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STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LANSING

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Declaratory Ruling

Phil Forner has requested a Declaratory Ruling from the Michigan Department of Licensing and Regulatory Affairs pursuant to Section 63, MCL 24.263, of the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq.*, and Michigan Administrative Code, R 338.81. Specifically, Mr. Forner asked for a determination of whether the Bureau of Construction Codes could stop enforcing Rule 338.903(1) prior to undergoing the rule rescinding process of the APA.

On behalf of the Bureau, I grant Mr. Forner's request and issue the following Declaratory Ruling:

APPLICABLE STATUTE AND RULE

Section 338.975(2) of the Forbes Mechanical Contractors Act (FMCA), 1984 PA 192, limits the scope of rule promulgation authority in part as follows:

The board, in consultation with the department, may promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.315 of the Michigan Compiled Laws, to provide an examination procedure for applicants for licensure under this act.

Administrative Rule 338.903 specifically addresses examination qualifications for applicants for licensure as a mechanical contractor. Subsection 1 of this rule states:

To qualify for examination, the applicant shall furnish on the application a notarized statement or statements from present or former employers to the effect that the applicant has a minimum of 3 years of experience totaling at least 6,000 hours in performance of 1 or more of the work classifications in the act. The notarized statement shall show a detailed and specific description of the type of work performed and the length of time work was performed.

QUESTION PRESENTED

Whether the Bureau is required to enforce an invalid rule until it is rescinded?

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ANALYSIS

Prior to May 2015, the Bureau enforced Rule 338.903(1) which required mechanical contractor licensure applicants to fill out a form detailing their work experience and required employers to provide a notarized statement regarding this experience.

The Bureau underwent a Reinventing Performance Management (RPM) process and a lean improvement process review focusing on customer service improvement by eliminating and reducing burdensome rules and forms to decrease processing times. Through these initiatives, it was determined Rule 338.903 exceeded the scope of legislative authority granted in MCL 338.975 which is limited to examination procedures. The Bureau revised its form and process to align with the statutory authority.

Although MCL 24.231(1) of the APA states that rules continue in effect until amended or rescinded, MCL 24.232(7) must be applied to determine the validity of a promulgated rule. This section of the APA provides that a rule shall not exceed the rule-making delegation contained in the statute authorizing the rule-making.

Therefore, it is my ruling that Rule 338.903 is invalid and unenforceable. MCL 338.975(2) of the FMCA is clear and unambiguous and limits the scope of statutory authority to an examination procedure. This conclusion was based upon a plain language reading of both the APA and the FMCA.

This ruling is limited to the specific facts presented and to the statutes, and rule identified. This rule is binding on this Bureau and Mr. Forner unless it is altered or set aside by a court of competent jurisdiction. This Bureau may not retroactively change this ruling, but may do so prospectively in its discretion. This ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

Keith Lambert

Keith Lambert, Acting Director

August 23, 2016

Date