

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SIMPLEXGRINNELL, L.P.,	)	
	)	
Plaintiff,	)	C.A. No. 7428-VCP
v.	)	
	)	
DELAWARE DEPARTMENT	)	
OF LABOR and SECRETARY OF	)	
LABOR JOHN McMAHON,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: July 6, 2012
Decided: October 31, 2012

G. Kevin Fasic, Esq., COOCH & TAYLOR, P.A., Wilmington, Delaware; W. Gregory Mott, Esq., OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Washington, D.C.; *Attorneys for Plaintiff.*

Ralph K. Durstein, III, Esq., Kevin R. Slattery, Esq., Laura L. Gerard, Esq., Joseph C. Handlon, Esq., STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware; *Attorneys for Defendants.*

PARSONS, Vice Chancellor.

The plaintiff in this case, an employer, seeks a declaration that the law does not require it to pay its employees the Delaware Department of Labor's prevailing wage rates and that the Department cannot compel the employer to pay those wage rates retroactively. Eight years ago, the Department informed the employer that it was not required to pay its employees prevailing wage rates. The Department recently reversed field and determined that the law requires the employer to pay certain of its employees the prevailing wage rates, which are almost double what the employer currently pays its employees. The Department of Labor now demands that the employer pay those employees the difference between the prevailing rates and the rates the employees actually were paid for work completed over the last two years. Rather than appeal this determination to the Secretary of the Department of Labor, the employer brought its dispute before this Court seeking declaratory and injunctive relief from the Department's determination. The Department and the Secretary moved to dismiss the employer's claim on the ground that the employer failed to exhaust its administrative remedies. After considering the parties' arguments and Delaware law governing exhaustion of administrative remedies, I conclude that this case is not properly before the Court because the employer first must exhaust its administrative remedies.

I. BACKGROUND

A. Parties

Plaintiff, SimplexGrinnell, L.P. ("SimplexGrinnell" or the "Company"), is a Delaware limited partnership that supplies commercial alarm and detection systems in

Delaware to private commercial customers and federal, state, and local government customers.

Defendants are the Delaware Department of Labor (the “Department”) and its Secretary, John McMahon (the “Secretary,” and collectively with the Department, “Defendants”). SimplexGrinnell sued the Secretary solely in his official capacity as the person who administers and enforces the Delaware Prevailing Wage Law (the “Act”).¹

B. Facts

Under the Act, the Department’s Division of Industrial Affairs is tasked with establishing prevailing wages for laborers and mechanics who will work on certain public works projects.² The Act provides Defendants with the narrow authority to regulate minimum prevailing wage rates for “various classes of laborers and mechanics.”³ Under the Prevailing Wage Regulations (the “Regulations”) promulgated by the Department,⁴ “electrician” is one of twenty-six listed classifications of laborers and mechanics. The Department recognizes Local Union No. 313 I.B.E.W.’s wage rates as “prevailing” for building construction electricians in Kent and New Castle Counties.

¹ 29 *Del. C.* §§ 6960–6970.

² *Id.* § 6960(a). Defendants’ authority is further limited to regulating wages for laborers and mechanics who perform laborer or mechanic work on the site of certain public works projects that fall above a monetary threshold that is fixed, and periodically amended, by the General Assembly. *Id.*

³ *Id.*

⁴ 19 *Del. Admin. C.* § 1322.

SimplexGrinnell regularly bids, contracts, and performs work for both private commercial customers and federal, state, and local public customers. Its workers, who hold the title of “technician,” make final connections to, upload proprietary software programming to, and verify and validate the operability and functionality of SimplexGrinnell-supplied alarm and detection systems in new public buildings. SimplexGrinnell is neither a licensed electrical contractor in Delaware, nor a signatory to the Local Union No. 313 I.B.E.W. labor agreement. Its technicians do not mount or hard-wire the SimplexGrinnell-supplied alarm and detection equipment. Likewise, the licensed electrical contractors that do mount and hard-wire the systems customarily do not perform the work, described above, that SimplexGrinnell’s technicians perform. SimplexGrinnell pays its technicians privately negotiated market rates that vary by technician. These rates range from \$22 to \$27 per hour.

The Department asserts that SimplexGrinnell has misclassified certain of its workers. Notwithstanding their title of “technician,” the Department has determined that certain of SimplexGrinnell’s technicians are in fact “electricians” as that class of worker is defined in the Regulations. The Department requires employers to pay building construction electricians in Kent and New Castle Counties an hourly rate of \$59.10 for taxpayer-funded projects or \$58.70 for federally funded projects.

In 2003, Defendants investigated SimplexGrinnell for a possible violation of the Act for failure to pay the applicable prevailing wage rate, failure to keep daily logs, and failure to post prevailing wage rates. The investigation terminated with a finding that SimplexGrinnell was not violating the Act. Eight years later, in November 2011,

Defendants reached a tentative conclusion that SimplexGrinnell should have used prevailing wages on a project that was completed in May 2011. In early 2012, SimplexGrinnell received three “final determinations” from Defendants, one dated March 12, 2012 and two dated March 30, 2012, stating that the Company had failed to pay certain employees correct prevailing wage rates for work performed from December 2010 through December 2011. The final determinations demanded that SimplexGrinnell either remedy the deficiency by paying the employees the difference between the wages paid and the wages that the Department determined should have been paid or appeal to the Secretary of Labor within fifteen days. On March 27, the Company faxed a notice of appeal to the Department regarding the March 12, 2012 final determination. On April 5, 2012, SimplexGrinnell received an additional citation for violating the Act which stated that Defendants would conduct a complete investigation for a final determination.

