



The Petitioner, B.W. Electric, Inc., filed a Petition in *Certiorari* and for Declaratory Judgment in this matter, challenging the Respondents’ – The Delaware Department of Labor (the “Department”), Daniel Nelson (“Nelson”), and the Secretary of the Department, Patrice Gilliam-Johnson (the “Secretary”) – application of Delaware’s Prevailing Law for lacking legal authority, legal error, and unconstitutionality. The Respondents now seek to dismiss the petition, on multiple grounds, pursuant to Superior Court Civil Rule 12(b)(6). After considering the parties’ arguments and relevant precedent, the Court concludes that it must dismiss those claims related to the Administrative Procedures Act and the alleged deprivation of Constitutional Due Process. The remaining claims, not dismissed, are listed in the conclusion of this decision.

## **BACKGROUND**

### *Delaware’s Prevailing Wage Law & Regulations*

Delaware’s Prevailing Wage Law (hereinafter, Delaware’s “PWL”),<sup>1</sup> as implemented by Delaware’s Prevailing Wage Regulations (hereinafter, Delaware’s “PWR”),<sup>2</sup> tasks the Department with establishing and enforcing payment of prevailing wages for various classes of laborers and mechanics who are employed as part of certain “public works” projects.

### *The Department’s Investigation & Final Decision*

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<sup>1</sup> See 29 Del. C. § 6960.

<sup>2</sup> See 19 Del. Admin C. § 1322.

On October 24, 2017, Respondent Nelson, a Labor Enforcement Officer II for the Department's Office of Labor Law Enforcement (the "OLLE"), informed the Petitioner that – in addition to labor laws not part of the *certiorari* and declaratory judgment petition – it had violated Delaware PWR 7.1.1.3.3 by failing to maintain proper daily logs for its employees as part of a public works project referred to by the Petitioner as the "US 301 Levels Road to Summit Bridge Road [C]onstruction [P]roject." Respondent Nelson also accused the Petitioner of misclassifying certain employees in violation of Delaware PWR 3.1.1 and 29 *Del. C.* § 6960.

On November 7, 2017, the Petitioner filed, what it claims constituted, a notice of appeal with the Secretary. The Petitioner contended that:

1. OLLE abused its discretion in determining that workers who assemble and install electrical conduit, install junction wells, pull coaxial cable, and install temporary electric service/panel are to be classified as Electricians.
2. OLLE abused its discretion when it determined that [the Petitioner's] employees actually engaged in some or all of the following tasks at the above-referenced project: assemble and install electrical conduit, install junction wells, pull coaxial cable, and install temporary electric service/panel.
3. OLLE abused its discretion in failing to identify the days and times any alleged misclassifications occurred. OLLE has only identified the weeks in which the alleged misclassifications occurred, making it impossible for [the Petitioner] to respond to or rebut the allegations. The allegations lack the required specificity to be legally valid.
4. OLLE abused its discretion by enforcing laws drafted by its own

enforcement officers during their concurrent service as Delaware state legislators, in violation of the Delaware Constitution.

On November 22, 2017, Respondent Nelson emailed Michael Sturgis of Allan Myers, Inc. – the prime contractor on the US 301 Levels Road to Summit Bridge Road Construction Project – directing Allan Myers, Inc. to withhold payment to the Petitioner, in the amount of \$14,414.53, as a result of the Petitioner’s violations of Delaware’s PWR.

On December 15, 2017, the Secretary dismissed the Petitioner’s “notice of appeal” without a hearing because the Petitioner did not provide any evidence in support of the Petitioner’s allegations, “nor did [the Petitioner] provide any hint of the manner in which OLLE allegedly abused its discretion.”

On December 19, 2017, the Petitioner requested that the Secretary set aside the Secretary’s dismissal of the Petitioner’s appeal and re-open the matter since the Petitioner’s November 7, 2017 filing was intended as a “notice of appeal” rather than the entirety of the Petitioner’s actual appeal materials.

*The Petitioner’s Certiorari Petition & Request for Declaratory Judgment*

On January 9, 2018, the Petitioner submitted to this Court its Petition in *Certiorari* and for Declaratory Judgment. In regards to the Petitioner’s request for a writ of certiorari, the Petitioner contends that:

[1.] The Secretary’s treatment of the Petitioner’s “notice of appeal” – the purpose of which was only to invoke the jurisdiction of the Secretary under Delaware’s PWR – as the entirety of the Petitioner’s submissions, without prior notice to the Petitioner, denied the Petitioner its most basic

due process rights, which require both notice and a right to be heard;

[2.] Because the Delaware Superior Court reviews the Secretary's determination on the record, the Secretary's decision also denied the Petitioner any right of further appeal because the Petitioner was not afforded the opportunity to create a record from which to appeal. As such, the Secretary's decision to dismiss the Petitioner's appeal of the OLLE's determination was unlawful and irregular, and should be overturned so that the Petitioner may submit evidence to support the Petitioner's appeal of the OLLE's determination;

[3.] 29 *Del. C.* § 10124 requires that parties be afforded a formal evidentiary hearing in matters involving a case decision when such parties do not consent to informal proceedings. 29 *Del. C.* § 10102(3) defines a case decision as any agency proceeding or determination that a named party, as a matter of past or present fact, is or is not in violation of a law or regulation;

[4.] Delaware's PWR 7.1.3 violates the Administrative Procedures Act (hereinafter, the "APA") in that it does not afford a hearing to parties who have been determined to have violated Delaware's PWL except in cases where the employer's right to proceed with work on the contract has been terminated. By complying with the unlawful Delaware PWR 7.1.3, the Respondents have violated the APA, committed errors of law, and abused their discretion;

[5.] Pursuant to the Due Process Clause of the 5th and 14th Amendments to the United States Constitution and Article I, § § 7 and 9 of the Delaware Constitution, Respondent Nelson's directive to Allan Myers, Inc. to withhold payment from the Petitioner was unconstitutional and invalid as a matter of law because the Petitioner was not afforded notice and an opportunity to be heard before the money was withheld;

[6.] Because the Respondents did not rely upon substantial relevant evidence, abused their discretion, committed errors of law, and acted arbitrarily and capriciously, the Secretary's decision to dismiss the Petitioner's appeal should be reversed.

