

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Worthington Construction, Inc.**

**Case No. 17-0038-PWH**

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor Worthington Construction, Inc. (Worthington Construction) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on January 25, 2017, with respect to a work of improvement known as the Durfee Elementary School New Two-Story Classroom Building (Project) performed for the El Monte City School District (School District) in the County of Los Angeles. The Assessment determined that the following amounts were due: \$461.82 in unpaid prevailing wages, \$10.88 in unpaid training fund contributions, \$800.00 in penalties under Labor Code section 1775 statutory,<sup>1</sup> and \$3,450.00 in penalties under section 1777.7. Worthington Construction timely filed its Request for Review of the Assessment on February 2, 2017.

A Hearing on the Merits was held in Los Angeles, California on May 10, 2018, before Hearing Officer Howard Wien. Dale Worthington (President of Worthington Construction) appeared for Worthington Construction, and Sotivear Sim appeared as counsel for DLSE. At the commencement of the Hearing, Sim and Worthington informed the Hearing Officer that DLSE and Worthington Construction had settled all issues except the assessment of \$3,450.00 in penalties under section 1777.7. Accordingly, the Hearing proceeded solely on that issue. Deputy Labor Commissioner

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

Kari Anderson testified on behalf of DLSE, and Worthington testified on behalf of Worthington Construction. The case stood submitted on May 10, 2018.

The issues for decision are:

- Whether Worthington Construction knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by not issuing a valid request for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committee in the geographic area of the Project for the craft of Landscape Laborer.
- Whether Worthington Construction knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by not employing apprentices on the Project in the ratio of one hour of apprentice work for every five hours of journeyman work in the craft of Landscape Laborer.
- Whether Worthington Construction is liable for penalties under section 1777.7, and if so, in what amount.

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's determination of the section 1777.7 penalty, but that Worthington Construction carried its burden of proving the basis for the Assessment was incorrect in part. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming but modifying in part the Assessment.

### **FACTS**

The School District advertised the Project for bid on December 24, 2013. On March 10, 2014, prime contractor, Robert Clapper Construction Services, Inc. (Clapper), entered into a contract with the School District to construct a two-story 24-classroom building, shade structures and associated site work. On March 20, 2014, Clapper and Worthington Construction entered into a subcontract (the Subcontract). In the Subcontract, Worthington Construction agreed to provide all necessary labor, materials,

transportation and equipment necessary to landscape the site of the new classroom building. Worthington Construction also agreed to comply with the apprentice requirements of California's Prevailing Wage Law. In that regard, article 33 of the Subcontract states in relevant part:

Attached hereto and incorporated herein by this reference are the provisions of California Labor Code sections 1771, 1775, 1776, 1777.5, 1813 and 1815 . . . . Subcontractor agrees to comply with all provisions of the California Labor Code including the above-referenced provisions applicable to the performance of its work on this project. Additionally, subcontractor specifically agrees to:

\* \* \* \*

f) Comply with the applicable requirements and joint apprenticeship standards as required by Labor Code 1777.5 . . .

The Assessment.

The Assessment arose from Worthington Construction's employment of five journeymen workers who worked on the Project in the craft of Landscape Laborer. The certified payroll records (CPRs) prepared by Worthington Construction classified the workers as Landscape Laborers. They worked on the Project seven days during the period July 11, 2014, through August 12, 2014, and 16 days during the period June 3, 2015, through July 30, 2015.<sup>2</sup> The Assessment found that Worthington Construction failed to send a timely request for dispatch of apprentices to the only applicable apprenticeship committee for the craft Landscape Laborers. The Assessment further found that Worthington Construction failed to have any apprentice Landscape Laborers work on the Project even though its journeyman Landscape Laborers worked 323 hours on the Project. For this failure to issue a timely request for dispatch of apprentices and failure to have apprentice Landscape Laborers work on the Project, the Assessment imposed a penalty of \$150.00 per violation for the 23 days that journeymen Landscape Laborers worked on the Project, totaling \$3,450.00. The \$150.00 penalty rate was based in part on a finding that Worthington Construction had two prior violations of apprenticeship requirements. Anderson testified as to the prior cases in which DLSE had

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<sup>2</sup> Worthington Construction performed no work on the Project from August 13, 2014, through June 2, 2015.

issued a civil wage and penalty assessment and a determination of civil penalty against Worthington Construction for apprenticeship violations.

Applicable Prevailing Wage Rate Determination.

As determined by the bid advertisement date of December 24, 2013, the applicable prevailing wage determination for Landscape Laborer working in Los Angeles County was No. SC-102-X-14-2013-2, issued August 22, 2013 (Landscape Laborer PWD). It specifies that Landscape Laborer is an apprenticeable craft.

