

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**B & B Nurseries, Inc. doing business as
The Landscape Center**

Case No. 24-0020-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor B & B Nurseries, Inc. doing business as The Landscape Center (B&B), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE), on October 19, 2023, with respect to work performed on the Indian Wells Golf Resort Palm Tree Replacement (Project) for the City of Indian Wells (City) in Riverside County. The Assessment indicated that B&B owed \$13,995.96 in unpaid prevailing wages and training fund contributions and \$10,815 in statutory penalties, for a total amount due of \$24,810.96.

A Hearing on the Merits occurred on October 9, 2024, before Hearing Officer Ann Wu. Luong Chau appeared as counsel for DLSE. Maggie Aguilar appeared for B&B. Deputy Labor Commissioner Caroline Wood testified in support of the Assessment. Dillon Reynolds testified in opposition to the Assessment.¹ The matter was submitted for decision on October 9, 2024.

Prior to the hearing, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment required the payment of prevailing wages and employment of apprentices.
- DLSE issued the Civil Wage and Penalty Assessment timely.
- B&B requested review timely.
- DLSE disclosed its evidence timely.

¹ The Hearing Officer admitted into evidence DLSE Exhibit Numbers 1 through 11 and 13 through 22; DLSE withdrew DLSE Exhibit Number 12. B&B did not submit any documentary evidence.

- B&B did not pay back wages and did not make a deposit of the full amount of the Civil Wage and Penalty Assessment with the Department of Industrial Relations as a result of the Assessment.

The issues for decision are as follows:

- Whether B&B paid the required prevailing wages to workers on the project.
- Whether B&B is liable for liquidated damages on wages found due and owing.²
- Whether B&B paid the required training fund contributions for all hours worked on the project.
- Whether B&B is liable for penalties assessed pursuant to Labor Code section 1775.
- Whether B&B is liable for penalties assessed pursuant to Labor Code section 1813.
- Whether B&B submitted contract award information to all applicable apprenticeship programs in a timely and factually sufficient manner.
- Whether B&B employed apprentices in the required minimum ratio of apprentices to journeypersons on the project.
- Whether B&B is liable for penalties assessed pursuant to Labor Code section 1777.7.
- Whether B&B is liable for penalties assessed pursuant to Labor Code section 1771.4.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) B&B did not carry its burden of proving that the basis for the Assessment was incorrect. (See Cal. Code

² The parties did not stipulate to this issue for decision. However, the Hearing Officer has the authority to define the issues for hearing. (Cal. Code Regs., tit. 8, § 17205, subd. (a).)

Regs., tit. 8, § 17250, subd. (b).) Accordingly, the Director issues this decision affirming the Assessment.

FACTS

The Project.

The Project involved the removal and replacement of date palm trees located at the entrance of the Indian Wells Golf Resort. (DLSE Exhibit No. 4, pp. 30, 41, 53-62; DLSE Exhibit No. 6, pp. 130-137.) The City advertised the Project for bid on April 7, 2022. (DLSE Exhibit No. 4, pp. 29, 31; DLSE Exhibit Nos. 17, 18.) The bid advertisement indicated that the Project was a public work subject to prevailing wage laws. (DLSE Exhibit No. 4, p. 32.) The successful bidder was B&B, which entered a contract for \$87,700 with the City on May 4, 2022. (DLSE Exhibit No. 5, p. 103; DLSE Exhibit No. 6, pp. 105, 109; DLSE Exhibit No. 17.) The contract required B&B to comply with the statutes and regulations covering prevailing wage and apprenticeship requirements. (DLSE Exhibit No. 6, pp. 111-112.)

B&B had workers on the Project from June 6, 2022, to June 17, 2022. (DLSE Exhibit No. 7.) The work was completed on June 17, 2022. (DLSE Exhibit No. 5, p. 103.) The City accepted the work on June 20, 2022, and a notice of completion was recorded on July 22, 2022. (DLSE Exhibit No. 5.)

The Audit.

DLSE received a complaint with supporting documents from the Center for Contract Compliance (CCC) that B&B violated prevailing wage and apprenticeship requirements on the Project. (DLSE Exhibit Nos. 16, 18; DLSE Exhibit No. 19, pp. 237-238.) In response, DLSE requested information and documents from the City and B&B. (DLSE Exhibit No. 18; DLSE Exhibit No. 19, p. 238.) Deputy Labor Commissioner Caroline Wood (DLSE Investigator) reviewed the information and documents received from the CCC, the City, and B&B. (DLSE Exhibit Nos. 8, 18; DLSE Exhibit No. 19, pp. 238-239.)

