STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

CINTAS CORPORATION NO. 2 **Case No. 17-0437-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Cintas Corporation No. 2 (Cintas) requested review of a Civil Wage and Penalty Assessment (Assessment) issued on December 15, 2017, by the Division of Labor Standards Enforcement (DLSE) with respect to a Fire Hydrant Testing Project (Project) undertaken for the Morgan Hill Unified School District (School District) in Santa Clara County. The Assessment determined that $3,753.66 in unpaid prevailing wages and associated penalties under Labor Code section 1775 were due,[1] and that $15,000.00 in penalties under section 1776 were due for failure to comply with DLSE's request for certified payroll records (CPRs).

Pursuant to written notice, a Hearing on the Merits on the request for review was held on May 24, 2018, and on June 20, 2018, in Oakland, California, before Hearing Officer Gayle Oshima. Evan Adams appeared as counsel for DLSE, and Deborah Wilder appeared as counsel for Cintas. Prior to the Hearing on the Merits, the Hearing Officer granted a motion to intervene by the Northern California Fire Protection Compliance Group (Compliance Group), pursuant to California Code of Regulations, title 8, section 17208, subdivision (c). Roberta Perkins appeared as counsel for the Compliance Group at the Hearing on the Merits.

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

Testimony was presented at the Hearing by DLSE Management Service Technician Breanna Roberts, Cintas attorney Erica O'Brien, Cintas Northern California Manager Isaac Defee, Cintas Regional Manager Shawn Folks, and Cintas workers Jeff Ange, Christopher Maxwell, Mauricio Alejandre, and Ulises Calderon.[2] DLSE submitted Exhibits 1 through 16, all of which were admitted into evidence without objection. Cintas submitted Exhibits A through M, all of which were admitted into evidence without objection.[3] On August 13, 2018, after post-trial briefing, the matter was deemed submitted.

The issues for decision are:

- Whether Cintas correctly paid prevailing wages for testing and maintenance of fire protection systems for the School District.
- Whether Cintas is entitled to credit against the amount of the Assessment for wage payments already made to the workers, and in what amounts.
- Whether penalties assessed under section 1775 should be reduced or waived.
- Whether penalties assessed under section 1776 are due.
- Whether Cintas is liable for liquidated damages under section 1742.1.

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 Cintas 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.

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[2] DLSE called Roberts and Ange as witnesses in support of the Assessment, and called O'Brien, Defee and Folks, as adverse witnesses. Cintas called Defee, Folks, Maxwell, Alejandre and Calderon in its case in chief.

[3] Cintas submitted one set of exhibits for both Case Numbers 17-0437-PWH and 17-0450-PWH. The Hearing Officer heard both cases simultaneously.

FACTS

The Public Work Contract.

School District and Cintas entered into a Fire Protection Service Agreement (the Contract) on July 19, 2015, at a price of $2,002.00, for the testing and inspection of eight fire hydrants for the School District. (DLSE Exhibit No. 6.) Work at issue in the Assessment proceeded under two Purchase Orders issued by School District, one dated July 24, 2015, and the other dated July 1, 2017. The Purchase Order for July 24, 2015, indicated a price of $2,002.00 for annual fire hydrant testing for the fiscal year 2015-2016. No party submitted at the Hearing the Purchase Order dated July 1, 2017. Work under the July 24, 2015, Purchase Order was not paid, at the time of work, at prevailing wage rates.

In June 2016, Cintas learned that fire hydrant testing for public school districts constituted public work subject to payment of the prevailing wage rate. At the Hearing, no party disputed that this is the case.

Applicable Employee Classifications and Prevailing Wage Determinations.

The Assessment used the prevailing wage rates contained in the prevailing wage rate determination (PWD) for the classification Sprinkler Fitter (Fire Protection and Fire Control Systems) (STC-2015-1) (Sprinkler Fitter PWD).[4]

The Assessment.

DLSE Management Service Technician Roberts initiated DLSE's investigation of Cintas's wage payments on the Project based on a complaint from the Compliance Group which was prepared by Derek Miles and accompanied by a letter from the Compliance Group's counsel detailing apprenticeship notification and ratio violations and certified payroll violations. The School District inspection logs accompanied the letter as attachments.

