STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE, BLDG. 69-2
CRANSTON, RHODE ISLAND 02920

East Bay Auto, Inc.; Euro Motor Cars, Inc.; Casale's Autobody, Inc.; Hillview Auto Body, Inc.; Bigelow Auto Body, Inc.; Randy's Auto, Ltd.; C.L. Enterprises, Inc.; Safe-Way Auto Sales, Inc.; Mike's Auto Body, Inc.; West Warwick Auto City, Inc.; D&H Auto Group; Curreri Collision Center, Inc.; New Century Auto Body, Inc.; Cranston Collision Center Sale & Service, Inc.; Michaud Auto Body, Inc.; Choice Collision Center, Inc.; Auto Service Auto Body, Inc.; Todisco Enterprises, Inc.; Providence Auto Body, Inc.; Pacheco Automotive, Inc.; Rego's Auto Body, Inc.; Anthony's Auto Body, Inc.; Detroit Collision Center, Inc.; Rick's Auto Body, Inc.; Blackstone Auto Sales & Body, Inc.; Auto Body Concepts, Inc.; and Warwick Auto Body, Inc., Complainants	:
v.	:
Allstate Insurance Group; Berkshire Hathaway Insurance Group (Geico); Mapfre Insurance Group; Metropolitan Group; Amtrust Gmaci Maiden Group; Hartford Fire & Casualty Group; Main Street America Group; Berkshire Hathaway Insurance Group (National Indemnity); Nationwide Corporation Group; Progressive Group; Selective Insurance Group; United States Automobile Assn. Group; Ohio Mutual Group; Providence Mut. Fire Ins. Co.; Travelers Group; Amica Mutual Group; And Liberty Mutual Group, Respondents.	:

DBR Case Nos.: 2017-IN-001 through 2017-IN-017 Administratively Consolidated

DIRECTOR'S ORDER ON RECOMMENDED DECISION

This matter was brought by the Director's Order Appointing Hearing Officer and Providing Notice of Complaint Hearing as a contested case pursuant to R.I. Gen. Laws § 42-35-9 and Rule 2.5 of 230-RICR-10-00-2 entitled *Rules of Procedure for Administrative Hearings* (the "Rules of

Procedure").[1] Pursuant to the Order, the Director appointed the Hearing Officer for the purpose of conducting a full evidentiary hearing on the Complaint in order to determine whether Respondents have violated R.I. Gen. Laws § 27-29-4.4 and/or 230-RICR-20-05-10 entitled *Auto Body Labor Rate Survey,* formerly known as Insurance Regulation 108 ("IR 108"), in their 2016 labor rate survey filings and whether administrative penalties should be imposed to the extent violations are found.

The recommended decision of the Hearing Officer includes within Section VI entitled "Findings of Fact" the procedural travel of the case. Section VI also makes reference to the Stipulation of Issues To Be Considered By the Hearing Officer filed by Complainants and Respondents (the "Stipulation"), noting that the parties agreed the matter could be decided based on the Stipulation. However, the Stipulation is a stipulation of issues to be considered by the Hearing Officer as opposed to a stipulation of facts. It outlines paragraph by paragraph, as to each Respondent, the proposed facts the parties agree need to be determined in order to determine whether such Respondent violated § 27-29-4.4 and/or IR 108.[2]

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[1] This matter is not a declaratory proceeding under R.I. Gen. Laws § 42-35-8 and Rule 3.3 of 230-RICR-10-00-3 entitled *Declaratory Rulings and Petitions.* In a declaratory proceeding, a person petitions an agency for an order interpreting or applying a statute administered by the agency or a determination whether or in what manner a rule, guidance document, or agency order applies to the petitioner. R.I. Gen. Laws § 42-35-8(a); see also 230-RICR-10-00-3 and *City of Providence Board of Licenses v. Department of Business Regulation*, 2013 R.I. Super. LEXIS 195. Rather, this case was brought as a contested case under § 42-35-9 and Rule 2.5 of the Rules of Procedure following Complainants' filing with the Department of a complaint alleging that the Respondents failed to comply with § 27-29-4.4 and IR 108 in their 2016 labor rate filings. Complainants' statement that they seek prospective relief and not retrospective relief does not transform the case from a contested proceeding to a declaratory proceeding. Also, Complainants' statement that they do not seek damages is immaterial, since the Department does not have authority to award damages in this case. Complainants have alleged that Respondents violated § 27-29-4.4 and IR 108 and the Department does have authority to impose a fine for violation pursuant to R.I. Gen. Laws § 27-29-4.5 as was stated in the Order Appointing Hearing Officer and Providing Notice of Complaint Hearing.

[2] For example, paragraph 1 of the Stipulation of Issues to be Considered by the Hearing Officer states:

"1. Whether Respondent Allstate Insurance Company, misnamed as Allstate Insurance Group ("Allstate") used information obtained from Connecticut and mispresented what ICAR gold means and represents in the insurance industry when it submitted its Labor Rate Filing to RIDBR, and, if so, whether that violates R.I.G.L. § 27-29-4.4 and/or Regulation 108."

Rhode Island General Laws § 42-35-12 requires that any final order in a contested case include findings of fact and conclusions of law separately stated. Parties are afforded the opportunity to present evidence and argument and to submit proposed findings, and any findings of fact shall be based exclusively on the evidence and matters officially noticed. R.I. Gen. Laws § 42-35-9. In order to satisfy the requirements of § 42-35-12, sufficient findings of fact and a determination as to whether Respondents violated § 27-29-4.4 and/or IR 108 need to be made. Accordingly, the Director hereby remits this matter to the Hearing Officer to conduct further evidentiary hearings as necessary to make findings of fact and conclusions of law as required to issue a final order in this proceeding.

Dated: July 30, 2018

Elizabeth Tanner
Director

NOTICE OF APELLATE RIGHTS

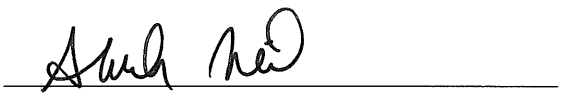
THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 1 day of August, 2018, that a copy of the within Order was sent by email and first class mail, postage prepaid to:

Peter J. Petrarca, Esq. Jina N. Petrarca, Esq. Petrarca & Petrarca 330 Silver Spring Street Providence, RI 02904 peter@petrarcalaw.com jina@petrarcalaw.com Peter330350@gmail.com	Melissa E. Darigan, Esq. David J. Pelligrino, Esq. Partridge Snow & Hahn LLP 40 Westminster St., Suite 1100 Providence, RI 02903 med@psh.com djp@psh.com	
Stephen D. Zubiago, Esq. Jeffrey S. Brenner, Esq. Nixon Peabody, LLP One Citizens Plaza, Suite 500 Providence, RI 02903 jbrenner@nixonpeabody.com szubiago@nixonpeabody.com	C. Russell Bengston, Esq. Todd J. Romano, Esq. Bengston & Jestings, LLP 40 Westminster St., Suite 300 Providence, RI 02903 rbengston@benjestlaw.com tromano@benjestlaw.com	Bruce A. Leach, Esq. DeSimone & Leach One Turks Head Place Suite 450 Providence, RI 02903 bleach@dllawri.com
Faith A. LaSalle, Esq. LaSalle & Kelleher, P.C. One Turks Head Place Suite 450 Providence, RI 02903 flasalle@lasallekelleher.com	R. Kelly Sheridan, Esq. Elizabeth Suever, sq. Roberts Carroll Feldstein & Peirce 10 Weybosset St., Suite 800 Providence, RI 02903 ksheridan@rcfp.com esuever@rcfp.com	

and by email to Elizabeth Kelleher Dwyer, Esquire, Deputy Director, and Matthew Gendron, Esquire, Department of Business Regulation, 1511 Pontiac Avenue, 69-2, Cranston, RI 02920.



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DBR Case Nos.: 2017-IN-001 through 2017-IN-017 Administratively Consolidated

DECISION

I. INTRODUCTION

This matter arose pursuant to Orders Appointing Hearing Officer and Providing Notice of Complaint Hearing ("Orders") issued by the Department of Business Regulation ("Department") to the above-captioned insurance companies ("Respondents") licensed as property-casualty insurers in the State of Rhode Island in response to complaints filed by the above-captioned

complainants ("Complainants"). A status conference was held on May 5, 2017. The Respondents filed motions to dismiss to which the Complainants objected. After hearing on the motions on June 20, 2017, an order denying the motions to dismiss was entered on July 28, 2017.[1] A status conference was held on January 19, 2018 at which time the Complainants and Respondents agreed to file stipulated facts and issues to be determined by the hearing officer and set a briefing schedule. The stipulation and all briefs were timely filed by May 18, 2018.

II. JURISDICTION

The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*, R.I. Gen. Laws § 27-29-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and Department regulation 230-RICR-100-00-2 *Rules of Procedure for Administrative Hearings* ("Hearing Regulation").

III. ISSUES

The issues in this matter arise from the labor rate survey required to be conducted by the Respondents pursuant to R.I. Gen. Laws § 27-29-4.4 and its attendant regulation, *Insurance Regulation*, 230-RICR-20-05-10 *Auto Body Labor Rate Survey* ("Survey Regulation").[2] The Complainants are all licensed as automobile body shops pursuant to R.I. Gen. Laws § 5-38-1 *et seq.*

In the stipulation, the Complainants and the Respondents agreed that the Complainants allege violations by the Respondents of R.I. Gen. Laws § 27-29-4.4 and/or the Survey Regulation in their 2016 labor rate survey filings and provided that the hearing officer should consider the following issues in the determination of these matters:

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[1] The Respondents filed an interlocutory appeal of the July 28, 2017 order with the Superior Court which was denied on January 10, 2018. See *Allstate Ins. Co. et al. v. Department of Business Regulation*, 2018 R.I. Super. LEXIS 3.

[2] This regulation was previously *Insurance Regulation* 108 *Auto Body Labor Rate Survey* and was amended on March 17, 2016 to take into account statutory amendments (discussed below) to R.I. Gen. Laws § 27-29-4.4. It was renamed and refiled effective March 17, 2017 pursuant to codification of regulations required by R.I. Gen. Laws § 42-35-5.

1. Whether Respondent Allstate Insurance Company, misnamed as Allstate Insurance Group ("Allstate"), used information obtained from Connecticut and misrepresented what ICAR gold means and represents in the insurance industry when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

2. Whether American Commerce Insurance Company, misnamed as MAPFRE Insurance Group ("American Commerce") used CCC and Mitchell estimating data that reflects the average industry labor rate and did not consider labor rates specific to Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

3. Whether AMICA Mutual Insurance Company, misnamed as AMICA Mutual Group ("AMICA") based its labor rates on a cross section of information including repair facilities, direct repair shops ("DRP") and non-DRP, dealerships, and independent shop operators, independent appraisal vendors and insurance staff appraiser data, and did not take into account labor rates specific to Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

4. Whether Amtrust GMACI Maiden Group ("Amtrust") did not take into account labor rates specific to Class A designated auto body shops when it included all shops in one analysis and determined labor rates for Class A auto body shops and Class B auto body shops that are only $2.00 apart when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

5. Whether GEICO Indemnity Company, Government Employees Insurance Company, GEICO General Insurance Company and GEICO Casualty Company (referred to by Complainants as Berkshire Hathaway Insurance Group) ("GEICO") did not take into account questionnaire responses received from Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

6. Whether The Hartford Financial Services Group, misnamed as The Hartford Fire & Casualty Group ("Hartford"), did not take into account labor rates specific to Class A designated auto body shops when it submitted its Labor Rate Filing to Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

7. Whether Liberty Mutual Group ("Liberty Mutual") used information obtained from Connecticut and did not take into account labor rates specific to Class A designated auto body shops when it submitted its Labor Rate Filing to Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

8. Whether Main Street America Group ("Main Street") compiled separate and distinct labor rate survey results of the Class A designated shops when it submitted its Labor Rate Filing to the Department, and, if not, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

9. Whether Metropolitan Insurance Group ("Metropolitan") rejected 43 out of 45 surveys received from auto body shops and did not compile separate and distinct labor rate survey results of the Class A designated shops when it submitted its Labor Rate Filing to Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

10. Whether National Indemnity Company ("NICO") did not take into account questionnaire responses received from Class A designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

11. Whether Nationwide Corporation Group ("Nationwide") violated R.I. Gen. Laws § 27 29-4.4 and/or Survey Regulation when it took into consideration its DRP rates when calculating or determining its Labor Rate Filing to the Department.

12. Whether Ohio Mutual Group ("Ohio Mutual") blended the rates of Class A designated auto body shops and Class B designated auto body shops instead of using the separate data from the labor rate surveys and used averages of estimates that it has previously paid when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

13. Whether Members of the Progressive Group of Companies doing business in Rhode Island, misnamed as Progressive Group ("Progressive") did not compile separate and distinct labor rate survey results of the Class A designated shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

14. Whether Providence Mutual Fire Insurance Company ("Providence Mutual") improperly rejected the surveys received from auto body shops when it established a labor rate for Class A designated auto body shops and improperly determined that it will pay an aluminum labor rate to the Class B designated auto body shops when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

15. Whether Selective Insurance Group ("Selective") used an arbitrary labor rate when it submitted its Labor Rate Filing to the Department, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

16. Whether the Travelers Companies, Inc., misnamed as Travelers Group ("Travelers"), ignored in its entirety Class A survey results when it established a labor rate for Class A designated auto body shops, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

17. Whether United Services Automobile Association ("USAA") used subrogation rates as part of its formula in determining the prevailing labor rate, and, if so, whether that violates R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

18. In order for the Hearing Officer to determine the aforementioned issues in paragraphs 4, 5, 6, 7, 8, 9, 10, 12, and 13 concerning compilation or blending of responses received from the Class A and Class B designated auto body repair shops in response to the surveys, the Hearing Officer must determine whether R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation prohibits an insurance company from aggregating the responses received from Class A and Class B designated auto body repair shops when it submits a Labor Rate Filing to the Department.

