The Report Card Newsletter

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May 2013 Volume 14 Issue 1

Hinshaw & Culbertson LLP

Illinois
Belleville
Chicago
Lisle
Rockford
Springfield
info@hinshawlaw.com
www.hinshawlaw.com

School Law Group

V. Brette Bensinger
312-704-3027

Alex Breland
312-704-3124

Heidi Eckert
618-310-2353

Anthony Ficarelli
630-505-4113

Thomas J. Lester
815-490-4908

Gina L. Madden
630-505-4170

Thomas Y. Mandler
312-704-3456

Thomas A. Morris, Jr.
312-704-3034

Scott E. Nemanich
630-505-4122

Steven M. Puiszis
312-704-3243

Charles R. Schmadeke
217-467-4914

D. Renee Schroeder
815-490-4921

Yashekia T. Simpkins
815-490-4942

Kathryn S. Vander Broek
312-704-3540

Michael L. Wagner
618-310-2380

Spring, Perfect Time for a Prevailing Wage Act Review

As Spring sets in and the weather creates more opportunities for facilities departments and contractors to trim hedges and to landscape, school districts should review their obligations under the Prevailing Wage Act (Act), 820 ILCS 130/0.01, *et seq.* SB 1466 — introduced on February 6, 2013 — proposes to exclude school districts from the Act. Until such a bill passes, school districts are required to comply with the Act, which includes landscapers as "laborers," who are covered based on an examination of the training, knowledge, skills and abilities required to landscape. *Illinois Landscape Contractors Ass'n v. Dep't of Labor*, 372 Ill. App. 3d 912, 923 (2007). The Illinois Department of Labor (IDOL) currently provides the following description for landscaping in Lake County:

> Landscaping work falls under the existing classifications for laborer, operating engineer and truck driver. The work performed by landscape plantsman and landscape laborer is covered by the existing classification of laborer. The work performed by landscape operators (regardless of equipment used or its size) is covered by the classifications of operating engineer. The work performed by landscape truck drivers (regardless of size of truck driven) is covered by the classifications of truck driver.

School districts working to comply with the Act must be mindful of the prevailing wage in their locality and the relevant categories of employees covered under the Act. What follows is a brief summary of Act-related concerns, not a comprehensive legal update. Because there are many elements to consider when dealing with Act, we suggest that you consult us for assistance with the process.

Obligation to Pay and Ascertain the Prevailing Wage, and Maintain Records

The Act provides that the general prevailing wage that is paid for similar work in a locality be paid to laborers, mechanics and workers employed in the construction of public works, *e.g.*, roads and buildings. The Act defines "public works" as all fixed works constructed or demolished by any public body, or paid for wholly or in part out of public funds. Public works include all projects financed in whole or in part with bonds, grants, loans, or other funds made available by or through the state or any of its political subdivisions. In Illinois, landscape or modifications to real estate are included within the definition of fixed work.

Every June, public bodies must ascertain the previous wage application to its territory and pass the appropriate ordinance. If the public body fails to ascertain the prevailing wage, the IDOL determines the wage. The IDOL makes this information publicly available at http://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/Rates.aspx.

Public bodies are required to maintain certified payroll records of hours and wages for all laborers, mechanics and other employees for the public works project. Certified payroll records are subject to disclosure under the Illinois Freedom of Information Act (FOIA), 820 ILCS 130/1 et seq., but should be redacted prior to disclosure if they contain sensitive material.

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Who Is Entitled to the Prevailing Wage?

Landscapers are classified as "laborers" under the Act. Laborers, workers and mechanics who are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job, and laborers, workers and mechanics engaged in the transportation of materials and equipment to or from the site, are counted as employed on the public work. The Act does not apply to individuals engaged in the transportation of goods by sellers and suppliers, or the manufacture or processing of materials or equipment related to the public work.

Notice of Obligations to Contractors

Public bodies that fail to pay the prevailing wage are subject to penalties. A public body must also exercise due diligence to provide notice of prevailing wage requirements to contractors. In particular, the public body awarding a contract must ensure that the project specifications and the contract stipulate that nothing less than the prevailing rate of wages must be paid to all laborers, workers and mechanics performing work under the contract. When a public body awards work to a contractor without a public bid, contract or project specification, notice must be provided on the purchase order related to the work to be done or on a separate document. If the public body does not provide proper written notice to the contractor, the IDOL may order the public body to pay any interest, penalties or fines that would have been owed by the contractor if proper written notice were provided.

NLRB Gets Involved With Public Schools Through Charters

A growing movement in Illinois to organize charter school teachers has raised the question of whether the National Labor Relations Board (NLRB) or the Illinois Educational Labor Relations Board (IELRB) have jurisdiction over election petitions to represent teachers at charter schools. Thus far, the NLRB has accepted requests to exercise its jurisdiction over these petitions.

Most recently, in *Pilsen Wellness Center,* No. 13-RM-001770 (NLRB Mar. 8, 2013), a nonprofit organization by the same name which employed teachers at a charter school, filed an election petition with the NLRB to determine support for the Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL-CIO (Union). The Union argued that the IELRB had jurisdiction to handle the petition because the nonprofit organization was a political subdivision, which is an employer exempt from the NLRB's jurisdiction under the National Labor Relations Act (NLRA).

