

the existence of the genuine issue of material fact, or to demonstrate that the legal issue should not be determined in favor of the movant."

III. UNDISPUTED FACTS

1. On December 9, 2005, Missoula County issued a Request for Proposal ("RFP") seeking a qualifying project to anchor the Missoula County Development Park, also known as the Missoula County Technology District. DIRECTV submitted a proposal in response to the RFP on December 20, 2005.

2. On December 23, 2005, Missoula County passed and adopted a Resolution approving the DIRECTV project.

3. On June 30, 2006, DIRECTV entered into an agreement with the State of Montana and a separate Development Agreement with Missoula County. The agreement included a provision that "DIRECTV agrees to pay prevailing wages as established by the Department of Labor and Industry, State of Montana for certain construction jobs, unless a different rate is required by a specific funding source." The agreement did **not** include a provision stating for each job classification the standard prevailing wage rate, including fringe benefits, that the contractors and employers shall pay during construction of the project.

4. During construction of the DIRECTV project, Composite Technologies ("Composite") was involved as a labor subcontractor for the construction of the facility. Composite contacted WFI and requested referrals for temporary employees for specific job descriptions. WFI referred Cuda. Cuda worked on the DIRECTV project through Composite from April 26, 2006 to July 14, 2006.

5. On October 26, 2007, Cuda filed a claim with the Montana Department of Labor and Industry Wage and Hour Unit ("Department"), pursuant to Montana Code Annotated §39-3-201 et seq. Cuda alleged he was owed \$2,630.30 for work performed during the period of April 26, 2006 to July 14, 2006 on construction of the DIRECTV building in Missoula, Montana.

6. On October 27, 2006, a request for a response to the claim, including a request for certified copies of the payroll records, was sent to WFI. WFI responded on November 2, 2006, with accompanying documents and a statement indicating that Cuda may not have been paid the correct prevailing wage rate for work performed on the project, and that WFI was working with James Rickard, a compliance investigator with the Montana Labor-Management alliance (MLMA) to correct any underpayment.

7. Rickard informed the Department that the claim had been resolved, saying in a letter received February 22, 2007: "...Composite has made voluntary back pays to all affected employees. . . ."

8. On February 20, 2007, Cuda informed the Department that "...only the wages have been paid and there has been no determination of penalties paid."

9. On April 2, 2007, Department Compliance Specialist Pam McDaniel issued a Determination and Dismissal, and on April 3, 2007, McDaniel issued an Amended Determination and Dismissal correcting the statement of appeal rights.

10. On April 20, 2007, Cuda requested a redetermination, again confirming that the correct wages were paid on January 17, 2007.

11. On April 26, 2007, Department Compliance Specialist Randy Siemers issued a Redetermination and Dismissal affirming that because the required prevailing wage information was not included in the contract, the employer was relieved of the obligation to pay the prevailing rate and was not subject to penalties.

12. On May 11, 2007, the Department received a request from Cuda for a hearing in this matter.

13. After mediation proved unsuccessful, the matter was transferred to the Hearings Bureau on May 21, 2007.

IV. DISCUSSION¹

The issue to be resolved in this matter is whether WFI owes Cuda the \$25.00 per day penalty provided for in Mont. Code Ann. §18-2-407 when a contractor, subcontractor or employer pays less than the prevailing wage. Mont. Code Ann. §18-2-403 requires all contractors under a public works contract to pay the standard prevailing wage. Except as provided in §18-2-403, a contractor, subcontractor or employer who pays workers or employees less than the standard prevailing wage must forfeit \$25 a day for each day that the employee was underpaid. Mont. Code Ann. § 18-2-407. The exception in § 18-2-403(9) provides that "[f]ailure to include the provisions required by 18-2-422 in a public works contract relieves the contractor from the contractor's obligation to pay the standard prevailing wage rate and places the obligation on the public contracting agency."

