

1 **STATE OF CALIFORNIA**
2 Department of Industrial Relations
3 Division of Labor Standards Enforcement
4 EDNA GARCIA EARLEY, State Bar No. 195661
5 320 W. 4th Street, Suite 430
6 Los Angeles, California 90013
7 Tel.: (213) 897-1511
8 Fax: (213) 897-2877

9 Attorney for the Labor Commissioner

10 **BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT**

11 **DEPARTMENT OF INDUSTRIAL RELATIONS**

12 **FOR THE STATE OF CALIFORNIA**

13 In the matter of the)
14 Debarment Proceeding Against:)

Case No.: SAC 1058

) **DECISION RE DEBARMENT OF**
) **RESPONDENTS FROM PUBLIC**
) **WORKS PROJECTS**

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SOUTHWEST GRADING, also dba
SOUTHWEST GRADING SERVICES,
INC.; and DAVID WALTER
CHOLEWINSKI, an individual,

) [Labor Code §1777.1]

Respondents.

23 The attached Proposed Statement of Decision of Hearing Officer Edna Garcia
24 Earley, debaring Respondents SOUTHWEST GRADING, also dba SOUTHWEST
25 GRADING SERVICES, INC.; and DAVID WALTER CHOLEWINSKI, an individual,
26 from working on public works projects in the State of California for three years, is hereby
27 adopted by the Division of Labor Standards Enforcement as the Decision in the above-
28 captioned matter.

1 This Decision shall become effective March 18, 2010.

2 IT IS SO ORDERED

3
4 Dated: January 29 2010 DIVISION OF LABOR STANDARDS ENFORCEMENT
5 Department of Industrial Relations
6 State of California

7 By: Angela Bradstreet
8 ANGELA BRADSTREET
9 State Labor Commissioner
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PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Division of Labor Standards Enforcement, Department of Industrial Relations, 320 West Fourth Street #430, Los Angeles, CA 90013.

On February 1, 2010, I served the foregoing document described as DECISION RE DEBARMENT OF RESPONDENTS FROM PUBLIC WORKS PROJECTS, on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, addressed as follows:

Southwest Grading
22031 Waite Street
Wildomar CA 92595

David Walter Cholewinski
Southwest Grading
22031 Waite Street
Wildomar CA 92595

David Walter Cholewinski, Agent for Service
Southwest Grading
29970 Technology Drive, Suite 205
Murrieta CA 92563

David Cross
Division of Labor Standards Enforcement
Department of Industrial Relations
State of California, Legal Unit
2031 Howe Avenue, Suite 100
Sacramento CA 95825

Rey Tuyor
Division of Labor Standards Enforcement
Department of Industrial Relations
State of California
300 Oceangate Blvd., Suite 850
Long Beach CA 90802

Monica Curi
Division of Labor Standards Enforcement
Department of Industrial Relations
State of California
300 Oceangate Blvd., Suite 850
Long Beach CA 90802

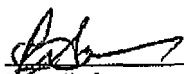
PROOF OF SERVICE

1 Lorna Espiritu
2 Division of Labor Standards Enforcement
3 Department of Industrial Relations
4 State of California
5 300 Oceangate Blvd., Suite 850
6 Long Beach CA 90802

7 Doreen Peters
8 Division of Labor Standards Enforcement
9 Department of Industrial Relations
10 State of California
11 6150 Van Nuys Blvd., Suite 100
12 Van Nuys CA 94101

13 By Mail: I am readily familiar with the firm's business practices of collection and processing
14 of correspondence for mailing with the United States Postal Service and said correspondence is
15 deposited with the United States Postal Service the same day with postage fully prepaid thereon.

16 Executed this 1st day of February, 2010, at Los Angeles, California, I declare under penalty
17 of perjury under the laws of the State of California that the foregoing is true and correct.

18 
19 _____
20 Kandi Guerrero

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10 **BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT**
11 **DEPARTMENT OF INDUSTRIAL RELATIONS**
12 **FOR THE STATE OF CALIFORNIA**

13 In the matter of the) Case No.: SAC 1058
14 Debarment Proceeding Against:)
15) **PROPOSED STATEMENT OF**
16) **DECISION RE DEBARMENT OF**
17) **RESPONDENTS FROM PUBLIC**
18) **WORKS PROJECTS**
19) **[Labor Code §1777.1]**
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Debarment proceedings pursuant to Labor Code §1777.1 were initiated by the Division of Labor Standards Enforcement, State Labor Commissioner on November 10, 2009, by the filing of a *Statement of Alleged Violations* against Respondents SOUTHWEST GRADING, also dba SOUTHWEST GRADING SERVICES, INC.; and DAVID WALTER CHOLEWINSKI, an individual.

