

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of Valley Infrastructure
d/b/a/ Zumbro River Constructors
State Project No. 1017-12,
State Contract S06063

**ORDER ON MOTION
FOR SUMMARY DISPOSITION**

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing issued on October 18, 2007, and the motion of Respondents Valley Infrastructure d/b/a Zumbro River Constructors and Hansen Thorp Pellinen Olson, Inc. for summary disposition. Patrick J. Lee-O'Halloran, Attorney at Law, Fabyanske, Westra, Hart & Thomson, represented the Respondents. Michael A. Sindt, Assistant Attorney General, represented the Minnesota Department of Transportation (MnDOT).

Based upon the files, records, and proceedings in this matter, and for the reasons set out in the following Memorandum,

IT IS HEREBY ORDERED as follows:

- (1) The Respondents' Motion for Summary Disposition is **DENIED**.
- (2) This matter shall proceed to hearing on a date to be determined.
- (3) To facilitate the scheduling of hearing dates, the parties shall provide the Administrative Law Judge by October 8, 2008, with an estimate of the number of days needed for hearing and a list of dates in November 2008 through January 2009 on which they and their witnesses and counsel would be available. The Administrative Law Judge will thereafter set hearing dates for this matter.

Dated: September 24, 2008.

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The Notice and Order for Hearing filed by MnDOT in this matter alleges that the Respondents Valley Infrastructure d/b/a Zumbro River Constructors (ZRC) and Hansen Thorp Pellinen Olson, Inc. (HTPO) committed violations of Minnesota's Prevailing Wage Act (MPWA) while under contract with the State to perform construction work on a State highway project. Specifically, MnDOT alleges that the employees who performed surveying services on the project are due additional wages under the MPWA. The Respondents maintain that the surveyors and their assistants are not owed back wages because they are not subject to the MPWA. In addition, the Respondents argue that the rules governing the MPWA are unconstitutionally vague and that MnDOT's enforcement action is arbitrary and capricious, and amounts to unauthorized rulemaking. For all of these reasons, the Respondents seek dismissal of the action.

As an initial matter, the Respondents' motion, which was labeled a "motion to dismiss and/or for summary disposition," is appropriately treated as one for summary disposition. When matters outside the pleadings are presented to be considered, the motion must be reviewed under a summary judgment standard.¹ In this case, Respondents have attached affidavits and supporting documentation to their motions. Accordingly, the Administrative Law Judge will review this matter as a motion for summary disposition.

Undisputed Facts

Based on the filings and arguments of the parties, it appears that the following facts are undisputed. On August 15, 2005, ZRC entered into a contract with MnDOT to perform construction work on Highway 212 ("the Project"). The Project included grading, surfacing, noise berms, noise walls, ponds, signals, lighting, signing and bridges on approximately 11.75 miles of Highway 212 located in Hennepin and Carver Counties. The contract required ZRC to pay prevailing wages to "the various laborers and mechanics" it employed and subcontractors under the contract. The original lump sum price of ZRC's contract was \$237,893,000.00.

ZRC entered into a subcontract with HTPO to provide construction surveying services on the Project. HTPO is an engineering, surveying and landscape architecture company. HTPO bid the Project on a lump sum basis, using its standard pay scale, for an original subcontract price of \$2,251,590.00. HTPO's contract did not include prevailing wages for its surveyors or survey assistants.

MnDOT conducted a partial review of the employee payrolls of Respondents ZRC and HTPO and concluded that the majority of HTPO's employees are due additional wages under the MPWA. According to MnDOT, based on the information and work duties presented, the "Common Laborer" classification is the same or most similar trade or occupation for the work performed by HTPO's employees.² MnDOT

¹ *Northern States Power Co., d/b/a Xcel Energy v. Minnesota Metropolitan Council, Minnesota Dept. of Transportation, et al*, 648 N.W.2d 485 (Minn. 2004); Minn.R.Civ.P. 12 and 56.

² Respondents' Ex. F.

reasoned that laborers perform surveying duties when establishing elevations for aggregate base, bituminous or concrete pavements.³ HTPPO objected to MnDOT's determination. It asserted that its employees were "design professionals" and not "mechanics and laborers" subject to the Act, and it pointed out that the United States Department of Labor's Dictionary of Occupational Titles classifies land surveyors and their assistants as "professional" occupations.

