

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Planet Mechanical, Inc.

Case No.: 19-0323-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

On June 26, 2019, the Division of Labor Standards and Enforcement (DLSE) issued a Civil Wage and Penalty Assessment (Assessment) with respect to work performed by affected subcontractor Planet Mechanical, Inc. (Planet Mechanical) on the Police Department Chief's Office Tenant Improvement (Project), contract number 2016-10-18-1212P, for the City of Stockton (Awarding Body) in San Joaquin County. The Assessment imposed \$820.00 in penalties under Labor Code section 1777.7.¹

On July 1, 2019, Planet Mechanical timely submitted a Request for Review of the Assessment. A Hearing on the Merits was held on November 7, 2019, before Hearing Officer Grant Thompson, and the matter was submitted for decision at the conclusion of the Hearing. Evan Adams appeared as counsel for DLSE, and David Lopez, President of Planet Mechanical, appeared on behalf of Planet Mechanical. Deputy Labor Commissioner Maria Mercado testified in support of the Assessment. Lopez testified on behalf of Planet Mechanical. The parties stipulated that the Project was a public work subject to the California prevailing wage law, the Assessment was timely, and the Request for Review was timely.

The issue for decision is whether Planet Mechanical is liable for \$820.00 in penalties under section 1777.7.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima

¹ All subsequent section references are to the Labor Code, unless otherwise specified.

facie support for the Assessment and Planet Mechanical failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment.

FACTS

The Project.

The Awarding Body advertised the Project for bid on July 7, 2016, and awarded the Project to Marko Construction Group (Marko Construction). On December 22, 2016, Marko Construction and the Awarding Body entered into a construction contract (Contract) for the Project. Pursuant to the Contract, Marko Construction agreed that in all its subcontracts it would include the same requirements and provisions of the Contract, to the extent they apply to the subcontractor's work. Under one such provision, the Contract requires the payment of prevailing wages and compliance with sections 1770 to 1784. The Contract specifically requires compliance with section 1777.5 concerning compliance with apprenticeship requirements.

Marko Construction subcontracted certain improvement work to Planet Mechanical. Planet Mechanical holds a C20-Warm Air Heating, Ventilating, and Air Conditioning license from the Contractors State License Board. Planet Mechanical employed three Sheet Metal Worker journeypersons on the Project.

On February 22, 2017, Planet Mechanical began work on the Project. Planet Mechanical's last day on the Project was June 16, 2017.

Applicable Prevailing Wage Rate Determination (PWD).

The relevant PWD in effect on the Project's bid advertisement date is Sheet Metal Worker for San Joaquin County (SJO-2016-1). The basic hourly rate set forth in the PWD is \$36.85. The combined fringe benefit hourly rate is \$30.80, and the training fund contribution hourly rate is \$0.82. The PWD indicates the craft is apprenticeable. The parties stipulated that this PWD was applicable to the work Planet Mechanical performed on the Project.

The Assessment.

After receiving a complaint of prevailing wage violations, DLSE conducted an investigation into whether Planet Mechanical complied with applicable requirements. Mercado testified that during the investigation, DLSE learned that Planet Mechanical commenced work on the Project on February 22, 2017, but did not timely notify the applicable apprentice program of its public work subcontract award information. Planet Mechanical did not send the required notification until April 4, 2017, when it submitted a Division of Apprenticeship Standards (DAS) Form 140 to the Northern California Valley Sheet Metal Industry Joint Apprenticeship and Training Committee (Sheet Metal JATC). Also on April 4, 2017, Planet Mechanical submitted to the Sheet Metal JATC its first request for dispatch of an apprentice, using DAS Form 142. Mercado testified that both the DAS 140 and DAS 142 forms were submitted later than required by law.

Mercado further testified that, due to the late submissions, she prepared a Penalty Review recommending a penalty under section 1777.7 based on the number of days Planet Mechanical failed to comply with the timely notice requirements. Mercado determined that there were 41 violations, one for each calendar day from February 22, 2017, the date Planet Mechanical began work, to and including April 3, 2017, one day before Planet Mechanical submitted a DAS 140 form to the Sheet Metal JATC.

Mercado testified that DLSE's records indicated that Planet Mechanical had no history of prevailing wage violations. She also testified that, based on DLSE's policy and practice, the minimum penalty amount is typically \$40.00 per violation. Mercado considered the factors set forth in section 1777.7, subdivision (b), and recommended in her Penalty Review that the penalty be set at \$80.00 per violation, in part due to what she believed was a lack of good faith on the part of Planet Mechanical in failing to comply with apprentice requirements.

