IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF: LAW OFFICES OF DAVID A. WISEMAN, Petitioner, v. DEPARTMENT OF LABOR AND IMMIGRATION, Respondent.	)	Civil Action No. 98-1299 **ORDER**

I. PROCEDURAL BACKGROUND

This matter came before the court on October 2, 2000, in Courtroom 220 at 9:00 a.m. on Petitioner's Petition for Judicial Review. David A. Wiseman, Esq., appeared on behalf of Petitioner. Assistant Attorney General Andrew Clayton, Esq., appeared on behalf of Respondent, the Department of Labor and Immigration. The court, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its decision.

II. FACTS

On April 22, 1996, Petitioner filed a Petition for Declaratory Ruling with the Department of Labor and Immigration (hereinafter referred to as "Respondent") pursuant to 1 CMC § 9107. Petitioner sought approval of three proposed contractual provisions it wished to incorporate in nonresident workers' employment contracts. These provisions include: a provision permitting a workweek of less than forty (40) hours; **[p. 2]** a provision permitting direct deductions from an employee's salary for advances, loans, or payments made by the employer at the employee's request; and a provision requiring that any employee who operates a motor vehicle outside the scope of employment to obtain minimum liability insurance.

On November 20, 1998, Secretary of Labor and Immigration Mark D. Zachares (hereinafter referred to as "Secretary Zachares") responded to Petitioner's Petition for Declaratory Ruling with

a one-page letter stating that the requested contractual provisions would not be approved and that Petitioner's Petition was denied.

On September 2, 1999, Plaintiff filed a Petition for Judicial Review (Petition) in the Superior Court seeking review of the November 20, 1998, letter.

On August 9, 2000, the court entered an order remanding the matter to the Respondent for further consideration on the ground that Secretary Zachares' letter dated November 20, 1998, failed to set forth findings and conclusions and the reasons and basis for them as required by the Commonwealth Administrative Procedure Act. *See In the Matter of the Law Offices of David A. Wiseman*, Civ. No. 98-1299 (N.M.I. Super. Ct. August 9, 2000) (Order).

On September 19, 2000, Respondent served Petitioner with an Administrative Order entered by Secretary Zachares as required by the court's order entered on August 9, 2000. Respondent's Administrative Order denied Petitioner's underlying Petition for Declaratory Ruling and rejected each of Petitioner's proposed contract provisions.

On September 8, 2000, Petitioner filed a Supplemental Brief asserting that Respondent's Administrative Order rejecting the proposed contractual provisions was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III. ISSUE

Whether Respondent's rejection of Petitioner's three proposed contractual provisions for nonresident worker employment contracts was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. **[p. 3]**

IV. ANALYSIS

A. Administrative Procedure Act/Judicial Review.

Judicial review of administrative agency action is governed by the Commonwealth Administrative Procedure Act, codified at 1 CMC § 9101 *et seq.* (hereinafter referred to as the "APA"). *See Camacho v. N.M.I. Retirement Fund*, 1 N.M.I. 364, 366 (1990). Pursuant to the APA, the reviewing court shall decide all questions of law, interpret constitutional and statutory provisions,

and determine the meaning or applicability of the terms of an agency action. *See* 1 CMC § 9112(f). With respect to an agency's actions, findings or conclusions, the law empowers the reviewing court to hold and set aside the same if it determines that any one of six bases set forth at 1 CMC § 9112(f) exist to warrant such a holding. 1 CMC § 9112(f) states, in pertinent part, that the reviewing court shall:

> (2) Hold unlawful and set aside agency action, findings, and conclusions found to be:
>
> > (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) Contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) In excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;
> >
> > (D) Without observance of procedure required by law;
> >
> > (E) Unsupported by substantial evidence in a case subject to Sections 9108 and 9109 or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > (F) Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

1 CMC § 9112(f).

Here, Petitioner asserts that Respondent's rejection of Petitioner's three proposed contractual provisions was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and should be declared unlawful pursuant to 1 CMC § 9112(f)(2)(A).

