

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**D D Systems, Inc., doing business as
ACE CD, Inc.**

Case No. 15-0168-PWH

From a Civil Wage and Penalty Assessment issue by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor D D Systems, Inc. (D D Systems) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on March 19, 2015, with respect to work performed by D D Systems on the Hurless Barton Park Irrigation and Amphitheater Improvement project (Project), in the City of Yorba Linda (City), Orange County. The Assessment determined that \$29,260.38 was due in unpaid prevailing wages and statutory penalties. A Hearing on the Merits occurred in Los Angeles, California on March 15, 2016, before Hearing Officer Steven A. McGinty. Danny Daher (Daher) appeared for D D Systems, and Max Norris (Norris) appeared for DLSE. The matter was submitted for decision on March 15, 2016.

The issues for decision are as follows:

- Was the Project a public work subject to the payment of prevailing wages and the employment of apprentices?
- Was the Assessment issued timely?
- Was the Request for Review timely?
- Did DLSE make its enforcement file available to the contractor in a timely manner?
- Were any wages paid or deposited with the Department of Industrial Relations as a result of the Assessment?

- Were the classifications used in the audit correct?
- Were the prevailing wage rates used in the audit correct?
- Were the credits given in the audit for payment of wages to the workers correct?
- Did the Labor Commissioner abuse her discretion in assessing penalties under Labor Code section 1775?
- Is D D Systems liable for liquidated damages on wages found due and owing?
- Did D D Systems submit contract award information to all applicable apprenticeship committees in a timely and factually sufficient manner?
- Did D D Systems employ apprentices in the required minimum ratio of apprentices to journeymen on the Project?
- Did the Labor Commissioner abuse her discretion in assessing penalties under Labor Code section 1777.7?

In this Decision, the Director affirms the Assessment with respect to the wages owed. In addition, the Director finds that D D Systems failed to properly provide the applicable apprenticeship committee with timely notice of contract award information and failed to properly request dispatch of laborer apprentices from one apprenticeship committee in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.5. Further, the Director finds that D D Systems was not prejudiced by the failure of DLSE to provide it with complete copies of the penalty review sheets. Thus, this Decision affirms the Assessment that a penalty is appropriate for the failure to pay the appropriate wage rate and that a penalty is appropriate for the apprentice violations; however, the penalty for wages owed is reduced to reflect credit for overpayment of wages and the penalty for apprentice violations is reduced to accurately reflect the correct number of violations. Therefore, the Director of Industrial Relations issues this Decision affirming and modifying the Assessment.

FACTS

The Project was advertised for bid on September 5 and 12, 2013. The City and D D Systems entered into a construction contract for the Project on December 3, 2013. The contract required the payment of prevailing wages, the employment of apprentices, and the preparation

and submission of Certified Payroll Records (CPRs). D D Systems employees worked on the Project from December 16, 2013, to March 21, 2014, in Orange County, within the city limits of Yorba Linda. For D D Systems' work on the Project, the CPRs were prepared by D D Systems. A Notice of Completion was not filed. However, the City's Parks Supervisor, Brad Skeene, informed DLSE that the Project was substantially complete on April 4, 2014.

Timeliness of Assessment: DLSE served the Assessment by mail on March 19, 2015. The Assessment was prepared by Jeffrey Pich (Pich). The Assessment found that 5 workers had been underpaid prevailing wages by D D Systems in the amount of \$16,940.38, and assessed penalties pursuant to Labor Code section 1775 in the amount of \$6,200.00.¹ The Assessment also found that D D Systems failed to submit contract award information to applicable apprenticeship programs in accordance with section 1777.5, subdivision (e), and failed to employ apprentices in accordance with section 1777.5, subdivision (g). DLSE assessed an aggregate penalty of \$6,120.00 under section 1777.7.

Timeliness of Request for Review: D D Systems filed its request for review on May 11, 2015.

Availability of Enforcement File: D D Systems obtained a copy of the enforcement file from DLSE. However, the section 1775 and the section 1777.7 penalty reviews were not signed by the senior deputy. In addition, on the copy of the section 1775 penalty review provided to D D Systems, section 2, to be completed by the Senior Deputy Labor Commissioner, was blank except for the line for the name of the Senior Deputy reviewing the submission; on that line, the name of Lorna Espiritu (Espiritu) was typed. On the copy of the section 1777.7 penalty review provided to D D Systems, section 4, to be completed by the Senior Deputy Labor Commissioner, was blank except for the line for the name of the Senior Deputy reviewing the submission; on that line, the name of Espiritu was typed.

