

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

ASSOCIATED GENERAL)
CONTRACTORS OF ILLINOIS,)
DIAMOND CONSTRUCTION)
COMPANY, and UNITED)
CONTRACTORS MIDWEST, INC.,)

Plaintiffs,)

v.)

ILLINOIS DEPARTMENT OF LABOR)
and JOSEPH COSTIGAN, as Director of)
the Department of Labor,)

Defendants.)

No. 13 CH 26840

Calendar 16

Judge David B. Atkins

MEMORANDUM OPINION AND ORDER

THIS CAUSE COMING ON TO BE HEARD on plaintiffs Associated General Contractors of Illinois’s, Diamond Construction Company’s, and United Contractors Midwest, Inc.’s Motion to Stay Enforcement of the Prevailing Wage Determinations for Survey Worker and Survey Foreman Classification pursuant to 735 ILCS 5/3-111(a)(1), and the court having considered the briefs submitted and the arguments of counsel, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff’s motion to stay is granted.

Background

This action concerns an administrative decision by defendant Illinois Department of Labor (“IDOL”) to include classifications for “Survey Worker” and “Survey Foreman” in its prevailing wage schedule published on October 1, 2013. Plaintiffs are construction industry trade organizations whose membership includes workers subject to the new classifications.

In June 2013, IDOL published prevailing wage rates on its official website. On July 23, 2013, non-party the International Union of Operating Engineers, Local 150, AFL-CIO timely filed an objection to the rates and petitioned IDOL to add a new sub-classification for survey crew members. This objection created File No. 14-H-TW-07-0031. On July 29, 2013, IDOL gave notice of the objection along with notice of hearing on the matter.

The administrative law judge (“ALJ”) set August 15, 2013 as the deadline for filing petitions to intervene in the matter. Plaintiffs filed a motion to intervene on August 28, 2013 and

again on September 10, 2013; both motions were denied as untimely. Other parties with timely petitions were granted leave to intervene in the matter.

Case No. 14-H-TW-07-0031 proceeded to hearing before the ALJ. Prior to adjudication, all parties reached a resolution on the disputed issues and entered into a formal consent decree ("Consent Decree") that was approved by the ALJ on September 12, 2013. The Consent Decree provided for the creation of new classifications for "Survey Worker" and "Survey Foreman." The new classifications were to become effective on October 1, 2013. On October 1, 2013 IDOL published a schedule of prevailing wages on its official website that included these new classifications.

On October 10, 2013, plaintiffs submitted a written notice of objection to the new prevailing wage classifications. On November 4, 2013, the Director of IDOL issued a determination denying plaintiff's request for a hearing. On December 4, 2013, plaintiffs filed the present complaint for administrative review. On February 14, 2014, plaintiff filed the present motion to stay enforcement of the new prevailing wage classifications. After expedited briefing, the court heard oral argument on April 4, 2014.

Legal Standard

Section 3-111(a)(1) of the Administrative Review Law, 735 ILCS 5/3-101 *et. seq.*, gives the court broad discretion to stay an administrative decision pending review. *Marsh v. Ill. Racing Bd.*, 179 Ill. 2d 488, 498 (1997). A petitioner must show good cause to obtain a stay. 735 ILCS 5/3-111(a)(1); *Parikh v. Div. of Prof'l Regulation*, 2012 IL App (1st) 121226, ¶ 24. The court's decision to grant or deny a stay will be reversed only upon a finding of an abuse of discretion. *Metz v. Dept. of Prof'l Regulation*, 332 Ill. App. 3d 1033, 1035 (2002).

Both sides have also recognized that, notwithstanding the provisions of the Administrative Review Law, the court has inherent equitable authority to stay proceedings. As the appellate court recently explained in *Certain Underwriters at Lloyd's, London v. Boeing Co.*:

A stay order seeks only to preserve the status quo existing on the date of its entry and does not address in any way the merits of the underlying dispute. The circuit court may stay proceedings as part of its inherent authority to control the disposition of cases before it. The moving party must prove by clear and convincing evidence that a stay of the proceedings outweighs the potential harm to the party against whom it is operative. Thus, the party seeking the stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.

385 Ill. App. 3d 23, 36 (1st Dist. 2008) (internal quotations and citations omitted).

Discussion

At the outset, it is important to clarify a basic misunderstanding that has muddied the briefs: plaintiffs are seeking to stay enforcement of the "Survey Worker" and "Survey Foreman"

classifications based on IDOL's decision to deny them a hearing on their objections to the published October 2013 prevailing wage schedule. Although the "Survey Worker" and "Survey Foreman" classifications resulted from the Consent Decree to which plaintiffs were not a party, they are not objecting to the Consent Decree itself. As plaintiffs note in their reply, "For the purposes of this motion to stay, the [c]ourt can completely disregard the Consent [Decree] entered in [Case No. 2014-H-TW-07-0031]." (Reply at 3) The court understands that plaintiffs did file timely petitions to intervene in Case No. 2014-H-TW-07-0031, but they cannot be punished for this failure indefinitely.

Much of defendants' response is devoted to discussing why plaintiffs lack standing to attack the Consent Decree; this is a moot point as are arguments pertaining to the court's subject matter jurisdiction and plaintiffs' exhaustion of remedies. The court would further clarify that the November 4, 2013 IDOL decision is, indeed, a final administrative decision.