///

1 The hearing on the alleged violations was held on January 12, 2010, in Los
2 Angeles, California. All named Respondents were duly served with the *Notice of*
3 *Hearing and Statement of Alleged Violations* but failed to appear at the hearing.
4 Edna Garcia Earley served as the Hearing Officer. David D. Cross, appeared on behalf of
5 Complainant, Labor Commissioner Angela Bradstreet, Chief of the Division of Labor
6 Standards Enforcement, Department of Industrial Relations, State of California
7 (“DLSE”). Present as witnesses for Complainant were Deputy Labor Commissioners
8 Yoon-mi Jo, Monica Curi, Doreen Peters, Lorna Espiritu, and Reynaldo Tuyor. The
9 hearing was tape recorded. The witnesses took the oath and evidence was received. At
10 the conclusion of the hearing, the matter was taken under submission.

11 FINDINGS OF FACT

12 1. Respondent SOUTHWEST GRADING is a contractor licensed by the
13 Contractor’s State Licensing Board under license number 840416, which is currently
14 active. The Contractor’s State License Board’s website identifies Respondent DAVID
15 WALTER CHOLEWINSKI as the Sole Owner with an association date of June 10, 2004.
16 The Contractor’s State Licensing Board does not identify SOUTHWEST GRADING
17 SERVICES INC. as a licensed contractor.

18 2. Yoon-mi Jo, Monica Curi, Doreen Peters, Lorna Espiritu, and Reynaldo
19 Tuyor are Deputy Labor Commissioners with DLSE, assigned to the Public Works unit.

20 3. The *Statement of Alleged Violations* against Respondents SOUTHWEST
21 GRADING, also dba SOUTHWEST GRADING SERVICES, INC.; and DAVID
22 WALTER CHOLEWINSKI, an individual (hereinafter, collectively referred to as
23 “SOUTHWEST GRADING”) states that Civil Wage and Penalty Assessments
24 (“CWPA”) were issued concerning SOUTHWEST GRADING’S misclassification of
25 workers, failing to pay prevailing rates to employees, failing to maintain accurate
26 certified payroll records and failing to pay fringe benefits on the following twelve (12)
27 public works projects :

28 ///

1 **a. Fire Station No. 79 – Duncan Canyon Road Project, San**
2 **Bernardino County, California (September 3, 2006 –**
3 **June 16, 2007)**

4 Deputy Labor Commissioner Yoon-mi Jo testified that on March 25, 2008, she
5 issued a Civil Wage and Penalty Assessment (“CWPA”) to Respondents on the Fire
6 Station No. 79-Duncan Canyon Project in San Bernardino County, California, for failure
7 to pay prevailing wages to 6 Operating Engineers, 2 Laborers/Teamsters and failure to
8 pay training funds. The CWPA has since been paid by Respondents.

9 Deputy Jo testified that her investigation of this project revealed that worker,
10 Timothy Howard, who was operating a Skiploader and water truck on this project, was
11 classified as being in Laborer Group 1, which rate is less than Operating Engineer Group
12 8, the proper classification for the type of work he was performing. Mr. Howard was also
13 classified as a Supervisor and paid \$8.00 per hour even though he was performing work
14 on the project that requires the payment of prevailing wages. The Building Inspector for
15 this project confirmed that Mr. Howard was a working foreman who performed operating
16 engineer work. Certified Payroll Records (“CPR’s”) were produced showing the
17 misclassification and underpayment for this worker. Additionally, Deputy Jo’s audit
18 revealed that Mr. Howard was underpaid by \$1,687.07 for this project as a result of the
19 misclassification.

20 Deputy Jo also testified that training funds were not properly submitted to the
21 California Apprentice Council (“CAC”) or to an apprenticeship program for this project.

22 **b. Fire Station No. 14 Project, Riverside County, California**
23 **(May 6, 2006 – March 17, 2007)**

24 Deputy Jo testified that she also issued a CWPA to Respondents on April 14, 2008
25 on the Fire Station No.14 Project in Riverside, California, for failure to pay prevailing
26 rates to employees due to misclassification. The CWPA has been paid by Respondents.

