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

MIDWEST REGION of the LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, PETITIONER(S), v. JOSEPH BEYER, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR, and THE ILLINOIS DEPARTMENT OF LABOR, RESPONDENTS. And ASSOCIATED GENERAL CONTRACTORS OF ILLINOIS and the SOUTHERN ILLINOIS BUILDERS ASSOCIATION, INTERVENOR.	)	STATE FILE NO. 2018-H-AS09-1976

ORDER

THIS MATTER COMING on to be heard under the Prevailing Wage Act, 820 ILCS 130/0.01-12 and Notice of Hearing issued there under; and, pursuant to Respondents' Motion to Dismiss and replies filed thereto, convened under 56 Illinois Administrative Code 120.301 (a)- (j) all parties having been duly advised on the premises issues this order;

I. PROCEDURAL HISTORY

On March 1, 2018, by agreement of the parties and intervenor, this matter as well as *Jiricek, as a Member of Local 126 of the International Machinists and Aerospace workers, and Local 126 of the International Association of Machinists and Aerospace Workers v. Joseph Beyer, Acting Director of Labor and the Illinois Department of Labor*, 2018-H-AS09-1992 were consolidated for the sole purpose of presenting arguments on all dispositive motions. Both matters containing similar legal issues.

On April 4, 2018 oral argument was heard in the consolidated matter. An Agreed Motion to Withdraw and Dismiss Objection with Prejudice in *Jiricek* matter was allowed by the undersigned on May 21, 2018.

In issuing this decision, all arguments brought forward in the consolidated matters are considered herein, if relevant, to the issue at bar. This will allow the issuance of a fulsome and complete order.

II. MOTION TO DISMISS

A. *Standard of Review*

Respondents' Motion to Dismiss admits the legal sufficiency of the complaint, all well-pled facts and all reasonable inferences therefrom, but argues that a 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 same.

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)

III. ANALYSIS

A. Bright Line Interpretation of PWA/ Bradley Analysis

It is undisputed that the rates found to have prevailed in the given localities or counties at issue in this matter are Petitioner's rates provided for under Petitioner's collective bargaining agreement. At issue in this matter is whether or not IDOL should have set the Petitioner's rates contained in the Section 9 petition at the rate which became effective after July 1, 2017 or in this case August 2017.

The Department asserts that recognizing rates that went into effect after June 30, 2017 runs counter to PWA provisions stating that the rates be ascertained in June annually and published August 15 of each year. 820 ILCS 130/9. The Department posits that the PWA does not give

detailed guidance as to what was envisioned in the investigation and ascertainment process of prevailing wages.

In finding the 1953 version of the PWA unconstitutional, the Illinois Supreme Court noted in the matter of *Bradley v. Casey*, 415 Ill. 576, 114 N.E.2d 681(1953) that there is no definition of the words 'prevailing' or 'ascertainment' stating, "[i]t must be conceded that the word 'prevailing' *ipso facto* connotes the existence of a condition. However, we declared in the *Mayhew v. Nelson*, 346 Ill. 381,388, 178 N.E. 921 (1931). 'Whether it means the rate which the most skillful, the average, the least capable or the most numerous group command, the Act does not disclose. Even if these varying factors could be brought into harmony, there is no assurance that agreement upon a rate of wages for work of a certain nature as prevailing in a particular community would result.' Later, in the *Reid v. Smith*, 375 Ill. 147, 30 N.E.2d 911 (1940) we stated that the term 'prevailing rate per diem wages' neither defines the term nor furnishes a standard for asserting a wage." *Bradley v. Casey*, 415 Ill. 576,583.

The *Bradley* Court held that a provision of the PWA which automatically recognizes collective bargaining agreement rates was an unconstitutional delegation of a "discretionary power to private parties." 415 Ill. 576, 585 (1953). IDOL argues that requiring IDOL to recognize the interim monthly increases contained in collective bargaining agreements would result in an unconstitutional delegation of power to private parties.

