STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Simmons Construction, Inc.

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

Case Nos. 15-0331-PWH

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Simmons Construction, Inc. (Simmons) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on July 8, 2015, with respect to work performed on the Parlier High School Gym Project (Project) for the Parlier Unified School District (District) in Fresno County, California. The Assessment determined that $68,286.86 in unpaid wages and unpaid training fund contributions, $39,700.00 in Labor Code section 1775 and 1813 penalties, and $99,000.00 in Labor Code section 1777.7 penalties were due. [1] Simmons timely filed its Request for Review of the Assessment on or about September 11, 2015.

A Hearing on the Merits was held on February 28, 2017, in Bakersfield, California, before Hearing Officer Gayle Oshima.[2] David Cross appeared as counsel for DLSE, and William L. Alexander and Elizabeth Estrada appeared as counsel for Simmons. Deputy Labor Commissioner Lori Rivera testified in support of the

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

[2] On July 8, 2015, DLSE issued two civil wage and penalty assessments against Simmons – the Assessment in this case and another one as to work on a project for the Sierra View Hospital District (Case No. 15-0317-PWH). The Hearing on the Merits in both cases occurred on February 28, 2017 (this case in the morning session, and the other in the afternoon session). By agreement of the parties, the cases were not consolidated, but portions of the evidence and testimony from each session was submitted as to both cases.

Assessment. Simmons' Office Manager Joanne Duggar, Project Manager Leonard Ancheta, and owner Chuck Simmons testified on behalf of Simmons.

On February 22, 2017, DLSE filed a Motion to Amend the Assessment (Motion), to be revised downward, finding the following amounts due: unpaid prevailing wages of in the amount of $12,176.70; training fund contributions of $412.85; section 1775 penalties of $29,520.00; section 1813 penalties of $1,000.00; and section 1777.7 penalties of $99,000.00, for a total amended Assessment in the amount of $142,109.55. There being no prejudice to Simmons, the Hearing Officer granted the motion at the Hearing. The case was deemed submitted on April 28, 2017.

The issues for decision are:

- Did Simmons pay the correct prevailing wage rates, and if not, was its failure to do so a good faith mistake or willful within the meaning of section 1775, subdivision (a)(2)(B)(i) and (iii)?
- If Simmons misclassified its workers, was it a result of a good faith mistake within the meaning of section 1775, subdivision (a)(2)(B)(i)?
- Is Simmons liable for section 1775 penalties?
- Is Simmons liable for section 1813 penalties?
- Is Simmons liable for penalties under section 1777.7, and if so, are the penalties disproportionate to the severity of the violation?
- Does Simmons' cooperation and "settlement" with the District Council of Plasterers and Cement Masons of Northern California Local 300 warrant a waiver or reduction of penalties?
- Did Simmons knowingly violate section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by not issuing timely and proper requests to applicable apprenticeship committees for dispatch of apprentices in a DAS 142 form or its equivalent to the Cement Mason apprenticeship committee in the geographic area of the Project site?
- Did Simmons knowingly violate section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by not employing

Laborer apprentices on the Project in the ratio of one hour of apprentice work for every five hours of journeyman work?

- Is Simmons liable for liquidated damages, and if so, should they be waived?

Simmons did not directly contest the specific amount of underpaid prevailing wages found under the Assessment as amended, but did dispute the finding of misclassification as to Cement Mason workers, and also disputed the amount of penalties assessed under section 1775 as an abuse of discretion. Simmons also admitted that it did not make timely requests for apprentices, but disputed the section 1777.7 penalty amount as excessive. Simmons further argued that the penalties under sections 1775 and 1777.7 are unconstitutionally excessive under the Due Process Clauses of the State and federal constitutions.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, but that Simmons carried its burden of proving the basis for the Assessment was incorrect in part. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming but modifying in part the Assessment.

FACTS

The Project and Contracts.

The District advertised the Project for bid on a date undisclosed by the parties. On June 16, 2009, the District awarded the prime contract to S.C. Anderson, Inc. (S.C. Anderson). The contract expressly notified the prime contractor to comply with the Labor Code, including as to the payment of prevailing wages and production of certified payroll records, among other requirements. S.C. Anderson advertised the Project subcontract for bid on January 7, 2013. The subcontract between S.C. Anderson and Simmons (Subcontract) was entered into on or around March 22, 2013. The Subcontract stated that the plans, drawings, and general contract, specifically referred to as the "Prime Contract," was made part of the Subcontract, and that "[t]he Subcontractor represents and

agrees that it has carefully examined and understands this Subcontract and the other contract documents....” The scope of work as specified in the Subcontract was concrete work, including but not limited to “...all site and building case-in-place concrete, tilt-up panels and site concrete with all required reinforcing steel.” (DLSE Exhibit No. 9.) Although the Subcontract did not include copies of sections 1771, 1775, 1776, 1777.5, 1813, and 1815, the Prime Contract stated specifically that the specified provisions of the Labor Code are “...incorporated into this Agreement by reference. Such laws and regulations shall be considered a part of this Agreement as if set forth herein in full and all work hereunder shall be executed in accordance therewith.” No evidence was introduced at the hearing that S.C. Anderson monitored Simmons' compliance with prevailing wage requirements or reviewed Simmons' CPRs.

