



COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

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Re: A & H Metals, Inc. v. Delaware Department of Labor  
C.A. No. 3826-VCN  
Date Submitted: August 7, 2008

Dear Counsel:

The Plaintiffs, public works contractors<sup>1</sup> who routinely employ sheet metal workers, brought this action to challenge the Delaware Department of Labor's (the "Department") designation in March 2008 of the prevailing wage rate for sheet

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<sup>1</sup> The Plaintiffs are A & H Metals, Inc. Delcard Associates, Inc., M. Davis & Sons, Inc., Merit Mechanical Co., Inc., and Quality Heating & Air Conditioning Company, Inc. Also joining as a plaintiff is Associated Builders and Contractors, Delaware Chapter, Inc. ("ABC"), which is a trade organization representing the interests of certain employers in the construction industry.

metal workers in New Castle County, Delaware. They asserted that the Department had violated Delaware's Freedom of Information Act ("FOIA")<sup>2</sup> by not having made certain records public; they also attacked the wage rate determination on its merits. Following discovery undertaken in support of their application for interim injunctive relief, the Plaintiffs concluded that the records forming the basis of their FOIA challenge do not exist. Accordingly, because the Department cannot make public that which does not exist, the Plaintiffs' FOIA claims are moot. This letter opinion addresses the question of whether the Court has, or, if it does, should continue to exercise, subject matter jurisdiction over the Plaintiffs' substantive challenge to the Department's prevailing wage rate determination.

\* \* \*

The Department, in rule-making efforts conducted under 29 *Del. C.* § 6960 and its Prevailing Wage Regulations (the "Regulations"), regularly sets the prevailing wage rate to be paid to various classes of laborers and mechanics on certain public works projects in each of the counties in Delaware. The process, generally, requires the Department to conduct an annual survey to ascertain the rate paid to the majority of employees performing such work.

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<sup>2</sup> 29 *Del. C.* ch. 100.

In the late winter of 2008, the Department conducted its survey and issued its preliminary wage rate determinations. The wage rate for sheet metal workers in New Castle County was reviewed by the ABC on behalf of its members employing sheet metal workers. The rate was acceptable and no protest or administrative appeal was filed. Without any other advance notice, the Department issued its final wage rate determination; the Plaintiffs were disheartened to learn that the sheet metal workers' wage rate had been increased by more than 20% from the Department's preliminary determination.

\* \* \*

The Plaintiffs assert that the Department had, in the interim, received new, but inaccurate, information submitted in error by one sheet metal worker employer. The Plaintiffs maintain that the error in the then-recent submittal had resulted in a material and unsupported increase in the wage rate. The Regulations provide that the Department "shall determine the validity of the data" as part of its rule-making process. If errors in survey data are found, the Department should then revise the wage rates in order to base them upon accurate data. This, according to Plaintiffs, the Department failed to do. The Plaintiffs asked the Department for documentation of its efforts to validate the data that was reviewed between the preliminary

determination and the final determination. The Department did not produce any documents in response to that request and that failure prompted the Plaintiffs to invoke FOIA to obtain the supporting records. As noted, however, discovery revealed that no such documents exist and, thus, the Plaintiffs' FOIA claim is moot.<sup>3</sup>

In addition to their FOIA claim, the Plaintiffs substantively challenged the Department's adoption of the final sheet metal workers prevailing wage rate without, as the Plaintiffs assert, first having satisfied its duty to validate the data upon which it based the revised wage rate. This substantive challenge to the rule-making effort is all that remains from the Plaintiffs' complaint.

\* \* \*

With this background, the Court turns to the question of subject matter jurisdiction. The Plaintiffs bear the burden of demonstrating that this Court has subject matter jurisdiction over a dispute. In general, subject matter jurisdiction in this Court requires the assertion of an equitable right, the seeking of an equitable remedy, or the advancement of a cause of action that the General Assembly has

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<sup>3</sup> The Plaintiffs also claimed that the Department had violated the Administrative Procedures Act, 29 *Del. C.* § 10112(a)(2) when it failed to release documents supporting its assessment of the accuracy of the collected data. That claim, however, is moot for the same reasons that mooted the FOIA claim.

assigned to this forum. If there is an adequate remedy at law, equitable jurisdiction will not be found.