By letter dated August 15, 2007, MnDOT informed Respondents that they could request an administrative hearing before an Administrative Law Judge if they disagreed with MnDOT's determination.⁴ Respondents requested a hearing in this case, and the Notice and Order for Hearing was issued on October 18, 2007.

Motion Standard

Respondents have moved for summary disposition. Summary disposition is the administrative equivalent of summary judgment.⁵ Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.⁶ The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition of contested case matters.⁷

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.⁸ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁹

Prevailing Wage Law

The Minnesota Prevailing Wage Act is a minimum wage law modeled after the Federal Davis Bacon Act that applies to construction projects financed in whole or in part by state funds. Its purpose is to ensure that those who work on such projects are paid wages comparable to wages paid for similar work in the community.¹⁰ The MPWA is codified at Minn. Stat. §§ 177.41-.44. The accompanying administrative rules are set forth at Minn. R. 5200.1000-.1120. Together, the statutes and rules govern the

³ *Id.*

⁴ Respondents' Ex. H.

⁵ *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

⁶ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwigie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03.

⁷ See Minn. R. 1400.6600.

⁸ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

¹⁰ Minn. Stat. § 177.41.

determination, certification, and payment of prevailing wages to laborers, workers and mechanics working on state-funded construction projects.¹¹

Under the MPWA, the Minnesota Department of Labor and Industry (DOLI) establishes the labor classifications for workers and determines the prevailing wage rate for the classifications.¹² Wages must be based on work performed solely within the applicable class of labor.¹³ Prevailing wage rates are determined by DOLI by the use of wage surveys that it compiles for each of ten defined areas of the state. The prevailing wage rate paid is the surveyed rate paid to the largest number of workers engaged in the same class of labor within the areas, as required by Minn. Stat. § 177.44, subd. 6, and Minn. R. 5200.1060. MnDOT is responsible for awarding and enforcing state construction contracts and for including the minimum rates determined by DOLI in bid specifications for public contracts.

DOLI has identified over 140 categories of work in a list of Master Job Classifications.¹⁴ If work is performed by a class of labor not defined by the Master Job classifications list, the contracting agency (in this case MnDOT) must assign a wage rate and DOLI must review and certify that rate based on the “most similar trade or occupation.”¹⁵ DOLI must then initiate a rulemaking procedure within 90 days to define the class of labor in the Master Job classifications list,¹⁶ or make available a reconsideration process with a contested case proceeding when requested by an aggrieved party.¹⁷ DOLI’s eventual labor classification determination must be based on the nature of the work performed with consideration given to those trades, occupations, skills, or work generally considered within the construction industry as constituting distinct classes of labor.¹⁸

There is no established labor classification for surveyors, surveyor assistants, or survey crew members in DOLI’s Master Classifications list (Minn. Rule 5200.1100). MnDOT identified the “common laborer” classification as the most similar occupation for the work performed by HTPO’s employees and assigned a wage rate based on that classification. Respondents objected to MnDOT’s determination and this hearing followed.

Each of the arguments made by Respondents in support of their motion for summary disposition is addressed below.

¹¹ Minn. Stat. § 177.41.

¹² Minn. Stat. § 177.44, subsd. 3 and 4.

¹³ Minn. Rule 5200.1030, subp. 2.

¹⁴ Minn. Rule 5200.1100.

¹⁵ Minn. Rule 5200.1030, subp. 2a(C).

¹⁶ *Id.*

¹⁷ *AAA Striping Service Co. v. Minnesota Dep’t of Transportation*, 681 N.W.2d 706, 716 (Minn. App. 2004).

¹⁸ Minn. Rule 5200.1040 (DOLI must also consider work classifications contained in the collective bargaining agreements, apprenticeship agreements on file with DOLI, the “United States Department of Labor Dictionary of Occupational Titles,” and customs and usage applicable to the construction industry).

