

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2017-00827

██████████ KELLY

vs.

HOWLAND DISPOSAL SERVICE, INC. & another<sup>1</sup>  
(and a companion case<sup>2</sup>)

**MEMORANDUM OF DECISION AND ORDER ON PARTIES'  
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This matter involves an employment dispute in which the plaintiffs, ██████████ Kelly and ██████████ LaFleur, allege their employer, Howland Disposal Service, Inc. ("Howland Disposal"), deprived them of wages.<sup>3</sup> The defendants moved for summary judgment, arguing they properly paid the plaintiffs' wages. The plaintiffs filed a Cross-Motion for Summary Judgment regarding their claim alleging violation of the Massachusetts Prevailing Wage Statute. For the following reasons, the defendant's Motion for Summary Judgment is **DENIED** and the plaintiffs' Cross-Motion for Summary Judgment is **ALLOWED**.

**BACKGROUND**

The following facts are drawn from the parties' joint statement of undisputed facts and supporting exhibits.

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<sup>1</sup> ██████████ G. Howland

<sup>2</sup> ██████████ LaFleur *vs.* Howland Disposal Service, Inc. and ██████████ Howland, Plymouth Superior Court, Civil Action No. 2017-00829

<sup>3</sup> The plaintiffs each filed a Complaint, which were then consolidated into one lawsuit. They both assert claims for nonpayment of wages in violation of G. L. c. 149, § 148 (Massachusetts Wage Act), nonpayment of wages in violation of G. L. c. 151, § 1A, 1B (Massachusetts Overtime Act), and nonpayment of wages in violation of G. L. c. 149, § 27F (Massachusetts Prevailing Wages Statute).

The Town of Yarmouth (“Yarmouth”) issued a Request for Proposals (“RFP”) on January 18, 2012 to find an entity to operate and maintain the Yarmouth Solid Waste Transfer Station (“the Transfer Station”). Among other objectives, the RFP stated Yarmouth sought to enter into an arrangement to “[r]eliev[e] the Town of Yarmouth of the administrative burden and expense of operating the Transfer Station with Town employees.” The RFP also included a Scope of Services section, whereby the successful bidder would be required provide all labor to operate the Transfer Station, sort and handle municipal waste, and perform housekeeping and maintenance functions of the Transfer Station and associated equipment.

SEMASS Partnership/Covanta (“SEMASS”) responded to the RFP and negotiated with Yarmouth concerning the Transfer Station. On or about February 3, 2014, Yarmouth entered into an agreement (“the Operating Agreement”) with SEMASS, whereby SEMASS was responsible for operating and maintaining the Transfer Station. The Scope of Services in the Operating Agreement largely mirrored the Scope of Services set forth in the RFP. Additionally, the Operating Agreement provided that the “Operator must comply with the applicable requirements of Chapter 149 of the General Laws of Massachusetts being the so-called Massachusetts Prevailing Wage Law.” The Operating Agreement further provided that the operator had the exclusive right to occupy, operate, and use the Transfer Station and the operator was permitted to accept material from any sources, including waste materials from persons or entities other than Yarmouth or Yarmouth residents. Additionally, the Operating Agreement conferred the operator with the right to all revenue generated from any waste or recyclable material delivered to the Transfer Station.

During this same general timeframe, SEMASS entered into a separate agreement (“the Subcontract”) with Howland Disposal to operate the Transfer Station on its behalf for a one-year

renewable term. Per the Subcontract, the Scope of Services was substantially similar to the Scope of Services articulated in the RFP and the Operating Agreement. The Subcontract was renewed on or about February 23, 2015 for an additional year. Howland Disposal hired and/or assigned necessary personnel to work at the Transfer Station, including hiring and/or assigning the plaintiffs as equipment operators.

██████████ Howland, president of Howland Disposal, contacted the Massachusetts Department of Labor Standards (“DLS”) in September of 2016 to inquire whether Howland Disposal was required to pay the Massachusetts Prevailing Wage to employees working at the Transfer Station. Attorney John H. Ronan, General Counsel for DLS, responded by email and stated “the Prevailing Wage does not apply.” In a subsequent e-mail exchange in November of 2017, Attorney Ronan stated that SEMASS leased the Transfer Station, was free to operate it in the way it desired, and the Prevailing Wage Statute did not apply. The defendants did not pay the plaintiffs in accordance with all aspects of the Prevailing Wage Statute for their work at the Transfer Station.

## **DISCUSSION**

### **I. Summary Judgment Standard of Review**

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Comm’r of Corrections*, 390 Mass. 419, 422 (1983); *Community Nat’l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16–17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that

negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of the case at trial. *Flesner v. Technical Comm. Corp.*, 410 Mass. 805, 808–809 (1991).

