

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Jason Flint Frost, individually dba Frost HVAC

Case No.: **16-0137-PWH**
[Request For Review of
DLSE Case No.: 40-46498-148]

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

The Division of Labor Standards Enforcement's request for reconsideration of the Decision of the Director issued in this matter on December 11, 2018 is denied.

Dated: 12/27/18



André Schoorl
Acting Director of Industrial Relations

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DECISION OF DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Jason Flint Frost, individually doing business as Frost HVAC (Frost HVAC), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on February 5, 2016, with respect to the work of improvement known as Little Village – HVAC Replacement (Project), performed for the Kern County Housing Authority (Housing Authority) in the County of Kern. The Assessment determined that the following amounts were due: \$9,837.73 in unpaid prevailing wages, \$646.72 in unpaid training fund contributions, \$10,400.00 in Labor Code section 1775¹ statutory penalties, and \$940.00 in section 1777.7 statutory penalties. Frost HVAC timely filed its Request for Review of the Assessment on March 28, 2016. In the request for review, Frost HVAC claimed that it was not subject to sections 1775 or 1777.7 penalties because the Project was federally-funded and contracted out by an agency of the federal government. It also alleged that all hours were reported on certified payroll forms and confirmed by records from an external payroll service company.

A Hearing on the Merits was held on December 20, 2016, in Bakersfield, California, before Hearing Officer Gayle Oshima. David Cross appeared for DLSE and Daniel Klingenberger appeared for Frost HVAC. Deputy Labor Commissioner Dina

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

Morsi, and three individuals who allegedly worked on the Project testified for DLSE; Merle Frost and Jason Flint Frost testified for Frost HVAC.

The issues for decision are:

- Did the California Prevailing Wage Law apply to the Project or was the Project was subject only to federal law because it was federally-funded?²
- Did Frost HVAC pay its workers the correct prevailing wage rates for all hours worked on the Project?
- Were the hours worked as listed in the audit correct?
- Were the mathematical calculations as set forth in the Assessment correct?
- Did all of the workers listed on the audit actually perform work on the Project?
- Were all the workers classified correctly on the certified payroll?
- Were all required training fund contributions paid to an approved plan or fund?
- Did Frost HVAC provide contract award information to the applicable apprenticeship committee within ten days of the date of execution of the contract?
- Did Frost HVAC timely request dispatch of apprentices for all employed crafts?
- Did Frost HVAC employ sufficient registered apprentices on the Project?
- Is Frost HVAC liable for penalties under section 1775?
- Is Frost HVAC liable for penalties under section 1777.7?
- Is Frost HVAC liable for liquidated damages?
- Should the liquidated damages be waived?

² Although the parties did not specifically identify this as an issue for resolution at the Hearing, the arguments made by the affected contractor presented the issue by necessary implication.

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 Frost HVAC carried its burden of proving the basis for the Assessment was incorrect in large 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

This case arises out of a public works contract between the Kern County Housing Authority and Frost HVAC to remove existing HVAC equipment, including coolers and forced air units, and to install new roof-mounted HVAC equipment in the Little Village development, which is owned by the Housing Authority and located in Bakersfield, California. On July 3, 2015, two of the workers, Ruben Maestas and Juan Nuñez, filed complaints with DLSE contending non-payment of wages and underreporting of hours. On July 13, 2015, a third alleged worker, Antonio Gonzalez, filed a complaint with DLSE contending non-payment of wages. All three workers represented on their complaint forms that the proposed finish date of the Project was May 20, 2015. According to the Housing Authority inspector's Daily Construction Reports (Inspector Logs), Frost HVAC completed its portion of the Project on or about May 29, 2015. The complaints were assigned to Deputy Labor Commissioner Morsi, who interviewed the workers and requested the Certified Payroll Records (CPRs) from Frost HVAC.

The Invitation for Bids.

The Housing Authority issued the Invitation for Bids (IFB) on March 2, 2015. The scope of work provision in the IFB indicates the Project consists of replacement of HVAC equipment. On the first page of the IFB, the Housing Authority notes that a recent legislative enactment, "...[Sen. Bill 854] made several changes to the laws governing how the Department of Industrial Relations (DIR) monitors compliance with prevailing wage requirements on public works projects. Refer to Attachment #1."³

³ See Senate Bill 854 (stats. 2014, ch. 28, §§ 2, 3, 5, and 62 – 71).

(Emphasis omitted.) Attachment number 1 is an undated document titled “Important Notice to Awarding Bodies.” Published by the Director of Industrial Relations, this document summarizes changes to the California Prevailing Wage Law, including the requirement, starting July 1, 2014, that contractors and subcontractors who bid or work on public works projects must register and pay an annual fee to the Department of Industrial Relations. The notice also provides that “[t]hese new requirements will apply to all public works that are subject to the prevailing wage requirements of the Labor Code, without regard to funding source.”

