
Public Hearing

before

ASSEMBLY LABOR COMMITTEE

*“Testimony on the implementation, enforcement
and application of the ‘New Jersey Prevailing Wage Act’ P.L. 1963, c.150,
and any proposed reforms to that act”*

LOCATION: Committee Room 9
State House Annex
Trenton, New Jersey

DATE: May 21, 2001
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Assemblyman George F. Geist, Chairman
Assemblyman Samuel D. Thompson, Vice-Chairman
Assemblyman Nicholas R. Felice
Assemblywoman Arline M. Friscia
Assemblyman Gary L. Guear Sr.



ALSO PRESENT:

Gregory L. Williams
*Office of Legislative Services
Committee Aide*

Victoria R. Brogan
*Assembly Majority
Committee Aide*

Jennifer Sarnelli
*Assembly Democratic
Committee Aide*

*Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, PO 068, Trenton, New Jersey*

TABLE OF CONTENTS

	<u>Page</u>
Wayne Marlin Legislative Liaison Office of the Chief of Staff New Jersey Department of Labor	1
Thomas St. John Director Foundation for Fair Contracting	2
Sharon Dickerson Division of Local Government Services New Jersey Department of Community Affairs	2
Patricia Prunty Judicial Standards Office of Administrative Law New Jersey Department of the Treasury	3
Sue Serbicki South Jersey Chamber of Commerce	3
Anthony Benedetti Local No. 27 Sheet Metal Workers' International Association	3
Steve Finkel, Esq. Legislative Counsel Office of the Attorney General New Jersey Department of Law and Public Safety	4
Steven A. Berkowitz, Esq. South Jersey Mechanical Contractors	4
Wendy Wolfe New Jersey Association of Professional Employer Organizations	4

TABLE OF CONTENTS (continued)

	<u>Page</u>
Eric Richard New Jersey State AFL-CIO	4
Thomas Manning Business Manager Local 475 Steamfitters, Pipe Fitters and Apprentices	5
Mark McManus Business Manager Local No. 24 Plumbers	5
Jeffrey Stoller Vice-President Human Resources Issues New Jersey Business and Industry Association	6
Edward M. Neafsey Inspector General Office of the Attorney General New Jersey Department of Law and Public Safety	7
Honorable Jeff S. Masin Chief Administrative Law Judge, and Acting Director Office of Administrative Law New Jersey Department of the Treasury	18
James Kehoe Assistant Business Manager Local No. 322 Plumbers and Pipe Fitters	29
Donald Norcross Business Agent Local No. 351	

TABLE OF CONTENTS (continued)

	<u>Page</u>
International Brotherhood of Electrical Workers	34

Mark Lohbauer
Director
Policy and Communications
School Finance and Construction Program
New Jersey Economic Development Authority 40

Leonard Katz
Assistant Commissioner
Labor Standards and Safety Enforcement
New Jersey Department of Labor 58

APPENDIX:

Letter and testimony
Submitted by
Steven A. Berkowitz 1x

Testimony
Submitted by
Donald Norcross 11x

Testimony
Submitted by
Mark Lohbauer 15x

hw: 1-72

ASSEMBLYMAN GEORGE F. GEIST (Chairman): Good morning. Welcome to this session of the Assembly Labor Committee. Today I welcome you to join us in listening and learning about the prevailing wage law. As I emphasized at the last session, I repeat, we are focusing on a 1963 law. I personally believe this law needs to be reformed. This Committee will be a catalyst toward real reform.

Today, if you are here to testify, the procedure is one in which we will ask you to declare your intent, through the Office of Legislative Services. The staff is here to assist you in expediting your testimony before this Committee.

Today I'm going to do something new. I'm going to listen and learn from you about who's here today. You see, I think, as Chair of the Labor Committee, as I strive to be the best that I can be, I appreciate your attendance today. I like knowing with whom I share this interest. I like knowing who is participating in the process.

As Chair of the Labor Committee, I sent a letter to every labor leader that I knew of to invite their participation. And I'm always interested in seeing who's more interested than less interested. So I'm going to do something we haven't done before. And before quorum calls, we anxiously await another member, I'm going to ask if you would honor this Committee with self-introduction. And I'm going to make the process easy by calling upon Wayne Marlin to start the process.

WAYNE MARLIN: Good morning, Mr. Chairman.

ASSEMBLYMAN GEIST: And you are?

MR. MARLIN: Wayne Marlin, from the Department--

ASSEMBLYMAN GEIST: This is for the record, everybody.

MR. MARLIN: Good morning, Mr. Chairman and members of the Committee. Wayne Marlin, from the Department of Labor. And we have with us today Assistant Commissioner Leonard Katz. Also we have the Director of Wage and Hour, Marty Gartzman; and Mike McCarthy, also from Wage and Hour. And they're going to continue our testimony from the last meeting and try to enlighten the Committee as to where the Department is going in our implementation of the wage and hour law.

ASSEMBLYMAN GEIST: Thank you.

If you are on the witness list, you do not need to declare your self-introduction.

The front row, who has not yet--

THOMAS ST. JOHN: Good morning, Mr. Chairman. I testified at your last hearing. My name is Tom St. John. I'm the Director of the--

ASSEMBLYMAN GEIST: We need all of this done here. I appreciate this. This is for a transcript.

MR. ST. JOHN: I understand that.

ASSEMBLYMAN GEIST: And we appreciate your participation.

MR. ST. JOHN: My name is Tom St. John. I'm the Director of the Foundation for Fair Contracting. With me this morning is a representative of our organization, Ronald Lehman.

ASSEMBLYMAN GEIST: Thank you.

Come on up.

SHARON DICKERSON: Good morning, Mr. Chairman. My name is Sharon Dickerson. I'm here from the Division of Local Government Services,

and we came here to observe and help the Committee in any way with information regarding the local public contracts law.

ASSEMBLYMAN GEIST: Pleased to know of your interest. Welcome.

Please feel free to just step right up, so we can expedite the record.

PATRICIA PRUNTY: Good morning. I'm Patricia Prunty. I'm here from the Office of Administrative Law. With me is the Acting Director of the Office of Administrative Law, Jeff Masin. And we're just here should any questions arise concerning our role in the process.

ASSEMBLYMAN GEIST: Thank you.

I know this is new for some of you, but this Chairman is very interested in knowing your interest.

SUE SERBICKI: Good morning. Hi, I'm Sue Serbicki. (phonetic spelling) I'm with the South Jersey Chamber of Commerce. And we're just sitting in today, too, to listen and learn, taking notes.

ASSEMBLYMAN GEIST: Great.

Don't all be shy. I know it's early in the morning.

ANTHONY BENEDETTI: Good morning, everyone. Anthony Benedetti, (phonetic spelling) from Sheet Metal Workers Local 27. And we're here for information, and if we can answer any questions, we're more than willing to. Thank you.

ASSEMBLYMAN GEIST: My plans are to have the transcript sent to all of you who are participating today, as my thank you. So, if that helps inspire you, I hope you're inspired.

Good morning, counselor.

STEVE FINKEL, ESQ.: Good morning, Assemblyman. Steve Finkel, Chief Legislative Counsel for the Attorney General. The Inspector General is here to testify, and when he heard this public hearing was coming up, he said, “Great, let me do testimony,” before he was even asked. So he absolutely shares your interest.

ASSEMBLYMAN GEIST: Super, and he’ll be first.

More self-intros, please.

STEVEN A. BERKOWITZ, ESQ.: Good morning, Mr. Chairman. Thank you for the opportunity. My name is Steven Berkowitz. I’m here on behalf of the South Jersey Mechanical Contractors, and John Connors. We’re here to give testimony with regard to certain issues on the Prevailing Wage Act.

ASSEMBLYMAN GEIST: Thank you. Thank you for representing a very fine South Jersey association.

Good morning.

WENDY WOLFE: Good morning, Mr. Chairman and Committee members. I’m Wendy Wolfe, attending today’s meeting on behalf of the New Jersey Association of Professional Employer Organizations. I’m really here today to listen and learn and determine the implication of the Wage Act on my clients.

ASSEMBLYMAN GEIST: Great.

I know we have some season ticket holders in the back row. They’re welcome to participate, too.

ERIC RICHARD: Good morning, Mr. Chairman, members of the Committee. Eric Richard, on behalf of the New Jersey State AFL-CIO. And, of

course, we're just here to listen and learn, and get the input of the Department on the enforcement of the prevailing wage.

ASSEMBLYMAN GEIST: You're off to a great start on behalf of AFL. Thank you.

MR. RICHARD: Thank you, sir.

ASSEMBLYMAN GEIST: You see, you just never know what will happen when you attend a Labor Committee meeting.

T H O M A S M A N N I N G: Good morning, Mr. Chairman.

ASSEMBLYMAN GEIST: Good morning.

MR. MANNING: Tom Manning, the Business Manager of Local 475, Pipe Fitters and Steamfitters. There's nothing more important to my membership than prevailing wage. That's why I'm here.

ASSEMBLYMAN GEIST: Very happy to see you here.

MR. MANNING: Thank you.

ASSEMBLYMAN GEIST: Thank you very much for your interest. Some of these labor leaders, the Chair knows. I want the colleagues of this Committee to know. That's part of the reason why I'm doing this today.

M A R K M c M A N U S: Good morning, Mr. Chairman. I'm Mark McManus, the Business Manager with the Plumbers Local Union, Number 24, Newark, New Jersey; also, Chairman of the State Pipe Trades Organization-Association. And I'm also a member of the Plumbing Board of Examiners, Master Plumber, State of New Jersey. So anything in the licensing or prevailing wage, we're very interested.

ASSEMBLYMAN GEIST: Great. Thank you very much.

Any others? I see some familiar faces in the back row. You can't hide.

You certainly qualify as a familiar face to this Committee. Good morning.

J E F F R E Y S T O L L E R: Yes, good morning, Jeff Stoller, Vice-President with New Jersey Business and Industry Association, and continue to be interested in following up on the original hearing.

ASSEMBLYMAN GEIST: Great.

MR. STOLLER: Thanks.

ASSEMBLYMAN GEIST: If any of you have not declared an intent to testify, as well, please do so if you desire to testify.

Any others? (no response)

Any others want to come up, for the record? I know some of you are very strong in your labor advocacy. (no response)

Okay, any others want to self-introduce for the record? (no response)

Seeing none, we'll start with the Inspector General, but first we'll do a quorum call.

Greg Williams of the Office of Legislative Services will declare the quorum call.

MR. WILLIAMS (Committee Aide): Assemblyman Guear.

ASSEMBLYMAN GUEAR: Here.

MR. WILLIAMS: Assemblywoman Friscia.

ASSEMBLYWOMAN FRISCIA: Here.

MR. WILLIAMS: Assemblyman Felice. (no response)

Vice-Chairman Thompson.

ASSEMBLYMAN THOMPSON: Here.

MR. WILLIAMS: And Chairman Geist.

ASSEMBLYMAN GEIST: Here.

Good morning. The witness list today will begin with our Inspector General, Department of Law and Public Safety, Edward Neafsey.

Good morning--

EDWARD M. NEAFSEY: Good morning, Mr. Chairman.

ASSEMBLYMAN GEIST: --Inspector General. We look forward to hearing from you about what that encompasses, and your involvement on this issue. We welcome you to this Committee, and we look forward to working with you.

