STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Suttles Plumbing & Mechanical Corporation Case No: 21-0206-PWH

From a Notice of the Withholding of Contract Payments issued by:

Los Angeles Unified School District

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor, Suttles Plumbing & Mechanical Corporation (Suttles) requested review of a Notice of the Withholding of Contract Payments (Notice) issued by the Los Angeles Unified School District on July 30, 2021, with respect to a classroom conversion into biotechnical lab (CTEIG) at the Orthopaedic Hospital Medical Magnet High School (Project) for the Los Angeles Unified School District (District or Awarding Body) in Los Angeles County. The Notice determined that Suttles owed $5,681.25 in unpaid prevailing wages, and $10,900.00 in statutory penalties.

A Hearing on the Merits occurred over five days before Hearing Officer Mirna Solís.[1] Jacqueline Orozco and Paul Rayburn appeared as counsel for the District. Thomas Kovavich appeared as counsel for Suttles. Uyenbinh Nguyen, Senior Labor Compliance Officer, Jessica Tam, Myint Moe, and Onanunga Ajoke testified in support of the Notice. Bryan Suttles, Jackie Turner, Rodney Cobos, and Adalberto Parada testified for Suttles. On July 18, 2024, the parties filed closing briefs and the Hearing Officer submitted the matter for decision.[2]

---

[1] October 5, 2022, February 1, 2023, April 12, 2023, May 10, 2023, and April 9, 2024.

[2] Pursuant to Rule 49 [Cal. Code Regs., tit. 8, § 17249], the Hearing Officer designated the Certified Court Reporter’s transcript as the official record of this proceeding.

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

- The work subject to the Notice of the Withholding of Contract payments 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.
- The Request for Review was filed timely.
- The enforcement file was requested and produced in a timely fashion.

The issues for decision are as follows:

- Whether the District served the Notice timely.
- Whether Suttles paid back wages and/or made a deposit of the full amount of the Notice of the Withholding of Contract Payments with the Department of Industrial Relations.
- Whether Suttles timely paid its employees the correct prevailing wage rates for all hours worked on Project.
- Whether Suttles reported all its workers in its Certified Payroll Records (CPRs).
- Whether Suttles paid required training fund contributions for all hours worked on the project.
- Whether the Labor Commissioner abused their discretion in approving penalties under Labor Code section 1775.[3]
- Whether Suttles is liable for liquidated damages equal to the unpaid wages.

[3] All subsequent section references are to the California Labor Code unless specified otherwise.

The Hearing Officer admitted into evidence the District's Exhibits 1-8, 10-24, 26-28 and 32-67.[4] Also, the Hearing Officer admitted into evidence Suttles' Exhibits B, E, K, T, Z, AA-DD, FF-HH, JJ, KK, NN-PP.[5]

---

[4] The District did not move into evidence Exhibit 25, and Exhibits 9 and 29-31 were ruled irrelevant. In addition, the Hearing Officer overruled Suttles' objections to the District's Exhibits 3-4, 8, and 11-17 on the grounds of hearsay and lack of foundation. The District's exhibits 8 and 11 were admitted under the official records exemption to the hearsay rule. (Evid. Code, § 1280.) Nguyen testified that these records were prepared in the regular course of business and maintained in the District's case file. Without regard to the testimony given and the nature of the documents, Suttles delayed the proceedings by repeatedly, and without merit, objecting categorically to any document drafted by the District's Labor Compliance Department (LCD). Those documents were as follows:

> Exhibit 8—LCD letters sent to 24 Suttles workers on LCD letterhead. With the exception of the worker's name and address each letter is exactly the same and appears to be boilerplate.
>
> Exhibit 11—LCD telephone call log/memo for three phone calls. Each log/memo was prepared by Nguyen's subordinate, Diem Au-Duong, who Nguyen testified would have contemporaneously written the log/memo note at or near the time of the telephone call. The probative value of those three logs/memos demonstrate Au-Duong's attempts to contact District personnel at the job site to ascertain Suttles' daily start times. The log/memo entry for a conversation with Mynt Moe contains statements made regarding Suttles' daily start times. While the memo/log itself falls under the official record exemption of the hearsay rule pursuant to Evidence Code section 1280, Moe's statements therein are hearsay, but also admissible under Rule 44, subdivisions (a) and (d) as admissible hearsay. (Cal. Code. Regs., tit. 8, § 17244, subds (a), (d).)

Suttles objected to the admission of the District's Exhibits 3-4 and 12-17 also based on lack of foundation and hearsay. Those exhibits are admitted as well.

[5] Suttles only moved the listed exhibits into evidence. Suttles stated in its closing brief erroneously that Adalberto Parada's Declaration (Exhibit D) and Rodney Cobo's Declaration (Exhibit OO) "were admitted for all purposes since they were available for cross-examination under Rule 34." (Suttles Closing Brief, p. 7, fn. 3.) Suttles only moved Exhibit OO into evidence and failed to move Exhibit D into evidence. The Hearing Officer did not admit into evidence Exhibit D.

For the reasons set forth below, the Director of Industrial Relations finds that the District carried its initial burden of presenting evidence that provided prima facie support for the Notice, with the exception of one worker's claim. Suttles failed to carry its burden of proving the basis for the Notice was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this decision affirming but modifying the Notice.

FACTS

The Project.

On December 24, 2018, the District published a bid advertisement for the classroom conversion to biotechnical lab at Orthopaedic Hospital Medical Magnet High School. (Exhibit 13.) Contract bid documents described the work as renovating an existing chemistry classroom with upgrades necessary to support identified equipment and lab functions. (Exhibit E, p. 9.) Also included were either full-length windows, or windows placed above new base cabinets created to replace tall storage cabinets. (*Ibid*.)

