STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Antoun Jean Fata doing business as Fata Construction and Development Case No. 18-0247-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Antoun Jean Fata dba Fata Construction and Development (Fata) submitted a timely Request for Review of the Civil Wage and Penalty Assessment (Assessment) issued on July 17, 2018, by the Division of Labor Standards Enforcement (DLSE) with respect to Phase 2 of the Casimir Middle School Modernization project (Project) for the Torrance Unified School District (District) in Los Angeles County. The Assessment asserted that a total of $393,342.50 was due in unpaid prevailing wages and training fund contributions, and penalties for prevailing wage violations under Labor Code section 1775 and penalties for apprenticeship program violations under Labor Code section 1777.7.[1] This figure included unpaid prevailing wages in the amount of $203,318.84. The Assessment identified Fata as the prime contractor and Naya Services, Inc. (Naya) as the subcontractor on the Project.[2]

A duly noticed Hearing on the Merits was conducted on March 4, 2020, in Los Angeles, California, before Hearing Officer John J. Korbol. William A. Snyder appeared as counsel for DLSE; there was no appearance by or on behalf of Fata. The Hearing Officer proceeded to conduct the Hearing on the Merits in Fata's absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a).

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

[2] Naya did not file a Request for Review.

Deputy Labor Commissioner Monique Munoz testified in support of the Assessment. Also testifying was Esaul Bedolla, one of the workers employed on the Project. DLSE's documentary exhibits were admitted into evidence without objection. The Hearing was concluded but the record was kept open to permit DLSE to file redacted paper copies of its exhibits. These documents were received by the Hearing Officer on April 7, 2020, and on May 1, 2020, DLSE filed and served a post-Hearing brief. The case was deemed submitted as of that date. Fata has not filed a motion seeking relief from its non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

The issues for decision are:

- Was the Assessment timely served?[3]
- Were all of the workers directly employed by Naya on the Project paid the required prevailing wages for all of their days and hours worked on the Project?
- Were the required training fund contributions made for all hours worked on the Project?
- Is Fata liable for penalties under section 1775, and did DLSE properly assess such penalties?
- Did Fata provide the contract award information to the applicable apprenticeship committee and request dispatch of apprentices for the employed and apprenticeable craft, and were apprentices employed in the proper apprentice to journeyman ratio?
- Is Fata liable for penalties under section 1777.7, and did DLSE properly assess such penalties?
- Is Fata entitled to a waiver of liquidated damages under section 1742.1?

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[3] DLSE does not dispute that Fata's Request for Review was timely.

For the reasons set forth below, the Director of Industrial Relations finds that the Assessment was timely served, that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, and that Fata failed to carry its burden of proving that the basis of 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 facts stated below are based on DLSE Exhibit Numbers 1 through 31, the testimony of Munoz and Bedolla, and the contents of the Hearing Officer's file.

Failure to Appear.

At the first two Prehearing Conferences conducted by the Hearing Officer, Fata participated through legal counsel. Subsequent to the second Prehearing Conference, Fata notified the Hearing Officer and DLSE that it was no longer being represented by an attorney. Fata did not participate in the duly noticed fourth and final Prehearing Conference on November 18, 2019.

The Hearing Officer was not contacted by a representative of Fata at any time between May 3, 2019, and the Hearing on March 4, 2020. There was no appearance by or on behalf of Fata at the Hearing. Counsel for DLSE informed the Hearing Officer that Antoun Fata is presently in Lebanon and unable to return to the U.S. Counsel for DLSE received an email from Fata on February 7, 2020, inquiring about settling a different case, but with regard to this matter Fata subsequently was unresponsive to DLSE.

The Assessment.

On June 29, 2015, the District advertised for bids on the Project. The District awarded a contract, which Fata and the District entered into on August 19, 2015 (Contract). Pursuant to the Contract, Fata agreed to perform demolition and hazardous

material abatement on phase 2 of the Casimir Middle School Modernization Project. As the successful bidder, Fata was required to be, and was, certified for hazardous substances removal. Naya was Fata's hazardous materials subcontractor under the Contract, and Naya directly employed all of the workers covered by the Assessment.[4]

Demolition work on the Project commenced no later than October 19, 2015, and hazardous waste abatement began no later than October 21, 2015.[5] Twenty-one workers employed by Naya performed work on the Project starting October 7, 2015, and ending July 8, 2016. The Notice of Completion indicates that Fata's work was completed on August 26, 2016, and that the District accepted the work as of January 17, 2017.

According to certified payroll records (CPRs) provided by Naya, two of Naya's workers were classified as asbestos and lead abatement laborers. Five of Naya's workers were classified as both asbestos and lead abatement laborers and as drywall installers/lathers. Naya classified eleven workers as drywall installers/lathers.

