

**THE DENVER LABOR DIVISION OF THE
DENVER AUDITOR’S OFFICE**

In the Matter of Appeal Regarding:

Appellant:

J. WILLIAMS HOLDINGS D/B/A NEXT WAVE ROOFING

V.

Appellee:

DENVER LABOR

And

Claimant:

JAMES MEYN

**DECISION AND ORDER OF HEARING OFFICER ON CROSS MOTIONS FOR A FINAL DECISION
WITHOUT A HEARING**

THE DENVER ORDINANCE amending D.R.M.C. Chapter 58 to “provide a civil penalty for the offense of wage theft and clarifying enforcement provisions for wage violations” is new by legislative standards, and this dispute raises questions that appear (based on the briefing) not yet to have been addressed. As a result, I will begin with some preliminary observations:

The Ordinance itself demonstrates recognition by Denver of the importance of prompt payment of wages and resolution of disputes over wages owed. (Ord. No. 1614-22, § 1, Jan. 9, 2023) In a world where many wage earners live paycheck-to-paycheck, delay can be catastrophic. The Ordinance sets short timelines, and it empowers the auditor to make rules regarding complaints, investigations and appeals to effectuate the goals of the Ordinance. (Sections 58-2,

58-8) In accordance with that authorization, Rules have been promulgated that also recognize the importance of prompt determinations and payment, and, among other things, establish that the record on appeal is Denver Labor’s investigatory file, except for allowance of presentation of newly discovered evidence.¹ Allowing in additional evidence after the record is otherwise closed would tend to encourage delay, and be contrary to the guidance and spirit of the Ordinance. Thus, I reject the parallel Next Wave draws between Rule 11.3 Motions for a Final Decision without a Hearing and civil procedures Motions for Summary Judgment, because those latter motions are expected to be supported by what the proponent alleges is evidence not otherwise in the record, like the affidavits the appellant here (“Next Wave” or “the employer”) has submitted.

However, I do not accept Denver Labor’s view of Rule 11.3, either. While the burden is and remains on Next Wave to establish by a preponderance of the evidence that Denver Labor’s Wage Determination is incorrect, I see the issue under Rule 11.3 to be whether the record established by the investigatory file is such that there needs to be a hearing for me to make a final decision on the issues raised by Next Wave’s appeal. In other words, the issue is **not** “Did the petitioner establish by a preponderance of the evidence **in the investigation** that it does not owe the money Denver Labor concluded that it does?” The Rule 11.3 issue is: “Did the petitioner provide sufficient credible evidence in the investigation that a hearing is necessary to decide whether it can establish by a preponderance of the evidence that it does not owe the money Denver Labor concluded that it does, as asserted in its appeal?” Otherwise, there would never need to be a hearing – The investigatory file would resolve the question, one way or another. In that sense only, I think an analogy to summary judgment is a useful one: Just as a court denies a motion for

¹ Rules 5.1 and 5.3 of the Denver Auditor’s Office Rules of Procedure of Appeals and Hearings (“Rules”).

summary judgment if there are disputed issues of material fact, in the Rule 11.3 context, the motion should be denied if the investigatory file provides credible evidence of disputed issues of material fact that should be resolved by oral testimony, the only piece missing from a file.² That is the standard of review I follow here.

With that background, I move to what evidence I will consider.

Next Wave complains (repeatedly) that Denver Labor didn't interview its representatives or ask for affidavits. The employer, with knowledge of the Rules, could have offered a representative for interview or provided statements, sworn or not, as it chose. "During an investigation, Denver Labor *accepts and requests* information . . ." (City and County of Denver Civil Wage Theft Rules 2023, Rule 6.1, emphasis supplied). Lawyers' representations are not evidence; they are argument. (And, I'll add to both parties, neither sarcasm nor derision are even argument.) Next Wave understood the specifics of Mr. Meyn's complaint and of Denver Labor's investigation. Its attorneys' letters make that clear. That is all that due process required. The employer decided how to respond to Denver Labor's investigation, and it cannot now be heard to complain about its own decision. Indeed, Next Wave **did** provide evidence that was not requested, in support of its position -- just not the evidence that it now offers in affidavit form.³

² I don't believe that I, or any decision maker, is necessarily good at evaluating whether people are lying, but I do believe that direct questioning by counsel, and a good cross examination, can be very helpful in evaluating whether people are **accurate**. People are wrong more often than they lie, and live (including remote) testimony can be good at testing accuracy. The issue is often not whether **individuals** are "credible," but whether their narrative is.

