

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Manal Nofal doing business as
Cal-United Construction Group**

Case No. 15-0030-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Cal-United Construction Group (Cal-United) submitted a request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) on December 29, 2014, with respect to work performed by Cal-United on the San Juan Hills High School 30 Meter Pool/Support Buildings project (Project) for the Capistrano Unified School District. The Determination found that Cal-United failed to maintain the required apprentice to journeyman ratio in accordance with Labor Code section 1777.5, subdivision (g).¹ DLSE assessed an aggregate penalty of \$7,920.00 under section 1777.7.

A Hearing on the Merits occurred in Los Angeles, California on July 28, 2015, before Hearing Officer Richard T. Hsueh. Manal Nofal (Nofal) appeared for Cal-United², and David Cross (Cross) appeared for DLSE. The matter was submitted for decision on July 28, 2015.

¹ All further statutory references are to Labor Code unless stated otherwise.

² The Determination was assessed against Cal-United Construction Group. However, Cal-United Construction Group is not a corporation but a sole proprietorship and a trade name for Manal Nofal, according to her testimony. Consequently, all references to Cal-United Construction Group also refer to Manal Nofal.

The issues for decision are as follows:

- Was the Determination of Civil Penalty timely served on Cal-United?
- Did Cal-United employ the applicable apprentices on the Project in the minimum ratio required by section 1777.5 (20% of journeyman hours employed)?
- Did the Labor Commissioner abuse her discretion in setting penalties under section 1777.7 at the mitigated rate of \$60.00 per violation?

In this Decision, the Director affirms the Determination that a penalty is appropriate and finds that the Labor Commissioner did not abuse her discretion in setting penalties under section 1777.7 at the mitigated rate of \$60.00 per violation. Therefore, the Director of Industrial Relations issues this Decision affirming the Determination.

FACTS

On or about March 30, 2011, Cal-United submitted several Division of Apprenticeship Standards (DAS) Public Works Contract Award Information forms (DAS 140) to the San Diego A.G.C. Apprenticeship & Training Trust (San Diego AGC). The forms indicated, among other things, that Cal-United executed a contract on March 1, 2011, to do work on the Project, and that it was going to employ journeymen cement masons, journeymen laborers, journeymen drywallers and journeymen carpenters, respectively, on the Project during the period to be determined. Each DAS 140 indicates either that Cal-United is approved to train apprentices by the San Diego AGC and would employ and train apprentices under AGC's standards or that it will comply with the standards of San Diego AGC for the duration of the job.

According to Cal-United Certified Payroll Records (CPRs) for the Project, employees worked on the Project from March 27, 2011, to February 24, 2012. On or about March 30, 2011, Cal-United submitted a DAS Request for Dispatch of Apprentice form (DAS 142) to San Diego AGC requesting the dispatch of one apprentice in the carpenter trade. On or about April 25, 2011, Cal-United submitted a DAS 142 to San Diego AGC requesting the dispatch of one apprentice in the laborer craft. On or about October 26, 2011, Cal-United submitted a DAS 142

San Diego AGC requesting the dispatch of one apprentice in the drywall craft. On November 11, 2011, Cal-United submitted yet another DAS 142 form to San Diego AGC requesting the dispatch of one apprentice in the carpenter craft.

DLSE's audit found that Cal-United did maintain the required apprentice to journeyman ratios in both the laborer and the drywall classifications. However, DLSE found a ratio violation with regard to the carpenter classification in that there were 1852.25 journeyman hours worked, requiring 370.45 apprentice hours, but Cal-United only reported 64 apprentice hours. Curi testified that the penalties were mitigated to \$60.00 per day because Cal-United did comply with the minimum ratio requirements for the other classifications and only violated the requirement for the carpenter classification. DLSE served the Determination by mail on December 29, 2014. The Determination was prepared by Deputy Labor Commissioner Monica Curi (Curi). Cal-United filed its request for review on January 26, 2015.

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 227 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 California Code of Regulations, title 8, 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 1 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.

