STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RAN Enterprises, Inc.

Case No. 11-0081-PWH

From a Notice of Withholding issued by:

Fullerton Joint Union High School District

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor RAN Enterprises, Inc. (RAN) submitted a timely request for review of the Notice of Withholding of Contract Payments (Notice) issued by Fullerton Joint Union High School District (District) with respect to the La Sierra/La Vista High Schools HVAC and EMS Controls Project (Project) in Orange County. The Notice determined that $26,250.37 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on August 12, 2011, and August 30, 2011, in Los Angeles, California, before Hearing Officer Christine Harwell. James Bowles appeared for RAN and Hugh Lee appeared for the District. The matter was submitted for decision after post hearing briefing.

The issues for decision are:

- Whether the Notice correctly found that RAN had failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers.
- Whether the District abused its discretion in assessing penalties under Labor Code section 1775[1] at the mitigated rate of $30.00 per violation.
- Whether RAN has demonstrated substantial grounds for appealing the Notice, entitling it to a waiver of liquidated damages.

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

The Director finds that RAN has disproven the basis of the Notice in part, as to certain days of work claimed by the workers that are not substantiated by the District, but has otherwise failed to carry its burden of proving that the basis of the Notice was incorrect. Therefore, the Director issues this Decision affirming and modifying the Notice. RAN has not proven the existence of grounds for a waiver of liquidated damages.

FACTS

The Fullerton Joint Union High School District (District) advertised the Project for bid on July 23, 2007, and July 30, 2007, and awarded the contract to RAN on November 5, 2007. RAN's employees worked on the Project from approximately May12, 2008, through June 9, 2010, installing HVAC units in new school construction.

Applicable Prevailing Wage Determinations (PWDs): The following applicable PWDs and scopes of work were in effect on the bid advertisement date:

Sheet Metal Worker (ORA-2007-1 and ORA-2007-2)[2]: This is the prevailing wage rate that should have been used in the Notice for all HVAC Sheet Metal work in Orange County. Throughout the relevant time period, the prevailing hourly wage due under the Sheet Metal PWD was $49.46 comprised of a base rate of $34.53, fringe benefits totaling $14.16 and a training fund contribution of $0.77. Daily overtime and Saturday work required time and one-half ($66.70).

RAN contracted with District to install HVAC units for a large school building project in Fullerton, California. RAN's President and Secretary, Roger Abinader (R. Abinader), signed the contract with District November 11, 2008. RAN was one of many contractors and subcontractors that built the school buildings and facilities including concrete work, structural steel, plumbing, electrical, rebar, metal studs, decking and other

[2] The District asserts in its September 30, 2011, Closing Brief that the applicable prevailing wage rate was ORA-2007-1 because the bid dates were January 23, and 30, 2007. Neither District nor RAN introduced documents to establish the applicable PWDs for the work on the Project. The Director here takes Administrative Notice that the correct PWDs for Sheet Metal Worker (HVAC) work in Orange County for the bid date of July 30, 2007, are ORA-2007-1 and ORA-2007-2. Both PWD's are operative as both have the same wages, benefits and overtime rates. ORA-2007-1 was issued February 22, 2007, and expired June 30, 2007 (ORA 2007-2 was issued August 22, 2007, and expired September 30, 2007).

structural work for the entire school project. RAN, and an affiliated company, APEX Construction, Inc. (APEX), owned by Ibrahim Abinader (I. Abinader), R. Abinader's brother, also had HVAC projects with other school districts in progress concurrently with RAN's work on the Fullerton Project. Due to the nature of the work and the concurrent projects, RAN's workers were not exclusively assigned to the Project on a daily basis. RAN's workers concurrently worked on the other RAN or APEX projects at other school locations, such as the "Bing-Wong" project in San Bernardino, the "Orchard" project in Tustin and other projects in Riverside, Irvine, and Palm Desert.[3] RAN prepared separate CPRs for the Project that did not include work at the other RAN/APEX work locations.

After RAN's work on the Project was completed, the District received complaints from three workers who asserted that RAN shaved their hours to less than eight hours per day and paid them less than the prevailing rate by reporting and paying some of their hours at the prevailing wage rate and paying the balance of the hours separately at a much lower rate. As a result, the workers contend that they were paid far less than the applicable prevailing wage rates for the actual hours that they worked.

