IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**GEORGE P. MARQUEZ, JR., DIRECTOR,
LABOR RELATIONS DIVISION,
NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS,**

Respondent-Appellant,

v.

**Ct. App. Docket No. 32,445
Dist. Ct. No. D-0202-CV 2011-09263**

NEW MEXICO BUILDING AND CONSTRUCTION TRADES COUNCIL,

Petitioner-Appellee.

ORAL ARGUMENT REQUESTED

ANSWER BRIEF

BERNALILLO COUNTY
HONORABLE CARL J. BUTKUS
SECOND JUDICIAL DISTRICT COURT

Justin Lesky
Law Office of Justin Lesky
8210 La Mirada Place NE Suite 600
Albuquerque, NM 87109
(505) 266-4335

for Appellee New Mexico Building and Construction Trades Council

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COMES NOW Appellee New Mexico Building and Construction Trades Council ("Council"), by and through its counsel of record Law Office of Justin Lesky, and pursuant to Rule 12-213(B) NMRA hereby submits the following Answer Brief to the Brief In Chief filed by Appellant Director George Marquez on February 25, 2013 (hereinafter "Director's Brief"), to wit:

I. SUMMARY OF PROCEEDINGS

This case has a much lengthier history than that conveyed by the Appellant in his Summary of Proceedings, which is pertinent to the issues to be decided in this case. To begin with, the Director of the Department of Workforce Solutions Labor Relations Division is required by law to set prevailing wage and fringe benefit rates on public works projects. *See* NMSA 1978, § 13-4-11.[1] In the past, this process involved a complex, expensive survey of rates being paid for the month of June each year that required approximately six months to prepare. *See* former Section 11.1.2.11 NMAC (12/31/09) of the Public Works Minimum Wage

[1] Throughout the Director's Brief, he only refers to prevailing "wage" rates. However, under the Public Works Minimum Wage Act the Director bears the responsibility of making determinations regarding both wage and fringe benefit rates. *See, e.g.,* NMSA 1978, § 13-4-11(B) ("The Director shall determine prevailing wage rates and prevailing fringe benefit rates . . . ."); § 13-4-10.1(C) (defining the term "fringe benefit"). The Director's rates at issue here involved both wages and fringe benefits. *See* LIC113-38. Throughout this Answer Brief, both will be referred to simply as "prevailing rates."

Act Policy Manual. However, in 2009 the State of New Mexico passed a new law that repealed the use of the old survey system to set prevailing rates and requires the Director to utilize collective bargaining agreements ("CBAs"). *See* NMSA 1978, § 13-4-11 (History: . . . 2009, ch. 206, § 3). The new law is a departure from the previous method of setting prevailing rates and its passage invalidated portions of the regulations that were specific to the previous method. The director then promulgated new regulations in November 2009 to comply with the new law. However, those regulations were appealed and were never put into effect. *See* LIC163-167.[2]

Despite the fact that the Public Works Minimum Wage Act was amended as described above and the law was made effective on July 1, 2009, the law has never been complied with in that workers on public works projects have never been paid prevailing rates determined under the amended law. Thus, in light of the new law and the vacuum of effective rules, in 2010 the Director began a temporary evidence gathering effort to allow for compliance with the new law beginning on January 1, 2011. LIC093-96. This effort asked all interested parties to submit

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[2] Citations to the Record Proper regarding pleadings filed in the district court are designated as "RP." Citations to the Record Proper on Appeal contained in the white three-ring binder, which is the administrative record regarding pleadings filed with the New Mexico Labor and Industrial Commission, are designated as "LIC."

information they believed may be relevant to the rate setting and included a non-mandatory form to guide those interested in submitting information. The publication suggested verification of documents but did not require it. The effort to gather relevant data to the setting of wages under the new law was not compulsory and carried no penalty for non-compliance. It was simply an effort to gather information so that the Director would have ample data to consider at the formal rate setting hearing. The evidence-gathering effort could not strictly follow the rules in effect at the time because they were not in compliance with the new law, and it could not follow the director's new rules because they had been stayed. A number of contractors and contractor's associations challenged the director's June 18, 2010 publication. Eventually, they dismissed their appeal regarding that matter. LIC097-100.