"The arbitrary and capricious standard of review embodies a comparatively low level of judicial scrutiny which only allows a reviewing court to overturn an administrative decision if a review of the administrative **[p. 4]** record reveals that the decision is totally intolerable and outside any conceivable rational alternative." *Limon v. Camacho*, Civ. No. 93-0508 (N.M.I. Super. Ct. July 1, 1994) (Memorandum Decision and Order at 3) *aff'd*, App. No. 94-040 (N.M.I. Sup. Ct. Aug. 5, 1996) (Opinion), citing Charles H. Koch, Jr., Administrative Law and Practice § 9.6 (1994). The court reviews actions which are alleged to be arbitrary and capricious under an abuse of discretion

standard. *In re Blankenship,* 3 N.M.I. 211, 213 (1992). A court will review an action or decision alleged to be arbitrary and capricious to determine whether the action was reasonable and based on information sufficient to support the decision at the time it was made. *Id.*, at 227. "Allegations of 'arbitrary or capricious' are similar to 'unreasonable or 'abuse of discretion,' and for judicial review purposes there is no practical difference among these terms, the basic idea of all of them being an excess of power, caprice, unreason, and lack of rational basis." *Id.*, at 227 n.3.

B. Burden of Proof.

Petitioner cites 1 CMC § 9112 for the proposition that Respondent carries the burden of proof in the present matter. Pursuant to 4 CMC § 4446 "[e]xcept as may be contrary to the provisions of this chapter, judicial review shall be pursuant to 1 CMC § 9112. Pursuant to 1 CMC § 9112(i) "[e]xcept as otherwise provided by statute, the proponent of an order or decision has the burden of proof." 1 CMC § 9112(i).

The language of 1 CMC § 9112(i), however, means that the party initiating the proceeding has the general burden of coming forward with a *prima facie* case. *See Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries,* 512 U.S. 267, 277, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) citing S. Rep. No. 752, 79th Cong., 1st Sess., 22 (1945), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S.Doc. No. 248, 79th Cong., 2d Sess., 208 (1946); H.R. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946), Leg.Hist. 270-271, *see also Limon v. Camacho*, Civ. No. 93-0508 (N.M.I. Super. Ct. July 1, 1994) (Memorandum Decision and Order), *aff'd*, App. No. 94-040 (N.M.I. Sup. Ct. Aug. 5, 1996) (Opinion) (stating that the party appealing an administrative decision has the burden of rebutting a presumption of regularity); *In Re Hafadai Beach Hotel*, 4 N.M.I. 37, 45 (1993) (stating that where standard is deferential, burden of overcoming presumption that agency action is valid is on party challenging action) citing *Chemical Waste Mgmt., Inc. v. Environmental Protection Agency,* 649 F. Supp. 347, 354 **[p. 5]** (D.C. Cir. 1986); *Mendiola v. Taimanao et al.*, Civ. Nos. 94-0024, 94-0025, 94-0026 (N.M.I. Super. Ct. May 11, 1994) (Findings of Fact and Conclusions of Law at 2, n.3) (stating that "[t]here is no question that the party seeking review of an agency decision bears the burden to show that the decision was

erroneous.') citing CHARLES H. KOCH, JR., 2 ADMINISTRATIVE LAW AND PRACTICE § 9.4 (1985); *Maryland Dept. of Human Resources v. United States Dept. of Agric.*, 976 F.2d 1462, 1476 (4th Cir.1992) (holding that the burden is not on the agency to justify its own regulation).

