

# HEYL ROYSTER

## GOVERNMENTAL NEWSLETTER

Summer 2008

### WELCOME LETTER

Dear Friends:

Welcome to the first edition of the *Heyl Royster Governmental Newsletter*, a publication created by the Governmental Practice Group of Heyl, Royster, Voelker & Allen. The goal of this publication is to share with you the latest developments in Illinois law, and to keep you aware of upcoming events sponsored by our firm. We welcome your thoughts on this publication. Please feel free to forward it to a friend.

Our governmental practice group is made up of Attorneys Timothy L. Bertschy, Andrew J. Keyt, and John M. Redlingshafer, and Paralegal Sheri Kyle. We hope you had a chance to meet all of us at the recent Prevailing Wage Seminar hosted by Cincinnati Township (which again, deserves our sincere “thanks” for hosting a great event). If you were unable to attend, we are planning similar legal education seminars at various times throughout the year, with alternating topics and areas of interest. Our next seminar will be held September 16, 2008 hosted by the Limestone Township. Be on the lookout for more information.

We thank you for the continuing opportunity to serve your legal interests, and hope you enjoy our newsletter.

All the best,



**John M. Redlingshafer** is an associate with Heyl, Royster, Voelker & Allen. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. Currently, John is Vice President of the Illinois Township Attorneys' Association, and serves as the Editor of the ITAA's newsletter, the *Talk of the Township*.



Meet our team at Heyl, Royster, Voelker & Allen — Attorney John M. Redlingshafer; Paralegal Sheri Kyle; Attorney Andrew J. Keyt; and Governmental Practice Group Chair, Attorney Timothy L. Bertschy.

### IN THIS ISSUE

- An Introduction to the Prevailing Wage Act for Township Officials
- Prevailing Wage Act Forms
  - Prevailing Wage Ordinance Township
  - Legal Notice Township
  - Prevailing Wage Certificate
- *DeSpain v. City of Collinsville* and the Freedom of Information Act: What Do We Do When a Citizen Requests Our Meeting Audiotapes?

## **AN INTRODUCTION TO THE PREVAILING WAGE ACT FOR TOWNSHIP OFFICIALS**

**By Timothy L. Bertschy**  
*tbertschy@hrva.com*

Most township officials are familiar with the yearly requirement that townships and road districts pass a Prevailing Wage Act ordinance, publish the fact of passing that ordinance, post the ordinance, and report the ordinance to certain bodies of state government. Unfortunately, fewer township officials understand how the Act actually applies. Fewer still are familiar with the Act's amendment of this past year which places additional responsibilities upon townships and road districts.

It is the policy of the State of Illinois "that a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, shall be paid to all laborers, workers and mechanics employed by or on behalf of any and all public bodies engaged in public works." 820 ILCS 130/1.

"Public works" means all fixed works constructed by any public body. 820 ILCS 130/2. A "public body" means any political subdivision of a state and thus includes townships and road districts. 820 ILCS 130/2. "Construction" on public works may also include maintenance, repairs, assembly, or disassembly work performed on equipment. *Id.*

Each June, the public body is to ascertain the prevailing rate of wages in the locality, to publish and publicly post those rates, and to keep them available for inspection in the main office of the public body. 820 ILCS 130/9. The public body is to file a certified copy of its rate determination (i.e., its prevailing wage ordinances) in the office of the Secretary of State and the Department of Labor. If a

body fails to ascertain the prevailing rate of wages, the prevailing wage rate is the rate determined by the Illinois Department of Labor (IDOL) for the county in which the public body is located. For most townships and road districts, it is typical to reply upon the published wage rates of IDOL for the annual prevailing wage ordinance. These wage rates can be found on the IDOL website at <http://www.state.il.us/agency/idol>.

When calling for bids for a contract, the public body is required to specify that the general prevailing rate of wages shall be paid for each craft or type of worker needed to execute the contract or to perform the work. It is mandatory upon the contractor to whom the contract is awarded and upon any subcontractors. 820 ILCS 130/4.