27 In explaining why she issued this CWPA against Respondents, Deputy Jo testified
28 that worker, Timothy Howard, provided information to her listing dates that he worked as

1 a Skiploader but was paid the rate for Laborer Group, which rate is less than the
2 minimum rate of pay for a Skiploader. Additionally, Mr. Howard was classified as a
3 Supervisor but was performing work on the project and should have received the
4 minimum rate of pay for the Operating Engineer 8 classification. Mr. Howard was also
5 classified as a Laborer-Apprentice and paid an apprenticeship rate even though he was
6 not registered as an apprentice with the Division of Apprenticeship Standards. CPRs
7 were produced showing the misclassifications for Mr. Howard on this project.
8 Additionally, Deputy Jo's audit revealed that Mr. Howard was underpaid by \$2,473.52
9 for this project as a result of the misclassification.

10 **b. Jameson Park Project, Riverside County, California (December**
11 **16, 2006 – February 10, 2007)**

12 Deputy Labor Commissioner Monica Curi testified that on October 28, 2007, she
13 issued a CWPA to Respondents on the Jameson Park Project in Riverside County,
14 California, for misclassifying workers and thus, failing to pay the proper prevailing wage
15 rate in violation of Labor Code §1774. The CWPA has since been paid.

16 The CWPA was issued against Respondents because Deputy Curi interviewed
17 worker, Timothy Howard, who informed her that he drove a water truck and/or a
18 Skiploader everyday while on the job but was paid as a Laborer Group 1 for all hours
19 worked. Mr. Howard was also paid \$8.00 per hour as a "Supervisor" even though he
20 performed work on the project that falls within the classification of Operating Engineer
21 Group 2. After talking with Mr. Howard and reviewing records obtained on the project,
22 Deputy Curi determined that Mr. Howard should have been paid the rate of Operating
23 Engineer Group 8, Operating Engineer Group 2 and Operating Engineer Group 8
24 Foreman based on the work actually performed by him on the project. CPRs were
25 produced showing Mr. Howard misclassified as a Laborer Group. Additionally, Deputy
26 Curi's audit revealed that Mr. Howard was underpaid by \$1,348.12 for this project as a
27 result of the misclassification.

28 ///

1 Deputy Curi's investigation also revealed that Respondents frequently deducted
2 money from Mr. Howard's paycheck for a personal savings account but never deposited
3 said money into a savings account, as promised. Moreover, the deductions were not
4 authorized by Mr. Howard.

5 c. **Regional Park / Open Space District Headquarters, Riverside**
6 **County, California (July 22, 2006 - February 17, 2007)**

7 Deputy Curi testified that she issued a CWPA to Respondents on April 8, 2008, on
8 the Regional Park / Open Space District Headquarters Project in Riverside County,
9 California, for misclassifying workers and failing to provide proof that Training Fund
10 Contributions were made to a valid plan. Judgment was entered on this CWPA but was
11 subsequently paid by Respondents.

12 Based on her investigation of this project, Deputy Curi determined that worker
13 Timothy Howard, who was paid as a Laborer-Apprentice, but was not actually registered
14 as an apprentice with the Division of Apprenticeship Standards, should have been paid as
15 a Group 1 Laborer. Deputy Curi also determined that on the days when Mr. Howard was
16 driving a water truck, he should have been classified as a Teamster Group 3.

17 Deputy Curi's investigation of this project also revealed that worker, Daniel
18 Moreno, was not paid the proper rate for Saturday work and worker Michael Shoff was
19 paid only \$8.00 as a Supervisor even though he was the only worker on the project that
20 day. As such, Deputy Curi determined that as the only work on the project, Mr. Shoff
21 must have been performing work on the project. Deputy Curi also determined that
22 worker David Cholewinski was not paid the correct prevailing wage or the correct
23 predetermined wage increase on this project.

24 CPRs were produced showing the misclassification of the aforementioned workers
25 on this project. Additionally, Deputy Curi's audit revealed that Mr. Howard was
26 underpaid by \$139.49, Mr. Moreno was underpaid by \$0.96, Mr. Shoff was underpaid by
27 \$1,557.12 and Mr. David Cholewinski was underpaid by \$155.33 for this project, all as a
28 result of being misclassified.

