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# Delegation of Power to Fix Prevailing Wages With Collective Bargaining Agreement as the Standard

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to allow the donor to dispose of his property as he desires. In addition, it guards against fraud by requiring that the donor's intention be shown with reasonable certainty. It is honest and to the point, in that it does not deal in the confusing *inter vivos* language so often employed by most courts. It provides the individual with a relatively simple and safe method of making a death-bed donation, and above all it allows him to die with a reasonable hope that his last wishes will be respected.

JAMES V MARCUM

DELEGATION OF POWER TO FIX PREVAILING WAGES  
WITH COLLECTIVE BARGAINING AGREEMENT AS  
THE STANDARD

Fear that the economic power of the State as employer and contractor might be utilized to undermine hard-fought-for wage scales has caused labor leaders to press for legislation to prevent such a threat. In response to this influence the Kentucky legislature has enacted a statute which regulates the wages of workmen engaged in construction work of a public nature in Kentucky. This so-called "prevailing wage" statute is as follows:

"Before advertising for bids or entering into any contract for construction of public works, every public authority shall ascertain the prevailing rates of wages of laborers, workmen, mechanics, helpers, assistants and apprentices for the class of work called for in the construction of such public works in the locality where the work is to be performed. This schedule of wages shall be attached to and made a part of the specifications for the work and shall be printed on the bidding blanks and made a part of every contract for the construction of public works."<sup>1</sup>

"The wages paid for a legal day's work to laborers, workmen, mechanics, helpers, assistants and apprentices upon public works shall not be less than the prevailing wages paid in the same trade or occupation in the locality. The public authority shall establish prevailing wages at the same rate that prevails in the locality under collective agreements or understandings between bona fide organizations of labor and their employers at the date the contract for public works is made if there are such agreements or understandings in the locality applying to a sufficient number of employees to furnish a reasonable basis for considering those rates to be the prevailing rates in the locality."<sup>2</sup>

In the recent case of *Baughn v. Gorrell & Riley* these two sections of this act were held constitutional by the Kentucky Court of Appeals in the face of an attack that the act made an unlawful delegation of legislative power to a private interest to regulate or fix wages.<sup>3</sup> This note will make an examination of this decision and analogous cases in the light of a general consideration of the problem of delegation of legislative power in an effort to determine the soundness of this holding of the Kentucky Court.

<sup>1</sup> KY. REV. STAT. sec. 337.510 (1948).

<sup>2</sup> KY. REV. STAT. sec. 337.520 (1948).

<sup>3</sup> *Baughn v. Gorrell & Riley*, 311 Ky. 537, 224 S.W. 2d 436 (1949).

In the *Baughn* case suit was filed against a county school board and a contractor engaged in the reconstruction of a school building, with the primary objectives of cancelling the contract between the board and the contractor and forcing compliance with the above statute in ascertaining and fixing the prevailing rates of wages for the work to be performed. The controversy arose through the failure of the board to comply with the "prevailing wage" statute and the contractor's payment to certain classes of labor less than the prevailing wages for similar work in the city of Owensboro, located about fourteen miles from the site of the building. The lower court upheld the contention of the contractor that the statute was an unconstitutional delegation of the exercise of the legislative function to private interests, *i.e.*, labor unions. On appeal there was no disagreement with the basic rule of law advanced that the delegation of legislative power to private interests would result in the unconstitutionality of the statute. The division of minds in the Court arose in the interpretation of the statute. A majority of the Court in reversing held that this was not a delegation of legislative power to regulate wages to a labor union and in upholding the constitutionality of the statute stated their conclusions as follows:

"The statute involved fixes the legislative policy. It establishes a standard, which we cannot say is unreasonable, to guide the public authorities. The public body is vested with a discretion in determining the reasonable prevailing wage which must be included, if any must be included, in the contract. These three factors being present, we find the Legislature has not delegated the exercise of its legislative function to private persons or interests."<sup>4</sup>

The dissent agreed that the legislature could fix or delegate to a public body the power to determine the prevailing wages for public works but argued that the statute passed such determination to a private group leaving the public authorities without the right or power to decide their reasonableness.

