

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

CINTAS CORPORATION NO. 2

Case No. 17-0450-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Cintas Corporation No. 2 (Cintas) requested review of a Civil Wage and Penalty Assessment (Assessment) issued on December 21, 2017, by the Division of Labor Standards Enforcement (DLSE) with respect to a Fire Hydrant Testing (Project) undertaken for the San Ramon Valley Unified School District (School District) in Contra Costa County. The DLSE determined that \$11,160.46 in unpaid prevailing wages; \$1,165.00 in penalties under Labor Code sections 1775 and 1813; \$42,000.00 in penalties under Labor Code section 1776; and \$7,360.00 in penalties under Labor Code section 1777.7 were due.¹

Pursuant to written notice, a Hearing on the Merits on the requests for review was held on May 24, 2018 and on June 20, 2018, in Oakland, California, before Hearing Officer Gayle Oshima. Evan Adams appeared as counsel for DLSE, and Deborah Wilder appeared as counsel for Cintas. Prior to the Hearing on the Merits, the Hearing Officer granted a motion to intervene by the Northern California Fire Protection Compliance Group (Compliance Group) pursuant to California Code of Regulations, title 8, section 17208, subdivision (c). Roberta Perkins appeared as counsel for the Compliance Group at the Hearing on the Merits.

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

Testimony was presented at the Hearing by DLSE Management Services Technician Breanna Roberts, Cintas attorney Erica O'Brien, Cintas Northern California Manager Isaac Defee, Cintas Regional Business Manager Shawn Folks, and Cintas workers Jeff Ange, Christopher Maxwell, Mauricio Alejandre, and Ulises Calderon.² DLSE submitted Exhibits 1 through 16, all of which were admitted into evidence without objection. Cintas submitted Exhibits A through M, all of which were admitted into evidence without objection.³ On August 13, 2018, after post-trial briefing, the matter was deemed submitted.

The issues for decision are:

- Whether Cintas correctly paid prevailing wages for testing and maintenance of fire protection systems for the School District;
- Whether Cintas is entitled to a reduction in the Assessment for unpaid prevailing wages to take account of wage payments already made to the workers for the work at issue, and in what amounts;
- Whether DLSE abused its discretion in assessing penalties under section 1775;
- Whether Cintas is liable for penalties under section 1813;
- Whether penalties under section 1776 are due;
- Whether Cintas violated section 1777.5;
- Whether penalties under section 1777.7 are due; and
- Whether Cintas is liable for liquidated damages under section 1742.1?

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 facie support for the Assessment, but that Cintas carried its burden of proving the basis for the Assessment was incorrect, in part. (See Cal. Code Regs., tit. 8, § 17250, subds.

² DLSE called Roberts and Ange as witnesses in support of the Assessment and called O'Brien, Defee and Folks, as adverse witnesses. Cintas called Defee, Folks, Maxwell, Alejandre and Calderon in its case in chief.

³ Cintas submitted one set of exhibits for both Case Numbers 17-0437-PWH and 17-0450-PWH. The Hearing Officer heard both cases simultaneously.

(a), (b).) Accordingly, the Director issues this Decision affirming, but modifying in part the Assessment, and denying section 1776 penalties.

FACTS

The Public Work Contract.

Cintas and the School District entered into a Master Purchase Agreement (MPA) dated July 1, 2015, which remained in effect through June 30, 2016. Work under the MPA entailed periodic testing of various fire suppression systems for the School District under maintenance contracts called Purchase Orders, together with related change orders. Purchase Orders set forth contractual terms for work by Cintas during the weeks ending January 2, 2016, March 5, 2016, March 12, 2016, April 9, 2016, and May 14, 2016. Work under the Purchase Orders for the aforementioned five weeks in 2016 was not paid, at the time of the work, at prevailing wage rates.

In June 2016, Cintas learned that fire hydrant testing for public school districts constituted public works subject to payment of the prevailing wage rate.

Applicable Employee Classifications and Prevailing Wage Determinations.

