

IN THE NEW MEXICO COURT OF APPEALS

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

FEB 25 2013

Wendy Jones

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

Respondent - Appellant,

v.

No. 32,445

No. D-0202-CV 2011-09263

NEW MEXICO BUILDING AND CONSTRUCTION TRADES
COUNCIL,

Petitioner - Appellee.

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
BERNALILLO COUNTY
HONORABLE CARL J. BUTKUS, Presiding

RESPONDENT-APPELLANT GEORGE P. MARQUEZ, JR.'S
BRIEF IN CHIEF

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I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

Petitioner George P. Marquez, Jr., Director of Labor Relations of the New Mexico Department of Workforce Solutions, appeals from the Second Judicial District Court's reversal and remand of a decision of the Labor and Industrial Commission ("the commission") that upheld Marquez's rescindment of prevailing wage rates issued by a previous Labor Relations Director, Francie Cordova. Prevailing wage rates are the rates paid to workers on public works projects that meet a certain dollar threshold. The rates at issue in this appeal were generated by former Director Francie Cordova, but were not promulgated or issued pursuant to the Public Works Minimum Wage Act ("Wage Act"), NMSA 1978, §§ 13-4-10 – 17 (1963, as amended through 2009); corresponding regulations; and the State Rules Act, NMSA 1978 §§ 14-4-1 – 11 (1967, as amended through 1995). The main issue before the Court is whether the prevailing wage rates should have been made as "rules" pursuant to the State Rules Act and the Wage Act. The question presented is one of first impression in New Mexico and is of much importance not only to the contractors and employees covered by the Wage Act but also to the

public's interest in a rulemaking process that meets due process and statutory requirements.

B. Record on Review and Abbreviated References Thereto

Citations to the official record proper in the New Mexico Court of Appeals are written as Record Proper ("RP"). Citations to the Record on Appeal, which is the record of administrative proceedings, are written as Labor and Industrial Commission ("LIC"). The Record on Appeal was transmitted to this Court by the Second Judicial District Court Clerk on January 23, 2013.

C. Course of Administrative Proceedings

The New Mexico Building and Construction Trades Council appealed Mr. Marquez's rescindment of Cordova's prevailing wage rates to the Commission. LIC pp. 70-71. Mr. Marquez rescinded the 2011 wage rates on June 10, 2011, upon determination that Ms. Cordova created the wage rate-setting process without following the rulemaking procedure. RP pp. 140-141. The commission dismissed the appeal on September 2, 2011, following the filing of motions and arguments regarding the matter. RP pp. 3-4.

The commission's decision dismissed an appeal by Respondent/Appellant, the New Mexico Building and Construction Trades Council ("Council"), that sought to uphold 2011 prevailing wage rates that were rescinded by Mr. Marquez in July 2011. The commission based its decision on Ms. Cordova's noncompliance with rulemaking procedure. RP pp. 3-4. The commission stated specifically that the 2011 rates published as a result of the June 2010 letter by Ms. Cordova were not valid because they had not been filed properly according to the State Rules Act at NMSA 1978, § 14-4-5. Id. Because the 2011 rates did not become rules, the commission upheld their rescindment by Mr. Marquez. Id. Following this decision by the commission, the Council filed an appeal in the Second Judicial District Court of New Mexico. RP p. 1. The Council argued that a prevailing wage rate determination "is not a 'rule' as contemplated by the State Rules." RP p. 105.

On appeal to the Second Judicial District Court on September 25, 2012, the Honorable Carl J. Butkus determined that the wage rates were not rules for the purposes of the State Rules Act, reversing and remanding the decision to the commission. RP pp. 188-189. The Council based some of its arguments on appeal on the fact that the rates did not

fit the definition of a rule at NMSA 1978 Section 14-4-2(C) and that the rates were not formatted or published in the New Mexico Administrative Code. RP pp. 105-108. The District Court apparently agreed with this argument, basing its reversal of the commission's decision on the argument that the wage rates are not rules for the purposes of the State Rules Act and did not need to comply with that statute to be enacted. RP pp. 188-189.

