

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Ayus & Co., Inc.**

Case No.: **20-0097-PWH**

From a Notice of Withholding of Contract Payments issued by:

**Los Angeles Unified School District**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor, Ayus & Co., Inc. (Ayus) requested review of a Notice of Withholding of Contract Payments (Notice) issued by the Los Angeles Unified School District (LAUSD) on December 20, 2019, with respect to plumbing work Ayus performed at Wilson Senior High School (Project) in Los Angeles County. The Notice indicated that \$10,051.28 in unpaid prevailing wages, \$471.95 in training funds, and \$9,805.00 in penalties were due. On July 6, 2022, the parties stipulated to the admissibility of an amended audit, dated June 28, 2022, which indicated that \$1,911.53 in unpaid wages, \$53.19 in training funds, and \$7,825.00 in penalties were due.

A Hearing on the Merits occurred over four days before Hearing Officer Mirna Solís.<sup>1</sup> Fabiola Rivera appeared as counsel for LAUSD. Baba Osiname, President and Owner of Ayus, appeared for Ayus. Richard Santo Domingo, Labor Compliance Officer, testified in support of the Notice. Osiname and Jesus Bravo, a former Ayus employee, testified for Ayus. On November 21, 2022, the parties filed their respective closing briefs and the matter was submitted for decision.

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<sup>1</sup> February 22, 2022, May 3, 2022, July 6, 2022, and August 8, 2022.

Prior to the Hearing on the Merits, the parties stipulated to the following:

- The work subject to the Notice was performed on a public work and required the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.<sup>2</sup>
- LAUSD served the Notice timely.
- Ayus filed the Request for Review timely.
- LAUSD made the evidence to be used at the hearing available to Ayus timely.

The issues for decision are as follows:

- Whether Ayus reported all workers and hours on the Project.
- Whether Ayus paid the correct prevailing wage rates.
- Whether the Notice found correctly that Ayus failed to make the required training fund contributions to an approved apprenticeship program or the California Apprenticeship Council.
- Whether Ayus is liable for liquidated damages on wages found due and owing.
- Whether the Labor Commissioner abused her discretion in approving section 1775 penalties.

The Hearing Officer admitted into evidence LAUSD's Exhibits 1-45 and Ayus's Exhibits A - CC, except Ayus's Exhibit BB, which LAUSD objected to as irrelevant.<sup>3</sup> Rulings were deferred on the parties' rebuttal exhibits, LAUSD Exhibits 46-48, and Ayus's Exhibits DD, EE and FF. The parties' rebuttal exhibits are admitted into evidence.<sup>4</sup>

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<sup>2</sup> All further statutory section references are to the California Labor Code.

<sup>3</sup> Ayus's Exhibits B, N, Q, AA, and CC were intentionally left blank.

<sup>4</sup> On Day three of the Hearing on the Merits, Ayus sought to augment Exhibits V and W. The additional documents were marked as Exhibit V-1 and Exhibit W-1. The exhibits are admitted into evidence. However, little weight is given to them as they

For the reasons set forth below, the Director of Industrial Relations finds LAUSD carried its initial burden of presenting evidence at the hearing that provided prima facie support for the Notice. Ayus failed to carry its burden of proving that the bases for the Notice were incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Notice.

## **FACTS**

### The Project.

On August 16, 2017, LAUSD published a Notice of Invitation for Bids (Bid Advertisement) for the Project, Americans with Disabilities Act (ADA) compliance improvements at Wilson High School. (Exhibit 39.) LAUSD awarded the contract to Technion Contractors T C I, Inc. (Technion) for \$816,700.00. On October 5, 2017, Technion subcontracted plumbing work to Ayus for \$64,063.00. (Exhibit 2.) The subcontract between Technion and Ayus incorporated and attached sections 1771, 1775, 1776, 1777.5, 1813 and 1815. (Exhibit 2, p. 7.)

Osiname attended a pre-job conference on November 17, 2017. Osiname electronically signed a LAUSD Labor Compliance Department checklist of labor law requirements that same day. (Exhibit 4.) The labor law checklist addressed prevailing wage law requirements and cited to relevant Labor Code sections. (*Ibid.*) At the Hearing on the Merits, Osiname testified he did not read the labor law checklist nor did he review the Prevailing Wage Determination (PWD) for the Plumber classification.<sup>5</sup> Ayus

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pertain to change orders allegedly concerning shift differential pay on other LAUSD projects. It is further noted that LAUSD's discretion not to pursue shift differential pay on other projects is irrelevant to the instant proceedings.