The DLSE Investigator reviewed the Project certified payroll records (CPRs) provided by the CCC, the City, and B&B, as well as the electronic CPRs (eCPRs) that

B&B uploaded to the Department's website.³ (DLSE Exhibit No. 7; DLSE Exhibit No. 19, p. 238.) The CPRs showed that B&B classified the workers on the Project under the Tree Maintenance Laborer prevailing wage determination.⁴ The DLSE Investigator reviewed the information provided by the CCC, as well as the daily logs provided by the City. (DLSE Exhibit Nos. 8, 16; DLSE Exhibit No. 19, p. 238.) These documents showed workers on site at the Project location with heavy machinery including a JCB reach lift 512, a JLG reach lift 800 AJ, a JLG reach lift 1255, a Hitachi mini excavator, a tractor trailer with a dump bed, a flatbed tractor, and a crane.⁵ The DLSE Investigator reviewed the scope of work described in the bid and contract documents, which indicated that the Project involved the removal of 21 existing date palm trees and the installation of 14 new date palm trees. (DLSE Exhibit No. 4, pp. 30, 41, 53-62; DLSE Exhibit No. 6, pp. 130-137; DLSE Exhibit No. 19, pp. 237-238.) The Project scope of work also included traffic control and required a one-year warranty on the newly installed trees. (DLSE Exhibit No. 4, pp. 53-55; DLSE Exhibit No. 6, pp. 131-134.)

The DLSE Investigator noted that the diagrams contained in the bid and contract documents showed the locations of the existing palm trees to be removed and the new palm trees to be installed, and that these marked locations showed that the Project involved the planting of trees in new holes rather than existing holes. (DLSE Exhibit No. 4, pp.59-60; DLSE Exhibit No. 6, pp. 135-136.) The DLSE investigator also reviewed the

³ On March 2, 2023, the DLSE Investigator sent questionnaires to the workers listed on the CPRs for the Project. (DLSE Exhibit No. 18; DLSE Exhibit No. 19, p. 238.) She received a questionnaire response from one worker on the Project, but the information provided "did not provide additional insight for the investigation." (DLSE Exhibit No. 19, p. 238.)

⁴ B&B provided copies of cancelled checks to show payments made to workers on the Project, as well as fringe benefits statements paid on behalf of workers. (DLSE Exhibit No. 19, p. 238.) There was no allegation that B&B failed to pay the workers the amounts reflected on the CPRs and fringe benefits statements.

⁵ These documents also showed that on June 6, 2022, the first day of the Project, the JCB reach lift 512 fell over on its side. (DLSE Exhibit Nos. 8, 16; DLSE Exhibit No. 19, p. 238.)

scopes of work and the prevailing wage rates required for the crafts of Tree Maintenance Laborer, Landscape Irrigation Laborer, and Landscape Operating Engineer.⁶ (DLSE Exhibit Nos., 9, 10, 11; DLSE Exhibit No. 19, p. 238.) She explained that the scope of work provisions for the Tree Maintenance Laborer covered the removal and replacement of trees, but not tree installation or establishment. (DLSE Exhibit No. 11, p. 175.) According to the DLSE Investigator, the removal and replacement of trees fall under maintenance work, but the installation and establishment of new trees could not be considered maintenance. Instead, she explained that the planting of trees is covered by the scope of work provisions for the Landscape Irrigation Laborer and the Landscape Operating Engineer crafts.⁷ (DLSE Exhibit No. 9, p. 167-168; DLSE Exhibit No. 10, p. 171-172.)

On September 29, 2023, the DLSE Investigator prepared an audit which consisted of the Audit Summary, the list of prevailing wage determinations used in the audit, as well as audit worksheets for each worker on the Project. (DLSE Exhibit No. 3.) Specifically, the DLSE Investigator relied on the CPRs for the names of the workers listed, hours worked and hourly rates paid, the scope of work contained in the bid and contract documents, the required prevailing wage rates and scopes of work from the prevailing wage determinations for the crafts of Tree Maintenance Laborer, Landscape Irrigation Laborer, and Landscape Operating Engineer, the photographs of the Project site, and the City's daily logs.