The process utilized by the director asking interested parties to submit relevant data to assist the director in complying with the new law was successful in that both unions and contractors submitted evidence for consideration in the setting of the 2011 prevailing rates. For those interested parties who did not participate in providing rate information, it was only because they made the free choice not to do so. *See* LIC101 (6/30/10 Email from President of Associated Builders and Contractors stating "If you receive a letter from the NM Department

of Workforce Solutions requesting wage information from your company, please do not comply.").

The director then reviewed the evidence submitted and performed calculations to produce a preliminary result for publication. LIC102-09. The director specifically noted that these preliminary results were done pursuant to regulation and they were "subject to change based on further data received and considered by the Director of the Labor Relations Division." LIC102. The publication of the preliminary results was accompanied by a formal notice of a rate setting hearing scheduled for November 1, 2010. LIC110. The Notice of Public Hearing gave parties the opportunity to review the proposed prevailing rate results and the information relied upon in those calculations, and it also stated that any interested parties could present their views to the director in writing on or before the hearing, or interested parties could present their views orally at the hearing.

In accordance with the Notice of Public Hearing, a hearing was conducted regarding the proposed prevailing rates on November 1, 2010. All interested parties were allowed to present their views regarding the proposed prevailing rates. Then, on December 8, 2010 after giving full consideration to the evidence submitted throughout the process, the director published the 2011 Wages, Fringes and Apprenticeship Contribution Rates. LIC113-38.

A number of contractors and contractor's associations appealed the final prevailing rate results the director had published on December 8, 2010. Then, on June 10, 2011, a new director, Mr. Marquez, served notice on interested parties that he was rescinding the 2011 prevailing rates promulgated by the former director. LIC139-45. There was no public hearing or opportunity for input whatsoever regarding the matter prior to the new director's determination. The new director decided that the former director had made what he considered to be "arbitrary and capricious decisions" relating to the 2011 prevailing rates. The new director remarked that there were no rules to govern the process for setting prevailing rates under the new law yet the director had taken action to set new rates under the new law. The new director claimed that Section 13-4-11 NMSA 1978 had been violated. The new director also attached an affidavit to his letter that, in his words, "explain[ed] precisely the actions that occurred during the 2011 prevailing wage process and which have resulted in my decision to rescind those rates." In his letter the new director claimed that "with the authority to issue rules and accomplish the purposes of the Act, the necessary authority to repeal such rules or actions, also follows."

On June 13, 2011 the appellants who had been appealing the Director's 2011 prevailing rates withdrew their appeal. LIC146-47. As a result of the

withdrawal, the LIC then dismissed that appeal. LIC148.

The Council appealed the Director's June 10, 2011 letter rescinding the 2011 prevailing rates to the LIC. LIC070-78. Among other things the Council argued that the 2011 rates were effective and could not be rescinded without the new Director following the process for changing prevailing rates, and the new Director's action violated due process. LIC083-85, LIC090. Director Marquez filed a Motion to Dismiss Appeal and Response to Appellant's Statement of Disagreement and Brief. LIC187-95. Chief among the Director's arguments was the assertion that the former director had failed to follow the proper rulemaking process when she issued the June 18, 2010 announcement that led to the new prevailing rates that were issued on December 8, 2010. LIC189-92. The Council responded in writing to the motion. LIC225-32. The Council argued, among other things, that the former director's June 18, 2010 announcement was not subject to the rulemaking process. LIC227-28.

