

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Grover Landscape Services, Inc.

Case No: 22-0014-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected Contractor Grover Landscaping Services, Inc. (Grover) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on November 23, 2021. DLSE issued the Assessment with respect to work performed by Grover for the County of Stanislaus (Awarding Body) for the project named McHenry Avenue Widening (Project) in Stanislaus County. The Assessment determined that the following amounts were due: \$1,988.18 in unpaid prevailing wages;¹ \$1,120.00 in Labor Code section 1775 penalties;² and, \$175.00 in section 1813 penalties.

A hearing on the merits occurred on September 8, 2022, before Hearing Officer Michael R. Drayton. Evan Adams appeared as counsel for DLSE. Andrew Grover, Project Coordinator, represented Grover. At the hearing, DLSE Deputy Labor Commissioner (DLC) Thuy Pham testified in support of the Assessment, as did Cayetano Reynoso of the Foundation for Fair Contracting (FFC). Andrew Grover, Mark Grover, President, and Matt Long, Tree Service Manager, testified on behalf of Grover. The Hearing Officer submitted the matter for decision upon the conclusion of the hearing on September 8, 2022.

¹ The Assessment indicated the breakdown as follows: \$1,949.66 in unpaid wages; and, \$38.52 in unpaid training fund contributions. Thus, a total of \$1,988.18 in unpaid prevailing wages.

² All subsequent references to sections are to the Labor Code, unless otherwise specified.

Prior to the hearing, the parties stipulated to the following:

- The McHenry Avenue Widening Project for the Stanislaus County Public Works Department in Stanislaus County, Department of Industrial Relations (DIR) project identification number 31673, was a public work requiring payment of prevailing wages.
- Stanislaus County awarded the contract for the Project to Grover.
- The Awarding Body advertised the Project for bid on December 20, 2019.
- The Prevailing Wage Determinations at issue were published on August 22, 2019: Operating Engineer, Northern California NC-23-63-1-2019-1; and Tree Maintenance (Laborer), NC-102-X-21-2019-1 (with sub-classifications of Senior Tree Trimmer, Tree Trimmer, and Groundsperson).
- The estimated date of completion for the project was June 30, 2020.
- DLSE issued the Assessment number 40-71738-149 on November 23, 2021, for \$1,949.66 in unpaid wages, \$38.52 owed in training funds, \$1,120.00 in penalties pursuant to section 1775 at a rate of \$40.00 per violation, and \$175.00 in penalties pursuant to section 1813.
- DLSE served the Assessment timely.
- Grover requested review timely.
- Grover deposited the full amount of the Assessment in accordance with section 1742.1.
- DLSE's attorney Evan Adams met and conferred with Andrew Grover on August 30, 2022.

The issues for decision are as follows:

- Whether Grover misclassified employees on the Project.
- Whether Grover underpaid prevailing wages on the Project.
- Whether Grover is liable for penalties assessed under section 1775.
- Whether Grover is liable for penalties assessed under section 1813.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima

facie support for the Assessment. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) However, Grover provided evidence that it would be inequitable to impose a portion of the penalties issued under section 1775. Accordingly, the Director issues this Decision affirming the Assessment, as modified.

FACTS

The Project.

Grover entered into a contract dated December 20, 2019, with the County of Stanislaus to provide “services involving tree removal along McHenry Avenue from Ladd Rd., North to San Joaquin County line to prepare the location for utility relocation in advance of upcoming roadway, widening project for the McHenry Avenue widening project” (referred to hereafter as the Project Contract). (DLSE Exhibit No. 4.)³

³ Prior to the Project, Grover provided landscaping services to the County of Stanislaus pursuant to a February 5, 2019 contract for independent contractor services, which Grover describes as the “Master Agreement” with the County (referred to hereafter as the General Landscaping Contract). (DLSE Exhibit No. 4.) The General Landscaping Contract specified that the work was subject to prevailing wage law. The scope of work attached as Exhibit A to the General Landscaping Contract indicates that the County “has a need to obtain tree trimming, tree removal, and other arboreal services for properties and facilities, owned, managed and/or maintained by the Department of Environmental Resources (DER) and the Department of Parks And Recreation (Parks), located throughout Stanislaus county.” The scope of work specified various particulars regarding tree trimming, tree removal, stump removal/grinding, brush trimming/removal, and other as needed additional landscape services. The scope of work further indicates that as each project is authorized, Grover was to develop the project cost based on the unit/task price/rates outlined in Exhibit C to the agreement. The pricing schedule provided that all the supervision, labor, equipment, materials, and tools necessary to perform the services under the contract shall be provided pursuant to the schedule.