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1 d. **Mead Valley Fire Station Project, Riverside County, California**
2 **(December 17, 2005 – September 30, 2006)**

3 Deputy Curi testified that she issued a CWPA to Respondents on July 28, 2008 on
4 the Mead Valley Fire Station Project in Riverside County, California, for failure to pay
5 prevailing rates, misappropriation of deductions, misclassification and failure to provide
6 proof that Training Fund Contributions were made to a valid plan. Deputy Curi's
7 investigation of this project revealed that worker Timothy Howard was classified as an
8 apprentice although he was not registered as an apprentice with the Division of
9 Apprenticeship Standards. Mr. Howard was also misclassified as a Group 1 Laborer
10 when he should have been classified as either a Teamster or Operating Engineer Group 8,
11 which rates are higher.

12 Deputy Curi also testified that her investigation revealed that Mr. Howard had
13 money deducted from his paychecks to be put into savings accounts but no such money
14 was deposited by Respondents. Moreover, Mr. Howard did not authorize the deductions.

15 Deputy Curi determined that worker Alan Cholewinski was improperly classified
16 as an Apprentice Laborer Period 1 and Laborer Group 1 instead of the proper
17 classification for the type of work he performed, Operating Engineer Group 8, which rate
18 is higher. Additionally, worker Michael Shoff was improperly classified as a Supervisor
19 when he should have been classified as an Operating Engineer Group 8 based on the type
20 of work he performed on the project. Mr. Shoff also was not paid the correct wage
21 increases for his classification.

22 CPRs were provided to substantiate Deputy Curi's findings. Additionally, Deputy
23 Curi's audit revealed that Mr. Howard was underpaid by \$2,086.86 as a result of the
24 misclassification and unauthorized deductions. Likewise, Mr. Shoff was underpaid by
25 \$1,303.36 for this project as a result of the misclassification.

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1 e. **Multi Purpose Building – Roosevelt Elementary School, Los**
2 **Angeles County, California (September 23, 2006 – January 20,**
3 **2007)**

4 Deputy Labor Commissioner Doreen Peters testified that on October 30, 2007, she
5 issued a CWPA to Respondents on the Multi Purpose Building at Roosevelt Elementary
6 School in Los Angeles County, California, for failure to pay the correct prevailing wage
7 rate. Specifically, Deputy Peters' investigation revealed that worker, Timothy Howard,
8 was paid at the rate of \$8.00 per hour and overtime was paid at \$12.00 per hour when he
9 should have been paid at \$37.40 per hour as the highest level journeyman for this project.
10 As a result of this misclassification, Mr. Howard was underpaid by \$2,191.71 for this
11 project.

12 g. **Boys and Girls Club of Redlands – Clay Street Clubhouse**
13 **Project, San Bernardino County, California (November 11, 2006**
14 **– June 9, 2007)**

15 Deputy Labor Commissioner Reynaldo Tuyor testified that on November 13,
16 2008, he issued a CWPA to Respondents on the Boys and Girls Club of Redlands – Clay
17 Street Clubhouse Project in San Bernardino County, California, for failure to pay
18 prevailing wage rates to workers by misclassifying them and failing to pay training fund
19 contributions to the California Apprenticeship Council, as required by the applicable
20 Prevailing Wage Determinations. The CWPA has since been paid by Respondents.

21 Deputy Tuyor's investigation revealed that worker, Timothy Howard, was actually
22 paid \$25.00 per hour even though the CPRs list him as having been paid \$36.15 per hour.
23 Mr. Howard was also classified as a Laborer Group 1 despite operating a Skiploader and
24 driving water trucks. Additionally, Mr. Howard complained of having deductions taken
25 from his paycheck despite never giving written authorization for Respondents to make
26 such deductions. Mr. Howard was underpaid by \$347.24 as a result of the
27 misclassification on this project.

28 Worker, Michael L. Shoff, was likewise misclassified. The CPRs show that

1 Mr. Shoff was classified as a Supervisor and paid \$8.00 per hour even though he was the
2 only worker listed on the project and therefore, must have been performing work. As a
3 result of the misclassification, Mr. Shoff was underpaid by \$1,183.24 for this project.