The LIC conducted a hearing on the matter on August 22, 2011. LIC001-056. At the hearing, the LIC took up the matter of the Director's Motion to Dismiss. The Director argued that the former director's process for gathering

information relating to setting the new prevailing rates under Senate Bill 33,[3] issued on June 18, 2010, should have gone through the rule-making process first. LIC021-26. Because the process contained in the June 18, 2010 letter did not go through the rulemaking process, the Director argued that the new prevailing rates were void. The Council responded to the motion to dismiss by stating among other things that the LIC had already determined in a previous case that the action taken by the former director on June 18, 2010 was valid, the June 18, 2010 announcement was not subject to the rulemaking process, and there were a number of the Council's arguments contained in its Statement of Disagreement that were unaddressed in the Director's Motion to Dismiss, such as the argument that the Director violated the due process clauses of the state and federal constitutions. LIC030-039.

The LIC went into closed session and then came back and asked the parties "[w]ere the wage rates in question here filed with the State Records Office?" LIC053. The LIC ultimately found, contrary to Director Marquez's argument, that the June 18, 2010 announcement was "not subject to the State Rules Act . . . as determined by the former LIC." LIC054, LIC239. However, at the hearing the LIC

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[3] Senate Bill 33, or "SB 33," was the 2009 law that amended the Public Works Minimum Wage Act.

went on to find that:

> Based on the record before the Commission at this point, that the rates – the prior rates that are subject here have not been filed with the State Records [Office], the State Rules Act requires or mandates that they be determined not to be in effect at this point.

LIC054. The LIC then granted the Motion to Dismiss. LIC055.

On September 2, 2011 the LIC issued a written Amended Order Granting Appellee's Motion to Dismiss Appeal. LIC239-40. In pertinent part, the Order stated:

(1) "[T]here is no legal basis to maintain an appeal of Appellee's June 10, 2011 letter rescinding the former Director's letter of June 18, 2010";

(2) "The June 18, 2010 letter was not subject to the State Rules Act . . . as determined by the former LIC";

(3) "The 2011 wage rates published as a result of the former Director's June 18, 2010 letter are not a rule subject to the State Rules Act because they were never properly filed as a rule as required by NMSA 1978, § 14-4-5";

(4) "Based upon the record before the Commission, it is undisputed that the 2011 wage rates which would have been the result of the fact finding process begun by the June 18, 2010 letter were never officially enacted as a

rule. Therefore the rescission of the 2011 wage rates as published is within the discretion of the current Director"; and

(5) "IT IS ORDERED that the Appellee's Motion is granted and the Appeal by the Appellant New Mexico Building and Construction Trades Council is dismissed in its entirety for the above stated reasons."

The district court appeal then followed. RP0001-04.

On September 25, 2012 the District Court entered a Final Order After Hearing Conducted on June 18, 2012. RP0188-89. Importantly, the District Court found that the 2011 prevailing rates published by the Department on December 8, 2010 were not "rules" as defined by the State Rules Act, NMSA 1978, § 14-4-2(C). *Id.*, ¶ 1. Because the 2011 rates were not "rules" under the State Rules Act, in order to be effective they did not need to first be filed as a "rule" under Section 14-4-5. *Id.*, ¶ 2.

Appellant then filed his Petition for Writ of Certiorari in this Court, which was granted and the case was assigned to the General Calendar. RP0190-91.

II. QUESTION PRESENTED FOR REVIEW

Are the prevailing rates set pursuant to the Public Works Minimum Wage Act, at NMSA 1978, § 13-4-11, rules for the purposes of the State Rules Act?

III. ARGUMENT

A. Introduction

The former director utilized a transparent process for determining the 2011 rates. Section 13-4-11 provides a process by which rates will be determined, and it states what information will be relevant to that decision. Not only were the parties given notice of the former director's intentions regarding the rates both through her announcements and the statute itself, but they were given a number of months to submit input to her office as well as the opportunity to provide information to her directly at a public hearing. This was all done prior to her decision regarding the new rates that were to be put into effect in 2011. Contrary to Appellant's assertions in a number of areas of its brief, it is unclear what more due process could have been given to interested parties, workers, and employers than what was already given by Director Cordova.[4] Thus, there was no disregard of the public's procedural due process rights. Instead, it was the new director's decision to rescind those prevailing rates, some six months after the fact with no hearing whatsoever, that disregarded the public's due process rights.