In the fact-pattern before this tribunal, it is undisputed that the Department voluntarily recognized Petitioner's collective bargaining agreements rates as the rates that govern in the localities at issue in this Section 9 dispute. This tribunal has not mandated that the Department recognize Petitioner's rates. Were this tribunal to mandate that IDOL recognize Petitioner's collective bargaining agreement as the prevailing rate, then doing so would be unconstitutional as recognized in *Bradley*. In this matter, IDOL *voluntarily* recognized Petitioner's rates to prevail in the localities at issue. The issue in this matter arises not because IDOL recognized Petitioner's rates as the rates that prevail, but rather if the rate setting and the subsequent posted rates complied with the Act and the Department's historical pattern and practice.

Thus, the argument presented by IDOL that this tribunal cannot mandate Respondent to recognize interim monthly increases in wages and benefits contained in collective bargaining agreements is inconsequential as Respondent has made a voluntary decision to recognize a rate in the collective bargaining agreements but no other rates in that agreement. In so doing, the issue to be analyzed is whether and if IDOL has in the past recognized interim monthly increases where IDOL has recognized collective bargaining rates to prevail in a locality.

All parties and intervenor alike agree that, as to this issue, there has been a change in the Department's customary pattern and practice regarding the posting of interim monthly increases provided for in collective bargaining agreements where IDOL recognizes those rates as the rates that prevail. However, the parties disagree as to where, when and how this change occurred. The analysis proceeds.

B. <u>Respondents' Historic Pattern and Practice</u>

It is undisputed that from January 2006 through July 2015 where IDOL recognized collective bargaining agreement rates for given localities, IDOL routinely published the prevailing wage rate monthly and the posted interim rate increases reflected collective bargaining agreements relative to wages and/or benefits.

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

> 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.[1]

820 ILCS 130/9 (2017).

An 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. The parties have not provided any caselaw, legislative history or other interpretations regarding the 2017 amendment. As provided above, one must balance all interests outlined in Section II (A) (B) and (C)of this Order to determine whether Respondents' Motion to Dismiss is to be granted.

The Intervenor and Petitioner concur that from January 2006 through July 2015, the Department posted rates monthly creating a pattern and practice. Moreover, the monthly postings recognized interim monthly rate increases reflected in collective bargaining agreements where IDOL determined collective bargaining rates as the rate that prevails. The Petitioner and the representatives in Jiricek argue it relied upon IDOL's pattern and practice of monthly amending rates where a collective bargaining agreement's rates were the applicable prevailing rate when negotiating collective bargaining agreements.

Petitioner further contends that the change in language in Section 9 of the statute was meant to codify the long-standing practice of interim rate postings by IDOL. Respondents, however, maintain 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.

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

Respondents maintain 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. Petitioner contends that the legislative intent ratified the Department's long-standing practice of posting ascertained rates monthly.

The Department's argument, however, is that it has routinely posted rates annually and has given enough notice to justify the change. Petitioner and Intervenor dispute the Department's argument. Review of the facts as presented *in a light most favorable to the non-moving parties* reflect that in the 2015-16 prevailing wage rate year, Petitioner's prevailing wage rates were posted in accordance with Respondents' customary pattern and historical practice of allowing monthly updates where appropriate.

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[1] Underlined language signifies June, 2017 amendment.

In 2016-17, organizations that understood the Department's routine survey process began submitting rates as always via paper forms with relevant attachments. However, in June 2016 Respondent attempted to move to an on-line electronic platform for efficiency sake to perform its survey and to ascertain wage rates. The Department only accepted responses via electronic platform. The new process spawned various lawsuits and litigation statewide. The Oller court ordered IDOL to return to its former practice of accepting paper survey forms. During the 2016-17 rate setting, the Department recognized responses to its survey whether paper or electronic but did not publish rates until May 26, 2017, *Parilli et al. v. Chaviano,* 16 CH 12963. *Parilli et al.* arose out of an administrative review action due to the Department's denial of Section 9 hearing requests from four separate unions, among other counts in the complaint, during the 2016-17 prevailing wage year. The presiding Cook County Court Judge issued a writ of mandamus requiring Respondents to post prevailing wage rates on May 26, 2017. Respondents posted rates on May 26 with an effective of June 5, 2017.

