

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matters of the Requests for Review of:

**Enterprise Interiors and
Savant Construction, Inc.**

Cases Nos. 05-0185-PWH
05-0186-PWH
05-0208-PWH
05-0209-PWH

From Notices of Withholding issued by:

Rowland Unified School District

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Affected contractor Savant Construction, Inc. ("Savant") and affected subcontractor Enterprise Interiors, Inc. ("Enterprise") both submitted timely requests for review of Notices of Withholding issued by the Rowland Unified School District Labor Compliance Program ("District") with respect to two public works projects: one involving the modernization of bathrooms at six schools ("Six School Project") and the second involving the modernization of bathrooms at three schools ("Three School Project") (collectively "the Projects"). A hearing on the merits was conducted on February 28, 2006, and March 30, 2006, before Hearing Officer Anthony Mischel. Dennis P. Zentil appeared for Savant, Philip J. Henderson appeared for the District, and Kathleen M. Jorgenson appeared for intervenor Carpenters/Contractors Cooperation Committee ("CCCC"). Enterprise did not appear at the hearings on the merits although it was given notice. The matters were submitted for decision on May 19, 2006. Now for the reasons set forth below the Director of Industrial Relations issues this joint Decision modifying in part and affirming the Notices of Withholding.

SUMMARY OF FACTS

In February 2004, the District awarded contracts to Savant as general contractor for both the Six School Project and the Three School Project. Savant subcontracted with Enterprise to perform framing work on the Six School Project and to install drywall on the Three.

School Project. Work commenced on the Six School Project in April 2004 and on the Three School Project in March 2004. Work at all nine schools ended in the late summer of 2004.

After the Projects were completed, the District received complaints from numerous individuals stating that Enterprise had underpaid them for work they had performed. Labor Compliance Technician Valerie Hernandez testified that the first complaint came in late 2004 or early 2005 and that the District subsequently received the balance of the complaints from CCCC. She interviewed each complainant regarding which of the Projects they worked on, their job duties, the hours they worked, the amount that they were paid per hour, and whether they had filled out any timesheets. In addition, each complainant listed the hours that he had worked on the Projects each day on a calendar provided by the District. Valerie Hernandez testified that some of the workers referred to a date book or calendar when listing the hours that they had worked on the projects and others had provided the information from memory. Hernandez stated that some workers did not know for certain which of the two projects they had been working on at a given time. None of them filled out or signed any time sheets while working for Enterprise on the Projects.

After completing the interviews, Valerie Hernandez performed an audit of Enterprise's payroll for those workers. In cases where a worker could not remember, or did not know, which project he had been working on at a given time, she arbitrarily divided the hours between the Projects. She relied on the information provided by the workers to determine the number of hours worked on a given day. In the case of a conflict between the work schedule stated in a worker's interview and the number of hours he had filled in for a given day on the calendar, Valerie Hernandez used the number of hours from the calendar in the audit. She stated that she had reviewed the Certified Payroll Records ("CPRs") in the course of the audit, but that a number of the complainants did not appear on Enterprise's CPRs. The hours and pay rate for those who were reported did not match the information provided by the complainants. To confirm whether or not the complainants who were not reported on the CPRs had actually worked on the projects, Hernandez requested payroll and time records from Enterprise, but none were submitted to the District until after the audit had been completed. In lieu of records from Enterprise, Hernandez spoke to other workers who vouched for the fact that those individuals had worked on the Projects. After the audit and the issuance of stop

payment notices by the workers, Hernandez received a package of time sheets from Enterprise for all complainants except Alfredo Gonzalez and Raul Chavez, whom Enterprise contended had never worked on the Projects.

Six of the workers with outstanding claims testified at the hearing: Fernando Lira Granados, Sergio Lira Hernandez, Refugio Lira Hernandez, Alejandro Santa Cruz, Raul Chavez and Alfredo Gonzalez.¹ All six workers verified the accuracy of the affidavits that they submitted documenting their underpayment by Enterprise on the Projects, the accuracy of the work hours they recorded on the calendars given to the District, and the accuracy of the amounts claimed on the stop notices they signed. In addition, they all verified their signatures on the affidavits and the stop notices.

