SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947

April 19, 2011

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RE: Mumford & Miller Concrete, Inc. v. Delaware Department of Labor and John McMahon, Secretary of Labor
C.A. No. S10A-03-003
Letter Opinion

Date Submitted: January 5, 2011

Dear Counsel:

This is my decision on Mumford & Miller Concrete, Inc.'s Petition for a Writ of Certiorari seeking review of Department of Labor Secretary John McMahon's decision upholding a labor law enforcement officer's determination that those Mumford & Miller employees who painted concrete safety barriers and a culvert and para-pit at a publicly-funded road construction project should have been paid the prevailing wage for painters instead of the prevailing wage for laborers. Certiorari review is limited to reviewing the record to determine whether the lower tribunal exceeded its jurisdiction, committed errors of law, or proceeded irregularly. I have affirmed Secretary McMahon's decision in part and reversed it in part. I have affirmed the part of Secretary McMahon's decision upholding the labor law enforcement officer's determination that the employees who painted the barriers

should have been paid the prevailing wage for painters because Secretary McMahon did not exceed his jurisdiction, commit an error of law, or proceed irregularly when he made this decision. I have reversed the part of Secretary McMahon's decision upholding the labor law enforcement officer's determination that the employees who painted the culvert and para-pit should have been paid the prevailing wage for painters because the labor law enforcement officer violated the law by not following the Department of Labor's rules and regulations for handling a prevailing wage classification dispute when he made this decision.

BACKGROUND

Mumford & Miller entered into a contract with the State of Delaware to perform work on a highway construction project in Sussex County, Delaware. The contract required Mumford & Miller to pay its employees the prevailing wage for working on the project. The contract also required Mumford & Miller to furnish and place concrete safety barriers at the site and to apply white latex paint to the vertical surfaces of the barriers that were to be exposed to moving traffic. Safety barriers are used on highway construction projects to direct the flow of traffic and protect workers. The contract also required Mumford & Miller to apply an anti-graffiti coating to a culvert and para-pit that were a part of the project.

Daniel R. Nelson, a labor law enforcement officer with the Office of Labor Law Enforcement, conducted a prevailing wage inspection at Mumford & Miller's site.[1] His inspection revealed that Mumford & Miller had classified and paid 11 of its employees who had painted the barriers and three of its employees who had applied an anti-graffiti coating

[1] The Office of Labor Law Enforcement is a part of the Division of Industrial Affairs, which is a part of the Department of Labor.

to the culvert and para-pit at the "laborer" prevailing wage rather than at the "painter" prevailing wage. The applicable portions of the definitions for "laborer" and "painter" as set forth in Delaware's Prevailing Wage Law Booklet are as follows:

Laborer

> Laborers may not assist mechanics in the performance of mechanics' work using tools peculiar to an established trade. Their work is to be confined to the following manual tasks:
>
> Mopping, brushing or spreading paint or bituminous compounds over surfaces for protection. Spraying materials such as water, sand, steam, vinyl, paint or stucco through hose to clean, coat or seal surfaces.

Painter

> Applies coats of paint, varnish, stain, enamel, or lacquer to decorate and protect interior or exterior surfaces, trimming and fixtures of buildings and other structures, including painting of roadway markings and lines.

Officer Nelson then opened a prevailing wage investigation into Mumford & Miller's wage classifications at the site. His investigation included conducting interviews with Mumford & Miller's employees, evaluation of the work performed, review of Mumford & Miller's daily logs and certified sworn payroll, and reviewing the definitions of "laborer" and "painter."

The respective views of Officer Nelson and Mumford & Miller on the dispute over the classification of the employees who painted the barriers are set forth in the letters they exchanged. Mumford & Miller took the position "that the work of sealing the barrier wall for protection is labor work." Officer Nelson disagreed, reasoning that the contract did not require Mumford & Miller to paint the barriers to protect them, but instead required

Mumford & Miller to paint the barriers to make them "visible" and "uniform." Thus, according to Officer Nelson's line of reasoning, the determining factor was the purpose for which the painting was done and that purpose was not found in the definition of "laborer." Officer Nelson also supported his determination by stating that Mumford & Miller's employees had used paint brushes, roller handles, and naps, which he concluded were "tools of the painter trade." The letters that Officer Nelson and Mumford & Miller exchanged did not discuss the dispute over the classification of the employees who had applied an anti-graffiti coating to the culvert and para-pit, apparently because Officer Nelson did not raise the issue in any of the letters that he sent to Mumford & Miller.