II. QUESTION PRESENTED FOR REVIEW

Are the Prevailing Wage 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. STATEMENT OF FACTS

In November 2009, former Labor Relations Director Francie Cordova attempted to modify regulations to comply with the Wage Act, which was amended in 2009 at NMSA 1978, § 13-4-11 (2009). LIC pp. 193-194. However, those regulations were appealed to the commission and they could not be implemented until a final ruling could be made regarding their lawfulness. LIC pp. 188-189. Rather than await the results of the appeal or follow rulemaking procedure, Cordova issued

her June 18, 2010 letter, which set in motion a “temporary” process for setting prevailing wage rates. LIC pp. 193-194. A set of prevailing wage rates for 2011 were published on December 8, 2010. RP p. 188.

The process that Ms. Cordova set in motion on June 18, 2010 was never filed as a rule pursuant to the State Rules Act. The temporary process was ostensibly to involve the collection of data from interested parties such as contractors and unions. LIC pp. 193-194. However, it is not clear that data was comprehensively gathered. RP p. 143. Moreover, Ms. Cordova herself did not follow this process but rather issued rates without accounting for the data that contractors and unions may have submitted. RP pp. 142-144.

When Marquez became the new Labor Relations Director, he reviewed the status of the wage setting process proposed rules and appeal and determined that Ms. Cordova’s June 2010 letter made arbitrary and capricious decisions outside of any properly established rules. LIC pp. 24-25. In a letter dated June 10, 2011, Mr. Marquez announced his decision that he was rescinding the 2011 Prevailing Wage Rates because they did not result from rules complying with Section 13-4-11. LIC pp. 72-73. He further stated he would only

establish rules following proper public notice and opportunity for public comment. Id.

IV. ARGUMENT

A. Introduction

The prevailing wage rates that Ms. Cordova attempted to put into effect should have been promulgated and filed as rules under the State Rules Act. The Court should reverse the determination of the Second District Court and restore the dismissal by the Labor and Industrial Commission of the appeal of Mr. Marquez's rescindment of the 2011 rates. This is a matter of first impression for the Court of Appeals. Resolution of the issue involves interpretation of the Public Works Minimum Wages Act in light of the State Rules Act's definition of "rules."

In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the legislature. *Adjustments v. New Mexico Pub. Regulation Comm'n*, 2000-NMSC-35, ¶ 9, 129 N.M. 787, 792, 14 P.3d 525, 530 (N.M. 2000) (quoting *Public Serv. Co. v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-40, ¶ 18, 128 N.M. 309, 313, 992 P.2d 860, 864). In order to determine legislative intent, this Court looks primarily to the plain language of the statute,

giving ordinary meaning to the words used. *Id.* The meaning that the Court gives to Section 13-4-11, “Prevailing wage and benefit rates determined,” will affect future administrative state officials not only in the administration of the Wage Act but also in adherence to the State Rules Act.

This Court will also find in examining the whole record that the commission did not err in interpreting the duties of administrative officials with regard to the rulemaking process. Ms. Cordova did not follow rulemaking procedures as she failed to comply both with the State Rules Act and the Public Works Minimum Wage Act Manual. Not only did Mr. Marquez have the authority and substantial evidence to rescind the rates, but he also had the obligation to do so out of consideration for the due process of the workers and employers affected by the rates.

B. Applicable Standards of Review

Upon a grant of a petition for writ of certiorari, the Court of Appeals utilizes the same standard of review to review the decision of the district court. *San Pedro Neighborhood Ass'n v. Bd. of County Comm'rs*, 2009-NMCA-45, ¶11, 146 N.M. 106, 110, 206 P.3d 1011, 1015 (N.M. Ct. App. 2009) (quoting *Rio Grande Chapter of the Sierra Club v.*

N.M. Mining Comm'n, 2003-NMSC-5, ¶¶ 16-17, 133 N.M. 97, 61 P.3d 806). The appellate court will conduct 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. *Id* (internal quotations omitted).