<u>Cement Mason Prevailing Wage Rate Classification.</u>

According to DLSE, most of the concrete work was done by workers classified by Simmons as Laborers. DLSE's audit found that given the work performed and the applicable prevailing wage rate determination, the workers properly should have been classified as Cement Masons. The Assessment identifies 36 Cement Masons and two Operating Engineers working on the Project for 330 days during the period from April 14, 2013, through March 9, 2014.

The applicable prevailing wage rate determination for Cement Mason was NC-23-203-1-2012 -1 (Cement Mason PWD). This rate determination specified that Cement Mason was an apprenticeable craft. The scope of work for the Cement Mason PWD specified that the work of a Cement Mason includes building construction generally, and more specifically, setting screeds including curb forms, application of curing compounds, and patching or sacking, among other duties. According to the Subcontract, the tasks performed by Simmons workers included “... all site and building cast-in-place concrete[,]...engineering and bracing, [and] sack and patching of panels....” (DLSE Exhibit No. 9.)

Ancheta testified at the Hearing that Simmons used the Southern California Prevailing Wage Determination for Laborers (SC-23-102-2-2012-1), even though the Project was located in Fresno County. The Southern California Laborer PWD includes a

list of counties covered; Fresno County is *not* included. (Simmons Exhibits C, D.)[3]

Duggar testified that the company did not issue the required DAS 140 form to provide notice of the contract award information. Duggar also testified that the company did not issue requests for dispatch of apprentices using DAS 142 forms to any apprenticeship committee and did not hire any apprentices. She testified that the company was inexperienced with respect to public works projects, and did not know that they were required to submit DAS 140 and 142 forms.

Duggar further testified that they had a project in Southern California where the prime contractor provided them with the prevailing wage determination and classification for Laborer. Both Ancheta and Duggar testified that they used the Southern California Laborer prevailing wage determination for their Northern California jobs. Ancheta and Duggar were not aware that the scope of work, classification, and wage determination for Laborers in Southern California were different for projects in Northern California.

Simmons' Penalty History.

DLSE deputy labor commissioner Rivera testified that in assessing the apprenticeship penalties, she reviewed Simmons' penalty history. She stated that she found three prior Simmons cases in the DLSE database showing penalty payments from Simmons under section 1775 for prevailing wage enforcement actions. The three DLSE enforcement actions were for jobs that all took place during roughly the same period of time. Under cross-examination, Rivera conceded that the enforcement actions by DLSE in the three other cases were all undertaken subsequent to the completion date of the Project at issue here. She also admitted that Simmons' work on the other projects and the Project at issue here occurred at about the same time. Rivera further conceded that Simmons had no prior history of prevailing wage violations and penalties at the time of the alleged violations at issue in this case. For its part, Duggar testified on behalf of

[3] Simmons asserts that DLSE's reclassification of its 36 Laborers to the Cement Mason craft was improper because the Laborer PWD included a few tasks not covered by the Cement Mason PWD and the two determinations overlapped each other as to other tasks done on the Project. Simmons did not, however, submit for the Hearing record the wage determination for Laborer for Fresno County. Hence, Simmons presents no factual basis on which to find the work in question should have been classified as Laborer, or that the Laborer and Cement Mason PWDs overlapped.

Simmons that about the time Simmons began the Project at issue in this case, it also started four other public works projects, including one involving Sierra View District Hospital in Tulare County. While the Project at issue here was the one of the first of five public work projects completed by Simmons, the Assessment in this matter was one of the last of five assessments issued by DLSE on those projects.

Apprentice Requirements.

Rivera testified that Simmons did not submit required contract information to the applicable apprenticeship committee, nor did it request dispatch of apprentices from that committee or maintain the required 1:5 apprentice to journeyman ratio for the craft of Cement Mason.[4]

Duggar testified that due to Simmons' inexperience with public works projects, it was not aware of, and did not comply with, the requirement to submit to applicable apprenticeship committees the DAS 140 and DAS 142 forms. She testified that the prime contractor did not inform her of the requirement to submit the forms; nor did DLSE inform Simmons of those requirements until July 2015 when the Assessment was served. Duggar testified that Simmons had received assessment of penalties for apprenticeship violations from DLSE for other jobs that were undertaken during the same period of time as the Project, but that those assessments were received after the work on the Project at issue here was completed.