Lopez testified that, prior to commencing work, he prepared an email to send the DAS 140 form, but failed to send it due to an oversight. He stated that it was not

until about April 4, 2017, that he realized he had not sent the required forms, and on that date, he finally sent the DAS 140 and DAS 142 forms to the Sheet Metal JATC. Lopez further testified that his failure to send the forms timely was the product of mere oversight, not a lack of good faith.

Following review by the Senior Deputy Labor Commissioner, the Labor Commissioner assessed a section 1777.7 penalty of \$20.00 per violation for 41 violations, for a total penalty amount of \$820.00.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages and hiring of apprentices on public works projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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 (*Lusardi*)). 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)); see also *Lusardi*, at p. 985.)

Sections 1777.5 through 1777.7 provide the statutory requirements governing the employment of apprentices on public works projects. These requirements are

further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, section 227, provides that the regulations “shall govern all actions pursuant to ... [sections] 1777.5 and 1777. 7.”² DLSE enforces the apprenticeship requirements not only for the benefit of apprentices, but to encourage and support apprenticeship programs, which the Legislature has recognized as “a vital part of the educational system in California.” (Stats. 1999, ch. 903, § 1 [Assem. Bill 921].)

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a Request for Review. (§ 1742.) The Request for Review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the Hearing, DLSE has the initial burden of presenting evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

In this case, for the following reasons, the record establishes that DLSE carried its initial burden of presenting prima facie support for the Assessment, and Planet Mechanical failed to carry its burden to prove the basis for the Assessment is incorrect.

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² All subsequent regulatory references are to California Code of Regulations, title 8.

The Assessment Correctly Found that Planet Mechanical Failed to Meet the Requirements for Employing Apprentices.

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform at least one hour of work for every five hours of work performed by journey level workers in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); § 230.1, subd. (a).) However, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) The DAS has prepared a form (DAS 142) that a contractor may use to request dispatch of apprentices from apprenticeship committees.

The regulations also require contractors to alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. DAS has prepared a form (DAS 140) that a contractor may use to notify apprenticeship committees for each apprenticeable craft in the area of the site of the project. The required information must be provided to the applicable committees within ten days of the date of the execution of the prime contractor subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. (§ 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

In this case, it is undisputed that there were journeypersons working on the Project in the classification of Sheet Metal Worker. When Planet Mechanical began work on February 22, 2017, three journey level workers were classified as Sheet Metal Worker, which is an apprenticeable craft. Planet Mechanical did not submit a DAS 140 form to the Sheet Metal JATC until April 4, 2017. Under the regulation the form was

due "in no event later than the first day in which the contractor has workers employed upon the public work." (§ 230, subd. (a).) Therefore, Planet Mechanical violated section 1777.5, subdivision (e), on each of the 41 calendar days between February 22, 2017, and April 4, 2017.

Penalties Under Section 1777.7 as Provided in the Assessment Are Affirmed.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty under section 1777.7, subdivision (a)(1), which provides as follows:

If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by a regulation, section 231, subdivision (h), as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, or the contractor had previously employed apprentices on the project.

At the Hearing, Planet Mechanical primarily argued that it did not "knowingly" violate section 1777.5. However, Lopez testified that, in January or February of 2017, he received a copy of the Contract, and he acknowledged that the Contract notified Planet Mechanical of its obligation to comply with Labor Code requirements applicable

to public works projects. Under section 231, Planet Mechanical's receipt of the Contract creates an irrebuttable presumption that Planet Mechanical knew or should have known of the requirements of section 1777.5.³ In addition, Lopez's testimony established that he actually knew of the apprentice requirements and had extensive experience with public works projects, and thus should have known of the requirements of section 1777.5.

Under section 231, the fact that Lopez knew or should have known of the requirements establishes that he "knowingly" violated section 1777.5, unless Planet Mechanical shows that the violation was due to circumstances beyond its control. (§ 231, subd. (h).) Lopez may have failed to send the DAS 140 form on a timely basis due to an oversight, but no evidence was presented showing that Planet Mechanical was unable to submit the DAS 140 form due to circumstances beyond its control.