19. In order for the Hearing Officer to determine the aforementioned issues in paragraphs 9, 14, and 16 concerning an insurance company's rejection of survey responses received from auto body repair shops, the Hearing Officer must determine whether each Labor Rate Filing explained why

the insurance company rejected consideration of the labor rate surveys submitted by the auto body repair shops in accordance with R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

20. In order for the Hearing Officer to determine the aforementioned issues in paragraphs 1, 2, 3, 7, 11, and 17 concerning data used in establishing a prevailing rate, the Hearing Officer must determine whether the consideration of factors besides auto body labor rate survey results, including but not limited to, contract rates, subrogation rates, and rates obtained in a geographical area outside of Rhode Island are prohibited under R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

The order on the motions to dismiss identified two (2) types of issues: analysis and process. In the stipulation, the parties addressed all issues in dispute and agreed on how the issues should be framed. Therefore, this matter is ready for a final decision.

IV. RELEVANT STATUTE AND REGULATION

R.I. Gen. Laws § 27-29-4.4 provides as follows:

> Auto body repair labor rate surveys.
>
> (a) Every insurance carrier authorized to sell motor vehicle liability insurance in the state shall conduct an auto body repair labor rate survey, subject to, and in accordance with, the following provisions:
>
> (1) When used in this section the following definitions shall apply:
>
> (i) "Auto body labor rate survey" is an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area.
>
> (ii) "Prevailing auto body labor rate" means the rate determined and set by an insurer as a result of conducting an auto body labor rate survey in a particular geographic area and used by insurers as a basis for determining the cost to settle automobile property damage claims.
>
> (iii) "Independent auto body repair facility" means any auto body repair facility that does not have a formal agreement and/or written contract with an insurer to provide auto body repair services to insureds and/or claimants.
>
> (iv) "Direct repair program" means any methods through which an insurer refers, suggests, or recommends a specific auto body repair facility, with whom the insurer has a formal agreement and/or contract to provide auto body repair services, to insureds and/or claimants.
>
> (v) "Contract rate" means any labor rate to which an auto body repair facility and an insurer have agreed in a formal agreement and/or written contract.
>
> (2) Each insurer must annually conduct a separate and distinct written auto body labor rate survey for each classification of auto body shops as established by the Department of business regulation pursuant to § 5-38-5, to determine a separate and distinct prevailing auto body labor rate for each classification of fully licensed auto body repair facilities.
>
> (3) Insurers may not use an auto body labor rate survey; contract rates from auto body repair facilities with which it has a formal agreement or contract to provide auto

body repair services to insureds and/or claimants; rates paid as a result of subrogation, rates obtained from auto body repair facilities in a different classification than that being surveyed, or rates from a repair shop facility holding a limited or special use license.

(4) Each auto body labor rate survey shall include the following:

(i) The name and address of each shop surveyed in the labor survey;

(ii) The total number of shops surveyed;

(iii) The prevailing rate established by the insurer for each classification of full collision licensed auto body repair facilities; and

(iv) A description of the formula or method used to calculate or determine the specific prevailing rate reported.

(5) Each insurer must report the results of their auto body labor rate survey to the Department of business regulation insurance division.

(6) The Department of business regulation must promulgate regulations related to auto body labor rate surveys by October 1, 2006, establishing the following:

(i) A questionnaire that must be used by all insurers in their labor rate survey;

(ii) Date of reporting; and

(iii) Number or percentage of shops to be surveyed.

(7) The Department of business regulation shall review all surveys submitted for compliance with this section and any rules and regulations promulgated by the Department.

(b) Nothing contained in § 27-29-4.4 shall require an insurer to establish the prevailing rate for each classification of full collision licensed auto body repair facilities based solely on the survey results.

To implement this statute, the Department promulgated the Survey Regulation which provides in part as follows:

10.4 Definitions

A. As used in this Regulation:

1. "Auto body labor rate survey" means an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area.

2. "Contract rate" means any labor rate to which an auto body repair facility and an insurer have agreed in a formal agreement and/or written contract.

***

4. "Full collision repair auto body facilities" means those facilities designated as such in Part 30-05-2 of this Title.

***

7. "Prevailing auto body labor rate" means the rate determined and set by an insurer as a result of conducting an auto body labor rate survey and used by insurers as a basis for determining the cost to settle automobile property damage claims.

***

10.6 Procedure and Deadlines

A. Prior to May 1 of each calendar year, the Department will publish on its website a list of those insurers that meet the applicability requirement.

B. Each insurer to which this Regulation applies shall, prior to June 1 of each calendar year, send a questionnaire substantially in the form included hereto as § 10.10 of this Part to Full Collision Repair Auto Body Facilities. Separate and distinct questionnaires shall be sent to each classification of auto body repair facilities as designated by the Commercial Licensing division of the Department.

C. Concurrent with the posting of a list of insurers required to conduct a survey, the Department's Commercial Licensing Division will provide a list of Full Collision Repair Auto Body Facilities with identification of Classification A and B shops which insurers must survey for that years' compliance. The list will be posted on the Department's website.

D. Insurers will omit those Full Collision Repair Auto Body Facilities with whom the insurer or Insurance Group, if reporting on a group basis, has a formal agreement and/or written contract to pay contract rates in order to provide auto body repair services.

E. Insurers will send the questionnaire to all of the Full Collision Repair Auto Body Facilities that remain after deletion of those facilities indicated in § 10.6(D) of this Part above.

10.7 Report of Labor Rate Survey to the Department

A. The report must be filed no later than September 1 of each calendar year.

B. The Report of the Labor Rate Survey must include the following:

1. A list, including the name and address, of all Full Collision Repair Auto Body Facilities to which the labor rate survey was sent.

2. A list of the Full Collision Repair Auto Body Facilities that failed to respond to the questionnaire within the time specified by the insurer.

3. A list of questionnaires that were not taken into consideration by the insurer in its analysis of the survey, including the reason that each such questionnaire was rejected for consideration.

4. Results of the questionnaires considered by the insurer.

5. The total number of shops surveyed for each classification of shops.

6. A description of the formula or manner in which the insurer has calculated or determined the prevailing labor rate which it pays to auto body repair facilities including certification of compliance with R.I. Gen. Laws § 27-29-4.4 and this Part.