Duggar testified that she was alerted by a representative of the District Council of Plasterers and Cement Masons of Northern California, Local 300 (Local 300) that the DAS 140 and 142 forms needed to be filed with the applicable apprenticeship committees in the geographic area of the Project. A Local 300 representative informed Simmons that if it paid wages to a particular apprentice who would have been dispatched to work on the Project, Local 300 would not lodge a complaint with the DLSE. A "dispatch" document dated April 3, 2014, from Local 300 and a copy of a check dated April 7, 2014, shows that Simmons paid apprentice Terry Butler the sum of $5,445.90 for the purpose of

[4] According to Rivera's penalty review, the applicable Cement Mason apprenticeship committee program within the geographic area of the Project was the Northern California Cement Masons J.A.T.C. in Pleasanton, California.

"settling" the apprenticeship violations.[5] As addressed below, this demand by the representative of Local 300 is troubling, and was neither authorized nor appropriate under the applicable enforcement provisions of the Labor Code and apprenticeship regulations.

Duggar further testified that subsequent to receiving the Assessment, Simmons endeavored to learn and understand the public works laws. Duggar and her staff attended classes and became aware of the necessity to comply with the law.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

> 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*).) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5 (a); see also *Lusardi,* at p. 985.)

Section 1775, subdivision (a), of the CPWL requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the applicable prevailing wage rate, and prescribes penalties when there has been an underpayment of required prevailing wages. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if

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[5] Simmons testified that a Local 300 representative calculated the amount to be paid by Simmons to the apprentice.

the wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a Request for Review. (§ 1742.) The Request for Review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of providing evidence that "provides prima facie support for the Assessment …." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment … is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, §1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)"

Simmons Failed to Pay the Required Prevailing Wage Rates.

At the Hearing, DLSE presented a prima facie showing that Simmons failed to pay the correct prevailing wage rate for a total underpayment of $12,176.70. DLSE's evidence included testimony by Rivera that the work at issue fell within the scope of work for the Cement Mason PWD, and one worker's questionnaire wherein he stated he was a finisher and placed new sidewalk. (DLSE Exhibit No. 14.) With that evidence, DLSE presented prima facie support for the finding in the Assessment that Simmons misclassified workers who were performing Cement Mason work.

Simmons responds by citing the Southern California Laborer PWD to assert that the work in question was Laborer work. That rate determination on its face, however, does not apply to projects in Fresno County, the location of the Project. Given DLSE's evidence of underpayment of wages based on the Cement Mason rates, Simmons presented no evidence sufficient to carry its burden to disprove the accuracy of the Assessment. (Cal. Code Regs., tit. 8, § 17250, subd. (b); §1742, subd. (b).) As a result the amended Assessment is affirmed as to the underpayment of wages in the amount of

$12,176.70.[6]

DLSE Did Not Abuse Its Discretion by Assessing Penalties Under Section 1775.

Former section 1775, subdivision (a), as it existed on March 22, 2013, the date of the Subcontract, 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 two hundred dollars ($200) 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 forty dollars ($40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate,... 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 eighty dollars ($80) ... 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 one hundred twenty dollars ($120) ... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[7]
> ***

[6] Simmons did not contest the revised Assessment's finding of unpaid training fund contributions in an amount of $412.85. Since it did not carry its burden to disprove the accuracy of the Assessment as to that amount, the amount is also found due and owing.

[7] The reference to section 1777.1, subdivision (c) is a typographical error in the statute. The correct subdivision of former section 1777.1, as it existed in 2013, is subdivision (d), which 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."

> (2)(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action … is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." *(Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the penalty appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. 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." (Cal. Code Reg., tit. 8 §17250, subd. (c).) Hence, the burden is on Simmons to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of $120.00 per violation. 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 when the Labor Commissioner determines that mitigation is appropriate.

Under the original Assessment, DLSE assessed section 1775 penalties at the rate of $120.00. Under the statute, that rate is a required minimum for willful violations. (Former § 1775, subd. (a)(2)(B)(iii).) The definition of a willful violation (former § 1777.1, subd. (d)), turns on whether Simmons knew or reasonably should have known of its prevailing wage obligations. Here, the Subcontract incorporated by reference the provisions of the Prime Contract, which stated that the prevailing wage statutes were "considered a part of this Agreement as if set forth herein in full and all work hereunder shall be executed in accordance therewith." (DLSE Exhibit No. 9.) Given these terms of the Subcontract and Prime Contract, Simmons reasonably should have known of its

prevailing wage obligations. Therefore, its failure to meet the obligation must be deemed willful.[8]

Simmons acknowledged that it was unfamiliar with the Labor Code and the requirements regarding public works projects. Lack of familiarity where the Subcontract required Simmons to comply with the prime contract, which in turn required compliance with the CPWL, cannot excuse Simmons' failure to meet its obligations. Accordingly, the Assessment's finding of $29,520.00 in penalties under section 1775 for 246 violations at the rate of $120.00 each is affirmed.