As to the Petitioner's request for declaratory judgment, the Petitioner contends that the Court should enter a declaratory judgment that:

[1.] The Department's classification of workers, in this case as "Electricians," is invalid and may not be enforced;

[2.] The portions of the State Procurement Act, 29 *Del. C.* § 6960, enacted during the legislative service of John Viola violate the Delaware Constitution and are void *ab initio* because the contested portions were enacted while Mr. Viola unconstitutionally served as both a member of the legislative and executive branch – in this instance, the Petitioner alleges that Mr. Viola served concurrently as a member of the House of Representatives and as a Labor Law Enforcement Officer for the Department;

[3.] The portions of the State Procurement Act, 29 *Del. C.* § 6960, enacted during the legislative service of Anthony J. Deluca violate the Delaware Constitution and are void *ab initio* because the contested portions were enacted while Mr. Deluca unconstitutionally served as both a member of the legislative and executive branch – in this instance, the Petitioner alleges that Mr. Deluca served concurrently as a Delaware Senator and as the OLLE Director from 1998 to 2013;

[4.] The Department's enforcement of laws drafted by its own officers violates the Delaware Constitution and is void *ab initio*;

[5.] Delaware PWR 7.1.2.3 violates the Delaware and United States Constitutions in that it permits an unconstitutional taking by allowing

the Department to direct a prime contractor to withhold money owed to an employer without due process of law;

[6.] Delaware PWR 7.1.3 violates the Delaware and United States Constitutions in that it does not provide due process to contest OLLE's determination of worker classification. Delaware PWR 7.1.3 also does not provide due process to contest the OLLE's determination to withhold money owed to an employer;

[7.] Delaware PWR 7.1.3 violates the APA in that it does not afford parties the opportunity for an evidentiary hearing prior to the issuance of a case decision;

[8.] Allan Myers, Inc. should turn over funds to the Petitioner that have been withheld at the direction of the Department;

[9.] The Department's system for appealing the classification of workers is invalid and may not be enforced;

[10.] The Department has no system for the appeal of the withholding of funds and/or that such system is invalid and may no longer be enforced or applied;

[11.] The Petitioner is entitled to attorney fees under the Delaware Declaratory Judgment Act; and

[12.] For such further relief as the Court determines to be equitable and just.

*The Respondents' Motion to Dismiss*

On January 22, 2018, the Respondents filed the instant Motion to Dismiss pursuant to Superior Court Civil Rule 12(b)(6). First, the Respondents contend that

*Lujan v. G & G Fire Sprinklers, Inc.*<sup>3</sup> – as adopted by the Delaware Court of Common Pleas in *Greenberg v. Thomas Edison Charter School*<sup>4</sup> – clearly mandates that the Petitioner’s recourse for its claim of unjust deprivation of property, is to file a breach of contract action against the awarding body of the public works contract and not against the Department that merely acts as an enforcing agency. To hold otherwise would, in the words of the Respondents, “open the entire panoply of state procurement activity to constitutional scrutiny – a scenario every precedential court has rejected.” Second, the Respondents contend that Count I of the *certiorari* and declaratory judgment petition should be dismissed because the Department provides more than sufficient due process for its role under the *Lujan* line of cases. Specifically, the Department’s investigations are reviewed internally, and there is a right under the regulations for review of the investigative findings relevant to the Petitioner’s challenges in this matter. Moreover, the Respondents allege that, pursuant to 29 *Del. C.* § 10161(b), the Department is exempt from 29 *Del. C.* § 10121.<sup>5</sup> Third, the Respondents contend that the Petitioner’s theories regarding due

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<sup>3</sup> *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001).

<sup>4</sup> *Greenberg v. Thomas Edison Charter School*, 2011 WL 6210632 (Del. Com. Pl. Nov. 21, 2011).

<sup>5</sup> The Respondents emphasize that the APA does not require a hearing in this context without a stop work order going into effect. Since no stop work order was issued, the APA apparently does not apply and the Petitioner’s remedies are in breach of contract for monetary damages that it believes it unjustly incurred. Additionally, the Respondents allege that there is no more evidence that the General Assembly sought to draft the entirety of the State Procurement Code into the APA than there is that the Fourteenth Amendment sought to draft the entirety of state contracting into



process are a step beyond anything required by the state or federal constitutions. Apparently, “they are a bold new proposal for expanding the due process rights best resolved by legislative activity, rather than [as] an action [the Petitioner] chose to file in lieu of its available breach of contract remedies.” Fourth, the Respondents contend that the Petitioner’s claims regarding Mr. Viola and Mr. Deluca should be dismissed because the Petitioner failed to cite to a “provision providing standing to complain about the enforcement of the statute because, at unrelated times and places, that statute was enforced by elected officials.” In addition, the Respondents allege that the Petitioner failed to cite any authority that makes a state legislator ineligible to enforce a statute that predates their own election. For the foregoing reasons, the Respondents request dismissal of this matter.

On February 2, 2018, the Petitioner filed its Response to the Motion to Dismiss. First, the Petitioner contends that, although *Lujan* provides a starting point for the Court’s analysis, the Respondents make an impermissible leap by assuming that Delaware has made ordinary judicial process available to contractors who have been found in violation of Delaware’s PWL, *and* that this ordinary judicial process would sufficiently redress all of the Petitioner’s claims. According to the Petitioner, Delaware Courts have consistently held that the Superior Court may issue a writ of certiorari to the Secretary to review prevailing wage determinations. And, in fact, the Department has previously agreed that, under circumstances similar to this case, a

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federal court.

writ of certiorari is the appropriate remedy.<sup>6</sup> Furthermore, the Petitioner contends that Delaware’s PWL is distinguishable from California’s PWL under review in *Lujan*. Section 1732 of the California law under review stated that “suit on the contract against the awarding body is the ‘exclusive remedy of the contractor or his assignees’ with respect to recovery of withheld wages and penalties [in a prevailing wage dispute].”<sup>7</sup> Delaware, by contrast, does not have such a remedy. Thus, the only mechanism for review of the Secretary’s decision to withhold funds under Delaware’s PWL is by way of a writ of certiorari, which provides “complete and adequate relief.” Second, the Petitioner contends that the Respondents incorrectly assert that the only basis for the Petitioner’s claims is a property right in the money withheld by Allan Myers, Inc. The Petitioner, however, asserts that it is subject to further consequences – such as treble damages, fees, and civil fines – flowing from Respondent Nelson’s letter determination sent on October 22, 2017. As such, the Petitioner claims that it is entitled to due process, which includes the right of review by this Court on *certiorari*. Third, the Petitioner contends that the Department’s actions are invalid and subject to review and reversal by this Court because the Secretary failed to comply with procedures of review set forth in Delaware’s PWR. Fourth, the Petitioner contends that its claims, related to the unconstitutional dual office holding of Department employees, should survive dismissal because the Petitioner believes

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<sup>6</sup> See *SimplexGrinnel, L.P. v. Delaware Dept. of Labor*, 2012 WL 5362835, at \*3 (Del. Ch. Oct. 31, 2012).