In the present matter, Petitioner initiated the proceeding to review Respondent's Administrative Order. As such, Petitioner bears the burden of proof in the present matter. "Burden of proof," means the burden of persuasion, not merely the burden of production. *See Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries, supra* 512 U.S. at 267-268. The standard of proof which the person initiating the proceeding must meet is the "preponderance of the evidence" standard. *Steadman v. SEC*, 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981). "The preponderance of the evidence standard is described as 'evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence, which as a whole shows that the fact sought to be proved is more probable than not.'" *In re Estate of Barcinas*, 4 N.M.I. 149, 154 (1994) citing BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

C. Authority of Department of Labor and Immigration to Regulate Contractual Provisions in Nonresident Worker Contracts.

An administrative regulation has the force and effect of law, but only when it is the product of an exercise of delegated legislative power. *See Portland Audubon Soc.* v. *Endangered Species Committee*, 984 F.2d 1534, 1543 n.21 (9th Cir.1993), citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S.Ct. 2778, 2781 n.9, 81 L.Ed.2d 694 (1984). Regulations that are inconsistent with provisions of the acts that they implement cannot stand. *Id*. To be valid, the regulation must fall within the power granted by the legislature and must fit within the parameters of statutes that define the powers of the agency. *Id*. **[p. 6]**

Normally, the court must address two questions in determining whether the legislative delegation of authority to an agency encompasses and allows the action taken by the agency. First, the court determines whether the legislature has spoken directly on the precise question at issue, and second, if the statute is silent or ambiguous with respect to the issue, the court determines whether

the agency's action was based on a permissible construction of the statute. *See Chevron U.S.A., Inc. v. U.S.A.*, 467 U.S. 837, 843, 104 S.Ct.2778, 2781-2, 81 L.Ed.2d 694 (1984).

However, "[i]f [the legislature] has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* Accordingly, if the legislative delegation of authority to an administrative agency is explicit, the only question before the court is whether the agency's decision is based on a permissible construction of those explicit provisions of the statute. *Id.*

1. Proposed Contractual Provision Permitting a Workweek of Less than Forty Hours for Nonresident Workers.

Petitioner proposes to include a provision in nonresident workers' employment contracts that permits a workweek of less than forty (40) hours. However, pursuant to the Nonresident Workers Act, codified at 3 CMC § 4411 *et. seq.* (hereinafter referred to as the "NWA"), the Legislature has explicitly conferred upon Respondent the authority and discretion to "oversee, monitor, and review the use of nonresident workers and all matters related to such use, including . . . working hours and conditions." *See* 3 CMC § 4421(c). Also, pursuant to 3 CMC § 4433, the Legislature has explicitly stated that Respondent "shall determine under what conditions and for what period of time the employer shall be permitted to use a nonresident worker to fill the vacancy." *See* 3 CMC § 4433.

The foregoing provisions evidence the fact that the Legislature delegated its legislative authority over certain aspects of the NWA to Respondent by explicitly leaving gaps in the NWA to be filled by Respondent. The Legislature could have included specific provisions within the NWA or in subsequent amendments clarifying the precise contractual provisions that could or could not be included in an employment contract between employers and nonresident workers. The Legislature, however, chose not to do so, but rather, explicitly **[p. 7]** conferred that duty upon Respondent. "If [the legislature] has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, supra* 467 U.S. at 843. Where legislative delegation of authority to an administrative agency is explicit, the question before the court is whether the agency's decision is based on a

permissible construction of those explicit provisions of the statute. *Id.* The court's only inquiry, therefore, is whether Respondent's decision to reject a contractual provision allowing a workweek of less than forty (40) hours was based on a permissible construction of the explicit provisions of 3 CMC § 4421(c) and (e).

Pursuant to 3 CMC § 4421:

> For the purposes of this chapter, and without limitation on the scope or extent of powers, duties, and responsibilities vested by any other provision of law, the chief shall, under the supervision of the director, have the following functions and duties:
>
> > (c) Oversee, monitor, and review the use of nonresident workers and all matters related to such use, including the health, safety, meals, lodging, salaries, and working hours and conditions of such workers, and the specific contractual provisions for the services or labor of such workers.
> >
> > (e) Require that employers accept such agreement or conditions for the payment of wages or benefits to nonresident workers, or any other agreement or contract provision, as the chief determines to be necessary and consistent with the policy and purposes of this chapter, and any such agreement, condition, or provision shall be legally enforceable in the courts of the Commonwealth.