Under the *Hawkins* test (*NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971)), an employing entity is considered a political subdivision if it is: (1) created by the state so as to constitute a department or administrative arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. The Union relied on the second categorization to support its position. The sole focus of the second arm of the test is on the individuals who administer the entity. If the entity's governing board and executive officers are appointed by and subject to removal by public officials (the law), the entity is a political subdivision. If the appointment and removal of a majority of the entity's governing board members and executive officers are controlled by private individuals (the entity's governing documents), the entity is not a political subdivision.

The NLRB resolved the jurisdictional question quickly and simply. Because the board of the Pilsen Wellness Center was appointed and subject to removal by sitting members of the entity's board, in accordance with the organization's bylaws, the organization was not a political subdivision. The NLRB decided that it had jurisdiction over the matter. This marks the second time in as many opportunities that the NLRB has exercised jurisdiction over an election petition involving charter school teachers.

In December 2012, the NLRB determined that under both arms of the *Hawkins* test, the Chicago Mathematics & Science Academy Charter School (CMSA) was not a political subdivision. *Chicago Mathematics & Science Academy Charter School, Inc.*, No. 13-RM-001768 (NLRB Dec. 14, 2012). This case was different because the charter school directly employed the teachers and operated only through this charter agreement with Chicago Public Schools. Also, the school and its board of directors were directly subject to the Illinois Charter Schools Law. These factual distinctions did not produce a different outcome.

Under the first arm of the *Hawkins* test, the NLRB held that CMSA was not a political subdivision. CMSA was incorporated as a nonprofit corporation by private individuals. Only after the school was incorporated did it have to comply with the Illinois Charter Schools Law. The NLRB applied the second arm of the test as it did in *Pilsen Wellness Center*. It focused on CMSA's governing board. Because the members of the governing board of the nonprofit corporation were privately appointed and removed, CMSA was not a political subdivision of Illinois and therefore the NLRB could exercise jurisdiction.

The NLRB has stated that it has not created a strict rule that categorically gives it jurisdiction over labor issues involving teachers at charter schools. In Illinois, this is debatable considering that private individuals commonly launch charter schools as nonprofit corporations with governing boards filled in accordance with the corporation's bylaws. As a result, the NLRB can be expected to routinely be involved in labor issues that arise in public schools, which traditionally are viewed as sites of local concern. The

NLRB believes that is not overreaching into state affairs because the "state law [in Illinois] does not mandate the establishment of charter schools as a means to fulfill 'the state's obligation to provide public education' in the same manner that it mandates the establishment of traditional public schools."

Pilsen Wellness Center, No. 13-RM-001770 (NLRB Mar. 8, 2013)

Chicago Mathematics & Science Academy Charter School, Inc., No. 13-RM-001768 (NLRB Dec. 14, 2012)

Federal Tax Reform Threatens to Eliminate the Tax-Exempt Status of Municipal Bonds

One of the foremost problems discussed in national politics is the country's growing budget deficit. Federal tax reform is a potential means to realize savings, and both Republicans and Democrats recently have been active in advocating tax reform proposals. In March 2013, the U.S. House of Representatives Ways and Means Committee, chaired by Representative Dave Camp (R-MI), held a hearing at which there were proposals to eliminate deductions for state and local taxes, and, relevant to school districts, municipal bonds. Members of the U.S. Senate Finance Committee headed by Senator Max Baucus (D-MT) have considered similar proposals. The appeal of such a measure is clear; the Joint Committee on Taxation estimates that eliminating the tax-exempt status of municipal bonds alone could raise as much as $25.7 billion in revenue.

Among the groups opposed to eliminating the tax exempt status of municipal bonds is the National Association of Counties (NACO), which contends that the demand for municipal bonds, of which an estimated $340.7 billion worth were issued in 2009, would significantly decline if Congress eliminated their tax-exempt status. The reason is clear. Municipal bond holders currently are willing to accept lower rates of return because they can deduct the interest on these bonds from their taxable income. State and local governments benefit from this practice because they can borrow money to fund public projects like building and renovating schools at lower costs. Absent this tax exemption, it is anticipated that the demand for municipal bonds will decline, state and local governments will be forced to borrow at higher costs, infrastructure investment will decline and jobs will disappear.

Congress will be challenged to balance these competing interests as it pursues comprehensive tax reform.

Just Cause Discharge Upheld Against a "Belligerent" Head Custodian

On January 17, 2013, the American Arbitration Association upheld the discharge of a head custodian in a grievance arbitration filed against an elementary school district in the northern suburbs of Chicago. Thomas Y. Mandler and Alex Breland, attorneys in Hinshaw's Chicago office, represented the school district at the arbitration hearing.

The grievance process was initiated when the school district terminated the seven-year employee for exhibiting threatening behavior, insubordination and inappropriate communications with a parent and supervisor. The head custodian's problems started when he confronted a parent entering a school building about the parent's parking location. The parent reported the incident to the school's principal, noting that the head custodian used profanity in their exchange.