C. Procedural History

On April 16, 2012, SimplexGrinnell filed its complaint in this Court seeking declaratory and injunctive relief (the “Complaint”). Defendants moved to dismiss the Complaint on May 10. Plaintiff moved for a temporary restraining order on July 2. I heard oral argument on those two motions on July 6, and I denied the motion for a temporary restraining order on July 12. This Memorandum Opinion constitutes my ruling on Defendants’ motion to dismiss.

D. Parties’ Contentions

SimplexGrinnell seeks a declaratory judgment (1) that it did not violate the Act and cannot be compelled to pay prevailing wages for projects bid between 2007 and

2011, and (2) that the Act does not apply to its technicians unless and until the General Assembly amends the Prevailing Wage Law to include its technicians' work scope. The Company contends that Defendants should be equitably estopped, based on their previous conclusion that SimplexGrinnell did not violate the Act, from citing it now for violating the law and assessing it with retrospective liability for certain recently completed projects. The Company also seeks relief under 42 U.S.C. § 1983 for Defendants' alleged infringements of its constitutional rights under color of state law.

Defendants argue that SimplexGrinnell's claim should be dismissed. First, they assert that Plaintiff failed to avail itself of an appeal to the Secretary and, therefore, is barred by the exhaustion doctrine from proceeding here. Defendants further contend that this Court lacks subject matter jurisdiction because this action essentially is an appeal of the Department of Labor's determination, which is reviewable only by writ of certiorari to the Superior Court. Lastly, Defendants assert that, based on the doctrine of sovereign immunity, 42 U.S.C. § 1983 does not permit claims against the Department, a state agency, or the Secretary for anything other than injunctive relief. SimplexGrinnell responds that this action falls within at least three exceptions to the exhaustion doctrine, that subject matter jurisdiction in this Court exists because Plaintiff lacks an adequate remedy at law, and that sovereign immunity does not bar its § 1983 claim.

II. ANALYSIS

A. Subject Matter Jurisdiction

Defendants' first two arguments effectively challenge this Court's subject matter jurisdiction over SimplexGrinnell's claims. Generally, the Court will grant a motion to

dismiss only where the Court finds that under no set of facts would the plaintiff be entitled to relief.⁵ The Court will grant a motion to dismiss under Court of Chancery Rule 12(b)(1) if it appears from the record that the Court lacks subject matter jurisdiction over the claim.⁶ The Court of Chancery can acquire subject matter jurisdiction over a case in three ways: (1) the invocation of an equitable right; (2) a request for an equitable remedy when there is no adequate remedy at law; or (3) a statutory delegation of subject matter jurisdiction.⁷ The party seeking a court's intervention bears the burden of establishing the court's subject matter jurisdiction, and the court may consider evidence outside the pleadings in resolving that issue.⁸ Further, "[i]n deciding whether or not equitable jurisdiction exists, the Court must look beyond the remedies nominally being sought, and focus upon the allegations of the complaint in light of what the plaintiff really seeks to gain by bringing his or her claim."⁹ In other words, the court must address the

⁵ *E. Shore Envtl., Inc. v. Kent Cty. Dep't of Planning*, 2002 WL 244690, at *3 (Del. Ch. Feb. 1, 2002).

⁶ *Id.*

⁷ *ASDC Hldgs., LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust*, 2011 WL 4552508, at *4 (Del. Ch. Sept. 14, 2011).

⁸ *Yancey v. Nat'l Trust Co.*, 1993 WL 155492, at *6 (Del. Ch. May 7, 1993).

⁹ *Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

nature of the wrong alleged and the available remedy to determine whether a legal, as opposed to an equitable, remedy is available and sufficiently adequate.¹⁰

Defendants maintain that SimplexGrinnell had an adequate remedy at law because it had the right to appeal the disputed final determinations to the Secretary. Therefore, according to Defendants, the Company may not properly invoke this Court's limited subject matter jurisdiction. Defendants further emphasize that the Delaware Administrative Procedures Act ("APA")¹¹ does not provide a right of appeal for Department of Labor decisions. Rather, the only mechanism for appealing a Department decision is by seeking an extraordinary or prerogative writ from the Superior Court.¹² Based on this procedural structure, Defendants argue that this Court should not permit SimplexGrinnell to seek appellate review of a Department decision because the APA makes no provision for such review.¹³

¹⁰ *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001).

¹¹ 29 Del. C. ch. 101.

¹² *Mumford & Miller Concrete, Inc. v. Del. Dep't of Labor*, 2011 WL 2083940, at *2 & n.3 (Del. Super. Apr. 19, 2011) (noting that the Superior Court has no authority to review the Secretary of Labor's decision under the APA and reviewing the case on a writ of certiorari); *Family Court v. Dep't of Labor & Indus. Relations*, 320 A.2d 777, 779–80 (Del. Ch. May 2, 1974) (recognizing the Superior Court's authority to issue a writ of prohibition to administrative bodies and evaluating the sufficiency of this and other writs as a legal remedy).