7. The separate prevailing labor rate(s) established by the insurer for each classification of full collision licensed auto body repair facilitates.

8. If the calculation or formula indicated in § 10.7(B)(6) of this Part above is not based on the results of the questionnaires identified in § 10.7(B)(4) of this Part above, a complete explanation as to why it is not so based.

***

10.8 Questionnaire

A. Each insurer to which this Regulation applies shall utilize a survey based on the questionnaire included hereto as § 10.10 of this Part. ***

B. Insurers shall specify a date upon which the questionnaire must be returned to the insurer. The date specified must grant at least thirty (30) days notice for response.

***

D. Insurers may reject any questionnaire that is not properly completed or does not provide the full information requested and are not required to provide notification to the Full Collision Auto Body Facility. Insurers shall keep detailed records for such rejection to allow audit by the Department. Insurers may be ordered by the Department to consider any questionnaire so "rejected" to be accepted if the Department finds that enough information has been provided to allow for consideration of the questionnaire. All questionnaires and all other information regarding the survey shall be maintained by the insurer for a minimum of five years.

***

V. DISCUSSION

A. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey*, 688 A.2d 1289 (R.I. 1997). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.*

B. Arguments

i. Complainants

The Complainants argued that the Class A and B prevailing rates cannot be identical. The Complainants argued that some insurers improperly rejected or did not consider survey responses. The Complainants argued that many of the insurers' explanations of why they did not consider the survey responses boils down to the fact that the insurers do not like the results of the survey. The Complainants argued that R.I. Gen. Laws 27-29-4.4(a)(3) excludes direct repair prices and subrogation rates as well as any information from outside of Rhode Island when determining the prevailing labor rate.

ii. Respondents

Allstate, American Commerce, AMICA, Hartford, Liberty Mutual, Metropolitan, Ohio Mutual, Progressive, Providence Mutual, Selective, Travelers, and USAA argued that the stipulation is binding on the parties. They argued that the statute does not mandate a separate numerical prevailing rate for each classification, and provides what cannot be included in the surveys, but does not limit what information the insurers may possess. They also argued that they complied with the statute since the Department accepted the surveys and that this matter had now become a request for an advisory opinion because the Complainants are not seeking penalties but prospective relief.

Amtrust argued that it conducted separate and distinct surveys and set separate and distinct rates for Class A and B shops. Main Street argued it filed separate and distinct labor rates and it was appropriate not to consider survey responses that did not coincide with the insurer's experience. Nationwide argued the parties are bound by the stipulation and that the statute bars the use of contract rates (direct repair rates) in conducting the surveys, but not in establishing the prevailing rate. GEICO and NICO argued that there are no statutory requirements on how the prevailing rate should be set

and there is no requirement that the rates cannot be identical. They argued that there is no evaluation standard for the explanation required when the prevailing rate is not based on the survey results.

C. What the Statute and the Survey Regulation Require

Before addressing the binding stipulation,[3] the requirements of the statute and Survey Regulation will be discussed in order to understand the statutory and regulatory requirements and to apply them to the agreed issues.

i. Overview

R.I. Gen. Laws § 27-29-4.4 provides that insurance carriers conduct an auto body repair labor rate survey. The survey is defined as an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area. R.I. Gen. Laws § 27-29-4.4(a)(1)(i). The prevailing auto body labor rate is defined as the rate set by an insurer after conducting an auto body labor rate survey and is used by the insurers as a basis for determining the cost to settle automobile damage. R.I. Gen. Laws § 27-29-4.4(a)(1)(ii). R.I. Gen. Laws § 27-29-4.4(b) provides that when establishing the prevailing rate, an insurer is not required to base the prevailing rate solely on the results of the auto body labor rate survey.

R.I. Gen. Laws § 27-29-4.4(b) was added by statutory amendment effective January 1, 2016. *Infra.* It codified what the Rhode Island Supreme Court already found in *Auto Body Ass'n v. State Dep't of Bus. Regulation*, 996 A.2d 91 (R.I. 2010). The Court found that the statute was ambiguous and upheld Department's finding that General Assembly had intended the labor rate survey to serve as one (1) factor in determining the prevailing labor rate. Thus, the auto body labor rate survey serves as an information gathering exercise for the insurers. By law, the insurers are not bound to set the prevailing rate based solely on the auto body labor rate survey.

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[3] See *In Re: McBurney Law Services, Inc.*, 798 A.2d 877 (R.I. 2002); and *McCulloch v. McCulloch*, 69 A.3d 810 (R.I. 2013) (stipulation binding on parties).

R.I. Gen. Laws § 27-29-4.4(a)(5) requires that each insurer report the results of its survey to the Department. R.I. Gen. Laws § 27-29-4.4(a)(4) requires what must be in the report.[4] The report must include the name and address of each shop surveyed, total number of shops surveyed, prevailing rate established for each auto body license classification, and a description of the formula or method used to determine the prevailing rate. Section 10.7(B)(6) of the Survey Regulation reiterates the statutory requirement that an insurer describe the formula or manner in which the insurer calculated or determined that prevailing labor rate. Since by statute, the rate is not necessarily based on the results of the surveys, § 10.7(B)(8) requires that a complete explanation be given if the calculation or formula indicated in § 10.7(B)(6) is not based on the results of the questionnaires. Section 10.7(B)(3) also requires that questionnaires that were not taken into consideration by an insurer in its analysis be listed in the report to the Department with the reason(s) that each was rejected for consideration.

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[4] Some Respondents argued that the Respondents were in compliance with the 2016 surveys since the Department accepted those surveys pursuant to R.I. Gen. Laws § 27-29-4.4(a)(7). A similar argument was addressed in the order on the motions to dismiss. Then the Respondents argued that they relied on the issuance of Bulletin 2016-4 and the Department's acceptance of rates so that the Department is estopped from bringing an action.

> The Rhode Island Supreme Court has held that
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> in an appropriate factual context the doctrine of estoppel should be applied against public agencies to prevent injustice and fraud where the agency or officers thereof, *acting within their authority*, made representations to cause the party seeking to invoke the doctrine either to act or refrain from acting in a particular manner to his [, her, or its] detriment. *Romano v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 767 A.2d 35, 39 (R.I. 2001) (citation omitted) (italics in original).

In addition, for a party to obtain equitable estoppel against a town, it must show that a "duly authorized" representative of the town made affirmative representations, that such representations were made to induce the plaintiff's reliance thereon, and that the plaintiff actually and justifiably relied thereon to its detriment. *Casa DiMario, Inc. v. Richardson*, 763 A.2d 607, 612 (R.I. 2000). See also *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1234 (R.I. 2000) ("key element of an estoppel is intentionally induced prejudicial reliance.") (internal citation omitted). However, "neither a government entity nor any of its representatives has any implied or actual authority to modify, waive, or ignore applicable state law that conflicts with its actions or representations." See *Romano*, at 39-40. See also *Technology Investors v. Town of Westerly*, 689 A.2d 1060 (R.I. 1997).