Later in the day, the head custodian entered the school's main office and started proclaiming his innocence to the school's secretaries. He was red in the face, agitated and speaking in a loud voice. His demeanor prompted the principal to come out of her personal office. She told him to postpone discussion of the matter until the next school day. The head custodian disregarded her and continued to claim his innocence. The principal repeated her directive, but the employee continued to defend himself and act belligerently. This exchange ended only after the principal said that one of the head custodian's managers from the facilities department would join them at their meeting on the next school day.

That evening the principal reported the misconduct to the facilities managers, who in turn reported the misconduct to human resources. The director of human resources determined that the head custodian posed a safety risk given his misconduct. Under the district's Violence in the Workplace Policy, he was suspended, pending an investigation. The employee was terminated after he had the opportunity to be heard at an investigatory meeting. The arbitrator upheld the discharge, finding that the head custodian's conduct was inappropriate and insubordinate.

Although the arbitrator found that the content of the head custodian's statements to the principal was not inappropriate, there were consequences to the employee's conduct that were inappropriate. Specifically, the head custodian's demeanor caused the principal to leave her office, and caused her so much concern she felt it reasonable to delay the discussion of the parent incident to another day. The statements also were made in public, which threatened to undermine her working relationship with the head custodian and other employees. The arbitrator emphasized the fact this misconduct occurred in an elementary school building, reaffirming the common

view that special interests in the school setting justify a higher standard of employee conduct.

The arbitrator based his insubordination finding on four factors that weighed in the district's favor. First, the principal gave the head custodian a clear and explicit directive to postpone discussion of the parent incident. Second, the directive was reasonable and work-related because it was aimed to get the head custodian to stop acting angrily and discuss the matter at a later time. Third, the principal had proper authority to give the directive. Fourth, the head custodian knowingly, willfully and deliberately disobeyed the repeated directive.

This arbitration decision is significant because the district was able to prove just cause for termination despite the facts that the employee was not given a warning of the consequences for noncompliance with the order and that he was not given time to correct his insubordinate behavior. A warning of consequences was unnecessary because the principal's order was clear, and affording the head custodian an opportunity to correct the insubordinate behavior was impracticable in light of the principal's immediate concerns about the employee's belligerent behavior.

New Requirements for Managing Information Related to Minors with Police Run-Ins

The Illinois General Assembly has approved changes to the School Code (Code) and that Juvenile Court Act (JCA) that will require school districts to change their record-keeping practices and update their reciprocal reporting agreements. The Code and the JCA intersect when students have run-ins with law enforcement agencies.

When a law enforcement agency arrests or takes a minor into custody, the agency is required to report to the principal at the school where the minor is enrolled the basis of the action, the circumstantial events, and the status of proceedings against the minor. Previously this information could then be disclosed to counselors or teachers to aid in student's rehabilitation or to protect the safety of students and employees in the school. P.A. 97-1104 has amended the Code to broaden the types of school personnel authorized to receive information contained in agency reports to "appropriate school official(s)." But P.A. 97-1104 simultaneously limits access to this information to school official(s) with a legitimate educational or safety interest to engage in the rehabilitation and safety activities described above.

P.A. 97-1104 also amends the JCA to limit school officials' ability to copy and inspect law enforcement records related to a minor's conduct to instances when the "the [law enforcement] agency or officer believes that there is an imminent threat of physical harm to students, school personnel, or others who are present in the school or on school grounds." Consistent with the Code, only school officials with a legitimate education or safety interest may inspect or copy these records under the JCA.

A reciprocal reporting agreement between the school district and law enforcement agency must be in place to allow inspection or copying. The legislation identifies new offenses that can lead to the disclosure of law enforcement records to school officials pursuant to a reciprocal reporting agreement: violations of the Harassing and Obscene Communications Act and Hazing Act; mob action; unlawful contact with street gang members; and a variety of bodily harm offenses including battery and stalking.

The amended JCA also borrows from the Code in its provision that information derived from law enforcement records pertaining to a minor shall not become a part of the student's official school record. The General Assembly did not expressly state that this rule applies to information orally exchanged between a law enforcement official and an appropriate school official. But it did require that any information related to a current investigation involving a minor student may only be shared with an appropriate school officially orally. In this situation, the oral information must be kept separate from the official school record.

School districts are advised to consult with counsel to revamp their record-keeping practices and reciprocal reporting agreements with law enforcement agencies to comply with the new mandates introduced by P.A. 97-1104.

In the Public

Steven M. Puiszis and Yashekia T. Simpkins spoke on the topic, "Hazing: Precautions, Warnings, and Steps to Take" in Peoria on May 4, 2013 at the "Promoting the Future, Remembering the Past" conference hosted by the Illinois Athletics Director Association.

Kathryn S. Vander Broek spoke on the topic, "Successfully Handling Disciplinary Actions for Special Needs Students" in Naperville on May 7, 2013 as part of the NBI Illinois Special Education Law seminar.

Hinshaw & Culbertson LLP prepares this newsletter to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects if you contact an editor of this publication or the firm.

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