STATE OF ILLINOIS – DEPARTMENT OF LABOR
160 N. LASALLATE ST., STE. C-1300
CHICAGO, ILLINOIS 60601

IN THE MATTER OF:	)	
	)	
WILLIAM HABEL, as a member of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 701,	)	
	)	
PETITIONER(S),	)	STATE FILE NO. 2018-H-PK08-1961
	)	
v.	)	
	)	
JOSEPH BEYER, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR, and THE ILLINOIS DEPARTMENT OF LABOR,	)	
	)	
RESPONDENTS.	)	

ORDER

THIS MATTER COMING on to be heard under the Prevailing Wage Act, ("PWA" or "Act") 820 ILCS 130/0.01-12 and Notice of Hearing issued there under; and, pursuant to Petitioner's Motion for Third Party Subpoena and Motion to Enforce Settlement Agreement and Bifurcate Hearing, and Respondent's Answer and Motion to Dismiss and Motion to Strike Petitioner's Reply to Motion to Dismiss and Leave to Reply with Additional Support, 56 Illinois Administrative Code 120.130 all parties having been duly advised in the premises issues this order;

1. **PETITIONERS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND BIFURCATE THE HEARING**

On October 3, 2017, the undersigned issued an order allowing Petitioner to Withdraw its Request for Section 9 Hearing pursuant to an alleged agreement between the parties. Thereafter, Petitioner filed a Motion for Injunctive Relief within 30 days of the order allowing Petitioner to Withdraw its Request for Hearing. This Motion was heard by the undersigned on November 6, 2017.

After having been apprised of all the circumstances including the apparent collapse of the previous agreement which was the subject of the October 3, 2017 order, the undersigned engaged in discussions with the parties in an effort "to bring the parties together on this matter and try and determine exactly what happened and if there's a bridge we can cross together in terms of setting this on the right path and perhaps even being able to settle the matter." *November 6, 2017 Pre-Hearing Conference, Digital Recording, 2:50.*

Despite the arguments made by the parties that the undersigned exceeded the authority granted under 120.545, at the time of the Motion to Dismiss hearing, by changing, amending or modifying the original settlement agreement between the parties, at no time did the undersigned exceed authority granted pursuant to 56 Ill. Adm. Code 120.545.

At the November 6, 2017 pre-hearing conference, the undersigned proposed a possible agreement for the parties wherein the Department would agree to post the rate previously agreed to between the parties, while the matter proceeds forward swiftly to hearing. In response

to that proposal, Petitioner's counsel stated that as he understood the proposal it was "a status quo not a final permanent decision -- I could live with that." *November 6, 2017 Pre-Hearing Conference, Digital Recording* 55:10. Thereafter, Respondents' attorney checked with its client and agreed to the proposal.

The undersigned reassumed jurisdiction pursuant to this agreement acting as the scrivener for the parties and placing the agreement into an order entered in this matter. The order provides as follows: "*By agreement of the parties* (emphasis added), the rate posted by the Illinois Department of Labor on its website **September 25, 2017** regarding the classification of **General Communication Technician** in **DuPage County** will remain in effect and will not be changed during the pendency of these proceedings." *Order, November 7, 2017*. IDOL has both complied with and acted in good faith in accordance with the terms of this agreement.

The undersigned agrees with Respondents' opinion that this agreement reached between the parties on November 7, 2017, superseded and revoked any and all prior agreements made between the parties supported by offer, acceptance and consideration. Both parties have followed through on the representations and agreements made at the time the November 6, 2017 Motion was heard until Petitioners filed the instant motion months later. Petitioner's Motion to Enforce the Settlement Agreement and Bifurcate the Hearing is denied.

2. RESPONDENTS' MOTION TO STRIKE PETITIONER'S REPLY TO RESPONDENT'S MOTION TO DISMISS

56 Ill Adm. Code 120.301 (b) provides:

> "Within 7 days after service of a written motion or other document, *or other period as the ALJ may allow* (emphasis added) a party may file a response in support of or in opposition to the motion and, if necessary, accompanied by affidavits or other evidence."