¹³ The APA lists the agencies for which a right of appeal to the Superior Court exists. The Department of Labor is not on this list. Therefore, decisions by the Secretary of Labor are final and unappealable. See *Mumford & Miller Concrete, Inc.*, 2011 WL 2083940, at *2 n.3.

Plaintiff contends, however, that the Delaware Supreme Court, in *Plumbers & Pipefitters Local 74 v. Department of Labor*,¹⁴ recognized that the Court of Chancery may have jurisdiction to review Department rulings and its adoption of regulations in certain circumstances.¹⁵ In *Plumbers & Pipefitters*, certain labor organizations and individuals had sought review in the Superior Court of regulations promulgated by the Delaware Department of Labor. The Superior Court dismissed their administrative appeal for lack of jurisdiction. The parties then appealed to the Supreme Court. The appellants argued that, although the APA did not designate the Department of Labor as an agency whose rulings are subject to review in the Superior Court, the law pre-dating the APA recognized a right of review of Department of Labor rulings. They further argued that, in any event, the Superior Court should exercise its appellate jurisdiction on constitutional grounds “to prevent the exercise of unfettered discretion by an administrative agency.”¹⁶ The Supreme Court rejected these arguments and affirmed the Superior Court’s decision that it lacked jurisdiction to hear an administrative appeal from Department of Labor rulings. In doing so, the Supreme Court held that, absent an expressly conferred right of review, the Superior Court is not free to exercise its appellate jurisdiction.¹⁷ It went on to recognize that a party may invoke the jurisdiction of the

¹⁴ 620 A.2d 858, 1992 WL 404285, at *1 (Del. Dec. 18, 1992) (ORDER).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Court of Chancery where no remedy exists at law “to prevent abuse of the administrative process.”¹⁸ Thus, the Supreme Court’s Order in *Plumbers & Pipefitters* does not itself provide Plaintiff a basis for invoking this Court’s jurisdiction to hear a dispute over a Department ruling. Rather, it reiterates one way in which this Court’s subject matter jurisdiction properly might be invoked: a request for equitable relief when no adequate remedy at law exists.¹⁹

This Court, therefore, would have subject matter jurisdiction over this dispute if no adequate remedy at law exists. The question of whether an adequate remedy at law exists, however, closely relates to the parties’ arguments on whether SimplexGrinnell had administrative remedies and whether it should have exhausted its administrative remedies before bringing its dispute before this Court. I begin, therefore, by considering the doctrine of exhaustion of administrative remedies and its applicability to this dispute.

B. Exhaustion of Administrative Remedies

Under the exhaustion doctrine, “where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will either

¹⁸ *Id.*

¹⁹ See *ASDC Hldgs., LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust*, 2011 WL 4552508, at *4 (Del. Ch. Sept. 14, 2011) (citing *Christiana Town Ctr., LLC v. New Castle Cty.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003)).

review any action by the agency or provide an independent remedy.”²⁰ The rule favoring exhaustion of administrative remedies is “[c]losely related to the ripeness doctrine” in that it “seeks to relieve courts from having to interfere with an administrative body’s ‘sifting process’ when issues have yet to run their course and when an administrative body might resolve the dispute without unnecessary or premature judicial action.”²¹ It is not, however, “a jurisdictional or an absolute requirement[, but] a judicially created doctrine, which courts exercise discretionally.”²² Accordingly, a motion to dismiss for failure to exhaust administrative remedies does not necessarily speak to whether the court possesses subject matter jurisdiction so much as whether, out of concern for the conservation of judicial resources, “it should exercise that jurisdiction under the circumstances presented.”²³

While Delaware has “a strong presumption in favor of requiring exhaustion,” the Supreme Court has noted several exceptions to its application: (1) where administrative review would be futile; (2) where there is a need for prompt decision in the public interest; (3) where the issues do not involve administrative expertise or discretion and

²⁰ *E. Shore Envtl., Inc. v. Kent Cty. Dep’t of Planning*, 2002 WL 244690, at *5 (Del. Ch. Feb. 1, 2002) (quoting *Levinson v. Del. Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1187 (Del. 1992)).

²¹ *Salem Church (Del.) Assocs. v. New Castle Cty.*, 2006 WL 4782453, at *4 (Del. Ch. Oct. 6, 2006).

²² *Id.*

²³ *Id.* at *4 n.36.

only a question of law is involved; and (4) where irreparable harm would otherwise result from denial of immediate judicial relief.²⁴

1. Does the administrative review process apply to this dispute?

Notwithstanding the presumption in favor of requiring a plaintiff to exhaust its administrative remedies, SimplexGrinnell argues that the administrative remedies Defendants would have it seek do not apply to this case. The purported administrative remedy appears in Section 7 of the Regulations. Section 7 states that a decision shall be reviewable by the Secretary if “the dispute between the Department and the employer pertains to the classification of workers as determined by the Office of Labor Law Enforcement” (“Section 7 Review”).²⁵ SimplexGrinnell does not dispute that it received final determinations from the Office of Labor Law Enforcement stating that the Company erred in not classifying its technicians as “electricians.” Neither does the Company dispute that the determinations invite SimplexGrinnell to appeal the Office’s decision to the Secretary. SimplexGrinnell contends, however, that the Department of Labor did not adopt this appeal process to address the situation that SimplexGrinnell asserts exists in this case, *i.e.*, where a company disputes the threshold question of whether the Act

²⁴ *Levinson*, 616 A.2d at 1189–90 (quoting *Brunetti v. Borough of New Milford*, 350 A.2d 19, 25–26 (N.J. 1975)).