The schedule provides for specific prices for tree, trimming, tree and stump removal, tree, felling (no stump removal required), individual stump, grinding/removal, Mulberry tree, trimming/canopy reduction, Mulberry tree, pollarding.

The General Landscaping Contract provides that the contract commences upon signing and continues until January 31, 2022. The agreement could be extended by the parties for an additional two years, within second agreement extension for another two years. In no case would the renewal extend beyond 4 years.

Grover commenced work on the Project on December 27, 2019, using the Prevailing Wage Determination (PWD) for the craft Tree Maintenance (Laborer), NC-102-X-21-2019-1—with sub-classifications of Senior Tree Trimmer, Tree Trimmer, and Groundsperson—per Stanislaus County’s directives. Grover utilized boom trucks, chainsaws, and loaders on the project, for preparing the Project area for roadway widening construction.

The Public Works Complaint and Investigation.

On or about December 1, 2020, DLSE received a complaint from Cayetano Reynoso of the FFC about the Project. (DLSE Exhibit No. 1.) Reynoso complained that Grover misclassified workers, under reported hours, underpaid wages and fringe benefits, and underpaid overtime. (*Ibid.*) In addition, Reynoso alleged that Grover should have employed laborer and operating engineer apprentices on the Project, failed to send contract award information to laborer and operating engineer apprenticeship programs and request dispatch of apprentices from them, as well as failed to pay training fund contributions. (*Ibid.*)

DLC Thuy Pham investigated the complaint. Pham received photographs from Reynoso that he took of work performed on the Project. The photographs showed workers using chainsaws and operating a Bobcat skid steer loader (model T595) as well as a boom truck. (DLSE Exhibit Nos. 13 and 5.) Grover informed Pham that the Awarding Body had indicated that Grover should use the classification Tree Maintenance (Laborer) on the Project. (Grover Exhibit G.)

The Prevailing Wage Rate Determinations.

The two prevailing wage determinations (PWDs) at issue in this matter are Tree Maintenance (Laborer), NC-102-X-21-2019-1 (Tree Maintenance), and Operating Engineer (Heavy and Highway Work), NC-23-63-1-2019-1 (Operating Engineer). (DLSE Exhibit Nos. 7 and 6 respectively.) While Operating Engineer is an apprenticeable craft,

Tree Maintenance is not. (*Ibid.*)⁴

The PWD for the craft of Tree Maintenance includes a specific limitation in its title. It specifies as follows: "(APPLIES ONLY TO ROUTINE TREE MAINTENANCE WORK, NOT CONSTRUCTION AND/OR LANDSCAPE CONSTRUCTION [fn. 2])" The footnote states: "This determination does not apply to tree trimming, removal, or planting work performed on construction or landscape construction contracts." (DLSE Exhibit No. 7.)

The PWDs and the associated scope of work for each include further discrete classifications. Operating Engineer, Group 6, applies to workers who use a skidsteer loader. (DLSE Exhibit No. 6.) Under the Tree Maintenance scope of work, those workers who direct and perform the trimming and pruning of trees are classified as Senior Tree Trimmer, those who perform all trimming and pruning of trees are classified as Tree Trimmer, while those workers performing all maintenance work other than trimming and pruning trees are classified as Groundsperson. (DLSE Exhibit No. 7.)

The Assessment.