In addition to the IFB’s references to California prevailing wage law, in the paragraph titled “Prevailing Wages,” the IFB states that the work to be done would be financed by the U.S. Department of Housing and Urban Development (HUD), and that it would be subject to the Davis-Bacon Act and three other federal laws. The IFB also states that the Davis-Bacon Act “...requires wages and benefits be paid in accordance with those published in the Federal Register and are made a part of the [IFB]. See Attachment #3.” (Emphasis omitted.) Attachment number three, however, did not contain the Davis-Bacon rates or the applicable federal craft classification. Instead, it consists of the Director of Industrial Relations’ Prevailing Wage Determination R-166-108-998-2014-1 issued on December 1, 2014, for the apprenticeable craft of “#Residential Sheet Metal Worker” (Residential Sheet Metal PWD).⁴ At the Hearing on the Merits, the parties did not submit the official scope of work that usually accompanies the California prevailing wage rate determination.

The Public Works Contract.

The Housing Authority, as owner of the Little Village property, accepted the bid of Frost HVAC and entered into the construction contract on April 1, 2015 (Contract). Article 1 of the Contract specifies that the Contract documents consist of the Contract, the Bid Proposal and “Davis Bacon [*sic*] Wages.” Further, paragraph 4.1 of Article 4, Contract Sum, states:

⁴ The Residential Sheet Metal PWD specifies that the basic straight-time hourly rate for Residential Sheet Metal Worker is \$24.73, with an \$.84 per hour increase effective January 1, 2015.

The owner shall pay the Contractor for the performance of the contract...the Sum of Ninety thousand Three Hundred Seventy Five Dollars and 00/100 Cents (\$90,375.00)... Contractor represents and warrants that he shall pay his employees, and all individuals performing work, not less than the prescribed minimum wages in accordance with the current published United States Department of Labor Wage Rates (Davis-Bacon Act), as such wage rates are amended from time to time from commencement of the Construction Contract through completion of the work.

The Contract also includes Attachment number three from the IFB—the Director’s Residential Sheet Metal PWD. Further, the Contract provided that the work to be performed was “on a project assisted under a program providing direct federal financial assistance from the Department of Housing and Urban Development.” (Contract, Article 10, ¶ 10.1, § 3.)

The Assessment and Evidence Concerning Alleged Unpaid Wages.

Deputy Labor Commissioner Morsi conducted DLSE’s investigation, and prepared an audit and the Assessment. The Assessment found that Frost HVAC did not pay for all the hours worked on the job by Maestas, Nuñez, and Gonzalez. In particular DLSE found that on its CPRs, Frost HVAC did not list Gonzalez as an employee or pay him the correct prevailing wage rate. The Assessment also found that Frost HVAC did not comply with apprentice requirements and failed to make required training fund contributions. On the basis of these findings, the Assessment imposed penalties under section 1775 and section 1777.7.

At the Hearing, Morsi testified that during the DLSE investigation, on January 13, 2016, she interviewed Maestas, Nuñez, and Gonzalez. According to Morsi’s interview notes, Maestas told Morsi during the interview that he worked 40 hours per week over four weeks for 160 hours total, spending two weeks on each of two groups of “units.” He agreed he was paid as reported on two weeks’ of CPRs for 43 hours and maintained he was owed the 117-hour difference. The notes show Maestas also informed Morsi that during that period he would “go to other non-prevailing wage projects so it was about 2 hours here and there” that he was not at the Project. Based on those absences and without identifying the weeks for which he was underpaid, Maestas told Morsi he would “go with

110 hours” as his claim for underpayment on the Project. Maestas also informed Morsi that Frost had emailed him, acknowledging that he owed Maestas money.

Morsi also testified that when she interviewed Nuñez, he first claimed Frost HVAC underpaid him 80 hours for two weeks’ work on the Project. When Morsi told him he had already been paid for 31 hours of work according to payroll records, Nuñez admitted that some unpaid work was for non-prevailing wage jobs and he revised his claim of unpaid wages on the Project to 40 hours for the final week, which he did not identify. Morsi’s interview notes confirm this account.⁵

Morsi testified that during her interview with Gonzalez, he told her he was paid only \$10.00 per hour in cash. According to Morsi’s interview notes, Gonzalez claimed that Jason Frost hired him and he worked five days a week, eight hours per day. He did not specify the number of hours he was seeking or number of weeks he worked, but instead stated that the hours he worked were similar to those of Nuñez.

During her investigation, none of the workers presented Morsi with any documents to confirm their estimates, such as time cards, calendars, diaries or personal notes.

Morsi testified that she requested certified payroll records (CPRs) from Frost HVAC, as well as Inspector Logs from the Housing Authority. With respect to the CPRs, Frost HVAC initially submitted two certified sets of CPRs on DIR forms, for the weeks April 13 to 17 and May 11 to 15, which showed total hours worked by Maestas and Nuñez. Gonzalez was not listed on the CPRs. Also, these CPRs did not break down total hours by day and omitted worker addresses and Social Security numbers. Frost HVAC also provided Morsi with copies of check stubs that showed payment to Maestas and Nuñez for the hours and pay shown in the CPRs. (DLSE Exh. No. 17, pp. 2-9.) Because the CPRs initially submitted were incomplete, Morsi requested that Frost HVAC resubmit CPRs.