Granados testified that he performed framing work for Enterprise at three of the schools that were part of the Six School Project. He testified to the hours and days he worked by referring to the calendar he prepared that was introduced into evidence. Granados recorded a Stop Notice on April 11, 2005 stating that he was owed a total of \$6,157.88 for the work he had performed for Enterprise but that he had been paid only \$1,060.97 at the time. Granados testified that he had subsequently received a supplemental check from Enterprise for the gross amount of \$2,963.50.

Sergio Hernandez testified that he performed framing work for Enterprise, working primarily at the Giano School, which was part of the Six School Project. He testified that he and his brother, Refugio Hernandez, both worked for Enterprise on the Six School Project and that they had worked seven days per week from June 7, 2004, through August 6, 2004, with their only days off being July 4 and 5. Sergio Hernandez admitted that he and his brother had calculated the hours that they had worked from memory and that there might be discrepancies of a half-hour to an hour on three or four days. Sergio Hernandez testified that he worked on 8 Saturdays from 8:00 a.m. until 5:00 p.m., which is 9 hours. However, his calendar reflects

¹ The one remaining complainant, Ronald O'Bienes, a Carpenter Apprentice I who is listed on the District's audit spreadsheet as having been underpaid on the Three School Project, did not testify at the hearing on the merits. Nor was any evidence regarding O'Bienes introduced at the hearing by either the District or Savant. The only reference to O'Bienes is in the spreadsheet attached to Savant's post-hearing brief which states that his claim is "moot-settled by Enterprise Interiors before hearing." The District has not contested this assertion nor provided information that would form the basis for imposing liquidated damages on this claim.

9.5 hours for each of these Saturdays. Sergio Hernandez received a one-half hour lunch but no other breaks. The Hernandez brothers drove together each day to and from work. The Stop Notice signed by Sergio Hernandez on April 11, 2005 states that he was owed a total of \$28,766.22 for the work he had performed for Enterprise but that he had been paid only \$13,959.00. Hernandez subsequently received a supplemental check from Enterprise for the gross amount of \$1,795.00.

Refugio Hernandez, the brother of Sergio, testified that he performed framing work on the Six School Project. He originally worked for Enterprise on the Six School Project under the name of Juan Avila, and received checks under that name. He testified that his supervisor, Santos Hernandez, took him to a supermarket to cash those checks and that he was not asked for identification because the store employees knew Santos Hernandez. On May 4, 2004, Refugio Hernandez was interviewed by an inspector from the District and told her that he was not working under his own name. Hernandez was subsequently given a job application to fill out under his own name. Like his brother, Sergio, Refugio Hernandez testified that he worked seven days per week throughout the Six Schools Project. He also put down 9.5 hours for each of the 15 Saturdays he worked, even though he testified that his hours were from 8:00 a.m. until 5 p.m. He testified that he and his brother had figured out the hours that they worked together, since they had both been on the job at the same times and days. The Stop Notice signed by Hernandez on April 11, 2005, states that he was owed a total of \$52,701.88 for the work he had performed for Enterprise but that he had been paid only \$25,388.00 at the time. Hernandez subsequently received a supplemental check from Enterprise for the gross amount of \$5,484.00.

Santa Cruz testified that he worked for Enterprise as a carpenter on both Projects under the supervision of Santos Hernandez.² He testified that he was never paid overtime or double time and that he kept a record of the hours for which he had not been paid. He worked on the Projects from 6:00 a.m. to 6:00 p.m. every week day, including Saturdays. He testified that he worked 2 Sundays per month. When asked about having marked 3 Sundays per month as having been worked on the calendar he submitted to the District, Santa Cruz testified that it

² The District's assessment of unpaid wages for Santa Cruz is only for the Six Schools Project.

had been a long time and that sometimes it could have been more. The Stop Notice signed by Santa Cruz on April 11, 2005, states that he was owed a total of \$54,860.68 for the work he had performed for Enterprise but that he had been paid only \$18,210.00 at the time. Santa Cruz subsequently received a supplemental check from Enterprise for the gross amount of \$15,298.50.