Compliance with Apprenticeship Requirements.

In the geographic area of the Project site there was one apprenticeship committee for the craft of Landscape Laborer: the Southern California Laborers Landscape and Irrigation Fitter Joint Apprenticeship Committee (Landscape JAC). On April 7, 2014, Worthington Construction faxed to the Landscape JAC a valid form DAS 140, "Public Works Contract Award Information." On this DAS 140, Worthington Construction estimates the Project will provide 67 hours of apprentice work. Worthington Construction checked the box on the DAS 140 stating that it will employ and train apprentices in accordance with the California Apprenticeship Council regulations.

Worthington Construction did not issue a DAS 142 form "Request for Dispatch of An Apprentice" to the Landscape JAC until June 8, 2015. Worthington Construction faxed the DAS 142 form to the Landscape JAC at 2:24 p.m. that day, and requested a single apprentice to report to the jobsite at 7:00 a.m. on June 11, 2015. Although the DAS 142 form twice states that Worthington Construction must submit the form at least 72 hours in advance of the time the apprentice is to report for work, Worthington Construction submitted the DAS 142 form 7-1/2 hours short of the required 72 hours.<sup>3</sup> The Landscape JAC did not dispatch an apprentice to the Project on June 11, 2015. Although Worthington Construction's Landscape Laborers worked on the Project on 22 other days (i.e., both before and after June 11, 2015), Worthington Construction did not

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<sup>3</sup> The instructions on the DAS 142 form state: "Requests for dispatch must be in writing and submitted at least 72 hours in advance (excluding weekends and holidays) . . ." (DLSE Exhibit No. 3, p. 3.) The portion of the DAS 142 form containing the blank lines to complete the date and time the apprentice is to report for work states: "Date Apprentice(s) to Report: \_\_\_\_\_ (72 hrs. notice required) Time to Report: \_\_\_\_\_." (*Id.*, emphasis in original.)

submit any other DAS 142 form to the Landscape JAC. Worthington Construction's Landscape Laborers worked on the Project a total of 323 hours. Worthington Construction did not hire any apprentices for the Project.

Worthington testified that he mistakenly thought only 48 hours' notice was required because the DAS 142 form that was previously in effect stated "48 hours notice required".

With respect to Worthington Construction's interactions with the Landscape JAC, Worthington testified as follows. Worthington Construction had been performing public works construction projects since the 1990s. In all these years, the Landscape JAC was the sole apprenticeship committee for Landscape Laborers in the geographic area in which Worthington Construction performed its work. Since the late 1990s, the Landscape JAC had never dispatched apprentices to Worthington Construction's public works projects despite Worthington Construction's timely submission of DAS 140 and DAS 142 forms to the Landscape JAC. The Landscape JAC repeatedly stated to Worthington Construction that it will not dispatch apprentices to Worthington Construction's public works projects unless Worthington Construction either becomes a union signatory, or enters into a union project agreement under which Worthington Construction would in effect be a temporary union contractor solely for the project at hand. Worthington Construction has consistently refused to do so.

With respect to the Project, shortly after Worthington Construction issued the DAS 140 form to the Landscape JAC on April 7, 2014, Worthington had a telephone conversation with the Landscape JAC representative in which the Landscape JAC representative reiterated the above-stated condition of signing an agreement to allow the dispatch of apprentices to the Project. Worthington refused to sign the union contract and the union project agreement, and the Landscape JAC responded that it would keep the DAS 140 form as a "compliance" document. Worthington understood this to mean that the Landscape JAC would continue its long practice of refusing to dispatch apprentices to Worthington Construction's projects, but would keep the DAS 140 form in its file.

Worthington testified that within a few days after faxing the DAS 142 form to the Landscape JAC on June 8, 2015, he had substantially the same telephonic communication

with the Landscape JAC as stated, *ante*, regarding the April 7, 2014 submission of a DAS 140 form. The Landscape JAC asked Worthington whether Worthington Construction will sign the union contract or a union project agreement, Worthington responded no, and the Landscape JAC stated it would keep the DAS 142 form on file as a “compliance” document. Again, Worthington understood this to mean that the Landscape JAC would continue its practice of refusing to dispatch apprentices to Worthington Construction’s projects absent an agreement.