The District awarded the contract to Federick Towers, Inc. (Towers), who was the lowest bidder at $1,398,000. (Exhibit 14; Exhibit 20, p. 16.) Nguyen testified that the Contract between Towers and the District contained prevailing wage requirements at section 6.48 of the General Provisions. (Exhibit E, pp. 127-129.) Towers subcontracted plumbing work on the Project to Suttles. At the Hearing, Brian Suttles

---

The District filed an objection to Exhibit B—"Suttles 2nd Shift Detail Letter" because it alleged the document contained, "statements of opinion, argument and improper legal or factual conclusions," and constituted a declaration, for which Suttles failed to provide the requisite 20-day notice under Rule 34. The District also objected to Exhibit Z—"Roger Alves Time History;" Exhibit DD "Beto–Tracker;" Exhibit HH—Declaration of Roger Alves; and Exhibit KK—Email thread dated September 27, 2019. All of the District's objections were on grounds of lack of foundation and authentication, the exhibits lacked probative value and were likely to necessitate undue consumption of time, and violated the best evidence rule. The District's objections were overruled. The Hearing Officer admitted the exhibits under Rule 44, subdivisions (a) and (d) [Cal. Code. Regs., tit. 8, § 17244, subds (a), (d)] as admissible hearsay.

testified he reviewed the Contract and other documents prior to submitting its bid to Towers. He estimated the plumbing work took approximately 2,400 work hours for the Project, which he described as a direct plumbing remodel for the labs and installation of a hot water boiler system. On February 5, 2020, the District's Procurement Services Division issued a Notice of Contract Completion confirming the District accepted the Project as completed on February 5, 2020. (Exhibit 19.)

Prevailing Wage Determinations.

Suttles employed workers in the Plumber, Industrial and General Pipefitters classification and the Laborer classification. The former is the only classification at issue. (Exhibit 39.)

The applicable Prevailing Wage Determination (PWD) for the Plumber, Industrial and General Pipefitter classification in Los Angeles County at the time of the bid advertisement was LOS-2018-2 (Plumber PWD). The total hourly rate of pay under the Plumber PWD was $74.30 which included a basic hourly rate of $50.13, health and welfare payment of $8.91, pension payment of $11.75, training fund contribution of $2.25, and $1.26 for other payments.[6] (Exhibit 32.) Effective September 1, 2019, the Plumber PWD required a $2.01 predetermined increase. (Exhibit 33.) The Plumber PWD for the second shift required a total hourly rate of pay of $81.33 with the difference of $7.03 going entirely into the basic hourly rate of $57.16 with all other payments the same as the first shift pay. (Exhibit 34.) Effective September 1, 2019, the Plumber PWD also required a $2.01 predetermined increase for the second shift. (Exhibit 35.)

For Plumber Apprentice-01, the total hourly rate of pay was $25.81 which included $22.86 as a basic hourly rate, $0.00 for health and welfare, $0.38 for pension, $1.43 for training fund contribution, and $1.14 for other payments. (Exhibit 36.) For Plumber Apprentice-02, the total hourly rate of pay was $37.49 which included $25.50 as a basic hourly rate, $8.91 for health and welfare, $0.38 for pension, $1.50 for training fund contribution, and $1.20 for other payments. (*Ibid.*) For Plumber

[6] Plumber PWD's footnote "AO" states Vacation/Holiday is "included in the basic hourly rate and factored at 1.5 times for all overtime." (Exhibit 32, pp. 2, 4.)

Apprentice-04, the total hourly rate of pay was $53.40 which included $35.47 as a basic hourly rate, $8.91 for health and welfare, $6.26 for pension, $1.56 for training fund contribution, and $1.20 for other payments.[7]

The Investigation.

The District initiated an audit investigation after Onanunga Ajoke, Labor Compliance Officer (Investigator), visited the Project site on April 15, 2019. (Exhibit 2.) Workers Roger Alves and Kelvin Barnes told the Investigator they had worked the previous week. Alves stated he worked the Friday of the previous week for eight (8) hours. The Investigator testified that the audit was initiated because the two workers were unreported on the CPR for the previous week. In addition, sometime thereafter, a revised CPR including Alves appeared in the District's system. (Exhibit 39.)

The investigation was a combined effort of several District Labor Compliance staff members. Ajoke conducted site visits, Huin Chhay initiated the audit, which was later completed by Diem Au-Duong. Ajoke and Au-Duong worked under Nguyen, who testified that she performed hundreds of audits and directly supervised the investigation of Suttles' possible prevailing wage violations on the Project. On February 11, 2020, the District requested documents for its audit from Towers. [8] Suttles was copied on the

[7] Suttles objected to the admissibility of Exhibit 29, which is the predetermined increase for the Laborers, Exhibit 30—PWD for Laborer Apprentices, and Exhibit 31—Scope of Work for Laborers, on the basis of relevance. The Hearing Officer deferred a ruling on Suttles' objections. The objections are sustained as the basis of the audit does not include wages and penalties for any worker classified as Laborer.

[8] In a September 26, 2019 letter, the District notified Suttles and Federick Towers that a prevailing wage audit was initiated against Suttles. (Exhibit 3). The District then requested by letter, Suttles' and Federick Towers' payroll and other documents to conduct its audit. (Exhibit 4.) Suttles objected to the District's Exhibits 3 and 4 on the grounds of hearsay and lack of foundation. The Hearing Officer deferred a ruling on Suttles' objections. No testimony was provided concerning the District's practice of issuing these letters, or whether they are regularly maintained in the District's files. Notwithstanding, the objection is overruled and Exhibits 3 and 4 are admitted under Rule 44, subdivisions (a) and (d) as admissible hearsay. (Cal. Code. Regs., tit. 8, § 17244, subds. (a), (d).)

request. Beginning on May 1, 2020, Suttles submitted mitigating evidence on 25 different occasions, with its last submission on May 25, 2021.

In response to the District's February 11, 2020, request for documents to Towers and Suttles, the District received Daily Construction Reports "DCRs," which were prepared by Towers to identify subcontractors and the number of workers by contractors, as well as a description of work on any given day.[9] (Exhibit 42.)

As part of its mitigating evidence, Suttles submitted monthly fringe benefits reports, which identify the workers' name and the hours worked. (Exhibit 43, p. 146.) Suttles also submitted sign-in sheets (SIS) (Exhibit 44, p. 10; Exhibit 45, p. 169), weekly timecards (Exhibit 49), and tracking information for a car assigned to a worker (Exhibit 58, p. 7).[10] Suttles also submitted daily job reports prepared by Suttles, which

---

[9] Suttles objected to Exhibit 41 (Inspector of Records) and Exhibit 42 (Towers' Daily Construction Reports) on the grounds of hearsay and lack of foundation. The Hearing Officer deferred a ruling on Suttles' objections. Nguyen testified that the prime contractor was required to complete the DCRs. Los Angeles Unified School District, Facilities Services Division, appears at the top of each DCR, which is a form. It appears the District provides the prime contractor with the DCR form template, which the prime contractor must complete every day. Nguyen testified that Suttles submitted the DCRs. Nguyen further testified that these records were prepared in the regular course of business and maintained the District's case file. Accordingly, Suttles' objections are overruled and Exhibits 41 and 42 are admitted under the official records exemption to the hearsay rule pursuant to Evidence Code section 1280.

