

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Edelman Corporation

Case No. 05-0052-PWH

From an Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected Sub-Contractor Edelman Corporation (“Edelman”) requested review of a Civil Wage and Penalty Assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“Division”) with respect to the Cal State Northridge (Engineering Building) (“Project”). A hearing on the merits was held on June 16, 2005, in Los Angeles, California, before appointed Hearing Officer Ann F. MacMurray. Edelman appeared through its Trade Supervisor, Curt Alston (“Alston”). The Division appeared through attorney Michael Villeneuve, together with Deputy Labor Commissioner Lorna Espiritu (“Espiritu”). The parties presented evidence and arguments, and the case was submitted for decision on June 16, 2005. Now, for the reasons set forth below, the Director issues this decision affirming the Assessment as modified.

STATEMENT OF FACTS

This case arises out of a public works contract between the California State University Northridge and the Contractor, MTM Construction, to install security monitoring equipment at Cal State Northridge (Engineering Building). A Project worker, Thomas Rojas (Rojas), filed a complaint with the Division contending that Sub-Contractor, Edelman had not paid the proper prevailing wage. The complaint was

assigned to Deputy Labor Commissioner Espiritu, who gathered documents from Rojas and sent a formal request for certified payroll records to Edelman. Edelman returned its certified payroll records ("CPR") which reflect that Rojas was classified as a "Comm & System Installer." According to the CPR's, Rojas was paid \$24.99 per hour for the week ending July 11, 2004 and \$24.79 per hour thereafter.

The Assessment was sent certified mail to Edelman on February 18, 2005. The basis for the Assessment was failure to pay the correct prevailing wages rate to Rojas in violation of California Labor Code section 1774. Edelman submitted its timely Request for Review on March 7, 2005.

The Division presented testimony through Espiritu. She testified that Rojas provided a hand-written calendar and timecards reflecting the dates and hours worked as well as copies of his paycheck stubs. Rojas also wrote Espiritu a letter capturing this information to the best of his recollection. The paycheck stubs reveal that Rojas was paid only \$12.00 per hour.

The Division also presented testimony of Rojas who verified that he was only paid \$12.00 per hour. As for the hours actually worked there was a conflict between his timecards and overtime claimed in the letter he wrote to Espiritu. His timecards, admittedly filled out by him, reflect that he worked 8-hour days yet in his letter to Espiritu, he claimed overtime of $\frac{3}{4}$, 2 and 1 $\frac{1}{2}$ hours on July 19, 20 and 21 respectively. He testified that his letter was reconstructed to the best of his memory, along with input from a co-worker. And, he entered 8-hours per day on his timesheet because he was told Edelman would not pay overtime.

On behalf of Edelman, Alston testified that he was appearing only to contest three days that Rojas' claim he worked on the Project - July 9, 13 and 15. Alston submitted sign-in logs which he claims establishes that Rojas was working on their other project, Crest National. While Alston did not appear to offer evidence or testimony regarding any

other issue, on cross-examination he did say that company policy required pre-approval of overtime.

Because Rojas' July 9 timecard actually showed that he was working at Crest National, the Division stipulated to a one-day wage assessment reduction. The CPRs as well as Rojas' timecards establish that he did work and was paid for Project work on July 13 and 15th.

The Assessment determined that Edelman was liable for back wages of \$2,047.52, \$650.00 in penalties under Labor Code section 1775, \$75.00 in penalties under Labor Code section 1813, \$59.54 in training funds for a total Assessment of \$4,820.04 with the potential for an additional \$2,047.52 in liquidated damages under Labor Code section 1742.1(a).

ANALYSIS AND DISCUSSION

Labor Code section 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction contracts.

"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].)

The Division 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." Lab. Code §90.5(a), and *see Lusardi, supra*.

Labor Code section 1775(a) requires, among other things, that contractors and subcontractors make up the difference to workers who were paid less than the prevailing

rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Labor Code section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a civil wage and penalty assessment under Labor Code section 1741.

When the Division determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to Labor Code section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under Labor Code section 1742. Subsection (b) of this section provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.”

1. Edelman is Liable for Back Wages as Modified by Stipulation

Edelman only sought to contest Rojas’ claim that he worked on the Project on July 9, 13 and 15th. All other claims in the audit are therefore affirmed as uncontested. Rojas’ own timecard showed that on July 9 he worked at the Crest National project, and the Division stipulated to reduce the wage assessment by one-day. But since Edelman’s own CPR’s show that Rojas worked and was paid for work on the Project on July 13 and 15, it did not meet its burden of proving that the basis for the Assessment was incorrect; therefore, the Assessment for back wages and training fund contributions is affirmed, as modified by the Division’s stipulated reduction of one-day.

