

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Montez Glass, Inc.

Case No. 14-0625-DAS

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Montez Glass, Inc. (Montez Glass) submitted a request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) on July 16, 2014, with respect to work performed by Montez Glass on the New Hollister Courthouse (Project) for the Judicial Council of California. The Determination found that Montez Glass failed to request dispatch of apprentices from the applicable apprenticeship program in accordance with Labor Code section 1777.5¹ and as a direct result failed to employ apprentices in compliance with the required apprentice to journeyman ratio. DLSE assessed an aggregate penalty of \$5,040.00 under section 1777.7.

On April 22, 2015, DLSE filed a motion to amend the Determination downward pursuant to Rule 26(a)(1)² to reduce the penalty to \$4,410.00. In the motion, DLSE reduced the penalty rate under section 1777.7 from \$60.00 per violation to \$30.00 per violation. Notwithstanding the overall reduction, DLSE increased the number of violations from 84 to 147 days. The Hearing Officer granted the motion.

A Hearing on the Merits was held on June 26, 2015, in Oakland, California, before Hearing Officer Ed Kunnes. Tony Montez and Suzanne Montez appeared for Montez Glass. Galina Velikovich appeared for DLSE. After the hearing, the parties briefed the issue of whether

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

² California Code of Regulations, title 8, section 232.26, subdivision (a)(1). All references to the regulations governing review of determinations of civil penalty under 1777.7 (Cal. Code regs., tit. 8, §§ 232.01 through 232.70) are in the format Rule *x*, with *x* being the numbers following 232. For example, California Code of Regulations, title 8, section 232.26 is Rule 26.

the Director had lost jurisdiction over the hearing because the hearing was set more than 90 days after filing of the Request for Review. The matter was submitted for decision on July 2, 2015.

At trial, the parties stipulated to the issues for decision as follows:

- Did the contractor request apprentices from the appropriate apprenticeship committee?
- Did the contractor employ registered apprentices at the required apprentice to journeyman ration?
- Does the fact that the hearing was set more than 90 days after the filing of the Request for Review preclude the Director from reviewing this matter?

In this Decision, the Director finds that Montez Glass properly requested dispatch of a glazier apprentice from the only applicable apprenticeship committee in the geographic area of the Project, so that Montez Glass was excused from the requirement to employ apprentices under section 1777.5 when the apprenticeship committee did not dispatch a glazier apprentice to the jobsite. Additionally, the Director finds that setting the hearing more than 90 days after filing of the Request for Review does not preclude the Director from reviewing the matter and issuing a decision. Therefore, the Director of Industrial Relations issues this Decision dismissing the Determination.

FACTS

The following witnesses testified at the Hearing on the Merits: Ying Wu (Wu), Deputy Labor Commissioner 1; Mark Watchers (Watchers), Executive Director of Northern California District Council 16 Joint Apprenticeship and Training Committee (the JATC); Tony Montez, President of Montez Glass; and Suzanne Montez, Vice President of Montez Glass. The facts stated below are based on the testimony of the witnesses, the documentary evidence submitted by the parties and the other documents in the Hearing Officer's file.

On April 23, 2012, Montez Glass submitted a Division of Apprenticeship Standards (DAS) Public Works Contract Award Information Form (DAS Form 140) to the JATC for work to be performed in San Benito County. According to Montez Glass's Certified Payroll Records (CPRs) for the Project, employees worked from February 24, 2013 to October 4, 2013. The work was performed exclusively by journeymen glaziers. No glazier apprentices were dispatched to the jobsite and no glazier apprentices were employed on the Project.

Timeliness of Determination and Request. The DLSE served the Determination by mail on July 16, 2014. Wu prepared the Determination. The last day a Montez Glass employee worked on the Project was October 4, 2013. Montez filed its request for review on July 23, 2014.

Applicable Committee in the Geographic Area. Suzanne Montez testified that the JATC was the only apprenticeship committee for glaziers in the Project's geographic area. Wu's testimony and Watchers' testimony implicitly supported Montez's contention that the JATC was the only applicable apprenticeship committee in the Project's geographic area. Suzanne Montez testified that in over twenty years Montez Glass had hired more than 60 apprentices through the JATC. Suzanne Montez and Tony Montez testified that they frequently did not receive a glazier apprentice after making a request and gave even odds of receiving an apprentice on any one job.

Request for Dispatch of Apprentices. Wu testified that she found, based on information provided by the JATC, that Montez Glass did not submit a request for dispatch (DAS Form 142) to the JATC. The alleged failure to submit a DAS Form 142 to the JATC requesting the dispatch of apprentices resulted in Montez Glass not employing any glazier apprentices on the Project. Watchers testified that documents received at the facsimile number that the JATC has set up for the receipt of DAS Forms 140 and 142, as well as other documents sent by contractors, are routed to a computerized system from which staff at the JATC enter information into a data base. The data base indicates the type of form, the name of the contractor who sent the form, the date on which the contractor sent the form and the location of the job for which the contractor sent the form.