- Alejandro De La Fuente (De La Fuente) signed a declaration on September 8, 2010, asserting that RAN hired him for only $12.00 per hour, gave him modest raises but never paid him the prevailing wage required. He was instructed to tell anyone asking that he earned $58.45 per hour. De La Fuente stated that his paychecks always had incorrect hours; sometimes he would work more than 40 hours and his check would reflect that he only worked 10 hours. De La Fuente was required to sign blank time sheets and, on paydays, a statement that he had waived his right to complain about anything to receive his paycheck.
- Javier Gutierrez Delgado (Delgado) also signed a declaration September 8, 2010, stating that he was hired by R. Abinader to work for RAN on the Project in October 2008. Delgado stated that he was hired at the rate $10.00 per hour for duct installation, heating, ventilation and air conditioning work. Commencing at the end of 2009, Delgado began being paid by APEX, instead of RAN. He stated

[3] The certified payroll records (CPRs) for this Project reference an "Alford 4" project; no evidence was provided establishing either that "Alford 4" was a separate project or where it was located. It appears that when workers worked on "Alford 4" RAN's CPRs reported those workers as working on the Project.

that he always worked eight hours or more per day and 40 or more hours per week on this Project. Delgado declared that he was paid with more than one check each pay period, but that only one of the checks had deductions taken out. The check with the deductions was always for 20 hours at an hourly rate of $58.56. The other checks constituted pay for the balance of the hours he worked, including overtime hours, at a lower rate which had the effect of lowering Delgado's actual pay rate to $23.00 per hour. Delgado was also required to sign for his paychecks declaring that everything was correct. He claimed that he had been unpaid for three weeks of work at the time he signed the declaration.

Delgado also complained about I. Abinader's treatment of workers, which he contends pushed him and the other workers to work at an unsafely fast pace. Delgado also complained that he received only a 45 minute break during eight hours of work. Delgado filed a written Prevailing Wage Complaint Form in October, 2010 in which he claimed he was only paid $20.00 per hour by combination of more than one separate check for each pay period. He also filed a Stop Notice to Withhold Construction Funds with the District on October 9, 2010, alleging that $22,192.00 was owed to him in back wages.

- Mario Coss (Coss) also filed a Prevailing Wage Complaint Form against both APEX and RAN stating that he was paid only $23.00 per hour. He had also filed a Stop Notice to Withhold Construction Funds with the District on October 8, 2010. Coss's September 9, 2010, declaration stated that when he started working for RAN he was paid $20.00 per hour, but was told by R. Abinader to tell anyone asking that he was earning $54.00 per hour. Soon after the Project commenced, Coss and others complained about their pay rate. R. Abinader arranged for an increase in pay, but, while Coss got several raises up to about $30.00 per hour, his overall pay never achieved prevailing wage rates. Coss stated that was told to tell anyone asking that he earned $58.00 per hour. He felt his checks were less than R. Abinader and the workers had agreed upon. Coss also stated that he would receive two checks each pay period, one with taxes taken out, but with fewer hours than he actually worked, and another with no deductions for the balance.

When combined, the hourly rate was approximately $26.00 to $32.00 per hour, but Coss could not tell exactly because the second check did not list either hours or rates of pay. Coss did not keep a record of the daily hours he worked, but stated that he knew them by memory. Coss claimed that he worked more than eight hours per day with only a 45 minute break. Coss quit on September 3, 2010, due to harassment by I. Abinader, after having worked for RAN for about seven years.

The District's Labor Compliance Field Officer, Michael Oates (Oates) had visited the worksite regularly. He made inquiries of the workers and reviewed RAN's CPRs, but until he met with the Sheet Metal Union, Local 105, representative, Angel Victoriano, Oates had no indication that RAN might have committed prevailing wage violations. After interviewing the workers who had filed complaints and comparing their calendars of claimed work days with RAN's CPRs, Oates determined that violations had occurred. Oates reviewed variations in the check stubs provided by the complaining workers. He found that some check stubs broke down a pay rate as low as $2.40 per hour on several checks. That indicated to Oates that RAN was both reporting fewer hours than the workers had actually worked and that RAN was reporting a higher pay rate than the workers were earning overall. Based on that evidence, Oates determined that the District should file a Request for Approval of Forfeiture with the Labor Commissioner requesting approval for a Notice of Withholding of Contract Payments for RAN's failure to pay its workers the required prevailing wages for all of their hours of work on the Project.