<sup>5</sup> No party disputed that LOS-2017-1 (Plumber PWD) was the applicable prevailing wage determination for the Plumber classification. The Plumber PWD for the classification Plumber, Industrial and General Pipefitter required a straight time total hourly rate of \$69.70, consisting of a basic hourly rate of \$44.16, fringe benefits of \$23.69, and training fund contributions of \$1.85. (Exhibit 20.) Effective July 1, 2017, a predetermined increase of \$2.43 was allocated to health and welfare (fringe benefits).

had workers in the classification of Plumber, Industrial and General Pipefitter on the Project from November 6, 2017, through and including May 18, 2018. (Exhibit 7.)

The Public Works Compliance Investigation.

On or about January 30, 2019, LAUSD notified both Technion and Ayus that its Labor Compliance Department initiated an audit of Ayus. (Exhibit 5.) Further, Santo Domingo had been assigned the audit.

Santo Domingo cross-referenced Certified Payroll Records (CPRs) submitted by Ayus with Technion's Daily Construction Reports (DCR). He reviewed the DCR to determine the number of workers on any given day and compared them to the CPRs. Santo Domingo also used Technion's Sign-In Sheets (SIS) to determine who was at the work site and number of hours they worked on any given day. The start time found on the SIS assisted Santo Domingo in determining if the shift differential rate applied. Additionally, Santo Domingo interviewed Manual Ongkeko, Technion's superintendent on the Project, who authored Technion's DCRs. Ongkeko confirmed workers employed by Ayus signed in and signed out on Technion's SIS. Also, he confirmed most of the work was done in the afternoons/evenings when students were not at school.

Santo Domingo also obtained Inspector Daily Reports (IDRs) from LAUSD's Inspection Department. Santo Domingo testified that Herman Vallejo, Project Inspector, inspected the work site and documented the work performed as well as other

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(Exhibits 21, 39.) Employees in the Plumber, Industrial and General Pipefitter classification working the 2nd Shift were entitled to an increased straight time basic hourly rate of \$50.78. (Exhibit 22.)

The General Prevailing Wage Apprentice Wage rates for apprentices in the classification Plumber, Industrial and General Pipefitter were as follows: for Period 1, a total hourly rate of \$23.80, consisting of a basic hourly rate of \$19.87, fringe benefits of \$2.90, and training fund contributions of \$1.03; for Period 2, a total hourly rate of \$34.60, consisting of a basic hourly rate of \$22.08, fringe benefits of \$11.42, and training fund contributions of \$1.10. (Exhibit 24.) Employees classified as Apprentice Plumber, Industrial and General Pipefitter working the 2nd shift were entitled to an increased basic hourly rate as follows: for Period 1 \$22.85; and, for Period 2, \$25.39. (Exhibit 25.)

observations. Santo Domingo testified that according to the IDRs and an interview he conducted with Vallejo, Ayus employees performed plumbing work mainly in the afternoon when students were not in school. On days the school was closed to students, construction work was performed during the first shift in the morning.

During LAUSD's audit investigation, Ayus produced electronic sign-in sheets generated through a phone application known as "Tsheets." Tsheets allowed Ayus's workers to sign in and sign out electronically and simultaneously provided their Global Positioning System (GPS) location. For purposes of shift differential applicability, LAUSD cross-referenced the start times on the Tsheets and Technion's SIS.

Having reviewed all the above, Santo Domingo testified the first shift started between 6:00 a.m. and 7:00 a.m., and the second shift started between 2:00 p.m. and 3 p.m. Osiname testified that all work stopped at 10:30 p.m. when the school custodian turned off the lights and turned on the school's alarm system.

Ayus relied on the Tsheets to rebut the sign-in/sign-out times on Technion's SIS. Specifically, Osiname explained that on December 26, 2017, the Tsheet for Anthony Akinbohun (Akinbohun) showed a sign-in time of 6:53 a.m. However, Tsheets' GPS tracking showed Akindohun's phone location on Sunset Boulevard, which Osiname testified was Ayus's office. Osiname pointed to Technion's SIS for that date, which stated Akinbohun signed in at 6:30 a.m. Akinbohun did not testify and there was no evidence regarding the travel time between the Ayus office location and the Project site. Jesus Bravo, a former employee of Ayus, testified that while Tsheets showed him arriving early to work, he did so only to find parking. No one instructed him to arrive early.

Santo Domingo used paystubs provided by Ayus to confirm hours worked and rate of pay. Cancelled payroll checks, as well as direct deposit reports, and bank statements for an account maintained by Ayus confirmed whether the workers were actually paid the amounts stated on paystubs. Fringe benefit reports were reviewed as well as the corresponding cancelled checks related to those reports. The fringe benefit

reports were cross-referenced with the SIS and the CPRs to determine whether all hours were accurately reported and paid by Ayus.

