STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Armando Vargas Pena dba Quality Plumbing

Case No. 09-0090-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Armando Pena Vargas dba Quality Plumbing ("Quality") submitted a timely request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") on March 30, 2009, with respect to work performed on the Classics at North Keystone Project ("Project") in San Jose, California. The parties agreed to submit the matter for decision on stipulated facts and exhibits without an evidentiary Hearing on the Merits. The parties' Stipulation of Undisputed Facts and joint exhibits were submitted to Hearing Officer Nathan D. Schmidt on April 20, 2010. Paul Simpson appeared as special counsel for the trustee in bankruptcy of the estate of Armando Vargas Pena and Martina Garza De Vargas; and Ramon Yuen-Garcia appeared for DLSE. The matter was submitted for decision at the conclusion of briefing on July 10, 2010.

The issues for decision are:

- Whether settlement of a prior assessment issued on the Project for Labor Code section 1776[1] penalties only barred DLSE's issuance of the Assessment.
- Whether Quality was required to pay the 29 workers who performed plumbing work on the Project the published general prevailing wage rate for the classification of Plumber, as found in the Assessment, or whether those workers

[1] All further statutory references are to the California Labor Code, unless otherwise indicated.

could be paid the lower advisory residential rate for the classification of Plumber specified by the City of San Jose ("City") without violating prevailing wage requirements.[2]

- Whether DLSE abused its discretion by assessing penalties under section 1775 at the rate of $10.00 per violation.
- Whether Quality is liable for penalties under section 1813.
- Whether Quality has demonstrated substantial grounds for believing the Assessment to be in error, entitling it to a waiver of liquidated damages.

The Director finds that Quality has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Director issues this Decision affirming the assessment of underpaid prevailing wages and section 1813 penalties in full, and affirming the assessment of section 1775 penalties and liquidated damages under section 1742.1, subdivision (a) as to the assessed underpaid Laborer Group 3 wages only. Based on Quality's reasonable reliance on the residential wage rates specified by the City for plumbing work on the Project, however, this Decision dismisses the assessment of section 1775 penalties and waives liquidated damages under section 1742.1, subdivision (a) as to the assessed underpaid Plumber wages.

SUMMARY OF FACTS

The parties' stipulated facts are set forth verbatim and are followed by excerpts from the documents in evidence.

"1. On April 22, 2003, the Redevelopment Agency of the City of San Jose, submitted a Memorandum to the Mayor of the City of San Jose, the City Council and the Agency Board, relating to the Disposition and Development Agreement with North Keystone, Limited Partnership. A copy of the memorandum is attached and incorporated hereto as Exhibit 1.

---

[2] The Assessment also includes underpaid prevailing wages for two additional workers under the classification of Laborer Group 3, for whom it is undisputed that the general prevailing wage rate was payable.

"2. On April 22, 2003, the Redevelopment Agency of the City of San Jose entered into a Disposition and Development Agreement with North Keystone, Limited Partnership, for the development of 42 residential condominium units known as the Classics at North Keystone, ("Project") in San Jose, County of Santa Clara, California. A copy of the agreement is attached and incorporated hereto as Exhibit 2.

"3. On June 29, 2004, the Redevelopment Agency of the City of San Jose, submitted a Memorandum to the Mayor of the City of San Jose, the City Council and the Agency Board, relating to the First Amendment to the Disposition and Development Agreement with North Keystone, Limited Partnership. A copy of the memorandum is attached and incorporated hereto as Exhibit 3.

"4. On June 29, 2004, the Redevelopment Agency of the City of San Jose and North Keystone, Limited Partnership, entered into the First Amendment to the Disposition and Development Agreement for the development of 42 residential condominium units known as the Classics at North Keystone, in San Jose, County of Santa Clara, California. A copy of the agreement is attached and incorporated hereto as Exhibit 4.

"5. The Classics at North Keystone Project is a residential public works project as defined by 8 C.C.R. § 16001(d).

"6. On February 2, 2006, North Keystone, Limited Partnership, entered into an agreement with San Jose Construction, Inc. as general contractor, for the construction of the Project. A copy of the agreement is attached and incorporated hereto as Exhibit 5.

"7. San Jose Construction, Inc. subcontracted part of the work on the Project to Quality Plumbing. A list of the subcontractors is attached and incorporated hereto as Exhibit 6.

"8. On May 21, 2004, Nina S. Grayson, Director, Office of Equality Assurance ("OEA"), City of San Jose, sent a letter to Tim Stahlheber, Division of Labor Statistics & Research ["DLSR"], requesting advisory residential wage rates for the next twelve months for Santa Clara County. A copy of the letter is attached and incorporated hereto as Exhibit 7. The OEA is responsible for the administration of and compliance with prevailing wage requirements on City of San Jose and San Jose Redevelopment Agency public works projects, including the Classics at North Keystone. The OEA acts as the representative of the awarding body.