²⁵ 19 *Del. Admin. C.* § 1322-7.1.2.4.

applies to its workers.²⁶ The Company emphasizes that the review contemplated by the Regulations applies only to “classification dispute[s].”²⁷

According to SimplexGrinnell, Defendants have mischaracterized their challenge as a classification dispute. SimplexGrinnell maintains that a classification dispute would exist where the Department disputes which of two worker classifications apply to an employer’s workers. Where, as here, the Department has determined for the first time that an employer’s workers are covered by the Act, the Company denies that that represents a classification dispute, and instead calls it a “threshold jurisdictional” challenge.²⁸ SimplexGrinnell argues that the Department’s 2003 determination that the Company’s workers were not covered by the Act strengthens its position because, since 2003, there have been no changes to the Act, the Regulations, or the work performed by SimplexGrinnell’s technicians.

In further support of its argument, SimplexGrinnell notes that Defendants’ final determination letters erroneously state that the determinations were based on SimplexGrinnell’s “daily logs.” The Company asserts that it had no daily logs. Since receiving Defendants’ 2003 letter stating that the Company was in compliance with the

²⁶ Pl.’s Answering Br. in Opp’n to Defs.’ Mot. to Dismiss (“Pl.’s Ans. Br.”) 7–9 (discussing the history surrounding the adoption of the Section 7 Review process).

²⁷ *Id.* at 8–9 (discussing 19 *Del. Admin. C.* § 1322-7.1.2.4 which states that a Department determination shall be reviewable by the Secretary “[i]f the dispute between the Department and the employer pertains to the classification of workers as determined by the Office of Labor Law Enforcement”).

²⁸ See Compl. ¶ 50.

Act, SimplexGrinnell has considered its work to be outside the scope of the Act and, therefore, it has not prepared the daily logs contemplated by the Act's state reporting and disclosure scheme. Additionally, SimplexGrinnell emphasizes that Defendants' deficiency letter explicitly instructed the recipient to appeal "*if* the dispute pertains to the classification of workers."²⁹ SimplexGrinnell reads this language as demonstrating that Defendants themselves were uncertain about whether Section 7 Review applies to the Company's situation.

Neither of SimplexGrinnell's latter two points regarding the language of the letters is persuasive. Although the quoted language may indicate that Defendants did not tailor their letters specifically to SimplexGrinnell, it does not support a reasonable inference that this dispute does not "pertain to the classification of workers" under Section 7. SimplexGrinnell's first point that this is not a classification dispute, but rather a threshold jurisdictional challenge, amounts to a distinction without a difference. Nothing in the language of the Act or the Regulations supports SimplexGrinnell's argument that the Department's determinations in 2011 and 2012 regarding the proper treatment of the Company's technicians is something other than a classification dispute. The language does not distinguish between a determination in the first instance that an employer's workers fall within a specific classification and a determination that an employer's workers fall within one and not another category. The Act and Regulations also do not prescribe a different course of action for the Department, or an employer, to follow where

²⁹ Pl.'s Ans. Br. 10.

an employer believes that the nature of its employees' work does not fall within any of the classifications for laborers and mechanics under the Act. Lastly, SimplexGrinnell cites no authority for the proposition that a challenge like the one it makes regarding the proper treatment under the Act of its technicians falls outside the scope of Section 7 Review. I conclude, therefore, that disputes over whether a company's employees come within any classification subject to the Act and over which of two or more of the Act's various classifications applies to a company's employees both "pertain[] to the classification of workers" within the meaning of the Regulations.³⁰

2. Would administrative review be futile?

SimplexGrinnell further argues that it has no clear-cut remedy through the administrative process and that exhausting its administrative remedies therefore would be futile. Under the Regulations, a classification dispute "shall be reviewable by the Secretary or his/her designee and shall be reversed only upon a finding of abuse of discretion."³¹ The procedure under which the Secretary will review a classification dispute is unclear. The Regulations appear to rule out the possibility of a hearing for an employee classification dispute. They state: "A hearing shall be held only in cases involving the termination of rights to proceed with the work under the public construction

³⁰ 19 *Del. Admin. C.* § 1322-7.1.2.4.

³¹ *Id.*

contract.”³² In at least one case involving an employee classification dispute, however, the Secretary did hold a hearing.³³

This uncertainty as to the availability of a hearing is not critical to the disposition of this case. SimplexGrinnell presents no authority, and the Court is aware of none, to support the position that pursuing administrative review would be futile absent a hearing. Even if SimplexGrinnell had no explicit right to a hearing, the record before the Court suggests that the Company might have received one. In any event, SimplexGrinnell’s conclusory assertion that pursuing administrative remedies would be futile, without supporting facts, is unpersuasive. Therefore, I conclude that Plaintiff has not shown that pursuing an appeal to the Secretary would have been futile.