## II. Defendants' Motion for Summary Judgment

The defendants move for summary judgment on all Counts of the plaintiffs' Complaints, arguing that all of their claims must fail because defendants did not violate the Prevailing Wage Statute, G. L. c. 149, § 27F. The Prevailing Wage Statute provides in part

**No agreement of lease, rental or other arrangement, and no order or requisition under which a truck or any automotive or other vehicle or equipment is to be engaged in public works by the commonwealth or by a county, city, town or district, shall be entered into or given by any public official or public body unless said agreement, order or requisition contains a stipulation requiring prescribed rates of wages, as determined by the commissioner, to be paid to the operators of said trucks, vehicles or equipment.** Any such agreement, order or requisition which does not contain said stipulation shall be invalid, and no payment shall be made thereunder. Said rates of wages shall be requested of said commissioner by said public official or public body, and shall be furnished by the commissioner in a schedule containing the classifications of jobs, and the rate of wages to be paid for each job. Said rates of wages shall include payments to health and welfare plans, or, if no such plan is in effect between employers and employees, the amount of such payments shall be paid directly to said operators.

Whoever pays less than said rates of wages, including payments to health and welfare funds, or the equivalent in wages, on said works, and whoever accepts for his own use, or for the use of any other person, as a rebate, gratuity or in any other guise, any part or portion of said wages or health and welfare funds, shall have violated this section and shall be punished or shall be subject to a civil citation or order as provided in section 27C.

G. L. c. 149, § 27F (emphasis added).

The parties do not dispute that the plaintiffs operated vehicles and equipment, but they dispute whether the Transfer Station was a public works site and whether the work at the Transfer Station was engaged by a municipality within the meaning of the Prevailing Wage Statute. As to this first disputed issue, the Court finds that the plaintiffs performed a public

works function through their employment at the Transfer Station. In *Perlera v. Vining Disposal Services, Inc.*, 47 Mass. App. Ct. 491 (1999), the Massachusetts Appeals Court noted “the meaning of the phrase [public works] is somewhat elastic, expanding or contracting with the statutory context.” *Id.* at 493 – 494. The *Perlera* Court held that the broad definition of “public works” within the Prevailing Wage Statute included trash collection and disposal. While the plaintiffs were not travelling in vehicles to collect waste materials in the same manner as the employees in *Perlera*, their employment was a public work as they maintained and processed municipal refuse. The nature of the underlying service, maintaining and processing municipal refuse, remains the same in the instant case and in *Perlera*.

Per the RFP and Operating Agreement, workers at the Transfer Station were tasked with loading, processing, and separating waste materials and recycling, together with general maintenance and repair of the facility. Yarmouth employees previously performed the same work, but in an effort to reduce some of the town’s administrative burden, Yarmouth sought through the RFP and eventual Operating Agreement to delegate this task to the operator of the Transfer Station. Where Howland Disposal employees functioned as stand-ins for municipal employees, their employment at the Transfer Station was a public works role within the meaning of the Prevailing Wage Statute.

The public works nature of the Transfer Station maintenance and operations was not transformed simply because it was operated by a subcontractor rather than a municipality or a direct contractor. The mere fact that the plaintiffs were working for subcontractors, rather than directly for Yarmouth, does not render their employment outside the scope of public works. See *Commonwealth v. W. Barrington Co., Inc.*, 5 Mass. App. Ct. 416 (1977) (“It is common knowledge that all the types of work just referred to [i.e., street sprinkling, brush removal, tree

removal] can be, and often are, performed by private contractors using their own employees and equipment rather than by the public labor force using publicly owned equipment.”). Such determination is buttressed by the fact the Subcontract included a substantially similar Scope of Services to the terms articulated in the RFP, which demonstrates Yarmouth specifically sought an entity which could take over its prior municipal role in operating and maintaining the Transfer Station.

Notwithstanding its status as a subcontractor, Howland was engaged, on Yarmouth’s behalf, within the meaning of the Prevailing Wages Statute. The *Perlera* court noted the statute addresses operation of vehicles and equipment, and “the focus of the quoted language is the utilization of vehicles and equipment on public works at the behest of the government, whether directly or indirectly.” *Perlera*, 47 Mass. App. Ct. at 498. Yarmouth’s RFP specifically sought entities to operate the Transfer Station for the benefit of the town. The mere fact that SEMASS elected to subcontract the operations to Howland Disposal does not diminish the intent of the RFP and subsequent Operating Agreement. Yarmouth and SEMASS entered into an arrangement analogous to those in *W. Barrington* and *Perlera* where contracting entities were directly engaged by a municipality to perform public functions, and the deciding courts found the Prevailing Wage Statute applied. While Howland Disposal was one step removed from Yarmouth, the tangential engagement by Yarmouth is similar to those in *W. Barrington* and *Perlera* because the work was being performed “at the behest of the government.” Therefore, the Prevailing Wage Statute similarly applies to the arrangement here.