The testimony by Wu and Watchers that Montez Glass failed to submit a DAS Form 142 relied upon the accuracy of the JATC's data base, which showed no request from Montez Glass for dispatch of apprentices for the Project. Additionally, Watchers stated that the JATC's practice was not to send an acknowledgment of receipt or any other follow-up communications to a contractor submitting a DAS Form 142. In other words, the JATC's sole response to a contractor's request for dispatch of an apprentice is either an apprentice appearing at the jobsite or no apprentice appearing at the jobsite.

Suzanne Montez testified that Montez Glass submitted a DAS Form 142 requesting dispatch of a glazier apprentice to begin work on June 3, 2013, on May 23, 2013, more than 72 hours in advance of the requested dispatch date. The DAS Form 142 and the Transmission Verification Report (transmission report), generated by Montez Glass's facsimile machine on a separate page, support Suzanne Montez's testimony and indicate that Montez Glass sent a timely DAS Form 142 to the JATC by facsimile.

Montez Glass typically has seven construction projects proceeding in any one month. Of those seven construction projects, there may be between two to five public works construction projects. Montez Glass's practice with regard to maintaining its public works files requires the office administrator to staple the transmission report to the DAS Form 142 and place them in a folder for that particular job.

After Montez Glass received the Determination, Suzanne Montez searched and found the completed DAS Form 142 and the attached transmission report in the Project folder. The Determination arrived some fourteen months after Montez Glass had transmitted the DAS Form 142. Suzanne Montez also found with these items a Post-it note attached to the transmission report stating: "Apprentice never showed."

Tony Montez testified that Montez Glass timed submission of the DAS Form 142 to correspond with the portion of the Project that required glaziers. DLSE explained at the hearing that it did not contest the timeliness of the submission but rather whether Montez Glass made any submission at all.

Timeliness of Hearing on the Merits. DLSE received the Request for Review from Montez Glass on July 25, 2014 and transmitted it to the Director's Office for assignment to a Hearing Officer on November 25, 2014. The Hearing Officer conducted two prehearing conferences on March 6 and April 24, 2015, and the Hearing on the Merits was conducted on June 26, 2015. Montez Glass never affirmatively waived the statutory directive that the hearing be commenced within 90 days after receipt of a timely request for review.

Assessment of Penalties. DLSE determined that Montez Glass was present at the jobsite for 147 days. On that basis, DLSE assessed penalties under section 1777.7 for 147 violations at

the rate of \$30.00 per violation. DLSE mitigated the daily penalty from \$60.00 per violation, as originally assessed, to \$30.00 per violation based on its finding that Montez Glass had not committed an intentional violation. Montez Glass had no history of prior violations.

DISCUSSION

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, section 227³ provides that the regulations "shall govern all actions pursuant to . . . Labor Code Sections 1777.5 and 1777.7."

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). In this regard, section 1777.5, subdivision (g) provides:

The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is section 230.1, subdivision (a), which states:

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required one hour of work performed by an apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

However, a contractor shall not be considered in violation of the ratio requirement if it has properly requested the dispatch of apprentices and no apprenticeship committee in the

³ All further regulatory references are to California Code of Regulations, title 8.

geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

Pursuant to section 230.1, subdivision (a), a contractor properly requests the dispatch of apprentices by doing the following:

[R]equest the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee, either consecutively or simultaneously, until the contractor has requested apprentice dispatches from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

DAS has prepared a form, DAS Form 142, which a contractor may use to request dispatch of apprentices from apprenticeship committees.

When DLSE determines that a violation of the apprenticeship laws has occurred, a written Determination of Civil Penalty is issued pursuant to section 1777.7. In the review of a determination “. . . the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.” (§ 1777.7, subd. (c)(2)(B).)

Montez Glass Requested Apprentices From An Appropriate Apprenticeship Committee.

Computer screen shots of information from the JATC's data base and the DAS Form 142 prepared by Montez Glass with its accompanying transmission report comprise the documentary evidence addressing the issue of whether Montez Glass properly requested dispatch of an apprentice for the Project.

Montez Glass presented substantial evidence affirmatively proving that it had properly submitted a DAS Form 142 requesting dispatch of an apprentice for the Project to the JATC, the only appropriate apprenticeship committee in the geographic area. The parties do not dispute the

timeliness of the request for dispatch or the appropriateness of the apprenticeship committee to whom the request was made.

DLSE argues that the transmission report is untrustworthy because it is on a separate page from the DAS Form 142, and thus may have documented transmission of some document other than a DAS Form 142 from Montez Glass to the JATC. DLSE also argues that the testimony of Suzanne Montez, as custodian of records for Montez Glass, must be discounted because she did not actually observe the facsimile transmittal of the DAS Form 142 to the JATC. DLSE's contentions are not meritorious.

Suzanne Montez credibly testified that Montez Glass's business practice on public works was to transmit the DAS Form 142 to the JATC via facsimile, to attach the transmittal report thereto and to place both documents into a file folder for the Project. Suzanne Montez also credibly testified that she found the DAS Form 142 and the attached transmittal report within the file folder for the Project after Montez Glass received the Determination.

