

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

E.H.L., Inc.

Case No. 06-0038-PWH

From an Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor E.H.L., Inc. ("EHL") submitted a timely request for review of the Civil Wage and Penalty Assessment ("Assessment") issued by Division of Labor Standards Enforcement ("Division") with respect to the Digital Video Recording Graffiti Surveillance project in the City of Pico Rivera. ("Project") The Assessment cited EHL for underpaid wages to one worker in the amount of \$49,742.40 and \$18,100.00 in penalties under Labor Code sections 1775 and 1813.¹ A hearing on the merits was conducted on July 21, 2006, August 11, 2006, and September 21, 2006, before Hearing Officer Terrance O'Malley. Mark J. Lee appeared for EHL. Bruce E. McManus appeared on behalf of the Division. Now, for the reasons set forth below, the Director issues this decision modifying this assessment.

SUMMARY OF FACTS

EHL is an office equipment repair service with its principal place of business in Brea, California. The corporation is owned and operated by Mark J. Lee. In 2003 EHL created Strike One Surveillance ("SOS") and identified it as a division of EHL. SOS was created for the specific purpose of entering into an agreement with the City of Pico Rivera ("City") to install a digital video recording surveillance system at the seven different parks throughout Pico Rivera. The work included installation of all cabling and conduits between the cameras and companion desk top computers, monitors and keyboards. The agreement contemplated the installation of fifty-six cameras and seven personal computers.

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

The parties stipulated that the work was a public work subject to the payment of prevailing wages under Section 1720. The Division contends this work is encompassed in the Communication & System Installer classification set forth in the Prevailing Wage Determination No. LOS-2004-1. EHL did not object to this classification.

The Assessment involves a single employee, Joshua Siler. Siler was hired as an office equipment technician for Automated Office Products ("AOP"), another division of EHL in March 2002. His duties with AOP included office equipment repair including fax machines, copiers, time stamp machines and shredders at the customers' place of business. In May 2004, EHL owner, Mark Lee, assigned Siler to assist him with the installation work on the Project. Lee and Robert Moreno, the Service Manager for AOP, agreed that Siler would continue to perform his duties with AOP as well. The arrangement was that Moreno had priority in setting Siler's schedule to perform his duties for AOP. When Siler was not needed by AOP, Lee used him on the Project. There was no set schedule when Siler would work for AOP or SOS, nor were there any reliable records kept that show the actual number of hours Siler worked on the Project. EHL did not maintain certified payroll records for the work performed on the Project. At all times Siler received his paycheck from AOP. SOS did not have its own payroll service. Siler earned \$13.00 per hour, plus health insurance and vacation pay for all of the work he performed for AOP and SOS.

The parties dispute when Siler actually began working on the Project. The Division claims the work commenced on March 2, 2004. Siler testified that he recalled March 2, 2004 was the first day of work at the project. EHL claimed no work was performed on the Project until after April 4, 2004, when SOS entered into the written agreement to perform the work. According to Lee, he installed equipment at two parks prior to Siler being involved. Lee testified that Siler first worked on the Project on May 1, 2004.

It was stipulated that Siler worked on the Project until his employment was terminated on August 10, 2005. The parties also agree Siler performed all of the functions required for the installation of the surveillance equipment including pulling and connecting wires, affixing the camera brackets to the walls and roofs of the structures where the cameras were installed, installing the computers and monitors and training the Pico Rivera employees on the use of the equipment. The parties dispute the number of hours Siler actually worked on the project. The

Assessment alleges a total number of straight time hours worked of 2,892, based on calendars Siler completed at the time he complained to the Division. The calendars reflect that he worked eight hours each working day from March 2, 2004, until August 9, 2005, plus a half day on August 10, 2005.

Siler testified to the accuracy of the information contained in his calendars. He admitted that he worked for both AOP and SOS during the period at issue. He testified that he was required to work irregular hours on the Project to accommodate his AOP responsibilities and the City's scheduling requirements. Neither party maintained a log of the hours Siler worked on the Project. Siler is confident he worked at least eight hours every day. On days he also made service calls for AOP he would work overtime. He estimated that from March 2004 to August 2005 ninety percent of the hours worked were on the Project and ten percent were for AOP. He was unable to explain why he did not include his overtime hours in the calendar of hours he prepared for the Division.

EHL claims Siler spent the majority of his work time on service calls for AOP. Moreno supervised Siler the entire time he worked at AOP. Moreno was also responsible for dispatching technicians for all service calls throughout Los Angeles. In preparation of his testimony, Moreno reviewed all of the AOP purchase orders assigned to Siler from May 1, 2004, to August 10, 2005. Moreno also relied on EHL's own surveillance camera records. The surveillance cameras positioned at the entrance of the AOP store front capture images of persons, including employees, entering and leaving the business. The interior images confirm arrival and departure times of employees and walk-up customers or vendors. The video confirms Siler was dispatched on AOP repair assignments during the periods he claims he was working at the Project. The interior cameras capture Siler working in the AOP warehouse when he was not dispatched to a call.