⁶The prevailing wage determinations at issue are those for Landscape Irrigation Laborer, SC-102-X-14-2022-1, and Landscape Operating Engineer, SC-63-12-33-2022-1. (DLSE Exhibit Nos. 9, 10.) Both of those crafts are apprenticeable. (*Ibid.*) The prevailing wage determination for Tree Maintenance Laborer, SC-102-X-20-2022-1, is also at issue. (DLSE Exhibit No. 11.)

⁷ The scope of work for the Landscape Irrigation Laborer classification also included traffic control and "plant establishment work performed under warranty." (DLSE Exhibit No. 9, p. 168.) The prevailing wage determination for the Landscape Operating Engineer covered the use of tree-planting equipment and all landscape and irrigation work on public or private jobs. (DLSE Exhibit No. 10, pp. 169-171.)

B&B classified all workers on the Project under the Tree Maintenance Laborer craft. On the CPRs, two workers, Roman Silva and Apolinar Tavira were classified as Senior Tree Trimmer, one worker, Martin Trejo, was classified as a Tree Trimmer, and six workers, Roman Acuna, Efrain Cortes, Luis Martinez, Jose Tavira, Rafael Aguilera Parra, and Sixto Rocha were classified as Groundsperson. (DLSE Exhibit No. 7.) The DLSE Investigator reclassified each worker as Landscape Irrigation Laborer in the audit, except for Efrain Cortes, who she reclassified as a Landscape Operating Engineer.⁸ (DLSE Exhibit No. 3.) For each worker on the Project, the audit showed the difference between the actual total hourly straight-time and overtime rates the workers were paid as reflected on the CPRs and the required total hourly straight-time and overtime rates less required training fund contributions for the Landscape Irrigation Laborer or Landscape Operating Engineer classification consistent with the prevailing wage determinations. Also, the audit showed the required training funds based on the applicable prevailing wage determination and the hours worked on the CPRs.⁹ The audit indicated that \$13,669.57 in underpaid prevailing wages and \$326.39 in unpaid training fund contributions were due. The audit also indicated that there were 53 violations of underpaid prevailing wages under Labor Code section 1775 and 47 violations of underpaid overtime premiums under Labor Code section 1813.

The Penalty Review.

The DLSE Investigator summarized her investigation in the Penalty Review. (DLSE Exhibit No. 19.) In addition to the underpaid wages and training fund contributions, and associated penalties under Labor Code sections 1775 and 1813 reflected in the Audit Summary, the DLSE Investigator determined that B&B failed to submit contract award information to, and failed to request apprentice dispatch from,

⁸ Cortes is identified in the complaint documents as an Operator. (DLSE Exhibit No. 16, p. 201.)

⁹ The Tree Maintenance Laborer classification is not apprenticeable and did not require the payment of training funds. (DLSE Exhibit No. 11.) B&B did not make any training fund contributions to the California Apprenticeship Council for this Project. (DLSE Exhibit No. 14.)

any of the applicable apprenticeship programs for the Landscape Irrigation Laborer classification, and failed to employ apprentices in the minimum ratio required for Landscape Irrigation Laborer on the Project. (DLSE Exhibit No. 13; DLSE Exhibit No. 19, pp. 236, 238-239.) The DLSE Investigator made this determination based on the CPRs, and on B&B's failure to provide proof that it submitted DAS 140 and 142 forms to the Associated General Contractors of American San Diego Chapter, or any of the applicable apprenticeship programs for the Landscape Irrigation Laborer craft.¹⁰ (DLSE Exhibit No. 13; DLSE Exhibit No. 19, p. 236.) She calculated 13 violations of apprenticeship requirements under Labor Code section 1777.7.¹¹ (DLSE Exhibit No. 19, p. 236.) The DLSE Investigator also determined that B&B's eCPRs were uploaded in September of 2023, more than a year after the completion of the Project. (DLSE Exhibit No. 19, pp. 236-237.) She calculated a total of 50 violations under Labor Code section 1771.4 for B&B's failure to submit eCPRs timely.¹² (*Ibid.*)

The DLSE Investigator found two prior prevailing wage and apprenticeship violations by B&B—one for worker misclassification in 2021, and the other for failure to submit contract award information in 2022. (DLSE Exhibit No. 19, p. 239.) Accordingly, the DLSE Investigator recommended a Labor Code section 1775 penalty rate of \$120 per violation and a Labor Code section 1777.7 penalty rate of \$85 per violation. (DLSE Exhibit No. 19, pp. 238-239.) Senior Deputy Labor Commissioner Tony Eguavoen approved the section 1775 penalty rate of \$120 per violation but mitigated the penalty

¹⁰ The DLSE Investigator reviewed the contract award information (DAS 140) and the request for dispatch of apprentices (DAS 142) that B&B submitted to the Laborers Southern California Landscape and Irrigation Fitter Joint Apprenticeship Committee for the Project. (DLSE Exhibit No. 15.) There was no evidence that B&B submitted contract award information to, or requested dispatch from, any other apprenticeship program.

