

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Borella Brothers, Inc.
Optima RPM, Inc.
Southwest Design and Supply Company

Case No. 17-0175-PWH
Case No. 17-0110-PWH
Case No. 17-0109-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Optima RPM, Inc. (Optima), affected sub-contractor Southwest Design and Supply Company (Southwest), and affected second-tier sub-contractor Borella Brothers, Inc. (Borella), (collectively, Requesting Parties) submitted requests for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on February 27, 2017, with respect to work performed by Borella on the Lawndale Elementary School District Kitchen Upgrade Project #2 (Project) for the Lawndale Elementary School District (Awarding Body) in Los Angeles County. The Assessment found that Borella: Misclassified the work being done as that for Teamster when the correct classification was for Sheet Metal Worker; failed to pay the required prevailing wage rate per Labor Code sections 1771 and 1774 for Sheet Metal Worker; failed to pay required training fund contributions per Labor Code section 1777.5; failed to employ apprentices in accordance with Labor Code section 1777.5, subdivision (g); and, failed to submit required contract award information to all applicable apprentice committees.¹ DLSE determined that the total amount of wages due was \$5,882.88 and assessed a penalty of \$2,240.00 under section 1775 and a penalty of \$2,960.00 under section 1777.7.

¹ All further section references are to the California Labor Code unless otherwise specified.

With no objection from the parties, the Hearing Officer consolidated the three requests for review to be heard together as one matter. Pursuant to notice, a Hearing on the Merits occurred in Los Angeles, California on December 19, 2017, and February 14, 2018, before Hearing Officer Steven A. McGinty. Travis Egan and Adam H. Meyers of Feldman & Associates appeared as counsel for Borella and Optima, and Luong Chau appeared as counsel for DLSE. There was no appearance for Southwest. The matter was submitted for decision on March 16, 2018.

The issues for decision are as follows:

- Did Borella use the correct classification(s) for the Project by classifying all workers as Teamster?
- If not, did Borella pay the correct prevailing wages for the classification of Sheet Metal Worker on the Project?
- If Borella did not pay the correct prevailing wages, what is the amount of unpaid prevailing wages due?
- Did Borella provide accurate certified payroll records?
- Did DLSE's audit correctly credit the wages already paid by Borella to its workers?
- Did Borella make all required training fund contributions for work performed on the Project?
- Is Borella liable for penalties under section 1775?
- Did Borella transmit the required contract award information using the Division of Apprenticeship Standard (DAS) 140 form or equivalent in a timely and factually sufficient manner to all applicable apprenticeship committees in the geographic area of the Project pursuant to section 1777.5 and California Code of Regulations, title 8, section 230?
- Did Borella fail to employ apprentices on the Project in the minimum ratio required by section 1777.5 (20% of hours that journeyman were employed)?

- Did Borella request the dispatch of apprentices using the DAS 142 form or equivalent in a timely and factually sufficient manner pursuant to section 1777.5, and California Code of Regulations, title 8, section 230.1?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1777.7?

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, and that Borella failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subs. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment.

Facts

The Project was advertised for bid on March 30, 2015. (DLSE Exhibit No. 1.) The Project bid advertisement documents indicated that the successful bidder and all subcontractor(s) were required to comply with all applicable Labor Code provisions including the payment of prevailing wages and the employment of apprentices on the Project. (DLSE Exhibit No. 1, p. 0002.)

Optima entered into a contract with the Awarding Body on May 6, 2015, to perform the work of the Project. (DLSE Exhibit No. 2 (Contract).) Paragraph numbers 8 and 6, respectively, of the Contract specified that the contractor was to pay prevailing wages as determined by the Director of Industrial Relations and to comply with various Labor Code provisions applicable to the Project.

On June 10, 2015, Optima signed a subcontract agreement with Southwest (Subcontract). The Subcontract indicates that it was effective on May 12, 2015. The purpose of the Subcontract was to construct portions of the Project. (DLSE Exhibit No. 3, p. 0008.) Southwest used second tier subcontractor Borella as a “vendor” on the Project. (Borella Exhibit A.)