<sup>7</sup> *Lujan*, 532 U.S. at 192-93.

that it has adequately alleged: (1) an “injury-in-fact;” and (2) that the interests it seeks to protect are within the zone of interest to be protected. For the foregoing reasons, the Petitioner requests that the Court deny the Respondents’ Motion to Dismiss.

On February 5, 2018, the Petitioner filed a supplement to its Response. The Petitioner included the Department’s briefing from *SimplexGrinnel, L.P.* According to the Petitioner, the Department “plainly and starkly” takes the position in that case that the proper recourse for disputing the Secretary’s determination, as to worker classification, is “to file a writ of certiorari to the Superior Court.”

On February 7, 2018, the Respondents filed a response to the Petitioner’s February 5, 2018 letter. The Respondents contend that the litigation in *SimplexGrinnel* occurred over five years ago under a different administration, which was amenable to exceeding its regulatory obligations by providing evidentiary administrative hearings. The Respondents are unclear as to what the Petitioner intends to accomplish by providing the Court with the *SimplexGrinnel* briefing, other than to possibly raise an issue with respect to equitable estoppel. If that is the case, the Respondents contend that equitable estoppel is inapplicable. Moreover, the Respondents emphasize that the Petitioner’s proposed course of litigation in this case would impermissibly impose evidentiary hearings in matters that are more appropriately suited for analysis by the courts when brought as a contract dispute between contractors and other state agencies.

*Oral Argument*

On March 23, 2018, the Court held oral argument to address the parties' pleadings. The Respondents, in essence, clarified that the Department was not required to grant the Petitioner a hearing before withholding the disputed funds, and that a breach of contract action could more than adequately address the Petitioner's objections to the Department's withholding. The Petitioner, in essence, clarified that a *certiorari* petition is appropriate because, under similar circumstances in *SimplexGrinnel L.P.*, the Court of Chancery recognized *certiorari* as the exclusive remedy in prevailing wage disputes. The Petitioner also clarified that it was not necessarily seeking an evidentiary hearing with the Secretary, rather, the Petitioner seeks review – by way of a *certiorari* petition – of the Secretary's decision to dismiss the Petitioner's "notice of appeal" without allowing the Petitioner to submit additional materials because the Secretary's action apparently does not comply with Delaware's PWL or Delaware's PWR. At the conclusion of argument, the Court ordered additional briefing to address whether or not the Petitioner could be afforded complete relief in a breach of contract action.

*Supplemental Briefing*

On April 2, 2018, the Respondents filed their supplemental briefing requested by the Court. The Respondents contend that "there is no reason why [the Petitioner] could not recover . . . damages in a breach of contract action against [Allan Myers, Inc.] or [the contracting state agency]" because the subcontract agreement between the Petitioner and Allan Myers, Inc. contains a number of provisions which could

create a viable cause of action for the Petitioner. “Whether [the Petitioner] has a legitimate claim is, of course, another question that would be determined by the Court reviewing its claims in a separate breach of contract action.”

Also on April 2, 2018, the Petitioner filed its supplemental briefing requested by the Court. First, the Petitioner contends that it cannot bring a breach of contract claim against the contracting state agency in this case because the Petitioner is a subcontractor with no contractual relationship with the agency. Second, even if the Petitioner had a contractual relationship with the contracting state agency, the Petitioner could not recover damages from the agency because the agency did not breach any part of the agency’s agreement with Allan Myers, Inc. Instead, Allan Myers, Inc. apparently breached the subcontract agreement with the Petitioner when Allan Myers, Inc. withheld funds at the direction of the Department. Third, the Petitioner contends that it cannot obtain the relief that it seeks in a breach of contract action against Allan Myers, Inc. because, according to the court in *J & K Painting Co. v. Bradshaw*,<sup>8</sup> “[a] suit against the contractor on the subcontract cannot afford any relief against the awarding body or the [Labor] Commissioner, and would typically be subject to arguably preclusive defenses based either on customary contract clauses or on the provisions of the prevailing wage law itself.”<sup>9</sup> Moreover, as the moving parties, the Respondents have failed to show how a breach of contract action between

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<sup>8</sup> *J & K Painting Co. v. Bradshaw*, 53 Cal. Rptr. 2d 496 (Cal. Ct. App. 1996).

<sup>9</sup> *Id.* at 500.

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the Petitioner and Allan Myers, Inc. – two private parties – could possibly invalidate the actions of the Department – a governmental body – or provide the declaratory relief that the Petitioner seeks. And, according to the Petitioner, the Respondents have utterly failed to demonstrate how the contractual defenses listed in *J & K Painting, Co.* would not effectively prevent the Petitioner from obtaining the relief it seeks. Finally, the Petitioner emphasizes that, even if it recovered the withheld funds from Allan Myers, Inc., it would not be afforded full relief from the non-monetary effects of the Respondents’ actions.

