

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Principles Contracting, Inc.

Case No. 17-0233-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Principles Contracting, Inc. (Principles) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued on May 24, 2017, by the Division of Labor Standards Enforcement (DLSE) with respect to the improvement known as the Downtown Plaza Improvements/Spray Park (Project) for the City of Fullerton (City) in Orange County, California. The Assessment determined that \$44,866.71 in unpaid prevailing wages and penalties were due for prevailing wage violations under Labor Code sections 1775 and 1813 and for apprenticeship violations under Labor Code section 1777.7.¹ Principles filed its request to review the Assessment on June 20, 2017.

A Hearing on the Merits was conducted on February 20, 2018, in Los Angeles, California, before Hearing Officer Douglas P. Elliott. David Cross appeared as counsel for DLSE; there was no appearance by or on behalf of Principles. The Hearing Officer proceeded to conduct the Hearing on the Merits in Principles' absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a).

Testimony was presented at the Hearing by Deputy Labor Commissioner Paul Tsan in support of the Assessment. DLSE Exhibit Numbers 1 through 23 were admitted into evidence without objection. Principles filed no motion seeking relief from its non-

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

appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b). The Hearing was concluded and the matter was deemed submitted for decision on May 11, 2018, the final date for post-hearing briefs.

The issues for decision are:

- Did DLSE's audit use the correct prevailing wage classifications for the workers employed by Principles on the Project?
- Did Principles pay the required prevailing wages for all hours worked on the Project?
- Did Principles provide the contract award information to the applicable apprenticeship committees and request dispatch of apprentices for employed crafts, and were apprentices employed in the proper apprentice to journeyman ratio?
- Is Principles liable for penalties under section 1775, and did DLSE properly assess such penalties?
- Is Principles liable for penalties under section 1813, and did DLSE properly assess such penalties?
- Is Principles liable for penalties under section 1777.7, and did DLSE properly assess such penalties?
- Is Principles entitled to a waiver of liquidated damages under section 1742.1?

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

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Facts

The facts stated below are based on DLSE Exhibits Number 1-23, the testimony of Tsan, the report of Tsan's investigation, the applicable prevailing wage rate determinations (PWDs) and related scopes of work, and the contents of the Hearing Officer's file.

Failure to Appear.

Principles was initially represented by legal counsel, Robert F. Schauer. Schauer signed the request for review on behalf of Principles. Schauer then appeared at the first telephonic Prehearing Conference on September 25, 2017, where he orally notified the Hearing Officer that he would be withdrawing from his representation of Principles. This was confirmed in a September 27, 2017 letter from Schauer to Principles, and in an October 2, 2017 letter from Schauer to the Hearing Officer. Thereafter, mail sent to Principles' last known address was returned by the Postal Service and marked as undeliverable, and email messages to Principles were also undeliverable. Principles did not appear for a duly noticed Prehearing Conference on October 23, 2017. On that date, the Hearing on the Merits was scheduled for February 20, 2018. The Order of the Hearing Officer scheduling the Hearing included the warning that the Hearing Officer is authorized under California Code of Regulations, title 8, section 17246, to proceed with the Hearing in the absence of a party and to recommend whatever decision is warranted by the available evidence.² At the duly noticed Hearing on the Merits, there was no appearance by or on behalf of Principles.

The Hearing Officer proceeded to conduct the Hearing on the Merits in Principles' absence to formulate a recommended decision as warranted by the evidence. DLSE's exhibits were admitted into evidence without objection and the matter was submitted on the evidentiary record. Principles filed no motion seeking relief from its non-appearance, as is permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

² The Hearing was scheduled to occur on the same date and consecutively with a Hearing on the Merits in a second request for review of a civil wage and penalty assessment against Principles in Case No. 17-0248-PWH.

The Assessment.

On December 16, 2015, the City advertised for bids on the Project. The City awarded a contract to Principles, which was entered on February 3, 2016 (Contract). Pursuant to the Contract, Principles agreed to renovate a water park for the City. The work to be performed under the Contract included removing and replacing concrete panels and a shower pad; installing new recirculating equipment, an exterior wash off shower, and restroom accessories; and repairing existing spray pad pump equipment. Principles employed 13 workers on the Project from February 9, 2016, through May 27, 2016, a period encompassing 109 calendar days.

