TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 17
Number 1 *Supreme Court and Local Government Law: 1999-2000 Term & New York State Constitutional Decisions: 2001 Compilation*

Article 13

March 2016

Court of Appeals of New York, Brukham v. Giuliani

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Cover Page Footnote
17-1

PREVAILING WAGE PROVISION

N.Y. CONST. art. I, § 17:

Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work . . . shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

COURT OF APPEALS OF NEW YORK

Brukhman v. Giuliani[1]
(decided February 22, 2000)

Plaintiffs, public assistance recipients, who were required by the New York City Department of Social Services to participate in a Work Experience Program (hereinafter "WEP"), brought suit against the City of New York claiming that the prevailing wage provision of the New York State Constitution should be used to calculate their pay rate.[2] The Supreme Court of New York agreed with the plaintiffs, and held that the recipients were entitled to have their hours measured by applying a comparable rate of pay for individuals engaged in the same or similar positions by the same employer, or at a similar site.[3] The Appellate Division reversed the lower court, holding that the recipients did not fall within the ambit of the state constitution's prevailing wage provision.[4] The court also held that paying the minimum wage to WEP participants instead of the prevailing wage did not violate equal protection, because a rational distinction existed between the participants and civil service employees for which the statute was written.[5] The New York Court of Appeals affirmed the Appellate Division's

[1] 94 N.Y.2d 387, 727 N.E.2d 116 (2000).
[2] *Id.*
[3] Brukhman v. Giuliani, 174 Misc. 2d 26, 662 N.Y.S.2d 914 (N.Y. Sup. Ct. 1997).
[4] Brukhman v. Giuliani, 253 A.D.2d 653, 678 N.Y.S.2d 45 (1st Dep't 1998).
[5] *Id.*

holding.[6] The Court concluded that the prevailing wage provision of the New York State Constitution[7] did not apply to public assistance beneficiaries who are statutorily required to participate in a WEP as a condition of continued receipt of monetary grants.[8] Moreover, the Court determined that the computation system created by New York Social Services Law § 336-c[9] was constitutional as applied.[10]

Under welfare reform legislation, recipients of Aid to Dependent Children and Home relief were given work assignments to continually perform as a condition of receiving their money.[11] Placements ranged from not-for-profit organizations to New York City agencies.[12] Various jobs were offered through the program ranging from skilled electrical work to office clerical functions.[13]

In order to determine the hours that a WEP participant was required to work, the City divided the benefits that a participant received by the federal minimum wage or the prevailing wage.[14] The plaintiffs claimed that the manner in which the City calculated their hours was unconstitutional, arguing that they fell within the ambit of the prevailing wage provision of Article I, Section 17 of the New York State Constitution, therefore making the receipt of federal minimum wage for their work inadequate.[15]

Plaintiffs relied on New York Social Services Law Sections 164 and 336-c to support their argument.[16] However, the New

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[6] *Id.*

[7] N.Y. CONST. art. I, § 17 states:

> Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work . . . shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used. *Id.*

[8] *Brukhman*, 94 N.Y.2d 387, 727 N.E.2d 116, 705 N.Y.S.2d 558.

[9] N.Y. SOC. SERV. LAW § 336-c (Consol. 1997).

[10] *Brukhman*, 94 N.Y.2d 387, 727 N.E.2d 116, 705 N.Y.S.2d 558.

[11] *Id.* at 391, 727 N.E.2d at 120, 705 N.Y.S.2d at 562.

[12] *Id.*

[13] *Id.* at 392, 727 N.E.2d at 121, 705 N.Y.S.2d at 562.

[14] *Brukhman*, 94 N.Y.2d at 391, 727 N.E.2d at 120, 705 N.Y.S.2d at 562.

