IN THE SUPREME COURT OF THE STATE OF NEVADA

SHEET METAL WORKERS UNION, LOCAL 26,
Appellant,
vs.
TERRY JOHNSON, IN HIS CAPACITY AS NEVADA STATE LABOR COMMISSIONER; KOVACH, INC.; AND THE OFFICE OF THE LABOR COMMISSIONER,
Respondents.

No. 44623

FILED

NOV 20 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order denying a petition for judicial review of the Labor Commissioner's decision in a prevailing wages matter. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

Respondent Kovach, Inc., is a subcontractor whose employees installed a sheet metal roof on a high school building in Lyon County. Appellant Sheet Metal Workers Union, Local 26 (Union) filed a formal complaint with the respondent Labor Commissioner, alleging that Kovach had violated the prevailing wage laws. The Union claimed that a February 2000 letter issued by the Labor Commissioner required all workers involved in the installation of a sheet metal roof to be paid as sheet metal workers. In response, Kovach argued it was only required to pay the sheet metal workers wage to those workers who actively installed the sheet metal components, while paying the employees involved in waterproofing and other preparation tasks the lower prevailing wages for carpenters and roofers.

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After an administrative hearing, the Labor Commissioner denied the Union's complaint. The Labor Commissioner acknowledged its February 2000 letter but determined that subsequent worker definitions published on its website in September 2000 superseded the letter. The September 2000 website listing described a roofer as one who "covers roofs with roofing materials other than sheet metal" and a sheet metal worker as one who "installs . . . sheet metal roofs." No definition of "install" was given for sheet metal workers that indicated prep work necessary to install a sheet metal roof would no longer be included in the sheet metal worker prevailing rate.

The Labor Commissioner applied the definitions from September 2000 to the tasks performed by Kovach's employees and determined that Kovach had appropriately allocated the labor between the sheet metal worker, roofer, and carpenter classifications. The district court denied the Union's petition for judicial review of the Commissioner's decision. This appeal followed.

A court reviewing the final decision of an administrative agency may set aside the decision, in whole or in part, if the decision was (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence in the record; or (6) arbitrary or capricious or characterized by an abuse of discretion.[1] "The standard of deference accorded to an administrative decision on review turns largely on whether the issues raised by that decision are more appropriately

[1]NRS 233B.135(3).

deemed questions of law or of fact."[2] We review the issue of whether the Labor Commissioner engaged in ad hoc rulemaking de novo because here it concerns statutory construction, which is a pure legal question.[3]

On appeal, the Union argues that the Labor Commissioner violated Nevada's Administrative Procedure Act (APA) by engaging in ad hoc rulemaking when he altered the scope and definition of the sheet metal worker classification. We agree.

The APA sets forth minimum procedural requirements, such as notice and a hearing, when agencies engage in rulemaking activity.[4] "The notice and hearing requirements are not mere technicalities; they are essential to the adoption of valid rules and regulations."[5] An agency's failure to follow the APA's notice and hearing requirements will render

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[2]Southern Nevada Op. Eng'rs v. Labor Comm'r, 121 Nev. ___, ___, 119 P.3d 720, 724 (2005).

[3]See id.

[4]Specifically, NRS 233B.060(1) provides that "before adopting, amending or repealing any permanent or temporary regulation, the agency must give at least 30 days' notice" of its intent. Further, NRS 233B.061 states, "[a]ll interested persons" must be given an opportunity to submit data, views or arguments, and the agency must put on a pre-hearing workshop, set the time and place of the public hearing, solicit written comments, and make available to the public minutes of all proceedings.

[5]State Farm Mut. v. Comm'r of Ins., 114 Nev. 535, 543, 958 P.2d 733, 738 (1998).

the decision invalid.[6] Whether a hearing is required hinges upon whether the work classification was a regulation and thus governed by the APA.

NRS 233B.038(1) defines a "regulation" as:

> (a) An agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency;
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> (b) A proposed regulation;
>
> (c) The amendment or repeal of a prior regulation; and
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> (d) The general application by an agency of a written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest.

A variety of administrative decisions have been classified as rulemaking and thus subject to the APA. In Public Service Commission v. Southwest Gas, this court ruled that an administrative decision redefining the manner in which utilities calculate consumers' bills amounted to rulemaking.[7] Although the agency's decision was directed only at one gas company, the court ruled that it had general applicability affecting other gas utilities and their customers and implicated major policy concerns.[8] The Commission's acts went far beyond merely applying the law to the

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[6]State of Nevada v. City of Fallon, 100 Nev. 509, 517, 685 P.2d 1385, 1390-91 (1984) (stating that the agency must "accord interested parties affected by [its] action a reasonable opportunity to be heard").

[7]99 Nev. 268, 273, 662 P.2d 624, 627 (1983).

[8]Id.

facts before them, but affected the rights of many interested parties who were not given the chance to participate in the proceedings.

Likewise, in Coury v. Whittlesea-Bell, the court ruled that an administrative decision establishing a new class of "stretch" limousines constituted rulemaking subject to the APA.[9] As in Southwest Gas, the court held that the creation and definition of a new class of limousines effectively set a standard applicable to all businesses in Nevada offering limousine service both now and in the future. Such a sweeping change affecting the rights of a large class of businessmen and consumers must follow APA processes.[10]

In other cases, this court has held that APA requirements applied to decisions adopting a new definition of trolley,[11] adopting a new method of calculating property tax,[12] and modifying the definition of a chargeable accident for the purposes of an insurance rate hike.[13] The common theme in all these cases is that the agency decision must have established a new rule of general applicability affecting the rights of persons not involved in the proceeding.

The most recent case of relevance is Southern Nevada Operating Engineers v. Labor Commissioner, in which the engineers'

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[9]102 Nev. 302, 305, 721 P.2d 375, 377 (1986).