A. Applicability of MPWA to Surveyors

Respondents argue that, by its express terms, the MPWA applies only to wages paid to “laborers or mechanics” for “work under a contract” with the State of Minnesota. Respondents maintain that HTPO’s employees are not laborers or mechanics, but are professional design team members providing professional services on the Project. Respondents point out that the US Department of Labor Dictionary of Occupational Titles, which DOLI is required to consider when making labor classification determinations, classifies land surveyors and their assistants as “professional” occupations. It further states that a surveyor assistant “obtains data pertaining to angles, elevations, points, and contours used for construction, map making, mining, or other purposes, using alidade, level, transit, plane table, Theodolite, electronic distance measuring equipment, and other surveying instruments; compiles notes, sketches, and records of data obtained and work performed.”¹⁹ In contrast, a “laborer” for road construction is classified by the US Department of Labor Dictionary of Occupational Titles as “Construction Worker II.” According to the Dictionary, laborers under this code perform tasks related to grading and maintaining roads “requiring little or no independent judgment.”²⁰

Respondents maintain that the HTPO survey crews were not working as laborers. Consistent with the Dictionary of Occupational Titles, Respondents assert that the surveyor assistants on the Project were working as instrument technicians performing instrument calibration and recording field notes. Because they were providing skilled professional services requiring independent judgment, Respondents contend they do not meet the definition of a laborer and are not subject to the Act.

Respondents also point out that, in a determination letter issued to the American Congress on Surveying and Mapping on November 4, 2004, the U.S. Department of Labor stated that it has been a longstanding position of the Department of Labor that preliminary survey work, such as the preparation of boundary surveys and topographical maps, is not construction work covered by the Federal Davis-Bacon Act, especially when performed pursuant to a separate contract.²¹ The letter continued:

Where surveying is performed immediately prior to and during actual construction, in direct support of construction crews, such activities is covered by Davis-Bacon requirements for laborers and mechanics. The determination of whether certain members of survey crews are laborers and mechanics is a question of fact. Such a determination must take into account the actual duties performed. As a general matter, an instrumentman or transitman, rodman, chainman, party chief, etc are not considered laborers or mechanics. However, a crew member who

¹⁹ Thorp Aff. at ¶ 13.

²⁰ Dictionary of Occupational Titles ¶ 869.687-026 (Construction Worker II).

²¹ Respondents’ Ex. M.

primarily does manual work, for example, clearing brush, is a laborer and is covered for the time so spent.²²

Respondents further argue that, even if HTPO's employees are properly considered "laborers or mechanics," their work still does not fall within the MPWA's provisions because they were not performing "work under a contract." Minnesota Rule 5200.1106 defines "work under contract" to mean "all *construction* activities associated with the public works project."²³ Respondents contend that HTPO's work involves design – specifically, verifying the site conditions reflected in the design – and not "construction activities," and therefore does not fall within the definition of work "under the contract."

In response, MnDOT points out that Minn. Stat. § 177.41 specifies that the prevailing wage applies generally to the "wages of laborers, workers, and mechanics on projects financed in whole or in part by State funds . . ." In *Faribault County v. Minnesota Department of Labor and Industry*,²⁴ the Minnesota Court of Appeals held that Minn. Stat. § 177.41 "requires that prevailing wages be paid on all projects funded in whole or part by state funds ..." In addition, Minn. Rule 5200.1106 provides that the prevailing wage must be paid for "work under the contract." "Work under the contract" is defined to mean:

all construction activities associated with the public works project, including . . . work conducted pursuant to a contract . . ., regardless of whether the construction activity or work is performed by the prime contractor, subcontractor, trucking broker, trucking firms, independent contractor, or employee or agent of any of the foregoing entities, and regardless of which entity or person hires or contracts with another.²⁵

Finally, the phrase "laborer or mechanic" is defined in DOLI rules to mean "a worker in a construction industry labor class identified in or pursuant to part 5200.1100."²⁶ Although survey crew members are not identified in a construction industry labor class set forth in part 5200.1100, MnDOT may assign a wage rate based on the most similar trade or occupation in an existing classification consistent with Minn. Rule 5200.1030, subp. 2a(C). MnDOT maintains that, read together, these statutes and rules demonstrate that the prevailing wage applies to all work performed on a project under a State contract unless a specific exemption applies, and that any worker on a state project is defined as a "laborer or mechanic."

The Administrative Law Judge concludes that there are material facts at issue regarding the actual duties performed by HTPO's employees that preclude granting Respondents' motion for summary disposition. It is possible that the activities in which HTPO's employees engaged and the services they provided in support of the Project

²² *Id.*

²³ Minn. Rule 5200.1106, subp. 2A (emphasis added).

