

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Revocation of
the High Pressure Piping License of
Mid-States Mechanical Services,
Inc.

**ORDER ON PETITIONS
FOR INTERVENTION**

The above-entitled matter is before Administrative Law Judge Beverly Jones Heydinger on the petitions for intervention of the Minnesota Pipe Trades Association (MPTA), Local Union No. 455 of the MPTA (Local 455), and David Winter, a member of Local 455 (collectively "the Petitioners"). The Petitions to Intervene were filed with the Office of Administrative Hearings on October 25, 2006. The Department of Labor and Industry filed a response on November 1, 2006. Mid-States Mechanical Services, Inc. (Mid-States) filed its response on November 2, 2006.

Edward P. Sheu, Attorney at Law, Best & Flanagan, LLP, 225 South 6th Street, Suite 4000, Minneapolis, Minnesota 55402-4690, represents the Petitioners. Julie A. Leppink, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, represents the Department. Gregory L. Peters, Attorney at Law, Seaton, Beck, Peters, 7300 Metro Boulevard, Suite 500, Minneapolis, MN 55439, represents Mid-States.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That the petition of the Minnesota Pipe Trades Association to intervene as a party in this matter is DENIED.
2. That the petition of Local 455 to intervene as a party in this matter is DENIED.
3. That the petition of David Winter to intervene as a party in this matter is DENIED.

Dated this 3rd day of November 2006

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

The Department has brought this action against Mid-States alleging repeated violations of the statutes and rules governing high pressure piping in Minnesota. The Department amended the Notice of Hearing to name Kent Durenburger and Kevin Durenburger, individually, as having violated those standards. The Department maintains that Mid-States failed to file for required permits, failed to properly supervise unlicensed pipefitters in performing licensed work, and that work performed by Mid-States failed to meet the quality standards in Minn. Rule Chap. 5230.¹ As a result, the Department is seeking to revoke or suspend the high pressure piping licenses of Mid-States and the Durenburgers.

This matter is not yet scheduled for hearing. The Administrative Law Judge has received petitions to intervene as parties from MPTA, Local 455, and David Winter. Local 455 and MPTA are labor organizations that represent employees of contractors conducting high-pressure piping projects. Neither organization was named as a party in the agency's notice of hearing. Winter is a licensed high-pressure pipefitter

A petitioner may be allowed to intervene as a party, with all the rights of a party, upon a proper showing of how the petitioner's legal rights, duties or privileges may be determined or affected by the contested case.² Under the procedural rules for contested case proceedings, anyone not named in the notice of hearing seeking to intervene in a contested case as a party must submit a timely petition to intervene and demonstrate the following:

The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case; shall show how the petitioner may be directly affected by the outcome or that petitioner's participation is authorized by statute, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate petitioner's statutory right to intervene if one should exist.³

Petitioners maintain that licensed high-pressure pipefitters (comprising the membership of the two labor organizations) will be directly affected by the outcome of this case. Petitioners assert that "Defective or poor workmanship on high-pressure piping can lead to explosions and severe personal injury or death to those who work in or inhabit the buildings, as well as to [those] ... who perform remediation or repair work

¹ *ITMO the Revocation of the High Pressure Piping License of Mid-States Mechanical Services, Inc.*, Amended Notice of Hearing, at 2-9.

² *Mankato Aglime & Rock Co., Inc. v. City of Mankato*, 434 N.W.2d 490, 492 (Minn. App. 1989).

³ Minn. Rule 1400.6200, subp. 1.

on high-pressure piping installations.”⁴ Winter identified a specific project on which he performed remediation on Mid-States’ welding work. He maintained that “it is likely” that his employer has lost bids to Mid-States, thereby affecting work available to Winter.⁵

MPTA and Local 455 each seek to intervene in these proceedings due to the safety and economic impacts on their membership that is alleged to arise from Mid-States’ business practices. They maintain that Mid-States does not properly train employees to the standards required of licensed high-pressure pipefitters and the lack of training results in dangerous conditions. Mid-States’ use of unlicensed employees is alleged to result in underbidding to take projects from employers using licensed pipefitters⁶

Mid-States objected to the Petitioners’ intervention, asserting that the motion was untimely. Mid-States noted that this matter has been ongoing for a year. No particular aspect of the matter is asserted to demonstrate that any party would be prejudiced by intervention at this stage. The hearing date for this matter has not yet been set. The Petitions for Intervention are timely.

Petitioners indicated that they seek to present testimony and other evidence regarding the work involved in this action. They expressed concern that the Department is not able or willing to represent the interests of high-pressure pipefitters.⁷ The Department responded that the essence of this contested case is the enforcement of the high-pressure piping code, a responsibility that lies solely with the Commissioner of Labor and Industry.⁸ The economic issues raised by the Petitioners are, the Department asserts, outside of the scope of this proceeding.⁹

Mid-States maintained that the economic injuries claimed were speculative. The underbidding of competitors for contracts, Mid-States maintains, is completely unrelated to any allegations in this proceeding. Mid-States points out that the employers of the union workers would be the proper parties to intervene, should economic considerations be relevant to this matter.¹⁰

The Petitioners maintain that their participation will more fully develop the record and assist the Administrative Law Judge in rendering her decision. Mid-States points out that knowledge of the facts to a proceeding does not equate to a right to intervene.¹¹

⁴ Winter Petition for Intervention, at 2.

