

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**DVBE ASAP, Inc.**

Case No. 16-0448-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor DVBE ASAP, Inc. (DVBE) submitted a timely Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on November 4, 2016, by the Division of Labor Standards and Enforcement (DLSE) with respect to work DVBE performed for the County of San Bernardino (Awarding Body) in connection with the Bloomington Area ADA Ramps project (Project) located in San Bernardino County. The Assessment asserted that \$393,067.47 was due in unpaid prevailing wages, training fund contributions, and statutory penalties..

A Hearing on the Merits was conducted in Los Angeles, California, before Hearing Officer Douglas P. Elliott on November 28, 2017. Anselmo Ybarra III (Secretary and owner of DVBE) appeared for DVBE and Sotivear Sim appeared as counsel for DLSE. Industrial Relations Representative Selene Barillas testified in support of the Assessment. Ybarra testified on behalf of DVBE.

The parties stipulated as follows:

- The work subject to the Assessment was performed on a public work and required the payment of prevailing wages and the employment of apprentices under the California Prevailing Wage Law, Labor Code sections 1720 – 1861.<sup>1</sup>
- The Request for Review was timely.
- No wages were paid or deposited with the Department of Industrial Relations

---

<sup>1</sup> All further section references are to the California Labor Code, unless otherwise specified

under section 1742.1 as a result of the Assessment.

The issues for decision are:

- Was the Assessment timely under section 1741?
- Was the DLSE enforcement file timely made available to DVBE?
- Did the Assessment correctly find that DVBE failed to pay the required prevailing wages for all time worked on the Project by its workers?
- Did the Assessment correctly find that DVBE failed to pay the correct fringe benefits amount?
- Did the Assessment correctly find that DVBE failed to contribute the required training funds for its workers on the Project?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1775?
- Did DVBE submit the required contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner?
- Did DVBE properly request the dispatch of apprentices for all employed crafts?
- Did DVBE employ apprentices in the required minimum ratio of apprentices to journeypersons on the Project?
- Did the Labor Commissioner abuse her discretion in setting penalties under section 1777.7?
- Did DVBE demonstrate substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages?
- Did DVBE violate section 1776, subdivision (h), by failing to timely respond to DLSE's request for certified payroll records (CPRs)?
- Does the evidence provided by DLSE provide prima facie support for the Assessment?

For the reasons set forth below, the Director finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, but that DVBE carried its burden of proving that the basis of the Assessment

was incorrect, in part. (See Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, the Director issues this Decision affirming but modifying in part the Assessment.

## **FACTS**

### The Project.

The Awarding Body advertised the Project for bid on November 18, 2014. The successful bidder was DVBE, which entered into a construction contract with the Awarding Body on or about February 10, 2015 (Contract). The Contract included references to the Labor Code requirements for payment of prevailing wages, employment of apprentices, and the keeping and provision of CPRs. As described in a memo from the Awarding Body's Department of Public Works to the County Board of Supervisors: "The Project will construct pedestrian curb ramps and other improvements that meet Americans with Disabilities Act standards" at six designated intersections in the Bloomington area. The memo also stated: "Following Board approval of this item, construction is anticipated to commence the beginning of March 2015 and be completed by the end of March 2015." On April 29, 2015, the Awarding Body recorded a notice of completion stating that the Project was completed on April 10, 2015. (DLSE Exhibit No. 4).

### The Assessment.

The Assessment was served on DVBE on November 4, 2016. It found that DVBE failed to pay the required prevailing wage rate and underpaid all workers including those in the classifications of Laborer and Cement Mason; failed to pay all training fund contributions due; failed to submit CPRs as requested by DLSE; failed to fulfill its obligation to provide notice of the Contract award to, and request dispatch of apprentices for the crafts of Laborer and Cement Mason from, all available committees; and failed to meet the minimum 1:5 ratio of apprentice to journeyman hours. The Assessment found unpaid prevailing wages and training fund contributions in the collective amount of \$13,167.47. Penalties were assessed under section 1775 at the rate of \$200.00 per violation for 55 violations, for a total amount of \$11,000.00. Penalties were also assessed under section 1777.7, subdivision (a) at the rate of \$100.00 per day for

39 days of noncompliance, for a total amount of \$3,900.00. Penalties were assessed under section 1776 in the amount of \$100.00 per worker per day for ten workers over a period of 365 days, for a total amount of \$365,000.00.

Applicable Prevailing Wage Determinations (PWDs).

Set forth below are the two relevant PWDs that were in effect on the bid advertisement date. It is undisputed that these PWDs were applicable to the work done on the Project, and there is no dispute as to the proper classification of any worker.

1. Cement Mason for Southern California (SC-23-203-2-2014-1) (Cement Mason PWD). The basic hourly rate provided in the Cement Mason PWD is \$31.85, the combined fringe benefits are \$21.25 per hour, and the training fund contribution rate is \$0.55 per hour, for a total of \$53.65 for each straight-time hour.
2. Laborer and Related Classifications for Southern California (SC-23-102-2-2014-1) (Laborer Group 1 PWD). The basic hourly rate provided for Laborer Group 1 is \$30.19, the combined fringe benefits are \$18.05 per hour, and the training fund contribution rate is \$0.64 per hour, for a total of \$48.88 for each straight-time hour.

The DLSE's Investigation.

On August 4, 2015, DLSE docketed a complaint from worker Paul Moreno. Moreno submitted complaints regarding two separate projects. One concerned a project identified as Perris Valley Line/Mt. Vernon (Mt. Vernon) and was assigned DLSE Case No. 40-46719/223. The other complaint concerned this Project and was assigned DLSE Case No. 40-46720/223. Both cases were assigned to Deputy Labor Commissioner Fred De Leon.

On August 7, 2015, by both regular and certified mail, DLSE served on DVBE and the Awarding Body its initial investigatory requests as to the Project, including a request for CPRs, which clearly indicated that "Bloomington Area ADA Ramps" was the project for which records were requested. On or about the same date, DLSE also served initial requests for records as to the Mt. Vernon project. According to De Leon's "PW 900" notes submitted into evidence by DLSE, on August 12, 2015, De Leon received a

call from Ybarra concerning the latter (Mt. Vernon) project. De Leon's notes state: "Ybarra clarified the correct name for the project and applicable AB [awarding body]. Information clarified on filemaker and request for information will be sent to the correct AB. Advised Ybarra to still follow request for information and provide certified payroll records. Ybarra acknowledged the request and the time within which the request must be fulfilled."