³ Both Exhibits 3 and 4 to counsel's April 4, 2023, letter (DL0041-42) are offered in support of argument, not in response to specific Denver Labor requests. Exhibits 5-7 provide information that is relevant to what Denver Labor asked for, but aren't exactly what was requested. In response to a request for specific documentation of payments to Mr. Meyn (DL0124-125), Next Wave produced, among other things, dozens of pages of **irrelevant** contract documents for a number of projects, none of which evidenced commissions owed or paid.

Finally, as to Denver Labor’s factual findings underlying its Determination, New Wave filed a very limited appeal, really on only two issues: Was Mr. Meyn entitled to a 30% commission on closed jobs after June 2022; and was he overpaid in **total commissions**, when he received \$18,872.25 instead of \$17,179.00 by the end of November 2022? The factual question of whether any (or all) of the commissions included in the Determination were owed after January 10, 2023, is implicit in New Wave’s constitutional challenge and it is therefore also addressed below.

New Wave moves under Rule 11.3 for a decision on its constitutional claims, and opposes Denver Labor’s motion on grounds that a hearing is needed to resolve what it asserts are factual disputes. Denver Labor opposes New Wave’s constitutional claims, and believes that the existing record doesn’t warrant a hearing. Those are the issues I am deciding.

With that background, the evidentiary record before me is the investigatory file, with documentation, but **not** lawyers’ factual assertions. It is based on that evidence that I evaluate New Wave’s constitutional claims and whether a hearing is needed to determine whether Next Wave can establish “by a preponderance of the evidence that Denver Labor erred in its determination” (Rules, 5.4).

Findings of Fact

CLAIMANT JAMES MEYN was hired by New Wave Sales Director Jeff Kuhnle in April 2022. His initial job offer was for a salary of \$46,000 with a 13% commission and “4% approvals,” which the parties appear to agree implied a 17% commission on New Wave’s gross profit (DL0005), payable to the person who made the sale or, apparently in some cases, to whomever worked the job.

There are several jobs for which Mr. Meyn either initially claimed a commission (the “Marsh” job, DL0012) or remain on the Denver Labor listing of underpaid commissions (the

“Slack” job, Denver Labor Exhibit F) for which Next Wave provided evidence that Mr. Kuhnle was the salesman. However, as no claim is made by Denver Labor on the Marsh job, I need not resolve whether Next Wave needs a hearing to establish its position on that job by a preponderance of the evidence.

The Slack job is a bit more troublesome, since the only documentary evidence in the record concerning this job is that Mr. Kuhnle signed the agreement in May 2022. (DL0077) The “Slack Close Sheet” referenced in an April 20, 2023, email from Next Wave’s attorney, DL0128, doesn’t appear to have made it into the record. For this issue, I will accept counsel’s representation that the Close Sheet **would have** shown that there was no commission owed, and will omit it from my final order.⁴

Mr. Meyn’s claim is that the commission rate was raised to 30% by company owner Jamie Williams in June 2022, with a goal of increasing that to 40%. (DL0015) In its Response to Denver Labor’s Motion, Next Wave asserts (Response, p. 8) that Mr. Meyn’s description of this conversation as occurring in June 2022 (“Approximately June of this year you had spoken to me and informed me that my commission would be at 30%, and you were working towards increasing that to 40%.”) is too vague to be relied upon, and that there is no evidence as to whom Mr. Meyn alleges he spoke.⁵ This is one of the central issues in this dispute, so I’ll address those assertions in more detail.

⁴ There is, in my view, a difference between unsupported assertions of fact by a lawyer and a summary of a document which the lawyer at least intended to provide. I’d prefer to see the actual document, but since I don’t know whose fault it is that it isn’t in the file I accept the lawyer’s statement as evidence.