"9. On July 16, 2004, Acting Director, John Rea, responded to the letter of May 21, 2004, of Nina S. Grayson, Director, Office of Equality Assurance, City of San Jose, and provided her with advisory residential wage rates for Santa Clara County. A copy of the letter with the rates are attached and incorporated hereto as Exhibit 8.

"10. On November 29, 2005, the OEA, through Nina S. Grayson, Director, provided San Jose Construction Co., Inc., with the residential wage rates provided to the OEA by Acting Director John Rea identified herein as Exhibit 8. The November 29, 2005, letter from the OEA to San Jose Construction, Inc. is attached and incorporated hereto as Exhibit 9.

"11. San Jose Construction Co., Inc. communicated the advisory residential wage rates identified herein as Exhibit 8, to its subcontractors, including Quality Plumbing.

"12. Quality Plumbing paid its plumbers employed on the Classics at North Keystone Place Project the advisory residential wage rates identified herein as Exhibit 8, except Quality Plumbing did not pay training funds to an approved apprenticeship training program or the California Apprenticeship Council for the Plumber classification but instead paid them directly to workers. The amount of the training fund contribution was $0.30 per hour.

"13. On September 18, 2007, Gary J. O'Mara, counsel for the Office of the Director, sent a letter to M.H. Sakata, Labor Compliance Agent, South Bay Pipe Industry, relating to the Requests for Coverage Determination for the Lofts and Classics at North Keystone Projects. A copy of the letter is attached and incorporated hereto as Exhibit 10.

"14. The Redevelopment Agency of the City of San Jose did not request, nor did the Director issue any Special Determinations pursuant to 8 C.C.R. Section 16202(a), on the Project.

"15. On October 2, 2007, Gary J. O'Mara, counsel for the Office of the Director, sent a letter to Nina S. Grayson, Director, Office of Equality Assurance, City of San Jose, relating to the requests for coverage determination for the Lofts and Classics at North Keystone Projects. A copy of the letter is attached and incorporated hereto as Exhibit 11.

"16. At all times herein mentioned, the general prevailing wage rate determinations for Santa Clara County for the plumber craft/classification published by the Division of Labor Statistics and Research (including the Holiday Provision) are contained in Determination No. STC-2005-2 and the predetermined rate increases relating thereto. A copy of the determination and the predetermined rate increases are attached and incorporated hereto as Exhibit 12.

"17. Acting Director Rea did not provide the OEA with any advisory residential wage rates for the Laborer craft/classification for Santa Clara County. At all times material herein mentioned, the general prevailing wage rates for Santa Clara County (including the Holiday Provision) applicable to the Laborer classification are contained in Determination No. NC-23-102-1-2005-1. A copy of the determination is attached and incorporated hereto as Exhibit 13.

"18. On October 29, 2007, the DLSE mailed a request for the Certified Payroll Records ("CPRs") via certified mail to Quality Plumbing relating to work it performed on the Classics at North Keystone public works project, DLSE case

No. 40-18536/254.

"19. Quality Plumbing submitted its CPRs to the DLSE on December 4, 2007, after the 10-day statutory deadline to submit the CPRs had past.

"20. On December 5, 2007, DLSE issued a Civil Wage and Penalty Assessment, case No. 40-18536/254 ("First Assessment"), assessing Quality Plumbing the sum of $14,725.00 in penalties under Labor Code Section 1776(g) for its failure to timely provide the requested CPRs. A copy of the assessment is attached and incorporated hereto as Exhibit 14.

"21. On December 7, 2007, Quality Plumbing requested a review of the Civil Wage and Penalty Assessment ("CWPA") issued in DLSE case No. 40-18536/254 on December 5, 2007, identified herein as Exhibit 14.

"22. On February 18, 2008, Jay Fenzke, Vice President of Operations of Quality Plumbing, sent a letter to counsel for DLSE requesting an opportunity to resolve the First Assessment. A copy of the letter is attached and incorporated hereto as Exhibit 15.

"23. On February 21, 2008, counsel for the DLSE, sent a letter to Jay Fenzke, Vice President of Operations of Quality Plumbing, relating to the resolution of the First Assessment. A copy of the letter is attached and incorporated hereto as Exhibit 16.

"24. On February 25, 2008, Quality Plumbing sent a check in the sum of $7,500.00 to the DLSE to resolve the First Assessment.

"25. On March 12, 2008, Jay Fenzke, Vice President of Quality Plumbing, sent a letter to Nathan D. Schmidt, Hearing Officer, and withdrew its Request for Review of the First Assessment. A copy of the letter is attached and incorporated hereto as Exhibit 17.

"26. On March 13, 2008, Nathan D. Schmidt, Hearing Officer, issued a Notice Dismissing the Request for Review on the First Assessment.