Espiritu testified at the hearing that copies of penalty review pages completed and signed by her should have been in the file. She said it was DLSE's normal practice that the signed

¹ All further statutory references are to the Labor Code unless otherwise indicated.

copies are placed in the file. Once Espiritu has reviewed and signed a penalty assessment, she scans the page with her signature back to the investigator. It would have been Mr. Pich's responsibility to place the scan of the signed page into the file.

Applicable Employee Classifications and Prevailing Wage Determinations: The Notice inviting bids for the Project indicated that the Project required extensive landscape irrigation work. The contract called for the provision of irrigation and amphitheater improvement services. D D System's CPRs indicate that it used operators, laborers, and tenders on the Project. Pich testified that on a landscape irrigation project, tenders must be under the guidance of a laborer.

There are two applicable Prevailing Wage Determinations: Landscape Operating Engineer (SC-63-12-33-2013-1); and, Landscape Irrigation Laborer/Tender (SC-102-X-14-2013-2). The latter Prevailing Wage Determination indicates specifically as follows:

The first employee on the jobsite shall be a Landscape/Irrigation Laborer; the second employee of the jobsite must be an Apprentice or a Landscape/Irrigation Laborer; and the third and fourth employees may be Tenders. The fifth employee on the jobsite shall be a Landscape/Irrigation Laborer; the sixth employee on the jobsite must be an Apprentice or a Landscape/Irrigation Laborer; and the seventh and [eighth] employees may be Tenders.

Pich testified that in the event the contractor violated the manning ratio described directly above, the contractor would be required to pay the Landscape/Irrigation Laborer rate to all Tenders on the Project.

Reclassification from Tender to Laborer: The Assessment reclassified one tender, Luis Mejia, to a laborer throughout the duration of the Project to meet the requirement that the second employee on the jobsite be an apprentice or a landscape/irrigation laborer. No apprentices were employed on the Project so the second employee had to be a laborer. Pich testified that Mejia worked the most hours on the Project and that Daher told him that Luis Mejia was one of his best workers. The Assessment also reclassified three other tenders - Frank Serna Mejia, Richard Medina, and Javier Barrera - as laborers during specified weeks of the Project when either there

was only one laborer or when there were two laborers and two tenders and a fifth and sixth employee performed work on the Project and the ratio called for additional laborers.

Underpayment of Prevailing Wage Rate: The final Assessment found that one worker classified as a laborer, Raul Barrera, and 4 workers classified as tenders - Luis Mejia, Frank Serna Mejia, Richard Medina, and Javier Barrera - were underpaid. To calculate the underpayment, Pich used the hours of work provided by D D Systems in their CPRs.

D D Systems CPRs indicated that Raul Barrera was paid \$44.04 an hour. The correct rate was \$44.65.

D D Systems CPRs indicated that Luis Mejia was paid \$19.46 an hour. The correct rate was \$44.65.

D D Systems CPRs indicated that Frank Serna Mejia was paid \$19.46 an hour. The correct rate for a tender was \$16.06. So there was an overpayment when Serna Mejia was correctly classified as a tender. However, when Serna Mejia was misclassified as a tender and should have been classified as a laborer, the correct rate was \$44.65. The same was true for Richard Medina and Javier Barrera. In those instances where the three workers were overpaid while working as tenders, Pich gave credit for the over payment as a tender against the underpayment for each as a laborer.

Applicable Apprentices Committees in the Geographic Area: There was one applicable committee in the geographic area: the Southern California Laborers Landscape and Irrigation Fitter Joint Apprenticeship Committee, located at 1385 W. Sierra Madre Ave., Azusa, CA 91702.

Notice of Contract Award Information and Request for Dispatch of Apprentices: Pich testified that he began his investigation in this matter as a result of a complaint by the Center for Contract Compliance (Center) that D D Systems failed among other things to provide contract award information, failed to request dispatch of apprentices, and failed to employ apprentices.

D D Systems provided Pich with a copy of a form DAS 140 Public Works Contract Award Information addressed to the applicable committee, but no proof of transmittal to the applicable committee. Similarly, D D Systems provided Pich with a copy of a form DAS 142 Request for Dispatch of an Apprentice likewise addressed to the applicable committee, but again with no proof of transmittal to the applicable committee. The Center provided Pich with a copy of a letter from the applicable apprentice committee that indicated it had not received either form.