Santo Domingo found Ayus violated prevailing wage law by not paying the correct straight time pay, overtime, and shift differential rates. According to Santo Domingo, Ayus also underreported its workers and failed to report all workers. Most of the wages owed stemmed from LAUSD's determination that Ayus's workers primarily started work in the afternoon, entitling them to a second shift rate, but Ayus failed to pay the second shift differential rate. On the following dates, Santo Domingo found Ayus failed to pay second shift differential rate to the following workers even though the SIS and Tsheets showed the workers started after 2:00 p.m.: December 14, 2017, for Brandon-David Geul-Dave a.k.a. Dave-David Geul-Brandon (Brandon/Dave); February 12, 2018, February 14, 2018, and February 15, 2018 for Kasey Cline (Cline); April 25, 2018, April 27, 2018, and April 30, 2018, for Robert Miskell (Miskell). On December 29, 2017, Brandon/Dave worked during the first shift, but Ayus failed to pay the first shift rate.

Santo Domingo also testified Ayus failed to report all hours worked. In the following instances, while the SIS and Tsheets indicated employees worked, their hours were unreported: on December 15, 2017, Anthony Akinbohin; on November 20, 2017, Brandon/Dave; and, on February 6, 2018, Cline.

With respect to fringe benefits, Santo Domingo testified Ayus did not pay fringe benefits on December 18, 2017, for Akinbohun,<sup>6</sup> and on April 27, 2018, for Miskell. For Miskell, Ayus reported and paid only 16 hours for April 2018 to the Southern California Pipe Trades Administrative Corporation, when Miskell worked a total of 24 hours for

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<sup>6</sup> In April 2021, Ayus made a restitution payment for fringe benefits and a credit was applied. But, Santo Domingo testified section 1775 penalties were still assessed because Ayus paid late.

April 2018 (8 hours on April 25, 8 hours on April 27, and 8 hours on April 30). (Exhibit F, p. 4; Exhibit 7, pp. 33-34.)<sup>7</sup>

Santo Domingo also testified he found the following instances where Ayus employed unidentified workers:

- 10/17/17: the DCR and the SIS confirm an unidentified worker was present from 7 a.m. to 10 a.m. Ayus provided no CPR for October 17, 2017. (Exhibit 9, p. 2.)
- 4/18/18: DCR showed an unidentified worker, along with Denis Arteaga and Kevin Smalls. Arteaga signed in at 3:19 p.m. Based on the reported hours of Arteaga and Smalls, LAUSD determined the unidentified worker also worked 8 hours and should have been paid at the second shift rate.

Osiname believed LAUSD erred in finding that on October 17, 2017, a total of three people performed work that day, including an unidentified worker. Osiname testified that he was on site that day, but was not working because school was in session. Although the SIS for that day states the purpose of the visit by the workers was for "marking," Osiname testified he was at the worksite to take pictures of his work. (Exhibit 9, p. 2.) Osiname also testified it was possible that Kasey Cline was also with him on that day because he was working at a nearby project.

Osiname testified that there was no unidentified worker present on the job site on April 18, 2018. Osiname asserted he was the third worker, alongside Kevin Smalls and Denis Arteaga. However, Osiname did not submit a CPR for himself for April 18, 2018. Osiname relied on his Tsheet which tracked his phone on April 18, 2018, to the Project site. (Exhibit P, p. 18.)

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<sup>7</sup> The initial audit incorrectly showed Miskell was owed \$293.62. LAUSD asserts there was a spreadsheet entry error in which Ayus was erroneously provided a \$847.99 credit for wages paid for the week April 30, 2018 to May 3, 2018. (Exhibit 39, p. 30.) A few days before the Hearing on the Merits, the audit was revised on February 16, 2022, reducing the credit given to Ayus from \$847.99 to \$793.54. (Exhibit 39-A.) Since a reduced credit was provided to Ayus, the resulting amount due to Miskell for this week increased from \$293.62 to \$348.07. Ayus stipulated to 39-A's admissibility.

Finally, LAUSD determined that Ayus owed a total of \$53.19 in training funds for six workers, including Brandon/Dave. According to the Joint Arbitration Board of the California Plumbing and Mechanical Contractors Association and the Southern California Pipe Trades District Council No. 16 of the United Association (Board), Ayus submitted an Exempt Ownership request to designate Brandon/Dave as an exempt owner of Ayus. (Exhibit H, p. 1.) The Board approved the request effective December 12, 2017. (*Ibid.*) Based on the Board's approval, Ayus believed it did not need to pay training funds for Brandon/Dave. Yet Osiname conceded that the Board's approval was subsequently rescinded as Brandon/Dave was not listed on Ayus contractor's license. (Ayus's Trial Brief, p. 6: 20-27.)