The Notice: The parties stipulated that District's March 1, 2011, Notice was timely served and that RAN's Request for Review was timely filed. RAN's CPRs indicate that RAN paid its Sheet Metal Workers, including the three complaining workers, $55.06 per hour; in excess of the required prevailing rate of $49.46 per hour. The Notice found, however, that RAN's CPRs failed to report either all of its employees performing work on the Project or the full amount of time they worked. As noted above, the complaining workers claimed they had worked more hours and days than RAN's CPRs reported and that they were separately paid less than the required prevailing wages for the unreported hours. As a result the District asserts that RAN failed to pay the

required prevailing wages for the Sheet Metal Workers on the Project. In those instances when the District does not disagree with the number of hours RAN's CPRs report that a worker worked on a specific day, the Notice credits RAN for the amounts in excess of the required prevailing wage on hours paid at $55.06 per hour.[4] Even with the credits, however, the Notice found a total of $23,013.80 in underpaid prevailing wages, including $416.57 in unpaid training fund contributions. Penalties were assessed under section 1775 at the mitigated rate of $30.00 per violation for 94 violations, totaling $2,820.00. Though the maximum rate of $50.00 per violation was requested by District, the District was not aware of any prior record of RAN failing to meet its prevailing wage obligations. The Labor Commissioner found that there was no evidence that RAN's failure to pay the correct prevailing wages was a good faith mistake but also determined that penalties at the rate of $30.00 per violation were warranted because RAN had no prior violations. No penalties were assessed under section 1813 for overtime violations.

Each of the workers, who filed complaints (De La Fuente, Delgado and Coss), Oates and the District's Labor Compliance Officer, Jerry Skaff, testified at hearing. RAN presented evidence that De La Fuente, Delgado and Coss, who were simultaneously employed by APEX on projects for other school districts, had each reported conflicting information regarding the dates of their work on APEX jobs in Fullerton, Palm Desert, Tustin and Riverside in support of their separate complaints against APEX for unpaid wages on those projects. RAN established that the complaining workers had claimed to have worked on different projects for APEX on some of the same days they had told Oates that they had worked on the Project for RAN. RAN provided evidence that each of the complaining workers had already received a settlement payment from APEX for the hours they claimed to have worked on those days. The District objected to that evidence.

According to R. Abinader, the nature of the work RAN employees performed on the Project usually required neither a full eight hour work day nor a consistent day to day

[4] The District itemized the daily hourly assessments it claimed in the Notice. On those days that the District deemed an employee to have worked, but RAN did not list that work on the CPR, the full amount of wages were deemed due, i.e. eight hours at $46.49 per hour totaling $365.68 per day. However, for those days that RAN listed a worker as working some time, but less than eight hours, the District's assessment appears to credit RAN with the excess balance between the $55.06 per hour RAN said it paid ($8.57 per hour above the required prevailing rate) against the assessment of the remaining unpaid hours.

presence on the Project, because installation of the HVAC units could only be done when supplies arrived and when the workers of other subcontractors had completed work necessary to prepare the buildings for HVAC installation.

Comparison of the calendars prepared by De La Fuente, Delgado and Coss listing the dates that they claimed to have worked on the Project to the District's Inspector daily records revealed that RAN did not have a constant presence on the Project work site. The conflicting calendars that the three workers prepared in support of their separate claims against APEX show that they were careless about claiming to have worked full days on the Project when they had previously claimed to have worked elsewhere for APEX on the same days. RAN asserts that the variances between the conflicting calendars put the workers' truthfulness in question. Comparison of the two calendars prepared by each of the affected workers reveals that a total of 31 days claimed as full days of work on the Project are the same dates the workers also claim to have also worked either at another location for APEX or in the "shop."[5]

In addition to the dispute over which days the affected workers worked on the Project, the parties also dispute how many hours they worked on the days that RAN did report them as working on the Project. For instance, in regard to Coss, RAN's CPRs often reported less than eight hours worked, while Coss told Oates that he worked at least