Gonzalez and Chavez, who are cousins, both testified that they worked for Enterprise as drywallers on the Projects under the supervision of Augustin Lopez. Gonzalez testified that he sometimes got checks in his own name, but that they frequently received checks in other people's names. Chavez testified that he always received checks with other people's names and never received checks in his own name. Both workers testified that Lopez told them to cash the checks at a store near his house and that, if the check was for more than they were owed, they were to give the excess cash back to him. Gonzalez testified that he generally worked on a crew with Chavez and that Lopez moved them from school to school every few days to fill in for other workers who were missing. They testified that they worked only on weekdays from 7:00 a.m. to 5:00 p.m. and that other workers were generally still working when they left for the day. Chavez testified that he was not completely certain of the hours recorded on the calendar he submitted, as he and his cousin had recorded them from memory, but he felt confident that they were mostly accurate. The Stop Notices signed by Gonzalez and Chavez on April 11, 2005, state that they were each owed a total of \$27,820.22 for the work they had performed for Enterprise but that they had each been paid only \$11,560.00 at the time.

Jason Haradon, a Vice President at Enterprise at the time of the Projects, testified that there was no record that either Chavez or Gonzalez worked for Enterprise on the Projects. It is undisputed that Chavez and Gonzalez were not reported on Enterprise's CPRs for the Projects. He spoke to the Enterprise's superintendents (none of whom testified) and none remembered either of them doing drywall work on the Projects. Haradon thought it was possible that Gonzalez may have worked for Enterprise on an earlier, unrelated project under a different name. When shown an Enterprise identification card in the name of Raul Chavez on cross-examination, Haradon then acknowledged that Chavez might have done work for En-

terprise on the Projects, as those were the only projects for which Enterprise ever issued such cards.

Haradon testified that he knew of a few people named Augustin Lopez who had worked for Enterprise. One of them was a drywaller who may have been employed by Enterprise at the time of the Projects. He stated, however, that while the Augustin Lopez that he recalled had some English skills, he was not a supervisor.

Haradon testified that after all the work was completed and complaints began to be made, he was assigned to review the claims of underpayment on the Projects and determine what, if anything, was owed to the complaining workers. While he was employed by Enterprise during the Projects, he was not involved in the Projects nor had he ever visited any of the job sites. He explained that he had spoken with superintendents for Enterprise who had worked on the Projects and reviewed the hours reported for the superintendents in an effort to find out what the truth was once the payment problems were brought to light. Although he admitted he had no personal knowledge of whether work was done on the weekends, Haradon expressed the opinion that it was impossible for the complainants to have worked seven days per week on the Projects because the superintendents worked only half as many hours as the workers were claiming and that, "from a logical standpoint," work does not occur in the absence of a superintendent. He stated that his investigation had revealed that weekend work was performed for partial days on only two Saturdays and one Sunday during the project. He acknowledged, however, that he no longer had any documentation of that finding. He testified that Enterprise sent supplemental checks to a number of the workers after he concluded his investigation and that a letter stating the results of the investigation had been sent to the District by Enterprise's counsel. The figures presented by the District as to the unpaid wages reflect a credit for these payments.

With regard to the timesheets that Enterprise belatedly provided to the District, Haradon testified that they would have been filled out by the supervisor, Santos Hernandez. It was not Enterprise policy for workers to review or sign the timesheets, even though there was a space on the form for the employee's signature. Haradon could not describe the preparation of these records from his personal knowledge. Haradon testified that Enterprise had minimal

experience with public works projects and that they were not prepared to deal with the reporting requirements.

A review of the Enterprise CPRs shows that Haradon signed virtually all of them even though he testified that his involvement began after the Projects were completed. The signature is under the language certifying the accuracy of the information provided. During the hearing, the parties stipulated that the CPRs were utterly inaccurate and could not be relied on to determine who worked on the Projects, the hours worked, or the wages paid. Two of the Enterprise employees listed on the CPRs Haradon signed testified they never worked on the Projects.

Lonnie Truett, Savant's Controller, testified that the work subcontracted to Enterprise on each Project was very distinct. It was strictly limited to framing on the Six School Project and to drywall installation on the Three School Project. He testified that neither Chavez nor Gonzalez could have installed drywall on the Six School Project, as they claimed, because Enterprise only did framing on that Project. Similarly, Truett stated that Santa Cruz, a carpenter, could not have worked on the Three School Project, as he claimed, because only drywall work was performed by Enterprise on that project. Truett submitted voluminous daily logs which had been maintained by Savant's superintendents on the Projects to establish which day's workers from Enterprise had been on the job. Truett testified that the logs had been maintained on a daily basis by Savant's superintendents at each job site and recorded which trades were present on the job each day. He stated that the logs were submitted to the District's project manager for the Projects each week. He testified that the logs simply show which subcontractors were on the job each day; they did not record the number of workers present from each subcontractor. When asked on cross-examination about a log entry for the Giano school, part of the Six School Project, for July 2, 2004, which seemed to indicate that Enterprise had people doing both framing and drywall work at the site that day, Truett stated that the entry must be wrong because Enterprise only did framing work on that Project. The superintendents named by Truett continue to work for Savant but none testified.