[15] *Id.*

[16] *Id.*

York State Legislature repealed Section 164[17] and amended Section 336-c.[18] Section 336-c of the Social Services Law currently states that the hours which are required of WEP participants to work are to be calculated by dividing the amount of benefits that the participants receive by the higher of the state or federal minimum wage.[19] The prevailing wage standard of the New York Constitution was not mentioned in the amendment.[20]

Plaintiffs' main argument was that they were engaged in 'public work' within the meaning of the constitutional provision on prevailing wages.[21] The defendants countered by stating that the prevailing wage provision as articulated in Article I, Section 17 of the New York State Constitution was intended to be very limited in scope, and therefore did not apply to the plaintiffs.[22] The New York State Court of Appeals agreed with the defendants, holding that the provision is very narrow and only covers employees of contractors and subcontractors engaged in the performance of public work.[23] Hence, the plaintiffs did not fit within the provision as it was intended by the legislature.[24]

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[17] N.Y. SOC. SERV. LAW. § 164 (Consol. 1992). Prior to its repeal, this law governed WEP participants who received Home Relief. In pertinent part it stated, "[t]he social services official of a county, city or town which is responsible for providing home relief shall provide for the establishment of public work projects for the assignment of employable persons in receipt of home relief. . . ." *See* Brukhman v. Giuliani, 174 Misc. 2d at 35, 662 N.Y.S.2d at 919.

[18] N.Y. SOC. SERV. LAW. § 336-c (Consol. 1997). Prior to its amendment, the law stated:

> A recipient may be assigned to participate in such work experience program only if: . . . (b) the number of hours that any such person may be required to work in any month does not exceed a number which equals the amount of assistance payable . . .divided by the higher of (1) the federal minimum wage, or (2) the state minimum wage, or (3) the rate of pay for persons employed in the same or similar occupations by the same employer at the same or equivalent site.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 394, 727 N.E.2d at 123, 705 N.Y.S.2d at 565.

[22] *Id.* at 394.

[23] *Id.* at 395, 727 N.E.2d at 124, 705 N.Y.S.2d at 566.

> The Record of the 1938 Constitutional Convention of the State of New York is replete with references that limit the breadth of the

In deciding the case at bar, the Court relied heavily upon it's previous decision in *Corrigan v. Joseph.*[25] In *Corrigan*, the Court of Appeals held that municipal employees in graded civil service positions could not use the prevailing-rate-of-wages formula to fix their wages.[26] In holding that the petitioners could not have invoked the prevailing wage provision of the New York State Constitution, the Court confirmed the limited scope of the provision.[27]

The constitutional provision only covered employees of "a contractor or subcontractor engaged in the performance of any public work."[28] The appellants in *Corrigan* conceded that they were not "in the employ of a 'contractor or subcontractor engaged in the performance of any public work'"; nevertheless, they contended that the constitutional provision covered them because of the mere fact that they were engaged in public work.[29] The Court concluded that the language of the provision was clear, and intended to cover only those "employed by a contractor or

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> prevailing wage provision. To be sure, the protection of a prevailing wage for 'public works contracts' represented 'one of the major achievements of organized labor which it desires reduced to a constitutional guarantee,' as well as ' the public policy of this State. *Id.*

[24] *Id.*

[25] 304 N.Y. 172, 106 N.E.2d 593 (1952).

[26] *Id.* The appellants were employees of the Board of Transportation of the City of New York. Their employment responsibilities included maintenance and repair of facilities of the municipally owned subway, surface and elevated railway lines. Prior to 1938, appellants were in ungraded civil service positions. Thereafter a resolution was passed, which reclassified their positions into graded service jobs. The Rapid Transit Railroad Service authorized the maximum and minimum compensation of the grades to be established by the Board of Transportation. An investigation into § 220 of the New York Labor Law ensued to determine if this practice was constitutional. *Id.*

[27] *Id.* at 179.

> That the intended scope of the provision was thus definitely limited is clearly indicated by the following statement made on the floor of the Constitutional Convention of 1938 by a delegate . . . 'This amendment reads as follows, . . . No laborer, workman or mechanic in the employ of a contractor or subcontractor. Now these words are vital. Unless the laborer, workman or mechanic is in the employ of a contractor or subcontractor it does not apply. *Id.*

[28] *Id.*

[29] *Id.*

subcontractor engaged in the performance of any public work."[30] Therefore, the fact that the graded civil service employees engaged solely in public work was insufficient to trigger the protections of the provision.[31]

In the instant case, the Court was not persuaded by the plaintiffs' argument that they should be considered "in the employ of" the different agencies where they were assigned.[32] The Court stated that a department of a municipality did not qualify as a "contractor or subcontractor" as defined under the prevailing wage provision.[33] Although a department entered into agreements with the municipality and provided positions for a WEP participant, it did not act as the municipality's contractor or subcontractor.[34]