[5] The following details the days the affected workers claimed to have worked full 8 hour days on the Project on the calendars prepared for Oates but also claimed they worked at other locations for APEX:

COSS

May 25, 2008	Shop
June 12, 2008	Riverside
Nov. 4 & 5, 2008, Jan. 9, 2009	Serrano
Aug. 10, 13, 14, 2009, Sept. 9, 2009	Citrus/Orchard

DELGADO

Sept. 3, 4, 10, 2008; Oct. 1,2, 3, 17, 23, 24, 27, 28, 2008; Nov. 14, 2008	Serrano
Nov. 5, 2008; Jan. 6, 7, 8, 12, 2009	Shop
Jan. 23, 2009; Oct. 2, 9, 2009	Citrus
October 13 and 21, 2009	Palm Desert

DE LA FUENTE

Sept. 22, 25, 2009; Oct. 9, 2009; Nov. 6, 2009	Irvine/Orchard
Oct. 12, 2009	Palm Desert

"Shop" hours worked at the RAN or APEX workshops were properly paid separately at a different rate than the prevailing rate.

eight hours every day.[6] Oates testified that he believed he had observed the affected workers present for an entire day when they worked on days he visited the Project site.

Summarizing the discrepancies between the hours claimed by the affected workers and those reported on RAN's CPRs: for Coss there were 23 days for which RAN's CPRs listed fewer hours than Coss reported to Oates and 17 days on which Coss claimed that he worked on the Project but is not reported on the CPRs: for Delgado there are 25 days when RAN's CPRs report him as working fewer than eight hours and 14 days where he is not reported as working at all; and for De la Fuente there are four days when RAN's CPRs report him as working fewer than eight hours and four days where he is not reported as working at all.

RAN required the workers to sign or initial a weekly hours roster (weekly roster) which was a grid form that listed the days of the week (Monday through Sunday), the date, and the classification of the workers, with spaces for the work location and hours (beginning and ending times and total hours worked); each day was to be initialed by the worker. The workers testified that they were required to initial the weekly rosters in advance, that is, before the written entries were made by someone else. Because of that the workers did not know what time amounts were included on the finished weekly roster. RAN disputed that the daily entries were initialed by the workers in blank. The hours listed on the rosters related to the Project were mostly, but not always, the same number of hours listed on RANs CPRs for each worker. RAN also required that the workers sign a "Payroll Release" that stated that the workers received the prevailing rates for all the working hours and that the checks issued were correctly calculated at the prevailing rate. The workers testified that they would not receive their paychecks unless they signed the payroll release form.

The District compared the Project Construction Manager's (CM) daily logs of the number workers, with the Inspector's daily logs, each of which contained a "head count" of workers on the Project by contractor and subcontractor. RAN argues that the CM's logs are more accurate than the Inspector's logs, while the District contends that the

---

[6] The calendar Coss prepared of his work on the Project usually listed more than eight hours of work per day but the Notice assesses only eight hours for each day; neither overtime nor Saturday work are claimed.

Inspector's logs are more reliable. There are slight variances between the two sets of logs, but neither the CM nor the Inspector testified. The District points out that that Inspectors have a statutory duty to continuously inspect and report that the work is performed according to specification and that the reports are often used to determine worker claims. It also contends that because RAN's records were prepared by R. Abinader, in addition to being neither signed or dated, they are not reliable and are not supported by either the CM's or the Inspector's daily logs.

The District introduced approximately 40 paycheck stubs produced by Delgado that the District contends reveal RAN's scheme to partially pay the affected workers prevailing wages and then pay the balance of the hours worked at a much lower hourly rate by separate check. When combined, the two hourly rates average out to an overall hourly pay rate below the required prevailing wage rates. The District relies on six checks issued to Delgado on May 24, 2008, referencing payment at $2.40 per hour, as evidence that RAN's practice was to issue separate checks in lower amounts to result in an average hourly rate far below prevailing rate. R. Abinader explained that those checks for $2.40 per hour were issued to make-up for an error on the prevailing wage rate previously paid to Delgado rather than as payment for hours worked at a less than prevailing wage rate. The District observed that R. Abinader did not even know what the required prevailing wage rate was. The District also argues that RAN's issuance of checks to some workers on a Friday for the pay period ending the following Sunday was improper and constitutes further evidence of a scheme to avoid paying prevailing wages on the Project.

