

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Garcia Juarez Construction, Inc.

Case No. 14-0565-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Garcia Juarez Construction, Inc. (Garcia Juarez) submitted a request for review of a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) on April 18, 2014, with respect to work performed by Garcia Juarez on the Avocado Boulevard, Calavo Drive, Louisa Drive, Hidden Mesa Drive Sanitary Sewer Replacement project (Project) for the Otay Water District. The Determination found that Garcia Juarez failed to submit contract award information to applicable apprenticeship programs in accordance with Labor Code section 1777.5, subdivision (e), and failed to employ apprentices in accordance with Labor Code section 1777.5, subdivision (g). DLSE assessed an aggregate penalty of \$27,000.00 under Labor Code section 1777.7.

A Hearing on the Merits occurred in Los Angeles, California on March 18, 2015, before Hearing Officer Steven A. McGinty. James Jackson (Jackson) appeared for Garcia Juarez, and William Arthur Snyder (Snyder) appeared for DLSE. The matter was submitted for decision on March 18, 2015.

The issues for decision are as follows:

- Did DLSE timely serve the Determination on Garcia Juarez?

- Did Garcia Juarez provide each applicable apprenticeship committee with timely notice of contract award information in the manner required by California Code of Regulations, title 8, section 230?
- Did Garcia Juarez properly request dispatch of laborer apprentices from all applicable apprenticeship committees as required by California Code of Regulations, title 8, section 230.1?
- Whether Garcia Juarez was excused from sending a DAS 140 and a DAS 142, or generally a request to dispatch laborer apprentices, to the Associated General Contractors of America, San Diego Chapter because it would have been a futile act to do so as Associated General Contractors of America, San Diego Chapter would not dispatch apprentices to a non-member contractor?
- Did Garcia Juarez fail to employ laborer apprentices on the Project in the minimum ratio required by Labor Code section 1777.5 (20 percent of journeyman hours employed)?
- Is Garcia Juarez liable for penalties under Labor Code section 1777.7?
- What is the appropriate penalty for any violations of Labor Code section 1777.5?

In this Decision, the Director finds that Garcia Juarez failed to properly provide one of the applicable apprenticeship committee with timely notice of contract award information and failed to properly request dispatch of laborer apprentices from one apprenticeship committee in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7. This Decision affirms the Determination that a penalty is appropriate, however, the penalty is reduced to more accurately reflect the severity of the violation, which was technical noncompliance based upon mistake. Therefore, the Director of Industrial Relations issues this Decision affirming and modifying the Determination.

FACTS

On or about February 14, 2012, Garcia Juarez submitted a Division of Apprenticeship Standards (DAS) Public Works Contract Award Information form (DAS 140) to the Laborers Southern California Joint Apprenticeship Committee (LSC JAC) indicating among other things

that it executed a contract on February 1, 2012 to do work on the Project, that it was going to employ journeymen laborers on the Project during the period February 22, 2012, through September 20, 2012, and that it would employ and train apprentices in accordance with the California Apprenticeship Council regulations. Also on or about February 14, 2012, Garcia Juarez submitted a DAS Request for Dispatch of an Apprentice form (DAS 142) to the LSC JAC indicating that it needed one apprentice in the craft or trade of laborer to report on February 22, 2012, to the Project, and provided the name of the person to report to as well as the address and time. According to Garcia Juarez's certified payroll records (CPRs) the last day an employee worked on the Project was May 17, 2013.

The Project was accepted by the Awarding Body on July 1, 2013, and a Notice of Completion was filed with the San Diego County Recorder's Office on July 9, 2013. No laborer apprentices were employed on the Project.

Timeliness of Determination. The DLSE served the Determination by mail on April 18, 2014. The Determination was prepared by Reynaldo S. Tuyor (Tuyor).