⁵ This last assertion is flatly incomprehensible: The “you” in the quoted language is Jamie Williams, to whom the email is addressed.

As to the first, people are not expected to remember exact dates for conversations that occurred months earlier, and “[a]pproximately June” is sufficiently precise that, if Mr. Williams wanted to deny the conversation, he had enough information to do so. However, other than broadly alleging that Mr. Meyn’s was overpaid on the jobs for which he received a 30% commission (DL0014), and based apparently **just** on the email job offer from Mr. Kuhnle, Mr. Williams never addresses this allegation at all. This is a notable silence in an exchange where the obvious response would be something like “I never said that.” The silence supports Mr. Meyn’s allegation. Further, this suspicious reliance solely on the original job offer to contest Mr. Meyn’s account of his actual terms of employment is repeated in the company’s handling of his truck allowance. Both Mr. Williams (DL0014) and Next Wave’s counsel (DL0019) assert that the truck reimbursements that were approved by Mr. Williams himself (DL0033) weren’t owed to Mr. Meyn because they weren’t in the email job offer. If this was not intentional dishonesty on Mr. Williams’ part (I assume counsel just repeated what he was told), it certainly suggests that Mr. Williams is an unreliable narrator.⁶

From there, Next Wave’s own records showing that Mr. Meyn was owed the larger commissions on contracts that were signed after June (Brenton, Roach and Vargas, DL0255, 271, and 289 and DO0054, 58 and 55) tend to support Mr. Meyn’s version, as does Next Wave’s constantly shifting assertions as to how much, supposedly, Mr. Meyn was overpaid, discussed below.

Next Wave’s related assertion that Mr. Meyn “unilaterally input[.]” the higher rates are alternatively unsupported, implausible or, in effect, irrelevant because of the employer’s own assertions about how its system works. It is unsupported, because the assertion is made as an

⁶ While not key to my decision, this tends to reduce the possible value of live testimony.

evidentiary fact in the record only by the employer's attorney. (DL0042; 0335) It is implausible because the employer is impeaching its own business records. And it is irrelevant because (now, accepting the assertions of Next Wave's affidavits and its attorney for this limited purpose) the affidavits assert that whatever commission number was input had to be approved by a manager or supervisor, which was also the evidence Mr. Juarez offered in his interview, DL0313. If Mr. Meyn's manager approved rates to which he wasn't entitled, that was between the manager and the company, but Mr. Meyn's payment was approved by the system set up by the company itself.

Thus, Next Wave did not produce enough evidence to support a finding, now, that it should be permitted to go to a hearing to try to establish by a preponderance of the evidence that Mr. Meyn's commission rate was **not** raised to 30-35% as of June 2022. Lawyers' assertions and affidavits that appear after the investigation was complete are not enough to require a hearing.

Sales commissions "are calculated and paid after projects are closed and actual amounts available for commissions are determined by management." (DL0092, Next Wave Roofing Employee Handbook for Field Personnel) Thus, neither the contract date nor evidence about when work was done determines when commissions were due.⁷ While Next Wave's lawyers represented that Next Wave generates a document called a "Close Sheet" (DL0128) which might have been expected to clarify when the commissions at issue were due, and in what amount, none was produced by Next Wave.

By early January 2023, both Mr. Kuhnle (who hired Mr. Meyn) and Anthony Juarez (who served briefly as Next Wave's Vice President and whose interview supported Mr. Meyn's general

⁷ To take only one example. The job for Sarah Krepel was identified by Next Wave in January 2023 as one that would close, and therefore be "due," that month. (DL0022/23). The contract was signed in May 2022. (DL0153) In light of the explanation of the Handbook about when commissions were due, there is nothing necessarily surprising about this delay, which was largely under the control of the employer.