The undersigned retains discretion allowing for responses to Motions outside of the 7 day period provided, 56 Ill. Adm. Code 120.301 (b). Because a Motion to Dismiss is dispositive, the undersigned is allowing Petitioner to respond outside of the 7 day period. Petitioner's Reply to the Motion to Dismiss stands.

3. MOTION TO DISMISS

a. STANDARD OF REVIEW

Respondent's Motion to Dismiss admits the legal sufficiency of the complaint, all well-pled facts and all reasonable inferences therefrom, but argues that the Petitioner's claim is defeated by some other defect or defense. *Johannesen v. Eddins*,357 Ill. Dec.663, 963 N.E.2d 1061 (2d Dist 2011). A motion such as this is designed to provide an avenue for summary disposition of issues of law or easily proven issues of fact *Nosbaum by Harding v. Martini*, 312 Ill. App.3d 108, 113 (1st Dist. 2000); *Melko v. Dionisio*, 219 Ill. App. 3d 1048, 1057 (2d Dist. 1991). However, a motion of this sort must satisfy a rigorous standard, and should be granted only where no set of facts can be proven that would support the non-moving party's cause of action., *Nosbaum ex rel. Harding v. Martini*, 312 Ill.App.3d 108, 113, 244 Ill.Dec. 488, 726 N.E.2d 84 (2000), *Feldheim v. Sims*, 326 Ill. App. 3d 302, 310 (1st Dist. 2001). When ruling on a motion to dismiss, the tribunal must accept all well-pled allegations of fact and any reasonable inferences that may arise therefrom, and must construe the motion and its supporting documents in the light most favorable to the non-

moving party. *Patrick Eng'g. Inc. v. City of Naperville*, 364 Ill. Dec. 40, 976 N.E.2d 318 (2012), *Piser v. State Farm Mut. Auto Ins. Co.*, 405 Ill. App. 3d 341, 345, 938 N.E.2d 640(1st Dist. 2010).

b. STATUTORY CONSTRUCTION

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Hayashi v. Illinois Department of Financial & Professional Regulation*, 388 Ill.Dec. 878, 25 N.E.3d 570. The best evidence of legislative intent is the language of the statute, and when possible, the court should interpret the language of a statute according to its plain and ordinary meaning. *Id.* In determining the plain meaning the entirety of the statute is to be considered as well as the subject addressed and the apparent intent of the legislature in enacting it.

c. DEFERENCE TO AGENCY INTERPRETATION

An agency's construction of the law may be afforded substantial weight and deference if the meaning of the terms used in a statute is doubtful or uncertain. Courts accord such deference in recognition of the fact that agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent. *Provena Covenant Medical Center v. Illinois Department of Revenue*, 236 Ill. 2d 368, 387 n.9, 339 Ill.Dec. 10, 925 N.E.2d 1131 (IL Sup Ct. 2010). When statutory language is unambiguous, however, the agency's role as an interpreter of doubtful law does not come into play. *Dusthimer v. Board of Trustees of the University of Illinois*, 368 Ill. App. 3d 159, 165, 306 Ill.Dec. 250, 857 N.E.2d 343 (2006), and an official's interpretation of a statute cannot alter the law's plain language. *Apple Canyon Lake Property Owners' Ass'n. v. Illinois Commerce Comm'n*, 368 Ill.Dec. 888, 985 N.E.2d 695 (2013). *Illinois Landowners Alliance NFP v. Illinois Commerce Commission*, 2017 IL 121302 (IL. Sup. Ct. September 2017).

In interpreting this language, the goal is to identify and implement the intent of the legislature, which is best evidenced by the language of the statute itself. *Cuevas v. Berrios*, 413 Ill. Dec. 465, 78 N.E.3d 457 (2017). "If the language is clear and unambiguous, we may not depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express, nor by rendering any word or phrase superfluous or meaningless." *Id. at 468.* We must read all parts of the statute together and not in isolation, so as to "produce a harmonious whole." *Dow Chemical Co. v. Department of Revenue*, 224 Ill. App. 3d 263, 266, 166 Ill. Dec. 558, 586 N.E.2d 516 (1991). Although a reviewer is not bound by an agency's interpretation of a statute that it administers, typically deference is given to the agency's interpretation unless it is erroneous. *Cuevas*, 413 Ill. Dec. 465, 78 N.E.3d 457.

d. PROVISION(S) OF PREVAILING WAGE ACT AT ISSUE

Section 1of the PWA outlines the State's policy which provides as follows:

> It is the policy of the State of Illinois that a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, shall be paid to all laborers, workers and mechanics employed by or on behalf of any and all public bodies engaged in public works.
>
> 820 ILCS130/1.