MR. NEAFSEY: Good morning to everyone on the Committee. And it is a pleasure to be here, Mr. Chairman, as Mr. Finkel advised you. And I'll just let the Committee know that we also have here our Chief Investigator, Anne Kriegner, and Deputy Attorney General Harlan Ettinger, who, on our behalf, has attended all of the meetings of the Prevailing Wage Compliance Work Group, which I'll mention in my testimony.

ASSEMBLYMAN GEIST: Great. Are you under the AG?

MR. NEAFSEY: Directly under the Attorney General.

ASSEMBLYMAN GEIST: Are you statutorily recognized with distinction with the title, Inspector General?

MR. NEAFSEY: We are not. It is an Attorney General initiative. And we've been in place for approximately one year.

ASSEMBLYMAN GEIST: Thank you. Please proceed.

MR. NEAFSEY: I'd like to start my testimony by commending the Committee for recognizing that as New Jersey embarks on an unprecedented school construction program, that New Jersey can no longer afford to conduct business as usual. Throughout the State, billions of taxpayers' dollars will be spent on repairing, renovating, and building schools. A program of this magnitude will create big opportunities for people to work. This is good for New Jersey. A program of this magnitude will create big opportunities for people to profit legitimately and illegitimately. Only the former is good for New Jersey.

When you in the Legislature enacted the Educational Facilities Act, you called on Attorney General John Farmer to establish an office to oversee the integrity of school construction expenditures. Attorney General Farmer assigned those responsibilities to the Office of Inspector General and tasked the office to identify and reduce the program's vulnerability to waste, fraud, and corruption.

Under the Educational Facilities Act, a registry of prequalified professionals, contractors, and subcontractors is to be developed. In that regard, the Office of Inspector General is working with EDA to develop a registry by screening each prequalification applicant for moral integrity. In short, the Office of Inspector General's goal is to block bad actors from becoming prequalified, and therefore, eligible to bid on contracts.

We want to encourage honest contractors to bid on school projects and believe we can do so by ensuring that there is a level playing field, which gives them a fair opportunity to win a bid. I believe a good-faith effort to keep unscrupulous individuals out of the school facilities process will entice honest

individuals to enter it and thereby maximize the State's opportunity to receive quality work for its taxpayer buck.

I also want to mention that, pursuant to your instructions in the Educational Facilities Act, our office has helped EDA draft language for an integrity attachment that will be part of all school facilities project contracts. This attachment includes an affidavit covering a statement of noncollusion, nondiscrimination, no gratuities, and significantly, prevailing wage and public works contractor registration compliance. We believe adding this language in affidavit form will make contract remedies effective tools to combat fraud and abuse.

And, I submit, your work on ensuring prevailing wage compliance is an essential ingredient to maintaining the integrity of the school construction program and to attracting quality contractors to work on school facilities projects. First, it's the law, required by both the Prevailing Wage Act and the Educational Facilities Act, and a law that is not enforced will not be complied with or respected.

Second, ineffective enforcement -- that is, enforcement that does not deter noncompliance -- threatens the integrity of the whole program, because contractors who cheat by paying workers less than the prevailing wage gain an unfair competitive advantage over honest contractors, who do pay their workers the prevailing wage.

Before final passage of the Educational Facilities Act, one of our deputies -- and I introduced him to the Committee -- who thereafter joined our staff, was warned by a prosecutor from the New York State Organized Crime Task Force that without effective enforcement of prevailing wage laws, New

Jersey will see a rapid race to the bottom, with the worst offenders competing to underbid one another for public works construction, and leaving poor quality projects in their wake.

And there is an example that was shared with us that was most tragic and compelling. It was an accident in which a student was killed in front of her junior high school, in New York City, when she was hit in the head by bricks that fell from a parapet that hadn't been properly secured by inexperienced day laborers, who were working on the facade instead of the skilled masons who should have been on the job.

After the creation of our office, we met with an expert from the United States Department of Labor, who advised us about the huge economic incentive to cheat on prevailing wage requirements, and how persistent prevailing wage violators often act in concert with labor racketeers to profit at the expense of workers and honest contractors. And this is the kind of activity -- the kind of precise activity traditionally engaged in by organized crime. We are investigating such a case as part of the prequalification process right now.

Finally, the SCI report on school roofing noted that in many instances the roofing company contracted to do the work subbed the job out to someone else who may have subbed it out yet again, or hired a crew of independent contractors who were paid far less than the prevailing wage. Often the so-called premium roofing systems that districts bought were installed by day laborers instead of the certified installers that districts bargained for, threatening, if not invalidating, the warranties that supposedly justified the high price of the premium roofing system in the first place.

And because all of these problems dramatically illustrate the need for close cooperation and coordination among many agencies -- in fact, among all the agencies involved in the school construction initiative, our office has participated in the Prevailing Wage Compliance Work Group, which was organized by the Department of Labor to ensure that there will be a high level of compliance with prevailing wage laws at all levels and in all phases of New Jersey's school construction program.

And as I stated previously, our office has agreed with EDA to screen each prequalification applicant for moral integrity. Among the things we will be screening for, in addition to debarments and criminal conduct, are prevailing wage compliance and OSHA violations. We have been advised that EDA will consider the bidder's prevailing wage compliance and safety history as factors in its price, plus other factors of determination, as it awards contracts.

This Committee heard and acted on the Department of Labor's call for more resources and better tools to improve prevailing wage enforcement when you enacted the Public Works Contractor Registration Act in 1999. We expect the certification process mandated by the Act to make a big difference in the level of prevailing wage compliance. Just knowing who is on the job is a significant step. And requiring contractors to make payroll records related to the job readily accessible to the Department of Labor as a condition of continued registration is certain to help them do their job.

Nevertheless, our office wanted to take this opportunity to speak with you today and to express our willingness to work with the Committee and its staff as the Committee continues to address this extremely important issue and other issues of this nature.

And in conclusion, I'd just like to repeat that from our perspective, the Prevailing Wage Compliance Work Group truly understands the significance of this issue, and that the Committee does deserve a lot of credit for recognizing that we can no longer afford to do business as usual in our State as we embark on this unprecedented program.

ASSEMBLYMAN GEIST: Thank you for your testimony. I'm impressed by your dedication on this common cause. And, of course, I have some questions, as I'm sure my colleagues do.

A) Do you have any particular recommendations for revision of the prevailing wage law?

MR. NEAFSEY: In general, Mr. Chairman, I would say that any steps you take -- and I know that you have some ideas kicking around right now -- any steps that you take to make the law a more effective deterrent, or to make enforcement of the law a much more realistic probability so that people truly fear the law, I think are steps in the right direction. And the only hesitancy I have this morning from perhaps mentioning anything specific is that we are working with the Department of Labor in the Compliance Working Group, and there are many people involved, including the Contractors Association, and many agencies, as I mentioned to you. And I think it may be more appropriate if we allow some of the work to continue to come up with a concrete recommendation from the group.

In many ways, we view our role on that group as supportive, and we're trying to be very, very supportive, but it is the Department of Labor's initiative, and it would probably not be appropriate for me to move forward ahead of them. That's for sure.

ASSEMBLYMAN GEIST: Do you have any particular requests for additional support staff to enable you to properly serve as inspector general, since the present scope of our school financing legislation is the best in the nation?

MR. NEAFSEY: Mr. Chairman, it literally took 12 months, but we were able to get up to just about the full staffing that the Attorney General envisioned when he announced the initiative. And I think it is most responsible, at this point, if we -- since we've just arrived at that amount of resources -- if we continue our work that we're doing. And if we find, based upon the amount of work that we're doing, that we are not keeping up, then we would then come to you -- come to the Legislature with a request for more resources.

I think it would not be appropriate -- as much as I'm tempted to -- it would not be appropriate for me to ask you to add to our staffing at this point, until we see the exact amount of individuals who want to be prequalified and the number of individuals that cause us to open an investigation before we can make a prequalification determination. So I appreciate what you're asking me, Mr. Chairman. I just think it would be premature at this point for me to make a specific resource request until I have a better handle on the exact scope of the work.

ASSEMBLYMAN GEIST: Debarments: Do you have any particular recommendations of sanctions that would enable immediacy, without the requirements of the due process triggered by debarment proceedings?

MR. NEAFSEY: I don't know that you could ever get away from the due process, because I think it might be set fairly strongly in case law. But

again, if I can go back to the Prevailing Wage Compliance Work Group -- and I know that Mr. Katz is here -- that's an issue--

ASSEMBLYMAN GEIST: Immediate suspensions. Immediate revocations. Immediate action. Immediate sanctions.

MR. NEAFSEY: I think you're hitting the nail on the head when you say immediate. And that's one of the issues that we're working on in that group, to come up with something that would be meaningful, so that, number one, immediate action could be taken, and number two, if you go to court recognizing that there are due process, case law requirements that you must meet, that there will be things you can offer the court to satisfy the court's concerns and be able to still move forward in really what you're suggesting. And I think you're getting to the nub of it. It is always better to be proactive with regard to this, rather than reactive.

ASSEMBLYMAN GEIST: Well, I'm real proactive, so I appreciate your interpretation of that interest.

Civil penalties: The law was written in 1963. Of course, I've already proposed that we revise the civil penalties. I'd like if you could review that issue to see if the proposed revision of civil penalties includes a type of monetary incentive for quality work.

MR. NEAFSEY: We'll be happy to do that, Mr. Chairman. And I think it goes to my first response -- or my initial response to your question about anything that the Committee does to strengthen reasons for people to comply with prevailing wage laws would be very helpful.

ASSEMBLYMAN GEIST: Do you believe that there should be, within the Attorney General's Office, a special prosecutor with prosecutorial capabilities to prosecute those that violate the prevailing wage law?

MR. NEAFSEY: If the Chair would allow, I'd like to not answer that specifically, having served as a special prosecutor at one point in my career in the Attorney General's Office, and I believe it was somewhat effective. But I'm really not in a position to speak to what is attorney enforcement in the Attorney General's Office of prevailing wage at the present time.

I know that within the last year or so, someone was put in charge. And that individual has raised the level of response in the Attorney General's Office, because of his, I think, hard work on this issue. But I couldn't tell you from, say, a global perspective, what is going on in the Division of Law or what is going on in the Division of Criminal Justice, which is also, you know, one of the arms that could be used in the Attorney General's Office to enforce prevailing wage.

ASSEMBLYMAN GEIST: Inspector General, a few moments ago I listened carefully to your reference to organized crime. So consequently, it's a logical follow-up to evaluate whether there should be prosecution violations of the prevailing wage law, as constituting criminal activity.

You know, I have a no-nonsense approach as a matter of overall perspective as Chair of this Committee, and I am interested in learning more about doing this the right way, in a real way, right away.

MR. NEAFSEY: Mr. Chairman, my position on criminal enforcement is that it is the most effective deterrent for the violation of any law. And so I think, not only with regard to making the law stronger, as the

Committee is considering on the civil side, some -- you know, it may be appropriate to give some thought to that as well, with regard to the criminal laws.

ASSEMBLYMAN GEIST: Your reputation is strong and actually outstanding. Should we recognize the Office of Inspector General with special statutory enabling authority? Should we include, within that, your potential prosecution for violations of prevailing wage law under the criminal code? These are thoughts I'd like to provoke you to think about to inspire you to come forth with some recommendations, because I see your dedication, and I'm impressed by that.