3. Do exigent circumstances excuse exhaustion of administrative remedies?

Similarly, SimplexGrinnell presents no facts to support its assertion that exigent circumstances excuse exhaustion of administrative remedies in this case. The Company’s sole allegation in this regard is that, without relief, it is between Scylla and Charybdis faced with choosing to pay its employees the substantially higher prevailing wage or to follow its current pay practice and risk prosecution and trebled damages. SimplexGrinnell contends that this uncertainty over how to proceed constitutes exigent circumstances sufficient to excuse its failure to pursue Section 7 Review.

³² *Id.* § 1322-7.1.3.

³³ *See Mumford & Miller Concrete, Inc. v. Del. Dep’t of Labor*, 2011 WL 2083940 (Del. Super. Apr. 19, 2011).

SimplexGrinnell's desire for a swift resolution, however, does not justify leapfrogging administrative review to obtain a decision from this Court. To the contrary, it would negate the policy underlying the exhaustion doctrine if SimplexGrinnell's desire for certainty, without more, were sufficient to excuse exhausting administrative remedies in the name of exigent circumstances. One basis for requiring exhaustion of administrative remedies is to avoid the additional burden on courts that results from aggrieved parties resorting to them in the first instance.³⁴ Downplaying the burden on the Court and the value of affording the Court the benefit of the Secretary of Labor's relatively expert view, SimplexGrinnell seeks instead to lessen the burden on itself by requesting a final adjudication by this Court in the first instance.³⁵ Because I consider Plaintiff's request to be contrary to Delaware law, which endeavors to maintain the proper relationship between the courts and administrative agencies, I reject the Company's contention that exigent circumstances exist here that excuse its failure to exhaust its administrative remedies.³⁶

³⁴ *Levinson v. Del. Comp. Rating Bureau, Inc.*, 616 A.2d 1182, 1187 (Del. 1992).

³⁵ *See id.* at 1191 (noting in the context of insurance rate-making that "[t]he Commissioner and his staff, have extensive experience in the regulation of the business of insurance, are intimately familiar with the operation of insurance companies and possess the type of expertise that is essential to an evaluation of proposed rates"); *see also Christiana Town Ctr., LLC v. New Castle Ctr.*, 2003 WL 21314499, at *4 (Del. Ch. June 6, 2003) ("The purpose of the exhaustion-of-remedies requirement is to prevent judicial interference in the administrative process and to allow the administrative agency to apply its expertise and discretion, and possibly resolve the conflict without judicial intervention.").

³⁶ *See Levinson*, 616 A.2d at 1187.

C. Is the Administrative Remedy an Adequate Remedy at Law?

Plaintiff also argues that, even if it were not excused from pursuing administrative remedies because of inapplicability, futility, or exigent circumstances, the administrative remedy afforded to SimplexGrinnell is “plainly deficient” and does not constitute an adequate remedy at law.³⁷ Accordingly, SimplexGrinnell asserts that the Act does not bar judicial review by the Court of Chancery even at this pre-enforcement stage.

For an adequate remedy at law to exist, the remedy “must be as complete, practical, and efficient to the ends of justice and to its prompt administration as the equitable remedy.”³⁸ SimplexGrinnell avers that the administrative remedy available to it, *i.e.*, Section 7 Review, does not meet this standard because it is legally inadequate and ineffective. Specifically, Plaintiff asserts that Defendants have a track record of taking in excess of one year to process run-of-the-mill job classification disputes.³⁹ But SimplexGrinnell cites only one case in support of this statement, namely, the Superior Court’s decision in *Mumford & Miller Concrete, Inc. v. Delaware Department of Labor*.⁴⁰ There, the company involved reportedly invoked Section 7 Review in January 2009 and received a ruling in February 2010.⁴¹ This one instance, however, does not

³⁷ Pl.’s Ans. Br. 12.

³⁸ *Theis v. Bd. of Educ.*, 2000 WL 341061, at *2 (Del. Ch. Mar. 17, 2000).

³⁹ Pl.’s Ans. Br. 15.

⁴⁰ 2011 WL 2083940 (Del. Super. Apr. 19, 2011).

⁴¹ Pl.’s Ans. Br. 15.

create a “track record” of protracted or sluggish proceedings. Furthermore, SimplexGrinnell has adduced no evidence that Mumford & Miller requested expedited proceedings or otherwise attempted to proceed expeditiously in that action.

I note additionally that Defendants’ 2003 investigation of SimplexGrinnell apparently moved at a rapid pace. In June 2003, Defendants notified SimplexGrinnell that it may be in violation of the Act and requested information. The Company presumably provided that information because, within twenty-five days of the due date for producing it, SimplexGrinnell received a responsive letter from the Department stating that the Company was in compliance with the Act. Admittedly, the 2012 letters were different in kind than the 2003 letter. The 2012 letters alleged specific violations. They provided the names of employees to whom Defendants determined SimplexGrinnell should have paid prevailing wages and they demanded that the Company send the Department checks made payable to the employees for the deficiency amounts. Nevertheless, the Department’s track record with SimplexGrinnell provides no basis for presuming that seeking review by the Secretary would be unduly time-consuming.