On August 11, 2015, De Leon received an email from the Awarding Body in response to his request for information on the Project. (DLSE Exhibit No. 18.) The email enumerated electronic copies of documents attached, and closed by stating: "Please note that DVBE ASAP has not provided certified payroll records."

DVBE never submitted the CPRs to DLSE or otherwise responded to the request for records on the Project. On September 3, 2015, the certified mail sent to DVBE was returned to DLSE by the United States Postal Service (USPS). The USPS online tracking site indicates that the letter was delivered to DVBE's address of record on August 10, 2015, but no authorized recipient was available, so a notice was left. The letter was returned as unclaimed after the maximum hold time had expired.

On October 3, 2016, De Leon interviewed the complainant, Moreno, by telephone. According to De Leon's notes, during that interview De Leon learned the identity of another worker on the Project, Robert Pitchford. De Leon interviewed Pitchford by telephone on October 6, 2016.

On October 18, 2016, the USPS returned as undeliverable a questionnaire De Leon had sent to Pitchford. On October 21, 2016, De Leon received a completed questionnaire he had sent to Moreno.

#### The Hearing.

DLSE's only witness at the Hearing on the Merits was Industrial Relations Representative Barillas. She testified that the case had been re-assigned to her after De Leon transferred out of DLSE. She identified for the record the exhibits offered by DLSE, but had little first-hand knowledge of the case. DLSE called no worker witnesses, but did offer as an exhibit Moreno's completed questionnaire.

Included in the DLSE exhibits identified by Barillas and offered into evidence were several cancelled checks issued by DVBE to Moreno and Pitchford. On their face, the following checks were written by DVBE, made payable to Moreno: \$700.00 on March 30, 2015; \$1,575.00 on April 3, 2015; \$700.00 on April 9, 2015; \$300.00 on April 24, 2015; and \$3,375.00 on May 14, 2015. The checks bear the wording on the memo line, “Bloomington Ramps” or “Bloom Ramps,” except that the May 14 check bears no wording on the memo line. All checks except for the May 14 check appear to have been endorsed by Moreno. Also, on their face, the following checks were written by DVBE, made payable to Pitchford: \$1,000.00 April 4, 2015; \$250.00 on April 17, 2015; and \$4,000.00 on May 14, 2015. All of these checks appear to have been endorsed by Pitchford, and the first two bear the wording “Bloom Ramps” on the memo line. As with the check of the same date made payable to Moreno, the May 14 check payable to Pitchford did not disclose what work it was for.

Barillas testified that in conducting an investigation, DLSE would typically rely primarily on CPRs to determine what wages had been paid to workers. In this case, however, no CPRs were available. In preparing the amount of unpaid wages asserted by the Assessment, according to Barillas, De Leon relied on statements made by the workers. With respect to the checks made payable to Moreno and Pitchford, however, Barillas later testified that in determining the unpaid wages asserted in the Assessment, DLSE “gave credit to the contractor for these payments [as reflected in the checks],” except for the May 14, 2015 checks. She stated that no credit was given for those final checks because there was no evidence of what they were payment for, and in the case of Moreno, because the check lacked his endorsement and when asked, Moreno denied receiving it.<sup>2</sup>

---

<sup>2</sup> DLSE’s penalty review supports Barillas’ testimony that the Assessment findings regarding unpaid wages were based solely on interviews of Moreno and Pitchford. Contrary to her testimony, none of the checks could have played any role in DLSE’s determination of wages found due and owing under the Assessment, as the footers on the copies of the cancelled checks indicate that those copies were printed on December 30, 2016, after the Assessment was served. Moreover, the penalty review makes no mention of De Leon having reviewed cancelled checks in the course of his investigation. The record lacks any documentation of either Moreno or Pitchford denying receipt of the checks dated May 14, 2015, or otherwise discussing them.

According to DLSE's penalty review document admitted at the Hearing, there were several applicable apprenticeship committees in the geographic area of the Project in the trades of Cement Mason and Laborer. Those apprenticeship committees for Cement Masons were the Southern California Cement Masons J.A.C., San Diego Associated General Contractors J.A.C.; and Southern California Laborers/Cement Mason J.A.C. For Laborers, the applicable apprenticeship committees were Laborers Southern California J.A.C. and Associated General Contractors of America, San Diego Chapter.

The DLSE penalty review also stated that DVBE did not submit any evidence that it sent a request for dispatch of apprentice form (DAS 142) to the applicable apprentice committees.

Ybarra testified that he had six to eight workers on the Project on any given day. Additionally, he was present at the Project site on a daily basis, but he did not state whether he engaged in any physical work himself. He testified that the work day was 7:00 a.m. to 3:00 p.m., and there was no overtime; the crew worked one Saturday, but were off the Friday before. He stated that he believed the Project end date was April 10, 2015, as stated in the Awarding Body's Notice of Completion. He also stated that he had seen a document from the Awarding Body stating that the start date was March 23, 2015. He could not locate a copy of that document, but testified that to the best of his recollection, that date was correct. He also testified that it was a ten-day project. The Assessment found that DVBE began work on the Project on March 2, 2015.

Ybarra further testified that to the best of his knowledge, he paid the correct prevailing wages to all employees. He did not have a bookkeeper or clerical staff and did not have time cards for his employees, but he had written down their hours in a notebook. He stated that all of the checks written to Moreno and Pitchford (copies of which were admitted into evidence as DLSE Exhibit No. 10) were for work done on the Project; they represented gross pay, with no deductions for taxes. He claimed to have sent a DAS 140 form to at least one apprentice program, and that a representative from one program had visited the Project site and said he had no apprentices available because it was such a small project. Ybarra was unable to identify which apprentice program this

representative was from, but believed it to be a Cement Mason program in San Bernardino.