From this information, Lee prepared a detailed summary of the hours Siler spent on AOP service calls and office work. The audit estimates the time Siler spent responding to service calls on behalf of AOP during the period he claims he worked on the Project. The study estimates travel time to and from the service call and length of time of the actual work performed. According to this summary, Siler worked 1,301.2 hours for AOP from May 2004 to August 10, 2005. According to the calendars, Siler worked 2,914 hours on the Project over that same

period. The sum of the AOP hours worked and the employee's estimates of the hours worked on the Pico Rivera Project is 4,215.2. Assuming 326 work days, Siler would have had to average 12.93 hours per day to work the number of hours claimed by both the parties.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

"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]).

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

Section 1775(a) requires, among other things, that contractors and subcontractors pay 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. 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 section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 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."

Prevailing Wages Are Due

The Labor Code requires an employer on a public work for which prevailing wages are required to be paid to prepare and maintain contemporaneous records of the hours an employee works. (§ 1776(a); see, also, Cal. Code Regs., Tit. 8, § 11160(6(a)(1)). Whereas here, the employer fails to maintain the required payroll records, the employee may demonstrate his hours by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. (*Hernandez v. Mendoza*, (1988) 199 Cal App.3d 721 citing with approval *Anderson v. Mt. Clemens Pottery Co* (1945) 328 U.S. 680 [L.Ed. 1515, 1523, 66 S. Ct. 1187].)

The burden then shifts to the employer to produce evidence of the precise number of hours worked or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *Hernandez, supra*. If the employer fails to produce such evidence, a court may then award wages to the employee, even though the result may be imprecise.

The Division's evidence of actual hours worked included Siler's testimony and the calendars he prepared for 326 working days. The evidence suggested Siler worked some of the hours on this public work, but it failed to support the substantial number of hours he claimed. Siler made a poor witness on this important issue. He was unable to adequately explain why all of his entries were for eight hours each day and did not vary in any respect. He failed to account for days he admittedly did not work, including his birthday and documented vacations. He provided no explanation why no overtime wages were claimed even though he testified he often worked overtime and the calendars he prepared suggested substantial overtime hours worked.² His testimony about the regularity of his hours is inconsistent with his testimony about his AOP work and with the information gathered from the video record.

Notwithstanding the above, this evidence was sufficient to meet Division's initial burden to show the amount and extent of that work as a matter of "just and reasonable inference." It was undisputed that Siler worked a substantial amount of time on the Project for which he was not paid the prevailing wage. Accordingly, the burden then shifted to EHL to produce evidence of the precise amount of work performed or evidence that negates the reasonableness of the

² The Assessment does not seek recovery of overtime wages.

inference to be drawn from the employee's evidence.

EHL's evidence (the testimony of Lee and Moreno, its audit supported by original work orders, and video surveillance film of AOP's business location) convincingly demonstrated Siler worked a substantial number of hours as a service technician for AOP during the same time he claims to have worked full time for SOS. Unlike the calendars offered by the Division, the purchase orders appear to be prepared contemporaneously with the actual work performed by Siler. The estimates for travel time and actual time necessary to complete the repairs were uncontested by the Division and appear reasonable and specific. The absence of any claim by Siler for overtime wages leads to the conclusion he did not work more than eight hours in a day.

EHL concedes Siler worked a total of 326 days from the date the public work commenced until his employment ended. The maximum number of hours Siler worked over this period therefore was 2,608 (326 x 8). EHL's audit shows that Siler worked 1301.2 hours on dispatched service repair calls for AOP. Those same records also established with precision that Siler was physically at the AOP warehouse performing duties unrelated to the public work project for an additional 697.5 hours. Subtracting only these documented non-public work hours from the total number of hours actually worked leaves a balance of 609.3 hours. This figure represents the number of hours Siler may have worked on the Project in capacities for which prevailing wages are due.³

The scope of work performed by Siler involved the installation of digital video recording equipment and companion computer equipment used to display the video recording. The parties agree that Siler ran wire through conduits, connected the wiring to surveillance cameras and the monitoring computer systems, installed wall mounts on roofs, ceiling and walls, affixed cameras to the wall mounts both inside and outside city buildings, serviced, maintained and trained city employees on how to use the equipment. The Division correctly used the classification of Electrician: Communication & Systems Installer for the Assessment based on the advisory scope of work provisions.

³ The parties agreed that some of Siler's work on the Project was training the City's employees on how to use the installed computers, which may not be subject to the payment of prevailing wages. However, the employer had the burden to prove how many of the hours Siler worked on the Project were not subject to the payment of prevailing wages. Having failed to make this showing, all hours that were not proven to be spent working for AOP are subject to payment of prevailing wages. *Hernandez, supra.*

The required basic hourly wage rate for this classification was \$22.18. Having worked 609.3 hours on the Project, the total basic hourly wage due Siler equaled \$13,514.27. The parties stipulate EHL paid Siler \$13.00 per hour in wages on the Project. Accordingly, EHL is entitled to a credit \$7,920.90 against the prevailing hourly rate actually owed to Siler.