Applicable Committees in the Geographic Area. Jackson acknowledged that there were two applicable committees in the geographic area. Those two apprenticeship committees were as follows: (1) the LSC JAC; and (2) the Associated General Contractors of America, San Diego Chapter (AGC-San Diego). However, Jackson testified that he was not aware of the AGC-San Diego until after the completion of the project when Garcia Juarez received notice of a complaint about its failure to send a DAS 140 and a DAS 142 to the AGC-San Diego.

Notice of Contract Award Information and Request for Dispatch of Apprentices. Garcia Juarez sent a DAS 140 and a DAS 142 to the LSC JAC as noted above. Jackson acknowledged that Garcia Juarez did not send either form to the AGC-San Diego, because he was unaware of the apprentice committee. Jackson produced a copy of the complaint filed by the Center for Contract Compliance in San Diego dated November 8, 2013, as Exhibit D.¹ Attached to the

¹ DLSE objected to the introduction of Exhibit D on the grounds of relevance and hearsay. The objection is overruled. DLSE itself offered into evidence Exhibit 7 a cover letter from the Center for Contract Compliance dated November 21, 2013, which indicated that the complaint was attached.

complaint were documents labeled as evidence in support of the complaint. One document was a copy of an email chain between the individual who signed the complaint on behalf of the Center for Contract Compliance, Jamie Roberts, and a representative of the AGC-San Diego, Shari Buch, labeled as "1st check W/AGC." In the opening email, dated June 28, 2012, Roberts wrote to Buch requesting that Buch verify if Garcia Juarez had filed a DAS 140 and a DAS 142 for the Project. Roberts wrote that there was, "no rush on this at all...the project wont [*sic*] be finished until fall and I don't plan on filing any apprenticeship complaints (if applicable) until project completion." Roberts followed up with another email a month later, on July 27, 2012, and received a response from Buch that same day, indicating that Buch had looked into what they had received during the year and that she did not see anything from Garcia Juarez. A second document was a copy of a letter addressed to Roberts from Moises Verdin of the AGC-San Diego dated November 8, 2013, labeled as "2nd CHECK W/AGC." In the letter, Verdin wrote that the AGC-San Diego had not located a DAS 140 or dispatch request form for the Project, and that Garcia Juarez was not a signatory member of their apprenticeship program. Jackson also produced a copy of web page labeled as AGC Apprenticeship and "Most Frequently Asked Questions" as Exhibit J.² The answer to one question indicates that the AGC requires contractors to maintain an annual membership with the AGC and sign a subscription agreement.

Assessment of Penalties. Kari Anderson, an Industrial Relations Representative with DLSE, testified that the penalties were assessed based on the number of days journeymen were on the Project, 450 days. The 450 days were calculated from the 2nd day journeymen were on duty for the Project to the last day journeymen were on duty. The last day worked was May 17, 2013. Anderson testified further that the amount of penalty was mitigated and set at \$60.00 per day because Garcia Juarez had one other violation but that violation had occurred close in time to the pendency of this Project.

DISCUSSION

Labor Code sections 1777.5 through 1777.7³ set forth the statutory requirements

² DLSE objected to the introduction of Exhibit J on the basis of relevance. The objection is overruled.

³ All further statutory references are to Labor Code unless stated otherwise.

governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, section 227⁴ provides that the regulations "shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7."

With respect to the requirement to issue a DAS 140, Labor Code section 1777.5, subdivision (c) states in part:

Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work.

The governing regulation for issuing DAS 140s is section 230, subdivision (a). Section 230, subdivision (a) specifies the requirement for contractors who are already approved to train by an apprenticeship program sponsor in the apprenticeable craft or trade, and the requirement for those contractors who are not so approved. Section 230, subdivision (a) states:

(a) Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work.... The DAS Form 140 or written notice shall include the following information, but shall not require information not enumerated in Section 230:

- (1) the contractor's name, address, telephone number and state license number;
- (2) full name and address of the public work awarding body;
- (3) the exact location of the public work site;
- (4) date of the contract award;
- (5) expected start date of the work;

⁴ All further regulatory references are to California Code of Regulations, title 8.

