OFFICE OF THE ATTORNEY GENERAL
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ADMINISTRATIVE LAW:
Authority to Promulgate Rules
Under the Prevailing Wage Act

Mr. Robert Healey
Director
Illinois Department of Labor
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Chicago, Illinois 60601-3150

Dear Director Healey:

I have your predecessor's letter wherein she inquired whether the Illinois Department of Labor is authorized to promulgate rules for the administration and enforcement of the provisions of the Prevailing Wage Act (820 ILCS 130/0.01 et seq. (West 1996)), particularly those provisions relating to the determination of wage classifications and rates. For the reasons hereinafter stated, it is my opinion that the Department has been granted the authority to promulgate rules only with respect to sections 11a and 11b of the Act (820 ILCS 130/11a, 11b (West 1996)). The Department possesses no general rulemaking authority

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with respect to the determination of wage classifications and prevailing rates or other aspects of the Act.

Initially, I note that the only references to rule-making in the Act are found in sections 11a and 11b thereof (820 ILCS 130/11a, 11b (West 1996)). Section 11a, which was added by Public Act 83-813, effective January 1, 1984, authorizes the Department to adopt rules and regulations governing procedures for debarment hearings. Section 11b, which was added by Public Act 88-359, effective January 1, 1994, authorizes the director to adopt rules to implement and enforce the Act's "whistleblower" protections. In each instance, the plain language of the provision limits its applicability to the section in which it appears. There is no specific grant of rulemaking authority in either section 4 or section 9 of the Act (820 ILCS 130/4, 9 (West 1996)), which relate to the determination and posting of wage classifications and prevailing rates, nor does the legislative history of the Act support a conclusion that general rulemaking authority can be derived by implication from those sections.

As originally enacted, the Department of Labor had no responsibilities under the terms of the Act. Rather, it was the responsibility of each public body to ascertain prevailing rates within its territory with regard to any public works project undertaken. (1941 Ill. Laws 703, sec. 4, 9.)

In 1957, however, the Act was amended to permit the Department to ascertain prevailing wage rates at the request of a public body. (1957 Ill. Laws 2662, secs. 4, 9.) Essentially the same procedures applicable to those public bodies were made applicable to the Department. Provisions were added for notice, objections, hearings and administrative review of the Department's actions.

In 1961, section 9 was amended to require each public body to investigate and ascertain prevailing rates of wages no less often than once each six months (1961 Ill. Laws 2919, sec. 9), and, in 1963, the section was again amended to require each public body to ascertain prevailing rates during the month of June of each year. (1963 Ill. Laws 2127, sec. 9.) Subsequently, section 9 of the Act was amended to require the Department, in June of each year, to determine the prevailing rates in each county of the State. The first paragraph of section 9 still places the primary responsibility for the determination of prevailing wages upon the public bodies constructing public works. If, however, a public body fails to ascertain the prevailing rates, then the rate for the county established by the Department must be used. (Public Act 83-201, effective January 1, 1984.) A further amendment to section 4 provided that if the Department revises hourly rates, that those rates shall apply to

contracts of public bodies. (Public Act 86-799, effective January 1, 1990.)

Based upon the history of the Act, it is clear that the Department had no involvement in ascertaining wage classifications or prevailing rates under the original version thereof. Although the Department has subsequently been given the authority to determine prevailing rates in the event that local public bodies fail to carry out their duties in this regard, public bodies retain the primary responsibility to do so in law, if not in practice. The structure of the Act suggests that the Department's procedures with respect to making wage classification and rate determinations are to be essentially the same as those of the public bodies that are subject to the Act. Those procedures provide for conducting an investigation and for objection and review after the filing of classifications and rates, but not for formalized rulemaking prior to filing.

The Illinois Administrative Procedure Act (5 ILCS 100/1-1 et seq. (West 1996)) (hereinafter referred to as "IAPA") does not grant agencies general rulemaking authority. Section 5-10 of the IAPA (5 ILCS 100/5-10 (West 1996)) requires the making of rules of procedure for hearings; section 5-15 (5 ILCS 100/5-15 (West 1996)) requires the making of rules regarding organization, information requests and rulemaking; and section 10-5 (5 ILCS

100/10-5 (West 1996)) requires the making of rules for the handling of contested cases. None of these provisions, nor any other in the IAPA, expressly authorizes any agency to promulgate substantive rules relating to the implementation or enforcement of particular statutes within their jurisdiction. Rather, the IAPA merely provides the procedure for making rules which are otherwise authorized by law.

