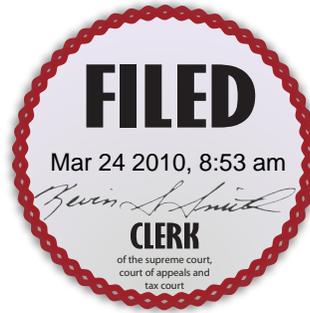


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ASSOCIATED BUILDERS & CONTRACTORS)
INDIANA CHAPTER, INC., HENRY)
ELECTRIC, INC., AND FREDERICKS, INC.,)

Appellant-Plaintiffs,)

vs.)

LORI A. TORRES in her official capacity as)
Commissioner of the Indiana Department)
of Labor,)

Appellee-Defendant.)

No. 49A02-0910-CV-995

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gerald Zore, Judge
Cause No. 49D07-0904-PL-19138

March 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Associated Builders & Contractors Indiana Chapter, Inc. (“ABC”) appeals the trial court’s order dismissing its complaint against Lori A. Torres in her official capacity as Commissioner of the Indiana Department of Labor (“DOL”). For our review, ABC raises a single issue, which we restate as: whether the trial court erred when it dismissed ABC’s complaint for lack of a justiciable controversy. Finding no error, we affirm.

Facts and Procedural History

The Common Construction Wage Act (the “Act”) requires any entity that is awarded a contract by a public agency for the construction of a public work to pay each worker on the project according to a scale of wages that may not be less than the common construction wage paid to other workers in the same county. Ind. Code § 5-16-7-1(a). The Act calls for the creation of a five-member committee to classify the workers needed as skilled, semi-skilled, and unskilled workers and to determine the common construction wages for the project. Ind. Code § 5-16-7-1(b).

On July 20, 2006, the DOL and the Indiana State Building and Construction Trades Council (“ISBCTC”), an affiliate of the AFL/CIO, reached an agreement regarding an

acceptable wage scale format for committees to determine common construction wages in each county. The DOL published the wage scale format and an explanatory letter on its website.¹ The wage scale format offers suggested criteria for determining which workers should be classified as skilled workers, semi-skilled workers, and unskilled workers. The wage scale format also offers advice on how to classify and pay workers participating in apprenticeship programs. The explanatory letter states:

Attached please find the agreed upon common construction wage scale format that will be accepted by the [DOL] for all common construction wage hearings across the state. I encourage you to utilize this form whenever making wage determinations in your county. The strict use of this form will help ensure the legal efficacy of the wages your committees set and will help guarantee acceptance and enforcement by the [DOL]. We strongly recommend that you utilize this form without amendment.

* * *

Deviations from this format may result in legal challenges to your wage scales.

Appellants' Appendix at 14.

On January 15, 2009, ABC's counsel sent a letter to the DOL alleging the agreed wage scale format violated the Act and was an improperly promulgated rule. On April 23, 2009, ABC filed its complaint seeking a declaratory judgment that the agreed wage scale format violated Indiana Law and an injunction prohibiting its use by the DOL. On June 9, 2009, the DOL filed a motion to dismiss on procedural grounds and for failure to state a valid claim. On June 23, 2009, ABC amended its complaint to cure the procedural deficiency.

¹ See www.in.gov/dol/files/Letter_to_Commissioners_7.20.06.pdf;
www.in.gov/dol/files/AGREED_UPON_COMMON_CONSTRUCTION_WAGE_SCALE_FORMAT_7.20.06.pdf.

Then on September 15, 2009, the trial court issued an order finding no justiciable controversy and dismissing ABC's complaint. ABC now appeals.

Discussion and Decision

I. Standard of Review

The DOL moved the trial court to dismiss ABC's complaint pursuant to Indiana Trial Rule 12(B)(6) because ABC lacked standing. We review a trial court's decision to dismiss a complaint for lack of standing de novo. State ex. rel. Steinke v. Coriden, 831 N.E.2d 753, 754 (Ind. Ct. App. 2005), trans. denied. The question of whether ABC has standing is a pure question of law, and therefore, we owe no deference to the trial court's decision. Id. We will reverse the trial court's decision if an error of law is demonstrated. Id.