As to the failure to provide CPRs to DLSE, Ybarra testified that DVBE's address of record was, in fact, his residence where he maintained a home office. He insisted that he never received DLSE's initial information request by regular mail, and did not receive the USPS notice for a delivery of certified mail. He did acknowledge receipt of the DLSE request for information on the Mt. Vernon project that was sent on or about the same date. Ybarra testified that he called De Leon on August 12, 2015, in response to the request concerning the Mt. Vernon project, and that he told De Leon he had no knowledge or involvement in any such project. He denied discussing this Project during that call, and denied acknowledging DLSE's request for CPRs for this Project or the time within which to respond to the request. He also disputed the Awarding Body's statement that DVBE had not submitted CPRs to it, but acknowledged that when he later requested copies of the CPRs from the Awarding Body, it told him that it did not have any CPRs from DVBE for the Project.

Ybarra also testified that the CPRs for the Project were stolen in a residential burglary. Ybarra said he did not remember the date of the burglary, but believed it was sometime in 2015. He stated that he had reported the burglary to the police, but did not have a copy of the police report. Ybarra stated that he kept the CPRs in a "business bag" in a file cabinet. He further stated that there were a "lot of things" in the bag, but he could not recall what they were.

Ybarra testified that he believed he sent notices of contract award information forms (DAS 140) to the applicable apprenticeship committees, but he did not produce those notices at the Hearing or testify as to the date he sent the DAS 140s to the apprentice committees. He testified that a representative of one Cement Mason committee visited the Project site and told him that they were not able to provide an apprentice because Project was too small. Ybarra, however, was unable to identify the specific committee or representative in question or give the date of the site visit. DVBE likewise failed to submit at the Hearing any evidence of compliance with the requirement to request dispatch of apprentices from applicable committees.



## DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

*(Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, citations omitted *(Lusardi)*.) DLSE enforces prevailing wage requirements not only for the benefit of workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of unpaid wages) if unpaid prevailing wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a Request for Review. (§ 1742.) The Request for Review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment . . .” (Cal. Code Regs. tit.

8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

Additionally, employers on public works must keep accurate payroll records, recording, among other information, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) A failure to supply certified payroll records to DLSE within 10 days from receipt of a request may result in a \$100.00 penalty for each calendar day, or portion thereof, for each worker, “until strict compliance is effectuated.” (§ 1776, subd. (h).) The penalty rate provided by the statute is mandatory.

In this case, for the reasons detailed below and based on the totality of the evidence presented at the Hearing, DLSE met its initial burden of presenting prima facie support for the Assessment. However, DVBE also met its burden of proving that the basis of the Assessment was incorrect, in part, as to the wages paid to the two workers at issue.

The Assessment Was Timely Served.

Section 1741 provides in pertinent part: “The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.” At a Prehearing Conference in this matter, DVBE raised the issue of timeliness of the Assessment, contending that the Awarding Body recorded a notice of completion on April 29, 2015, and the Assessment was not served until November 4, 2016, slightly more than 18 months later. At DVBE’s request, the Hearing Officer issued, pursuant to California Code of Regulations, title 8, section 17227, an Order to Show Cause why the Assessment should not be dismissed as untimely.

DLSE responded that the period for service of the Assessment was tolled by operation of two separate provisions of section 1741.1. First, DLSE cited section 1741.1, subdivision (b)(2), which provides:

If the awarding body fails to timely furnish the Labor Commissioner with the documents identified in paragraph (1), the period for service of assessments under Section 1741 shall be tolled until the Labor Commissioner's actual receipt of the valid notice of completion for the public work or a document evidencing the awarding body's acceptance of the public work on a particular date.

DLSE pointed out that under Civil Code section 9204, in order to be valid, a notice of completion must be recorded within fifteen days after the date of completion of the work. DLSE argued that since the notice of completion furnished by the Awarding Body was recorded more than fifteen days after the completion date of April 10, 2015, it was invalid.

Second, DLSE cited section 1741.1, subdivision (a), which provides in part: "The period for service of assessments shall also be tolled for the period of time that a contractor or subcontractor fails to provide in a timely manner certified payroll records pursuant to a request from the Labor Commissioner ...." As discussed above, DVBE never responded to DLSE's request for CPRs, and never provided those records. For that reason, DLSE argued, the service period was tolled by operation of section 1741.1, subdivision (a).

In an Order dated August 17, 2017, the Hearing Officer found that "the statute of limitations is tolled by operation of Labor Code section 1741.1, and the Assessment is therefore timely." As a result, the matter proceeded to the Hearing on the Merits.

At the Hearing on the Merits and in post-hearing argument, DVBE again asserted that the service period was not tolled as a result of the invalid notice of completion, citing *Fontana Paving, Inc. v. Hedley Brothers, Inc.* (1995) 38 Cal.App.4th 146, 154 (*Fontana Paving*). At issue in that case was the timeliness of a mechanic's lien claim recorded more than 90 day after completion of a work of improvement. The court noted that Civil Code section 3116 "specifies two alternative time periods for filing liens by claimants other than the original contractor: (a) within 90 days after completion if no notice of completion or cessation has been recorded, or (b) within 30 days after recordation of a

notice of completion or cessation.” The court held that the lien claim was untimely, finding that “[b]ecause the notice of completion was not filed within the 10-day period specified in section 3093, it had no legal effect on the statutory lien-filing period.” Presumably, DVBE cites this case for the proposition that a late-filed notice of completion under section 1741.1 does not toll the section 1741 limitations period for the Assessment.

DVBE also cited *Department of Industrial Relations v. Fidelity Roof Co.* (1997) 60 Cal.App.4th 411 (*Fidelity Roof*), which held that a lawsuit by DLSE was barred by the statute of limitations then in effect, where no notice of completion had ever been recorded. The court reasoned:

In a public works context, completion occurs upon acceptance of the project by the awarding body. (Civ. Code, § 3086.) Consequently, once AUSD [the awarding body] accepted the project on December 10, it had until December 20 to record a notice of completion. (Civ. Code, § 3093.) That failing, a valid notice of completion could never be recorded. DLSE argues that the absence of a valid notice creates an indefinite period for the filing of suit against Fidelity. We disagree. The 90-day period for DLSE to act begins to run upon the completion of the public work unless a notice of completion is recorded within the next 10 days. If a notice is recorded within 10 days of completion, the 90-day period begins to run anew from the date of recording. (Accord, *Kray Cabling Co. v. County of Contra Costa* (1995) 39 Cal.App.4th 1588, 1591-1594, 46 Cal.Rptr.2d 674.) Because no notice of completion was recorded in this case, the statute of limitations period began on December 10, 1991, and ended on March 9, 1992. DLSE's complaint was therefore untimely.