MR. NEAFSEY: Mr. Chairman, certainly our office would appreciate any consideration by the Legislature in terms of providing it statutory authority, because it then makes it easier for the office to do its job.

Specifically one of the ways, perhaps, Mr. Chairman -- one of the things that could be considered is that there is legislation in the Educational Facilities Act that's already on the books that says the Attorney General needs to look at certain things. It doesn't specify prevailing wage. It just talks about identifying and remedying fraud, waste, and abuse with regard to school facilities projects. And that may be a vehicle for becoming more explicit in terms of what the Legislature would like the office to do.

ASSEMBLYMAN GEIST: Your testimony has focused significantly, and properly so, on school construction. Do you believe that some of those integrity safeguards in school construction should be statutorily codified to apply to other public works projects?

MR. NEAFSEY: Yes, Mr. Chairman.

ASSEMBLYMAN GEIST: I'd love to learn more about how we can do so. If your particular beliefs are that there are certain elements of the school construction financing legislation that would enhance the integrity of public works projects, utilizing public dollars, this Committee would be very interested in knowing.

MR. NEAFSEY: We would be happy to work with the Committee on that.

ASSEMBLYMAN GEIST: This Committee is on the Internet today. This Committee is boldly going where this Committee has never gone before. And if we're going to do this the right way, I really want to know, through this process, all of the objectives, including -- if it includes broadening the scope of the integrity standards to apply to other areas of public works projects, utilizing public dollars.

MR. NEAFSEY: Understood, Mr. Chairman.

ASSEMBLYMAN GEIST: Any other questions for the Inspector General from the members?

Vice-Chairman Thompson.

ASSEMBLYMAN THOMPSON: On the previous testimony it indicated one of the big problems here is bringing enforcement to fruition. And that seemed to be hampered by an inadequacy of adequate AOLs assigned to the job -- or ALJs assigned to the job, adequate attorneys for prosecuting, etc. Are you in agreement that we need to do something to see that there are more administrative law judges available for this purpose, and individuals to prosecute the cases?

MR. NEAFSEY: With specific regard to AOL, I would not have enough of a knowledge basis in terms of their staffing to address it. In general, I would accept the point that it is one thing to put a law on the books, but it has to be backed up with the resources to make sure that the enforcement of that law is meaningful.

So I do support ensuring that each agency or entity that's involved in the process, or at any level of the process, has the resources to do the job.

ASSEMBLYMAN GEIST: Any other members? (no response)
Could you stay and listen and learn?

MR. NEAFSEY: I intend to, Mr. Chairman.

ASSEMBLYMAN GEIST: Thank you. A pleasure meeting you.

MR. NEAFSEY: Thank you.

ASSEMBLYMAN GEIST: I understand that the Office of Administrative Law is represented today, and there are some questions. Jeff Masin is the Chief Administrative Law Judge, and Acting Director.

Good morning.

JUDGE JEFF S. MASIN: Good morning, sir.

ASSEMBLYMAN GEIST: Do we call you the Honorable Judge -- good morning -- Director?

JUDGE MASIN: You can call me whatever you'd like.

ASSEMBLYMAN GEIST: Your name for the record.

JUDGE MASIN: Jeff Masin. I'm the Acting Director and Chief Administrative Law Judge.

ASSEMBLYMAN GEIST: I'll ask a simple question to get you started. How many judges oversee the prevailing wage law? Are they assigned

by statutory designation? Are they established throughout the State? Are they regionally available? Are they readily available? Thank you.

JUDGE MASIN: We have 34 judges in the office, presently. The way the office is set up, no judges are specifically assigned to any particular case or any particular area. We have judges who specialize in various areas of law. The nature of the extremely complex calendar that we handle is such that all judges need to be available to handle a substantial breadth of cases.

In terms of prevailing wage, over the years we've had a varying caseload in terms of prevailing wage. It's very hard to predict, in any given year, how many cases we're going to see. And particularly in light of the initiatives that we're hearing about and the school construction cases that we anticipate, we really don't know yet what the influx of cases will be.

As a result, we certainly are looking, and we've been in discussions with counsel's office, and with the Commissioner of Labor, in regard to our staffing needs. And there's no question that as the increase of cases begins to flow in, we will have a significant need to have staffing to meet the demands of these cases, because the nature of our caseload is such that many of these matters that we deal with in many areas come to us on an emergent or on an expedited basis. We have a lot of competing legislative and Federal requirements with regard to the nature of how soon cases must move.

In the case of prevailing wage cases, and particularly debarments, the statute does provide for immediate action. Obviously there needs to be staffing, along with all of our other competing requirements to be able to meet those cases, both on our level and the Attorney General's level and the Department level.

So we are very cognizant of the need to deal with the increase in caseload that we anticipate. We haven't really seen it yet, but it's beginning to flow in, and we understand that it may be coming in considerable numbers. As a result of that, as I say, we're in active discussion with counsel's office and the Commissioner of Labor in regard to how we can achieve the funding we need.

As you know, appointments of administrative law judges are by the Governor, with advice and consent of the Senate. So we don't really control, as such, how many judges we have, other than through the budget process. We deal with that, and that's a process that we're actively engaged in right now.

ASSEMBLYMAN GEIST: If you could, for the benefit of the Committee as well as those in attendance, explain why you are the court system that is currently the one that oversees the prevailing wage law?

JUDGE MASIN: Well, as you know, we are a division of the executive branch. And debarments, at least initially, start out as administrative actions. As a result, the due process requirements provide that hearings, for which parties are entitled if a debarment is to take place, must initially take place within the executive branch, in the administrative proceeding.

The statute provides that if the Commissioner debar someone after a hearing, then the process can move into the Superior Court, either as an appeal or as an action for an injunction. But the initial process must be through the administrative branch. Before the Commissioner takes final administrative action, parties are entitled to have an administrative hearing.

ASSEMBLYMAN GEIST: Do you have any statistics on the number of debarment proceedings?

JUDGE MASIN: Well, it might, and we attempted to gather some of these when we learned of the hearing on Friday.

ASSEMBLYMAN GEIST: Thank you.

JUDGE MASIN: We tried to get together what we could. And what I've been able to determine is that last year we had only a handful. This year my numbers indicate that we have approximately seven or eight, that I'm aware of, debarments that have come into the office. There may be a few more that I wasn't able to track down on Friday.

As I say, the number appears to be increasing. When this procedure went into effect in 1995, we had a number of matters then. And then it sort of fell off for a while. But the numbers appear to be coming back up. And as I indicate, the Department of Labor indicates that they anticipate a considerable growth in the caseload very quickly.

ASSEMBLYMAN GEIST: Could you explain, for purposes of the record, how a debarment proceeding is initiated?

JUDGE MASIN: Well, the statute provides that the Commissioner has the authority, upon determining after investigation that someone has failed to pay prevailing wage, the Commissioner can list someone for debarment. And if that happens, then the person is entitled to a hearing within 48 hours. In fact, the statute says that a decision must be rendered within 48 hours. As a practical matter, that may well be somewhat unworkable because of the nature of the cases and the length of these cases.

In my discussions with the Attorney General's Office, I'm told that the cases they're sending us now tend to be the ones that they can't resolve. They tend to be the ones that are more complex, in which the parties have more

strongly held positions. And their estimate is that the cases might take four or five days to try. So we're not talking about minimal cases, the ones that are likely to come to OAL.

But the statute provides for a very quick hearing, a very quick decision. That assumes that the Commissioner lists someone, up front, for debarment, and it's immediate debarment, and they're entitled to a hearing immediately. The Commissioner has not always, as I understand it -- and, of course, the Commissioner can speak to this better than I can -- but my understanding is that they have not always put into effect the immediate debarment, partly because of some of the problems concerning staffing, and there may be other reasons that I'm unaware of.

But the process does provide for the immediacy that I think you're looking for. It becomes a question, of course, of resources, and a question of what -- you know, we deal with what we're sent. So to the extent that a case is sent to us, we will deal with it as the statute requires.

But the process does provide for the kind of immediacy that I think you're concerned with.

ASSEMBLYMAN GEIST: Do you train all your administrative law judges to be capable of participating in prevailing wage proceedings?

JUDGE MASIN: Yes, we do. But I have to say, in fairness, that the number of cases over the years has not been that great, so that the number of judges who had occasion to deal with these has been fairly limited. What I would anticipate, in light of the increase in these matters, is that we will go back to our judges and we'll be giving them some additional information, some additional materials, so that they can deal with them.

Obviously, the judges are well trained to deal with cases in general, and while these have their -- these and any other cases have their own particular individual characteristics, much of what we will deal with in this kind of a case is, frankly, what we deal with in most of our cases in terms of the nature of the process.

ASSEMBLYMAN GEIST: There was some suggestion that there was only one or two judges, statewide, that were available and capable for purposes of oversight of prevailing wage law. Your testimony today is otherwise.

JUDGE MASIN: Yes. I'm not sure where that comes from. It may simply be a matter of which judges were handling cases. There may have only been a few that had cases assigned to them because of their availability, what the calendars looked like. But we have, as I say, we have presently 34 judges, and the vast majority of them are theoretically available. Again, it depends on the calendars and other factors such as that.

But there's certainly no limitation to just a handful of people who are either assigned to handle these or capable of handling these.

ASSEMBLYMAN GEIST: Director, I appreciate your availability.
Any questions from the members?

Vice-Chairman Thompson.

ASSEMBLYMAN THOMPSON: You do indicate that you have 34 ALJs, and I recognize that your office handles all regulatory hearings under the Administrative Procedures Act for all divisions or departments of the State, of course, of any regulatory action that is necessary there.

JUDGE MASIN: Right.

ASSEMBLYMAN THOMPSON: When was the last time that the number of administrative law judges was increased, and how much was it increased by at that time?

JUDGE MASIN: That's a little difficult to say, because, as you know, the appointment process being what it is, we tend to get a judge here and a judge there. And that's the way it's been. The last judge was appointed last year.

ASSEMBLYMAN THOMPSON: That was a new position--

JUDGE MASIN: Yes.

ASSEMBLYMAN THOMPSON: --as opposed to filling an old one?

JUDGE MASIN: No. No, that was not a new position.

ASSEMBLYMAN THOMPSON: I'm saying, when was the last time the number of positions was increased, and by how much?

JUDGE MASIN: I'm not sure that I can tell you the number of positions have ever been increased in that sense, because at one point we had as many as -- and this goes back quite a ways -- we had as many as 48 judges. Over the years, for various reasons, the number has declined.

We have an authorized number. We have a budgeted number. And we have the actual number, so that right now we have 34. There are four nominations.

ASSEMBLYMAN THOMPSON: Thirty-four is the actual--

JUDGE MASIN: I should point out that there are four nominations pending before the -- pending in the Senate at this point. So theoretically, we--

ASSEMBLYMAN THOMPSON: So 34 is the filled positions?

JUDGE MASIN: Thirty-four is the filled positions.

ASSEMBLYMAN THOMPSON: And you said you have four pending.

JUDGE MASIN: Yes.

ASSEMBLYMAN THOMPSON: So your authorization, obviously, is more than 34 at the present time.

JUDGE MASIN: Yes, yes.

ASSEMBLYMAN THOMPSON: Just not filled.

ASSEMBLYMAN GEIST: What's your actual?

ASSEMBLYMAN THOMPSON: What would you say--

JUDGE MASIN: Our actual authorized positions? I believe it's 41.