Overtime Penalty Is Due Where Overtime Was Not Paid.

Section 1813 prescribes a fixed penalty of $25.00 for each instance of failure to pay the prevailing overtime rate when due. Section 1813 states, in pertinent part, as follows:

> The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25.00) for each worker employed in the execution of the contract by the … contractor … for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Section 1815 states in full as follows:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

The record establishes that Simmons violated sections 1813 and 1815 by paying less than the required prevailing overtime wage rate. Moreover, Simmons did not contest that overtime wages were due but not paid in 40 instances, and has not contested the amount of section 1813 penalties found due in the Assessment. According to DLSE,

[8] With the conclusion that Simmons' failure to pay prevailing wage rates was willful and subject to the $120.00 penalty rate, it follows that Simmons' failure was not a "good faith mistake" subject to a lesser penalty rate, notwithstanding Simmons' claim of ignorance of the requirements. (§ 1775, subd. (a)(2)(B)(i).)

Simmons paid the wages after the end of the Hearing. Nonetheless, the overtime wages were not paid at the time they were incurred, and the penalty under section 1813 is affirmed for $1,000.00.

Simmons Violated Apprenticeship Requirements.

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. (Cal. Code Regs., tit. 8, §§ 227 to 232.70.) In the review of a determination as to the apprentice requirements, "… the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (See former § 1777.7, subd. (c)(2)(B), as it existed from June 27, 2012, to December 31, 2014 [stats. 2012, ch. 46, § 96], and Cal. Code Regs., tit. 8, § 232.50(b).)

Section 1777.5, subdivision (e), requires that, prior to commencing work on a public works project, every contractor shall submit contract award information to an apprenticeship program that can supply apprentices to the site of the public work. The governing regulation, California Code of Regulations, title 8, section 230, subdivision (a) states in pertinent part:

> Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body for the purpose of determining the accrual of penalties under Labor Code Section 1777.7.

Here, DLSE presented prima facie evidence that Simmons failed to submit a DAS

140 or its equivalent to the applicable apprenticeship committees in the geographic area of the Project for the apprenticeable craft of Cement Mason. Simmons provided no evidence to the contrary, and Duggar testified to that fact.

Former section 1777.5, subdivision (d), establishes that every contractor awarded a public work contract by the state or any political subdivision who employs workers in any apprenticeable craft or trade "shall employ apprentices in at least the ratio set forth in this section ...." Former section 1777.5, subdivision (g), specifies the ratio as not less than one hour of apprentice work for every five hours of journeyman work. The regulation governing regulation for the one-to-five ratio of apprentice hours to journeyman hours is California Code of Regulations, title 8, section 230.1, subdivision (a), which states in part:

> 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.[9] Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract. Contractors who are not already employing sufficient registered apprentices (as defined by Labor Code Section 3077) to comply with the one-to-five ratio must request 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. ... All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.... [I]f in response to a written request no apprenticeship committee dispatches, or agrees to dispatch during the period of the public works project, any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the

[9] Here, the record established no exemption for Simmons.

> project, provided that the contractor made the request in enough time to meet the above-stated ratio.

DAS provides a form (DAS 142) that a contractor may use to request dispatch of apprentices from apprenticeship committees.

In this case, Simmons had journeymen Laborers working on the Project a total of 330 days during the period commencing April 14, 2013, and ending March 9, 2014. As found, *ante*, according to the Cement Mason PWD and its scope of work, the workers properly fell within the apprenticeable craft of Cement Mason. Simmons did not hire any apprentice Cement Masons for the Project, and thereby failed to satisfy the one-to-five ratio. Simmons also failed to timely and properly request dispatch of apprentices to the Cement Mason apprenticeship committees. Accordingly, the evidentiary record establishes Simmons' liability for its violation of section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a).

<u>Simmons Is Liable for a Penalty under Section 1777.7.</u>

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not exceeding $100.00 for each full day of noncompliance. (§ 1777.7, subd. (a)(1).) However, the penalty may be increased up to $300.00 for each full day of noncompliance under the following circumstances:

> ... A contractor or subcontractor that knowingly commits *a second or subsequent* violation within a three-year period, if the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance.

(§ 1777.7, subd. (a)(1), emphasis added.)

As used in the above provisions, a "knowing" violation is defined by California Code of Regulations, title 8, section 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. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section

> 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects, ...