The public body awarding the contract is required to insert into the contract a stipulation to the effect that not less than the prevailing rate of wages shall be paid to all laborers, workers and mechanics performing the work under the contract. The public body is also to require in all contract bonds that the contractor include such provisions as will guarantee the faithful performance of the Prevailing Wage Act. All bid specifications shall list the specified rates to all laborers, workers and mechanics in the locality for each craft or type of work or mechanic needed to execute the contract, and the law specifically requires the wage rates to be attached to the bid specifications. If the prevailing wage rate is revised during the course of the project, the revised rate is to apply to the contract and it is the public body's responsibility to notify the contractor and each subcontractor of the revised rate.

However, only laborers, workers and mechanics that are directly employed by contractors and 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

(but not including the transportation by the sellers and suppliers or the manufacture or processing of materials or equipment) are deemed to be employed upon public works. Township and road district employees are not covered by the Prevailing Wage Act. Laborers, workers and mechanics employed off-site by contractors and subcontractors are not covered. Transportation of materials to a township job by an individual (non-corporate) owner of a truck hired for that job by the township or road district is not included under the Act.

Repair work at the township hall or road district shed is covered. For example, replacement by a contractor of a roof or window is a Prevailing Wage Act job. Repair or replacement within a township structure, painting touch-ups at the hall, seal-coating the parking lots, or re-striping parking lots would be encompassed by the Act.

However, routine maintenance that does not include physical repairs to the property, such as lawn mowing, tree trimming, fertilizing, and weed spraying, generally would not be covered under the Act.

For road commissioners, oil and chipping of the roads would be covered by the Act if performed by an outside contractor. There are specific oil and chip rates specified at the IDOL website (<http://www.state.il.us/agency/idol>) pertaining to this. Road re-striping is covered by the Act if performed by an outside contractor.

With respect to culverts, guard rails, posts and similar materials, the Act does not cover the purchase of these materials so long as the vendor does not do the installation work.

The Prevailing Wage Act provides no dollar minimum threshold. Accordingly, the Act applies from the first dollar of expenditure on a public works project. Note that this means the Act applies to even small jobs involving fixed works, *e.g.*, bathroom repairs, wall patching, and the like.

The contractor and each subcontractor and/or the officer of the public body in charge of the project is required to keep an accurate record showing the names and occupation of all laborers, workers and mechanics employed in connection with the public work and showing the actual hourly wages paid to each of these persons. This record is to be open at all reasonable hours to the inspection of the public body or the Department of Labor.

The Prevailing Wage Act requires that a contractor and subcontractor submit monthly to the public body a certified payroll consisting of each worker's name, address, telephone number, Social Security number, job classification, hourly wages paid in each pay period, the number of hours worked each day, and the starting and ending times of work each day. The certified payroll is to be accompanied by a statement signed by the contractor or subcontractor which testifies that the records are true and accurate, that the hourly rate paid to each worker is not less than the general prevailing wage, and that the contractor or subcontractor is aware that filing a certified payroll that he or she knows to be false is a Class B misdemeanor. The public body is to keep these records for a period of not less than three (3) years and the records are considered to be public records, with the exception of the employee's address, telephone number and Social Security number. In short, the records (excluding the protected information) are to be available under the Freedom of Information Act. Although the language of the Act places no specific responsibilities upon the township or road district other than to receive and maintain the records and to make them available under the Freedom of Information Act, a question can be raised as to the diligence which must be exercised by a township official in allowing payments to be made to a contractor which is in clear or apparent disregard of the Prevailing Wage Act. In light of the potential criminal penalties that apply to a public official under the Act, it

would seem that the supervisor or road district commissioner is required at a minimum to ensure that any contractor or subcontractor meet their reporting requirements and that wages paid at least facially appear to be in compliance with the Act.

