

**VOLUME NO. 36**

**Opinion No. 90**

**DEPARTMENT OF LABOR AND INDUSTRY — Authority to issue  
subpoenas; Sections 41-701, 41-1604, Revised Codes of Montana 1947.**

**HELD:** The department of labor and industry is not authorized by section 41-1605, R.C.M. 1947, or section 41-701, R.C.M. 1947, to issue subpoenas duces tecum, compelling a public works contractor to transmit to your office time sheets and payroll records of all employees engaged in its public works contracts including subcontractors, to assist you in determining if a violation of section 41-701, R.C.M. 1947, has occurred.

June 23, 1976

Mr. Tony Softich, Administrator  
Labor Standards Division  
Department of Labor and Industry  
1331 Helena Avenue  
Helena, MT 59601

Dear Mr. Softich:

You have requested my opinion regarding the Montana Prevailing Wage Law, amended by the Forty-Fourth Legislative Assembly by Chapter 531, Laws of 1975, and effective May 1, 1975, on the following question:

Is the Department of Labor and Industry authorized by section 41-701, R.C.M.1947, and section 41-1605, R.C.M. 1947, to issue subpoenas duces tecum, compelling a public works contractor to transmit to your offices time sheets and payroll records of all employees engaged in its public works contracts, including subcontractors, to assist you in determining if a violation of section 41-701 has occurred?

The practical advantages of compelling the production of such records as may be necessary and proper for the purposes of determining whether any person has violated any provision of the Prevailing Wage Law is self-evident.

But it is well settled that the power of subpoena which formerly was exclusively a judicial power, may be granted to nonjudicial agencies or officials by statute. The power and the extent of this power is determined by the express statutory grant. **Commonwealth v. Orsini**, 368 Pa. 259, 81 A.2d 891, 892-3 (1951); **Donatelli Building Co. v. Cranston Loan Co.**, 140 A.2d 705, 707 (R.I. 1958); **Andrews v. Nevada State Board of Cosmetology**, 467 P.2d 96, 97 (Nev. 1970); Cf. 1 Davis, **Administrative Law Treatise**, §3.05, p. 171 et seq. (1958) and Supplement thereto, p. 91. Thus, in the absence of a specific grant of authority, the agency has no power to issue any type of subpoena. **Andrews v. Nevada State Bd. of Cosmetology**, *supra*, 467 P. 2d at 97.

A careful scrutiny of the statutory authorizations relating to section 41-701 is therefore in order.

Section 41-1605 provides that:

[t]he department of labor and industry shall be charged with the duty of enforcing all the laws of Montana relating to . . . all state labor laws enacted by legislation.

Subdivision (2) of section 41-1605 further provides:

[i]n discharging the duties imposed upon the department of labor and industry, the commissioner of labor and industry...may administer oaths, examine witnesses under oath, take depositions or cause same to be taken, deputize any citizen eighteen (18) years of age or older to serve subpoenas upon witnesses, **and issue subpoenas for the attendance of witnesses before him in the same manner as for attendance before district courts...** (Emphasis supplied)

Among the state labor laws is the prevailing wage provision found in section 41-701. Section 41-701 provides that in all public works contracts the contractor must pay the "standard prevailing rate of wages including fringe benefits for health and welfare and pension contributions, and travel allowance provisions, applicable to the county or locality in which the work is being performed."

Prior to the recent amendments to section 41-701, the Commissioner of Labor and Industry was directed only to:

keep and maintain copies of collective bargaining agreements and other information from which rates and jurisdictional areas applicable to public works contracts under this act may be ascertained...

Section 41-703 provided a penalty for violating the act, providing that the public contracting agency:

shall retain one thousand dollars (\$1,000.00) of the contract price as liquidated damages for the violation of the terms of the contract...

The recent amendments to section 41-701, enacted by the Forty-fourth Legislative Assembly [Chapter 531, Laws of 1975], substantially changed the act. The "prevailing rate of wages" as defined, remained the same, but the obligations of the commissioner of labor were altered. Subdivision (1) now provides:

The Montana commissioner of labor may determine the standard prevailing rate of wages in the county or locality in which the contract is to be performed. The commissioner shall undertake to keep and maintain copies of collective bargaining agreements and other information from which rates and jurisdictional areas applicable to public works contracts under this act may be ascertained.

In addition, subdivision (3) provides that the contractor, subcontractor, or employer who violates the act:

shall forfeit to the contracting agency the sum of twenty-five dollars (\$25.00) a day for each worker so underpaid....

Subdivision (3) further authorizes the commissioner of labor to maintain actions in district court to recover these penalties:

[w]henver it shall appear to the...Montana commissioner of labor that there are insufficient moneys due to the contractor...under the terms of the contract to cover such penalties...

Thus the commissioner of labor's duties as they pertain to the prevailing rate of wage provisions, first, to "determine the standard prevailing rate of

wages” and, second, to maintain in district court an action to recover penalties “whenever it shall appear...that there are insufficient moneys due to the contractor...” to cover such penalties.

The commissioner of labor is not authorized to issue subpoenas by the terms of section 41-701. Further, reference to section 41-1605 will not provide a basis to hold that commensurate with the duties, imposed by section 41-701 he has the power to issue subpoenas duces tecum. Subpart 2 thereof only provides that in discharging the duties imposed upon the commissioner of labor by any state labor law he may:

issue subpoenas for the attendance of witnesses before him in the same manner as for attendance before district courts.

A subpoena duces tecum is significantly different than a subpoena demanding that a witness appear in that it constitutes a demand for the production of records.

**THEREFORE, IT IS MY OPINION:**

The department of labor and industry is not authorized by section 41-1605, R.C.M. 1947, or section 41-701, R.C.M. 1947, to issue subpoenas duces tecum, compelling a public works contractor to transmit to your office time sheets and payroll records of all employees engaged in its public works contracts including subcontractors, to assist you in determining if a violation of section 41-701, R.C.M. 1947, has occurred.

Very truly yours,

**ROBERT L. WOODAHL**  
Attorney General