*Wagner v. City of Milwaukee*,<sup>5</sup> cited as authority by the appellee, concerned substantially identical facts except that the prevailing wage provision appeared in an ordinance rather than in a statute. The ordinance provided that:

" all skilled laborers employed on any work done by or for the city or for any contractor or subcontractor performing work for the city shall be paid a sum which shall not be less than the prevailing wage in this city for such skilled labor; said prevailing wage to be determined by the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor, which prevailing wage shall be the minimum price paid to all skilled laborers hereafter provided such prevailing wage shall first be determined and approved by a majority vote of the members of the common council."<sup>6</sup>

The ordinance and a resolution adopted thereunder were held to be void as a surrender by the common council of the exercise of their judgment and an agreement to be bound by the wage scale determined by the labor unions if they chose to act on the subject. The end result of the ordinance vesting the determination of such a legislative function in a private group was held to be abdica-

<sup>4</sup> *Id.* at 542, 224 S.W. 2d at 439.

<sup>5</sup> 177 Wis. 410, 188 N.W. 487 (1922).

<sup>6</sup> *Ibid.*

tion, and not exercise, of a discretion belonging exclusively to the common council. The dissenting opinion was unable to find an authorized delegation of legislative power. On the contrary, it stated that this was nothing more than a delegation of power to find a fact, which was not a legislative function.

“The legislative declaration is that skilled laborers shall be paid not less than the prevailing wage. That is the legislative declaration, and as legislation it is full and complete. Manifestly the determination of what is the prevailing wage at any given time involves the ascertainment of a fact. The common council cannot by its fiat establish the prevailing wage. That is established by various industrial and economic forces. The ascertainment of a fact is not a legislative function.”<sup>7</sup>

“If there is any delegation of power it is the power to ascertain facts, to wit, the prevailing wage. This is not legislative, and it may be delegated. It is not uncommon for statutes to declare the legislative will in general terms under circumstances making the ascertainment of facts necessary in order to determine where and when the law is operative. In such cases it is held competent for the Legislature to prescribe how, when, and by whom such facts shall be determined.”<sup>8</sup>

The Kentucky Court, after stating that it did not agree with the reasoning of the majority opinion in the *Wagner* case, pointed out the following grounds for distinguishing the two cases: (1) At the time union rates were not generally accepted as a prevailing wage as they are today, and (2) the construction of the controlling legislation. In disposing of the *Wagner* case, the Court merely mentioned these two factors without providing a detailed explanation of either; but it is clear that what the Court did was to take this opportunity to construe the Kentucky statute in the light of our more recent understanding of the administrative process and flatly reject the *Wagner* case.

Two possible approaches or viewpoints which may be taken toward the constitutionality of such an attempted delegation of authority are illustrated by the *Baughn* and *Wagner* decisions. First, from the decision in the *Baughn* case and the dissent of the *Wagner* case comes the idea that such an attempted delegation is constitutional because it results simply in the delegation of authority to an administrative board to find a fact under the specified standard to carry out the legislative policy declared in the act. Second, from the dissent in the *Baughn* case and the decision in the *Wagner* case comes the view that such an attempted delegation is unconstitutional as in effect it is an unlawful abdication of legislative power to fix wages to a private group.

A consideration of the background of wage regulation as to public employees will aid in an understanding of the problem. The legislature may validly fix minimum wages to be paid laborers on public works or it may properly grant to public authorities the discretionary power of fixing prevailing wage rates. Minimum wage statutes applicable to public works have been generally sustained on the theory that the state as employer having full control of the terms and conditions under which it will contract may, through its legislature, and within constitutional limitations, provide the wage which shall be paid to employees.<sup>9</sup> There has been

<sup>7</sup> *Id.* at — 188 N.W. at 490.

