

BRIAN SANDOVAL
GOVERNOR

STATE OF NEVADA

REPLY TO:

BRUCE BRESLOW
DIRECTOR

SHANNON CHAMBERS
LABOR COMMISSIONER



■ OFFICE OF THE LABOR COMMISSIONER
1818 E. COLLEGE PARKWAY #102
CARSON CITY, NEVADA 89706
TELEPHONE: (775) 687-4850
FACSIMILE: (775) 687-6409

Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER

April 3, 2017

Ms. Tracy Larkin Thomason, PE
Deputy Director – Nevada Department of Transportation
1263 So. Stewart Street
Carson City, Nevada 89712

Re: Advisory Opinion – Jurisdictional Disputes

Dear Ms. Larkin Thomason:

Pursuant to Nevada Administrative Code (NAC) Section 607.650, the Office of the Labor Commissioner is issuing this Advisory Opinion in response to your letter dated March 9, 2017. In your March 9, 2017 letter, you have asked how the Nevada Department of Transportation (NDOT) should handle Prevailing Wage Claim(s)/Complaint(s) involving Nevada Revised Statutes (NRS) and Nevada Administrative Code (NAC) Section 338, when the Prevailing Wage Claim(s)/Complaint(s) appear to involve a Jurisdictional Issue/Dispute¹ based on the assignment of work pursuant to Collective Bargaining Agreements (CBAs).

The simple answer to your question is that the Public/Awarding Bodies including, the Nevada Department of Transportation (NDOT), should not assert jurisdiction over Prevailing Wage Claim(s)/Complaint(s) or other alleged violations of NRS and NAC on the assignment of work if these Prevailing Wage Claim(s)/Complaint(s) or other alleged violations appear to involve a Jurisdictional Dispute based on CBAs as negotiated by various Labor-Management Organizations and/or Unions with Contractors and/or Subcontractors as applicable.

Nevada Revised Statutes (NRS) Section 338.010, Section 17 defines a Public Work as follows: “Public work” means any project for the new construction, repair or reconstruction of the following:

A project financed in whole or in part from public money for:

- (1) Public buildings;
- (2) Jails and prisons;

¹ A “jurisdictional issue/dispute” is a disagreement about whether a group of employees represented by one union should perform certain job functions or whether those job functions should, instead be performed by employees represented by a separate union.

- (3) Public roads;
- (4) Public highways;
- (5) Public streets and alleys;
- (6) Public utilities;
- (7) Publicly owned water mains and sewers;
- (8) Public parks and playgrounds;
- (9) Public convention facilities which are financed at least in part with public money; and
- (10) All other publicly owned works and property.

NRS Section 338.040 sets forth the requirements for when workers are deemed to be employed on public works.

Workers deemed to be employed on public works.

1. Except as otherwise provided by specific statute, workers who are:
 - (a) Employed at the site of a public work; and
 - (b) Necessary in the execution of the contract for the public work, are deemed to be employed on public works.
2. The Labor Commissioner shall adopt regulations to define the circumstances under which a worker is:
 - (a) Employed at the site of a public work; and
 - (b) Necessary in the execution of the contract for the public work.

NAC Section 338.009 provides as follows:

1. As used in NRS 338.040, the Labor Commissioner will interpret:
 - (a) "Employed at the site of a public work" to mean the performance of work in the execution of a contract for a public work at the physical place or places at which the work is performed or at which a significant portion of the public work is constructed, altered or repaired if such place is established specifically for the execution of the contract for the public work or dedicated exclusively, or nearly so, to the execution of the contract for the public work.
 - (b) "Necessary in the execution of the contract for the public work" to mean the performance of duties required to construct, alter or repair the public work and without which the public work could not be completed.
2. As used in this section, "site of a public work" includes job headquarters, a tool yard, batch plant, borrow pit or any other location that is established for the purpose of executing the contract for the public work or that is dedicated exclusively, or nearly so, to executing the contract for the public work. The term does not include a permanent home office, branch plant establishment, fabrication plant, tool yard or any other operation of a contractor, subcontractor or supplier if the location or the continued existence of the operation is determined without regard to a particular public work.

NRS Section 338.010 defines Wages paid on Public Works Projects as: (a) The basic hourly rate of pay; and (b) the amount of pension, health and welfare, vacation and holiday pay, the cost of apprenticeship training or other similar programs or other bona fide fringe benefits which are a benefit to the worker.