- (6) estimated journeyman hours;
- (7) number of apprentices to be employed;
- (8) Approximate dates apprentices will be employed.

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

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

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

Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an a apprentice for every five hours of labor performed by a journeyman, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

However, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

According to the regulation, a contractor properly requests the dispatch of apprentices by doing the following:

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. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee, either consecutively or simultaneously, until the contractor has requested apprentice dispatches from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

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

When DLSE determines that a violation of the apprenticeship laws has occurred, a written Determination of Civil Penalty is issued pursuant to section 1777.7. In the review of a determination as to the 1:5 ratio requirement, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (§ 1777.7, subd. (c)(2)(B).)

The Determination Was Issued Timely.

A Determination for violation of section 1777.5 "shall be issued and served on the Affected Parties no later than three years after date of accrual." (Cal. Code of Regs., tit. 8, § 232.70.) The date of accrual is the end of the contract as the affected contractor has the opportunity to meet its obligations under the law by employing apprentices for the requisite number of hours before the end of the contract. (Regulation 230.1.) According to Garcia Juarez's CPRs the last day an employee worked on the Project was May 17, 2013. Thus, the date of accrual was May 17, 2013. DLSE served the Determination by mail on April 18, 2014, which was prior to the expiration of the three year limitations period (May 18, 2016).

Garcia Juarez Failed To Employ Laborer Apprentices.

"Laborers" was the craft at issue in the Determination. With respect to the 1:5 ratio of apprentice hours to journeyman hours, Garcia Juarez employed no laborer apprentices on the

Project. Accordingly, the record establishes that Garcia Juarez violated Labor Code section 1777.5 and section 230.1.

There Were Two Applicable Committees in the Geographic Area.

There is no dispute that there were two applicable apprenticeship committees in the geographic area of the Project. Garcia Juarez merely claims that it was unaware that one of the committees, the AGC-San Diego, was an applicable committee. However, Garcia Juarez offered no testimony or evidence that it could not have determined the appropriate applicable apprenticeship committees in the geographic area of the Project.

Garcia Juarez Failed To Properly Issue A Notice of Contract Award Information and Request The Dispatch Of Laborer Apprentices.

Garcia Juarez acknowledged that it failed to provide a DAS 140 and a DAS 142 to the AGC-San Diego.

The Penalty for Noncompliance.

If a contractor “knowingly violated Section 1777.5” a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against Garcia Juarez under the following portion of section 1777.7, subdivision (a)(1):

A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as a civil penalty an amount not exceeding one hundred dollars (\$100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.

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

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

Garcia Juarez “knowingly violated” the requirement of a 1:5 ratio of apprentice hours to journeyman hours for laborer apprentices, and the record establishes that this violation was “knowingly committed.” Jackson testified that he was familiar with the requirement for use of apprentices on the Project, and familiar with the need to send contract award information, and to contact apprentice committees and request the dispatch of apprentices.

Garcia Juarez failed to meet its burden of proof by providing evidence of compliance with section 1777.5. In order to show that its failure to employ apprentices was due to circumstances beyond its control, Garcia Juarez had to demonstrate that it properly provided contact award information and properly requested the dispatch of laborer apprentices from the two applicable committees and that no apprentices were dispatched. The testimony of Jackson on this point was essentially that Garcia Juarez had complied with both requirements with respect to one apprentice committee, the LSC JAC, but that it did not know about the other apprentice committee, the AGC-San Diego. But that if it had known about the AGC-San Diego, it would have sent both a DAS 140 and a DAS 142 to it. However, Jackson did not offer any explanation for why Garcia Juarez could not have determined which applicable apprentice committees for the craft of laborers existed in the geographic area of the Project. Jackson’s testimony regarding compliance was not sufficient as discussed above. Since Garcia Juarez knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty upon Garcia Juarez on April 18, 2014. Garcia Juarez sought review of that penalty on June 20, 2014. Under the version of section 1777.7, in effect at both the time of the imposition of the penalty and the time of the request for review, subdivision (f)(2), requires the Director to decide the appropriate amount of the penalty de novo.⁵ In making this

