

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Davis Laboratories, Inc.

Case No. 14-0372-PWH

From Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Davis Laboratories, Inc. (Davis Labs) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Barry J. Nidorf Juvenile Hall Security Enhancements, Project 1122-004.01 (Project) performed for the County of Los Angeles Department of Public Works Architecture/Engineering Division. The Assessment determined that Davis Labs had violated Labor Code section 1777.5, subdivision (m)(1) and assessed a penalty of \$40.00 under Labor Code section 1775.¹

Pursuant to written notice, a Hearing on the Merits was held on January 14, 2015, in Los Angeles, California, before Hearing Officer Howard Wien. Counsel Max D. Norris appeared for DLSE. Kristy Davis-Jones appeared as representative for Davis Labs.

The issues for decision are:

1. Whether Davis Labs violated section 1777.5, subdivision (m)(1) by failing to pay hourly training contributions to the California Apprenticeship Council (CAC) or an apprenticeship program approved by the Division of Apprenticeship Standards (DAS).
2. Whether Davis Labs is liable for a penalty of \$40.00 under section 1775.

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

In this decision, the Director finds that the Assessment correctly found that Davis Labs violated section 1777.5, subdivision (m)(1) and that Davis Labs is liable for the penalty of \$40.00 under section 1775. Accordingly, the Director affirms the Assessment.

FINDINGS OF FACT

1. Davis Labs is a nondestructive testing business located in the City of Brea, California, and other locations. Its nondestructive testing work includes concrete x-ray and industrial radiography, by which Davis Labs uses x-rays to inspect the inside of beams and concrete structures in buildings.

2. As early as 2010, Davis Labs had determined that when it performed its concrete x-ray and industrial radiography services on public works projects, it would pay its workers the applicable prevailing wage. It is undisputed that the prevailing wage determination (PWD) applicable to Davis Labs' work on this Project is SC-23-63-2-2011-1D (Building/Construction Inspector and Field Soils and Material Tester for Southern California), and the applicable classification and prevailing wage rate is Group III which is designated "Nondestructive Testing (NDT)" (Inspector Group III).

3. On or about November 21, 2012, Davis Labs entered into a written contract with the prime contractor on the Project, New Creation Builders (Prime Contractor). The Prime Contractor initially requested Davis Labs to perform concrete and industrial radiography on the Project on November 27, 2012, and on that day Davis Labs had two journeymen workers perform this work: Anthony Kenny worked 8.5 hours and Robert Merrell worked 8.67 hours. Subsequently, the Prime Contractor requested Davis Labs to perform this work on January 18, 2013, and on that day Davis Labs had two journeymen workers perform this work: Anthony Kenny worked 8.67 hours and Louis Rodriguez worked 8.5 hours. The total number of journeymen hours was 34.34. Davis Labs invoiced the Prime Contractor for this work.

4. Davis Labs subsequently prepared certified payroll records (CPRs) for this work on the Project. In its CPRs, Davis Labs classified and paid its workers the applicable Inspector Group III prevailing wage rate specified by PWD SC-23-63-2011-1D.

5. PWD SC-23-63-2011-1D designated the Inspector Group III classification as apprenticeable. The applicable PWD was subject to a predetermined wage increase effective July 1, 2011, which increased the required training fund contribution from \$0.65 to \$0.80 per hour. Accordingly, for the 34.34 hours of work performed on the Project by the affected workers, Davis Labs was obligated to pay a training fund contribution of \$27.47 to the CAC or a DAS-approved apprenticeship committee.

6. Davis Labs chose not to pay the required training fund contribution to the CAC or a DAS-approved apprenticeship committee. Rather, Davis Labs paid the training fund contribution to itself in reimbursement for its expenses in training its journeymen in-house and through outside training vendors.

7. The Assessment assessed the minimum penalty allowed under section 1775: \$10.00 per violation. Since Davis Labs worked on the Project for two days, with two workers per day, the penalty was assessed for four violations in the total sum of \$40.00.

8. DLSE timely served the Assessment upon Davis Labs. Davis Labs timely filed its Request for Review of the Assessment.

DISCUSSION

Davis Labs Failed To Pay The Required Training Funds To The CAC Or An Approved Apprenticeship Program As Required By Section 1777.5, Subdivision (m)(l).

Section 1777.5 states the statutory requirements governing apprentices on public works projects. Davis Labs was a contractor subject to these requirements, as defined by section 228, subdivision (c) which states: "For the purpose of this Article 10 ... CONTRACTOR means a general, prime, specialty or subcontractor." Under this definition, the fact that Davis Labs performed services on the Project rather than supplying goods or materials to the Project does not alter the conclusion that Davis Labs falls within the definition of "contractor." Further, the record establishes that Davis Labs performed its services pursuant to a written contract with the Prime Contractor.

Section 1777.5, subdivision (m)(l) requires contractors on public works projects who employ journeyman or apprentices in any apprenticeable craft to pay training fund contributions

to the CAC or to a DAS-approved apprenticeship committee, as follows:

A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

When DLSE determines that a violation of this law has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a Request for Review under section 1742. The contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742, subd. (b).)

In this case, Davis Labs failed to meet its burden of proving that the basis for the Assessment is incorrect. The record establishes that Davis Labs did violate section 1777.5, subdivision (m)(1). Davis Labs performed concrete and industrial radiography on the Project, using three radiography journeymen who worked a total of 34.34 hours. Davis Labs acknowledged in its CPRs that the work of these three journeymen was subject to the Inspector Group III prevailing wage rate. As found above, the applicable Inspector Group III prevailing wage rate included a required training fund contribution of \$0.80 per hour. Accordingly, Davis Labs was obligated to pay a training contribution of \$27.47 to the CAC or a DAS-approved apprenticeship committee. Davis Labs failed to do so.

DLSE Did Not Abuse Its Discretion By Assessing Penalties Under Section 1775 At The Mitigated Rate Of \$10.00 Per Violation.

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 fifty dollars (\$50) 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 ten dollars (\$10) . . . unless the failure of the . . . 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 . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[2]

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. 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.” (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

The Director’s review of DLSE’s determination is limited to an inquiry into whether the action was “arbitrary, capricious or entirely lacking in evidentiary support . . .” (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of

² Section 1777.1, subdivision (c) 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.”

discretion, however, the Director is not free to substitute her own judgment "because in [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.

The record shows that DLSE mitigated the section 1775 penalty rate used in the Assessment to the minimum rate of \$10.00 per violation. Davis Labs has offered no evidence or argument to show that DLSE abused its discretion in assessing penalties at this greatly mitigated rate. The record does not establish that DLSE abused its discretion and, accordingly, the assessment of penalties under section 1775, subdivision (a) is affirmed in the full amount of \$40.00.

Accordingly, the Assessment is affirmed in its entirety.

FINDINGS

1. Affected subcontractor Davis Laboratories, Inc. violated section 1777.5, subdivision (m)(1) by failing to pay training fund contributions to the CAC or to a DAS-approved apprenticeship committee in the sum of \$27.47.

2. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the mitigated rate of \$10.00 per violation in the sum of \$40.00 for four violations.

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

Training funds due:	\$27.47
Penalties under Labor Code section 1775:	\$40.00
TOTAL:	\$67.47

ORDER

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

Dated: 6/9/2015 Christine Baker
Christine Baker
Director of Industrial Relations