ASSEMBLYMAN GEIST: Thank you.

ASSEMBLYMAN THOMPSON: What would you say--

JUDGE MASIN: But I should point out, that's not budgeted. That's authorized.

ASSEMBLYMAN THOMPSON: --is about the time lag between when you receive a request from a department -- not just prevailing wage, but when you receive a request from a department-- What would you say about the time between when a request is received and when the hearing is actually scheduled?

JUDGE MASIN: It depends on the nature of the case and the priorities that are set, either by Federal or State law regulation. We have everything from emergent matters -- we deal with a huge caseload of special

education matters that have to be scheduled, very often as emergencies, literally tomorrow, and hearings within a week or so. Everything through that up to cases that have no special statutory priority, in which case you might be looking at four to six or even eight months, depending on the lag of individual calendars and the overall calendar.

ASSEMBLYMAN THOMPSON: But no more than about four to six to eight months then?

JUDGE MASIN: There may be occasions where it gets beyond that. I don't think as a practical -- generally not.

ASSEMBLYMAN THOMPSON: In other words, if we were saying in prevailing wage cases, then it would not -- not an emergent one, but it was one, then it might -- it probably would be heard within four to six months, or something like that?

JUDGE MASIN: That's a fair estimate.

ASSEMBLYMAN THOMPSON: Okay. I have had the pleasure of participating in several hearings by administrative law judges in previous positions where I was a regulator. So I'm well familiar with your process. Thank you.

ASSEMBLYMAN GEIST: A quickie on penalties. Do you oversee decisions pertinent to the application of civil penalties?

JUDGE MASIN: Well, the statute provides for penalties. And the judges, of course, would impose those civil penalties. And as you know, of course, decisions are reviewable by the Commissioner.

ASSEMBLYMAN GEIST: Do you have any recent decisions in which there was imposition of civil penalties by one of your administrative law judges?

JUDGE MASIN: Frankly, I could not cite one to you at the moment. I could certainly provide you with that information.

ASSEMBLYMAN GEIST: Through the Chair, if you could do so.

JUDGE MASIN: I will do so.

ASSEMBLYMAN GEIST: I'm real interested in knowing about rulings on civil penalties by administrative law judges, so if you could.

JUDGE MASIN: I will do so.

ASSEMBLYMAN GEIST: I really appreciate you coming before the Committee to assure us that you have many judges, and they are available, and they are capable, and they are trained and informed on prevailing wage law. It's reassuring to me.

Any other questions?

ASSEMBLYMAN GUEAR: Mr. Chairman.

ASSEMBLYMAN GEIST: Sure, Assemblyman.

Assemblyman Guear.

ASSEMBLYMAN GUEAR: We're about to spend billions of dollars on school construction, and I think we're all quite aware of a number of unscrupulous contractors that are going to come out of the woodwork and what we're going to be faced with. I'd like to know your opinion on the criminal penalties, setting up some criminal penalties for these individuals, as opposed to the civil penalties -- and/or, along with civil penalties, would the taxpayers of this State be better served if these individuals were to go to Superior Court and

face some jail time, as opposed to just penalties. Because people can pay fines. People will pay fines. People will take a chance on stealing money, if they know they only have to pay a fine if and when they get caught, and when they're convicted, as opposed to the distinct possibility that they might actually have to go to jail.

I'd just like to know your opinion on that.

JUDGE MASIN: Assemblyman, with all due respect, while I might have some thoughts on that, really, my role in this process is such that I have to say that I would have to defer that to the Attorney General and those who deal with the enforcement side of this, rather than the decisional side, or the adjudicative side. I think that's really something that -- a lot of what you say, I think probably bears considerable significance. But I think it's better addressed by the Attorney General than by me.

ASSEMBLYMAN GEIST: Any other questions? (no response)

Thank you.

JUDGE MASIN: I'll be here if there's any further questions.

ASSEMBLYMAN GEIST: Thank you, Judge. Nice meeting you, Your Honor.

JUDGE MASIN: Thank you.

ASSEMBLYMAN GEIST: I'm going to mix up the cycle somewhat and bring in someone from the private sector, South Jersey Mechanical Association representative, attorney, Steven Berkowitz.

Good morning.

MR. BERKOWITZ: Good morning, Mr. Chairman.

ASSEMBLYMAN GEIST: And you have a distinguished companion coming forth?

MR. BERKOWITZ: This is James Kehoe, of Local Union 322.

ASSEMBLYMAN GEIST: Good morning.

J A M E S K E H O E: George, we have a unique relationship with our contractors, as the UA throughout the State does, where we do a lot of things together, as opposed to when we're negotiating, where we're apart

ASSEMBLYMAN GEIST: Glad to see you here, both of you.

MR. BERKOWITZ: Well, thank you, Mr. Chairman, and thank you to the Committee members for the opportunity to speak on these issues.

I am an attorney. I represent unions and union contractors in civil prevailing wage actions. I have two specific amendments that I believe would aid in the enforcement of the Prevailing Wage Act.

The first one has to do with the Public Works Contractor Registration Act.

Is this better? (referring to PA microphone)

The first one has to do with the Public Works Contractor Registration Act. This Act is a great idea, and it was made in order to assist in controlling the contractors who participate in public work and who are awarded public contracts.

The Act basically says that no contractor shall be permitted to bid on or engage in public contracts unless he is so registered. And the problem that we run into is, a judge looks at that, and when you're dealing with a public bid -- and as I'm sure you're aware, the contractors are required to set forth the name or names of subcontractors to whom they will subcontract the work. The

Act does not say that a subcontractor that is listed on a public bid must be registered in accordance with the Public Works Contractor Registration Act.

Now it seems intuitive to anybody in the industry that any subcontractor that is listed to perform public work would have to be registered in accordance with the Public Works Contractor Registration Act. However, we have brought bid challenges against contractors that have listed subcontractors that are not registered with the Public Works Contractor Registration Act. And the courts have been split on the issue of whether or not that bid is materially defective, and therefore, the public body should be without discretion to award the contract to a contractor that has listed a subcontractor to perform public work, even though that subcontractor is not registered in accordance with the Public Works Contractor Registration Act.

We have one case, in Monmouth County, where they said, "Well, obviously, that is a material defect in the bid because they have listed a subcontractor that can't possibly perform the project; therefore, their bid is materially defective and should be thrown out."

We have another case where the judge said, "Well, this Act says bid on or engage in public work. And by listing this subcontractor -- this subcontractor has not bid on the public work, because they didn't submit a bid to the public body. And the subcontractor is not engaging in, because it's just being listed on a bid." And that judge said, "That's not a material defect," and he gave the contractor the opportunity to cure that defect, and gave the subcontractor the opportunity to get registered after the bid. And this causes confusion, and basically I think it hinders the effectiveness of the Public Works Contractor Registration Act.

So what we're proposing is that the Act be amended so that the statute says, "Contractor or subcontractor may not bid on, engage in, or be listed for public works contracts if it is not registered in accordance with the Act."

The second issue deals with the civil remedy that is included in the Prevailing Wage Act. Specifically, if an employee is not paid the wage, it has the option of seeking administrative assistance from the Department of Labor or bringing a civil action, independently.

Now the Act, as the Chairman was good enough to point out, is from 1963. And the administrative remedy has a two-year statute of limitations attached thereto. So, if an employee goes to the Department of Labor and says that he's not been paid the prevailing wage, the Department of Labor may go back two years and assess the penalties.

We believe it would be much stronger enforcement of the Prevailing Wage Act if we could put the statute of limitations for a civil penalty -- for a civil action -- at six years. And the reason for this is that, as you are probably aware, the Prevailing Wage Act has a requirement in it that each public contract include a term that the employer will pay its employees the prevailing wage. The statute of limitations on a contract -- or breach of contract in the State of New Jersey is six years. Once again, it seems intuitive that the statute of limitations for a prevailing wage violation that is brought civilly -- not through the Department of Labor, but civilly -- would be six years.

Courts have come down on either side of this issue. And again, we've won a motion, which permits us to go back six years. But we believe that

some incorporation into the legislation would assist in enforcing the Prevailing Wage Act.

That's all I have.

ASSEMBLYMAN GEIST: Excellent concept. Statute of limitations is a new development in these proceedings. I appreciate you bringing it to our attention. The ordinary contract statute of limitations is six years. You're the first one to raise the fact that they're applying the tort standards two years, in what is a contract situation. OLS is going to be looking into this. I appreciate you bringing it to our attention. If you have any court rulings to forward to OLS, so that they can learn more about the application of statute of limitations, we welcome that.

I can see why you were selected as counsel. I congratulate you and thank you for your presence.

I also want to bring to your attention, the Chair has already put through this Committee legislation to inform subcontractors of the prevailing wage law. That's different than your emphasis on registration. I'd like, if we could forward to you, the Chairman's legislation, so that you can look at that. I, perhaps, can do some floor amendments to tighten it up. I don't know why we didn't have you here when we did the Registration Act, because what you're talking about seems to be common sense. We had almost every labor leader in New Jersey here, and we did that legislation through my Committee, and we're proud of that law. But obviously you come forth with an idea to improve it.

And I'm sure the Department of Labor is very interested in having more register, so this is a common cause, together.

Thank you for your testimony, and we look forward to working with you to get the job done.

Any other questions for Steven Berkowitz? (no response)

Mr. Kehoe, always a pleasure.

MR. KEHOE: Thank you, George. And may I add, out of frustration from our part is what got us to initiate the services of Steve, and Steve has done a terrific job and has brought us up to the next level.

But we hope what you do with your Committee would help all labor unions and our good contractors in the State of New Jersey to hire taxpayers in the State of New Jersey, reach some sort of an accord where we get some action, and get some action that means something and that scares people away who are going to be unscrupulous.

ASSEMBLYMAN GEIST: That's certainly our goal. We thank you both.

MR. KEHOE: Thank you, George.

MR. BERKOWITZ: Thank you.

ASSEMBLYMAN GEIST: We're going to continue the Chairman's South Jersey flavor by calling upon a friend. He's the President of the South Jersey Central Labor Council, from the IBEW 351, today, Donald Norcross.

Donald, I thought it's only appropriate you follow a South Jersey brother in your testimony. Once again, for the record, you are?

D O N A L D N O R C R O S S: Good morning. Don Norcross. I'm a business agent with IBEW Local 351, out of the Folsom office.

Good morning, Chairman Geist and Committee members. I know we have quite a few people before us today, so I'll try to condense my remarks, and my prepared comments I will give to you when I'm finished.

On behalf of the members of my local, we appreciate the opportunity to come before you today and to give testimony on the Prevailing Wage Act. A couple of weeks ago we were in this very room to hear testimony from folks who gave a variety of issues that they face day in and day out, concerning prevailing wage. You had commented that this is a listen and learn session, and you wanted very specific examples.

With that in mind, I come before you today to share a very specific example of the abuse of this Act.

The account I'm about to tell you is one that the Committee might find shocking, but to any of the business agents in the room today, who operate in our State, this is a commonplace occurrence.

The account begins with an employee, and an employer who is the owner of a very large electrical contracting firm, who performs millions of dollars each year in what we call rate work. The employee asked for a meeting with the owner, because he had some serious concerns with the signing of an affidavit, presented to him by the owner, with his attorney, stating he was a laborer on a rate job, and not an electrician.