On April 5, 2018, the Respondents filed their response to the Petitioner’s supplemental briefing. First, to rebut the Petitioner’s supplemental briefing, the Respondents set forth 6 *Del. C.* § 3502, 6 *Del. C.* § 3503, and 6 *Del. C.* § 3504 as possible avenues for relief from Allan Myers, Inc.’s withholding of funds. The Petitioner could also, theoretically, seek a mechanic’s lien against the property of the contracting agency under Chapter 27 of Title 25 of the Delaware Code. Thus, the Petitioner’s conclusory statement, that a breach of contract action would not be viable, is not accurate according to the Respondents. Second, rebutting the supposed inapplicability of *Lujan*, the Respondents assert that such a contention ignores numerous similar cases cited by the Respondents, involving contractors who sought to sue government agencies for constitutional violations instead of availing themselves of existing contractual remedies. The Respondents also believe that the Petitioner’s invocation of *J & K Painting Co.*, is unhelpful because it stands for the proposition that the Petitioner’s current lawsuit is unlikely to prevail – particularly

the portions seeking declaratory judgment. Third, the Respondents contend that “[n]othing about the potential liability on the prevailing wage violations challenged in the [Petitioner’s *certiorari* and declaratory judgment petition] will absolve it of liability on the [Department’s] numerous ancillary claims.” Fourth, the Respondents contend that the Petitioner’s request for a hearing is more appropriately couched as an action for declaratory judgment; one that could be filed as a counterclaim in a separate action, although, the Respondents note that such a claim would likely be dismissed because the APA does not apply to the Department. Finally, the Respondents again emphasize that the Petitioner’s claims, related to the apparent unconstitutionality of the Delaware PWL and Delaware PWR, are unsupported, unsustainable, and even surprisingly subversive.

Also on April 5, 2018, the Petitioner filed its response to the Respondents’ supplemental briefing. Primarily, the Petitioner contends that the Respondents have failed to meet their burden of showing that the Petitioner is unable to obtain relief under any conceivable set of circumstances based on the claims and allegations in the pending petitions. The Respondents conclusory assertions, regarding the availability of viable breach of contract actions, are insufficient because the Respondents failed to identify the specific provisions in the subcontract between the Petitioner and Allan Myers, Inc. that allegedly creates such an action. But, even if the Respondents did provide the relevant provisions of the subcontract, the Petitioner contends that it is beyond the scope of what the Court could consider on a motion to dismiss. Finally, the Petitioner re-emphasizes that unless the Petitioner is permitted to petition for

*certiorari* or declaratory judgment, the Secretary and the Department's decisions would effectively remain beyond the review of any court, regardless of whether it comported with the law or was arbitrary and capricious. For these reasons, the Petitioner asks the Court to deny the Respondents Motion to Dismiss.

### STANDARD OF REVIEW

Pursuant to Delaware Superior Court Civil Rule 12(b)(6), the Court will dismiss a complaint, or in this case a petition in *certiorari* and for declaratory judgment, if it “fail[s] to state a claim upon which relief can be granted.”<sup>10</sup> Dismissal is limited to those cases in which the Court determines “with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the [Petitioner] would not be entitled to relief.”<sup>11</sup>

In deciding the Respondents' motion, the Court must assume as true the well-pleaded allegations of the petition,<sup>12</sup> and afford the Petitioner “the benefit of all reasonable inferences that can be drawn from [its] pleading.”<sup>13</sup> While the Court must generally decline review of matters outside the complaint, or again in this case the

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<sup>10</sup> Super. Ct. Civ. R. 12(b)(6).

<sup>11</sup> See *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at \*3 (Del. Super. Apr. 16, 2014) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

<sup>12</sup> See *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996). See also *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003); *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406 (Del. 1995) (explaining that a complaint is “well-plead” so long as it puts the opposing party on notice of the claim brought against it).

<sup>13</sup> See *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991).



petition, documents that are integral to or incorporated by reference in the complaint/petition may be considered.<sup>14</sup> “[A] complaint[/petition] may, despite allegations to the contrary, be dismissed where the unambiguous language of the documents upon which the claims are based contradict the complaint’s[/petition’s] allegations.”<sup>15</sup>

## DISCUSSION

Having thoroughly reviewed all the filings in this matter, the Court has identified three primary issues that the Court must address at this stage in the proceedings: (1) can the Petitioner raise the issues set forth in his petition as a breach of contract action and will such an action afford the Petitioner complete relief? (2) does the APA apply to the Department’s enforcement of Delaware’s PWL and PWR? and (3) does the Petitioner have standing to challenge the enforcement of Delaware’s PWL based upon the apparent unconstitutional dual office holdings of Mr. Viola and Mr. Deluca?

### *The Petitioner’s Remedy*

The parties contend that *Lujan v. G & G Fire Sprinklers, Inc.*<sup>16</sup> should be the starting point for the Court to address this issue. The Court agrees, as it is crucial for the Court to explain the precise implications of *Lujan’s* holding to the facts of this

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<sup>14</sup> See *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

<sup>15</sup> See *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 139 (Del. Ch. 2003).

<sup>16</sup> *Lujan*, 532 U.S. 189.

case. In *Lujan*, the California Division of Labor Standards Enforcement (the “DLSE”), acting pursuant to the California Labor Code, directed the awarding bodies of three public works projects to withhold wages and penalties from the contractors of the public works projects for a subcontractor’s violation of the California Labor Code.<sup>17</sup> The awarding bodies withheld payment from the contractors, who in turn withheld payment from the offending subcontractor.<sup>18</sup> The subcontractor, as a result, filed suit seeking declaratory and injunctive relief against the DSLE, the California Department of Industrial Relations, and several state officials in their official capacities.<sup>19</sup> The subcontractor claimed that “the issuance of withholding notices without a hearing constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment.”<sup>20</sup> The United States Supreme Court did not agree. Instead, the Court upheld the constitutionality of the statutory scheme because the California Labor Code and, presumably, California’s common law afforded the subcontractor a sufficient opportunity to recover the funds through a breach of contract action in California state court.

The *Lujan* Court explained that California’s Labor Code provided a “public works” contractor *and his or her assignees* with an “exclusive remedy” to bring suit

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<sup>17</sup> *Id.* at 193.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Lujan*, 532 U.S. at 193.

against the awarding body of the public works contract for the alleged breach thereof, in order to recover withheld wages or penalties.<sup>21</sup> The Court expressed concern about what might happen if the subcontractor could not obtain assignment of the right to sue the awarding body under the contract, but ultimately concluded that in that situation, “subcontractors . . . may pursue their claims for payment by bringing suit against the contractor under California [common] law.”<sup>22</sup> Although that view was “necessarily tentative, since the final determination of the question rest[ed] in the hands of the California courts,” the subcontractor having failed to “convince[] [the court] that this avenue of relief [was] closed to it” failed to meet its burden to prove that the statutory withholding scheme was unconstitutional.<sup>23</sup>

To support its “tentative” view that, in the absence of assignment, California common law permitted the subcontractor to pursue a claim for breach of contract the *Lujan* Court cited *J & K Painting Co. v. Bradshaw*.<sup>24</sup> In *J & K Painting*, a painting subcontractor, PaintCo, instituted an action to challenge the California Labor Commissioner’s practice of imposing penalties for prevailing wage violations at the maximum statutory rate and sending a “notice to withhold” to the prime contractor including that amount prior to conducting a thorough investigation. In the action,

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<sup>21</sup> *Id.* at 197.