DLSE found that Grover misclassified and underpaid prevailing wages to workers. Grover's certified payroll records (CPRs) indicated that it used the classification Senior Tree Trimmer for two employees on the Project (Enrique Ojeda and Marco Favela), the classification Tree Trimmer for one employee (Jesus Silva), and the classification Groundsperson for six employees (Joel Ojeda, Ramon Valdovinos, Javier Contreras, Jr., Vincente Gonzalez, Bladamir Corral Garcia, and Jesse Grover). (DLSE Exhibit No. 9.) Further, the CPRs indicated that every employee, except Enrique Ojeda and Jesus Silva, was underpaid the prevailing wage for the classification they were assigned. (*Ibid.*) The straight-time hourly rate for Senior Tree Trimmer was \$29.62. (DLSE Exhibit No. 7.) Grover paid Marco Favela, a Senior Tree Trimmer, \$28.50 per hour for the week ending December 28, 2019. (DLSE Exhibit No. 9.) The straight-time hourly rate for

⁴ The Foundation for Fair Contracting raised the issue of whether some employees on the Project should have been classified under a third PWD, that of Laborer and Related Classifications, NC-23-102-1-2019-2 (DLSE Exhibit No. 8), rather than Tree Maintenance. DLSE did not agree.

Groundsperson was \$25.77. (DLSE Exhibit No. 7.) Grover paid Joel Ojeda, a Groundsperson, \$23.86 per hour for the weeks ending December 28, 2019, January 11, 2020, February 1, 2020, and February 8, 2020; and Grover paid Ojeda \$23.80 per hour for the week ending February 15, 2020. (DLSE Exhibit No. 9.) Grover paid Ramon Valdovinos, a Groundsperson, \$25.31 per hour for the week ending December 28, 2019, and \$25.27 per hour for the week ending May 30, 2020, both less than the \$25.77 required. (*Ibid.*) Grover paid Javier Contreras, Jr., a Groundsperson, \$24.45 per hour for the weeks ending January 11, 2020, February 1, 2020, February 8, 2020, and February 15, 2020, less than the \$25.77 required. (*Ibid.*) Grover paid Vincente Gonzalez, a Groundsperson \$25.00 per hour for the week ending January 11, 2020, less than the \$25.77 required. (*Ibid.*) Grover paid Bladamir Corral Garcia, a Groundsperson, \$24.69 per hour for the week ending January 11, 2020, less than the \$25.77 required. (*Ibid.*) Finally, Grover paid Jesse Grover, a Groundsperson, \$23.26 per hour for the week ending February 15, 2020, again less than the \$25.77 required. (*Ibid.*)

Not only did Grover underpay prevailing wages to employees who Grover classified under the Tree Maintenance PWD, but also Grover misclassified some of those workers. Grover provided a spreadsheet to DLSE that specified the names of employees and the days during which those employees used a combination of a "Chainsaw" and a piece of heavy equipment. (DLSE Exhibit No. 10.) Grover identified the heavy equipment as "Bucket Truck," "Chip Brush," or "Skid Loader." Thus, the spreadsheet indicated "Bucket Truck/Chainsaw, Chainsaw/Chip Brush, and Chainsaw/Skid Loader"), an exception to this being employee Jesse Grover who used only a "Skid Loader" on the one day he worked. (*Ibid.*) DLSE determined that Grover should have classified employees using the heavy equipment under the Operating Engineer PWD as Operating Engineer, Group 6, as the Project was specifically for road-widening construction. (DLSE Exhibit Nos. 6 and 7 respectively.) The Tree Maintenance PWD specifically excludes work incidental to construction. (DLSE Exhibit No. 7.) Therefore, DLSE reclassified employees who used heavy equipment to Operating Engineer, Group 6. In addition, DLSE reclassified employees who used a chainsaw from Groundsperson to Tree

Trimmer. The rationale for the latter reclassification being that the use of the chainsaw was within the scope of Tree Trimmer, which performs all trimming and pruning of trees. (DLSE Exhibit No. 7.) When it could not be determined with accuracy how many hours an employee spent using specific equipment, DLSE investigator Pham divided the time between two classifications, Operating Engineer, Group 6, and Tree Trimmer.

DLSE included in the Assessment the amount of training fund contributions owed by Grover for the hours of work employees performed under the Operating Engineer, Group 6 classification. Otherwise, the DLSE investigator did not “audit for apprenticeship issues, which were caused by misclassification of workers.” (DLSE Exhibit No. 13, p. 6.)

Reynoso Testimony.