assertions about Next Wave’s payroll practices) were gone, and on January 9, 2023, Mr. Meyn was terminated. On January 14th, Mr. Meyn made a demand for what he asserted were unpaid commissions and Mr. Williams responded that unpaid commissions would be “calculated this coming week.” (DL0008) On January 17, 2023, Mr. Williams asserted that “we now have 6 projects, with a total of \$6,430.15 in commissions after being able to close out these projects with all documents and payments accounted for this week,” although he also asserted (on various grounds) that Mr. Meyn in fact owed the company money. (DL0014) Based on the spreadsheet attached to counsel’s letter on January 26 (DL0019-23), the six projects referenced were those for Krepel, Christy, Baker, Moelis, Kotlyar, and White⁸, although Next Wave, through counsel, re-asserted a claim (although in different amounts) that Mr. Meyn had been overpaid. Next Wave’s next responses, through counsel, changed its position again. (Compare DL0014⁹ with DL0019¹⁰ with DL0042¹¹). Ultimately, Denver Labor concluded that Mr. Meyn had been owed commissions on eight jobs after the passage of the Ordinance¹² – Krepel (\$566.74, DL0046), Christy

⁸ I’ll refer to jobs by the last name of the homeowner from here on.

⁹ Asserting overpayments to Meyn of \$4,449.84 on “3 of the projects that had been paid at the incorrect commission percentage” plus \$4,200 in truck payments.

¹⁰ “NWR actually overpaid you \$3,093.74 . . . “

¹¹ Dropping the claim relating to vehicle payments, “NWR has overpaid Mr. Meyn by \$1,693.25 . . .”

¹² DL0329; Denver Labor Exhibit F.

The unpaid commission amounts set out in the two documents are the same. In Exhibit F, as in its Brief, Denver Labor acknowledges that it could only assess interest from when the commissions were owed after the contracts “closed” as asserted by Next Wave. To the extent that the interest assessments in DL0329 constitute clear error, the Hearing Officer finds by a preponderance of the evidence that Next Wave has established that interest, if owed, is only owed from January 21, 2023.

(\$1,081.58, DL0201), Moelis (\$1,677.48, DL218), Kotlyar (\$682.77), Brenton (\$2,728.45, DL0054), Vargas (\$2,361.90, DL0055), White (\$2,222.93, DL0316¹³) and Slack, addressed above.

The record of what commissions Mr. Meyn actually was paid for particular jobs is impossible to disentangle but ultimately not relevant, even without consideration of the rejected claim that none should have been paid at 30%. While Next Wave’s “onpay” payroll records for April-November (DL0059-72) record a total of \$18,872.25 in commission payments, those aren’t broken down by project (DL0126). None was paid after Mr. Meyn’s termination and the “closing” of contracts after his termination, which are the commissions at issue. Next Wave’s calculation of the “correct” total commission amounts of \$17,179¹⁴ in response to the Denver Labor Determination appears to be a comparison of apples and oranges – according to Next Wave’s Handbook, the payroll records (“onpay” and the Chase ACH records, DL0130-131) demonstrate payments made on contracts that had closed before Mr. Meyn’s termination. In contrast, Denver Labor’s calculation of unpaid commissions is based (largely, as set out above) on the Job Commission Reports that were printed after the termination and that (presumably) show amounts that **would be owed** in commissions (and therefore, presumably, **not** part of the \$18,872.25 paid before mid-November, **or** the \$17,179 Next Wave says it should have paid). Six of those are for

¹³ This is the only figure which cannot be derived from a “Job Commission Report” that Next Wave generated after the investigation began. It is, however, based on the gross profit figure, (DL0316, 0320) with a 30% commission rate. The White contract isn’t one of those that was provided by Next Wave, so there is no evidence that might require a hearing as to when it was entered into – before or after June 2022 – and since Next Wave’s appeal lumps all of the Denver Labor commission-owed numbers together, I cannot conclude that it contests this number in particular or only includes it with its claims about 30% commission jobs.