In response to a subpoena duces tecum that Worthington Construction served on the Landscape JAC in this case, the Landscape JAC produced its log of communications between it and Worthington Construction regarding the Project. The log corroborates Worthington’s testimony that Worthington Construction was unwilling to sign an agreement required by the Landscape JAC as described above. The log included a description of a telephone conversation between Worthington and the Landscape JAC on August 11, 2017, in which the Landscape JAC staff member stated in part: “I explained that if the compliance company wants to contact me, I can confirm that the DAS140 and DAS142 were received and that no apprentice was sent because he was submitting for compliance and not willing to sign our agreement.”

## **DISCUSSION**

### Worthington Construction Violated Apprenticeship Requirements.

Sections 1777.5 through 1777.7 set forth 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. (Cal. Code Regs., tit. 8, §§ 227 to 232.70.) In review of an assessment asserting violation of apprentice requirements, “. . . the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.” (§ 1777.7, subd. (c)(2)(B); accord, Cal. Code Regs., tit. 8, § 232.50, subd. (b).)

Section 1777.5, subdivision (d), establishes that every contractor awarded a public works contract by the state or any political subdivision who employs workers in any apprenticeable craft or trade “shall employ apprentices in at least the ratio set forth in this section . . . .” Section 1777.5, subdivision (g), specifies the ratio as not less than one hour

of apprentice work for every five hours of journeyman work:

The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

(§ 1777.5, subd. (g).) The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is California Code of Regulations, title 8, section 230.1, subdivision (a), which states in part:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter.<sup>4</sup> Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

The regulatory scheme establishes a two-step process by which the contractor obtains apprentices to satisfy the 1:5 ratio: (1) prior to commencing work the contractor is required to submit public work contract award information to the applicable apprenticeship committees to notify them of upcoming apprentice work opportunities; and (2) the contractor is required to request the applicable apprenticeship committees to dispatch apprentices to work on the project. (§ 1777.5, subd. (e); Cal. Code Regs., tit. 8, §§ 230, subd. (a) and 230.1, subd. (a).)

As to notification to apprenticeship committees of upcoming work opportunities, California Code of Regulations, title 8, section 230, subdivision (a), states in part:

Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an

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<sup>4</sup> Here, the record established no exemption for Worthington Construction.

apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information.

As to the request to the applicable apprenticeship committees to dispatch apprentices to the project job site, California Code of Regulations, title 8, section 230.1, subdivision (a), states in relevant part:

Contractors who are not already employing sufficient registered apprentices (as defined by Labor Code Section 3077) to comply with the one-to-five ratio must request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

(Cal. Code Regs, tit. 8, § 230.1, subd. (a).) The Division of Apprenticeship Standards (DAS) provides a form, DAS 142, that contractors may use to request dispatch of apprentices from apprenticeship committees.

Further, California Code of Regulations, title 8, section 230.1, subdivision (a), provides in relevant part:

. . . [I]f in response to a written request no apprenticeship committee dispatches or agrees to dispatch during the period of the public works project any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in



enough time to meet the above-stated ratio. If an apprenticeship committee dispatches fewer apprentices than the contractor requested, the contractor shall be considered in compliance if the contractor employs those apprentices who are dispatched, provided that, where there is more than one apprenticeship committee able and willing to unconditionally dispatch apprentices, the contractor has requested dispatch from all committees providing training in the applicable craft or trade whose geographic area of operation includes the site of the public work.

(Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

Here, Worthington Construction had journeymen Landscape Laborers working on the Project a total of 323 hours on 23 days. Landscape Laborer was an apprenticeable craft. Worthington Construction did not hire any apprentice Landscape Laborers for the Project. Worthington Construction thereby violated the requirement that it employ Landscape Laborer apprentices in the ratio of one hour of apprentice work for every five hours of journeyman work.

Worthington Construction did satisfy the requirement of issuing a DAS 140 form to the applicable apprenticeship committee for the Project. However, Worthington Construction did not issue a valid request for dispatch of apprentices in a DAS 142 form or its equivalent for any of the 23 days that its journeymen Landscape Laborers worked on the Project. The DAS 142 form that Worthington Construction faxed to the Landscape JAC is invalid because it failed to give the 72 hours' notice required by California Code of Regulations, title 8, section 230.1, subdivision (a). It was short the period of 7-1/2 hours.

Worthington Construction contends that its communications with the Landscape JAC regarding the DAS 140 and 142 forms excused it from the requirement of issuing a valid DAS 142 form. Worthington Construction's evidence does establish that the Landscape JAC would not have dispatched an apprentice to the Project even if Worthington Construction had issued a valid DAS 142 form: the Landscape JAC would not dispatch an apprentice unless Worthington Construction first executed either a union contract or a union project agreement, and Worthington Construction was unwilling to do so. This, however, fails to satisfy the provision of California Code of Regulations, title 8,

section 230.1, subdivision (a), quoted above concerning the limited circumstances in which a contractor “shall not be considered in violation” of the 1:5 ratio requirement. That regulation is clear: the contractor’s written request to the apprenticeship committee for dispatch of apprentices must be valid, and this means it must give at least 72 hours’ notice of the date and time the apprentice is to report for work.