Moreover, SimplexGrinnell’s decision to bypass the administrative review process deprives the Court of information on which it could base a determination that such process is inadequate. As the Delaware Superior Court stated:

Proper use of administrative remedies provides not only an opportunity for the grievant to be heard, but also for the Court to attain a greater understanding of the particular administrative process and its adequacy or inadequacy. When this process is circumvented, the reviewing court is left with a hole in the record that both sides attempt to fill with

speculation—a matter that leaves courts suspicious at least, uncomfortable at best.⁴²

SimplexGrinnell initially responded to Defendants’ March 12, 2012 final determination by noticing an appeal on March 27, 2012. In its notice of appeal, SimplexGrinnell demanded an evidentiary hearing in the month of April 2012. Although it had not yet received a response from the Department, on April 16, 2012 SimplexGrinnell filed its Complaint in this action. The Company provides two reasons for why it did not await a response from Defendants before filing the Complaint: first, it did not learn until after its March 27 appeal that Defendants’ rules bar them from conducting a hearing and, second, Defendants have no recognized or APA-sanctioned internal appeals process for handling what SimplexGrinnell characterizes as a threshold jurisdictional issue. Additionally, SimplexGrinnell notes that, as of the time it filed its Complaint, Defendants had not formally or informally acknowledged the Company’s appeal, leading the Company to suspect systemic deficiencies in the Department’s review process.⁴³

SimplexGrinnell asserts that the Regulations do not permit the Secretary to hold a hearing on a job classification dispute because Section 7.1.3 states, “A hearing shall be held *only* in cases involving the termination of rights to proceed with work under a public construction contract.”⁴⁴ Defendants contend that a reasonable interpretation of Section

⁴² *State, Dep’t of Corr. v. Potter*, 2011 WL 5966720, at *2 (Del. Super. Nov. 29, 2011).

⁴³ Pl.’s Ans. Br. 14.

⁴⁴ *Id.* (quoting 19 Del. Admin. C. § 1322-7.1.3 (emphasis added))

7.1.3 is that it *requires* a hearing only when termination of contract rights is at issue and does not prohibit hearings as an option in other instances.⁴⁵ Defendants further contend that SimplexGrinnell was on notice of their interpretation because the Secretary provided a hearing in the *Mumford & Miller* case that was decided on April 19, 2011.⁴⁶ For the reasons discussed in this Part II.C, I find that SimplexGrinnell's arguments should be raised to the Secretary in the first instance. Furthermore, the lack of a hearing alone does not render the agency's review process inadequate.⁴⁷ SimplexGrinnell's attack on Defendants' internal appeal process may have had some force if it had allowed that review process to unfold and this Court to determine for itself whether the process constitutes an adequate remedy at law. On this record, however, there is no basis for concluding that the administrative remedy Defendants offer is inadequate.⁴⁸

⁴⁵ Defs.' Reply Br. in Supp. of Their Mot. to Dismiss 12.

⁴⁶ *Id.*; see also *Mumford & Miller Concrete, Inc. v. Del. Dep't of Labor*, 2011 WL 2083940, at *2 (Del. Super. Apr. 19, 2011) ("Secretary McMahon held a hearing and then issued a written decision affirming Officer Nelson's classification of Mumford & Miller's employees as 'painters' and not as 'laborers.'").

⁴⁷ *Cf. W.L. Gore & Assocs., Inc. v. Wu*, 2006 WL 905346, at *4 (Del. Ch. Mar. 30, 2006) (recognizing in a civil dispute not involving government actors, and assuming the case implicated the Fourteenth Amendment, that "[i]n some cases due process does not require an evidentiary hearing"). The absence of a hearing in the circumstances of this dispute conceivably might support a future determination that Defendants violated SimplexGrinnell's rights by finally depriving it of a property interest without due process of law. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). This question, however, is not currently before the Court.

⁴⁸ See *E. Shore Envtl., Inc. v. Kent Cty. Dep't of Planning*, 2002 WL 244690, at *5 (Del. Ch. Feb. 1, 2002) ("[E]quity may intervene in the administrative process, but

Additionally, Plaintiff has made no showing that, if it is dissatisfied with the Secretary's ruling, an extraordinary writ, such as a writ of certiorari, from the Superior Court would not be an adequate remedy at law.⁴⁹

In sum, SimplexGrinnell had an administrative remedy. No exception to the presumption in favor of requiring exhaustion of administrative remedies applies here to excuse SimplexGrinnell's failure to pursue an appeal to the Secretary. Moreover, this Court will not consider Plaintiff's constitutional challenge under 42 U.S.C. § 1983 until Defendants have been "given an opportunity to 'arrive[] at a final, definitive position regarding how [they] will apply the regulations at issue.'"⁵⁰

D. Equitable Estoppel

Although I conclude that this case is not properly before this Court because SimplexGrinnell must exhaust its administrative remedies, I address separately SimplexGrinnell's contention that the nature of its claim effectively precludes this Court from requiring exhaustion. SimplexGrinnell argues that "[t]he compelling equities

'only when strict conformity with that process fails to do justice, and therefore, there is no adequate remedy at law.'").

⁴⁹ See *Mumford & Miller Concrete, Inc.*, 2011 WL 2083940, at *2–3 & n.3 (accepting a writ of certiorari to review a Department of Labor worker classification determination that was appealed to and affirmed by the Secretary of Labor).