The work of the Project was to upgrade kitchens at three elementary schools in the Lawndale Elementary School District. (DLSE Exhibit No. 3, p. 0008.) The work included the delivery and installation of food service equipment including exhaust hoods, walk-in cooler

doors and glass doors, stainless steel counters and sinks, and stainless steel wall flashing and trim and closures. (DLSE Exhibit No. 3, pp. 0031, 0033, 0035, and 0038; Borella Exhibit A.)

Borella had workers on the Project from Tuesday, July 14, 2015, through and including Thursday, August 20, 2015. (DLSE Exhibit No. 8, Borella's certified payroll records (CPRs) Borella Exhibit E.) The CPRs classified its workers on the Project as "teamster." (*Ibid.*) Borella installed food service equipment on the Project. In doing so, it employed no apprentices on the Project. The Awarding Body filed a notice of completion on November 18, 2015, indicating that the actual work on the Project was completed on August 31, 2015. (DLSE Exhibit No. 7.)

Brian Germain of Public Works Contract Compliance filed a complaint with the Labor Commissioner against Borella for misclassifying workers and various violations of the apprenticeship laws. (Borella Exhibit G.) According to Germain's complaint, the workers on the Project should have been classified as Sheet Metal Worker, not Teamster. DLSE Deputy Labor Commissioner Norbert Flores investigated the complaint.

While investigating the complaint, Flores obtained various documents from the Awarding Body, Optima, Southwest, and Borella, including the contract documents and purchase orders. He reviewed the scopes of work and prevailing wage determinations (PWDs) for Sheet Metal Workers and Teamsters found on the Department of Industrial Relation's website.² In addition, he consulted with the Department of Industrial Relations' Office of Policy, Research & Legislation – Research Unit (OPRL). Flores determined that Borella should have classified its workers on the Project as Sheet Metal Worker.

Flores testified that the scopes of work for Sheet Metal Worker and Teamster were determinative in his investigation. The scope of work for Sheet Metal Worker includes coverage of employees engaged in the "assembly, handling, erection, installation... of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all... exhaust

² There was no dispute by the parties that the applicable prevailing wage determinations in effect on the bid advertisement date (March 30, 2015) were LOS-2015-1 for Sheet Metal Worker (Sheet Metal PWD, DLSE Exhibit No. 11; Borella Exhibit D), and SC-23-261-2-2014-1 for Teamster (Teamster PWD, DLSE Exhibit No. 19). The numbers associated with the scopes of work are 166-102-1 for Sheet Metal Worker (DLSE Exhibit No. 11; Borella Exhibit D) and 23-261-2 for Teamster (DLSE Exhibit No. 12; Borella Exhibit C).

systems,...including the setting of all equipment and all reinforcements in connection therewith...[including] exhaust systems of all types and hoods used for collection of any airborne substance or material.” (Borella Exhibit D, Art. 1, § 1.) Flores also testified that he found some of the items from the description of items to be installed for the Project in the Subcontract’s scope of work section. In addition, the complainant provided Flores with a copy of the collective bargaining agreement between the Sheet Metal Air Conditioning Contractors’ Association and Air Conditioning Sheet Metal Association – Los Angeles and the International Association of Sheet Metal, Air, Rail, and Transportation Workers Local Union 105 for the period July 1, 2015, to June 30, 2020. (DLSE Exhibit No. 11, pp. 0102-0104, (Sheet Metal CBA).) The Sheet Metal CBA indicated under the “Work to be Performed Statement” that kitchen equipment was included. (*Id.* at p. 0104.) The scope of work for Teamster PWD did not include any of the items listed in the Subcontract’s scope of work for the Project. (DLSE Exhibit Nos. 2, 3, and 12.) In addition, the description of the various classification groups in the Teamster PWD for employees who worked on construction sites, consists mostly of drivers of various types of trucks, their helpers, and mechanics. There is no listing or description of installation work of any kind. (DLSE Exhibit No. 19, p. 0140.)

OPRL confirmed that the Sheet Metal Worker classification was appropriate for the work performed on the Project. In an attachment to an email to Flores, OPRL noted that “For work involving the installation of exhaust hoods, the scope of work provision for the craft(s) classification(s) of the Sheet Metal Worker may include similar types of work.” Further, it noted that “For work involving the installation of stainless steel counters, sinks, steel wall flashings, trim & closures, the scope of work provision for the craft(s) classification(s) of the Sheet Metal Worker and Iron Worker may include similar types of work.” (DLSE Exhibit No. 10, p. 0087.) OPRL’s opinion did not mention Teamster as a classification that was appropriate for work on the Project.