It has been suggested that the authority to promulgate rules relating to the Department's duty to investigate and determine prevailing rates and wage classifications may be implied from the provisions of the IAPA, even in the absence of express statutory authority to do so. In support of this suggestion, citation has been made to subsection 5-10(c) of the IAPA (5 ILCS 100/5-10(c) (West 1996)), which provides, in part:

" * * *

> (c) No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act. No agency, however, shall assert the invalidity of a rule that it has adopted under this Act when an opposing party has relied upon the rule.

* * * "

Section 1-70 of the Act (5 ILCS 100/1-70 (West 1996)) defines the term "rule" as follows:

> "'Rule' means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda, (iv) the prescription of standardized forms, or (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act."

Based upon these provisions, it has been held that an agency's announcement of a policy change by any means other than in accordance with the IAPA is invalid. (Senn Park Nursing Center v. Miller (1984), 104 Ill. 2d 169.) It is argued, therefore, that if the Department makes statements of general applicability that implement, apply, interpret or prescribe law or policy regarding its conduct of investigations to determine prevailing rates and wage classifications, without following the procedures prescribed by the IAPA, those statements are not valid. Consequently, rulemaking authority must be implied in order to effectuate the Department's duty to determine rates and classifications.

Generally, when there is no express statutory authority for rulemaking within an Act, none exists by implication. (Aurora East Public School District v. Cronin (1982), 92 Ill. 2d

313, 326.) It has also been stated, however, that although an administrative agency possesses no inherent or common law power, it may exercise not only those powers conferred by express provision of law but also those that are found, by fair implication or intendment, to be incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which the agency was created. (In re Estate of Hoheiser (1981), 97 Ill. App. 3d 1077.) Therefore, because an agency has implied power to do that which is necessary to carry out its objectives, if it were not reasonably possible for the Department to implement the Prevailing Wage Act without making rules relating to procedures for conducting investigations to determine prevailing rates and wage classifications, the authority to promulgate such rules might be implied from the requirements of either the Prevailing Wage Act or the IAPA. In my opinion, however, such an implication is not necessary.

It appears that the Department has been implementing sections 4 and 9 of the Prevailing Wage Act for over 40 years without establishing rules relating to the investigation of prevailing rates and wage classifications. Such an investigation is inherently a fact finding exercise. While it may be possible or convenient to establish a standard approach for conducting

fact finding investigations, it cannot be said that the promulgation of administrative rules is necessary to effectuate their duties. An agency need not promulgate rules before it can adjudicate facts to implement its statutory mandate. (Riverboat Development Corporation v. Illinois Gaming Board (1994), 268 Ill. App. 3d 257, 260.) Adjudicated cases are a proper alternative method of announcing agency policies, when an administrative agency interprets statutory language as it applies to a particular set of facts. (Sparks & Wiewel Construction v. Martin (1993), 250 Ill. App. 3d 955, 968.) Sections 4 and 9 of the Act provide for an investigative fact finding procedure, the filing of prevailing rates and wage classifications, objections to those rates and classifications and a contested hearing process to test the correctness of the facts as determined by the Department. This procedure provides a means for the Department to announce, defend and, if necessary, adjust its policies with respect to determining prevailing rates and wage classifications in a way similar to that approved in the cases cited above. The procedure is essentially the same as that which must be followed by local public bodies who have the initial statutory responsibility for making wage classification and prevailing rate determinations.

Therefore, because neither the Prevailing Wage Act nor the Administrative Procedure Act authorizes the Department of

Labor, either expressly or by implication, to promulgate rules relating to the determination of wage classifications and prevailing rates, it is my opinion that the Department lacks general rulemaking power with respect to these matters.

Sincerely,

James E. Ryan

JAMES E. RYAN
ATTORNEY GENERAL