[4] Cintas represented at the Hearing that the bid advertisement date for the Project was July 1, 2015. (Cintas Exhibit F.) The general per diem prevailing wage rate under the Sprinkler Fitter PWD in effect on that date totaled $82.19 per hour, which included a basic hourly rate of $56.02, $8.77 per hour for health and welfare, $15.90 per hour for pension, $1.10 per hour for training, and $.40 per hour for "other." The Sprinkler Fitter PWD contained an increase to the basic hourly rate in the amount of $2.00, $3.00 and $3.75 on August 3, 2015, August 1, 2016 and July 31, 2017, respectively.

On August 15, 2017, Roberts sent Cintas a notice of investigation and request for CPRs. On the request for CPRs, Roberts identified the Project as “Fire Hydrant Testing,” with no project number, and no geographic location, facility name, or awarding body name listed. (DLSE Exhibit No. 3.) The notice of investigation likewise contained only the phrase “Fire Hydrant Testing” to identify the project.

Cintas contacted Roberts and asked for clarification on the CPR request, and an extension of time for responding to the request. According to Cintas manager Defee’s testimony, Cintas sought clarification because DLSE’s request for CPRs did not identify a project. Roberts responded by sending two documents: a blank Department of Industrial Relations (DIR) form (PWC 100) that called for Cintas to identify the Project by awarding body and physical address, and the Purchase Order dated July 24, 2015. (See Cintas Exhibit F and testimony of manager Defee.) Based on that clarification and after obtaining from Roberts an extension of time for responding to DLSE’s records request, on September 15, 2017, Cintas produced several documents: a CPR for the week ending July 16, 2016; the filled-out PWC 100 form indicating the School District as awarding body and a contract price of $2,002.00; the Purchase Order dated July 24, 2015, for $2,002.00; a filled-out Statement of Employer Payments, as proof of payment of fringe benefits; and a DIR training fund contribution form, as proof of $13.20 payment of a training fund contribution. (Cintas Exhibit F.) The CPR was presented on a federal form (U.S. Department of Labor) for the week ending July 16, 2016, and reflected wages paid for two workers on July 13, 2016. Both parties’ documentation shows that Cintas did not submit CPRs for work performed in August 2015. This omission by Cintas went unexplained.

School District inspection logs obtained by Roberts showed that Cintas workers performed work at several School District sites on August 12, 26, and 27, 2015. According to the CPR delivered by Cintas to DLSE on September 15, 2017, Cintas had two workers on the Project on one day, July 13, 2016. Roberts testified that she determined that these same two employees, who worked on July 13, 2016, also worked one or more days in August 2015.

Further, Roberts testified that, based on inspection logs for August 2017, Cintas had workers at School District sites on August 7, 8, and 10, 2017. During its investigation, DLSE determined that three employees worked one or more of the dates in August 2017. DLSE did not submit any evidence at the Hearing demonstrating that it had requested CPRs from Cintas for work performed in August 2017.

Roberts testified that while she considered the Cintas response to her request for CPRs as timely, the CPRs were incomplete because they did not include all five workers who she believed had worked both in 2015 and 2017 on the Project. On cross-examination, however, Roberts acknowledged that her request for CPRs from Cintas did not identify the project, the contract number, location, or awarding body's name. Additionally, Roberts testified that she did not communicate with Cintas between its response of September 15, 2017, and the issuance of the Assessment, despite a written request from Cintas in its September 15, 2017, cover letter asking DLSE if it needed other documents in order to confirm that Cintas had "paid the full amount of prevailing wages.…" (Cintas Exhibit F.)

The Assessment found that Cintas underpaid wages required by the Sprinkler Fitter PWD, and failed to report all worker hours on CPRs. The Assessment gave no credit to Cintas for the wages that were actually paid to the workers for their work on the Project. Additionally, the Assessment found a failure to pay required training fund contributions, with no credit given for the payments that had been made. The Labor Commissioner assessed section 1775 penalties at $40.00 per violation for each of ten violations for a total of $400.00, and section 1776, subdivision (h), penalties at a rate of $100.00 per day for a period of 30 days for each of the five workers, for a total of $15,000.00.

