

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Baron Services, Inc.

Case No. **14-0188-PWH**

From a Notice of Withholding of Contract Payments issued by:

Golden State Labor Compliance LLC for the Victor Valley Union High School District Labor Compliance Program

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Affected contractor Baron Services, Inc. (Baron), timely requested review of a Notice of Withholding of Contract Payments (Notice of Withholding) issued by Golden State Labor Compliance LLC (Golden State), the labor compliance program for the awarding body, the Victor Valley Union High School District (District) with respect to the work of improvement known as Silverado High School Sports Complex –Increment 2 (Project). The Notice of Withholding determined that \$16,441.68 in wages and statutory penalties was due. A Hearing on the Merits was held on June 19, 2014, in Los Angeles, California, before Hearing Officer John J. Korbol. Robert Nida of Castle & Associates appeared for Golden State, with three previously disclosed witnesses: Terry Zinger, Lisa D. Sylvester, and Christy Yates. Jeff Baron appeared for Baron, in pro per. He was assisted by Lou Desmond, who was permitted to participate as a hearing representative. Two of Baron's previously disclosed witnesses were also present, in addition to Desmond: Daisy Dias and Lowell Connor.

At the Hearing, the parties agreed that the underlying facts were not in dispute and that the case turns on the resolution of a single legal issue concerning the applicability of the exemption from the prevailing wage law for volunteer labor. The parties stipulated that there was no need to take the sworn oral testimony of the parties or any of the witnesses present. Golden State's exhibits 1 through 17 were admitted without objection. Baron had inadvertently brought the wrong set of exhibits to the Hearing. Baron was given leave to file its exhibits after the Hearing, and Baron's exhibits A through J were admitted without

objection.¹ Both parties submitted post-trial written arguments, and the matter was taken under submission as of July 8, 2014. Now, based on evidence showing that Baron was a contractor that received payment in return for the labor performed by the persons purported to be volunteers, the Director of Industrial Relations affirms the Notice of Withholding.

FACTS

The prime contractor on the Project, Bogh Engineering, Inc., subcontracted with Baron on September 20, 2012 to perform final cleanup work at the Project site. The contract provides that the subcontractor, Baron, “shall pay each worker engaged in the project not less than the general prevailing wage as determined by the State of California, Department of Industrial Relations”. The contract also forbids Baron from assigning the work without the prior written consent of Bogh Engineering. The agreed amount of payment for the job is \$9,935.00.

Five individuals performed cleanup work at the Project on various dates from May 2, through May 10, 2013: Daisy Dias, Joseph Pierce, Simon Acosta, Lewis Polk, and Frank Roland. Golden State’s audit of the Project determined that none of these workers were paid for their labor. Baron represented that volunteer labor was used and submitted a set of payroll records prepared not by Baron, but by John Dias, the pastor of Victory Outreach La Puente, listing the five workers by name and identifying each as a volunteer. Baron also produced two checks from Baron to Victory Outreach dated May 13 and May 20, 2013, totaling \$2,575.00. Dias represented that Victory Outreach is a 501(c)(3) corporation² that furnished unpaid volunteer labor to do cleanup work at the Project as a “service project” in furtherance of the organization’s residential substance abuse program. The payments from Baron to Victory Outreach constituted a *quid pro quo* for Victory Outreach having supplied the laborers who did the final cleanup on the Project.

Golden State conducted a labor compliance investigation and determined that Baron’s use of unpaid labor in the form of persons referred by Victory Outreach did not come within Labor Code section 1720.4³ which provides an exemption from the prevailing wage law for work performed by volunteers. Golden State determined that the five individuals sent to the

¹ Golden State raised a hearsay objection to Baron’s exhibits. This objection goes to the weight and sufficiency of Baron’s exhibits, rather than their admissibility.

² Presumably a reference to section 501(c)(3) of the Internal Revenue Code.

³ All further statutory references are to the California Labor Code.

Project by Victory Outreach should have been paid, collectively, \$10,293.20, and that Baron should have paid an additional \$148.48 in training fund contributions. Additionally, Golden State assessed penalties in the amount of \$6,000.00 under section 1775 for Baron's failure to pay the workers at the prevailing wage rates. The penalties were calculated at the maximum rate of \$200.00 per day for the 30 days worked by the five workers, totaling \$6,000.00. The applicable prevailing wage determinations are: (1) SC-23-102-2-2011-1, with the applicable job classification being Laborer Group 1; and (2) SC-61-569-20-2008-1, with the applicable job classification being Fixture Cleaner.

Based on these conclusions, Golden State submitted a Request for Approval of Forfeiture Amount to the Division of Labor Standards Enforcement (DLSE). DLSE's approval was obtained, and the Notice of Withholding in the aggregate amount of \$16,441.68 for unpaid wages, training fund contributions, and penalties was prepared and served on Baron. The Notice of Withholding also apprised Baron that it may be liable for liquidated damages of an additional \$10,441.68. Baron timely requested review.

DISCUSSION

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

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 [citations omitted].)

Section 1774 provides:

The contractor for whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

It is a well-established legal principle that "exceptions to the general provisions of a statute are to be narrowly construed; only those circumstances that are within the words and

reason for the exception may be included.” (*San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 400.) This is especially true with respect to remedial statutes governing the conditions of employment (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 794; see also *Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1, 31.)

A labor compliance program such as Golden State (for the District) 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.*)

When the District, through its labor compliance program, determines that a violation of the prevailing wage law has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that the contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect.⁴ The District withheld contract payments pursuant to its authority under section 1771.5(b)(6) and California Code of Regulations, title 8, section 16435.5. Such withholding requires the prior approval of the Labor Commissioner, which was obtained here.