"27. On March 30, 2009, the DLSE issued another Civil Wage and Penalty Assessment, Case No. 40-18536/254 ("Second Assessment") assessing San Jose Construction, Inc. and Quality Plumbing the sum of $492,559.74 in wages plus penalties in the amount of $19,570.00, for the failure of Quality Plumbing to pay the correct prevailing wages on the work performed on the Classics at North Keystone project.

"28. The sum of $467,827.53 in wage underpayments and $18,945.00 in penalties assessed in the Second Assessment are attributable to the difference between the advisory residential wage rates identified herein as Exhibit 8 paid by Quality Plumbing to the Plumbers for work performed on the Classics at North Keystone project and the prevailing wage rates under determination No. STC-2005, and the predetermined rate increases thereunder, indentified herein as Exhibit 12. The balance due under the Second Assessment is attributable to the wage rates paid by Quality Plumbing to certain workers identified in the Second Assessment as Laborers who worked on the project and the prevailing wage rates under determination No. NC-102-102005-1 identified herein as Exhibit 13, the penalties assessed against Quality Plumbing for those workers identified as Laborers, and the training funds that were not paid to an approved apprenticeship training program or the California Apprenticeship Council.[3]

"29. On January 26, 2009, the Director issued an Important Notice to Awarding Bodies and Interest Parties Regarding Prevailing Wage Determinations for Residential Projects. A copy of the Notice is attached and incorporated hereto as Exhibit 18.

"30. On December 2, 2009, the Director published new Residential

---

[3] Quality has presented neither evidence nor argument disputing the portion of the Second Assessment attributable to the underpayment of Laborers on the Project. Quality's untimely request to reserve this issue for hearing if its argument that DLSE was barred from issuing the Second Assessment is unsuccessful, made for the first time in Quality's opposition to DLSE's opening brief, is denied. That portion of the Assessment, constituting $24,732.21 in unpaid prevailing wages and $625 in section 1775 penalties, is therefore affirmed without further discussion.

Prevailing Wage Determinations. A copy of the new Residential Prevailing Wage Determinations is attached and incorporated hereto as Exhibit 19.

"31. In the Second Assessment, DLSE, in exercising its discretion under Labor Code section 1775, has assessed San Jose Construction, Inc. and Quality Plumbing penalties at the minimum rate of $10.00 per violation as provided in Labor Code Section 1775.

"32. The project is a public works project within the meaning of Labor Code section 1720.

"33. No wages found by the DLSE to be due under the Second Assessment have been paid by San Jose Construction, Inc. or Quality Plumbing as of this date as the Second Assessment is disputed, in whole or in part. Quality Plumbing filed a timely Request for Review of the Second Assessment.

"34. The Hearing Officer determined that no timely Request for Review of the Second Assessment was filed by San Jose Construction, Inc.

"35. On November 16, 2009, Hearing Officer, Nathan D. Schmidt, authorized San Jose Construction, Inc. to participate in the instant proceeding in accordance with 8 C.C.R. § 17208."

Section 702 of the Disposition and Development Agreement imposed a prevailing wage requirement on the Developer as follows:

> Developer shall pay, or cause to be paid, prevailing wages, for all construction work required for the Project. For the purposes of this Agreement, "prevailing wages" means not less than the general prevailing rate of per diem wages, as defined in Section 1773 of the California Labor Code and Subchapter 3 of Chapter 8, Division 1, Title 8 of the California Code of Regulations (Section 16000 et seq.), and as established by the Director of the California Department of Industrial Relations ("DIR"), or in the absence of such establishment by DIR, by the City's Office of Equity Assurance ("OEA"), for the respective craft classification. . . .

The same prevailing wage requirement was imposed on San Jose Construction, Inc. ("San Jose")

as general contractor and was memorialized by letter from Grayson to San Jose on November 29, 2005. The advisory residential rates that were obtained by the City were attached as an exhibit to Grayson's letter. San Jose communicated the prevailing wage requirement and advisory rates in turn to its subcontractors, including Quality. (*See* Stipulated Facts 10 and 11 above.)

