

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

DBS Painting, Inc.

Case No. 06-0168-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

Affected subcontractor DBS Painting, Inc. ("DBS") submitted a timely request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") with respect to work performed by DBS on the Calistoga Farm Labor Camp Remodel. A telephonic Hearing on the Merits occurred on April 16, 2007, before Hearing Officer Nathan D. Schmidt. Robert Fried appeared for DBS, and Ramon Yuen-Garcia appeared for DLSE. For the reasons set forth below, the Director of Industrial Relations issues this Decision affirming the Assessment.

SUMMARY OF FACTS

The parties stipulated to the following facts:

"1. On or about April 15, 2005, the Napa Valley Housing Authority, published a Notice of Bid for the work of improvement known as the Calistoga Farm Labor Camp Remodel ('Project'), in the County of Napa, California.

"2. The Notice of Bid specifies that the prevailing wage law shall apply to the Project.

"3. On or about May 26, 2005, the Napa Valley Housing Authority entered into a written public works contract with Helmer & Sons, Inc. for the construction of the Project.

"4. On or about July 8, 2005, Helmer & Sons, Inc. entered into a subcontract with DBS Painting, Inc. to perform a part of the work on the Project.

"5. In the performance of the subcontract relating to the Project, DBS Painting, Inc. hired certain painters to perform the work on the Project.

"6. Under Labor Code section 1720 et seq., all workers who performed work on the Project are required to be paid the general prevailing wages within the geographical area of the prevailing wage determination issued by the Director.

"7. The applicable prevailing wage rate for the classification of Painter for work performed after June 30, 2005, is contained in Determination No. NAP-2005-2.

"8. The prevailing wage rate for the classification of Painter (Brush and Spray) under Determination No. NAP-2005-2, is the sum of \$29.61 in basic hourly rate, \$13.54 in fringe benefits, and \$0.25 in contribution to apprenticeship training funds, for a total sum of \$43.40.

"9. On or about February 17, 2006, the Division of Labor Standards Enforcement ('DLSE') received a complaint that the workers of DBS Painting, Inc. were not paid the required prevailing wages for work performed on the Project.

"10. As a result of an investigation, DLSE determined that DBS Painting, Inc. had paid its painters the correct basic hourly rate of \$29.61. However, it paid the painters only \$12.79 per hour in fringe benefits instead of \$13.54. The balance of the required fringe benefits of \$0.75 per hour and the required \$0.25 per hour in contribution to apprenticeship training funds were paid by DBS Painting, Inc. to the [Associated Builders and Contractors Golden Gate Chapter ('ABC GGC')] Training Trust. A copy of the Contribution Worksheets and cancelled checks in payment of the contributions is attached and incorporated hereto as Exhibit A, and becomes a part of the stipulation herein.

"11. DBS did not communicate orally or in writing to its workers that it had contributed \$0.75 per hour of their prevailing wages to the ABC GGC Training Trust.

"12. Attached and incorporated hereto as Exhibit B, is a copy of the Subscribing Employer Agreement, Agreement to Participate in the ABC Golden Gate Chapter Apprenticeship Program, entered into between the Associated Builders and Contractors, Golden Gate Chapter, Training Trust and DBS Painting, Inc. on December 20, 2002. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents, or the relevancy of the contents of the document to the issues involved herein.

"13. Attached and incorporated hereto as Exhibit C, is a copy of the Adoption Agreement entered into between the Associated Builders and Contractors, Golden Gate Chapter,

Training Trust Fund and DBS Painting, Inc. on December 20, 2002. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents, or the relevancy of the contents of the document to the issues involved herein.

“14. Attached and incorporated hereto as Exhibit D, is a copy of the Trust Agreement of the Associated Builders and Contractors, Golden Gate Chapter, Training Trust Fund. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents; or the relevancy of the contents of the document to the issues involved herein.

“15. Attached and incorporated hereto as Exhibit E, is a copy of the Associated Builders and Contractors, Golden Gate Chapter, Training Trust Fund, Fringe Benefit Contribution Payment Guidelines for Participating Employers. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents, or the relevancy of the contents of the document to the issues involved herein.

