STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

GRFCO, Inc.

Case No. 16-0471-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor GRFCO, Inc. (GRFCO) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on December 5, 2016, with respect to work performed by GRFCO on the Feather Hill Drive Subdrain and Villareal Drive Storm Drain Improvements project (Project) for the City of Orange (City) in Orange County, California. The Assessment found that GRFCO failed to timely and properly submit requests for dispatch of apprentices to applicable apprenticeship committees and failed to employ apprentices in accordance with Labor Code section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a). DLSE assessed an aggregate penalty of $3,900.00 under Labor Code section 1777.7.[1] GRFCO timely filed its Request for Review of the Assessment on or about December 21, 2016.

Pursuant to written notice, a Hearing on the Merits was held on July 20, 2017, in Los Angeles, California, before Hearing Officer Howard Wien. Lance A. Grucela appeared for DLSE and Jim Jackson (GRFCO's Project Manager for the Project) appeared for GRFCO. Deputy Labor Commissioner Kari Anderson testified on behalf of DLSE and Jackson testified on behalf of GRFCO. The case stood submitted on July 20, 2017.

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

The issues for decision are:

- Did GRFCO knowingly violate section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by not issuing timely and proper requests for dispatch of apprentices in a DAS Form 142 or its equivalent to the two laborer apprenticeship committees in the geographic area of the Project site?
- Did GRFCO knowingly violate section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by not employing laborer apprentices on the Project in the ratio of one hour of apprentice work for every five hours of journeyman work?
- Is GRFCO liable for section 1777.7 statutory penalties, and if so, in what amount?

In this Decision, the Director finds that GRFCO failed to timely and properly request dispatch of laborer apprentices from the two laborer apprenticeship committees in the geographic area of the Project. GRFCO, therefore, was not excused from the requirement to employ laborer apprentices on the Project in the ratio of one hour of apprentice work for every five hours of journeymen work. GRFCO also failed to employ any laborer apprentices on the Project. The Director further finds that GRFCO knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a). Under de novo review, the Director finds that the penalty under section 1777.7 shall be $3,900.00, computed at the rate of $300.00 per day for 13 days of journeyman laborer work on the Project. Accordingly, the Director affirms the Assessment.

Assessment.

The facts stated below are based on the testimony of Anderson and Jackson, and the parties' exhibits admitted into evidence.

The City advertised the Project for bid some time prior to December 4, 2014.[2] The City awarded the contract to GRFCO, with the contract dated February 18, 2015. The contract expressly notified GRFCO that the Project was a public work under the Labor Code. Attached to the contract were several sections of the Labor Code stating the prevailing wage and apprentice requirements for the Project, including section 1777.5 stating the statutory requirements governing the employment of apprentices on the Project. As to these contract attachments, the contract stated:

> The Contractor hereby acknowledges that it has read, reviewed and understands those provisions of the California Labor Code and, accordingly, hereby agrees to and shall prosecute and complete the Work under this Contract in strict compliance with all of the terms and provisions contained in those provisions of the California Labor Code.

GRFCO had journeymen laborers working on the Project for 13 days during the period beginning March 4, 2015 and ending March 20, 2015. Those journeymen performed 227 hours of work on the project. Their scope of work fell within the classification of Laborers Group 1 in the applicable Prevailing Wage Determination, SC-23-102-2-2014-1. This determination specified that Laborer Group I was an apprenticeable craft.

On Thursday, February 26, 2016, GRFCO timely and properly issued DAS 140 notices of contract award information to the two laborer apprenticeship committees within the geographic area of the Project: the Associated General Contractors of America, San Diego Chapter, and the Laborers Southern California Joint Apprenticeship Committee.

