

STATE OF NEVADA

JOE LOMBARDO
Governor



DR. KRISTOPHER SANCHEZ
Director

BRETT HARRIS
Labor Commissioner

DEPARTMENT OF BUSINESS AND INDUSTRY
OFFICE OF THE LABOR COMMISSIONER

March 4, 2024

Brandon Sendall, Esq.
City of Sparks, City Attorney Office
431 Prater Way
P.O. Box 857
Sparks, Nevada 89432-0857

Re: Request for Advisory Opinion—5 Ridges Prevailing Wage Compliance

Dear Mr. Sendall,

Pursuant to Nevada Administrative Code (“NAC”) Section 607.650, an Advisory Opinion has been requested clarifying three matters relevant to the potential execution of a Development and Financing Agreement (“DFA”) for a portion of the 5 Ridges Development in Sparks, Nevada (the “5 Ridges” project): (1) documentation relevant in investigating allegations of unpaid wages when a project becomes a Public Works Project in the midst of the project due to a financing change; (2) the applicable prevailing wage determination for the 5 Ridges project under NRS 338.030 if/when it becomes a Public Works Project; and (3) whether the Office of the Labor Commissioner (the “OLC”) is inclined to assess penalties, fees, or interest if the contractors on the 5 Ridges project make a back payment of prevailing wage wages in the event the project goes from private to Public Works based on the execution of a DFA. As set forth in NAC 607.650, this advisory opinion is limited to the facts and circumstances set forth in the request. This advisory opinion shall not apply to any pending administrative, civil, or criminal proceeding and shall not be relied upon by any party, whether a party at issue in the facts or not, in any future proceeding unrelated to the specific and unique facts and circumstances set forth in the request.

I. RELEVANT DOCUMENTATION IN A WAGE COMPLAINT

The first question presented in the Request for Advisory Opinion asked whether the contractor’s timecard records prior to the execution of the DFA would suffice in lieu of certified payroll reports for purposes of evidencing and satisfying NRS 338 compliance requirements for payment of prevailing wage and utilization of apprentices in the event of an NRS 338 investigation on the 5 Ridges project. First, under the specific circumstances presented by the 5 Ridges project and the Request for Advisory Opinion, the Office of the Labor Commissioner agrees with the City’s statement and interpretation that the work performed is/was not subject to NRS 338 requirements prior to public funds being pledged under a DFA (and no other applicable laws compel the payment of prevailing wage under the facts and circumstances as presented and known).

As such, until the 5 Ridges project secures/secured public funds, certified payroll reports are/were not required under applicable law, including NAC 338.092, et seq. It would be impracticable, and not feasible, to create and file certified payroll reports for hours worked in the past when there was: (1) no such requirement; and (2) no public works project (“PWP”) number to track or receive the certified payroll reports. Because certified payroll reports were not required at the time the applicable work at issue was performed, the lack of certified payroll reports would not form the basis for a violation and would not be used as an adverse inference against the respondent.

If the Office of the Labor Commissioner were to receive any other complaint under its jurisdiction pursuant to NRS 338.010-338.130 regarding the 5 Ridges project, the OLC would consider the contractor’s timecards prior to the execution of the DFA, as applicable to the claim(s), as well as any information gathered and set forth pursuant to NAC 338.110(3), and any other information that could reasonably assist in evaluating whether a violation was committed, which may include, but is not limited to: (1) time and attendance records; (2) check stubs; (3) employment records as is the case in investigations for unpaid wages outside of the public works and prevailing wage; (4) relevant business records as applicable; and/or (5) communications.

II. APPLICABLE PREVAILING WAGE DETERMINATION

The second question posed in the Request for Advisory Opinion requested clarification on the applicable prevailing wage determination for the 5 Ridges project in the event of the execution of the DFA. Pursuant to NRS 338.030(9)(b):

[i]f the contract for a public work...[i]s not to be awarded pursuant to a competitive bidding process...the prevailing rate of wages in effect on the date on which the contractor for the contract is selected by the awarding body must be paid until the completion or termination of the contract or for the 36 months immediately following the date on which the contractor was selected, whichever is earlier. If the contract is not entered into within 90 days after the date of the selection of the contractor, the prevailing rates of wages in effect on the date on which the contract is entered into must be paid until the completion or termination of the contract or for the 36 months immediately following the date on which the contract was entered into, whichever is earlier.

Based on NRS 338.030(9)(b), the 2020-2021 Prevailing Wage Determination applies, in this instance, to any contract entered between October 1, 2020, and September 30, 2021. Assuming the applicable contract was entered into between those dates, the 2020-2021 Prevailing Wage Determination would apply until the earlier of termination/completion of the project, or 36 months from the date the contract was entered, as stated in NRS 338.030(9). Although not stated in the Request for Advisory Opinion, the Office of the Labor Commissioner is informed and believes that the applicable contract was entered in February 2021, and therefore, the 2020-2021 Prevailing Wage Determination would apply **until February 2024**, or termination, if terminated before that date. As such, if the 5 Ridges project becomes a Public Works Project, any work performed more than 36 months from the execution of the original contract in February 2021, would be subject to the 2023-2024 Prevailing Wage Determination, while work performed prior to the expiration of 36 months would be subject to the 2020-2021 Prevailing Wage Determination in effect at the time of the applicable contract.

III. PENALTIES, FEES, OR INTEREST

The third question in the Request for Advisory Opinion asked for clarification on whether any penalties, fees, or interest must be paid in addition to backpay covering the difference in private wages and the applicable prevailing wage rate if/when the 5 Ridges project becomes a Public Works Project. As stated above, the Office of the Labor Commissioner agrees with the City's statement and interpretation that work performed prior to the execution of a DFA is/was not subject to NRS 338 prevailing wage, certified payroll reporting, and apprentice utilization requirements because public funds were not yet pledged (and no other applicable laws compel the payment of prevailing wage under the facts and circumstances as presented and known). Any applicable prevailing wages are/were not due or owed to employees unless and until a corresponding requirement in law is/was triggered.

As stated in the Request for Advisory Opinion, the developer stated an intent, through the contractor, to provide backpay to all workers who were not paid prevailing wage. Because prevailing wages were not required to be paid at the time the work was performed, it was not a violation of law if the employee was not paid such prevailing wages at that time (assuming other wage laws were complied with), and therefore, there is no violation to warrant any fines, penalties, or other relief, including interest under NAC 607.065 or otherwise. Additionally, assuming the developer, through the contractor, paid the applicable difference between the previously paid rate and the applicable prevailing wage, the developer and/or contractor would be compliant with the law, and therefore, no violation or resulting penalty, fee, or interest would be warranted. As it applies here, the Office of the Labor Commissioner is informed and believes that such payments have already been made to the applicable employees before any requirement to pay prevailing wage has triggered. Accordingly, there would be no violation or resulting penalties, fees, or interest for wages that were paid before they became due.

Please be advised that this Advisory Opinion is limited to the specific facts and circumstances described herein. The Office of the Labor Commissioner may revisit this issue through the Administrative Rulemaking Process. Please be further advised that subsequent statutory or administrative rule changes or judicial interpretation of the statutes or rules upon which any opinion is based may require modification or abandonment of this Advisory Opinion.

Thank you for reaching out to the Office of the Labor Commissioner with your questions. We appreciate the opportunity to provide information and education regarding Nevada labor laws, and their application. Should you need any additional clarification, please do not hesitate to contact our office at (702) 486-4650.

Sincerely,



Brett K. Harris
Labor Commissioner