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***Southern Nevada Operating Engineers v. Labor Commissioner*, 121 Nev. Adv. Op. 54, 119 P.3d ___ (September 15, 2005)¹**

LABOR – APA – RULEMAKING

Summary

The elimination of an entire class of workers from an adopted prevailing wage regulation by the Labor Commissioner (“Commissioner”) constitutes administrative rulemaking and thus requires compliance with the notice and hearing provisions of Nevada’s Administrative Procedure Act (“APA”).²

Disposition/Outcome

Reversed. The Commissioner’s actions were akin to ad hoc administrative rulemaking without compliance with the notice and hearing provisions of Nevada’s APA.

Factual and Procedural History

In 2001, an issue arose regarding the payment of the prevailing wage for soil testers and field soil engineers by Clark County. The local union for soil testers discovered that one of the subcontractors was not paying the prevailing wage for soil testers. The County investigated and determined that the prevailing wage should be paid. The subcontractor appealed to the Commissioner who held an administrative hearing on the issue.

The only parties that received notice of the hearing were the immediate interested parties. The Commissioner heard some testimony on the duties of a soils tester and argument regarding whether a soils tester met the two prong test for a “workman.”³ At the conclusion of the hearing, the Commissioner determined that a soils tester did not qualify as a workman because the duties are more “professional and administrative in nature than akin to those of a ‘workman.’”⁴ Consequently, soils testers were removed from the prevailing wage list.

Discussion

This situation is unlike a situation where the Commissioner must determine whether an individual falls within a given class on the prevailing wage list. Here, the Commissioner’s acts effectively altered a regulation.⁵ In a contested case, the Commissioner may determine “whether

¹ By Scott McDonald

² NEV. REV. ST. Chapter 233B (2004).

³ NEV. REV. ST. § 338.040 provides that a workman must be (1) “[e]mployed at the site of a public work,” and (2) “[n]ecessary in the execution of the contract for public work.” The determination must be made because “an individual must be deemed a ‘workman’ to qualify for the prevailing wage.” *S. Nev. Operating Eng’rs v. Labor Comm’r*, 121 Nev. Adv. Op. 54, 4 (2005) (citing NEV. REV. ST. § 338.040).

⁴ *Id.* at 5-6.

⁵ *Id.* at 10.

an individual fits within an existing classification” but “may not determine whether an entire job classification may exist.”⁶

Actions outside the scope of a contested case determination require compliance with the rulemaking provisions of the APA.⁷ This includes the requirements to provide 30 days notice to “all interested persons” and “reasonable opportunity” to be heard.⁸ Nevada Revised Statute 338.030 enables the Commissioner to change the prevailing wage rates and classifications, but only once 30 days notice and an opportunity to be heard have been given.⁹

⁶ *Id.* at 11.

⁷ NEV. REV. ST. § 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;
- (b) A proposed regulation;
- (c) The amendment or repeal of a prior regulation; and
- (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.

⁸ NEV. REV. ST. § 233B.060(1) provides: “Except as otherwise provided in subsection 2 and in NRS 233B.061, before adopting, amending or repealing any permanent or temporary regulation, the agency must give at least 30 days' notice of its intended action, unless a shorter period of notice is specifically permitted by statute.” NEV. REV. ST. § 233B.061 states that:

1. All interested persons must be afforded a reasonable opportunity to submit data, views or arguments upon a proposed regulation, orally or in writing.
2. Before holding the public hearing required pursuant to subsection 3, an agency shall conduct at least one workshop to solicit comments from interested persons on one or more general topics to be addressed in a proposed regulation. Not less than 15 days before the workshop, the agency shall provide notice of the time and place set for the workshop:
 - (a) In writing to each person who has requested to be placed on a mailing list; and
 - (b) In any other manner reasonably calculated to provide such notice to the general public and any business that may be affected by a proposed regulation which addresses the general topics to be considered at the workshop.
3. With respect to substantive regulations, the agency shall set a time and place for an oral public hearing, but if no one appears who will be directly affected by the proposed regulation and requests an oral hearing, the agency may proceed immediately to act upon any written submissions. The agency shall consider fully all written and oral submissions respecting the proposed regulation.
4. The agency shall keep, retain and make available for public inspection written minutes of each public hearing held pursuant to subsection 3 in the manner provided in subsections 1 and 2 of NRS 241.035.
5. The agency may record each public hearing held pursuant to subsection 3 and make those recordings available for public inspection in the manner provided in subsection 4 of NRS 241.035.

⁹ 121 Nev. Adv. Op. 54, at 13.

Conclusion

Because the Commissioner engaged in ad hoc rulemaking, in violation of Nevada's APA requirements for notice and hearing, the decision to eliminate soil testers from the prevailing wage regulation was invalid.