¹⁴ DL0042; DL0074; DL0118; DL0126, DL0316; D0336

jobs that Next Wave itself identified as closing after January 10, 2023, and for three (Brenton, Vargas and White), Denver Labor concluded that commissions of 30% were owed **after Mr. Meyn's termination and after passage of the Ordinance.**

These three warrant special discussion. Vargas and Brenton were not among the original six identified by Next Wave as closing after January 10, but both appear on the spreadsheets which formed the basis of Mr. Meyn's claim to Next Wave (DL0012). All three appear on the Determination of Underpayment that went to Next Wave on June 7 (DL0327-330) with commission rates at 30%. As to Brenton and Vargas, Next Wave asserted (prior to, but not in, its appeal) that commissions were paid at 30% erroneously on November 4 (DL0022/23). However, the commission amounts for those two jobs, based on 30%, would have added up to \$5,090.35 (DL0054-55) and there is no bank record that is consistent with that amount having been paid on November 4 (or any other time), and there is no payment record **after** November 4 that would account for those payments. The evidence is confusing, but if Next Wave wanted an opportunity to clarify it in a hearing and prove that Denver Labor was wrong to include Vargas and Brenton (at **any** commission rate) in its Determination, separately from its general argument about the alleged \$1,693.25 overpayment or 17% v. 30% commissions, it needed to provide something other than confused records, and needed to raise this as an issue in its appeal. The employer offered no evidence during the investigation as to which a hearing to determine credibility would be needed as to when Vargas and Brenton closed, or what commissions were paid on those jobs if they were paid before January 10, 2023. Further, it doesn't identify the Vargas and Brenton jobs in its appeal other than, broadly, under the rubric of the dispute over the 30% commission rate, and therefore it didn't raise the issue of when they closed and whether (or when) they had, in fact, been paid.

The file evidence on White is sparse on both sides. Denver Labor apparently concluded that the commission for that job should have been 30%, not the 17% stated in DL0056, but there is no explanation in the record why. (The White contract isn't in the record.) However, other than (presumably) lumping the White 30% commission in with its over-arching argument about the proper commission rate, Next Wave neither presented any evidence to address this apparent anomaly nor raised that as an issue in this appeal. Had it done so, (and depending on what evidence had been presented) I might have found that there is a credibility determination that required a hearing on what rate should be applied to the White job, presuming that contracts entered into after June 2022 had commissions at the 30% rate. On the record and appeal as it exists, I find that there is no need for a hearing on this question.

Based upon its findings (and with the error in interest calculation noted above), Denver Labor filed its Determination of Underpayment on June 7, 2023, and Next Wave filed a timely appeal on July 7. The appeal raises a constitutional challenge to the Ordinance and broadly asserts that Mr. Meyn was overpaid, based on its assertion that his commission rate was always 17% and that he was therefore overpaid \$1,693.25 in commissions prior to November 18, 2022. It does not raise an issue on appeal, nor could it, concerning the six jobs that its owner and counsel identified as closing after January 10, 2023 and, for the reasons stated above, cannot be understood to appeal the finding that the Vargas and Brenton commissions were not owed or paid before the Ordinance date. It asserts in its Response brief (p. 11) that Denver Labor “disregarded payments that did not match commission reports exactly” based on DL0320, but offered no evidence that commissions **were paid on any of the jobs for which the Determination claims**¹⁵. And, in fact,

¹⁵ The fact that it asserts that it produced “all” Job Commission Reports doesn't rise to the level of evidence addressing the Denver Labor findings, or even a statement of the issues on appeal.

Cont'd

it is impossible to match up the \$5,156.51 it says Denver Labor ignored (Response, p. 11) with the jobs for which \$11,417.58 in unpaid commissions is claimed. To which of the eight jobs on which the Determination is based does Next Wave want to attribute that \$5,156.51? And why was **any** commission paid, according to Next Wave, on jobs that closed after January 10th?

The fact that the payroll records Next Wave produced don't provide this evidence doesn't suggest that Next Wave could not have mustered **any** evidence that it paid commissions that are owed on a job-by-job basis and when it made such payments. But if it has no such records in fact, it would not be able to contest the Denver Labor finding based on the preponderance of the evidence if the case were to go to hearing. And in any event, Next Wave is back to another apples-to-oranges comparison: The jobs for which commissions are sought through the Determination are ones that closed after Mr. Meyn's termination, either by Next Wave's own account or by its failure to provide any conflicting evidence. Next Wave has never asserted that it paid the commissions for Krepel, Christy, Kotlyar, Moelis, or White,¹⁶ and (as noted above) its assertions as to Brenton and Vargas appear unsupported in the evidence it did supply.