In this matter it is undisputed that the contract between Missoula County and DIRECTV was a public works contract as that term is defined in Mont. Code Ann. § 18-2-401(9). The contract between Missoula County and DIRECTV involved the construction of a facility with a cost of up to \$12,400,000.00. See Document 125. It is also undisputed that the contract between Missoula County and DIRECTV also included a provision requiring DIRECTV to "pay prevailing wage as established by the Department of Labor and Industry, for

¹Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

certain construction jobs, unless a different rate is required by a specific funding source.” Document 124. Missing from this contract provision was a specific statement of the prevailing wage for each job classification. *Id.* Accordingly, DIRECTV and its subcontractors under the contract were relieved from paying the prevailing wage. Nonetheless, Cuda has stated that he has been paid the proper prevailing wage, albeit some time after the work was performed.

Cuda argues that because WFI knew or should have known and paid the proper prevailing wage and should be penalized as a result. Neither the applicable statutes nor the supporting case law supports his argument.

The Montana Supreme Court has held that even if the prevailing wage rates were available in Helena (as Cuda alleges here), their mere existence is not binding on a company when they are not contained in the bid specification and contract. *Thompkins v. Fuller* (1981), 205 Mont. 168, 176-177, 667 P.2d 944, 949 (citing Section 18-2-422, MCA). Thus, whether WFI knew of the proper prevailing wage or could have obtained it from the Department of Labor and Industry does not impose on it the obligation to pay the prevailing wage. The statute is silent as to whether, once released from the obligation to pay the prevailing wage, the contractor or employer is still liable for the \$25 per day penalty. It seems incongruous to relieve employers from the obligation to pay the prevailing wage but to penalize them nonetheless.

This incongruity has been resolved by the Montana Supreme Court in a case where it determined who pays the penalty, the public contracting agency or the private contractor/employer, when the required prevailing wage provisions are not included in the contract or bid specifications. *Hunter v. City of Bozeman* (1985), 216 Mont. 251, 256-257, 700 P.2d 184,188. In that case, the Court held that Mont. Code Ann. §18-2-403 imposes penalties on the public contracting agency, not the private contractor/employer, when the required prevailing wage provisions are not included in the contract or bid specifications. Applying the holding in *Hunter* to this case makes it clear that WFI is not liable for penalties under the undisputed facts of this case because it is not the public contracting agency. Rather, Missoula County is the public contracting agency.

With regard to Cuda’s response to WFI’s motion for summary judgment, the hearing officer finds that his alleged disputed facts are either immaterial or are mere assertions unsupported by any evidence or sworn statements.

V. REQUEST FOR ATTORNEYS’ FEES AND COSTS

Montana law allows the awarding of court costs and attorneys' fees in the following situation:

- (1) Whenever it is necessary for the employee to enter or maintain a suit at law for the recovery or collection of wages due as provided for by this part, a resulting judgment must include a reasonable attorney's fee in favor of the successful party, to be taxed as part of the costs in the case.

...
Mont. Code Ann. § 39-3-214

However, the Montana Supreme Court has held that “an administrative hearing is not a "suit at law" and that a "determination" made by the Commissioner is not a "judgment." *Chagnon v. Hardy Constr. Co.* 208 Mont. 420, 680 P.2D 932 (1984) (citing *Thornton v. Commissioner of Dep't of Labor & Indus.*, 190 Mont. 442, 448, 621 P.2d 1062,1066 (Mont. 1980) Therefore, the *Chagnon* Court held that “it would be improper to award fees to any party for services rendered at the administrative agency level.” *Id.* Consequently, it would be improper to award attorneys fees and cost in this matter

VI. CONCLUSIONS OF LAW

1. Ross Cuda was properly paid the prevailing wage by WFI.
2. DIRECTV's contract with Missoula County did not comply with Mont Code Ann. §18-2-422 because it failed to include a provision stating the prevailing wage rate for each job classification.
3. WFI as a subcontractor is not obligated to pay Cuda the prevailing wage to or to forfeit \$25 per day to him. Mont. Code Ann. §18-2-407.
4. Due to Missoula County's failure to list the prevailing wage in its contract with DIRECTV, the employer here, WFI, is not required to pay a penalty Mont. Code Ann. §18-2-403.
5. There are no genuine issues of material fact and the respondent is entitled to summary judgment as a matter of law.
6. The respondent is not entitled to attorneys' fees or costs.

VII. ORDER

The respondent's motion for summary judgment is granted and this case is dismissed.

DATED this 30th day of AUGUST, 2007.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

Cuda FAD dsp