The Assessment used the prevailing wage rates contained in the prevailing wage rate determination (PWD) for the classification Sprinkler Fitter (Fire Protection and Fire Control Systems) (STC-2015-1) (Sprinkler Fitter PWD).⁴ The parties applied the prevailing wage increase from August 3, 2015.

The Assessment.

DLSE Management Services Technician Roberts initiated DLSE's investigation of Cintas's wage payments on the Project based on a complaint from the Compliance Group prepared by Derek Miles and accompanied by a letter from the Compliance Group's counsel detailing certified payroll violations, apprenticeship notification and ratio violations, and prevailing wage violations.

⁴ The general per diem prevailing wage rate under the Sprinkler Fitter PWD totals \$82.19 per hour, which includes a basic hourly rate of \$56.02, \$8.77 per hour for health and welfare, \$15.90 per hour for pension, \$1.10 per hour for training, and \$.40 per hour for "other." The Sprinkler Fitter PWD contains an increase to the basic hourly rate in the amount of \$2.00, \$3.00 and \$3.75 on August 3, 2015, August 1, 2016 and July 31, 2017, respectively.

On August 14, 2017, Roberts sent Cintas a notice of investigation and request for CPRs. On the request for CPRs, Roberts identified the Project as “Fire Hydrant Testing,” but with no project number, and no geographic location, facility name, or awarding body name listed. (DLSE Exhibit No. 3.) The notice of investigation likewise contained only the phrase “Fire Hydrant Testing” to identify the project.

Cintas contacted Roberts to obtain an extension of time to respond and also to request clarification as to the project for which DLSE was requesting CPRs.⁵ According to Cintas manager Defee’s testimony, DLSE did not clarify the project for which it sought CPRs, although the documentation submitted at Hearing does suggest that Cintas at least was able to determine a portion of the relevant time-period for which DLSE was seeking CPRs. On September 15, 2017, Cintas sent a packet to DLSE containing CPRs on Department of Industrial Relations (DIR) forms, proof of training contributions and a fringe benefit report (PW26). The packet was timely pursuant to the extension afforded Cintas, but the CPRs only related to a Purchase Order dated May 3, 2016, for \$3,658.20. At the Hearing, Roberts testified that she had no recollection of communicating with Cintas to correct the apparent misunderstanding as to the time-period for which DLSE sought the CPRs. Nonetheless, Roberts said she wondered why Cintas did not produce the payroll records Cintas had previously prepared on federal forms and had delivered to the School District for the weeks ending March 5, 2016, March 12, 2016, April 9, 2016, and May 14, 2016.

DLSE assessed section 1776, subdivision (h), penalties at \$100.00 per day for the 14 employees for a period of 30 days (for a total of \$42,000.00). DLSE did not submit into evidence the customary DLSE penalty review document that might describe the basis for setting the period of 30 days for section 1776, subdivision (h).

As to apprenticeship requirements, Cintas admitted that it did not submit its public works award contract information, on the Division of Apprenticeship Standards (DAS) Form 140, or submit the Request Dispatch of an Apprentice DAS Form 142 to any DAS-approved apprenticeship program. Additionally, Cintas failed under section 1777.5 to employ apprentices in compliance with the required apprentice-to-journeyman ratio for

⁵ While Roberts’s testimony confirmed that Cintas employee Lyna Nguyen and she exchanged email about the requested CPRs, neither party submitted into evidence those communications and Roberts had no memory of their content.

the classification of Plumber-Sprinkler Fitter. Cintas acknowledged that the first day of the Project was December 28, 2015, and the last day of the Project was May 11, 2016, a total of 135 days. For purpose of the penalties, DLSE calculated the number of days at 184.⁶ The Assessment assessed section 1777.7 penalties at \$40.00 per violation.

DLSE did not submit at the Hearing the DLSE penalty review document that might explain the number of days and the basis for the penalty rate that DLSE used in the Assessment for section 1777.7 penalties. Nor did DLSE otherwise explain its calculation under section 1777.7. Similarly, DLSE did not submit at the Hearing the penalty review document, or any other document, to explain the penalty rate of \$40.00 per violation that DLSE used in the Assessment for section 1775 penalties.

