

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Principles Contracting, Inc.

Case No. 17-0234-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 a Civil Wage and Penalty Assessment (Assessment) issued on May 9, 2017, by the Division of Labor Standards Enforcement (DLSE) with respect to the Del Norte Park Improvements (Project) for the City of West Covina (City) in Los Angeles County. The Assessment determined that a total of \$10,884.53 in unpaid prevailing wages and penalties were due for prevailing wage violations under Labor Code section 1775 and for apprenticeship violations under Labor Code section 1777.7.¹

A Hearing on the Merits was conducted on December 12, 2018, in Los Angeles, California, before Hearing Officer John J. Korbol. Jenifer A. Aikman 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).

At the Hearing on the Merits, DLSE presented an amended audit that lowered the unpaid prevailing wages from \$6,324.53 to \$5,958.50, while adding \$48.52 in unpaid training fund contributions. DLSE moved to amend the Assessment accordingly. There

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

being no prejudice to Principles, the Hearing Officer granted the motion. The amended audit and motion did not amend the penalties under section 1775 and section 1777.7.

DLSE's exhibits were admitted into evidence without objection and the matter was submitted on the evidentiary record, including the oral testimony of Deputy Labor Commissioner Paul Tsan. Principles filed no motion seeking relief from its non-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 December 12, 2018.

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 pay the required training fund contributions 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 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 as amended, 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, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment as amended.

Facts

The facts stated below are based on DLSE Exhibit Numbers 1-40, the testimony of Tsan, the affidavit of Jaime Villalvazo, a worker employed by Principles on the Project, 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 August 24, 2018. At the duly noticed Hearing on the Merits, the Hearing Officer attempted to reach Jeffrey Signor, the responsible managing officer and one of the owners of Principles, by telephone, using a number provided by counsel for DLSE. This call went to voicemail. There was no appearance by or on behalf of Principles at the Hearing.

The Assessment.

On March 6, 2015, the City advertised for bids on the Project. The City awarded a contract, which Principles and the City entered into on July 7, 2015 (Contract). Pursuant to the Contract, Principles agreed to construct a new picnic shelter. The work to be performed under the Contract included the assembly and installation of two picnic tables, the construction of a sheltering structure over the tables, concrete paving to underlay the shelter structure, and the installation of a concrete sidewalk. Seven workers employed by Principles performed work on the Project from October 26, 2015, through

November 6, 2015, a period encompassing twelve calendar days.² The Project was completed on November 12, 2015.

According to Principles' certified payroll records (CPRs), its workers were classified and paid as either Landscape Irrigation Laborers or Landscape Irrigation Tenders. In reality, the tasks performed by the workers come within the scopes of work for the crafts of Cement Mason and Carpenter, respectively. The prevailing wage determinations (PWDs) and scopes of work in effect on the bid advertisement date for these crafts are embodied in the PWD for Cement Mason (SC-23-203-2-2015-1)³ and the PWD for Carpenter and Related Trades (SC-23-31-2-2014-1).⁴

The Assessment, as amended, found that the listed workers had been misclassified and underpaid in the collective amount of \$5,958.50.⁵ The Assessment found section 1775 penalties were due based on 32 instances on which the workers were underpaid prevailing wages. In addition, both of the applicable PWDs indicated that Cement Mason and Carpenter were apprenticeable crafts. The Assessment found that Principles failed to comply with the apprenticeship requirements for both crafts over the twelve calendar days from the beginning to the end of the Project.

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

² No work was done on the weekend dates of Saturday, October 31, 2015, and Sunday, November 1, 2015.

³ The Cement Mason PWD rates include a predetermined increase in effect before work on the Project began.

⁴ The Carpenter PWD rates include a predetermined increase in effect before work on the Project began.

⁵ In addition to the \$5,958.50 in underpaid wages, the Assessment finds unpaid training fund contributions of \$48.52.

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 a 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, Principles Failed to Pay Them at the Required Prevailing Wage Rate.

In his affidavit signed under penalty of perjury, Villalvazo describes the work that he and co-worker Fernando Cabello performed on the Project as that of a Cement Mason. The two workers used tools that are normally used by Cement Masons. Villalvazo’s affidavit states that he also supplied receipts for materials he picked up from The Home Depot, consisting of such items as rebar and cement, which are customarily used by Cement Masons.