⁵⁰ *Acierno v. Mitchell*, 6 F.3d 970, 974 (3d Cir. 1993); see also *E. Shore Envtl., Inc.*, 2002 WL 244690, at *7 ("Having elected to truncate the administrative appeal process that, when concluded, would establish th[e] precondition for constitutional ripeness [that the local government authority arrive at a final, definitive position], Eastern Shore cannot presently contend that it has a ripe claim that the County has acted in an unconstitutional manner.").

presented in the instant case support the Court’s refraining from requiring exhaustion (even if applicable), and exercising its discretion to entertain the case.”⁵¹ Specifically, SimplexGrinnell asserts that the equities compel this Court to hear its claim because the Department informed the Company in a 2003 letter that the Company was not required to pay its technicians prevailing wages. Based on this letter, the Company continually has bid, contracted, and performed work with the “settled expectation” that its technicians’ work is not subject to the Act or the Regulations.⁵² SimplexGrinnell alleges that it was entitled to, and did, rely on the 2003 letter in paying its technicians at a substantially lower rate than the prevailing wage rate that the Department now has determined it must pay such employees. In that regard, it appears to be undisputed that the Act, the Regulations, and the work performed by SimplexGrinnell’s technicians have remained unchanged since 2003. Still, Defendants contend that the Secretary of Labor, not this Court, is the appropriate body to hear Plaintiff’s arguments as to why the Department’s final determinations were improper.

Neither Defendants nor SimplexGrinnell directly addressed in their briefing whether this Court may hear a claim based on equitable estoppel without the plaintiff first having to exhaust administrative remedies. In its independent review, the Court located one case which held that an equitable estoppel claim did not require exhaustion of administrative remedies. In *Eastern Shore Environmental, Inc. v. Kent County*

⁵¹ Pl.’s Ans. Br. 6.

⁵² Compl. ¶ 79.

Department of Planning,⁵³ the Court so held because it found that the claim asserted in that case, which was based on equitable estoppel grounds, fell outside the scope of an administrative body's authority and expertise.⁵⁴ Because that case is sufficiently distinguishable from the case before me, however, I conclude that SimplexGrinnell must exhaust its administrative remedies notwithstanding the equitable basis for its claim.⁵⁵

The petitioner in *Eastern Shore* was a company that operated a dry and solid waste transfer station in Kent County. The company sought a declaratory judgment based on equitable estoppel grounds that it was entitled to operate its transfer station even though a change in zoning laws around 1980 made the operation of the facility an impermissible use under the county's zoning ordinance. Eastern Shore purchased the facility in 1999 and, throughout 1999 and 2000, county officials repeatedly had assured the company that the transfer station was "grandfathered in" under the new zoning laws and that it could continue its operations. In reliance on these assurances, Eastern Shore spent over

⁵³ *Id.* None of the parties to this action addressed the *Eastern Shore* case in their briefs.

⁵⁴ *E. Shore Env'tl., Inc.*, 2002 WL 244690, at *3 (concluding that the doctrine of exhaustion of administrative remedies did not apply because the statute empowering the administrative body to hear appeals did not empower it to hear equitable estoppel claims and because such claims did not fall within the expertise of the administrative body).

⁵⁵ *See Salem Church (Del.) Assocs. v. New Castle Cty.*, 2006 WL 4782453, at *4 n.43 (Del. Ch. Oct. 6, 2006) ("In [*Eastern Shore*], [] the Court found that exhaustion was unnecessary only where the plaintiff was not challenging the substantive correctness of an administrative body's decision.").

\$500,000 to improve its facilities.⁵⁶ Yet, in July 2000, the county informed the company that its operations were not permitted under the new zoning laws.

Under these facts, the Court denied the defendants' motion to dismiss for failure to exhaust administrative remedies. It noted that the General Assembly empowered the administrative body only to hear and decide appeals based on an "error in any order, requirement, decision or refusal made by an administrative official or agency."⁵⁷ The Court reasoned that the appeal did not fall within the scope of the agency's statutory authority because it was not based on the merits of a county decision. Rather, the company contested the county's change of position regarding what zoning was required for the facility. Because the company did not challenge the substantive correctness of the administrative body's decision, the Court concluded that the statute did not authorize the administrative body to hear the equitable claim. The Court further found that the rationale for requiring exhaustion did not apply because equitable claims, unlike claims on the merits, do not draw on an administrative body's subject area expertise.⁵⁸ Thus, the Court determined that the administrative body was no more competent than the Court to resolve an equitable estoppel claim.

In this case, SimplexGrinnell both disputes the merits of the Department's final determinations and argues that the Department should be estopped by the 2003 letter.

⁵⁶ *Id.* at *1–2.

⁵⁷ *Id.* at *5–6.

⁵⁸ *Id.* at *6.

The resolution of this case turns, in part, on whether Defendants or SimplexGrinnell is correct in its interpretation of whether SimplexGrinnell’s workers are “electricians” under the Regulations and whether the Act and Regulations therefore require the Company to pay its workers prevailing wages. Hence, the agency’s final position on these questions, through an appeal to and decision by the Secretary, is pivotal.