Truett stated that between the first and second days of hearing, he and his project assistant had gone through the daily logs and had compiled a spreadsheet showing the specific

days that Enterprise workers were on the job at each of the nine schools. Using that spreadsheet, they reviewed the calendars submitted to the District by each of the complainants and circled the days when Enterprise did not have any workers on the job. The spreadsheets along with the marked calendars were admitted as administrative hearsay.³ Truett contended that the marked calendars he had prepared established that the complainants could not have worked on 95 of the days on the complainants' calendars because the daily logs establish that no one from Enterprise was on the applicable job sites on those days.

The parties stipulated that the subcontracts between Savant and Enterprise did not contain any of the Labor Code sections required by Labor Code section 1775, subdivision (b)(1).⁴ Although the testimony conflicted on whether Savant had access to the Enterprise's CPRs, in light of the stipulation, the conflict does not need to be resolved.

On July 28, 2005, after conducting an investigation and obtaining the approval of the Division of Labor Standards Enforcement, the District served Notices of Withholding of Contract Payments for both of the Projects (collectively "the Notices").⁵ Savant served a Request for Review of the Notices on September 20, 2005, and Enterprise served a Request for Review of the Notices on September 23, 2005. The District forwarded a copy of Enterprise's Request for Review to the Department of Industrial Relations on November 7, 2005, but did not forward a copy of Savant's Request for Review until December 14, 2005 when it was ordered to do so by the Hearing Officer.

The parties stipulated that within 60 days of the Notices Enterprise made full payments to five of the complainants in satisfaction of the amounts due them. The parties therefore stipulated that the claims of those workers were resolved and that the forfeiture was reduced by the contract amounts withheld by the District as to those workers. The amended claims for the Projects were as follows:

³ See, Cal. Code Regs., tit. 8, §17244. The regulations controlling these proceedings are found starting at California Code of Regulations, title 8, sections 17200 *et seq.* These regulations will be referred below as "Rule" with the last two digits of the section, e.g., the above regulation would be referred to as Rule 44.

⁴ All statutory references are to the Labor Code unless otherwise specified.

⁵ The parties stipulated that the Notices were timely.

	Six Schools	Three Schools
Unpaid Prevailing Wages	\$ 48,563.05	\$ 20,832.12
Section 1775 Penalties	\$ 16,850.00	\$ 7,100.00
Section 1813 Penalties	\$ 8,675.00	\$ 3,325.00
Total	\$ 74,088.05	\$ 31,257.12

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

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].)

Labor Compliance Programs (LCPs) under which the District enforces prevailing wage requirements are 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." (Lab. Code, §90.5(a), and *see, Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate. Section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(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 Notice of Withholding of Contract Payments under section 1771.6.

When an LCP determines that a violation of the prevailing wage laws has occurred, a

Notice of Withholding of Contract Payments is issued pursuant to Labor Code section 1771.6. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under Labor Code section 1742. Subdivision (b) of section 1742 provides that the affected contractor or subcontractor has the burden of proving that the basis for the Notice of Withholding of Contract Payments is incorrect.

The Identified Workers Are Entitled To Unpaid Prevailing Wages.

Under Rule 50(a), the District must establish a prima facie case for the withholding of contract payments. Once it has done so, the burden shifts to contractor or subcontractor to prove that "the basis for the [withholding of contract payments] is incorrect." (Lab. Code, § 1742(b), Rule 50(b).)