In this case, for a penalty under section 1777.7, the Assessment found that Simmons violated section 1777.5 over a period of 330 days, and imposed a penalty of $300.00 per day, for a total penalty amount of $99,000.00.

Under the version of former section 1777.7 that applies to this case, upon a request for review, the Director decides the appropriate penalty de novo. (Former § 1777.7, subd. (f)(2).)[10] In setting the penalty, the Director considers all of the following circumstances:

> (A) Whether the violation was intentional.
>
> (B) Whether the party has committed other violations of Section 1777.5.
>
> (C) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.
>
> (D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
>
> (E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(Former § 1777.7, subd. (f)(1) and (2).)

Applying the penalty factors in this case, the evidentiary record establishes that Simmons' violations of section 1777.5 and the implementing regulation were "knowing." Simmons did not show that its failure to comply was due to circumstances beyond its control, and given the Subcontract's reference to the Prime Contract, Simmons should have known of its prevailing wage obligation. (Cal. Code Regs., tit. 8, § 231, subd. (h).)

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[10]Section 1777.7 was amended effective January1, 2015. (See Stats. 2014, ch. 297, § 3 (AB 2744).) Under the current version of the statute, as amended, the Labor Commissioner's determination of the penalty under section 1777.7 is reviewable only for abuse of discretion. (§1777.7, subd. (d).) For purposes of this Decision, however, the Director has applied the language of Section 1777.7 that was in effect at the time the Project was advertised for bid (in 2013). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (See, e.g., Elsner v. Uveges (2004) 34 Cal.4th 915, 936.)

Further, the violations were "knowing" under the irrebuttable presumption established by the regulation. (*Id.*) The Subcontract with S.C. Anderson incorporated by reference the prime contract between S.C. Anderson and the District. The Subcontract, therefore, notified Simmons of its obligation to comply with the Labor Code provisions applicable to public works projects. Hence, DLSE has established sufficient facts for application of the irrebuttable presumption that Simmons knew or should have known about the requirements of section 1777.5.

Given that Simmons committed a "knowing" violation, the analysis turns to the five de novo review factors "A" through "E" listed above. Factor "A" – whether the violation was intentional –favors a lower-end penalty rate of $40.00. Although Simmons' violation was "knowing" within the statutory provisions, because Simmons was informed of its obligations through the provisions of the Subcontract and the prime contract, there is no evidence that Simmons had actual knowledge of the apprenticeship requirements and deliberately refused to comply. The Project was one of the first public works projects undertaken by Simmons, and Duggar testified that she did not understand the procedures and requirements associated with public works projects.

Factor "B" – whether Simmons had committed other violations of section 1777.5 -- also favors setting the penalty at $40.00 rather than the maximum of $300.00. DLSE asserted that prior to the issuance of the Assessment on July 8, 2015, Simmons had committed three prior violations of section 1777.5 on three separate public works projects for three separate awarding bodies. Accordingly, DLSE based its penalty rate of $300.00 per violation on what it considered to be "prior" violations.[11] Simmons' work on the Project at issue here, however, did not occur subsequent to the assessments for violations on the other projects. Rather, the Project at issue here was one of the first public works projects undertaken by Simmons to be completed. Although the work on the other projects was somewhat concurrent, the assessments on the other projects were all issued

[11] Although the statute refers to "other" violations, the implication – particularly in light of the reference to "a second or subsequent violation" in subdivision (a) – is that part of what is relevant is whether the contractor has committed *prior* violations, i.e., that a contractor who has committed and been informed of prior violations, but fails to correct the issue, should be subjected to a higher penalty, although a pattern of other violations even in the absence of prior assessments could also be relevant. (See former § 1777.7, subd. (f)(1)(B); current § 1777.7, subd. (b)(2).)

by DLSE *after* the work on this Project (which was completed on March 9, 2014).

Specifically, the "prior" assessments were issued as follows:

1. In DLSE Case No. 44-38436, by letter dated March 20, 2014, DLSE issued a "Notice of Apprenticeship Compliance," as to Simmons' work on the New Police Department project from October 22, 2012, to December 20, 2013. DLSE planned to assess $100.00 per day for 425 days for violations of section 1777.5 and California Code of Regulations, title 8, sections 230 and 230.1, based on Simmons' failure to issue notices of contract award information to applicable apprenticeship committees in the geographic area of the public work site. Rivera made a settlement demand for $8,500.00 on April 7, 2014, and Simmons paid the penalty.

