OPINION NO. 81-081

Syllabus:

1. The Department of Industrial Relations has a mandatory duty to determine the prevailing rate of wages of mechanics and laborers for the class of work called for by a public improvement. This determination must be made before the public authority which plans to construct or contract for construction of the public improvement advertises for bids or begins construction with its own forces. R.C. 4115.04.

2. In order to determine the proper prevailing rate of wages to be paid to laborers, workmen, or mechanics employed upon a public improvement, the Department of Industrial Relations must first look to the functional nature of the work to be performed, and determine which union craftsmen having a collective bargaining agreement typically perform that type of work in the immediate locality where the public improvement is located. If no collective bargaining agreement for that type of work exists in the immediate locality, the Department must look to the nearest locality having such an agreement. The prevailing wage rate cannot be less than the wage rate established by the collective bargaining agreement. R.C. 4115.05.

To: Helen W. Evans, Director, Department of Industrial Relations, Columbus, Ohio
By: William J. Brown, Attorney General, December 7, 1981

I have before me your request for my opinion as to whether you have the authority under R.C. Chapter 4115 to construe collective bargaining agreements in conjunction with your determination of the appropriate prevailing wages to be paid in the construction of a public improvement. You also ask what criteria should be utilized in resolving controversies concerning the appropriate prevailing wage.

From your letter I understand the underlying facts to be as follows. The City of Columbus had a refuse and coal fired electric plant constructed; the plant is a public improvement under R.C. 4115.03. Pursuant to R.C. 4115.04, every public authority, before advertising for bids for the construction of a public improvement, must have the Department of Industrial Relations "determine the prevailing rates of wages of mechanics and laborers in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed." The schedule of prevailing rates of wages must be "attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract." Your letter states:

> The practice of this department, because we have no way of determining what particular classification a project will entail, is to send to the contracting public authority a current comprehensive list of classifications and wage rates. At the same time, we expect the contracting public authority to decide which parts of the complete package are applicable to their project and attach those pertinent parts to the specifications. This schedule was sent for this project to the City of Columbus in accordance with section 4115.04 of the Revised Code.

In this case, the city attached to the bid specifications the entire package sent by the Department, which included classifications for two separate types of construction, heavy and highway construction, and building construction. B. G. Danis Co., the low bidder and the prime contractor to which the contract was awarded, and its subcontractor, Davis-McKee, Inc., used the classifications and wage rates under the heavy and highway construction section to cover work which included the unloading, handling, distribution, and installation of cooling water piping for turbines. They employed members of the Laborers Union and Operating Engineers Union to perform this work.

The city notified the prime contractor and the subcontractor that the work should have been classified as building construction rather than heavy and highway construction, and informed the Department of Industrial Relations that the contractors were in violation of the prevailing wage law. The Department informally notified the prime contractor that the building construction rates should be used. The Department was notified by the prime contractor that it was in compliance and would check on the subcontractor, and the Department consequently took no further action. However, further complaints were received, and the contractors contended that the heavy and highway construction classification and rates were applicable.

In your opinion request you ask, first, whether the Department of Industrial Relations has the statutory authority under R.C. Chapter 4115 to construe the application of the pertinent collective bargaining agreements in order to resolve the dispute involving the use of heavy and highway construction or building construction classifications and rates, and to establish the proper prevailing wage rate. Further, you ask that, if I determine that the Department has such authority, I provide you with an outline of criteria which should be used in resolving the controversy and a determination as to which classifications and wage rates would be proper in this case. I am unable to advise you as to which classifications and

wage rates were proper in this case, since, as the following discussion indicates, it is the Department's statutory task to apply the facts of a particular project to the law in question. However, the following analysis of the statutes should provide you with a methodology for the Department to follow in all cases.

Within R.C. Chapter 4115, the primary code sections relating to the Department's authority to set the prevailing wage rates are R.C. 4115.04 and R.C. 4115.05. R.C. 4115.04 reads in pertinent 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 in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. (Emphasis added.)

R.C. 4115.05 provides in part that: "Where contracts are not awarded or construction undertaken within ninety days from the date of the establishment of the prevailing rate of wages, there shall be redetermination of the prevailing rate of wages before the contract is awarded." R.C. 4115.08 states that no public official who is to have a public improvement constructed, either by contract or force account, "shall fail, before advertising for bids or undertaking such construction with his own forces, to have the department of industrial relations determine the prevailing rates of wages. . .as provided in section 4115.04 of the Revised Code." R.C. 4115.09 prohibits a member of a public board, commission, or other public authority from voting for the award of a contract for the construction of a public improvement, and from voting for the disbursement of any funds for the construction of a public improvement, "unless such public authority has first had the department of industrial relations determine the prevailing rates of wages. . .as provided in section 4115.04 of the Revised Code." R.C. 4115.99(A) provides: "Whoever violates section 4115.08 or 4115.09 of the Revised Code shall be fined not less than twenty-five nor more than five hundred dollars."

It is clear from the above provisions that the Department of Industrial Relations must determine prevailing rates of wages for the class of work called for by the public improvement in the appropriate locality before a public authority can advertise for bids for the work on the public improvement or start construction with its own forces. R.C. 4115.05 sets out criteria for the Department to follow in determining the prevailing wage rate, and reads in part:

> The prevailing rate of 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 at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.
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> In event there is no such collective bargaining agreement or understanding in the immediate locality, then the prevailing rates of wages in the nearest locality in which such collective bargaining agreements or understandings are in effect shall be the prevailing rate of wages, in such locality, for the various occupations covered by sections 4115.03 to 4115.16 of the Revised Code. (Emphasis added.)