Cintas manager Folks testified that in approximately June 2016, Cintas first became aware that Sprinkler Fitting work performed for public schools required the payment of prevailing wages. Cintas claimed that after June 2016, and for work performed in July 2016 and August 2017, it paid for all such work at prevailing wage rates. While Cintas apparently made restitution (i.e., paid additional wages) to workers on other projects who had initially been paid less than prevailing wage, Cintas failed to

establish at the Hearing that it had made additional wage payments to the workers on this Project for work that occurred before June 2016. In particular, Cintas did not address the wage rates it had paid for work performed on the Project in August 2015 when Cintas claims to have been unaware that the Project required the payment of prevailing wages.

On behalf of Cintas, six employees testified at the Hearing regarding payroll practices, but only one employee, Christopher Maxwell, testified as to the rate of pay he received for work on the Project. Maxwell testified that in timely fashion he received wages and fringe benefits on the Project totaling $87.72 per hour. Defee and Folks further testified that based on Maxwell's hours, Cintas sent $1.65 in training fund contributions to California American Fire Sprinkler Association Apprenticeship Training Trust (CAFSA Fund). In that regard, Cintas' evidence at the Hearing demonstrated that it had paid all training fund contributions due for the Project.

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, subd. (a), and *Lusardi,* at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. 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 does not mandate mitigation when the Labor Commissioner determines that mitigation is inappropriate.

Additionally, employers on public works must also keep accurate payroll records, recording the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee, among other information. (§ 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.) A failure to supply certified payroll records to DLSE within ten days from receipt of a request may result in a $100.00 penalty for each calendar day, or portion thereof, for each worker, "until strict compliance is effectuated." (§ 1776, subd. (h).) The penalty rate provided by the statute is mandatory.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if the wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment (or CWPA), the contractor deposits into escrow with DIR the full amount of the assessment of unpaid wages, including the statutory penalties thereon. In the instant case, Cintas did not make a deposit with the DIR.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a request for review under section 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 burden of presenting 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." (§1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

<u>A Contractor May Receive Credit for Wages and Fringe Benefits Paid to Workers After an Assessment Issues.</u>

Sections 1771 and 1774 of the Prevailing Wage Law require that prevailing wages must be paid to all workers for work on public works projects. Section 1773.1 defines "per diem wages" for purposes of both establishing prevailing wage rates and crediting employer payments toward those rates, providing in pertinent part as follows:

> (a) Per diem wages . . . shall be deemed to include employer payments for the following:
> (1) Health and Welfare.
> (2) Pension.

* * *

> (b) Employer payments include all of the following:
> (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
> (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments and a contribution to the California Apprenticeship Council (CAC) or an approved apprenticeship-training fund. (§ 1773. 1, Cal. Code Regs., tit. 8, § 16000.) The first two components (also known as the total prevailing wage) must be paid to the worker or to a bona fide trust fund on the worker's behalf, as specified in the prevailing wage determination. If an employer does not make fringe benefit payments on the worker's behalf totaling at least the amount required by the applicable PWD, the balance must be paid to the worker as wages.

Under the CPWL enforcement provisions, an assessment under Section 1741 specifies the amounts of wages due. Section 1775, subdivision (a)(2)(E), provides that workers are to be paid the difference between the prevailing wage rate that applied and the amount that was paid to the workers for their work on the project. Thus, a determination of unpaid prevailing wages must reflect a reduction for any amounts an employer is able to show were already paid to workers for the dates and hours at issue.

Cintas Failed to Carry Its Burden of Showing the Amount of Wages Paid on the Project, Except as to One Worker.

In this case, DLSE established a prima facie case for the amounts assessed when Roberts testified to performing her audit based on admitted documentary evidence, including the Purchase Order from July 24, 2015, CPRs, employee questionnaires, and inspection logs. The burden of proving that the basis of the Assessment is incorrect then shifted to Cintas. Cintas failed to meet its burden of proof as to the unpaid prevailing wages because it did not provide sufficient evidence at the Hearing to demonstrate the amount of wages it had already paid to each of the workers on the Project for the dates and hours at issue in the Assessment.