On September 28, 2015, Frost HVAC responded with two additional (but

⁵ Worker Interviews of January 14, 2016. (DLSE Exh. No. 13, pp. 5 - 6.)

uncertified) payroll sets on DIR forms, listing work by Maestas and Nuñez, but not Gonzalez, in the weeks of April 20 to 24 and May 18 to 22. (DLSE Exh. No. 17, pp. 14-16.) The total hours and pay figures for the two workers as shown in the previously submitted CPRs and check stubs for the week of April 13 to 17 were identical to that shown in the uncertified forms for the week April 20 to 24. Similarly, except for a minor difference, the hours and pay amounts for the two workers as shown in the previously submitted CPR for the week May 11 to 15 were identical to that shown in the uncertified records for the week May 18 to 22.

Also, Morsi testified that she asked Frost HVAC for time cards, but Frost HVAC did not provide them. Instead, Frost HVAC sent Morsi "Employee Earnings Records" (Payroll Journals) for Maestas and Nuñez and CPRs on federal forms covering work by Maestas and Nuñez in the two weeks April 20 to 24 and May 18 to 22, but not in the week April 13 to 17 as shown on previously submitted CPRs. (DLSE Exh. No. 17, pp. 17-24.) The newly submitted federal-form CPRs added Frost as working full time (40 hours a week) in four weeks of the Project: April 13 to 17, April 20 to 24, and May 18 to 22, and 18 hours May 25 to 27. The federal CPRs also showed part time hours worked by Maestas and Nuñez only in two weeks, April 20 to 24 and May 18 to 22. The Payroll Journals for Maestas and Nuñez matched the federal CPRs for those two weeks.

Morsi testified that she found discrepancies in the various CPR sets.⁶ When she compared the hours listed on the CPRs with hours shown in the Inspector Logs, she noted that for some days listed on the logs, no work was recorded on the CPRs and for other days, the logs showed more hours than recorded on the CPRs. Morsi testified that based on the inadequate CPRs, she prepared her audit and a Penalty Review, associating the number of hours claimed by Maestas, Nuñez, and Gonzalez with days of work shown on the Inspector Logs, with credit for payment made based on the check stubs. In so doing,

⁶ As example of a discrepancy, the CPR for April 20 to 24 recorded that Maestas worked five hours on Tuesday, five hours on Wednesday, and five hours on Thursday. (DLSE Exh. No. 17, page 14.) Another CPR for the same week recorded that Maestas worked five hours on Monday, five hours on Tuesday, one and one-half hours on Wednesday, and three and one-half hours on Thursday. (DLSE Exh. No. 17, page 20.) The hours for Nuñez likewise varied in the two sets of CPRs for the week from April 20 to 24.

Morsi admitted that the Assessment finds more worker hours on some days than what was shown on the Inspector Logs. When questioned about days in the Inspector Logs that indicated, for example, one worker on the Project for only four hours, when Morsi assessed back wages for eight hours, Morsi answered that she made the calculation based on the worker interviews. Morsi did not attempt to corroborate any one worker's claimed hours by questioning the inspector or any other worker on the jobsite. She testified that she did speak to an official of the Housing Authority, who told her the Inspector Logs are estimates of hours worked.

At the Hearing, Maestas testified generally as to the work he and Nuñez performed, swapping out coolers, replacing them with air conditioning units, and removing old furnace units. He could not clarify how much of the money he was owed for the Project specifically, as opposed to what he believed Frost HVAC owed him for other non-prevailing wages jobs. While he referred to timesheets he kept at home, he did not produce those records either to DLSE during the investigation or at the Hearing. He testified he would "text" to Frost on his cellular phone at unspecified intervals, informing him what workers were doing. No other evidence of those texts were introduced at the Hearing.

Maestas first testified that he never saw the inspector for the Housing Authority, then later testified that he did see the inspector. As to his estimate of how many hours he was owed on the Project, he testified it was "about" or "around" 110 hours that were owed to him by Frost HVAC for the Project, but he could not "really be sure." DLSE nevertheless adopted that estimate in its audit. Maestas's testimony, further, did not break down the days or hours of work for those 110 hours, describe for what weeks he thought he was owed, or state if he was on the Project during the first week. He testified that he came up with 110 hours based on a 40 hour work week minus two hours on unspecified days in which he had to perform duties on a non-prevailing wage job. While Maestas did not say that he hired Gonzalez, he did testify that Gonzalez worked on the Project.

Nuñez testified he could not recall the exact date he started working on the Project but thought it was in April 2015. During the first week, he worked alone on the Project,

but he was unsure when Gonzalez joined him. He testified he worked three to four weeks, with a break for work on another Frost HVAC project. His work involved removing old units, installing new units, installing lines, among other things. Nuñez repeatedly testified that Frost HVAC owed him wages for 40 hours in the last week he worked there. The Payroll Journal showed that Nuñez was paid for work during the weeks ending April 24, 2015, and May 22, 2015, but the DLSE audit finds an underpayment of 40 hours for the week ending May 29, 2015.

