

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Idowu Oghogho, doing business as ID Vortex
Construction Company**

Case No. 08-0112-PWH

From a Notice of Withholding of Contract Payments
issued by:

California Department of Transportation.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Idowu Oghogho, doing business as ID Vortex Construction Company (“Oghogho”), filed a timely request for review from a Notice of Withholding of Contract Payments (“Notice of Withholding”) issued by the California Department of Transportation (“Caltrans”) with respect to a contract for the removal of homeless debris. A hearing on the merits was held in Sacramento, California on November 13, 2008, before hearing officer John Cumming. Oghogho appeared on his own behalf, and Cheryl Pirtle appeared for Caltrans.

The Notice of Withholding determined that Oghogho was liable for \$1,874.16 in back wages, \$950.00 in penalties under Labor Code section 1775,¹ and potentially \$1,874.16 in liquidated damages under section 1742.1. However, in light of Oghogho’s intervening discharge in bankruptcy, Caltrans stipulated that its recovery is limited to \$1,750.00, which is the amount being withheld from contract payments due to Oghogho and slightly less than the total wages found due. Because there is no dispute that the back wages remain unpaid, and because the amount withheld by Caltrans was effectively forfeited by Oghogho for the benefit of the workers to whom the wages were due, the Director of Industrial Relations affirms the Notice of Withholding as to the withheld amount and vacates the balance of the Notice of Withholding.

¹ All statutory references hereinafter are to the Labor Code unless otherwise specified.

FACTS

The relevant facts are not in dispute. On June 21, 2007, Caltrans issued an Invitation for Bid for a two-year contract to perform homeless debris removal services on a seasonal on-call basis in the Delta Region (Contra Costa and parts of Sacramento and Solano Counties). The work required the payment of prevailing wages for the classification of Laborer Group 4 under General Prevailing Wage Determination NC-23-102-1-2007-1. With a predetermined increase that became effective on June 25, 2007, this required payment of a straight-time total hourly rate of \$31.99 per hour (basic hourly rate of \$18.58 plus \$12.94 for employer fringe benefit contributions and a \$.47 training fund contribution) for work performed in Contra Costa County, and a dollar less in the other two counties.

On July 11, 2007, Oghogho submitted a bid to perform this work at a proposed contract rate of \$31.25 per hour.² Rather than disqualifying the bid, a Caltrans representative met with Oghogho to confirm his intent to submit a below cost bid and offer an opportunity to withdraw the bid. However, Oghogho would not withdraw the bid and proceeded to sign a contract based on his proposal.

Oghogho performed one two-day job for Caltrans in late October and another one-day job in December, all in Contra Costa County. Oghogho paid his employees the basic hourly wage portion of the prevailing wage (*i.e.* \$18.58 per hour) but did not pay the fringe benefits. Oghogho started to set up accounts to provide health and pension benefits for his employees but never made payments to those accounts on the employees' behalf. Oghogho also had his employees sign employment contracts which stated, among other things, that they were required to work six hundred hours to qualify for medical benefits and four thousand hours to qualify for a pension. Oghogho had just started his business, and none of the employees had yet worked the required minimum number of hours for either benefit.

After the initial job, Oghogho tried to renegotiate his contract to obtain additional funds to cover his prevailing wage obligation, but Caltrans refused.³ Caltrans subsequently withheld

² The total bid was for \$75,000.00, calculated at the rate of \$31.25 per hour for 2400 hours over a two-year period. However, the contract did not guaranty that amount of work.

³ Caltrans explained that its contracting policies precluded it from unilaterally rejecting Oghogho's bid in the first

contract payments for the December job due to Oghogho's failure to provide proof of payment of the fringe benefit portion of the prevailing wage. Caltrans eventually determined that back wages were due to Oghogho's employees in the total amount of \$1,874.16, all attributable to the unpaid fringe benefits. The amount actually withheld by Caltrans from contract payments that were otherwise due to Oghogho was \$1,750.00.

Oghogho filed a petition for relief under Chapter 11 of the Bankruptcy Code after signing his contract with Caltrans but before being assigned any work. Oghogho later converted his bankruptcy to a Chapter 7 proceeding, which eventually resulted in the cancellation of his contract with Caltrans and a full discharge under 11 U.S.C. section 727, including a discharge of any direct employee wage claims against Oghogho. However, the Trustee for the bankruptcy estate disclaimed any interest in the \$1,750.00 that Caltrans had withheld from Oghogho.