In *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 728, the court found that it was the employer's duty to keep accurate time records showing the beginning and ending of each work period. Imprecise evidence offered by the employee who performed the work can provide a sufficient basis for damages as a matter of just and reasonable inference where such contemporaneous records do not exist. The burden then shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. In *Hernandez*, because the employer did not keep proper records, the employer was not able to overcome the worker's evidence showing the days and hours worked which consisted of calendar entries solely created from the worker's memory.⁶

Here, each of the workers who is subject to one of the Notices testified to the hours he worked, the days he worked, and the wages he received (sometimes by referring to his verified Stop Notice). There are sufficient variations in their testimony to believe that their estimated hours and days are not fabricated. Sergio and Refugio Hernandez could verify the hours each worked as they commuted together. Chavez and Gonzalez, who claimed substantially less than the others, testified they were usually the first workers to leave. While not perfectly accurate, the workers' testimony and related documents are sufficient to create a rea-

⁶ This rule is identical to the rule in federal wage and hour cases. *Anderson v. Mt. Clements Pottery* (1945) 328 U.S. 680, 687.

sonable inference of the number of hours of work. The only basis on which to reduce the claimed unpaid wages is the very specific evidence that shows the Hernandez brothers could not have worked 9.5 hours each Saturday. As they each testified they only worked from 8:00 a.m. until 5 p.m. and that they received a one-half hour lunch break, their claim for Saturday work has to be reduced by 1 hour for the 8 Saturdays Sergio Hernandez worked and for the 15 Saturdays Refugio Hernandez worked.

Enterprise and Savant have not otherwise presented sufficiently precise evidence to negate a reasonable inference resulting from the workers' testimony. For example, Savant argues that Santa Cruz could not have worked every Sunday because its superintendents did not work on Sunday. Even if Truett's testimony of what Savant superintendents did is competent evidence, it does not rebut the testimony based on personal knowledge of what **Enterprise** employees did. The records from Enterprise do not buttress Savant's position because there was no authentication of the manner of preparation, including when they were prepared, who prepared them, the information on which the records were based, or how they were prepared. Under *Hernandez*, this is not enough to meet the employer's heightened burden. Savant never explains why the Director should credit its arguments and unauthenticated documents over the testimony from witnesses with personal knowledge. This is especially perplexing when at least some witnesses with personal knowledge to support Savant still work for Savant. Savant's evidence, in short, is more argumentative than persuasive.

The only records that have some indication of accuracy are Savant's superintendent's records, which Savant argues shows that some workers could not have performed the work claimed on their documents filed with the District because the claims were for work not done on the specified projects—i.e., they claimed dry wall work on the framing project or *vice versa*. There is a legitimate reason for this conflict between their records and the Notice, namely the District's allocation of hours between the projects when the worker could not remember at which school he worked. This allocation decision, in turn, is produced by the fact that there were not accurate records from Savant or Enterprise to say who worked where. Normally, such a conflict between recollected oral testimony and authenticated, contemporaneous written records as what kinds of work was done would discredit the worker. But here the cause clearly is not the worker's recollection but the decision of the District as to which

project to charge. To disallow recovery based on an adverse inference as to credibility would be inaccurate, because the workers' testimony was otherwise believable. Ultimately, it would contradict the purpose of the public works laws, because it would effectively reward the subcontractor, who is obligated to keep accurate time records, for failing to do so, and the general contractor who was in the best position to know, earlier than any, that the subcontractor was not keeping *any* time records (even those required for private work.). Further, Truett's response on cross-examination that one record showing both framing and drywall by Enterprise at a Six School site was "wrong" is cursory—it diminishes the weight accorded to these records, in light of the fact that the superintendents never testified, and live would have let the issue be explored completely. While this is a close question, ultimately it is the contractor who has the burden of proof, which has not been met here.

Enterprise and Savant Are Liable for Penalties Assessed under Labor Code

Section 1775.

Section 1775 provides in relevant part:

(a)(1) The contractor ... shall, as a penalty to the state ..., forfeit not more than fifty dollars (\$50) 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.

(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 ... 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...
- (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

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

Amount of Section 1775 Penalties: As with the merits of whether prevailing wages are due, the affected contractor and subcontractor have the burden of proving that the District abused its discretion in setting the daily amount of the penalties.

Abuse of discretion is established if the District "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." Code Civ. Pro., §1094.5(b). In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances, the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.

Enterprise failed to pay its employees at the California prevailing wage rate. The District's imposition of penalties of \$50 per day per violation is not unreasonable. There is no evidence that Enterprise made a good faith mistake in paying their employees for fewer hours than they worked. There is no evidence that Enterprise relied on any reliable timesheets in paying its employees. According to the District's Request for Approval of Forfeiture submitted to DLSE, it was the lack of accurate documentation, the substantial variations between the workers' claims and the highly inaccurate CPRs, as well as Enterprise's recalcitrance during the audit that justified the penalty amount.