Additionally, the court recognizes that plaintiffs are seeking administrative review of IDOL's denial of a hearing; they are not technically seeking review of the new prevailing wage classifications. However, as plaintiff's attorney noted at oral argument, these classifications are the root of the dispute. The only reason plaintiffs are unable to attack an administrative decision pertaining directly to the new classifications is because the IDOL refused to allow substantive argument on that point. However, this does not foreclose the court from staying enforcement of the new classifications as part of the present action seeking review of IDOL's denial of a hearing.

Alternatively, to the extent that a stay is not authorized under the Administrative Review Law, the court would exercise its inherent equitable authority to stay enforcement of these classifications. Based upon its reading of the statute, the court finds that the balance of the equities clearly favors plaintiffs in this situation.

It would appear, from the plain language of the Illinois Prevailing Wage Act, that IDOL's publication of the prevailing wage rate on its website is what triggers the right to object to new classifications. The statute reads, in relevant part:

At any time within 30 days after the Department of Labor has published on its official web site a prevailing wage schedule, any person affected thereby may object in writing to the determination or such part thereof as they may deem objectionable by filing a written notice with the public body or Department of Labor, whichever has made such determination, stating the specified grounds of the objection. It shall thereafter be the duty of the public body or Department of Labor to set a date for a hearing on the objection after giving written notice to the objectors at least 10 days before the date of the hearing and said notice shall state the time and place of such hearing. Such hearing by a public body shall be held within 45 days after the objection is filed, and shall not be postponed or reset for a later date except upon the consent, in writing, of all the objectors and the public body.

820 ILCS 130/9.

As this statutory language indicates, plaintiffs had 30 days from the October 1, 2013 publication of the new prevailing wage classification to file their written objection with IDOL; they did so on October 10, 2013 which appears to be timely.

The court appreciates that IDOL is only required to publish a prevailing wage schedule on their website in June of each year. *See* 820 ILCS 130/9. However, if the agency chooses to publish more frequently, the court sees no reason why each publication should not trigger a right to object. At oral argument, defendants indicated that it was the IDOL's preference to limit objections to its prevailing wage rates to the June publication. Yet this preference is not enough to overcome the clear and plain statutory language of 820 ILCS 130/9.

Further, the sort of "slippery slope" policy argument raised by defendants need not be addressed because it is not implicated by these facts. This is not an instance where plaintiffs objected to the same prevailing wage classification on a monthly basis, after each time it was published on the IDOL website. Rather, this is an instance where a new classification was published for the first time and plaintiffs timely objected only after the first publication.

The court finds that plaintiffs have demonstrated good cause to stay enforcement of the new prevailing wage classifications. "Good cause" requires the applicant to show (i) that an immediate stay is required in order to preserve the *status quo* without endangering the public, (ii) that it is not contrary to public policy, and (iii) that there exists a reasonable likelihood of success on the merits." 735 ILCS 5/3-111(a)(1). In their complaint for administrative review, plaintiffs are simply seeking a hearing before the IDOL; as discussed above, it would appear they have met the statutory requirements to be entitled to such a hearing. Thus, plaintiffs have demonstrated a reasonable likelihood of success on the merits.

Further, the court finds that a stay is necessary to preserve the *status quo*. The *status quo* sought to be preserved is the "last, actual, peaceable, uncontested status which preceded the pending controversy." *Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 397 (1993). Defendants contend that staying the new classifications would not preserve the *status quo* because survey workers were subject to the prevailing wage, as "General Laborers," even before October 1, 2013. Plaintiffs, whose members include many survey workers subject to the new classifications, vehemently deny that they were subject to the prevailing wage rates prior to October 1, 2013. Instead, they argue that they were salaried employees more akin to freelance professional than union construction workers. The court need not decide this dispute today.

Even if defendants' argument is taken as true, it fails for two reasons. First, the letters defendants have attached to their response in support of this statement are inadmissible hearsay. Even if they were admitted they fail to prove that survey workers were paid a prevailing wage in accordance with the new classifications prior to October 1, 2013. Second, even if most survey workers were paid the prevailing wage prior to October 1, 2013, plaintiffs' concerns pertaining to the new classifications (for instance, plaintiffs allege that the classifications are vague and difficult to implement in practice) is not alleviated and certainly could not be said to exist before the classifications went into effect on October 1, 2013.

Finally, staying enforcement of the new prevailing wage classifications would not be contrary to public policy nor does defendants' response contend that it would. Statutes are an expression of Illinois public policy. *Am. Fed'n of State, Cnty. & Mun. Emp's v. State*, 124 Ill. 2d 246, 260 (1988). In certain circumstances, the IPWA requires ongoing work to be stopped pending resolution of a dispute regarding the amount of prevailing the wage. See 820 ILCS 130/11. This is an indication that suspending enforcement of the new classifications, even if it results in a work stoppage, is not contrary to public policy. Further, the court notes that staying enforcement pending resolution of this case or a hearing before the IDOL will have the benefit of providing clarity with respect to the new classifications.

WHEREFORE, plaintiffs Associated General Contractors of Illinois's, Diamond Construction Company's, and United Contractors Midwest, Inc.'s Motion to Stay Enforcement of the Prevailing Wage Determinations for Survey Worker and Survey Foreman Classification is granted in that the prevailing wage classification for "Survey Worker" and "Survey Foreman" shall not be applied or enforced until this matter has been decided on its merits, or until defendant Illinois Department of Labor grants plaintiffs a hearing in accordance with 820 ILCS 130/9, or until further order of court.

JUDGE DAVID B. ATKINS

APR 04 2014

~~Circuit Court-1879~~
Judge David B. Atkins

The Court.