⁵ *Id.* at 3.

⁶ MPTA Petitioner for Intervention, at 2.

⁷ Petitioners’ Memorandum, at 2. Petitioners cite as support alleged inadequacies in Department responses to requests made by Petitioners under the Minnesota Data Practices Act (Minn. Stat. Chap. 13, hereinafter “Data Practices”). Sheu Affidavit, at 1-3. Data Practices requests are not relevant to the underlying issues for which the information is requested. The Department points out that any disputes in that area can be addressed through the appeal mechanism provided for in Data Practices itself.

Department Memorandum, at 3.

⁸ Department Memorandum, at 2.

⁹ *Id.* at 3.

¹⁰ Mid-States Memorandum, at 6.

¹¹ Mid-States Memorandum, at 7.

A person has standing “if they can show an interest arguably among those intended to be protected by the applicable statute.”¹² An example of such an interest is the prevailing wage standard, in which the ALJ held:

The Administrative Law Judge is persuaded that Local 49 and the Minnesota Teamsters have made an adequate showing that their members’ rights may be directly affected by the outcome of this case. As labor organizations, Local 49 and the Minnesota Teamsters have a direct interest in the interpretation and enforcement of the Minnesota Prevailing Wage Act as it affects their members’ wages and benefits. In addition, since MnDOT does not represent public works employees, it may not adequately represent the interests of the petitioner’s members in this matter....¹³

In the prevailing wage example, the action by the agency would directly determine wage and benefit standards experienced by the unions’ members. In this contested case, the only economic impacts are indirect. The economic impacts do not support granting Petitioners’ requests to intervene.

The safety issue is a closer question. There is no doubt that Winter and the other members of Local 455 and MPTA work in close proximity to high-pressure piping and that such high-pressure piping poses a serious risk if improperly installed. But this same danger is posed to any member of the public in the vicinity of such equipment. Thus, the assertion that intervention is needed rests on a claim that the Department is failing to protect the public interest.

Intervention based on a claim that an agency is failing to protect the public interest carries a high burden.¹⁴ There is no indication that the Department is discounting the safety risks posed by improperly installed high-pressure piping. The Department has affirmatively sought to have first-hand evidence, including that possessed by Petitioners, presented in this proceeding.¹⁵

The Petitioners have emphasized that intervention should be “liberally applied to encourage all legitimate interventions.”¹⁶ That standard for intervention does not substitute for the required demonstration that the public interest is not adequately protected.

The Department noted that the contested case rules expressly allow nonparties to provide “testimony or other evidence relevant to the case.”¹⁷ Mid-States objected to the participation of the Petitioners through this rule provision. That rule provision, Minn. Rule 1400.7150, is a restatement of the provision in the intervention rule (Minn. Rule 1400.6200, subp. 5) for participation by members of the public in contested case proceedings. These rule provisions must be read in conjunction with the rules

¹² Id. See also, Beck, Gossman, Nehl-Trueman, *Minnesota Administrative Procedure* § 6.2.6 (2d ed. 1998).

¹³ *ITMO Mark Sand & Gravel Acquisition Co., State Contract No. S98354*, OAH Docket No. 11-3000-13222-2 (Order on Petitions for Intervention issued November 29, 2000).

¹⁴ G. Beck, *Minnesota Administrative Procedure*, § 6.2.3, p. 78, (2nd Ed. 1998).

¹⁵ Department Memorandum, at 3-4.

¹⁶ Petitioners’ Memorandum, at 4 (quoting G. Beck, *Minnesota Administrative Procedure*, § 6.2.3, n. 68).

¹⁷ Minn. Rule 1400.7150, subp. 1.

governing the conduct of parties (Minn. Rule 1400.7100) and witnesses (Minn. Rule 1400.7200).

The rules regarding participation without intervention have been analyzed as follows:

In the absence of a petition for intervention, interested persons may, without becoming parties, enter an appearance, offer testimony and exhibits, and question witnesses at a contested case hearing. The extent of such participation is discretionary with the ALJ and is most commonly permitted when the preceding involves questions of legislative fact and important policy issues. The parties normally are entitled to question any persons offering testimony or exhibits under this rule. If the agency is not a party to the contested case and is acting in a quest in traditional capacity only, the ALJ may permit an agency representative to question witnesses. This enables the agency staff to clarify or complete the record.¹⁸

The issues present in this proceeding are specific to the work performed by Mid-States, and the supervision standards applicable to work with high-pressure piping. These issues are not legislative facts or policy decisions that would benefit from participation by members of the public in a nonparty role.

Winter has indicated that he has direct knowledge of some work performed by Mid-States. The Department has indicated a willingness to call Winter as a witness to this proceeding. That is the appropriate means of incorporating that evidence into the contested case record.

For the foregoing reasons, the ALJ finds that the Petitioners should not be allowed to participate as parties in this proceeding. The motions for intervention are denied.

B.J.H.

¹⁸ G. Beck, *Minnesota Administrative Procedure*, § 6.2.8, p. 87.