STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Serenity Fire Protection Case No. 12-0261-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor, Serenity Fire Protection (Serenity) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by Division of Labor Standards Enforcement (DLSE) on August 6, 2012, with respect to the Orange County Fire Station #46 (Project) in Orange County. The Assessment determined that $46,500.00 in statutory penalties under Labor Code section 1776 was due.[1] A Hearing on the Merits was conducted on February 25, 2013, in Los Angeles, California, before Hearing Officer Harold L. Jackson. Robert E. Racine appeared for Serenity, and David Cross appeared for DLSE. The matter was submitted for decision on April 15, 2013.

The issues for decision are:

- Whether Serenity failed to timely submit certified payroll records and is therefore liable for penalties under section 1776.
- Whether penalties under section 1776 should be assessed at $25.00 per calendar day per worker or $100.00 per calendar day per worker.

The Director finds that Serenity has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Director issues this Decision affirming the Assessment.

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

FACTS

On November 19, 2010, Serenity entered a Subcontract Agreement (Subcontract) with Erickson-Hall Construction Company (Erickson-Hall), for a price of $23,760.00, including materials, for installation of an overhead fire sprinkler system at the Orange County Fire Station #46, which was being constructed under a prime contract entered between the City of Stanton and Erickson-Hall. Exhibit 3 to the Subcontract stated that "[t]he Subcontractor agrees to comply with all portions of Labor Codes including 1771, 1774, 1775, 1776, 1777, 1813, and 1815. A copy of these have [*sic*] been provided and are [*sic*] attached herein as Exhibit 6." Exhibit 6 to the Subcontract consists of a copy of sections 1770 through 1815, including section 1776, subdivision (g), which, in 2010, provided for a penalty of $25.00 for each calendar day or part thereof for each worker upon failure to comply within 10 days to a written notice requesting certified payroll records (CPRs).

By certified mail deposited on April 19, 2012, DLSE sent a Request for Certified Payroll Records (Request) to Serenity at its address of record, 417 S. Associated Road, Brea, California 95825. The Request asked for copies of time and payroll information for all workers employed by Subcontractor on the Project, including health and welfare, pension, vacation/holiday, and training plan contributions. Enclosed with the Request was a form for the Subcontractor's use in certifying under penalty of perjury that the submitted records were true, full and correct copies of originals which depict the payroll records of the actual disbursements to the workers. The Request specified that failure to provide the CPRs within 10 days of receipt of the request would subject Subcontractor to a penalty of $100.00 per calendar day or portion thereof for each worker until the records are received, citing section 1776, subdivision (h). DLSE's witness, Reynaldo Tuyor, testified he was instructed by his supervisor to use the $100.00 penalty rate instead of the $25.00 rate for section 1776 violations occurring after January 1, 2012. That date is the effective date of an amendment to section 1776 that increased the penalty rate from $25.00 to $100.00 enacted by Assembly Bill (AB) 551 (stats. 2011, ch. 677, § 2.5).

A signed United States Postal Service return receipt indicated receipt of the Request on April 20, 2012. Robert W. Black, Serenity's president, testified that the Associated Road address where the Request was sent was a post office box he uses and the signature on the return receipt was that of a person at the post office box location, not an employee of Serenity. At the time Black usually checked for mail on a daily basis, sometimes weekly. The Associated Road address to which DLSE sent the Request is the same address Serenity used for itself on the Subcontract and in its Request for Review of the Assessment.

Black testified that while he bid on a few public work contracts and was awarded a few, including the one for the Project, he had an incomplete understanding about the reporting requirements for public work projects. Serenity was a small company with no administrative staff; Black performed the paperwork duties himself. The last date a Serenity employee was on site was in July 2011. During the Subcontract term, Black told Erickson-Hall that he could not pay the required prevailing wage rates and Erickson-Hall cancelled his subcontract in response. On September 14, 2011, Erickson-Hall emailed Serenity that it had two payroll registers and copies of cleared checks from Serenity's bank, but no certified payroll records. In that email, Erickson-Hall asked for the full names, addresses and social security numbers of each employee, work classifications for the employees, apprentice identification and training program used. Serenity provided Erickson-Hall with that information on September 26, 2011.