Nuñez also testified that Maestas hired Gonzalez to work on the Project and also on non-prevailing wage jobs for Frost HVAC, but Nuñez did not see Maestas hire him. Nuñez testified that Maestas and Gonzalez lived together, and he would drive them to the Project. Nuñez further testified that on unspecified dates, Gonzalez posted on social media (Facebook) a record of having worked on the Project. Nuñez testified that he considered Gonzalez a friend and that he has known Maestas for seven years.

Gonzalez testified Maestas hired him to work on the Project, and he filled out no paperwork when hired. He stated Maestas paid him \$10 per hour in cash for his work. Gonzalez assumed that Frost gave Maestas the cash to pay him, but admitted that Maestas did not say where the cash came from. During DLSE's investigation, Gonzalez told Morsi that he worked the same number of hours as Nuñez, describing it as five days a week, eight hours a day, for close to a month.⁷ Yet, during the Hearing, he testified that aside from the cash wages he was paid, Frost HVAC owed him the balance for two weeks of work, six days a week, eight hours a day. Gonzalez also testified that the two weeks he worked were two consecutive weeks in April and no hours in May. Gonzalez did not produce any evidence from social media that he had worked on the Project, as testified to by Nuñez.

According to Frost's testimony, the Housing Authority is a federal agency, not a California public entity. During a preconstruction meeting, an official from the Housing Authority allegedly told him that despite the bid package containing the Residential Sheet

⁷ Worker Interviews January 28, 2016, page 3. (DLSE Exh. No. 13, p. 3.)

Metal Worker PWD, Frost HVAC was “exempt” since the Project was federally-funded.

As to the hours of work performed on the Project, Frost testified that along with Maestas and Nuñez, he worked on the Project at various times beginning April 13, 2015, through May 29, 2015. Frost HVAC paid Maestas and Nuñez through the payroll service company via direct deposit into the workers’ bank accounts. Frost HVAC made no such payments on behalf of Gonzalez. Frost testified he did not know Gonzalez and disclaimed any knowledge that Gonzalez worked on the Project or any other Frost HVAC job. Frost also testified that he never gave anyone authority to hire workers on his behalf, including his father and Maestas.

Frost testified that towards the end of the Project, his father (Merle) went to the job site to do warranty work such as assisting residents of the housing development to operate the air conditioning. On three dates, the Inspector Logs contain notations with comments such as “Merle doing service.” The Inspector Logs do not reference Gonzalez or any other worker by name. Frost’s father, Merle, testified that he supervised the work on the Project and was at the job site almost every day. He did not recognize Gonzalez and testified he never saw him on the job site.

Finally, at the Hearing, Frost HVAC produced a few weekly timesheets for Maestas and Nuñez. Frost testified that the timesheets bear the signatures of the two workers. Timesheets for Maestas for the weeks ending April 24 and May 22 are, for the most part, consistent with the total hours worked and wages paid for those weeks as recorded on CPRs. A timesheet for Nuñez for the week ending May 22 is consistent with all sets of CPRs for that week, with the exception of the initial set of CPRs that Frost HVAC sent DLSE.

Claim of Non-Payment of Training Funds.

DLSE’s investigation disclosed that Frost HVAC failed to pay any of the training fund contributions for the workers required by the Residential Sheet Metal PWD. That rate determination required the payment of \$1.72 per hour per worker to the California Apprenticeship Council or an applicable apprenticeship program. The Assessment determined that these unpaid training fund contributions totaled \$646.72, based on 376 hours for all workers as reflected in DLSE’s audit. Frost HVAC did not dispute that it

failed to make any training fund contributions. Instead, its position was that it was exempt from the contribution requirement because the work was federally-funded.

Apprentice Requirements.

The Residential Sheet Metal PWD indicates that the classification was an apprenticeable craft. DLSE's uncontroverted evidence established that Frost HVAC failed to provide contract award information to an apprenticeship committee, failed to request apprentices from an apprenticeship committee, and failed to hire any apprentices for the Project.⁸ Frost HVAC's failure to hire Residential Sheet Metal Worker apprentices lasted 47 days (measured by the duration of work on the Project by Frost HVAC workers, including Frost). On that basis, DLSE assessed a penalty of \$20.00 per day for each of the 47 days for a total of \$940.00. At the Hearing Frost HVAC presented no evidence to rebut DLSE's assertions about the failures to comply with apprentice requirements, which occurred because it believed that the Project was exempt from apprentice requirements based on it being federally-funded.

DISCUSSION

The Project Is Subject to California Prevailing Wage Requirements.

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 Prevailing Wage Law 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.

⁸ DLSE stated in its Penalty Review that the applicable apprenticeship committee was the Northern California Valley Sheet Metal Industry J.A.T.C. Frost HVAC made no showing to the contrary.

(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 *Lusardi*, at p. 985.)