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[4] Appellant's due process argument is also quite ironic given his failure to conduct any hearing or seek any public input whatsoever before or after he made the decision to rescind the 2011 prevailing rates some six months after they had been determined.

Prior to this case, previous directors had never considered prevailing rates to be "rules" under the State Rules Act, and in fact the rates that are currently in effect never conformed to the requirements for "rules" under that law either.[5] LIC155-62. For example, Appellant cannot cite to the currently effective prevailing rates, determined in 2009 and put into effect on January 1, 2010, because they were never treated as "rules" under the State Rules Act and they were never put into the style and format required for "rules" under the State Rules Act. LIC155-62. The Public Works Minimum Wage Act has been in effect since at least 1963. *See* history to NMSA 1978, § 13-4-10. The State Rules Act has been in effect since at least 1967. *See* history to NMSA 1978, § 14-4-1. In the almost fifty-year history that these laws have been in effect, no one has ever considered prevailing rates determinations to be "rules" under the State Rules Act. This is true regardless of the political party that was in power at the time. Until, for some reason, now. Hence, in this case Appellant seeks to overturn almost fifty years of bipartisan precedent regarding the determination of prevailing rates in this state.

Director Cordova, and all directors previous to her, simply gathered data

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[5] Note that the Director has not rescinded the 2010 prevailing rates currently in effect, which were not done pursuant to the amendments to the Public Works Minimum Wage Act in 2009 that required use of collective bargaining agreements, despite the fact that, like the 2011 prevailing rates, they were not treated as "rules" under the State Rules Act either.

and, utilizing that data, made a determination as to what the prevailing rates would be under statutory law and regulations that were already in place. The ramifications of Appellant's argument will go well beyond this case should the Court agree with it though, and the distinction between "rules" and other actions taken by government agencies and executive departments will disappear. Appellant's argument is that anytime a state agency or executive department acts or make a determination under a statute or a rule or a regulation, that action itself then becomes a "rule" under the State Rules Act and subject to its requirements for "rules." Thus, under the Appellant's argument, all rulings, orders, decisions, and instructions are then "rules." If every time an administrative agency did anything to comply with controlling statutes and rules it was also required to then promulgate yet another new "rule" allowing it to do so beforehand, then government itself will grind to a halt.

B. Standard of Review

After the Court grants a writ of certiorari under Rule 12-505 NMRA, the Court then "conduct[s] the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806.

Pursuant to the Public Works Minimum Wage Act, NMSA 1978, § 13-4-15(D), decisions of the New Mexico Labor and Industrial Commission (hereinafter "LIC") may be appealed under the provisions of Section 39-3-1.1. Subsection D of Section 39-3-1.1 provides that the district court may set aside, reverse, or remand the LIC's decision if it determines that (1) the LIC acted fraudulently, arbitrarily or capriciously; (2) the LIC's decision was not supported by substantial evidence; or (3) the LIC did not act in accordance with law. Rule 1-074(R) provides that the district court apply the following standards of review: (1) whether the agency acted fraudulently, arbitrarily or capriciously; (2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence; (3) whether the action of the agency was outside the scope of authority of the agency; or (4) whether the action of the agency was otherwise not in accordance with law. When an administrative decision is based on an issue of law, such as statutory interpretation, the Court's review is de novo. *ERICA, Inc. v. N.M. Regulation & Licensing Dep't*, 2008-NMCA-065, ¶ 11, 144 N.M. 132, 184 P.3d 444. Regarding the question presented in this case, the Council asserted that the LIC's decision was not in accordance with law, and the district court agreed. RP0189.