The one Enterprise employee who did testify, Haradon, undercut his own credibility by denying prior involvement in the Projects even though he signed weekly affidavits that the hours reported on totally discredited CPRs were accurate. No other mitigating evidence was submitted to show an abuse of discretion in setting the penalty amount. Nor did Savant or Enterprise introduce any evidence to prove that the District had not "proceeded in a manner required by law."

As to the number of violations assessed, even though Savant proved that two of the workers worked fewer hours on some Saturdays, there were still violations on those days. Therefore, there is no basis for reducing the number of violations subject to the \$50 penalty amount.

Contractor Liability: Savant's main argument on section 1775 penalties is di-

rected at the joint and several nature of them. A Contractor and subcontractor are jointly and severally liable for section 1775 penalties unless the contractor proves the elements in section 1776(b). A general contractor may avoid liability for section 1775 penalties if it proves that it had no knowledge that the underpayments were occurring and fully complied with four specified requirements. Section 1775(b) provides in pertinent part that:

If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

The language, "unless the prime contractor fails to comply with all of the following requirements," means that the burden is on the contractor to show that it did in fact satisfy all four requirements. Savant misreads this requirement when it argues that it is entitled to relief under section 1775(b) unless the District proves that it failed to satisfy all four of the performance standards. The failure to satisfy any one of the enumerated requirements will deny the contractor relief under this section.

In this case, it is uncontested that Savant did not know of the violations caused by Enterprise. However, the subcontracts between Savant and Enterprise did not contain the re-

quired statutory language, as Savant has admitted. With its admitted failure to satisfy subdivision (b) (1), Savant cannot establish that it is entitled to relief from penalties under Labor Code section 1775(b). Therefore, Savant is jointly and severally liable for the full penalties assessed on Enterprise under section 1775.

Enterprise and Savant Are Liable for Penalties Assessed under Section 1813.

Section 1813 states in relevant part as follows:

The contractor or subcontractor shall, as a penalty to the state ..., forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Section 1815 authorizes overtime work on public works projects only if the employees are paid at least 1½ times the prevailing rate for work in excess of eight hours in a day or 40 hours in a week. Failure to pay this required rate for overtime constitutes a distinct violation under section 1813, and unlike the penalties assessed under section 1775, the District has no discretion to vary the amount of these penalties assessed for each violation of overtime requirements.

As with the other issues, the affected contractor and subcontractor bear the burden of proof. For the reasons given above, the bulk of the Notices are being affirmed. For the same reason that there is no basis to reduce the number of section 1775 penalties, there is no basis to reduce the number of section 1813 violations.

Enterprise and Savant Are Liable For Liquidated Damages..

Section 1742.1(a) provides that:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 ..., the affected contractor ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the assessment or notice 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. If the contractor ... demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) states as follows:

To demonstrate "substantial grounds for believing the Assessment ... to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment ... was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment...

More than 60 days have elapsed since the service of the Notices, and the wages found due by this Decision have not been paid. The payments made by Enterprise were already credited to the claimed unpaid wages. Enterprise, needless to say, presented no evidence that demonstrate that it had any basis for contesting the Notices. Savant's basis for contesting the Notices was based on its belief that the claimed hours were excessive, but not on any credible evidence that refuted the charges made in the Notice as to unpaid wages. While Savant's challenge may have had a subjective basis in that Savant truly believed the hours were overstated, nothing in the presentation of its defense shows that at the time it filed its request for review it had an objective basis that in fact the workers' estimates were wrong. Therefore, there is no basis for waiving payment of the liquidated damages, and both Enterprise and Savant are liable for liquidated damages.

Any Delay in the Hearing on the Merits Does Not Deprive the Director of Jurisdiction or Require the District's Notices of Withholding Be Dismissed.

Savant has argued that through no fault of its own, the District failed to ensure that the hearing on this matter began within 90 days of its Request for Review as required by section 1742(b) and that the District's Notices of Withholding therefore must be dismissed. There is no factual question that the hearing did not proceed within 90 of Savant's Request being sent to the District because the District failed to forward the request in the time frame provided by Rule 23.