Bruce Borella, the President of Borella, testified that Borella installed food service equipment at the Project’s three locations. Mr. Borella was on site and did installation work. He testified that the food service equipment included the following: pre-fabricated or pre-

manufactured stainless steel counters and sinks; stainless steel wall panels, flashing, tracks, trim and closures; and exhaust hoods. He noted that stainless steel is a cleanable surface. Mr. Borella said his employees used a drill motor called a roto (rotary) hammer and a wrench to bolt stainless steel sinks to the floor. They used drill motors and drivers to make holes in the wall and to mount tracks for stainless steel wall flashing, trim, and closures, then slid stainless steel wall panels into the tracks. Likewise, they used drill motors and drivers to attach exhaust hoods to the wall above the cooking equipment by bolting them into place.³ According to Mr. Borella, the hoods exhausted heat, grease, smoke, and steam collected from the cooking equipment.

Borella employees also handled and assembled other pieces of stainless steel food service equipment. According to Mr. Borella's testimony, his employees met the delivery trucks delivering the stainless steel food service equipment at the schools where the Project took place. Borella does not have its own trucks for delivering equipment. The delivery truck pulled into the school grounds close to the kitchen. Borella employees assisted the delivery driver in unloading the food service equipment from the truck onto the tarmac. The employees uncrated the equipment using hand tools such as a hammer and pry bar. They discarded the packing material into dumpsters, and rolled the equipment into the building and set it in place. The assembly included putting wheels on equipment such as cooking ranges and stacking ovens. The other types of stainless steel food service equipment they handled included refrigerators, meat slicers, mixers, and microwave ovens.

Borella entered into a five-year collective bargaining agreement with Teamsters Local 986 on December 1, 2012, that covered its production and installation employees. (Borella Exhibit I (Teamster CBA).) The Teamster CBA included a provision for hourly wage rates for food service equipment installer. (*Id.*, Appendix A.) Borella paid its workers on the Project in accordance with the Teamster CBA. On its CPRs, Borella used the work classification "teamster" for its workers. (Borella Exhibit E; DLSE Exhibit No. 8.)

³ Borella did not perform electrical, plumbing, or refrigeration connection work on the Project.

The Assessment.

DLSE served the Assessment by mail on February 27, 2017. (DLSE Exhibit No. 15, p. 0122.) Flores prepared the Assessment. The Assessment found that Borella misclassified its workers by using the classification Teamster rather than Sheet Metal Worker, and underpaid four workers in the amount of \$5,688.00. Pursuant to section 1775, penalties were assessed in the amount of \$2,240.00 (at the rate of \$80.00 per day) for underpayment of prevailing wages, and \$194.88 for nonpayment of training fund contributions. (*Id.* at p. 0120.) In addition, the Assessment found that Borella had failed to submit the required contract award information to all applicable apprenticeship committees, failed to request dispatch of apprentices in the crafts of sheet metal worker, and failed to meet the required minimum ratio of apprentices to journeymen for sheet metal worker on the Project. As a result, Borella was assessed penalties pursuant to section 1777.7 in the amount of \$2,960.00 at the rate of \$80.00 per day.

Underpayment of Training Fund Contributions.

Based on the Sheet Metal Worker PWD, the Assessment found that training fund contributions were due from Borella in the amount of \$194.88, but no training fund contributions were paid. Flores testified that he downloaded from the California Apprenticeship Council (CAC) website a list of transactions of public works training fund contributions made by Borella for the four-year period prior to January 17, 2017, the period that included this Project in 2015. (DLSE Exhibit No. 9, p. 0085.) The list included contributions made for projects Borella worked on from August 9, 2013, through December 1, 2016. There was no record of training fund contributions made by Borella for this Project.