DLSE found in the Assessment that Cintas violated section 1774 for failure to pay the prevailing wage pursuant to the Sprinkler Fitter PWD. Accordingly, DLSE assessed penalties under section 1775 in the amount of \$1,040.00, and penalties under section 1813 in the amount of \$125.00. DLSE refused to credit against the amount of the unpaid prevailing wages assessed any wage payments already made by Cintas to the workers for the dates and hours at issue, but did credit Cintas for training fund contributions made and assessed no amount due for training fund contributions.

According to the testimony of Cintas's Regional Business Manager Folks, after Cintas realized the work for the Project required the payment of prevailing wages, Cintas reviewed wages paid for its public work projects from January 2015 through mid-2016 to determine additional amounts owed to over 50 workers, involving over a thousand Purchase Orders. In October 2016, Cintas made additional wage payments to a number of its workers, in the combined amount of approximately \$200,000.00, as "restitution" for prior wages that had been below the required prevailing wage rate set in the Sprinkler Fitter PWD. This included additional wage payments made to seven of the 14 workers on this Project.

Workers Jeff Ange and Edgar Hernandez returned employee questionnaires to DLSE that stated a rate of pay of \$25 an hour and \$19 an hour, respectively. In their questionnaires, Ange and Hernandez indicated they received the same rates of pay

⁶ DLSE did not explain its calculation. The 184-day-figure given above is derived by dividing the section 1777.7 penalty of \$7,360.00 by the stated penalty rate of \$40.00 per hour rate used in the Assessment.

whether working on non-public works projects or for public works projects that required prevailing wages. Ange also stated on the questionnaire that the paycheck stubs did not differentiate between non-public works and public works.⁷

At the Hearing, Cintas submitted compilations of various business records to support its assertions as to the wages previously paid to the workers on the Project, both those that were contemporaneous to the work, as well as the additional wages paid later, in October 2016. From all appearances, Cintas prepared the records in contemplation of the Hearing, and they were collectively bound into several exhibits. Defee and Folks demonstrated in their testimony the accuracy of these records, at least with respect to the wage payments that had been made at the time of the work and later in October 2016. While documents prepared in contemplation of a hearing are not business records, under the relaxed administrative hearsay rules, the Hearing Officer may admit them if the other party does not raise a hearsay objection. (Cal. Code Regs, tit. 8, § 17244, subd. (d).) In the instant case, DLSE raised no hearsay objection, and the testimony and underlying business records provided support for the compilation documents Cintas had prepared for the Hearing. Accordingly, these documents made in contemplation of the Hearing were admitted into evidence and accorded weight as demonstrating prior wages paid to the workers on the Project, either at the time of work or later in October 2016, before the Assessment was issued. (Exhibits I, K and L.)

DLSE’s audit on which the Assessment was based identified 14 workers, their dates and hours of work, and unpaid wages. DLSE’s audit and Cintas’s response per the evidence of record, as introduced at the Hearing, reflect the following hours of work and wages due for each worker:

<u>DLSE Audit</u>	<u>Cintas Response</u>
Joseph Kaufman worked seven hours of straight time; wages due of \$470.33.	Kaufman worked March 2, 2016, March 7, 2016. Same number of hours and earnings reported as DLSE. Admits \$79.93 remains due to the worker.
Fernando Corral worked 15 hours of straight time; wages due of \$1,007.85.	Corral worked March 1, 2016, and March 2, 2016. Same number and earnings

⁷ Both Ange and Hernandez received restitution checks for work on public work projects. Cintas reports that before the Assessment was issued, Ange received an additional \$631.12 in a restitution check for this Project. Hernandez did not receive any restitution payment specifically associated with this Project.