At the hearing, D D Systems produced as an exhibit, a fax cover sheet dated October 9, 2013, indicating that a 2-page fax was sent to fax number (626) 856-5751. Daher indicated that the fax showed that he had transmitted the DAS 140 dated December 20, 2013 and the DAS 142 to the applicable apprentice committee. The committee's fax number on the letter given to Pich is listed as (626) 633-0204.

Assessment of Penalties: Pich testified that the penalties for underpayment of wages were assessed based on the number of violations, 155. The violations were calculated by the number of instances of underpayment by employee per day.

Pich testified that the penalties for the apprentice violations were assessed based on the number of days journeymen were on the Project, 102 days. The 102 days were calculated from the 2nd day journeymen were on duty for the Project, December 17, 2013 to the last day journeymen were on duty. The last day worked according to Pich was March 28, 2014. However, the CPRs prepared by D D Systems and used by Pich, indicate that the last day journeymen were on duty was March 21, 2014.

Espiritu testified that she reviews the penalty reviews. In this matter, she did so on or about March 13, 2015. She further testified that with respect to the section 1775 penalty review, pages 1-4 were completed by deputy Pich, except for Section 2 of page 1, which she completed. She assessed penalties at the rate of \$40.00 on the \$200.00 scale. She did so based on the report by Pich that the contractor had no history of prior violations and because the violations were ratio violations, she thought it could have been a mistake and probably not intentional on the part of the contractor. Thus, Espiritu mitigated the penalty to the lowest rate. With respect to the

section 1777.7 penalty review, sections 1-3, on pages 1-4, were completed by Pich. She completed page 5. She set the violation rate at \$60.00, because it appeared that the contractor should have reasonably known the requirements of the apprenticeship laws. However, she did mitigate the penalty down to \$60.00 [from \$100.00] per violation because the contractor had no history of prior violations.

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. Specifically:

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].) 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), and see *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775, subdivision (a) 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 the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the Civil Wage and Penalty Assessment is incorrect.”

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, section 227² provides that the regulations “shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7.”

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

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

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

(a) Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contract award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. This contract award information shall be in writing and may be a DAS Form 140, Public Works Contract Award Information. The information shall be provided to the applicable apprenticeship committee within

² All further regulatory references are to California Code of Regulations, title 8.

ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work.... The DAS Form 140 or written notice shall include the following information, but shall not require information not enumerated in Section 230:

- (1) the contractor's name, address, telephone number and state license number;
- (2) full name and address of the public work awarding body;
- (3) the exact location of the public work site;
- (4) date of the contract award;
- (5) expected start date of the work;
- (6) estimated journeyman hours;
- (7) number of apprentices to be employed;
- (8) Approximate dates apprentices will be employed.

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

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

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

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

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

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

Request the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee, either consecutively or simultaneously, until the contractor has requested apprentice dispatches from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

DAS has prepared a form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. In the review of a determination as to the 1:5 ratio requirement, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (§ 1777.7, subd. (c)(2)(B).)

There are two distinct limitations periods for the types of violations alleged in the Assessment. Section 1741, subdivision (a) provides a limitations period for the service of an assessment by the DLSE for the failure to pay the correct wages. California Code of Regulations, title 8, section 232.70 provides a separate limitations period for the service of an assessment by the DLSE for the failure to employ apprentices on public works.

1. Wage Violations

In 2013, section 1741, subdivision (a) provided in pertinent part as follows:

The assessment shall be served not more than 180 days after the filing of a notice of completion...or not later than 180 days after acceptance of the public work, whichever is last. However if the assessment is served after the expiration of the 180-day period, but before the expiration of an additional 180 days, and the Awarding Body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained.

Effective, January 1, 2014, section 1741, subdivision (a) was amended to increase the statute of limitations. The new provision provides as follows:

The assessment shall be served no later than 18 months after the filing of a valid notice of completion in the office of the county recorder in the county in which the public work or some part thereof was performed, or not later than 18 months after the acceptance of the public work whichever occurs last.

Statutes apply prospectively unless there is a clear expressed statutory intent otherwise. (*Elsner v. Ueveges* (2004) 34 Cal.4th 915. 936.) If the legislature extends a period of limitations, any matter not already barred is subject to the new period of limitations. (*Mudd v. McColgan* (1947) 30 Cal.2nd 463.)