(*Fidelity Roof*, 60 Cal.App.4th at p. 418.) As indicated, the court in *Fidelity Roof* used the December 10 date of acceptance of the project as the completion date under former Civil Code section 3086 (current Civil Code § 9200.) *Fidelity Roof*, however, does not help DVBE’s cause because the record in this case contains no evidence of the date of acceptance by Awarding Body.

For purposes of this case, it is unnecessary to decide whether the logic of the cases cited by DVBE applies to this case, because the undisputed failure of DVBE to ever provide the CPRs requested by DLSE tolls the statutory period under the express

language of section 1741.1, subdivision (a).<sup>3</sup> DVBE contends that it was not properly served with the request for CPRs. That contention is rejected for the reasons discussed, *post*. While Ybarra testified that he did not receive the request, DVBE provided no evidence that it was not properly served. Indeed, DLSE submitted a Certification of Service by Mail proving that it was.<sup>4</sup>

For the foregoing reasons, the statutory period was tolled by operation of section 1741.1, subdivision (a), and the Assessment was timely served.

DVBE Was Timely Given an Opportunity to Review DLSE's Evidence.

Section 1742, subdivision (b) provides in pertinent part:

The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing. Any evidence obtained by the Labor Commissioner subsequent to the 20-day cutoff shall be promptly disclosed to the contractor or subcontractor.

California Code of Regulations, title 8, section 17224, subdivision (d), provides in part: "The Enforcing Agency's failure to make evidence available for review as required by Labor Code section 1742(b) and this Rule, shall preclude the Enforcing Agency from introducing such evidence in proceedings before the Hearing Officer or the Director."

At the Prehearing Conference on August 21, 2017, DVBE and DSLE stipulated that DLSE's Enforcement File was timely made available. However, at the Hearing on the Merits, Ybarra testified that while the Enforcement File was made available to him, "I think there was some items missing (*sic*)". In his cross-examination of Barillas, Ybarra

---

<sup>3</sup> The version of section 1741.1 that DLSE relies upon did not exist on the bid advertisement date in this case, November 18, 2014. Instead, the version in effect on that date provided for tolling of the limitations period for "the length of time [the] notice [of completion] is not given in timely manner to the Labor Commissioner pursuant to this subdivision." (See former § 1741.1, stats. 2013, ch. 780, §2 [Sen. Bill. 377].) Arguably, that tolling provision in former section 1741.1 depends on the date any notice of completion is given to DLSE, not on the filing of a "valid" notice of completion, that is, one filed within 15 days of the date of completion under Civil Code section 9204. Resolution of the questions of which version of section 1741.1 applies and how it applies, however, is unnecessary given that all versions of section 1741.1 in effect on the bid advertisement date and continuing through the present toll the limitations period based on a contractor's failure to provide CPRs in response to a DLSE request.

<sup>4</sup> As discussed below, Ybarra testified that the CPRs were stolen. This does not change the fact that DLSE properly requested them and DVBE failed to provide them, and thus is irrelevant for purposes of the tolling of the statute of limitations.

asserted that the Public Works Investigation Worksheets for Moreno and Pitchford (included in DLSE's Exhibit No. 2) were not made available to him when he reviewed the Enforcement File. Barillas testified that it is DLSE's standard procedure to include such worksheets in the Enforcement File, stating "When we do an audit, we print out these from our computers and put it (*sic*) in the case file." Ybarra did not submit any corroborating evidence to support his belief that DLSE deviated from this standard procedure described by Barillas, nor did he articulate any prejudice to DVBE by virtue of the alleged omission of the worksheets when he first reviewed DLSE's file.

Ybarra acknowledged that he received the complete Exhibit 2 from DLSE in the exhibit exchange the Hearing Officer required three weeks prior to the Hearing on the Merits. DVBE could have requested a continuance of the hearing if it believed it needed additional time to respond to the exhibit, but it did not do so. Moreover, California Code of Regulations, title 8, section 17224 provides for preclusion of evidence not properly disclosed, but DVBE did not request this remedy, nor did DVBE object to the admission of Exhibit 2 or any part thereof. Based on the foregoing analysis, DVBE's contention that it was not given timely opportunity to review DLSE's evidence is rejected.

DVBE Failed to Provide CPRs Upon Request, and Is Liable for Section 1776 Penalties.

Section 1776 provides in pertinent part:

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.  
(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract and the Division of Labor Standards Enforcement of the Department of Industrial Relations.

...

(g) The contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a), including the street address, city, and county, and shall, within five working days, provide a notice of a change of location and address.

(h) The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

DLSE showed that DVBE was served with the initial Request for Payroll Records via both certified and regular mail addressed to 28840 Bay Avenue, Moreno Valley, CA, 92555, DVBE's address of record with DLSE. Ybarra confirmed that this was the correct business address for DVBE, as well as his residence address, yet he denied receiving either the regular mail copy of the Request, or the notice of attempted delivery of certified mail.

California Evidence Code section 641 provides: "A letter correctly addressed and properly mailed is presumed to have been properly received in the ordinary course of mail." This means that if a party proves a letter was mailed, the trier of fact must find that it was received, in the absence of any believable evidence to the contrary. If, however, the adverse party denies receiving the letter, the trier of fact must then weigh that denial against the inference of receipt that arises from mailing, and decide whether or not the letter was in fact received. (*Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832, fn. 12.)

Here, DLSE has proved that the Request for Payroll Records was properly mailed. Based on Ybarra's testimony as a whole, his denial is not credible and is insufficient to overcome the inference that the Request was received. Ybarra acknowledged that he received other mail regarding this case at the same address, and that he received the request regarding the Mt. Vernon project around the same date. His frequent references to the latter request in his testimony must be viewed as a red herring. Ybarra telephoned De Leon on August 12, 2015, and informed him that DVBE had not been involved in any Mt. Vernon project. Thereafter, the record does not reflect that DLSE took any action on the Mt. Vernon investigation, until it sent a Notice of Complaint Closed on October 16, 2016. That notice, which Ybarra also acknowledges receiving, stated as the reason for closure: "Duplicate of Case 40-46720-223 [this Project] which is still under investigation." While Ybarra may initially have been confused to receive a request concerning the Mt. Vernon project about which he knew nothing, that circumstance does not change the fact that he was notified that this Project was under investigation and that his payroll records were requested.