On November 16, 2015, Principles worker Jaime Villalvazo filed a complaint with DLSE alleging Principles failed to pay the correct prevailing wages for Cement Mason work, misclassified him as a Landscape Irrigation Laborer, and failed to pay him fringe benefits. The matter was assigned to DLSE Deputy Tsan, who obtained Principles' certified payroll records (CPRs). The CPRs showed Principles' workers were classified and paid as either Landscape Irrigation Laborer, Landscape Irrigation Tender, or Laborer. DLSE Deputy Tsan testified that based on his investigation and PWDs provided by the City, the Project entailed work of the Cement Mason and Operating Engineer Group 4 trades, in addition to work of Landscape Irrigation Laborer and Landscape Irrigation Tender trades.

DLSE submitted into evidence the relevant PWDs and related scopes of work in effect on the bid advertisement date for the following crafts or trades: Cement Mason (SC-23-203-2-2015-2), Laborer Group 1 (SC-23-102-2-2015-2), Operating Engineer Group 4 (SC-23-63-2-2015-1), Landscape Irrigation Laborer (SC-102-X-14-2015-2), and Landscape Irrigation Tender (SC-102-X-14-2015-2A). (DLSE Exhibit Nos. 9 – 15.)

According to Tsan's testimony, to investigate the matter he obtained daily logs from Principles and inspector logs from the City. He interviewed the City's inspector Eliseo Bravo, as well as workers Jaime Villalvazo, David Casteneda, and Gilberto Magaña, as to work performed, equipment used, and fringe benefits paid. The daily logs demonstrated that Operating Engineer and Cement Mason work had been performed, considering the scopes of work for those trades. The City supplemented the inspector

logs with photographs and details of the work showing concrete saw-cutting and removal work; backhoe and mini-excavator operation for trenching; installation of a water tank in the ground, water lines, and spray equipment; and construction of a concrete control room. (DLSE Exhibit No. 19.) Comparing the daily logs, inspector logs, and PWD scopes of work, Tsan concluded that Principles misclassified workers as Landscape Irrigation Laborer and Landscape Irrigation Tender when they were actually performing duties that fell within the scopes of work for Operating Engineer and Cement Mason. Accordingly, in his audit, Tsan reclassified three workers to the Cement Mason craft over 30 days of work and two workers to the Operating Engineer craft over ten days of work.

Based on reports from workers that Principles had underpaid the fringe benefits required by the PWDs, Tsan testified he asked Principles for proof of payment of fringe benefits, and also contacted the welfare plan to which Principles claimed it had made fringe benefits on behalf of its workers on the Project. Principles did not provide proof of payment. The welfare plan likewise did not have records sufficient to establish that the fringe benefits due for the work on the Project were paid, although there were records of some payments to the plan by Principles. Tsan testified that in determining the amount of unpaid fringe benefits under the Assessment, he nevertheless gave Principles a credit for some portion of the payments that were made to the plan, deriving the credit amount by annualizing the payments based on a 40-hour work week.

The Assessment accordingly found that Principles misclassified its workers and underpaid prevailing wages, including fringe benefits, in the collective amount of \$17,436.71. The Assessment also found Principles failed to pay required overtime rates in ten instances, and imposed penalties under section 1813 at a rate of \$25.00 per violation, for a total amount of \$250.00. The Assessment further found section 1775 penalties were due in the amount of \$20,640.00, calculated at the rate of \$120.00 for 172 instances in which the workers were underpaid prevailing wages.

DLSE also presented evidence that Principles failed to submit public works contract award information to applicable apprenticeship programs in the geographic areas of the Project that could have supplied apprentices in the Cement Mason, Operating Engineer, and Landscape Irrigation Laborer crafts, all of which were apprenticeable. The

evidence showed that Principles did send contract award information to three programs that could provide Landscape Irrigation Laborer apprentices: the Laborers Southern California Landscape and Irrigation Fitter JAC and the Laborers Southern California JAC, and the Landscape & Irrigation Fitter of Southern California JATC. DLSE also presented evidence that showed that Principles failed to request dispatch of apprentices from the applicable apprenticeship programs, except for two, the Landscape & Irrigation Fitter of Southern California JATC and the Laborers Southern California JAC.