“16. On or about June 29, 2006, DLSE notified DBS Painting, Inc. that as a result of its investigation, it determined that DBS Painting, Inc. had violated the prevailing wage law by underpaying the painters \$0.75 per hour, and there is due the sum of \$440.25. The notice also advised DBS that if it voluntarily pay the wage deficiencies, DLSE would substantially reduce the penalties assessed under Labor Code section 1775.

“17. DBS Painting, Inc. did not voluntarily correct the wage deficiencies. Thereafter, on or about August 22, 2006, DLSE issued and served upon DBS Painting, Inc. a Civil Wage and Penalty Assessment as provided in Labor Code section 1741, for the sum of \$440.25 in wages and the sum of \$4,600.00 in penalties at the rate of \$50.00 per violation as provided in Labor Code section 1775.

“18. In determining the amount of penalties to be assessed under Labor Code section 1775, DLSE considered whether the failure of DBS Painting, Inc. to pay the correct rate of per diem wages to the workers was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to its attention, and whether it has a prior record of failing to meet its prevailing wage obligations.

"19. The records of DLSE do not show that a Civil Wage and Penalty Assessment had previously been issued to DBS Painting, Inc. for violating the prevailing wage law.

"20. In issuing the Civil Wage and Penalty Assessment, DLSE determined that the failure to pay the full amount of the fringe benefits to the painters was not a mistake, but an intentional act. Even if it was a good faith mistake, DBS Painting, Inc. did not promptly and voluntarily correct the underpayments when brought to its attention. It also took into consideration that no Civil Wage and Penalty Assessment had previously been issued to DBS Painting, Inc. for violating the prevailing wage law.

"21. On or about September 25, 2006, DBS Painting, Inc. filed a Request for Review of the Civil Wage and Penalty Assessment as provided in Labor Code section 1742.

"22. As of this date, DBS Painting, Inc. has not paid any portion of the wages found to be due in the Civil Wage and Penalty Assessment."

The two issues to be decided are:

1. Whether DBS is entitled to credit toward its per diem wage obligation for training fund contributions paid in excess of the \$0.25 per hour mandated by the applicable prevailing wage determination; and
2. Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775¹ at the maximum rate of \$50.00 per violation.

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.

¹ All further unspecified section references refer to the Labor Code.

(*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 Civil Wage and Penalty 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.”

DBS Is Not Entitled To Credit Toward Its Prevailing Wage Obligations For Additional Training Fund Contributions Made To ABC GGC.

Section 1771 requires, with certain exceptions not relevant here, that “not less than the general prevailing rate of per diem wages for work of a similar character in the locality . . . be paid to all workers employed on public works.” Similarly, section 1774 requires “[t]he contractor to whom the contract is awarded, and any subcontractor under him, [to] pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.” There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments and a contribution to the California Apprenticeship Council (“CAC”) or an approved apprenticeship training fund. The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker’s behalf and for his or her benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must either be paid to the worker as wages or offset by credit for “employer payments” authorized by sec-

tion 1773.1.

In this case, the parties stipulate that all affected workers received the basic hourly rate and that DBS made the required training fund contributions of \$0.25 per hour to the ABC GGC Training Trust. The sole question presented here is whether DBS is entitled to credit toward the balance of its per diem wage obligation for an additional \$0.75 per hour that it paid to the ABC GGC Training Trust for hours worked by each of the affected journeymen. The answer is that DBS has not shown that it had a right to do so in this case.

Section 1773.1 defines "per diem wages" for purposes of both establishing prevailing wage rates and crediting employer payments toward those rates, providing in pertinent part as follows:

(a) Per diem wages . . . shall be deemed to include employer payments for the following:

- (1) Health and Welfare.
- (2) Pension

* * *

(6) Apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions.

* * *

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

The mandatory apprenticeship training contribution is established by section 1777.5, subdivision (m)(1), which provides that:

A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of ap-

apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

The payment required by section 1777.5 is distinct from the per diem wages due to workers under section 1773.1, and must be distinguished from apprenticeship or training programs offered as an employee fringe benefit under section 1773.1, subdivision (a)(6). It is not a direct employee fringe benefit since it is never paid to the worker and may be paid to programs that do not necessarily have a direct connection to the workers employed on the project.