In addition, the Court added that the WEP participants were not "in the employ of" any employer.[35] The participants were placed in their positions to fulfill a requirement necessary for the continuation of their welfare benefits. Moreover, since the positions that the WEP participants obtained were temporary,[36] and the agencies did not pay their salaries, they were not employed by their respective agencies.[37]

In concluding that the plaintiffs were not engaged in "public work," the Court of Appeals followed *Varsity Transit, Inc. v. Saporita*.[38] The *Varsity* court stated, "it is hornbook law that the Labor Law provision only applies to workers involved in the construction, replacement, maintenance and repair of 'public works' in a legally restricted sense of that term."[39] Although Article I, Section 17 of the New York State Constitution extended

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[30] *Id.*
[31] *Id.*
[32] *Brukhman*, 94 N.Y.2d at 395, 727 N.E.2d at 127, 705 N.Y.S.2d at 568.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 394, 727 N.E.2d at 124, 705 N.Y.S.2d at 565.
[36] *Id.* at 396, 727 N.E.2d at 126, 705 N.Y.S.2d at 567. "The program's manual states that 'participants are expected to seek paid employment' participants are 'assigned' to various 'worksite[s] where they provide valuable service' until they are able 'to secure employment in the regular economy.'" *Id.*
[37] *Brukhman*, 94 N.Y.2d at 396, 727 N.E.2d at 126, 705 N.Y.S.2d at 567 (paying a salary is one of the main requirements that triggers the prevailing wage provision).
[38] 71 A.D.2d 643, N.Y.S.2d 667 (1st Dep't 1979).
[39] *Id.* at 644, N.Y.S.2d at 668.

the protection of Section 220 of the Labor Law to contractors and subcontractors engaged in "public works," it was not intended to expand the definition of "public works."[40]

In the Matter of Twin State CCS Corporation. v. Roberts[41] clarified how to determine what constitutes "public work." The Court stated that the focus should be on "the purpose or function of the project."[42] In *Twin*, the Court found that the installation of a telecommunications system into a public building, which would be used by public employees, satisfied the definition of "public work."[43] Moreover, the installation required a degree of "construction-like" labor which was precisely what the prevailing wage provision was intended to cover.[44]

In the instant case, the plaintiffs attempted to convince the Court that the term "public work," as used in the New York State Constitution, should be given an elastic interpretation.[45] The Court was not persuaded, and referred to the debate record from the New York State Constitutional Convention to clarify the meaning of "public work."[46] The Court found it to be inconsistent that the work which the WEP participants engaged in was "public work," because the participants were not employees of the agencies where they were placed.[47]

With regard to plaintiffs' equal protection claim, they argued that New York's Social Security Law 336-c discriminated against them as a class because it authorized that the manner in which they should have been paid was the higher of the federal or state minimum wage.[48] The Court concluded that a rational distinction existed between public employees selected from civil service lists, and WEP participants who received their assignments

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[40] *Id.*
[41] 72 N.Y.2d 897, 528 N.E.2d 1219, 532 N.Y.S.2d 746 (1988).
[42] *Id.* at 899, 528 N.E.2d at 1220, 532 N.Y.S.2d at 748.
[43] *Id.*
[44] *Id.*
[45] *Brukhman*, 94 N.Y.2d at 393, 727 N.E.2d at 733, 705 N.Y.S.2d at 563.
[46] *Id.* "The expectations of 'public work' . . . are specifically and intentionally related to construction projects, rather than general services: 'Constructing a public building in the State of New York.'" *Id.*
[47] *Id.*
[48] *Id.* at 392, 727 N.E.2d at 732, 705 N.Y.S. at 562.

as a condition to their continued receipt of financial assistance. The Court did not provide further analysis.[49]

The Federal Constitution does not contain a provisional counterpart to the New York State Constitution regarding prevailing wages. Finally, the New York Court of Appeals did not address the plaintiffs' equal protection claim, since the equal protection clauses of the Federal[50] and New York State Constitutions[51] contain similar language and provide similar constitutional guarantees.

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[49] *Id.*

[50] U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

[51] N.Y. CONST. art. 1 § 11. This section provides: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by firm, corporation, or institution, or by the state or any agency or subdivision of the state." *Id.*

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