C. The Prevailing Rates Set Pursuant to the Public Works Minimum Wage Act, at NMSA 1978, § 13-4-11, Are Not Rules For Purposes of the State Rules Act.[6]

In engaging in statutory construction, a court's primary purpose is to give effect to the intent of the Legislature. *Bd. of Educ. v. N.M. State Dep't of Pub. Educ.*, 1999-NMCA-156, ¶ 16, 128 N.M. 398, 993 P.2d 112. "The first rule is that the plain language of a statute is the primary indicator of legislative intent. Courts are to give the words used in the statute their ordinary meaning unless the [L]egislature indicates a different intent. The court will not read into a statute . . . language which is not there, particularly if it makes sense as written." *Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-021, ¶ 27, 127 N.M. 120, 978 P.2d 327 (internal quotation marks and citations omitted). Although the court applies the plain meaning rule, a "construction must be given which will not render the statute's application absurd or unreasonable and which will not defeat the object of the Legislature." *Cox v. N.M. Dep't of Pub. Safety*, 2010-NMCA-096, ¶ 15, 148 N.M. 934, 242 P.3d 501 (internal quotation marks and citation omitted). Additionally, when interpreting a statute, all sections of the statute "must be read

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[6] This argument was asserted and preserved in the district court at RP0105-08.

together so that all parts are given effect." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599.

Appellant contends that all prevailing rate determinations are "rules" under the State Rules Act, and thus are subject to the requirements for "rules" therein. The purpose of the State Rules Act is to provide notice to persons of a new agency rule. *See State v. Joyce*, 94 N.M. 618, 621, 614 P.2d 30, 33 (Ct. App. 1980). The State Rules Act, NMSA 1978, § 14-4-5, provides in pertinent part that "No **rule** shall be valid or enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act." (Emphasis added). This is what the LIC relied on in dismissing the appeal–the fact that the former director had not filed the new prevailing rates with the records center and published them in the New Mexico register like is done with a typical "rule." LIC054-55; *see also* NMSA 1978, § 14-4-3 (requiring agencies to "place the rule in the format and style required by rule of the records center"). Thus, the LIC believed and Appellant contends here, the former director's 2011 prevailing rate determinations were not effective and could simply be rescinded without any hearings or public input.

A "rule" under the State Rules Act means in pertinent part:

> [A]ny rule, regulation, order, standard, statement of policy, including amendments thereto or repeals thereof issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing such rule or to affect persons not members or employees of such issuing agency. **An order or decision or other document issued or promulgated in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule nor shall it constitute specific adoption thereof by the agency.**

NMSA 1978, § 14-4-2(C) (Emphasis added). The "particular matter" at issue when the former director published the new prevailing rates on December 8, 2010 was a determination of new prevailing rates done in accordance with the Public Works Minimum Wage Act, as amended, and the applicable rules that remained valid after the amendment. Section 13-4-11(B) establishes the methodology by which prevailing rates are to be determined. The "specific set of facts" that were the subject of this "particular matter" involved the collective bargaining agreements and other data (*i.e.*, hours, project types, and classifications) that were submitted to the former director. In essence, what the former director did was to utilize the law and the then-existing rules to make a determination regarding what the prevailing rates should be as of December 8, 2010, to become effective on January 1, 2011. This was done to conform to the statute and such actions and

determinations were not "rules" under the State Rules Act but rather simply an "agency decision." Notice of the former director's actions in this regard were provided to the public throughout the process of determining the 2011 prevailing rates, so the purpose behind the State Rules Act is not a concern in this case.

Under caselaw "[t]he statutory designation for an enactment by an agency designed to have the force and effect of law and to control the actions of persons who are being regulated by the agency is a 'rule.'" *Bokum Resources Corp. v. New Mexico Water Quality Control Comm.*, 93 N.M. 546, 553, 603 P.2d 285, 292 (1979). A determination of the prevailing rates that apply during a certain period of time are not designed to apply forevermore like is a law or a rule–the rates are subject to change whenever the Director goes through the proper process already established under the law and the rules. Under similar circumstances that involved an administrative agency's interpretation and application of its controlling act and an argument that the agency's interpretation and application had to go through the rulemaking process, the New Mexico Court of Appeals stated that "[i]f, when we agreed with **an agency's application of a controlling law**, we nevertheless rejected that application simply because the agency failed to comply with [required administrative procedures], then we would undermine the legal force of controlling law." *Director, Labor and Industrial Division, New Mexico*

Department of Labor v. Echostar Communications Corp., 2006-NMCA-047, ¶ 14, 134 P.3d 780 (citation omitted; emphasis added), *Cert. Granted*, No. 29,724 (April 20, 2006), *Cert Quashed*, 2006-NMCERT-010, 146 P.3d 810 (October 27, 2006). The former director was merely applying controlling law when she determined the 2011 prevailing rates.