[10] Suttles' worker, Victor Andia, directly emailed some of his weekly timesheets to Diem Au-Duong. (Exhibit 9.) The timesheets referenced job codes which corresponded to other projects. Suttles objected to Exhibit 9 on the grounds of hearsay and lack of foundation. The Hearing Officer cross-referenced Andia's emailed timesheets with Suttles' Ledger Card Report (Exhibit 49, pp. 54–219) and determined the job codes on Andia's Timesheets corresponded to the following projects: "THO853850C" is the Thomas Starr King MS Seismic job (*Id.* at p. 198); "Wes1801"is the West Valley Occupation Job (*Id.* at p. 211); "LA academy" is the Los Angeles Academy job (*Id.* at p. 123); "Mad8S4510C " is the Madison Middle School job (*Id.* at p. 129); "San8S3160C" is the Santee HS Wellness job (*Id.* at p. 176); "Mac8S1960C" is the Maclay Wellness Center job (*Id.* at p. 128); "PLA9S4770C" is the Placensia Elementary School job (*Id.* at p. 167); "LAN19010C" is the Langdon Elementary School job (*Id.* at p. 118). None of codes listed in Andia's timesheets corresponded to this

identify the date, workers, description of the work, and hours worked. (Exhibit 46, p. 44.)

Also, Suttles submitted bank statements. The District used them as proof of payment and provided Suttles credit. (Exhibit 45.) Pay stubs, cancelled checks, as well as direct deposit registers were also submitted. (Exhibit 47.) Ledger Card Reports, which were organized by job, and listed the workers on the job by name, check numbers issued to them, the rate of pay and hours worked. (Exhibit 45, p. 34.) Labor distribution reports listed the employees who worked on the Project, their work dates, and hours, as well as their pay. (Exhibit 49.)[11]

The District cross-referenced Suttles' CPRs with all of Suttles' mitigating evidence to ascertain the days workers worked, their hours, and their rates of pay. Nguyen testified that the District utilized DCRs to compare with Suttles' CPRs to confirm the number of workers at the job site. In addition, the District compared Suttles' daily job reports with Suttles' CPRs to confirm workers' hours, as well as the work performed. The District used the PWD scope of work to confirm the correct classification as reported for each worker. The District used fringe benefit reports to compare the accuracy of the hours reported on the CPRs, as well as to confirm whether all fringe

---

Project. Further, the Audit indicated no wages were owed for Andia. Accordingly, the Hearing Officer determined Exhibit 9 was irrelevant and therefore excluded.

[11] Suttles submitted mitigating evidence piecemeal. As part of its May 20, 2020 submission, Suttles submitted more Ledger Card Reports, as well as weekly timecards. (Exhibit 49, p. 755.) On March 2, 2021, Suttles submitted more bank statements and more canceled checks. (Exhibit 50.) On March 30, 2021, additional fringe benefit reports, a mileage log, more Ledger Card Reports, and more weekly timecards were submitted. (Exhibit 51.) On April 26, 2021, more fringe benefit reports (Exhibit 52), payment confirmation notices to a union (*Id*. at p. 24), as well as vendor invoices were provided (*Id*. at p. 52). One day later, Suttles submitted more bank documents and weekly timecards. (Exhibit 53.) On May 3, 2021, Suttles submitted more bank statements and more Ledger Card Reports. (Exhibit 54.) On May 18, 2021, Suttles provided more bank statements, direct deposit registers, pay stubs, and canceled checks. (Exhibit 56.) On May 20, 2021, Suttles provided additional Ledger Card Reports. (Exhibits 59 and 60.)

benefits were paid. The District used the SIS to confirm whether all Suttles' workers on any given day were reported on the CPRs. Hours and days worked were also confirmed by reviewing weekly timecards and the mileage log, which were then compared to the CPRs. For one worker, tracking information for the worker's assigned company car was used to confirm days and hours worked.

The Ledger Card Reports were cross-referenced with the CPRs to confirm that Suttles paid the basic hourly rate. Direct deposit registers and cancelled checks were also used to verify payments to the workers. Bank statements were also used as proof of payment. (Exhibit 45.) The District compared the labor distribution reports with pay stubs and other proof of payments to identify the workers' pay rate, as well as to compare the hours reflected in the reports with the hours reported on the CPRs. (Exhibit 49.)

The District also relied on internal documents. Nguyen reviewed Diem Au-Duong's interview notes with workers. (Exhibit 10.) Au-Duong interviewed plant managers and Mynt Moe, the Project's Resident Construction Engineer/Owner Authorized Representative, whom she contacted to ascertain Suttles' daily start time.[12] (Exhibit 11.)

The District's Inspector Office prepared "Inspector of Record" reports (IORs), also referred to as Inspector Daily Reports, which describe what activity was observed on any given date, as well as the number of workers on the job. (Exhibit 41.) The District also has specialty inspectors for work by certain classifications. For instance, on the Project, an HVAC Specialist performed an inspection and completed a report. (*Id*. at p. 46.)

After reviewing all the mitigating evidence and the District's Project documents, the District determined there were prevailing wage violations on the Project. On February 5, 2021, a pre-withholding meeting was scheduled for February 17, 2021, to

---

[12] Moe testified his title is resident construction engineer, but his duties also include the same duties as owner authorized representative (OAR), who is the main point of contact in construction projects for the District.

discuss the violations. (Exhibit 5.) On February 17, 2021, just before the pre-withholding meeting, the initial audit was forwarded to Suttles and Towers by email. (Exhibit 6.) Later that day at the pre-withholding meeting, Nguyen and Au-Duong appeared for the District, Jackie Turner attended for Suttles, while Sandra Alzate and Katy Iranpanah attended for Towers. The District provided Suttles with additional time to produce any mitigating evidence in response to the initial audit. (Exhibit 7.)

A second meeting held on May 12, 2021, was attended by Nguyen and Au-Duong for the District, Jackie Turner and Shy Suttles for Suttles. (Exhibit 12.)[13] The Parties discussed the mitigating evidence and the audit's finding that second shift differential pay was required.