Borella provided Flores with some information about training fund contributions. First, it provided Flores with an Apprentice Training Fund Invoice. (DLSE Exhibit No. 9, p. 0086.) Flores testified that contractors can download the invoice form from the CAC's website to include with their payment. The invoice indicates that Borella was making a training fund contribution payment for this Project of \$72.96 on August 10, 2015, covering the period July 1 to July 31, 2015. However, Borella did not provide proof of actual payment, and the list of transactions recorded by the CAC did not include it. Second, Borella provided a copy of the face

of a check made payable to Zenith American Solutions, Inc. for \$238.69 that indicates it was for the Teamster Training Fund for July 2015. (DLSE Exhibit No. 13, p. 0113; Borella Exhibit K.) Flores said he did not give credit to Borella because Borella did not provide him with proof of actual payment and the amount on the face of the check was different from that listed on the CAC invoice yet covered the same time.

Applicable Apprenticeship Committees in the Geographic Area.

According to Flores' testimony, there were four apprenticeship committees in the geographic area of the Project in the trade of Sheet Metal Worker: (1) Kern & Northern Los Angeles Counties Air Conditioning & Sheet Metal Workers J.A.T.C.; (2) So. Calif. Chapter of A.B.C., Inc., Heating, Ventilation & Air Cond. U.A.C.; (3) South. Calif. Chapter of Associated Builders and Contractors, Inc., Sheet Metal U.A.C.; and, (4) Southern California Sheet Metal J.A.T.C. (DLSE Exhibit No. 17, p. 0135.)

Notice of Contract Award Information.

Flores testified that Borella provided him with a copy of one Notice of Contract Award Information form (DAS 140) dated May 15, 2015, addressed to Teamsters Local 986 in El Monte. (DLSE Exhibit No. 13, p. 0111, and DLSE Exhibit No.18, p. 138; Borella Exhibit J.) The form was incomplete in that four boxes for information about the estimated number of journeymen hours, occupation of apprentice, estimated number of apprentice hours, and approximate dates to be employed, were all left blank. Borella provided no proof that the form itself was actually sent to the Teamsters. In his testimony, Mr. Borella stated had no personal knowledge about the matter. The Requesting Parties provided the Hearing Officer with no form showing Borella provided notice of the contract award to the applicable apprenticeship committees for the trade of Sheet Metal Worker.

Request for Dispatch of Apprentices.

During the DLSE investigation, Borella provided Flores with a copy of one Request for Dispatch of Apprentice form (DAS 142) dated July 6, 2015, addressed to the "Teamsters app. com." in Fontana. (DLSE Exhibit No. 13, p. 0112, and DLSE Exhibit No.18, p. 138; Borella Exhibit J.) Once again, Requesting Parties provided the Hearing Officer with no proof that the

form was sent. Flores testified he contacted the Teamster committee in Fontana to confirm that Borella had submitted the form, and was informed that the form was not received. In addition, Requesting Parties provided the Hearing Officer with no form request for dispatch to the applicable apprenticeship committees for the trade of Sheet Metal Worker.

Employment of Apprentices.

In his testimony, Mr. Borella acknowledged that his company did not employ apprentices on the Project. He asserted that the Teamsters did not have kitchen installation apprentices. DLSE calculated the apprentice violations starting on the second day of the Project, July 15, 2015, through and including August 20, 2015, the last day on the Project. The Assessment found 37 violations.

Assessment of Statutory Penalties.

According to Flores' testimony, the Senior Deputy Labor Commissioner assessed the penalties. Borella's history of apprenticeship violations included two earlier cases, one in which training fund contributions were paid by Borella, and one in which 44 apprentice violations were alleged and penalties of \$20.00 per violation were imposed. The latter matter was resolved by Borella by the payment of \$500.00. (DLSE Exhibit No. 17, pp. 0132 and 0137.)

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, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment (or CWPA), the contractor deposits into escrow with DIR the full amount of the assessment of unpaid wages, including the statutory penalties thereon.⁴

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted 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 burden of presenting evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial 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.” (§1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

⁴ Here, Borella made the required timely deposit with the Department of Industrial Relations under section 1742.1, subdivision (a), and therefore is not liable for liquidated damages.

Borella Underpaid Prevailing Wages Because It Failed to Prove that Teamster Was the Correct Classification for Workers on the Project.