	reported as DLSE. Admits \$590.70 remains due to the worker.
Marcos Duenas worked 7.5 hours of straight time; wages due of \$503.93.	Duenas worked March 3, 2016. Same number of hours and earnings reported as DLSE. No amounts remain due to the worker.
Mauricio Alejandro worked 9.5 hours of straight time; wages due of \$638.31.	Alejandro worked March 2, 2016 and March 5, 2016. Same number of hours and earnings reported as DLSE. No amounts remain due to the worker.
Mike Villafana worked 6 hours of straight time; wages due of \$403.14.	Villafana worked March 2, 2016, and March 7, 2016. Same number of hours and earnings reported as DLSE. No amounts remain due to the worker.
Hector Mendez worked 8 hours of straight time; wages due of \$537.52.	Mendez worked March 9, 2016. Same number of hours and earnings reported as DLSE. No amounts remain due to the worker.
Edgar Hernandez worked 6.5 hours of straight time; wages due of \$436.74.	Hernandez worked April 6, 2016. Same number of hours and earnings reported as DLSE. No amounts remain due to the worker.
Scott Samuels worked 6.5 hours of straight time; wages due of \$436.74.	Samuels worked April 6, 2016. Same number of hours and earnings reported as DLSE. No amounts remain due to the worker.
Jeff Ange worked 15 hours of straight time; wages due of \$1,007.85.	Ange worked April 6, 2016 and April 7, 2016. Same number of hours and earnings reported as DLSE. No amounts remain due to the worker.
Ulises Calderon worked 31 hours of straight time and 2 hours of overtime; wages due of \$2,273.79.	Calderon worked December 28, 2015, December 29, 2015, April 6, 2016, and April 7, 2016. Calderon worked 30.5 hours of straight time and 2.5 hours of overtime. Admits \$935.40 remains due to the worker.
Martin Gonzalez worked 5 hours of straight time; wages due of \$335.95.	Gonzalez worked May 11, 2016. Same number of hours reported as DLSE. Gonzalez earned \$420.95. Admits \$3.75 remains due to the worker.
Cesar Ramirez worked 6 hours of straight time; wages due of \$403.14.	Ramirez worked on May 11, 2016 for 5 hours and earned \$420.95. No amounts remain due to the worker.
Joe Moriarty worked 30 hours of straight time and 3 hours of overtime; wages due of \$2,302.05.	Moriarty worked on December 28, 2015, December 29, 2015, December 30, 2015 and December 31, 2015. Same number of hours reported as DLSE. Admits

	\$2,862.20 remains due to the worker.
Tyler Burton worked 6 hours straight time; wages due of \$403.14.	Burton worked on December 28, 2015. Same number of hours reported as DLSE. Admits \$292.68 remains due to the worker.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed 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); *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

Additionally, employers on public works must also keep accurate payroll records, recording the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee, among other information. (§ 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.) A failure to supply certified payroll records to DLSE within ten days from receipt of a request may result in a \$100.00 penalty for each calendar day, or portion thereof, for each worker, “until strict compliance is effectuated.” (§ 1776, subd. (h).) The penalty rate provided by the statute is mandatory.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, following the service of a civil wage and penalty assessment if the wages are not paid within 60 days. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment, the contractor deposits into escrow with DIR the full amount of the assessment, including the statutory penalties.

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade. (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The DAS has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs, tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio, however, 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).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

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 or subcontractor may appeal that assessment by filing a request for review under section 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 initial 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.” (§ 1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

DLSE Is Obligated to Take Into Account Wages Already Paid to Workers for the Work At Issue.

Under the CPWL enforcement provisions, an assessment under Section 1741 specifies the amount of unpaid prevailing wages that are due. Section 1775, subdivision (a)(2)(E), provides that workers are to be paid the difference between the prevailing wage rate that applied and the amount that was paid to the workers for their work on the project. Thus, an assessment for, and a determination of, unpaid prevailing wages must reflect a reduction for any wages an employer is able to show were already paid to workers for the work at issue.