4 **h. Walter D. Ehler Senior and Community Center Expansion**
5 **Social Hall Building Project – Orange County, California**
6 **(August 16, 2008 – November 22, 2008)**

7 Deputy Labor Commissioner Lorna Espiritu testified that on July 30, 2009, she
8 issued a CWPA to Respondents on the Walter D. Ehler Senior and Community Center
9 Expansion Social Hall Building Project in Orange County, California, for failure to pay
10 fringe benefits to workers resulting in underpayment of prevailing wages in violation of
11 Labor Code §1774. Respondents have since paid the CWPA.

12 Respondents submitted a Statement of Employer Payments (PW 26 form) to their
13 Prime Contractor AMG & Associates, wherein they reported paying fringe benefits for
14 workers on this project to National Association of Prevailing Wage Contractors and
15 training fund contributions to AGC Apprenticeship & Training Trust Office.

16 Respondents submitted a different Statement of Employer Payments with their CPRs, to
17 the DLSE showing they paid only the training fund contributions and not the fringe
18 benefits. On April 20, 2009, Deputy Espiritu received a letter from Respondents dated
19 April 16, 2009, admitting that they had not paid the fringe benefits to the third parties.
20 Based on this admission, Deputy Espiritu issued the CWPA on July 30, 2009.

21 **i. Upland Animal Shelter, Animal Services Shelter, Bid No. 2008-**
22 **12 Project, San Bernardino County, California (October 4, 2008**
23 **– April 25, 2009)**

24 Deputy Espiritu testified that on July 30, 2009, she issued a CWPA to
25 Respondents on the Upland Animal Services Shelter, Bid No. 2008-12 Project in San
26 Bernardino County, California, for failure to pay fringe benefits to workers resulting in
27 underpayment of prevailing wages in violation of Labor Code §1774.
28

1 Deputy Espiritu testified that she received two versions of the Statement of
2 Employer Payments (form PW26) submitted by Respondents showing different
3 information. Deputy Espiritu received one form from Prime Contractor KPRS
4 Construction showing fringe benefits paid to the National Association of Prevailing
5 Wage Contractors and training fund contributions being paid to AGC Apprenticeship &
6 Training Trust Office. The form submitted by Respondents, however, showed only
7 training fund contributions as being paid. On April 20, 2009, Deputy Espiritu received a
8 letter dated April 16, 2009 from Respondents admitting to having failed to make timely
9 contributions for fringe benefits. Based on this admission, Deputy Espiritu issued the
10 CWPA on July 30, 2009.

11 The CPRs and a copy of the Fringe Benefits Statement submitted to the Prime
12 Contractor KPRS Construction, were submitted as evidence.

13 **j. Yucca Valley Transit Station Project, San Bernardino**
14 **County, California, (August 2, 2008-April 18, 2009)**

15 Deputy Espiritu testified that on August 3, 2009, she issued a CWPA to
16 Respondents on the Yucca Valley Transit Station Project in San Bernardino County,
17 California, for failure to pay fringe benefits to workers resulting in underpayment of
18 prevailing wages in violation of Labor Code §1774.

19 Respondents submitted a Statement of Employer Payments (form PW26) to
20 Deputy Espiritu indicating that they paid fringe benefits to National Association of
21 Prevailing Wage Contractors at \$15.99 and \$13.45 per hour for Operator 8 and Laborer
22 Group 1, respectively. After Deputy Espiritu requested proof of payment of the fringe
23 benefits reported on the Statement of Employer Payments submitted, she received a letter
24 from Respondents on April 20, 2009 dated April 16, 2009, admitting that they failed to
25 make timely contributions for fringe benefits. Based on this admission, Deputy Espiritu
26 issued the CWPA on August 3, 2009.

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1 **k. UC Riverside East Campus Child Development Center**
2 **Project, Riverside County, California (October 4, 2008 –**
3 **April 25, 2009)**

4 Deputy Espiritu testified that on July 30, 2009, she issued a CWPA to
5 Respondents on the UC Riverside East Campus Child Development Center Project in
6 Riverside County, California, for failure to pay fringe benefits to workers resulting in
7 underpayment of prevailing wages in violation of Labor Code §1774.

8 Respondents submitted a Statement of Employer Payments (PW 26 form) to their
9 Prime Contractor Perrera Construction & Design, Inc., wherein they reported paying
10 fringe benefits for workers on this project to National Association of Prevailing Wage
11 Contractors and training fund contributions to AGC Apprenticeship & Training Trust
12 Office. Respondents submitted a different Statement of Employer Payments with their
13 CPRs, to the DLSE showing they paid only the training fund contributions and not the
14 fringe benefits. On April 20, 2009, Deputy Espiritu received a letter from Respondents
15 dated April 16, 2009, admitting that they had not paid the fringe benefits to the third
16 parties. Based on this admission, Deputy Espiritu issued the CWPA on July 30, 2009.

