no argument that a county is a political subdivision "authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor,, and so, is a "public authority" within the purview of

Section 4115.03, *supra*. In my opinion, “direct employment of labor” includes regular employees who are used in the construction of a public improvement conducted by force account.

Accordingly, answering your question, I am of the opinion and you are advised that the provisions of Sections 4115.03 to 4115.06, inclusive, Revised Code, are applicable to full-time regular salaried employees of a county engineering department where such employees are constructing a public improvement within the meaning of Sections 4115.03 to 4115.06, Revised Code.

Respectfully,
MARK MCELROY
Attorney General