OAH 82-1901-31552
OSHA 11795

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Ken B. Peterson, Commissioner, Minnesota
Department of Labor and Industry,

Complainant, **ORDER**

vs.

Geislinger & Sons, Inc.,

Respondent.

This matter came before Administrative Law Judge (ALJ) Barbara J. Case on the Department of Labor and Industry's Motion to Preclude Respondent's Representation by Arnold C. Kraft.

Rory H. Foley, Assistant Attorney General, Minnesota Attorney General's Office, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Arnold Kraft, ARC Management Associates, appeared on behalf of Geislinger and Sons (Respondent).

Based upon the record in the case and the briefs filed in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. This case was initiated by the Department to determine whether Respondent violated occupational safety and health standards.[1]

2. A prehearing conference was held on July 16, 2014, and the First Prehearing Order was issued on July 24, 2014.[2]

3. The First Prehearing Order set no deadlines for non-dispositive motions.[3]

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[1] Notice and Order for Hearing (June 2, 2014).
[2] First Prehearing Order.
[3] *Id.*

4. At the prehearing conference, Mr. Kraft appeared on behalf of Respondent. Jackson Evans, Assistant Attorney General, appeared on behalf of the Department. Mr. Evans noted that Mr. Kraft was not an attorney but did not raise a formal objection or motion at that time.[4]

5. On October 28, 2014, the Department filed a Motion to Preclude Respondent's Representation by Arnold R. Kraft.

6. Mr. Kraft filed a response to the motion on November 3, 2014.

7. Mr. Kraft is not an attorney; he is a Certified Safety Professional who provides services relevant to worksite safety to contractors who, because of their size, cannot afford a full-time safety manager.[5]

8. Mr. Kraft does not solicit work representing clients before the Office of Administrative Hearings.[6]

9. Geislinger and Sons is a business corporation organized under Minn. Stat. ch. 302A (2014), with an office address in Watkins, Minnesota.[7] The corporation has four shareholders: Mr. Geislinger and his three sons.[8]

CONCLUSIONS OF LAW

1. Pursuant to Minn. R. 1400.5800 (2013) in matters before the Office of Administrative Hearings (OAH), "parties may be represented by an attorney throughout the proceedings in a contested case, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law."

2. Minn. Stat. § 481.02, subd. 1 (2014) prohibits the unauthorized practice of law, defined as the practice of "any person or association of persons" other than licensed attorneys appearing

> to maintain, conduct, or defend" any "action or proceeding in any court in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to

[4] Respondent's Response, at 1.
[5] *Id.*
[6] *Id.*
[7] The ALJ takes judicial notice of this fact, pursuant to Minn. R. Evid. 201, as a fact not subject to reasonable dispute and publicly available at OFFICE OF THE MINNESOTA SECRETARY OF STATE, http://mblsportal.sos.state.mn.us/Business/SearchDetails?filingGuid=28493029-90d4-e011-a886-001ec94ffe7f (Nov. 18, 2014).
[8] E-mail from Arnold Kraft to ALJ (Nov. 7, 2014).

> another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to prepare for another person, firm, or corporation, any other legal document.

3. Mr. Kraft's actions on behalf of, and representation of, Respondent in this case are the "unauthorized practice of law" for purposes of Minn. R. 1400.5800.

Based on the record in this matter and for the reasons set forth in the memorandum below:

IT IS HEREBY ORDERED THAT:

1. Mr. Kraft may not represent Respondent in this matter.

2. Respondent may request a continuance of the hearing if required to comply with this order.

Dated: December 5, 2014

s/Barbara J. Case
BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

Procedural Background

This order is made in response to the Department's Motion to Preclude Respondent's Representation by Arnold R. Kraft. This order is not dispositive of the case or any substantive issue in the case.

"Right to Counsel Rule" and the Unauthorized Practice of Law Statute

As a general rule for cases held before Administrative Law Judges at the Office of Administrative Hearings, parties to contested case hearings are not required to be represented by attorneys.[9] According to Minn. R. 1400.5800, "parties may be represented by an attorney throughout the proceedings in a contested case, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law."[10] By its explicit terms, this general rule is modified and limited by the proviso at the end of the sentence: "if not otherwise prohibited as the

[9] *See generally* Minn. R. 1400.5800; George A. Beck, MaryBeth Gossman and Laura Nehl-Trueman, *Minnesota Administrative Procedure* 102 (2d ed. 1998).
[10] Minn. R. 1400.5800.

unauthorized practice of law." Laws must be read, if at all possible, so as to give meaning to all of their words[11] and "provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer."[12] Consequently, the general rule that parties may represent themselves, or be represented by a person of their choice, is subject to the specific exception that such is only allowed if it is "not otherwise prohibited as the unauthorized practice of law.[13]"

However, the term "unauthorized practice of law" is not defined within the rules for contested case hearings. Thus the rule, read alone, is ambiguous. To give meaning to the proviso it is necessary to refer to Minn. Stat. § 481.02 (2014), where the only definition of "unauthorized practice of law" in Minnesota rule or statute is found.[14]

Minn. Stat. § 481.02, defines the unlawful practice of law as the practice of law by individuals or associations or persons not licensed to practice law as attorneys in any court in this state. The statute provides:

> It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee

[11] Minn. Stat. § 645.16 (2014); *see American Family v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) ("A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." (quotation omitted)).