¹¹ It appears that the DLSE Investigator calculated the number of apprenticeship violations by counting the number of days from the three days before the first day that work was performed to the last day work was performed on the Project. (DLSE Exhibit No. 19, p. 236.)

¹² Labor Code section 1771.4 allows the imposition of penalties for a maximum of 50 violations.

rate under section 1777.7 to \$60 per violation and set the penalty rate under section 1771.4 at \$50 per violation. (DLSE Exhibit No. 5, p. 32.)

The Assessment.

DLSE issued the Assessment against B&B on October 19, 2023.¹³ (DLSE Exhibit No. 1.) The Assessment was based on DLSE's determination that B&B misclassified workers as Tree Maintenance Laborers for work performed under the scope of work covered by the Landscape Irrigation Laborer and Landscape Operating Engineer crafts. This worker misclassification resulted in underpayments of the correct prevailing wage rates and required training fund contributions for those two crafts. In addition, because the workers were misclassified, the DLSE investigator necessarily concluded that B&B failed to submit contract award information and employ apprentices for the Landscape Irrigation Laborer craft. The Assessment assessed unpaid prevailing wages in the amount of \$13,669.57 and unpaid training fund contributions in the amount of \$326.39. The Assessment indicated that DLSE imposed Labor Code section 1775 penalties of \$6,360 based on 53 violations of prevailing wage requirements assessed at \$120 per violation, section 1813 penalties of \$1,175 based on 47 violations of overtime requirements assessed at \$25 per violation, section 1777.7 penalties of \$780 based on 13 violations of apprenticeship requirements assessed at \$60 per violation and section 1771.4 penalties of \$2,500 based on 50 violations of eCPR requirements assessed at \$50 per violation.

¹³ DLSE issued an Amended Civil Wage and Penalty Assessment on November 2, 2023, to correct erroneous calculations of the penalty rates assessed for violations of Labor Code sections 1775, 1777.7, and 1771.4, in the Audit Summary attached to the original Civil Wage and Penalty Assessment. (DLSE Exhibit Nos. 1, 2.) The erroneous penalty rates in the original Audit Summary did not reflect the mitigated penalty rates approved by Senior Deputy Labor Commissioner in the Penalty Review. (DLSE Exhibit No. 1; DLSE Exhibit No. 19, p. 233.) There was no change in the amounts assessed, as the erroneous calculations in the Audit Summary were not reflected in the amounts listed on the original Civil Wage and Penalty Assessment. (DLSE Exhibit Nos. 1, 2.)

B&B's Defense.

Dillon Reynolds testified on behalf of B&B. He is a certified arborist, and he was the estimator and project manager on the Project. Reynolds prepared the bid proposal for the Project. He understood the scope of work for the Project to be the removal and replacement of palm trees, which he claimed was covered by the Tree Maintenance Laborer craft. According to Reynolds, the Project did not require B&B to provide plant establishment. Reynolds explained that plant establishment refers to aftercare and maintenance following installation. It was his understanding that plant establishment would be performed by the City. Reynolds testified that ten of the new palm trees were placed in the same holes as the old palm trees, but that four of the new palm trees were placed in new holes. This was based on field conditions on site, such as underground obstructions or spacing requirements. Reynolds was at the Project location every day that work was performed. Reynolds confirmed that B&B followed the diagram in the contract documents in the removal of existing palm trees and installation of new palm trees. (DLSE Exhibit No. 6, p. 136.)

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.¹⁴ 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.

¹⁴ All further references are to the Labor Code.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, citations omitted.) DLSE enforces prevailing wage requirements not only for the benefit of workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a); see also *Lusardi*, 1 Cal.4th at p. 985.)

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public work is performed (as defined in section 1724) and publishes a general prevailing wage determination (PWD) for a craft, 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.)