What I will read next are the highlights of the actual recording of the meeting, and as part of my prepared comments, I've included the entire text of that meeting. Just to briefly tell you, the names in the transcript, in addition to his colorful language, we've pulled out.

Just to set this up, it was the employee and the owner meeting in the early morning at the place where the owner had called for, because this employee was uncomfortable with what he felt he was coerced into signing. Now, I use that word. He did not. He was very berating.

So I will just briefly read some of the statements made by the owner, but this goes right to the heart of why we're here today.

ASSEMBLYMAN GEIST: I'm sure the enforcers are listening. I appreciate that.

MR. NORCROSS: I hope so.

ASSEMBLYMAN GEIST: They better be.

MR. NORCROSS: This is the owner speaking.

"Wait, will you listen to me? This thing is about the state, right? Then you should have spoken up. I appreciate, and the company appreciates everything you did here on Friday," referring to the signing of that affidavit.

"I understand what you did. I read the (blank) records up in Trenton, right? We all smiled when the guy told you you were a laborer, right? I understand all that, right? We've done this for 20 (blank) years."

Let me repeat that. This is the owner: "We've done that for 20 years."

"The state's been here hundreds of times, the first time they've ever questioned this, right, first time."

Now this is the owner. The employee tries to make a statement. We have the actual recording. He goes on to say:

"I spend a lot of time and money with the (blank) lawyers, right, to clear the company's name, right? So we have to continue to do the rate job.

“Have we made mistakes, sure. But the state has never said a (blank) thing to us.”

He’s berating his employee here.

“In the hundreds of times they’ve looked at our books, they’ve never said a (blank) thing, until right now -- never. And the first time they looked at our books on the job, they classify you as a laborer, and then, because of the asshole union bitched, they wanted to switch you to an electrician.”

Now, this is the problem he’s running into, misclassification of an employee.

“Well, the second employee signed the same thing, only in much more detail, where he classified everyone as a general thing, as an electrician for the company. So employee II got this, right? The engineering firms are involved in all this. All of our friends are doing the same thing.”

So he’s bragging about what they do.

It goes on to say: “The only thing, with the state, nobody appreciates that more than me. Nobody does. Could the company afford to pay all the money? Sure, we could pay all the money that the state’s looking for. All this does to us, right, it teaches us a lesson. We better keep better paperwork.

“We could have afforded it,” actual words.

As outrageous as this account may sound to a number of the members of the Committee, it’s the type of story I hear all the time from employees of dishonest contractors.

Rough calculations concerning potential back pay due to this one misclassified employee could be over \$25,000. Multiply that by the number of

potentially misclassified or unreported employees on that job alone can show how dishonest contractors knowingly cheat the system, enabling them to lowball their bids and gain contracts from the government.

You've heard us tell you this all the time, and here's his actual words. Here we're pointing to just one example, one contractor, and by his own words, "We've been doing this for 20 years." Imagine how much money the employees and the State of New Jersey have been shortchanged?

What would the State do if a company cheated and didn't pay a \$25,000 tax bill, or if I walked out of this room and got robbed of \$25,000? I think the answer is quite clear on how you would act. That person would be arrested and led away in handcuffs.

The time for action is now. The State has committed nearly 9 billion in school renewal projects, and we believe the State must make the commitment to a timely and effective enforcement of the Prevailing Wage Act.

I might add that certainly the \$9 billion in school construction, but there's still all the other construction. And the gentleman I'm talking about here never did a school job in his life, that I know of.

We respectfully request the Committee and the State of New Jersey treat the theft of wages the same way they treat the theft of money, by enhancing investigating resources and vigorous prosecution of dishonest prevailing wage violators.

I would just say, in conclusion, that the IBEW is very eager to work in partnership with all the members of this Committee and with the Department of Labor to address this very serious issue.

ASSEMBLYMAN GEIST: Donald, thank you. Your testimony is another instance of compelling-- The Committee is very interested in learning the best way to make the 1963 law a better law. You, today in your closing, seem to suggest as though that violations of the law should be prosecuted.

MR. NORCROSS: Absolutely. They can pay -- you heard in his own words, "We got the money." The money is not the issue. They're not afraid of paying a few more bucks. They don't like it, but if you take away some of their freedom and their ability to work on these jobs -- because what we heard today is what, seven cases are up there for disbarment. How many contractors have registered in the State of New Jersey.

ASSEMBLYMAN GEIST: In the real world, in which you are a real voice, where is the system breaking down as you see it, the Department of Labor, the Inspector General, the Contractor Registration Act? Any particular --

MR. NORCROSS: I'm not going to bite on that one, George. I just would say that the incentive by a dishonest owner to cheat, where's the downside? Twenty years he's been getting away with it. "What's the worst they're going to do to me?" "What is the worst they are going to do to me? I've been doing it for 20 years, and I'm bragging about it."

This guy is hopefully going to face the music in a disbarment, at minimum. But in the real world, you lock the guy up, or the potential of locking the guy up is going to scare the hell out of him. And that, I think, along with many of the comments we've heard here today, go right to the heart of the matter.

ASSEMBLYMAN GEIST: Any other questions for Donald Norcross?

ASSEMBLYMAN GUEAR: Mr. Chairman.

ASSEMBLYMAN GEIST: Assemblyman?

ASSEMBLYMAN GUEAR: Just a comment. I've asked the Office of Legislative Services to draft legislation just along the lines of what you're saying here. And it goes along with my question earlier, when I mentioned Superior Court.

This is not a disorderly persons offense. It should be heard in Superior Court. It should be an indictable offense. The guy on the street that steals a TV off the back of a delivery truck, anything over \$200, that's an indictable offense. And we're talking about thousands of dollars here. It parallels a theft by deception, and this is the legislation that I've requested that the Office of Legislative Services to research and to have drafted for the future, because I agree wholeheartedly with you, that you have to have some criminal aspects.

ASSEMBLYMAN GEIST: The Chair wants to assure the Committee that the request is bipartisan, through the Chair, with the Assemblyman, and it is under way, in terms of the breadth of scope. That's why we're here today, to continue to listen and learn.

It does seem amazing to me -- a side comment -- and this is perhaps just a reality of the times that exist. And you probably know this, Donald, that there seems to be better enforcement by the Election Law Enforcement Commission than there is of the prevailing wage law. The penalties for violation in the Election Law Enforcement Commission are more rigorous than the prevailing wage law.

It's interesting, the priorities. I'm not critically commenting on the Election Law Enforcement Commission, but what I'm saying to you is that this Committee needs to obviously work with you and others to enhance the prevailing wage law.

Any other questions for Donald Norcross? (no response)

Thank you.

MR. NORCROSS: Thank you.

ASSEMBLYMAN GEIST: You're always welcome back.

President Wowkanech, AFL-CIO. (no response)

OLS thought he had an interest in testifying. When he comes back, we'll have him back.

Mark Lohbauer, New Jersey Economic Development Authority Program.

Good morning, Mark. Welcome to this Committee.

MARK LOHBAUER: Good morning, Mr. Chairman.

ASSEMBLYMAN GEIST: Congratulations on your new career endeavor.

MR. LOHBAUER: Thank you very much.

ASSEMBLYMAN GEIST: Mark, you can probably anticipate that there's interest in knowing how the EDA is administering the prevailing wage law, not just on school construction, but as the EDA. There's proposed legislation, and in this instance I'm hopeful you've had a chance to review that proposed legislation. This Committee is interested in knowing how the EDA respects the prevailing wage law.

Good morning.

MR. LOHBAUER: Good morning. Mr. Chairman, I do have some information about the economic development aspect -- the traditional aspect of EDA, but I hope you and the Committee members will bear with me. I'm relatively new to the Authority. I joined them last Labor Day as part of the school construction initiative.

In fact, I wanted to introduce myself. I'm Mark Lohbauer, Director of Policy and Communications of the School Finance and Construction Program at EDA. And on behalf of Executive Director Caren Franzini, I would like to thank you all for inviting me to appear here this morning before the Committee and present our views, with regard to the observance of the New Jersey Prevailing Wage Act in school construction, and as the Chairman suggested, historically, in other projects.

Let me begin by saying that the past 10 months, since the passage of the Educational Facilities Construction and Financing Act, have been a whirlwind of activity at EDA. Many times I've likened it to a commercial that was on the last Super Bowl of an airliner. It's cruising at 30,000 feet. A stewardess is serving coffee to a passenger, and as she pours it, it's blowing in the passenger's face because the plane isn't finished construction. It's cruising along, but there are workmen out on the wing, bolting down ailerons and attaching seats to the structure. And that's really much the way we feel at EDA.

We had to hit the ground running July 18th, when the Act was signed into law. And we had to assemble a team. We're still in that process, but I think we're very proud of the fact that we've been hard at work building the processes and procedures by which your mandate to rebuild the public school infrastructure of the State of New Jersey shall be implemented.

Our first order of business was to address conditions affecting the health and safety of children in the *Abbott* school districts. Last fall, we received approval from the Commissioner of Education to take action on conditions that were identified in 403 schools throughout the 30 *Abbott* districts.

In December, we began the process of hiring architects and engineers to design the repairs, and design work is now ready for about \$100 million worth of repair work, and we are beginning the process of soliciting bids from general contractors for this work to be done this summer.

These will be the very first construction projects under the new law, and I am proud to report to this Committee that, to our knowledge, they represent an historic first with regard to the Prevailing Wage Act. An important tool that the Legislature gave to the EDA to implement the school construction program was the power to select contractors on the basis of price and other factors. This is a significant advance over the traditional standard of lowest responsible bidder. For the first time, we will be able to select bidders on the basis of their past performance, including past performance under the prevailing wage law.

Each bid package that we are issuing will require the bidder to select one of three statements about his or her prevailing wage record over the past five years. I'll quote them for you. They select one of these.

Number one: "This firm has no record of reported violations of failure to pay prevailing wages."

Or, number two: "This firm has a record of one or two violations of failure to pay prevailing wages."

Or, number three: “This firm has a history of three or more violations of failure to pay prevailing wages.”

We take these statements--

ASSEMBLYMAN GEIST: Excuse me.

MR. LOHBAUER: Yes.

ASSEMBLYMAN GEIST: That’s the exact wording?

MR. LOHBAUER: Those are the exact words in the bid package, yes.

ASSEMBLYMAN GEIST: Go ahead.

MR. LOHBAUER: And the bidder is required to check off one, or they have an incomplete bid package.

ASSEMBLYMAN GEIST: Thank you.

MR. LOHBAUER: We take that statement, and we share it with the Department of Labor. The Department maintains old records of prevailing wage information, and they go through and confirm the bidder’s answer to that question.

We only count records of conviction against a bidder. We will not consider poor record keeping as a violation to pay. But those bidders that are able to report no violations will receive a 20-point boost to their other factors score. Bidders with one or two violations will lose five points from their score. And bidders with three or more violations will lose 15 points from their score.

While the prevailing wage record is only one of several factors to be considered -- the others being the past construction performance on projects of similar size and nature, quality of the project team, and safety record as reported to OSHA over the past three years -- it is significant that prevailing wage data

will now be used to influence the scoring of bids received. For the first time, past performance on prevailing wage will truly matter to the bidder's ability to compete.

This innovative step has only been possible due to the close cooperation and the assistance of the Department of Labor, which maintains these extensive records, and which has worked diligently with us at EDA to develop a workable system that will promptly review the data and respond without delaying our bid process.