Officer Nelson determined that Mumford & Miller should have classified and paid its employees who had painted the safety barriers and applied an anti-graffiti coating to the culvert and para-pit as "painters" and not as "laborers." He told Mumford & Miller in a letter that the classification and payment of its employees as "laborers" instead of as "painters" ran afoul of Delaware's prevailing wage law and regulations and explained that, as a result of the company's misclassification, it had underpaid its painters on the project in the amount of $3,247.23. Officer Nelson's letter to Mumford & Miller did not mention the culvert and para-pit.

Mumford & Miller then filed an appeal of Officer Nelson's prevailing wage determination with Department of Labor Secretary John McMahon. The classification determination made by the Office of Labor Law Enforcement shall be reviewable by the Secretary and shall be reversed only upon a finding that the Office of Labor Law Enforcement abused its discretion. An "abuse of discretion" may only be found where an administrative board's decision exceeds the bounds of reason or where rules of law or

practice have been ignored so as to produce an injustice.[2] The parties submitted briefs to Secretary McMahon in support of their respective positions on the employee classification issue. Officer Nelson's determination that Mumford & Miller should have paid its employers who had applied an anti-graffiti coating to the culvert and para-pit as "painters" and not as "laborers" first appeared in an affidavit that he prepared and which was attached to the Department of Labor's answering brief, but was not specifically discussed in the answering brief. Mumford & Miller addressed the issue in its reply brief. Secretary McMahon held a hearing and then issued a written decision affirming Officer Nelson's classification of Mumford & Miller's employees as "painters" and not as "laborers." Secretary McMahon's decision did not address the culvert and para-pit. However, by affirming Officer Nelson's determination, Secretary McMahon also affirmed that portion of it dealing with the culvert and para-pit. The Secretary's decision is final and unappealable.[3] Mumford & Miller then filed a Petition for a Writ of Certiorari with the Superior Court.

Mumford & Miller argues that Secretary McMahon's decision must be reversed because (1) the definitions of "painter" and "laborer" are so poorly worded and confusing that the enforcement of them in this case by the Department of Labor would be arbitrary and capricious; (2) Secretary McMahon employed the wrong standard of review when he reviewed Officer Nelson's wage determination, and (3) Secretary McMahon did not review the worker classification for the Mumford & Miller employees who applied an anti-graffiti

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[2] *Lopez v. Parkview Nursing Home,* 2011 WL 900674 (Del. Super. March 15, 2011).

[3] The Superior Court has no statutory or legal authority to review the Secretary of Labor's decision pursuant to the Administrative Procedures Act under 29 Del.C. § 10161(b), which states that decisions of administrative agencies not listed in Section 10161(a) may not be appealed. The Department of Labor is not listed in Section 10161(a).

coating to the culvert and para-pit.

STANDARD OF REVIEW

"Under Delaware law, a writ of certiorari is essentially a common law writ."[4] Its purpose "is to permit a higher court to review the conduct of a lower tribunal of record."[5] Under this common law writ, this Court has the power to quash or affirm the proceedings and to remand."[6] The "threshold qualifications for a Certiorari review . . . [are] in particular that the judgment below is final, and that there must be no other available basis for review."[7] The Court's review on *certiorari* "involves a review only of errors that appear on the face of the record."[8] *Certiorari* review differs from appellate review in that an appeal "brings up the case on its merits," while a *writ* brings the matter before the reviewing court to "look at the regularity of the proceedings."[9] Thus, *certiorari* review "is not the same as review on appeal" because it "is on the record and the reviewing court may not weigh

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[4] *Goldberg v. City of Wilmington,* 1992 WL 114074, at *1 (Del. Super. May 26, 1992); See also *Christiana Town Ctr*., *LLC v. New Castle County*, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004) (Citing *Shoemaker v. State*, 375 A.2d 431, 436-37 (Del. 1977); Woolley, *Delaware Practice*, Volume I, § 894. See e.g. *Hundley v. O'Donnell*, 1998 WL 842293, at *3 n. 7 (Del. Ch. Dec. 1, 1998).

[5] *Christiana Town Ctr., LLC,* 2004 WL 2921830, at *2.