The payment required under section 1777.5, subdivision (m) does not preclude contractors from offering apprenticeship or training programs as a specific employee fringe benefit under section 1773.1, subdivision (a)(6), or from making additional contributions to those programs, as DBS has done here. However, DBS does not become entitled to a further credit for its additional contributions of \$0.75 per hour to the ABC GGC Training Trust simply because apprenticeship training is an enumerated fringe benefit under section 1773.1, subdivision (a)(6), even though the ABC GGC Training Trust may be a "plan, fund, or program" within the meaning of section 1773.1, subdivision (b)(1). Unlike the contribution under section 1777.5, which is not required to benefit the worker, an employer cannot claim a credit against a worker's per diem wages for a benefit payment under section 1773.1 unless the worker actually benefits from the payment.

The purpose of the ABC GGC Training Trust Fund, as stated in its Trust Agreement, is:

to provide a distinct legal entity into which monies may be contributed by participating employers and employees for the exclusive purpose of creating and administering an employee welfare benefit plan providing apprenticeship and training programs (or plans) *for the benefit of participating employees*, and their beneficiaries, and for defraying reasonable expenses of administration. [Emphasis added.]

The Trust Agreement defines "participating employee" as:

Any individual employee of a participating employer who is eighteen (18) years of age, who has entered into a written apprenticeship agreement which conforms with the apprenticeship standards adopted by a related unilateral apprenticeship committee and who is not covered by the terms of a collective bargaining agreement."

This means that the beneficiaries of the ABC GGC Training Trust are limited to apprentices. DBS presented no evidence that the four affected journeymen are beneficiaries of the Trust. Consequently, DBS has failed to prove the requisite connection between the affected workers and the Trust and is not entitled to a credit against the per diem wages owed to those workers for any contributions to the ABC GGC Training Trust in excess of the amount mandated by section 1777.5.²

DBS relies on *DLSE Management Memo 93-3*, an internal policy memorandum issued by the State Labor Commissioner fourteen years ago, for its contention that the additional training fund contributions should be credited toward its fringe benefit obligations whether or not the journeymen directly benefit. However, the memorandum clearly states the fundamental statutory requirement that any fringe benefit payments must be for the benefit of the employees for whom the credit is claimed. While some of the examples given in the memorandum indicate that additional training fund contributions can be used to offset an employer's per diem wage obligations in some circumstances, none of the examples given include factual situations similar to the one here where contributions are being required of workers who are not beneficiaries of the apprenticeship agreement. Therefore, DBS may not rely on the examples alone without reference to the substantive discussion of the requirement in *DLSE Management Memo 93-3* to claim credit for its additional training fund contributions without showing a benefit to the journeymen working on the Project.

DBS can affiliate with an apprenticeship program that requires a larger contribution than that mandated by the applicable prevailing wage determination. However, such an affiliation on its own does not entitle DBS to claim the additional contribution as an offset against required per diem wages owed to workers who are not beneficiaries of those contributions and whose contribution amounts have not been annualized. Accordingly, the Assess-

² Moreover, the Adoption Agreement that DBS signed with the ABC GGC Training Trust and the Fringe Benefit Contribution Payment Guidelines For Participating Employers adopted by the Trust obligated DBS to contribute a minimum of \$1.00 to the Trust for each hour worked by journeyman painters on public works projects only. Even if the affected journeymen were beneficiaries of the Trust due to some additional provision of the Trust Agreement that has not been submitted into evidence, the limitation of contributions to hours worked on public works projects would make the contributions a seasonal benefit that is subject to annualization under section 1773.1, subdivision (d). The stipulated record is devoid of any evidence regarding either the ratio of private to public works hours worked by the affected journeymen during the relevant time period or the annualization of DBS's contributions to the ABC GGC Training Trust on behalf of those workers. Consequently, DBS would

ment of back wages in the amount of \$440.25, which represents the net underpayment of per diem wages at the rate of \$0.75 per hour, is affirmed.

DLSE Did Not Abuse Its Discretion In Assessing Penalties Under Labor Code Section 1775 At The Maximum Rate.