On February 26, 2016, GRFCO also issued requests for dispatch of laborer apprentices in forms DAS 142 to those two apprenticeship committees. Those DAS 142

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[2] There was no evidence of the bid advertisement date. However, DLSE's exhibit 8 established that the bid advertisement date must have been prior to December 4, 2014. This exhibit included the City's undated "Legal Notice" for the Project that commenced, "Informal sealed bids are being invited under our Bid No. 145-23; Project D-166-A; Feather Hill Drive Subdrain and Villareal Drive Storm Drain Improvements, in accordance with bid forms and specifications available at the office of the City Engineer, . . . "This Legal Notice further stated, "Bids will be received until 2:00 PM, December 4, 2014 (Thursday) in the office of the City Clerk, City of Orange, . . ." (Emphasis added.)

forms stated that the apprentices were to report for work on Monday, March 2, 2015. March 2 was the day that GRFCO had scheduled journeymen laborers to commence their work on the Project.

Two days before the February 26 issuance of the forms DAS 140 and DAS 142, Jackson had signed the DAS 140 forms expecting that his administrative assistant would issue them to the apprenticeship committees on that day, i.e. on February 24. Jackson did not discover until February 26 that his administrative assistant had inadvertently failed to issue the DAS 140 forms and DAS 142 forms to the apprenticeship committees. Jackson then had his administrative assistant issue the DAS 140 forms and the DAS 142 forms that day, i.e., on February 26. Jackson knew that the DAS 142 forms were untimely, since they stated the apprentices were to report for work on March 2, and thus failed to give 72 hours' notice to the apprenticeship committees.[3] So Jackson re-scheduled the journeymen laborers to commence their work on the Project on Wednesday March 4 rather than Monday March 2. However, GRFCO never issued any requests for dispatch of laborer apprentices to report for work on March 4 -- nor on any of the other 12 days in which GRFCO had journeymen laborers working on the Project. GRFCO did not hire any apprentices for the Project.

Anderson testified as to prior assessments and determinations of civil penalty that DLSE had issued to GRFCO for GRFCO's alleged violation of section 1777.5 for failure to employ apprentices on public works projects in the required ratio of one hour of apprentice work to five hours of journeyman work, and for alleged violation California Code of Regulations, title 8, section 230, based on GRFCO's failure to issue notices of contract award information to applicable apprenticeship committees within the geographic area of the public work sites.

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[3] The DAS 142 forms stated this 72 hours' notice requirement on their face.

DISCUSSION

1. GRFCO 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. California Code of Regulations, title 8, section 227 provides that the regulations "shall govern all actions pursuant to . . . Labor Code Sections 1777.5 and 1777.7." In the review of a determination as to the apprentice requirements, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (See § 1777.7, subd. (c)(2)(B), as it existed from June 27, 2012, to December 31, 2014 [stats. 2012, ch. 46, § 96], and Cal. Code Regs., tit. 8, § 232.50(b).)[4]

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. However, the contractor shall not be considered to be in violation of the one-to-five ratio requirement if the contractor timely and properly requests dispatch of apprentices from the applicable apprenticeship committees in the geographic area of the project (via a DAS form 142 or equivalent), the apprenticeship committees dispatch fewer apprentices than requested (or no apprentices at all), and the contractor employed all the apprentices who were dispatched.

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[4] The bid advertisement date determines the date of the applicable Labor Code sections. As stated, *supra,* the bid advertisement date was some time before December 4, 2014. Accordingly, this Decision will apply the Labor Code sections in effect in 2014. Sections 1777.5 and 1777.7 at that time were effective June 27, 2012, to December 31, 2014 (stats. 2012, ch. 46, § 96 [Sen. Bill 1038].) In that version, section 1777.7, subdivision (f)(1) and (2) required the Director to decide section 1777.7 penalties de novo.

The regulation governing these requirements is California Code of Regulations, title 8, section 230.1, subdivision (a); as to the one-to-five ratio requirement, it 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.[5] Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract.

As to the contractor being excused from the one-to-five ratio requirement if specific events occur as specified above California Code of Regulations, title 8, section 230.1, subdivision (a) states in part:

> ...Contractors who are not already employing sufficient registered apprentices (as defined by Labor Code Section 3077) to comply with the one-to-five ratio must request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required. . . . All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email. . . . . [I]f in response to a written request no apprenticeship committee dispatches, or agrees to dispatch during the period of the public works project, any apprentice to a contractor who has agreed to employ and train apprentices in accordance with either the apprenticeship committee's standards or these regulations within 72 hours of such request (excluding Saturdays, Sundays and holidays) the contractor shall not be considered in violation of this section as a result of failure to employ apprentices for the remainder of the project, provided that the contractor made the request in enough time to meet the above-stated ratio.

