BEFORE THE NEVADA STATE LABOR COMMISSIONER
CARSON CITY, NEVADA

IN RE:
NOTICE OF INTENT TO ACT UPON
REGULATIONS AND HEARING AGENDA
Re: NAC 338: Rules of Practice Before
the Labor Commissioner

REGULATION HEARING TRANSCRIPT

A hearing on the Notice of Intent to Act Upon Regulations, Nevada Administrative Code Chapter 338, was held before Labor Commissioner, Shannon M. Chambers, on April 27, 2020, at 9:00 a.m. The Labor Commissioner was present at 1818 College Parkway, Suite 102, Carson City, Nevada, 89706.

On March 22, 2020, Governor Sisolak issued Emergency Directive 006, suspending certain requirements of Nevada’s Open Meeting Law. The requirement that there be a designated physical location for meetings of public bodies where members of the public could be permitted to attend and participate at the physical location was suspended.


The meeting was noticed so that members of the public could attend and participate by phone and through a WebEx meeting. The Labor Commissioner also extended the time for additional public comment to May 1, 2020.

http://labor.nv.gov/Meetings/2015/Workshops and Hearings(1)/
I am going to go ahead and officially start the public hearing on regulation package R018-18. This is a regulation package of the Office of the Labor Commissioner. This package has been in the works since 2018. There have been several public hearings on it and written comments have been submitted and we are at the stage now where we are going to again go over the proposed changes and then we will take public comments. Depending on the public comments and the written comments that have already been received into the record, this package will then go over to the Legislative Commission for potential approval. I will tell you in advance that we will have the hearing today, but I will also leave the record open until Friday, May 1, 2020, to take additional written comments. That will be the final day for written comments. I will provide information on how to do that at the end. With that I am going to go ahead and get started with the regulation package and for those that have not seen it, it is available on our website and was sent out as part of the hearing notice. So hopefully all of you have seen it, and with that, we will go ahead and get started. Just to give the bigger framework here, these changes were started in 2018, but obviously with the 2019 Legislative Session, many bills were passed during that session relating to public works projects and prevailing wage.
Because of the bills passed during the 2019 Legislative Session, there was a need to make some adjustments to the Nevada Administrative Code (NAC) 338 regulations. With that, I am going to turn to section 1 of the regulations and this is page 4 in the actual regulations package. In this section, it is adding new language into section 1 of Chapter 338, to address the filing of a complaint with the Office of the Labor Commissioner and the time period to file an answer, when a complaint is filed. If no answer is filed, the Labor Commissioner potentially has the authority to issue a default decision, and this provides the specific language in this section to do this. Nevada Administrative Code section 607 already has this authority, but 338 deals specifically with public works and prevailing wage, so this new language is to provide the authority to issue a default specifically upon the filing of a complaint alleging a violation of law relating to public works and prevailing wage.

On page 5, section 2 of the package, this language just clarifies the definition of apprentice for purposes of Senate Bill 207 passed during the 2019 legislative session, also known as the Apprenticeship Utilization Act.

Section 3 adds some language for the Labor Commissioner to enforce public works and prevailing wage laws even if there is no contract between an awarding body and a contractor. It is just adding some additional authority to pursue potential violations involving public works and prevailing wage law.
Section 4 of the regulations clarify that when there’s work being done that is for a specific period of time or does not fall within a typical job classification, or job description under prevailing wage, or the work is incidental and ancillary to the actual construction, repair, or reconstruction of the public work, that prevailing wage would not apply. This is codifying some of the intent of the Advisory Opinion that was issued on service providers, or clarifying those instances where the actual work or the services that are being provided don’t fall within the typical public works or prevailing wage job classification and job description.

Section 5 of the regulation adds some new language again about apprentices, so this is again tied to Senate Bill 207 passed during the 2019 legislative session. This again clarifies throughout the regulation what the definition of an apprentice is and how the Labor Commissioner will interpret that. It also adds some language about jurisdictional disputes. And I will note for the record, I have received some public comment about this section, so the Labor Commissioner will review the language in this section again. There is already existing authority in Nevada Revised Statutes section 338 that provides that work can be assigned according to area practice, and again the Labor Commissioner has no intention of getting involved in jurisdictional disputes and that was the intent of this language. I will go back and look at this to make sure that is clear, and I do appreciate the public comment on this section.
Section 6 adds new language regarding how the prevailing wage will be calculated, and recognizes Senate Bill 243, which established the different regions for prevailing wage in the State of Nevada. The prevailing wage rates are now established by region and they last for a period of two years. Now, there is the potential for adjustments to those rates based on changes to collective bargaining agreements. For those rates that are non-union rates that prevail, Senate Bill 243 provides that those rates will be adjusted based on a consumer price index. This language is implementing Senate Bill 243 and it is also implementing many provisions of Assembly Bill 190 that was also passed during the 2019 legislative session. If the prevailing wage rate is a rate that is a collectively bargained rate, the Labor Commissioner will recognize that rate and will also recognize those job descriptions in that collective bargaining agreement. This language clarifies those provisions, and it is also clarifying what is going to be included as far as construction, and what the definitions of construction will be for the purposes of the survey. So again, just implementing many of the new provisions of Senate Bill 243 and Assembly Bill 190.