#### Imposition of Statutory Penalties.

Because LAUSD deemed Ayus's prevailing wage law violations willful, LAUSD recommended to the Labor Commissioner a penalty rate of \$150.00 per day per worker in section 1775 penalties. The Labor Commissioner reduced the recommended section 1775 penalty rate to \$120.00 per day per worker. (Exhibit 31.) Santo Domingo testified the Section 1775 penalty rate was based on Ayus's knowledge of prevailing wage law. Ayus performed work on more than 24 projects with LAUSD and signed labor law checklists for each of the 24 projects. In addition, LAUSD stated it notified Ayus of shift differential requirements and provided copies of the shift differential provisions to Ayus prior to issuing the Notice. (Exhibit 30, p. 12.)

LAUSD assessed \$25.00 in section 1813 penalties at the statutory rate of \$25.00 for Ayus's failure to pay the prevailing wage rate for overtime work performed by one worker. (Exhibit 31.) On April 18, 2018, Ayus's Tsheets showed Kevin Smalls signed in at 1:28 p.m. and signed out at 10:18 p.m., for a total of 8.33 hours. The CPR for that day showed an underreporting of .33 overtime hours. At the correct prevailing wage rate for overtime work on a second shift (\$104.86 per hour) and after applying credits, Smalls is owed \$33.99. After the Notice was issued, Ayus made a restitution payment, but section 1813 penalties remained because of the late payment.



Ayus Alleged Procedural Irregularities with LAUSD's Monitoring.

Ayus asserted various alleged "irregularities" with LAUSD's investigation/conduct. According to Osiname, the labor compliance officer was at the Project site, but did not advise Ayus of prevailing wage requirements during their site visits. Osiname further testified, "the regulation is required to be posted and discussed with the employees to make sure we were in compliance." LAUSD did not advise Ayus of underpayments immediately after Ayus submitted its CPRs. Ayus further argued that the CPRs do not have a shift differential column—only straight time pay, overtime, double time, and "3x" columns. (Exhibit U.) Ayus further asserted the Labor Compliance Program (LCP) was not at the pre-job conference.

Santo Domingo testified that the LCP was not required to participate in the pre-job conference. At the pre-job conference, Ayus had an opportunity to review state and federal laws. Osiname signed a labor law checklist stating he understood state and federal law requirements and agreed to comply.

Ayus also argued that as a signatory to a local union it was required to comply with the shift differential language in the collective bargaining agreement, which Ayus interpreted as requiring a first shift before a second shift differential rate was paid. Ayus also relied on the Project Stabilization Agreement (PSA), which prohibited the payment of a shift differential.

In rebuttal, Elvis Tran, LAUSD's Project Labor Coordinator/Senior Labor Compliance Officer, testified that he educates contractors and local unions on the PSA. The PSA is a collective bargaining agreement executed in 1999 between LAUSD and the Los Angeles / Orange County Building Construction Trades Union. (Exhibit 46.) Prime contractors and subcontractors can also sign onto the PSA on PSA-applicable projects. After the PSA was revised in 2003, side letters (i.e. special notices) were issued to clarify certain PSA sections. (Exhibits 46, 47.) Tran testified that the special notices have been on LAUSD's website for over 5 years.

Section 6.4(b) of the PSA addresses shift pay. A special notice (Special Notice) was issued to notify all parties that if prevailing wage law requires shift differential pay

then it must be paid, notwithstanding any PSA section. (Exhibit 47.) The Special Notice also refers to section 1770, which requires the payment of prevailing wages as determined by the Director, including shift differential.

Tran testified that when a contract is awarded, a PSA pre-job conference may be held, which is separate from a pre-job conference where labor law requirements are discussed. Tran did not know if Ayus attended the PSA pre-job conference.

## **DISCUSSION**

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 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*).) A Labor Compliance Program like LAUSD 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.”<sup>8</sup> (§ 90.5, subd. (a), and see *Lusardi*, at p. 985.)

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<sup>8</sup> The Division of Labor Standards Enforcement (DLSE), also known as the Labor Commissioner’s Office, is responsible for enforcing the California prevailing wage laws. (Lab. Code, §§ 90.5 and 1741; Cal. Code Regs., tit. 8, § 16100, subd. (a).) However, there are four legacy labor compliance programs (LCPs) that have been approved by

The prevailing rate of pay for given craft, classification, or type of workers 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 by section 1724) and publishes a general prevailing wage determination (PWD) for a craft, such as Plumber, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.)