[10]Id. at 306, 721 P.2d at 377-78.

[11]Las Vegas Transit v. Las Vegas Strip Trolley, 105 Nev. 575, 577-78, 780 P.2d 1145, 1146-47 (1989).

[12]State Bd. Equal. v. Sierra Pac. Power, 97 Nev. 461, 465, 634 P.2d 461, 463 (1981).

[13]State Farm Mut., 114 Nev. at 543-44, 958 P.2d at 738-39.

union alleged that a contractor employed on a public works project failed to pay a soils tester the proper prevailing wage.[14] The Labor Commissioner determined that the worker, as he described his job duties, was not a "workman" within the meaning of NRS 338.040 and thus was exempt from the prevailing wage requirement. As in the instant case, the Labor Commissioner in Southern Nevada Operating Engineers admitted that his office had transmitted conflicting memoranda addressing the issue of applying the prevailing wage to this class of workers. The union contended on appeal that the Commissioner's determination excluding soil testers from the prevailing wage list constituted "ad hoc rulemaking" in violation of the APA.[15]

In holding the Commissioner's decision invalid, we stated,

> [T]he Labor Commissioner's decision was more closely akin to the amendment of a regulation under NRS 233B.038(1)(a) because the public works prevailing wages list effectuates the prevailing wage laws and policy by establishing the rates that apply to certain detailed classifications of workers. Therefore, the Labor Commissioner's decision in concluding that the classification of "field soils tester" was improperly included on the list of prevailing wage "workmen" classification, effectively altered a prior regulation.[16]

We held that "[w]hen acting in an adjudicative capacity, the Labor Commissioner may not determine whether an entire job classification

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[14]Southern Nevada Op. Eng'rs, 121 Nev. ___, 119 P.3d 720.

[15]Id. at ___, 119 P.3d at 724.

[16]Id. at ___, 119 P.3d at 725.

should exist."[17] We went on to state, "[T]he Labor Commissioner's decision here affects a broad group of employees and their employers by eliminating the requirement that several engineering companies pay the prevailing wage to soils testers under their employ."[18] We concluded that the Labor Commissioner's decision was subject to the APA, but in making it he had failed to follow the APA notice and hearing requirements, rendering his decision invalid.[19]

Here, the Labor Commissioner's decision narrowed the "sheet metal workers" classification, thereby redefining it and rendering the Labor Commissioner's decision more akin to the amendment of a regulation. The workers who were engaged in the preparatory work of installing sheet metal roofs had previously been classified as "sheet metal workers" in the February 3, 2000 letter. Subsequently, in this case, the Labor Commissioner decided that the September 2000 job descriptions superseded the February 2000 letter and more narrowly defined the term "sheet metal worker" by determining that the term "install" no longer applied to preparatory work. This redefinition of the sheet metal worker classification created a general standard affecting the entire sheet metal industry—as such, the Labor Commissioner effectively engaged in ad hoc rulemaking in this case. Because the Labor Commissioner's decision was a statement of general applicability effectuating his office's policy rather than a mere adjudicatory decision in a contested case, we conclude that

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[17]Id. at ___, 119 P.3d at 725-26.

[18]Id. at ___, 119 P.3d at 726.

[19]Id.

the Labor Commissioner's decision to exclude the relevant workers from the definition of "sheet metal workers" is subject to the APA's rulemaking requirements of notice and a hearing. Because these were not provided by the Labor Commissioner, we further conclude that his decision is invalid.

Even if the APA did not apply, as contended by the respondents, the Union should still have been provided an opportunity to challenge the Labor Commissioner's action under the prevailing wage laws, specifically NRS 338.030.

The Labor Commissioner is charged with implementing the prevailing wage statutes and may promulgate regulations to that effect.[20] After notice to the public, the Commissioner sets the prevailing county rate by conferring with local contractors for each "craft or type of work"[21] performed by "classes of mechanics and workmen."[22] NRS 338.030(3) provides that the Commissioner is required to conduct a hearing where he is in doubt as to the prevailing wage or receives an objection claiming the published wage is off by more than 50 cents per hour.[23] Contrary to the

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[20]NRS 338.012.

[21]NRS 338.030(1). The Commissioner may hold only one hearing per year on the prevailing wage of any craft or type of work in any county. NRS 338.030(3). This determination becomes effective October 1 of each year and generally remains effective for one year. NAC 338.040(1).

[22]NRS 338.020(1).

[23]NRS 338.030(3) states, "The Labor Commissioner shall hold a hearing in the locality in which the work is to be executed if he: (a) [i]s in doubt as to the prevailing wage; or (b) [r]eceives an objection or information pursuant to subsection 2." NRS 338.030(2) permits interested parties to object and present evidence that a different wage should apply within 30 days of the annual prevailing wage determination.

Commissioner's and Kovach's contentions, defining a classification is an inherent part of determining the wage rates employees are entitled to be paid.[24]

Because the Labor Commissioner redefined the classification of "sheet metal workers" in his decision, this constitutes action under NRS 338.030, which any interested party should have had the opportunity to challenge. Because the Labor Commissioner failed to provide this opportunity, his decision is invalid under the prevailing wage laws, in addition to the APA. Accordingly, we

ORDER the judgment of the district court REVERSED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Robert G. Berry, Settlement Judge
Michael E. Langton
Attorney General George Chanos/Gaming Division/Las Vegas
Attorney General George Chanos/Las Vegas
McDonald Carano Wilson LLP/Reno
Washoe District Court Clerk

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[24]City Plan Dev. v. State, Labor Comm'r, 121 Nev. ___, ___, 117 P.3d 182, 190 (2005); see also Southern Nevada Op. Eng'rs, 121 Nev. at ___ n.16, 119 P.3d at 726 n.16.