In this case, DLSE acknowledged that Cintas paid training fund contributions, but inexplicably gave no credit to Cintas in the audit underlying the Assessment for the wages Cintas had already paid its workers on this Project. At minimum, DLSE should have worked toward an accurate audit of prior wage and fringe benefit payments and then amended the Assessment as necessary to reflect that audit. Not having finalized the amounts already paid in wages, and those allegedly due, DLSE never completed its investigation and audit. Absent a finalized audit, DLSE failed, in the main, to provide prima facie support for the amended Assessment.⁸

⁸ This decision is distinguishable from Case No. 17-0437 because there Cintas did not present evidence sufficient to prove the wages it had already paid its employees for work on that project, with one exception.

Over two days of Hearing, Cintas presented evidence showing the amounts that it had already paid in wages to its employees for work on the Project, both at the time of work and in the additional wage payments made after it learned the work required the payment of prevailing wages. Specifically, Cintas demonstrated through testimony and documentation that it had originally paid a total of \$6,039.36 in wages, and later paid additional wages of \$3,139.21. Cintas also proved fringe benefit payments in the amount of \$664.26. A summary of the Cintas' evidence presented at the Hearing, as to each worker, is set forth in the chart above. DLSE did not present testimony or submit any documents to rebut Cintas's evidence.

In the Assessment, DLSE found \$11,160.46 due in wages for fourteen workers, but as noted, failed to take into account the wage payments that had already been made to these workers as proven by Cintas. Instead, DLSE refused to credit payments made by Cintas apparently on the grounds there were no paper copies of payroll checks, despite Cintas's explanation that it used a computerized payroll system and direct deposit. The evidence at Hearing, as summarized above, demonstrated that only \$4,764.66 in unpaid wages is still owing to the workers on the Project. Therefore, the Director modifies the amount of wages due from \$11,160.46 to \$4,764.66.

DLSE's Penalty Assessment Under Section 1775 Is Modified.

Section 1775, subdivision (a), as it read at the time the Project was bid (May 21, 2015), states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.⁹

((Former) § 1775, subd. (a).)

The Labor Commissioner’s determination as to the amount of penalty is reviewable only for abuse of discretion. (§ 1775, subd. (a)(2)(D).) Abuse of discretion is established if the “agency’s nonadjudicatory action . . . 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 for abuse of discretion, however, the Director is not free to 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.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, “the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

DLSE assessed section 1775 penalties for a total amount of \$1,040.00 at the rate of \$40.00 per violation based on Cintas underpaying the 14 workers listed in the audit in a total 26 instances. Cintas demonstrated at the Hearing that it had underpaid workers in only 14 instances. Cintas did not demonstrate that DLSE abused its discretion in setting

⁹ The reference to section 1777.1, subdivision (c) is a typographical error in the statute. In the version of section 1777.1 as it existed in 2015 (including on the date of the bid advertisement for the Project), the correct reference is to subdivision (e), which defines a willful violation as one in which “the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.”

the penalty rate at \$40.00 per violation, as the issue went unaddressed. The penalty rate being within the discretion of the Labor Commissioner, the Director confirms the penalty rate at \$40.00 per violation. Accordingly, the Director modifies the total penalty assessment under section 1775 from \$1,040.00 to \$560.00.

DLSE's Penalty Assessment Under Section 1813 Is Affirmed.

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty at \$25.00 per day for each underpaid worker.

DLSE assessed three calendar days (\$75.00) of violations for Moriarty and two calendar days (\$50.00) of violations for Calderon. Cintas shows in its Exhibit I that Moriarty worked overtime three calendar days and remains owed wages for the overtime worked for those days. Cintas shows in its Exhibit I that Calderon worked overtime three calendar days and remains due wages for two calendar days, but that Cintas paid him the prevailing rate and overtime wages on the third calendar day. Cintas also shows that Ange worked overtime one calendar day for which Cintas paid him the prevailing rate and overtime wages, and DLSE assessed no section 1813 penalties for Ange.

Accordingly, the Director affirms section 1813 penalties in the amount of \$125.00.

Cintas Is Not Liable for Penalties for Failure to Produce CPRs.

Section 1776 sets forth an employer's obligations with respect to certified payroll records (CPRs) under the CPWL, providing in part as follows:

- (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 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.

...
(h) 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 one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of 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.