Section 1720, subdivision (a), of the CPWL defines “public works” in relevant part as “Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds.” Section 1720, subdivision (b)(1) defines the phrase “paid for in whole or in part out of public funds” to include “the payment of money or the equivalent of money by the state or political subdivision” Section 16000 of title 8 of the California Code of Regulations provides that “public funds” includes “state, local, and/or federal monies.” Section 16001 subdivision (b) of those regulations provides as follows:

Federally Funded or Assisted Projects. The application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort.⁹

Section 1722 defines “awarding body” as “department, board, authority, officer or agent awarding a contract for public work.” Section 16000 of title 8 of the California Code of Regulations further defines “awarding body” as follows: “Any state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works.”

The Contract between Frost HVAC and the Housing Authority specified that the scope of work entailed the replacement of the HVAC units in the housing development owned by the Kern County Housing Authority. Under section 1722, the Housing Authority is a California awarding body, notwithstanding Frost’s mistaken belief that it

⁹ No evidence was offered showing the HVAC sheet metal classification in Kern County, California prevailing wage rates are higher than federal rates, although state rates commonly are higher than federal rates. Frost HVAC has the burden to prove the basis of the Assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Because Frost HVAC failed to show federal rates were actually higher than California rates, it is concluded that California rates apply, as found by the Assessment.

was a federal agency.¹⁰ The California prevailing wage laws apply because the Project was paid for with public funds, the definition of which includes federal funds (Cal. Code Regs., tit. 8, § 16000), and was under control of or carried out by the Housing Authority, a California awarding body. It is irrelevant that the entire \$90,375.00 the Housing Authority paid Frost under the Contract may have originated with the federal government. (Cal. Code Regs., tit. 8, § 16001, subd. (b); *Southern Cal. Labor Management Committee v. Aubry* (1997) 54 Cal.App.4th 873, 886 [project carried out by federal, not state awarding body].) It is well established that public works projects in California funded with federal monies are only exempt from the California PWL if the project is controlled and carried out by the federal government itself; if the project is controlled and carried out by a state or local agency, the CPWL will apply. (*Id.*, 54 Cal.App.4th at p. 883.) Here, because the Project was covered work done under contract, paid for with public funds within the meaning of section 16000 of title 8 of the California Code of Regulations, the HVAC replacement contract was a public work within the meaning of section 1720, and subject to the provisions of the CPWL.

Frost HVAC argues that the bidding materials provided to potential bidders included references to the Davis-Bacon Act and that the Housing Authority specified that the Project was “federally funded.” Frost HVAC further claimed it was informed by the Housing Authority that it was exempt from and did not need to comply with California prevailing wage requirements. Based on the bid package, however, Frost HVAC had knowledge that the Project was a public work subject to the California Prevailing Wage Law because the Residential Sheet Metal Worker PWD was attached to the IFB. At the very least, Frost HVAC had knowledge that the project was a public work and would

¹⁰ The Housing Authority is a public corporation organized under the auspices of Health and Safety Code section 34200 et seq. It was created in 1938 “by the enactment of the housing authority laws (Stats. Ex. Sess. 1938, ch. 4, p. 9) embodied in Act 3483 of the General Laws of the State of California and by resolution of the Board of Supervisors of the county of Kern, dated May 10, 1949.” (*Blodget v. Housing Authority of Kern County* (1952) 111 Cal.App.2d 45, 47 [“The United States Housing Act of 1937, as amended [42 U.S.C.A. § 1401 et seq.] authorized the public housing administration of the United States to give financial assistance to local governments for the development, acquisition, or administration of slum-clearance and low-rent housing projects”].)

require payment of prevailing wages – under either federal Davis-Bacon or state law. By disregarding the California prevailing wage determination that was attached to the IFB, and, and by failing to follow up and to clarify the information from the Housing Authority, Frost HVAC failed to appropriately ascertain its responsibilities with respect to its prevailing wage and reporting requirements. It may be that the Housing Authority’s representations to Frost HVAC as to whether California prevailing wage law applied could be used by Frost HVAC to seek reimbursement from the Housing Authority under section 1726, subdivision (c) or section 1781, subdivision (a)(1). Such representations, however, are irrelevant to the underlying question of whether the CPWL applies and do not excuse Frost HVAC from complying with its obligations. Accordingly, this Decision finds that the Project was a public work subject to the CPWL.

Frost HVAC Carried Its Burden to Show the Assessment Is Incorrect as to Underpaid Wages.

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 also prescribes penalties when there has been an underpayment of required prevailing wages to workers. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a 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 under section 1742. 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).)