The Department accepted the labor survey rates and posted them. There is nothing in the Bulletin 2016-4 that shows the Department made any affirmative representations to the Respondents that any challenges to the labor rates were precluded by the acceptance of the labor rate surveys. In any event, the Department does not have the power to waive or modify the applicable law and would not be acting within its authority if it tried to do so. Thus, the Department's acceptance and posting of the rates cannot be found to have waived any applicable law regarding the labor rates.

In *Auto Body Ass'n*, the Court referenced that the Department in its declaratory ruling on the original statute found that the statute sought to provide additional transparency to the setting of rates. Certainly, the statute is setting out a process for conducting an auto body repair labor rate survey which is an analysis of information regarding rates of labor that the shops charge. However, the insurers set their own prevailing rate and the survey may or may not be the basis of that prevailing rate. The statute provides for an openness regarding the use of the survey in setting the prevailing rate, but the use of the surveys or their results are not mandated in the setting of the prevailing rate.

ii. <u>What is not Included in the Survey</u>

R.I. Gen. Laws § 27-29-4.4 mandates that insurance carriers in the State (further defined in the Survey Regulation) shall conduct an auto body repair labor rate survey. The statute lists items that are not be included in the survey. That list was expanded by statutory amendment effective January 1, 2016. See P.L. 2015, ch. 154 § 2 and P.L. 2015 ch. 142 § 2 (identical amendments). When amending the statutory list, the General Assembly changed most of the commas to semi colons, but the list still is for what items may not be included. As set forth above, R.I. Gen. Laws § 27-29-4.4(a)(3) provides as follows:

> (3) Insurers may not use an auto body labor rate survey; contract rates from auto body repair facilities with which it has a formal agreement or contract to provide auto body repair services to insureds and/or claimants; rates paid as a result of subrogation, rates obtained from auto body repair facilities in a different classification than that being surveyed, or rates from a repair shop facility holding a limited or special use license.

Section (a)(3) is included in a statute entitled "auto body repair labor rate surveys." Section (a)(3) makes no reference to determining the prevailing rate. Instead, it is part of list – (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7) – about a labor rate survey that must be conducted and how it is to be conducted and reported and what is to be included in labor rate survey report to the Department. It may have made for sense for the first phrase in (a)(3) to read as "insurers may not

use [the following] **in** an auto body labor rate survey" followed by a colon and then include the items that follow next in the statute. Indeed, the Complainants in their brief inserted an "in" in that first phrase prior to the words, "an auto body." However, the statute does not use the word "in." Nonetheless, with or without the "in," R.I. Gen. Laws § 27-29-4.4(a)(3) is about the auto body labor rate survey. There is no mention in the section of the prevailing rate or its calculation. Rather the section lists what is to be excluded from the auto body labor rate survey.

In conducting the survey, the statute says that insurers are not to use an auto body rate survey. The second phrase says insurers cannot use rates from a direct repair program since (a)(3) uses the terms from the direct repair program definition in R.I. Gen. Laws § 27-29-4.4(a)(1)(iv) ("any methods through which an insurer refers, suggests, or recommends a specific auto body repair facility, with whom the insurer has a formal agreement and/or contract to provide auto body repair services, to insureds and/or claimants."). The third phrase in (a)(3) states that subrogation rates are to be excluded from the survey. Consistent with the statutory requirement of separate and distinct surveys for Class A and B licensed shops (discussed below), the fourth and fifth phrases state that the survey cannot include information from shops of a different licensed class than those being surveyed and that rates from limited or special use licensees cannot be included.

iii. Separate and Distinct

Effective January 1, 2016, the labor rate survey statute was amended to reflect a statutory change that provided for two (2) classifications for full auto body collision licenses. See P.L. 2015, ch. 154 § 2 and P.L. 2015 ch. 142 § 2 (identical amendments). R.I. Gen. Laws § 27-29-4.4(a)(2) now requires each insurer to annually conduct a separate and distinct written auto body rate survey for each classification of auto body shops established pursuant to R.I. Gen. Laws § 5-38-5. R.I. Gen. Laws § 5-38-5 establishes two (2) classifications for full collision licenses, Class A and

Class B.[5] Therefore, R.I. Gen. Laws § 27-29-4.4(a)(2) now requires insurers to conduct a written separate and distinct auto body rate survey for Class A and Class B auto body licensees **and** to determine a separate and distinct prevailing rate for each classification.[6]

As set forth above, the words of a statute are to be given their plain and ordinary meaning. The Supreme Court in *Auto Body Ass'n* found the statute to be ambiguous in terms of the issue of whether the survey was to be the sole determinant for setting the prevailing rate and in terms of the issue of which licensed insurers had to conduct such a survey.

Nonetheless, in *Roadway Express, Inc. v. Rhode Island Commission for Human Rights*, 416 A.2d 673 (R.I. 1980), the Court relied on a dictionary definition in applying the "ordinary meaning" of "must." *Id.*, at 674. As the Court has found, "[i]n a situation in which a statute does not define a word, courts often apply the common meaning given, as given by a recognized dictionary." *Defenders of Animals, Inc.*, at 543. In terms of the narrow issue of the terms, "separate" and "distinct" as related to the conducting the survey, the common usage of the terms is appropriate to be used. "Separate" means "to set or keep apart" or "to make a distinction between."[7] Distinct means "distinguishable to the eye or mind as being discrete . . . or not the same: separate."[8]

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[5] *Commercial Licensing Regulation* 230-RICR-30-05-2 *Motor Vehicle Body and Salvage Vehicle Repair* implements the two (2) statutory classes of license for full collision facilities, Class A and Class B. Said regulation also provides for various limited auto body repair licenses, but by statute, the auto body repair labor rate surveys are of the full collision class of licenses.

[6] Consistent with these statutory requirements, Section 10.6(B) of the Survey Regulation requires that insurers send annual questionnaires to "Full Collision Repair Auto Body Facilities" and that the questionnaires shall be "separate and distinct" to each classification of auto body repair facilities. Section 10.7(B)(7) of the Survey Regulation provides that in setting the rates, a "separate prevailing labor rate(s)" is to be "established by the insurer for each classification of full collision licensed auto body repair facilities."

[7] https://www.merriam-webster.com/dictionary/separate.

[8] https://www.merriam-webster.com/dictionary/distinct.

