

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Labat's Tree Care

Case No. 10-0279-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

**ORDER GRANTING RECONSIDERATION
AND AMENDING FINDINGS OF FACT**

The Division of Labor Standards Enforcement ("DLSE") seeks reconsideration of the Decision of the Director issued on February 4, 2011 ("Decision"), on the basis that the Decision incorrectly reduced statutory penalties assessed against Labat's Tree Care ("Labat's"). Labat's has not filed a response. Based on my review of DLSE's arguments and the relevant parts of the record, I will grant reconsideration and amend the Decision for the following reasons.

The Decision affirmed and modified DLSE's Civil Wage and Penalty Assessment ("Assessment") seeking \$9,300.00 in penalties under Labor Code section 1776, subdivision (g)¹ for Labat's failure to timely furnish certified payroll records ("CPRs") after receipt of DLSE's request for copies of those records ("Request"). The Decision found that DLSE had not properly calculated the penalties because the Request allowed Labat's 10 "working days" after receipt to furnish the CPRs.² Labat's received the Request on Saturday, August 28, 2010.

The Decision also found that Labat's was entitled to an additional five days to respond under Code of Civil Procedure section 1013 because service of the Request was by

¹ All further statutory references are to the California Labor Code unless otherwise specified. References to "subdivision (g)" are to section 1776, subdivision (g).

² A "working day" is defined in the regulations as "any day that is not a Saturday, Sunday, or State holiday" (Cal. Code Regs., tit. 8, § 17202, subd. (o).)

mail.³ Accordingly, the Decision found that Labat's had until September 20, 2010, to comply and modified the Assessment by deducting penalties assessed for purported non-compliance prior to that date. On that additional basis, the assessed penalties under subdivision (g) were reduced to \$6,900.00.

DLSE argues that this reduction was excessive, because subdivision (g) specifies that a "contractor or subcontractor has 10 days in which to comply subsequent to *receipt* of a written notice" requesting CPRs. (Emphasis added.) Because the statute specifies that the time to provide CPRs without penalty is calculated from receipt of the request, not service, Labat's should not have been given additional time to respond based on Code of Civil Procedure section 1013. On further review, this is correct and the time for Labat's response started immediately upon receipt of the Request.

DLSE further argues that subdivision (g) allows 10 "days" to comply with a request for records; the Decision improperly used "work days." Cal. Code Regs., tit. 8, § 16000 provides that "days *unless otherwise specified* means calendar days." (Emphasis added.) If it were not for the plain language of the Request, DLSE would have a persuasive point. However, DLSE's Request "otherwise specified" that the time within which to provide records was 10 "working days" and this is the time period that will be respected in this case. Because Monday, September 6, 2010, was a state holiday, the last working day for Labat's to respond to the Request without penalty was Monday, September 13, 2010 and penalties could not start to run until the next day, September 14, 2010. DLSE incorrectly assessed penalties beginning on September 13, 2010.

IT IS THEREFORE ORDERED that reconsideration of the Decision of the Director issued on February 4, 2011, is granted, and that the Decision is hereby reissued in its entirety, except that the findings of fact are amended as set forth below:

FINDINGS

1. Affected subcontractor Labat's Tree Care filed a timely request for review of the Civil Wage and Penalty Assessment ("Assessment") and Amended Civil Wage and Penalty Assessment ("Amended Assessment").

³ See also Rule 03 (Cal. Code Regs., tit. 8, § 17203, subd. (c)).

2. Labat's provided workers to a public works project, the Tree Replacement, Highland and Nancy Boyd Parks, Project, pursuant to a construction contract entered into on March 18, 2010, with the City of Martinez.

3. The construction contract requires Labat's to pay at least prevailing wages to all workers on the Project and to comply with all provisions of section 1776.

4. On August 26, 2010, DLSE mailed to Labat's a Request For Certified Payroll Records (the "Request"). The Request was received by Cheryl Cole, Owner, on August 28, 2010. The Request required Labat's to produce certified copies of its payroll records to DLSE for all workers employed on the Project within 10 working days of receipt of the Request or be subject to penalties under subdivision (g) of \$25.00 per calendar day or portion thereof for each worker until the records were received.

5. Labat's did not provide certified copies of its payroll records to DLSE until October 20, 2010.

6. Labat's failed to meet its burden of proving that it was not subject to penalties under section 1776, subdivision (g).

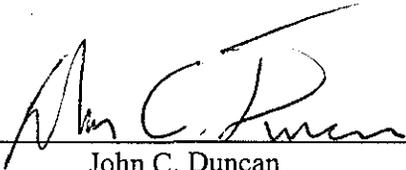
7. DLSE properly assessed penalties against Labat's under section 1776, subdivision (g) for its failure to provide the payroll records to DLSE within 10 working days of August 28, 2010. However, DLSE incorrectly calculated the penalties by assessing penalties for September 13, 2010. Because September 6, 2010 was the Labor Day holiday, September 13, 2010 was the tenth working day after the Request was received and thus the last day on which compliance without penalty was permissible.