²⁴ 427 N.W.2d 166, 170 (Minn. App. 1991), *rev. denied* (Minn. August 29, 1991).

²⁵ Minn. Rule 5200.1106, subp. 2.

²⁶ Minn. Rule 5200.1106, subp. 5A.

may be considered work identified with laborers performed under contract and subject to the MPWA. At this stage, it cannot be said that surveyors and surveyor assistants are not subject to the MPWA as a matter of law.

B. Vagueness of Rules

Respondents also argue that MnDOT's claims should be dismissed because they are based upon unconstitutionally vague and ambiguous rules. According to the Respondents, MnDOT seeks to apply the term "laborer" to design professional employees who have never been so classified under the MPWA. The Respondents contend that the rules fail to provide any definitions or guidance as to the tasks that fall within the various labor classification codes and that, as a result, the rules allow for inconsistent determinations and require the Respondents to guess at the application of the classifications to their employees. Moreover, Respondents assert that statutes and rules that impose criminal penalties, such as the MPWA, must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.²⁷ According to Respondents, the rules here fail to provide sufficient specificity and guidance to prevent the classification determination process from being subjective and arbitrary. As a result, Respondents urge the Administrative Law Judge to dismiss MnDOT's claims on the grounds that Minn. Rule 5200.1040 and 5200.1100 are void for vagueness.

As a general rule, neither an Administrative Law Judge nor the head of an agency can declare a statute or rule unconstitutional on its face in a contested case proceeding, since that power is vested in the judicial branch of government.²⁸ While Administrative Law Judges must apply laws, rules, and ordinances in a constitutional manner, questions of the constitutional validity of such enactments are not normally within the jurisdiction of an ALJ or agency official.²⁹ It is permissible, however, for an agency or ALJ to determine a constitutional question in the interpretation or application of a statute or rule to particular facts taking into account relevant judicial decisions.³⁰

Like statutes, rules must meet due process standards of definiteness under both the state and federal constitutions.³¹ A rule is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or

²⁷ *State v. Robinson*, 539 N.W.2d 231, 236 (Minn. 1995); *State v. Newstrom*, 371 N.W.2d 525, 528 (Minn. 1985).

²⁸ *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Service, a Div. of Hiawatha Aviation of Rochester, Inc.*, 500 N.W.2d 495 (Minn. App. 1993).

²⁹ *Neeland v. Clearwater Memorial Hosp.*, 257 N.W.2d at 368. Under the MAPA rulemaking procedures, an ALJ may disapprove a proposed rule if the rule is not rationally related to the agency's objective or the rule is unconstitutional. Minn. R. 1400.2100 (2007). Once approved, rules adopted under the MAPA procedures enjoy a presumption of legality. Minn. Stat. § 14.37, subd. 1 (2006).

³⁰ *Petterson v. Commissioner of Employment Services*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (1975); *Jackson County Education Ass'n v. Grass Lake Community*, 291 N.W.2d 53 (Mich. App. 1980).

³¹ *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 107 (Minn. App. 1991), *rev. denied*, (Minn. July 24, 1991).

fails to provide sufficient standards for enforcement.³² If a regulation defines an act in a manner that encourages arbitrary enforcement or is so indefinite that people must guess at its meaning, it is impermissibly vague.³³ The burden of proving that a regulation is vague is upon the party challenging the constitutionality of the regulation.³⁴

Those challenging a rule on vagueness grounds bear a heavy burden.³⁵ The Minnesota Supreme Court has stated that a rule “should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent.”³⁶ Moreover, the Minnesota Court of Appeals held that a statute is not unconstitutionally vague merely because the legislature could have defined its terms more precisely.³⁷

In a recent OAH decision, Administrative Law Judge Eric Lipman recommended dismissal of MnDOT’s claims brought under the MPWA based in part on a determination that the rules were impermissibly vague.³⁸ In that case, Comstock Construction Inc. (Comstock) challenged the reassignment of work performed by its employees to various existing classes of labor found on the Master Classifications list. Comstock argued that the rules failed to provide sufficient guidance as to which tasks fell within which labor classifications. The record in that case established, for example, that DOLI has at times classified persons who install chain link fences as “Laborers” and at other times has classified them as “Iron Workers.”³⁹ The Administrative Law Judge found that the classification categories failed to give a person of ordinary intelligence a reasonable opportunity to know which designations are prohibited, and failed to provide sufficient standards for later enforcement by the agency. According to Judge Lipman, the lack of a reasonably definite set of standards for applying labor classifications fell below the minimum process due Comstock and other employers.⁴⁰