<sup>22</sup> *See id.* at 197-98.

<sup>23</sup> *Id.* at 198.

<sup>24</sup> *J & K Painting Co.*, 53 Cal. Rptr. 2d 496 (Cal. Ct. App. 1996).

PaintCo sought a writ of mandamus, “ordering [the Labor Commissioner] to exercise her discretion as required by statute [to] initiate a full investigation into the alleged prevailing wage violations of Petitioner . . . and [to] make a determination before imposing any penalties under Labor Code § 1775 . . . .”<sup>25</sup> Although the California court’s decision does not specifically so state, the text of *J & K Painting Co.* indicates that the petition was brought under the California civil code provision governing traditional mandamus petitions.<sup>26</sup>

The Labor Commissioner contended that PaintCo lacked standing to challenge the Commissioner’s practice since the funds were withheld from the general contractor, and that mandamus was inappropriate because PaintCo had one or more plain, speedy, and adequate remedies at law, including “(1) a statutory suit, under an assignment from the general contractor, for the recovery of penalties from the awarding body; (2) recordation of a stop notice against the project for nonpayment under the subcontract; and (3) suit against the general contractor under the subcontract.”<sup>27</sup>

The court in *J & K Painting Co.* considered and rejected these procedural defenses. First, in regards to standing, the court held that PaintCo was “directly aggrieved by the withholding, and possess[ed] a direct interest in a determination of

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<sup>25</sup> *Id.* at 498.

<sup>26</sup> *See id.* at 499-500.

<sup>27</sup> *Id.* at 500.

its lawfulness” because the general contractor withheld funds from PaintCo as the California Labor Code expressly empowered it to do.<sup>28</sup> Second, the court held that none of the proceedings mentioned by the Labor Commissioner as adequate substitutes for a writ proceeding “would afford the relief sought . . . by PaintCo, i.e., a determination that the practice regularly employed by the [Labor] Commissioner to collect penalties [was] unlawful, and a writ commanding that it cease.”<sup>29</sup> “A statutory suit against the awarding body would be ‘limited to the *recovery* of the wages and penalties,’ and would permit ‘[n]o other issues’ to be ‘presented to the court.’”<sup>30</sup> “The statutory stop-notice procedure [was] at least equally limited, and (indulging the doubtful assumption that it might otherwise be applicable) could well become time-barred before an aggrieved subcontractor even learned funds were being withheld.”<sup>31</sup> Finally, a suit against the contractor on the subcontract cannot afford any relief against the awarding body or the Labor Commissioner, and the suit would also typically be subject to arguably preclusive defenses based on the prevailing wage law itself.<sup>32</sup>

In light of the foregoing review, the Court understands *Lujan* as holding that

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<sup>28</sup> *J & K Painting Co.*, 53 Cal. Rptr. 2d at 499.

<sup>29</sup> *Id.* at 500.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *J & K Painting Co.*, 53 Cal. Rptr. 2d at 500 (citation omitted).

due process does not require a pre-deprivation hearing to contest the withholding of funds related to a suspected prevailing wage law violation as long as some post-deprivation judicial remedy is available to permit the subcontractor to reclaim the sums withheld. A standard breach of contract action against the contractor on the subcontract agreement, for example, would suffice according to *Lujan*. On the other hand, if a contract action is unavailable or inadequate under the circumstances, the subcontractor could also challenge a state labor secretary's decision to withhold funds directly, through an ordinary writ. This being the remedy permitted in *J & K Painting Co.* and cited favorably in *Lujan*.

The Respondents contend that, like *Lujan*, a breach of contract action is the appropriate judicial remedy in this case. However, having reviewed the parties' submitted briefs, the Court is skeptical, particularly because neither party in this case submitted the subcontract between Allan Myers, Inc. and the Petitioner. Though it may potentially be outside the scope of a motion to dismiss,<sup>33</sup> it is surely necessary for the Court to review the terms of the subcontract in order evaluate the availability of a breach of contract action. Nor do the parties' conclusory arguments adequately address the potential defenses that Allan Myers, Inc. will more than likely assert to preclude the Petitioner's recovery of the withheld funds.<sup>34</sup> In effect, the Court has

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<sup>33</sup> The Court could have easily converted the motion to dismiss to a motion for summary judgment, if required.

<sup>34</sup> See *J & K Painting Co.*, 53 Cal. Rptr. 2d at 500 n. 4 (where the court acknowledged that the contractor:

almost no basis whatsoever to determine whether or not a breach of contract action could afford the Petitioner adequate relief in this case. Finally, this Court shares the concern identified by the California appellate court in *Mobley v. Los Angeles Unified School District*:

On a more pragmatic note, a dispute between a state agency and a subcontractor concerning payment of prevailing wages cannot be efficiently resolved by a breach of contract suit against the contractor. Generally, the contractor acts as a conduit in withholding payments. It does not conduct the investigation or determine the appropriate penalty and, therefore, would have very little knowledge of the pertinent facts. As a nonparty to the litigation, the agency would not be subject to ordinary discovery, and essential documents and witnesses' testimony would have to be obtained through the cumbersome process of subpoena.<sup>35</sup>

In sum, the Court is unconvinced that a breach of contract action is sufficient to provide the Petitioner with adequate relief in this case. The Petitioner is not left without a post-deprivation judicial remedy sufficient to satisfy due process though, as Delaware courts have previously allowed similarly situated parties to seek relief

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[W]ould undoubtedly take the position that its statutory entitlement to withhold payments from the subcontractor under [the California Labor Code] was a defense to any action on the subcontract; that it had acted as a mere conduit for payment of the sums withheld; that it was under no obligation to contest a notice to withhold issued on account of alleged violations by the subcontractor; and that the subcontractor waived its rights to the sums, or failed to mitigate its contract damages, by failing to proceed against the involved public agencies. [The court] of course express[ed] no view as to the soundness of any such defenses.