8. The amount found due on the Amended Assessment as modified and affirmed by this Decision is as follows:

Wages due:	\$0.00
Penalties assessed under sections 1775 and 1813:	\$0.00
Penalties assessed under section 1776:	\$9,000.00
TOTAL:	\$9,000.00

The Amended Civil Wage and Penalty Assessment is modified as set forth in the above Findings.

Dated: 2/16/11



John C. Duncan
Director of Industrial Relations

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the matter of the Request for Review of:

Labat's Tree Care

Case No. 10-0279-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Labat's Tree Care ("Labat's") submitted a timely request for review of a Civil Wage and Penalty Assessment ("Assessment") in the amount of \$3,000.00 issued by the Division of Labor Standards Enforcement ("DLSE") with respect to work performed by Labat's on the Tree Replacement, Highland and Nancy Boyd Parks, Project (the "Project") for the City of Martinez ("City"). After the request for review was submitted, DLSE issued an Amended Civil Wage and Penalty Assessment ("Amended Assessment") in the amount of \$9,300.00. A Hearing on the Merits occurred on January 3, 2011, in San Francisco, California, before Hearing Officer A. Roger Jeanson. Cheryl Cole, Owner, appeared for Labat's. Ramon Yuen-Garcia appeared for DLSE. Sherry Gentry, DLSE Deputy Labor Commissioner, testified by telephone without objection.¹

The issue for decision is whether DLSE properly assessed Labat's pursuant to Labor Code section 1776, subdivision (g)² for its failure to timely furnish certified payroll records ("CPRs") to DLSE after receipt of DLSE's request for copies of the records.

The Director finds that Labat's failed to meet its burden of proving that it should not be assessed a penalty under subdivision (g) for failing timely to furnish the records to DLSE.

¹ DLSE objected to Labat's Exhibits D and E because they contain confidential settlement discussions. However, neither document contains offers to compromise or inadmissible statements against interest. The objection is overruled. DLSE also objected to Exhibit E on the grounds that it constitutes hearsay. Public works hearings are not conducted in accordance with technical rules of evidence, and hearsay evidence may be admissible for limited purposes under Rule 44 (Cal. Code Regs., tit. 8, § 17244, subd. (d).) The objection is overruled. Exhibits D and E will be admitted in evidence.

² All further statutory references are to the California Labor Code unless otherwise specified. References to "subdivision (g)" are to section 1776, subdivision (g).

However, DLSE incorrectly calculated the penalty, and, accordingly, this Decision reduces the assessment to \$6,900.00. Therefore, this Decision modifies the Amended Assessment.

SUMMARY OF FACTS

Labat's entered into a construction contract with City on March 18, 2010, to provide labor and materials to the Project. The contract provides in pertinent part in paragraph 9 that Labat's will pay at least prevailing wages to all workers on the Project and in paragraph 12 (A) that Labat's "shall" keep accurate payroll records for all workers employed on the Project and "shall comply with each and every provision of Section 1776 pertinent to said records as well as any other records governed by said Section 1776"

Some time prior to August 26, 2010, DLSE received a complaint against Labat's from the Foundation for Fair Contracting, which included copies of Labat's CPRs for the payroll periods ending April 30, 2010, and May 7, 2010 (the "Redacted Records"). On August 26, 2010, DLSE mailed to Labat's by Certified Mail a Request For Certified Payroll Records ("Request"). The Request asked that Labat's submit CPRs to DLSE for all workers employed on the Project, stated that it was a formal request authorized by section 1776, and provided that failure to produce the records to DLSE within ten (10) "working days" after receipt of the Request would subject the contractor to a penalty of twenty-five dollars (\$25.00) per day for each worker until the records are received. The Request was received and signed for by Cole on August 28, 2010. Cole testified that after she signed for receipt of the Request, she misplaced the Request without reading it.

Gentry did not receive records from Labat's, and, therefore, prepared the Assessment on September 23, 2010. It assessed a \$3,000.00 penalty against Labat's under subdivision (g) for the failure to furnish the payroll records. Gentry testified that she calculated the Assessment based on the Redacted Records at \$25 per day per worker for twelve workers for the period September 13 to September 23, 2010.³ The Assessment states in part that "Pursuant to Labor Code Section 1776 (g), the contractor shall forfeit \$25.00 for each calendar day for each worker until compliance is effectuated"

³ The Redacted Records show that Labat's had eight workers on the Project for the week ending April 30, 2010, and twelve workers for the week ending May 7, 2010.

Labat's received the Assessment on September 25, 2010. On September 27, 2010, Cole mailed the request for review, which states in part, "Now that we have received your request, please give us a chance to honor it."

Cole asked John Sonnikson, a part-time assistant, to respond to the Assessment. Sonnikson unsuccessfully tried on several occasions to contact Gentry by telephone to find out what they needed to do. On October 18, 2010, Labat's mailed copies of the payroll records to DLSE. They were received by DLSE on October 20, 2010.

In the meantime, on October 14, 2010, Gentry prepared the Amended Assessment, which increased the penalty under subdivision (g) to \$9,300.00. Gentry testified that the Amended Assessment included penalties for an additional 21 days, from September 24 through October 14, 2010, at \$25.00 per day for twelve workers.