[6] *Jardel Co., Inc. v. Carroll*, 1990 WL 18296, at *2 (Del. Super. Feb. 26, 1990); *State v. J.P. Ct. No. 7*, 1989 WL 31600, at *1 (Del. Super. April 13, 1989); *Breasure v. Swartzentruber*, 1988 WL 116422, *1 (Del. Super. Oct. 7, 1988) (citations omitted).

[7] *Christiana Town Ctr., LLC v. New Castle County*, 2003 WL 22120857, at *1 (Del. Super. Sept. 10, 2003). See e.g. *Adjile, Inc. v. City of Wilmington*, 2004 WL 2827893, at *1 (Del. Super. Nov. 30, 2004), *aff'd*, 2005 WL 1139577 (Del. May 12, 2005).

[8] *Luby v. Town of Smyrna*, 2001 WL 1729121, at *2 (Del. Super. Dec. 27, 2001), *citing Castner v. State*, 311 A.2d 858, 860 (Del. 1973).

[9] *Breasure*, 1988 WL 116422, at *1.

evidence or review the lower tribunal's factual findings."[10] To that end, the "transcript of the evidence below is not part of the reviewable record ... the Court cannot examine the transcript in order to evaluate the adequacy of the evidence which supports the conclusion rendered below."[11] It is the function of "the agency, not the court, to weigh evidence and resolve conflicting testimony and issues of credibility."[12] Thus, the Court does not consider the case below "on its merits" or "substitute its own judgment for [that] of the inferior tribunal."[13] Instead, the Court's review is limited to considering "the record to determine whether the lower tribunal[:]" (a) exceeded its jurisdiction, (b) committed errors of law, or (c) proceeded irregularly.[14] A decision "will be reversed on jurisdictional grounds only if the record fails to show that the matter was within the lower tribunal's personal and subject matter jurisdiction."[15] A decision "will be reversed for an error of law ... when the record

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[10] *Christiana Town Ctr., LLC,* 2004 WL 2921830, at *2, *citing Reise v. Bd. of Bldg. Appeals of Newark,* 746 A.2d 271, 274 (Del. 2000).

[11] *Green v. Sussex County*, 668 A.2d 770, 773 (Del. Super. Ct. 1995), *aff'd,* 1995 WL 466586 (Del. Aug. 2, 1995). See e.g. *Matter of Butler*, 609 A.2d 1080, 1081-82 (Del. 1992) (declining to consider a transcript of the underlying Superior Court proceedings or overrule *Castner*, 311 A.2d 858, and holding that the Superior Court's order "is the entire record before us for purposes of certiorari review."). *Cf. Barbour v. Bd. of Adjustment of Bethany Beach*, 1992 WL 302292, at *2 (Del. Super. Sept. 28, 1992) (Noting that "statutory writ of certiorari is broader and allows for the filing of a transcript of the evidence" but that "a transcript could not be filed in a common law certiorari proceeding since the reviewing court was prohibited from considering the evidence before the lower tribunal.").

[12] *Christiana Town Ctr., LLC v. New Castle County*, 2004 WL 1551457, at *2 (Del. Super. July 7, 2004), *aff'd,* 2004 WL 2921830 (Del. Dec. 16, 2004).

[13] *Christina Town Ctr., LLC,* 224 WL 2921830, at *2; *Breasure,* 1988 WL 116422, at *1.

[14] *Christiana Town Ctr., LLC*, 2004 WL 2921830, at *2, *citing Reise,* 746 A.2d at 274.

[15] *Id.* at *2, *citing* Woolley, *Delaware Practice*, Volume I, § 921.

affirmatively shows that the lower tribunal has 'proceeded illegally or manifestly contrary to law.'"[16] Finally, a decision "will be reversed for irregularities of proceedings if the lower tribunal failed to create an adequate record to review."[17] The "burden of persuasion rests upon the party attempting to show that the Board's decision was arbitrary and unreasonable."[18]

DISCUSSION

I. Ambiguous

Mumford & Miller argues that Secretary McMahon's decision must be reversed because the definitions of "painter" and "laborer" are so poorly worded and confusing that the enforcement of them in this case by the Department of Labor would be arbitrary and capricious. This argument fails to implicate any of the grounds that are appropriate for certiorari review. It does not concern an error of law or irregularity in the proceedings or a jurisdictional issue. The record does not show that the matter was not within the Department of Labor's personal and subject matter jurisdiction. The record does not show that the Department of Labor proceeded illegally or manifestly contrary to law. The record does not show that the Department of Labor failed to create an adequate record to review. This argument is nothing more than an attempt by Mumford & Miller to persuade me to consider the case on the merits and, hopefully, reach a different conclusion than did Secretary McMahon. It would, as such, require me to review not just the record, but also

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[16] *Christiana Town Ctr., LLC*, 2004 WL 2921830, at *2, *citing* Woolley, *Delaware Practice*, Volume I, § 939.