Cayetano Reynoso, Field Representative for the Foundation for Fair Contracting (FFC), prepared the public works complaint filed with DLSE. (DLSE Exhibit No. 1.) Reynoso monitored prevailing wage projects in Northern California for compliance. He drove by the Project worksite and observed the work performed by Grover at the time of the Project. Reynoso took pictures of the work he observed (DLSE Exhibit No. 5), which he described during his testimony.

Reynoso observed workers cut branches and remove trees on the Project. Workers used chainsaws on the Project. He also observed a lift (which he referred to as a “boom truck”) that workers used for elevation in order to cut trees. Reynoso saw workers using a Bobcat skid vehicle as well as a woodchipper.

According to Reynoso, because the work performed was tree removal for roadway construction, the Tree Maintenance classification did not apply to this Project. Rather, the employees performed work classified properly as (1) Laborer and Related Classifications and (2) Operating Engineer.

Pham Testimony.

DLC Thuy Pham investigated the public works complaint and testified in support of the Assessment. She relied upon documentation provided by FFC and Grover, as well as documentation accessible to DLSE online.

Pham reviewed the photographs provided to DLSE by Reynoso. (DLSE Exhibit No. 5.) She received and utilized CPRs and timecards she received from Grover. (DLSE Exhibit Nos. 9 and 11 respectively.) In addition, Grover provided Pham with a spreadsheet detailing the use of machinery and tools by its employees. (DLSE Exhibit No. 10.) The equipment identified in the document included a bucket truck, chainsaw, chip brush, and skid loader.

According to Pham, the Tree Maintenance PWD applied to routine tree maintenance work only. It did not apply to tree trimming and removal performed on construction or incidental to construction, as was the case for this Project.

Pham testified regarding the preparation of and calculations in the Public Works Audit Worksheet (Audit Summary). (DLSE Exhibit 12.) She utilized the PWD's applicable to Tree Trimmer, Area 2, and Operating Engineer, Group 6, Area 1 (OE-G6). According to Pham, she could have used the Laborer and Related Classifications PWD (NC-23-102-1-2019-2)—as suggested by FFC—in lieu of the Tree Maintenance (Laborer) PWD because the work of the Project was for road widening; however, since both PWDs involved laborers, she used the PWD with the lower prevailing wage rates, Tree Maintenance. Pham added her decision on which PWD to use depended on a case-by-case analysis.

Pham explained that because Grover was not able to verify how much time the workers classified as Groundsperson spent on each task, operating heavy equipment and using chainsaws, she divided the worked hours of that day into half and reclassified them as Operating Engineer, Group 6 and Tree Trimmer. She gave credit to the contractor for what they paid to the workers as shown on the certified payroll records. Finally, since Grover had no history of violations, Pham recommended the lowest penalty rate of \$40.00 per violation.

On cross-examination, Pham could not recall why she reclassified Bladmir Garcia, Joel Ojeda, and Ramon Valdovinos from Groundsperson to Tree Trimmer in the audit. Upon redirect, Pham testified that use of chainsaws by them was not within the scope of work for a Groundsperson.

Testimony of Grover Representatives.

Matt Long testified that he inquired of the County, with which Grover was separately performing work under a general maintenance contract, what job classification Grover should use for the Project. A County representative told Long to use the Tree Maintenance classification. In preparation of the bid, Long used the rates utilized under the maintenance contract. Andrew Grover testified to his understanding that the proper classification for an employee using a chainsaw—Groundsperson versus Tree Trimmer—depended on the level of skill required for the task.

Mark Grover, President of Grover, testified, that he was aware of the exchanges between Long and Stanislaus County. Grover intended to comply fully with the law regarding payment of prevailing wages. He testified that if a mistake was made, it was an honest mistake and that his greatest concern was having a record that Grover violated the law intentionally.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The California Supreme Court summarized the purpose of the CPWL as follows:

The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987, citations omitted *(Lusardi)*.) DLSE enforces prevailing wage requirements not only for the benefit of workers but also “to protect employers who comply with the law from those who

attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a) and see *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate, and prescribes penalties for failing to pay the prevailing rate. Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. Section 1742.1, provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days, or the amount of the full Assessment is not deposited with the Department of Industrial Relations following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, DLSE issues a written civil wage and penalty Assessment pursuant to section 1741. An affected contractor may appeal that Assessment by filing a request for review under section 1742. DLSE transmits the request for review to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the Assessment. (§ 1742, subd. (b).)