The relevant provisions of Section 9 of the PWA are as follows:

> To effectuate the purpose and policy of this Act each public body shall, during the month of June of each calendar year, investigate and ascertain the prevailing rate of wages as defined in this Act and publicly post or keep available for inspection by any interested party in the main office of such public body its determination of such prevailing rate of wage and shall promptly file, no later than July 15 of each year, a certified copy thereof in the office of the Illinois Department of Labor.
>
> The Department of Labor shall during the month of June of each calendar year, investigate and ascertain the prevailing rate of wages for each county in the State.
>
> 820 ILCS 130/9.

In 2017, the Illinois General Assembly amended Section 9 of the Prevailing Wage Act providing:

> The Department shall publish on its official website a prevailing wage scheduled for each county in the State, no later than August 15 or each year, based on the prevailing rate of wages investigated and ascertained by the Department during the month of June. Nothing prohibits the Department from publishing prevailing wage rates more than once per year.

820 ILCS 130/9 (2017).

e. <u>Analysis</u>

The 2017 PWA amendment became effective June 16, 2017 and provided a date certain by which the Department is to post ascertained prevailing wage rates. The 2017amendment also provides additional language granting the Department the ability to publish rates throughout the year.

At issue in the Motion to Dismiss is the meaning of this newly amended section of the statute along with various other long standing PWA provisions. There is no caselaw or other interpretations available to consult regarding the 2017amendment. However, as provided above, one must balance all equities outlined in Section III (a) (b) and (c)of this Order to determine whether Respondents' Motion to Dismiss is to be granted.

In determining the plain language of the amendment, one need look no further than to the two parties' divergent interpretations as to whether the newly enacted amendment is clear and unambiguous.

Respondents argue that the legislature intended to ratify the Department's current practice of posting rates once yearly but that the General Assembly has provided the Department discretion to do so more than one time per year should it so choose. Respondents' counsel argues, "In my mind, the legislative intent there was to ratify the Department's *current practice posting once per year* (emphasis added), and what the General Assembly is saying there is the Department of Labor has discretion to essentially manage its operations and its statutory directives as it sees fit." *Oral Argument, January 8, 2018 (T. 47)*.

Petitioners contend that the legislative intent ratified the Department's long-standing practice of posting ascertained rates monthly. Petitioner argues "that configuration was there long before the amendment of the Act, which indicates to me that that (sic) was always the legislative intent." *Oral Argument, January 8, 2018, (T. 40)*. "It is not infrequent in collective bargaining agreements even that begin in June, they will stagger a wage rate so that the employer doesn't have to pay – if it's a dollar per hour increase, he would pay $0.50 June 1 and another $0.50 January 1, and a lot of times – it is an economic incentive that – to the employer." *Oral Argument, January 8, 2018, (T. 40)*. Petitioners argue that posting rates month by month demonstrates the Department's understanding that construction agreements – durations can vary and that sometimes there are interim wage increases." *Oral Argument, January 8, 2018* (T. 39).

Respondents' argument that the General Assembly codified its "practice" of posting rates once per year is not credible. In 2016, the Department posted rates pursuant to court order in May 2017, well into the year for which the rates should have been effective and wherein the routine practice prior to this would have been to post them much sooner in 2016 and monthly thereafter. When asked why the Department performed a survey in 2016 and did not post it, the Department denied the relevance of the inquiry and when pushed failed to articulate a reason.

In June 2017, the amendment became effective prior to publication of any 2017 rates. In viewing the facts most favorable to the non-moving party, it is concluded based upon pattern and practice that the Department did not have a "practice" under the current Administration for posting rates pre-2017 amendment. In 2017, the Department complied with a court order to post the 2016 rates and offered no explanation why it had performed a survey but failed to post the ascertained rates. The newly ascertained 2017 rates had not been published at the time of the amendment. Thus, to argue that the General Assembly codified the Department's current practice strains credulity as it is concluded there was no current pattern or practice of the current Administration to codify. Therefore, it stands to reason that it was not possible for the General Assembly to have meant to codify a non-existent practice. The only remaining established pattern and practice in which the Department engaged prior to this Administration was posting the rates monthly. This pattern and practice weighs in favor of Petitioners' argument that the amendment is surmised to codify the Department's past practice of posting rates monthly.

