

**City Plan Development, Inc. v. Office of the Labor Commissioner, 121 Nev.
Adv. Op. 43 (August 11, 2005)¹**

ADMINISTRATIVE LAW – LABOR LAW

Summary

This case examines the Labor Commissioner’s authority to “conduct hearings, render decisions, and assess penalties involving prevailing wage issues under Nevada labor law.”²

Disposition/Outcome

The Nevada Supreme Court held that the “Labor Commissioner properly heard and rendered a decision on public works project employees’ claims alleging inadequate payment under Nevada’s wage statutes.”³ It also held, however, that the Labor Commissioner improperly assessed the employer a double penalty when it determined that the employees were not paid the prevailing wages and corresponding awards.

Factual & Procedural History

The Clark County Board of County Commissioners awarded City Plan Development, Inc. (“City Plan”), a public contract to build Fire Station #26. It was completed in September of 1999. Following the completion, twenty individuals filed wage claims against City Plan. The Office of the Labor Commissioner scheduled a hearing and issue notice of violations. Former Deputy Labor Commissioner David Hill presided at the hearing, issuing a decision on June 13, 2000 against City Plan.

City Plan petitioned the district court for judicial review. The district court set aside the decision, remanding matter for a subsequent hearing limited to the eight individuals’ wage claims, Arteaga, Guerrero, Reyes, Flores, Victor, Jarero, Lopez, and Guillen. The district court ordered that “if the hearing officer awarded any monetary amount to the claimants, he had to specify precisely the dates, hours, wage rate applicable, and wage rate actually paid.”⁴

Labor Commissioner Terry Johnson conducted the second hearing. At the hearing, Rodrigues, an administrative employee of City Plan, testified that she usually prepared the payroll for the fire station project employees from the timecards prepared and submitted by their supervisors. At the time, the foreman or other supervisors would call in the employees’ hours, which she copied onto the timecards. The employees would then later sign the timecards when they picked up their paychecks. She also testified that wages were determined by the predetermined public works projects wage schedules based on notations on the timecards classifying the type of job.

Next, five of the claimants testified. With the exception of one of the claimants, Guerrero, each claimant testified that he had worked approximately 3 ½ days or 37.5 hours on the fire

¹ By Robert Henriksen

² City Plan Dev., Inc. v. Office of the Labor Comm’r, 121 Nev. Adv. Op. 43, 1 (Aug. 11 2005).

³ *Id.* at 2.

⁴ *Id.*

station project. They had negotiated with Ochoa, a City Plan foreman, to perform framing work for a total of \$1,800. Thus, the four claimants asserted that they were each paid \$360 for their work. “The four claimants also testified to endorsing checks for payments that they never received, receiving inaccurate payment documentation, signing blank timecards, and/or discovering their signatures had been forged on certain documents.”⁵

The fifth claimant, Guerrero, testified that he worked on the project for approximately two months performing carpentry work. He testified that he had entered into oral agreements with Ochoa and that he was supposed to be paid \$16 per hour. He averred that he was paid \$16 per hour for the first 39 ½ hours, although the corresponding paycheck indicated that he worked 25 hours. He also testified that he signed blank timecards and that his other paychecks reflected fewer hours than he actually worked, and consequently, a rate of pay higher than what he actually received.⁶

Dizon, the Labor Office’s investigator, testified that his investigation resulted in certain findings that corroborated the claimants’ statements.

The Labor Commissioner determined that City Plan violated the wage statutes and was indebted to the claimants. The Labor Commissioner, pursuant to the instructions of the district court, “listed in detail the dates, hours, type of work, rate of pay received, and rate of pay the City Plan should have paid.”⁷ “The decision specified the amount owed to each claimant, assessed an administrative penalty, and mandated forfeiture for a period of time from awards of public work contracts.”⁸

City Plan sought judicial review in the district court, which the district court denied. City Plan appealed, challenging both the decision itself and the Labor Commissioner’s authority to proceed with wage claims.