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual

per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (See, e.g., *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-688 [rule for estimate-based overtime claims under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727 [applying same rule to state overtime wage claims]; *In re Gooden Construction Corp.* (U.S. Dept. of Labor Wage Appeals Board 1986) 28 WH Cases 45 (BNA) [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§ 3141 et seq.]) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, for the reasons detailed below, the Hearing Officer determined based on the totality of the evidence presented at the Hearing that DLSE's Assessment as to the amount of unpaid prevailing wages was unreliable, and that the contractor met its burden of demonstrating that the basis for the Assessment was incorrect. As an initial matter, it was apparent that Frost HVAC's record-keeping was incomplete and, at times, inconsistent, as disclosed in the different sets of CPRs. In the initial two-week set of CPRs submitted to DLSE, hours were not broken down by days, Jason Frost was not listed as a worker, and worker addresses and Social Security numbers were missing. While the initial set of CPRs were certified, as required, subsequent sets sometimes were and sometimes were not certified. Frost HVAC submitted check stubs that matched the initial set of CPRs. Yet, the check stubs, and the CPRs, conflicted with the next sets of CPRs submitted, wherein the weeks, days, and hours of work from the initial set of CPRs appeared to have been moved to the next weeks. That suggested the initial set of CPRs were inaccurate. Further, worker daily hours seen on some sets of CPRs conflicted with

those shown on other sets of CPRs. Reading together the later-produced CPRs and the Payroll Journal, Frost HVAC's records implied that checks to Maestas and Nuñez issued on April 24 constituted payment for work performed from April 20 to 24, an unlikely scenario given the usual lag after a work week before a check can be issued. Thus, at best, the record-keeping of Frost HVAC appears to have been cavalier and sloppy.

In light of the records, DLSE had good reason to obtain and evaluate the Inspector Logs and to conduct worker interviews in an effort to determine how many hours had actually been worked on the Project by each of the employees at issue and to determine the amount of any unpaid wages. In attempting to re-create an accurate accounting of the hours worked on the Project, however, the DLSE audit produced an end product (the Assessment) that significantly conflicts with the main independent sources of accurate time-reporting, namely the Inspector Logs and the contemporaneous timesheets signed by Maestas and Nuñez.¹¹

While the Inspector Logs may not have been a perfect accounting of the hours on the Project, given that worker names were omitted, the logs were not signed, and the inspector gave only estimates, the records did provide a relatively reliable source from which to draw conclusions. Where DLSE's audit adds hours of unpaid work for work weeks in which the Inspector Logs show many fewer work hours, pause must be taken. Among other instances, the conflict is notable in the last week of the Project, for which the Inspector Logs showed one person working eight hours Monday through Friday, yet the Assessment adds Maestas, Nuñez, and Gonzalez each working eight hours a day.

The conflict between the Assessment and the timesheets casts further doubt on the accuracy of the Assessment.¹² The time cards contain a small number of confusing entries in that some hours appear to refer to time worked on other, separate non-

¹¹ While the workers' signatures on the timesheets are not easily legible, they at least resemble the signatures on their DLSE complaints. Also, DLSE did not attempt to rebut Frost's testimony that the workers' signatures appear on the timesheets.

¹² During its investigation, DLSE asked for timesheets and Frost HVAC did not produce them until the Hearing when it offered them into evidence. While the non-response during the investigative stage is counter-productive, the timesheets cannot be disregarded, having been admitted into evidence.

prevailing wage jobs. The precise hours of work by Maestas and Nuñez on the Project as marked on the timesheet, however, coincided with the precise hours listed on the CPRs, at least those submitted after the first set of CPRs, as stated *ante*. The hours reflected by the timesheets consisted of a total of 44 hours by Maestas and 40 hours by Nuñez for the weeks ending April 24 and May 22. In contrast, the Assessment adds for Maestas 19 unpaid hours for April 20 to 24 and 11 hours for May 18 to 22, over and above the hours that were reflected on the timesheets. Given the evidence reflected in the contemporaneous timesheets, and the lack of any other documentary evidence, there was insufficient basis for DLSE to have added those additional unpaid hours for Maestas as reflected in the Assessment.

The Assessment does find some support in the testimony of the workers alleging unpaid hours. The workers' claims, however, are essentially the only evidence on this issue; the Inspector Logs and the workers' own timesheets conflict with DLSE's findings. And closer evaluation of the workers' claims simply did not justify the faith DLSE placed in them. This is particular true in that, in some respects DLSE's findings conflicted with the worker's own written statements and Hearing testimony. For example, in their respective July 2015 complaints to DLSE, all three workers gave a May 20, 2015 finish date of the Project, yet the Assessment adds hours for all three during the week of May 25 to 29. During DLSE's investigation, Maestas informed Morsi that during the Project he would "go to other non-prevailing wage projects so it was about two hours here and there" that he was not at the Project. Yet, the Payroll Journal and timesheets suggest he was gone from the Project for much longer periods of time – 25 hours for the period paid by check dated April 24 and 30 hours for the period paid by check dated May 22. For his part, Nuñez testified that during his first week on the Project, he worked alone. Yet, DLSE's audit and Penalty Review do not show any week in which Nuñez worked alone. Gonzalez testified that Frost HVAC owed him the balance for two weeks of work, six days a week, eight hours a day, and that the two weeks were consecutive weeks in April, with no hours in May. The Assessment, however, finds Gonzalez was owed 20 unpaid hours in the third week of the Project and 40 unpaid hours in the fourth week, both weeks in May.