Thus, when conducting the survey, an insurer cannot survey Class A and Class B shops together. There is to be a separate and distinct survey for each class. Thus, the questionnaire provided by the Department to be used by insurers has each shop indicate whether it is an A or B class of shop. The insurer is then to set a separate prevailing rate for each classification. However, a separate rate does not mean that the rates cannot be the same. It could be in conducting both surveys, the insurer determines a rate that is the same for both shops or they could be different by one (1) dollar or five (5) dollars, *etc.* The statutory requirement is that the survey and the rate setting are separate and distinct.[9] Thus, the rates can be the same as long as the survey and determination were separate and distinct. While distinct can mean "not the same," in this situation, not the same would be if an insurer set the rates for Class A and B shops together. The statute requires the process and the analysis be separate so that the rates are determined separately even if the rates end up the same.

The statute is setting a process by which auto body surveys are conducted. The statute does not mandate what can or cannot be considered by insurers in setting the prevailing rate. It just mandates that the insurers must explain why if the surveys were not a basis for setting the prevailing rate. It would not make sense for the statute to mandate that the Class A and Class B prevailing rates be different as the statute is only concerned with process. The determination process may come up with two (2) different rates or identical rates but as long as the process was separate and distinct in surveying and determining the two (2) rates, the rates can be identical.

iv. certain/particular geographic area

R.I. Gen. Laws § 27-29-4.4(a) applies the auto body repair labor rate survey requirements to motor vehicle liability insurance carriers in the state so within Rhode Island. The survey is of shops that are fully licensed by the Department so the survey is only of shops that are within Rhode Island.

[9] The use of both terms really is redundant as both terms as used have the same meaning.

The definition in R.I. Gen. Laws § 27-29-4.4(a)(1)(i) for "[a]uto body labor rate survey" is "an analysis of information gathered from auto body repair shops regarding the rates of labor that repair shops charge in a certain geographic area." As the survey is only to be of Rhode Island shops, it follows that the certain geographic area only refers to an area within Rhode Island.

R.I. Gen. Laws § 27-29-4.4(a)(1)(ii)'s definition of prevailing auto body labor rate refers to a rate set by an insurer as a result of conducting an auto body labor rate survey in a "particular geographic area." The survey is only to be conducted within Rhode Island so "particular" like "certain" means within Rhode Island.

There is nothing in the statute about calculating the prevailing rate differently based on regional differences within Rhode Island. Certainly, most surveys have been conducted for all Rhode Island shops, but the statute does allow the labor rate survey to be of charges in a certain geographic area (e.g. by county). In fact, Travelers set a prevailing Class B rate by county. See appendix to Travelers' brief. However, how the prevailing rate is set is not limited by the statute. The statute does not limit considerations for setting the prevailing rate to only information from a particular geographic area. In other words, while the term certain/particular geographic area refers to within Rhode Island, it is only used in connection with the labor rate survey. There is no such geographic limitation as to how the prevailing rate is determined.

v. Setting the Prevailing Rate

The insurers receive the returned surveys. Some responses may be rejected for being improperly completed or incomplete. The insurers are to keep records of those survey responses rejected as they are subject to Department audit. § 10.8(D).

After receiving the results of the surveys, the insurers determine a prevailing rate for Class A and Class B shops. The statute does not have any requirements in how the prevailing rate is set.

Instead, insurers are to report a "description of the formula or method used to calculate or determine the specific prevailing rate reported." R.I. Gen. Laws 22-9-4.4(a)(4)(iv). The survey does not need to be the sole determinant of the prevailing rate. If the calculation of the prevailing rate is not based on the auto body survey results, a complete explanation is required in the insurer's survey report.

"Complete" is defined as a "having all necessary parts, elements, or steps" or "total, absolute" or "fully carried out: thorough."[10] While the Survey Regulation does not require the explanation be "justified," complete would indicate that it must be more than the insurer does not like the results of the auto body survey. Thus, if the explanation given is that the insurer only received 40 of 100 shops surveyed so insurer felt that the data received did not cover enough shops so did not rely on the survey and instead relied on other data (that is explained/referenced in the description of calculating the prevailing rate), the Complainants may not like the explanation, but it would be "complete" in that it was a complete explanation of why the surveys were not considered.

Along with the complete explanation for not using the survey results as a basis for the prevailing rate, the insurers must keep a list of those questionnaires not taken into consideration in its analysis including the reason for not considering the response. It could be that the insurer considers all responses, but does not use them as a basis for the prevailing rate and gives a complete explanation. It could be that the insurer rejects some responses as incomplete and then also determines that some of the responses cannot be considered and gives reasons why. The insurer then could have remaining responses that it does not base the prevailing rate on, but has considered. In other words, the insurer considers responses but then gives an explanation for not using the responses as a basis for the prevailing rate calculation.

[10] https://www.merriam-webster.com/dictionary/complete.

D. Stipulation

The last three (3) paragraphs of the stipulation summarizes the issues to be determined and which stipulated paragraphs fall under each issue.

i. First Issue:

> In order for the Hearing Officer to determine the aforementioned issues in paragraphs 4, 5, 6, 7, 8, 9, 10, 12, and 13 concerning compilation or blending of responses received from the Class A and Class B designated auto body repair shops in response to the surveys, the Hearing Officer must determine whether R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation prohibits an insurance company from aggregating the responses received from Class A and Class B designated auto body repair shops when it submits a Labor Rate Filing to the Department.

In 2016, the statute was amended to reflect the change in the licensing of full collision body shops. Because of the change in licensing, the statute now requires that the auto body surveys be conducted separately and distinctly so the insurers must provide separate Class A and B reports that include a description of the calculations for the separate and distinct prevailing rates for Class A and B. Section 10.7(B) of the Survey Regulation requires that a list of all shops to which the survey was sent and a list of those shops that failed to respond and a list of those surveys not taken into consideration and the total number of questionnaires considered by the insurer be included in the report. In may be that in such a listing, it is possible to determine the percentages of returned surveys by class. But if the report states that the total responses to the survey were 100 out of 200 sent without then specifying how many were sent to Class A and Class B shops and how many were received from each class of shop, the report would be deficient. However, if the report states that 100 questionnaires were sent to A and 100 to B and 40 were returned for A and 60 for B that would be separate and distinct. The report may also note a 50% return rate overall, but should also include that the return rate for Class A was 40% and for Class B was 60%. It may be that an insurer may find too few responses are received for one class, but not the other class.

