

Testimony of Robert V. O'Brien

Labor and Industry Committee, PA House of Representatives

August 10, 2011

Good morning Chairman Miller, Chairman Keller and House Labor Committee members. I appreciate the opportunity to offer some perspectives on House Bills 1367 and 1685 which are presently pending before this Committee. I am Bob O'Brien and I am representing the following groups: the Mechanical Contractors Association, Plumbing Contractors - UAC #690, Constructors Association of Western PA, Sheet Metal and Air Conditioning Contractors Association of PA, Mechanical Trades District Council of Delaware Valley and the National Electrical Contractors Association, Pennsylvania, New Jersey, Delaware Chapter.

I am honored today to be in the unique position of addressing you on behalf of over 16,000 Pennsylvania construction workers and hundreds of Pennsylvania contractors: Pennsylvania employers who consistently pay their employees family sustaining wages and family supporting benefits and finance the training of highly skilled, highly qualified Journey persons and Apprentices in Pennsylvania's construction industries.

For the past approximately eight and a-half years (until a very short time ago), I served at Pennsylvania's Department of Labor and Industry. As Bureau Director of the Bureau of Labor Law Compliance, I was responsible for the day to day application of the Pennsylvania Prevailing Wage Act and as Deputy Secretary and Executive Deputy Secretary; I was responsible for the oversight of the administration of the Pennsylvania Prevailing Wage Act.

The intent of the Pennsylvania Prevailing Wage Act is, as it has been since its adoption by the General Assembly in 1961, to ensure that taxpayers get value for their public construction tax dollars, protect Pennsylvania Contractors from unfair competition and ensure that locally established wages, benefits and conditions are maintained. Taken together these statutory goals are aimed at creating and maintaining a level playing field for contractors to bid on Pennsylvania's taxpayer funded public works projects.

Pennsylvania's Prevailing Wage Act and regulations are often discussed, regularly misrepresented, frequently misunderstood and baselessly maligned but the fact is that when this Law is fairly, reasonably and consistently enforced, it serves Pennsylvania's taxpayers, contractors, public bodies and construction workers with distinction.

The first issue I would like to discuss is the subject matter of HB 1367 – statutorily requiring the application of a so-called "average wage" in determining Pennsylvania's Prevailing Wage rate for every skilled trade and craft classification performing work on no federal taxpayer financed public construction projects. The "average wage" in construction classifications, as presently computed by the Pennsylvania Department of Labor and Industry's Center for Workforce Information and Analysis,

creates wage and benefit rates attributable to work in Pennsylvania that is based upon data that is both under and over inclusive and is simply unusable and unrepresentative of the reality of our construction industry as it operates in our commonwealth. Using these wages as the prevailing wages is not the "fix-all" others have made it out to be.

This so called "average wage" includes wages from maintenance activities, residential work, work on mobile homes and offsite fabrication. It also incorporates the wages of helpers, learners, registered and unregistered apprentices, unskilled, untrained workers, who during the course of a single day, could be assigned tasks typically performed by a trained laborer, carpenter, electrician, plumber, pipe fitter, heavy equipment operator, painter, glazer, welder, roofer, paper hanger, dry wall finisher, soft flooring installer and who knows what else. Of great significance in that analysis is the fact that there is no fixed statutory methodology for making those "average wage" calculations, for determining precisely what information is to be included in and excluded from the calculation or any legally predictable, consistently required basis for the resultant calculations. They are, in a word, arbitrary and therefore unreliable as a measure of determining the Prevailing Wage and benefit rates in any particular Pennsylvania community for any identifiable trade or craft of construction worker.

Some of the additional specific methodological flaws in the present formulations of the Department of Labor and Industry's so called construction "average wage" include:

- The wage data used in these calculations is typically stale and not currently reflective of presently paid wages and benefits. It should not be relied upon and utilized because it is as much as 4 years old.
- Another glaring flaw is that only a limited number of employers participate in this survey each year; it limits the respondents to 8000 Pennsylvania companies. And by participating in this survey, these specific contractors are precluded from again participating for up to the next four years, regardless of any such participant's market share, the relative size of the jobs undertaken, the number of employees or the distribution of work among the various trades and crafts. And, non Pennsylvania domiciled contractors are completely prohibited from reporting regardless of how many workers they employ on Pennsylvania construction activities.
- A further example of the fundamental unworkability of this suggested approach is that a reporting contractor may have a hundred employees: 25 may have worked in Dauphin County in the past year, 25 may have worked in Chester County in the past year, 25 may have worked in Bucks County in the past year and the last 25 employees in Philadelphia County for the past year. If the business is located in Lancaster County all 100 employees' wages would be applied to the computation of the "average wage" in Lancaster County where not so much as one hour of the work was actually performed.

- Another issue is the failure to include any information for the calculation of employee benefits...a basic element of Prevailing Wage rate determination required as a matter of law and regulation pursuant to our Prevailing Wage Act.
- Finally, I am compelled to point out that this particular Pennsylvania Department of Labor and Industry data set is so unreliable that the US Department of Labor refuses to use its results in the compilation or calculation of the Federal Davis-Bacon prevailing wage rates.