Section 1742(b) provides that the Director's hearing officer shall start the hearing within 90 days "upon receipt." A hearing officer can only be appointed upon receipt by the Director's office of the Request for Review. Rule 04(a). This means that the statutory time within which to begin a hearing starts not with the enforcing agency's receipt of a request but

with the Director's receipt. To avoid the precise problem that occurred here (i.e. that the District failed to comply with Rule 23), requesting parties are advised to send a courtesy copy of their requests to the Director. Rule 23(d). Savant did not do this here.

The District sent Savant's Requests for Review to the Director on December 14, 2005; the Director's office received the Requests the following day. Therefore the latest that the hearing should have commenced was March 15, 2006, under the Director's regulations. The hearing in fact began on February 28, 2006, within the statutory 90 days.

Even if Savant were correct that the proper date from which to calculate the 90 days were the date on which the District received the Requests, dismissal of the Notices would not follow. The California Supreme Court in *California Correctional Peace Officers Association v. State Personnel Board*, (1995) 10 Cal.4th 1133, analyzed a similar issue when it held that the 90 day requirement of Government Code section 18671.1 was not jurisdictional in effect. Thus, the State Personnel Board's failure to comply with Government Code section 18671.1's requirement that a decision "shall" be issued within 90 days neither deprived the Board of jurisdiction to proceed beyond that time limit nor did it require a dismissal of the underlying appeal.

The Supreme Court's conclusion was premised on the distinction between legislative provisions that are "directive" or "mandatory" in effect. The Court held that an agency is not deprived of jurisdiction merely because a statute uses the word "shall." Rather, the failure to comply with a particular procedural requirement must be viewed in light of whether there is an expression of statutory intent to invalidate the governmental action as a result of that failure. In addition and of particular relevance to the issue here, the Supreme Court found that time limitations are "deemed to be directory unless the Legislature clearly expresses a contrary intent." *Id.* at 1145.

As in *California Correctional Peace Officers Association*, section 1742 does not provide or suggest within its terms that the failure to commence a hearing within 90 days is jurisdictional in effect, or that as a consequence of that failure, the governmental action is invalidated. Nothing has been provided that would show or tend to show a contrary legislative intent. Consequently, the various time limitations set forth in section 1742(b) are directive.

The failure to commence the hearing within 90 days does not present a jurisdictional impediment to proceeding nor does it operate to invalidate the District's Notices of Withholding.⁷

FINDINGS

1. Affected contractor Savant Construction, Inc. and affected subcontractor Enterprise Interiors, Inc. filed timely Requests for Review of the Notices of Withholding issued by the District with respect to the Projects.

2. The Notice for the Six Schools Project is modified by reducing the unpaid wages for Sergio Hernandez by \$ 416.64 (8 days times \$ 52.08) and for Refugio Hernandez by \$ 781.20 (15 days times \$ 52.08) to reflect the one hour reduction on Saturdays for these two workers. This reduces the unpaid wages to \$ 47,365.21.

3. The Notice for the Three Schools Project is affirmed as to the claimed unpaid wages of 20,832.12.

4. The penalties under section 1775 are affirmed for both Projects.

5. The penalties under section 1813 are affirmed for both Projects.

6. Liquidated damages are awarded in the amount of \$ 47,365.21 (Six School Project) and \$ 20,832.12 pursuant to Labor Code section 1742.1.

7. The failure of the District to forward Savant's Requests for Review to the Director did not deprive the Director of jurisdiction to decide this case.

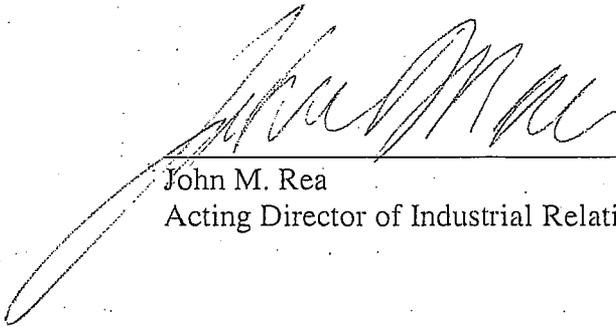
ORDER

The Notices of Withholding are 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: _____

⁷ Contrast the time limit for requesting review under section 1742(a), which provides that the assessment will become "final" if not appealed within that limit. The use of similar language in Labor Code section 98.2 was found to establish a mandatory and jurisdictional time limit in *Pressler v. Donald L. Bren Co.* (1982) 32 Cal. 3d 831.

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John M. Rea
Acting Director of Industrial Relations