Lastly, DLSE presented evidence that Principles failed to meet the minimum 1:5 ratio of apprentices to journeymen and, in fact, employed no apprentices at all on the Project. (DLSE Exhibit Nos. 20 – 22.) The Assessment imposed penalties under section 1777.7 calculated at \$60.00 per violation for 109 days, starting with Principles' first day of work on February 9, 2016, to its last day, May 27, 2016, for a total amount of \$6,540.00.

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 construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case 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); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. 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 when the Labor Commissioner determines that mitigation is inappropriate.

In general, and unless an exemption applies, 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. (Cal. Code Regs. tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared form DAS 140, that a contractor may use to submit contract award information to an applicable apprenticeship committee (Cal. Code Regs. tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any violation of the apprenticeship requirements, it may issue a written civil wage and penalty assessment 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 producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (a); 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).)

By Misclassifying Its Workers and Not Paying the Full Fringe Benefits Required by the Applicable PWDs, Principles Failed to Pay Its Workers at the Required Prevailing Wage Rates.

Based on the record as a whole, DLSE presented prima facie support for its finding in the Assessment that some of the work on the Project should have been classified under the Cement Mason and Operating Engineer PWDs. The concrete saw-cutting and removal work, along with other cement work, fell within the Cement Mason scope of work, and the backhoe and mini-excavator operation for trenching and other purposes fell within the Operating Engineer scope of work. Because Principles classified all the workers as Landscape Irrigation Laborer, Landscape Irrigation Tender, and Laborer, the record provided prima facie support for DLSE’s determination that the workers were misclassified and were underpaid. DLSE also presented prima facie evidence that Principles underpaid the required fringe benefits.

The burden therefore fell to Principles to prove that the basis of the Assessment was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Having failed to appear at the Hearing, Principles presented no rebuttal, compelling the conclusion that the Assessment correctly found that workers were misclassified as Landscape Irrigation Laborer and Landscape Irrigation Tender for hours they performed the work of Cement Mason and Operating Engineer. Similarly, Principles did not rebut DLSE’s evidence that required fringe benefits were not properly paid. Hence, it is concluded that the workers

employed on the Project by Principles were underpaid in the aggregate amount of \$17,436.71.

DLSE's Penalty Assessment Under Section 1775 Was Proper.

Section 1775, subdivision (a)(2)(B)(iii), states that the penalty for failure to pay the required prevailing wage rates may not be less than \$120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of section 1777.1.³ Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion is established if the “agency’s 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 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 DLSE abused its 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 in the amount of \$20,640.00, calculated at the rate of \$120.00 per violation for 172 instances, based on Principles’ deliberate and intentional misclassification and underpayment of its workers. The burden was on Principles to prove that DLSE abused its discretion in setting the penalty amount at the rate of \$120.00 per violation. (§ 1775, subd. (a)(2)(D).) Principles failed to carry that burden. Therefore, the section 1775 penalty assessment will be affirmed.

³ The reference in section 1775, subdivision (a)(2)(B)(iii) to section 1777.1, subdivision (c) is mistaken. The correct reference is to section 1777.1, subdivision (e). According to that subdivision as it existed on the December 16, 2015 date of the bid advertisement, a willful violation is defined 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.”

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.

The record establishes that Principles violated section 1815 by paying less than the required prevailing overtime wage rate for ten hours of overtime worked on the Project. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed in the amount of \$250.00, calculated at \$25.00 for each of the ten violations.

Principles Violated Apprenticeship Requirements.

DLSE established in its prima facie case that Principles failed to submit contract award information to apprenticeship programs that could have supplied Cement Mason, Operating Engineer, and Laborer apprentices, and further failed to request dispatch of such apprentices from all those programs. DLSE's evidence also showed that Principles failed to employ any apprentices on the Project, thereby violating the requirement to maintain a 1:5 apprentice to journeyman ratio. Further, based on the record, DLSE's evidence showed that Principles knowingly violated these requirements. Principles showed its awareness of its apprentice obligations by virtue of the fact that it provided contract award information to three of the nine applicable apprenticeship programs, including programs for Landscape Irrigation Laborers and Laborers and requested dispatch from two of the applicable committees for Landscape Irrigation Laborer and Laborer crafts. It was not sufficient, however, for Principles to cease in its efforts to obtain apprentices after notifying just three applicable programs of its public works contract and requesting dispatch of apprentices from just two. The statute and regulation require that apprenticeship programs for all applicable crafts be notified, yet Principles failed to notify all the apprenticeship programs for the trades of Operating Engineer, Cement Mason, and Landscape Irrigation Laborer. (§ 1777.5, subd. (d); Cal. Code Regs. tit. 8, § 230.1, subd. (a).) Further, if an applicable apprenticeship committee does not respond to a dispatch request, a contractor is required to request dispatch by the other

