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

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Albright, Justice, dissenting:

I dissent from the majority opinion in this case for the simple reason that it disregards the intent of the Legislature as to what public works projects are subject to a prevailing wage rate. The substantial loophole thereby created invites untoward mischief.

Unquestionably, the various provisions of the state's prevailing wage act (W.Va. Code §§ 21-5A-1 to -11)[1] under discussion are not the model of clarity. However, the precise policy statement set forth in West Virginia Code § 21-5A-2 is quite clear regarding the legislative intent for enacting the statutory scheme. This section plainly and concisely 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.

[1]The federal counterpart to the state's prevailing wage act is the Davis-Bacon Act. As explained by one authority, the Davis-Bacon Act "is designed to protect local wage standards . . . and to give local labor and the local contractor a fair opportunity to participate in federal building programs." 51B C.J.S. *Labor Relations* §1103 (2003).

The majority blindly adhered to Appellant's position – ignoring the expressed legislative intent underpinning this entire Article of the Code – in order to conclude that the Legislature really didn't mean that people employed *by* public authorities should ever be paid the prevailing wage rate unless a completely new construction project is undertaken.

In addition to offending the legislatively declared policy, the majority does not consider or appreciate the significance of the distinction between public improvements, including expansions, versus repairs. Such an oversight will no doubt promote spurious practices. Following the majority opinion, a public body can argue that any work done on an existing facility by people it hires as temporary workers is outside of the scope of the prevailing wage statute. As an example of how this promotes sham practices, consider summer hires at schools. The school district could hire school service personnel and pay them less than the prevailing wage rate during the summer for any work on an existing school whether that work entails painting classroom walls or building a new wing on a school. In the instant case, it was undisputed that the expansion of the landfill was an addition or improvement to an existing public project rather than simply a repair. Therefore, this project should have been subject to the provisions of the prevailing wage act. By essentially excluding expansion projects from the reach of the statute, the majority has succeeded in eviscerating the prevailing wage statute because expansion projects likely

comprise 75 - 80% of public works projects. Perhaps the majority opinion represents the most vigorous assault on this state's Davis-Bacon Act in nearly half a century.

The problem with the majority opinion is underlined by the inclusion in it of a new syllabus point eight, which reads as follows:

> Pursuant to W. Va. Code § 21-5A-1(7) (1961) (Repl. Vol. 2002), the terms "employee" and "workman," as used in the West Virginia Prevailing Wage Act, W. Va. Code § 21-5A-1, *et seq*., do not include workers who are (1) employed or hired by a public authority on a regular basis, (2) employed or hired by a public authority on a temporary basis, (3) employed or hired by a public authority to perform temporary repairs, or (4) employed or hired by a public authority to perform emergency repairs.

By failing to exclude work on public "improvements" from the sweeping language of the new syllabus point, the majority has added to the difficulty of interpreting and applying the prevailing wage statute, opening the possibility that certain public agencies will routinely seek to avoid the requirements of the statute by treating all persons engaged in the construction of such public "improvements" as "temporary employees."

This Court has repeatedly and frequently recognized that when faced with matters of statutory construction, courts are bound to first determine what the Legislature intended in enacting the statute because "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State*

Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975). The constitutional principle of separation of powers dictates that such deference be paid to legislative pronouncements. Despite this time-honored approach to statutory construction and deference to legislative prerogative, the majority has chosen in this case to supplant its policy for that expressed by the Legislature in a fashion which potentially renders the prevailing wage statute inapplicable to a large number of public works projects. I certainly cannot agree with this course and respectfully dissent.

I am authorized to state that Justice Starcher joins in this dissent.