DLSE also attempted to raise doubt as to whether the JATC had received the facsimile transmission by submitting computer screen shots of information from the JATC's data base. These computer screen shots indicate that the JATC did not input any information regarding receipt of a DAS Form 142, or any other documents, from Montez Glass for the date of May 23, 2013. DLSE argues that the absence of any record in the JATC's data base indicating receipt of a DAS Form 142 from Montez Glass on that date contradicts Montez Glass's transmittal report and proves that no such form was submitted. If Montez Glass had transmitted something other than a Form 142 to the JATC on that date, as DLSE hypothesizes, the JATC would presumably have entered the information from the document received into its data base. As noted above, however, the JATC's data base does not reflect the receipt of anything from Montez Glass on May 23, 2013, despite Montez Glass's transmittal report documenting a transmission to the correct facsimile number on that date.

Section 230.1, subdivision (a) requires that Montez Glass make the request for dispatch of an apprentice. Montez Glass had the burden of proving that it made the request for dispatch. (§ 1777.7.) As found above, Montez Glass has proved that it sent the required request for dispatch. However, Montez Glass does not have the additional burden of proving what became

of that request once it was transmitted. Section 230.1, subdivision (a) only required Montez Glass to submit a request for dispatch of apprentices “in writing, sent by first class mail, facsimile or email.” What the JATC did with the request once they received it, or whether the JACT received it at all, has no relevance to the inquiry of whether Montez Glass did or did not send the request.

Accordingly, Montez Glass has carried its burden of proving that it properly requested dispatch of an apprentice for the Project.

Montez Glass Was Excused From Employing Registered Apprentices At The Required Apprentice To Journeyman Ration.

A contractor is excused from employing apprentices at the required apprentice to journeyman ratio upon making a timely and proper request for dispatch of an apprentice to the appropriate apprenticeship committees and upon no apprenticeship committee dispatching an apprentice. (§ 230.1, subd. (a).) Having found that Montez Glass made a timely and proper request for dispatch of an apprentice to the appropriate apprenticeship committee, Montez Glass cannot be held responsible for the fact that the JATC did not dispatch an apprentice to the jobsite for this Project.

The Fact That The Hearing Was Set More Than 90 Days After Filing Of The Request For Review Does Not Preclude The Director From Reviewing This Matter.

As DLSE notes in its post hearing briefing, the Director has consistently found that the statutory directive in section 1742 to commence a hearing within 90 days after receipt of a request for review is directory rather than mandatory in nature and thus failure to commence a hearing within 90 days is not jurisdictional.

In *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, the California Supreme Court found that a similar requirement to issue a decision within 90 days after the conclusion of a hearing under Government Code section 18671.1 was not jurisdictional in effect. Thus, the State Personnel Board’s failure to comply with Government Code section 18671.1’s requirement that a decision “shall” be issued within 90 days neither deprived the Board of jurisdiction to proceed beyond that time limit nor required dismissal of the underlying appeal.

The Supreme Court's conclusion was premised on the distinction between legislative provisions that are "directive" or "mandatory" in effect. The Court held that an agency is not deprived of jurisdiction merely because a statute uses the word "shall." Rather, the failure to comply with a particular procedural requirement must be viewed in light of whether there is an expression of statutory intent to invalidate the governmental action as a result of that failure. In addition and of particular relevance to the issue here, the Supreme Court found that time limitations are "deemed to be directory unless the Legislature clearly expresses a contrary intent." *Id.* at 1145.

As in *California Correctional Peace Officers Association*, section 1742 does not provide or suggest within its terms that the failure to commence a hearing within 90 days is jurisdictional in effect, or that, as a consequence of that failure, the governmental action is invalidated. Nothing has been provided that would show or tend to show a contrary legislative intent. Consequently, the various time limitations set forth in section 1742, subdivision (b) must be read as directive rather than mandatory in effect. The failure to commence the hearing within 90 days does not present a jurisdictional impediment to proceeding nor does it operate to invalidate DLSE's Determination of Civil Penalty.

Accordingly, the fact that the hearing on the merits was held later than 90 days after the request for review was filed does not preclude the Director from reviewing this matter and issuing this decision.

FINDINGS

1. Affected contractor Montez Glass, Inc. filed a timely Request for Review of a Determination of Civil Penalty issued by DLSE.
2. Montez Glass properly requested dispatch of an apprentice from the appropriate apprenticeship committee for the Project.
3. Despite Montez Glass not employing an apprentice on the Project, it fulfilled its obligation pursuant to section 1777.5 by timely making a request for dispatch to the appropriate apprenticeship committee and therefore Montez Glass has no liability for penalties set forth in the Determination.

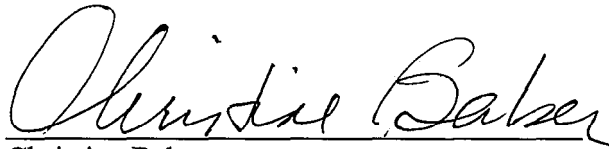
4. The failure to timely bring the matter to hearing does not preclude the Director from reviewing the merits of the case and does not deny the Director jurisdiction over the matter.

ORDER

Based on these findings, it is ordered that the Determination is dismissed in its entirety. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated:

7/29/2015



Christine Baker
Christine Baker
Director of Industrial Relations