2. In DLSE Case No. 44-40456, on August 28, 2014, DLSE issued a demand as to Simmons' work on the Adolfo Camarillo High School project from June 24, 2013, to March 4, 2014. The auditor based penalties for violations of section 1777.5 and California Code of Regulations, title 8, section 230 on a complaint for failure to provide apprenticeship information, failure to employ apprentices, and misclassification of workers. The auditor stated in the demand email that the original penalty was calculated at a rate of $100.00 per violation, but that the senior deputy reduced the penalty rate to $60.00 per violation. Simmons paid the penalty.

3. In DLSE Case No. 40-41932, DLSE issued an Assessment on April 4, 2015, for a total penalty under section 1777.5 in the amount of $227,700.00 as to Simmons' work on the College of the Canyons Student Services Building project from May 1, 2013, to September 13, 2014. The DLSE auditor based the penalties on Simmons' failure to issue notices of contract award information to applicable apprenticeship committees, and its failure to employ apprentices on the project in the required 1:5 ratio. DLSE assessed the violations at $180.00 per day. Simmons paid $90,000.00 in settlement of the penalties under section 1777.7.

In her testimony, DLSE deputy Rivera conceded that Simmons had not been assessed prior penalties for underpaid prevailing wages at the time of the alleged

violations in this case. Accordingly, factor "B," favors a penalty rate of $40.00, and does not support the assessed rate of $300.

De novo review factor "C" also favors the $40.00 penalty rate. Ancheta and Duggar both testified that once they understood the requirements of filing DAS forms 140 and 142, and the requirement to hire apprentices, Simmons has taken steps to comply with the law. In particular, Duggar testified that she and her staff have taken public works classes and continuously seek information regarding public works requirements. Moreover, Simmons could not remedy the situation during the pendency of the Project because work was complete by the time the Assessment was issued.

Although Simmons apparently attempted to "remedy" its apprentice violation by acceding to a demand from Local 300 to pay an apprentice the sum of $5,445.90, a sum apparently calculated by Local 300, the Director does not take that payment into account as mitigation here, or as otherwise relevant to this Decision. Section 1777.5 and 1777.7, and the applicable regulations governing enforcement of the apprenticeship requirements on public work projects, at title 8, sections 227, et seq., do not authorize a union or apprenticeship program to demand payment to an apprentice in "settlement" of alleged apprenticeship violations, or in lieu of the organization making a complaint to the DLSE. The statutory framework and enforcement provisions are not focused on the dollars to be paid to apprentices, but rather on the training opportunities to be provided, i.e., hours worked on the job under the guidance of more experienced journey level workers in order to learn a trade. Payments of sums that might otherwise have been earned do not substitute for these opportunities. Further, the applicable statutes and regulations vest the Labor Commissioner (through DLSE) with enforcement authority, through the imposition of penalties as specified. This structure neither contemplates nor authorizes an apprenticeship program to "settle" alleged apprenticeship violations by demanding payment in lieu of a complaint to the DLSE, and the Director cautions against any such practice.

As to the de novo review factors "D" and "E," Simmons' journey level Cement Masons worked 2,190 hours on the Project. Applying the one-to-five ratio, 438 hours of Cement Mason apprentice hours were required, which is approximately 11 weeks of

work time for an apprentice. This does represent a sizeable lost training opportunity, but given the totality of circumstances, the Director does not find that these factors warrant a penalty higher than $40 per violation.

Simmons contests one other aspect of DLSE's penalty amount by arguing that DLSE mistakenly calculated the number of days of noncompliance. Simmons notes that its journeymen performed work on the Project on 59 days, not the 330 days that DLSE counts in calendar days from April 14, 2013, through March 9, 2014 (the date of completion). Simmons is incorrect that DLSE is limited, when calculating the number of days of noncompliance under sections 1777.5 and 1777.7, to work days on which journeymen were present. The statute speaks in terms of a penalty for each "full calendar day of noncompliance." (§ 1777.7, subd. (a)(1).) And the failure to provide contract award information to applicable apprentice committees constitutes one form of noncompliance. For this violation, and under the applicable regulation, the contract award information is due "within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work." (Cal. Code Regs., tit. 8, § 230, subd. (a).) Further, "[f]ailure to provide contract award information … shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed … for the purpose of determining the accrual of penalties." (*Id.*) In this case, Simmons entered into the Subcontract on March 22, 2013. A date "no later than the first day" that Simmons had workers on the Project was April 14, 2013. An end date for the "continuing violation" for purposes of the regulation would occur no sooner than March 9, 2014, when Simmons' work on the Project was completed. (Cal. Code Regs., tit. 8, § 230, subd. (a).) Based on the record, the count of 330 days provides the proper measure of days of "noncompliance," which began with April 14, 2013, as the amended Assessment provides.