There is no prohibition in submitting one (1) report that addresses the separate and distinct labor rate survey and describes separately the setting of the separate and distinct prevailing rate. No matter how the report is formatted, it must separately address Class A and B prevailing rates and state their calculations separately. It may be that the reasons are very similar, but the calculation for Class A and B prevailing rates must be separate and if surveys are not a basis for either rate the complete explanation – even if very similar to each other - must be given separately for each Class. Thus, the report would most likely include a section about the Class A prevailing rate and how it was calculated and whether it was based on the Class A surveys and, if not, why not, and have a similar section for the Class B prevailing rate.

ii. <u>Second Issue</u>:

> In order for the Hearing Officer to determine the aforementioned issues in paragraphs 9, 14, and 16 concerning an insurance company's rejection of survey responses received from auto body repair shops, the Hearing Officer must determine whether each Labor Rate Filing explained why the insurance company rejected consideration of the labor rate surveys submitted by the auto body repair shops in accordance with R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

The Survey Regulation requires a complete explanation when the survey responses are not used as a basis for calculating the prevailing rate. Those responses have been considered but the insurer has determined with an explanation not to use them as a basis for setting the prevailing rate. It may be that some survey responses that are not rejected are then not considered and those must be listed with a reason given for not being considered. Thus, an insurer could send out 100 Class A surveys and receive 50 back. It could then reject five (5) of those 50 as being late and/or incomplete, but must keep a record of those rejected subject to a Department audit. Then of those 45, it may decide that 10 cannot be considered and must give reasons why. Then for the remaining 35 responses that are considered, the insurer must decide whether to use them as a basis in setting the prevailing rate and if not, it must give a complete explanation of why. An insurer could decide

to "consider" all responses, but then not base the prevailing rate on the responses because they were incomplete, vague, or too few surveys were returned, *etc*. The issue of the explanation is that a complete explanation must be given. It may be that not everyone agrees that the reasons given were good reasons, but the requirement is only of a complete – a reason why - explanation. The "whys" could include reasons such as too few surveys were returned to be reliable, the responses did not include charged rates based on [fill in], and/or the rates given were much higher (or lower) than other information (e.g. research) showing [fill in].

iii. <u>Third Issue</u>:

> In order for the Hearing Officer to determine the aforementioned issues in paragraphs 1, 2, 3, 7, 11, and 17 concerning data used in establishing a prevailing rate, the Hearing Officer must determine whether the consideration of factors besides auto body labor rate survey results, including but not limited to, contract rates, subrogation rates, and rates obtained in a geographical area outside of Rhode Island are prohibited under R.I. Gen. Laws § 27-29-4.4 and/or Survey Regulation.

As discussed above, R.I. Gen. Laws § 27-29-4.4((a)(3), limits what can be used in an auto body labor rate survey. It does not mention prevailing rate, but is part of a listing about the auto body labor rate survey and (a)(3) speaks of the auto body labor survey. Whether the "in" is added or not, the result is still the same in that the items listed are not be used in an **auto body labor rate survey**. There is a difference between the auto body labor rate survey and the setting of the prevailing rate. The statute does not say insurers may not use the following in setting the prevailing rate. The prevailing rate definition does not exclude any factors. Indeed, the statute only requires that a description of the formula or method used to calculate the prevailing rate must be given. And by regulation a complete explanation must be given if the calculation or formula for the prevailing rate is not based on the results of the survey.

There are no statutory or regulatory limits in what is included in the calculation of the prevailing rate. Thus, an insurer can consider information from other states or subrogation rates

or in-house research. The statute requires the process of setting the prevailing rate be explained and, if after considering the survey responses and the responses are not a basis for setting the prevailing rate, a complete explanation must be given for not relying on the surveys. The statute merely provides transparency in the use (or non-use) of the results of the auto body labor rate survey and transparency in how the prevailing rate is calculated. There is no mandatory methodology or limits other than that the prevailing rates are to be determined separately and a complete explanation must be given if the prevailing rate is not based on the survey results. Based on the foregoing, outside factors are allowed in the consideration of the prevailing rates.[11]

E. Prospective Relief

In the stipulation, the Complainants agreed that they sought prospective relief, not retrospective relief or damages, in regard to the complaints they filed against the Respondents. Thus, while the stipulation speaks of determining whether there were violations, it is a pointless exercise to review the prevailing rate filings to establish specific violations of the insurers' reports in terms of the reporting the separate and distinct prevailing rates and the methods used to calculate each rate. However, the description of calculating the two (2) different rates cannot be combined into a basis for both rates. Even if the rates end up identical, the process for the calculation is to be separate so must be described separately. The report must delineate the calculations separately and even if some items might be repetitive – e.g. reason for not considering the survey responses – they must be stated separately for each Class.

As prospective relief is being requested, some Respondents argued this turned the complaint hearing into a request for an advisory opinion. By not seeking retrospective relief or

[11] This is consistent with *Auto Body Ass'n* which found prior to the amendment of R.I. Gen. Laws § 27-29-4.4(b) that allowing the labor rate survey to be the sole determinant in establishing the prevailing rate would lead to an absurd result since such an interpretation would in effect permit rate-setting in the uncontrolled discretion of auto body shops.

damages, the issues became not any prior violations, but whether on a go forward basis, what is required to be included in the report and what may be considered by the insurers.

This matter was brought as a consumer complaint which is allowed under the Hearing Regulation. It alleged violations by the Respondents of R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation in their 2016 auto body labor rate survey. R.I. Gen. Laws § 27-29-4.5 and R.I. Gen. Laws § 42-14-16 provide for penalties.[12]

In *City of Providence Bd. of Licenses v. Dep't. of Bus. Regulation of R.I.*, 2013 R.I. Super. LEXIS 195, the Department impermissibly turned a request for an advisory opinion into a declaratory ruling under R.I. Gen. § 42-35-8.[13] Unlike in *City of Providence*, the undersigned has

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[12] R.I. Gen. Laws § 27-29-4.5 provides that an insurer's failure to comply with any requirements of R.I. Gen. Laws § 27-29-4.4 or any Department regulation thereto shall result in a fine of up to $5,000. R.I. Gen. Laws § 42-14-16 provides for various penalties any violation of Title 27 which includes R.I. Gen. Laws § 27-29-4.4. R.I. Gen. Laws § 42-14-16 provides as follows:

> Administrative penalties.
> (a) Whenever the director shall have cause to believe that a violation of title 27 and/or chapters 14, 14.5, 62 or 128.1 of title 42 or the regulations promulgated thereunder has occurred by a licensee, or any person or entity conducting any activities requiring licensure under title 27, the director may, in accordance with the requirements of the Administrative Procedures Act, chapter 35 of this title:
> (1) Revoke or suspend a license;
> (2) Levy an administrative penalty in an amount not less than one hundred dollars ($100) nor more than fifty thousand dollars ($50,000);
> (3) Order the violator to cease such actions;
> (4) Require the licensee or person or entity conducting any activities requiring licensure under title 27 to take such actions as are necessary to comply with title 27 and/or chapters 14, 14.5, 62, or 128.1 of title 42, or the regulations thereunder; or
> (5) Any combination of the above penalties.
> (b) Any monetary penalties assessed pursuant to this section shall be as general revenues.