17 **l. Fontana Courthouse Expansion and Remodel Project, San**
18 **Bernardino County, California (December 6, 2008 –**
19 **January 10, 2009)**

20 Deputy Espiritu testified that on October 12, 2009, she issued a CWPA to
21 Respondents on the Fontana Courthouse Expansion and Remodel Project in San
22 Bernardino County, California, for failure to pay fringe benefits to workers resulting in
23 underpayment of prevailing wages in violation of Labor Code §1774. Fringe benefits
24 were deducted from workers' hourly rates of pay but not paid to third party
25 administrators, as reported.

26 On April 20, 2009, Deputy Espiritu received a letter from Respondents dated April
27 16, 2009, admitting that they had not paid the fringe benefits to the third parties.
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CONCLUSIONS OF LAW

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.

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

3 The evidence presented at the hearing established that Respondents
4 SOUTHWEST GRADING, also dba SOUTHWEST GRADING SERVICES, INC.; and
5 DAVID WALTER CHOLEWINSKI, an individual, violated the public works laws
6 “willfully” and with “intent to defraud.”

7 **“Willful” Violation of the Public Works Laws**

8 The evidence supports a finding of “willfulness” of the violations. Labor Code
9 §1777.1 defines when a Labor Code violation may be deemed “willful” and includes a
10 “deliberate failure or refusal to comply with the law.” Moreover, under Labor Code
11 §1771.1(c), “a willful violation occurs when the contractor or subcontractor knew or
12 reasonably should have known of his or her obligations under the public works law and
13 deliberately fails or refuses to comply with its provisions.” A person’s knowledge of the
14 law is imputed to him and an unlawful intent may be inferred from the doing of an
15 unlawful act. *People v. McLaughlin* (1952) 111 Cal.App.2d 781.

16 The uncontested testimony and exhibits presented by DLSE established that
17 Respondents knew or should have reasonably known of their obligations under the public
18 works laws and deliberately refused to comply with its provisions. Specifically, the
19 evidence established that Respondents repeatedly characterized laborers and operating
20 engineers as “Supervisors” in order to avoid complying with the prevailing wage laws.

21 Labor Code §1771 requires that “all workers” employed on public works must be
22 paid at no less than the “general prevailing rate of per diem wages.” Labor Code §1723
23 defines a “worker” as including “a laborer, worker, or mechanic.” Thus, a worker who
24 performs skilled or unskilled labor on a public works project is entitled to be paid the
25 applicable prevailing wage rate for the time the work is performed, regardless of whether
26 the individual holds a “Supervisor” title. The evidence presented at the hearing
27 established that worker Tim Howard was classified as a “Supervisor” and paid only \$8.00
28 per hour on the Fire Station No. 79 – Duncan Canyon Road Project, the Fire Station No.
14 Project, the Jameson Park Project, and the Multi-Purpose Building – Roosevelt

1 Elementary School Project, despite uncontroverted evidence that showed him performing
2 work as an Operating Engineer or CPRs that showed he was the only worker on the
3 project. Likewise, Respondents classified worker Michael Shoff as a Supervisor on the
4 Regional Park / Open Space District Headquarters Project and the Boys and Girls Club of
5 Redlands – Clay Street Clubhouse Project on the CPRs, despite the fact he was the only
6 worker on the project. Mr. Shoff was also classified as a Supervisor on the Mead Valley
7 Fire Station Project and paid \$8.00 per hour even though he was performing work as an
8 Operating Engineer Group 8. Respondents should have known that classifying workers
9 as Supervisors and paying them only \$8.00 per hour when they were the only workers on
10 the project or when they were also performing labor on the project in connection with
11 their supervisory responsibilities, was a violation of the public works laws.

12 The uncontested evidence presented also established that workers were being
13 underpaid due to being misclassified as apprentices when they were not registered with
14 the Division of Apprenticeship Standards or being misclassified as laborers when they
15 were performing work of a different and higher paying classification. On many projects,
16 Respondents classified Mr. Howard as being in Laborer Group 1 when the evidence
17 shows that he should have been classified as an Operating Engineer Group 8 or as a
18 Teamster.