[17] *Id.* at *2, *citing* Woolley, *Delaware Practice*, Volume I, § 923.

[18] *Christina Town Ctr., LLC*, 2004 WL 1551457, at *2.

the definitions of "laborer" and "painter" and the facts to determine if under the facts of the case the definitions of those two words are so ambiguous that the application of them would be arbitrary and capricious. This type of analysis is clearly not appropriate for certiorari review.[19]

Moreover, and much more disconcerting to me, is the fact that Mumford & Miller consistently and emphatically took the position both before Officer Nelson and Secretary McMahon that the definition of "laborer" was clear and that the actions of its employees in painting the barriers clearly fell within it. Todd Willits, a project manager for Mumford & Miller, wrote Officer Nelson a letter on December 9, 2008, stating that "[t]he Wage Code Classification for laborers is very clear and unambigious," and that "[t]he work that is disputed clearly falls under the Laborer Classification."[20] (Emphasis added)

Mumford & Miller repeated this position in the opening brief that it submitted to Secretary McMahon, stating "the work performed by Mumford & Miller's employees fits perfectly within the definition of laborer."[21] (Emphasis added)

Mumford & Miller repeated this position in the reply brief that it submitted to Secretary McMahon, stating, "[t]hus, even if the worker classifications for 'Painter' and 'Laborer' can be deemed ambiguous, which they CANNOT, the proper procedure would be for the Division to clarify the classifications."[22] (Capitals in original)

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[19] *Christiana Town Ctr., LLC,* 2004 WL 2921830, at *2.

[20] Letter from Todd Willits to Daniel Nelson dated December 9, 2008.

[21] Mumford & Miller's Opening Brief, page 6.

[22] Mumford & Miller's Reply Brief, page 2.

I am certainly not going to consider an argument made by a litigant on appeal that was not only not raised by the litigant in the proceedings below, but is also contrary to the argument made by the litigant in the proceedings below.

II. Secretary McMahon's Decision

Mumford & Miller argues that Secretary McMahon employed the wrong standard of review when he reviewed Officer Nelson's decision. This argument is based on Secretary McMahon's reference to a definition of "abuse of discretion"[23] and his statement that incorporates a part of that definition in his written decision.[24] Mumford & Miller's argument does not accurately reflect the entirety of Secretary McMahon's decision and everything that he stated in it. Secretary McMahon, in his four page decision, did the following:

1. He discussed the factual and procedural background of the case.

2. He discussed the appropriate standard of review, stating "[t]he standard of review is set forth in the Regulations and any determinations by the Office of Labor Law Enforcement on classification matters shall be reversed only upon a finding of abuse of discretion."

3. He reviewed what Officer Nelson did in reaching his conclusion.

4. He reached his own conclusion, stating the following:

> Because the Division based its determination on Nelson's Regulation-guided investigation, the Secretary finds substantial evidence to support the classification and holds that there was no abuse of discretion on the part of the Division. The Regulations allow the Secretary to reverse a determination "*only* upon a finding of abuse of discretion." Since there is no such abuse of discretion, the Division's determination that

[23] *Person-Gaines v. Pepco Holdings, Inc.,* 2009 WL 1910950, at *3 (Del. Super. April 23, 2009).

[24] The Secretary's statement is "the only issue here is whether the Division's determination is based on substantial evidence in this matter. The Secretary finds that it was."

> workers applying paint to the Jersey Barriers on the Project should be paid as Painters rather than Laborers is affirmed.

Secretary McMahon's decision follows an orderly and logical process and shows that he clearly recognized and reviewed Officer Nelson's determination of the appropriate wage classification by applying the abuse of discretion standard. The fact that he also found "substantial evidence" to support Officer Nelson's classification is nothing to complain about, particularly given the exceedingly deferential nature of the abuse of discretion standard.