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 prevailing wage determination for a craft, such as Teamster and Sheet Metal Worker, 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. Ericson 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.⁵

The record as a whole shows that Borella failed to carry its burden of proving that the actual work duties performed by its employees on the Project are contained within the scope of work for Teamster rather than that for Sheet Metal Worker. Borella workers installed stainless steel food service equipment. They did so using hand tools. The Teamster scope of work does not contain a description of that work.

The Teamster scope of work describes building construction and the assembly of equipment used in building construction. It also describes the work of changing a building structure. Borella workers were not doing any building construction or assembling equipment used in building construction. They were not changing a building's structure. In his testimony, Mr. Borella minimized the amount of assembly and installation that the workers performed. He

⁵ Because the Director's advisory scope of work governs the classification dispute, it is not necessary to consider the terms of the Sheet Metal CBA or the Teamster CBA.

portrayed most of the work as simply putting in place food service equipment. Borella also emphasized that the workers would not make any connections to any other building systems such as electrical, plumbing, exhaust, fire, or HVAC systems.

In comparison to the Teamster scope of work, the Sheet Metal Worker scopes of work contain descriptions of the actual assembly and installation work performed by the workers on the Project. The scope of work for Sheet Metal Workers states employees engage in the “assembly, handling, erection, installation...of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all...exhaust systems,...including the setting of all equipment and all reinforcements in connection therewith...[including] exhaust systems of all types and hoods used for collection of any airborne substance or material.” (Borella Exhibit D.) Mr. Borella testified that the workers installed the following: stainless steel counters and sinks; stainless steel wall panels, flashing, tracks, trim and closures; and, exhaust hoods. The hoods exhaust heat, grease, smoke, and steam. Thus, the workers on the Project actually performed the work duties of Sheet Metal Workers.⁶

Under section 1742, subdivision (b), Borella had the burden of proving that the basis for the Assessment was incorrect. Borella’s defense was that Teamster was the correct classification to use for the work on the Project.⁷ As stated above, that defense cannot carry the day. DLSE’s Assessment stands un rebutted, and Borella failed to carry its burden under section 1742, subdivision (b) to prove that the Assessment was incorrect.

Based on reclassifying Borella workers from Teamster to Sheet Metal Worker, the Assessment found unpaid wages due to four workers in the amount of \$5,688.00. Flores used the CPRs prepared by Borella to calculate the wages due. (DLSE Exhibit 8.) He used the hours worked as listed on the CPRs and used the prevailing wage rates from the Sheet Metal Worker

⁶ Given the actual work performed on the Project, there is no overlap in the scope of work provisions for Teamster and Sheet Metal Worker.

⁷ Borella did not pay the Teamster prevailing wage rate; it paid the rates listed in its Teamster CBA (Borella Exhibit I). The Director’s prevailing rate determinations, not CBAs to which a contractor may be signator, control the analysis as to the prevailing wage rates that apply. (§§ 1773, 1773.1.)

PWD. (DLSE Exhibit No. 11; Borella Exhibit D.) Borella offered no evidence that the calculations were incorrect, and thereby failed to carry its burden to prove the Assessment was incorrect as to the unpaid wages. (§1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).)⁸ Accordingly, Borella is liable for payment of unpaid prevailing wages in the amount of \$5,688.00.

Borella Failed to Prove that It Paid Training Fund Contributions.

Section 1777.5, subdivision (m)(l), requires contractors on public works projects who employ journeyman or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Department of Apprenticeship Standards. In this case, DLSE presented prima facie evidence that training fund contributions for the Project were due in the amount of \$194.88. Borella produced to DLSE two different records to establish compliance with the requirement to pay training fund contributions. Each record constitutes incomplete proof. The first record was an invoice prepared on a CAC form. However, Borella did not provide proof of payment to the CAC. In addition, CAC records do not list the payment. The second record was the face of a check made payable to Zenith American Solutions. Again, Borella did not provide proof of actual payment because it did not produce the back of the check, a bank statement, or any other evidence of receipt. Thus, whether the check was actually sent to and cashed by the recipient was not established. Based on a preponderance of the evidence, Borella failed to carry its burden to prove the Assessment was incorrect as to training fund contributions found due. Accordingly, Borella is liable for payment of training funds in the amount of \$194.88.