19 The result of misclassifying workers such as Mr. Howard and Mr. Shoff as
20 Supervisors or laborers, is that these workers were consistently underpaid. The evidence
21 presented established that Mr. Howard was underpaid by \$1,687.07 on the Fire Station
22 No. 79 – Duncan Canyon Road Project, underpaid by \$2,473.52 on the Fire Station No.
23 14 Project, \$1,348.12 on the Jameson Park Project, underpaid by \$139.49 on the
24 Regional Park / Open Space District Headquarters Project, underpaid by \$2,086.86 on
25 the Mead Valley Fire Station Project, underpaid by \$2,191.71 on the Multi-Purpose
26 Building – Roosevelt Elementary School Project and underpaid by \$347.24 on the Boys
27 and Girls Club of Redlands – Clay Street Clubhouse Project. Similarly, as a result of
28 being misclassified, Mr. Shoff was underpaid by \$1,557.12 on the Regional Park / Open

1 Space District Headquarters Project, underpaid by \$1,303.36 on the Mead Valley Fire
2 Station Project, and underpaid by \$1,183.24 on the Boys and Girls Club of Redlands –
3 Clay Street Clubhouse Project. The underpayments are significant and the only plausible
4 explanation is that Respondents were deliberately attempting to circumvent payment of
5 higher prevailing wages.

6 Respondents also knowingly and under penalty of perjury listed workers on the
7 CPRs as working under the wrong classification. Additionally, Respondents deliberately
8 reported that they paid fringe benefits to third party administrators when the evidence, in
9 particular, Respondents' own admissions, state that no such payments were made.

10 In sum, the uncontested evidence presented at the hearing, established that
11 Respondents "willfully" violated the public works laws.

12 **Violation of the Public Works Laws with an Intent to Defraud**

13 The uncontested evidence also supports a finding that Respondents violated the
14 public works laws with "intent to defraud." California Code of Regulations, Title 8,
15 Section 16800 defines "**Intent to Fraud**" as "the intent to deceive another person or
16 entity, as defined in this article, and to induce such other person or entity, in reliance
17 upon such deception, to assume, create, transfer, alter or terminate a right, obligation or
18 power with reference to property of any kind." Intent to deceive or defraud can be
19 inferred from the facts. *People v. Kiperman* (1977) 69 Cal.App.Supp. 25. Additionally,
20 an unlawful intent can be inferred from the doing of an unlawful act. *People v.*
21 *McLaughlin, supra.*

22 The uncontested evidence presented supports a finding of an intent to deceive. In
23 classifying workers as Supervisors and paying them only \$8.00 per hour when no other
24 workers performed work on the project or when they were performing labor on the
25 project in connection with their supervisory duties, Respondents failed to report labor
26 being performed on such projects. As such, Respondents intended to deceive the DLSE
27 and awarding bodies into believing that no labor was being performed by these
28 Supervisors. Likewise, by classifying and paying workers as Laborers when they were
clearly performing work under a higher paying classification, Respondents intended on

1 deceiving the awarding bodies and the DLSE by misleading both groups into believing
2 the proper rates were being paid for all the projects at issue. Respondents were obligated
3 to demonstrate on the CPRs that they were paying the proper prevailing wage rates even
4 in situations where workers were performing work that fell under two separate
5 classifications, as was the case in many of the projects at issue herein. Instead of meeting
6 this obligation, Respondents opted to list the lowest paying classification for the worker
7 in an attempt to deceive the worker, the awarding body and the DLSE.

8 The uncontested evidence presented also established that Respondents violated the
9 public works laws with "intent to defraud" when they falsely reported to their prime
10 contractors, to the DLSE and to the workers, that fringe benefits were being paid to third
11 party administrators, despite later admitting that no such payments were made.

12 Under these circumstances, the evidence established that Respondents violated the
13 public works laws with an intent to defraud.