Even more problematic for the Assessment is that the workers' claims were uncorroborated by any documentary evidence. Maestas testified that he texted his hours to Frost, and that he had at least one time sheet at home in a bag. Maestas failed, however, to provide that timesheet to DLSE or to present any of that evidence at the Hearing. No timesheets, calendars, diaries or personal notes, or similar such records, support any of the workers' claims concerning the number of unpaid hours. Maestas showed Morsi an email from Frost allegedly admitting Frost owed money. Yet, the email left open the possibility the debt was owed in connection with other, non-public works jobs. In that the timesheet evidence, admittedly partial in nature, coincides with the Inspector Logs, the uncorroborated claims of Maestas, Nuñez, and Gonzalez were not persuasive, especially because they consisted of generalized estimates not broken down into specific weeks, days, and hours.

Lastly, with respect to Gonzalez's alleged work on the Project, Frost and his father credibly testified that Gonzalez did not work on the Project at all. Gonzalez, backed by Maestas and Nuñez, claimed he did work on the Project. Gonzalez maintains he was paid by Maestas in cash, at a rate of \$10.00 an hour; if his claim were to be accepted, he would be due the difference between the cash wages and the prevailing wage rates for the hours he worked. Gonzalez' claim, however, lacked any documentary support. Further, the claim conflicted with evidence in the Inspector Logs as to the number of workers on the Project, especially for days on which Frost himself worked on the Project. Gonzalez also gave conflicting accounts as to the time he worked on the Project. On the one hand, he informed DLSE during the investigation that he worked similar hours as did Nuñez and specifically for five days a week for two consecutive weeks in April, but at the Hearing he testified that he worked six days a week. Based on these considerations, the Hearing Office did not find Gonzalez' claim of work on the Project to be credible.

Altogether, the evidence presented by DLSE with respect to alleged unpaid wages on the Project, and in response to the deficiencies in the contractor's CPRs, was not sufficient to constitute "credible estimates sufficient to allow the decision maker to determine the amount by a just and reasonable inference from the evidence as a whole."

(*Anderson, supra*, 328 U.S. at pp. 687-688; *Hernandez, supra*, 199 Cal.App.3d at pp. 726-727.) Instead, the record as a whole is insufficient to allow the inference that Maestas, Nuñez, and Gonzalez actually performed unpaid work on the Project on any of the days for which DLSE's audit and resulting Assessment alleged additional unpaid hours.

Based on the foregoing, and the Hearing Officer's overall assessment of the evidence submitted at the Hearing, this Decision concludes that while DLSE met its initial burden to show that there was prima facie support for the Assessment, Frost HVAC also met its burden to show that the Assessment was incorrect as to the claim for underpayment of wages. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, Frost HVAC is not liable for alleged unpaid prevailing wages for Maestas, Nuñez and Gonzalez in the assessed sum of \$9,837.73. Because this Decision finds no underpayment of prevailing wages, no penalties pursuant to Section 1775 are due.

Frost Failed to Make Required Training Fund Contributions.

Section 1777.5, subdivision (m)(l) requires contractors on public works projects who employ journeyman or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Division of Apprenticeship Standards (DAS). That subdivision specifies:

A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

Here, the Assessment found that Frost HVAC was obligated by the Residential Sheet Metal Worker PWD to make training fund contributions in the aggregate sum of \$646.72. However, the number of total hours worked by Frost, Maestas, and Nuñez

according to the CPRs, is 198 hours. Therefore, the underpaid training fund contributions in the aggregate equals \$340.56.¹³ Frost HVAC made no contribution whatsoever.

Frost HVAC presented no evidence to disprove the basis for, or the accuracy of, the Assessment as regards the training fund issue. Accordingly, Frost HVAC is liable for payment of training fund contributions in the aggregate sum of \$340.56.¹⁴

Frost 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.)

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

¹³ The figure for unpaid training contributions is calculated by multiplying 198 total number of hours worked by Frost, Maestas, and Nuñez, according to the CPRs, by \$1.72 per hour. Although Frost and his father both testified that his father worked on the Project, and the Inspector Logs specifically referenced his father, DLSE did not include in its calculation of underpayment of training fund contributions of the any hours that Frost's father worked on the Project. Frost's father testified he supervised, but performed "very little" craft work on the job, a claim DLSE appears to have accepted.

¹⁴ While it did not raise it as an issue to be decided, Frost HVAC alluded in the Hearing to an issue whether the work of installing replacement air conditioning units it performed under the Contract constituted "sheet metal" work. Morsi testified that installing the units did fall within the scope of work of the Residential Sheet Metal Worker PWD, and Frost HVAC failed to rebut that showing. As Frost HVAC had the burden of proving that the basis for the Assessment was incorrect (see Cal. Code Regs., tit. 8, § 17250, subd. (b)), this Decision finds the Residential Sheet Metal Worker PWD applies to the work done on the Project.

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 Frost failed to submit a DAS 140 or its equivalent to the applicable apprenticeship committee in the geographic area of the Project for the apprenticeable craft of Residential Sheet Metal Worker. Frost provided no evidence to the contrary.