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

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[5] Here, the record established no exemption for GRFCO.

Here, GRFCO had journeymen laborers working on the project a total of 227 hours on 13 days during the period commencing March 4, 2015, and ending March 20, 2015. Their scope of work fell within the apprenticeable craft of Laborers Group I. GRFCO did not hire any apprentice laborers for the Project, and thereby failed to satisfy the one-to-five ratio.

As stated above, GRFCO would have been excused from the one-to-five ratio requirement if it had timely and properly requested dispatch of apprentices to the two laborer apprenticeship committees in the geographic area of the Project, and the apprenticeship committees then failed to dispatch apprentices. However, this did not happen: GRFCO did not timely and properly request dispatch of apprentices to either of the two laborer apprenticeship committees.

GRFCO did issue DAS 142 forms to the two laborer apprenticeship committees on Thursday February 26, 2015, but they were not timely and were not proper. As utilized by GRFCO, the DAS 142 forms failed to provide the required 72 hours' notice. By requesting apprentices to appear for work on Monday, March 2, 2015, the DAS 142 forms only gave 48 hours' notice.

Additionally, the DAS 142 forms were improper because they were illusory: they stated that the laborer apprentices were to report for work on March 2, 2015, but GRFCO rescheduled its journeymen laborers to commence work on March 4, 2015. Without a journeyman laborer on the job on March 2, no apprentice laborer could work on the Project. This prohibition of apprentice work when no journeyman is present is stated in California Code of Regulations, title 8, section 230.1, subdivision (c):

> Where an employer employs apprentices under the rules and regulations of the California Apprenticeship Council, . . . apprentices employed on public works must at all times work with or under the direct supervision of journeyman/men.

GRFCO expressly acknowledged the applicability of the above-quoted regulation in the DAS 140 forms it submitted to the two laborer apprenticeship committees on February 26, 2015; on these DAS 140 forms, GRFCO checked the box stating:

> We will employ and train apprentices in accordance with the California Apprenticeship Council regulations, including § 230.1 (c) which requires that apprentices employed on public projects can only be assigned to perform work of the craft or trade to which the apprentice is registered and that the apprentices must at all times work with or under the direct supervision of journeyman/men.

Accordingly, the evidentiary record establishes GRFCO's liability for its violation of section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a).

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

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

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

(§ 1777.7, subd. (a)(1).)

As used in the above provisions, a "knowing" violation is defined by California Code of Regulations, title 8, section 231, subdivision (h) as follows:

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

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

In the Assessment, GRFCO was determined to be in violation of section 1777.5 for 13 days and was assessed a penalty of $300.00 per day for a total penalty amount of $3,900.00. Under the former version of section 1777.7 that applies to this case, upon a request for review the Director decides the appropriate penalty de novo. (§ 1777.7, subd. (f)(2).) In setting the penalty the Director considers all of the following circumstances:

> (A) Whether the violation was intentional.
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> (B) Whether the party has committed other violations of Section 1777.5.
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> (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.

(§ 1777.7, subd. (f)(1) and (2).)

Here, the evidentiary record establishes that GRFCO's violations of section 1777.5 and the implementing regulation were "knowing" violations under the irrebuttable presumption quoted above: GRFCO's contract with the City for the Project notified GRFCO of its obligation to comply with the Labor Code provisions applicable to public works projects. Hence, DLSE has established sufficient facts for application of the irrebuttable presumption that GRFCO knew or should have known about the requirements of section 1777.5.

Given that GRFCO committed a "knowing" violation, the analysis turns to the five de novo review factors "A" through "E" listed above. Factor "A" – whether the violation was intentional -- favors a penalty rate of $100.00, rather than any lesser rate.