A public official who wilfully violates or fails to comply with the Act, or any contractor or subcontractor who fails to abide with their reporting requirements, is guilty of a Class A or B misdemeanor. 820 ILCS 130/5 and 6.

A contract in violation of the Act is void as against public policy and a contractor is prohibited from recovering any damages for the voiding of the contract. 820 ILCS 130/11. The contractor is limited to a claim for amounts actually paid for labor and materials supplied to the public body. Any laborer, worker or mechanic who is paid less than the Prevailing Wage Act has a right of action (presumably against his employer and not the township or road district) for the difference in wages, together with costs and reasonable attorney's fees. A contractor or subcontractor who violates the Act is liable to the Department of Labor for twenty percent (20%) of the under payments plus two percent (2%) of the amount of such penalty to the underpaid laborer, worker or mechanic. Subsequent violations raise these sanctions to fifty percent (50%) and five percent (5%), respectively. The Department of Labor can also maintain the right of action on the behalf of underpaid individuals.

A contractor or subcontractor who violates the Act on two separate occasions within five (5) years is in jeopardy of being placed on a "no-contract" list for four (4) years.

The Act does not require contracts to be bid so as to include Prevailing Wage Act requirements where a bid is not otherwise required under applicable law. However, any contract (whether bid or not) must provide that the Prevailing Wage Act applies to the contract. In small jobs with no contract (*e.g.*, a minor

repair), there should be some paperwork directed to the contractor describing how the Act applies to the subject job.

Helpful forms can be obtained at the IDOL website at <http://www.state.il.us/agency/idol>. IDOL employees familiar with the Act are willing to answer questions at (217) 782-1710.

In sum, the Prevailing Wage Act is more demanding upon township and road district officials than generally known. Township officials would be well advised to read the Act, its bidding, contracting and reporting requirements, and the obligations it places upon public officials, and to consult with their township attorneys regarding the Act's requirements in respect to any particular job.

**Tim Bertschy** is a partner with Heyl, Royster, Voelker & Allen. He concentrates his practice in the areas of complex commercial litigation, employment, and local governmental law. He has litigated cases involving contractual breaches, business torts, partnership and corporate break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, covenants not to compete, lender liability, fraud and misrepresentation, eminent domain (condemnation), computer and software problems, privacy, real estate disputes, zoning issues and business losses. He has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields.



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### Pages 5-6:

- Prevailing Wage Act Forms
  - Prevailing Wage Ordinance Township
  - Legal Notice Township
  - Prevailing Wage Certificate

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF [Township Name] TOWNSHIP,  
[Name of County] COUNTY, ILLINOIS, ASCERTAINING THE  
PREVAILING RATE OF WAGES FOR LABORERS, WORKMEN AND MECHANICS  
EMPLOYED ON PUBLIC WORKS OF SAID TOWNSHIP

WHEREAS, the State of Illinois has enacted, "An Act regulating wages of laborers, mechanics and other workers employed in any public works by the State, county, city or any public body or any political subdivision or by anyone under contract for public works," approved June 26, 1941, as amended, being 820 ILCS 130/0.01 et. seq., and

WHEREAS, the aforesaid Act and 60 ILCS 1/100-20 requires that the Township Board of the Township investigate and ascertain the prevailing rate of wages as defined in said Act for laborers, mechanics and other workers in the locality of said Township employed in performing construction of public works, for said Township.

NOW THEREFORE, BE IT ORDAINED BY THE SUPERVISOR AND BOARD OF TRUSTEES OF [Township Name] TOWNSHIP AS FOLLOWS:

**SECTION 1:** To the extent and as required by "An Act regulating wages of laborers, mechanics and public works by State, county, city or any political subdivision or by anyone under contract for public works," approved June 26, 1941, as amended, the general prevailing rate of wages in this locality for laborers, mechanics and other workers engaged in construction of public works coming under the jurisdiction of the Township is hereby ascertained to be the same as the prevailing rate of wages for construction work in this county as determined by the Department of Labor of the State of Illinois as of June, 2008, a copy of that determination being attached hereto and incorporated herein by reference, and any subsequent amendments thereto. The definition of any terms appearing in this Ordinance which are also used in aforesaid Act shall be the same as in said Act.