The defendants argue the Operating Agreement was merely a lease whereby SEMASS/Howland Disposal were granted exclusive use of the Transfer Station, and as part of the deal, Yarmouth and Barnstable residents were permitted to dump their waste for free. The

Court rejects this argument. Per the Operating Agreement, Yarmouth expected the operator of the Transfer Station to perform several public functions, as discussed above. There was certainly a service element of the Operating Agreement, by which Yarmouth and its residents received the benefit and service of the operator processing their waste and recyclables. Contrary to the defendants' assertions, Yarmouth was not simply leasing a facility to SEMASS to do with it as SEMASS pleased. Rather, there was a specific Scope of Services that SEMASS, or any subcontracted operator, was expected to perform for Yarmouth's benefit. Accordingly, there was an agreement between Yarmouth and the Transfer Station's operator to provide services to Yarmouth and its residents. Howland Disposal's exclusive use of the Transfer Station does not transform the service arrangement into a mere landlord/tenant relationship.<sup>4</sup>

The defendants largely rely upon the Ronan correspondences, arguing that DLS's position should determine this dispute. Generally, a court will "grant substantial deference to an interpretation of a statute by the administrative agency charged with its administration." *Massachusetts Hosp. Ass'n v. Department of Med. Sec.*, 412 Mass. 340, 345-346 (1992). A court is not bound by a DLS determination, however, and "where the agency's interpretation is 'contrary to plain language of the statute and its underlying purpose,' no deference is warranted." *Swift v. Autozone, Inc.*, 441 Mass. 443, 450 (2004), citing *Massachusetts Hosp. Ass'n*, 412 Mass. at 346. Thus, where the Court finds the plaintiffs were entitled to receive the applicable prevailing wage as discussed above, it rejects the DLS determination in this matter.

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<sup>4</sup> In making this assessment, the Court acknowledges the defendants' arguments concerning the language of the Operating Agreement, which states that the operator has the exclusive right to occupy, operate, and use the Transfer Station and the right to accept materials from entities other than Yarmouth or Yarmouth residents. The Court also acknowledges that the Operating Agreement allowed the operator to generate revenue from any waste or recyclable material delivered to the Transfer Station. None of these factors, however, disturb the Operating Agreement's provisions which required the Transfer Station's operators to perform a municipal service to benefit Yarmouth and its residents.

Finally, the Court is mindful that “[G. L. c. 149,] Section 27F is primarily a remedial statute.” *Perlera*, 47 Mass. App. Ct. at 499. A remedial statute is afforded “a broad interpretation, viewed in light of its purpose.” *Case of Sylvia*, 46 Mass. App. Ct. 679, 685 (1999). “The prevailing wage law endeavors to achieve parity between the wages of workers engaged in public construction projects and workers in the rest of the construction industry.” *Mullally v. Waste Mgt. of Mass.*, 452 Mass. 526, 532 (2008). Thus, the facts of this case must be viewed through the remedial lens of the Prevailing Wage Statute, which focuses upon parity of wages.

The defendants argue *Perlera* and *W. Barrington* are distinguishable because the municipality in those cases hired contractors directly and there is subcontract here. This argument ignores the intent of the Prevailing Wage Statute, which was designed to establish an equal payment scheme for public and private worksites. The defendants should not be permitted to circumvent the requirements of the Prevailing Wage Statute simply because they are a step removed from the entity that contracted with Yarmouth. Permitting entities to avoid paying such wages by entering into subcontract agreements flies in the face of the Prevailing Wage Statute, which was drafted with parity in mind. The plaintiffs were performing the same type of work as the Yarmouth employees who previously worked at the Transfer Station, and their wages should reflect such parity.

### **III. Plaintiffs’ Cross-Motion for Partial Summary Judgment**

The plaintiffs oppose the defendants’ Motion for Summary Judgment and filed their own Cross-Motion for Partial Summary judgment as to Count III, which asserts a violation of the Prevailing Wage Statute. They do not move for summary judgment on their remaining claims. As discussed above, the plaintiffs were entitled to pay in accordance with the Prevailing Wage

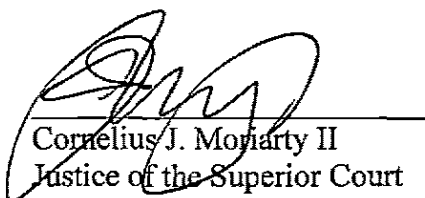


Statute. The summary judgment record reveals that the plaintiffs were not paid in accordance with all aspects of the Prevailing Wage Statute for their work at the Transfer Station. Thus, the plaintiff's Motion for Summary Judgment as to Count III of their Complaints is allowed.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that the defendant's Motion for Summary Judgment be **DENIED** and the plaintiff's Cross-Motion for Summary Judgment be **ALLOWED**. Judgement shall entered for the plaintiffs on Count III of their Complaints.

March 6, 2019



Cornelius J. Moriarty II  
Justice of the Superior Court

3/7/19  
CC: RM, JLF  
& MFD