As noted, the Awarding Body informed DLSE that DVBE had not provided it with CPRs. Ybarra insisted to the contrary that he had, and that he could not have been paid if he had not done so. This claim finds no support in the exhibits. DVBE's contract with the Awarding Body required it to provide records upon request, but did not say that providing CPRs was a precondition for payment. Significantly, Ybarra acknowledged that when he later requested copies of the CPRs from the Awarding Body, it also told him that it did not have them. The Awarding Body had no apparent reason to lie, either to DLSE or to Ybarra. It provided other documents requested by DLSE, and there is no reason to believe it would not have provided the CPRs if it had had them. Ybarra's insistence that he did submit CPRs to the Awarding Body in the face of credible evidence to the contrary raised substantial questions about his veracity and credibility on the issue.

Ybarra's testimony that the CPRs had been stolen in a burglary raised more questions than it answered. He did not recall specifically when the theft occurred, although he believed it was sometime in 2015. He testified that he reported the burglary to the police, yet had no documentation of that report. Nor did he present any evidence



that he had submitted an insurance claim regarding the theft. Although section 1776, subdivision (g), required DVBE to inform the Awarding Body of the location of the CPRs, and any change in that location, there is no evidence that DVBE notified the Awarding Body of the alleged theft.

And, significantly, there is no evidence that DVBE informed DLSE of the alleged theft at any time while this case was under investigation. The PW 900 notes indicate that when Ybarra copied the file on January 13, 2017, he told DLSE that he never received the initial packet containing the Request for Payroll Records. But the PW 900 notes do not indicate that he stated the records had been stolen. That same day, January 13, 2017, DLSE served another request for CPRs to DVBE's address of record, again by certified and regular mail. This time, Ybarra signed the certified mail receipt, but apparently never responded to the request, even to say that he could not comply because the records had been stolen.

The preponderance of the evidence supports a finding that DVBE received the Request for Certified Payroll Records sent to it by regular mail on August 7, 2015. Ybarra's claim that he did not receive it is not credible for the reasons stated above.

Given that DVBE received the request for CPRs and never provided them, assessment of section 1776 penalties was appropriate. Subdivision (h) authorizes a penalty of \$100.00 "for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated." While there is no discretion as to the penalty rate, and no compliance has ever been effectuated in this case, the question of the number of workers and days of noncompliance still must be considered.

The Assessment calculated the penalty on the basis of ten workers being employed on the Project. The DLSE penalty review quotes an Awarding Body representative as stating, on October 3, 2016, that "roughly ten workers" worked on the Project. By its own terms, this is not a specific number. Moreover, the statement is hearsay, lacking in any documentary corroboration or foundational facts. Ybarra's in-person testimony that six to eight workers were employed on the Project is the only evidence sufficient to support a finding on the question. Accordingly, it is found that there were eight workers on the Project for purposes of the section 1776 penalty.

According to DLSE's penalty review, it deemed the period of noncompliance to commence on August 26, 2015. "Strict compliance" under section 1776, subdivision (h) was never effectuated in that DVBE never produced its CPRs. DLSE ended the period of noncompliance on August 26, 2016, 365 days later. The total penalty assessed by DLSE was thus \$365,000 (\$100 per day, for 10 workers, and 365 days). Because there is no evidence that there were any more eight workers on the Project, this Assessment is modified to reduce the penalty from \$365,000 to \$292,000.00 (\$100 per day, for eight workers, for 365 days), but is otherwise affirmed.

DVBE Underpaid Moreno and Pitchford.

Lacking CPRs, DLSE based the Assessment of \$13,167.47 in unpaid wages on statements made by Moreno and Pitchford, and information furnished by the Awarding Body. The \$13,167.47 consists of \$4,905.73 in wages and fringe benefits due to Moreno based on his hours, plus \$130.54 in training fund contributions due, and \$7,977.60 in wages and benefits due to Pitchford based on his hours, plus \$153.60 in training fund contributions due. The Assessment found underpayments only for Moreno and Pitchford, as no other workers were identified. In reviewing the Assessment, the principal questions are whether the start and end dates of the Project are correct, and whether the alleged hours worked and wages paid are correct.

Although the Awarding Body's notice of completion was invalid due to untimely recording, it is undisputed that the Project was in fact complete as of April 10, 2015. There is dispute, however, about the start date. The Assessment determined a start date of March 2, 2015, based on Moreno's and Pitchford's statements to De Leon about the length of time they worked on the Project. DVBE provided no documentation regarding the start date, and relies on Ybarra's recollection that it was March 23, 2015. However, Ybarra also stated that the Project only took ten days, which is inconsistent with a March 23 start date. The only documentary evidence of record regarding the start date is a memorandum dated February 10, 2015, from the Awarding Body's Director of the Department of Public Works, titled "Report/Recommendation to the Board of Supervisors of San Bernardino County, California and Record of Action" (Report/Recommendation). It states: "Following Board approval of this item,

construction is anticipated to begin the beginning of March 2015 and be completed by the end of March 2015.”

The Report/Recommendation is the best evidence of the Project start date. Ybarra’s uncertain and uncorroborated recollection is insufficient to outweigh that evidence. Accordingly, DVBE has not carried its burden of proving that the Assessment was incorrect as to the start date.

On the basis of Moreno’s interview and questionnaire, the Assessment credited him with 40 straight time hours and ten overtime hours as a Cement Mason, and 160 straight time hours and one overtime hour as a Laborer. Ybarra testified unequivocally that there was no overtime work on the Project. Moreno did not testify, and his statements in the questionnaire and interview are uncorroborated hearsay.<sup>5</sup> Accordingly, DVBE has met its burden of proving that Moreno did not work overtime on the Project, and the Assessment must be modified accordingly.

Curiously, however, DLSE’s Public Works Investigation Worksheet showed the total amount due for Moreno’s work as a Cement Mason for the week ending March 14, 2015, was \$2,124.00—the amount required for 40 hours of straight time wages and fringe benefits at the prevailing rate of \$53.10 per hour. Thus, eliminating the overtime hours for that week does not actually reduce the total amount of unpaid wages and fringe benefits due, as set forth in the Assessment, although it does reduce the amount of training fund contributions due. For week ending March 21, 2014, however, removing the one overtime hour credited to Moreno has the result of reducing the amount of wages due for that week from \$1,992.93 to \$1,929.60, a difference of \$63.33.