Thus, in 2016-17, IDOL did have Section 9 hearing challenges in the form of administrative review actions in the courts rather than at the administrative level. Due to the denial of the administrative hearing requests by IDOL in 2016, the undersigned is unable to find that the regulated public was reasonably on notice of the change in the Department's practice and interpretation due to the late posting of the rates and the confusing messages provided by the Department regarding which rates were being sought. The survey on the electronic platform specified to respond with June rates only, while the paper form, posted in compliance with a St. Clair County order failed to specify which monthly rates were sought. *Oller et al. v. Illinois Department of Labor et al.*, 17 MR 134.

The effect of posting rates late into the prevailing wage season effectively mooted the ability of any entity to challenge the Department's interpretative change because the late posting of rates essentially mooted any possible Section 9 substantive challenges that year. Under Section 9, individuals wishing to challenge rates have 30 days to file a request for hearing. 820 ILCS 130/9. Due to the late posting the last date to file in 2017 would have been July 5, 2017 at which time the survey process had already concluded for the following year and posting of new rates in 2017 was imminent. Respondents' action effectively mooted the ability of any party to acquire actual due process all the way through to administrative hearing during this prevailing wage year. *Viewed in a light most favorable to the non-moving party*, Respondent is at this time unable to establish an easily recognizable change in its historic pattern and practice this year as the circumstances which arose were unusual given that Respondent conducted a survey, failed to publish the rates, became mandated by a Court to publish rates and mandated by another court to post and accept paper prevailing wage survey forms while denying administrative hearing requests.

In 2017-18 prevailing wage year, IDOL for the first time received Section 9 challenges which allowed requestors to proceed through to administrative hearing and where for the first time it is argued by Petitioner and Intervenor that the Department changed its historic pattern and practice in the ascertainment and posting of rates. Jiricek representatives maintain that when Respondent did not have an explicit statutory grant of authority (pre-2017 amendment) to publish prevailing wage rates monthly it did so, and now that Respondent has explicit statutory authority to post rates more than once annually, it is not doing so.

Respondents' argument that the General Assembly solidified and properly noticed the regulated public that its "practice" of posting rates once per year is not credible for the aforementioned reasons. In addition, the Department performed a survey in 2016, did

not post it and the Department failed to articulate a reason. Similarly in 2017, Respondents failed to clearly articulate reasons for the change in the electronic platform or paper survey documents. Thus, Intervenor persuasively argues that IDOL has concluded, without sufficient explanation, that interim monthly postings are inconsistent with the Act has failed to articulate a reason. This it is a burden the Department must overcome to sustain its decision to prove it is not arbitrary and capricious.

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, offering 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 so 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 Petitioner's 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.

All 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 did not amend 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 artificial inflation of the prevailing wage rate in that the unions throughout the State as evidenced by the Machinists' representations at oral argument will change the collective bargaining agreement effective dates to June of each year thus artificially increasing the rates all at once during the month of June rather than incrementally throughout the year. In turn, this raises the cost of projects to public bodies around the State of Illinois. In addition, the Department's decision since 2016 has resulted in workers being paid a rate lower rate than that which 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. Specifically, the Petitioner represents their rates were frozen for two years, while Jiricek indicated they have been frozen between two and three years depending upon the classification and lack of routine pattern and practice by Respondents. 820 ILCS 130/9. In fact, the Department admitted that where the increases in rates took place after June 30, IDOL 'defaulted' to the previous year's rates without any efforts to determine whether there were in fact any interim increases that should be recognized in the newly posted rate. This is inapplicable in the current matter. See Affidavit of Adam Schuster, *Jiricek v, Beyer and Illinois Department of Labor*, 2018-H-AS09-1992.

Respondent's current interpretation of Section 9 departs from Respondents' 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 reasons been provided by the parties 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 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 Petitioner's favor that the General Assembly recognized 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 Petitioner*, 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).

Intervenor correctly concludes that IDOL has provided an insufficient explanation as to why the interim monthly postings are inconsistent with the Act. The failure to articulate reasons why is a burden that the Department must overcome to sustain its interpretation and decision so as not not to be viewed as arbitrary and capricious. 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. The Department has provided insufficient explanation thus far.

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.

