

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Southwest General Contractors, Inc.

Case No. 14-0123-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Southwest General Contractors, Inc. (Southwest) submitted a request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) on February 7, 2014, with respect to work performed by Southwest on the Mount Miguel High School Phase 3BR Bldg. 500 and 600 project (Project) for the Grossmont Union High School District. The Determination found that Southwest failed to submit contract award information to applicable apprenticeship programs in accordance with Labor Code section 1777.5, subdivision (e), and failed to employ apprentices in accordance with Labor Code section 1777.5, subdivision (g). DLSE assessed an aggregate penalty of \$2,280.00 under Labor Code section 1777.7.

A Hearing on the Merits occurred in San Diego, California on March 4, 2015, before Hearing Officer Steven A. McGinty. Daniel Ray Crown (Crown) appeared for Southwest, and Max D. Norris (Norris) appeared for DLSE. On the first day of hearing, DLSE filed a motion to amend the Determination downward pursuant to Rule 26(a)(1)¹ to reduce the penalty due to \$1,440.00. In the motion, DLSE acknowledged that Southwest had submitted contract award

¹ California Code of Regulations, title 8, section 232.26, subdivision (a)(1). All references to the regulations governing review of determinations of civil penalty under Labor Code section 1777.7 (Cal. Code Regs., tit. 8, §§ 232.01 through 232.70) are in the format Rule *x*, with *x* being the numbers following 232. For example, California Code of Regulations, title 8, section 232.26 is Rule 26.

information to all apprenticeship committees that it was required to by law. The motion was granted. The matter was submitted for decision on March 4, 2015.

The issues for decision are as follows:

- Did DLSE timely serve the Determination on Southwest?
- Did Southwest employ cement mason apprentices on the Project in the minimum ratio required by Labor Code section 1777.5 (20% of journeyman hours employed)?
- What were the applicable apprenticeship committees in the geographic area of the Project in the trade of cement mason?
- Did Southwest request the dispatch of apprentices (DAS 142 or equivalent) in a timely and factually sufficient manner pursuant to Labor Code section 1777.5, so as to give rise to an affirmative defense to a minimum ratio violation under Labor Code sections 1777.5 and 1777.7 pursuant to California Code of Regulations, title 8, section 230.1.?
- Did the Labor Commissioner abuse her discretion in assessing penalties under Labor Code section 1777.7?

In this Decision, the Director finds that Southwest failed to properly request dispatch of cement mason apprentices from the two applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7. This Decision affirms the Determination that a penalty is appropriate, however, the penalty is reduced to more accurately reflect the severity of the violation, which was technical noncompliance based upon mistake. Therefore, the Director of Industrial Relations issues this Decision affirming and modifying the Determination.

FACTS

On or about April 18, 2011, Southwest submitted a Division of Apprenticeship Standards (DAS) Public Works Contract Award Information form (DAS 140) to the San Diego Associated General Contractors Joint Apprenticeship Committee (San Diego AGC JAC) indicating among other things that it executed a contract on April 15, 2011 to do work on the Project, that it was going to employ journeymen cement masons on the Project during the period April 15, 2011 – August 30, 2011, and that it would employ and train apprentices in accordance with the

California Apprenticeship Council regulations. Southwest had an approved agreement to train cement mason apprentices with the San Diego AGC JAC. According to Southwest's Certified Payroll Records (CPRs) for the Project, employees worked from May 4, 2011 to September 23, 2011. On 72 days during that period, cement mason journeymen worked 2300.5 hours. No cement mason apprentices were employed on the Project.

Timeliness of Determination. The DLSE served the Determination by mail on February 7, 2014. The Determination was prepared by Lance A. Grucela (Grucela). The last day a Southwest employee worked on the Project was September 23, 2011. Southwest filed its request for review on February 11, 2014.

Applicable Committees in the Geographic Area. Grucela testified that he searched the DAS website and printed off a list of three apprenticeship committees in the geographic area of the Project in the trade of cement mason on November 18, 2013. Those three apprenticeship committees were as follows: (1) San Diego AGC JAC; (2) San Diego County Cement Masons J.A.C. (San Diego CCM JAC); and (3) Southern California Laborers Cement Mason Joint Apprenticeship Committee (SCLCM JAC). Grucela did not know when SCLCM JAC received approval to train apprentices in San Diego County. On cross-examination, Grucela testified he had no reason to believe that the three apprenticeship committees were not approved to train apprentices at the time of the Project.

Crown testified that only the first two of the three apprentice committees were approved to train apprentices in 2011. He testified that the third apprentice committee, the SCLCM JAC, was not in existence at the time of the Project in 2011. In support of his testimony, Crown produced a letter from the DAS Deputy Chief to SCLCM JAC dated March 6, 2012, congratulating the committee on the approval of its apprenticeship standards for the cement mason craft, and an excerpt from a chart Crown testified that he found on the DAS website entitled "Completion Rates for Apprenticeship Committees" indicating that SCLCM JAC had no completion rate number listed for the years 2008-2012, and that for the year 2013 the rate was 0.00.

Request for Dispatch of Apprentices. Grucela testified that Southwest failed to submit a request for dispatch of cement mason apprentices to any of the three applicable apprenticeship

committees in the San Diego region - the ones that he found on the DAS website. Further, he testified that no evidence was provided that any of the three committees received a request for dispatch of apprentices from Southwest.

Crown testified that Southwest requested dispatch of cement mason apprentices from San Diego AGC JAC and the San Diego CCM JAC. He said that both he and Lauren Corson (Corson), a former employee of Southwest, requested dispatch of cement masons from the San Diego AGC JAC. They did so by email, DAS 142, and telephone. The email was sent by Crown about a week before Southwest started work; around the first of April 2011. Denise Fallon (Fallon) from the San Diego AGC JAC responded to the email on March 28, 2011, stating that she would send Crown apprentices for review.² Corson sent the DAS 142 to the San Diego AGC JAC. Crown did not have a copy of that DAS 142. Corson was supposed to put the copy of the DAS 142 in the file. However, Corson left the firm and Crown cannot find the file. Crown first called the San Diego AGC JAC in mid-March 2011. He spoke to Fallon. He told Fallon that Southwest was getting ready to start a new project and that it needed carpenter and cement masons apprentices. Southwest needed applicants to interview because it was a school project so the apprentices had to go through a Department of Justice background check. According to Crown, Fallon said she would send Southwest applicants that she had available. She sent Southwest multiple carpenter apprentices, and one individual Crown thought was a cement mason apprentice, but who turned out to be a carpenter apprentice. Crown testified that he called Fallon of the San Diego AGC JAC again and told her that Southwest needed cement mason apprentices. She responded that she was looking but could not find anyone. It was at that point, Crown testified, that he instructed Corson to contact the union (the San Diego CCM JAC) for dispatch of apprentices.

Crown testified that Corson sent a DAS 142 to the San Diego CCM JAC, and that she had told him that she had done so. Crown said that he did not have a copy of that DAS 142. Corson had the files in her office. She did not file the documents in the correct location and Crown cannot find that DAS 142. On cross-examination, Crown testified that he saw that DAS 142 because Corson showed it to him. However, Crown could not remember what specific date

² At the hearing, Crown refreshed his recollection on this point by reviewing email on his smart phone.

was used as the date on which the cement mason apprentices should report for work. Also on cross-examination, in response to a question about what date Crown used in requesting cement mason apprentices from the San Diego AGC JAC, Crown testified that he was requesting apprentices for work within the next 2 weeks. Southwest received no cement mason apprentices from either apprentice committee.

Crown testified that he was familiar with the requirement for use of apprentices on the Project. Also, that he was familiar with the need to contact apprentice committees and request the dispatch of apprentices. Southwest received carpenter apprentices from the San Diego AGC JAC for the project.

Assessment of Penalties. Grucela testified that the penalties were mitigated from a maximum of \$100.00 to \$20.00 a day based on the fact that DLSE believed that the violations were a result of a good faith mistake by the contractor. Further, that Southwest had no history of prior violations, and was in compliance with other classifications, specifically the employment of carpenter apprentices, on the Project.

DISCUSSION

Labor Code sections 1777.5 through 1777.7³ set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, section 227⁴ provides that the regulations “shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7.”

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 journeymen in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). In this regard, section 1777.5, subdivision (g) provides:

The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program

³ All further statutory references are to Labor Code unless stated otherwise.

⁴ All further regulatory references are to California Code of Regulations, title 8.

operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a), which states:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

However, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

According to the regulation, a contractor properly requests the dispatch of apprentices by doing the following:

Request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

DAS has prepared a form, DAS 142, that a contractor may use to request dispatch of apprentices

from apprenticeship committees.

When DLSE determines that a violation of the apprenticeship laws has occurred, a written Determination of Civil Penalty is issued pursuant to section 1777.7. In the review of a determination as to the 1:5 ratio requirement, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (§ 1777.7, subdivision (c)(2)(B).)

The Determination Was Issued Timely.

A Determination for violation of section 1777.5 "shall be issued and served on the Affected Parties no later than three years after date of accrual." (Rule 70.) The date of accrual is the end of the contract as the affected contractor has the opportunity to meet its obligations under the law by employing apprentices for the requisite number of hours before the end of the contract. (Regulations § 230.1.) According to Southwest's CPRs, the last day employees worked on the Project was September 23, 2011. Thus, the date of accrual was September 23, 2011. DLSE served the Determination by mail on February 7, 2014, which was prior to the expiration of the three year limitations period (September 23, 2014).

Southwest Failed To Employ Cement Mason Apprentices.

Cement mason was the apprenticeable craft at issue in the Determination. With respect to the 1:5 ratio of apprentice hours to journeyman hours, the journeymen cement masons that Southwest employed on the Project worked a total of 2300.5 hours. However, Southwest employed no cement mason apprentices on the Project. Accordingly, the record establishes that Southwest violated Labor Code section 1777.5 and section 230.1.

There Were Only Two Applicable Committees in the Geographic Area.

Crown provided convincing evidence that there were two committees approved to train apprentices during the pendency of the Project in 2011: (1) San Diego AGC JAC; and, (2) San Diego CCM JAC. He testified credibly that those were the only two at the time, and he provided documentary proof that DAS did not approve the alleged third committee, SCLCM JAC, until after the accrual date of the Project. Grucela assumed that SCLCM JAC was approved at the time of the Project based solely on review of the DAS website on November 18, 2013, more than

two years after the accrual date of the Project.

Southwest Failed To Properly Request The Dispatch Of Cement Mason Apprentices.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (Regulation 230.1, subd.(a).) Southwest failed to introduce any documentary evidence that showed it complied with the regulation with respect to the dispatch of cement mason apprentices for the Project. While Crown credibly testified as to Southwest's efforts to comply with the requirement to request dispatch of cement mason apprentices from the two applicable committees, his testimony was insufficient to demonstrate actual compliance.

First, Crown did not testify that Southwest ever gave the San Diego AGC JAC a date certain on which cement mason apprentices should report for work. According to Southwest's CPRs, it first had employees working on the project on May 4, 2011. Crown testified that when he was requesting apprentices on or about the first of April 2011, he was doing so for work within the next 2 weeks. However, "work within the next 2 weeks" is not notice of the date on which apprentices should report for work.

Second, Crown could not remember what specific date was used on the DAS 142 he saw that was prepared by Corson to request dispatch of cement mason apprentices from San Diego CCM JAC. In addition, while Corson told Crown that she sent the DAS 142 to the San Diego CCM JAC, Crown produced no proof that Corson actually did so. Because Crown testified that Corson did not keep business records properly, it is hard to give credence to what Corson told Crown she did. However, even assuming a DAS 142 was sent to the San Diego CCM JAC, based on the testimony, there is no proof that the DAS 142 was completed properly.

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against Southwest under the following portion of section 1777.7, subdivision (a)(1):

A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding 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.

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by regulation 231, subdivision (h) 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.

Southwest "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for cement mason apprentices, and the record establishes that this violation was "knowingly committed." Crown testified that he was familiar with the requirement for use of apprentices on the Project, and familiar with the need to contact apprentice committees and request the dispatch of apprentices.

Southwest failed to meet its burden of proof by providing evidence of compliance with section 1777.5. In order to show that its failure to employ apprentices was due to circumstances beyond its control, Southwest had to demonstrate that it properly requested the dispatch of cement mason apprentices from the two applicable committees and that no apprentices were dispatched. The testimony of Crown on this point was essentially that Southwest had complied with the requirement to request dispatch of cement mason apprentices, that none were dispatched, but that Southwest lacked the documentary proof to establish compliance because of its own fault. Furthermore, Crown's testimony regarding compliance was not sufficient as discussed above. Since Southwest knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty upon Southwest on February 7, 2014. Southwest sought review of that penalty on February 11, 2014. Under the version of section 1777.7, in effect at both the time of the imposition of the penalty and the time of the request for review, subdivision (f)(2), requires the Director to decide the appropriate amount of the

penalty de novo.⁵ In making this decision, the Director is to consider the factors stated in section 1777.7, subdivision (f)(1), stated as follows:

- (A) Whether the violation was intentional.
- (B) Whether the party has committed other violations of Section 1777.5.
- (C) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.
- (D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
- (E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

Here, the factors favor a very low penalty. Under factor “A,” the evidence establishes that the violation was not intentional: Southwest made efforts to comply with the requirement to employ cement mason apprentices by requesting dispatch of apprentices but made technical mistakes in doing so. Under factor “B” there is no evidence that Southwest committed other violations of section 1777.5. Indeed, Southwest met its obligation under the law to employ carpenter apprentices on the Project. Southwest was not informed of the violation until after the Project was complete, so factor “C” is irrelevant to the consideration of penalty. There is some evidence of lost training opportunities for apprentices under factor “D” as there were 2300.5 hours of journeyman cement mason work on the Project, therefore, at a minimum, there should have been 460 hours of apprentice work. However, with respect to factors “D” and “E” the evidence is that one of the two applicable apprenticeship committees had no cement mason apprentices to dispatch, and the other union committee had never dispatched apprentices to Southwest, a non-union contractor, in the past. Finally, DLSE believed that the violations were a

⁵ There is no express declaration that the amendments to section 1777.7 that went into effect on January 1, 2015, apply to pending cases. Statutes apply prospectively unless there is a clearly expressed statutory intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) In this matter, application of the amendments to section 1777.7 changes the legal consequences to the affected contractor in that it precludes the affected contractor from a new review of the alleged conduct to determine whether a penalty is appropriate at all or whether it should be ordered to provide apprenticeship employment equivalent or whether the penalty should be less than that imposed. It alters the affected contractor’s burden on the issue of penalty by making the affected contractor establish that the Labor Commissioner abused her discretion where no such burden existed before. (*Id.*, at p. 938.) Moreover, equity requires that the affected contractor, who requested review in this matter prior to the change in the law, not be prejudiced by any delay in bringing this matter to hearing.

result of a good faith mistake by the contractor, and that Southwest was in compliance with other classifications, specifically the employment of carpenter apprentices, on the Project.

In applying these factors, the Director concludes that a daily penalty of \$5.00 is the appropriate penalty under Labor code section 1777.7. Going forward, Southwest should ensure that it completes the DAS 142 or equivalent properly and that it has competent staff, and oversight of that staff, to ensure compliance with the law.

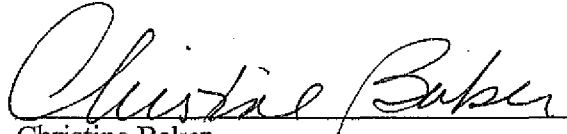
FINDINGS

1. The Determination of Civil Penalty was timely served By DLSE on Southwest.
2. There were two applicable apprenticeship committees in the geographic area of the Project in the craft of cement mason: (1) the San Diego Associated General Contractors Joint Apprenticeship Committee; and, (2) the San Diego County Cement Masons Joint Apprenticeship Committee.
3. Southwest violated Labor Code section 1777.5 by failing to employ cement mason apprentices on the Project in the minimum ratio required by the law.
4. Southwest failed to properly request dispatch of cement mason apprentices from the two applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
5. Under Labor Code section 1777.7, a penalty is assessed upon affected contractor Southwest General Contractors, Inc. in the amount of \$360.00, computed as \$5.00 per day for the 72 days that journeymen cement masons worked on the Project.

ORDER

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

Dated: 6/22/2015


Christine Baker
Director of Industrial Relations