<u>The Notice</u>

The Notice issued by the District indicated multiple issues with the payment of prevailing wages for workers on the Project by Suttles.

Roger Alves.

On March 12, 2019, Suttles' Daily Job Report showed one worker on site, Roger Alves. (Exhibit 46, p. 46.) The Daily Job Report indicated six hours were worked that day. The DCR for the date indicated that "capping/demo site walk/layout" took place. Moe explained that this work was during the early stage of the Project and Suttles was trying to demolish some of the existing pipeline and capping it. Moe testified that some of the layout on the Project was also performed that day. The CPR prepared by Suttles

[13] Exhibit 12 is the pre-withholding meeting minutes, which were provided to Suttles immediately after the meeting. Suttles objected to the admissibility of Exhibit 12 on the grounds of hearsay and lack of foundation. The Hearing Officer deferred a ruling on Suttles' objection. The minutes memorialized a meeting that fulfilled the District's obligations under California Code of Regulations, title 8, section 16432, subdivision (f), which requires that Suttles be afforded an opportunity to respond to the District's audit before the District sends its Request for Approval of Forfeitures to the Labor Commissioner. Further, Nguyen testified that the meeting minutes were prepared in the regular course of business and maintained in the District's case file. Accordingly, the Hearing Officer overruled Suttles' objection, and admitted Exhibit 12 under the official records exemption to the hearsay rule pursuant to Evidence Code section 1280.

for March 12, 2019, indicated that Alves worked that day, but only for four hours. (Exhibit 39, p. 6.) The District determined two hours were underreported for Alves.

Jackie Turner, Suttles' Human Resource and Payroll Manager, testified that on March 12, 2019, Alves mistakenly wrote 6 hours on Suttles' Daily Job Report. She testified that on March 15, 2019, Alves revised his Daily Job Report to show only four hours of work, but the District did not change this in the final audit. (Exhibits FF-GG.) She also testified that she does not recall if the revised Daily Job Report was attached in an email to the District. She also did not recall if she emailed the revised the Daily Job Report to the District before April 21, 2022.

Unidentified Workers.

The DCR for April 26, 2019, indicated that four workers from Suttles performed "layout for SOVs and Access Panels at the 2nd fl sinks, Layout and drill holes for CPVC, Cut and safe off/cap existing 3/4" copper water riser[.]" (Exhibit 42, p. 55.) However, the CPR prepared by Suttles for the date indicated three workers on site. (Exhibit 39, p. 14.)

On May 10, 2019, the DCR stated Suttles had four workers on the Project to do, "A229, Rough in plumbing." (Exhibit 42, p. 65.) Suttles reported only three workers on its CPR for the date. (Exhibit 39, p. 20.)

Jackie Turner testified that the District also counted a third unidentified worker on July 9, 2019. However, Suttles disputed that the worker was unidentified. Turner testified that Adalberto Parada was the alleged unidentified worker on July 9, 2019. Suttles primarily relies on the vehicle tracker assigned to Parada's company car. According to the vehicle tracker, Parada's assigned company car was at the Project site from 7:49 a.m. to 9:13 a.m., and again from 1:14 p.m. to 2:38 p.m. (Exhibit DD.) Turner concedes they did not identify Parada on their CPR on this Project, but she testified he was paid for a full eight hours on another project that he visited on July 9, 2019.

With respect to the unidentified workers on April 26, 2019, and May 10, 2019, Suttles maintained that they were undoubtedly their vendor. Turner testified that

Smardan, a vendor for Suttles, made deliveries to the Project site on those dates. (Exhibit 52.) Smardan's invoices show under "ship via" a "will call" reference. Turner could not explain why Smardan completed its invoices with that reference. Turner also testified that nothing in the invoices indicated that someone from Smardan was at the Project site. If Smardan had delivered material to the jobsite, someone would have signed documents, such as a packing slip, indicating the materials were received. However, at the time, Suttles did not ensure that packing slips were obtained and returned to the office for record keeping.

Second Shift Differential.

For the work week April 29, 2019, to May 5, 2019, Suttles reported seven workers on their CPRs, and paid them the first shift rate of pay. (Exhibit 39, p. 16.) The District determined most of the work performed by Suttles occurred after 3:15 p.m. Moe testified that section 3.01, subsection (d) of the Contract General Provisions required that contractors begin work after 3:15 p.m. on a school day. (Exhibit 1, pp. 99, 104.) He visited the site two to three times a week for two to three hours every time he visited. He made sure the Project was moving forward and responded to any outstanding issues from the contractors, architects and inspectors. During the summer and spring break, work was performed during the day. But, on instructional/school days when school was in session, work began after 3:15 p.m.

Moe recalled speaking with Au-Duong who asked him if Suttles was working after school hours. Moe testified that about 80-90 percent of the work performed by Suttles occurred after school hours. In fact, Moe was responsible for notifying contractors when they could work during the day on non-instructional/non-school days. Brian Suttles confirmed that daily start times were either 2:30 p.m. or 3:00 p.m., which he characterized as "a late start."

Brian Suttles also testified that he was advised of the shift differential pay requirement while working on the Project because he received an LCD claim regarding the Santee project for failure to pay shift differentials on the Santee project. He submitted a change order for this Project for the additional labor costs associated with the shift differential. However, the District rejected the change order and quoted section 6.4 of the Project Stabilization Agreement (PSA).[14]

Nguyen testified that she determined Suttles was required to pay a second shift differential rate of pay for work performed after 3:15 p.m. after she reviewed the Plumber PWD, DIR's important notice (Exhibit 38), and a DIR Enforcement Opinion (FEI case) regarding second shift differential rate for the Electrician classification.[15]

Nguyen provided the following two examples of Suttles failure to pay the second shift differential:

For the week April 8, 2019 to April 14, 2019, Suttles paid Kelvin Barnes, Plumber Apprentice-01, $25.81 an hour, when the second shift differential required a pay rate of $28.97 an hour.

For the week April 29, 2019 to May 5, 2019, Suttles paid Cesar Alcor, Plumber, $74.30 an hour, but the second shift differential required a pay rate of $81.33 an hour.