The purpose of the Public Works Minimum Wage Act is to "prevent[] foreign contractors from using itinerant workers to underbid local contractors." *Memorial Medical Center v. Tatsch Const., Inc.*, 2000-NMSC-030, ¶ 26, 129 N.M. 677, 12 P.3d 431. The law is remedial in nature. *See id.* Thus, the purpose of Act envisions a process by which rates on public works projects will be updated so as to prevent foreign contractors from using itinerant workers to underbid local contractors since wage and fringe benefit rates are usually changing from year to year.

Early on, the New Mexico Supreme Court noted the distinction between prevailing rate determinations and rulemaking in the Public Works Minimum Wage Act. *See City of Albuquerque v. State Labor and Industrial Commission*, 81 N.M. 288, 289, 466 P.2d 565, 566 (1970) ("The New Mexico Public Works Minimum Wage Act (§ 6--6--6 through 6--6--10, N.M.S.A. 1953 Comp.) charges the Labor Commissioner with the responsibility of determining the prevailing

wage rates for workers employed on public works **and** authorizes the adoption of rules and regulations to carry out that function.") (emphasis added). The fact that the Legislature did not intend determinations of prevailing rates to be treated as "rules" is evidenced by the text of the Public Works Minimum Wage Act itself. For example, Section 13-4-11(B)(4) states that "prevailing wage rates and prevailing fringe benefit rates determined pursuant to the provisions of this section shall be compiled as official records and kept on file in the director's office and the records shall be updated in accordance with the applicable rates used in subsequent collective bargaining agreements." If prevailing rate determinations were to have the same effect as a rule that is formatted and published in the New Mexico Administrative Code, surely they would not merely be "kept on file in the director's office" and then subject to change in accordance with new rates in subsequent collective bargaining agreements. In contrast, the Act has a separate provision relating to rules, as opposed to rates, which states simply that "The director shall issue rules necessary to administer and accomplish the purposes of the Public Works Minimum Wage Act." § 13-4-11(E).

Prevailing rate determinations are not designed to be applied forevermore, or at least for an indeterminate period of time, like are rules normally. For example, under the former regulations contained in the Public Works Minimum

Wage Act Policy Manual, new rates were established on an annual basis utilizing a survey. *See* former 11.1.2.11(C) NMAC (12/31/09). Under the new rules promulgated last year by the Secretary of the Department of Workforce Solutions, the determination of prevailing rates will still be done on an annual basis. *See* 11.1.2.12 NMAC (3/15/12). Hence, if in the past the Department has changed the rates annually and it plans to change the rates every year in the future as well, they surely do not appear to be anything other than an "agency decision upon a particular matter as applied to a specific set of facts" pursuant to the State Rules Act, § 14-4-2(C).

In addition, in making a decision in this case the Court should specifically review in detail what Appellant is attempting to portray as a "rule." LIC155-162 contains the prevailing rates currently in effect, and made effective on January 1, 2010. They constitute simply a list of trade classifications along with base wage and fringe benefit rates in the form of dollar figures, along with a few notes. LIC113-38 contains the rates that should currently be in effect, and in addition to the 2011 prevailing rates they contain explanations for the determinations made by Director Cordova. As detailed in the notes and first appendix to the 2011 prevailing rates, LIC121-35, in making her final determination Director Cordova made decisions based on fact-intensive inquiries involving the information she

acquired and that was provided to her. Such a determination is neither a "rule" nor is it intended to be a "rule" under the State Rules Act but rather it is an "agency decision upon a particular matter as applied to a specific set of facts" pursuant to Section 14-4-2(C).