In light of the discharge in bankruptcy, Caltrans stipulated that it was not seeking to recover any amounts in excess of the \$1,750.00. While not disputing his failure to pay the assessed wages, Oghogho nevertheless seeks to recover the amount being withheld by Caltrans based on his discharge in bankruptcy, his asserted rights as a debtor, and claims of hardship under various state and federal statutes.

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.

instance, since some companies intentionally underbid in order to "get a foot in the door" as state contractors. Once Oghogho signed his contract, Caltrans' policies precluded any amendment to relieve Oghogho from the consequences of his underbid, since doing so would interfere with the integrity of the bidding process, by effectively inviting contractors to submit unreasonably low bids in anticipation of later amending their agreements to obtain a higher amount.

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 (citations omitted). Prevailing wage requirements are enforced by the state not only for the benefit of workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§90.5(a), and see *Lusardi, supra.*)

Section 1775 makes contractors liable for the difference between prevailing wages due and the wages actually paid, plus penalties for each violation. Violators may also be subject to additional liabilities and sanctions under other sections of the Labor Code. Prevailing wage requirements are enforced by the Labor Commissioner and by awarding bodies through the determination of violations, the assessment of back wages and penalties, and, when possible, the withholding of contract funds otherwise due to the contractor to satisfy these liabilities. Section 1771.5(b)(6) mandates that an awarding body with an approved labor compliance program, such as Caltrans, “shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.” An affected contractor may appeal a Notice of Withholding Contract Payments by filing a Request for Review under section 1742. In that appeal the contractor “has the burden of proving that the basis . . . for the Withholding of Contract Payments is incorrect.” (Cal.Code Reg., tit.2, §17250(b); see §1742(b).)

In this case it is undisputed that Oghogho underpaid the required prevailing wages and that the total amount of his underpayment was \$1,874.16. It is also undisputed that Caltrans issued a Notice of Withholding pursuant to section 1771.6 for that underpayment plus associated penalties, and that Caltrans withheld \$1,750.00 in contract payments that were otherwise due to Oghogho. The ultimate question in this case is whether Oghogho’s employees are entitled to receive the funds withheld by Caltrans as part of the prevailing wages due for their work, or whether, as Oghogho contends, those funds must be paid to Oghogho.

Section 1774 requires contractors to “pay not less than the specified prevailing rates of wages to all workmen [sic] employed in the execution of the contract.” The prevailing rate is the hourly wage the Director determines is paid to the greatest number of workers in the relevant labor market and includes employer payments for fringe benefits. (*See* §1773.1(a).) The total pre-

vailing wage (including fringe benefits) is the amount due to a worker under section 1774, although the fringe benefit portion may be provided either in cash or in the form of fringe benefit contributions for the benefit of the workers employed on the project (§§1771 and 1774). In the case of contributions to benefits plans, they must be “irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.” (§1773.1(b)(1).) Essentially this means first that the benefits must have some actual current value to the workers, and second that the contractor has no right under any set of conditions to get the contributions back.⁴ In light of these requirements, Oghogho’s argument that his employees did not work a sufficient number of hours to qualify for medical or pension benefits is not a valid reason for not paying this portion of the prevailing wage to those employees. Moreover, under no circumstances would Oghogho have any right to recover that portion of the prevailing wage.

In his request for review and in several other letters and statements, Oghogho also raises fourteen other grounds for challenging the Notice of Withholding, with citations to over two dozen state and federal statutes. The majority of these contentions pertain to his right to relief from contract obligations and related contract rescission rights under the federal bankruptcy and state civil statutes as well as more specific rights to relief from obligations to make pension contributions (under the Employee Retirement Income Security Act) or pay prevailing wages (under federal and state statutes) on the basis of hardship. Oghogho raises additional legal arguments under state and federal law based on his rights as a debtor who has been discharged in bankruptcy. Oghogho further asserts that he is not liable for penalties in light of the standards used for setting the penalty amount under section 1775. None of these arguments has merit as to the contract payments being withheld by Caltrans.