Ruling on Introduced Evidence: At hearing all of the parties' exhibits that had been listed on their respective exhibit lists and served prior to trial were admitted without objection. RAN's exhibits included both sets of calendars prepared by workers Coss, Delgado and De la Fuente. The District objected to RAN's attempt to introduce settlement documents showing payment to the workers by APEX.[7] RAN objected to the

[7] At hearing RAN introduced exhibits "I", "K', and "L," which were purported settlement and release agreements between each of the workers, RAN and APEX (and a subcontractor) for the workers' claims for unpaid wages for work at the Palm Desert and Tustin School Districts. The District objected to the evidence on the basis of relevancy. Particularly, District states that the agreements do not describe what

District's introduction of copies of paychecks to a worker as evidence of underpayments.[8] Both objections are granted because the documents are irrelevant.

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*] (*Lusardi*).) An Awarding Body like the District enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and

---

specific days were covered or how many hours. District further objected based on foundation as to whether the Agreements relate to similar labor claims arising from the alleged violations asserted by the Labor Compliance Programs (LCPs) for those school districts. The District properly notes that any forfeitures or withholdings by a Labor Compliance Program (LCP) require approval of the Labor Commissioner pursuant to Title 8, California Code of Regulations section 16346 and 16347. While there is no bar to introduction of this negotiation statement under Evidence Code section 1152, as it was introduced by RAN, a party, there is no relevancy to the fact of settlement by the workers, or for how much. For those reasons, Exhibits I, J and K are not admitted. The relevant evidence was the conflicting calendars that were summarily admitted without objection. Each worker testified to and authenticated the calendars.

[8] The District introduced Exhibit "22," a one-page copy of two paycheck stubs for Delgado for two payments by RAN on February 27, 2009. RAN objected on the basis that District did not establish that the payments were made for the Project. It is noted that two checks are reflected, one (#4291) for "auto expense" but with deductions and a rate of pay in the amount of $55.06 for eight hours of work, another (#4299) with deductions and a rate of pay of $55.06 for 13 hours of work for the period February 23, 2009, through March 1, 2009. It is also noted that the District's notice has no wage claim for Delgado for the pay period February 23, 2009 through March 1, 2009. Hence, the pay check stubs are irrelevant and are not admitted.

Lusardi, supra.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (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 Notice of Withholding under section 1776.1.

When the District determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding 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 [Notice of Withholding] is incorrect."

The Affected Workers Are Entitled To Receive Prevailing Wages For Their Documented Work On The Project.

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (*Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-688 [rule for estimate-based overtime claims under the federal Fair Labor Standards Act, 29 U.S.C. §§201 et seq.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727 [applying same rule to state overtime wage claims]; and *In re Gooden Construction Corp.* (USDOL Wage

Appeals Board 1986) 28 WH Cases 45 [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for a Notice of Withholding is incorrect.

RAN described the nature of its work as being sporadic and not requiring full or consistent days of work. Some of that description is corroborated by the admissions of the workers that they worked at various projects simultaneously; some for which they were employed by RAN and others for which they were employed by APEX. While that evidence puts the actual days the affected workers worked on the Project in question, it does not affect the workers' consistent testimony that they nearly always worked a full eight hours or more each day and that they never worked at more than one work site in a day. RAN asserts that the evidence of the weekly rosters establishes that these workers did not work full eight hour days. RAN denies the workers' testimony that they were required to sign the weekly rosters in blank, contending that such a practice would be illogical because some weeks had a different number of days than others and each of the rosters were signed off at the appropriate number of entries. RAN posits that such accurate signing by workers could not happen with a blanket sign off of a blank form.

