

# **PREVAILING WAGE ADVISORY COMMITTEE**

## Meeting Minutes

Thursday, April 12, 2007

Labor & Industries Building  
350 Winter St. NE, Room F  
Salem, OR 97301-3878

### **Members Present**

Jessica Adamson  
Sonny Chickering  
John Killin  
Norman Malbin  
Shawn Miller  
Patrick O'Brien  
Pete Savage  
Bob Shiprack

### **Members Absent**

Daniel Bonham  
Mark Holliday  
John Mohlis

### **Staff Present**

Dan Gardner  
Doug McKean  
Christine Hammond  
Lois Banahene  
Mike Kern

Commissioner Dan Gardner called the meeting to order at 1:30 PM .

### **Minutes of Last Meeting of March 8, 2007**

The committee unanimously approved the draft minutes of the March 8, 2007 meeting as written.

### **Quarterly Statistical Reports**

The first report discussed was the fiscal year 2006-2007 performance standards that measure 1) "Number of Days to Complete PWR Investigations" and 2) "Number of Days to Process PWR Predeterminations." BOLI's goal is to process 50% of its PWR investigations within 90 days of receipt and to process PWR predeterminations within 15 business days of receiving all documentation from the requesting party. Wage and Hour Division Administrator Christie Hammond explained to the committee that cumulatively (fiscal year-to-date) we have met our performance goals for completing PWR investigations within 90 days. However, Ms. Hammond noted, only 39% of PWR investigations were completed within 90 days during the third quarter, due in part to the hiring of two new investigators who will require time to get up to speed. The PWR unit is considering ways to speed up the investigative process, including a 60 day early warning system.

Regarding predeterminations, last quarter BOLI met its performance measurement by processing 100% of the PWR predeterminations within 15 business days; while the cumulative total was 85% - still well within the goal.

Ms. Hammond briefly reported to the committee that the initial list of non-respondent contractors to the 2006 Construction Industry Survey provided to BOLI by the Employment Department contained 346 contractors. Of that total, 116 were contractors that employed five or less employees; BOLI did not pursue these. BOLI automatically takes administrative action against contractors who have violated the law in the past. There were twelve contractors that qualified, and they were assessed a civil penalty of \$5,000 each. The remaining 218 contractors were sent a letter in February giving them one last chance to return the survey. Forty two contractors failed to reply to that letter and administrative action has begun for which civil penalties of \$1,000 has been assessed against each.

Denise Voll, (nee O'Farrell) from the Oregon Employment Department, reported to the committee that the total number of hours reported for the 2006 Construction Industry Survey are up. She reported to the committee that approximately 5,000 contractors are surveyed statewide and explained that the Employment Department screens out those contractors who perform only residential construction through the use of postcards mailed out to contractors prior to sending out the survey.

A summary of PWR Enforcement Activity was provided to committee members which included a summary of PWR Education Seminars for the Biennium 2005-2007. This summary provides attendance totals for public agencies and contractors.

Committee member Bob Shiprack asked whether contracting agencies generally brought their legal council to the seminars. Because they rarely do, he inquired as to whether a special PWR seminar could be created/marketted specifically for attorneys who represent public agencies.

### **Proposed Legislation**

An updated summary of PWR-related legislation was provided to the committee members, along with new and/or updated copies of each bill, any proposed amendments, and a summary of the status of each bill. The following bills were reviewed and discussed:

#### **HB 2021**

Commissioner Gardner asked committee member Jessica Adamson to discuss the status of HB 2021, in particular, her amendments, which as proposed, would do away with BOLI's enforcement provisions concerning the requirement that contractors pay the higher of federal or state prevailing wage rates.

Ms. Adamson responded to Commissioner Gardner's request by stating that legal council had met with her and BOLI earlier in the week to discuss amendments to HB 2021. She stated that her clients would like to maintain the higher of the two rates, but that the ideas relating to the enforcement issues that were presented at that meeting were not met with approval by BOLI. She provided three possible options: Option one provided BOLI authority to investigate/enforce the higher rate by applying federal regulations, policies and procedures only. Option two allowed BOLI to examine certified payroll reports at face value in determining whether an underpayment

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had occurred. Any other issues such as misclassification, ratio, etc., would be forwarded to the contracting agency or the federal Department of Labor. Option three retained the requirement to pay the higher of either the Davis-Bacon rate or PWR rate, but BOLI would have no enforcement provisions; rather, the contracting agency or the feds would enforce.

Ms. Hammond clarified that BOLI had agreed to enforce the federal regulations as they apply to the definition of "site of work," the application of a 20% standard for all truck drivers engaged in work on the site of work, and the federal job training programs.

Ms. Adamson stated that applying the federal guidelines to the three areas listed above would not work because it did not address any potential changes in the application, enforcement, interpretation, etc. of federal law that may occur in the future. She suggested that the enforcement of the higher of the two rates should be left up to the USDOL and the contracting agencies.

Committee member Sonny Chickering questioned the logic of giving public agencies more work.

Ms. Adamson replied that the responsibility would already be assumed by agencies in the enforcement of their contracts.

Ms. Hammond pointed out that the provisions of the law as amended only state that the higher of the two rates apply. The amendment does not say that contracting agencies would enforce the law. Unless it is specifically addressed in the statute, there is an assumption that because it is within the PWR laws, BOLI would enforce it.

Commissioner Gardner responded by stating that it was BOLI who was responsible for enforcement of the prevailing wage rate laws, not public agencies. He stated that he was okay with the amendment to HB 2021 requiring the bureau to enforce the federal provisions as they apply to site of work, truck driving provisions and training programs on projects subject to both state and federal PWR law, but that BOLI was not set up to enforce other federal laws.

Ms. Adamson stated that her clients would only agree that BOLI should enforce the higher rate on the condition that BOLI applied all the federal provisions on those projects subject to both State and federal PWR law.

Mr. Shiprack thought it would make more sense to put the site of work and other provisions discussed (for these projects only) into rule form rather than statute due to the fact that any fix to the statute would require the legislature to be in session. He also noted that federal rules are slow to change and their rules are decades old.

Commissioner Gardner agreed that a rule might be more appropriate because it can be changed more quickly, but it would still be difficult to encapsulate any unknown changes as Ms. Adamson was suggesting.

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Ms. Adamson stated that from her perspective she didn't think it would be difficult for the bureau to enforce the Davis-Bacon provisions on those projects subject to both state and federal PWR law.

Deputy Commissioner Doug McKean stated that it would be overly burdensome and be a strain on the bureau's current resources. There would be an increased workload issue to train BOLI staff to enforce the Davis-Bacon Act (DBA) on only a few specific projects.

Ms. Hammond mentioned that bureau personnel were aware of some of the differences between state and federal law, but not all of them..

Commissioner Gardner said that this issue needed more conversation and compromise. He suggested that members of the committee get together at some point in the near future to discuss this issue.

Committee member Patrick O'Brien asked for clarification on whether a reference to the applicable prevailing wage rates was allowed in the specifications.

Ms. Hammond responded that this is currently allowed by rule.

Mr. O'Brien was relieved that the entire rate publication did not have to be included in bid specifications.

**HB 2458**

Commissioner Gardner briefly recapped that the intent of the bill was to make the annual survey voluntary. It appears that this particular bill is not going anywhere.

**HB 2557**

Commissioner Gardner mentioned this bill, which would have provided for certain public-private and affordable housing exemptions, has been added to HB 2944.

**HB 2618**

Commissioner Gardner reported this bill dealt with Apprentice issues and appears to be dead.

**HB 2664**

Commissioner Gardner explained that it was unlikely this piece of legislation would be going anywhere.

**HB 2776**

Ms. Adamson noted that an agreement between Representative Shields and herself had been reached and that the exemption from the public works bond would be for the first four years of certification or for contracts of \$100,000 or less.

**HB 2777 & HB 2778**

Commissioner Gardner explained that in light of HB 2776, both of these bills were for all intent and purposes dead.

**HB 2795**

Ms. Adamson explained that both the requirement to perform audits and the PWR fee increase, under current language, would include sunset clauses dated January 1, 2011. She also noted that under this bill the public agency would be responsible for paying the PWR fee directly to BOLI, not contractors as is currently required.

Commissioner Gardner asked whether the committee had any problems with this piece of legislation.

Committee Member Shawn Miller did not understand why the audits would be necessary.

Although the bill doesn't require audits be conducted, Commissioner Gardner reassured the committee members that no audits would occur without first asking the committee for input on how the audits would be implemented or before an approved procedure was in place.

Mr. Miller voiced his concern that the bureau could come in as a group of investigators, like IRS, and take over the office. He noted that audits can tie up smaller companies and he foresees problems with the audits being unfairly applied between union and non-union shops.

Commissioner Gardner stated that there was no set procedure for performing an audit except to note that, such an audit might look at the entire year to find the peak week and compare that information to what was submitted on the survey in question. He would be sure that any procedures would be fair to all parties involved. The purpose of the audits was not to tie up small businesses or the resources of small companies. He also noted that it was not the goal of the audits to close non-union shops and that the information obtained from the audits would not have a huge statistical impact on the survey data.

Mr. O'Brien asked who would perform these audits.

Commissioner Gardner stated that Employment Division had been approached with the idea of conducting the audits on behalf of the bureau, but they had declined.

Mr. Miller asked what kinds of problems exist and what penalties would be assessed for failing an audit.

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Commissioner Gardner provided an example of when a peak week falls within two regions, but the contractor reports all work in one region. He stated that this is usually an error on the contractor's part. He believed that civil penalties of up to \$5,000 could be assessed, but stated that BOLI's goal is not to assess penalties; rather, it is to seek compliance with the law.