The Assessment credited DVBE with payment of \$5,000.00 in wages and benefits to Moreno. Lacking CPRs or other documentation, DLSE based this number solely on statements made by Moreno in his interview and questionnaire, which are uncorroborated hearsay, as stated above. Ybarra presented unrebutted testimony that all cancelled checks shown in DLSE Exhibit Number 10, including those dated May 14, 2015, were payments for work done on the Project. By that testimony, DVBE carried its burden of proving by

---

<sup>5</sup> Documentation of Moreno’s interview is actually double hearsay. Moreover, the record does not contain his actual statements, but only De Leon’s paraphrase of his statements recorded in the PW 900 Notes.

a preponderance of the evidence that the Assessment understated the wages and benefits paid to Moreno. The checks paid to him total \$6,650.00, and that amount must be credited against the \$9,842.40 in total wages and benefits required (as modified by the adjustment for the overtime hours as discussed, *ante*). This calculation leaves a total of \$3,192.40 in unpaid wages due Moreno, rather than the \$4,905.73 found in the Assessment, a reduction of \$1,713.33.

On the basis of Pitchford's interview statements, the Assessment credited him with 240 straight time hours and no overtime hours as a Laborer. It calculated that the wages and benefits due for this work totaled \$11,577.60. Pitchford's interview responses also provided the basis for the Assessment's determination that he was paid a total of \$3,600.00. Since the PW 900 notes are the only evidence of those responses, they are uncorroborated double hearsay. As with the matter of checks issued to Moreno, Ybarra's unrebutted testimony establishes by a preponderance of the evidence that DVBE actually paid Pitchford a total of \$5,250.00. When that sum is subtracted from the \$11,577.60 Pitchford was due on the basis of the Public Works Audit Worksheet (DLSE Exhibit No. 2), the total due Pitchford in unpaid wages and benefits is \$6,327.60 (a reduction of \$1,650.00 from the \$7,977.60 stated in the Assessment).

Summarizing the result of the underpayment analysis provided *ante*, the reduction in unpaid wages and fringe benefits from the amount found in the Assessment, for both workers combined, comes to \$3,363.33, leaving unpaid wages and fringe benefits in the total amount of \$9,520.00.

DVBE Did Not Pay the Required Training Fund Contributions.

The Assessment found that DVBE failed to make training fund contributions in a total amount of \$284.14 for this Project. This amount included contributions for Moreno for 50 hours worked as a Cement Mason and 161 hours worked as a Laborer; and for 240 hours worked by Pitchford as a Laborer. Barillas testified that in the course of a DLSE investigation, the contractor typically provides proof of the training fund contributions that have been made, but that DVBE had provided no such evidence. She also testified that it was the practice of the California Apprenticeship Council (CAC) to maintain a record of such payments on its website. Following her assignment to the case on

November 22, 2017, Barillas checked the CAC website and verified that there was no record of training fund payments by DVBE for this Project. DVBE provided no evidence at the Hearing of having made any such payments.

Accordingly, the preponderance of the evidence supports a finding the Assessment correctly determined that DVBE failed to make any training fund contributions. However, in calculating the training fund payments owed, the Assessment included ten hours of overtime work by Moreno as a Cement Mason and one hour of overtime work by him as a Laborer. Since this Decision finds that Moreno did not work any overtime hours, the Assessment must be modified to reduce amount the training fund contributions due by \$5.50 for Cement Mason hours and \$0.64 for the one Laborer hour. This results in a total reduction in training funds due of \$6.14, leaving due in training fund contributions a total amount of \$278.00.

DLSE's Penalty Assessment Under Section 1775.

Section 1775, subdivision (a), as it read at the time the Awarding Body advertised for bids on the Project, states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2) (A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

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

(B)(i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than eighty dollars (\$80) . . . if the . . . subcontractor has been assessed penalties within the previous three

years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.<sup>[6]</sup>

The determination of the Labor Commissioner as to the amount of the penalty is reviewable only for abuse of discretion. (§ 1775, subd. (a)(2)(D).) Abuse of discretion by DLSE is established if the “agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy.” (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment “because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh.” (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, “the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

The Labor Commissioner assessed section 1775 penalties at the rate of \$200.00 because DVBE underpaid at least two workers in a significant amount, comprising 55 violations. According to the DLSE penalty review, the Labor Commissioner declined to mitigate the penalty rate due to the failure of DVBE to demonstrate that the violations were not willful.

The burden was on DVBE to prove that the Labor Commissioner abused her discretion in setting the penalty. DVBE disputed that it had underpaid workers, but did not carry its burden of proving that the Assessment was incorrect. Nor did DVBE demonstrate abuse of discretion as to the penalty. The number of prevailing wage

---

<sup>6</sup> The reference to section 1777.1, subdivision (c) is mistaken. The correct reference is to section 1777.1, subdivision (d). That subdivision, as it existed on the bid advertisement date, defines a willful violation as one in which “the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.”

violations committed by DVBE, and DVBE's lack of any reasonable defense, support a finding that DVBE's violations were willful.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty in light of prescribed factors. Here, given the determination that the violations were willful, the statute permitted mitigation to not less than \$120.00. The fact that such mitigation is permissible, however, does not mean that it is mandated. The Director is not free to substitute his or her own judgment. Because DVBE has not shown an abuse of discretion as to the penalty rate, the assessment of penalties at the rate of \$200.00 is affirmed.

Given that this Decision credits the amounts shown in DVBE checks as wages paid to Moreno and Pitchford on this Project, however, the number of violations on which the penalty is assessed must be reduced. According to the DLSE audit sheets, the underpayment of wages occurred on 25 days for Moreno, and 30 days for Pitchford (for a total of 55 worker days). The credit for DVBE checks amounts to \$3,363.33, which represents 69.72 hours at the Laborer hourly rate of \$48.24, or 8.71 days based on an 8 hour workday.<sup>7</sup> Rounding up to 9 days, the 55 worker days of violation should be reduced to 46 days. Thus, at the \$200.00 per day penalty rate, the total amount of penalties under section 1775 is \$9,200.00 (46 worker days x \$200 per day).