14 **Debarment**

15 "Although debarment can have a severe economic impact on contractors, it 'is not
16 intended as punishment. It is instead, a necessary means to enable the contracting
17 governmental agency to deal with irresponsible bidders and contractors, and to administer
18 its duties with efficiency.'" *Southern California Underground Contractors, Inc. v. City of*
19 *San Diego* (2003) 108 Cal.App.4th 533, 542. The evidence established that Respondents
20 repeatedly acted irresponsibly. Additionally, the evidence established that Respondents
21 "willfully" and with "intent to defraud," violated the public works laws. Accordingly,
22 debarment is appropriate. The proper period of debarment for purposes of the sanctions
23 mandated by Labor Code §1777.1 and California Code of Regulations, Title 8, Section
24 16802(a), is three (3) years. The debarment applies to Respondents SOUTHWEST
25 GRADING, also dba SOUTHWEST GRADING SERVICES, INC.; and DAVID
26 WALTER CHOLEWINSKI, an individual.

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1 **ORDER OF DEBARMENT**

2 In accordance with the foregoing, it is hereby ordered that Respondents
3 SOUTHWEST GRADING, also dba SOUTHWEST GRADING SERVICES, INC.; and
4 DAVID WALTER CHOLEWINSKI, an individual, shall be ineligible to, and shall not,
5 bid on or be awarded a contract for a public works project, and shall not perform work as
6 a subcontractor on a public work as defined by Labor Code §§1720, 1720.2 and 1720.3,
7 for a period of three (3) years, effective March 18, 2010. A three year period is
8 appropriate under these circumstances where Respondents SOUTHWEST GRADING,
9 also dba SOUTHWEST GRADING SERVICES, INC.; and DAVID WALTER
10 CHOLEWINSKI, an individual, deliberately and with complete disregard of the public
11 works laws failed to comply with the public works laws by properly classifying their
12 workers and thus, paying proper prevailing wage rates and/or failing to pay fringe
13 benefits which Respondents deducted from their workers' paychecks, to third party
14 administrators as they falsely reported on twelve public works projects and knowingly
15 and intentionally submitted inaccurate certified payroll reports under penalty of perjury
16 and inaccurate Statement of Employer Payments (form PW26) to the various parties.

17 This debarment shall also apply to any other contractor or subcontractor in
18 which Respondents SOUTHWEST GRADING, also dba SOUTHWEST GRADING
19 SERVICES, INC.; and DAVID WALTER CHOLEWINSKI, an individual, have any
20 interest or for which either Respondents SOUTHWEST GRADING, also dba
21 SOUTHWEST GRADING SERVICES, INC.; and DAVID WALTER CHOLEWINSKI,
22 an individual, act as responsible managing employees, responsible managing officers,
23 general partners, managers, supervisors, owners, partners, officers, employees, agents,
24 consultants, or representatives. As defined under Labor Code §1777.1(f), " 'Any interest'
25 includes, but is not limited to, all instances where the debarred contractor or
26 subcontractor [Respondents] receive payments, whether cash or any other form of
27 compensation, from any entity bidding or performing work on the public works project,
28 or enters into any contracts or agreements with the entity bidding or performing work on
the public works project for services performed or to be performed for contracts that have

1 been or will be assigned or sublet, or for vehicles, tools, equipment or supplies that have
2 been or will be sold, rented or leased during the period of from the initiation of the
3 debarment proceedings until the end of the term of the debarment period.”

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5 Dated: January 29, 2010


EDNA GARCIA EARLEY
Hearing Officer

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PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Division of Labor Standards Enforcement, Department of Industrial Relations, 320 West Fourth Street #430, Los Angeles, CA 90013.

On February 1, 2010, I served the foregoing document described as PROPOSED STATEMENT OF DECISION RE DEBARMENT OF RESPONDENTS FROM PUBLIC WORKS PROJECTS, on the interested parties in this action by placing true copies thereof enclosed in sealed envelopeS, addressed as follows:

Southwest Grading
22031 Waite Street
Wildomar CA 92595

David Walter Cholewinski
Southwest Grading
22031 Waite Street
Wildomar CA 92595

David Walter Cholewinski, Agent for Service
Southwest Grading
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7 Doreen Peters
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11 6150 Van Nuys Blvd., Suite 100
12 Van Nuys CA 94101

13 By Mail: I am readily familiar with the firm's business practices of collection and processing
14 of correspondence for mailing with the United States Postal Service and said correspondence is
15 deposited with the United States Postal Service the same day with postage fully prepaid thereon.

16 Executed this 1st day of February, 2010, at Los Angeles, California, I declare under penalty
17 of perjury under the laws of the State of California that the foregoing is true and correct.

18 
19 _____
20 Randi Guerrero