<sup>35</sup> *Mobley v. Los Angeles Unified Sch. Dist.*, 109 Cal. Rptr. 2d 591, 604 (Cal. Ct. App. 2001).

from the enforcement of Delaware's PWR pursuant to a writ of certiorari or an action for declaratory judgment.<sup>36</sup>

Having found that due process can be satisfied by either a writ of certiorari or a declaratory judgment action, the Court may dismiss the Petitioner's claims complaining of its deprivation. Those claims, set forth in Count I of the petition for certiorari, include the following:

[1.] The Secretary's treatment of the Petitioner's "notice of appeal" – the purpose of which was only to invoke the jurisdiction of the Secretary under Delaware's PWR – as the entirety of the Petitioner's submissions, without prior notice to the Petitioner, denied the Petitioner its most basic due process rights, which require both notice and a right to be heard;

[5.] Pursuant to the Due Process Clause of the 5th and 14th Amendments to the United States Constitution and Article I, §§ 7 and 9 of the Delaware Constitution, Respondent Nelson's directive to Allan Myers, Inc. to withhold payment from the Petitioner was unconstitutional and invalid as a matter of law because the Petitioner was not afforded notice and an opportunity to be heard before the money

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<sup>36</sup> See *Delaware Bldg. & Constr. Trades Council, AFL-CIO v. Univ. of Delaware*, 2015 WL 884058 (Del. Super. Feb. 20, 2015) (where the plaintiff filed a declaratory judgment action seeking a determination as to whether the defendants were subject to Delaware's PWR); *Mumford & Miller Concrete, Inc. v. Delaware Dept. of Labor*, 2011 WL 2083940 (Del. Super. Apr. 19, 2011) (where the petitioner sought *certiorari* review of the Delaware Department of Labor Secretary's, John McMahon, decision upholding a labor law enforcement officer's determination that the petitioner's employees who painted concrete safety barriers, a culvert, and para-pit at a publicly-funded road construction project should have been paid the prevailing wage for painters instead of the prevailing wage for laborers); *SimplexGrinnell, L.P.*, 2012 WL 5362835 (Del. Ch. Oct. 31, 2012) (where the plaintiff sought a declaration that Delaware's PWR did not require it to pay its employees the prevailing wage rates and that the Delaware Department of Labor could not compel the employer to pay those wage rates retroactively).



was withheld;

Those claims, set forth in Count II of the petition for declaratory judgment, include the following:

[5.] Delaware PWR 7.1.2.3 violates the Delaware and United States Constitutions in that it permits an unconstitutional taking by allowing the Department to direct a prime contractor to withhold money owed to an employer without due process of law;

[6.] Delaware PWR 7.1.3 violates the Delaware and United States Constitution in that it does not provide due process to contest OLLE's determination of worker classification. Delaware PWR 7.1.3 also does not provide due process to contest the OLLE's determination to withhold money owed to an employer;

*The APA*

The Petitioner's contentions regarding the APA, unfortunately for the Petitioner, can be discarded with relative ease because Delaware precedent is clear on this issue.<sup>37</sup> The Superior Court has no statutory authority or legal authority to review the Secretary's decision pursuant to the APA under 29 *Del. C.* § 10161(b), which states that decisions of administrative agencies not listed in Section 10161(a) may not be appealed.<sup>38</sup> The Department is not listed in Section 10161(a).<sup>39</sup> Consequently, the Court may dismiss the following claims listed in Count I of the

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<sup>37</sup> See *SimplexGrinnell, L.P.*, 2012 WL 5362835 at \*3 n. 12 & 13 (citing *Mumford & Miller Concrete, Inc.*, 2011 WL 2083940 at \*2 & n.3).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

petition for certiorari:

[3.] 29 *Del. C.* § 10124 requires that parties be afforded a formal evidentiary hearing in matters involving a case decision when such parties do not consent to informal proceedings. 29 *Del. C.* § 10102(3) defines a case decision as any agency proceeding or determination that a named party, as a matter of past or present fact, is or is not in violation of a law or regulation;

[4.] Delaware's PWR 7.1.3 violates the APA in that it does not afford a hearing to parties who have been determined to have violated Delaware's PWL except in cases where the employer's right to proceed with work on the contract has been terminated. By complying with the unlawful Delaware PWR 7.1.3, the Respondents have violated the APA, committed errors of law, and abused their discretion;

Likewise, the Court may dismiss the following claims listed in Count II of the petition for declaratory judgment:

[7.] Delaware PWR 7.1.3 violates the APA in that it does not afford parties the opportunity for an evidentiary hearing prior to the issuance of a case decision;

*The Petitioner's Standing - Delaware Constitution Article II, § 14*

The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing.<sup>40</sup> The degree and manner of evidence that is required to establish standing varies as the successive stages of any litigation proceeds.<sup>41</sup> At the pleading stage, general allegations of injury are sufficient to withstand a motion to

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<sup>40</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

<sup>41</sup> *Id.*

dismiss because it is “presume[d] that general allegations embrace those specific facts that are necessary to support the claim.”<sup>42</sup>

In *Dover Historical Society v. City of Dover Planning Commission*,<sup>43</sup> the Delaware Supreme Court explained that:

The term “standing” refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance.<sup>44</sup> Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a “case or controversy” that is appropriate for the exercise of the court’s jurisdictional powers. The issue of standing is concerned “only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter in controversy.”<sup>45</sup>

To establish standing, a plaintiff or petitioner must demonstrate first, that he or she sustained an “injury-in-fact”; and second, that the interests he or she seeks to be protected are within the zone of interests to be protected.

The requirements for Article III constitutional standing have been identified by the United States Supreme Court in *Lujan v. Defenders of Wildlife*<sup>46</sup> and were recently summarized by the United States Court of Appeals for the Third Circuit in *Society*

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<sup>42</sup> *Id.* (quotations omitted).

<sup>43</sup> *Dover Historical Soc’y v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1110-11 (Del. 2003).

<sup>44</sup> *See Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991).

<sup>45</sup> *Id.* (emphasis in original).

<sup>46</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555.

