

PREVAILING WAGE ADVISORY COMMITTEE

Meeting Minutes

Thursday, September 13, 2007

Portland State Office Building
Room 1B
800 NE Oregon Street
Portland, OR

Members Present

Jessica Adamson
Daniel Bonham
Sonny Chickering
Mark Holliday
John Killin
Norm Malbin
Shawn Miller
John Mohlis
Pete Savage
Bob Shiprack

Members Absent

Patrick O'Brien

Staff Present

Dan Gardner
Christine Hammond
Tricia Collier
Wesley Jones
Marsha Jossy
Mike Kern
Gerhard Taeubel
Hannah Wood
Susan Wooley

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

Minutes of Last Meeting of April 12, 2007

The committee unanimously approved the draft minutes of the April 12, 2007 meeting as written.

Quarterly Statistical Reports

Staff presented several quarterly statistical reports, including a summary of PWR enforcement activity and a summary of the PWR education seminars conducted biennium-to-date.

2007 Legislation and Temporary Rules

An updated summary of PWR-related legislation and temporary rules promulgated was provided to the committee members, along with final (enrolled) copies of HB 2021, HB 2140, and HB 2776.

Christie Hammond summarized the provisions of HB 2021, HB 2140, and HB 2776, and said that temporary rules implementing HB 2140, which went into effect on July 1, had been filed by the agency.

Committee member Bob Shiprack asked where the temporary rules were in the administrative process and whether there had there been a public hearing yet.

Commissioner Gardner responded by stating that temporary rules do not require a public hearing.

Ms. Hammond pointed out that temporary rules are “emergency” rules and the agency is not required to provide an opportunity for a public hearing. She also stated that temporary rules go into effect immediately upon filing and expire in 180 days, unless the rules have gone through the permanent rule making process, which does require the provision of a public hearing upon request. Ms. Hammond informed the committee that it was the goal of the bureau to have permanent rules in place when the new laws become effective on January 1, 2008. She told the committee that the bureau will make available to the committee members draft copies of the proposed rules for comments prior to filing.

Commissioner Gardner added that there may or may not be a need for a public hearing regarding the proposed rules since the rules are simply intended to implement the legislation: The bureau will wait and see whether anyone requests a hearing.

Committee member Sonny Chickering requested clarification regarding the temporary rules pertaining to the issuance of determinations; specifically subsections (4) and (5) in OAR 839-025-0005 relating to requests for reconsideration. He asked whether subsection (5)(c) of the rule applied to the original request for a determination or the reconsideration date.

Christie Hammond responded that it would apply to the reconsideration request date.

Mr. Chickering also asked whether it might be helpful to state the actual number of days that the Commissioner has to issue a determination in subsection (4) of the temporary rules.

Commissioner Gardner responded by noting that a provision in the bill allows the bureau to take longer than 60 days under certain circumstances and it was unnecessary (and could possibly be misleading) to include the 60-day provision in the rules.

Committee member Norman Malbin stated that he could foresee situations in which the provision of additional information is thwarted by a public agency not providing the needed information. He further stated it would seem to make sense to have a provision in the rule that would allow the Commissioner additional time for “good cause” to issue determinations without requiring the requester to resubmit the entire package. He gave an example of a situation in which it is not the contracting agency that is requesting a reconsideration, but another party, and the agency is not being cooperative in providing the necessary information.

Commissioner Gardner agreed this would be a good idea if it could be done within the statutory confines of the bill.

Ms. Hammond said that the bureau's objective was to figure out some way of not having an open-ended time frame in regard to pending requests for reconsideration.

Committee member Norm Malbin expressed concern that the currently proposed language could penalize the person making the request for reconsideration, even if by no fault of their own the agency is not cooperating and providing necessary information to provide for a determination.