Other differences between the facts of this case and those in *Eastern Shore* also support waiting for a decision by the Secretary before a Court hears SimplexGrinnell’s arguments that Defendants should be bound by their 2003 letter and should not be permitted to require the Company to pay prevailing wages for work that was completed while the Company was relying on that letter. A decision by the Secretary in Plaintiff’s favor could moot these points. Furthermore, SimplexGrinnell has presented no authority to support a finding that, in the circumstances of this case, Defendants must be bound by decisions made by a previous administration.⁵⁹ In that regard, I note that the 2003 letter related to different projects than those that form the basis for the final determinations at issue here. In addition, SimplexGrinnell seeks not only to enjoin Defendants from enforcing the Act against it for the disputed projects bid between 2007 and 2011, but also for any future projects the Company might pursue. Consequently, SimplexGrinnell seeks much broader relief than the plaintiff in *Eastern Shore*. The relief SimplexGrinnell seeks would tie the hands of an administrative agency in an area of important public interest. I

⁵⁹ See Compl. ¶ 60 (noting that since the 2003 letter, “the only potentially relevant action taken by Defendants is hiring a former I.B.E.W. business agent to run the Delaware Department of Labor’s prevailing wage enforcement program”).

conclude, therefore, that the equitable basis for SimplexGrinnell's claim does not support allowing it to proceed in this Court without having to exhaust administrative remedies.

E. Defendants' Compliance with the Act

Lastly, I address SimplexGrinnell's argument that the Court should invalidate Defendants' determinations as a matter of law because Defendants failed to follow the procedures required by the Act by abandoning the Prevailing Wage Advisory Council (the "Council"). Section 6960(l) of Title 29 states:

A Prevailing Wage Advisory Council is hereby established to assist the Department in carrying out its duties under the prevailing wage law. Such advisory council *shall be appointed* by the Secretary of Labor, *shall be convened* by the Director of the Division of Industrial Affairs (who shall serve as a non-voting member) *and shall consist of* 10 representatives from construction industry organizations/associations. The members shall be appointed for a term of 3 years provided, however, that the initial members may be appointed to terms shorter than 3 years but not less than 1 year to ensure staggered term expirations. The members shall receive no compensation.⁶⁰

SimplexGrinnell alleges that the Council has not met since at least 2006. It asserts that Defendants' abandonment of the Council "shields Defendants from receiving the very considered business perspective on prevailing wage coverage matters that the General Assembly demands inform the executive branch's administration of the State's prevailing wage program."⁶¹ Accordingly, SimplexGrinnell seeks a declaratory judgment that Defendants may not hold the Company in violation of the Act unless and until the

⁶⁰ 29 Del. C. § 6960(l) (emphasis added).

⁶¹ Compl. ¶ 30.

General Assembly amends the Act to include SimplexGrinnell's technicians' work and Defendants then amend their rules after receiving the required advice of the Council.⁶²

SimplexGrinnell's argument that the General Assembly intended the Council to serve as a business advisor to Defendants has some appeal. The General Assembly established the Council and used mandatory language that requires the Secretary to appoint the Council and the Director of the Division of Industrial Affairs to convene the Council. Section 6960(*l*) states that the Council's purpose is "to assist the Department in carrying out its duties."⁶³ The Act, however, does not require the Secretary or the Director of the Division of Industrial Affairs to convene the Council at specific intervals or to use the Council in any particular manner. Defendants' alleged failure to seek or consider the advice of the Council in connection with its determination that SimplexGrinnell has violated the Act, therefore, does not provide a basis for this Court to invalidate Defendants' determinations. At most, the Company's allegations could support a finding that Defendants are not in compliance with the three-year term requirements because they have not convened the Council for six years. Such a finding might support, for example, an argument on a writ of certiorari to the Superior Court that the lower tribunal "(a) exceeded its jurisdiction, (b) committed errors of law, or (c)

⁶² Compl. ¶ 77.

⁶³ 29 *Del. C.* § 6960(*l*).

proceeded irregularly.”⁶⁴ A similar argument also might be brought to this Court if, after exhausting its administrative remedies, the record demonstrates that the Company has no adequate remedy at law and that this Court’s authority should be invoked to prevent abuse of the administrative process.⁶⁵ In any case, this aspect of SimplexGrinnell’s argument also must await the exhaustion of its administrative remedies.

III. CONCLUSION

For the foregoing reasons, I grant Defendants’ motion and dismiss Plaintiff’s Complaint without prejudice for failure to exhaust its administrative remedies.⁶⁶

IT IS SO ORDERED.

⁶⁴ See *Mumford & Miller Concrete, Inc. v. Del. Dep’t of Labor*, 2011 WL 2083940, at *3 (Del. Super. Apr. 19, 2011).

⁶⁵ See *Plumbers & Pipefitters Local 74 v. Dep’t of Labor*, 620 A.2d 858, 1992 WL 404285, at *1 (Del. Dec. 18, 1992) (ORDER) (“Where no remedy exists at law, the authority of the Court of Chancery may be invoked to prevent abuse of administrative process.”).

⁶⁶ In reaching this conclusion, I note that at oral argument Defendants stated, “this record should reflect that the Department of Labor and the Secretary of Labor, John McMahon, are prepared to offer a hearing to SimplexGrinnell within 30 days.” Tr. 67.