Under the limitations provision of section 1741, generally the period within which to serve the assessment begins to run after the filing of a notice of completion. However, no notice of completion was ever recorded by the City. DLSE essentially contends that the City accepted the Project on April 4, 2014. D D Systems does not dispute DLSE's assertion, and the CPRs indicate that D D Systems employees did not perform any further construction, alteration, demolition, installation, repair of maintenance work after March 21, 2014. Because the matter was not barred at the time the new period of limitations went into effect, the new period of 18 months applies. Thus, the Assessment was timely

with respect to the wage violations, as it was served on March 19, 2015, less than 12 months after the City accepted the Project on April 4, 2014.

2. Apprentice Violations

An Assessment for violation of section 1777.5 "shall be issued and served on the Affected Parties no later than three years after date of accrual." (Rule 70.) The date of accrual is the end of the contract as the affected contractor has the opportunity to meet its obligations under the law by employing apprentices for the requisite number of hours before the end of the contract. (Regulation 230.1.)

According to the CPRs, the last day employees worked on the Project was March 21, 2014. The City accepted the Project on April 4, 2014. DLSE served the Assessment by mail on March 19, 2015, which was prior to the expiration of the three year limitations period (April 4, 2017).

Copy of Enforcement File

D D Systems claimed it was aggrieved because it did not receive signed copies of the two penalty reviews when it copied the enforcement file. However, it failed to demonstrate how it was prejudiced.

The Assessment that was served on D D Systems included the amount of the assessed penalties. The copy of the penalty reviews it received indicated the number of violations. It was a simple mathematical calculation to divide the penalty amount by the number of violations to obtain the penalty rate. Thereafter, the penalty statutes themselves indicate what rate may be imposed. In addition, even if D D Systems had difficulty determining the penalty rate that did not prevent D D Systems from placing on deposit with the Department the amount of unpaid wages in order to mitigate the possibility of incurring substantial liquidated damages.

D D Systems Failed To Pay The Proper Prevailing Wage Rate

D D Systems essentially conceded that Luis Mejia should have been classified as a laborer. It disputed, however, that Frank Serna Mejia, Richard Medina, and Javier Barrera were

misclassified, and that they and Raul Barrera were underpaid. D D Systems did not offer evidence that DLSE used the wrong prevailing wage rates. It disputed the correctness of DLSE's calculations; however, it was not able to establish errors by DLSE in making the calculations. D D Systems alleged that it was entitled to credit for the times it overpaid the employees when they were correctly classified as tenders, but Pich testified he did give credit, and the calculations bear that out.

DLSE's Penalty Assessment Under Section 1775

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 her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission*, 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." (Rule 50, subd. (c) [Cal. Code Reg. tit. 8 §17250, subd. (c)].)

DLSE assessed Labor Code section 1775 penalties at the rate of \$40.00 because D D Systems misclassified workers and underpaid workers in a significant amount comprising 155 violations. However, the penalty rate was the lowest allowed by statute because of the nature of the violations: ratio violations.

The burden is on D D Systems to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$40.00 per violation. Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. Here DLSE did mitigate the statutory maximum penalty of \$200.00 down to \$40.00. The Director is not free to substitute her own judgment. D D Systems

has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$40.00 is affirmed. The Decision reduces the total assessed violations, however, to take into account credit for overpayments made to Raul Barrera and Frank Serna Mejia. The credit for overpayments made to each if credited during a period of underpayment was equal to 5 violations each. So the 155 violations are reduced to 145 violations.

D D Systems Is Liable For Liquidated Damages

Labor Code section 1742.1, subdivision (a) provides in pertinent part as follows:

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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the Assessment . . . to be in error, the director shall waive payment of the liquidated damages.

Rule 51, subdivision (b) (Cal. Code Regs., tit. 8, § 17251, subd. (b)) states as follows:

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

In accordance with the statute, D D Systems would be liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to D D System’s position on the merits and specifically whether there was an “objective basis in law and fact” for contending that the assessment was in error.

Because the assessed back wages remained due more than sixty days after service of the Assessment, and D D Systems has not demonstrated grounds for waiver, D D Systems is also liable for liquidated damages in an amount equal to the unpaid wages.

D D Systems Failed To Employ Laborer Apprentices

“Laborers” was the craft at issue in the Determination. With respect to the 1:5 ratio of apprentice hours to journeyman hours, D D Systems employed no laborer apprentices on the Project. Accordingly, the record establishes that D D Systems violated Labor Code section 1777.5 and section 230.1.