As to a failure to request dispatch of apprentices from applicable apprentice committees, and a failure to maintain the required 1:5 apprentice to journeyman ratio on the job, the statute and regulations anticipate a calculation of the penalty that refers to days that journeymen were present and apprentices were necessary (§ 1777.5, subd. (h);

Cal. Code Regs., tit. 8, § 230.1, subd. (a).) It is not necessary to address in detail how days of noncompliance based on a failure-to-request-dispatch violation or a failure-to-maintain-the-proper ratio violation would be calculated. As the enforcement agency, DLSE has the discretion to select the type of apprentice violation on which it bases a penalty, and in this case it selected the failure to provide contract information as a continuing violation under the regulation.[12]

Accordingly, the requirements in section 1777.7, subdivision (a)(1), for setting the penalty rate at $40.00 per violation are satisfied in the present case. Simmons is liable for a section 1777.7 statutory penalty in the sum of $13,200.00, computed at the rate of $40.00 per day for 330 days.

There Are No Grounds for a Waiver of Liquidated Damages.

At all times relevant to this Decision, former section 1742.1, subdivision (a), provided in pertinent part as follows:

> (a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 ... the affected contractor, subcontractor, and surety ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment ... subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment ..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.[13]

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[12] In its post-hearing brief, Simmons cites the June 2014 version of the DLSE Public Works Manual to argue that the three types of apprentice violations—failure to provide contract award information, failure to request dispatch of apprentices, and failure to maintain the 1:5 ratio – are to be calculated in like fashion based solely on the number of journeyman days. However, the DLSE Manual is a "training tool for the Division of Labor Standards Enforcement …. The Manual's text, standing alone, is therefore not binding on the enforcement activities of the Division, or the Department of Industrial Relations … or on the courts when reviewing DIR proceedings under the prevailing wage laws." (DLSE Manual, § 1.1.) Resolution of legal issues arising in the Hearing derives from court precedent, the Labor Code and the California Code of Regulations, title 8, not the Manual.

[13] On June 27, 2017, the Director's discretionary waiver ability was deleted from section 1742.1 by Senate Bill 96. (Stats. 2017, ch. 28, §16 (SB 96).) Legislative enactments, however, are to be construed prospectively rather than retroactively, unless the Legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the

Under this provision, a contractor may avert liability for liquidated damages by paying any unpaid wages due within 60 days of issuance of an assessment. In addition, under section 1742.1, subdivision (b), a contractor may also avert liability for liquidated damages by depositing into escrow with the Department of Industrial Relations (DIR) the full amount of the assessment of unpaid wages, plus the statutory penalties.

In this case, the record reflects that Simmons neither deposited the full amount of the Assessment with DIR, nor paid the unpaid prevailing wages due within 60 days of the Assessment. Accordingly, absent a waiver by the Director, Simmons is liable for liquidated damages in an amount equal to the unpaid prevailing wages found due in this Decision. (Former § 1742.1, subd. (a).) Entitlement to a waiver of liquidated damages in this case requires evaluation of Simmons' position on the merits and specifically whether it had "substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment."

Simmons argues that after the revised audit of February 22, 2017, it paid the reduced assessment amounts within 60 days of receiving the revised audit from DLSE, entitling it to avoid liquidated damages on the amount of unpaid wages found due in this Decision. But the 60-day period for determining the unpaid wages for purposes of liability for liquidated damages runs from the issuance of the Assessment, not a revised audit or an amended Assessment based on a revised audit. (Former § 1742.1, subd. (a).) Simmons also contends that it had substantial grounds for appealing the original Assessment that was issued on July 8, 2015, because it had overlooked disclosing in its CPRs its payment of fringe benefits. After the oversight was corrected, the DLSE deputy labor commissioner revised the amount found due and owing, thereby reducing the figure for unpaid wages by 72 percent, as reflected by the amended Assessment. This circumstance does not supply evidence of substantial grounds for appealing the

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amended Assessment was issued (July 8, 2015) allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced Simmons' decision as to how to respond to the Assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what Simmons elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

Assessment *as to the amounts found due* in this Decision. Liquidated damages can be imposed only on wages found due under an Assessment, not on wages previously found due in an Assessment but amended out before a Hearing on the Merits. Likewise, a waiver of liquidated damages can be only be granted (and is only relevant) as to the wages found due by the Director.

Simmons did not demonstrate that it had substantial grounds for appealing the Assessment as to either the amount of unpaid prevailing wages found due in this Decision on account of the misclassification of Cement Mason work, or on account of underpayment of overtime wages. Simmons conceded the overtime underpayment. As to misclassification, Simmons did not provide any substantive evidence supporting its position on the classification issue, and specifically failed demonstrate substantial grounds for disputing the reclassification of its workers to Cement Mason. Rather, as discussed above, Simmons attempted to use the Southern California wage determination and scope of work for Laborer, a determination that is irrelevant to the Project, which was in Fresno County. (See § 1771 ["…not less than the general prevailing rate of per diem wages for work of a similar character *in the locality in which the work is performed* … shall be paid to workers on public works"], emphasis added.)