Section 7 of the regulation again just makes conforming changes on how the Labor Commissioner will calculate prevailing wage, and what type of information will be used. Section 8 is adding some new language related to truck drivers. I will note for the record that written comments have been received on this section and that the Labor
Commissioner will go back and review this language and will also discuss this with our Deputy Attorney General. There was a Nevada Supreme Court decision that was issued also known as the Granite case, and the language that came back from the Legislative Counsel Bureau, the new language in Section 8, subpart 3, may not be in compliance with the Granite decision. The Labor Commissioner will go back and review the language considering the Granite decision. Noting for the record that there was written comment received about the proposed new language relating to truck driver.

Section 9 of the regulation adds some language again about what the Labor Commissioner will consider when calculating prevailing wages and doing the survey. This language just clarifies what is going to be used, when the prevailing wages will be effective, the different information that can be used, and again just making some conforming changes to tie into some of the previous sections of the regulation.

Section 10 implements the language that provides the authority for the Labor Commissioner to adjust the prevailing wage Rates. Senate Bill 243 provided that the prevailing wage Rates would be in effect for two years. However, with Assembly Bill 190 there was a recognition that if there were adjustments in the collective bargaining agreements, that the Labor Commissioner could take note of those and adjust the prevailing wage rates based on those collective bargaining agreements. It also clarifies
when those adjustments will become effective and recognizes the prevailing wage rates by the region.

Section 11 again clarifies some of the authority of the Labor Commissioner to correct the prevailing wage rates if there is a clerical error and when the correction becomes effective.

Section 12 clarifies the language about the regions now and not referring to localities and the authority for the Labor Commissioner to correct prevailing wage rates if there’s doubt, and again those corrections would be based on region by region.

Section 13 of the regulation provides some additional language clarifying when a contract is awarded and who needs to be reported for purposes of the certified payroll reports.

Section 14 recognizes the passage of Senate Bill 231 and the submission of certified payroll reports electronically and what needs to be included on those certified payroll reports. Senate Bill 231 provided the authority for the Labor Commissioner to implement regulations regarding electronic filing and reporting of prevailing wage rates. This language is setting forth how certified payroll reports can be submitted electronically and what must be included on them. The language about the bona fide fringe benefits reflect the language of Senate Bill 190, which clarified what bona fide fringe benefits were and how they had to be reported. There’s additional language in this section about apprentices and the
information and documentation that needs to be reported concerning apprentices. Again, this is tied to Senate Bill 207 - Apprenticeship Utilization Act.

Section 15 clarifies more about what needs to be included on certified payroll reports and the electronic submission of certified payroll reports. It also requires the awarding body to verify those certified payroll reports, to correct those certified payroll reports, and to potentially report those corrections and adjustments and potential problems to the Labor Commissioner. So, it provides that if an awarding body is going to use an electronic certified payroll system they do need to have the checks, balances, and verifications in place to ensure that those certified payroll reports have the required information pursuant to section 15.

Section 16 of the regulation talks about non-submission of certified payroll reports if work has not been performed for a certain period. It adds some additional language and creates some timeframes upon which a certified payroll report may not be required based upon non-performance.

Section 17 just makes a conforming change.

Section 18 of the regulation clarifies the complaint process for purposes of Nevada Administrative Code section 338. If a complaint is filed alleging a potential violation of not only Nevada Administrative Code section 338, but also Nevada Revised Statutes section 338, this section clarifies what needs to be included in the filing of the complaint. It also clarifies the time period upon which the Labor
Commissioner can act upon a complaint. This has been sort of a "grey" area that has been out there. I know that since I became the Commissioner, this has been an open question. The time frame now is going to be 24 months. So if a complaint is going to be filed, the act or omission has to have occurred within the past 24 months. This is consistent not only with several statutes of limitations, but also consistent with the complaint filing process under Nevada Administrative Code section 607. This section also provides that the Labor Commissioner can act upon anonymous complaints. The Labor Commissioner has been challenged on that on certain occasions. This clarifies that if there is an anonymous complaint, the Labor Commissioner can act upon it and investigate it.