The Department further argues that it must have the ability to move forward citing that it is a natural transition given technological advances to move to an electronic survey system as an example. Thus, the Department further maintains that changing its position or pattern and practice should not be made an impossibility. The Department cites its inability or lack of authority to rule make, which process would provide for public comment, as one reason for the inability to communicate changes.

Respondent's position seems to be off base. The Petitioner and Intervenor do not maintain a position that once a status quo has been established it must remain *ad infinitum*. Rather, the arguments advanced are that should the Department want to change a pattern, practice or process, it must be done properly and cannot be made and executed in an arbitrary and capricious fashion. Intervenor and Petitioner believe that based upon the law, Respondent must articulate clear and definitive reasons for a change to overcome any arbitrary and capricious determination. An example of the confusion created for the regulated public was the Department's shift to move to an electronic survey platform. The electronic survey instructed responders to the survey to provide rates paid on public works contracts to workers as of June. However, the paper survey forms posted by IDOL did not contain the same restriction leading to confusion as to the Department's policy. Was it a departure from the past? Was the old method reinstated as a result of the paper forms having been posted?

Last, the Department does maintain an ability to communicate in numerous ways with its regulated public to announce changes and articulate reasons absent rulemaking authority. While the Department did in fact perform outreach via Listserv during the relevant survey, the documentation contained in the electronic survey differed from the paper survey forms which caused confusion for the regulated public. Some examples of outreach which have been presented in this Motion: 1) IDOL's website presence; 2) IDOL's Listserv, 3) training sessions for the regulated public. It is also possible to utilize social media for communication purposes.

C. <u>Waiver and Estoppel Theory</u>

Respondents assert that Petitioner and Intervenor should be prevented from moving forward on a Section 9 hearing petition due to waiver and estoppel. Specifically, Respondents assert that Petitioner's failure to request relief regarding the interpretation of the 2017 amendment in the *Oller* matter waives its right to make this claim before this tribunal. Similarly, Respondents further maintain that Intervenor also waived its right to this having this tribunal adjudicate relief because members of its Association are named plaintiffs in the *Oller* matter.

Petitioner claims that while it was unclear as to what methods the Department would use to set rates from 2016 forward, it did in fact file an administrative review action due to the Department's lack of rate setting in 2016. The Department denied the request giving rise to the *Parilli* matter. Petitioner represents that a similar issue had been raised in related litigation and counsel for Respondents argued that the court did not maintain jurisdiction as Petitioner failed to exhaust its administrative remedies. Intervenors believe that having members of the Association as named plaintiffs in *Oller* differs significantly from the actual Association (the Intervenor in this matter) being a named plaintiff and should not be prevented from moving forward with this matter.

Review of the pleadings demonstrates the parties failed to provide case law or legal support regarding this issue. Nevertheless, it is found that Petitioner is party to at least two different legal actions in two different courts with Respondents outside of this administrative hearing. *See Robert J. Parilli, as member of the International Brotherhood of Electrical Workers Local 134 and*

the International Brotherhood of Electrical Workers, Local 134 v. Hugo Chaviano, Director of the Illinois Department of Labor and the Illinois Department of Labor, 16 CH 12963 and *Oller et al. v. Illinois Department of Labor et al.*, 17 MR 134. Respondents maintain that Petitioner had the ability to challenge the Department's legal interpretation and change in its historical process through these lawsuits but failed to do so and should be estopped from arguing same in this matter.

The issue before the undersigned did not become 'ripe' until August 2017 when the Department failed to post the Midwest Laborers' August 2017 rates. At that time, the initial injunction issue in the *Oller* matter had been disposed of and the *Parilli* matter was on appeal. While the *Oller* matter survives the injunction decision, the issue in *Oller* is distinct from the issue before the undersigned. The issues in that lawsuit were/are use of federal standard occupational classification (SOC) codes and collection of rates on private construction which parties are the proper parties to be surveyed as well as the use of non-public works data in the survey.

A party is free to choose a forum that is appropriate to relief sought. On the other hand, it also makes sense for this issue to have been consolidated into existing matters. Nevertheless, the PWA provides a 30 day window to request an administrative hearing or an affected individual is unable to request same.