⁸ Borella's objection to DLSE Exhibit No. 16 (Public Works Audit Worksheets for the individual workers) is overruled and the Exhibit is admitted. Borella had the exhibit three weeks prior to the Hearing on the Merits, and it had the summary page attached to the Assessment for the entire period that it challenged the Assessment. (DLSE Exhibit No. 15, p. 0120.) Moreover, Borella did not dispute the accuracy of the calculations used to come up with the amount of wages alleged due in the Assessment. Rather, Borella disputed that it had misclassified its workers. It never raised an issue that if the correct classification was Sheet Metal Worker, then the amount alleged owed was wrong. Thus, Borella was not prejudiced by the delay in receipt of the Exhibit. Moreover, the Director need not rely solely on DLSE Exhibit No. 16, since the summary page, showing which workers were misclassified and how much they were owed, was part of the Assessment.

DLSE's Penalty Assessment Under Section 1775.

Section 1775, subdivision (a), as it read at the time the Project was bid (March 30, 2015), stated 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.^{9]}

(D) The Determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

((Former) § 1775, subd. (a).) Abuse of discretion by DLSE is established if the “agency’s

⁹ Section 1777.1 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 refuses to comply with its provisions.”

nonadjudicatory 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 her or his own judgment “because in [his/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).)

DLSE assessed section 1775 penalties at the rate of \$80.00. It determined that the failure to pay the correct prevailing wage was not a good faith mistake. The burden was on Borella to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$80.00 per violation. Although Borella disputed that it had misclassified workers and underpaid them, it provided no compelling or probative evidence establishing that the workers had not been misclassified, for the reasons addressed above.

Nor did Borella provide evidence of abuse of discretion by DLSE. Borella argued that the Labor Commissioner abused her discretion by issuing the Assessment and imposing the penalty before Flores had received a reply from OPRL to his request for a determination of the proper classification for installation of food service equipment. However, it is clear that DLSE had enough evidence of misclassification based on its investigation. The OPRL advisory opinion that the scope of work provision for Sheet Metal Worker included the types of work performed on the Project merely confirmed what DLSE had already determined, and ruled out Teamster as a potential additional appropriate classification.

As stated *ante*, section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his or her own judgment. Here, the maximum penalty the Labor Commissioner could have imposed was

\$200.00 per violation; the penalty was set at \$80.00 per violation. Borella has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$80.00 is affirmed.

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (California Code of Regulations, title 8, sections 227 to 232.70.)¹⁰

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). In this regard, section 1777.5, subdivision (g) provides:

The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a), which states:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

However, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency

¹⁰ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

According to that regulation, a contractor properly requests the dispatch of apprentices by doing the following:

Request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

(§ 230.1, subd. (a).) DAS has prepared a form, DAS 142 that a contractor may use to request dispatch of apprentices from apprenticeship committees.

Prior to requesting the dispatch of apprentices, the regulations require contractors to alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. The relevant regulation provides, in relevant part, as follows:

Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. The contract award information shall be in writing and may be a DAS Form 140 Public Works Contract Award Information. The information shall be provided to the applicable committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the

awarded contractor, shall be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body, for the purpose of determining the accrual of penalties under Labor Code section 1777.7....

(Cal. Code Regs., tit. 8, § 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

“The determination of the Labor Commissioner as to the amount of the penalty imposed under subdivisions (a) and (b) shall be reviewable only for an abuse of discretion.” (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

The record demonstrates that Borella violated the apprenticeship requirements summarized above on the Project. Sheet Metal Worker was an apprenticeable craft; Borella employed no apprentices on the Project. Accordingly, the record establishes that Borella violated section 1777.5 and the related regulations, sections 230 and 230.1.

In addition, DLSE established that there were four applicable apprenticeship committees for Sheet Metal Worker in the geographic area of the Project. Borella did not dispute that the four committees for the Project were the applicable committees for Sheet Metal Worker, but it did not send contract award information to any of them. Thus, Borella violated section 1777.5, subdivision (e) and the applicable regulation, section 230.