For administrative appeals, the Court expressly modified the substantial evidence rule and supplemented it with the whole record standard for judicial review of findings of fact made by administrative agencies. *Duke City Lumber Co. v. New Mexico Env'tl. Improvement Bd.*, 101 N.M. 291, 294, 681 P.2d 717, 720 (N.M. 1984). The Court reviews an administrative agency's order to determine if it is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or otherwise not in accordance with law. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-5, ¶ 17, 133 N.M. 97, 103, 61 P.3d 806, 813 (N.M. 2002). A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record. *Id*.

In appeals of decisions by the Labor and Industrial Commission under the Wage Act, the Supreme Court has acknowledged the adoption

of the whole record review. *Grauerholtz v. New Mexico Labor & Indus. Comm'n*, 104 N.M. 674, 676, 726 P.2d 351, 353 (N.M. 1986) (quoting *Duke City Lumber Co.*, 101 N.M. at 293, 681 P.2d at 719). The whole record review requires the Court to review and consider not only evidence in support of one party's contention to determine whether there was substantial evidence to support the agency finding, but courts are to look also to evidence which is contrary to the finding. *Id.* The reviewing court then decides whether on balance, the agency's decision was supported by substantial evidence. *Id.*

C. The Prevailing Wage Rates are Rules and Should Have Been Treated as Such in 2011.

Petitioner first seeks to clarify the confusion that previous orders and arguments may have caused the Court. The position of Petitioner is that the prevailing wage rates made pursuant to the Wage Act must become rules to have force and effect. Petitioner interpreted the commission's decision as stating that the 2011 rates were not rules because they were not made as rules pursuant to the Rules Act. The question now before this Court was not the precise issue that Respondent initially brought before the commission, but the question addresses the basis of the commission's order with which the District

Court disagreed. When it was previously argued that the 2011 rates are rules, Petitioner did not argue that the rates Ms. Cordova set were rules. Rather, Petitioner argues that prevailing rates set for any year, including those for 2011, should be made as rules.

i. A necessarily broad reading of the Rules Act shows that Wage Act prevailing wage rates fall within the statute’s definition of a rule.

The State Rules Act (“Rules Act”), regulations pursuant to the Rules Act, and case law make clear that the prevailing wage rates are a “rule.” These authorities include the plain language of the Rules Act, which defines rules in the negative, the definition of a rule by the New Mexico Administrative Code, and precedent that illustrates the difference between adjudicative and rulemaking functions of administrative bodies. Reading the provisions of the Wage Act in light of these authorities strengthens the identification of the prevailing wage rates as rules.

Interpretation of the Wage Act depends also on the Court’s interpretation of the Rules Act’s provisions. Generally, in resolving statutory ambiguities, courts will favor a general provision over an exception. *Regents of the Univ. of New Mexico v. New Mexico Fed’n of*

Teachers, 1998-NMSC-20, ¶ 27, 125 N.M. 401, 410, 962 P.2d 1236, 1245 (N.M. 1998) (internal citations omitted). This is especially true when a statute promotes the public welfare. *Id.* It is familiar that if the words employed are susceptible of two meanings, that will be adopted which comports with the general public policy of the state, as manifested by its legislation, rather than that which runs counter to such policy. *Id.* Because of this judicial predilection, strict or narrow construction is usually applied to exceptions to the general operation of a law. *Id.*

The Rules Act has some ambiguities when identifying what types of administrative actions are “rules.” However, the statute clearly adds to protection of interested parties’ due process rights to notice and opportunity to comment. *See generally Rivas v. Board of Cosmetologists*, 101 N.M. 592, 594, 686 P.2d 934, 936 (N.M. 1984). Moreover, the Rules Act should be read broadly to include the prevailing wage rates as rules. The Rules Act’s definition of “rules” is broad and consists largely of definition in the negative:

[Rule] means any 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.

Section 14-4-2(C).¹ This subsection defines a rule as something that is not an order or decision pertaining to a specific set of facts.