While the parties failed to provide any research, legal background or legal authority regarding the waiver and estoppel theory. A waiver and estoppel theory lies in equity. It is found that 820 ILCS 130/0.01-12 and 56 Ill. Adm. Code 120.100 – 670 fail to provide the undersigned with the ability to provide equitable relief. Because the undersigned does not have authority to exercise the equity requested by Respondents, no relief can granted to Respondent on waiver and estoppel grounds.

D. <u>Disparate Treatment</u>

Petitioner maintains that the correct interpretation of the law is to post monthly updates on prevailing wage rates where IDOL has determined a collective bargaining agreement is the rate that prevails in a given locale. As support, Petitioner cites the decision received by Petitioner in the matter of *Habel, Illinois Brotherhood of Electrical Workers, Local #701 v. IDOL*, 2018-H-PK-1961 wherein IDOL agreed in a 2017 Section 9 matter to post the IBEW's rates which went into effect after July 1, 2017.

Respondent believes it is not bound by individual decisions made in individual cases which involve unique facts and fact patterns. *Hawthorne Race Course v. Ill. Racing Bd.*, 366 Ill. App. 3d 435, 443 91st Dist. 2006), *Kozminski v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, 2012 Ill. App. (1st) 111808-U, para. 18 (Nov. 15, 2012).

It is found that the Department is not in fact bound to treat each situation that comes before it identically. Furthermore, the undersigned does not have authority to reach or adjudicate constitutional issues. As such, it is found that the Department has authority to treat each situation that comes before it uniquely where the fact pattern is not identical. *Hawthorne Race Course v. Ill. Racing Bd.*, 366 Ill. App. 3d 435, 443 91st Dist. 2006), *Kozminski v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, 2012 Ill. App. (1st) 111808-U, para. 18 (Nov. 15, 2012).

E. <u>Mandatory/Permissive Statutory Construction</u>

Respondents maintain that the language contained in Section 9 provides guidance as to when the Department must post rates as well as how often. Specifically, the new amendment language states:

> 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).

The Department interprets the monthly posting language as permissive in nature and not mandatory. Thus, the Department theorizes it *may* (emphasis added) post rates more than on an annual basis, it is not *required* (emphasis added) to post monthly.

> "Generally, the use of the word 'shall' in a statute is regarded as indicating a **mandatory** rather than a directory intent. The rule is not, however, an inflexible one; the statute may be interpreted as permissive, depending upon the context of the provision and the intent of the drafters." *People v. Woodard*, 175, Ill.2d at 445, 222 Ill.Dec. 401, 677 N.E.2d at 940.
>
> "Normally, if a statute specifies a time for the performance of an official duty, the statute only will be considered directory if the rights of the parties cannot be injuriously affected by failure to act within the time indicated in the statute. *Carrigan v. Illinois Liquor Control Comm'n.*, 19 Ill.2d 230, 233, 166 N.E.2d 574,576 (1960). "However, where such statute contains negative words, denying the exercise of the power after the time named, or where a disregard of its provisions would injuriously affect public interests or private rights, it is not directory but **mandatory**." *Carrigan*, 19 Ill.2d at 233, 166 N.E.2d at 576. *See also Lincoln Manor v. Department of Public Health*, 295 Ill. Dec. 506, 358 Ill. App.3d 1116, 832 N.E.2d 956, (4th Dist. 2005).

In balancing all interests outlined in Section II (A) (B) and (C), it is found that the undersigned currently has insufficient facts to determine whether the lack of posting would be injurious to the public interest, or private rights. As such, the matter must proceed to hearing to determine same.

F. Ascertainment of Future Rates

Respondents further argue that it is unable to ascertain future rates. Specifically, rates that are contained within collective bargaining agreements contain future interim rate increases, thus, and Respondents believe future rates are not the rates that prevail. Furthermore, Respondents argue it is unable to predict the future.

Where IDOL has recognized and determined that a collective bargaining rate is the prevailing rate in a locale and that collective bargaining rate contains interim future increases within the four corners of the contract, there is nothing speculative about being able to accurately ascertain prevailing wage rates in those locales for those classifications because IDOL has already made a determination that the collective bargaining rate prevails in those counties. Utilizing the discretion/authority granted to it in the new amendment to the Prevailing Wage Act allows Respondents to post interim rates throughout the year thus effectuating the purpose of

the statute contained in Section 1 of the Act that workers are paid a current rate that prevails as opposed a static rate which could be up to 11 months old.