Under these facts, Worthington Construction has not carried its burden to prove compliance with section 1777.5 (§ 1777.7, subd. (c)(2)(B); Cal. Code Regs., tit. 8, § 232.50, subd. (b).) Accordingly, the Director finds that Worthington Construction violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by failing to issue valid requests for dispatch of apprentices and failing to have apprentices work on the Project in the 1:5 ratio of apprentice hours to journeyman hours.

A Modified Penalty Under Section 1777.7 Is Justified Under De Novo Review of the Facts.

Former section 1777.7, the version in effect on the date of the bid advertisement, December 24, 2013, states in relevant part:

(a)(1) A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding 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. A contractor or subcontractor that knowingly commits a second or subsequent violation of Section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance. Notwithstanding Section 1727, upon receipt of a determination that a civil penalty has been imposed by the Labor Commissioner, the awarding body shall withhold the amount of the civil penalty from contract progress payments then due or to become due.

The phrase “knowingly violated Section 1777.5” is defined by California Code of Regulations, 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. 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, . . . .

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).)

The Assessment determined that Worthington Construction violated section 1777.5 for 23 days and imposed a penalty of \$150.00 per day, totaling \$3,450.00. Under the former version of section 1777.7 applicable in this case, the Director decides the appropriate penalty de novo. (§ 1777.7, subd. (f)(2).) In setting the penalty de novo, the Director is to consider all of the following circumstances:

- (A) Whether the violation was intentional.
- (B) Whether the party has committed other violations of Section 1777.5.
- (C) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.
- (D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
- (E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(§ 1777.7, subd. (f)(1) and (2).)

Here, the evidentiary record establishes that Worthington Construction “knowingly” violated section 1777.5 under the irrebuttable presumption of California Code of Regulations, title 8, section 231, subdivision (h). The Subcontract notifies Worthington Construction of its obligation to comply with the Labor Code provisions on apprenticeship requirements for public works projects. Additionally, the following facts establish that Worthington Construction “knowingly” violated section 1777.5. First,

Worthington Construction had 23 days of journeymen Landscape Laborers working on the Project, and therefore 23 days for which it could have issued a DAS 142 form to the Landscape JAC to request dispatch of an apprentice, but Worthington Construction did not issue a DAS 142 form for 22 of those 23 days. Second, for the one day for which Worthington Construction did issue a DAS 142 form, June 11, 2015, Worthington Construction failed to give the required 72 hours' notice even though the DAS 142 form clearly contains two statements (one in bold lettering) that 72 hours' notice is required. Given that the wording on the DAS 142 form submitted for June 11, 2015, clearly stated the 72 hours' notice requirement, the evidence established that Worthington Construction knew the 72-hour requirement but failed to comply.

A violation is not deemed to be “knowingly” made if “the failure to comply was due to circumstances beyond the contractor’s control.” (Cal. Code Regs., tit. 8, § 231, subd. (h).) Here, the evidentiary record establishes that Worthington Construction’s violation was not due to any matter beyond its control.

Given that Worthington Construction committed a “knowing” violation, the analysis turns to the five de novo review factors “A” through “E” listed above.

Factor “A” – whether the violation was intentional – favors a higher penalty. The facts stated above on the violation being “knowingly” made support a finding that the violation was intentional.

Factor “B” – whether Worthington Construction had committed other violations of section 1777.5 – favors a higher penalty. In the Hearing on the Merits, DLSE presented evidence of a prior case establishing that Worthington Construction had previously committed other apprenticeship violations. In DLSE Case No. 44-37790-578, DLSE issued a determination of civil penalty (DCP) on February 7, 2014, setting a section 1777.7 penalty of \$24,100.00 (computed at \$100.00 per violation for 241 violations) for failure to timely submit DAS 140 and DAS 142 forms to all applicable apprenticeship committees, and failure to meet the 1:5 ratio of apprentice hours to journeyman hours. On the same day, DLSE issued a civil wage and penalty assessment (CWPA) for failure to satisfy prevailing wage requirements. Worthington Construction’s requests for review of the DCP and CWPA were designated as Case Nos. 14-0280-PWH

and 14-0281-PWH. The Director issued a Decision on December 12, 2014, finding: (a) Worthington Construction's requests for review were untimely, (b) the Director therefore has no jurisdiction to proceed, and (c) consequently the DCP became a final order on April 15, 2014, and the CWPA became a final order on April 18, 2014.<sup>5</sup> Worthington testified at the Hearing in the present case that Worthington Construction paid the \$24,100.00 penalty for apprenticeship violations issued in the DCP matter addressed in the Director's Decision of December 12, 2014. The Director finds that these particular facts suffice to establish that Worthington Construction committed a violation of the apprenticeship requirements under de novo factor "B." However, because that case was resolved on the issue of untimeliness of Worthington Construction's request for review, de novo factor "B" only moderately favors a high penalty.<sup>6</sup>