And finally, all requests for dispatch of apprentices must be in writing and provide at least 72 hours’ notice of the date on which one or more apprentices are required. (§ 230.1, subd.(a).) Borella failed to introduce any documentary evidence demonstrating that it had complied with this regulation for the dispatch of apprentices on this Project.

The Penalty for Noncompliance.

If a contractor “knowingly violated Section 1777.5” a civil penalty is imposed under section 1777.7. As it existed on the date of the bid advertisement (March 30, 2015), section

1777.7 provided, in relevant part:

(a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. ...

((Former) § 1777.7, subd. (a)(1).) The phrase quoted above -- “knowingly violated Section 1777.5” -- is defined by the regulation, section 231, subdivision (h) as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control.

Borella “knowingly violated” the requirement of a 1:5 ratio of apprentice hours to journeyman hours for Sheet Metal Worker. Mr. Borella did not testify that he was unfamiliar with the requirement for the employment of apprentices on the Project, or unfamiliar with the need to contact apprentice committees and request the dispatch of apprentices. Indeed, there was evidence that Borella made an insufficient attempt to request dispatch of even Teamster apprentices. Borella’s defense was that the correct classification was Teamster and that the Teamster’s apprenticeship program did not dispatch apprentices to Borella because it did not have any. Whether or not the Teamster’s program made that statement, there was no evidence that Borella could not have sent contract award information to the applicable committees for the Sheet Metal Worker craft and could not have requested dispatch of apprentices from those same committees. Since Borella was aware of its obligations under the law, and provided no evidence of why it could not have complied with the law, Borella failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since Borella knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty of \$80.00 for 37 days of violations, based in part on the fact that Borella had been issued a previous Assessment for apprenticeship violations. In addition, there had been loss of apprenticeship training opportunity for local apprentices, and there had been harm to apprentices and apprenticeship programs. Here the Labor Commissioner set the penalty at \$80.00 per violation when the maximum possible penalty is \$300.00 per violation. Borella has not shown an abuse of discretion pursuant to section 1777.7, subdivision (d), and, accordingly, the assessment of penalties at the rate of \$80.00 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 and the employment of apprentices.
2. DLSE served timely the Civil Wage and Penalty Assessment in accordance with section 1741.
3. Affected contractors Borella Brothers, Inc., Optima and Southwest each filed a timely request for review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made available its enforcement file.
5. Borella Brothers, Inc., misclassified its employees on the Project as Teamster; the correct classification was Sheet Metal Worker. The employees were entitled to wages at the journeyman rate for Sheet Metal Worker for the work on the Project, which was higher than the rates of wages they were paid.
6. In light of findings 5 above, Borella Brothers, Inc., underpaid its employees on the Project in the aggregate amount of \$5,688.00.
7. Borella Brothers, Inc., did not pay training fund contributions in the amount of \$194.88.
8. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of \$80.00 per violation, and the resulting total penalty of \$2,240.00 is affirmed.

9. There were four applicable apprenticeship committees in the geographic area of the Project in the craft of Sheet metal Worker.
10. Borella Brothers, Inc., failed to issue a Notice of Contract Award Information to all applicable apprenticeship committees for the craft of Sheet Metal Worker.
11. Borella Brothers, Inc., failed to request dispatch of Sheet Metal Worker apprentices from the four applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
12. Borella Brothers, Inc., violated Labor Code section 1777.5 by failing to employ apprentices in the craft of Sheet Metal Worker on the Project in the minimum ratio required by the law.
13. DLSE did not abuse its discretion in setting section 1777.7 penalties at the rate of \$80.00 per violation, and the resulting total penalty of \$2,960.00 is affirmed.
14. The amounts found remaining due in the Assessment is affirmed by this Decision are as follows:

Wages due:	\$5,688.00
Penalties under section 1775:	\$2,240.00
Training Fund Contributions:	\$194.88
Penalties under section 1777.7	\$2,960.00

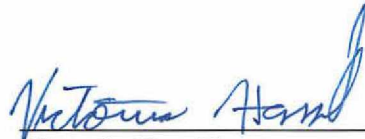
TOTAL **\$11,082.88**

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In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is affirmed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: April 29, 2019


Victoria Hassid
Chief Deputy Director
Department of Industrial Relations ¹¹

¹¹ See Government Code sections 7, 11200.4