2. Edelman is Liable for Penalties under Labor Code Section 1775(a) as Modified by the Division’s Stipulation

Labor Code section 1775(a) states in part as follows:

(a)(1) The contractor or subcontractor under the contract shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates ... for the work or craft in which the worker is employed for any public work done under the contract by the contractor....

(2)(A) The amount of this 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 upon being 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.

* * *

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. ...

Abuse of discretion is established if the Labor Commissioner "...has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." Code Civ. Pro. §1094.5(b). In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.

As with the determination that workers were underpaid, the affected contractor or subcontractor has the burden to prove that the basis for any penalty assessment is incorrect. Lab. Code §1742(b).

The Senior Deputy Labor Commissioner assessed the section 1775 penalties at \$50.00 per violation. While Edelman did not offer any evidence, as is their burden, their CPR's are enough to support the maximum penalty. The CPR's show that Rojas was paid \$24.99 per hour for the week ending July 11, 2004 and \$24.79 per hour thereafter. The paycheck stubs, fortified by Rojas' testimony, establish without contest that he was paid only \$12 per hour. The prevailing wage rate for this classification is \$30.205 per hour (includes the training fund contribution).

Because the penalty assessment is based on a per-day basis, the penalty assessment stands, as modified by the Division's stipulated one-day reduction.

3. Edelman is Liable for Penalties Under Labor Code Section 1813

Labor Code section 1813 states as follows:

The contractor ... shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

Unlike penalties assessed under Labor Code section 1775, the Division has no discretion to vary the amount of section 1813 penalties assessed for each violation.

Because Edelman did not offer any evidence to contradict the overtime claim, Rojas testimony that his best recollection of overtime on July 19, 20 and 21, of $\frac{3}{4}$, 2 and $1\frac{1}{2}$ hours on respectively stands unrefuted. He clarified the discrepancy between his timecards, which show no overtime hours, and his letter to Espiritu, when he testified that he reconstructed his claim from memory and input from a co-worker and that he entered 8-hours per day on his timesheet because Edelman would not pay overtime; therefore, the overtime penalty assessment is affirmed.

4. Edelman is Liable for Liquidated Damages

Labor Code section 1742.1(a) provides in pertinent part as follows:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice 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. If the contractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Reg., tit. 8, §17251(b)] states as follows:

To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment

or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

No back wages had been paid within the 60 days as afforded by section 1742.1. Additionally, Edelman did not offer any evidence on this point; therefore, the liquidated damages on wages due is affirmed as modified by the Division's stipulated one-day reduction.

FINDINGS

1. The contract between California State University Northridge and the contractor, MTM Construction for the Cal State Northridge (Engineering Building) security installation is a public works contract subject to the payment of prevailing rate of wages to the workmen employed in the execution of this contract.

2. Affected Sub-Contractor Edelman filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Cal State Northridge (Engineering Building).

3. Edelman's employee, Thomas Rojas, is due back wages, as modified, in the amount of \$1,752.42, including training fund contributions of \$59.54.

4. The Division did not abuse its discretion in setting the penalties under Labor Code section 1775(a) at a rate of \$50.00 per violation. Consequently, Edelman is liable for penalties under section 1775(a) in the total amount as modified of \$600.00.

5. The record establishes that section 1813 overtime penalties are due in the amount of \$75.00.

6. Liquidated damages due under section 1742.1 in the total amount as modified of \$1,752.42.

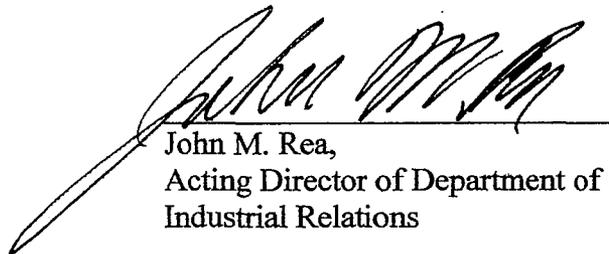
7. The amount found due in the Assessment, affirmed as modified by this Decision is as follows:

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|--|-------------------|
| Wages Due | \$1,752.42 |
| Training Fund | \$ 59.54 |
| Penalties under Labor Code section 1775(a) | \$ 600.00 |
| Penalties under Labor Code section 1813 | \$ 75.00 |
| Liquidated Damages under Labor Code section 1742.1 | <u>\$1,752.42</u> |
| TOTAL | \$4,239.38 |

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: 19 July 05


 John M. Rea,
 Acting Director of Department of
 Industrial Relations