Prevailing wage rates can be identified as rules in part because of their distinction from that which the Rules Act defines as not being a rule. The Wage Act gives authority to the director of the Department of Workforce Solutions to ensure that contracts with a state agency that meet certain conditions include minimum wage rates for various classes of workers that are based on prevailing wage rates. Section 13-4-11(A). The director “shall determine prevailing wage rates and prevailing fringe benefit rates for respective classes of laborers and mechanics employed on public works projects.” Section 13-4-11(B). Subsections (A) and (B) imply a distinction between wage rates assigned in particular contracts and the prevailing wage rates, which form the basis for the particular contract rates. The director determines the Section 13-4-

¹ Also, at 1.24.1.7(OO) NMAC: “Rule’ means any rule, regulation, order, standard or statement of policy, including amendments thereto or repeals thereof, issued or or repeals thereof, issued or promulgated by an agency of state government and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, and as further defined in subsection C of Subsection 14-4-2 NMSA 1978 and Attorney General Opinion No. 93-1.”

11(A) wage rates with respect to a particular contract and according to the prevailing wage rates. Because the prevailing wage rates involve the compilation of data regarding broad classes of workers rather than rates for workers on specific contracts, the prevailing wage rates appear to be rules when contrasted with specific contract rates. Therefore, the Court should find that the prevailing wage rates fall more within the general provision than in the Rules Act's exceptions or negative definition of a rule.

ii. The Wage Act Itself Evinces the Nature of the Prevailing Wage Rates as Rules

More specifically than defining a rule by what it is not, the Wage Act contains provisions that fall into the category of orders made “in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts.” *See* § 14-4-2(C). The Supreme Court has identified certain administrative actions as adjudication. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-49, ¶ 11, 149 N.M. 42, 46, 243 P.3d 746, 751 (N.M. 2010) (“administrative adjudications; that is, the application of existing law to the facts of a particular matter”). The difference between an adjudication and rule-making or procedure making is found elsewhere in New Mexico law in

the separation of powers doctrine, which directs administrative agencies to their duty of implementing legislation.² *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. at 293, 681 P.2d at 719. The doctrine supports the idea that administrative agencies have the two functions, which are adjudication and rulemaking and are described by the Rules Act's definition of rules. This separation of powers is made explicit in the language of certain statutes. *See New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-5, ¶ 14, 274 P.3d 53, 57 (N.M. 2012) (the statute enabling the Water Quality Control Commission also delineates a rule-making procedure). The Wage Act does not explicitly define adjudicative and promulgating functions, but it does provide for appeals, which result in decisions, of "any determination, finding or action of the director" made pursuant to the statute. NMSA 1978, §13-4-15(A) – (C).

The Wage Act's provisions and the regulations promulgated pursuant to that statute characterize the prevailing wage rates more like rules and less like case-by-case determinations to be made by the

² "The Legislature grants agencies the discretion of promulgating rules and regulations which have the force of law. The agencies must also determine whether there has been compliance with administrative decisions, and this is an adjudication. Therefore, agencies exercise in part functions of all three branches of government." *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. at 293, 681 P.2d at 719.

director. A rule is largely defined by whom it affects, as indicated by the first sentence of the definition at Section 14-4-2(C). In the section that delineates the determination of prevailing wage rates, the Wage Act states that the “director shall issue rules necessary to administer and accomplish the purposes of the Public Works Minimum Wage Act.” Section 13-4-11(E). The 2005 amendment to this section removed the phrase “and regulations” after “rules” in Subsection E. See “Statutory Notes” for Section 13-4-11. The statutory language of that subsection, particularly in its amended form, shows that rulemaking must be involved in the prevailing wage determination process. The statute also provides for penalties and rights with regard to the payment of workers at the prevailing wage rates. A contractor may lose its contract if it fails to pay employees according to established wage rates, NMSA 1978 § 13-4-13, and a contractor failing to pay may be liable to a laborer who did not receive such pay. NMSA 1978 § 13-4-14. Additionally, the plain language of the Wage Act indicates that prevailing wage rates were not only meant to apply to broad classes of workers but that they are different from other types of wage determinations that apply to specific contracts that fall under the statute.