**SECTION 2:** Nothing herein contained shall be construed to apply said general prevailing rate of wages to any work or employment except public works construction to the extent required by the aforesaid Act.

**SECTION 3:** The Township Clerk shall publicly post or keep available for inspection by any interested party in the main office of this Township this determination of such prevailing rate of wages.

**SECTION 4:** The Township Clerk shall mail a copy of this determination to any employer, and to any association of employers and to any person or association of employees who have filed their names and addresses, requesting copies of any determination, stating the particular rates and the particular class of workers whose wages will be affected by such rates.

**SECTION 5:** The Township Clerk shall promptly file a certified copy of this Ordinance with **both** the Secretary of State and the Department of Labor of the State of Illinois.

**SECTION 6:** The Township Clerk shall cause to be published in a newspaper of general circulation within the area a certification of this Ordinance, and such publication shall constitute notice that the determination is effective and that this is the determination of this public body.

PASSED this \_\_\_\_ day of June, 2008.

\_\_\_\_\_  
Township Supervisor

ATTEST:

\_\_\_\_\_  
Township Clerk

**LEGAL NOTICE**

**NOTICE OF ORDINANCE OF [Township Name] TOWNSHIP  
PREVAILING WAGE RATES**

TAKE NOTICE that [Township Name] Township, [Name of County] County, Illinois, pursuant to "An Act regulating wages of laborers, mechanics and other workers employed in any public works by the State, county, city or any public body or any political subdivision or by anyone under contract for public works," (735 ILCS 130) has determined on, and as effective from the \_\_\_ day of June, 2008, that the general prevailing rate of wages in this locality for laborers, mechanics, and other workers engaged in the construction of public works coming under the jurisdiction of the body of government is the same as determined by the Department of Labor of the State of Illinois for said county as of June, 2008. A copy of the full Ordinance and the Department of Labor determination is available for inspection by any interested party in the main office of said public body (set forth below).

\_\_\_\_\_  
[Name of Township]

\_\_\_\_\_  
Main Office Street Address

\_\_\_\_\_  
City, State, Zip

BY: \_\_\_\_\_

ITS: \_\_\_\_\_

STATE OF ILLINOIS )  
 ) SS  
COUNTY OF [Name of County] )

**PREVAILING WAGE CERTIFICATE OF  
[Township Name] TOWNSHIP  
[Name of County] COUNTY, ILLINOIS**

I, \_\_\_\_\_, DO HEREBY CERTIFY THAT I am the Township Clerk in and for [Township Name] Township; that the foregoing is a true and correct copy of an Ordinance duly passed by the Supervisor and Board of Trustees of [Township Name] Township being entitled: "AN ORDINANCE OF ASCERTAINING THE PREVAILING RATE OF WAGES FOR LABORERS, WORKMEN AND MECHANICS EMPLOYED ON PUBLIC WORKS OF SAID TOWNSHIP," which ordinance was passed at a regular Township board meeting held on the \_\_\_ day of June, 2008, the Ordinance being a part of the official records of said Township.

\_\_\_\_\_  
Township Clerk

ATTEST:

\_\_\_\_\_  
Township Supervisor

## **DESPAIN V. CITY OF COLLINSVILLE AND THE FREEDOM OF INFORMATION ACT: WHAT DO WE DO WHEN A CITIZEN REQUESTS OUR MEETING AUDIOTAPES?**

**By Andrew J. Keyt  
and John M. Redlingshafer**  
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You likely have received requests pursuant to the Illinois Freedom of Information Act (5 ILCS 140/1, et seq. "FOIA.") The City of Collinsville ("City") received three written FOIA requests, it did not envision a fight that culminated in an Appellate Court decision handed down in May 2008.