3 CMC § 4421 (c), and (e).

The Legislature explicitly conferred upon Respondent significant discretion in implementing regulations relating to employment contracts between employers and nonresident workers. As previously stated, "[i]f [the legislature] has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron, supra* 467 U.S. at 843. Here, the Legislature, at 3 CMC § 4421(c) and (e), expressly delegates to Respondent the authority to promulgate regulations or conditions related to any agreement or contract provision between employers and nonresident workers. *See* 3 CMC § 4421(c) and (e). Specifically, 3 CMC § 4421(c) plainly and explicitly states that respondent shall **"oversee, monitor, and review the use of nonresident workers and all matters related to such use**, **including the . . . working hours and conditions of such workers, and the specific [p. 8] contractual provisions for the services or labor of such workers**." 3 CMC § 4421(c) (emphasis added). Respondent has interpreted this provision as an explicit grant of authority to promulgate regulations and conditions related to the number of hours worked in a workweek by nonresident

employees. The court finds such an interpretation to be a reasonable. Also, "[courts] have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, supra* 467 U.S. at 844.

The court finds, therefore, that Petitioner has not met the burden of proof and has not shown by a preponderance of the evidence that Respondent's decision to reject Petitioner's proposed contractual provisions was not based on a permissible construction of the explicit provisions of 3 CMC § 4421(c) and (e). As such, the court finds that Respondent's decision to reject the proposed contractual provisions was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Proposed Contractual Provision Permitting Direct Deductions from a Nonresident Worker's Salary for Advances, Loans, or Payments Made by the Employer at the Employee's Request.

Petitioner next proposes to include a provision in nonresident worker employment contracts which permits direct deductions from an employee's salary for advances, loans, or payments made by the employer at the employee's request. Respondent, however, contends that 3 CMC § 4421 and 3 CMC § 4433 explicitly grant Respondent the power to allow or disallow such deductions for loans or advances from employers to nonresident employees. Respondent reasons that because the NWA confers upon Respondent the authority and discretion to require that certain contractual provisions be included, the NWA also confers upon Respondent the power to exclude certain contractual provisions.

Respondent asserts that it rejected the proposed contractual provision on the ground that enforcement of such a provision would be difficult and would result in additional labor cases. In addition, Respondent notes that there are already provisions in the NWA which limit the ability of employers to make deductions from nonresident workers' wages. **[p. 9]**

Pursuant to 3 CMC § 4434(c):

> (c) The contract between the employer and the nonresident worker shall include specific itemization of any deductions from the employee's salary. **No deductions may be levied against a nonresident worker unless**:

> (3) **Deductions of such expenses from employees compensation is not in violation of any applicable federal or Commonwealth law or regulation promulgated by the director**.

3 CMC § 4434(c) (emphasis added).

The Legislature, at 3 CMC § 4434(c)(3), explicitly conferred upon Respondent significant discretion in promulgating regulations related to an employer's deductions from a nonresident worker's wages. Again, the foregoing provision evidences the fact that the Legislature delegated its legislative authority over certain aspects of the NWA to Respondent by explicitly leaving gaps in the NWA to be filled by Respondent. The Legislature could have included specific provisions within the NWA or in subsequent amendments clarifying the precise contractual provisions that could or could not be included in an employment contract between employers and nonresident workers. The Legislature, however, chose not to do so, but rather, explicitly conferred that duty upon Respondent. As stated, "[i]f [the legislature] has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, *supra* 467 U.S. at 843. Here, the Legislature, at 3 CMC § 4434(c)(3), expressly states that wage deductions must not be in violation of any regulation promulgated by the Director of Labor. Respondent has interpreted this provision as an explicit grant of authority to promulgate regulations or conditions related to deductions from nonresident workers' wages. The court finds such an interpretation to be reasonable.