NRS Section 338.020 requires payment of the prevailing wage on public works projects and states in relevant part as follows:

1. Every contract to which a public body of this State is a party, requiring the employment of skilled mechanics, skilled workers, semiskilled mechanics, semiskilled workers or unskilled labor in the performance of public work, must contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workers. The hourly and daily rate of wages must:

(a) Not be less than the rate of such wages then prevailing in the county in which the public work is located, which prevailing rate of wages must have been determined in the manner provided in NRS 338.030; and

(b) Be posted on the site of the public work in a place generally visible to the workers.

Subdivision (6) of NRS Section 338.020 states that: ***“Nothing in this section prevents an employer who is signatory to a collective bargaining agreement from assigning such work in accordance with established practice.”***

A review of the Legislative Intent of subdivision (6) of NRS Section 338.020 reveals that it was intended to allow for the assignment of work pursuant to established practice in a locality as incorporated into the description of work and wages paid as set forth in CBAs. NRS Section 338.020 subdivision (6) also provides for the payment of “double time” for overtime based on the CBA.

To the extent that a Prevailing Wage Claim(s)/Complaint(s) or other type of Claim/Complaint alleging violations on Public Works Projects pursuant to NRS and NAC Section 338 is submitted to the Public/Awarding Body, including NDOT, that appears to involve a Jurisdictional Dispute over the assignment of work pursuant to a CBA, the Public/Awarding Body should notify the Office of the Labor Commissioner of the Claim(s)/Complaint(s), and then decline to assert jurisdiction over the Claim(s)/Complaint(s).

Collective Bargaining Agreements that assign work and pay based on established practice contain specific provisions on how Jurisdictional Disputes must be resolved. These steps/remedies must be pursued before the Public/Awarding Body should investigate or assert jurisdiction over the alleged violations and/or Claim(s)/Complaint(s).

Even to the extent that the Public/Awarding Body decided to assert jurisdiction and issued a Determination finding an alleged violation of NRS and NAC Section 338, the Office of the Labor has the authority to “decline jurisdiction” over the matter that is the subject of the Determination, and dismiss the Determination issued by the Awarding Body pursuant to NAC Section 338.112 subdivision (1)(e), and subdivision (2)(e).

Once the jurisdictional dispute is resolved, the Public/Awarding Body and/or the Office of the Labor Commissioner can then assert jurisdiction over any pending Claim(s)/Complaint(s) and require the Public/Awarding Body to conduct further investigation pursuant to NRS Sections 338.060 and 338.070. Any Determination issued by the Public/Awarding Body pursuant to NAC Sections 338.110 and 338.112, would then be reviewed by the Office of the Labor Commissioner and action taken in

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accordance with NAC Section 338.112. In addition, the Office of the Labor Commissioner could also investigate the matter pursuant to NAC Section 338.114.

Nothing in this Advisory Opinion should be construed as the Office of the Labor Commissioner or Public/Awarding Bodies ceding or abandoning any authority over Public Works Projects and Prevailing Wage requirements as set forth in NRS and NAC Section 338, or sanctioning private causes of action over the laws and regulations already governing the legal requirements concerning Public Works Projects and Prevailing Wage. The Office of the Labor Commissioner remains the primary regulatory authority over the enforcement of Prevailing Wage Requirements on Public Works Projects and other Public Works Projects requirements pursuant to NRS Section 338.015. NAC Section 338.107 sets forth how Complaints are filed alleging violations of NRS and NAC Section 338.

Instead, this Advisory Opinion is clarifying that disputes about the assignment of work and wages based on established practice in a locality must first be resolved as set forth in CBAs before the Public/Awarding Body or the Office of the Labor Commissioner have jurisdiction.

This Advisory Opinion should also not be considered to be retroactive or applying to any past matters involving this issue that involved the Office of the Labor Commissioner. Please be advised that this Advisory Opinion is limited to the specific facts and circumstances described herein. 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 that this Advisory Opinion be modified or abandoned.

Should you need any additional clarification, please do not hesitate to contact me at your earliest opportunity at (775) 684-1890.

Sincerely,



Shannon M. Chambers
Labor Commissioner
Office of the Labor Commissioner