IN THE SUPREME COURT OF THE STATE OF NEVADA

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL 88,
Appellant,
vs.
LABOR COMMISSIONER OF THE STATE OF NEVADA; AND RED ROSE, INC.,
Respondent.

RED ROSE, INC.,
Appellant,
vs.
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL 88; LABOR COMMISSIONER OF THE STATE OF NEVADA; AND CLARK COUNTY DEPARTMENT OF FINANCE,
Respondents.

No. 42656

FILED

MAR 22 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from district court orders denying consolidated petitions for judicial review of an administrative decision pertaining to a public works project. Eighth Judicial District Court, Clark County; David Wall, Judge. In his decision, the respondent Labor Commissioner of the State of Nevada declined to find respondent/cross-appellant Red Rose, Inc., a metal roofing subcontractor on public works projects administered by cross-respondent Clark County Department of Finance (Clark County), in violation of the prevailing wage for sheet metal workers, but imposed a $54,600 forfeiture upon Red Rose for wage reporting violations. The district court subsequently denied

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petitions for judicial review filed by appellant/cross-respondent Sheet Metal Workers International Association Local 88 (SMWIA) and Red Rose.

We affirm the district court's orders denying judicial review and conclude that the Labor Commissioner's decision was supported by substantial evidence in the record and was not arbitrary or capricious.[1] In so affirming, we conclude that we may not retroactively apply provisions of NRS 338.060 and NRS 338.015 capping penalties for first-time, non-willful wage reporting violations by a contractor engaged in a public works project.

Because SMWIA did not formally intervene, it was not entitled to participate in the contested case hearing

We agree with SMWIA's contention that it lies within the "zone of interests" established by Nevada's prevailing wage laws. However, absent a formal motion to intervene in Red Rose's contested case before the Labor Commissioner, we disagree that SMWIA was entitled to present evidence or otherwise participate in that proceeding.

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[1]Under NRS 233B.135(3), we may set aside the decision of an administrative agency, in whole or in part, if the decision was

> (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the agency; (c) Made upon unlawful procedure; (d) affected by other error of law; (e) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) Arbitrary or capricious or characterized by abuse of discretion.

Whether a party falls within the zone of interests of a statutory scheme is a principle of prudential standing.[2] "[T]hose whose interests are directly affected by a broad or narrow interpretation of the [statutes] are easily identifiable."[3] Courts have long recognized that labor unions have an important stake in the enforcement of the prevailing wage laws.[4] SMWIA's members fall within the zone of interests of Nevada's prevailing wage statutes because they are the intended beneficiaries of the statutory scheme protecting Nevada workers from being undercut by low-wage workers from outside the locality.

Falling within the zone of interests of our prevailing wage statutes, however, is insufficient to entitle a labor union to participate in a contested case when not named a party to the proceeding. Nevada's

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[2]See National Credit Union Admin. v. First National Bank & Trust Co., 522 U.S. 479, 488 (1998) ("For a plaintiff to have prudential standing under the [federal] APA, 'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" (quoting Data Processing Service v. Camp, 397 U.S. 150, 152 (1970))).

[3] Data Processing Service, 397 U.S. at 157.

[4]See International U. of Operating Eng., Local 627 v. Arthurs, 355 F. Supp. 7, 14 (D. Okla. 1973), aff'd, 480 F.2d 603 (10th Cir. 1973) (stating that, "[i]t is beyond any question that [labor unions are] within the zone of interests to be protected by the Davis-Bacon Act"); Southeastern Wash. Bldg. v. Dept. of Labor, 586 P.2d 486, 488 (Wash. 1978) (recognizing that, "[u]nless workers or representatives of workers who are not parties to such a contract but whose wages and expectancies are affected by its terms can be heard to complain of prevailing wage determinations, the interest of such workers may very well be left unprotected"); Lusardi Const. Co. v. Aubry, 824 P.2d 643, 649 (Cal. 1992) (observing that, "both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law").