Additionally, employers on public works must keep accurate payroll records, recording, among other information, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

Section 1775, subdivision (a), requires 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 training fund contributions as described in section 1773.1, with the latter paid to the California Apprenticeship Council in accordance with section 1777.5, subdivision (m)(1).

When LAUSD determines that a violation of the prevailing wage laws has occurred, it prepares a Request for Approval of Forfeiture for review and approval by the Labor Commissioner's Office (LCO). Once LAUSD obtains approval, it issues a Notice of the Withholding of Contract Payments to the contractor or subcontractor. (Cal. Code Regs., tit. 8, §§ 16436-16437; Lab. Code, §§ 1771.5, 1771.6.) The Notice must "describe the nature of the violation and the amount of wages, penalties, and

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the Director to enforce compliance on their own public works projects. (§ 1771.5; <https://www.dir.ca.gov/lcp.asp>.) LAUSD has a legacy LCP.

forfeitures withheld.” (Lab. Code, § 1771.6, subd. (a).) 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 notice under section 1771.6.

An affected contractor may appeal that notice 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, LAUSD has the initial burden of producing evidence that “provides prima facie support for the [Notice] ....” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the [Notice] ... is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the Notice. (§ 1742, subd. (b).)

LAUSD Determined Properly that Ayus Failed to Pay the Correct Shift Rate.

LAUSD’s evidence established prima facie violations of prevailing wage law. The evidence overwhelmingly demonstrated that Ayus failed to pay the correct prevailing wage rate for first and second shift work. Ayus claimed it was not required to pay second shift differentials for various reasons. Osiname’s primary argument was that as a signatory to a local union he was bound to shift differential language in the collective bargaining agreement (Master Agreement) and the PSA language. (Ayus’s Trial Brief, p. 2, Exhibits X, pp. 3-4, Y, Z.)

Ayus relied on section 4.4.1.2 of the Master Agreement between the California Plumbing and Mechanical Contractors Association (CPMCA) and Southern California Pipe Trades District Council No. 16 of the United Association (UA). This section reads:

If two (2) shifts are worked, the second shift shall be eight (8) hours for which each employee shall receive pay for the hours worked, plus fifteen percent (15%). Work in excess of eight (8) hours per shift shall be paid at overtime rates. In computing overtime pay the shift rate shall be the base rate.

(Exhibit 18, pp. 1, 3.)

Ayus interpreted the above section as requiring a first shift before the second shift differential rate is applicable. Ayus contended it was not required to pay a second shift differential because there was only one shift, therefore, work was performed during the “first shift.”

Ayus misinterpreted section 4.4.1.2 to mean two shifts were necessary before a second shift differential was required. The above-quoted language simply describes the treatment of hours when an employer has employees working shifts under the Master Agreement. However, the first page of DIR’s Shift Provision for the Plumber classification includes a conspicuous note which expressly states that the Master Agreement shift work provisions, including the above-quoted section, is merely advisory as to hours, not rate of pay. DIR’s Shift Provision for Plumbers states:

**Note:** The shift provision provided in the following pages provide guidance on the work hours that are applicable to each shift. **Shift differential pay is required and will be enforced during each applicable shift where shift differential pay is in the determinations . . . if work is performed during hours typically associated with a 2nd or 3rd shift the appropriate shift rate of pay is required.** Shift differential pay shall not apply to work during traditional shift hour (swing or grave) if the determination includes a footnote that indicates that the non-shift rate may be paid for a special single shift.<sup>9</sup>

(Exhibit 18, p. 1 (emphasis added).)

Ayus also relied on section 6.4 of the PSA, which states in part “. . . employees performing Project Work shall not be entitled to any differentials.” Specifically, section 6.4, titled “Shifts and Alternative Work Schedules” states:

- (a) Alternate starting and quitting time and/or shift work may be performed at the option of the contractor upon three (3) days’ prior notice to the affected union(s), unless a shorter notice period is provided for in the applicable Schedule A, and shall continue for a period of not less than five (5) working days. Saturdays and

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<sup>9</sup> The Plumbers PWD does not include a footnote indicating that a non-shift rate may be paid for a special single shift.

Sundays, if worked, may be used for establishing the five (5) day minimum work shift. If two shifts are worked, each shall consist of eight (8) hours of continuous work exclusive of a one-half (1/2) hour non-paid lunch period for 8 hours pay. The last shift shall start on or before 6:00 p.m. The first shift starting at or after 6:00 am is designated as the first shift, with the second shift following.