Black admitted not producing the CPRs to DLSE, stating he was concerned that the Subcontract would be cancelled. Yet, he also testified that the Subcontract had already been cancelled by the time he produced payroll information to Erickson-Hall in September 2011. Black testified that he could not respond to the Request because a response would entail providing information on wages and garnishments, fringe benefits, and a certification that those were the wages he paid. Black said he could not certify those facts under penalty of perjury because he had not paid prevailing wage rates.

On July 17, 2012, Erickson-Hall wrote to Serenity, stating that DLSE had demanded all documents on the labor Serenity provided for the Project and that Erickson-

Hall had previously requested CPRs from Serenity and it had refused to provide them. As a result, Erickson-Hall felt forced to bring in another firm to complete Serenity's contract work. Erickson-Hall told Serenity that it expected that, once it turned over the documents demanded by DLSE without proof of payment by Serenity, DLSE would demand payment of all unpaid prevailing wages, penalties, fringe benefits and interest. Erickson-Hall advised Serenity to document what was paid to reduce its ultimate liability. Serenity responded to Erickson-Hall's letter by email dated July 17, 2012, stating all information was sent to Erickson-Hall on September 1, 2011, and all he received from Erickson-Hall was a cancelled contract in response and no payments outside of payment to some of its suppliers. Ultimately, Erickson-Hall paid DLSE $9,561.86 for Serenity's underpayment of prevailing wages to five Serenity employees, including Black.

After DLSE received no CPRs from Serenity in response to the Request, it issued the Assessment dated August 6, 2012, and served it on Serenity by first class, certified mail on August 6, 2012. The Assessment imposes a $100 per calendar day per worker penalty on the basis of 5 workers for 93 days. DLSE determined the 93 day period by counting the number of days from the April 20 date of receipt of the Request to the date of the Assessment, minus 15 days for the 10-day statutory period allowed for a response to the Request and a mailing period. DLSE determined the number of workers based on records produced by Erickson-Hall. Serenity does not dispute it had five workers on the Project.

Serenity makes a variety of claims in its post-hearing brief: Serenity asserts DLSE did not effectively serve Serenity with its Request by sending it to Serenity's address because it was a post office box; Serenity could not have timely responded to the Request because to do so it would have required committing perjury; and Serenity should be excused from failing to respond to the Request because it lost money on the Project, because it had no administrative staff to do the paperwork, and because Erickson-Hall had cancelled its Subcontract. Serenity argues that it made good faith efforts to comply with the prevailing wage law, committed no willful violation, and made a good faith offer to pay for the Assessment at the prior $25.00 penalty rate.

Serenity further claims that the $25.00 penalty rate under former section 1776 applies because the Subcontract and work thereunder occurred before the $100.00 penalty rate became effective on January 1, 2012, and to apply the $100.00 rate would improperly apply the law retroactively. Serenity also argues that applying the $100.00 rate would interfere with the obligation of contracts in violation of the California and United States Constitutions; that section 1776, subdivision (f), as applied and on its face, violates the Equal Protection and Due Process Clauses of the California and United States Constitutions; and that section 1776, subdivision (f) violates the Excessive Fines Clause of the California and United States Constitutions.[2]

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra.*)

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

As it read before AB 551, section 1776 stated, in relevant part:

> (a) 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

[2] Section 1776, subdivision (f) was the provision imposing the $25.00 penalty rate as of 1992. It is assumed Serenity meant to refer to section 1776, subdivision (h), which is the provision for the $100.00 rate in effect at the time Serenity failed to respond to DLSE's Request.

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.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(g) The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

As amended by AB 551, effective January 1, 2012, section 1776, subdivision (h) replaced the former section 1776, subdivision (g), to provide, in relevant part:

> In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars ($100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.

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

DLSE's Penalty Assessment Under Section 1776 Is Appropriate.