In addition, Respondent's authority to reject the proposed contractual provision is reinforced by 3 CMC § 4421(c), which plainly and explicitly states that respondent shall **"oversee, monitor, and review the use of nonresident workers and all matters related to such use**, **including the. . . specific contractual provisions for the services or labor of such workers**." 3 CMC § 4421(c) (emphasis added). Respondent has interpreted this provision as an explicit grant of authority to promulgate regulations or conditions related to deductions from nonresident workers' wages. Again, the court finds such an interpretation to be a reasonable. Also, "[courts] have long recognized that considerable weight should be accorded to an **[p. 10]** executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron*, *supra* 467 U.S. at 844. 3 CMC § 4434 (c) and 3 CMC § 4421(c)

The court finds, therefore, that Petitioner has not met the burden of proof and has not shown by a preponderance of the evidence that Respondent's decision to reject Petitioner's proposed contractual provision was not based on a permissible construction of the explicit provisions of 3 CMC § 4434(c) and 3 CMC § 4421(c). As such, the court finds that Respondent's decision to reject the proposed contractual provision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

3. Proposed Contractual Provision Requiring any Nonresident Worker Operating a Motor Vehicle Outside the Scope of Employment to Obtain Minimum Liability Insurance.

Petitioner's arguments in favor of the third proposed contractual provision, requiring mandatory liability insurance for nonresident workers, became moot with the passage of "The Mandatory Liability Auto Insurance Act." *See* Public Law 11-55 (codified at 9 CMC § 8104, *et seq*.) Pursuant to Public Law 11-55, "[n]o person shall operate any motor vehicle on the public roads or highways of the Commonwealth unless during such operation, the operator and the vehicle are covered by the minimum liability motor vehicle insurance required by this Act." *See* 9 CMC § 8104. "All motor vehicle liability insurance policies that provide coverage for the operation of any motor vehicle within the Commonwealth are hereby required by law to contain, at a minimum, the following terms and provisions . . . [s]uch policies shall provide not less than the following coverage: $15,000 for bodily injury or death of any one person in any one accident; $30,000 for the bodily injuries or deaths of all persons involved in any one accident; $15,000 for injury, damage or destruction of property in any one accident." *See* Public Law 11-55 (9 CMC § 8106(1)). Accordingly, the court need not address Petitioner's third proposed contractual provision related to mandatory liability insurance for nonresident workers given that Public Law 11-55 applies to all persons within the Commonwealth, including nonresident workers. **[p. 11]**

D. Legislature's Direct Authority over Respondent and the Employment Relationship Between Employers and Nonresident Workers.

The court notes that it is within the purview of the Legislature to withdraw the authority of Respondent to "oversee, monitor, and review the use of nonresident workers and all matters related to such . . ." as provided at 3 CMC § 4421(c). Petitioner's remedy, therefore, lies with the Legislature, not with the Judiciary. Though the court believes that the current contract procedures and regulations can be improved, "[the court] will not act as a super legislature and strike down a statute or a regulation merely because it could have been better written." *King v. Board of Elections*, 2 N.M.I. 399, 406 (1991), *see also Commonwealth v. Island Amusement*, App. No. 97-024 (N.M.I. Sup. Ct. Nov. 16, 1998) (Opinion at 5). Recently proposed legislation, (House Bill 12-275), if passed, will allow Commonwealth employers and their nonresident workers to have increased freedom in negotiating the terms of their employment relationship. However, it is for the Legislature and not the court to determine if such a proposed course of action is appropriate for the Commonwealth.

V. CONCLUSION

For the foregoing reasons, the court finds that Petitioner has not met the burden of proof and has not shown by a preponderance of the evidence that Respondent's decision to reject the three proposed contractual provisions for nonresident workers' employment contracts was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, Petitioner's request for an order of the court holding Respondent's rejection of the proposed contractual provisions to be unlawful is **DENIED**.

So ORDERED this 8th day of November, 2000.

/s/ Juan T. Lizama
JUAN T. LIZAMA, Associate Judge