The prevailing wage determination (PWD) in effect on the bid advertisement date for asbestos and lead abatement laborers was Asbestos and Lead Abatement (Laborer) (SC-102-882-1-2015-1).[6] The PWD set the hourly base pay for such workers at $29.23, the training fund contribution at 70 cents per hour, and the fringe benefits at the cumulative figure of $16.95 per hour. This was not an apprenticeable craft.

The PWD for drywall installers/lathers was Drywall Installer/Lather (Carpenter)

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[4] DLSE was never furnished with a copy of the subcontract between Fata and Naya. Naya does not appear on any of the daily logs kept by the District's inspector on the Project, although the tasks performed by Naya workers do appear on the logs. Also, Naya was included on Fata's list of subcontractors provided to the District, the workers covered by the Assessment understood Naya to be their employer, and Naya produced payroll records for work performed on the Project.

[5] These dates are derived from the daily log kept by the Project's inspector on the Project. The daily log entries reflect that Fata, not Naya, was present on the Project site.

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[6] The proper classification of the workers included in the Assessment was not disputed by either party.

(SC-31-X-41-2014-1). This PWD set the hourly base pay for such workers at $40.40, the training fund contribution at 57 cents per hour, and the fringe benefits at the cumulative figure of $14.98 per hour, reflecting a predetermined wage increase effective July 1, 2015. This was an apprenticeable craft.

The Assessment asserted that the workers employed on the Project had been underpaid in the collective amount of $207,142.50, a figure that includes $3,823.66 for unpaid training funds. The Assessment asserted that section 1775 penalties were due at the rate of $200.00 per violation, in the total amount of $167,600.00 based on 838 instances in which the workers were underpaid prevailing wages. The Assessment also asserted section 1777.7 penalties were due at the rate of $100.00 per violation, in the total amount of $18,600.00 for 186 apprenticeship violations.

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 construction 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.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing 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.

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 journeypersons 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 Division of Apprenticeship Standards (DAS) has prepared a 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 if it has properly requested 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. (Cal. Code Regs., tit. 8, § 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, including with respect to any violation of the apprenticeship requirements, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the 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 burden of producing evidence that "provides prima facie support for the Assessment ...." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (a); 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).)

The Assessment Was Timely.

Section 1741, subdivision (a), provides that an assessment shall be served not later than 18 months after the filing of a notice of completion or after acceptance of the public work, whichever occurs last. Here, the District accepted the Project as of January 17, 2017. The Assessment was served precisely 18 months later, on July 17, 2018.[7] Therefore, the Assessment was timely served.

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[7] It also appears that the District may have recorded the Notice of Completion on March 29, 2017, when it was notarized.

Naya Failed to Pay Required Prevailing Wages.

In this case, the record establishes that DLSE presented prima facie support for the Assessment, and Fata failed to prove the basis for the Assessment was incorrect. Munoz testified about the content of the Assessment, the underlying audit, her analysis of the CPRs, and the results of her investigation. In the course of conducting her audit and gathering information about Naya's prevailing wage violations, Munoz interviewed some of the workers and asked them to describe the work they did on the Project. These workers provided answers to a questionnaire provided by DLSE. The workers summarized their recollection of the period of time they were employed on the Project and reported their days and hours worked on a 2016 calendar, notably including underreported hours. The workers involved in the investigation asserted that their rate of pay ranged from $16.00 to $25.00 per hour for eight hours per day, and all of them denied ever having received payment for fringe benefits. The workers also reported having been paid by check, with cash, or both.

Munoz reviewed the Contract and the applicable PWD. She reviewed a set of CPRs submitted by Fata and another set of CPRs provided by the District. She also accessed and reviewed some electronic CPRs that had been completed by Naya. There were inconsistencies in the number of workers reported on the Project per day, the number of days that Naya was on the Project site, and the number of hours.[8] Munoz also detected discrepancies between the overlapping and inconsistent CPRs and the complaints by the workers she had interviewed, especially as to the underreporting of hours worked and the underpayment of wages due. Requests for copies of cancelled checks, payroll records, timesheets, bank statements and the like, documents that might have provided corroboration of the CPRs, were ignored. All of this evidence was unrebutted in light of Fata's failure to participate in the Hearing.

[8] Many of the CPRs in the record are legally noncompliant.

The oral testimony of Bedolla corroborated some of the conclusions of Munoz. He was paid cash at the rate of $20.00 per hour for hazardous material removal. He was not paid fringe benefits. There was no tax withholding by Naya.