DLSE showed that Serenity was served with the Request and the Assessment via certified mail to the Associated Road address. For service of a request for CPRs, the applicable regulation does not prescribe any particular type of service. Instead, it states that the request "shall be in any form and/or method which will assure and evidence receipt thereof." (Cal. Code. Regs., tit. 8, § 16400, subd. (d).) The Associated Road address is the same one Serenity used for itself in the Subcontract and on its Request for Review of the Assessment. While the Associated Road address where the Request was sent was a post office box and the signature on the return receipt was not a Serenity employee but that of a person at the post office box location, Serenity has not provided any alternate address it used at the time or anytime thereafter. The post office box address is deemed to be Serenity's usual mailing address and service there was proper. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 548.) The mailing constituted effective service of the Request on Serenity. This conclusion is supported by the fact that Serenity has not denied timely receipt of the Request.

Therefore, DLSE met its burden of coming forward with evidence that Serenity was served with the Request and served with the Assessment in accordance with the

applicable rules. (Cal. Code. Regs., tit. 8, § 17220, subd. (a) [Rule 20], and § 17250, subd. (a) [Rule 50].)

DLSE having met its burden of coming forward, Serenity had the burden of disproving the basis for the penalty assessment. Serenity has failed to meet its burden. The Request listed the regulatory definition of payroll records and information to produce, and included sample forms that would assist Serenity is organizing the data. The law and regulation do not call for a response to be certified. Contrary to its claim, Serenity would not have committed perjury by providing a timely and accurate response using what records it did have. While providing that information may have assisted DLSE in determining if prevailing wage rates had been paid, that is the precise point of requesting the records. In September 2011, Serenity provided at least some of the payroll records to Erickson-Hall, yet Serenity produced no documents and no information to DLSE in response to DLSE's Request. None of Serenity's reasons -- it lost money on the Project; it had no administrative staff; Erickson-Hall cancelled its Subcontract; it made good faith efforts to comply with the prevailing wage law; it committed no willful violation; and it made a good faith offer to settle the Assessment -- provide a logical explanation why it could not have responded to the Request. None are sufficient to disprove the basis of the penalty assessment. Since the $100.00 penalty rate was the one in effect at the time of both DLSE's request for and Serenity's refusal to provide the requested records, Serenity does not show any error in DLSE's imposition of that rate.

Serenity cites no authority for the propositions that DLSE has any discretion in setting penalties under section 1776 or that the size, sophistication or staffing levels of a subcontractor in are of any relevance to the penalty assessment. Nor does Serenity present any authority holding that good faith efforts to comply with the prevailing wage law, lack of willfulness as to statutory obligations, or an offer to pay the assessed penalties at a lower rate are relevant to either DLSE's assessment of penalties for failure to produce CPRs or to the Director's decision when ruling on a Request for Review.

Serenity's Claim That The Director Would Improperly Apply A Retroactive Law To Affirm DLSE's Assessment At The $100.00 Penalty Rate Must Also Be Rejected.

Serenity argues that application of the $100.00 penalty rate instead of the expired $25.00 rate would constitute a retroactive application of section 1776. For that argument, Serenity relies on *Aetna Cas. & Surety Co. v. I.A.C.* (1947) 30 Cal.2d 388, 391, *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206, and *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269. Those cases generally stand for the proposition that where a statute operates to increase a party's liability for past conduct, it is impermissibly retroactive unless the Legislature intends a retroactive effect.

When a statute's application to a given case is challenged as retroactive, the analysis begins with the presumption that statutes operate prospectively absent a clear indication that the Legislature intended otherwise. (*Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 230.) The legislative history of AB 551 discloses no legislative intent for the $100.00 penalty rate under section 1776 to operate retroactively. (See, e.g., Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of AB 551 (2011-2012 Reg. Sess.) as amended June 29, 2011.) The question, then, is whether applying that rate under the facts of this case amounts to an impermissible retroactive application of law.

"A statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.) "A statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." (*Id.*, at p. 8.) The adoption of the $100.00 penalty rate

did not "substantially change the legal effect of past events because the conduct giving rise to the liability for a penalty occurred after the effective date of the increase in the penalty rate. An exhibit to the Subcontract lists former section 1776 with its $25.00 rate. Also, as pointed out by Serenity, the Subcontract was signed and the work took place before the effective date of AB 551. However,

> '[i]n general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.]'