[12] Minn. Stat. § 645.19 (2014). Pursuant to Minn. Stat. § 645.001 (2014), Minnesota laws of statutory construction govern all rules as well as statutes, unless specifically provided to the contrary by law or rule.

[13] Minn. R. 1400.5800.

[14] The fact that only the Minnesota Supreme Court can determine the unauthorized practice of law for Minnesota Courts gives rise to complicated analyses of the constitutionality of the statute. It is not necessary for purposes of giving meaning to the proviso in the rule to perform those analyses. Though the legislature does not specifically refer to OAH in section 481.02, the use of a legislative definition of the unauthorized practice of law to give meaning to the rule of a legislatively created tribunal does not raise constitutional separation of powers issues. Other jurisdictions have found that the legislature can determine the unauthorized practice of law before executive branch agencies. *See Fla. Bar v. Moses*, 380 So.2d 412, 417 (Fla. 1980); *In State Bar of Mich. v. Galloway*, 335 N.W.2d 475, 480 (Mich. App. 1983). *But see Unauthorized Practice of Law Comm. v. Emp'rs Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986); *Brookens v. Comm. on Unauthorized Practice of Law*, 538 A. 2d 1120, 1125-27 (D.C. App. 1988); *Reed v. Labor and Indus. Relations Comm.*, 789 S.W.2d 19, 20 (Mo. 1990).

> or any consideration, to prepare for another person, firm, or corporation, any other legal document, except as provided in subdivision 3.[15]

This statute has numerous exceptions pertaining to what legal-like services may be provided by a non-attorney.[16] None of the exceptions are applicable to Mr. Kraft's representation of Respondent in this matter. Rather, Mr. Kraft's preparation of the response to the Department's motion and his representation of Respondent at the prehearing conference fit the activities prohibited in the statute. Mr. Kraft appears to hold himself out as competent or qualified to give legal advice or counsel and to prepare legal documents. He appears to furnish for a fee the services of a lawyer and to give legal advice and perform legal services.

Respondent argues that Minn. Stat. § 481.02 is not applicable to OAH because it "has not constitutional status but is a creation of the legislature, and its power to act is limited to authority granted to it by the legislature, consistent with the principles of separation of powers."[17] Respondent concludes "that representation in a minor matter in an administrative hearing would not be an unauthorized practice of law.[18]" Furthermore, Respondent argues that actions and proceedings in a court do not include administrative proceedings.[19]

Respondent's arguments do not lead to the conclusion Respondent desires. OAH is a creation of the legislature and is housed within the executive branch. The rule applied in this case was created under the authority of both of those branches and is legitimate for its purpose, regulating representation by non-attorneys before OAH.[20] For these reasons, the Department's motion prevails.

Conclusion

"The power to regulate the practice of law on the state level is a judicial power vested only in the courts."[21] Nonetheless, in cases before the Office of Administrative Hearings, where the application of its own rules answers a question before it, the existence of the rule should end the inquiry unless superior laws render the rule invalid. In the absence of a court ruling in the contested case context on the representation of a corporation by a non-attorney, whose only relationship with the corporation is as the provider of services on fee for service basis, the Office of Administrative Hearing's own rule is determinative.

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[15] Minn. Stat. § 481.02, subd. 2.
[16] Minn. Stat. § 481.02, subd. 3.
[17] Respondent's Response, at 2.
[18] *Id*. at 3.
[19] *Id.* at 4.
[20] The Minnesota Supreme Court has said that an administrative process that empowers nonattorneys to engage in the practice of law, infringes on the court's exclusive power to supervise the practice of law. *Holmberg v. Holmberg*, 588 N.W.2d 720, 726 (Minn. 1999).
[21] Beck, *supra* note 9, at 103 (citing *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973)); *see also In re Greathouse*, 189 Minn. 51, 54, 248 N.W. 735, 737 (1933).

The Minnesota Supreme Court has not issued an opinion on whether corporations must be represented by counsel in hearings before the Office of Administrative Hearings. Further, the Department's motion does not ask for that result. Its motion assumes that corporations may be represented by "owners or officers in legal actions."[22] This order does not reach that conclusion or make any conclusion on when counsel is required by a corporation appearing before the OAH. The issue raised by the Department was whether Respondent's representation by Mr. Kraft is the unauthorized practice of law under Minn. R. 1400.5800. The ALJ finds that it is.

B. J. C.

[22] Department's Brief, at 4.