Hence, in setting the prevailing wage rate, the Department must first look to the functional nature of the work to be performed on the public improvement and determine which union craftsmen having a collective bargaining agreement typically perform that type of work. The Department must analyze the wage provisions of the current collective bargaining agreements which would cover the "class of work called for by the public improvement" if the job were being performed by unionized labor. R.C. 4115.04. The Department is obligated to verify that the contracts under analysis are the current contracts, since the prevailing wage rate must be that "then" payable under a collective bargaining agreement. Once it is determined which collective bargaining agreement covers the type of work, then the prevailing wage rate cannot be less than the wage rate established by that agreement. The prevailing wage rate, at a minimum, must be paid to whoever actually does the work, whether or not the workers are unionized and whether or not they belong to the union whose wage rates are being used as the basis for prevailing wage rates.

In some situations, it may be unclear which union normally performs the work or which of its collective bargaining agreements applies. Such difficulties complicate, but do not alter, the Department's responsibility to "determine" the prevailing wage. That is the exclusive statutory responsibility of the Department under R.C. 4115.04. Your letter states that it has been the Department's "practice" to send to the public authority "a current comprehensive list of [job] classifications and wage rates" with the expectation that the public authority will "decide which parts of the complete package are applicable to their project and attach those pertinent parts to the specifications." In the instant situation, this provision of the "complete package" consisted of merely sending both the "heavy and highway" and "building" collective bargaining agreements to the city with no designation as to which rates applied and which contract controlled. It was left to the city to peg the actual prevailing rate for each job classification in the construction of its trash-fired electrical generating plant.[1] As explained above, it is the duty of the Department to tell the contracting authority exactly what the prevailing wage rate is for each job which will be performed in the construction of the public improvement. To make this determination, the Department must first look to the functional nature of the work to be performed and determine which collective bargaining agreements customarily cover that "class of work" in the immediate locality, or if no such agreements exist in the immediate locality, in the nearest locality in which such agreements are in effect. R.C. 4115.05. If it is unclear which craft normally performs the work or which of its collective bargaining agreements applies, the Department must make an appropriate investigation and bring to bear its expertise and resolve such questions. One way in which the Department could verify the "class of work" to be performed on a project is to request pertinent information from the project architect at the time the determination request is made.

In determining which union craftsmen typically perform the sort of work required for the public improvement, it is the task of the Department to determine which craft has performed such work, not which craft should perform it. Hence, the key information to be obtained by the Department relates to past industry practices in the locale (i.e., which union has traditionally done this kind of work). If the work contemplated for the public improvement is not precisely the same as that traditionally performed by union craftsmen, the Department must analyze the similarity of the work to past processes and substituted functions and determine

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[1]In this instance, the City of Columbus did not attach the applicable classifications and wage rates to the bid specifications, but rather attached the total package sent by the Department. The contractors chose the classifications and wage rates they thought appropriate. In effect, the private contractors were performing the statutory duty of the Department of Industrial Relations in setting the prevailing wage rate.

which unionized craft has performed in the past work having a substantial similarity to the type of work to be performed on the public improvement. That craft's contract rate should be utilized.[2] See 1977 Op. Att'y Gen. No. 77-076 ("[t]he wages determined by such an [collective bargaining] agreement provide the only basis upon which the Department of Industrial Relations is able to determine the prevailing wage" (emphasis added)).

Once the Department has identified which unionized craft has traditionally performed substantially similar work, a problem may arise if that craft has more than one collective bargaining agreement in force in that locality and such agreements contain different wage rates. In that situation, the Department must analyze the contracts and determine which controls the type of job which the public improvement represents. Collective bargaining agreements in the construction industry typically contain elaborate descriptions of the type(s) of work covered by the agreement. Once the appropriate craft is identified based upon industry past practices, it is usually relatively clear which of that craft's collective bargaining agreements apply. Despite any difficulty the Department may have in choosing which agreement applies, a decision must be made before work on the public improvement is advertised for bids or actually begun.

In conclusion, it is my opinion, and you are advised, that:

1. The Department of Industrial Relations has a mandatory duty to determine the prevailing rate of wages of mechanics and laborers for the class of work called for by a public improvement. This determination must be made before the public authority which plans to construct or contract for construction of the public improvement advertises for bids or begins construction with its own forces. R.C. 4115.04.

2. In order to determine the proper prevailing rate of wages to be paid to laborers, workmen, or mechanics employed upon a public improvement, the Department of Industrial Relations must first look to the functional nature of the work to be performed, and determine which union craftsmen having a collective bargaining agreement typically perform that type of work in the immediate locality where the public improvement is located. If no collective bargaining agreement for that type of work exists in the immediate locality, the Department must look to the nearest locality having such an agreement. The prevailing wage rate cannot be less than the wage rate established by the collective bargaining agreement. R.C. 4115.05.

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[2]It should be noted that the job of the Department is not to award the work itself to one craft or another. That function devolves (at least initially) upon the contractor who is awarded the job. The function of the Department is solely to determine the minimum wage rate which must be paid to whoever actually does the work, whether or not those persons are members of the craft whose collective bargaining agreement controls the determination or, indeed, whether they are union or non-union. Nor is it of any significance if a different craft is in fact subsequently awarded the work as part of jurisdictional dispute proceedings, as might have happened here (Plumbers and Steamfitters Local 189, 254 NLRB No. 151 (1981)), except to the extent that those who actually perform the work might have to be paid wages which exceed their collectively bargained rate in any situation where the prevailing wage rate determined by the Department exceeds their contractual rate.