

No. 33809 – *State ex rel. Tucker County Solid Waste Authority v. West Virginia Department of Labor, West Virginia State Building and Construction Trades Council, AFL-CIO*

Starcher, J., dissenting:

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

As the majority opinion makes clear, the Prevailing Wage Act, *W.Va. Code*, 21-5A-1, *et seq.*, contains confusing and contradictory language. In fact, the Act urgently needs legislative attention and repair to correct these defects. Until those corrections are made, government agencies and courts are obliged to do their best to interpret and apply the statute to the factual situation presented by a given case. *Cf. Hinchman v. Gillette*, 217 W.Va. 378, 386, 618 S.E.2d 387, 395 (2005); *Harmon v. Fayette County Bd. of Educ.*, 205 W.Va. 125, 136, 516 S.E.2d 748, 759 (1999); *Rogers v. City of South Charleston*, 163 W.Va. 285, 304, 256 S.E.2d 557, 568 (1979) (Neely, J., dissenting); *see generally* Guido Calabresi, “A Common Law for the Age of Statutes,” Harvard University Press 1982.

A court’s polar star in undertaking such a task must be to follow the legislative intent whenever possible. “In the interpretation of a statute, the legislative intention is the controlling factor[.]” *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 144, 107 S.E.2d 353, 358 (1959).

The legislative intent in enacting the Prevailing Wage Act could not be more clear. It is to require public authorities to pay “prevailing wages” when constructing public improvements, *whether the authority is using private contractors’ employees or persons directly employed by the public authority*. As *W.Va. Code*, 21-5A-2 [1961] states:

It is hereby declared to be the policy of the State of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in this State in which the construction is performed, shall be paid to *all* workmen *employed by or on behalf of any public authority* engaged in the construction of public improvements.

(Emphasis added).

The majority opinion, however, ignores the above-quoted legislative intent, and reads the statute as categorically excluding from its protection those workers who are constructing public improvements, and who are employed to do so by a public authority. The majority thus reaches a result that is directly contrary to the clearly stated legislative intent.

The majority opinion relies on the definition of “employee” at *W.Va. Code*, 21-5A-1(7) [1961]. But this definition can also be read as simply excluding from the Act’s protections all workers who are engaged in temporary repair jobs. Admittedly, this is a slightly strained reading; but a strained reading is preferable to disregarding the clearly-stated legislative intent.

It is notable that the Prevailing Wage Act contains other language evidencing a legislative intent that public employees who are constructing public improvements should be paid prevailing wages. *W.Va. Code*, 21-5A-8 [1961] says that “[t]he contractor and each subcontractor *or the officer of the public authority* in charge of the construction of a public improvement shall keep an accurate record showing the names and occupations of all such skilled laborers, workmen, and mechanics *employed by them*, in connection with the

construction on the public improvement. . . .” Clearly, in this instance the statute contemplates covering employees of the public authority.

I would adhere to the stated legislative intent: that workers constructing public improvements are entitled to prevailing wages, no matter who employs them.

If the Legislature wants to allow public employees to construct public improvements without being paid prevailing wages, then the Legislature can certainly say so. But they have not. Rather, the Legislature has made a commendable effort to help insure that *all* working people in West Virginia will earn a decent wage when constructing public improvements.

The majority opinion defies the legislative intent and denies that decent wage to an important class of workers, West Virginia’s public employees. I dissent to this improper, unfair, and mean-spirited result. I would deny the requested writ of prohibition.¹

¹I encourage the respondents to bring a declaratory judgment action on the issue of whether this project should have been bid out in the first place. That issue is not decided by this Court’s opinion and it needs to be resolved to avoid future similar situations.