It is quite puzzling as to why Respondents have set forth this argument, in that, from 2006 to 2015, IDOL posted rates monthly when IDOL recognized that collective bargaining rates were the rates that prevailed. Now, in this matter, it appears IDOL has changed its position stating that there is value to having a static rate to allow public bodies, contractors and workers fiscal certainty when taking on prevailing wage projects. IDOL its seems did not have difficulty ascertaining 'future' rates in the past, but fails to provide a reason why it now states differently. The record fails to provide a reason as to why it is arguing differently.

Respondents maintain that while an annual posting would result in a static rate, doing so allows predictability for the regulated public and workers alike. Historically, however, the Department may be that a static annual rate allows predictability to the regulated public and workers alike, this is not the practice in the past in which IDOL has not historically engaged.

IDOL failed to develop this argument further, and failed to provide an affidavit supporting its assertion that interim future rate increases created non-compliance issues for the regulated public. Taking this argument *in a light most favorable to the non-moving party*, there is a lack of support in the record for this argument. Because the record shows a a shift in historic pattern and practice along with a lack of non-compliance information, the undersigned is unable at this time to determine whether the Department's actions are arbitrary and capricious. Further evidence would be necessary at the time of hearing to address the impact on union and non-union employee's wages alike regarding underpayment of the actual *prevailing* wage rate as well as whether confusion or non-compliance interim monthly postings cause non-compliance issues would be expected.

It is noted that during argument Jiricek representatives maintain that if the Department continues to interpret the matter in this manner, it will enter into collective bargaining agreements that do not contain interim rate increases, but will bargain to have the entire increase paid up front.

For the forgoing reasons, it is found *in a light most favorable to the non-moving party* that this matter is appropriate to hearing.

IT IS HEREBY ORDERED:

1. Respondents' **Motion to Dismiss** is **denied.**

2. General discovery (e.g., deposition, interrogatories or request to produce or admit) is not permitted. 56 Ill. Adm. Code 120.410 (a).

3. The parties must demonstrate compliance with Illinois Supreme Court Rule 201(k) regarding discovery.

4. Each party shall provide the opposing party with a copy of any document that it may offer into evidence. The parties shall exchange documents on or before **June 15, 2018.** Each party shall provide newly discovered documents, except for witness statements, as they become known to the party intending to introduce the document. The parties remain under a continuing duty to provide any newly discovered documents to the opposing party as soon as possible.

5. The parties shall file motions for third party subpoenas, along with a draft copy of a subpoena (the subpoena shall show on its face the name and address of the party) at whose request the subpoena was issued with the undersigned on or before **June 22, 2018**. The parties maintain a duty to supplement document exchange wherein documents have been obtained in this fashion. In any case, those documents shall not be produced to the opposing parties after **July 6, 2018** without leave of the administrative law judgez.

6. Subpoenas for the attendance and testimony of witnesses shall be filed on or before July 6, 2018. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

7. Each party shall provide to the opposing party and the undersigned a witness list containing the name, address and affiliation with the matter of any witness who may be called to testify on or before **July 6, 2018**. Witnesses not on these lists will require leave of the administrative law judge to be allowed to testify.

8. Written stipulations shall be provided to the undersigned on or before **July 6, 2018**.

9. This matter is scheduled for in person hearing on **July 10 and 11, 2018 at 9:00 a.m.** at the Illinois Department of Labor, 160 N. LaSalle St., Ste. C-1300, Chicago, IL 60601. The parties shall be prepared to proceed.

DATE: 6/6/18

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

Claudia D. Manley
Chief Administrative Law Judge
Illinois Department of Labor
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DOL.hearings@illinois.gov

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

CERTIFICATE OF SERVICE

Under penalties as provided by law, including pursuant to Section 1-109 of the Code of Civil Procedure, I **Blanca Hinojosa**, 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-AS09-1976** and 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 Certificate of Service, having caused each envelope to be served by U.S. mail requested at 100 W. Randolph Street, Chicago, Illinois on the **7th** day of **June, 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/ Blanca Hinojosa
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