Summarizing, then, I conclude that the commission amounts set out in Denver Labor Exhibit F are and have been owed since January 21, 2023, with the exception of the Slack job, and that Next Wave has not provided credible evidence to the contrary sufficient to question go to hearing on Denver Labor's findings.

As discussed below, the Job Commission Reports are an incomplete record, since they omit Ash, Tobias and Kmyta, jobs for which payment was presumably made by November 2022. They are therefore not evidence of what Mr. Meyn was owed on jobs that were **not** paid by the end of November. Had Next Wave produced Closing Sheets, or **any** contemporaneous business records demonstrating for which jobs Mr. Meyn was actually paid, the situation might be different. It didn't, and it isn't.

¹⁶ Or Slack

Conclusions of Law: Constitutional Challenge

MUCH OF THE BRIEFING IN THIS MATTER by both sides addresses Next Wave's constitutional challenge to the Ordinance. That challenge rests on two assertions: One to the Ordinance as applied to Next Wave, and the other (apparently) to the Ordinance on its face, although both are based on Denver Labor (purportedly) applying, or having the right to apply, the Ordinance both retroactively and retrospectively.

Were Denver Labor applying the Ordinance retroactively, the first question would be whether the legislation contains a clear statement of legislative intent to overcome the presumption that statutes operate prospectively. *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 13 (Colo. 1993). If there **were** such a clear statement of the intent to apply the Ordinance retroactively, constitutionality would turn on whether the application was, nonetheless, retrospective. "A statute is retrospective if it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *Denver S. Park & Pac. Ry. Co. v. Woodward*, 4 Colo. 162, 167 (1878) (quoting *Soc'y for the Propagation of the Gospel v. Wheeler*, 2 Gall. 105, 22 F. Cas. 756, 767 (C.C.D.N.H.1814)); *see also Van Sickle*, 797 P.2d at 1271; *In re Estate of Dewitt*, 54 P.3d 849, 854 (Colo. 2002).

Next Wave addresses its second constitutional argument to Section 58-24(b) of the Ordinance, and since this was not applied to Next Wave, this is a facial challenge. Accordingly, the first issue would be whether Next Wave has standing to raise that challenge:

Where, as here, fundamental constitutional rights are not implicated, "[an] individual may not raise a claim that the statute is unconstitutional as applied to others in situations not before the court." *People v. Shepard*, 983 P.2d 1, 3 n.3 (Colo. 1999). Hence, "a party must allege an injury in fact to a legally protected interest in order to have standing" to challenge the facial constitutionality of a

statute. *Poudre Valley Rural Elec. Ass'n v. City of Loveland*, 807 P.2d 547, 550-51 (Colo. 1991).”

Kirkmeyer v. Dep't of Local Affairs, 313 P.3d 562, 567 (Colo.App. 2011). Assuming *arguendo* that Next Wave has standing to challenge the constitutionality of the Ordinance based on Section 58-24(b), the question would remain whether the provision is facially invalid.

Since I answer those questions, in order

1. Denver Labor is not applying the Ordinance to Next Wave retroactively;
2. Next Wave does not have standing to make a facial challenge to Section 58-24(b);
and
3. In any event, the provision is not facially invalid

I do not need to answer these thorny constitutional questions. I will, however, explain why I am not doing so.

Denver Labor is not applying the Ordinance to Next Wave retroactively

AS SET OUT ABOVE, NEXT WAVE’S OWNER ADMITTED in his email of January 14, DL0014, and counsel confirmed in its letter of January 26, DL0019-23, that there were six jobs that had, in effect, not “closed” before Mr. Meyn was terminated on January 9 and, therefore, under Next Wave’s Handbook rules, commissions were not yet owed. Next Wave’s Cross-Motion Brief describes this at p. 5 as a “creative[.]” reading of the email: I conclude that it is the only plausible reading, and that Next Wave never presented any evidence, or even any legal argument, to the contrary. (DL0022/23, attached to counsel’s January 26, 2023, letter, lists the commissions on these projects as “due.”) It is, admittedly, hard to reconcile all the conflicting payment information that is in the record, but confusion in its own records doesn’t allow Next Wave to argue that it **could** prove that (at least those six) jobs’ commissions had been owed or paid before January 10, 2023, its owner and attorneys’ representations to the contrary notwithstanding.