ASSEMBLYMAN GEIST: A question, if I could interject?

MR. LOHBAUER: Certainly.

ASSEMBLYMAN GEIST: How long does that take for the Department of Labor to do the review?

MR. LOHBAUER: Well, we actually haven't sent them the first bids yet. We're only just now posting the first bid projects for these health and safety projects.

ASSEMBLYMAN GEIST: So, while the questionnaire is prepared, there's been yet, to date, no answers, and thus, no Department of Labor review?

MR. LOHBAUER: That's correct. We haven't received any bid proposals yet. It will happen soon, and I'm sure the Department of Labor could probably better address what their anticipation is about ability to respond. But I know we have worked together trying to devise a system that will ensure that they can respond within a reasonable time that would not delay our award work.

ASSEMBLYMAN GEIST: I hope some people are listening to the Chair, as I'm about to say this. If you know what the questions are, and you're

anticipating what the answers are, why can't the Department of Labor provide you now with a list of all those that have a track record of noncompliance? Those that are in the one to two, minus five point range, why can't they provide that to you immediately? On the three-plus, minus 15 point range, why can't they provide it to you immediately, so candidly, you are right up front advised what the answers are before you even ask the questions?

MR. LOHBAUER: I suspect that the answer to that, Chairman, is that this information is dynamic. It's changing all the time.

ASSEMBLYMAN GEIST: Well, they can update it all the time.

MR. LOHBAUER: I think it's certainly--

ASSEMBLYMAN GEIST: I hope they're listening. I asked the Commissioner to be here today. I hope they're listening.

MR. LOHBAUER: Certainly, our colleagues from Labor are here.

ASSEMBLYMAN GEIST: And we'll be talking to them. And they're going to be following you. The sequence is there. I'm interested in knowing about the turnover of those lists.

MR. LOHBAUER: We certainly want to do whatever is most efficacious--

ASSEMBLYMAN GEIST: And updates.

MR. LOHBAUER: --and thorough.

ASSEMBLYMAN GEIST: Sure, but at the same time, I don't want there to be a delay in school construction because the Department of Labor hasn't provided you with a list of those that's violating the prevailing wage law.

Thank you. I'm trying to help you, Mark.

MR. LOHBAUER: I appreciate that, Mr. Chairman. I will take the suggestion back.

Should I continue?

ASSEMBLYMAN GEIST: Sure.

MR. LOHBAUER: Okay. We're also working very closely with the Inspector General's Office, as they believe that prevailing wage violations often lead to other issues with a contractor, which they may investigate.

We will also be asking our regional project managers to oversee prevailing wage.

We will soon be entering into a memorandum of understanding with the Department of Labor, as we have for several years for our economic development projects, to monitor the payment of prevailing wage on school construction jobs. So the MOU isn't finalized yet. And we can, perhaps, work your suggestion into it.

We have a wonderful record of cooperation with the Department of Labor in the economic development arena. As of the end of April, EDA has 52 economic development projects which we have financed that are worth \$1.9 billion that are now actively under construction in the State of New Jersey.

ASSEMBLYMAN GEIST: Prevailing wage projects?

MR. LOHBAUER: Yes. Yes, these are being checked, reviewed by the Department of Labor -- and all -- as I said, all are being monitored by the Department of Labor for prevailing wage compliance. Another \$2.3 billion of these projects are pending.

ASSEMBLYMAN GEIST: So it's your testimony today that to the best of your knowledge there is no EDA project, financed with public dollars, where there is noncompliance with the prevailing wage law?

MR. LOHBAUER: I am unaware of any project that is noncompliant. And certainly all of our projects that are financed with public dollars are supervised, monitored by the Department of Labor for that compliance.

ASSEMBLYMAN GEIST: Thank you.

MR. LOHBAUER: I'll wrap up, if I may, Chairman.

The EDA is proud to contribute to the impact of the prevailing wage law, to protect a fair wage for New Jerseyans. We look forward to the development of high performance schools in the 21st century, which will not only serve our school children, but which will have provided our workforce with a fair opportunity to earn a living wage.

Thank you.

ASSEMBLYMAN GEIST: Thank you, Mark.

Questions for Mark?

Assemblyman, good morning.

ASSEMBLYMAN GUEAR: I have a question. On the third statement, three or more, is there a provision for them to indicate the number, if there are more than three? And if this number were to be excessive, would that contractor be precluded from bidding -- from being involved in the bidding process? Or do you feel that he or she should be precluded on an excessive number of violations?

MR. LOHBAUER: Assemblyman, there is no place for them to indicate the number of violations. Having three, or more than three, warrants giving them the largest detriment to their score. So, at this point in time, for this review, that number is not particularly relevant. They get the worst score impact.

The Office of Inspector General, who reviews this -- or rather, the Department of Labor that reviews this might have some reaction to a large number of violations. But our reaction is to give them the high impact on their -- the detriment.

ASSEMBLYMAN GUEAR: Okay. To your knowledge -- and I'm not aware throughout the State, and anything -- you might not have it. The Department of Labor may have this information, but how many infractions can one outfit accumulate before something is done? I mean, is the number 10 or more excessive. Or do we have records to show us what contractors may have an excessive number of violations?

MR. LOHBAUER: I have to confess, Assemblyman, I don't have any particular history with this sort of analysis. And I would best defer to the Department of Labor to address your question.

ASSEMBLYMAN GEIST: Assemblyman, you ask good questions, as always.

Baseball, three strikes and you're out. Here you're giving them three strikes and more strikes, and those that are really, really atrocious are getting the equivalent -- minus 15 points. Do you give any consideration of having a graduated scale, a three strikes and you're out rule? In a way, you're

enabling the continuation of violations by treating more violations as the same as three.

What does minus 15 points mean? Does that mean that they're disqualified?

MR. LOHBAUER: It winds up having a devastating impact on their ability to compete.

ASSEMBLYMAN GEIST: What does devastating mean?

MR. LOHBAUER: Well, we have a -- all the bidders have to score at least 70 out of 120 possible points, in order to have their bid considered. And this not only takes away -- out of 120 points, they can receive 20 for being good actors under the Prevailing Wage Act. Not only do they not receive that 20, they can lose 15. So altogether, it has an impact of 35 points on their score, taking them very, very close to the level where their bid is just tossed out.

So obviously a contractor that has that sort of a checkered past is very likely to have other problems in their record that would wind up disqualifying them.

ASSEMBLYMAN GEIST: Respectfully, there's checkered pasts, and there's checkered boards. And three-plus is the same as the driving while revoked law, where they treat three-plus the same way. I'm not so sure that's an effective law. And I'm not so sure that this is an effective standard. Minus 15 for someone who has violated 10 times doesn't necessarily seem to be the right proportionality to someone who has just, all of a sudden, become a third time for the first time.

Food for thought.

Any other questions for Mr. Lohbauer?

ASSEMBLYMAN THOMPSON: Mr. Chairman.

ASSEMBLYMAN GEIST: Vice-Chairman Thompson.

ASSEMBLYMAN THOMPSON: As I recall the statute, a violation consists of, if you've got one individual and they're two paychecks that you didn't pay him, that could be two violations. Or during one inspection they found two employees, that could be two violations.

So what are we saying constitutes a violation here?

MR. LOHBAUER: We're treating a conviction under the Prevailing Wage Act as a violation.

ASSEMBLYMAN THOMPSON: Even if there are multiple charges, it's only one conviction -- one violation?

MR. LOHBAUER: That's the way I understand it, Assemblyman, yes.

ASSEMBLYMAN GEIST: We will be following up with the Department of Labor after you finish, so you can stay and listen to their answers.

Assemblywoman Friscia.

ASSEMBLYWOMAN FRISCIA: I have one question. How did the Department arrive at this measurement device that you are using?

MR. LOHBAUER: Well, much like that airplane that's being bolted together, this is a process that we had to devise, based on consultation with our consultant. You know, we hired Heery International, Inc., as a consultant as really the first step the EDA took in order to put this program together. So we've been in consultation with them, in consultation with the Department of Labor, in consultation with the Office of Inspector General, with

the Attorney General's Office, trying to come up with a system that would be workable.

ASSEMBLYWOMAN FRISCIA: I have a problem with this system in that I believe that there are certain violations that should be automatics for disbarment. I don't believe they should be thrown into a mix where other things may offset this. And I would like to see some consideration of that.

For example, the example that Mr. Norcross gave us before. If we have a contractor who is continually reporting his workers as laborers because they are the lowest paid on the scale, as opposed to their true classification, that to me should be automatic disbarment. That should be -- should not be thrown into a point mix to give the contractor an opportunity to wash this whole situation.

So I have a problem with this point system, and that's why I wanted to know how you arrived at it.

MR. LOHBAUER: Well, you understand, Assemblywoman, that under the point system, what we're doing is evaluating a bid. It doesn't give us the ability to make a debarment decision.

ASSEMBLYWOMAN FRISCIA: Well, I have a problem not knowing how many violations one of these individuals has committed. I mean, the number three, to me, is ridiculous. If they have committed several, that should appear somewhere.

MR. LOHBAUER: I guess our point of view is, we would hope you would be encouraged by the fact that at the level three, you incur the most severe response from us.

ASSEMBLYWOMAN FRISCIA: It doesn't cut it, because the impact is not there. It says three. If there's 30, I want to know if there's 30.

ASSEMBLYMAN GEIST: Mark, these constructive criticisms should be well heeded.

MR. LOHBAUER: Absolutely, Chairman.

ASSEMBLYMAN GEIST: This Committee is going to continue oversight -- as far as I'm concerned, we're going to continue oversight. This questionnaire that you're developing may need to be redeveloped.

We're going to hear from the Department of Labor in a minute about how they're going to provide you with a scorecard that you're going to review to make a decision as to whether it's one, two, or three. And we oversee the Department of Labor, so this is going to be an easy process for updates on this, to make sure that this is being done well.

Assemblywoman Friscia has a bill in. She didn't ask you about it, but I want to know your thoughts on it.

Assemblywoman Friscia has a bill in on the EDA issue, because there's some concern as to whether EDA dollars are being utilized on projects where the prevailing wage is not prevailing. Your testimony was, a minute ago, that when there's an EDA project, with public dollars, the prevailing wage is prevailing.

MR. LOHBAUER: That's correct.

ASSEMBLYMAN GEIST: Assemblywoman, do you want to ask any follow-up questions on that?

ASSEMBLYWOMAN FRISCIA: Haven't there been cases in the past where it hasn't been prevailing?

MR. LOHBAUER: I'm aware that with regard to BEIP Grants -- Business Employment Incentive Program Grants -- that a prevailing wage does not apply. But public dollars are not spent on those grants. The way the BEIP program works is, a tax incentive is provided to the grantee in the form of reduced New Jersey State Income Withholding Tax to the employer, for them to apply to their business in whatever way they see best. In many cases, that will involve expansion of the business. And where that construction is undertaken, it is not subject to prevailing wage.

ASSEMBLYMAN GEIST: Mark, there are a lot of labor leaders in this room. And I'm letting you know, if a labor leader brings to our attention an EDA project where the prevailing wage is not prevailing, we're going to try to do something about that.

MR. LOHBAUER: Understood.

ASSEMBLYMAN GEIST: So all of you labor leaders that are involved in this issue, please let this Committee know if there is an EDA project where the prevailing wage is not prevailing.