*Hill Towers Owners' Association v. Rendell*, as follows:

(1) the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>47</sup>

Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are “mere intermeddlers.”<sup>48</sup> The Delaware Supreme Court has recognized that the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware.<sup>49</sup>

With these principles in mind, the Court must determine if the Petitioner has standing to contest the following claims of unconstitutionality pursuant to Article 2,

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<sup>47</sup> *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000); see also *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 484-85 (3d Cir. 1998) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61)).

<sup>48</sup> *Stuart Kingston, Inc.*, 596 A.2d at 1382 (quotations omitted).

<sup>49</sup> *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 904 (Del. 1994).

Section 14 of the Delaware Constitution:

[2.] The portions of the State Procurement Act, 29 *Del. C.* § 6960, enacted during the legislative service of John Viola violate the Delaware Constitution and are void *ab initio* because the contested portions were enacted while Mr. Viola unconstitutionally served as both a member of the legislative and executive branch – in this instance, the Petitioner alleges that Mr. Viola served concurrently as a member of the House of Representatives and as a Labor Law Enforcement Officer for the Department;

[3.] The portions of the State Procurement Act, 29 *Del. C.* § 6960, enacted during the legislative service of Anthony J. Deluca violate the Delaware Constitution and are void *ab initio* because the contested portions were enacted while Mr. Deluca unconstitutionally served as both a member of the legislative and executive branch – in this instance, the Petitioner alleges that Mr. Deluca served concurrently as a Delaware Senator and as the OLLE Director from 1998 to 2013;

[4.] The Department's enforcement of laws drafted by its own officers violates the Delaware Constitution and is void *ab initio*;

Having never addressed standing in this context, the Court conducted a searching inquiry of similar constitutional provisions set forth by other states, as well as the United States Constitution. Even then, the Court has found little guidance for the issue before the Court now. Nevertheless, the following cases have been helpful to the Court's understanding.

In *Schlesinger v. Reservists Committee to Stop the War*,<sup>50</sup> the respondents brought a class action on behalf of all United States citizens and taxpayers against the

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<sup>50</sup> *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

petitioners, the Secretary of Defense and the three Service Secretaries, challenging the Armed Forces Reserve membership of Members of Congress as violating the Incompatibility Clause of the United States Constitution.<sup>51</sup> The citizens and taxpayers allegedly suffered injury because “Members of Congress holding a Reserve position in the Executive Branch were said to be subject to the possibility of undue influence by the Executive Branch, in violation of the concept of the independence of Congress implicit in Art. I of the Constitution.”<sup>52</sup> “Reserve membership was also said to place upon Members of Congress possible inconsistent obligations which might cause them to violate their duty faithfully to perform as reservists or as Members of Congress.”<sup>53</sup> The United States Supreme Court found, however, that the respondents did not have standing to sue as either citizens or taxpayers. The respondents did not have standing to sue as citizens, since the claimed nonobservance of the Incompatibility Clause implicated only the generalized interests of all citizens in constitutional governance.<sup>54</sup> Thus, the injury complained of was merely an abstract injury rather than the concrete injury that is essential to satisfy Article III’s case of controversy requirement.<sup>55</sup> The

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<sup>51</sup> *Id.* (the Incompatibility Clause, as set forth in article I, § 6, clause 2, of the United States Constitution, provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office”).

<sup>52</sup> *Id.* at 212 (citation omitted).

<sup>53</sup> *Id.*

<sup>54</sup> *Schlesinger*, 418 U.S. at 216-227.

<sup>55</sup> *Id.*

respondents also lacked standing to sue as taxpayers, since they failed to establish the required “logical nexus between the (taxpayer) status asserted and the claim sought to be adjudicated.”<sup>56</sup>

In *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority*,<sup>57</sup> the Citizens for the Abatement of Aircraft Noise (hereinafter, the “Citizens”) challenged the constitutionality of certain conditions attached by Congress to the transfer of two federally owned and operated airports to a regional airport authority created by the Commonwealth of Virginia and the District of Columbia. Specifically, the Citizens contested the legitimacy of the “Board of Review,” composed entirely of members of Congress, which the Metropolitan Washington Airports Authority (hereinafter, the “Authority”) was required to establish as a specific condition to the transfer of the airports. The Citizens argued that the Board of Review was unconstitutional on several grounds, including the separation-of-powers principles, the Incompatibility Clause and the Ineligibility Clause of article I, § 6, clause 2 of the United States Constitution.<sup>58</sup> The D.C. Circuit

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<sup>56</sup> *Id.* at 227-228.

<sup>57</sup> *Citizens for the Abatement of Aircraft Noise, Inc. v. Metro Wash. Airports Auth.*, 917 F.2d 48, 53 (D.C. Cir. 1990), *aff’d*, 501 U.S. 252 (1991).

<sup>58</sup> Article I, § 6, clause 2 providing *in toto* that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member

Court found that the Citizens had standing to raise these issues, holding that:

We have little doubt, moreover, that [the Citizens] have alleged the distinct and palpable injury required to bring an action in federal court. To claim Article III standing, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” [The Citizens] claim that they are adversely affected by noise, air pollution, and the risks of injury associated with flights in and out of [Washington] National [Airport] is not challenged. Furthermore, that harm is “fairly traceable” to the implementation of the Master Plan, which provides for a significant increase in air traffic, because only with the Board of Review in operation can the Authority carry it out. Lastly, it is obvious that a favorable ruling will redress [the] Citizens[] alleged injuries, because if the Board’s actions are invalidated, then, under the provisions of the Act, the Authority will be unable to implement the Plan and continue expansion.<sup>59</sup>

Finally, in *United States v. Lane*,<sup>60</sup> the appellant contested the composition of the United States Air Force Court of Criminal Appeals on the ground that assignment of a judge to the panel, who was a United States Senator and a lieutenant colonel in the United States Air Force Standby Reserve, violated the Incompatibility Clause of the Constitution. The court in *Lane*, held that “[c]ontrary to the Government’s assertion, the constitutionality of the assignment of a person to serve as a judge on a

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of either House during his Continuance in Office.

<sup>59</sup> *Id.* at 53 (internal citations omitted).

<sup>60</sup> *United States v. Lane*, 64 M.J. 1 (C.A.A.F. 2006).



