

Opinion No. 63-160

December 3, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: R. M. Montoya Deputy Labor Commissioner State Labor and Industrial Commission
Santa Fe, New Mexico

QUESTION

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1. What possible legal action can be instituted against persons or organizations who submit false or fraudulent certified payrolls to the Labor Commissioner for his use in determining minimum wage rates on public works, as authorized by § 6-6-6, N.M.S.A., 1953 Compilation (P.S.), of the Public Works Minimum Wage Act?
2. If any action can be maintained, then what agency is responsible for prosecution?

CONCLUSIONS

1. No legal action may be instituted unless the wage rate data is submitted by sworn affidavit, under oath, and if said affidavit is found false or fraudulent, then criminal charges of perjury or false swearing might be initiated.
2. The Labor Commission by and through the assistance of the District Attorney in the locality where the alleged offense has occurred is responsible for prosecution.

OPINION

{*377} ANALYSIS

We have previously explained in the meetings with the various organizations that the submission of wage rate data by the organizations and persons listed under § 6-6-6, supra, is voluntary, and the Public Works Minimum Wage Act does not provide for any civil or criminal penalty if the reports which are submitted are false. Under these circumstances, the Labor Commissioner can only refuse to consider fraudulent wage rate data and exclude such data from the computation of the minimum wage rate. Since the organizations, (both labor and management) attending the meetings were not satisfied with the limited action by the Commissioner, stated above, it was suggested that if the wage rate data were submitted by affidavit, a criminal penalty might possibly be invoked in the event an affidavit were found to be false or fraudulent. The Commissioner is impliedly authorized by law to enact a regulation requiring the submission of wage-rate data by affidavit under the Act, and it is the understanding of

this office that said regulation has been drawn with the approval of all the interested organizations and is currently awaiting the approval of the Labor Commission.

In our subsequent research on the matter, it is evident that the submission of fraudulent wage-rate data by affidavit could possibly be the basis of a charge of **perjury** under our new Criminal Code. Under § 40A-25-1 of the Code (N.M.S.A., 1953 Compilation (P.S.)) perjury includes the "making of a false statement under oath or affirmation, material to the issue or matter involved in the course of any administrative or other official proceeding, knowing such statement to be untrue." It is a fourth degree felony which is punishable by "imprisonment in the penitentiary for the term of not less than one (1) year nor more than five (5) years" or by a "fine of not more than five thousand (\$ 5,000), or both imprisonment and fine in the discretion of the judge." Section 40A-29-3 (D), N.M.S.A., 1953 Compilation (P.S.).

Furthermore, at common law, "false swearing" is a separate and indictable offense, "consisting in the swearing of what the deponent knows to be untrue, corruptly and intentionally, in a manner that is morally and willfully false as distinguished from being merely mistaken." 70 **C.J.S.** 459. Our 1963 Criminal Code "recognizes" the common law "where no provision of the code is applicable," § 40A-1-3, N.M.S.A., 1953 Compilation (P.S.).

And if a district court found that the submission of false or fraudulent affidavits, pursuant to the Public Works Minimum Wage Act was not an indictable offense of Perjury under the Criminal Code, (because the false statement was not made in the "course of an administrative or other official proceeding,") the defendant could subsequently be charged with the common law crime of false swearing, it is to be regarded as a petty misdemeanor under § 40A-29-11 (C) and upon conviction the Defendant would be subject to imprisonment "in the county jail for a definite term not to exceed six (6) months, or to the payment of a fine of not more than one hundred dollars (\$ 100) or to both such imprisonment and fine in the discretion of the judge, § 40A-29-4 (B), N.M.S.A., 1953 Compilation (P.S.).

In response to your second question, it would appear that the Labor Commission would be responsible for the prosecution of any person or organization charged with the crimes explained above.

In conclusion, please be advised that any prosecution contemplated by the Commission should be referred to the District Attorney in the locality where the alleged false swearing or perjury has occurred.

By: George Richard Schmitt

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