Rodney Cobos, business manager, financial secretary, and treasurer, of the Southern California Pipe Trades District Council 16, testified he signed the 2018 to 2026 master agreement between the Pipe Trades and the California Plumbing and Mechanical Contractors Association. The agreement was submitted to DIR. His understanding of section 4.1.1. of the agreement was that if there were two shifts the first shift would be paid at the regular rate for eight hours. If there was a single shift with a delayed start time after 3:15 pm, the second shift provision would apply. He understood that DIR did not adopt the CBA in full or in totality.

Section 1775 Penalties

In recommending a penalty rate, Nguyen testified that the District considers whether the violation is a good faith mistake, prior violations of failing to pay prevailing

---

[14] Moe testified that the PSA applied to the Project, which meant the contractor awarded the project must be a signatory to the appropriate union agreement for work on the Project. Brian Suttles testified that Suttles was a signatory to the PSA and that his company hired workers from the Plumbers Local 78.

[15] Jessica Tam, Labor and Contract Compliance Administrator, also testified that she considered DIR's important notice concerning when a shift differential was required.

wages, the contractor's knowledge of prevailing wage law, and whether the violations were intentional and willful. In this matter, the District recommended $100 per worker per day in section 1775 penalties. Nguyen testified that the penalty rate was based on Suttles having a previous violation, knowledge of prevailing wage law, and that the violation was not considered a good faith mistake.

With respect to knowledge of prevailing wage obligations, she testified that Suttles knew of its obligations from the trainings it attended for a labor compliance certification, the bid advertisement for the project, and that section 6.21 of the Contract's general conditions for the Project advised Suttles of prevailing wage requirements. (Exhibit 1, p. 49.) Further, when Suttles submitted its CPRs it was required to sign a labor law checklist, which contained prevailing wage law obligations. (Exhibit 17.) [16]

---

[16] Suttles objected to Exhibits 14-17 on the grounds of hearsay and lack of foundation. Exhibit 14 was a pre-award LCD letter. Nguyen testified that this type of letter is mailed to the contractor after the LCD receives the Procurement Services Division's notice of intent to award the contract to the lowest bidder. After receiving this notice, the LCD sends its pre-award letter notifying the contractor of its prevailing wage obligations. Exhibit 14 was mailed out in accordance with this practice.

Similarly, Exhibit 15 advised the contractors of its prevailing wage law obligations., i.e., to submit weekly Certified Payroll Records (CPRs) online. Nguyen testified that generally this letter is sent to the prime contractor and subcontractors. Eleven days after the anticipated start date, the LCD sent this letter to Towers, notifying it of this obligation.

Exhibits 16 and 17 are "Checklist of Labor Requirements To Review At Pre-Job Conference" (Checklist), which were electronically signed by Towers and Suttles, respectively. Nguyen testified that generally contractors review the checklist when they login to the Certified Payroll Systems online and that the Checklist can be downloaded once it is electronically signed. It appears Towers and Suttles signed the Checklists pursuant to that process. For each of the above exhibits, Nguyen testified that these records were prepared in the regular course of business and maintained in the District's case file. Accordingly, the Hearing Officer overruled Suttles' objections to Exhibit 14-17, which were admitted under the official records exemption to the hearsay rule pursuant to Evidence Code section 1280.

Finally, Nguyen testified that the District's Case Tracker revealed that in the three years prior to the issuance of the Notice Suttles had one prior violation. (Exhibit 20, p. 6.)

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 construction projects. The purpose of the CPWL was summarized by the California Supreme Court 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.) A labor compliance program, such as the District, 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, supra,* 1 Cal.4th at p. 985*;* and see § 1771.5, authorizing enforcement by labor compliance programs.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay 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 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. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if those wages are not paid within 60 days following service of a notice of withholding of contract payments under section 1741.

When the District determines that a violation of the prevailing wage laws has occurred, a written notice of withholding of contract payments is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the notice of withholding of contract payments by filing a request for review under section 1742. The request for review is transmitted to the Director of DIR, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, the District has the burden of producing evidence that "provides prima facie support for the [notice of withholding of contract payments]." (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 [notice of withholding of contract payments] 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 Notice of Withholding. (§ 1742, subd. (b).)

<u>The District Issued the Notice Timely.</u>

Pursuant to section 1741, subdivision (a), service of the Notice must be "not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last."

The District accepted the Project as complete on February 5, 2020. Therefore, the deadline to serve the Notice was August 6, 2021. The Notice was served on July 30, 2021, which was timely.[17]

---

[17] Suttles signed for receipt of the Notice by certified return receipt mail on August 3, 2021. (Exhibit 22, p. 6.)

The District Provided Prima Facie Evidence that Suttles Failed to Pay Wages.

Every employer in the on-site construction industry, whether the project is a public work or not, must keep accurate information with respect to each employee. Industrial Welfare Commission (IWC) Wage Order No. 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

> Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee including . . . name, home address, occupation, and social security number . . . [t]ime records showing when the employee begins and ends each work period . . . [t]otal wages paid each payroll period . . . [and] [t]otal hours worked during the payroll period and applicable rates of pay . . .

(Cal. Code Regs., tit. 8, § 11160, subd. (6)(A).) Also, the employer must furnish each employee with an itemized statement in writing showing all deductions from wages at the time of each payment of wages. (Cal. Code Regs., tit. 8, § 11160, subd. (6)(B); see also Lab. Code, § 226.) Employers on public works have the additional requirement to keep accurate certified payroll records. (§ 1776; Cal. Code Regs., tit. 8, § 11160, subd. (6)(D).) Those records must reflect, among other information, "the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journey[person], apprentice, worker, or other employee employed by him or her in connection with the public work." (§ 1776, subd. (a).)

Non-Shift differential claims for unpaid wages.

Based on the evidence available to the District at the time the Notice issued, the District relied appropriately on Suttles' Daily Job Report to find that Alves worked six hours on March 12, 2019, of which only four hours were reported on the CPR. Therefore, the District met its burden of providing prima facie support for the audit. However, Suttles provided a revised Daily Job Report for March 12, 2019, changing the hours worked from six to four hours. Turner could not remember whether the revised Daily Job Report was attached to an email to the District before the Notice was issued. She also could not remember when she sent it by email to the District. Given Turner's lack of knowledge in this regard and the numerous piecemeal emails sent to the

District—which evidenced poor record keeping and failure to readily maintain such records—the Hearing Officer found the revised Daily Job Report was not likely sent until after the Notice was issued. Had Suttles provided all its mitigating evidence in a timely manner, the March 12, 2019, claim for Alves likely would have been removed from the audit. Notwithstanding, Suttles met its burden of proving the March 12, 2019, claim as to Alves is inaccurate, albeit as a result of their failure to timely provide the revised Daily Job Report.