The facts involved in *Comstock* are, however, distinguishable from those involved in the current case. Unlike the *Comstock* case, which involved the State giving shifting and inconsistent opinions on the proper classification of particular tasks, there is no allegation here that the State has inconsistently classified survey crew members in the past. Moreover, unlike *Comstock*, this case involves a class of labor (survey crew members or assistants) that is *not* found on the Master Classifications List. When work

³² *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972); *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985), *appeal dismissed* 106 S.Ct. 375 (1985).

³³ *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. App. 2001); *Humenansky v. Minnesota Bd. of Md. Exam’rs*, 525 N.W.2d 559, 564 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995).

³⁴ *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983).

³⁵ *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 243 (Minn. 1984).

³⁶ *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985).

³⁷ *State v. Normandale Properties, Inc.*, 420 N.W.2d 259, 261 (Minn. App. 1988), *rev. denied* (Minn. May 4, 1988) (ruling on a challenge to state’s hazardous waste statute).

³⁸ *In re MnDOT Detroit Lakes Regional Headquarters, Construction Project Number 00T21791B*, OAH Docket No. 8-3001-17706-2 (Order dated February 7, 2008) (hereinafter referred to as the *Comstock* case).

³⁹ *Id.* at 19.

⁴⁰ *Id.* at 20.

is performed by a class of labor not defined on the Classifications List, the rules specifically require the agency to assign a wage rate “based on the most similar trade or occupation.”⁴¹ In this case, MnDOT assigned the wage rate of “common laborer” to HTPO’s survey crew members. The issue presented here is whether HTPO’s employees are subject to the MPWA and, if so, whether the duties they performed are most similar to those of a laborer or whether there is some other class whose duties are more like those of survey crew members.⁴²

In *AAA Striping Service Co. v. Minnesota Department of Transportation*,⁴³ a pavement marking company that applied stripes and other markings to road surfaces on a state highway project objected to MnDOT’s classification of the work performed by its employees. The company referred to its employees as “stripers” and “striper tenders.” (Stripers drive the truck and operate a machine that applies the striping material, and striper tenders follow the striping truck placing traffic cones around the fresh striping material.) Neither position had ever been included in the Master Classification list by those names or by job description. MnDOT informed the company that it should have paid its stripers the “painter” rate, and its striper tenders the “common laborer” rate. The company challenged the classification. The state (MnDOT and DOLI) argued that it appropriately placed the employees in pre-existing labor categories. It also argued that AAA was not entitled to a specific classification for its employees or a contested case hearing and rulemaking procedure on each type of employee.

The Court of Appeals in *AAA Striping* rejected the state’s position and held that companies are entitled to administrative review of the classification of their employees for purposes of the MPWA, either through rulemaking or a contested case proceeding before an Administrative Law Judge.⁴⁴ The panel noted:

Workers, labor unions, contractors, subcontractors (including AAA), and perhaps even local units of government, have a substantial interest in the classification process. Fair wages, workers’ livelihoods, the financial feasibility of projects, and entrepreneurial opportunities for contractors may be affected by these decisions. [Citation omitted.] The statutes mandate investigation and hearings necessary to define worker classifications. Minn. Stat. § 177.44, subd. 3. This is strong legislative directive to observe the basics of procedural due process in making classification decisions. We conclude that at a minimum, DOLI should engage in rulemaking as specified in its own regulation, or, in the alternative, make available a reconsideration process with a contested case proceeding when requested by an aggrieved party. . . . To say that the decision to include striper and striper tenders in an existing classification is entirely within the discretion of DOLI, that it can exercise this discretion without a record or a hearing, and that there is no review

⁴¹ Minn. Rule 5200.1030, subp. 2a(C).

⁴² It should be noted that DOLI has recently proposed amending the prevailing wage rules to add a labor classification for Survey Field Technician.

⁴³ 681 N.W.2d 706, 716 (Minn. App. 2004).