Administrative Procedure Act (APA) permits any party, who is identified as a party of record by an agency in an administrative proceeding and aggrieved by a final decision in a contested case, to seek judicial review before the district court.[5] "A party is 'aggrieved' . . . 'when either a personal right or right of property is adversely and substantially affected' by a district court's ruling."[6]

The record indicates that although SMWIA originally complained to the Labor Commissioner (who, in turn, notified the County to investigate SMWIA's complaint under NRS 338.070), SMWIA made no request, formal or informal, to intervene as a complainant alongside Red Rose. Since SMWIA was not named as a party, nor did it seek to intervene, it was not entitled to participate in the Labor Commissioner's contested case, nor is it entitled to judicial review.

The statutory scheme made the Labor Commissioner's imposition of a forfeiture mandatory

Red Rose contends in its cross-appeal that the Labor Commissioner could have exercised discretion and equitably reduced the $54,600 forfeiture amount.[7] We disagree. At the time of the Labor

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[5]NRS 233B.130(1).

[6]Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (quoting Estate of Hughes v. First Nat'l Bank, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980)).

[7]Because Red Rose's cross-appeal requires us to review the Labor Commissioner's application of statutory provisions, we do so de novo. United States v. State Engineer, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001). However, we note that "'great deference should be given to the . . . agency's interpretation [of its own statute] when it is within the language of the statute.'" Pyramid Lake Paiute Tribe v. Washoe Co., 112 Nev. 743, 748,

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Commissioner's 2003 decision, contractors and subcontractors engaged in public works construction projects were required to "keep or cause to be kept an accurate record showing the name, the occupation and the actual per diem, wages and benefits paid to each workman employed . . . in connection with the public work."[8] The statute required the contractor or subcontractor to "ensure that a copy of the record for each calendar month is received by the public body awarding the contract no later than 10 days after the end of the month."[9]

Prior to amendment in 2003, NRS 338.060(1) required that contractors violating these reporting requirements forfeit "not less than $20 nor more than $50 for each calendar day or portion thereof" until the contractor cured the violation.[10] The statute further provided the Labor Commissioner to set, and the public body awarding the contract to enforce, the per diem forfeiture amount based on the "size of the contractor's business."[11]

The language of NRS 338.060 at the time of the Labor Commissioner's decision clearly and unambiguously divested the Labor Commissioner of discretion to waive or reduce the forfeiture. Although NRS 338.060 provided, and still provides, that the Labor Commissioner

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918 P.2d 697, 700 (1996) (quoting State v. State Engineer, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

[8]2003 Nev. Stat., ch. 330, § 2, at 1863.

[9]Id.

[10]Id. § 1, at 1862.

[11]Id. at 1863.

may base his calculation of administrative fines on equitable principles (e.g., the severity of a violation) on a case-by-case basis, this provision specifically refers to "fines." NRS 338.060 differentiates between "fines" and "forfeitures." By requiring that a forfeiture clause be inserted in each public works contract, the statute recognizes that the forfeiture is a contractual penalty that the parties to the contract must enforce, similar to a liquidated damages clause. The use of the word "shall" in NRS 338.060 unambiguously supports the Labor Commissioner's position that he lacked discretion to reduce or waive the forfeiture.

The amended versions of NRS 338.060 and NRS 338.015 may not be applied retroactively

Red Rose asserts that statutory amendments capping fines and forfeitures for first-time, non-willful violations of the reporting requirements should apply retroactively. We disagree. In 2003, the Legislature enacted Assembly Bill 432, which amended NRS 338.060 by imposing forfeitures only for violations for which the contractor or subcontractor "willfully included inaccurate or incomplete information."[12] As amended by A.B. 432, NRS 338.060 now provides that forfeitures for first-time violations be capped at $1,000 and forfeitures for subsequent violations be capped at $5,000.[13] Finally, in contrast to its prior version, NRS 338.060(8) now permits the Labor Commissioner to waive or otherwise reduce the forfeiture for good cause shown. This amended version of NRS 338.060 became effective June 9, 2003.

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[12]Id. at 1862.

[13]NRS 338.060(3)(a)-(b).

"[C]hanges in statutes are presumed to operate prospectively absent clear legislative intent to apply a statute retroactively."[14] While the Legislature intended to remedy the situation faced by non-willful violators in Red Rose's position, nothing in the amended text of the statutes demonstrates the Legislature's intent that the amended provisions apply retroactively to limit the forfeiture to $1,000.