DVBE Is Not Liable for Section 1813 Penalties.

Section 1813 provides in pertinent part:

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, 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.

Thus, the contractor is liable for section 1813 penalties whenever it fails to pay the overtime rate as required in the applicable PWD.

---

<sup>7</sup> Using the \$53.10 hourly rate for Cement Mason produces a reduction of 8 days (\$3,363.33 divided by \$53.10 for 63.34 hours, for 7.91 days based on an 8-hour day. The greater reduction of 9 days for purposes of the section 1775 penalty using the Laborer rate, as explained above, is deemed to be more appropriate here.

Here, DLSE's Public Works Investigation Worksheet for Moreno showed six overtime violations, resulting in \$150.00 in section 1813 penalties. However, apparently as a result of a clerical or mathematical error, the Assessment stated that the "total amount of penalties under Labor Code sections 1775 and 1813 is: \$11,000.00." That sum actually reflected the amount assessed for section 1775 alone, so in fact the Assessment did not include section 1813 penalties. Since this Decision finds that Moreno did not work any overtime hours, there were no violations, and the Assessment is affirmed in this respect.

DVBE Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages on a contractor who has failed to pay the required prevailing wages. The statute provides in part:

After 60 days following the service of a Civil Wage and Penalty Assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the Assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

The statutory scheme regarding liquidated damages that was in effect on the date of the Assessment provided contractors three alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the CWPA.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor



deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

There shall be no liability for liquidated damages if the full amount of the assessment..., including penalties, has been deposited with the Department of Industrial Relations, within 60 days of the service of the assessment..., for the department to hold in escrow pending administrative and judicial review.

Also, within the 60-day period, the contractor could choose not to pay any of the assessed wages to the workers, and not to deposit with DIR the full amount of assessed wages and penalties. Instead, the contractor could choose to rely on the potential of the Director's discretion to waive liquidated damages under the following portion of section 1742.1:

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment ..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

( §1742.1, subd. (a).)

In this case, DVBE did not pay any back wages to the workers in response to the Assessment or deposit with the Department the assessed wages and section 1775 and section 1777.7 statutory penalties. That leaves the question whether DVBE has demonstrated to the Director's satisfaction it had substantial grounds for appealing the Assessment.<sup>8</sup>

---

<sup>8</sup> On June 27, 2017, the Director's discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch 28, § 16 (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Assessment was issued and at the time the Request for Review was filed allowed a waiver of liquidated damages in the Director's discretion, as specified. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what DVBE elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

Noting that liquidated damages are payable only the wages found to be due and payable, the Director finds that DVBE failed to present any substantial grounds for appealing the Assessment as to the wages that are found due in this Decision. Accordingly, liquidated damages are affirmed in the amount of \$9,520.00.

Apprenticeship Violations.

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. (See California Code of Regulations, title 8, sections 227 to 232.70.)<sup>9</sup>

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 journeypersons in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); § 230.1, subd. (a).) 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 journeyperson 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 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.

---

<sup>9</sup> All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

However, a contractor is not 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).)

A contractor properly requests the dispatch of apprentices by doing the following:

Request[ing] 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 dispatch(es) 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.

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

The regulations also require contractors to alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. DAS has prepared a form (DAS 140) that a contractor may use to notify apprenticeship committees for each apprenticeable craft in the area of the site of the project. The required information must be provided to the applicable committee within ten 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. (§ 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs in the geographic region of upcoming opportunities and to request dispatch of apprentices.

When the Labor Commissioner determines that a violation of the apprenticeship

laws has occurred, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (Former § 1777.7, subd. (c)(2)(B), as it existed on the date of the bid advertisement for the Project, November 18, 2014.)

DVBE Failed to Employ Cement Mason and Laborer Apprentices in the Required Ratios, Failed to Give Notice of the Contract Award and Failed to Request Dispatch of Apprentices.

Cement Mason and Laborer Group 1 were the apprenticeable crafts at issue in this matter. DVBE employed no apprentices in either craft. Accordingly, the record establishes that DVBE violated section 1777.5 and the related regulations, sections 230 and 230.1, in its failure to meet the required 1:5 apprentice to journeyman ratios.

DLSE established that there were three applicable apprenticeship committees for Cement Mason in the geographic area of the Project, and two applicable apprenticeship committees for Laborer. DVBE did not dispute that the five committees listed by DLSE were the applicable apprenticeship committees for the Project. Ybarra testified that he believed he notified the applicable committees, but he offered no corroborating evidence, and did not specify the date(s) of notice, so there was no evidence that timely notification occurred. Ybarra's testimony that a representative of one Cement Mason committee visited the Project site on an unknown date does not prove compliance with the notification requirements. Thus, DVBE failed to carry its burden of proving that the Assessment was incorrect in finding that it failed to notify the applicable apprentice committees of its public works contract, and thereby violated section 1777.5, subdivision (e) and the applicable regulation, section 230, subdivision (a).

DVBE also failed to carry its burden on the issue of requesting dispatch of apprenticeships. All requests for dispatch must be in writing and provide at least 72 hours' notice. (§ 230.1, subd. (a).) DVBE presented no evidence at the Hearing that it complied with these requirements.

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 under the following portion of

former section 1777.7, subdivision (a)(1):<sup>10</sup>

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.... A contractor or subcontractor that knowingly commits a second or subsequent violation of section 1777.5 within a three-year period, where 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....

The phrase quoted above -- “knowingly violated Section 1777.5” -- is defined by the regulation, 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.

DLSE imposed a penalty rate of \$100.00 for each of 39 days of noncompliance, evidently based on the period from the day on which the DAS 140 notice was required to be given through the last day DVBE worked on the Project.

To analyze whether the penalty is correctly calculated, under the former version of section 1777.7 applicable to this case, the Director decides the appropriate penalty de novo.<sup>11</sup> In setting the penalty, the Director considers all of the following circumstances (which also guide DLSE’s Assessment):

(A) Whether the violation was intentional,

---

<sup>10</sup> Section 1777.7 was amended, effective January 1, 2015. (See Stats. 2014, ch. 297, § 3 (AB 2744).) For purposes of this Decision, the Director has applied the language of section 1777.7 that was in effect at the time the Project was advertised for bid.