In viewing the facts in a light most favorable to the non-moving party, it is found that the amendment is not clear and unambiguous. Because the 2017 amendment is not clear and unambiguous, deference is to be given to Respondent's interpretation, however, the statute is to be read as a "harmonious whole" where interpretation of portion of the statute cannot render another portion superfluous, can include consideration of legislative intent.

Both parties failed to address the legislative history of this amendment. Nevertheless, the analysis must move forward. Another axiom of statutory construction is to read the language of the statute as a whole. All parts of the statute are to be read together and not in isolation, so as to produce a harmonious interpretation. *Dow Chemical Co. v. Department of Revenue*, 224 Ill. App. 3d 263, 166 Ill. Dec. 558, 586 N.E.2d 516 (1991).

While the General Assembly amended Section 9 of the Act on 2017, it failed to reopen the policy upon which the Act itself rests. Section 1 of the Act provides:

> It is the policy of the State of Illinois that a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, shall be paid to all laborers, workers and mechanics employed by or on behalf of any and all public bodies engaged in public works.
>
> 820 ILCS130/1.

It is important to reflect upon the initial purpose of the Act. It is concluded from Section 1 of the Act, that the State of Illinois statutorily committed to paying workers the prevailing wage rate for work of a similar character in the locality in which the work is performed when engaged on public works construction contracts.

To effectuate this purpose the statute further enabled the Department of Labor to perform a survey regarding rates and classifications of work performed on public works construction contracts in all localities throughout the State. It is true that the means and method to performing the survey is left within the discretion of the Department. However, in reading the 2017 amendment together with the policy purpose of the statute as a whole, while still giving deference to the agency interpretation and viewing all facts in a light most favorable to the non-moving party, it is found that the Respondents' interpretation of Section 9 fails to read the Act as a harmonious whole and in fact vitiates the policy purpose of the Act.

Pursuant to Section 1 of the Act it is the State's policy to provide a prevailing wage rate for those working on public works construction contracts through ascertainment of rates. Petitioner contends that wage rates can fluctuate throughout the term of an agreement or throughout a year. And, in fact, if one adopts the Respondents' bright-line interpretation that wages are to be mandatorily posted once annually and ascertained only in June, the Respondents' interpretation may result in workers being paid a rate lower or higher than the rate that prevails in a given locality throughout the year by failing to recognize interim rate increases or decreases in a locality while adhering to a strict interpretation of the statute 820 ILCS 130/9. This interpretation also represents a departure from its past pattern and practice/interpretation wherein rates were posted monthly. No facts have been developed by either party demonstrating why the Department departed from its past practice and interpretation of the law nor have provided reasons why it is currently being interpreted differently. As analyzed above, the 2017 amendment and its presumed legislative intent do not support this analysis. Nevertheless, the Department remains steadfast in that it should be allowed deference to strictly interpret the statute.

Respondents advocate a bright-line test providing that rates are to be ascertained in June, only in June and are to remain static throughout the year. This posture represents a departure from the Department's past pattern and practice where it published rates monthly even in absence of statutory authority to do so. (See above analysis as to the paucity of practice under the current administration).

Included in the Respondents' argument is the fact that Section 9 of the Act specifically provides that rates are to be ascertained in the month of June. 820 ILCS 130/9. Reading this section together with the 2017 amendment appears to lend credence to and weigh in Petitioners favor that the General Assembly recognized that the method of ascertaining rates once yearly may not provide the worker with the true prevailing wage as a result the Department is now granted authority to post rates more than once annually. In addition, Petitioner contends rates can and do fluctuate throughout the year

hence the Department's past practice to post monthly is a recognition of Section 1 of the Act. Taken in a light most favorable to Petitioners, it appears that absent any development of facts to shed light upon the Respondents' bright-line interpretation that the Department may have erred in its interpretation.