The General Assembly has conferred upon the Superior Court the jurisdiction to resolve appeals from the Department's rule-making activities.<sup>4</sup> Thus, as to judicial review of the Department's rule-making, an adequate legal remedy is available in the Superior Court, and this Court would lack independent subject matter jurisdiction to consider such an appeal.

\* \* \*

That conclusion does not, however, necessarily end the inquiry. When this action was filed, there was a claim (the FOIA claim) which was within this Court's subject matter jurisdiction. Frequently, this Court may consider both legal claims and equitable claims as a matter of efficiency and fairness.<sup>5</sup> This Court will assume,

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<sup>4</sup> 29 *Del. C.* § 10141 (governing judicial review of regulations generally). *See also* 29 *Del. C.* § 10102(4) (providing that the "Court" for these purposes is the Superior Court). The Department is an "agency" within the meaning of 29 *Del. C.* § 10102(1) because it is "department . . . of the state government . . . authorized by law to make regulations . . .". By 29 *Del. C.* § 10101(7), "'regulation' means any requirement . . . formulated and promulgated by an agency." A prevailing wage rate determination by the Department constitutes the establishment of a requirement for wages that must be paid by certain public works contractors. Although the whole of 29 *Del. C.* ch. 101 may not bind the Department, *see* 29 *Del. C.* § 10161(a), its efforts to promulgate regulations are subject to judicial review under 29 *Del. C.* § 10141, *see* 29 *Del. C.* § 10161(b).

<sup>5</sup> *See* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, §2.04 at 2-72 (2008).

for present purposes, that it had the authority to consider the FOIA claim and the appeal from the rule-making process. Even though the equitable claims under the FOIA are now moot, it does not automatically follow that this Court no longer has jurisdiction. Under the so-called clean-up doctrine, the Court, once it has a basis for exercising subject matter jurisdiction, may retain those legal claims which it otherwise could not have addressed even after the equitable claims have all been dismissed.<sup>6</sup> The Court's decision to retain jurisdiction under the clean-up doctrine is committed to the Court's discretion.

\* \* \*

In this instance, the Court declines to invoke the clean-up doctrine (even with the assumption that it could). The General Assembly has made it clear that judicial review of regulations, as a general matter, should be accomplished in the Superior Court. Here, appeal to the Superior Court of the Department's rule-making activity falls squarely within 29 *Del. C.* § 10141. There are no efficiencies to be gained by litigating in this venue an appeal of administrative action after the FOIA claim has

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<sup>6</sup> *See id.* In addition to the FOIA claim, the Plaintiffs also sought a temporary restraining order which might otherwise have provided a basis for the Court's subject matter jurisdiction. In substance, they sought to prevent implementation of the new wage rate. Whether the Superior Court's authority under 29 *Del. C.* § 10144 to stay the operation of a regulation pending judicial review would be an adequate legal remedy obviating the need or appropriateness of a temporary restraining order need not be addressed.

fallen away. There is no fairness argument to be asserted on behalf of the Plaintiffs when their right to obtain review in the Superior Court was well-recognized.<sup>7</sup> In sum, there is no reason to deviate from the general approach prescribed by the General Assembly that judicial review of the administrative actions should be conducted by the Superior Court.<sup>8</sup>

\* \* \*

Accordingly, for the foregoing reasons, the above-entitled action will be dismissed for lack of subject matter jurisdiction. The Court declines to exercise any authority that it may have under the clean-up doctrine. Transfer to the Superior Court may be accomplished pursuant to 10 *Del. C.* § 1902.<sup>9</sup>

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap

cc: Register in Chancery-K

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<sup>7</sup> See, e.g., *Nichols v. Lewis*, 2007 WL 158462, at \*1 (Del. Ch. May 1, 2007) (“there is no efficiency or fairness argument that justifies this court’s retention of clean-up jurisdiction”).

<sup>8</sup> Of course, judicial review of certain administrative actions has been assigned to this Court by the General Assembly. See, e.g., 6 *Del. C.* § 7324 (Court of Chancery has exclusive jurisdiction to review orders of the Securities Commissioner).

<sup>9</sup> This Court expresses no view as to the applicability of the requirement imposed by 29 *Del. C.* § 10141(d) on parties seeking judicial review in the Superior Court to file their action within thirty days of the agency action.