Furthermore, little in the bill's legislative history indicates that the Legislature intended the amendments to have retroactive effect. The Assembly Committee on Commerce and Labor discussed A.B. 432 on two occasions before passage and submission to the Senate. During neither of those Committee meetings did the Committee discuss or hear testimony on the bill's retroactive effect. The Senate Committee on Government Affairs also met to discuss the bill on April 30, 2003. Although the Committee members and Labor Commissioner Terry Johnson, who testified in support of the bill, did briefly discuss potential retroactive application of the bill, the Committee passed the bill on May 14, 2003, without further comment as to retroactivity. The Governor signed the bill on June 9, 2003. We conclude that although this litigation was pending during the 2003 legislative session, the statutes must be

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[14]Castillo v. State, 110 Nev. 535, 540, 874 P.2d 1252, 1256 (1994); Nevada Power v. Metropolitan Dev. Co., 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988) ("In the absence of clear legislative intent to make a statute retroactive, it will be interpreted to have only a prospective effect."); accord Convention Properties v. Washoe Co. Assessor, 106 Nev. 400, 403, 793 P.2d 1332, 1333 (1990) (stating that "[m]erely because a tax statute operates on facts which were in existence before [the statute's] enactment does not render the statute retroactive").

applied as enacted at the time of the Labor Commissioner's February 2003 decision.[15]

The Labor Commissioner's refusal to adjust the forfeiture on a "sliding scale" was not arbitrary or capricious

Red Rose contends that NAC 338.120, which sets fine limits based on a contractor's Nevada State Contractors' Board license limit, arbitrarily and capriciously interprets the provision in NRS 338.060(2). This provision mandates that the Labor Commissioner establish fine limits based on the size of the contractor's business.

At the time of the Labor Commissioner's decision, NAC 338.120(2) provided that "[i]f the State Contractors' Board has not established a monetary limit on the license of a prime contractor . . ., the amount of the penalty imposed against the . . . contractor pursuant to NRS 338.060 must be $50 for each calendar day or portion thereof." NRS 624.263 provides that the license limit may be set after consideration of, inter alia, the contractor's net worth, amount of liquid assets, credit history, pending liens, and reputation for honesty and integrity. Red Rose contends, however, that these factors do not relate to the "size" of its

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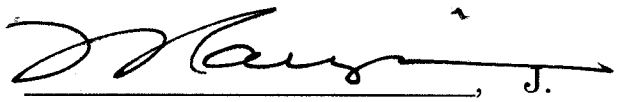
[15]We reject Red Rose's argument that the $54,600 forfeiture is unconstitutionally excessive. A fine is unconstitutionally excessive when it is unlimited both in its amount and in the discretion vested in the officials charged with imposing it. City of Las Vegas v. Nevada Industries 105 Nev. 174, 178, 772 P.2d 1275, 1277 (1989). NRS 338.060, both in its former and current form, establishes a valid maximum penalty and provides clear direction to the Labor Commissioner and awarding bodies as to the assessment of the penalty. We defer to the Legislature's rational election of a statutory penalty mechanism and the Labor Commissioner's reasonable implementation of the statute.

business. Rather, it contends, these factors are meant to reflect "how much business a contractor may undertake."

We defer to the Labor Commissioner's experience and expertise in interpreting NRS 338.060(2) and NAC 338.120. The Labor Commissioner has a unique understanding of the public contracting construction industry and may apply it accordingly. Thus, we deny Red Rose's request that this court conduct an evidentiary hearing or remand for a trial de novo. Therefore, we

ORDER the judgments of the district court denying judicial review AFFIRMED.



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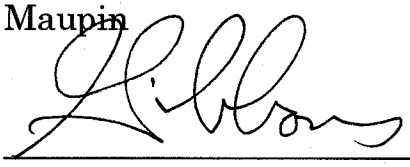
Maupin



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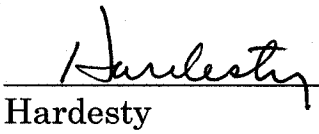

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Hardesty

cc: Hon. David Wall, District Judge
McCracken Stemerman Bowen & Holsberry
Attorney General George Chanos/Las Vegas
Clark County District Attorney David J. Roger/Civil Division
Haney, Woloson & Mullins
Clark County Clerk