The evidence supplied by the District demonstrates that these workers did not keep adequate records of where they worked and for how many hours. The calendars they prepared themselves for the APEX jobs in Palm Desert and Tustin conflict dramatically with the calendars for the Project that they provided to Oates. Their conflicting calendars are more irregular than regular, listing work both on the Project and on other work for APEX on many of the same days. The workers had little explanation for these conflicts except that they were "rushed" to prepare the calendars for the APEX jobs and were thus unable to sit down and think carefully about what they were doing. They explained that they had more time to be accurate for the RAN calendars they prepared for Oates. Oates testified he was unaware of the existence of the conflicting calendars at the time the Notice was prepared. He said that he would have considered the inconsistencies had he known that the workers had prepared the other calendars.

An analysis of the differences between RAN's CPRs and the District's assessed unpaid wages establishes that the total assessed days, whether full or partial, should be offset by the conflicts in the calendars of the workers. The results are as follows:

Coss: Total days assessed: 81, of which 35 days were fully paid for eight hours with no claimed violation for those days, leaving 46 days in question. 17 of those were claimed as full days which were unpaid, but Coss filled out a calendar of APEX work listing work elsewhere for APEX on five of those days, leaving 12 days with no conflict. There were 29 partial days assessed, four of which Coss listed as working elsewhere for APEX, leaving 25 days with no conflict. Hence, 37 days (12 whole days + 25 partially paid days) remain without a conflict of evidence for Coss.

Delgado: Total days assessed: 74, of which 23 days were fully paid for eight hours, leaving 51 days in question. 24 of those were claimed full days which were unpaid, but Delgado filled out a calendar of APEX work listing work elsewhere for APEX on 15 of those days. There were 22 partial days assessed, six of which Delgado listed as working elsewhere for APEX. Hence, 25 days (nine whole days unpaid + 16 partially paid days) remain in question for Delgado.

De La Fuente: Total days assessed: 14, of which six days were fully paid for 8 hours leaving 8 days in question. Four of those were claimed full days which were unpaid, but De La Fuente filled out a calendar of APEX work listing work elsewhere for APEX on all four of those days. There were four partial days listed, two of which De La Fuente listed as working elsewhere for APEX. Hence, two partially paid days remain in question for De la Fuente.

The District's production of approximately 40 paycheck stubs produced by Delgado is sufficient to support its contention that RAN utilized a scheme of paying prevailing wages for some of the hours worked and then paying a lower rate for the balance of the hours by separate check to average out to a lower overall hourly pay rate. The District's other argument that RAN's issuance of checks on a Friday when the pay period ends the following Sunday is improper is not sufficient without more to establish a scheme to pay less than prevailing wage. The District's argument is also supported by the evidence of the six checks issued to Delgado on May 24, 2008, referencing payment

at the rate of $2.40 per hour. R. Abinader's explanation that the $2.40 hourly rate of pay checks was intended to make up for a shortfall in the required prevailing wages is not compelling and contradicts his claim to have paid each of the affected workers more than the required prevailing wage rate throughout the Project.

Each of the workers testified to essentially the same scenario: they agreed to be paid at an overall hourly rate of $23.00 to $26.00 per hour; RAN would pay some of their hours at $55.06 but would pay a much lower rate for the balance of the hours to average out to $23.00 to $26.00 per hour. The weight of the evidence supports a finding that this scheme existed. It is unlikely that the affected workers would work for only one or two hours on a given day; each worker testified that he did not go from one job to another on a single day. This testimony is supported by the fact that the Project site and the work sites for the APEX projects were many miles apart. Further, Oates testified, based on his own observation, that he believed the affected workers were present on the Project site for eight hours on each day they worked. RAN's only witness to the contrary was its owner, R. Abinader, who also prepared the CPRs. The workers consistently testified that R. Abinader had devised the scheme and offered to pay them at $23.00 to $26.00 per hour with no taxes withheld. Neither the Project Construction Manager nor the Inspector was called to testify that RAN's workers had only worked partial days. Additionally, RAN did not submit CPRs from the concurrent APEX jobs to document whether the affected workers were also listed as workers for APEX on days they claim to have been unpaid in whole or in part.

In conclusion, with the exception of those days for which RAN has shown that the affected workers had previously claimed to have been working on other projects for APEX, it has failed to meet its burden to disprove the basis of the Notice. The assessed unpaid wages are therefore affirmed and modified as discussed above.

District's Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775, subdivision (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.[9]

The Director's review of the Labor Commissioner's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ..." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service*

[9] Section 1777.1, subdivision (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 refuses to comply with its provisions."