<sup>8</sup> *Id.* at — 188 N.W. at 491.

<sup>9</sup> See 50 A. L. R. 1480 (n. 27); 81 A. L. R. 349 (1932).

a greater controversy over the establishment of minimum wages to be paid by contractors on public works, although the tendency is to sustain this power of the state.<sup>10</sup> In support of legislation governing the minimum wage to be paid by a contractor the majority view holds that the legislature, in regulating the wages of these employees on public works, is exercising the employer's power to prescribe the terms under which the employees will be hired.<sup>11</sup> At one time this power was generally denied. It was argued that the invalidity resulted from the expenditure of public funds for other than public purposes,<sup>12</sup> the abridgement of the freedom to contract,<sup>13</sup> the granting of special privileges to individuals or classes,<sup>14</sup> the taking of property without due process of law,<sup>15</sup> and the giving away of public funds indirectly through prescribed terms less favorable than those resulting from competition.<sup>16</sup> Most of the later decisions recognize the power to fix wage scales arguing from the basis that the employer can control the contractual terms. The right or power of a public authority to fix a minimum wage to be paid by contractors on public works involves consideration of the delegated legislative authority to act and the possibility of violation of constitutional guaranties. The later view is that the fixing of wage scales is a legitimate field for the exercise of legislative power.

Considering the *Baughn* case, in the light of the general authority on the delegation of legislative authority to determine prevailing wages for public works, the problem is resolved into whether or not there is a sufficient declaration of policy and standard in the statute to control the acts of the public body. Necessarily the validity of such delegation depends on the language of the particular grant. It is believed that a sufficient policy and standard were set out in the Kentucky "prevailing wage" statute to sustain the majority finding. A California court, after upholding the power of the legislature to let public authorities fix minimum wages for public works, considered the terms of a California statute as to sufficiency of standard, and concluded that the term "general prevailing rate of per diem wages," within the act requiring it as the minimum wage for workmen on public works, was not too uncertain a standard. The phrase "work of a similar nature," within the same statute, was held to be sufficiently definite as was "locality in which work is to be performed."<sup>17</sup> The Kentucky statute is even more definite as to standard since it prescribes that wage which at the present time will generally be found to be prevailing, *i.e.*, union rates.

It is permissible for the legislature to delegate the power to determine facts or conditions upon which the operation of a statute is contingent. The legislature may also delegate to a public authority, the power to determine the existence of certain facts, and to carry out the statute according to those facts. This is not invalid as a delegation of the legislative function.<sup>18</sup> If the action of the official or agency authorized to act does not in effect decide what the law shall be, but only

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<sup>10</sup> *Campbell v. City of N. Y.*, 244 N. Y. 317, 155 N.E. 628 (1927); *Malette v. City of Spokane*, 77 Wash. 205, 137 p. 496 (1913).

<sup>11</sup> *Malette v. Spokane*, 77 Wash. 205, 137 p. 496 (1913); 81 A. L. R. 349 (1932).

<sup>12</sup> *See Reid v. Smith*, 375 Ill. 147, 30 N.E. 2d 908 (1940).

<sup>13</sup> *State ex rel Bramley v. Norton*, 7 Ohio Dec. N. P. 354 (1897).

<sup>14</sup> *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N.E. 895 (1903).

<sup>15</sup> *Wright v. Hoctor*, 95 Neb. 342, 145 N.W. 704 (1914).

<sup>16</sup> *See note 12 supra.*

<sup>17</sup> *Metropolitan Water District v. Whitsett*, 215 Cal. 400, 10 P. 2d 751 (1932).