⁴⁴ 681 N.W.2d at 717.

available is inconsistent with DOLI's own rules, the statutes, and with the principles of procedural due process.⁴⁵

Unlike the *Comstock* case, the rule involved here governs the process by which the wage rate of existing labor classifications are assigned to work performed by a class of labor not defined by the classification list. The Respondents have failed to show that this rule is so indefinite as to be unconstitutionally vague. Moreover, the precise issue was raised in *AAA Striping*, and MnDOT's actions in this matter are consistent with the holding in that case. MnDOT offered Respondents the opportunity for a hearing to challenge the wage rate determination assigned to the affected employees.

The Administrative Law Judge concludes that the Respondents have not met their heavy burden in bringing this vagueness challenge, and their motion for summary disposition based on the application of unconstitutionally vague rules is denied.

C. Arbitrary and Capricious Government Action

Respondents also argue that MnDOT's claims should be dismissed because it has acted in an arbitrary and capricious manner and did not follow the prevailing wage rules. Respondents maintain that MnDOT failed to comply with Minn. R. 5200.1040 when it determined which labor classification should apply to HTPO's employees. Specifically, the Respondents contend that MnDOT failed to consider the U.S. Department of Labor Dictionary of Occupational Titles when it determined that HTPO's employees should be classified as laborers,⁴⁶ and thereby failed to comply with Minn. R. 5200.1040(E).

In response, MnDOT asserts that its actions were based on the facts it had gathered and were consistent with the applicable statutes, rules, and Minnesota case law. MnDOT maintains that Minn. R. 5200.1030, subp. 2a(C), governs the investigation and assignment of an existing classification's wage rate to HTPO's workers, not Minn. R. 5200.1040 as Respondents contend. Part 5200.1030, subp. 2a(C) states that, if work is performed by a class of labor not defined in the Master Job Classifications set forth in part 5200.1100, "the contracting agency [here, MnDOT] shall assign a wage rate and the commissioner of labor and industry shall review and certify the assigned wage rate based on the most similar trade or occupation from the area wage determination" In contrast, part 5200.1040(E) requires DOLI, when making labor classifications, to "consider work classifications contained in collective bargaining agreements, apprenticeship agreements on file with the department, the 'United States Department of Labor Dictionary of Occupational Titles,' and customs and usage applicable to the construction industry" in determining particular classes of labor. The Administrative Law Judge agrees that it is the provisions of Minn. R. 5200.1030, subp. 2a(C) that are at issue here.

⁴⁵ 681 N.W.2d at 717.

⁴⁶ In its response to Requests for Admissions, MnDOT admitted that it did not consult the Dictionary in connection with its investigation prior to sending its June 19 and August 15, 2007, letters to Respondents. Respondents' Memorandum in Support of Motion, Ex. J at 12 (responses to Requests 5 and 6).

In connection with its memorandum in opposition to the motion, MnDOT provided affidavits from Charles Groshens, MnDOT Labor Compliance Supervisor; Robert P. Richards, Senior Labor Investigator in the Labor Compliance Unit; and Rick Morey, Assistant Director of Surveying and Mapping for MnDOT. Mr. Groshens stated in his affidavit that MnDOT decided to enforce the MPWA with respect to survey crews performing work on covered contracts on a case-by-case basis; conducted several survey crew investigations regarding work performed on state-funded construction contract; ascertained that the project on which HTPO's employees were working was funded in part with state funds and that they were subject to the MPWA; determined that the Master Job Classification Lists did not include an existing class of labor applicable to HTPO's employees; and ultimately determined that the most similar existing class of labor is Labor Code No. 101, Common Laborer.⁴⁷

Mr. Richards, who is responsible for monitoring and enforcing state and federal prevailing wage laws and regulations on MnDOT projects, described in his affidavit the prevailing wage investigation process that was followed in this case. He attested that the duties performed by HTPO employees were not found in the established Master Classification List of labor classification and he subsequently determined that the duties of survey crew members were the most similar to the existing classification of Laborers Code 101 because "they perform functions which include the clearing of brush and the installing of survey stakes." He also explained the basis for MnDOT's current calculation of back wages owed to HTPO workers.⁴⁸ Finally, Mr. Morey, who is also a licensed Land Surveyor, attested that there are clear differences between construction surveys and design/location surveys. He indicated that the work performed in construction surveying is generally carried out by non-licensed technical personnel rather than licensed land surveyors, and noted that MnDOT policy allows construction surveying to be performed under the supervision of either an engineer or land surveyor. He also stated that survey crew members may make minor adjustments from the construction plan under the supervision of a licensed land surveyor when performing tasks associated with construction surveying.⁴⁹