De novo review factor "C" – whether, upon notice of the violation, Worthington Construction took steps to voluntarily remedy the violation – is not applicable here. DLSE did not commence its investigation and initiate communication with Worthington Construction until after Worthington Construction's work on the Project had ceased.

De novo review factors "D" and "E" – whether, and to what extent, the violation resulted in lost training opportunities for apprentices and otherwise harmed apprentices or apprenticeship programs – supports a low penalty. As stated *ante*, Worthington Construction's evidence establishes that the sole applicable apprenticeship committee would not have dispatched apprentices to the Project even if Worthington Construction had issued a valid DAS 142 form. Based on those facts, there were no lost training opportunities for apprentices, and no harm to any apprenticeship program.

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<sup>5</sup> Pursuant to California Code of Regulations, tit. 8, section 232.45, the Hearing Officer took official notice of that Director's Decision.

<sup>6</sup>DLSE also presented evidence at the Hearing of an additional case in which Worthington was cited for apprenticeship violations. In Case No. 40-43018-133, DLSE issued a civil wage and penalty assessment on December 12, 2016, finding apprenticeship violations and setting a penalty under section 1777.7. DLSE represented that a Request for Review was filed in that assessment, which remains pending. While the date of the Assessment in the present case occurred approximately one month later (January 25, 2017), the record from the Hearing does not disclose the date of the underlying circumstances or events in the alleged prior case. Moreover, the work at issue in this case occurred substantially prior (in 2014 and 2015) to the date of the assessment issued in Case No. 40-43018-133. On this record, it cannot be presumed that circumstances in the other case establish prior violations for purposes of section 1777.7.

Upon this de novo review, this Decision finds that the weighing of the five review factors supports a \$100.00 penalty rate. The Labor Commissioner set the penalty rate at \$150.00 per violation. Under section 1777.7, any penalty rate from \$101.00 to \$300.00 requires a determination that the contractor knowingly committed a second or subsequent violation of section 1777.5 within a three-year period, and that such violation resulted in apprenticeship training not being provided. (§ 1777.7, subd. (a)(1).) Here there is no evidence that Worthington Construction's violation resulted in apprenticeship training not being provided; consequently the penalty rate cannot be set higher than \$100.00. Given the prior violation, however, the Director elects not to set the rate below \$100.00.

Accordingly, this Decision sets the penalty rate at \$100.00 per violation. Worthington Construction is liable for the section 1777.7 statutory penalty in the sum of \$2,300.00, computed at the rate of \$100.00 per day for the 23 days that Worthington Construction had journeymen Landscape Laborers working on the Project.

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

### **FINDINGS**

1. Affected contractor Worthington Construction, Inc. timely filed a Request for Review of the Civil Wage and Penalty Assessment timely issued by the Division of Labor Standards Enforcement.

2. Worthington Construction, Inc. knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by: (a) not issuing a valid request for dispatch of apprentices in a DAS 142 form or its equivalent to the Landscape Laborer apprenticeship committee in the geographic area of the Project for any of the 23 days that Worthington Construction, Inc. had journeymen Landscape Laborers working on the Project; and (b) not employing on the Project Landscape Laborer apprentices in the ratio of one hour of apprentice work for every five hours of journeyman work.

3. Worthington Construction, Inc. is liable for an aggregate statutory penalty under Labor Code section 1777.7 in the sum of \$2,300.00, computed at \$100.00 per day for the 23 days that its journeymen Landscape Laborers worked on the Project.

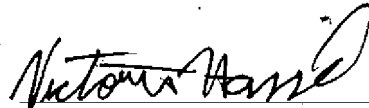
4. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Penalty under section 1777.7:	\$ 2,300.00
<b>TOTAL:</b>	<b>\$ 2,300.00</b>

### ORDER

The Civil Wage and Penalty Assessment is modified and 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: June 15, 2019



Victoria Hassid  
Chief Deputy Director  
Department of Industrial Relations<sup>7</sup>

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<sup>7</sup> See Gov. Code, § 7, 11200.4.