- (b) Contractors, the Council and the Union recognize the economic impact upon the District and the District rate payers of the massive project being undertaken by the District and agree that all parties to this Agreement desire and intend Project Work to be undertaken in a cost efficient and effective manner to the highest standard of quality and craftsmanship. Recognizing the economic conditions, the parties agree that, **to the extent permitted by law**, employees performing Project Work shall not be entitled to any differentials or additional pay based upon the shift or work schedule of the employees. Instead, all employees working on Project Work shall be paid at the same base rate regardless of shift or work schedule work"

(Exhibit 46, p. 27-28 (emphasis added).)

Section 6.4, subsection (a) clarifies shift hours when two shifts are worked. Subsection (b) states that no shift differential will be required on public works projects, **"to the extent permitted by law."** On May 31, 2006, LAUSD and the Los Angeles/Orange Counties Building and Construction Trades Council issued a clarifying letter, i.e. Special Notice, stating that under section 6.4, subsection (b), contractors and subcontractors **must pay a shift differential, if DIR's PWD contains a shift differential pay requirement.** (Exhibit 48.) The language of the May 31, 2006, Special Notice expressly states that if the PWD required a shift differential, the contractor must pay it. Neither section 4.4.1.2 of the Master Agreement nor the PSA Special Notice support Ayus's argument that it did not have to pay the second shift differential.

The law required Ayus to pay the second shift differential rate. Ayus did not dispute that workers repeatedly started their shifts around 2:00 p.m. or 3:00 p.m. Because of that start time, LAUSD established the law required Ayus to pay the

differential and determined that Ayus failed to pay second shift differential. Ayus did not carry its burden of proving the bases for the Notice was incorrect.<sup>10</sup>

LAUSD Determined Properly that Ayus Failed to Report All Hours, All Workers, and Failed to Pay Fringe Benefits.

LAUSD established that Ayus also did not report all hours worked and all workers who worked on the Project. Specifically, on November 20, 2017, Ayus did not report any work for Brandon/Dave, yet Technion's SIS showed that Brandon/Dave signed in.<sup>11</sup> Similarly, Ayus did not report any hours for Cline on February 6, 2018, and February 14, 2018, although the DCRs and the Tsheets showed he worked.

Additionally, LAUSD established Ayus employed unidentified workers. The DCR for October 17, 2017, confirmed an unidentified worker, but there is no CPR for October 17, 2017. Osiname testified that he was on site on that day, but was only taking pictures of his work. However, Osiname conceded it was possible that Cline was with him on that day. LAUSD provided other instances where Ayus did not report all workers and hours. For April 18, 2018, the DCR noted an unidentified worker. Yet, there is no CPR. Osiname testified he was the "unidentified worker," but did not submit a CPR for himself.

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<sup>10</sup> Ayus attempted to shift blame to LAUSD for allegedly failing to provide Ayus with notice of the correct prevailing wage. LAUSD complied with its obligations under section 1773.2 to publish a bid advertisement notifying contractors the project was a public work and that PWDs could be found at its headquarters' office. Osiname conceded he never obtained the PWD from the headquarters' office nor did he attempt to review the PWDs posted on DIR's website. Ayus is responsible for ensuring it complies with prevailing wage law and is deemed to have actual and constructive notice of its legal obligations. (See *Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 [contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates].) Accordingly, Ayus's argument that it did not know about the second shift differential rate because LAUSD did not provide a copy of the PWD to Osiname is not persuasive.

<sup>11</sup> Osiname, without foundation, alleged the handwritings on the SIS were different than that of the actual worker, thereby implying that individual workers did not sign in on the SIS.

LAUSD also established that Ayus failed to pay the required fringe benefits on at least one occasion. Miskell is owed \$260.56 in fringe benefits for work performed on April 27, 2018. For purposes of fringe benefits, Ayus reported to the Southern California Pipe Trades Administrative Corporation that Miskell only worked 16 hours in April 2018, despite having worked 24. (Exhibit F, p. 4.) Ayus appeared to argue that the 8 hours difference was paid in May. (Ayus Trial Brief, p. 8:24-27.) If Miskell was paid a higher amount in another month, ultimately it is LAUSD's discretion not to provide a credit as Ayus did not timely pay the correct fringe benefit amount when it should have been paid in April 2018.

Therefore, LAUSD met its prima facie burden by establishing that Ayus failed to pay the correct prevailing wage, failed to report all workers on the Project and all hours worked on the Project. Ayus did not carry its burden of showing the Notice was incorrect. Accordingly, Ayus is liable for wages owed in the aggregate sum of \$1,911.53.