Moreover, Planet Mechanical presented no evidence to corroborate Lopez's assertion that he timely prepared, but inadvertently failed to send, the DAS 140 form by February 22, 2017, Planet Mechanical's first day on the Project. If such an error had occurred, however, it would only provide further evidence that Planet Mechanical knew of the applicable requirements, which, under section 231, is sufficient to show that it "knowingly" violated section 1777.5.

In light of this evidence and as determined by DLSE, Planet Mechanical "knowingly" violated section 1777.5. As a result, section 1777.7 requires the imposition of the penalty, and the only issue remaining is whether DLSE properly determined the amount of the penalty.

Section 1777.7, subdivision (a)(1), provides that the Labor Commissioner may impose a penalty of up to \$100.00 for each full calendar day of noncompliance where

³ While the record does not include a copy of Planet Mechanical's subcontract, the Contract required that all subcontracts include the same provisions ensuring compliance with the requirements applicable to public works projects. Therefore, Planet Mechanical's subcontract likely includes the same language. Even if this were not the case, Lopez acknowledged that the Contract notified him of the applicable requirements.

the contractor has no prior record of violations within a three-year period. That subdivision further provides the amount of the penalty may be reduced "if the amount of the penalty would be disproportionate to the severity of the violation." Section 1777.7, subdivision (b), requires the Labor Commissioner to consider the following factors in evaluating the amount of the penalty: (1) whether the violation was intentional; (2) whether the party committed other violations; (3) whether, upon notice of the violation, the party took steps to voluntarily remedy the violation; (4) whether the violation resulted in lost training opportunities for apprentices; and (5) whether the violation otherwise harmed apprentices or apprenticeship programs.

The determination of the Labor Commissioner as to the amount of the penalty is reviewable "only for an abuse of discretion." (§ 1777.7, subd. (d).) Under this standard, the agency's action "will not be set aside unless it is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing the agency's determination, the Director cannot substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

In this case, Mercado considered the factors set forth in section 1777.7, subdivision (b), and recommended in her Penalty Review that the penalty be set at \$80.00 per violation. Mercado found no record of prior violations by Planet Mechanical but also found that the violations were not committed in good faith and resulted in lost training opportunities for apprentices and apprenticeship programs. On review of Mercado's recommendation, the DLSE Senior Deputy Labor Commissioner reduced the penalty recommendation to \$20.00 per violation, which was the amount ultimately assessed by the Labor Commissioner. The \$20.00 rate is half of the minimum penalty amount typically imposed, and is consistent with Planet Mechanical's lack of any prior violations.

The record shows that DLSE engaged in a rational penalty review process and considered the relevant statutory factors in light of the facts and circumstances. Planet Mechanical did not show the final penalty amount constituted an abuse of discretion. Further, while Planet Mechanical questioned Mercado's view that the violation was not a good faith mistake, DLSE's final review reduced Mercado's proposed penalty of \$80.00 per violation to only \$20.00 per violation, which is half the minimum penalty amount typically imposed and consistent with Planet Mechanical's lack of prior violations. In light of the evidence as a whole in this case, Planet Mechanical has not carried its burden to prove that DLSE's penalty was an abuse of discretion. (See Cal. Code Regs., tit. 8, §§ 232.50, subd. (b) and 17250, subd. (b).)

Accordingly, the Assessment of \$820.00 for 41 violations at \$20.00 per violation is affirmed.

Based on the foregoing, the Director makes the following findings:

FINDINGS

1. As stipulated by the parties, the Project was a public work subject to California prevailing wage laws, the Assessment was timely, and the Request for Review was timely.
2. For purposes of section 1777.7, Planet Mechanical, Inc. knowingly violated section 1777.5.
3. DLSE did not abuse its discretion in setting the penalty amount at \$20.00 for each full calendar day of noncompliance, for a total of 41 violations.
4. Penalties under section 1777.7 are due from Planet Mechanical, Inc. in the amount of \$820.00.

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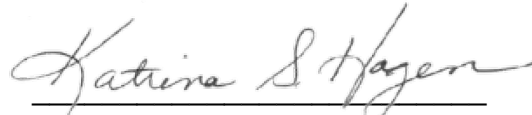
5. The amount found due in the Assessment as affirmed by this Decision are as follows:

Category	Amount Due
Penalties under Labor Code section 1777.7	\$820.00
TOTAL	\$820.00

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 that shall be served with this Decision on the parties.

Dated: 10-16-2020



Katrina S. Hagen, Director
Department of Industrial Relations