Contractors and subcontractors who fail to pay the correct prevailing wage to workers on public works projects are required to pay the difference between the correct prevailing wage and the amount they paid to the workers. (§ 1775, subd. (a)(2)(E).) In addition, section 1775, subdivision (a), prescribes penalties for failing to pay the correct prevailing wage rate.¹⁵ Section 1813 prescribes penalties for failing to pay the overtime rate as required in the applicable PWDs. Section 1771.4, subdivision (a)(3) prescribes penalties for failure to furnish eCPRs to DLSE.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for

¹⁵ The prevailing rate of per diem wage includes fringe benefits and training fund contributions pursuant to section 1773.1 and section 1777.5, subdivision (m).

review under section 1742. The request for review is transmitted to the Director of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).)

DLSE has the initial burden of presenting evidence that “provides prima facie support for the Assessment . . .”¹⁶ (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 Civil Wage and Penalty Assessment . . . 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 assessment. (§ 1742, subd. (b).)

B&B Underpaid Required Prevailing Wages to the Workers on the Project.

DLSE established a prima facie showing that B&B misclassified and underpaid workers on the Project. DLSE relied on the Project scope of work set forth in the bid and contract documents, the scope of work provisions contained in the prevailing wage determinations for the crafts of Tree Maintenance Laborer, Landscape Irrigation Laborer, and Landscape Operating Engineer, the information provided with the prevailing wage complaint including the photographs of the Project site, the City’s daily logs, and the Project CPRs, to reclassify workers from Tree Maintenance Laborer to Landscape Irrigation Laborer and Landscape Operating Engineer and to calculate the wages owed to workers on the Project resulting from the reclassification.

¹⁶ “‘Evidence’ means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.” (Evid. Code, § 140.) “Prima facie” is defined as: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue <a prima facie showing>.” (Black’s Law Dict. (12th ed. 2024).) “Prima facie evidence is that which will support a ruling in favor of its proponent if no controverting evidence is presented. [Citations.] It may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences. [Citation.]” (*Evans v. Paye* (1995) 32 Cal.App.4th 265, 280.) Further, “[a]ll burdens of proof and burdens of producing evidence shall be construed in a manner consistent with relevant sections of the Evidence Code . . .” (Cal. Code Regs, tit. 8, § 17250, subd. (d).)

B&B did not meet its burden to show that the basis for DLSE's assessment of underpaid prevailing wages was incorrect. According to B&B, the Project was for the removal and replacement of trees, consistent with the scope of work provisions of the Tree Maintenance Laborer craft. However, Reynolds admitted that while ten of the new trees were placed in the same holes as the old trees, four of the new trees were placed in new holes. The installation of new trees in new holes is outside the scope of work provisions for the Tree Maintenance Laborer craft, and as such, that work cannot be considered maintenance work.¹⁷ Instead, the installation of new trees in new holes is properly considered landscape work covered under the scope of work provisions for the Landscape Irrigation Laborer and the Landscape Operating Engineer crafts. In addition, the Project contract required a one-year warranty on the newly installed trees as well as traffic control, and that scope of work is covered under the Landscape Irrigation Laborer scope of work. B&B did not dispute the numerical calculations in DLSE's audit or in the Assessment. For these reasons, B&B is liable for unpaid prevailing wages in the amount of \$13,669.57.

B&B Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, as follows:

After 60 days following the service of a civil wage and penalty assessment 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 . . . is subsequently overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

At the time the Assessment issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in

¹⁷ Maintenance includes "[r]outine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility . . . for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired." (Cal. Code Regs., tit. 8, § 16000.)

addition to prevailing on the case or settling the case with enforcing agency 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 and thereby avoid liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liquidated damages if, within 60 days from issuance of the notice, the contractor deposits with the Department of Industrial Relations the full amount of the assessed unpaid wages, including all statutory penalties.

In this case, B&B did not pay wages due, nor did it deposit with the Department the full amount of the assessed wages and statutory penalties. Accordingly, B&B is liable for liquidated damages under section 1742.1 for the unpaid prevailing wages found in this Decision in the amount of \$13,669.57.

B&B Underpaid Required Training Funds on behalf of Workers on the Project.

Section 1777.5, subdivision (m)(1), requires contractors on public works projects who employ journeypersons or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Division of Apprenticeship Standards (DAS). For the same reason that B&B misclassified workers and underpaid required prevailing wages, B&B failed to meet its burden to show that the Assessment was incorrect as to its failure to pay training fund contributions on behalf of the workers on the Project. Therefore, B&B is liable for unpaid training fund contributions in the amount of \$326.39.