Settlement of First Assessment: The documents in evidence state in part:

> *Letter from Fenzke to Ramon Yuen-Garcia, dated February 18, 2008:*
>
> This letter is in reference to the case between Quality Plumbing vs. Division of Labor Standards Enforcement for failure to comply with Labor Code Section 1776 (g), requiring the subcontractor to provide requested certified payroll information within 10 days to the State of California Department of Industrial Relations for the North Keystone Project.
>
> Per our prehearing conference call on February 11, 2008, we would like the opportunity to explain and possibly resolve the claim against Quality Plumbing. We are not disputing the claim made by the State of California Department of Industrial Relations, but are asking for leniency based on the following reasons for the delay in providing the information within the 10 day timeframe.
>
> * * *
>
> Quality Plumbing takes full responsibility for failure to comply with Labor Code Section 1776 (g) and understands this failure stemmed from an internal problem. Quality Plumbing is asking the Division of Labor Standards Enforcement to reconsider the penalty assessed against Quality Plumbing and assist in resolving this issue without accessing [*sic*] the full amount.
>
> *Letter from Yuen-Garcia to Fenzke, dated February 21, 2008:*
>
> This is in response to your letter of February 18, 2008. Although the penalties for failure to timely submit payroll records are mandated under Labor Code section 1776(g) . . ., we will mitigate the amount due to the particular circumstances in this case. Please do not take this as a precedent. Accordingly, the Civil Wage and Penalty Assessment will be resolved if payment in the sum of $7,500.00 is received in this office within ten (10) days from the date of this letter. If the offer is accepted, please make a check payable to the Division of Labor Standards Enforcement, and forward it to the above address. You should also file a withdrawal of your Request for Review of the Civil Wage and Penalty Assessment with the Hearing Officer, with a copy to this office.

Request for advisory residential rates: The documents in evidence state in part:

Letter from Grayson to DLSR, dated May 21, 2004:

The City of San Jose requests assistance in providing Advisory Residential Wage Determination [*sic*] for the next twelve months, June 2004 through June 2005, for various City of San Jose Housing Department/Private Developer and San Jose Redevelopment Agency/Private Developer new construction residential housing projects. These projects will increase the City's supply of affordable housing units.

Letter from Acting Director Rea to Grayson, dated July 16, 2004:

This is in response to your facsimile transmittal of May 21, 2004, requesting advisory residential wage determinations for the next twelve months, June 2004 through June 2005, for various new construction residential housing projects located in Santa Clara County.

Pursuant to the California Code of Regulations Section 16001(d), residential projects consist of single-family homes and apartments up to and including four stories. Construction of any structures or ancillary facilities on the projects that does not meet this definition requires the payment of the general prevailing wage rates.

The following is a list of advisory residential rates as requested. Please note that these rates have not been issued to you, but are strictly for informational purposes only. The City is not bound by the advisory rates as provided in this letter. However, depending on the sources of financing and/or any public financial arrangements of your project, there is a possibility of change in the requirements for the payment of prevailing wages. If the project involves any state funds such as state bonds or state grants, it may require the payment of prevailing wages. If you require a formal coverage determination, please send your request in writing and provide copies of all relevant documents. Coverage determinations are made on a project-by-project basis and analysis of the specific facts involved in a project.

Letter from O'Mara to Sakata, with copy to Grayson, dated September 18, 2007:

I am writing in response to your letters to Acting Director John M. Rea, both dated July 18, 2007, following up on your coverage determination requests of January 2, 2007. [*Footnote omitted.*] As I explained on the telephone, your requests need not be processed as coverage determination requests because both you and Nina S. Grayson, Director, Office of Quality Assurance, Department of Public Works, City of San Jose ("City"), have advised that there is no dispute that these two projects are public works projects for which prevailing wages must be

and have been paid by the City's contractors. [*Footnote omitted.*]

During discussions with both you and Ms. Grayson it became apparent that the only issue you raised with the City related to either project is the use of advisory residential rates by the City in advising its contractors what the applicable prevailing wage rate is for certain crafts needed to perform residential construction on the projects. You have taken issue with the City's use of advisory rates though these rates are apparently identical to the rates City's contractors would have paid had City obtained special determinations under California Code of Regulations, title 8, § 16202(a). City contends that despite its best efforts, it could not obtain special determinations from the Division of Labor Statistics & Research ("DLSR") in a timely manner for the two projects and City has advised that it instead used the advisory determinations. DLSR in its provision of rates, made clear that the rates were advisory only.

Your coverage requests ask for a general determination as to the public works status of these two projects because of the apparent failure of City to request residential rates under California Code of Regulations, title 8, § 16001(d) and § 16202(a), to obtain residential rates for appropriate payment of prevailing wages. However, your organization apparently made no effort to challenge the advisory residential rates for these projects in 2004 and 2005, when these projects were bid by filing a petition with the Department of Industrial Relations ("DIR") under Labor Code § 1773.4 and California Code of Regulations, title 8, § 16302. . . .

* * *

Otherwise, DLSR is without authority to change a prevailing wages rate retroactively without violating the provisions of Labor Code § 1773.6 . . .

* * *

Also, contractors told by City to bid the work as residential are at a distinct disadvantage if, at this late date, they were required to pay commercial rates for work already performed on largely completed projects. . . .