<sup>18</sup> 11 AM. JUR. 926.

determines within the prescribed limits some fact upon which the law by its own terms operates, such action is administrative and not legislative in nature. A broad general rule is that the legislature may delegate any non-legislative power which it may itself exercise.<sup>20</sup> Mere matters of detail within the policy and standards established by the statute are basically ministerial rather than legislative. Where the act sufficiently sets out the legislative purpose and leaves the administrative details to another agency, it is not subject to the objection that it delegates legislative power. The mere fact that the subordinate body is granted discretion in the exercise of the power conferred by statute does not necessarily mean that the discretion amounts to the use of legislative power, so as to render the delegation invalid.<sup>21</sup>

Kentucky's "prevailing wage" statute delegated to a public body the authority to find a fact and that fact was to be used in the manner prescribed by statute. The only discretion allowed was as to the reasonableness in considering the collective agreement rate as prevalent. This discretion is perhaps necessary to keep the standard from being arbitrary and unreasonable. The legislature granted the public authority no power in making the law. The most that can be said of the function of the public authority is that it had authority to determine the fact which the legislation applies. There is no legislative discretion in the finding of an economic fact such as a prevailing wage under a policy and standard. The function granted to the public authority could and should be considered the delegation of power to find an administrative fact and no more.

The legislature cannot delegate the exercise of its legislative functions to private persons or interests.<sup>22</sup> At the present time legislatures, to a great extent, confine their actions to formulating general policies, leaving to other agencies the task of promulgating the details necessary to effectuate the legislative intent. So long as the policy is laid down and the standard is established by statute, no unconstitutional delegation of legislative power is involved in leaving to named instrumentalities the making of subordinate rules within the prescribed limits and the finding of facts to which the declared policy is applicable. Where the legislation does not limit the activities of private interests to being heard, but allows them to initiate, approve or determine substance, a question arises as to the validity of such delegation. Similarly the question is involved in attempted delegations directly to private persons or groups. The problem is deciding what amounts to a delegation of legislative power.

One type of statute allows an agency to formulate the rules and regulations involved under a prescribed policy and standard but permits the participation of private groups in this rule-making process. Another attempts a direct delegation of the rule-making function to the private interests. As to the former, the cases have distinguished between those statutes which grant private groups power to initiate that which is to be promulgated by the public authority and those calling for approval by private interests of the rules formulated before it is issued. While statutes depending upon the initiative of private groups for the action of the public authority have been invalidated as improper delegation,<sup>23</sup> those requiring

<sup>20</sup> *Steele v. Louisville & N. R. R.*, 154 Tenn. 208, 285 S.W. 582 (1926); *Minneapolis, St. P. & S. Ste. M. Ry. v. Railroad Commission*, 136 Wis. 146, 116 N.W. 905 (1908).

<sup>21</sup> *Livesay v. De Armond*, 131 Or. 563, 284 P. 166 (1930).

<sup>22</sup> 11 AM. JUR. 931, 932.

<sup>23</sup> *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935); *Chester C. Fosgate Co. v. Kirkland*, 19 F. Supp. 152 (D.C. Fla. 1937).

approval of private interests before the statute becomes effective have been held valid.<sup>23</sup> In both instances the private interests affected by the possible action can prevent it.

The question of the constitutionality of a statute allowing a public body to promulgate regulations after the participation of private groups in the legislative process is an issue independent from that of the failure to provide sufficient standards of guidance to validate delegated authority. Legislation may not be subject to the latter objection, and be invalid as to the former, or it may be invalid as to both. An implication from *Schechter Poultry Corp. v. United States* might be that where the public authority has made adequate standards, correction cannot come from the action of private interests, because such delegation to the private groups would in itself be improper.<sup>24</sup>

Statutes which place the power of initiation of rules pertaining to wages, hours, etc., in private groups and limit the action of the public body to mere approval or disapproval, have been held to be improper delegations.<sup>25</sup> Where the statute permits the appropriate body to act on its own initiative under proper standards, it is not, an improper delegation to private interests merely because it allows private groups to initiate such rules and regulations.<sup>26</sup>

Statutes empowering a public authority to effectuate a legislative policy on wages, hours or prices, under proper statutory standards, is not invalid as delegation of legislative power to private interests because by its terms such legislation is to take effect only on the approval of certain private groups. *Currin v. Wallace*<sup>27</sup> upheld the validity of such a statute and distinguished *Carter v. Carter Coal Co.*<sup>28</sup> upon the ground that this was not a situation where a majority could make the law and subject a minority to its provisions.