Oghogho’s contractual claims are largely irrelevant. The obligation to pay prevailing wages imposed by the California Labor Code cannot be overridden by contract. (*Lusardi, supra*, 1 Cal.4th at 986 – 988.) Moreover, Oghogho’s claimed right to relief from further contractual obligations is moot inasmuch as he has, in fact, been granted that relief through his discharge in bankruptcy. The termination of the contract, however, does not give Oghogho the right to re-

⁴ As Caltrans noted, Oghogho’s benefit accounts did not meet the test of being bona fide third party plans or funds because they were set up in his own name and did not irrevocably set aside funds for the benefit of his workers.

cover the payments that remained due under that contract; instead the termination of the contract extinguished his contractual rights to the same extent as it extinguished his contractual obligations to Caltrans.⁵

Oghogho's claimed entitlement to the \$1,750.00 based on his discharge in bankruptcy and exemption rights as a debtor, necessarily assumes a property interest in that money that is superior to the claims of others. These arguments fail in light of the fact that the money is, and at all relevant times has been, in Caltrans' possession and has effectively been forfeited by Oghogho and held in trust for the benefit of his workers pending the resolution of this review proceeding. (*In re Great South Beach Construction* (E.D.N.Y., 1992) 145 B.R. 372.; and *In re Pacific Marine Dredging and Construction* (Bkrtcy.D.Or.,1987), 79 B.R. 924; and *see also J & K Painting Co. v. Bradshaw* (1996) 45 Cal.App.4th 1394, 14045 [unpaid wages considered forfeited upon violation of prevailing wage law].) Notably, the trustee in Oghogho's bankruptcy did not regard the money as an asset of Oghogho's to be recovered for the bankruptcy estate, effectively undercutting Oghogho's own claim of interest in the money. Furthermore, the discharge of any direct claims that Oghogho's workers might have against him did not discharge the workers' entitlement to the money being held for their benefit by Caltrans.

Finally, Oghogho's arguments concerning the penalty provisions of section 1775 are moot because Caltrans no longer seeks to recover any penalties assessed by the Notice of Withholding. In light of Oghogho's discharge in bankruptcy, Caltrans does not seek to collect any amounts over the \$1,750.00 withheld from Oghogho's contract payments, which is less than the total amount of unpaid prevailing wages. Accordingly, the issues of penalties, liquidated damages, and interest are moot, and the Notice of Withholding is vacated as to amounts sought in excess of the \$1,750.00 withheld by Caltrans.

//

//

⁵ In terms of Oghogho's specific rights under the laws governing the rescission of contracts, Civil Code section 1691(b) requires a party seeking to rescind a contract to restore or offer to restore to the other party everything of value received under the contract. In other words, Oghogho cannot invoke his right to rescind the contract, under whatever facts or theory support that action, without also forfeiting any benefits he has received or was entitled to under the contract.


FINDINGS

1. Affected Contractor Idowu Oghogho doing business as ID Vortex Construction Company filed a timely Request for Review from a Notice of Withholding of Contract Payments issued by the California Department of Transportation.
2. The Notice of Withholding of Contract Payments assessed \$1,874.16 in back wages and \$950.00 in penalties under section 1775 based on Oghogho's failure to pay the fringe benefits portion of the prevailing wages due for work on a contract for homeless debris removal. Pursuant to this Notice of Withholding, Caltrans withheld \$1,750.00 from contract payments otherwise due to Oghogho for work on that contract.
3. Oghogho failed to pay the wages found due by Caltrans.
4. The \$1,750.00 withheld by Caltrans was forfeited by Oghogho for the benefit of the workers to whom the wages were due, and Oghogho's subsequent discharge in bankruptcy does not entitle him to recover those funds from Caltrans.
5. Caltrans stipulated that it is not trying to recover any additional amounts from Oghogho.
6. In light of the foregoing Findings, the Notice of Withholding of Contract Payments is affirmed as to back wages in the amount \$1,750.00, which shall be distributed to the workers to whom they are due on a pro rata basis. The Notice of Withholding of Contract Payments is vacated as to all other amounts and potential liabilities.

ORDER

The Notice of Withholding of Contract Payments is affirmed as to \$1,750.00 withheld by Caltrans and vacated as to the remainder as set forth in the foregoing Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 2/2/09



John C. Duncan
Director of Industrial Relations