Three other claims for unpaid wages stemmed from the District determining that there were unidentified workers on the Project on April 26, 2019, May 10, 2019, and July 9, 2019. The District relied on the DCRs, which had a head count of Suttles workers on those days. The District provided prima facie proof that the three additional workers did not appear on the corresponding CPRs. Suttles failed to carry its burden of proving that the basis of the Notice was incorrect with respect to the three unidentified workers. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).)

For the dates April 26, 2019 and May 10, 2019, Suttles argued the unidentified workers were Smardan's workers. Smardan's invoices do not have any information to establish by a preponderance of the evidence that the unidentified workers were not working "doing Rough in plumbing" or removing and capping off work as explained by Moe, and that the unidentified workers were actually making deliveries for Smardan. (Exhibit 52, p. 53.) Suttles argued the invoices prove Smardan's personnel or some other delivery person delivered material directly to the job site. The argument is tenuous at best. Smardan's invoice contains information such as the "customer number," "customer order number," "ordered by," "ship date" "order date" and "shipped via." For April 26, 2019, the invoice states the "ship date" and "order date" are the same. The invoice also states Suttles was billed and under "ship to" states "Suttles PLBG- Orthopaedic Hospital High School" followed by the school's address. Under the "shipped via," Smardan wrote "Will Call." Turner did not know why Smardan wrote "Will Call" under the "shipped via." Similarly, the May 10, 2019, Smardan invoice contains the same categories of information. The order date was May 9, 2019, and the ship date was May 10, 2029. Turner stated that a packing slip would be evidence of an actual delivery directly to the job site. However, Suttles failed to produce a packing slip nor did Suttles subpoena any Smardan personnel to testify and confirm that its personnel or some other delivery person/carrier was indeed at the job site delivering material on April 26, 2019, and May 10, 2019, and were inadvertently included in the count of workers performing work on the Project. Notwithstanding, even if Suttles had proven that a delivery person was at the job site making a delivery, such a fact does not make it more likely than not that the delivery person was the third individual on the DCR and not a third worker—an unidentified worker—"doing rough in plumbing" or "removing and capping off work." Accordingly, Suttles did not carry its burden of proving the basis of the Notice with respect to those two unidentified workers was incorrect.

The July 9, 2019, DCR completed by Towers counted three Suttles' workers on July 9, 2019, and described the work as "hallway fire sprinkler shut down." The District determined one of the workers was unidentified, while Suttles argued the unidentified worker was Adalberto Parada. However, the tracking information only establishes a vehicle assigned to Parada was used to travel to the Project site on that date, as well as other jobsites. Suttles could have asked Parada on direct examination if he was the third worker that day or Suttles could have subpoenaed the other two workers who were on the job that day, Alves and Kelvin Barnes, to testify whether there was a third unidentified worker or whether it was Parada.[18] Further, the SIS for July 9, 2019, does not show that Parada signed-in on the Project even though he signed-in on the previous day. (Exhibit 45, pp. 175-176.) Suttles also concedes that Parada was paid for a full eight (8) hours on another project—the 6th Street elementary school project. (Suttles' Closing Brief, p. 9:16-17.) Moreover, Suttles did not list Parada on the CPR for that day, and there's no evidence that Parada was paid for work on the Project that

[18] Suttles called Parada to testify that he signed the declaration marked as Exhibit D. Suttles did not move Exhibit D into evidence. Nor did Suttles ask Parada about the work he did on July 9, 2019, or about whether there was a third worker on the Project that day.

day. All of these facts taken together do not establish by a preponderance of the evidence that Parada was the third unidentified worker. Therefore, Suttles did not carry its burden of proving the basis of the Notice was incorrect with respect to the July 9, 2019, unidentified worker.

Second Shift Differential.

Suttles failed to pay the correct prevailing wage rate for second shift work. The District provided prima facie evidence that the work began after 3:15 p.m. and that the Plumber PWD and its corresponding scope of work, as well as DIR's March 4, 2002, Important Notice require a second shift differential for second shift work.[19] Under General Prevailing Wage Determination LOS-2018-2, only three crafts have second shift differentials—"Carpet, Linoleum," "Electrician," and "Plumber".(Exhibit 34.) DIR provided further clarification in its March 4, 2002, Important Notice, which states:

> When a worker is required to work a regular shift, he/she must be paid the applicable craft rate from the Director's General Prevailing Wage Determinations for the construction activity he/she is performing. However, when a worker is required to work a shift outside of normal working hours, he/she must be paid the shift differential pay according to the shift he/she is working. **For example, if only one shift is utilized for the day, and the work being performed is during the hours typically considered to be a swing (second) shift or graveyard (third) shift, the worker employed during the hours typically considered to be a swing shift or graveyard shift must**

[19] Suttles objected to the March 4, 2002, DIR Important Notice (Exhibit 38), based on Rule 24, claiming that Exhibit 38 was new evidence that had not been provided in a timely manner to Suttles prior to the Hearing on the Merits. The District filed its initial exhibit list on September 14, 2022, and an amended exhibit list on September 28, 2022. On September 29, 2022, Suttles filed an objection to the District's amended exhibit list on the grounds that any new evidence was inadmissible under Rule 24. The District clarified that Exhibit 38 was not new evidence, simply a better copy of what was previously provided to the Suttle on September 24, 2021, as part of its investigative file. (Exhibit 26.) Further, the Hearing Officer reviewed both of the District's exhibits lists and there is no indication that any new evidence was being offered. Exhibit 38 was listed in both exhibits. Throughout the five days of trial, Suttles did not identify any new documents to support its objection nor were any other documents identified as "new evidence" in Suttles' closing brief. As such, the Hearing Officer overruled Suttles' September 29, 2022, objection to the District's amended Exhibit List, as well as its objection to Exhibit 38.

> **be paid the shift differential pay for the shift he/she is working**. If multiple shifts are used for the day, the worker working on the second or third shift must be paid according to the shift he/she is working.
>
> Please refer to the contract provisions posted on the Internet at www.dir.ca.gov/DLSR/PWD for the working hours applicable to the craft/classification published in the Director's General Prevailing Wage Determinations, which has a swing shift and/or a graveyard shift.