A legislative enactment directly conferring the exercise of the legislative function upon private individuals or interests is considered an invalid delegation of legislative authority. The provisions of the Federal Bituminous Conservation Act of 1935 which authorized a certain percentage of the producers and miners to fix maximum hours and minimum wages for particular districts were held to be invalid delegations of legislative power to those groups in the *Carter Coal* case.<sup>29</sup> In effect, the act made acceptance of the standards compulsory by a tax provision containing a rebate clause and a provision that the United States, and contractors with the United States, should not buy bituminous coal from producers not complying with the prescribed code.

Considering the statute in the *Baughn* case, in the light of the power of a private interest to initiate or approve legislation or a direct power to legislate, there is nothing invalid in the statute. The legislature in enacting the statute has relied on their power to fix a minimum wage for the employees on public works or to delegate that power to a public body. They recognized the need for a legislative policy and standard in order for the delegation to a subordinate body to be valid. In selecting the standard they gave due regard to the active economic and

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<sup>23</sup> *Brock v. Superior Ct.*, 9 Cal. 2d 291, 71 P. 2d 209 (1937).

<sup>24</sup> 295 U.S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570 (1935).

<sup>25</sup> *Hollingsworth v. State Board of Barber Examiners*, 217 Ind. 373, 28 N.E. 2d 64 (1940); *Revue v. Trade Commission*, — Utah — 192 P. 2d 563 (1948).

<sup>26</sup> *Arnold v. Board of Barber Examiners*, 45 N. M. 57, 109 P. 2d 779 (1941).

<sup>27</sup> 306 U.S. 1, 59 Sup. Ct. 379, 83 L. Ed. 441 (1939).

<sup>28</sup> 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160 (1936).

<sup>29</sup> *Ibid.*

industrial forces that, today, determine to a large extent the prevailing wage in almost every locality. Today the union wage comes close to being the prevailing wage. Recognition is also given to the fact that the standard cannot be arbitrary and unreasonable. This is found in the discretion granted to public authority to determine whether the collective agreement covers a sufficient number of workmen to make its scale the prevailing wage. The public authority is the body empowered to ascertain the prevailing wage existing in the locality. Under this statute there is no grant of legislative authority to a labor union to declare what the "prevailing wage" shall be. There is not even a remote suggestion that the establishment of the wage requires union approval of the public body's finding. There is not a direct delegation to the labor union in the sense that the decision as to the wage rate is surrendered to it for formulation or promulgation. The authority to find a definite fact is delegated to the public authority. Such a statute exerts little or no influence on the collective bargaining agreement between the employer and the union. Economic factors and forces, social policy, and sheer power determine the wage rate in the collective agreement. This results in a readjustment of those same forces in relation to the agreement. The wage rate in the collective agreement was adopted as the standard by which the ultimate authority was to be guided.

The delegation of power to the public authority to find the prevailing wage, with the collective agreement rate as a standard, is not an invalid grant of legislative power to labor unions. It is believed that such a contention will fall before the arguments of the *Baughn* case and the dissent in the *Wagner* case. The Court found sufficient legislative policy and standard to support a delegation of authority to a public body. The duty was imposed to determine and fix the local prevailing wage. The standard is set as the wage agreement between labor unions and employers at the date of the contract. The discretion placed in the public body is the power to determine whether or not the collective agreement covers a sufficient number of employers for the rate therein to be considered a "prevailing wage." The ultimate decision as to the prevailing rate resides in the public authority. As stated before the legislature may prescribe the wage rate for public works. A discretionary power may properly be granted to public authorities to fix a prevailing wage for public works. If this discretionary power may be delegated, it must follow that authority to find a prevailing wage, according to a reasonable and specific standard, subject to the discretion of the public body as to the reasonableness of its existence, may be granted to a public body. The Court should not invalidate a standard merely because it doubts the soundness of the legislative policy.<sup>30</sup>