In April 2001, Mr. DeSpain asked that the City allow him to inspect and listen to audiotapes of city council meetings from earlier that year. This request was in connection with a complaint Mr. DeSpain had previously filed in court alleging the City had violated the Open Meetings Act. The City advised Mr. DeSpain that the records were available for inspection, but the City did not have the ability or facilities for the public to come and listen to the audiotapes. The City also told DeSpain that the City had to maintain the original tapes, but would provide copies of the tapes for a fee.

Mr. DeSpain followed up this response by appealing (as required by the FOIA statute) to the Mayor of Collinsville, saying the Freedom of Information Act permitted him to inspect the audiotapes. The Mayor denied the appeal, explaining the City had to preserve its original tapes and records, and a copy had to be made (for a fee). The Mayor offered a city employee to assist Mr. DeSpain when he listened to copies of the audiotapes, but still required DeSpain to pay for the copies.

This led Mr. DeSpain to amend his original

complaint to include allegations that the City violated the Freedom of Information Act by denying his request to listen to the audiotapes he had asked to review. He asked the Court require the City of Collinsville to give him access to the original tapes versus copies.

The City asked the Court to find that nothing in the Freedom of Information Act requires a governmental body to provide an original public record or "the means or facilities to a requestor for the purposes of listening to an original or a copy of an audiotape." The City maintained that because Mr. DeSpain had not been denied access to public records, it was in compliance with the Act.

The trial court in which Mr. DeSpain's complaint was filed agreed with the City, stating Mr. DeSpain had no right to listen to original audiotapes nor was the City obligated to provide a way for him to listen to them. Mr. DeSpain appealed to the Illinois Appellate Court. The primary issue on appeal was whether Mr. DeSpain was entitled to listen to the original audiotapes or whether the City complied with the Freedom of Information Act by allowing Mr. DeSpain the opportunity to listen to copies.

In its decision, the Appellate Court noted the Act sets forth examples of what a "public record" is, but does not refer to an "original" record at any time. The Act also does not prohibit the use of copies for inspection. However, in taking the Act as whole, the Court stated that a "public record" refers to the government body's original records, as it is from those records that requested copies are reproduced.

The Court concluded the lack of facilities to allow for Mr. DeSpain to listen to tapes was not a valid basis upon which to deny his request to examine the original records. The Act requires a public body to make records available for inspection and copying, unless a specific exception is given in the Act (and none were applicable here).

The City could not charge Mr. DeSpain for his

## HEYL ROYSTER GOVERNMENTAL NEWSLETTER

request to inspect records. Under the Act, a public body is only entitled to charge fees associated with the “cost for producing and certifying public records” or the “use, by any person, of the equipment of the public body to copy records.” 5 ILCS 140/6a. Any fee assessment not consistent with the Act is considered a denial of the right to inspect.

Therefore, Mr. DeSpain was entitled to inspect the original audiotapes he had requested many years before without being charged a fee.

The lesson here is to provide access to original papers or recordings upon request.

**Andrew J. Keyt** is an associate with the firm of Heyl, Royster, Voelker & Allen. He concentrates his practice on both governmental affairs and in the defense of asbestos and toxic tort claims arising from environmental and occupational exposures, including products and premises liability claims. Andy represents and assists in the representation of public entities as their counsel. As counsel for local public entities, Andy attends all monthly meetings, board meetings and provides counsel on all legal issues.



### UPCOMING SEMINAR

Please mark your calendars and join us for the next seminar on governmental issues planned for September 16, 2008 hosted by the Limestone Township.

We will focus on the Manual on Uniform Traffic Control Devices with specific discussion on the following topics:

- Planning
- Practical Application
- Financial Aspect
- Legal Analysis

Watch your mail for upcoming details. Hope to see you there!

### FOR MORE INFORMATION

If you have questions about this newsletter, please contact:

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*The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.*