The evidentiary record clearly establishes that GRFCO's failure to hire any laborer apprentices for the Project --following GRFCO's failure to timely and properly issue requests for dispatch -- was intentional. The evidence establishes that GRFCO knew the requirements of section 1777.5 and its implementing regulations because: (1) GRFCO timely and properly issued DAS 140 forms to the two laborer apprenticeship committees in the geographic area of the Project; and (2) when Jackson realized on February 26, 2015, that the DAS 142 forms would not be issued until that day, he changed the start date the laborer journeymen from March 2 to March 4 because he knew that the DAS 142 forms failed to provide the required 72 hours' notice. The initial mistake of GRFCO's administrative assistant to timely issue the DAS 142 forms may have been inadvertent, as discussed, *supra*. However, the evidentiary record establishes that after having issued the DAS 142 forms untimely on February 26, 2015, GRFCO intentionally failed to issue any further DAS 142 forms even though GRFCO had journeymen laborers working on the Project for 13 days during the period March 4, 2015 through March 20, 2015.

Factor "B" – whether GRFCO has committed other violations of section 1777.5 -- also strongly favors setting the penalty $100.00 rather than a lesser sum. The evidentiary record establishes that prior to the issuance of the Assessment on December 5, 2016, GRFCO had committed three other violations of section 1777.5 on three separate public works projects for three separate awarding bodies – for which DLSE issued three Determinations of Civil Penalty (DCP) against GRFCO on December 29, 2014. The violations in those three cases were as follows:

1. In DLSE Case No. 44-42221-133, DLSE assessed a penalty of $14,300.00 for GRFCO's violation of section 1777.5 and California Code of Regulations, title 8, sections 230 and 230.1, based on GRFCO's failure to issue notices of contract award information to applicable apprenticeship committees in the geographic area of the public work site, failure to request dispatch of apprentices, and failure to employ apprentices on the project in the required ratio of one hour of apprentice work for every five hours of journeyman work. The case was designated for hearing as Case No. 15-0074-PWH. After the hearing on the merits, the Director issued her Decision on March 22, 2016,

finding that GRFCO had violated section 1777.5 and California Code of Regulations, title 8, sections 230 and 230.1 as stated in the DCP.[6] The Decision reduced the assessed penalty from $14,300.00 to $8,580.00.

2. In DLSE Case No. 40-42223-133, DLSE assessed a penalty of $3,800.00 for GRFCO's violation of section 1777.5 and California Code of Regulations, title 8, section 230, based on GRFCO's failure to issue notices of contract award information to applicable apprenticeship committees in the geographic area of the public work site, and GRFCO's failure to employ apprentices on the project in the required ratio of one hour of apprentice work for every five hours of journeyman work. GRFCO and DLSE entered into a settlement of the matter, but GRFCO failed to pay the full settlement sum. DLSE then obtained entry of judgment against GRFCO for the full $3,800.00 assessment, and GRFCO paid that judgment.

3. In DLSE Case No. 44-42225-133, DLSE assessed a penalty of $2,700.00 for GRFCO's violation of section 1777.5 and California Code of Regulations, title 8, section 230, based on GRFCO's failure to issue notices of contract award information to applicable apprenticeship committees in the geographic area of the public work site, and failure to employ apprentices on the project in the required ratio of one hour apprentice work for every five hours of journeyman work. GRFCO and DLSE entered into a settlement of the matter, but GRFCO failed to pay the full settlement sum. DLSE then obtained entry of judgment against GRFCO for the full $2,700.00 assessment, and GRFCO paid that judgment.

Accordingly, factor "B" strongly favors the $100.00 penalty rate.

De novo review factor "C" favors the $100.00 penalty rate. Jackson unequivocally testified that on February 26, 2015, he was on notice that the DAS 142 forms requesting apprentices for March 2 were untimely because they failed to give 48 hours' notice to the apprenticeship committees. Jackson rescheduled his journeymen to commence their work on March 4. Jackson could then have voluntarily remedied the

[6] Pursuant to California Code of Regulations, tit. 8, section 232.45, the Hearing Officer took official notice of the Director's Decision in Case No. 15-0074-PWH.