DLSE stipulated at trial that it would not seek additional penalties against Labat's after October 14, 2010.

DISCUSSION

Section 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages. DLSE investigates and enforces prevailing wage requirements on public works projects "to ensure employees are not required or permitted to work under substandard conditions ... and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5 (a).)

When DLSE determines that a violation of the prevailing wage laws has occurred, it issues a written Civil Wage and Penalty Assessment. (§ 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 "The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

Each contractor and subcontractor employing workers on a public works project is required to maintain payroll records pursuant to section 1776 and to furnish CPRs upon request to DLSE. Failure to provide such records to DLSE within 10 days of written notice subjects the contractor or subcontractor to statutory penalties. (§ 1776, subd. (g).)

Section 1776 provides in relevant part as follows:

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. ...

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

...

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

...

(g) The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she *shall*, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each calendar day, or portion thereof, for each worker, until *strict compliance* is effectuated. (Italics added.)

Thus, the Legislature has clearly provided that if a contractor fails to provide CPRs when requested a penalty is mandatory until the payroll records are provided, i.e., until there is “strict compliance” with DLSE’s request that the records be furnished to it.

Labat’s argues that it is a small business and did not understand what it was supposed to do. Therefore, it should be excused from penalties for its failure to timely provide the records to DLSE. However, maintaining CPRs and furnishing copies of them on request is required of all contractors on public works projects regardless of size. In addition, Labat’s specifically agreed in its construction contract with City to comply with “each and every provision” of section 1776. The Request, Assessment and statute are clear on what was required of Labat’s in this situation. The Legislature has not provided a “small business” defense in section 1776, or, indeed, set forth any factors which might mitigate the assessment of penalties. Subdivision (g) provides that penalties “shall” be paid for each calendar day, or portion thereof, until the request for records is

complied with; i.e., the imposition of penalties for failure to “strictly comply” is mandatory. Accordingly, DLSE properly assessed penalties against Labat’s for its failure to furnish the certified payroll records within the time permitted.

However, DLSE has not properly calculated the penalties based on the time it gave Labat’s to comply with the Request. The Request allows Labat’s 10 “working days” from receipt of the Request to furnish the payroll records to DLSE.⁴ Labat’s received the Request on Saturday, August 28, 2010. With 10 “working days” and an additional 5 days because service of the Request was by mail,⁵ Labat’s had until September 20, 2010 to comply. Accordingly, on the facts of this case, penalties could not be assessed until beginning September 21, 2010 for the period from September 21 through October 14, 2010. Thus, the assessed penalties are correctly calculated based on 23 days rather than 31 days of non-compliance at \$25.00 per day for 12 workers for a total penalty assessment of \$6,900.00, rather than \$9,300.00.

FINDINGS

1. Affected subcontractor Labat’s Tree Care filed a timely request for review of the Civil Wage and Penalty Assessment (“Assessment”) and Amended Civil Wage and Penalty Assessment (“Amended Assessment”).

2. Labat’s provided workers to a public works project, the Tree Replacement, Highland and Nancy Boyd Parks, Project, pursuant to a construction contract entered into on March 18, 2010, with the City of Martinez.

3. The construction contract requires Labat’s to pay at least prevailing wages to all workers on the Project and to comply with all provisions of section 1776.

4. On August 26, 2010, DLSE mailed to Labat’s a Request For Certified Payroll Records (the “Request”). The Request was received by Cheryl Cole, Owner, on August 28, 2010. The Request required Labat’s to produce certified copies of its payroll records to DLSE for all workers employed on the Project within 10 working days of receipt of the Request or be subject to penalties under section 1776, subdivision (g) of \$25.00 per calendar day or portion thereof for each worker until the records were received.

⁴ A “working day” is defined in the regulations as “any day that is not a Saturday, Sunday, or State holiday” (Cal. Code Regs., tit. 8, § 17202, subd. (o).)

⁵ (Cal. Code Regs., tit. 8, § 17203, subd. (c).)

5. Labat's did not provide certified copies of its payroll records to DLSE until October 20, 2010.

6. Labat's failed to meet its burden of proving that it was not subject to penalties under section 1776, subdivision (g).

7. DLSE properly assessed penalties against Labat's under section 1776, subdivision (g) for its failure to provide the payroll records to DLSE within 10 working days of August 28, 2010. However, DLSE incorrectly calculated the penalties by assessing penalties for the calendar days September 13 through September 20, 2010. Under the applicable Rules, September 20, 2010 was the last day on which compliance without penalty was permissible.

8. The amount found due on the Amended Assessment as modified and affirmed by this Decision is as follows:

Wages due:	\$0.00
Penalties assessed under sections 1775 and 1813:	\$0.00
Penalties assessed under section 1776:	\$6,900.00
TOTAL:	\$6,900.00

The Amended Civil Wage and Penalty Assessment is modified as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served on the parties with this Decision.

Dated: 2/4/11



John C. Duncan
Director of Industrial Relations