(Exhibit 38, emphasis added.) Accordingly, the District presented prima facie support that the second shift differential was required.

In response, Suttles argued that it did not have to pay the second shift differential because Suttles workers only worked one shift. (Suttles' Closing Brief, pp. 17-18.) Suttles relied on section 4.4.1.2 of the 2014-2018 Master Agreement between California Plumbing and Mechanical Contractors Association (CPMCA) and Southern California Pipe Trades District Council No. 16 (DC 16). (Exhibit T.)

For a December 2018 bid advertisement date, DIR's applicable Plumber PWD for the second shift provides a link to the Plumber's Shift Provisions.[20] (Exhibit 37.) DIR's Plumber shift provisions incorporated *certain* provisions from CPMCA and DC 16's 2018-2026 Master Agreement, which became effective July 1, 2018. Section 4.4.1.2 was incorporated into the 2018-2 Plumber PWD's shift provisions. Section 4.4.1.2 states:

> The first or day shift shall work on a regular eight (8) hour shift as outlined in Section 4, Paragraph 4.1.1 of this Agreement. [21] 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.

---

[20] The District failed to include in its Exhibits shift provisions for the Plumber PWD for second shift and Suttles Exhibit T is the incorrect shift provision. Accordingly, the Hearing Officer took official Notice of DIR's shift provision for the Plumber PWD for the second shift pursuant to Rule 45. A copy of the relevant shift provisions is attached hereto as Addendum A.

[21] DIR did not adopt section 4, Paragraph 4.1.1.

Suttles contends "[r]eviewing the underlying collective bargaining agreement adopted by the Director's office, Section 4.1.1. states. . ." (Suttles Closing Brief, p. 18.) This statement is a misrepresentation. The DIR has not adopted "the underlying collective bargaining agreement." With respect to shift differentials, DIR only adopted section 4.4.1.2 and the other sections in the attachment.[22]

Section 4.4.1.2 simply describes the treatment of hours when an employer has employees working shifts under the Master Agreement. Significantly, the first page of DIR's Shift Provision for the Plumber classification includes a conspicuous note, i.e., "Stamp," 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

[22] Suttles also cited to Prevailing Wage Determination 23-2 for the Pipefitter Classification, which Suttles failed to introduce as evidence. (Closing Brief, p. 19 fn. 10.) Suttles contended that shift provision language for the Prevailing Wage Determination 23-2 for the Pipefitter Classification had bearing on prior determinations, including the Plumber PWD. In support of its contention, Suttles cited to testimony of Rodney Cobos, DC 16 business manager, who testified that he worked with DIR in August 2023 concerning 2023 changes to shift provisions and that 23-2 clarified language in the Plumber PWD. The Hearing Officer declined to take official notice of 23-2 as it was not relevant to a project with a 2018 bid advertisement date. Additionally, there was no evidence that 23-2 clarified the shift provisions of the Plumber PWD. DIR would have made such clarification in the form of an important notice. Further, relying on sections of the collective bargaining agreement, which have not been adopted by DIR is improper. The obligation to pay prevailing wages has a statutory basis independent of any contractual requirement. (*Busker v. Wabtec Corp.* (2021) 11 Cal.5th 1147, 1156, citing *Lusardi*, *supra*, 1 Cal.4th at pp. 987-988 [contract between awarding bodies and contractor cannot supersede state prevailing wage law].)

> rate may be paid for a special single shift. [23] Please note the exemptions in California Code of Regulations Section 16200 (a)(3)(F) do not waive the shift differential pay. These regulatory exemptions only apply to overtime pay. Overtime shall be required in accordance with the determination and Labor Code Section 1810 through 1815.

(Emphasis added.) In *Vector Resources, Inc. v. Baker*, the court reaffirmed " '[u]nder the prevailing wage law, all workers employed on public works . . . must be paid not less than the general prevailing rate of per diem wages as determined by the Director. . . for work of a similar character and not less than the general prevailing per diem wage for holiday and overtime work.' [citations omitted]." (*Vector Resources, Inc. v. Baker* (2015) 237 Cal.App.4th 46, 54 (hereafter *Vector Resources*).) In *Vector Resources*, the Director relied on the Stamp and March 4, 2002, Important Notice to determine that the contractor failed to pay a higher "shift differential" rate for work performed during shifts commencing after 12:00 noon. (*Id*. at p. 52.) The court affirmed the validity of the Stamp and March 4, 2002, Important Notice and found that they "clearly are determinations by the Director that, at minimum, *relate to*, if not establish or fix, shift differential pay rates." (*Id.* at p. 58, italics in original.) The court held that "the Important Notice and Stamp establish prevailing wage rates for shifts outside of normal working hours—i.e., they establish that workers must be paid the applicable shift differential pay for the shift he or she is working." (*Ibid.*) Accordingly, Suttles' argument that section 4.4.1.2, or any other provision of any Master Agreement, relieved it of having to pay a second shift differential or that these sections supersede the Stamp and March 4, 2002, Important Notice is meritless.

The District met its prima facie burden by establishing that Suttles failed to pay the correct prevailing wage and failed to report all workers on the Project. With the exception of Alves' March 12, 2019, claim, Suttles did not carry its burden of showing the Notice was incorrect. Accordingly, Suttles is liable for wages owed in the aggregate sum of $5,460.09.

---

[23] The Plumber PWD did not include a footnote indicating that a non-shift rate may be paid for a special single shift.

Suttles is Liable for Liquidated Damages for the Unpaid Wages.

Section 1742.1, subdivision (a) provides in part:

> After 60 days following the service of a [notice of withholding of contract payments] 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 notice . . . 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 means to avert liability for liquidated damages (in addition to prevailing on the case, or settling with the District agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the notice of withholding of contract payments, and thereby avoid liability for liquidated damages on the amount of wages paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of a notice of withholding of contract payments, the contractor deposits with the Department the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case, Suttles failed to provide testimony or evidence of a deposit with DIR.[24] Accordingly, Suttles is liable for liquidated damages in the amount of the unpaid prevailing wages, totaling $5,460.09.

Suttles is Liable for Unpaid Training Fund Contributions.