[13] R.I. Gen. Laws § 42-35-8 provides in part as follows:

> Declaratory order.
> (a) A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether, or in what manner, a rule, guidance document, or order issued by the agency applies to the petitioner.
> (b) An agency shall promulgate rules prescribing the form of a petition under subsection (a) and the procedure for its submission, consideration, and prompt disposition. The provisions of this chapter concerning formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory order, except to the extent provided in this section or to the extent the agency provides by rule or order.
> ***

not been presented with abstract questions of law, but rather with an issue that occurs every year (annual requirement to conduct auto body labor rate survey and set a prevailing rate for Class A and B shops) and violations of the statutory requirements could lead to administrative penalties (if not more) being imposed on insurers. The Complainants alleged violations of the statute and regulation and sought relief in their filing with the Department. The parties disputed how the surveys were to be conducted and what could be included in the survey and what could be considered in the setting of the prevailing rates. The parties disputed how the insurers should make their annual reports to the Department. Under the *City of Providence Bd. of Licenses*, there is an actual justiciable controversy with disputed facts to turn this consumer complaint also into a declaratory judgment request.[14]

(e) If an agency issues a declaratory order, the order must contain the names of all parties to the proceeding, the facts on which it is based, and the reasons for the agency's conclusion. If an agency is authorized not to disclose certain information in its records to protect confidentiality, the agency may redact confidential information in the order. The order has the same status and binding effect as an order issued in a contested case and is subject to judicial review under § 42-35-15.

(f) An agency shall publish each currently effective declaratory order on its agency website.

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[14] *City of Providence Bd. of Licenses* held as follows:

> The Rhode Island Supreme Court has stated that § 42-35-8 is "an administrative counterpart of the Declaratory Judgments Act." Liguori v. Aetna Cas. & Sur. Co., 119 R.I. 875, 882-83, 384 A.2d 308, 312 (1978). Therefore, the well-settled rule that "the Superior Court is without jurisdiction under the Uniform Declaratory Judgments Act unless it is confronted with an actual justiciable controversy" applies equally to declaratory rulings under § 42-35-8. See McKenna v. Williams, 874 A.2d 217, 226 (R.I. 2005). A justiciable claim must involve "'a plaintiff who has standing to pursue the action' and 'some legal hypothesis which will entitle the plaintiff to real and articulable relief.'" Id. (quoting Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004). Declaratory rulings are "not intended to serve as a forum for the determination of abstract questions or the rendering of advisory opinions." Lamb v. Perry, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967). A review of the facts in this case compels the conclusion that DBR's ruling was improperly rendered given Karma's failure to articulate a justiciable basis for a declaratory judgment.
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> More significant than defects in form, however, is Karma's [plaintiff] failure to include any "facts relied upon in form similar to complaints in civil actions before the superior courts of this state," or a "prayer of the petitioner." Id. Such contested facts are necessary to establish the required "legal hypothesis" entitling Karma to "real and articulable relief" under a declaratory ruling. See McKenna, 874 A.2d at 217; accord Republican Party of Conn. v. Merrill, 307 Conn. 470, 55 A.3d 251, 258 (Conn. 2012) (holding that a request to an administrative agency "by a person seeking a determination regarding the applicability of a statute to specific facts may be treated as a petition for a declaratory ruling") (emphasis added); accord Cannata v. Dep't of Envtl. Prot., 239 Conn. 124, 680 A.2d 1329, 1335 (Conn. 1996) (holding that a petition to an administrative agency constituted a petition for a declaratory ruling

F. Conclusion

Based on the foregoing, this decision is issued in relation to the consumer complaints filed by the Complainants against the Respondents and the consumer complaint hearing held in this matter.

As there is no need to determine specific violations because this matter is being treated prospectively by agreement of the parties, this decision shall address the issue pursuant to R.I. Gen. Laws § 42-14-16(a)(4) which provides that when there may have been a violation(s), the Department may require any licensee under Title 27 to comply with Title 27. Therefore, all future labor rate surveys shall be conducted pursuant to R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation and shall be consistent with this decision.

Further, based on the stipulation and case law, this matter will also be treated as a declaratory order pursuant to R.I. Gen. Laws § 42-35-8 so that all labor rate surveys shall be conducted pursuant to R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation and shall be consistent with this decision.

VI. FINDINGS OF FACT

1. The Department issued Orders to the Respondents regarding the complaints filed by the Complainants. A status conference was held on May 5, 2017. The Respondents filed motions to dismiss to which the Complainants objected. On July 28, 2017, an order denying said motions to dismiss was entered. After a status conference, the Complainants and Respondents filed an agreed to

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because the party expressly requested a determination as to whether their particular use of land met statutory requirements for an exemption). Specifically, Karma's request "ask[ed] for clarification" regarding DBR's 2008 Notice as to which, if any, statute prohibited the sale of alcohol by the bottle. (Pl.'s Ex. A at 1.) The request did not reference the facts underlying Karma's March 2013 fines regarding its alleged violation of such rules or present an argument in support of any particular analysis. See id. The request did not include any "prayer of the petitioner" in that it did not include any persuasive language indicating that Karma had a vested stake in the resolution of the issue, nor did it advocate a particular interpretation. See id.

stipulation and briefs in order to resolve this matter. The stipulation covered all issues in dispute. The parties agreed that this matter could be decided on the stipulation and that only prospective relief was sought. The record closed on May 18, 2018.

2. The facts contained in Sections III, IV, and V are reincorporated by reference herein.

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented: The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 42-35-1 *et seq.*, R.I. Gen. Laws § 27-29-1 *et seq.*, R.I. Gen. Laws § 42-14-1 *et seq.*, and the Hearing Regulation.

VIII. RECOMMENDATION

Based on the foregoing, the Hearing Officer recommends as follows:

In terms of the decision after hearing, pursuant to R.I. Gen. Laws § 42-14-16(a)(4), the Respondents (who require licensing under Title 27) are required to comply with Title 27. Therefore, all future labor rate surveys shall be conducted pursuant to R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation and shall be consistent with this decision.

Further, this matter will also be treated as a declaratory order pursuant to R.I. Gen. Laws § 42-35-8 so that all labor rate surveys shall be conducted pursuant to R.I. Gen. Laws § 27-29-4.4 and the Survey Regulation and shall be consistent with this decision

Dated: June 29, 2018

Catherine R. Warren, Esquire
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

_____ ADOPT
_____ REJECT (see Director's Order dated July 30, 2018)
_____ MODIFY

Dated: 7/30/18

Elizabeth Tanner, Esquire
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 1 day of ~~July~~ August, 2018 that a copy of the within Decision and Notice of Appellate Rights was sent by first class mail and electronic delivery to –

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and by electronic delivery to Elizabeth Kelleher Dwyer, Esquire, Deputy Director, and Matthew Gendron, Esquire, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.