Discussion

Standard of Review

The court reviews administrative decisions generally under an abuse of discretion standard.⁹ Also, while the Court reviews purely legal questions de novo, a “hearing officer’s conclusions of law, which will necessarily be closely tied to the hearing officer’s view of the facts, are entitled to deference on appeal.”¹⁰ “An administrative decision based on a credibility determination is not open to appellate review.”¹¹

Authority of Labor Commissioner

City Plan makes numerous arguments challenging the authority of the Labor Commissioner. It first argues that the Labor Commissioner lacked authority over the matter, because he failed to follow the requirements of NRS 607.160 and NRS 607.170. NRS 607.160 and NRS 607.170 authorize the Labor Commissioner to take assignments of wage claims for

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.* at 5.

⁸ *City Plan Dev., Inc. v. Office of the Labor Comm’r*, 121 Nev. Adv. Op. 43, 5-6 (Aug. 11 2005).

⁹ *Ayala v. Caesars Palace*, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003).

¹⁰ *City Plan Dev., Inc.*, 121 Nev. Adv. Op. at 6-7.

¹¹ *Langman v. Nevada Adm’rs, Inc.*, 114 Nev. 203, 209, 955 P.2d 188, 192 (1998).

prosecution or to refer the claims to the Attorney General when the claimants cannot financially hire counsel. The provisions do not provide mandatory prehearing procedures that the Labor Commissioner must follow, but rather they define the prosecutorial authority of the Labor Commissioner. Also, NRS 338.010 to 338.130, the prevailing public works project statutes, only require the Labor Commissioner, after rendering a decision, to notify the Attorney General of any violations for prosecution. Here, the Labor Commissioner acted within the scope of his authority.

City Plan argues that the Labor Commissioner's office was not in compliance with NAC 607.200, "because the amended administrative complaint was not verified or filed, and it was signed more than twenty-four months after the last act complained about in the complaint."¹² However, the Court observed that the claimants filed their wage claims well within the period prescribed by NAC 607.200, making the claims timely. NAC 607.200 did not govern the Labor Commissioner's subsequent amended complaint, and therefore, there was no mandate to meet the regulatory requirement.

Fairness of the Administrative Process

City Plan argues that the administrative process lacked fairness and violated its due process rights, because the Labor Commissioner acted as both the prosecutor and the hearing officer. It contends that the Hearing Officer should have disqualified himself because of his multiple roles. However, the Court notes, that City Plan failed to present support for this proposition.

NRS 233B.122(1) provides that no individual "who acts as an investigator or prosecutor in any contested case may take any part in the adjudication of such case." Here, Dizon, "a senior investigator, conducted the initial investigation, made recommendations, and prepared the amended complaint."¹³ Maxwell, the chief compliance investigator, signed the amended complaint. Therefore, the Labor commissioner did not take any part in the filing or the prosecution of the complaint.

The Court observed that the Labor Commissioner's actions complied with NRS 338.015(1) and NRS 338.090, which authorized him to hold hearings and assess fines for violations of the prevailing wage provisions.

Also, "[i]t is not uncommon in administrative law to find the combination of investigating, prosecuting, and judging functions."¹⁴ Here, because the senior investigator conducted the investigation, the chief compliance audit investigator signed the complaint, and the Labor Commissioner conducted the hearing, the administrative process was not manifestly unfair or in violation of City Plan's rights.¹⁵

Application of the Prevailing Wage Law to the Claimants

City Plan argues that NRS 422.065 expressly precludes City Plan from being required to pay the complainants the prevailing wages because the claimants were undocumented aliens.¹⁶

¹² *City Plan Dev., Inc.*, 121 Nev. Adv. Op. at 9.

¹³ *Id.* at 10.

¹⁴ *Rudin v. Nevada Real Estate Advisory Comm'n*, 86 Nev. 562, 565, 471 P.2d 658, 660 (1970).

¹⁵ *City Plan Dev., Inc.*, 121 Nev. Adv. Op. at 11.

¹⁶ NEV. REV. STAT. § 422.065 provides, in pertinent part:

City Plan claims that the Attorney General and the Labor commissioner “aided and abetted these illegal acts” of bestowing public benefits on the claimants.¹⁷ The court noted that no payments of costs or expenses related to a state or local public benefit are at issue. The payment of a prevailing wage is required when an entity enters into a contract to perform a public work. NRS 422.065 is not applicable.

The Court also concluded that NRS 612.448, which addresses the payment of unemployment benefits based on an alien’s status, does not apply because this issue involves that of payment of the prevailing wages. NRS 338.040 and NRS 338.050 apply, and provide that those persons employed on a public work are entitled to the prevailing wages.