As used in the Minnesota Administrative Procedure Act, the phrase "arbitrary and capricious" has essentially been defined as requiring a showing that the agency's determination "represents its will and not its judgment."⁵⁰ If a decision "represents a reasonable judgment," it is not arbitrary or capricious.⁵¹ So long as an agency engaged in reasoned decisionmaking, a court will affirm even though it may have reached a different conclusion had it been the factfinder.⁵² The arbitrary and capricious standard

⁴⁷ Aff. of Groshens at ¶¶ 17, 19, 20, 22, 23.

⁴⁸ Aff. of Richards at ¶¶ 8, 14-17.

⁴⁹ Aff. of Morey at ¶¶ 3, 6-9.

⁵⁰ *Markwardt v. Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

⁵¹ *People's Natural Gas Co. v. Minnesota Pub. Utils. Comm'n*, 342 N.W.2d 348, 353 (Minn. App. 1983).

⁵² *Cable Communications Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 668-69 (Minn. 1984).

incorporates a high degree of judicial deference to the agency, with the court declining to substitute its judgment for that of the agency.⁵³

An agency action is arbitrary and capricious if:

... the agency relied on factors which the legislature had not intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise⁵⁴

The Administrative Law Judge concludes that there are material facts at issue regarding the wage rate determination made in this case that preclude granting Respondents' motion for summary disposition, and the Respondents have failed to show that they are entitled to judgment as a matter of law based on arbitrary and capricious government conduct. MnDOT has provided affidavits explaining the basis for its determination and suggesting that it relied upon factors that were intended by the statute and rules, and Respondents have not put forward sufficient evidence to conclude that MnDOT acted in an arbitrary manner. Respondents' motion for summary disposition based on arbitrary and capricious government action is denied.

D. Unauthorized Rulemaking

Finally, Respondents argue that MnDOT's claims should be dismissed because they are engaging in unauthorized rulemaking. According to the Respondents, MnDOT's job classification determinations meet the definition of a rule under the Minnesota Administrative Procedure Act (APA) and, as such, must be adopted in compliance with the Minnesota APA in order to be enforceable.

The Minnesota APA requires agencies to adopt, as rules, all formal and informal procedures of an agency "to the extent that those procedures directly affect the rights of or procedures available to the public."⁵⁵ The Act defines a rule as:

every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure.⁵⁶

However, Minnesota courts have held that an agency may formulate policy by either adopting rules under the Minnesota APA or by making individual case-by-case determinations; the agency has discretion to decide what method is appropriate in a

⁵³ See, *Town of Forest Lake v. Minnesota Mun. Bd.*, 497 N.W.2d 289 (Minn. App. 1993), rev. denied (Minn. April 29, 1993).

⁵⁴ *In re Space Center Transport*, 444 N.W.2d 575, 581 (Minn. App. 1989) (action of Transportation Board denying transfer was not arbitrary and capricious).

⁵⁵ Minn. Stat. § 14.06(a).

⁵⁶ Minn. Stat. § 14.02, subd. 4.

particular situation.⁵⁷ In making case-by-case determinations, an agency must apply specific facts to specific parties.⁵⁸

In *L&D Trucking v. Minnesota Department of Transportation*,⁵⁹ the Court of Appeals upheld MnDOT's authority to enforce the Prevailing Wage law on a case-by-case basis. In that case, prospective bidders on state highway projects argued that MnDOT's published interpretation of the statutory term "commercial establishments," which provides an exception to the prevailing wage law for certain businesses, constituted unauthorized rulemaking. The Court of Appeals disagreed and concluded that, based on MnDOT's investigation and findings, MnDOT was properly applying the statute to specific facts and parties and was not enforcing its interpretation of "commercial establishment" as if it were a properly promulgated rule.⁶⁰

However, in *Sa-Ag, Inc. v. Minnesota Department of Transportation*,⁶¹ the Court held that MnDOT's issuance of an addendum to all bidders on state contracts, which purported to interpret the term "substantially in place" and identify which haulers of sand and gravel would have to adhere to prevailing wage rates, was unauthorized rulemaking. The Court held that the addendum was an agency statement of general applicability and future effect and, because the term was subject to more than one interpretation, the addendum amounted to an interpretive rule that needed to be adopted pursuant to Minnesota APA.