The applicable regulations provide as follows concerning a request for certified payroll records:

- (b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request *shall be in writing and contain at least the following information*:
- (1) The body awarding the contract;
 - (2) The contract number and/or description;
 - (3) The particular job location if more than one;
 - (4) The name of the contractor;
 - (5) The regular business address, if known.

(Cal. Code Regs., tit. 8, § 16400, subd. (b), emphasis added.)

On August 14, 2017, DLSE issued a request for CPRs to Cintas. DLSE omitted from its request, however, the name of the body awarding the contract, the contract number and/or description, and the particular job location, all of which are required under the regulation. Cintas responded by requesting clarification as to the specific project for which DLSE was requesting CPRs. Although the record reflects some dialogue on this issue, the evidence at Hearing suggested that Cintas may have understood the request for the CPRs to apply to only one purchase order under the MPA (the one dated May 3, 2016, for \$3,658.20), whereas Roberts apparently intended the request to apply to all of the work performed under the MPA. The evidence failed to demonstrate that this issue and the exact nature of the request was ever clarified. Based on this record, the penalty assessed by DLSE under section 1776, at \$100 per day for 14 workers for 30 days, for a total of \$42,000.00, cannot be affirmed. DLSE's request for the CPRs was plainly defective under the applicable regulation, in that it lacked at least three of the required

categories of information, and there is nothing in record establishing that DLSE ever remedied this issue or clarified the request.

Cintas Violated Apprentices Requirements.

As described, *ante*, under section 1777.5 and applicable regulations, a contractor is required to notify apprenticeship programs of upcoming opportunities, to request dispatch of apprentices for specified dates and with sufficient notice, and to hire apprentices in the required 1:5 apprentice to journeyman ratio. In this case, DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment as to Cintas's failure to notify applicable apprenticeship committees. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Cintas admitted that at least one applicable apprenticeship committee existed in the geographic area of the Project and that it did not properly notify the committee of the public works contract. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, it is concluded that Cintas violated section 1777.5, subdivision (e), and the applicable regulation, as to the notice requirement. Similarly, Cintas admitted that it failed to request the dispatch of apprentices for the craft of Sprinkler Fitter in compliance with the applicable regulation.

DLSE's evidence also demonstrated that Cintas employed no apprentices on the Project, which Cintas also admitted. Accordingly, the record establishes that Cintas violated section 1777.5, subdivision (g), and the applicable regulation (Cal. Code Regs., tit. 8, §230.1, subdivision (a)) based on its failure to employ apprentices in the required 1:5 apprentice-to-journeyman ratio for the craft of Sprinkler Fitter.

DLSE Did Not Abuse Its Discretion in Assessing Penalties Under Section 1777.7 at the Reduced Rate of \$40.00 per Violation; the Director Modifies Penalties Downward Based on Calendar Days of Violations.

As it existed on the date of the bid (July 1, 2015), section 1777.7 states in relevant part:

- (a) (1) 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 “knowingly violated Section 1777.5” is defined by the regulation, Title 8, 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.

“The determination of the Labor Commissioner as to the amount of the penalty imposed under subdivisions (a) and (b) shall be reviewable only for an abuse of discretion.” (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

In this case, Cintas failed to notify the applicable apprenticeship committees, failed to request dispatch of apprentices in the craft of Sprinkler Fitter, and failed to hire any apprentices in that craft. Moreover, the record provides no reason for Cintas’s failures other than Cintas’s purported ignorance of the law. Based on these facts, Cintas “knowingly violated” the requirement of a 1:5 ratio of apprentice hours to journeyman hours and is subject to the statutory penalty of up to \$100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) As set forth in the Assessment, DLSE mitigated the penalty downward to \$40.00 per day and Cintas did not object to that rate. While DLSE did not submit the penalty review into evidence and the mitigated penalty went unexplained, the Director nevertheless approves the rate as being within the discretion of the Labor Commissioner.