B&B is Liable for Penalties under Section 1775.

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 1777.1.¹⁸

. . .

- (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 by DLSE is established if the "agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment

¹⁸ Section 1777.1 defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

“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.)

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day considering prescribed factors, but it does not mandate mitigation in all cases. Further, the Director is not free to substitute her own judgment. DLSE assessed section 1775 penalties at the rate of \$120, which is less than the statutory maximum, for 53 prevailing wage violations on the Project. B&B had the burden to prove that DLSE abused its discretion in setting the penalty amount under section 1775. For the reasons discussed above, B&B did not overcome DLSE’s prima facie showing that B&B misclassified workers and underpaid the total hourly prevailing wage rates required by the applicable prevailing wage determinations. Even if B&B made a good faith mistake in relying on the wrong prevailing wage determination, there is no evidence that B&B promptly and voluntarily corrected its failure to pay the correct prevailing wages when these issues were brought to its attention. For these reasons, B&B has not shown an abuse of discretion in the rate selected by the Labor Commissioner. Accordingly, the assessment of section 1775 penalties at the rate of \$120 for 53 violations in the amount of \$6,360 is affirmed.

B&B is Liable for Penalties under Section 1813.

Section 1815 states:

[w]ork 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 1½ times the basic rate of pay.

Section 1813 states:

The contractor or any 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 . . . contractor . . . 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 1813 prescribes a penalty of \$25 per calendar day for each worker found to have worked overtime without having been paid at the applicable hourly overtime wage rate. As discussed above, the evidence established 47 such violations by B&B. B&B did not meet its burden to show that the Assessment was incorrect as to the finding it underpaid overtime owed to the misclassified workers. Accordingly, B&B is liable for \$1,175 in penalties assessed under section 1813.

B&B Failed to Comply with Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. The apprenticeship requirements apply to public works contracts of \$30,000 or more. (§ 1777.5, subd. (o).) These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 230.2.)

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) “The information shall be provided to the applicable committees “within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed . . .” (Cal. Code Regs., tit. 8, § 230, subd. (a).) The Division of Apprenticeship Standards (DAS) has prepared a form, the DAS 140, that a contractor may use for that purpose.

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatched apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. The request for dispatch must be made by “written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before

the date on which one or more apprentices are required.” (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, the DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees.

B&B’s CPRs indicate that B&B did not employ apprentices on the Project. While the classification B&B used, Tree Maintenance Labor, is not apprenticeable, the Landscape Irrigation Laborer and Landscape Operating Engineer crafts are apprenticeable. Here, DLSE established a prima facie case based on the documentation in its investigation file that B&B failed to submit contract award information to, and failed to request the dispatch of apprentices from, any of the applicable apprenticeship programs for the Landscape Irrigation Laborer and Landscape Operating Engineer crafts. As a result, B&B did not meet the minimum ratio requirement for apprentice to journeyman hours for the apprenticeable crafts of Landscape Irrigation Laborer and Landscape Operating Engineer. As discussed above, B&B did not meet its burden to show that DLSE was incorrect in reclassifying the workers on the Project to apprenticeable crafts. Accordingly, B&B violated the ratio requirement of section 1777.5 subdivision (g), as well as the notice and dispatch requirements of section 1777.5, subdivision (e), and the related regulations, sections 230 and 230.1, for the Landscape Irrigation Laborer and Landscape Operating Engineer crafts.

B&B is Liable for Penalties Assessed under Section 1777.7.

Section 1777.7 provides, in relevant part:

If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. A contractor or subcontractor that knowingly commits a second or subsequent violation within a three-year period, if the noncompliance results in apprentice training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance.

(§ 1777.7, subd. (a)(1).) The phrase quoted above -- “knowingly violated Section 1777.5” -- is defined by former regulation, section 231, subdivision (h)—in effect at the time of the pendency of the Project as well as the Hearing on the Merits, as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirement of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, or the contractor had previously employed apprentices on a public works project.