Section 19 of the regulation clarifies the determination process and what needs to be included in a determination. It also provides the authority for the Labor Commissioner to conduct inspections and to issue subpoenas. So again, providing additional authority and investigative tools for the Labor Commissioner to investigate potential violations of Nevada Administrative Code section 338 and Nevada Revised Statutes section 338, as well. It also provides the express language for an awarding body to not issue a determination if it's simply a matter of a late certified payroll report. The reason for this is there is an automatic, statutory $1,000 forfeiture penalty for the late submission of a certified payroll report that goes up to $5,000 for additional violations. This is just reflecting that statutory
authority and eliminating undue work for the awarding body or the Labor Commissioner because again, for late certified payroll reports the statute already provides for specific language on what the forfeiture and penalty will be for that particular violation.

Section 20 is adding some additional authority and power to the Labor Commissioner that can be used when investigating. It also specifies the information that can be included in the determination issued by the Labor Commissioner. There is also new language regarding who can actually dispute a determination. This provides authority for the parties, trade organizations, and different entities who have the authority and power to file a complaint to also dispute a determination that is issued not only by the Labor Commissioner, but also by the awarding body.

Section 21 clarifies who can dispute a determination issued by the Labor Commissioner like section 20.

Section 22 clarifies the hearing process on determinations issued by the awarding body or the Labor Commissioner. It provides that the Labor Commissioner will use the procedures in Chapter 233B of the Nevada Revised Statutes, also known as the Administrative Procedure Act, along with the procedures set forth in 607 of the Nevada Administrative Code. It also specifies that if there is a complaint filed pursuant to 338.107 of the Nevada Administrative Code, the Labor Commissioner shall hold a hearing on the matter. In 607.300 of the Nevada
Administrative Code outside of public works and prevailing wage, the Labor Commissioner does have the authority to issues orders without conducting a hearing. This language says that if it is a complaint specifically related to Nevada Administrative Code 338.107 and potential violations of public works and prevailing wage, that the Labor Commissioner must hold a hearing.

So those are the sections that will be amended and the new language that will be added to Nevada Administrative Code section 338. These changes and additions implement the bills passed during the 2019 Legislative Session relating to collective bargaining agreements and prevailing wage rates, Senate Bill 207-Apprenticeship Utilization Act, Senate Bill 243 the calculation of the prevailing wage by region, and some further clarification on the complaint process and the statute of limitations on the filing complaints.

I am going to go ahead and close my portion of this. I will go ahead now at this point and ask if there is any public comment, and again please use chat feature if you can so that makes it easier and clearer for the record. It looks like the person we have is Brian Dowd. Mr. Dowd if you could unmute your mike and go ahead and provide whatever public comment you like.

Brian Dowd: Can you hear me?
Shannon Chambers: I can hear you, go ahead.
Brian Dowd: I am sorry, okay. I was happy to hear you say that you were going to be reviewing subsection 3 of
Section 8 regarding the wage rate for truckers. I am a representative of Granite Construction, and we were a party to the Supreme Court ruling in 2002, and the way it is worded right now it seems like it is in direct conflict with that ruling. It sounds like you are going to be looking at that subsection and I appreciate that. Thank you.

Thank you. It looks like the next public comment, who wants to make a public comment, is the Nevada Associated General Contractors. Mr. Dowd, you did the right thing and said who you were, so if I could have you identify yourself and your organization just for the record. The Nevada Associated General Contractors submitted written comment about the truck driver language and shared the same concerns as Mr. Dowd.

As I said earlier, I will hold the record open until May 1, 2020 to receive any additional public comment. You can submit that to mail1@labor.nv.gov. Again, that is mail, the number 1, at labor.nv.gov. Public comment needs to be received by then. At that point, the Labor Commissioner will evaluate the public comments and review that along with all the other public comments that have been received and determine what changes if any need to be made to regulation package R018-18. Once that is completed, the final package will be sent over to the Legislative Counsel Bureau. It will then go before the Legislative Commission, and parties, and awarding bodies, and contractors and subcontractors will at that point have another opportunity to go before the Legislative
Commission to give testimony as to whether they're for or against some of the proposed changes to Nevada Administrative Code section 338. We are going to go ahead and close the hearing on R018-18. Thank you all for being flexible and for cooperating with this technology. These are new times and interesting times. I appreciate the turnout and like I said please get those public comments in by this Friday, May 1, 2020. We will go ahead and adjourn the hearing on regulation package R018-18. Thank you.

Shannon M. Chambers
Labor Commissioner
State of Nevada
CERTIFICATION OF TRANSCRIPTS

I, Rosiland M. Hooper, do hereby certify that the foregoing page 1 through 13 contain a true and correct transcript of the proceedings held April 27, 2020.

DATED this 28th day of April, 2020.

[Signature]
Rosiland M. Hooper, Chief Assistant
Office of the Labor Commissioner

Transcribed by:
Rosiland M. Hooper
Chief Assistant
Office of the Labor Commissioner