DLSE assessed the penalty, however, based on 184 days of violations, which was incorrect. The applicable number of days for this Project (for a period running from December 28, 2015 to May 11, 2016) was 135.¹⁰ The Director therefore approves the penalty rate of \$40.00 per day, but for only 135 days, for a total of \$5,400.00. (§ 1777.7,

¹⁰ Cintas journeymen may have worked on the Project for a total of only 12 days, as demonstrated by Cintas. The penalty period of 135 days, however, commenced on the date Cintas should have, but failed to, submit the DAS 140 notice, and spans the entire duration of the Project, not just on the number of days on which journeymen were working at the jobsite. (See Cal. Code Regs., tit. 8, § 230, subd.(a).)

subd. (d).)

Cintas Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides in part:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a) the contractor has 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposited with DIR the full amount of the assessment of unpaid wages, including all statutory penalties.¹¹

Here, Cintas did not pay the unpaid prevailing wages due to the workers or deposit those funds with the DIR.¹² Accordingly, Cintas is liable for liquidated damages of the underpaid prevailing wages, \$4,764.66.

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

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¹¹ On June 27, 2017, before Cintas filed its request for review of the amended Assessment, the Director's discretionary ability to waive liquidated damages was deleted from section 1742.1 by legislative amendment. (Stats. 2017, ch. 28, §16 [Sen. Bill No. 96].)

¹² Cintas's restitution payments to workers, made after it realized that prevailing wages were due for the work at issue, were made prior to the issuance of the Assessment and therefore served to reduce the amount of unpaid wages found due in this Decision.

FINDINGS AND ORDER

1. Affected prime contractor, Cintas Corporation No. 2, underpaid \$4,764.66 in prevailing wages owed to six of the 14 workers on the Project. Accordingly, prevailing wages in the sum of \$4,764.66 are due.
2. Cintas Corporation No. 2 did not pay these wages or deposit the funds with DIR within 60 days after the amended Assessment issued. Accordingly, under Labor Code section 1742.1, subdivision (a), liquidated damages in the sum of \$4,764.66 are due.
3. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775, subdivision (a), at the rate of \$40.00 per violation; however, the penalties are modified to reflect only 14 violations, for a total sum of \$560.00.
4. Cintas Corporation No. 2 did not pay the overtime rate for two workers in a total of five instances, and is liable for \$125.00 in Labor Code section 1813 penalties at the rate of \$25.00 per violation.
5. DLSE failed to make a proper request for certified payroll records to Cintas Corporation No. 2 pursuant to California Code of Regulations, section 16400, subdivision (b), and accordingly, the Assessment is modified to set aside the Labor Code section 1776, subdivision (h), penalties (assessed in the amount of \$42,000.00).
6. Cintas Corporation No. 2 knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a), by not issuing public works contract award information in a DAS 140 form or its equivalent to the applicable apprenticeship committees in the geographic area of the Project site for the craft of Sprinkler Fitter.
7. Cintas Corporation No. 2 knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by: (1) not issuing requests for dispatch of apprentices in a DAS 142 form or its equivalent to the applicable apprenticeship committees for the craft of Sprinkler Fitter in the geographic area of the Project site; and (2) not employing on the Project apprentices

in the applicable craft of Sprinkler Fitter in the ratio of one hour of apprentice work for every five hours of journeyman work.

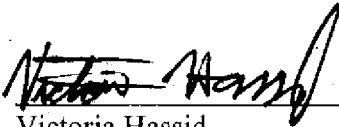
8. Cintas Corporation No. 2 is liable for an aggregate penalty under Labor Code section 1777.7 in the sum of \$5,400.00, computed at \$40.00 per day for 135 days.
9. The amounts found due in the Assessment, as modified and affirmed by this Decision, are as follows:

Wages:	\$4,764.66
Liquidated damages under section 1742.1:	\$4,764.66
Penalties under section 1775, subdivision (a):	\$560.00
Penalties under section 1813:	\$125.00
Penalties under section 1777.7	\$5,400.00
TOTAL:	\$15,614.32

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is in part affirmed, in part modified and in part denied, 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: July 8, 2019


Victoria Hassid
Chief Deputy Director
Department of Industrial Relations¹³

¹³ See Government Code sections 7, 11200.4.