There Was One Applicable Committee in the Geographic Area

There is no dispute that there was one applicable apprenticeship committee in the geographic area of the Project. D D Systems merely claims that it provided the required notices to the applicable committee, the Southern California Laborers Landscape and Irrigation Fitter Joint Apprenticeship Committee.

D D Systems Failed To Properly Issue A Notice of Contract Award Information and Request The Dispatch Of Laborer Apprentices

While D D Systems claimed that it provided a DAS 140 and a DAS 142 to the Southern California Laborers Landscape and Irrigation Fitter Joint Apprenticeship Committee, it provided no proof of doing so.

The Penalty for Noncompliance

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

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

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

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

D D Systems "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for laborer apprentices, and the record establishes that this violation was "knowingly committed." Daher was familiar with the requirement for use of apprentices on the Project, and familiar with the need to send contract award information, and to contact apprentice committees and request the dispatch of apprentices. He had prepared the necessary forms and attempted to establish that he had in fact sent them. However, he simply had no proof of doing so.

D D Systems failed to meet its burden of proof by providing evidence of compliance with section 1777.5. In order to show that its failure to employ apprentices was due to circumstances beyond its control, D D Systems had to demonstrate that it properly provided contact award information and properly requested the dispatch of laborer apprentices from the two applicable committees and that no apprentices were dispatched. It did not do so. Since D D Systems knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE's Penalty Assessment Under Section 1777.7

As with penalties under section 1775, the contractor has the burden to prove that DLSE abused its discretion in setting the penalty, and the Director is not free to substitute her own judgment. D D Systems has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$60.00 is affirmed.³ The Decision reduces the total assessed violations,

³ The contractor also argued that total penalties of \$12,320.00 were disproportionate in light of the contract value of \$175,000.00, but made no legal argument to support a reduction in the penalties assessed on that basis. Under both sections 1775 and 1777.7, the legislature has set specific ranges of maximum and minimum penalties and limited the Director's review of the Labor Commissioner's assessment of penalties under those sections to abuse of discretion.

however, to take into account that the CPRs indicate that the number of days on the job was 95 not 102.

FINDINGS

1. The Project was a public work subject to the payment of prevailing wages.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor D D Systems filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. D D Systems was not prejudiced by the failure of DLSE to provide it with complete copies of the penalty review sheets.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. Raul Barrera performed work in Orange County within the City limits of Yorba Linda during the pendency of the Project and was entitled to be paid the journeyman rate for Landscape Irrigation Laborer for that work.
7. Luis Mejia, Frank Serna Mejia, Richard Medina, and Javier Barrera performed work in Orange County within the City limits of Yorba Linda during the pendency of the Project and were entitled to be paid the journeyman rate for Landscape Irrigation Laborer for that work.
8. In light of findings 6 and 7 above, D D Systems underpaid its employees on the Project in the aggregate amount of \$16,940.38.
9. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of \$40.00 per violation, and the resulting total penalty of \$5,800, as modified for 145 violations, is affirmed.

In this case, the penalties assessed under both sections were substantially mitigated by the Labor Commissioner and no abuse of discretion was shown by D D Systems.

10. The unpaid wages found in Finding No. 8 remained due and owing more than 60 days following issuance of the Assessment. D D Systems is liable for an additional amount of liquidated damages under section 1742.1 and there are insufficient grounds to waive payment of these damages.
11. There was one applicable apprenticeship committee in the geographic area of the Project in the craft of laborer: the Laborers Southern California Joint Apprenticeship Committee.
12. D D Systems failed to properly submit contract award information and failed to properly request dispatch of laborer apprentices from the applicable apprenticeship committee in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
13. DLSE did not abuse its discretion in setting section 1777.7 penalties at the rate of \$60.00 per violation, and the resulting total penalty of \$5,700.00, as modified for 95 violations, is affirmed.
14. The amount found remaining due in the Assessment is modified and affirmed by this Decision are as follows:

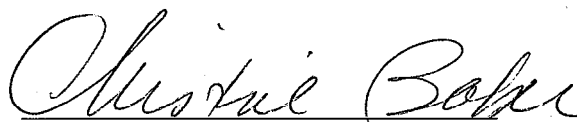
Wages due:	\$16,940.38
Penalties under section 1775(a):	\$5,800.00
Liquidated damages:	\$16,940.38
Penalties under section 1777.7:	\$5,700.00
TOTAL	\$45,380.76

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

ORDER

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: 5/19/2016



Christine Baker
Director of Industrial Relations