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public work is performed (as defined in section 1724), and publishes a general PWD for a craft, such as Tree Maintenance (Laborer) or Laborer and Related Classifications, to inform all

interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) Ultimately, the Director's PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed.

DLSE's Reclassified Workers on the Project.

DLSE determined correctly that the Project was for the specific purpose of removing trees for road construction. (See DLSE Exhibit No. 2.) The Tree Maintenance (Laborer) PWD includes a statement in bold and all capital letters immediately below the title, "**(APPLIES ONLY TO ROUTINE TREE MAINTENACNE WORK, NOT CONSTRUCTION/AND OR LANDSCAPE CONSTRUCTION...)**" Further, the scope of work for Tree Maintenance (Laborer) provides the following limitation: "This Agreement does not cover (a) any work of any employee performing construction or landscape construction work (including work incidental to construction . . ." (DLSE Exhibit No. 7.) Thus, Grover classified employees improperly when it used the Tree Maintenance (Laborer) classification for the Project. The Project was not routine tree maintenance, but rather tree removal incidental to construction. Therefore, DLSE reclassified properly employees on the Project who operated a skid steer loader or skid loader from Tree Maintenance, Groundsperson, to Operating Engineer, Group 6. Operating Engineer PWD, NC-23-63-1-2019-1, issued August 22, 2019, provided the appropriate basis for classification of employees operating the heavy machinery—the skid loader—and the determination of the correct prevailing wage to pay for that work on the Project.

DLSE applied the prevailing wage rates for Operating Engineer PWD, NC-23-63-1-2019-1, Group 6 to those employees operating the skid loader on the Project. Grover

identified those employees operating the skid loader in a spreadsheet Grover provided to DLSE. (DLSE Exhibit No. 10.) Thus, Grover admitted that its employee operated a skid loader.

It appears that DLSE erred in not reclassifying employees on the Project who did not operate heavy equipment, from the Tree Maintenance (Laborer) classifications to the classifications found in the Laborer and Related Classifications craft. Instead, DLSE chose to use the lower prevailing wage rates found in the Tree Maintenance (Laborer) classification. However, DLSE did reclassify employees on the Project within the Tree Maintenance (Laborer) sub-classifications. DLSE reclassified employees Grover classified as Groundsperson to Tree Trimmer. DLSE did so because the employees used a chainsaw while working.

DLSE evaluated the work performed by Grover employees on the Project and hours worked by them based on documentation provided by Grover. The documentation included the spreadsheet prepared by Grover that identified employees who used specific equipment and tools on specific days of the Project, timecards, and CPRs. In addition, information provided by FFC corroborated what DLSE learned from Grover. Thus, the evidence supports the calculation of unpaid prevailing wages due in the amount of \$1,949.66, and unpaid training fund contributions in the amount of \$38.62.

Grover contended that the County directed that it use the Tree Maintenance PWD. However, the County's direction regarding which prevailing wage determination to utilize is not controlling or a defense to incorrect payment of prevailing wages. The Labor Code provides an interested party the exclusive remedy of "a petition to [the Director of Industrial Relations to] review a determination of any rate or rates . . . specified in . . . the call for bids." (§ 1773.4; Cal. Code Regs., tit. 8, § 16302.) No party made such request here.

Grover Is Liable For Penalties Assessed Under Section 1775.

Section 1775, subdivision (a), states in relevant part:

- (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
- (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
 - (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
 - (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
- (B)
 - (i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.
 - (ii) The penalty may not be less than eighty dollars (\$80) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
 - (iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[5]

⁵ The citation in section 1775 to section 1777.1, subdivision (c) is mistaken. Section 1777.1, subdivision (e), as it existed on the contract date, defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or

Abuse of discretion by DLSE is established if the "agency's non adjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

Pham recommended section 1775 penalties at the mitigated rate of \$40.00 per violation. Grover had no previous history of violations. In addition, Pham believed the violation was a good faith mistake. (DLSE Exhibit No. 13, p. 6.)