Accordingly, the Director finds that Simmons did not demonstrate grounds for a waiver and is liable for liquidated damages on the unpaid prevailing wages found due in this Decision, in the amount of $12,176.70.

<u>Constitutionality of Civil Penalties.</u>

Simmons argues that the civil penalties assessed under sections 1775 and 1777.7 are unconstitutional because they are excessive. Simmons contests the section 1775 penalties, asserting that the total penalties would outstrip the slim profit margin it earned on the Project. It contests the section 1777.7 penalties for the same reason, and because the way DLSE calculated the penalties would allegedly penalize Simmons for days when it was not on the job. Sections 1775 and 1777.7, however, do not recognize profit margins when setting the standards for penalty rates; nor does section 1777.7 support Simmons' argument as to how penalty days are measured.

The Director declines to opine on Simmons' constitutional arguments because the Director is bound by California Constitution, article III, section 3.5, which provides that an administrative agency has no power to refuse to enforce a statute on the grounds it is unconstitutional unless and until an appellate court has so held; nor does an administrative agency have the power to declare a statute unconstitutional. (Cal. Const., art. III, § 3.5; *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002; *Southern California Labor Management Operating Engineers Contract Committee v. Aubry* (1997) 54 Cal.App.4th 873, 887.) While the Director views Simmons' constitutional arguments as lacking merit, the Director declines to provide further discussion of those arguments in this Decision.

FINDINGS AND ORDER

1. Affected subcontractor Simmons Construction, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Simmons Construction, Inc. underpaid the prevailing wages owed to its workers on the Project in the aggregate amount of $12,176.70. Accordingly, prevailing wages in the sum of $12,176.70 are due.[14]
3. Simmons Construction, Inc. failed to pay the prevailing overtime rate for work performed on 40 days. Accordingly, statutory penalties under section 1813 in the sum of $1,000.00 are due.
4. Simmons Construction, Inc. failed to make required training fund contributions in the aggregate amount of $412.85. Accordingly, training fund contributions in the sum of $412.85 are due.
5. Simmons Construction, Inc. did not establish grounds for waiver of liquidated damages, and accordingly, under section 1742.1, subdivision (a), liquidated damages in the sum of $12,176.70 are due.

[14] To the extent Simmons Construction, Inc. has already paid DLSE or the workers any portion of this amount for the unpaid prevailing wages or any other amount listed in these Findings, it is entitled to a credit.

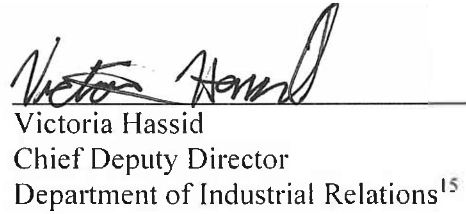
6. The Labor Commissioner did not abuse her discretion in assessing penalties under section 1775, subdivision (a), at the rate of $120.00 per violation for 330 violations. Accordingly, statutory penalties in the sum of $29,520.00 are due.
7. Simmons Construction, Inc. knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a), by not issuing public works contract award information in a DAS Form 140 or its equivalent to the applicable apprenticeship committees in the geographic area of the Project site for the craft of Cement Mason.
8. Simmons Construction, Inc. knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), by: (1) not issuing requests for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committees for the craft of Cement Mason in the geographic area of the Project site; and (2) not employing on the Project apprentices in the applicable crafts of Cement Mason in the ratio of one hour of apprentice work for every five hours of journeyman work.
9. Simmons Construction, Inc. is liable for an aggregate penalty under section 1777.7 in the sum of $13,200.00, computed at $40.00 per day for 330 days.
10. The amounts found due in the Assessment, as modified and affirmed by this Decision, are as follows:

Wages:	$ 12,176.70
Training fund contributions:	$ 412.85
Liquidated damages under section 1742.1:	$ 12,176.70
Penalties under section 1775, subdivision (a):	$ 29,520.00
Penalties under section 1813	$ 1,000.00
Penalties under section 1777.7	$13,200.00.
TOTAL:	**$68,486.25**

In addition, interest is due from Simmons Construction, Inc. and shall accrue on unpaid wages in accordance with section 1741, subdivision (b), from the date the wages were due and payable until the wages were paid after the Hearing on the Merits.

The Civil Wage and Penalty Assessment is affirmed as modified, 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: 9/24/19



Victoria Hassid
Chief Deputy Director
Department of Industrial Relations[15]

[15] See Gov. Code § 7, 11200.4.