(*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1288-1289 [italics in original; citations omitted]; accord, *Landgraf, supra,* 511 U.S. at pp. 269-270 ["A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment [citation omitted] or upsets expectations based in prior law. ..."].) While the Subcontract was entered and work done before the $100.00 rate became effective on January 1, 2012, under AB 551, the misconduct addressed by section 1776 is the failure to timely respond to a request for CPRs. Serenity's failure occurred in 2012, after the $100.00 rate became effective. Under these facts, no "new legal consequences" were attached to "events completed" before AB 551 increased the penalty rate from $25.00 to $100.00. (*Id.*, at p. 270.) Accordingly, DLSE's Assessment of the $100.00 penalty rate in this case is not a retroactive application of law.

The Director Declines To Rule On Serenity's Constitutional Challenges To Labor Code Section 1776

Serenity also argues that applying the $100.00 penalty rate would interfere with the obligation of contracts in violation of the California and United States Constitutions,[3] citing *Russell v. Sebastian* (1914) 233 U.S. 195 and *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Manufg Co.* (1885) 115 U.S. 650, 672-673 [*New Orleans Gas*].)

Serenity further argues that application of the $100.00 penalty rate would constitute both facial and as applied violations of the Equal Protection Clauses under the California and United States Constitutions.[4] The sole authority Serenity cites is *Lujan v. G & G Fire Sprinklers, Inc.* (2001) 532 U.S. 189. Serenity also argues that application of the $100.00 penalty rate would constitute both facial and as applied violations of due process under the California and United States Constitutions[5] citing *Lujan.* Finally, Serenity claims both facial and as applied violations of the Excessive Fines Clause, citing *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, *United States*

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[3] The Contract Clause of the United States Constitution states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." (U.S. Const., art I, §10, cl. 1.) Similarly, article I, section 9 of the California Constitution provides: "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." Courts interpret the California provision no differently than its federal counterpart. (*People v. Snook* (1997) 16 Cal.4th 1210, 1220.)

[4] The Fourteenth Amendment provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." California Constitution Article I, section 7, subdivision (a) provides that "[a] person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws; ... ."

[5] The Fourteenth Amendment provides that "no state shall deprive any person of life liberty, or property, without due process of law."

v. Bajakajian (1998) 524 U.S. 321, *Mattice Investments, Inc. v. Division of Labor Standards Enforcement* (1987) 190 Cal.App.3d 918, and section 226, subdivision (e).[6]

The Director is bound by California Constitution, Art. III, section 3.5 which provides that an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional or conflicts with federal law, until an appellate court has so held. (*Reese v. Kizer* (1988) 46 Cal.3d 996, 1002, 251 Cal.Rptr. 299, 760 P. 2d 495; and *Southern California Labor Management Operating Engineers Contract Committee v. Aubry* (1997) 54 Cal.App.4th 873, 887, 63 Cal.Rptr.2d 106.) While the Director views Serenity's constitutional arguments as lacking merit, the Director declines to provide any detailed discussion of those arguments in this Decision.

FINDINGS

1. Affected subcontractor Serenity filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Serenity entered the Subcontract on the Project, provided five employees to the Project, and subjected itself to compliance with section 1776.

3. On April 19, 2012, DLSE served Serenity with a request for certified payroll records, to be produced to DLSE within 10 days from the receipt of the request, or be subject to penalties under section 1776, subdivision (h) in the amount of $100.00 per calendar day or portion thereof for each worker until the records were received. The request was received on April 20, 2012, by Serenity's agent at the address Serenity uses for mailing purposes.

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[6] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Similarly, California Constitution, Article I, section 17, provides that "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed."

4. Serenity failed to timely submit certified payroll records pursuant to the DLSE request, as required by section 1776.

5. DLSE properly assessed penalties against Serenity under section 1776, subdivision (h) for its failure to provide certified payroll records to DLSE within 10 days of April 20, 2012.

6. In light of the findings above, Serenity is liable for penalties under section 1776, subdivision (h) in the total amount of $46,500.00.

ORDER

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

As to all issues decided here, the Decision is final.

Dated: 10/3/2013

Christine Baker
Director of Industrial Relations