<sup>11</sup> As noted *ante*, section 1777.7 was amended effective January 1, 2015. Applying former section 1777.7, subdivision (f)(2) to this case, the Director reviews de novo the penalty for violation of section 1777.5.

- (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.

(Former § 1777.7, subd. (f)(1) and (2).)

In this case, as determined by DLSE and shown in the audit underlying the Assessment, DVBE hired no Laborer or Cement Mason apprentices for the Project. Nor did DVBE attempt to obtain apprentices by sending DAS 140 and DAS 142 forms to the applicable apprenticeship committees. DVBE's violations were "knowing" violations under the irrebuttable presumption quoted, *ante*, in that Ybarra signed the Contract acknowledging that DVBE was aware of and would comply with laws requiring the employment of registered apprentices on the Project. Ybarra did not testify that he was unfamiliar with the requirement for the employment of apprentices on the Project, or unfamiliar with the need to notify apprentice committees of the Contract and to request the dispatch of apprentices. There was no evidence that Ybarra could not have sent contract award information to all the applicable committees and could not have requested dispatch of apprentices from those same committees.

Since DVBE knowingly violated the law, a penalty should be imposed under former section 1777.7.

Applying the de novo standard for this case, factor "A" would suggest a penalty rate on the higher end. The Contract put DVBE on notice that it was required to employ apprentices. The applicable prevailing wage determinations stated that the relevant crafts were apprenticeable. DVBE did not bear its burden of proving that the violations were not intentional.

Factor "B" supports a penalty rate that is less than the maximum. The record shows no previous apprenticeship violations by DVBE.

Factor “C” is neutral in this case. DLSE did not notify DVBE of its violations until August 2015, four months after the Awarding Body recorded its Notice of Completion and after DVBE’s work on the Project. Hence, DVBE had no opportunity to voluntarily remedy the violations after receiving notice.

As to the de novo review factors “D” and “E,” DLSE’s evidence established that DVBE’s Laborer and Cement Mason journeypersons worked a total of 440 hours on the Project, but only no apprentice hours were worked. Applying the five-to-one ratio for Laborers and Cement Masons, DVBE’s violations of the ratio requirement deprived apprentices of 88 hours of paid on-the-job training, or just over two weeks of work. While this number of hours is not insignificant, neither is it particularly substantial. Accordingly, factors “D” and “E” support a penalty rate that is less than the maximum.

On balance, and given the totality of the circumstances, the Director finds that a penalty rate of \$40.00 for each of 39 days of noncompliance is appropriate. Accordingly the Assessment is modified in this respect, to reduce the total section 1777.7 penalty to a total amount of \$1,560.00.

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

### **FINDINGS AND ORDER**

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor DVBE, Inc., filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE.
4. DLSE timely made available to DVBE, Inc. its enforcement file.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. Paul Moreno performed work on the Project and was properly classified as a Cement Mason and Laborer, but was paid less than the required prevailing rate for those classifications.

7. Robert Pitchford performed work on the Project and was properly classified as a Laborer, but was paid less than the required prevailing rate for those classification.
8. In light of findings through 6 and 7 above, DVBE, Inc. underpaid its employees on the Project in the aggregate amount of \$9,520.00.
9. DVBE, Inc. did not pay required training fund contributions in the modified amount of \$278.00 for its employees on the Project.
10. DLSE, Inc. did not abuse its discretion in setting section 1775 penalties at the rate of \$200.00 per violation, but this Decision modifies the number of violations downward from 55 to 46, such that , DVBE, Inc. is liable for section 1775 penalties in the amount of \$9,200.00 for 46 violations.
11. The Assessment's finding that DVBE, Inc. is liable for section 1776 penalties is affirmed in the modified amount of \$292,000.00.
12. The unpaid wages found in Finding No. 8 remained due and owing more than 60 days following issuance of the Assessment, as did the unpaid training fund contributions found in Finding No. 9 above. DVBE, Inc. had no substantial grounds to appeal the Assessment as to the wages found due and unpaid. Accordingly, is liable for an additional amount of liquidated damages under section 1742.1 in the amount of \$9,520.00.
13. There were three applicable apprenticeship committees in the geographic area of the Project in the craft of Cement Mason: (1) Southern California Cement Masons J.A.C.; (2) San Diego Associated General Contractors J.A.C, and (3) Southern California Laborers/Cement Mason J.A.C.
14. There were two applicable apprentice committees in the geographic area of the Project in the craft of Laborers: (1) Laborers Southern California J.A.C.; and (2) Associated General Contractors of America, San Diego Chapter.



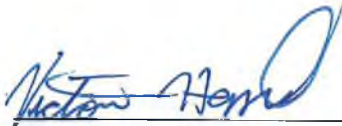
15. DVBE, Inc. failed to issue a Notice of Contract Award Information to all applicable apprenticeship committees for the crafts of Cement Mason and Laborer.
16. DVBE, Inc. failed to properly request dispatch of Cement Mason apprentices from the three applicable apprenticeship committees in the geographic area of the Project, and it was not excused from the requirement to employ apprentices under former Labor Code section 1777.7.
17. DVBE, Inc. failed to properly request dispatch of Laborer apprentices from the two applicable apprenticeship committees in the geographic area of the Project, and it was not excused from the requirement to employ apprentices under former Labor Code section 1777.7.
18. DVBE, Inc. violated section 1777.5 by failing to employ apprentices in the crafts of Cement Mason and Laborer on the Project in the minimum ratio required by the law.
19. Section 1777.7 penalties at the rate of \$40.00 per violation for 39 violations are appropriate, and the Assessment is modified accordingly, resulting in a total penalty of \$1,560.00.
20. The amount found due in the Assessment is modified and affirmed by this Decision are as follows:

Wages due:	\$ 9,520.00
Penalties under section 1775(a):	\$9,200.00
Penalties under section 1813:	\$ 00.00
Penalties under section 1776	\$292,000.00
Training Fund Contributions:	\$ 278.00
Liquidated damages:	\$ 9,520.00
Penalties under section 1777.7	\$1,560.00
<b>TOTAL</b>	<b>\$322,078.00</b>

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is affirmed in part and modified in part 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: November 1, 2019

  
Victoria Hassid  
Chief Deputy Director  
Department of Industrial Relations<sup>12</sup>

---

<sup>12</sup> See Government Code sections 7 and 11200.4.