I appreciate your testimony today relative to your reaffirmation that the prevailing wage is prevailing. Your scorecard reveals an interesting approach toward rewarding those that are complying. We'll continue our focus on this.

Any other questions for Mark, as the Director of Policy and Communications for EDA?

ASSEMBLYWOMAN FRISCIA: Mr. Chairman.

ASSEMBLYMAN GEIST: Assemblywoman, yes.

ASSEMBLYWOMAN FRISCIA: Mark, I asked you these questions because I sit on the commission to oversee the expenditure of these

moneys. And I think that that is an awesome responsibility, because the amount of money that we are talking about is just mind-boggling.

MR. LOHBAUER: Yes.

ASSEMBLYWOMAN FRISCIA: So I want to make sure that this is so airtight, that there is no way for contractors to find a loophole to continue actions such as Mr. Norcross repeated here. I find no excuse for that. Education -- being a former educator -- to me is so important, I cannot tolerate the waste of funds, and I will be very upset if we don't have an airtight set of rules to follow through this whole process with the construction of schools.

I thank you.

MR. LOHBAUER: Thank you. We will certainly look forward to working very closely with you to make sure that you are pleased with the results, that the entire Legislature, and that the public of the State of New Jersey is pleased, because we share that goal.

ASSEMBLYMAN GEIST: Mark, anytime you see prevailing wage on the agenda, if someone from EDA could be here so, if necessary, we have the opportunity to ask some questions and get updates.

MR. LOHBAUER: Certainly, Chairman.

ASSEMBLYMAN GEIST: The prevailing wage today continues tomorrow, and we're going to do what we can to continue our focus on it.

I congratulate you on your new position, and thank you for your debut before this Committee.

MR. LOHBAUER: Thank you.

ASSEMBLYMAN THOMPSON: One final question.

ASSEMBLYMAN GEIST: Vice-Chairman Thompson.

ASSEMBLYMAN THOMPSON: A follow-up to points made by Assemblywoman Friscia and the Chairman, as well as my understanding of a previous statement you made. They both were concerned relative to someone who may have particular onerous violations they've committed--

MR. LOHBAUER: Yes.

ASSEMBLYMAN THOMPSON: --or very large numbers of them. I understood you to make a statement earlier that it's possible that although you're going through the bidding process here, that the Department of Labor might still be able to void an award of a contract to someone who fell into the categories they speak of here that had an exceptionally large number of violations or particularly onerous violations.

Is that correct, or did I misunderstand?

MR. LOHBAUER: Well, my understanding -- the question really is about debarment. Debarment is not something that falls to EDA.

ASSEMBLYMAN THOMPSON: Well, no, I don't think they were saying necessarily debar, but simply that this contract is not awarded to this person or firm, because they have this record here.

MR. LOHBAUER: Well, I certainly don't want to mislead the Committee. Decisions about a bid that is submitted for award of a bid will be made by the EDA, based on recommendations received by the Department of Labor. But obviously, when it comes to the prevailing wage issue, at the moment what we have planned is that three-point question. And we will take our information and score accordingly.

Obviously, given the comments received this morning, it may be necessary to review and once again reconsider that approach.

ASSEMBLYMAN GEIST: And these are notarized, sworn statements, for which false declarations can be the subject of accountability and prosecution?

MR. LOHBAUER: I don't know about prosecution, Chairman, but yes, they are sworn statements.

ASSEMBLYMAN GEIST: Let's make sure that that's incorporated. As soon as you complete your final format, if you could provide that, through OLS, to the Chair and the Committee.

MR. LOHBAUER: Certainly.

ASSEMBLYMAN GEIST: We want to help you on this, Mark. We want to help you make sure it's done the right way. I think you're off to a good start. If you're going to file a statement, it better be truthful, particularly when it comes to the prevailing wage, at least as far as this Committee is concerned.

MR. LOHBAUER: Yes.

ASSEMBLYMAN GEIST: The record should reflect, by the way, my colleague, Speaker Pro Tem Felice, has been here for all of these proceedings, with the exception of the initial quorum call.

ASSEMBLYMAN FELICE: If I may.

ASSEMBLYMAN GEIST: Speaker Pro Tem.

ASSEMBLYMAN FELICE: Yes, I apologize. I did have some duties in the Assembly Chambers to take care of.

But I want everyone here to know that other than this meeting and the other meeting, I have been in contact with labor leaders and contractors. As

a former engineer, I have been involved in projects in this country and other countries. I understand.

Like many other things, it isn't a question of do we need additional new legislation, or do we need legislation to enforce what's already out there. I think, in listening to all this, is the question of the legislation that we have, is it sufficient, or is there new legislation needed to make sure what's on the books is enforced.

And I think it's a combination of both, certainly, having been involved in local government, and actually having been involved on a college board, knowing firsthand some of the abuses that can come in construction of educational buildings or others where public moneys are involved, and knowing that in many cases where there was a problem. And it went back to the fact that the work that was done was not done according to the specs. It wasn't done by the proper authorizing contractor as far as the labor was concerned, with the proper qualified members of the construction people.

So we know that there is definitely a problem, and I think that this Committee, in looking at the results of this hearing and others, plus the information that each one of us individually gets in our offices from both labor and contractors and so forth, we know that the legislation that this Committee eventually comes up with either has to enforce the existing laws that are out there, or to ensure that the new legislation that is generated by this Committee does what we all hope it will do as far as the Act that we have before us.

And I thank you and the other people. And I apologize for not being here for some of the hearing today. But believe me, I do go over the information as presented to us, and I thank you for your time today.

ASSEMBLYMAN GEIST: Thank you, Speaker Pro Tem.

Thank you.

MR. LOHBAUER: Thank you, Chairman. I'll leave a copy of my statement.

ASSEMBLYMAN GEIST: For his encore performance, the Assistant Commissioner of Labor for Workplace Standards, the distinctive Assistant Commissioner Leonard Katz.

ASSISTANT COMMISSIONER LEONARD KATZ:

Thank you, Mr. Chairman.

ASSEMBLYMAN GEIST: Welcome back.

ASSISTANT COMMISSIONER KATZ: Thank you.

Thank you for the opportunity to address some of the concerns we've heard this morning, also.

ASSEMBLYMAN GEIST: We did invite the Commissioner. We thank you for representing the Department today--

ASSISTANT COMMISSIONER KATZ: Thank you.

ASSEMBLYMAN GEIST: --with your team.

ASSISTANT COMMISSIONER KATZ: Thank you.

I'd like to get right into it and talk about that situation that Don Norcross brought to our attention, because that is -- he's absolutely right. That is a great, and at the same time, a terrible example of what we're dealing with in Prevailing Wage Act enforcement.

And he, in that statement -- and I not only heard it today, but we've met with representatives of the local, a couple of weeks ago, when they first brought to our attention that they had this evidence. And as soon as they called

us, we immediately said, come on in. And we, in fact, brought over a deputy attorney general from the Division of Criminal Justice to also listen to what they had. And we've provided her -- and they've provided her with copies of the transcripts. We've asked that deputy attorney general to see what the Attorney General's Office can do criminally while we move administratively against this contractor.

When you heard that the contractor bragged that we, the Department, were there hundreds of times, I doubt that we were there hundreds of times, because had we been there hundreds of times and not been able to determine or find the violations, I would have certainly heard from someone else, either his attorney or a legislator, that we were harassing this innocent contractor.

But I'm sure we were there numbers of times, and as that case points out, the payroll records, on their face, looked good to us. The employees, though we write to them routinely at home because we know they're afraid to talk to us when we interview them on the job site, usually respond the same way this employee did. They go to the employer and they say, "I got this inquiry at my home, from the Department of Labor, asking if, indeed, I was paid as those certified payroll records indicated. What should I do with it?"

And the employer, as this one did, will either say, "Throw it away and don't respond. Or let's do one better. Let's respond that you absolutely got paid, as those certified payroll records indicated."

In this case, we probably -- again, from our investigation and at the behest of the local, knowing in their gut that there was something wrong here -- went back to the employer. I looked at that file. I saw a brief from his attorney

that thick. (indicating) So that raises another issue, Mr. Chairman, that you identified in that scenario. They could have paid the prevailing wage rate. They rather would spend money on lawyers fighting us. I'm sure what that lawyer, in putting this brief together, in just dealing with this case -- we're not even before the Office of Administrative Law. We're just talking about is there a violation here. The time and money that lawyer spent for that client, unless he's on retainer and he's eating something up, I mean, it would have been more expensive than to pay this employee the difference between the laborer's rate and the electrician's rate.

But that's part of this thing out there, that they don't want to comply. I don't know if it's because they don't think the employee is worth it, or if they just don't like the system, and they're going to beat it, whatever way. I've seen instances of both.

But in any case, when the employer, through his attorney or without an attorney, submits to us sworn statements from an employee that, "Yes, while I was on that job site, I did the work that we would recognize and have to recognize as laborer's rate work," there are, on projects that are in question on this specific case, and the electrician's union recognizes it, certain functions that can be performed and paid at the laborer's rate.

So when that employer goes through that exercise to have that employee give us a sworn statement that he's the one who did that, and he did nothing more, at that point we're pretty much at a dead end. It's difficult for us to go further.

And as I had said the last time, it's not until this employee, sadly enough -- this one had a conscience -- but sadly enough it's not until a couple

of years later, or at least after the project is completed, that the employee and employer have a falling out, and then the employee comes to us and says, "You know, I lied to you when you wrote to me and asked me if I was getting paid and was working as an electrician. I was. I said no, but I was, and I want you to now go out and get me my money back."

And then, again, as I said the last time, now we're faced with the representations from the employer, "Well, that's just a disgruntled employee, and he's going to say anything because we had a falling out."

This also relates into a concern I heard at the meeting with the representatives from the building case, this particular case. And it's come up here in some of your questions today. When we go out and do an audit on a contractor, it's usually, as I said, 90 percent of the time, in response to a complaint. We do very little routine, because that's how significant the caseload has been.

When we go to check ABC Construction for a specific public works project that was the basis of a complaint, while we're there we say, "We want to see all your payroll records for the last two years. We want to see all your certified payrolls for every public works project you worked on." And this is a concern of the building trades, and I don't know how to address it, because it again is advisement we've gotten from the Attorney General's Office as part of due process. If this is that first instance with that contractor, and we're looking at 10 different public works projects -- he did 10 different public works projects in the course of those two years -- and we find violations, and there may have been hundreds of employees involved on those 10 different public works projects over those two years, we're going to write up all those violations. But

we consider that -- because that's the first instance, we've told that contractor, "Okay, you've violated the Prevailing Wage Act. You've violated it on 10 different projects. You've failed to pay hundreds of different employees on those project's wage rates. This is your first notice of violation. The next time we're going to look at you and consider you for debarment."

The trades are upset because when you look at it, and when the EDA gets our advisement on the violations of that, that's going to show one instance of violation. It's not going to show one violation. It's going to show hundreds of violations, whatever we've cited the contractor for. But again, we've, as far as the Department of Labor is concerned, for considering that contractor for debarment, that's going to be a first offense.

Now that's in a situation, again, where it's not -- where we can show it's a willful violation. This contractor that was brought to our attention, though it may be his first -- and I'm not certain if it's his first, or if he had minor, or at least what we could prove as minor violations previously -- we're going to take action. We've already initiated action, using the Public Works Contractor Registration Act, to suspend or revoke his registration, because now we have some evidence that this is a willful violation. He coerced that employee to submitting a false affidavit.