Tsan testified that in the advertisement for bids, none of the work described came within the scope of work for the crafts of Landscape Laborer or Tender. The contract documents required over 2,500 square feet of concrete paving. Tsan testified that the daily log sheets kept by Principles reflects a substantial amount of cement work. Tsan obtained from the awarding body’s project manager several photographs of the work in

progress on the Project. These photographs provide evidence of grading, the digging of footers for the picnic table shelter, the installation of forms for the concrete, and the pouring and finishing of concrete slabs.

Tsan further testified he detected a substantial amount of carpentry work described in Principles' daily log sheets. This was substantiated by the photographs from the awarding body, which document the construction of a skeleton for the picnic tables' shelter consisting of wooden posts and beams. Tsan also testified that the awarding body also confirmed with him that there was no landscape work performed on the Project.

All of this evidence, which was unrebutted, provides ample support for DLSE's conclusion that the workers were misclassified by Principles as Landscape Irrigation Laborers and Landscape Irrigation Tenders. Instead, Villalvazo and Cabello should have been classified and paid as Cement Masons, and the other workers should have been classified and paid as Carpenters. Based on the Cement Mason and Carpenter PWDs, evidence of record, and Principles' failure to carry its burden to prove the Assessment is incorrect, it must be concluded that the workers employed on the Project by Principles were underpaid in the aggregate amount of \$5,958.50, and Principles underpaid training fund contributions in the amount of \$48.52.

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 1777.1.⁶ 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

⁶ 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 March 6, 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."

for abuse of discretion, however, the Director is not free to substitute his or her 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 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 at the rate of \$120.00 based on Principles’ deliberate and intentional misclassification and underpayment of its workers in 32 instances. 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. Principles failed to carry that burden and the penalty assessment will be affirmed.

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 or Carpenter apprentices, and further failed to request dispatch of such apprentices. Ultimately, Principles failed to employ any apprentices on the Project. Principles did not rebut the evidence of these failures. Hence, it is concluded that Principles violated section 1777.5, subdivisions (e) and (g), and the applicable regulation, section 230, 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 apprentice to journeyman ratio for the crafts of Cement Mason and Carpenter, both of which were apprenticeable crafts. At the Hearing, DLSE sought a \$60.00 per day penalty for 12 calendar days of apprenticeship violations.

Based on the record, Principles knowingly violated the requirement of a 1:5 ratio of apprentice hours to journeyman hours for apprentices and failed to notify applicable

apprentice committees or request the dispatch of apprentices from them. Having not appeared at the Hearing, Principles showed no reason for these failures to follow the law. The assessment of penalties at the rate of \$60.00 per day for 12 calendar days for a total of \$8,520.00 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.⁷

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, \$5,958.50.

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

⁷ On June 27, 2017, subsequent to the issuance of the Assessment and the filing of the Request for Review in this case, 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 9, 2017) allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced Principles' decision as to how to respond to the assessment. 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 the contractor 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.

FINDINGS

1. Affected contractor Principles Contracting, Inc. filed a timely Request for Review of a timely Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Principles Contracting, Inc. underpaid its workers \$5,958.50 in prevailing wages.

3. Penalties under Labor Code section 1775 are due from Principles Contracting, Inc. in the amount of \$3,840.00 for 32 violations at the rate of \$120.00 per violation.

4. Penalties under Labor Code section 1777.7 are due from Principles Contracting, Inc. in the amount of \$720.00 for 12 violations at the rate of \$60.00 per violation.

6. Because none of the unpaid wages were paid within 60 days after service of the Assessment, liquidated damages are due from Principles Contracting, Inc. in the unpaid wages in the amount of \$5,958.50.

7. Principles Contracting, Inc. underpaid the required training fund contributions in the amount of \$48.52.

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

Wages Due:	\$5,958.50
Training Fund Contributions:	\$48.52
Penalties under section 1775, subdivision (a):	\$3,840.00
Penalties under section 1777.7:	\$720.00
Liquidated Damages:	\$5,958.50
TOTAL:	\$16,525.52

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

ORDER

The amended 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 Director⁸
Department of Industrial Relations

⁸ See Gov. Code, §§7, 11200.4.