In the Director's brief, page 11, he asserts that the State Rules Act "has some ambiguities." However, the term at issue in this case, *i.e.*, the definition of a "rule," is more specifically defined in the statute itself. When an agency is called upon to make a decision based upon a "particular matter" involving "a specific set of facts," then the State Rules Act does not treat that decision as a "rule." Thus, to be effective the decision does not have to conform to requirements for "rules" in that Act. Prevailing rates determinations have never been codified because of this fact. Government agencies must have some freedom to be able to make decisions, based upon established statutory law and governing rules, without having to codify everything they do into the New Mexico Administrative Code.

Appellant attempts to draw an unconvincing distinction between a director's prevailing rate determinations, on the one hand, and rates contained in a specific contract on the other. Director's Brief, pages 12-13. Obviously the process involves the director setting prevailing rates, and then individual contracts are entered into between government agencies and construction contractors regarding

public works projects. However, there is no evidence in the record regarding the terms and conditions that are contained in individual contracts with employers on public works projects. More than likely the contracts are predominantly pro forma, and follow the prevailing rates already determined by the director. If any adjustments are made to those rates, they would be relatively simple calculations based on the terms and conditions contained in the collective bargaining agreements that are applicable. The director utilizes the prevailing rates to set the terms and conditions contained in particular contracts. Appellant acknowledges that setting prevailing rates involves the "compilation of data," which supports the conclusion that under the State Rules Act prevailing rates determinations are not "rules." Furthermore, "workers on specific contracts" will belong to one or more of the "broad classes of workers" for which the prevailing rates have already been determined. Hence, for purposes of analysis of what is and is not a "rule" under the State Rules Act, there is no distinction between prevailing rates determinations made in accordance in Sections 13-4-11(A) and (B) and the specific contracts that are entered into with employers.

Appellants desires to limit what is not a "rule" for purposes of the State Rules Act to individual adjudicatory cases, such a contractor that is being fined or an individual who is challenging a license determination. *See* Director's Brief,

pages 13-17. However, that position ignores the entire text of the "rule" definition contained in Section 14-4-2(C). It is not just "any case" that is excepted from the definition of a "rule," but also an "agency decision upon a particular matter as applied to a specific set of facts" as well. Prevailing rates determinations operate much like individual adjudicatory cases in any event. The law is applied to a particular set of facts in the form of wage and fringe benefit data, and an agency decision is made on the matter. All interested parties have the opportunity for input through submission of data and attendance at hearings. If they do not agree with the director's determination, interested parties can appeal the determination to the LIC in accordance with Section 13-4-15(A)-(C), which conducts its hearing in adjudicatory fashion with the presentation of witnesses, evidence, motions practice and so forth. *See* 11.1.2.16 NMAC (governing the disposition of appeals to the LIC) (3/15/12). Then, the following year, the entire process is to begin anew. Thus, prevailing rates determinations are not designed to operate as a rule because their effectiveness is normally limited in duration.

Appellant asserts at page fifteen of its brief that a "rule is largely defined by whom it affects." While the definition of a "rule" contained in Section 14-4-2(C) does refer to this, nevertheless a "rule" cannot be so expansive. More than likely the Legislature chose to define "rule" in this manner so that a distinction is made

between a true "rule" and internal policies affecting, for example, a government agency's own employees. It does not follow that a decision is a "rule" simply because it affects others outside the government agency. For example, there are many individual cases that arise from an administrative adjudicatory proceeding that can affect many others outside the agency. *See, e.g., City of Deming v. Deming Firefighters Local 4521*, 2007-NMCA-069, 141 N.M. 686, 160 P.3d 595 (arising initially in the context of a state labor board administrative proceeding, and establishing that localities cannot limit bargaining rights to fewer employees than does the state bargaining law). Yet these kinds of cases certainly are not "rules" under the State Rules Act that must be codified in the New Mexico Administrative Code.