The administrative regulations made pursuant to the Wage Act that were in effect at the time of Ms. Cordova's actions also exhibited a distinction of the prevailing wage rates from more adjudicative functions. Under the section of the Public Works Minimum Wage Act Policy Manual formerly titled, "Powers and Duties of the Director and of the Contracting Agencies in the Administration of the Public Works Minimum Wage Act," the director was given authority to make determinations of wage rates for particular contracts.³ This authority involved a three-week determination based on prevailing wage rates. The regulations in effect immediately before Ms. Cordova's actions pertaining to the generation of prevailing wage rates entailed the gathering of information that applies to classes of laborers potentially

³ "B. Requests for and issuance of wage decisions:

(1) All agencies proposing to contract for work to be performed subject to this act must make written request to the director, not less than three (3) weeks before the advertising date, for a wage rate decision applicable to the work to be performed, which request must contain the following information:

- (a) name, title and signature of requesting officer;
- (b) department or agency requesting decision;
- (c) date of request;
- (d) full description and estimated cost of each of the several classifications of construction as set out in Subsection B of 11.1.2.9 NMAC of these rules and regulations;
- (e) location (city or other description) of project site;
- (f) proposed advertising date and date by which bids are to be submitted.

(2) The director shall issue and mail the appropriate wage rate decision or decisions to the requesting agency within five (5) working days of receipt by the director of such agency's proper written request." 11.1.2.10 NMAC (12/31/09).

involved in various contracts.⁴ Perhaps most pertinent to the contrast of prevailing wage rates with the contract-specific wage rate determinations, the regulations called for the director to “hold a public hearing on the proposed regulations, proposed amendments or repeal of an existing regulation.” 11.1.2.15(B) NMAC (12/31/2009). The regulation also called for 30-day notice of the hearing to be given. *Id.* These types of hearing and notice requirements are common to rulemaking procedures compliant with the Rules Act in the context of other statutes. *See Bokum Resources Corp. v. New Mexico Water Quality Control Comm’n*, 93 N.M. 546, 553, 603 P.2d 285, 292 (N.M. 1979) (“it is clear that the standards contained in the regulations adopted by the Commission, after the required notice, hearing and filing, are exactly what the Legislature calls them: ‘rules’”); *Rivas v. Board of Cosmetologists*, 101 N.M. at 594, 686 P.2d at 936 (“Due process generally requires that affected parties receive reasonable notice, and the minimum protections upon which administrative action may be based are according to interested parties a simple notice and right to comment.”).

⁴ See 11.1.2.15 NMAC (12/31/2009) for the previous regulations guiding the determination of prevailing wage rates, and 11.1.2.13(D) NMAC (3/15/2012) for the current regulations.

iii. Because The 2011 Prevailing Wage Rates Should Have Been Produced and Filed as Rules Pursuant to the Rules Act, Mr. Marquez Acted Properly in Rescinding the Rates.

Mr. Marquez's July 2011 letter rescinding both the process and prevailing wage rates enacted by Ms. Cordova was proper because it brought the department into compliance with both the Wage Act and the Rules Act. Because 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. Ms. Cordova should have used rulemaking in the determination and issuance of the prevailing wage rates. *See* §13-4-11(E). Mr. Marquez's rescinding letter was appropriate because the rates were not properly set and did not become rules.

IV. CONCLUSION

Petitioner respectfully requests this Court to enter an Order reversing the Order of the Second District Court in this matter in all respects and restoring the administrative decision of the Labor and Industrial Commission on September 2, 2011, and determining that prevailing wage rates under the Public Works Minimum Wage Act are

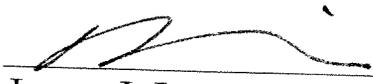
“rules” under the State Rules Act and that the Rules Act’s requirements apply to the promulgation of state prevailing wage rates.

V. STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, the Department hereby certifies that the body of this brief consists of 3,894 words written in 14-point Century Schoolbook font. The word count was obtained from Microsoft Word for Mac 2011. The Brief-in-Chief therefore complies with the requirement of 12-213(F)(3) and 12-305 NMRA.

Respectfully submitted,

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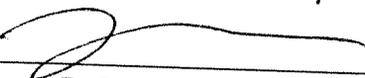
I hereby certify that on the 25th day of February, 2013, the foregoing was served on the following parties via first class mail:

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