Failure to provide a contract award notice is a continuing violation for the duration of the work, starting no later than the first day on which the contractor has workers employed upon the public work, and ending when a notice of completion is filed by the awarding body. (§ 230, subd. (a).) Penalties for that failure, as well as failure to meet the required 1:5 ratio, can be assessed “for each full calendar day of noncompliance . . .” (§ 1777.7, subd. (a)(1).) The determination of the Labor Commissioner as to the penalty is reviewable only for abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

As discussed above, B&B did not submit contract award information to any applicable apprenticeship programs for the Landscape Irrigation Laborer and Landscape Operating Engineer crafts, nor did B&B employ any apprentices on the Project. B&B “knowingly violated” the ratio requirement because there is an irrebuttable presumption that B&B knew or should have known that the apprenticeship requirements of section 1777.5 applied because the bid and contract documents for the Project notified the contractor of its obligations to comply with prevailing wage and apprenticeship requirements. As B&B knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty rate of \$60 per violation for B&B's apprenticeship violations, which is less than the statutory maximum. DLSE calculated 13 calendar days of noncompliance for the three days before the first day work was performed on the Project as well as for the ten days that work was performed on the Project, which is less than the statutory maximum. B&B did not show an abuse of discretion under section 1777.7, subdivision (d), as to either the penalty rate or those number of days of violations as found in the Assessment. Accordingly, section 1777.7 penalties at the rate of \$60 for 13 violations in the amount of \$780 are affirmed.

B&B is Liable for Penalties Assessed under Section 1771.4.

Under section 1771.4, subdivision (a)(3), contractors on public works projects are required to submit electronic CPRs in the manner prescribed by the Labor Commissioner. Contractors who fail to do so are subject to penalties under section 1771.4, subdivision (a)(3)(B), at the rate of \$100 for each day of non-compliance up to \$5,000 per project, which works out to a maximum of 50 violations. Here, DLSE submitted unrebutted evidence that B&B failed to submit electronic CPRs until over a year after the Project was completed. DLSE assessed penalties for 50 violations at the rate of \$50 per violation, which is less than the statutory maximum. Accordingly, section 1771.4 penalties at the rate of \$50 for 50 violations in the amount of \$2,500 are affirmed.

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

FINDINGS AND ORDER

1. The work subject to the Civil Wage and Penalty Assessment 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 Labor Commissioner served the Civil Wage and Penalty Assessment timely.

3. B & B Nurseries, Inc. doing business as The Landscape Center filed the Request for Review timely.
4. The Labor Commissioner disclosed its evidence timely.
5. No back wages were paid and no deposit made with the Department of Industrial Relations as a result of the Civil Wage and Penalty Assessment.
6. B & B Nurseries, Inc. doing business as The Landscape Center underpaid the required prevailing wages to workers on the Project in the amount of \$13,669.57.
7. B & B Nurseries, Inc. doing business as The Landscape Center is liable for liquidated damages on wages found due and owing in the amount of \$13,669.57.
8. B & B Nurseries, Inc. doing business as The Landscape Center failed to pay the required training fund contributions on behalf of workers on the Project in the amount of \$326.39.
9. B & B Nurseries, Inc. doing business as The Landscape Center is liable for penalties assessed pursuant to section 1775 in the amount of \$6,360.
10. B & B Nurseries, Inc. doing business as The Landscape Center is liable for penalties assessed pursuant to section 1813 in the amount of \$1,175.
11. B & B Nurseries, Inc. doing business as The Landscape Center failed to submit contract award information for the Project to all applicable apprenticeship programs in a timely and factually sufficient manner.
12. B & B Nurseries, Inc. doing business as The Landscape Center failed to employ apprentices in the required minimum ratio of apprentices to journeypersons on the Project.
13. B & B Nurseries, Inc. doing business as The Landscape Center is liable for penalties assessed pursuant to section 1777.7 in the amount of \$780.
14. B & B Nurseries, Inc. doing business as The Landscape Center is liable for penalties assessed pursuant to section 1771.4 in the amount of \$2,500.

The amounts found due under the Assessment, as affirmed by this Decision, are as follows:

Basis of the Notice	Amount
Wages Due:	\$ 13,669.57
Liquidated damages:	\$ 13,669.57
Training Fund Contributions Due:	\$ 326.39
Penalties under section 1775:	\$ 6,360.00
Penalties under section 1813:	\$ 1,175.00
Penalties under section 1777.7:	\$ 780.00
Penalties under section 1771.4:	\$ 2,500.00
TOTAL:	\$ 38,480.53

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

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

Dated: 6/1/26



Jennifer Osborn, Director
California Department of Industrial Relations