Appellant makes much of the fact that the words "and regulations" after "rules" were removed from Subsection E of Section 13-4-11 in 2005. Director's Brief, page 15. Appellant contends that this "shows that rulemaking must be involved in the prevailing wage determination process." However, such a contention is quite a leap from that simple amendment. The Legislature may have removed the words "and regulations" simply because it was repetitive of "rules" so such terminology was superfluous.

D. Director Marquez Acted Contrary to Law in Rescinding the 2011 Prevailing Rates.

Appellant claims that "[b]ecause the District Court did not disturb the commission's ruling that Mr. Marquez, as director, had the authority to rescind the prevailing wage rates, the Court need not address that issue." Director's Brief, page 18. First, the District Court did not disturb that ruling because it found that the 2011 prevailing rates published by the Department on December 8, 2010 were not "rules" as defined by the State Rules Act, NMSA 1978, § 14-4-2(C). *Id.*, ¶ 1. Because the 2011 rates were not "rules" under the State Rules Act, in order to be effective they did not need to first be filed as a "rule" under Section 14-4-5. *Id.*, ¶ 2. Therefore, since Director Cordova's 2011 prevailing rates were effective, Director Marquez could not just merely "rescind" them. The Public Works Minimum Wage Act provides only two methods for prevailing rates to be changed once they have been fixed. One method is through the process for determining new prevailing rates under Section 13-4-11. This is what was done by Director Cordova in 2010, which culminated in her final determination of the 2011 prevailing rates on December 8, 2010. The other method is through an appeal of those rates to the LIC and through the courts. *See* NMSA 1978, § 13-4-15. However, there was no appeal pending by which the 2011 prevailing rates could

be changed. No process exists in the statute or even in the rules that allows the Director to merely "rescind" previously determined prevailing rates. Hence, the Director was without authority to rescind the 2011 prevailing rates that were finalized on December 8, 2010.

IV. CONCLUSION

The District Court properly decided that the prevailing wage and fringe benefit rates determined under the Public Works Minimum Wage Act were not "rules" for purposes of the State Rules Act and they did not have to comply with the requirements for rules under that law in order to be effective. The District Court correctly reversed the decision of the New Mexico Labor and Industrial Commission. Director Marquez acted contrary to law in merely rescinding the previously-determined 2011 prevailing rates, and they should be made effective. Thus, the Court of Appeals should affirm the District Court's decision and dismiss this appeal.

V. REQUEST FOR ORAL ARGUMENT

Appellee Council believes oral argument would be helpful to a resolution of the issues for a number of reasons. First, as stated by Appellant, this is a case of first impression–whether prevailing rates determinations under the Public Works Minimum Wage Act are "rules" for purposes of the State Rules Act and must be

treated and filed accordingly to become effective. Second, a quick query of reported New Mexico cases regarding the Public Works Minimum Wage Act reveals that the law has only been a subject in approximately seven appellate cases. Thus, the appellate courts may not have much familiarity with the law because they have not had ample opportunity to analyze it. Third, the outcome of this case could affect many administrative agencies in this state in determining the process they utilize when issuing decisions, rulings, orders, and instructions. Fourth, workers on public works projects in this state have labored for over two years under wage and fringe benefits rates that were not determined under the changes to the Public Works Minimum Wage Act made effective in July 2009 and that were not based on current data, and many employers have had difficulty submitting competitive bids on public works projects because of this time lag. The outcome of this case would help resolve those problems.

Respectfully submitted,

LAW OFFICE OF JUSTIN LESKY

Justin Lesky
8210 La Mirada Place NE Suite 600
Albuquerque, NM 87109
(505) 266-4335

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via first class mail on this 26th day of April 2013 to:

Jason J. Lewis
Ernest I. Herrera
2501 Rio Grande Blvd., NW, Ste. B
Albuquerque, NM 87104
Counsel for Appellee

Cholla Khoury
New Mexico Attorney General
Civil Division
P.O. Drawer 1508
Santa Fe, NM 87504
Counsel for NM LIC

Wayne E. Bingham
Bingham, Hurst & Apodaca, PC
3908 Carlisle Blvd. NE
Albuquerque, NM 87107
Counsel for Intervenors/Interested Parties