According to the Respondents, MnDOT's announcement that the task of surveying triggers an obligation for state contractors to pay the prevailing wage for laborers is a "rule" that must be adopted pursuant to Minnesota APA procedures. Respondents point out that, as Judge Lipman noted in the *Comstock* case, case-by-case adjudication requires the application of an extrinsic source of law (either a statute or regulation) to the facts of the particular case. If, on the other hand, the agency seeks to establish a more general proposition not found in existing statute and rule that it will apply in future cases, then the agency must undertake rulemaking. Respondents contend that by applying the existing classification of laborer to the tasks associated with surveyors, MnDOT is engaging in unauthorized rulemaking and not case-by-case adjudication. Respondents further assert in their reply brief that DOLI's recent proposed rule amendments adding a job classification for survey field technician supports their argument that MnDOT's enforcement action in this case amounts to unauthorized rule making. Respondents maintain that, by proposing the rules, the State has made an admission that surveyors and surveyor assistants are not currently covered by the MPWA.

⁵⁷ *Bunge Corp. v. Commissioner of Revenue*, 305 N.W.2d 779 (Minn. 1981).

⁵⁸ *L&D Trucking v. Minnesota Depart. of Transp.*, 600 N.W.2d 734, 736 (Minn. App. 1999); *In re Hibbing Taconite Co.*, 431 N.W.2d 885, 894-95 (Minn. App. 1988).

⁵⁹ 600 N.W.2d 734 (Minn. App. 1999).

⁶⁰ 600 N.W.2d at 737. (The Court also noted that it was not unmindful of the problems that case-by-case enforcement of the prevailing wage law creates for contractors who want to bid on state projects, and it encouraged MnDOT to engage in formal rulemaking to establish definitions.)

⁶¹ 447 N.W.2d 1 (Minn. App. 1989).

Unlike the situation in the *Comstock* case, the Administrative Law Judge concludes that MnDOT is applying an extrinsic source of law to the specific facts in this matter, and therefore is engaging in case-by-case adjudication. Minnesota Rule part 5200.1030, subp.2a(C), requires MnDOT to assign a wage rate when work is performed by a class of labor not defined by the Master Job classifications list. The record suggests that MnDOT staff reviewed the facts in this case and made a determination as to which class of labor has the most similar duties to Respondents' survey crew members. In *AAA Striping*,⁶² the Minnesota Court of Appeals held that the Minnesota Department of Labor and Industry has the discretion when determining that workers are members of an existing labor classification to *either* engage in rulemaking *or* offer an aggrieved party reconsideration of the job classification through a contested case proceeding. In this case, MnDOT has offered Respondents a contested case hearing. In addition, the fact that DOLI has recently proposed amendments to the rules governing the MPWA, which include adding a classification for survey field technicians, does not establish as a matter of law the MnDOT engaged in unauthorized rulemaking by pursuing this enforcement action.

Respondents' motion for summary disposition is denied. There is evidence in the record tending to support MnDOT's assertion that it enforced the provisions of the Prevailing Wage Act against Respondent following the procedure set forth at Minn. Rule 5200.1030, subp. 2a(C), and only after reviewing and applying the specific facts of this matter to Respondent's specific situation. Because there are material facts at issue regarding how the classification determination was made and whether it is supported by substantial evidence, summary disposition is not appropriate.⁶³ Respondents' motion for summary disposition of MnDOT's claims on the grounds that it is engaged in unauthorized rulemaking is denied.

Viewing the record in a light most favorable to MnDOT, the Administrative Law Judge concludes that genuine issues of material fact remain for hearing and preclude granting summary disposition in favor of Respondents. Accordingly, this matter will proceed to hearing on a date to be determined.

B. L. N.

⁶² 681 N.W.2d at 717.

⁶³ See, *AAA Striping Service Co. v. Minnesota Dept. of Transp.*, 681 N.W.2d 706, 719-720 (Minn. App. 2004).