Section 1777.5, subdivision (m)(1) requires contractors who employ journeypersons or apprentices in any apprenticeable craft to contribute to the California Apprenticeship 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

[24] The parties never stipulated to Suttles having made a deposit with DIR. The District's Exhibit 25 is a September 23, 2021, letter from Suttles addressed to DIR's Cashiering Unit along with a copy of a check for $16,581.25. Suttles failed to move Exhibit 25 (as incorporated into its Exhibit MM) into evidence. Notwithstanding, even if Suttles had moved Exhibit MM into evidence, there is no evidence that the check was actually sent and that the check was cashed.

such contributions made to a DAS-approved apprenticeship program that can supply apprentices to the site of the public work.

The District determined Suttles owed $58.50 in training fund contributions stemming from two alleged unreported hours for Alves on March 12, 2019, and a total of 16 unreported hours for three unidentified workers. As discussed above, Suttles did not carry its burden of proving the basis of the Notice was incorrect with respect to $54 in training fund contributions for the three unidentified workers. The assessment of $58.50 in training fund contributions is modified to remove $4.50 for the alleged two hours of unreported work for Alves on March 12, 2019. Suttles owes in aggregate $54 in training fund contributions.

<u>Suttles Failed to Prove the Labor Commissioner Abused their Discretion in Assessing Penalties Under Section 1775.</u>

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B) (i) The penalty may not be less than forty dollars ($40) . . . unless the failure of the contractor . . . 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 . . .

(ii) The penalty may not be less than eighty dollars ($80) . . . if the contractor . . . has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars ($120)... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1. [[25]]

. . .

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

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 his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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

At the District's recommendation, the Labor Commissioner approved the imposition of a penalty rate of $100 per day per worker for Suttles' failure to pay the

---

[25] 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, 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."

correct prevailing wages. Suttles argued against the penalty for four reasons: 1) "[n]one of the factors in Labor Code § 1775(a)(2)(A) were even considered;" 2) "[t]here was no prior violation" and the District misrepresented to the Labor Commissioner the number of prior violations; 3)the District could only count violations where the Director made a finding or determination of a violation; and, 4) the District failed to discuss whether the violation in this case was made in good faith. (Suttles' Closing Brief, p. 19.) Without providing evidence, Suttles makes the serious claim of misrepresentation but fails to identify the specific statement that was a misrepresentation.

Suttles' claims are unfounded. To the extent Suttles claims the alleged misrepresentation by the District stems from the following statement in the Request for Approval of Forfeitures they are wrong:

> Suttles Plumbing has one previous violation with the District within the last three (3) years [from the date of the Request for Approval of Forfeitures, June 14, 2021]. Prior to this one violation, Suttles Plumbing had multiple cases [sic] audit with the District in the past that resulted in assessments of back wages, training funds, and penalties.

(Exhibit 20, p. 6.) On the date of the Request for Approval of Forfeitures, June 14, 2021, the District stated that there was one prior "violation…which resulted in assessments of back wages, training funds, and penalties…." (Exhibit 20, p. 5.) The Request for Approval of Forfeitures identifies the prior violation as the Santee project. (*Ibid.*) Nguyen testified that although she was unsure if a notice of withholding was issued on the Santee project, she knew Suttles resolved the matter through settlement. The Request for Approval of Forfeitures also clarifies that at the time it was sent to the Labor Commissioner's Office there were seven "pending cases" against Suttles. (Exhibit 20, p. 5.) Suttles failed to establish how any of the District's above statements constitute a misrepresentation. Accordingly, Suttles' allegation is unfounded.

Further, Nguyen testified that the District considered the two factors under section 1775, subdivision (a)(2)(A). Prior to issuing the Notice in this matter, the District referred to its Case Tracker and found Suttles resolved the Santee matter. Additionally, Nguyen testified that the District also considered whether Suttles' violations were good faith mistakes. She stated Suttles' violations were not in good faith because it had knowledge of its prevailing wage obligations. Brian Suttles confirmed Nguyen's testimony when he stated that while Suttles was working on the Project, he found out the District was seeking second shift differentials because he got the claim for failure to pay the second shift differential on the Santee project. Even if Suttles' failure to pay the second shift differential was somehow a good faith mistake, the error was not "promptly and voluntarily corrected" when Suttles was informed of it. Despite knowledge that the District sought second shift differentials for the Santee project, Suttles did not correct its practice and did not begin paying the second shift prevailing wage rate on this Project. To date, it has refused to compensate workers.

While section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, it does not mandate mitigation in all cases. Further, the Director is not free to substitute her own judgment. For the reasons stated above, Suttles failed to carry its burden of proving the $100 penalty rate per violation was an abuse of discretion. Accordingly, this Decision affirms and modifies the Notice's section 1775 penalties at a $100 penalty rate for 108 violations, amounting to $10,800.[26]

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

FINDINGS AND ORDER

1. The work subject to the Notice of the Withholding of Contract Payments was performed on a public work and required the employment of apprentices and the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.
2. The Enforcing Agency served the Notice of the Withholding of Contract Payments timely.

---

[26] Section 1775 penalty corresponding to Alves's alleged claim is removed.

3. Suttles Plumbing & Mechanical Corporation filed the Request for Review timely.
4. The Enforcing Agency produced its enforcement/investigative file in a timely fashion.
5. No back wages were paid and no deposit made with the Department of Industrial Relations as a result of the Notice of the Withholding of Contract Payments.
6. Suttles Plumbing & Mechanical Corporation failed to report three unidentified workers on it CPRs.
7. Suttles Plumbing & Mechanical Corporation failed to pay second shift prevailing wages.
8. As a result of finding numbers 6 and 7, Suttles Plumbing & Mechanical Corporation underpaid prevailing wages in the sum of $5,460.09.
9. Suttles Plumbing & Mechanical Corporation failed to pay $54 in required training fund contributions.
10. The Labor Commissioner did not abuse their discretion in approving penalties under Labor Code section 1775 at the rate of $100 per violation for 108 violations, resulting in an aggregate sum of $10,800.
11. Suttles Plumbing & Mechanical Corporation is liable for liquidated damages on wages found due and owing in the amount of $5,460.09.

The amount found due under the Notice is as follows:

Basis of the Notice	**Amount**
Wages Due:	$ 5,460.09
Training Fund Contributions Due:	$ 54.00
Penalties under section 1775:	$ 10,800.00
Liquidated damages:	$ 5,460.09
TOTAL:	**$21,774.18**

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

The Notice of the Withholding of Contract Payments is modified and 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:6/22/26

Jennifer Osborn, Director
California Department of Industrial Relations