In addition to the basic hourly rate, the prevailing wage determination requires payment for health and welfare, pension and training benefits for each hour worked of at least \$7.15 per hour. It is undisputed that EHL paid Siler's health benefits during his entire length of employment. The contractor's credit for these payments is limited to the amount of the premiums attributable to the public work. According to the billing detail from Kaiser Permanente, EHL paid \$2,341.00 in premiums on behalf of Siler over the 326 days at Pico Rivera. Based on the number of hours worked on the Project, the contractor is entitled to a credit for insurance premiums paid of \$545.45.⁴ Calculated from 609.5 hours worked, the following chart is an accounting of the prevailing wages owed, less credits for payments made:

Basic Hourly Rate(\$22.18)	13,514.27
Less Wages Paid:	<u>7,920.90</u>
Basic prevailing wage rate due:	5,593.37
Benefits Portion (\$7.15):	4,357.93
Less Benefits paid:	<u>545.45</u>
H&W Benefits due:	3,812.48
Apprenticeship Contribution (\$.21):	127.95

The Division's Penalty Assessment under Section 1775 Is Appropriate

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

“(a)(1) The contractor or 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 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:

⁴ Of the 2608 total hours worked, only 609.3 hours were performed on the public work. This represents 23.3 percent of the total hours worked. 23.3 percent of \$2,341.00 insurance premiums paid equals \$545.45

(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)). The affected contractor or subcontractor has the burden to prove that the basis for any penalty assessment is incorrect. (Lab. Code, §1742(b)) Here, the Senior Deputy Labor Commissioner assessed the section 1775 penalties at \$50.00 per violation per worker. At the commencement of the hearing, and in accordance with California Code of Regulations, Title 8, Chapter 8, Subchapter 6, section 17226, the Division amended its penalty assessment downward to \$20.00. The contractor has failed to prove the basis for the penalty assessment was incorrect.

EHL made no showing of prompt and voluntary correction once it became aware that prevailing wages were due. The only mitigating evidence from the contractor was the testimony of Mark Lee that EHL has never been involved in a public work before or since. Lee testified persuasively that he was unaware of the obligation to pay prevailing wages. Moreover, he was never informed by the Awarding Body that the project was a public work for which prevailing wages were required to be paid. While this evidence may give rise to a right of reimbursement from the Awarding Body under section 1726(c) or 1781, it does not relieve the contractor from its duty to pay either the unpaid prevailing wages, or the penalties for its failure to do, particularly after it is notified of the error by the Division.

It is accepted that contractor’s failure to pay prevailing wages was a good faith mistake. However, prevailing wages were clearly due. Moreover, the error in failing to pay was not promptly and voluntarily corrected when brought to the contractor’s attention. For these reasons the revised penalty assessment of \$20.00 per day is supported by the evidence and not an abuse

of the Division's discretion. The affected worker worked a total of 77 days, accordingly, the Labor Code Section 1775 penalties due total \$1,540.00 (77 x \$20.00).

EHL is liable for Liquidated Damages on the wages due and unpaid

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, section 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”.

EHL fails to meet the criteria of Rule 51(b). EHL's primary reason to contest the Assessment was that the Project was not subject to the payment of prevailing wages because the City of Pico Rivera never required the payment of prevailing wages. Eventually, EHL stipulated that the Project was subject to prevailing wage requirements as it was obvious that the Project was within the plain meaning of section 1720. EHL also could not have a reasonable, subjective belief that the Assessment was in error within 60 days of service of the assessment, since its audit showing the employee's claims were inflated was not completed until after the hearing on the merits commenced. Furthermore, the actual hours worked subject to prevailing rate wages were reduced, but not eliminated by the audit, and the reduction cannot reasonably be characterized as “substantial.”

FINDINGS

1. The contract between the City of Pico Rivera and the Contractor, Strike One

Service, a division of EHL for installation of a digital video recording graffiti surveillance video system throughout the city park system is a public works contract subject to the payment of wages at the prevailing rate for Communication and System Installer No. LOS-2004-1 to the workers employed in the execution of this contract.

2. Affected Contractor EHL 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 graffiti abatement project.

3. EHL employee, Joshua Siler, is due prevailing wages for 609.3 hours, less credits already paid, in the amount of \$5,593.37.

4. EHL employee, Joshua Siler, is due benefit payments in the amount of \$3,812.48.

5. The record establishes that training funds are due in the amount of \$365.58 payable to the California Apprenticeship Council.

6. The Labor Commissioner did not abuse its discretion in setting the penalty amount at \$20.00 per violation for 77 violations. Penalties under section 1775 are affirmed in the amount of \$1,540.00.

The record establishes that liquidated damages due under section 1742.1 are due in the amount of \$ 9,405.85

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 to be served with this Decision on the parties.

Dated: 9/4/07


John C. Duncan,
Director of Industrial Relations