The following prevailing wage violations were detected by Munoz and included in the Assessment. These violations are substantiated by the evidence produced by DLSE at the Hearing.

<u>Naya and Fata underreported the days and hours worked on the Project, resulting in underpayment</u>. The unrebutted evidence establishes that most of Naya's workers employed on the Project, as reflected in the audit that supports the Assessment, were not paid for at least some of their days and hours worked. Either the workers were not paid for all hours worked on any given day, or they were not paid for some of the days they performed work. The inspector logs provide support for the underreporting of days that Naya had workers on the Project. Given the conflicting information that can be gleaned from the CPRs provided by Fata and the electronic CPRs prepared by Naya, the dates and numbers of hours worked reported on those CPRs must be augmented by the recollection of the workers themselves, recollection that was reasonably detailed and consistent from worker to worker.

<u>Naya failed to pay its workers the required prevailing wage rate.</u> The workers who turned in questionnaires and spoke to Munoz, including Bedolla, assert that they were paid at flat rates of $25.00, $20.00, or $16.00 per hour, with no additional compensation for fringe benefits. Neither Naya nor Fata ever produced copies of cancelled payroll checks, bank statements, or other evidence that might have served to refute their workers' assertions. In this respect, the CPRs can only be regarded as self-serving and falsified. With no evidence of actual wage payments from either Naya or Fata, the alleged underpayment of the applicable prevailing wage rate and the alleged nonpayment of fringe benefits is credible and unrebutted.

By virtue of evidence presented at the Hearing, DLSE met its burden of

producing evidence that "provides prima facie support for the Assessment ...." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Given Fata's failure to appear and participate in the Hearing, Fata has failed to carry its burden to prove the Assessment is incorrect. It must be concluded that the workers employed on the Project by Naya were underpaid in the aggregate amount of $203,318.84.

Section 1743, subdivision (a), provides, in part, that "The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon." Accordingly, Fata has joint and several liability for unpaid wages in the amount of $84,010.00.

DLSE's Penalty Assessment under Section 1775 Was Proper.

Section 1775, subdivision (a)(1), provides that the contractor and any subcontractor be penalized a maximum of $200.00 "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director . . . ." Section 1775, subdivision (a)(2)(B)(iii), states that the penalty for failure to pay the required prevailing wage rates may not be less than $120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of section 1777.1.[9] Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. 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

[9] The reference in section 1775, subdivision (a)(2)(B)(iii), to section 1777.1, subdivision (c), is mistaken. The correct reference is to section 1777.1, subdivision (e). According to that subdivision as it existed on the June 29, 2015 date of the bid advertisement, a willful violation is defined 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."

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 DLSE abused its 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 at the rate of $200.00 based on Naya's underreporting of the size of its workforce, underreporting of days and hours worked, and underpaying Naya's workers in 838 instances. The maximum penalty rate of $200.00 per violation was chosen because DLSE deemed Naya's violations to be intentional and Naya had been unresponsive to requests for information, failing even to provide legally compliant CPRs.

The burden was on Fata to prove that DLSE abused its discretion in setting the penalty amount at the rate of $200.00 per violation and in calculating the number of violations. Fata failed to carry that burden.

Additionally, Fata did not take the necessary actions to avail itself of the safe harbor protection for prime contractors in section 1775, subdivision (b). Having not submitted for the record a copy of the subcontract it had with Naya and having not appeared at the Hearing, Fata did not demonstrate that a copy of the relevant statutes was included in the subcontract. While there are other requirements for the safe harbor protection that Fata has not met, the failure as to the subcontract alone suffices to establish Fata's liability for section 1775 penalties. (§ 1775, subd. (b)(1).)

Accordingly, Fata is liable for section 1775 penalties in the sum of $167,600.00, calculated at the $200.00 penalty rate for 838 violations.

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Naya Violated Apprentice Requirements.

DLSE established in its prima facie case that Naya failed to submit contract award information to apprenticeship programs that could have supplied Drywall Installer/Lather (Carpenter) apprentices, and further failed to request dispatch of such apprentices.[10] Ultimately, Naya failed to employ any apprentices on the Project. Fata did not rebut the evidence of these failures. Hence, it is concluded that Naya violated section 1777.5, subdivisions (e) and (g), and the applicable regulation, section 230, for its failures to provide the requisite notice of its public work contract to applicable apprenticeship committees, to request dispatch of apprentices from those committees, and to employ sufficient apprentices to meet the required 1:5 apprentice to journeyperson ratio for the craft of Drywall Installer/Lather, an apprenticeable craft.