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” 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 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.¹⁵ 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*

¹⁵ Here, the record established no exemption for Frost HVAC.

writing, sent by first class mail, facsimile or email. Except for projects with less than 40 hours of journeyman work, each request for apprentice dispatch shall be for not less than an 8 hour day per each apprentice, or 20% of the estimated apprentice hours to be worked for an employer in a particular craft or trade on a project, whichever is greater, unless an employer can provide written evidence, upon request of the committee dispatching the apprentice or the Division of Apprenticeship Standards, that circumstances beyond the employer's control prevent this from occurring.... (Emphasis added.)

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

DLSE submitted prima facie evidence showing that Frost HVAC employed journeymen Residential Sheet Metal Workers on the Project at various times from April 13, 2015, through May 29, 2015, over 47 days. However, Frost HVAC failed to submit either a DAS 140 form or a DAS 142 form or their equivalents to any apprenticeship program, and failed to hire any apprentices. The only argument that Frost HVAC made in defense of the apprentice violations was that the Project was federally funded, and therefore, he was not subject to section 1777.5 requirements. As explained, *ante*, this argument is incorrect on the law, and does not provide a cognizable excuse for Frost HVAC's failure to comply with section 1777.5. Therefore, Frost HVAC failed to prove the Assessment was incorrect as to the apprentice violations. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

DLSE Did Not Abuse Its Discretion in Assessing Penalties Under Section 1777.7 at the Reduced Rate of \$20.00 per Violation.

Section 1777.7 states in relevant part:

(a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than 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.

“The determination of the Labor Commissioner as to the amount of the penalty imposed under subdivisions (a) and (b) shall be reviewable only for an abuse of discretion.” (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

In this case, Frost HVAC hired no apprentices at all, violating the required 1:5 ratio of apprentice hours to journeyman hours for Residential Sheet Metal Worker, and the record establishes that this violation was intentional. Additionally, Frost HVAC did not give the proper notice of his contract to, or request dispatch of, apprentices from the applicable apprenticeship committees. Under these facts, Frost “knowingly violated” the requirement of a 1:5 ratio of apprentice hours to journeyman hours for Residential Sheet Metal Worker and is subject to the statutory penalty of up to \$100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).)

Under section 1777.7, subdivision (b), DLSE imposed a penalty of \$20.00 for each of 47 days of violations based on Frost HVAC’s failure to provide the requisite notice of the Contract to an applicable apprenticeship program. (§ 1777.5, subd. (e); Cal. Code Regs., tit. 8, § 230, subd. (a).) The 47 days were determined by counting the first day a Frost HVAC journeyman worked on the Project, April 13, 2015, through the last day on the job, May 29, 2015, dates reflected in the Inspector Logs. DLSE selected the \$20.00 rate based in part on the fact that Frost HVAC had no previous assessment for apprentice violations but the failure to comply with apprentice requirements was intentional. Also, the Penalty Review identified over 75 hours of apprentice work that was lost, based on the required 1:5 apprentice to journeyman ratio. However, like the

calculation of worker hours for purposes of the training fund contribution, *ante*, the total journeyman hours worked by Frost, Maestas, and Nuñez according to the CPRs is not 376 but 198 hours. Under the 1:5 ratio, 39 hours is the figure which represents a loss of training opportunities for local apprentices within the meaning of section 1777.7, subdivision (b). The penalty rate of \$20.00 per violation was less than the \$100.00 per violation penalty initially proposed by the DLSE deputy. Frost HVAC did not prove that the penalty based on the rate of \$20.00 for 47 days, as determined by DLSE, represents an abuse of discretion. (§ 1777.7, subd. (d).) Therefore, the penalty is affirmed for a total of \$940.00.

Based on the foregoing, the Director makes the following findings:

FINDINGS

1. Affected contractor Jason Flint Frost, individually dba Frost HVAC, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. The evidence does not show that Jason Flint Frost, individually dba Frost HVAC, underpaid the prevailing wages owed to three alleged workers on the Project. Accordingly, prevailing wages are not due.
3. Jason Flint Frost, individually dba Frost HVAC, did not make required training fund contributions in the aggregate amount of \$340.56 for three workers on the Project. Accordingly, training fund contributions in the sum of \$340.56 are due.
4. Jason Flint Frost, individually dba Frost HVAC, 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 committee in the geographic area of the Project site for the apprenticeable craft of Residential Sheet Metal Worker.
5. Jason Flint Frost, individually dba Frost HVAC, knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by: (1) not issuing a request for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committee for the craft of laborer in the geographic area of the Project site; and (2) not employing on the Project apprentices in

the craft of laborer in the ratio of one hour of apprentice work for every five hours of journeyman work.

6. Jason Flint Frost, individually dba Frost HVAC, is liable for an aggregate penalty under section 1777.7 in the sum of \$940.00, computed at \$20.00 per day for the 47 days from April 13, 2015, through May 29, 2015.

7. All other issues are moot.

8. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Training Fund Contributions:	\$ 340.56
Penalties under section 1777.7	\$ 940.00
TOTAL:	\$ 1,280.56

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed 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: 12/10/2018



André Schoorl
Acting Director of Industrial Relations