Pennsylvania's current system of relying substantially upon collectively bargained agreements, subject of course to the Act's plainly articulated administrative challenge, to determine the locally Prevailing Wage rates in Pennsylvania communities has worked consistently well over the years in assuring the multiple intentions of the Act that I have previously discussed. Remember, the Prevailing Wage rate determined for any trade or craft is not some artificial number set by some government employee who knows nothing about the construction industry. The Prevailing Wage rates currently applied in Pennsylvania are most frequently based upon negotiated agreements between businesses, employers and contractor associations and union representatives selected by their members, who, working together seek to assure, through, among other things, realistic wage and benefit rates that are reflective of actual local market conditions., a continuous flow of jobs and work in the affected communities in which they actually operate. These are not fantasy rates or hypothetical aspirations - they are actual rates currently paid and verifiable by way of the mutually agreed upon enforcement mechanisms embodied and articulated in those same collectively bargained agreements.

And our Pennsylvania prevailing wage rates are calculated by both each trade or craft and by each county. Unlike all the possible alternatives and certainly unlike the proposed artificial and unreliable "average wage" these are not inflated or non-existent rates as some would have you believe but are, instead, actually what the private sector is already paying in each of our Pennsylvania communities for a high skilled, well trained, productive worker.

To demonstrate the point in this regard, there have been very few challenges or grievances to any Pennsylvania prevailing wage determination for any project, in any county for any trade or craft published by the Department of Labor and Industry for a building project, a highway project or a heavy and highway project in the last 8 and a half years.

And I want to point out as well that not one single contractor, union or non-union, nor one single contractor association, union or non-union, has provided the Department of Labor and Industry, Bureau of Labor Law Compliance, with any wage information or wage data in the past 8 1/2 years that even suggests that the Prevailing Wage rates determined by the Secretary on behalf of the Department were improper or inaccurate rates for any trade or craft in any county in Pennsylvania. While we should always seek to assure that our procedures are reflective of the market place, I respectfully submit that the Act as presently applied and administered in this regard has consistently yielded exactly that result.

Next I would like to discuss House Bill 1685. This bill would statutorily compel reliance upon the federal Occupational Outlook Handbook for craft and classification of construction workers on Pennsylvania taxpayer financed construction projects. By its own description "The Occupational Outlook Handbook"

is a recognized source of career information designed to provide valuable assistance to individuals making decisions and choices about their future work lives. It's for people looking for broad and general information on jobs. It was not designed to be used to determine classifications on a jobsite. And it is precisely based upon this plainly articulated and very narrowly focused purpose that the U.S. Department of Labor refuses to utilize this source as any aspect of the basis for Federal Prevailing Wage classification determinations.

The Occupational Outlook Handbook does not utilize any locally identifiable data but, instead, takes a broad national approach. If the Occupational Outlook Handbook were to be used, it would cause confusion among the Pennsylvania contractor community because Pennsylvania's Department of Labor and Industry is still required to determine wages, classifications and crafts on a purely local level in the county where the work is to be performed. The Occupational Outlook Handbook does not take into account the differences among cities, rural areas and various localities and completely ignores established local and regional custom and usage in the construction industry.

Moreover, the Occupational Outlook Handbook relies on information from types of projects not covered or contemplated by the Pennsylvania Prevailing Wage Act such as single family housing projects, projects under the threshold of 25,000 dollars, industrial work and offsite fabrication.

The Occupational Outlook Handbook does not account for the fact that workers are trained for the work they perform and that the Pennsylvania Department of Labor and Industry uses the Commonwealth's statutorily approved and accepted Apprenticeship Standards to help determine local custom and usage for each trade and craft in each Pennsylvania county.

I am also advised that this Committee is looking for ways to improve the Prevailing Wage Act. That is both admirable and commendable. In that regard I have two proposals.

- If the act were to be amended, it should be modified so as to assure that fines and penalties may be assessed with respect to every contractor who intentionally or unintentionally violates Pennsylvania's Prevailing Wage Act. Such fines and penalties should be returned to a designated fund at the Department of Labor and Industry to assure improved and consistent enforcement as well as ongoing guidance to both public bodies and contractors bidding on Pennsylvania public works projects.
- The current and very limited Maintenance Exception should be eliminated. Our Pennsylvania courts have spoken with clarity on this topic. By requiring uniform and consistent Prevailing Wage Act applicability, confusion and potential inconsistent applications would be eliminated, compliance with recent Pennsylvania court rulings would be simplified and our administrative framework would mirror the Federal Davis-Bacon Act and the vast majority of states that have Prevailing Wage laws.

In conclusion, the Pennsylvania Prevailing Wage Act in its present form has served Pennsylvania's taxpayers, contractors and construction workers well. It is endowed with the flexibility to assure consistent, predictable applications and realistic establishment of rates and occupational duties and

content. I hope you will agree with me that Pennsylvania's employers are entitled to a level playing field when bidding on taxpayer financed projects and that Pennsylvania's construction workers deserve family sustaining wages and family supporting benefits when they work on tax payer funded projects.

That dual goal based approach is not only consistent with the law and good public policy; it's the right thing to do for our businesses, our citizens, our communities and our taxpayers

I'd be happy to answer any questions you may have at this time.