DAS 142 violation by issuing timely DAS 142 forms requesting apprentices to report for work on March 4. But Jackson intentionally failed to do so.

As to the de novo review factors "D" and "E", GRFCO's journeymen laborers worked 227 hours on the Project. Applying the one-to-five ratio, 45 hours of laborer apprentice hours were required. However, the evidence was mixed as to whether there would have been apprentice training opportunity and benefit to the apprenticeship programs. Jackson testified that GRFCO did not issue any DAS 142 forms after it had issued the untimely DAS 142 forms on February 26, 2015, because it would have been futile; according to Jackson, on prior public works projects GRFCO had issued requests for dispatch of apprentices to apprenticeship committees, but no apprenticeship committee ever dispatched apprentices to GRFCO because GRFCO was a non-union shop. However, Jackson's testimony was not fully credible: his allegation that GRFCO did not issue DAS 142 forms because the apprenticeship committees would not dispatch apprentices to GRFCO is contradicted by his testimony that he expected his administrative assistant to issue the DAS 142 forms on February 24, 2015 to timely request apprentices to work on March 2, 2015. Therefore factors "D" and "E" support neither enhancement nor mitigation of the penalty in this case.

Accordingly, the weighing of the five de novo review factors – particularly the heavy weight given to GRFCO's intentional violation in this case and GRFCO's violations in three prior cases – supports a penalty rate of $100.00 rather than a lesser rate.

The Labor Commissioner set the rate at $300.00 per violation, which requires findings that the contractor knowingly committed a second or subsequent violation of section 1777.5 within a three-year period, and that such violation resulted in apprenticeship training not being provided. (§ 1777.7, subd. (a)(1).) As stated above, the evidentiary record establishes GRFCO committed prior violations of section 1777.5 that DLSE determined in three prior cases. In addition, the testimony of Anderson establishes that each of those prior violations occurred within the three-year period preceding the issuance of the Assessment in this case on December 5, 2016.

As to the requirement that the prior violations resulted in apprenticeship training not being provided, the violations stated above in DLSE Case No. 44-42221-133 – for which the Director issued her Decision in Case No. 15-0074-PWH – fail to satisfy this requirement. The Director's Decision addressed this issue in the context of analyzing de novo factors "D" and "E", and found there was a lack of evidence that GRFCO's violations resulted in a denial of apprenticeship training.

However, GRFCO's prior violations stated above in DLSE Case Nos. 44-42221-133 and 44-42225-133 do satisfy this requirement. In those two cases, the penalties were assessed at the $100.00 rate, DLSE obtained judgments against GRFCO for the full amount of those assessments, and GRFCO paid those judgments in full. These facts demonstrate that GRFCO's is a record of repeated failure to comply, not just one isolated failure to provide apprenticeship training. That record is sufficient to establish that each of the de novo factors "A" through "E" were satisfied, including factors "D" and "E" establishing that GRFCO's violations resulted in apprenticeship training not being provided as contemplated by section 1777.7, subdivision (a)(1).

Accordingly, the requirements in section 1777.7, subdivision (a)(1) for setting the penalty rate up to $300.00 per violation are satisfied in the present case. This Decision sets the penalty rate at $300.00 per violation. GRFCO is liable for the section 1777.7 statutory penalty in the sum of $3,900.00, computed at the rate of $300.00 per day for the 13 days that GRFCO had journeymen laborers working on the Project.

FINDINGS

1. Affected contractor GRFCO, Inc. knowingly violated section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by: (a) not issuing timely and proper requests for dispatch of apprentices in form DAS 142 or its equivalent to the two laborer apprenticeship committees in the geographic area of the Project site; and (b) not employing on the Project laborer apprentices in the ratio of one hour of apprentice work for every five hours of journeyman work.

2. GRFCO, Inc. is liable for an aggregate penalty under section 1777.7 in the sum of $3,900.00, computed at $300.00 per day for the 13 days that its journeymen laborers worked on the Project.

ORDER

The Civil Wage and Penalty Assessment is 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: 8/18/2017

Christine Baker
Director of Industrial Relations