Cintas claims it made timely payments at the prevailing wage rate to its workers, but it provided no testimony or documentation at the Hearing demonstrating the actual wage payments made for work performed in August 2015. Because of the inadequacy of Cintas's evidence at the Hearing, specific to the August 2015 wages, the Director is unable to credit wage payments already made to Ange and Debarr for work performed on the Project during this time period.

Additionally, the Director is not able to determine that any reduction is warranted in the DLSE audit and Assessment for the July 2016 work because Cintas failed to provide sufficient documentation as to the amount of wages already paid to the workers for their work on the Project on those dates. Although Cintas submitted various timesheets for work on the Project, there was no coherent evidence as to the actual wages paid to each worker on the Project for each date of work. This was in part because Cintas's Exhibit purporting to document payment of wages cut off the name of the

worker, rendering the Exhibit essentially indecipherable for the purposes proffered. (Cintas Exhibit J, pp. 24, 25, 26, 27, 30, 31.)

One employee, Maxwell, testified to his own wages, stating that he received $82.54 per hour in the form of regular pay and fringe benefits of $5.18 per hour for 1.5 hours worked on the Project. Accordingly, the Hearing Officer found that Maxwell should be removed from the Assessment because DLSE found that Cintas owed $129.14 in wages to Maxwell, without giving Cintas any credit for the wages already paid. Cintas's evidence regarding wage payments already made to other workers is otherwise contradictory, confusing, incomplete, and insufficient to carry Cintas' burden of demonstrating that the Assessment was incorrect.

Cintas did present unrebutted evidence and testimony showing that it made training fund contributions to CAFSA Apprenticeship Fund for this Project. Hence, this Decision reduces the Assessment by $29.60 for training fund contributions. As discussed below, however, the penalties under section 1775 remain unchanged due to late payment to the training fund. Accordingly, the Director modifies the amount of wages due from $3,324.06 downward to $3,194.92, and the amount of training fund contributions due from $29.60 downward to $0.00.

DLSE's Penalty Assessment Under Section 1775 Was Proper.

Section 1775, subdivision (a), as it read at the time the Project was bid (July 1, 2015), 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) . . . unless 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)The penalty may not be less than eighty dollars ($80) . . . if the contractor or 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 ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[5]

((Former) § 1775, subd. (a).)

Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion 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 punishment 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 DLSE abused its discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

DLSE assessed section 1775 penalties at the rate of $40.00 for each calendar day, for each worker paid less than the prevailing wage, for a total of ten violations ($400.00),

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[5] The reference to section 1777.1, subdivision (c) is a typographical error in the statute. In the version of section 1777.1 as it existed in 2015 (including on the date of the bid advertisement for the Project), the correct reference is to subdivision (e), 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."

based on a failure of Cintas to pay the prevailing wage rate and/or the training fund contribution. Although Cintas paid the prevailing wage rate to one worker on the Project, Cintas failed to prove it timely submitted training fund contributions. "Training contributions to the Council are due and payable on the 15th day of each month for work performed during the preceding month." (Cal. Code Regs., tit. 8, § 230.2, subd. (b).) It cannot be determined whether Cintas's training fund contributions to CAFSA Apprenticeship Fund made in association with Maxwell's work on August 10, 2107, were timely because payments were made in both September and October. Cintas failed to carry its burden with regard to showing timely payment of the train fund contributions for Maxwell. The penalty assessment will be affirmed.

<u>Cintas Is Not Liable for Section 1776 Penalties Because DLSE Failed to Make a Proper Request for CPRs.</u>

Section 1776 of the CPWL requires an employer to maintain accurate and complete payroll records, containing specified information, and to produce certified payroll records to DLSE within ten days of a request. The statute provides, in relevant part, as follows:

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:
> (1) The information contained in the payroll record is true and correct.
> (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.
> . . .
> (h) The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars ($100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Labor Standards Enforcement, these penalties

> shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

The applicable regulations provide as follows concerning a request for certified payroll records:

> (b) Requests for certified copies of payroll records pursuant to Section 1776 of the Labor Code may be made by any person. However, any such request *shall be in writing and contain at least the following information*:
> (1) The body awarding the contract;
> (2) The contract number and/or description;
> (3) The particular job location if more than one;
> (4) The name of the contractor;
> (5) The regular business address, if known.