applicable apprenticeship committees in the geographic area of the Project. (Cal. Code Regs. tit. 8, § 230.1, subd. (a).) DLSE's evidence showed that Principles failed to do so and failed to hire any apprentices whatsoever, violating the 1:5 ratio required by statute. (§ 1777.7, subd. (g).)

Having failed to appear at the Hearing, Principles did not rebut DLSE's prima facie case establishing these apprenticeship violations. Hence, it is concluded that Principles violated section 1777.5, subdivisions (e) and (g), and the applicable regulations, for its failures to provide the requisite notice of its public work contract to applicable apprenticeship committees, to request dispatch of apprentices from those committees, and to employ sufficient apprentices to meet the required 1:5 ratio for the crafts of Cement Mason, Operating Engineer, and Landscape Irrigation Laborer, all of which were apprenticeable crafts.

The Assessment imposed a \$60.00 per day penalty for 109 calendar days from the first day Principles worked on the Project to its last day of work. DLSE based the penalty period on Principles' failure to submit contract award information to applicable apprenticeship programs for the crafts of Cement Mason, Operating Engineer, and Landscape Irrigation Laborer, a continuous violation under section 1777.5, subdivision (e). The assessment of penalties calculated at the rate of \$60.00 per day for 109 calendar days for a total of \$6,540.00 is affirmed.

Principles Is Liable for Liquidated Damages.

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 the 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 (the CWPA), the contractor deposits into escrow with the Department the full amount of the assessment of unpaid wages, plus the statutory penalties under section 1775. In addition, in May of 2017 when the Assessment was issued in this matter, (former) section 1742.1 allowed the

Director to exercise his or her discretion to waive the liquidated damages if the contractor demonstrated that he or she had substantial grounds to appeal the assessment.⁴

Here, no evidence shows that Principles paid any back wages to the workers in response to the Assessment or deposited with the Department the assessed wages and penalties. Further, Principles presented no evidence or argument that it had substantial grounds for appealing the Assessment. Accordingly, the Director does not waive payment of the liquidated damages, and Principles is liable for liquidated damages in the amount of the underpaid prevailing wages, \$17,436.71.

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

FINDINGS AND ORDER

1. Affected contractor Principles Contracting, Inc. underpaid its workers \$17,436.71 in prevailing wages.
2. Penalties under Labor Code section 1775 are due from Principles Contracting, Inc. in the amount of \$20,640.00 for 172 violations at the rate of \$120.00 per violation.
3. Penalties under Labor Code section 1813 are due from Principles Contracting, Inc. in the amount of \$250.00 for ten violations at the rate of \$25.00 per violation.
4. Penalties under Labor Code section 1777.7 are due from Principles Contracting, Inc. in the amount of \$6,540.00 for 109 violations at the rate of \$60.00 per violation.
5. Because none of the unpaid wages were paid within 60 days after service

⁴ On June 27, 2017, the Director's discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch 28, § 16 (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Assessment was issued (on May 24, 2017) and at the time the request for review was filed (June 20, 2017) allowed a waiver of liquidated damages in the Director's discretion, as specified. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what Principles elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

of the Assessment, liquidated damages are due from Principles Contracting, Inc. in the unpaid wages in the amount of \$17,436.71.

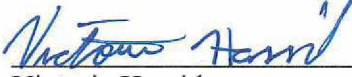
6. The amounts found remaining due in the Assessment affirmed by this Decision are as follows:

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| Wages Due: | \$17,436.71 |
| Penalties under section 1775, subdivision (a): | \$20,640.00 |
| Penalties under section 1813: | \$250.00 |
| Penalties under section 1777.7: | \$6,540.00 |
| Liquidated Damages: | \$17,436.71 |
| TOTAL: | \$62,303.42 |

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 as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: May 27, 2019



Victoria Hassid
Chief Deputy Director
Department of Industrial Relations⁵

⁵ See Government Code sections 7, 11200.4.