A contractor shall not be considered in violation of the regulation, however, if it has properly requested the dispatch of apprentices and no apprenticeship committee in the 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. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

According to the regulation, 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 dispatch(es) 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....

(Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared a form, DAS 142 that 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 as to the 1:5 ratio requirement, "... 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).)

The Determination Was Issued Timely

A Determination for violation of section 1777.5 "shall be issued and served on the Affected Parties no later than three years after date of accrual." (Cal. Code Regs., tit. 8, § 232.70.) The date of accrual is the end of the contract as the affected contractor has the opportunity to meet its obligations under the law by employing apprentices for the requisite number of hours before the end of the contract. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) According to Cal-United's CPRs, the last day employees worked on the Project was February 24, 2012. Thus, the date of accrual was February 24, 2012. DLSE served the Determination by mail on December 29, 2014, which was prior to the expiration of the three year limitations period (February 24, 2015).

Cal-United Failed To Employ Carpenter Apprentices

Carpenter was the apprenticeable craft at issue in the Determination. With respect to the 1:5 ratio of apprentice hours to journeyman hours, the journeyman carpenters that Cal-United provided to the Project worked a total of 1852.25 hours. However, Cal-United reported only 64 carpenter apprentice hours on the Project. Accordingly, the record establishes that Cal-United violated section 1777.5 and California Code of Regulations, title 8, section 230.1.

The Penalty for Noncompliance

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against Cal-United under the following portion of Section 1777.7, subdivision (a)(1):

A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount

not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by regulation 231, subdivision (h) as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control.

Cal-United "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for carpenter apprentice. Nofal testified that she was familiar with the requirements of section 1777.5 and the Subcontract Agreement between Cal-United and the prime contractor on the Project, Horizon Construction Company International Inc. The Subcontract Agreement expressly required Cal-United's compliance with section 1777.5.

Cal-United failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Cal-United did not offer any substantive evidence or testimony to refute DLSE's finding that there were 1852.25 journeyman carpenter hours worked but only 64 apprentice carpenter hours worked. Nofal testified that there should be 286 additional apprentice hours added for Edder Hernandez and Jose Sanchez. She then provided Cal-United Time by Job Detail documents to support her contention. However, those documents are incomplete and do not establish that there were journeymen on duty when Hernandez and Sanchez were working. She contended that her superintendent at that time, Felipe Garcia, was on duty and actually served as the journeyman and supervised Hernandez and Sanchez. On cross-examination, however, she admitted that Garcia was not listed on the CPRs as a carpenter on some of the days that Hernandez and Sanchez had worked.

Additionally, Cal-United argued that when combining all the journeyman hours (carpenters, drywall installers and laborers) and the apprentice hours on the Project, the

minimum ratio had been met. However, Cal-United should have known that section 1777.5 requires compliance with the minimum ratio in *each* craft or trade. Since Cal-United knowingly violated the law, a penalty should be imposed under section 1777.7.

As with penalties under section 1775, the contractor has the burden to prove that DLSE abused its discretion in setting the penalty, and the Director is not free to substitute her own judgment. Cal-United Systems has not shown an abuse of discretion and, accordingly, the assessment of penalties totaling \$7,920.00 for 132 violations at the mitigated rate of \$60.00 per violation is affirmed.

FINDINGS

1. The Determination of Civil Penalty was timely served by DLSE on Manal Nofal doing business as Cal-United Construction Group.
2. Manal Nofal doing business as Cal-United Construction Group violated Labor Code section 1777.5 by failing to employ carpenter apprentices on the Project in the minimum ratio required by the law.
3. DLSE did not abuse its discretion in setting section 1777.7 penalties at the rate of \$60.00 per violation, and the resulting total penalty of \$7,920.00, for 132 violations, is affirmed.

ORDER

The Determination of Civil Penalty is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Decision and appeal rights which shall be served with this Decision on the parties.

Dated: 7/29/2016


Christine Baker
Director of Industrial Relations