II. Standing Requirement for a Declaratory Judgment Action

ABC contends it has standing to seek a declaratory judgment under Indiana Code section 34-14-1-2, which states:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

“[T]he purpose of a declaratory judgment action is to quiet and stabilize legal relations and thereby provide a remedy in a case or controversy when there is still an opportunity for peaceable judicial settlement.” Ferrell v. Dunescape Beach Club Condos. Phase I, Inc., 751 N.E.2d 702, 707 (Ind. Ct. App. 2001). “The basis of jurisdiction under [Indiana Code section 34-14-1-2] is a justiciable controversy or question, which is clearly defined and affects the

legal right, the legal status, or the legal relationship of parties having adverse interests.” Little Beverage Co. v. DePrez, 777 N.E.2d 74, 83 (Ind. Ct. App. 2002), trans denied. However, a plaintiff seeking to bring a declaratory judgment action must demonstrate standing to pursue the relief requested. Id.

In order to obtain declaratory relief, the person bringing the action must have a substantial present interest in the relief sought, not merely a theoretical question or controversy but a real or actual controversy, or at least the “ripening seeds of such a controversy,” and that a question has arisen affecting such right which ought to be decided in order to safeguard such right.”

Id. (quoting Town of Munster v. Hluska, 646 N.E.2d 1009, 1012 (Ind. Ct. App. 1995)).

ABC sought a declaratory judgment that the agreed wage scale format violates the Act and represents an improperly promulgated rule. ABC alleges it is “an association of Indiana-based building trades contractors,” whose members “bid[] on Indiana public works projects,” which are subject to the Act. Appellants’ App. at 7. ABC argues the alleged illegality of the agreed wage scale format creates uncertainty for its members in setting wages for public works projects and forces contractors “to do the impossible – comply with the ... Act while at the same time comply with the [DOL’s] policy that runs completely afoul to the ... Act.” Appellants’ Brief at 15.

Initially, we point out the agreed wage scale format and explanatory letter are not directed to contractors. Rather they are directed to the committees charged with setting the common wage scales. As such, neither one requires or prohibits any activity by contractors. Second, the explanatory letter makes clear the wage scale format is the result of over a year and a half of negotiations between the AFL/CIO, the ISBCTC, and the DOL and represents

their agreement as to the proper method of determining the common wage scale. The letter phrases use of the wage scale format as a strong recommendation but not a requirement. Additionally, although the letter promises use of the form will ensure acceptance and enforcement of the wages by the DOL and cautions deviation from the wage scale format may result in legal challenges to the wage scales, it does not guarantee such challenges would occur or indicate the DOL would initiate the challenges. This understanding is supported by the fact the DOL's 2008 Guide to Establishing Indiana's Common Construction Wage² makes no mention of the agreed wage scale format.

We also note although the DOL issued the agreed wage scale format and explanatory letter in the summer of 2006, ABC did not attempt to challenge the alleged rule until January 15, 2009, when it sent its first letter to the DOL, and April 23, 2009, when it filed its complaint.³ From the time the agreed wage scale format was published until ABC filed its complaint, ABC had presented common wage scales on at least 567 occasions and its wage scales were adopted by the committee at least 348 times. ABC does not allege its wage scales were ever refused for failure to strictly comply with the agreed wage scale format or that the DOL invalidated or refused to enforce its wage scales during that period. Therefore, ABC has failed to demonstrate an actual controversy or even the ripening seeds of a controversy related to the agreed wage scale format as required to demonstrate standing to

² Available at www.in.gov/dol/files/Guide_to_CCW_5-30-08.pdf.

³ Based upon these dates, even if ABC was successful in surviving dismissal of its action, it has likely waived its challenge to the alleged rule because Indiana Code section 4-22-2-45 requires a claim that asserts a rule is invalid on procedural grounds must be brought within two years after the date the rule becomes effective, unless the rule is alleged to have caused substantial harm to the due process rights of an individual.

bring the declaratory judgment action, and the trial court did not err when it dismissed ABC's complaint for lack of standing.

Conclusion

ABC lacks standing to seek a declaratory judgment that the agreed wage scale format violates the Common Construction Wage Act and is an unpromulgated rule. Therefore, the trial court properly dismissed ABC's complaint.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.