As discussed above, the cases for White, Brenton and Vargas are somewhat different, but I conclude (for the reasons stated) that Next Wave did not present enough evidence in the investigatory stage to require a hearing on whether it could prove by a preponderance of the evidence that Denver Labor’s conclusion that these commissions, too, were owed after January 10, 2023, was wrong.

The fact that Next Wave’s records are so disordered that it is nearly impossible to tell what payments are attached to what jobs does not amount to evidence in its favor.¹⁷ Based on the evidentiary record, Denver Labor has not applied the Ordinance retroactively to Next Wave.

Next Wave does not have standing to make a constitutional challenge to Section 58-24(b)

CONSTITUTIONAL FACIAL CHALLENGES GENERALLY ARISE IN RELATION TO FUNDAMENTAL RIGHTS such as free speech:

Beginning with *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975), however, we recognized that the limitations on third party standing have been substantially relaxed in the context of first amendment claims. We stated:

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. Not so, however, where, as here, we are dealing with First Amendment protections. *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908 [2914], 37 L.Ed.2d 830 [(1973)]; *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 [(1975)].

¹⁷ According to Next Wave, DL0045-58 are all of Mr. Meyn’s Job Commission Reports, but the commission numbers on those documents total \$22,751.31 (DL0074) while the total commissions the bank records document come to \$18,872.25 and DL0022/23 omits three of the jobs that are included in the Job Commission Reports (Ash, Kmtya and Tobias), although those three are included on DL0073, which omits Slack. Ultimately, it is not the job of the Hearing Officer to try to discern order in the chaos when Next Wave may no colorable effort to do so.

People v. Seven Thirty-Five East Colfax, Inc., 697 P. 2d 348, 355 (1985). The responsibility of entities upstream of the direct employer of labor for making sure they get paid isn't novel: Mechanics' liens entered Colorado statutes in 1899, and many general contractors take on this responsibility either by contract (with property owners) or as a prudential business practice. The right to have work done on your behalf or by which you benefit without paying for it (whether you contract directly or indirectly with the workers) is not a fundamental value, akin to Free Speech.

Next Wave's facial challenge to the Ordinance (or, really, just to Section 58-24(b)) is an assertion of third party standing, since it is the direct employer of the workers protected by the Ordinance. Setting aside Denver Labor's (well founded) argument that the Ordinance doesn't reach to the homeowners in whose interest Next Wave purports to be acting, it doesn't have third party standing to bring that challenge.

Section 58-24(b) is not facially unconstitutional

THIS POSES A BIT OF A CONUNDRUM. On the one hand, Denver Labor asserts that the Ordinance **is** retroactive (although they have not applied it in such a manner here). Next Wave asserts that it is **not**. But the facial constitutional challenge would rest, if on anything, on the assertion of retroactivity.

I don't need to cut this particular knot, because I don't think that Section 58-24(b) **must be read** as retroactive, and it is therefore not **facially** unconstitutional. Whether it could be applied retroactively is an issue for another day and another dispute.

Conclusions of Law and Order: Cross-Motions for a Decision without a Hearing

MY LEGAL CONCLUSIONS ARE LARGELY EMBEDDED in the statement of the facts: I conclude that Next Wave failed to present enough evidence in the investigatory phase of this dispute to

entitle it to a hearing in which it could attempt to establish, by a preponderance of the evidence, that Denver Labor erred in its determination that commissions were owed on seven of the eight jobs for which a claim is made. I will therefore deny Next Wave's Motion, and grant Denver Labor's Motion to the extent consistent with this conclusion.

Denver Labor is Ordered to recalculate its Determination within no more than 14 days from the date of this Decision and Order, excluding the Slack Job and updating the interest through the date of the recalculation, and to provide a figure for daily interest accruals through the date of payment.

October 9, 2023

Entered by:

Ellen M. Kelman

Hearing Officer