City Plan argues that the Labor Commissioner engaged in “ad hoc rulemaking” by inappropriately classifying the claimants as “laborers” and “carpenters.”¹⁸ This argument is unpersuasive, because NRS 338.030 sets for that “the public body awarding any contract for public work...shall ascertain from the Labor Commissioner the prevailing wage...for each craft or type of work.” The Labor Commissioner’s determination of the craft or work classification is an inherent part of the process.¹⁹

Substantial Evidence

City Plan argues that even if the administrative process was properly carried out, the record still does not support the Labor Commissioner’s decision. The court observed that “City Plan erroneously contends that because the claimants did not testify to: (1) what days and hours they worked, (2) the type of work they performed, and (3) how much they should have been paid, the record does not support the Labor Commissioner’s determination.”²⁰ The Labor Commissioner relied on the statements and the credibility of the claimants in rendering the decision. The Labor Commissioner also relied on several exhibits that he reviewed before rendering his decision on the work performed. He also heard testimony from City Plan’s payroll specialist, Rodrigues. Finally, the court observed that “[b]ecause an administrative hearing officer’s decision based on a credibility determination is not open to review and because the claimants’ testimony and other evidence is consistent with the labor Labor Commissioner’s determination, we conclude that the Labor Commissioner’s decision is supported by substantial evidence in the record, and it will not be disturbed.”²¹

Penalties

The Labor Commissioner found that “(1) City Plan was indebted to the five claimants in the total amount of \$11,946.31, (2) an assessed penalty was due under NRS 338.090 in the amount of \$11,946.31, (3) a forfeiture in the amount of \$1550 was appropriate under NRS 338.060, and (4) City Plan was disqualified from being awarded a public works contract for two

“Notwithstanding any other provision of state or local law, a person or governmental entity that provides a stat or local public benefit...[i]s not required to pay any costs or other expenses relating to the provision of such a benefit after July 1, 1997, to an alien who, pursuant to 8 U.S.C. § 1621, is not eligible for the benefit.”

¹⁷ *City Plan Dev., Inc.*, 121 Nev. Adv. Op. at 13.

¹⁸ *Id.* at 18.

¹⁹ *Id.* at 16.

²⁰ *Id.* at 16-17.

²¹ *Id.* at 17-18.

years.”²² Although City Plan alleged the Labor Commissioner failed to explain the penalties, it only specifically challenges the Labor Commissioner’s imposition of forfeitures and the penalties assessed under NRS 338.090.

City Plan’s assertions regarding imposition of forfeitures lack merit. NRS 338.060 authorizes the Labor Commissioner to impose forfeiture ranging from \$10 to \$25 per day. The statute requires notice of any forfeiture to be inserted in the public works contract.²³ Therefore, City Plan, was placed on notice that it faced forfeitures if it failed to pay the prevailing wages. The Labor Commissioner determined this figure well within the requirements of NRS 338.060.

With regard to the \$11,946.31, the City Plan alleges that this is an impermissible double penalty. The Court agrees. The court reviews this *de novo*, because it is a question of the construction of the statute.²⁴ The court held that NRS 338.090 is ambiguous and susceptible to more than one reasonable interpretation. City Plan notes that the statute could be read to provide for one assessment only, equal to the amount of the prevailing wages less the amount actually paid. Or, as the Labor Commissioner maintains, the provision could be read to provide two assessments equal to the difference between the required prevailing wage and the actual amount of wages paid. Because the statute is ambiguous a review of legislative history is appropriate.

A review of legislative history shows that it was not appropriate for the Labor Commissioner to assess a double fine, and the statute should be read to authorize only one assessment equal to the prevailing wage—actual wage differential.²⁵ Thus, City Plan is not required to pay the second \$11,946.31.

Conclusion

The Court affirms the portion of the district court’s order denying judicial review with respect to the prevailing wages and most of the penalties imposed on City Plan. The Court reverses the portion of the penalty imposed under NRS 338.090.

²² *Id.* at 18.

²³ NEV. REV. STAT. § 338.060.

²⁴ *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998).

²⁵ *City Plan Dev., Inc.*, 121 Nev. Adv. Op. at 21.