#### Ayus is Not liable for Liquidated Damages

Section 1742.1, subdivision (a) provides in part:

After 60 days following the service of a [notice of withholding] under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with the Enforcing Agency and the Enforcing Agency agreeing to waive liquidated damages). Under section 1742.1, subdivision (a) the contractor has 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the notice of withholding, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1,



subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the notice of withholding, the contractor deposited with DIR the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, the Notice was served on December 20, 2019, by first class and certified mail. (Exhibit 32, pp. 4-5.) At the time, the Notice's total assessment was \$20,328.23, including \$10,051.28 in wages. Ayus did not offer any exhibits concerning a deposit of \$20,328.23 with DIR. However, Ayus provided the following chronology in its closing brief indicating it made a deposit pursuant to 1742.1:

12.27.19 received certified mail of DIR forfeiture approval of  
\$22,698.23 Exhibit 32 page 5  
2.21.20 check for \$22,698.23 cleared Ayus bank a/c was  
confirmed by [H]earing [O]fficer McGinty

(Ayus's Closing Brief, p. 10:13-14.)

Ayus did not provide a copy of the \$22,698.23 cleared check. However, on June 26, 2023, Ayus filed a request for DIR to release excess escrow funds as a result of LAUSD's reduced revised audit in this matter. Attached to Ayus's June 26, 2023, request, was check number 5159 for \$20,328.23 made out to the DIR for case number 19-1010, project number 23-11841, which is the instant Project. The check was dated February 20, 2020, and cleared on February 21, 2020. The deposit was timely because Ayus had until February 23, 2020, to make the deposit, as service by mail extended the deposit date five days. (See Cal. Code Regs., tit. 8, § 17203, subd. (c).)<sup>12</sup> Accordingly, Ayus is not liable for liquidated damages.

Ayus is Liable to Pay Training Fund Contributions.

LAUSD determined that Ayus owed \$53.19 in training funds for six employees. Section 1777.5, subdivision (m)(1) requires contractors who employ journeymen or apprentices in any apprenticeable craft to contribute to the California Apprenticeship

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<sup>12</sup> Sunday, February 23, 2020, was the fifth day, however, pursuant to Rule 03, subdivision (a) if the date falls on a non-working day, the time to respond or act is further extended to the next working day. (Cal. Code Regs., tit. 8, § 17203, subd. (a).) Therefore, Ayus's deadline to make the deposit was Monday February 24, 2020.

Council the amount reflected as the hourly "training" rate that appears on the Director's PWD for each hour worked. The contractor is entitled to take credit for such contributions made to a DAS-approved apprenticeship program that can supply apprentices to the site of the public work.

Ayus only disputes owing training funds for Brandon/Dave in the amount of \$12.95. The dispute is based on Brandon/Dave's alleged exempt status. Although Ayus stated the Joint Arbitration Board of the California Plumbing and Mechanical Contractors Association (CPMCA) and the Southern California Pipe Trades District Council No. 16 of the United Association (UA) approved its "Exempt Ownership Request" to designate Brandon/Dave as an exempt owner, Osiname conceded that the approval of such exemption was revoked. (Ayus's Trial Brief, p. 6: 20-27.) Thus, Ayus owed training fund contributions for Brandon/Dave. Moreover, Ayus provided no explanation as to why training funds were not paid for the other five workers. Accordingly, Ayus did not carry its burden of proving the bases of the Notice was incorrect and owes \$53.19 in training funds.

Ayus Failed to Prove the Labor Commissioner Abused their Discretion in Assessing Penalties under Section 1775.

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

(a)(I) 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) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless 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) The penalty may not be less than eighty dollars (\$80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or 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) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision [(e)] of Section 1777.1. <sup>[13]</sup>

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

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<sup>13</sup> According to section 1777.1, subdivision (e), 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."

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).)

LAUSD recommended that the Labor Commissioner approve a penalty rate of \$150.00 per day per worker for Ayus's failure to pay correct prevailing wages. The Enforcing Agency considered Ayus's history of having performed work on more than 24 public works projects with LAUSD, as well as having signed and acknowledged understanding the prevailing wage requirements. However, the Labor Commissioner reduced the penalty rate to \$120.00 per day per worker. (Exhibit 31.)

Ayus argued the \$120.00 penalty rate was excessive because it had no prior violations. According to Ayus, the law allows for a penalty rate of less than \$40 dollars if the violation is promptly rectified, which Ayus alleged it did. Osiname testified that once the wages owed were reduced to an "acceptable" figure he paid them, thus, the penalties should be less.