At the Hearing, DLSE sought a $100.00 per day penalty for 186 calendar days of apprenticeship violations. This span of time is measured from January 5, 2016, when individuals doing the work of a drywall install/lather were first employed on the Project, to July 8, 2016, the last day such work was done.

Based on the record, Naya knowingly violated the requirement of a 1:5 ratio of apprentice hours to journeyperson hours for apprentices and failed to notify the applicable apprenticeship committee or request the dispatch of apprentices from it.

As with its liability for section 1775 penalties, Fata did not take the necessary actions to avail itself of the safe harbor protection for prime contractors in section 1777.7, subdivision (e). Having not appeared at the Hearing, Fata failed to rebut that it had knowledge of its subcontractor's failure to follow the law. Accordingly, Fata is liable for penalties at the rate of $100.00 per day for 186 calendar days for a total of $18,600.00.

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[10] In this case, an applicable apprenticeship program was the Southern California Drywall/Lather Joint Apprenticeship Committee.

Training Fund Contributions Are Due and Owing.

In support of that component of the Assessment for an asserted failure to make the required training fund contribution mandated by the applicable PWD, DLSE produced a letter from the California Apprenticeship Council (CAC). In that letter, the CAC reported that as of June 11, 2018, "no contributions have been received for Contractors License Number 973142 in the past four years." Although DLSE did not produce a license detail report from the Contractors State License Board for Naya, as it did for Fata, the list of subcontractors prepared by Fata includes license number 973142 as the license for Naya. Thus the letter from the CAC stands as unrebutted evidence that Naya failed to make the required training fund contributions in the amount of $3,823.66, and there is no evidence that Fata ever covered this shortfall. Therefore, the assessment of that amount is confirmed.

Fata Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of unpaid wages) if those wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. 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 the Department the full amount of the assessment of unpaid wages, plus the statutory penalties under section 1775. There is no evidence that either Fata or Naya made such a deposit with the Department, or that any of the assessed wages were paid within 60 days.

In addition, as of July 17, 2018, when the Assessment was issued in this matter, the Director's discretionary power to waive liquidated damages had been deleted from section 1742.1 by Senate Bill 96. (Stats. 2017, ch 28, § 16, eff. June 27, 2017.)

Section 1743, subdivision (a), provides that the prime contractor has joint and severally liable for all amounts found due. In light of the finding that unpaid prevailing

wages in the amount of $203,318.84 are due and owing, Fata is liable for liquidated damages in the same amount.

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

FINDINGS AND ORDER

1. DLSE timely served the Civil Wage and Penalty Assessment on Antoun Jean Fata dba Fata Construction and Development with respect to the Project.

2. Affected contractor Antoun Jean Fata dba Fata Construction and Development filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

3. Naya Services, Inc., a subcontractor of Antoun Jean Fata dba Fata Construction and Development, underpaid the workers in the amount of $203,318.84 in prevailing wages.

4. Naya Services, Inc. a subcontractor of Antoun Jean Fata dba Fata Construction and Development, underpaid training fund contributions in the amount of $3,823.66.

5. Prime contractor Antoun Jean Fata dba Fata Construction and Development is jointly and severally liable for the unpaid wages, unpaid training fund contributions, and liquidated damages as a result of violations of the prevailing wage law by its subcontractor, Naya Services, Inc.

6. The Labor Commissioner did not abuse her discretion in assessing penalties against Antoun Jean Fata dba Fata Construction and Development under section 1775 at the rate of $200.00 per violation for 838 violations committed by Naya Services, Inc., a subcontractor of Antoun Jean Fata dba Fata Construction and Development, for a total amount of $167,600.00.

7. Penalties under Labor Code section 1777.7 are due from Antoun Jean Fata dba Fata Construction and Development in the amount of $18,600.00 for 186 violations committed by Naya Services, Inc., a subcontractor of Antoun Jean Fata dba Fata Construction and Development, calculated at the rate of $100.00 per violation.

8. Because none of the unpaid prevailing wages were paid within 60 days after service of the Assessment, liquidated damages are due from Antoun Jean Fata dba Fata Construction and Development in the amount of $203,318.84.

9. The amounts asserted in the Assessment to be due from Antoun Jean Fata dba Fata Construction and Development, as affirmed by this Decision, are as follows:

Basis of the Assessment	**Amount**
Wages	$203,318.84
Penalties under section 1775, subd. (a) Penalties under section 1777.7 Training Fund Contributions	$167,600.00 $18,600.00 $3,823.66
Liquidated Damages	$203,318.84
TOTAL	**$596,661.34**

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

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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.

Dated: __7/13/20______ _***/s/ Katrina S. Hagen***_

Katrina S. Hagen
Director
Department of Industrial Relations