* * *

Please be advised that in the future DIR will be unable to entertain retroactive prevailing wage rate change requests if the provisions of Labor Code § 1773.4 are not complied with and a request to DIR is not made within 20 days after commencement of advertising of the call for bids by the awarding body. By copy of this letter I am advising Ms. Grayson that all future requests for residential rates must be made via the special determination process described in California Code of Regulations, title 8, § 16202(a).

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

> 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 (*Lusardi*) [*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), and *see Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage 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 sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect."

Settlement Of The First Assessment For Section 1776 Penalties Did Not Bar DLSE's Issuance Of The Second Assessment.

Quality contends that the settlement of the First Assessment, which was issued under the same DLSE case number as the Second Assessment, constituted an accord and satisfaction of all claims against Quality related to its work on the Project. Quality argues that the parties intended to resolve the entire matter and not just isolated claims as can be seen by the use of the DLSE case number to identify the matter that they intended to resolve. Quality argues without any authority that the burden was on DLSE to explicitly reserve the right to pursue further enforcement action against Quality if DLSE did not intend the settlement to resolve all claims related to the Project. Since DLSE did not do so, Quality contends that DLSE is barred from pursuing the Second Assessment. DLSE disagrees, arguing that the written settlement communications between the parties make it clear that the parties understood the settlement to resolve the assessment of section 1776 penalties only. The record supports DLSE's position.

The parties agree that whether a transaction constitutes an accord and satisfaction "depends on the intention of the parties as determined from the surrounding circumstances, including the conduct and statements of the parties." (See, e.g., *In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1059.)[4] Here, the parties evidenced by their written settlement correspondence that they intended to resolve only Quality's violation of section 1776, subdivision (g) as no other indication was expressed. Fenzke's letter of February 18, 2008, is focused on that issue alone, stating that Quality took "full responsibility for failure to comply with Labor Code Section 1776 (g)" and asking DLSE "to reconsider the penalty assessed" and "assist in resolving this issue without accessing [*sic*] the full amount." DLSE's response is likewise focused on the single issue of section 1776 penalties, stating: "[a]lthough the penalties for failure to timely submit payroll records are mandated under Labor Code section 1776(g) . . ., we will mitigate the amount due to the particular circumstances in this case."

---

[4] It is noteworthy that the parties did not include in the settlement of the First Assessment the mandatory language for general releases found in Civil Code section 1542.

The parties' settlement of the section 1776 penalties, therefore, does not bar DLSE from pursuing further enforcement action against Quality for underpayments of the required prevailing wages related to its work on the Project.

Quality Was Required To Pay The General Prevailing Wage Rate For Plumbing Work Performed On The Project Notwithstanding The City's Specification Of A Lower Advisory Residential Rate For That Work.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773 et seq. The Director, through DLSR, issues two types of prevailing wage rates: published general prevailing wage determinations and special determinations. In addition, the Director will provide advisory rates on request. Each type of determination is described below.

In determining the general prevailing wage rates for specific types of work in specific localities or regions of the state, the Director ascertains and considers the applicable wage rates that prevail for each type of work established by collective bargaining agreements, rates that may have been predetermined for federal public works, and other relevant wage data within each locality and its nearest labor market area. (§ 1773, Cal. Code Regs., tit. 8, § 16200.) Based on that information, the Director determines the prevailing rates paid for "each craft, classification or type of work" that might be employed in public works. The Director then publishes general prevailing wage determinations such as STC-2005-2 to inform all interested parties and the public of the applicable wage rates that must be paid for public work. (§ 1773, Cal. Code Regs., tit. 8, § 16201 et seq.) Contractors and subcontractors have constructive notice of the applicable published prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 (*Ericsson*).)

The general prevailing wage rates applicable to a specific public work are the ones in effect at least ten days prior to the date the public works contract is advertised for bid. (*See* § 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the awarding body to specify in the call for bids the published general prevailing wage rates to use on the project; alternatively the awarding body can inform prospective bidders that the published general prevailing rates are on file in the body's principal office and have copies of the determinations posted at each job site.

Special determinations are issued on a project-by-project basis when the applicable prevailing wage rate for a particular type of work has not been determined or where there is a question regarding which prevailing wage rate is payable for a particular type of work on a specific project. (Cal. Code Regs., tit. 8, § 16202.) Historically, prevailing wage rates have been determined based on construction pay rates for commercial construction. Residential wage rates, which are normally lower than commercial construction wage rates, may be applicable to residential construction projects consisting of single family homes and apartments up to four stories. (Cal. Code Regs., tit. 8, § 16001, subd. (d).) Accordingly, the Director has issued regulations allowing awarding bodies to request special determinations based solely on prevailing residential construction wage rates. (Cal. Code Regs., tit. 8, § 16001, subd. (d).) When an awarding body believes that a project qualifies for a residential rate, it has to request a special determination from the Director at least 45 days prior to the bid advertisement date. (Cal. Code Regs., tit. 8, § 16202, subd. (a).)[5] In the absence of a request for a special determination, the contractor and subcontractors are required to pay the general prevailing wage rate, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085 (*Sheet Metal Workers*).) The awarding body never requested a special determination for the Project.

Advisory rates are not defined by statute or regulation; but, as Acting Director Rea explained in his letter to Grayson, they are provided for informational use only. They are neither usable by nor binding upon the requesting entity. Advisory rates, such as the advisory residential rates provided to the City, may be used for budgeting purposes. Additionally, as Grayson said in her May 21, 2004, letter, advisory residential rates are useful for "various City of San Jose Housing Department/Private Developer and San Jose Redevelopment Agency/Private Developer

---

[5] In addition, Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].)

new construction residential housing projects." That is, advisory rates may assist awarding bodies to specify wage rates in contracts for projects that are not statutorily defined as public works or otherwise subject to the payment of prevailing wages. (§ 1771.)

When the Project was put out for bid, there were no published general prevailing wage rates for residential construction; as seen above, residential prevailing wage rates were issued by the Director on a project-by-project basis in accordance with California Code of Regulations, title 8, sections 16001, subdivision (d) and 16202, subdivision (a). (*See Ericsson, supra,* 221 Cal.App.3d at pp. 126-127.) In this case, the City specified the advisory residential wage rates for plumbing and other types of work in its bid specifications for the Project without complying with the mandatory procedures; in specifying rates without compliance with the regulations, the City failed to comply with section 1773.2 since it had neither requested nor obtained a special determination authorizing the use of those rates. This leads to the ultimate question of whether Quality's payment of the residential plumber rate specified by the City constitutes a violation of the prevailing wage laws because the wage rates were not properly obtained. I find that it does.

Quality contends that the City was authorized to specify the payment of residential prevailing wage rates on the Project even though it did not receive a special determination, because the City believed that the advisory residential wage rates from Acting Director Rea "for the next twelve months" was a blanket issuance of residential rates for any residential public works projects commenced by the City during that period. DLSE disagrees because the City failed to request the special determination required by California Code of Regulations, title 8, sections 16001, subdivision (d) and 16202, subdivision (a). The record and applicable law support the Assessment.

Contrary to Quality's assertion about Acting Director Rea's blanket issuance of residential rates for all residential public works projects commenced by the City in the following 12 months, his letter is clear that: "these rates have not been issued to you, but are strictly for informational purposes only. The City is not bound by the advisory rates as provided in this letter." Acting Director Rea continued:

If you require a formal coverage determination, please send your request in

> writing and provide copies of all relevant documents. Coverage determinations are made on a project-by-project basis and analysis of the specific facts involved in a project.

It is indisputable from the plain language of Acting Director Rea's letter that the advisory rates had been provided for informational purposes only and that these rates were only advisory for 12 months. Rea's letter is explicit that formal determinations were required on a project-by-project basis before residential prevailing wage rates could actually be used on any specific public works project. Thus, Rea gave the City the information it needed to project the cost of projects it funded **if** the City made project-by-project requests for special determinations. In the absence of a special determination authorizing the use of residential rates on the Project, the City was not authorized to specify those rates and the general prevailing wage rate for Plumber is applicable to the plumbing work Quality workers performed on the Project.

Further, nothing in the record supports a finding that the City was misled by Acting Director Rea's letter into a belief that the advisory rates took the place of a special determination. If anything, Grayson's letter implies the exact opposite, which is that the City was asking for advisory rates for "private development."

Quality further contends that, notwithstanding the City's failure to request a special determination, O'Mara's letter to Sakata on January 2, 2007, affirms the use of residential rates on the Project. Quality relies on the letter's opinion that

> contractors told by City to bid the work as residential are at a distinct disadvantage if, at this late date, they were required to pay commercial rates for work already performed on largely completed projects. . . .

Quality argues that this language is a ratification of the City's specification of residential rates for the Project. In addition, Quality points to O'Mara's direction "that all *future* requests for residential rates must be made via the special determination process" as further ratification of the City's past use of advisory residential rates without obtaining special determinations. (*Emphasis added.)* The best argument Quality can make in this regard is that somehow

O'Mara's letter acts as estoppel to a later enforcement action.[6]

Quality misinterprets what O'Mara was saying in his letter, however, by taking the quoted language out of context. The letter is a response to someone unconnected to the City, to the contractor, or to Quality from a request for an after–the–fact prevailing wage determination on the Project. O'Mara's letter clearly rejects any attempt to bypass the statutory and regulatory methods that determine prevailing wage rates because to do so would be unfair to other contractors. The letter in no way affirms the City's specification of residential rates. O'Mara's letter points out that the proper avenue for Sakata to have challenged the advisory residential wage rates specified in the bid specifications for the Project would have been to file a petition with DIR under section 1773.4 two years earlier. In summary, the letter makes two key points: DIR will not issue retroactive special determinations and the City's attempt to avoid the special determination process was not effective. O'Mara's direction to make "future" requests for residential rates using the special determination process is simply a direction to follow the correct procedure going forward. It cannot be interpreted as a validation of the City's failure to follow the required procedure in the past. (§ 1774 and *see Sheet Metal Workers, supra,* 153 Cal.App.4th at pp. 1084-1085.) Moreover, the express terms of the Disposition and Development Agreement for the Project placed both San Jose and Quality on notice that "the general prevailing rate of per diem wages" was required to be paid for all construction work on the Project.

For these reasons, the City's specification of an unauthorized rate did not relieve Quality of the statutory requirement to pay the applicable general prevailing wage rate for plumbing work on the Project. (*Ericsson, supra.*) I find that Quality has failed to disprove the basis of the Assessment and is therefore required to pay the general prevailing wage rate for plumbing work

---

[6] Equitable estoppel does not exist here as none of the elements of defense are met. "'Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" (*Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 641.)

on the Project, as assessed. Because Quality has presented no defense to the balance of the Assessment applicable to work performed on the Project by two Laborers, I affirm the assessed unpaid prevailing wages in full.

Equity Requires The Dismissal Of The Section 1775 Penalties Assessed For Underpayment Of Plumbers On The Project.

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.[7]

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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 parties stipulate that DLSE exercised its discretion by assessing section 1775 penalties at the substantially mitigated rate of $10.00 per violation. In reducing the potential penalty assessment by 80 percent, DLSE appears to have given substantial weight to Quality's good faith payment of the advisory residential wage rates specified by the City for plumbing work on the Project. There is no evidence that DLSE abused its discretion by setting the penalty amount at $10.00 per violation.

An issue not raised by Quality but worthy of consideration is whether penalties should be waived under the broader equitable circumstances. This case presents a unique factual situation in which the City wrongly specified that residential wage rates were payable for plumbing and other specified work on the Project, leading Quality to the reasonable, if erroneous, conclusion

---

[7] 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."

that the City had properly obtained the necessary special determination authorizing the payment of those wage rates. The situation is not completely clear cut, because San Jose and Quality were on notice that "the general prevailing rate of per diem wages" was due for work on the Project, but, in the face of the City's express direction to pay residential wage rates for specified work on the Project, Quality and other similarly placed subcontractors would have had no reason to seek an independent determination under section 1773.4 or to otherwise question the City's direction. As noted in *Lusardi*:

> We agree that in a proper case equitable considerations may preclude the imposition of statutory penalties against a public work contractor for failing to pay the prevailing wage. This is such a case. Here Lusardi acted in good faith in entering into the contract on the basis of the District's representations, assertedly on the advice of its attorneys that the project was not subject to the prevailing wage law. Under the circumstances of this case it would be inequitable for Lusardi to be held liable for penalties for failure to pay the prevailing wage. Lusardi's exposure to liability must be limited to the amount of underpayment.

(*Lusardi, supra*, 1 Cal.4th at p. 996.) The same equitable considerations apply here: Quality relied, in good faith, on the representation made by the City that the City had permission to use specially determined residential wage rates for plumbing work on the Project when the City was on notice that it had no such permission. *Lusardi* gives the Director the authority, where appropriate, to make a determination as to the equity of imposing section 1775 penalties, including the authority to waive the section 1775 penalties assessed in relation to the plumbing work performed on the Project.[8]

The exercise of equity is particularly appropriate in this case, because the assessed section 1775 penalties, if paid, would go to the City; the entity whose actions caused the underpayments. (§ 1775, subd. (a) (1).) Accordingly, the Assessment is modified to dismiss the $18,795.00 in section 1775 penalties attributable to Quality's underpayment of plumbers on the Project.

---

[8] It is worthy of note that after *Lusardi* was decided, the Legislature added two provisions into the Labor Code that allow for indemnity from awarding bodies for their misstatements that a project is not a public work. (§§ 1726, subd. (c), 1781.) Thus, waiver of penalties is only justified in extremely narrow circumstances.

No such equitable considerations apply, however, to Quality's underpayment of the two laborers included in the Assessment, because no residential rate was specified by the City for that work. The parties stipulate that the general prevailing wage rate for Laborer Group 3 used in the Assessment is the applicable rate for the work and Quality has offered no argument disputing the accuracy of the assessment at to those workers. The balance of $625.00 in section 1775 penalties attributable to Quality's underpayment of laborers on the Project is therefore affirmed.[9]

Quality Is Liable For Penalties Under Section 1813.

Section 1813 states, in pertinent part, as follows:

> 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 ($25.00) 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 1815 states in full as follows:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

The stipulated record establishes that Quality violated section 1815 by paying less than the required prevailing overtime wage rate to its workers on 6 occasions. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813 is affirmed in the amount of $150.00 for 6 violations.