In determining whether the Respondents' bright-line interpretation of Section 9 should stand, one must determine whether this decision is arbitrary and capricious. An administrative decision is arbitrary and capricious where the agency: "(1) relies on factors which the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the agency, or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 505–06, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988). "While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary." *Greer,* 122 Ill.2d at 506, 120 Ill.Dec. 531, 524 N.E.2d 561. The "arbitrary and capricious" standard of review is the least demanding standard, the equivalent of the "abuse of discretion" standard. *Greer,* 122 Ill.2d at 497, 120 Ill.Dec. 531, 524 N.E.2d 561. An agency is not required to adhere to a certain policy or practice forever, however, sudden and unexplained changes have often been considered arbitrary. (See 2 C. Koch, Administrative Law & Practice § 9.6, at 101 (1985).) One is to apply the standard of rationality. The scope of review is narrow and the court is not, absent a "clear error of judgment" (*Citizens to Preserve Overton Park, Inc. v. Volpe* (1971), 401 U.S. 402, 416, 91 S.Ct. 814, 823–24, 28 L.Ed.2d 136, 153), to substitute its own reasoning for that of the agency." *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 505-06, 524 N.E.2d 561, 129 Ill. Dec.531 (1988).

Whether Respondents' bright-line position of ascertaining rates only during the month of June along with Section(s) 1, and the 2017 amendment within Section 9 is arbitrary and capricious is unable to be reached on a Motion to Dismiss. This inquiry requires evidence regarding how and why the Department changed its modus operandi and its legal interpretation of the law at or around the same time as the 2017 amendment. At this time, the record contains no facts regarding same. As stated above, when asked why the Department performed a survey in 2016 and did not post it, the Department denied the relevance of the inquiry and when pushed failed to articulate a reason.

It is found that the 2017 amendment to the PWA is not clear and unambiguous. The parties have presented a dearth of actual legislative intent for consideration. In compliance with statutory construction, all reasonable inferences have been made in reaching a conclusion regarding the legislative intent. Beyond the intent, the undersigned has construed the PWA giving deference to the agency's interpretation but did read the PWA as a "harmonious whole" so as not to read any portion of the statute superfluous and may have found error in the Respondents' interpretation. This conclusion, however, was reached in applying the correct standard, which is to read all facts in a light most favorable to the non-moving party. It is possible that once facts, opinions, interpretations and reasoning is provided, of course, that the Respondents' interpretation may be upheld after hearing.

Respondents' Motion to Dismiss is denied.

IT IS HEREBY ORDERED:

1. Petitioners' Motion to Enforce the Settlement Agreement and Bifurcate the Hearing is denied.

2. Respondents' Motion to Strike Petitioner's Response to its Motion to Dismiss is denied.

3. Respondent was verbally granted leave to supplement its response by filing a reply.

4. Respondents' Motion to Dismiss is denied.

5. This matter will proceed to hearing on February 8, 2018 at 9:00 a.m. at 160 N. LaSalle St., Ste. C-1300, Chicago, Illinois.

DATE: February 1, 2018

/s/ Claudia D. Manley
Claudia D. Manley
Chief Administrative Law Judge

Claudia D. Manley
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NOTE: Entrance into the building requires security screening and production of valid government issued photo identification.

STATE OF ILLINOIS)
)
)
COUNTY OF COOK)

CERTIFICATE OF SERVICE

Under penalties as provided by law, including pursuant to Section 1-109 of the Code of Civil Procedure, I Ann Harrison a non-attorney, affirm, certify or on oath state, that I served notice of the attached Order upon all parties to this case, or their agents appointed to receive service of process, by enclosing a copy of the Order in Case No. 2018-H-PK-08-1961and a copy of the Certificate of Service in an envelope addressed to each party or party's agent at the respective address shown on the Order or on the Certificate of Service, having caused each envelope to be served by U.S. mail with postage prepaid at 100 W. Randolph Street, Chicago, Illinois on the 2 day of February, 2018 prior to 4:30 p.m. and placed on the Illinois Department of Labor's official website at and placed on the Illinois Department of Labor's official website at www.state.il.us/agency/idol/

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/s/ Ann Harrison
Executive Secretary
Illinois Department of Labor