Draft Revised Occupational Definitions

Christie Hammond explained to the committee the process utilized by the bureau's PWR Unit in revising the PWR occupational classifications, which included a review of the occupational definitions from several other states and USDOL. Ms. Hammond stated that the proposed revised drafts of the occupational definitions were sent out to parties whom BOLI believed might have an interest, soliciting their comments with regard to the drafts. Ms. Hammond advised the committee that with the possible exception of one of the revised definitions, it appeared that the drafts were approved by a consensus of the trades. She informed the committee that the bureau had invited identified interested parties to the meeting that day to express any concerns or voice any other comments relating to the draft revisions.

Committee member Bob Shiprack asked how widely distributed the draft occupational revisions were.

Ms. Hammond responded by stating the draft revisions had been provided to all the committee members as well as to those identified as interested parties listed at the bottom of each individual draft occupational revision.

Committee member John Killin noted that it appeared there were no non-union parties consulted.

Shawn Miller expressed concern that he had only received the draft revisions the previous week.

Jessica Adamson said she would appreciate having additional time to send out the draft revisions to her member contractors so that they could look at them.

The committee discussed how much additional time was needed to review the draft occupational definitions and whether the commissioner was seeking agreement or input. Commissioner Gardner replied that he was seeking input and that it was the agency's intention to publish the revised definitions in the bureau's upcoming (January 1, 2008) rates publication, barring any major objections. Commissioner Gardner stated that the purpose of revising the definitions was to improve the definitions, making it more difficult for a contractor to misclassify workers. He agreed that interested parties should be given more time to review the revised definitions.

Commissioner Gardner stated that in situations in which a craft requested language be added to its definition but another craft objected, the language would not be added to the requesting craft's definition. He gave an example of a possible exception to this; where the agency determined that amended language was needed to add clarity to existing language. Commissioner Gardner said

he was not inclined to add new something to a craft's definition if it was not already there and another craft objected to the addition.

Commissioner Gardner requested that any comments on the draft classification revisions be submitted to Christie Hammond. He encouraged interested parties to first look at the definitions of the states listed as sources prior to submitting comments.

The committee members agreed to submit comments within 30 days.

Shawn Miller asked it to be noted on the record that the addition of testing and balancing to the revised Sheet Metal occupational definition will be an issue.

Committee member Bob Shiprack requested that Michael Anderson of The Community Development Network be allowed to submit draft proposed rules relating to HB 2140 for consideration.

Mr. Anderson presented proposed rules that he stated were clarifications of matters that were not made clear in the legislation, but were very explicit in the agreements between the building trades and non-profit housing developers.

Commissioner Gardner requested that Mr. Anderson submit his proposed rule amendments to Christie Hammond for review. He also said that the proposed draft permanent rules will be sent out to everyone on the interested parties list.

Discussion of Below-Market Loan Interest Rates

Commissioner Gardner gave a brief explanation of below-market loan interest rates and explained how they are used on public-private projects. Commissioner Gardner said that the Portland Development Commission had questioned whether only the principal amount loaned by a public agency is to be used in determining the amount of "public funds" used on a project or if the value of the difference between the market interest rate and the interest rate provided by a public agency also needed to be included.

Commissioner Gardner proposed that the committee set aside a future advisory committee meeting to discuss the issue of below-market loan interest rates, and that a representative from the Portland Development Commission be invited to the meeting to participate in the discussion.

The committee members agreed to this proposal.

Application of PWR Law to Testing, Adjusting, and Balancing Air Systems

Commissioner Gardner explained that the issue of application of the PWR law to testing and balancing of air systems (TAB) had become an issue when BOLI received a complaint from an employee performing this type of work. Commissioner Gardner declined to go into specific

detail regarding the bureau's pending investigation, and suggested that a subcommittee of the advisory committee, chaired by committee member Norman Malbin, be formed to discuss future policy relating to this work.