Court of Criminal Appeals is not an abstract question.”<sup>61</sup> The court’s finding especially holding true in light of *Ryder v. United States*, where the United States Supreme Court stated, in the context of the Appointments Clause of Article II of the Constitution, that “one who makes a . . . challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred.”<sup>62</sup> Moreover, arguing against the Government’s contention that Incompatibility Clause determinations are the sole province of Congress, the court in *Lane* warned that:

Under the Government’s theory of standing, no citizen could cite the Incompatibility Clause in challenging a governmental decision bearing directly on the life, liberty, or property of the citizen. Members of Congress could serve as the heads of departments and regulatory agencies, simultaneously participating in the passage of legislation and in the execution of laws. A person against whom such a law was executed, under the Government’s theory, could not challenge the participation of Members of Congress in the enforcement and adjudication of rights under such laws. Under such a regime, the structural integrity of the Constitution would rest on a gravely weakened foundation. We reject all of the Government’s arguments that Appellant lacks standing and proceed to the merits of this appeal.<sup>63</sup>

Thus, the appellant in *Lane* satisfied the requirements of standing.

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<sup>61</sup> *Id.* at \*3.

<sup>62</sup> *Ryder v. United States*, 515 U.S. 177, 182-83 (1995).

<sup>63</sup> *Lane*, 64 M.J. at \*3-4.

Here, the Court equates the Petitioner's claims to those of the Citizens in *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority*. In actuality, the Petitioner's injuries are even more concrete and particularized than those identified by the *Citizens* case because, whereas the *Citizens* claimed that implementation of the Master Plan would increase the noise, air pollution, and risk of injury associated with flights in and out of airports, the Petitioners in this case allege a direct economic injury as a result of the Respondents withholding of funds pursuant to Delaware's PWL and PWR. Thus, the Petitioner has alleged an injury that rises above those generalized grievances available to all citizens in *Schlesinger*. Next, the Court finds that the harm is fairly traceable to the Respondents, even though Mr. Deluca and Mr. Viola are the individuals who allegedly held two incompatible offices, as the Respondents actually caused the Petitioner's injury by enforcing Delaware's PWL and PWR against the Petitioner. Finally, as in *Citizens*, the Court finds the Petitioner's claims are redressable because if the Court finds Delaware's PWL void for the unconstitutional dual-office holding of Mr. Deluca and Mr. Viola, then, the Court would likely order the Respondents to return the withheld sums to the Petitioner and stop enforcement of the statute until it is properly amended.<sup>64</sup>

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<sup>64</sup> The Court's finding as to standing in no way alludes to the merits of the Petitioner's contentions regarding the dual-office holding of Mr. Deluca and Mr. Viola, especially seeing as the D.C. Circuit Court in *Citizens* held that previous actions by the Board of Review were not automatically invalidated solely because the board was vested with unconstitutional powers. *Id.* at 57-58. Instead, like the court in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), *superseded by statute on other grounds*, Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Sta. 81, *as recognized in*

## CONCLUSION

After this Court's extensive analysis, the Court presumes that it is necessary to set forth the Petitioner's remaining claims that have survived the Respondents' Motion to Dismiss. Those claims that remain, as to Count I of the petition for *certiorari*, include the following:

[2.] Because the Delaware Superior Court reviews the Secretary's determination on the record, the Secretary's decision also denied the Petitioner any right of further appeal because the Petitioner was not afforded the opportunity to create a record from which to appeal. As such, the Secretary's decision to dismiss the Petitioner's appeal of the OLLE's determination was unlawful and irregular, and should be overturned so that the Petitioner may submit evidence to support the Petitioner's appeal of the OLLE's determination;

[6.] Because the Respondents did not rely upon substantial relevant evidence, abused their discretion, committed errors of law, and acted arbitrarily and capriciously, the Secretary's decision to dismiss the Petitioner's appeal should be reversed.

Those claims that remain, as to Count II of the petition for declaratory judgment, include the following:

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*McConnell v. Federal Election Com'n*, 540 U.S. 93 (2003), the D.C. Circuit Court acknowledged the "de facto validity" of the board's past actions. *Id.* This apparently being consistent with the United States Supreme Court's recognition of the same remedy for legislative acts performed by legislators held to have been elected in accordance with an unconstitutional plan. *See Connor v. Williams*, 404 U.S. 549, 550-51 (1972). *See also Ryan v. Tinsley*, 316 F.2d 430, 431-32 (10th Cir. 1963); *Schaefer v. Thompson*, 251 F. Supp. 450, 453 (Wyo. 1965), *aff'd sub nom. Harrison v. Schaeffer*, 383 U.S. 269 (1966). *Cf. City of Richmond v. United States*, 422 U.S. 358, 379 (1975) (Brennan, J., dissenting). The Court suggests that the parties review these cases in detail, seeing as they likely will be vital to this case as litigation progresses.

[1.] The Department's classification of workers, in this case as "Electricians," is invalid and may not be enforced;

[2.] The portions of the State Procurement Act, 29 *Del. C.* § 6960, enacted during the legislative service of John Viola violate the Delaware Constitution and are void *ab initio* because the contested portions were enacted while Mr. Viola unconstitutionally served as both a member of the legislative and executive branch – in this instance, the Petitioner alleges that Mr. Viola served concurrently as a member of the House of Representatives and as a Labor Law Enforcement Officer for the Department;

[3.] The portions of the State Procurement Act, 29 *Del. C.* § 6960, enacted during the legislative service of Anthony J. Deluca violate the Delaware Constitution and are void *ab initio* because the contested portions were enacted while Mr. Deluca unconstitutionally served as both a member of the legislative and executive branch – in this instance, the Petitioner alleges that Mr. Deluca served concurrently as a Delaware Senator and as the OLLE Director from 1998 to 2013;

[4.] The Department's enforcement of laws drafted by its own officers violates the Delaware Constitution and is void *ab initio*;

[8.] Allan Myers, Inc. should turn over funds to the Petitioner that have been withheld at the direction of the Department;

[9.] The Department's system for appealing the classification of workers is invalid and may not be enforced;

[10.] The Department has no system for the appeal of the withholding of funds and/or that such system is invalid and may no longer be enforced or applied;

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[11.] The Petitioner is entitled to attorney fees under the Delaware Declaratory Judgment Act; and

[12.] For such further relief as the Court determines to be equitable and just.

The parties may proceed consistent with this opinion and order.

**IT IS SO ORDERED.**

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh