STATE OF CALIFORNIA
DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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Attorney for the Labor Commissioner

BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

In the matter of the Debarment Proceeding Against: AYODEJIA A. OGUNDARE, individually and dba PACIFIC ENGINEERING COMPANY Respondent.	**Case No.: SAC 1039** **DECISION RE DEBARMENT OF RESPONDENTS FROM PUBLIC WORKS PROJECT** **[Labor Code § 1777.1]**

The attached Proposed Statement of Decision of Hearing Officer Edna Garcia Earley, debarring AYODEJIA A. OGUNDARE, individually and dba PACIFIC ENGINEERING COMPANY, from working on public works projects in the State of California for one year, having been remanded to the trial court pursuant to the attached Opinion of the Court of Appeal of the State of California, Fifth Appellate District, Case No. F061162, and the time for issuance of the order by the trial court affirming DLSE's administrative decision having run, is hereby adopted by the Division of Labor Standards Enforcement as the Decision in the above-captioned matter.

This Decision shall become effective immediately.

IT IS SO ORDERED.

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California

Dated: 5-15-13

JULIE A. SU
State Labor Commissioner

CERTIFICATION OF SERVICE
(C.C.P. 1013)

In the matter of the Debarment Proceeding Against Ayodejia Ogundare dba Pacific Engineering Company
Case No: SAC 1039

I, Ramina German, hereby certify that I am employed in the County of Sacramento, over 18 years of age, not a party to the within action, and that I am employed at and my business address is: DIVISION OF LABOR STANDARDS ENFORCEMENT, Legal Unit, 2031 Howe Avenue, Suite 100, Sacramento, California 95825.

On May 15, 2013, I served the following documents:

- **Decision re Debarment of Respondents from Public Works Project**

A. First Class Mail - I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. mail in Sacramento, California, for collection and mailing to the office of the addressee on the date shown below following ordinary business practices.

B. By Facsimile Service - I caused a true copy thereof to be transmitted on the date shown below from telecopier (916) 263-2920 to the telecopier number published for the addressee.

C. By Overnight Delivery - I caused each document identified herein to be picked up and delivered by Federal Express (FEDEX)), for collection and delivery to the addressee on the date shown below following ordinary business practices.

D. By Personal Service - I caused, by personally delivering, or causing to be delivered, a true copy thereof to the person(s) and at the address(es) set forth below.

Type of Service	Addressee
A	Ayodejia Ogundare Dba Pacific Engineering Company 6310 Stewart Way Bakersfield, CA 93308

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 15, 2013, at Sacramento, California.

R. German
Ramina German
Legal Secretary

STATE OF CALIFORNIA
Department of Industrial Relations
Division of Labor Standards Enforcement
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Attorney for the Labor Commissioner

BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT

DEPARTMENT OF INDUSTRIAL RELATIONS

FOR THE STATE OF CALIFORNIA

In the matter of the Debarment Proceeding Against: AYODEJIA A. OGUNDARE, individually and dba PACIFIC ENGINEERING COMPANY, Respondent.	Case No.: SAC 1039 **PROPOSED STATEMENT OF DECISION RE DEBARMENT OF RESPONDENTS FROM PUBLIC WORKS PROJECTS** **[Labor Code §1777.1]** Hearing Date: April 30, 2009 Time: 10:00 a.m. Hearing Officer: Edna Garcia Earley

Debarment proceedings pursuant to Labor Code §1777.1 were initiated by the Division of Labor Standards Enforcement, State Labor Commissioner ("DLSE"), by the filing of a *Statement of Alleged Violations* against the following named Respondent: AYODEJIA A. OGUNDARE, individually and dba PACIFIC ENGINEERING COMPANY.

Respondent was duly served with the Notice of Hearing, Statement of Alleged Violations and Notice of Hearing on December 22, 2008.

The hearing on the alleged violations was held on April 30, 2009 in Bakersfield, California. Edna Garcia Earley served as the Hearing Officer. David D. Cross appeared on behalf of Complainant, the Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California. Daniel K. Klingenberger, Esq. of Dowling Aaron Keeler, appeared on behalf of Respondent AYODEJIA A. OGUNDARE, individually and dba PACIFIC ENGINEERING COMPANY, (hereinafter, collectively referred to as "OGUNDARE"). Present as a witness for Complainant was Deputy Labor Commissioner Sherry Gentry and worker, Miguel Ibarra. Present as witnesses for Respondent OGUNDARE were: AYODEJIA A. OGUNDARE, workers Garlin Frank, Frederick Wright, Harlen Johnson, Javier Cabrera, and Alonzo Cleveland Vareen.

The hearing was tape recorded. The witnesses took the oath and evidence was received. At the conclusion of the hearing, the matter was taken under submission.

FINDINGS OF FACT

A. The Parties

Complainant is the Department of Industrial Relations, Division of Labor Standards Enforcement, also known as the State Labor Commissioner, (hereinafter, referred to as "DLSE"). Deputy Labor Commissioner Sherri Gentry, (hereinafter, referred to as "Gentry"), who has worked in the Public Works Unit of the DLSE for

approximately 12-13 years, was the investigating deputy on all projects at issue in this case.

OGUNDARE is a licensed contractor dba PACIFIC ENGINEERING COMPANY under Contractor's License #710322, based out of Bakersfield, California and performs mainly concrete (flat) and underground (water, soil, and sewer) work. OGUNDARE testified that 99% of the projects his company works on are public works jobs. Between 2001 and the present, he has performed over 60 public works projects. Prior to becoming the owner of PACIFIC ENGINEERING COMPANY in 2002, OGUNDARE owned a company called Energy Tek, Inc.

B. The Projects

In 2007 and 2008, the DLSE conducted several investigations on public works projects on which Subcontractor, OGUNDARE worked. As a result of those investigations on these projects, the DLSE found various violations of the public works laws, which are the subject of the instant debarment proceedings.

1. Delano

On October 16, 2008, the DLSE issued a Civil Wage and Penalty Assessment ("CWPA") against OGUNDARE on a public works project awarded by the City of Delano known as the "Water & Sewer Lines and Sidewalk at Various Locations – 2007" project, (hereinafter, referred to as the "Delano project"). Hydrotech, Inc. dba Nevada Hydrotech, Inc., A Nevada Corporation, ("Hydrotech") served as the Prime Contractor on this project. In conducting this investigation, Gentry testified that she interviewed workers on this project, reviewed certified payroll records and copies of cancelled

checks, and obtained contract documents. As a result of her investigation, Gentry issued a CWPA to OGUNDARE on this project for:

> Willful violations of public work law[sic] in violation of Labor Code Sections 1771, 1774 for failure to pay required prevailing wages to any workers employed in the execution of this public works; certified payroll records were falsified; hours were not reported; workers were not reported; wages were not paid as reported; overtime work was not reported in violation of 1815; Saturday work and holiday work not reported, and if it was reported it was not paid as specified in the applicable prevailing wage determination; violation of Section 1777.5 for failure to make required training fund contributions.

The CWPA included findings that $148,188.53 in wages were due and assessed $50,800.00 in penalties pursuant to Labor Code §§1775 and 1813.

a. Violations of Labor Code Sections 1771 and 1774

In support of DLSE's conclusion that workers were not paid prevailing wages on this project, a worker on this project, Miguel Ibarra, ("Ibarra"), testified that he always received $15.00 per hour regardless of the hours he worked and that he often worked more than 8 hours in a day. Ibarra admitted that he did not maintain time records of his hours even though he was given time sheets, however, he presented a copy of paycheck #10170 from Pacific Engineering Company, dated August 4, 2007, in the amount of $915.00 to support his testimony that he was paid only $15.00 per hour on this project, which was substantially less than the amount he was required to be paid on the project. The following notation is typed on the memo section of the check: "Delano (61) hours." Ibarra testified that he did in fact work 61 hours the week of August 4, 2007, as indicated on the copy of the check he produced. A review of two certified payroll records

submitted by OGUNDARE for the week ending August 4, 2007 on the Delano project, list Ibarra as working 25 hours at the prevailing wage rate of $36.10 per hour as a "Laborer" and earning $902.50 gross and $746.71 net. The check number listed on one of the two certified payroll records for Ibarra for the week ending August 4, 2007 on this project is also #10170. OGUNDARE provided no evidence to dispute or explain why the copy of check #10170 which Ibarra presented at the hearing showed payment of $915.00, reflecting 61 hours worked and did not match the information listed on the certified payroll records.

Gentry testified that she interviewed and documented in her "Legal Referral and Case Summary," other workers who worked on this project and who informed her they were also paid at rates far below the prevailing wage rate required for their classification. For instance, she interviewed Felipe Martinez ("Martinez") who stated that he worked 9 hours per day except weekends and received $25.00 per hour. The certified payroll report for the week ending August 4, 2007, lists Martinez as receiving $39.10 per hour as a Laborer, however, no records were submitted by DLSE showing that he was, in fact, being paid $25.00 as he stated to Gentry. Benito Rubio, ("Rubio"), another worker on this project, told Gentry that he always received $25.00 per hour yet the certified payroll records submitted for the week ending September 22, 2007 show him earning $40.81 per

hour. Again, as with Martinez, no records were submitted by DLSE showing that Rubio did in fact earn $25.00 as he told Gentry.[1]

b. Violation of Labor Code Section 1815

Gentry testified that overtime was worked but not reported on the certified payroll records for this project. Despite testifying that she had records to substantiate that overtime was worked, including Inspector Reports, none of these supporting records were produced at the hearing by DLSE. The only records produced by the DLSE were certified payroll records for the weeks ending July 13, 2007, July 17, 2007, August 4, 2007 and September 22, 2007. Gentry also referenced (but did not produce as evidence) certified payroll records for the week ending September 8, 2007 to show that workers who were reported on the certified payroll records as working on Labor Day, were not paid at the holiday rate.

OGUNDARE testified that all workers on this project were paid the prevailing wage rates required. In addition, workers Frederick Wright, Javier Cabrera, and Alonzo Cleveland Vereen, testified that they were each paid the correct prevailing wage rates for their classification, for all hours worked on this project.

c. Violation of Labor Code Sections 1776

Gentry testified that she received at least three different sets of certified payroll reports from OGUNDARE for this project. One report was received by OGUNDARE on

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[1] It appears from Pages Two and Three of Gentry's "Legal Referral and Case Summary" for this project, that Rubio provided her with copies of some of his checks but none were submitted as evidence at this hearing by the DLSE.

June 30, 2008, one report was received in the Sacramento DLSE office pursuant to a records request by the DLSE, and another report was submitted by OGUNDARE'S accountant. A review of three separate certified payroll records for the week of September 22, 2007 for this project showed that addresses and social security numbers for some of the workers were not accurately reported. For instance, worker Enrique Castro appears on the first set of certified payroll records but not the second and then appears again on the third set. Additionally, his social security number on the first set is different than that listed on the second set. Another worker, Felipe Martinez, also appears on the first and third sets but has different addresses and social security numbers. Several other workers have different addresses or social security numbers or both from set to set.

In addition to the numerous discrepancies appearing on the different sets of certified payroll records, Gentry also testified that she received certified payroll records for this project for work performed through September, 2007, although her investigation revealed that the work continued until January 15, 2008. On cross examination, Gentry admitted that none of the allegations reported on the CWPA and supporting documents such as the "Labor Code Section 1775 Penalty Review" and "Legal Referral and Case Summary" she prepared, were actually proven in a hearing. In other words, no findings have been made by a hearing officer or court on the alleged violations. Rather, a request for review was filed by OGUNDARE after issuance of the CWPA but, at the time of this hearing, the parties were in settlement discussions. Gentry also admitted that some of the certified payroll records she received showed that workers were overpaid. But, Gentry

explained that she did not think the certified payroll records were accurate so therefore, it was very unlikely that workers were overpaid.

OGUNDARE testified that he did not personally prepare any of the certified payroll records at issue. Rather, he had his staff prepare the records. OGUNDARE explained that when business was slow, he had to lay off many of his office staff. Likewise, when business picked up, he had to rehire and retrain new office staff, some of which were not always experienced in preparing certified payroll records. Eventually, OGUNDARE hired an outside accountant from Bakersfield, James O'Hearn, ("O'Hearn"), whom he used on an "as needed" basis when his office staff was too busy to handle preparation of the certified payroll records.

OGUNDARE testified that weekly certified payroll records were prepared which were submitted to his Prime Contractor, Hydrotech. At some point, OGUNDARE and Hydrotech had a dispute which resulted in Hydrotech withholding payment to OGUNDARE and consequently, OGUNDARE ceased to work on the Delano project and left the project. OGUNDARE testified that after Gentry requested copies of the certified payroll records, he attempted to obtain them from Hydrotech but Hydrotech, on advice from its attorneys, refused to communicate further with OGUNDARE. Consequently, OGUNDARE had his office staff recreate the certified payroll records from whatever records they had available and submit them to Gentry. OGUNDARE testified that he was informed that there was a 5 cent rate increase for one of the classifications being used on this project. After learning this, OGUNDARE instructed his staff to revise the certified payroll records to reflect this rate increase and to resubmit to Gentry. Per

OGUNDARE, Gentry informed him that the certified payroll records he submitted to her were confusing. As a result, OGUNDARE had his accountant, O'Hearn, contact Gentry and prepare certified payroll records that complied with the Labor Commissioner's requirements. Unbeknownst to OGUNDARE, during this period of time, Hydrotech also submitted their copies of the certified payroll records to Gentry. OGUNDARE argued that any discrepancies on the certified payroll records were simply mistakes and were not intended to confuse or defraud the Labor Commissioner or anyone else.

In response to the allegation that OGUNDARE provided certified payroll records through September 2007 only, despite working through January 2008, OGUNDARE testified that after he pulled out of the Hydrotech job in September 2007, the City of Delano contacted him to construct three manholes. OGUNDARE argued that this job was separate and apart from the contract he had with Hydrotech and that is why certified payroll records were not submitted on the Hydrotech-Delano project for workers who worked on this separate manhole project in January, 2008. OGUNDARE further argued that had it been within the scope of the Hydrotech- Delano project, he would not have agreed to perform the work since he still had not been paid by Hydrotech.

2. Madera

On November 25, 2008, Gentry issued a CWPA against OGUNDARE on a public works project awarded by the City of Madera known as the "Madera Youth Center" project, (hereinafter, referred to as the "Madera project"). Meadows Constructions Services, Inc., A California Corporation, served as the Prime Contractor on this project. In conducting this investigation, Gentry testified that she requested copies of certified

payroll records, cancelled checks, time cards and subcontractor agreements from OGUNDARE but received no response. Gentry also testified that she received a partial set of payroll records from the prime contractor and received some Inspector Reports. As a result of her investigation, Gentry issued the CWPA to OGUNDARE on this project for:

> Violation of Labor Code Sections 1771, 1774, for failure to pay prevailing wages to 17 workers employed as Laborers, Masons, and an Operating Engineer, failure to pay travel time, mileage and subsistence to Laborers; failure to pay overtime pursuant to Section 1815; violation of Section 1777.5 for failing to make required training fund contributions; Violation of Section 1776 for failure to provide and furnish accurate payroll records showing the straight time and overtime hours worked each day and week and the actual per diem wages paid to each worker, and provide such records to the DLSE upon request in 10 days – partial incomplete and inaccurate records provided by prime contractor but these records were determined to be falsified - workers did not receive the wages reported and contractor willfully defrauded those workers and created false records as a subterfuge to avoid detection - penalties assessed at $425/day for each day of non-compliance from 11/4/08 to 11/25/08.

The CWPA included findings that $77,045.32 in wages were due and assessed $10,475.00 in penalties pursuant to Labor Code §§1775 and 1813 and $8,925.00 in penalties pursuant to Labor Code §1776.

a. Violation of Labor Code Sections 1771 and 1774

Gentry testified that her investigation concluded that 17 workers were not paid the prevailing wage rate for their work in the various classifications on this project. In support of this testimony, DLSE produced Gentry's "Legal Referral and Case Summary" for this project where she indicates that Laborers were paid $4.00-$6.00 more than what

was required, Cement Masons were paid a variety of hourly wages ranging from $43.46 to $46.45 and Operating Engineers were paid $52.03, although the wage increased to $53.60 on the last date reported. On cross examination, Gentry testified that she did not believe Laborers on this project were paid more than required because she was never shown any proof that OGUNDARE paid his workers *any* wages.

OGUNDARE testified that the workers on this project were paid their required prevailing wage rates. Additionally, he explained that on every non-union public works project that he performs work, the unions always come out to the job site to educate the workers on the prevailing wage rates they are required to be paid and also attempt to get the workers to join the union. Garlin Frank, ("Frank"), the Foreman for the Madera project, testified that he observed the union talk to the workers on this project about the prevailing wage rates they were entitled to be paid. Additionally, Frank testified he was responsible for signing the checks and that all workers were paid for all hours worked on this project, at the prevailing wage rate required for their classification. Workers Frederick Wright, Harlen Johnson, Javier Cabrera, and Alonzo Cleveland Vereen, also testified they were properly paid for all work they performed on this project.

b. Violation of Labor Code Section 1815

Gentry testified that she compared those certified payroll records she was able to obtain from the Prime Contractor on this project with the certified payroll records obtained on another public works project in the City of Exeter, ("Exeter project"), in which OGUNDARE was serving as the Subcontractor and which was also going on at the same time as the Madera project. A comparison of the two certified payroll records

revealed that many times, workers were reported as working 8 hours on the Madera project and 8 hours on the Exeter project, which were an hour apart, without being paid any overtime. The DLSE submitted records showing that on July 18, 2008, Laborer, Javier Perez, ("Perez"), worked 8 hours on both projects for a total of 16 hours, yet no overtime was reported on either certified payroll record. Although Gentry made a chart which she included in her "Legal Referral and Case Summary" of other instances where workers were reported as working on both projects more than 8 hours in a day but no overtime was reported on the certified payroll records for either project, the DLSE did not submit as evidence at this hearing certified payroll records to support Gentry's chart for the other workers, as it did for Perez.

OGUNDARE testified that any instance where a worker was shown working 8 hours on the Madera project and 8 hours on the Exeter project was clearly a clerical error.

c. Violation of Labor Code Section 1776

Gentry testified that she did not receive any certified payroll records from OGUNDARE for this project despite numerous requests. Additionally, as discussed above, Gentry testified that her review of the partial certified payroll records (which she received from the Prime Contractor) compared to the partial certified payroll records received on the Exeter project, (which she received from the Awarding Body), established that the records were falsified. Specifically, workers were listed on the certified payroll records for each project, the aggregate hours for both projects exceeded 8 hours per day, yet the workers were not paid overtime on either project. Lastly, Gentry testified that according to the Inspector Reports for this project, OGUNDARE

consistently underreported workers. The DLSE did not submit the Inspector Reports into evidence, however, to substantiate this claim.

OGUNDARE testified that he provided certified payroll records to the Labor Commissioner and subsequently received a call from the Prime Contractor who informed him that it was notified by DLSE that such records had not been submitted by OGUNDARE. After receiving this call from the Prime Contractor, OGUNDARE testified, that he sent copies to the Prime Contractor, the City of Madera and attempted to send another copy to Gentry but she notified him that she had already made her decision with regard to her investigation on this project.

d. Failure to Pay Travel Time, Mileage and Subsistence Compensation

Gentry testified that she concluded OGUNDARE failed to pay his workers travel time, mileage and subsistence compensation on this project, as required, because the partial certified payroll records she obtained from the Prime Contractor did not list any amounts as having been paid to the workers for travel time, mileage reimbursement or subsistence compensation. On cross examination, however, Gentry admitted that travel time would not be required to be paid and reported on the certified payroll records for those employees classified as Cement Masons and would only be required to be paid to workers classified as Laborers unless such workers were paid their regular rate for the time spent driving to and from the job site. Likewise, Gentry admitted that mileage would not be required to be paid to the workers if the workers were driven to the different job sites in company trucks. Lastly, Gentry agreed that travel subsistence compensation

would not be required to be paid to the workers if the collective bargaining agreement did not require it or if OGUNDARE paid for it himself.

OGUNDARE testified that workers are provided transportation on all jobs and are not expected to take their own cars. Garlin Frank, Superintendent on this project, testified that he drove the company truck on this project and was reimbursed for all expenses incurred.

3. Exeter

On December 3, 2008, Gentry issued a CWPA against OGUNDARE on a public works project awarded by Exeter Union Elementary School District in the County of Tulare known as the "Multi-Use and Administration Building at Wilson School" project, (hereinafter, referred to as the "Exeter project"). Davis Moreno Construction, Inc., a California Corporation, ("Davis Moreno") served as the Prime Contractor on this project. In conducting the investigation on this project, Gentry testified that she requested certified payroll records from OGUNDARE and that he failed to respond. Gentry received partial certified payroll records for this project from the Awarding Body, Exeter Union Elementary School District. Gentry testified that she was unable to interview workers because OGUNDARE provided her with incorrect addresses for the workers. As a result of her investigation, Gentry issued the CWPA to OGUNDARE on this project for:

> Violation of Labor Code Sections 1771, 1774 for failing to pay prevailing wages to 24 workers employed as Laborers, Masons, and Operating Engineers; failure to pay travel time, mileage and subsistence to Laborers and travel reimbursement to Masons; violation of Section 1777.5 failure to make required training fund

contributions; Section 1776 for failure to provide accurate payroll records showing the straight time and overtime hours worked each day and week and the actual per diem wages paid to each worker and failure to provide those records upon request to DLSE, partial records were provided by Prime Contractor, but records were incomplete, do not report all workers, and were falsified – workers did not receive the wages reported and contractor willfully defrauded those workers and created false records as a subterfuge to avoid detection; penalties assessed at $600.00 per day for each day of non-compliance from 11/13/08 to 12/3/08.

The CWPA included findings that $84,551.70 in wages were due and assessed $12,675.00 in penalties pursuant to Labor Code §§1775 and 1813 and $12,000.00 in penalties pursuant to Labor Code §1776. OGUNDARE failed to request review of this CWPA pursuant to Labor Code §1742 and consequently, judgment was entered on the CWPA on February 11, 2009.

a. Violation of Labor Code Section 1775

Gentry first testified that she concluded the workers were not paid on this project *at all* because she was not provided with any proof in the form of cancelled checks to substantiate the partial certified payroll records she received from the Awarding Body. Gentry then testified that she concluded workers were paid straight time rates for work performed on Saturdays, *if paid*, because the partial certified payroll records indicate they worked on July 12, 2008, which was a Saturday. On cross, however, Gentry admitted that she did not interview OGUNDARE or any workers to see if they did, in fact, work on Saturdays on this project. On the section "Audit Notes" included in the "Legal Referral and Summary" Gentry prepared for this project, she noted for August 2, 2008 that

Laborers Walker and Villa were paid at the Cement Mason rate but admitted on cross examination that the Cement Mason rate is actually higher than the Laborer rate.

Gentry testified that records received from Prime Contractor Davis Moreno, showed that work was performed beyond September 4, 2008, on this project by four union workers but not reported on the partial certified payroll records she received from the Awarding Body after OGUNDARE failed to submit them to DLSE. DLSE provided copies of records, including copies of checks, showing that Davis Moreno paid the union workers who performed work after September 4, 2008 on this project, because, as Davis Moreno claimed, OGUNDARE failed to pay them. Letters from Davis Moreno to DLSE also state that the four union workers were OGUNDARE'S employees.

OGUNDARE testified that Davis Moreno was a signatory to the Laborer's union and explained that whenever a union prime contractor is awarded a job, all subcontractors working for it must also be union contractors. In order to comply with this requirement, OGUNDARE signed a collective bargaining agreement with the Cement Mason union. When the Laborer's union learned that OGUNDARE had signed with the Cement Mason union, representatives of the Laborer's union showed up on the job site and demanded that OGUNDARE sign an agreement with the Laborer's union. As a resolution to the problem, Davis Moreno offered to bring the four Laborer union workers to help on the project. Per OGUNDARE, OGUNDARE paid them for the work they performed while he was still on the project. After OGUNDARE left the project, however, Davis Moreno brought them back to perform additional work for Davis Moreno. Subsequently, a dispute arose as to who employed the 4 union workers. OGUNDARE testified that the parties

reached an agreement that Davis Moreno would compensate them for the work performed and explained that this was why OGUNDARE did not include them in his certified payroll records.

b. Violation of Labor Code Section 1813

As with the Madera project, Gentry prepared a chart included in her "Legal Referral and Case Summary" showing those instances where workers were shown working 8 hours on the Madera project and 8 hours on the Exeter project, but no prevailing overtime being reported on either set of partial certified payroll records she received. For instance, on August 12, 2008, Laborer Juan Ramirez, ("Ramirez"), is reported as working 8 hours on the Madera project, 8 hours on the Exeter project and 7 hours on another project known as the Beardsley project, for a total of 23 hours, yet no prevailing overtime is reported on the partial certified payroll records for either the Madera or Exeter projects. On August 11, 2008, Ramirez is shown working 8 hours on the Beardsley project and 8 hours on the Madera project with no prevailing overtime being reported on the Madera partial certified payroll records. Lastly, on August 13, 2008, Ramirez is reported working 8 hours on the Madera project and 8 hours on the Exeter project, again with no prevailing overtime being reported on the certified payroll records for either project.

Again, OGUNDARE testified that workers showing up on two and occasionally three certified payroll reports are clearly clerical errors. Moreover, he testified as with other projects, his workers were paid all prevailing wages required to be paid. Several workers testified they were paid all prevailing wages due on this project.

c. Violation of Labor Code Section 1776

Gentry testified that she requested certified payroll records from OGUNDARE but did not receive any response. As a result, Gentry received a partial set of certified payroll records from the Awarding Body which she used to compare with partial certified payroll records she received on the Madera project. Based on her review of both sets of partial certified payroll records, Gentry determined that they were falsified since they included workers showing up on both sets for jobs on the same day and no prevailing overtime being reported. Gentry also determined the partial certified payroll records for this project were false because they omitted the four union workers who were eventually paid by Prime Contractor Davis Moreno.

OGUNDARE testified that he turned over certified payroll records to the DLSE but did not specify which weeks he submitted and did not provide any evidence to substantiate his testimony.

d. Failure to Pay Travel and Subsistence Compensation

Gentry testified that OGUNDARE failed to pay travel time and mileage subsistence compensation to Laborers and Masons on this project. On her "Legal Referral and Case Summary," Gentry wrote: "There is no evidence that contractor paid for lodging, or subsistence, or any mileage. From my knowledge, there are no company vehicles and in prior CWPA investigation, he rarely paid for fuel." When asked on cross examination about this statement, Gentry admitted that her conclusion that OGUNDARE did not have any company cars and rarely paid for fuel was based on interviewing one

worker, Javier Solomon. Gentry also testified she did not interview OGUNDARE to determine if he owned company cars.

Gentry explained that she concluded in her investigation of this project that the required $60 per day subsistence payments were not made by OGUNDARE based on the fact they were not reported on the partial certified payroll records. OGUNDARE, however, testified that if the workers did not spend the night in hotels or if OGUNDARE paid the cost of the hotels, he would not be required to make the subsistence payment and report it on the certified payroll reports.

C. Past Dealings with OGUNDARE

In 2001, Gentry issued a Notice of Payment Due on a job OGUNDARE'S then company, Energy Tek, Inc., was working on as both the Prime and Sub-Contractor for the City of Arvin. The Notice of Payment Due was issued for underpayment due to workers being misclassified. After Energy Tek, Inc. conducted a self audit, it was determined that the amount of wages owed was $71.43, which Energy Tek, Inc. paid.

In 2002, Gentry testified that she issued a CWPA to Energy Tek, Inc. for failure to pay training fund contributions and failure to pay the prevailing wage rate for the reported work classification on the New Charter School/Sandstone Education Center – Site Concrete project, on which it served as the Subcontractor. Energy Tek, Inc. denied the allegations, settled the case with the DLSE and paid pursuant to the settlement reached.

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CONCLUSIONS OF LAW

DLSE seeks to debar OGUNDARE for a period of three (3) years based on its position that OGUNDARE "willfully" violated the public works laws with "intent to defraud." OGUNDARE admits there were clerical mistakes and problems related to the three projects at issue, but argues that DLSE failed to provide evidence of fraud or intentional conduct to support debarring OGUNDARE for three (3) years.

Labor Code §1777.1 provides:

> (a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter **with intent to defraud**, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor, or subcontractor has any interest is ineligible for a period of not less than one year or more than three years to do either of the following:
>
> (1) Bid or be awarded a contract for a public works project.
>
> (2) Perform work as a subcontractor on a public works project.
>
> (b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be **in willful violation** of this chapter, except Section 1777.5, the contractor or subcontractor or a firm corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:
>
> (1) Bid on or be awarded a contract for a public works project.

(2) Perform work as a subcontractor on a public works project.

California Code of Regulations, Title 8, Section 16800 defines "Intent to Defraud" as "the intent to deceive another person or entity, as defined in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind."

Under Labor Code §1771.1(c), "A willful violation occurs when 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."

A. Underpayment of the Required Prevailing Wage Rates.

Each of the three CWPAs issued by the DLSE in the Delano, Madera and Exeter projects, include allegations that OGUNDARE failed to pay prevailing wages and prevailing overtime, as required. Through the testimony of Laborer Miguel Ibarra, the DLSE established that OGUNDARE underpaid at least one worker on the Delano project. Specifically, Ibarra was required to be paid at least $39.10 for his classification as a Laborer. The certified payroll records submitted to the DLSE, under penalty of perjury, list Ibarra as receiving the required amount for the week ending August 4, 2007. Ibarra, however, testified he was always paid $15.00 per hour on this project and submitted a copy of a paycheck he received for the week ending August 4, 2007 which shows that he earned $915.00 reflecting 61 hours of work paid at $15.00 per hour. While Gentry testified that other workers informed her that like Ibarra, they too, were not paid

the prevailing wage rate for work performed on the Delano project, DLSE failed to provide any evidence to substantiate the statements made to Gentry by these individuals. OGUNDARE, on the other hand, provided testimony of three individuals who also worked on this project and all three stated under oath that they were paid prevailing wages.

Gentry testified about non-payment of prevailing wages, prevailing overtime and holiday pay on all three projects but, aside from Miguel Ibarra's testimony, the DLSE failed to put forward evidence to substantiate these allegations. The evidence put forward by DLSE consisted of Gentry reading from the three "Legal Referral and Case Summary" reports she prepared on each project and a few certified payroll records received in each of the three projects. While Gentry's "Legal Referral and Case Summary" reports were detailed and thorough and she appeared to have the supporting documents in her possession, DLSE did not put forward the documents that were analyzed by Gentry and used in creating these reports. For example, Gentry included charts in her reports that she compiled comparing partial certified reports received by the Prime Contractor in the Madera project with partial certified reports received by the Awarding Body in the Exeter job to show that workers were listed on both sets on the same day, yet no prevailing overtime was reported as paid. DLSE presented records to substantiate these findings for one worker on the Madera project, Laborer Javier Perez, and one worker on the Exeter job, Laborer Juan Ramirez, both for one week only. Records were not put into evidence, however, for any of the other workers DLSE alleged worked but were not paid prevailing overtime.

Gentry also testified and documented on her "Legal Referral and Case Summary" report on the Delano project that workers were not paid holiday pay but was able to show only one instance where this was the case, Labor Day 2007.

Gentry concluded that some union workers on the Exeter job were paid by Prime Contractor Davis Moreno because OGUNDARE failed to pay them or report them on his certified payroll records. It appears, though, that OGUNDARE and Davis Moreno had a dispute about who employed these union workers. Without any of the union workers present at the hearing to testify as to who employed them, the evidence is insufficient to make a determination one way or the other.

In sum, the evidence of underpayment of the required prevailing wage rates which was presented by the DLSE at the hearing shows that one worker, Ibarra, was not paid the prevailing wage rate, two Laborers, Perez and Ramirez, appear to have worked overtime but no prevailing overtime was paid or reported and work that was performed on Labor Day 2007 was paid at the straight rate.

Ibarra's testimony that he was always paid $15.00 per hour on the Delano project and worked 61 hours during the week ending August 4, 2007 is credible especially since he provided a copy of a paycheck corroborating his testimony. OGUNDARE knew that payment to this individual was not in compliance with the public works laws as evidenced by the fact that the check shows payment at $15.00 per hour for 61 hours worked yet OGUNDARE submitted to the DLSE certified payroll records listing the correct prevailing wage rate that should have been paid and listing only 25 hours worked for the week ending August 4, 2007. In this regard, OGUNDARE "willfully" violated

the public works laws. OGUNDARE also violated the public works laws with "intent to defraud" evidenced by the fact that he put the required amount of payment on the certified payroll records he signed under penalty of perjury knowing that he paid a much lower rate.

Likewise, the records presented at the hearing establish that Laborers Javier Perez (on the Madera project) and Juan Ramirez (on the Exeter project), worked over 8 hours but did not receive prevailing overtime pay. Consequently, we find that OGUNDARE "willfully" failed to pay overtime in these instances because he should have known that prevailing overtime was due both workers if they worked over 8 hours. "Intent to defraud" is also established here since it appears that OGUNDARE was attempting to split the total hours worked by Perez and Ramirez, so as not to have to pay or report prevailing overtime that was in fact worked by both workers.

B. Payroll Records

The evidence presented by the DLSE at the hearing unquestionably established that OGUNDARE violated Labor Code §1776 on all three projects. Labor Code §1776(a) provides:

> Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:
>
> (1)The information contained in the payroll record

is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

OGUNDARE does not deny there were substantial problems regarding the certified payroll records but argues that the violations were not done with "intent to defraud" but were clerical errors made by his inexperienced staff. The evidence does not support a finding that the violations were done with "intent to defraud" but it does support a finding that the violations were "willful" within the meaning of Labor Code §1771.1(c). OGUNDARE testified that 99% of the jobs his company performs are public works jobs. Additionally, since 2001-2002 when he operated Energy Tek, Inc., his company has performed over 60 public works projects. The evidence presented by the DLSE established that certified payroll records were submitted to the DLSE under penalty of perjury with incorrect social security numbers, incorrect addresses, incorrect hours, and incorrect pay. OGUNDARE claims that his staff's lack of experience, his attempt to provide Gentry with accurate payroll records in a form acceptable to the DLSE, and ultimately, his hiring of an outside accountant, resulted in four sets of certified payroll records being submitted to the DLSE on the Delano project. It is not plausible for a contractor, with as many years of experience working in public works projects, as OGUNDARE, to claim inexperience in preparing certified payroll records and to repeatedly submit certified records without carefully reviewing their accuracy. OGUNDARE knew or should have known that the certified payroll records he submitted on all three projects were not accurate. A person's knowledge of the law is imputed to

him and an unlawful intent may be inferred from the doing of an unlawful act. *People v. McLaughlin* (1952) 111 Cal.App.2d 781. A contractor is not excused from complying with Labor Code §1776 during periods when the company is busy or is working on two projects at the same time such as the Madera and Exeter projects. A contractor who is working on a public works project must always ensure that the payroll records he is certifying as accurate are in fact accurate, even if it means using an outside accountant at all times. In other words, a contractor must do all that he can to ensure he complies with the provisions of Labor Code §1776(a).

OGUNDARE'S violation of Labor Code §1776(g), that is, the failure to submit certified payroll records within 10 days of written notice by the DLSE requesting the records, is also inexcusable. OGUNDARE knew or should have known that records requested by the DLSE were required to be turned over to her within 10 days of the DLSE's written request, especially given the number of years his company has been performing public works jobs. OGUNDARE'S failure to comply with Gentry's request for records constitutes a "willful" violation of Labor Code §1776(g).

C. Travel and Subsistence Compensation

The evidence presented by DLSE is insufficient to establish a finding that OGUNDARE violated the travel and subsistence requirements on any of the three projects at issue. Gentry concluded that OGUNDARE violated the various travel and subsistence requirements because the partial certified payroll records she received (from the Prime Contractor on the Madera project and the Awarding Body on the Exeter project) did not list payments that could be attributed to either or both requirements. On

cross examination, however, Gentry conceded that such payments would not have to be made and reported if OGUNDARE provided company trucks for the workers, paid travel time or paid for hotel stays when workers were required to stay overnight at a job location. And, in fact, several workers testified under oath that OGUNDARE provided company trucks and paid them all prevailing wages and benefits due.

CONCLUSION

Based on the evidence presented at the hearing, we find that OGUNDARE "willfully" and with "intent to defraud" violated the public works laws in not paying prevailing wages to one worker, Laborer Miguel Ibarra and prevailing overtime to two workers, Laborers Javier Perez (on the Madera project) and Juan Ramirez (on the Exeter project). Although the DLSE argued that OGUNDARE had a pattern and practice of failing to pay prevailing wages and prevailing overtime on the three projects at issue as well as on previous projects performed under the company name, Energy Tek, Inc, the evidence simply was not presented at this hearing to establish this was the case.

We also find that OGUNDARE "willfully" violated the provision of Labor Code §1776 by submitting certified payroll records to the DLSE, Prime Contractors, Awarding Bodies and others, that were not accurate.

"Although debarment can have a severe economic impact on contractors, it 'is not intended as punishment. It is instead, a necessary means to enable the contracting governmental agency to deal with irresponsible bidders and contractors, and to administer its duties with efficiency.'" *Southern California Underground Contractors, Inc. v. City of*

San Diego (2003) 108 Cal.App.4th 533, 542. Accordingly, we debar OGUNDARE for a period of one (1) year.

ORDER OF DEBARMENT

In accordance with the foregoing, it is hereby ordered that Respondent AYODEJIA A. OGUNDARE, individually and dba PACIFIC ENGINEERING COMPANY, shall be ineligible to, and shall not, bid on or be awarded a contract for a public works project, and shall not perform work as a subcontractor on a public work as defined by Labor Code §§1720, 1720.2 and 1720.3, for a period of one (1) year, effective September 21, 2009. A one year period is appropriate under these circumstances where Respondent "willfully" and with "intent to defraud" failed to pay Laborer Miguel Ibarra the proper prevailing wage rate and then attempted to conceal such violation in certified payroll records submitted to the DLSE and others, "willfully" failed to pay overtime to Laborers Javier Perez (on the Madera project) and Juan Ramirez (on the Exeter project), and "willfully" failed to comply with the requirements of Labor Code §1776.

This debarment shall also apply to any other contractor or subcontractor in which Respondent AYODEJIA A. OGUNDARE, individually and dba PACIFIC ENGINEERING COMPANY has any interest or for which Respondent acts as a responsible managing employee, responsible managing officer, general partner, manager, supervisor, owner, partner, officer, employee, agent, consultant, or representative. "Any interest" includes, but is not limited to, all instances where Respondent receives payments, whether in cash or in another form of compensation, from the entity bidding or performing works on the public works project, or enters into any contract or agreement

with the entity bidding or performing work on the public works project for services performed or to be assigned or sublet, or for vehicles, tools, equipment or supplies that have been or will be sold, rented or leased during the period of debarment.

Dated: August 6, 2009

EDNA GARCIA EARLEY
Hearing Officer

Filed 2/27/13; pub. order 3/18/13 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

AYODEJI A. OGUNDARE et al., Respondents, v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT, Appellant.	F061162 (Super. Ct. No. CV268425) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Linda S. Etienne, Commissioner.

David D. Cross for Appellant.

Dowling, Aaron & Keeler, Daniel K. Klingenberger and Stephanie Hamilton Borchers for Respondents.

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Ayodeji A. Ogundare, individually and doing business as Pacific Engineering Company (together Pacific), filed a petition for writ of administrative mandate asking the trial court to set aside a "debarment"[1] decision adopted by the State of California, Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) that would have precluded Pacific from bidding or working on public works construction projects for one year. The trial court reviewed the administrative record and concluded there was no credible evidence to support a finding that Pacific violated prevailing wage laws *with intent to defraud*, which finding was necessary in this case for debarment to be imposed under Labor Code section 1777.1.[2] Accordingly, the trial court granted Pacific's petition. DLSE appeals, arguing that (i) the trial court failed to apply the correct standard of review (i.e., the substantial evidence test) and (ii) there was substantial evidence in the record to support the administrative finding of intent to defraud. We agree on both points and will reverse.

FACTS AND PROCEDURAL HISTORY

Pacific was a general engineering construction company based in Bakersfield, California, that performed concrete (flat) and underground (water, soil and sewer) construction work. Ninety-nine percent of the projects undertaken by Pacific were public works projects. Pacific was owned and managed by Ayodeji A. Ogundare (Ogundare), who was a licensed contractor.

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1 Debarment occurs when an individual or entity is excluded from bidding, contracting or subcontracting on public works projects, usually for a defined period of time, due to violations of public contract law or other wrongful conduct. (See Labor Code, § 1777.1, subd. (b); *Golden Day Schools, Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695, 703.)

2 Unless otherwise indicated, all further statutory references are to the Labor Code.

In 2007 and 2008, DLSE conducted investigations regarding public works projects on which Pacific was a subcontractor, including a project in Delano for sewer and sidewalk construction (the Delano project), a project in Madera to build a youth center (the Madera project), and a project in Exeter to construct a school building (the Exeter project). As a result of these investigations, DLSE notified Pacific of apparent violations of laws relating to public contracts and issued civil wage and penalty assessments against Pacific. Additionally, DLSE initiated the instant debarment proceedings against Pacific based on particular allegations that Pacific violated prevailing wage laws in a manner that was allegedly willful and with intent to defraud. The present appeal concerns the debarment proceedings only.[3]

The debarment proceedings were commenced against Pacific in December 2008, when DLSE filed a statement of alleged violations, seeking Pacific's debarment pursuant to the provisions of section 1777.1.

The hearing of the debarment proceedings was held on April 30, 2009, before a hearing officer. Pacific and DLSE were each represented by counsel and following the presentation of evidence and closing arguments, the hearing officer took the matter under submission. On August 6, 2009, the hearing officer issued a written statement of decision that was adopted the same day by DLSE as the decision of that agency. The statement of decision stated that Pacific committed willful violations with intent to defraud, and a one-year debarment of Pacific was ordered by DLSE therein.[4]

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[3] A prior appeal was made concerning one of the monetary wage and penalty assessments against Pacific and another contractor. (See *Department of Industrial Relations v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560.)

[4] When we refer to the statement of decision herein, we mean the administrative decision made by the hearing officer and adopted by DLSE, *not* the trial court's decision on the petition for administrative writ of mandate.

The statement of decision stated the following principal conclusions: "[Pacific] 'willfully' and with 'intent to defraud' violated the public works laws in not paying prevailing wages to one worker, Laborer Miguel Ibarra and [in not paying] prevailing overtime to two workers, Laborers Javier Perez (on the Madera project) and Juan Ramirez (on the Exeter project). Although the DLSE argued that [Pacific] had a pattern and practice of failing to pay prevailing wages and prevailing overtime on the three projects at issue as well as on previous projects ... the evidence simply was not presented at this hearing to establish this was the case." Further, as to the alleged inadequacy of Pacific's payroll records, the statement of decision stated that Pacific willfully violated provisions of section 1776 by submitting certified payroll records to DLSE, prime contractors, awarding bodies and others, that were "not accurate." However, Pacific's failures to provide adequate payroll records, although willful, were not sufficient in themselves to show intent to defraud.

On the specific issue of intent to defraud, the statement of decision elaborated: "[Miguel] Ibarra's testimony that he was always paid $15.00 per hour on the Delano project and worked 61 hours during the week ending August 4, 2007 is credible especially since he provided a copy of a paycheck corroborating his testimony. [Pacific] knew that payment to this individual was not in compliance with the public works laws as evidenced by the fact that the check shows payment at $15.00 per hour for 61 hours worked yet [Pacific] submitted to the DLSE certified payroll records listing the correct prevailing wage rate that should have been paid and listing only 25 hours worked for the week ending August 4, 2007. In this regard, [Pacific] 'willfully' violated the public works laws. [Pacific] also violated the public works laws with 'intent to defraud' evidenced by the fact that he put the required amount of payment on the certified payroll records he signed under penalty of perjury knowing that he paid a much lower rate." Additionally, the statement of decision indicated that Pacific's intent to defraud was further corroborated by the failure to pay overtime prevailing wages to Javier Perez and

Juan Ramirez, since it appeared that Pacific "was attempting to split the total hours worked by Perez and Ramirez, so as not to have to pay or report prevailing overtime that was in fact worked by both workers."

As a consequence of the violations and of the finding of intent to defraud, the statement of decision ordered that Pacific "shall be ineligible to, and shall not, bid on or be awarded a contract for a public works project, and shall not perform work as a subcontractor on a public work ... for a period of one (1) year ...."

On September 22, 2009, after DLSE adopted the statement of decision as the decision of DLSE in this matter, Pacific filed a petition for writ of administrative mandate pursuant to Code of Civil Procedure section 1094.5, seeking to have the order of debarment set aside on the ground that the order was not supported by the record. A first amended petition for writ of administrative mandate was filed by Pacific on December 4, 2009.

On August 16, 2010, the trial court issued its written order ruling on the petition for administrative writ of mandate. The trial court applied the "independent judgment" standard of review to the administrative decision on the assumption that Pacific's interest in bidding on public contracts was a "fundamental vested right." (Capitalization omitted.) In applying that standard to the record before it, the trial court found that "there was no credible evidence offered by [DLSE] to support a finding of an intent to defraud ...." (Capitalization omitted.) Moreover, the trial court explained that without a finding of intent to defraud pursuant to section 1777.1, subdivision (a), the mere willful violations in this case could not (by themselves) justify debarment since there were no prior willful violations as required by section 1777.1, subdivision (b). (Cf., § 1777.1, subd. (a) [debarment appropriate if violation of prevailing wage law was found to be with "intent to defraud"]; *id.*, subd. (b) [debarment for "willful" violations appropriate only if a prior willful violation occurred in past three years].) Accordingly, no basis existed for debarment under section 1777.1, and the trial court granted Pacific's petition.

DLSE timely filed its notice of appeal.

DISCUSSION

I. Standard of Review

Since our standard of review is affected by the standard of review that was applicable in the trial court, we will begin with a summary of the law regarding the trial court's standard of review.

A. In the Trial Court

"Section 1094.5 of the Code of Civil Procedure governs judicial review by administrative mandate of any final decision or order rendered by an administrative agency. A trial court's review of an adjudicatory administrative decision is subject to two possible standards of review depending upon the nature of the right involved. [Citation.] If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence. [Citations.] The trial court must not only examine the administrative record for errors of law, but must also conduct an independent review of the entire record to determine whether the weight of the evidence supports the administrative findings. [Citation.] If, on the other hand, the administrative decision neither involves nor substantially affects a fundamental vested right, the trial court's review is limited to determining whether the administrative findings are supported by substantial evidence. [Citations.]" (*Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305, 313, relying on *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32 & *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144.)

Whether an administrative decision substantially affects a fundamental vested right must be determined on a case-by-case basis. (*Bixby v. Pierno*, *supra*, 4 Cal.3d at p. 144.) "A right may be deemed fundamental 'on either or both of two bases: (1) the character and quality of its economic aspect; [or] (2) the character and quality of its human aspect.' [Citation.] 'The ultimate question in each case is whether the affected

right is deemed to be of sufficient significance to preclude its extinction or abridgement by a body lacking *judicial* power. [Citation.]' [Citation.]" (*Wences v. City of Los Angeles*, *supra*, 177 Cal.App.4th at pp. 313-314.) "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." (*Bixby v. Pierno*, *supra*, at p. 144.) For example, an agency's decision to revoke a professional license or the right to practice one's trade or profession has been found to affect the person's fundamental vested rights. (*Rand v. Board of Psychology* (2012) 206 Cal.App.4th 565, 574.) On the other hand, "as a general rule, when a case involves or affects purely economic interests, courts are far less likely to find a right to be of the fundamental vested character. [Citations.]" (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1060 [cases digested] (*JKH Enterprises*).)

B. In the Court of Appeal

"Regardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing the superior court's administrative mandamus decision always applies a substantial evidence standard. [Citations.]" (*JKH Enterprises*, *supra*, 142 Cal.App.4th at p. 1058.) However, "the reviewing court's *focus* changes, depending on which standard of review governed at trial." (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 218, italics added.) "[D]epending on whether the trial court exercised independent judgment or applied the substantial evidence test, the appellate court will review the record to determine whether either the trial court's judgment or the agency's findings, respectively, are supported by substantial evidence. [Citation.] If a fundamental vested right was involved and the trial court therefore exercised independent judgment, it is the trial court's judgment that is the subject of appellate court review. [Citations.] On the other hand, if the superior court properly applied substantial evidence review because no fundamental vested right was

involved, then the appellate court's function is identical to that of the trial court. It reviews the administrative record to determine whether the agency's findings were supported by substantial evidence, resolving all conflicts in the evidence and drawing all inferences in support of them. [Citations.]" (*JKH Enterprises, supra,* 142 Cal.App.4th at p. 1058, fn. omitted.)

II. The Trial Court Should Have Applied Substantial Evidence Test

Looking to the character and quality of the right involved, we conclude that Pacific's one-year debarment from being able to bid or work on public projects did not implicate a fundamental vested right. Pacific was not prevented from bidding or working on all construction projects, but only from certain kinds of work (i.e., public projects). Hence, it appears that the interest affected was purely economic in this case. (See, e.g., *JKH Enterprises, supra,* 142 Cal.App.4th at pp. 1061-1062 [stop work order and penalty issued by Department of Industrial Relations due to employer's failure to provide workers' compensation to employees did not implicate fundamental vested right—interest involved "purely economic"]; *Kawasaki Motors Corp. v. Superior Court* (2000) 85 Cal.App.4th 200, 204 [protest to New Motor Vehicle Board of manufacturer's termination of automotive dealer franchise reviewed under substantial evidence test as purely economic contractual privileges were involved]; *Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590, 604-605 [no fundamental right to operate four rather than three refinery units even though return on investment may be lower].)

It follows that the trial court applied the wrong standard. It should have reviewed DLSE's administrative decision under the substantial evidence test rather than under the independent judgment standard of review. However, we need not send the matter back to the trial court to apply the proper standard. Where the trial court erroneously uses the independent judgment standard, an appellate court may proceed to review the matter by applying the substantial evidence standard to the administrative findings. (*Housing Development Co. v. Hoschler* (1978) 85 Cal.App.3d 379, 387; *Savelli v. Board of*

Medical Examiners (1964) 229 Cal.App.2d 124, 133; 2A Cal.Jur.3d (2007) Administrative Law, § 754, p. 230.)

III. Administrative Decision Supported by Substantial Evidence

The question remains whether a different result would have been required in the present case under the substantial evidence test. This test "requires a review of the entire record to determine whether findings of an administrative decision are supported by substantial evidence." (*Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal.App.3d 14, 23-24.) If the administrative decision is supported by substantial evidence, we may not overturn it merely because a contrary finding would have been equally or more reasonable. (*Id.* at p. 24) "In general, substantial evidence has been defined in two ways: first, as evidence of ""'ponderable legal significance ... reasonable in nature, credible, and of solid value'"' [citation]; and second, as '"relevant evidence that a reasonable mind might accept as adequate to support a conclusion"' [citation]." (*County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 555) "Unless the finding, viewed in the light of the entire record, is so lacking in evidentiary support as to render it unreasonable, it may not be set aside." (*Northern Inyo Hosp. v. Fair Emp. Practice Com.*, *supra*, at p. 24.)

In order to impose debarment in the present case, it was necessary for DLSE to establish intent to defraud under section 1777.1. That statute provides, in relevant part, as follows: "Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter with intent to defraud, ... the contractor or subcontractor ... is ineligible for a period of not less than one year or more than three years to do either of the following: [¶] (1) Bid on or be awarded a contract for a public works project. [¶] (2) Perform work as a subcontractor on a public works project." (§ 1777.1, subd. (a)(1) & (2).) The term "intent to defraud" is defined in the applicable regulations as follows: "'Intent to defraud' means the intent to deceive another person or entity, as defined in this article,

and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind." (Cal. Code Regs., tit. 8, § 16800.)

Here, as noted above, the statement of decision adopted by DLSE explained that intent to defraud was found based on (among other things) the following: "[Miguel] Ibarra's testimony that he was always paid $15.00 per hour on the Delano project and worked 61 hours during the week ending August 4, 2007 is credible especially since he provided a copy of a paycheck corroborating his testimony. [Pacific] knew that payment to this individual was not in compliance with the public works laws as evidenced by the fact that the check shows payment at $15.00 per hour for 61 hours worked yet [Pacific] submitted to the DLSE certified payroll records listing the correct prevailing wage rate that should have been paid and listing only 25 hours worked for the week ending August 4, 2007. In this regard, [Pacific] 'willfully' violated the public works laws. [Pacific] also violated the public works laws with 'intent to defraud' evidenced by the fact that he put the required amount of payment on the certified payroll records he signed under penalty of perjury knowing that he paid a much lower rate." Additionally, the statement of decision indicated that Pacific's intent to defraud was further corroborated by the failure to pay overtime prevailing wages to Javier Perez and Juan Ramirez, since it appeared that Pacific "was attempting to split the total hours worked by Perez and Ramirez, so as not to have to pay or report prevailing overtime that was in fact worked by both workers."

The parties, like the trial court, have placed primary emphasis on the evidence relating to Miquel Ibarra's wages. DLSE argues that such evidence was sufficient to reasonably allow the conclusion that Pacific acted with an intent to defraud. Pacific, on the other hand, argues that in light of the entire record, the evidence was inadequate to support that conclusion.

We'll begin with Pacific's position. Pacific argues that since Ibarra testified he did not keep a record of the number of hours he worked for any particular week and he was unsure of the total hours he worked on the particular week reflected on the paycheck introduced into evidence (i.e., the week ending August 4, 2007), it was not substantiated that he was paid only $15 per hour. Pacific also claims that the large discrepancy between Ibarra's paycheck (showing Ibarra was paid $15 per hour) and the certified payroll records (showing he was paid a prevailing wage of $36.10 and worked only 25 hours that week) did not show intent to defraud. In that regard, Pacific points out that although the statement of decision noted the certified payroll records were signed (by Ogundare) under penalty of perjury, the record on appeal does not include any signature. Ogundare's name is printed on the signature line, but no signature is present. Also, Pacific refers to the fact that the statement of decision characterized Pacific's inaccurate payroll records as a "'willful'" violation of the recordkeeping statute (§ 1776), but not a fraudulent violation of that statute.[5] Finally, Pacific points out that three other employees testified that they had been paid properly (i.e., prevailing wages) on the same job.

DLSE's position is that intent to defraud was established by the evidence, in particular Ibarra's testimony that he was paid $15 per hour as confirmed by the paycheck for the week of August 4, 2007, and the certified payroll records for that same week showing that Ibarra was paid prevailing wages of $36.10 per hour and only worked 25 hours that week. We agree with DLSE. Although Ibarra did not keep a record of his hours, his testimony that he was paid $15 per hour was clearly supported by the

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[5] Ogundare testified at the administrative hearing about there being some confusion due to (among other things) some turnover or inexperience of employees in payroll, followed by hiring an outside accountant, and it was argued that any errors were clerical mistakes. The statement of decision rejected that explanation as inherently implausible in light of Ogandare's (Pacific's) extensive experience in public contracts and knowledge of recordkeeping that is required.

paycheck. The notation on that check indicated he was being paid for 61 hours worked on the Delano job, and the total amount paid was $915. Doing the math, this equates to $15 per hour. For the identical week, the certified payroll records reported by Pacific to DLSE pursuant to section 1776 (whether or not personally signed under oath by Ogundare) represented to DLSE that Ibarra was making $36.10 per hour and worked only 25 hours. (See § 1776, subd. (a)(1) & (2) [records must include hours worked, wages paid, and declaration stating compliance with § 1771 (prevailing wage law)].) No satisfactory explanation was ever provided by Pacific for this glaring discrepancy between Ibarra's actual paycheck reflecting $15 per hour and the contrary representations by Pacific to DSLE. A party's intent, including intent to defraud, may be shown by circumstantial evidence. (1 Witkin, Cal. Evidence (5th ed., 2012) Circumstantial Evidence, § 122, p. 528; *People v. Phillips* (1960) 186 Cal.App.2d 231, 240.) A reasonable conclusion from this evidence is that Pacific violated the prevailing wage law with intent to defraud.

DISPOSITION

The trial court's judgment granting Pacific's writ of administrative mandate is reversed. The matter is remanded to the trial court with instructions that a new order be entered by the trial court denying the writ and affirming DLSE's administrative decision to impose a one-year debarment. Costs on appeal are awarded to DLSE.

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Kane, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Detjen, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

AYODEJI A. OGUNDARE et al., Respondents, v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT, Appellant.	F061162 (Kern Super. Ct. No. CV268425) **ORDER GRANTING REQUEST FOR PUBLICATION**

As the nonpublished opinion filed on February 27, 2013, in the above entitled matter hereby meets the standards for publication specified in the California Rules of Court, rule 8.1105(c), it is ordered that the opinion be certified for publication in the Official Reports.

KANE, J.

WE CONCUR:

WISEMAN, Acting P.J.

DETJEN, J.