Committee member Shawn Miller addressed the committee, stating that he considers TAB work to be a "grey area" in the law, similar to the public-private project issues addressed previously. Mr. Miller said he believed it is the committee's responsibility to resolve the issue of PWR law coverage for TAB work. He said that there are only twelve TAB contractors in the state of Oregon and described some of the differences between mechanical contractors and TAB-only contractors, including the fact that on public works projects, the mechanical contractor is required to be separate from the TAB contractor. Mr. Miller stressed that TAB contractors do not perform installations of mechanical systems and need to be independent and accredited nationally. He described the work of the TAB contractor as technical in nature, noting that much of the work, such as measuring airflow, is done using a computer. He explained that when a problem with an HVAC system is identified by a TAB contractor, the TAB contractor notifies the owner of the system of the necessary repair work to be performed by a mechanical contractor.

Mr. Miller introduced audience member Denny Whitzel, a TAB contractor, to further explain the work of TAB contractors/workers.

Mr. Whitzel explained the differences between sheet metal contractors and certified TAB contractors. He acknowledged that there may be sheet metal contractors who perform TAB work, but said that they could only do this type of work on *private* projects. He stressed that on public works projects, it was required that there be an independent third-party TAB contractor that has no affiliation with the other construction contractors on the project.

Mr. Whitzel noted that many union sheet metal contractors have individually certified technicians, but said that unlike his company, the contractor's company itself is not certified independently. He further stated that none of his employees are trained in performing sheet metal work and discussed certification requirements of the National Environmental Balancing Bureau (NEBB) and Associated Air Balance Council (AABC). Mr. Whitzel expressed concern about the potential outcome of requiring TAB contractors to become sheet metal workers or be classified as such. He offered documentation regarding the differences between TAB and sheet metal contractors to support his position. He stated that the documentation provided would show the high level of technical competency required in the performance of TAB work.

Shawn Miller requested that Mr. Whitzel be designated as the de facto industry person on the TAB subcommittee.

Mr. Whitzel told the committee that he had been under the assumption that TAB work was exempt from the PWR law for 25-30 years based on letters from BOLI indicating that the work being performed was technical in nature and therefore exempt. He said he would like to know where the industry stands right now.

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Commissioner Gardner responded by stating that there was not 25 years worth of letters from BOLI exempting TAB work specifically from the PWR law, but rather indicating that work that is technical, as opposed to manual or physical in nature, is exempt. Commissioner Gardner also stated that he was aware of several mechanical contractors in the state that do have TAB divisions/workers.

After further discussion, committee member Norm Malbin stated that he thought the best thing that can come from the subcommittee, based on his prior experience, is to try and see if consensus on the issue can be reached, and if not, at least try and sort out the pros and cons of competing policy positions from the information provided to the subcommittee.

Commissioner Gardner stated that his goal for the discussion that day was to provide the subcommittee with a snapshot of the TAB issue and that the issue came down to two questions: First, is 20% or more of the time spent in performing TAB duties physical, as opposed to technical in nature; and second, is the work being performed sheet metal work by definition or should there be a separately surveyed classification?

Committee member Norm Malbin asked the committee for recommendations about who should be appointed to the TAB subcommittee.

Committee member Bob Shiprack suggested Bob Endicott, who he said has spent his entire career in this area.

Committee member Pete Savage asked what harm there was in having the TAB techs classified as sheet metal workers on public works projects, and asked about the pay rates for TAB workers.

Shawn Miller responded that sometimes the TAB techs' pay was higher than the sheet metal workers' rate, but that currently TAB contractors are not paying PWR and the federal government is not requiring TAB contractors to pay PWR wages. He told the committee that he did not want to leave the TAB issue up to interpretation, which could lead to lawsuits.

Commissioner Gardner asked that the TAB subcommittee not focus on the current case, as a determination had already been made, but to focus on what the policy should be in the future. He stated that if the TAB subcommittee was able to reach a consensus recommendation, he was likely to follow the recommendation.

Committee member Norm Malbin asked the commissioner when he would like the subcommittee's findings/recommendations. Commissioner Gardner replied that he would like them by the end of the year if possible.

The meeting was adjourned at approximately 3:00 PM.