Section 1775(a) states in relevant part:

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

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

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

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

(B)(i) The penalty may not be less than ten dollars (\$10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^{3]}

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 of Civil Procedure section 1094.5(b). In re-

still not be entitled to a credit for those contributions even if the stipulated record supported a finding that the affected journeymen were beneficiaries of the Trust.

³ Labor Code §1777.1, subd. (c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or

viewing 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.

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment, namely, "the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal.Code Reg. tit. 8 §17250(c)].)

DBS's sole defense against the penalty award is tied to its arguments on the merits. DBS contends that it acted in good faith by complying with what it believed to be DLSE's interpretation of section 1773.1, subdivision (a)(6) and that the assessment of penalties, which was based on a different interpretation and without prior notice, is therefore an abuse of discretion. As discussed above, however, DBS's proffered interpretation of section 1773.1, subdivision (a)(6) is based solely on the examples given in *DLSE Management Memo 93-3* without reference to the substantive statutory discussion in the memorandum. Although it was not addressed in the examples, the memorandum expresses DLSE's interpretation that per diem wages must be paid to the worker or on the worker's behalf and for his or her benefit. The record does not establish that DLSE changed its interpretation of section 1773.1 without prior notice to the detriment of DBS.

DLSE's determination that DBS knew or reasonably should have known of its obligation to pay the full per diem wages on the Project to or for the benefit of its journeymen is supported by the record. While section 1775, subdivision (a)(2) grants DLSE the discretion to mitigate the statutory maximum penalty in light of prescribed factors, it does not mandate the exercise of that discretion in a particular manner. The record shows that DLSE considered the prescribed factors for mitigation and determined that the maximum penalty of \$50 per violation was warranted in this case. The Director is not free to substitute his own judgment. The record does not establish an abuse of discretion and, accordingly, the assessment of penalties in the amount of \$4,600.00 under section 1775 is affirmed.

refuses to comply with its provisions."

DBS 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 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the Assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the Assessment . . . 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 . . . to be in error,” the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment . . . 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 . . .

In accordance with the statute, DBS would be liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to DBS’s position on the merits and specifically whether there was an “objective basis in law and fact” for contending that the assessment was in error.

As discussed above, DBS reasonably should have known of its obligation to pay the full per diem wages on the Project to or for the benefit of its journeymen. Its proffered interpretation of section 1773.1, subdivision (a)(6) based on the examples given in *DLSE Management Memo 93-3* cannot be found to constitute an “objective basis in law and fact” for contending that the Assessment on the Project was in error. Because the assessed back wages remained due more than sixty days after service of the Assessment, and DBS has not demonstrated grounds for waiver, DBS is also liable for liquidated damages in an amount equal to the unpaid wages, that is, an additional \$440.25.

FINDINGS

1. Affected subcontractor DBS Painting, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. DBS failed to show that it is entitled to credit for payments made to the ABC GGC Training Trust beyond those allowed by the Division of Labor Standards Enforcement. In particular, DBS failed to establish that the additional \$0.75 per hour that it contributed to the Trust above the amount required by the applicable prevailing wage determination was for the benefit of the employees on whose behalf the contributions are made.

3. The Assessment correctly determined that DBS underpaid its employees on the Calistoga Farm Labor Camp Remodel in Napa County in the aggregate amount of \$440.25.

4. The DLSE did not abuse its discretion in setting section 1775(a) penalties at the rate of \$50 per violation, and the resulting total penalty of \$4,600.00 is affirmed.

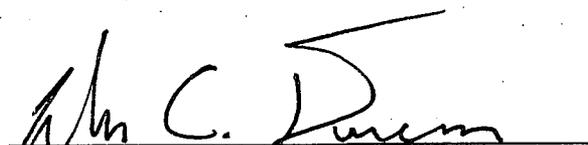
5. The back wages found due in Finding No. 3 remained due and owing more than sixty days following issuance of the Assessment. DBS is liable for an additional award of liquidated damages under section 1742.1 in the amount of \$440.25, and there are insufficient grounds to waive payment of these damages.

6. The total amount found due and affirmed by this Decision is \$ 5,480.50. In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

ORDER

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: 12/10/07



John C. Duncan
Director of Industrial Relations