⁵ There is no express declaration that the amendments to section 1777.7 that went into effect on January 1, 2015, apply to pending cases. Statutes apply prospectively unless there is a clearly expressed statutory intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) In this matter, application of the amendments to section 1777.7 changes the legal consequences to the affected contractor in that it precludes the affected contractor from a new review of the alleged conduct to determine whether a penalty is appropriate at all or whether it should be ordered to provide apprenticeship employment equivalent or whether the penalty should be less than that imposed. It alters the affected contractor’s burden on the issue of penalty by making the affected contractor establish that the Labor Commissioner abused her discretion where no such burden existed before. (*Id.*, at p. 938.) Moreover, equity requires that the affected contractor, who requested review in this matter prior to the change in the law, not be prejudiced by any delay in bringing this matter to hearing.

decision, the Director is to consider the factors stated in section 1777.7, subdivision (f)(1), stated as follows:

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

Here, the factors favor a low penalty. Under factor "A," the evidence establishes that the violation was not intentional: Garcia Juarez made efforts to comply with the requirement to employ laborer apprentices by sending a DAS 140 and requesting dispatch of apprentices from the LSC JAC but made a mistake by not similarly sending a DAS 140 and DAS 142 to the AGC-San Diego. Under factor "B" there is some evidence that Garcia Juarez committed other violations of section 1777.5, as Anderson testified that Garcia Juarez had one other violation that occurred during the pendency of the Project. However, Anderson did not explain the nature of the previous violation or how it was resolved. With respect to the violations on this Project, Garcia Juarez was not informed of the violation until after the Project was complete, so it did not have a chance to correct the violation even though the Center for Contract Compliance could have made known its concern in July 2012, 10 months before the Project was completed. There is some evidence of lost training opportunities for apprentices under factor "D" as journeymen laborers worked on the Project, therefore, there should have been hours of apprentice work. However, with respect to factors "D" and "E" there was no evidence that one of the two applicable apprenticeship committees, the LSC JAC, dispatched laborer apprentices in response to Garcia Juarez's timely request, and there was evidence that the other committee, the AGC-San Diego would not have dispatched apprentices to Garcia Juarez, a non-member contractor. So

even if Garcia Juarez had sent the DAS 140 and the DAS 142 to AGC-San Diego there is no evidence that it would have dispatched apprentices.

In applying these factors, the Director concludes that a daily penalty of \$10.00 is the appropriate penalty under Labor code section 1777.7. Going forward, Garcia Juarez should ensure that it checks the DAS website and consults with DAS personnel to ascertain all applicable apprenticeship committees in the geographic area of a public works project prior to commencement of the project, completes the DAS 140 and the DAS 142 or equivalent properly and sends them to all applicable apprenticeship committees in the geographic area, and that it has competent staff, and oversight of that staff, to ensure compliance with the law.

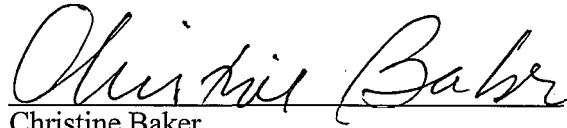
FINDINGS

1. The Determination of Civil Penalty was timely served By DLSE on Southwest.
2. There were two applicable apprenticeship committees in the geographic area of the Project in the craft of laborer: (1) the Laborers Southern California Joint Apprenticeship Committee; and, (2) the Associated General Contractors of America, San Diego Chapter.
3. Garcia Juarez failed to properly submit contract award information and failed to properly request dispatch of laborer apprentices from the two applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
4. Under Labor Code section 1777.7, a penalty is assessed upon affected contractor Garcia Juarez Construction, Inc. in the amount of \$4,500, computed as \$10.00 per day for the 450 days that journeymen laborers worked on the Project.

ORDER

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

Dated: 8/25/2015



Christine Baker
Director of Industrial Relations