III. The Culvert and Para-Pit

Mumford & Miller argues that Secretary McMahon's decision must be reversed because he did not review the worker classification for the employees who applied an anti-graffiti coating to the culvert and para-pit. Mumford & Miller's argument is correct and does require the reversal of this part of Secretary McMahon's decision, albeit for a different reason than offered by Mumford & Miller.

The proper classification of the workers applying an anti-graffiti coating to the culvert and para-pit was not raised in any of Officer Nelson's letters to Mumford & Miller. All of those letters dealt with the classification of the employees who had painted the barriers. The issue involving the culvert and para-pit came up after the Department of Labor submitted its reply brief to the Secretary of Labor. The attorney for the Department of Labor did not discuss the culvert and para-pit. However, she did attach an affidavit prepared by Officer Nelson that does address the issue. The affidavit has four paragraphs and was signed on November 16, 2009. It is a thorough discussion of Officer Nelson's investigation into the classification of the workers who painted the barriers and is devoted

almost exclusively to that. However, in paragraph four of his affidavit, Officer Nelson states, in part, that:

> A total of eleven (11) Mumford & Miller, Inc. employees had performed Painter tasks on the project on various dates, but had been paid less than the prevailing wage rate for painting the concrete traffic barriers. In addition, the daily logs provided information that three (3) of Mumford & Miller Concrete, Inc. employees had painted "para-pit and culvert walls" on July 30 and 31, 2008, using a special "anti-graffiti" coating. The surface was prepared by 'power washing' and brushes and rollers, tools of the trade, were used to apply the paint to the wall surface per the daily logs. The painting of the concrete traffic barriers and the application of the anti-graffiti paint to the "para-pit and culvert" walls are part of and explained in the Maintenance of Traffic (MOT) contract for the DelDOT#22-124-06, US13/DE 404 Intersection Realignment project. (Emphasis Added)

Officer Nelson included all 14 workers when he calculated and assessed the prevailing wage deficiency against Mumford & Miller. Thus, Secretary McMahon's decision, which upheld Officer Nelson's wage deficiency, covers the employees who painted the barriers and culvert and para-pit. Secretary McMahon's approval of this part of Officer Nelson's decision must be reversed because it runs afoul of the administrative process set forth in Section VII of the Department of Labor's prevailing wage rules and regulations.

The Department of Labor has promulgated rules and regulations to enforce the prevailing wage requirements set forth in 29 Del.C. § 6960. Section VII(B)(1)-(4) is the applicable section of the rules and regulations for this case. This section sets up a process that provides for (1) notification to the employer that a prevailing wage investigation has been started, (2) notice to and an opportunity for the employer to correct the violation if the investigation determines that the employer has not been paying the correct prevailing wage, (3) a directive by the Department of Labor to the contracting agency and/or prime

contractor to withhold payments from the employer if the employer does not correct the violation, and (4) review of the matter by the Secretary of the Department of Labor if the dispute between the Department of Labor and the employer pertains to the classification of workers.

This process requires the Department of Labor to give notice of a violation to the employer and give the employer an opportunity to correct the violation before the Department of Labor can levy a deficiency against the employer. This process was followed for the barriers, but not for the culvert and para-pit. The classification of the workers who had applied an anti-graffiti coating to the culvert and para-pit only came up in the middle of the briefing before the Secretary of Labor. Officer Nelson never gave notice to Mumford & Miller of a violation regarding the culvert and para-pit and an opportunity to correct the violation before he issued the deficiency for the culvert and para-pit. It is well-settled law that, once an agency adopts regulations governing how it handles its procedures, the agency must follow them. If the agency does not, then the action taken by the agency is invalid.[25] The Department of Labor did not follow its own rules and regulations for the dispute over the culvert and para-pit. Thus, that part of Secretary McMahon's decision dealing with the culvert and para-pit must be reversed. I pass no judgment on the merits of Officer Nelson's classification of Mumford & Miller's employees who applied an anti-graffiti coating to the culvert and para-pit or whether the Department of Labor can now pursue this as a violation of the prevailing wage law after following the proper procedures because those issues are not before me.

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[25] *Dugan v. Delaware Harness Racing Commission*, 752 A.2d 529 (Del. 2000).

CONCLUSION

The Secretary of Labor's decision is affirmed in part and reversed in part as set forth herein.

IT IS SO ORDERED.

Very truly yours,

/ S / E. Scott Bradley

E. Scott Bradley