Grover failed to pay the correct prevailing wage for the Tree Maintenance (Laborer) classifications Grover assigned to seven of its employees. Grover committed 25 such violations.

Pham determined that Grover committed 28 violations because Grover misclassified its employees. She determined that three of the 28 violations occurred because Grover misclassified three employees as Groundsperson when the correct classification was Operating Engineer, Group 6. The remaining 25 violations were a result of misclassifying an employee as Groundsperson when the correct classification was Tree Trimmer.

The burden was on Grover to prove that DLSE abused discretion in issuing penalties and setting the penalty amount under section 1775. Grover presented credible evidence that the County directed it to utilize the job classifications and rates for work that were set forth in the General Landscaping Contract, Tree Maintenance (Laborer).

deliberately refuses to comply with its provisions."

For that reason, when it prepared its bid for the Project, it relied in good faith on the direction of the County. As a result, Grover was the successful bidder. The County benefitted from the misclassification of workers, utilizing the incorrect PWD. It is undisputed, as Pham testified on direct examination, that Grover made an error in good faith. Grover's witnesses provided credible testimony that supports the conclusion that the County misled Grover, though not intentionally, and therefore Grover utilized the incorrect PWD for this Project.

Nevertheless, Grover still failed to pay its employees the correct prevailing wage under the Tree Maintenance (Laborer) PWD, with or without misclassification of its employees as Groundsperson. Under either scenario, Grover committed 25 violations. Further, Grover did not prove an abuse of discretion as to the penalty rate. DLSE reduced the rate from the maximum \$200 per violation to \$40 per violation, an 80 percent reduction. Grover has shown no abuse of discretion as to that rate. Accordingly, the Assessment is affirmed as to the \$40 rate, but modified to reduce the number of violations from 28 to 25, with the resulting reduction in the total amount of section 1775 penalties owed from \$1,120 to \$1,000.

DLSE's Penalty Assessment Under Section 1813 Was Proper.

Section 1813 prescribes a penalty of \$25 per calendar day for each worker found to have worked overtime without having been paid at the applicable hourly overtime wage rate. DLSE's un rebutted evidence established seven such violations by Grover. The seven violations occurred because Grover misclassified employees as Groundsperson rather than Tree Trimmer, though one of the seven violations would have occurred simply because Grover failed to pay Bladamir Corral Garcia the correct overtime rate in the classification that Grover assigned, Groundsperson. The \$175 penalty is affirmed.

Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages.
2. DLSE served the Civil Wage and Penalty Assessment timely in accordance with section 1741.
3. Affected contractor Grover Landscape Services, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment.
4. Grover Landscape Services, Inc. underpaid prevailing wages to seven employees on the Project.
5. Grover Landscape Services, Inc. misclassified employees on the Project.
6. Grover Landscape Services, Inc. failed to pay the required overtime rates to three employees on the Project.
7. As a result of Findings numbers 4-6, Grover Landscape Services, Inc., underpaid prevailing wages in the aggregate sum of \$1,949.66.
8. Grover Landscape Services, Inc. failed to pay required training fund contributions for the classification Operating Engineer in the amount of \$38.52.
9. No liquidated damages are due, as Grover Landscape Services, Inc. deposited timely with the Department the full amount of the Civil Wage and Penalty Assessment.
10. The Labor Commissioner did not abuse discretion in assessing penalties under Labor Code section 1775 at the rate of \$40 per violation. The Assessment's finding of 28 violations is modified downward to 25, resulting in the aggregate sum of \$1,000.
11. The Labor Commissioner's finding of seven overtime violations resulting in a penalty of \$175.00 is affirmed.

The amount found due in the Assessment is affirmed as modified by this Decision as follows:

Basis of the Assessment	Amount
Wages Due:	\$ 1,949.66
Training Fund Contributions:	\$ 38.52
Penalties under section 1775:	\$ 1,000.00
Penalties under section 1813:	\$ 175.00
TOTAL:	\$ 3,163.18

The Civil Wage and Penalty Assessment is affirmed as modified herein, as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 5/29/24


Katrina S. Hagen, Director
California Department of Industrial Relations