Ayus's argument is unpersuasive and relies on an incorrect legal interpretation. A penalty rate of less than \$40.00 is only available if there is a good faith mistake *and* if the mistake is promptly rectified. Here, Ayus failed to produce any evidence that its failure to pay the correct prevailing wages was a good faith mistake. As LAUSD pointed out, Ayus was an experienced public works contractor. Ayus knew or reasonably should have known of its obligations under the public works law but deliberately failed or refused to comply with its provisions. Further, Ayus did not promptly rectify its failure to pay the correct prevailing wages. Restitution payments were not made until April 2021, more than a year after the December 20, 2019, Notice was issued. Accordingly, Ayus failed to carry its burden to establish abuse of discretion by the Labor Commissioner in

setting the penalty rate at \$120.00 per day per worker. This Decision affirms the Notice's section 1775 penalties amounting to \$7,800.00.<sup>14</sup>

Ayus is Liable for Section 1813 Penalties for Failure to Pay the Correct Overtime Prevailing Wage Rate.

Section 1813 states, in pertinent part, as follows:

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

Section 1815 states in full as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 1/2 times the basic rate of pay.

The record established that Ayus violated section 1815 by paying less than the required prevailing wage rate for overtime work performed by Kevin Smalls on April 18, 2018. On that day, the Tsheets show Kevin Smalls signed in at 1:28 p.m. and signed out at 10:18 p.m., for a total of 8.33 hours. The CPR shows an underreporting of .33 overtime hours. The correct prevailing wage rate for overtime on the second shift was \$104.86 per hour. After applying credits, Smalls was owed \$33.99. Ayus made a restitution payment to Smalls after the Notice was issued, but section 1813 penalties were assessed appropriately because of late payment.

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<sup>14</sup> To the extent Ayus argues it was waiting on the union completing its own audit, this position is also unreasonable as a union's findings/position is irrelevant to the LAUSD's enforcement of State law.

Ayus disputed that Smalls was on the Project site the entire time. It argued "at 1:28pm Kevin Small signed in and went off site and returned to site before 3pm for work and signed out at 10:18pm. Kevin Small worked less than 8 hours but paid for 8 hours so the alleged overtime time lacks merit especially with a no complaint from a 15 years [sic] experienced union journeyman." (Ayus's Trial Brief, p. 8:19-22.) Ayus's argument is unpersuasive. Ayus is responsible for keeping accurate payroll records. According to the Tsheets, Smalls signed in at 1:28 p.m. Ayus did not carry its burden of proving that the sign-in and sign-out times were incorrect. Smalls did not testify nor did Ayus present any other evidence aside from the Tsheets.

Unlike section 1775 above, section 1813 does not give LAUSD any discretion to reduce the statutory penalty rate of \$25.00 per violation, nor does it give the Director any authority to limit or waive the penalty rate of \$25.00 per violation. Accordingly, the Decision affirms \$25.00 in section 1813 penalties for Ayus's failure to pay the correct prevailing wage rate for overtime on April 18, 2018, to Smalls.

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. LAUSD served the Notice of Withholding of Contract Payments timely in accordance with Labor Code section 1741.
3. The affected subcontractor Ayus & Co., Inc. filed a timely Request for Review of the Notice of Withholding of Contract Payments issued by LAUSD with respect to the Project.
4. LAUSD made available to Ayus & Co., Inc. its enforcement file timely.
5. Following issuance of the Notice of Withholding of Contract Payments, Ayus & Co., Inc. timely deposited an amount equal to the assessment with the Department of Industrial Relations.
6. Ayus & Co., Inc. underpaid its workers \$1,911.53 in prevailing wages.

7. Ayus & Co., Inc. is liable for Training Fund Contributions in the amount of \$53.19.
8. The Labor Commissioner did not abuse her discretion in approving LAUSD's recommended assessed penalties under Labor Code Section 1775 at \$120.00 per violation for 65 violations, in the aggregate sum of \$7,800.00.
9. Ayus & Co., Inc. is liable for penalties assessed under Labor Code section 1813 in the amount of \$25.00.
10. Ayus & Co., Inc. is not liable for liquidated damages.

The amount found due in the Amended Audit is affirmed by this Decision as follows:

<b>Basis of the Assessment</b>	<b>Amount</b>
Wages Due:	\$1,911.53
Training Fund Contributions:	\$ 53.19
Penalties under section 1775:	\$7,800.00
Penalties under section 1813:	\$ 25.00
<b>TOTAL:</b>	<b>\$9,789.72</b>

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

The Notice of Withholding of Contract Payments is affirmed as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 11/24/25



**Jennifer Osborn, Director**  
California Department of Industrial Relations