---

[9] I note that the parties' stipulated division of the assessed section 1775 penalties between plumbing work and laborer work results in amounts that are not evenly divisible by the $10 per violation penalty used in the Assessment. In the absence of any argument or statement of error by either party, however, I will not disturb the stipulated division of section 1775 penalties.

Quality Has Established Grounds For A Partial Waiver Of Liquidated Damages.

Section 1742.1, subdivision (a) provides in pertinent part as follows:

> After 60 days following the service of 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 . . . 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.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . . , the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Rule 51, subdivision (b) [Cal.Code Regs., tit. 8, § 17251, subd. (b)] states as follows:

> To demonstrate "substantial grounds for believing the Assessment . . . to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment . . . was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment . . . [10]

Absent waiver by the Director, Quality is liable for liquidated damages in an amount equal to any wages that remained unpaid 60 days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to Quality's position on the merits and specifically whether there was an "objective basis in law and fact" for contending that the Assessment was in error. The parties stipulate that no portion of the unpaid wages were paid within 60 days following service of the Assessment.

---

[10] Section 1742.1, subdivision (a) was amended effective January 1, 2009. Among other things, the amendment changed the standard for establishing a basis for waiver of liquidated damages from demonstrating "substantial grounds for believing the assessment . . . to be in error" to demonstrating "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment." While Rule 51, subdivision (b) has not been amended to track the new language of section 1742.1, the core of the standard, a demonstration of "substantial grounds," remains unchanged. I therefore find that Rule 51's guidance that a demonstration of "substantial grounds" requires a showing of both subjective and objective bases for requesting review of the assessment continues to control the waiver analysis.

Here, Quality has demonstrated that it had a reasonable subjective belief that the Assessment was in error and a factual defense in that the awarding body specified that residential wage rates were payable for plumbing work on the Project. Under these circumstances, requiring Quality to pay liquidated damages in addition to the unpaid prevailing Plumber wages and associated section 1813 penalties would be unreasonable in light of its reliance on the City's specification of residential wage rates for the Project. Quality has therefore demonstrated that it had substantial grounds for believing the $467,827.53 of the assessed unpaid prevailing wages attributable to plumbing work on the Project to be in error, thereby entitling it to a waiver of liquidated damages for that portion of the Assessment under section 1742.1, subdivision (a). Quality has demonstrated no such grounds, however, for believing that the balance of the assessed unpaid wages owing to two Laborers was also in error. Accordingly, Quality is liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amount of $24,732.21.

FINDINGS

1. Affected subcontractor Armando Pena Vargas dba Quality Plumbing timely requested review of the civil wage and penalty assessment issued by the Division of Labor Standards Enforcement with respect to the Classics at North Keystone Project in San Jose, California.

2. The Assessment was issued timely.

3. Quality failed to pay its workers at least the prevailing wage for plumbing work on the Project, as it paid the lower advisory residential wage rate erroneously specified by the City rather than the applicable general prevailing Plumber rate. In addition, Quality failed to pay at least the prevailing wage to two laborers it employed on the Project. The assessed unpaid wages in the aggregate amount of $492,559.74 are therefore affirmed.

4. Under the unique facts of this case, Quality is entitled to equitable relief from the section 1775, subdivision (a) penalties attributable to Quality's underpayment of Plumbers on the Project. Accordingly, the Assessment is modified to dismiss the $18,795.00 in section 1775

penalties attributable to plumbing work. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the rate of $10.00 per violation, and the balance of the penalty assessment attributable to work by laborers on the Project is affirmed in the amount of $625.00.

5. Penalties under section 1813 at the rate of $25.00 per violation are due for 6 violations on the Project, totaling $150.00 in penalties.

6. In light of Finding 3, above, the potential liquidated damages due under the Assessment are $492,559.74. Quality has demonstrated that it had substantial grounds for believing the $467,827.53 of the assessed unpaid prevailing wages attributable to plumbing work on the Project to be in error, thereby entitling it to a waiver of liquidated damages for that portion of the Assessment under section 1742.1, subdivision (a). Quality has demonstrated no such grounds, however, for believing that the balance of the assessed unpaid wages owing to two Laborers was also in error. The parties stipulate that none of the unpaid wages were paid within 60 days following service of the Assessment. Accordingly, Quality is liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amount of $24,732.21.

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

Wages Due:	$492,559.74
Penalties under section 1775, subdivision (a):	$625.00
Penalties under section 1813:	$150.00
Liquidated Damages:	$24,732.21
TOTAL:	**$518,066.95**

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

ORDER

The Civil Wage and Penalty Assessments are modified and 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: 3/3/11

John C. Duncan
Director of Industrial Relations