The legislature has sufficiently declared the policy and standard under which the public authority is to find a fact. The legislature could find this fact for it is merely ministerial. The legislature can delegate a non-legislative function which itself could have exercised. A prevailing wage is an economic fact. It is a fact that rises from the interplay of economic forces and not merely from the demand of the legislature. Thus, at any given time it is necessary to determine as a fact what the prevailing wage is. No legislative discretion is involved in the finding of a mere fact, for the ascertainment of a fact is not a legislative function. In 1922 when the *Wagner* case was decided, it is doubtful if a union rate was a common wage. Today, it is possible and quite probable that the union scale would be a fair criteria for determining a local prevailing wage. Naturally, matters of public

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<sup>30</sup> *Craig v. O'Rear*, 199 Ky. 553, 251 S.W. 828 (1923).



policy enter into the adoption of such a standard. Perhaps, the benefit of well paid labor justifies employment on terms less favorable than those resulting from competition. This is the decision of the legislature as shown by its action in adopting such a standard. The only function delegated by the legislature was the finding of an economic fact which the statute applies automatically.

DEMPSEY A. COX

### FINANCIAL INABILITY AS A DEFENSE UNDER THE CORPORATE OPPORTUNITY DOCTRINE

It is a well recognized concept in the law of corporations that a director stands in a fiduciary relation to his corporation and has the duty to act in the utmost good faith to promote the corporation's interest and business. A problem of some difficulty which has emerged out of this duty of loyalty on the part of directors is the extent to which a director may take for himself a particular business opportunity which falls within the general scope of the corporation's business. In determining whether a director has the right to usurp a business opportunity the test has been said to be whether there is a specific duty to act or contract in regard to the particular matter as a representative of the corporation.<sup>1</sup> An important factor in determining this duty is the financial ability of the corporation to enter into the particular business transaction.

The important part financial inability may play in this respect is illustrated in the recent Kentucky case of *Urban J. Alexander Co. v. Trinkle*.<sup>2</sup> The Alexander Co. was organized in 1932 to engage in the investment and brokerage business. In 1943 Trinkle, the manager of the company secured an option in his own name to sell all the capital stock of Independent Ice and Coal Co. Trinkle was unable to obtain a purchaser and the option lapsed. A year later, Trinkle entered into a partnership with Hofgesang to purchase the stock, Trinkle obtained another option and sold the stock to the partnership. On the sale of the Independent Ice and Coal Co. the partnership realized a profit of \$80,000.00. The corporation brought suit to recover one-half of the profits realized by Trinkle less commissions.

In his defense, Trinkle contended that because of the legal incapacity and financial inability of the corporation to take advantage of the opportunity, it was no longer a corporate opportunity. The charter imposed a debt limit of \$250,000.00 and the corporation was practically without assets. Its credit position was such that it could not have financed the undertaking without exceeding the debt limit. The corporation had a \$5,000.00 capital outlay and the transaction required \$300,000.00. The debt limit imposed by the charter was a legal barrier to any transaction that would violate it. If Trinkle, as an officer, had exceeded the debt limit, he would have been liable for any loss sustained.<sup>3</sup> Furthermore, no bank

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<sup>1</sup> 3 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, c-11, sec. 862 (Perm. Ed. 1947).

*Id.* sec. 862.1.

<sup>2</sup> 311 Ky. 635, 224 S.W. 2d 923 (1949).

<sup>3</sup> Federal Chemical Co. v. Paddock 264 Ky. 338, 94 S.W. 2d 645 (1936); Randolph v. Ballard County Bank, 142 Ky. 145, 134 S.W. 165 (1911); see Phoenix Third National Bank v. Martin, 219 Ky. 579, 293 S.W. 1064 (1927).