Commission (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that 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 Regs., tit. 8, §17250, subd. (c)].)

The weight of the evidence provided by RAN through the conflicting worker calendars was sufficient to discredit the workers' claims to Oates of their working on the Project for RAN when they had previously reported working elsewhere on APEX jobs. The District submitted Inspector reports and prepared a report establishing how many RAN workers were present on the Project each day. While the information presented by the District is more persuasive and accurate than RAN's weekly rosters, it does not establish which workers were actually present, and other workers were listed on RAN's CPRs as working on some of those days. The three affected workers, however, consistently testified to working a full day or more and there was no evidence to the contrary except for the weekly rosters that the workers testified were signed in blank. There is therefore sufficient evidence to establish that RAN manipulated the wage rates paid to show prevailing wages on part of the work while paying less than prevailing wages for the balance of the hours worked that were not reported on RAN's CPRs.

Section 1775, subdivision (a) (2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it neither mandates mitigation in all cases nor requires mitigation in a specific amount. Here the Labor Commissioner determined that mitigation from $50.00 to $30.00 was appropriate. The record shows that the Labor Commissioner considered the prescribed factors for mitigation and determined that a penalty of $30.00 per violation was warranted in this case. The Director is not free to substitute her own judgment. RAN has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of $30.00 is affirmed for 60 violations.

RAN Is Liable For Liquidated Damages.

Section 1742.1, subdivision (a) provides in pertinent part as follows:

> After 60 days following the service of. . . a notice of withholding under subdivision (a) of Section 1771.6], 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 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.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing . . . the notice with respect to a portion of the unpaid wages covered by . . . the notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Director, RAN is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is partially tied to RAN's position on the merits and specifically whether, within the 60 day period after service of the Assessment, it had "substantial grounds for appealing . . . the notice with respect to a portion of the unpaid wages covered by the . . . the notice . . ."

Although RAN has disproven the basis of the Notice in part, as to certain days of work claimed by the workers that were not substantiated by the District, resulting in a reduction of the assessed unpaid prevailing wages, the record as a whole establishes that RAN intentionally underpaid its workers on the Project and misreported the days and hours they had worked to make it appear that the required prevailing wages had been paid. Because the assessed back wages remained due more than sixty days after service of the Notice, and RAN has not demonstrated grounds for waiver, RAN is also liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected contractor RAN filed a timely Request for Review of the Notice of Withholding issued by District with respect to the Project.

2. RAN failed to pay its workers at least the prevailing wage rate for Sheet Metal Worker ORA-2007-1 for all the disputed work on the Project, comprising 60 violations of section 1775. The individual workers were underpaid as follows:

- De la Fuente: 9 hours unpaid; unpaid wages: $374.51,[10] and the corresponding training fund requirement was unpaid in the amount of $6.93;

- Delgado: 134 hours; unpaid wages: $6,138.90, and the corresponding training fund requirement was unpaid in the amount of $103.18, and

- Coss: 180 hours; unpaid wages: $6,395.58, and the corresponding training fund requirement was unpaid in the amount of $138.60.

3. In light of Finding 2 above, RAN underpaid its employees on the Project in the aggregate amount of $13,157.69 including unpaid training fund contributions.

4. District did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $30.00 per violation, and the resulting total penalty of $1,800.00, as modified, for 60 violations is affirmed

5. The unpaid wages found due in Finding No.4 remained due and owing more than sixty days following issuance of the Notice. RAN is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of $13,157.69, and there are insufficient grounds to waive payment of these damages

6. The amounts found remaining due in the Notice as modified and affirmed by this Decision are as follows:

Wages Due:	$12,908.98
Training Fund Contributions Due:	$248.71
Penalties under section 1775, subdivision (a):	$1,800.00
Liquidated Damages:	$13,157.69

[10] Each worker's unpaid wage totals reflect the amounts calculated by the District that deducted credits for overpayments of partial day hours RAN paid at $55.06 per hour, when only $46.49 per hour was due.

TOTAL: **$28,115.38**

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

ORDER

The Notice of Withholding is affirmed and modified in part 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: 3/12/2012

Christine Baker

Christine Baker
Director of Industrial Relations