So when we have evidence in that regard, it doesn't take two or three violations.

All of our cases, every time a contractor comes up with a second violation -- again, second instance of violation-- We were there once before. We've gone back again. We found a violation. That case is reviewed by the

Director and the Assistant Director to see if it warrants debarment -- every case, second time.

Now, you heard today we only have seven cases. I think it's more like twelve that are over at the Attorney General's Office either awaiting OAL hearings for debarment or not yet gone there. But there are at least a dozen in the pipeline. And that's because, as I said to you last time, we finally have a deputy attorney general that's dedicated solely to working with us on these cases.

Previous to that, the Department of Labor had the services of about five or six deputies attorney general, but as you've also heard here earlier today, there were other statutes that funded and took up most of those deputies' time.

So we now have one deputy. He's dedicated solely to handling our debarment cases and our revocation cases, under the Public Works Contractor Registration Act.

I know, Mr. Chairman, you had some concern about the administrative penalties. We really don't refer cases over to the Attorney General's, and thereby the OAL, to collect administrative penalties, in and of themselves. Because if a contractor is going to fail to resolve a case with us for administrative penalties, it's going to go to debarment at the same time. And we look to use the debarment first, and then we'll worry about collecting the penalties afterward.

So I can think of very few cases, and very few cases also that go over there, because there are at times legitimate issues raised as to whether or not this was a violation or not. And those are contested cases that have to go

over to the OAL. But again, those are the far and few between. What we want to concentrate on are the debarments.

We absolutely agree with the earlier testimony on the statute of limitations being six years in civil action. As a matter of fact, there's a case pending, and we've asked the Attorney General's Office, and they have, indeed, entered a brief on our behalf in that particular case, which we are not party to. But the Attorney General's Office has submitted a brief as to why the Department feels and why the court should consider, in a civil action, a six-year statute of limitations. That's been our position, and we still hold along with that.

And also, the other suggestion, to clarify, on the Public Works Contractor Registration Act, that even a subcontractor identified in a bid document should be registered with us at that time. We've taken that one court's opinion, and we're going with it. So we had not realized that until that issue had come up in court. Again, the law is only in effect for a year already, so we'll be seeing more test cases, and that will help us determine our position.

But though there are two competing court decisions, when asked now, the Department of Labor routinely advises that, yes, a subcontractor identified in a bid document must be registered. Hopefully, when those court cases go through, the one that held that will prevail. But if not, maybe the law needs to be amended in that regard.

Something else that I think you touched upon here, and I think it's been brought out with the Office of the Inspector General's testimony, and we have, indeed, been working very closely with them, what the Office of the Inspector General is doing with and for the EDA should be spread statewide to

all public bodies. It shouldn't be just contracts let by the EDA for the school construction. All the other public works subject to the Prevailing Wage Act should have more public body involvement, more public body accountability.

I like the aspect -- and I think the Office of Inspector General is leaning with the EDA in making the contract language so tight in requiring the affidavit of compliance. I think they're going to have more leverage to go after a violator than we would, just under the Prevailing Wage Act. And I think that should be statewide for all public works projects.

ASSEMBLYMAN GEIST: So long as they do the affidavit form the right way as to enable the prosecutor to have accountability, I agree.

ASSISTANT COMMISSIONER KATZ: Right.

You know, again, we've been talking about the debarment or lack thereof, what we're doing now trying to make that a better process. I have to raise something, and maybe I'm remiss, again, having been at it for so long. But something I still can't find out, and it may be something for the Committee to look into -- and I hope I don't cause one of my other, sister agencies some grief over this -- but it's the bonding.

I told you that I have concerns, and we have concerns about debarment, because we go through all of this effort and we go through the OAL and the Commissioner upholds or sometimes reverses the OAL and debars a contractor. And we see, virtually the next day, that that same entity somehow is in business again, under a different name, with different responsible corporate officers -- other family members or people who I'm sure that debarred contractor must trust. Where's this contractor come up the next day with bonding to do the same types of millions of dollars worth of work? I don't know. I've never

been able to figure that one out. But that's something that needs looking into to make the debarment worthwhile.

I mean, if it's too simple for us to go through all this effort and all these resources to have the same, willful violators set up shop just under another name, there has to be something with that bonding that we're missing there.

One other thing. I don't know if it was from our school construction, prevailing wage work group, but something else to look at -- the bids themselves. Again, because other than the EDA and the school construction program, it's still low bid out there -- albeit lowest responsible bidder, but as we talked about in the past, sadly enough, too few public bodies want to deal with that issue as to responsibility other than whether the contractor is debarred or not.

But there should be something, again, maybe through amendment of the Prevailing Wage Act, that when the bid comes in too low, that something's wrong, and something needs to be done.

I mean, the public bodies know, through their architects and their engineers, what that project should cost. I mean, our prevailing wage rates are out there. It's not a secret, what the labor is going to be. The Prevailing Wage Act component of what that contract price is going to be should be a simple enough figure to figure out. And yet you see projects come in -- a \$10 million project comes in \$2 million below the next guy. If that doesn't somehow point to responsibility or trouble ahead, I don't know what does.

So maybe there's something that could be done under the local public contracts law to enable a public body to reject a bid that's too low. It doesn't seem like they would want to, but something to look into.

ASSEMBLYMAN FELICE: Mr. Chairman -- if I may, Mr. Chairman? Can I ask a question?

ASSEMBLYMAN GEIST: Let's let the Assistant Commissioner --

ASSISTANT COMMISSIONER KATZ: Well, I'll just ramble on, so I'll take questions.

ASSEMBLYMAN GEIST: Let's let him finish first.

ASSEMBLYMAN FELICE: I thought he was winding down

ASSISTANT COMMISSIONER KATZ: I'm just rambling on, and I'll just keep going, so you better stop me. (laughter)

ASSEMBLYMAN FELICE: I felt the same way. Through you, Mr. Chairman.

ASSEMBLYMAN GEIST: Assembly Speaker Pro Tem Felice.

ASSEMBLYMAN FELICE: You brought up a very interesting question, of course. Many of us, having served in local government, where we have public buildings built -- libraries, municipal buildings -- and, of course, it's the obligation of the officials, if you do have somebody who looks suspiciously low, you have the right today -- and actually, you can throw out all the bids and start all over.

And that's happened in many cases, because of either history, or as you said, it's a suspicious bid.

The question that you brought up -- it's very interesting -- about bonding. Start off, we're going to build a public building -- a public library. And we contact a reputable contractor. Everything is within proper boundaries. And all of a sudden, through whatever fault, the contractor goes default.

Now, of course, in everything, we always ask for a bonding to protect that particular building and that contractor. And when that happens, as it happened in a case that I know, that the contractor did default -- the situation, whatever it was -- and the bonding company comes in, do you go in and make sure that that bonding company then keeps the prevailing wage for the people that are going to do that job? How do you work that?

Because most of the time you don't think about it. Oh, it's bonded, 110 percent. That's it. But is there anybody really there to check that whoever picks up the defaulted work, that they also must provide the prevailing wage also? Or is that--

ASSISTANT COMMISSIONER KATZ: No, we would absolutely hold that -- whoever that bonding company brought in to complete that work is also subject to the Prevailing Wage Act. Do we routinely do it? Again, since up until lately, our staffing only required us -- or enabled us to respond to complaints, unless we had a complaint, I don't know if we would routinely follow up to make sure that that contract-- I would think we would, because again, it probably came to our attention, through the default, that there were prevailing wage issues also. Usually a contractor defaults, there's prevailing wage issues that come up right with that.

ASSEMBLYMAN FELICE: Because sometimes, naturally, the municipality or whoever the client is, they are just concerned with getting the project done. And the fact that they had the foresight to make sure that they bonded it properly, that's fine. But in particular cases, I'm sure the scrutiny is not as close, because they're at the stage where they want this project completed. And I'm just wondering how many times that they ensure that the people that

the bonding company brings in to complete the job, that those people also are obeying the prevailing wage law.

ASSISTANT COMMISSIONER KATZ: Again, I would have to agree with you that in my experience, I would doubt that that public body would be too concerned at that time as to whether or not all the T's were crossed relative to prevailing wage compliance.

ASSEMBLYMAN FELICE: Thank you.

ASSISTANT COMMISSIONER KATZ: You're welcome.

ASSEMBLYMAN GEIST: Any other questions?

Assemblywoman?

ASSEMBLYWOMAN FRISCIA: Yes. You hit on something before that I was concerned about, the lowest bidder. How would the Department feel about using the concept of cost, plus other factors, as opposed to the lowest bid?

ASSISTANT COMMISSIONER KATZ: Again, I think it opens the door, as we've seen through the testimony of the Inspector General -- it opens the door for the public body then to be creative and pick up its part of the weight in ensuring that the Prevailing Wage Act is complied with.

I don't think the public bodies would like it, again, because what I've heard, with their concern about dealing with the lowest responsible bidder, as soon as they say we're not going to give you this contract because you're not responsible -- yes, you're the lowest bidder, but we deem, for whatever reasons, that you're not responsible -- they're in court. And then they have legal costs on top of construction costs. And then they have delays of getting that project going.

So, if it could be worked so that they-- As you heard, we need some expediency to this whole thing. I think it would be helpful.

ASSEMBLYWOMAN FRISCIA: Thank you.

ASSEMBLYMAN GEIST: Thank you again for your testimony today.

As we are about to conclude this public hearing, I want those in attendance to know the reason for the forum is to enable transcripts. The transcripts will be a matter of public record, and they will be available.

I'm asking OLS today, for all of us in this room to know, about the anticipated completion of the transcripts, so that you leave here today with an understanding as to when the transcripts will be available.

Greg Williams is the OLS staff director for the Labor Committee.

Gregory, what's the anticipated completion date for not one, but both transcripts of both public hearings?

MR. WILLIAMS: The hearing from last time is already under way. They've got most of it transcribed. They can prioritize something to within a week. But I have to clear that with the Hearing Unit. I can't tell. It's up to Harry.

ASSEMBLYMAN GEIST: Otherwise, what would be the anticipated transcript completion date for this hearing?

MR. WILLIAMS: Well, if it wasn't prioritized, it would be more than a week.

ASSEMBLYMAN GEIST: And what would that be? What can we anticipate the transcript completion date for this hearing?

MR. WILLIAMS: I'm not the Hearing Unit, but what I got from the Hearing Unit is that if they prioritize it, they could do it within a week.

ASSEMBLYMAN GEIST: Let's prioritize it.

MR. WILLIAMS: Okay.

ASSEMBLYMAN GEIST: Earlier this morning, I started a new precedent, and that's welcoming you to declare your presence for the record, if you wanted to declare your presence. Some of you came in after the hearing proceeded. I will extend the same opportunity for those who came in a little later.

If you want the record to reflect your personal presence, you're welcome to come up now at this time and declare your personal presence for the record. That will also ensure that we've made available for you a copy of the transcripts. That's my way of appreciating your attendance today.

Any others desirous of participating with the public declaration, please come forth. (no response)

A motion to adjourn will be entertained.

ASSEMBLYMAN FELICE: So moved.

ASSEMBLYMAN GEIST: Second?

ASSEMBLYWOMAN FRISCIA: Second.

ASSEMBLYMAN GEIST: All in favor? (affirmative responses)

Thank you very much.

(HEARING CONCLUDED)