Mr. Miller asked whether the Oregon Employment Department currently calls the contractor when it sees obvious errors on the surveys they receive.

Ms. Voll stated that the Employment Department does call if they see obvious mistakes, but would have no way of knowing if an error had occurred in the example provided by the commissioner.

Committee member Pete Savage stated that completing the survey was not a priority for contractors; and that the time it takes does not pay the bills. He also mentioned that many contractors are confused by the survey. He suggested that the audit could be used to educate contractors.

Mr. O'Brien questioned whether there was in fact a need for audits.

Ms. Adamson noted that if it proved there was no need to perform the audits, the sunset clause included in the legislation would effectively end this requirement.

Commissioner Gardner asked Ms. Voll whether there was a trend or pattern in the types and/or number of mistakes found on the surveys.

Ms. Voll responded by stating that most of the mistakes found on the surveys are honest mistakes.

Committee member Norm Malbin mentioned concern over a perceived bias and noted that the Employment Department has third party autonomy. He asked the committee whether they would rather have the Employment Department conduct the survey.

Ms. Voll responded that the Employment Department performs surveys for several agencies. They do not want to both conduct the survey(s) and perform the audits; nor do they want to become an enforcement agency. She also stated that the Employment Department assumes that surveys are being filled out correctly.

Mr. O'Brien stated that he thought the term "survey" did not sound mandatory. He also felt that performing audits was not that big of a deal, that there could be standards set for performing audits including: minimum payroll amounts (\$250,000) and a minimum number of employees.

Committee member John Killin agreed with Mr. O'Brien's idea concerning a minimum gross income. He suggested that the audit be called an "Informational Audit" because it would be less threatening. He also suggested that BOLI help contractors complete the audit, and that there should be clear language stating that no fines would be assessed if the bureau finds that the data submitted by the contractor does not match the audit results.

Commissioner Gardner told the committee that he did not envision BOLI totally giving up its authority to issue civil penalties as far as the audits are concerned; especially in the event of a contractor completely refusing to cooperate with the law. However, he may consider not penalizing contractors within the first couple of years for honest errors.

### **HB 2824**

Commissioner Gardner said he believed that this bill was dead.

### **HB 2944**

This bill concerns the requirement that BOLI make timely determinations on whether or not certain projects are subject to the prevailing wage rate law. Commissioner Gardner briefly summarized that the bill had been amended to include public-private and affordable housing project exemptions. He advised the committee that he believes that this bill has been worked out on amendments and that it is expected to go the house floor for a vote on Tuesday April 17, 2007 and then referred on to the Senate.

### **HB 2998**

This bill extend coverage to those who manufacture items for public works projects.

Mr. Shiprack stated that he thought this bill needed a lot more work and he thought the PWR Advisory Committee should address this after the session. He suggested that ODOT might have a more comprehensive list of standard items.

Ms. Hammond noted that Washington State does cover this type of work and has guidelines distinguishing standard and non-standard items as related to off site fabrication. She offered to send the members a link via e-mail which lists products considered to be standard/non-standard.

Mr. Killin agreed with Ms. Hammond, but noted that Washington States guidelines are limited to two or three trades. He also stated that the manufacturing/fabrication of standard and non-standard was a difficult issue and that his organization was looking into this.

Further discussion ensued relating to the difficulties of drawing a clear line of what, where and when this type of work would be covered. Because of current trends in the industries, it is an area that eventually needs to be addressed. Commissioner Gardner suggested to the Committee that they dedicate some time to discuss HB 2998 after the current legislative session.

### **HB 3319**

Commissioner Gardner told the Committee that this bill was dead.

### **SB 361**

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Mr. O'Brien asked whether SB 361 would cover private or public inspectors on PWR projects.

Ms. Hammond replied that under SB 361 both private and public inspectors would be covered under the PWR law.

Commissioner Gardner said that the bill's sponsor, Senator Morrisette, has constituents who represent state inspectors and that state inspectors are paid far less than private inspectors. The bill needs further action, and he is not sure where this bill was headed.

Commissioner Gardner asked what the general consensus was regarding the scheduling of the next advisory committee meeting. It was decided that due to the pressing issues during the remainder of the session, the bureau would schedule the next meeting in approximately four months. BOLI will send out an email notification to the PWR Advisory Committee members.

As for topics at future meetings of the advisory committee, Ms. Hammond told the Committee that the PWR Unit was currently working on revising the definitions of covered occupations and that the revised definitions would be brought to the committee for their review.

Commissioner Gardner suggested that the committee discuss the "Site of Work" issue.

Ms. Hammond pointed out that following this legislative session there will be many new rules to write and review as well.

Mr. O'Brien said that he would like to see an image review of BOLI to potentially change the construction industry's perceptions of BOLI.

**Next Meeting**

There is no firm date, although there is a tentative agreement among committee members that it should be scheduled for sometime after this current legislative session.

The meeting was adjourned at approximately 3:00 PM.