(Cal. Code Regs., tit. 8, § 16400, subd. (b), emphasis added.)

On August 15, 2017, before it issued the Assessment, DLSE issued a request for CPRs to Cintas. As noted above, however, the request for certified payroll records by DLSE Management Service Technician Breanna Roberts omitted the name of the body awarding the contract, the contract number and/or a description, and the particular job location, i.e., at least three important categories of information expressly required under the applicable regulation. Not surprisingly, Cintas responded to DLSE by requesting clarification about which project DLSE sought CPRs. Thereafter, there was dialogue and back and forth between DLSE and Cintas concerning precisely which payroll records were requested, and it is not clear from the record and evidence at Hearing that the parties ever reached a mutual understanding on this issue. The record does suggest that by September 15, 2017, Cintas thought DLSE was requesting CPRs for the time-period corresponding to the Purchase Order dated July 24, 2015, for $2,002.00. Further, it also appears that Cintas did timely respond to the request, but its response was incomplete because it omitted CPRs for the work performed in August 2015, one of the time periods linked to the Purchase Order dated July 24, 2015, while producing other records. The record also reflects, however, that Cintas asked in its cover letter when it produced the (apparently incomplete) CPRs whether DLSE needed any additional records, and DLSE never responded to that inquiry. Thus, although the record does provide some support for

the section 1776 penalties in the Assessment, and although DLSE limited the amount of penalties assessed, the patently deficient initial request by DLSE and the overall resulting confusion that was evident at the Hearing compels the conclusion that section 1776 penalties are not appropriate in this case. Accordingly, this Decision finds that Cintas carried its burden of proving that the basis for the assessment of section 1776 penalties was incorrect.

Cintas Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides in part:

> 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.

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These two alternative means required the contractor to make key decisions within 60 days of the service of the civil wage penalty assessment upon the contractor.

Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor could entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposited with DIR the full amount of the assessment of unpaid wages, including all statutory penalties.[6]

[6] On June 27, 2017, before Cintas filed its request for review of the amended Assessment, the Director's discretionary ability to waive liquidated damages was deleted from section 1742.1 by legislative amendment. (Stats. 2017, ch. 28, §16 [Sen. Bill No. 96].)

Here, no evidence shows Cintas paid any back wages to the workers in response to the Assessment, or deposited with DIR the assessed wages and statutory penalties. Accordingly, Cintas is liable for liquidated damages of the underpaid prevailing wages, $3,194.92.

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

FINDINGS AND ORDER

1. Affected contractor Cintas Corporation No. 2 underpaid its workers $3,194.92 in prevailing wages.
2. Affected contractor Cintas Corporation No. 2 is entitled to a credit for payments made to California American Fire Sprinkler Association Apprenticeship Training Trust such that no training fund contributions remain due and owing.
3. Penalties under section 1775 are due from affected contractor Cintas Corporation No. 2 in the amount of $400.00 for 10 violations at the mitigated rate of $40.00 per violation.
4. Because none of the unpaid wages were paid or deposited within 60 days after service of the Assessment, liquidated damages are due from affected contractor Cintas Corporation No. 2 in the full amount of the unpaid wages, $3,194.92.
5. No penalties under section 1776 are due.

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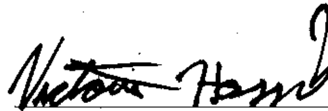
6. The amounts found due from affected contractor Cintas Corporation No. 2 in the Assessment as affirmed by this Decision are as follows:

Wages:	$3,194.92
Training fund contributions:	$0.00
Liquidated damages under section 1742.1:	$3,194.92
Penalties under section 1775, subdivision (a):	$400.00
TOTAL:	**$6,789.84**

In addition, interest is due from affected contractor Cintas Corporation No. 2 and shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment, as modified herein, is affirmed. The Hearing Officer shall issue a Notice of Findings, which shall be served with this Decision on the parties.

Dated: July 8, 2019



Victoria Hassid
Chief Deputy Director
Department of Industrial Relations[7]

[7] See Government Code sections 7, 11200.4.