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following the service of a Notice of Withholding.

Baron does not dispute that the workers obtained through Victory Outreach were unpaid.⁵ Nor does Baron dispute the identity of those workers, the hours worked, or the type of work that was done. The only issue is whether the workers may be considered “volunteers” as that term is defined in section 1720.4.

⁴ Section 1771.6(b) provides that a notice of withholding shall be reviewable in the same manner as a civil wage and penalty assessment under section 1742.

⁵ Victory Outreach characterizes the workers as “members.”

Section 1720.4 provides:

(a) This chapter shall not apply to any of the following work:

(1) Any work performed by a volunteer. For purposes of this section, "volunteer" means an individual who performs work for civic, charitable, or humanitarian reasons for a public agency or corporation qualified under Section 501(c)(3) of the Internal Revenue Code as a tax-exempt organization, without promise, expectation, or receipt of any compensation for work performed.

If this were the entire statute, Baron may have a colorable claim that the volunteer exemption applies to the facts of this case. It is not disputed that Victory Outreach is a tax-exempt 501(c)(3) nonprofit organization engaged in a charitable enterprise. There is some evidence that the five workers may indeed have considered themselves to be volunteers when they worked on the Project even if their motive is unclear.⁶

There is, however, an additional qualification in the statute that is directly applicable to the facts of this case. Subparagraph (C) of section 1720.4, subdivision (a)(1) sets forth a restriction to the exemption for volunteer labor by providing:

An individual shall not be considered a volunteer if the person is otherwise employed for compensation at any time . . . (ii) by a contractor, other than a corporation qualified under Section 501(c)(3) of the Internal Revenue Codes as a tax-exempt organization, that receives payment to perform construction, alteration, demolition, installation, repair, or maintenance work on the same project.

The cleanup work done on the Project was carried out in the execution of the contract between Baron and Bogh Engineering. The five workers covered in the Notice of Withholding were employed to fulfill Baron's contractual obligation to Bogh Engineering. Thus, the workers were employees of Baron, in addition to their affiliation with Victory Outreach. These facts are not altered because Victory Outreach may have ultimately benefitted financially by its arrangement with Baron. Victory Outreach is not a public works contractor and had no contractual relationship with Bogh Engineering. Victory Outreach cannot claim the status of a

⁶ Subparagraph (A) of subdivision (a)(1) of section 1720.4 clarifies that a person may be considered a volunteer "only when his or her services are offered freely and without pressure and coercion, direct or implied, from an employer." In its Supplemental Statement of the Case, Golden State questions whether the five workers employed in this case may truly be considered volunteers under this standard, but there is no evidence of pressure or coercion by Baron in the documentary evidence, and the parties did not otherwise brief or argue whether the five individuals employed on the Project were pressured into doing the work. Consequently, it is assumed that there was no such pressure or coercion by Baron.

subcontractor on the Project.⁷ Victory Outreach acted as nothing more than a referral source of workers for Baron. Even if the workers could be plausibly considered volunteers performing work for Victory Outreach under section 1720, subdivision (a)(1), Baron would still be their employer, triggering application of the restriction articulated in section 1720, subdivision (a)(C)(ii). Under that provision, the volunteer labor exemption is not available to a contractor receiving payment for work on a public works project.

Baron is a for-profit corporation that was to receive payment for the cleanup work Baron contracted to perform on a public works project. Consequently, it is statutorily barred from asserting the volunteer exemption as a basis to avoid paying the five workers referred to Baron by Victory Outreach.

Based on the undisputed facts drawn from the evidence and the foregoing legal analysis of section 1720.4, Baron failed to pay the workers employed to carry out the work called for in its subcontract and failed to pay training fund contributions. The total unpaid wages due are \$10,293.20. Unpaid training fund contributions come to an additional \$148.48. In addition, \$6,000.00 in penalties under Labor Code section 1775 are due, at the rate of \$200.00 per violation for 30 instances of failure to pay the applicable prevailing wages. Baron has not provided a basis for waiver of the liquidated damages.

FINDINGS

1. Affected contractor Baron Services, Inc. filed a timely Request for Review from a Notice of Withholding of Contract Payment issued by Golden State Labor Compliance LLC for the Victor Valley Union High School District Labor Compliance Program.
2. Daisy Dias, Joseph Pierce, Simon Acosta, Lewis Polk, and Frank Roland were not volunteers as defined in Labor Code section 1720.4.
3. Daisy Dias, Joseph Pierce, Simon Acosta, Lewis Polk, and Frank Roland were not paid for the work they performed on the Project.
4. Unpaid wages are due in the amount of \$10,293.20.
5. Unpaid training fund contributions are due in the amount of \$148.48.

⁷ Such a relationship would have been prohibited by the terms of Baron's contract with Bogh.

6. In light of Findings 2 and 3 above, Baron underpaid its employees in the aggregate amount of \$10,441.68.

7. Penalties under section 1775 are due in the amount of \$6,000.00 for 30 violations at the rate of \$200.00 per violation.

8. Liquidated damages are due in the amount of \$10,293.20, and are not subject to waiver under section 1742.1, subdivision (a).

9. The amounts found due in the Notice of Withholding as affirmed by this Decision are as follows:

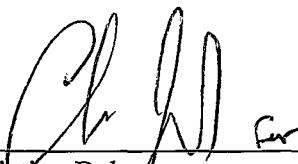
Wages Due:	\$10,293.20
Training Fund Contributions Due:	148.48
Penalties under section 1775, subdivision (a):	6,000.00
Liquidated damages:	10,293.20
TOTAL:	\$26,734.88

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

ORDER

The Notice of Withholding of Contract Payments is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 11/21/14



Christine Baker,
Director of Industrial Relations