

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Graffiti Protective Coatings, Inc.

Case No. 15-0182-PWH

From Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Graffiti Protective Coatings, Inc. (Graffiti) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Graffiti Abatement Services Contract No. 901129 Procurement Contract 9966 – Alameda County (Project) performed for the Alameda County Department of Public Works (County) and the Community Development Agency in the unincorporated areas of the County of Alameda. The Assessment found that Graffiti failed to submit contract award information to applicable apprenticeship programs in accordance with Labor Code section 1777.5, subdivision (e), failed to request dispatch of apprentices under section 1777.5, subdivision (d), and failed to employ apprentices in accordance with section 1777.5, subdivision (g). DLSE assessed an aggregate penalty of \$17,880.00 under section 1777.7.¹

A Hearing on the Merits was held on December 1, 2015 and March 10, 2016, in Oakland, California, before Hearing Officer Gayle Oshima. Ramon Yuen-Garcia appeared as counsel for DLSE. Charles H. Goldstein and Joseph A. Goldstein appeared as counsel for Graffiti. The matter was submitted for decision after post-trial briefing on May 9, 2016.

The issues for decision are:

- Is the Project a public work covered by the prevailing wage law: section 1720, et seq.?

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

- Is Graffiti Protective Coatings, Inc. estopped from raising the issue of coverage by the prevailing wage law?
- Is Graffiti obligated to comply with section 1777.5 for the graffiti removal work?
- Did DLSE abuse its discretion in assessing the penalties under section 1777.7 of \$60.00 per violation?
- Is Graffiti obligated to comply with its agreement with the County of Alameda?²

The Director finds Graffiti failed to carry its burden of proving that the basis of the Assessment was incorrect. The Project was a public work subject to the Prevailing Wage Law, and therefore, Graffiti failed to properly provide the applicable apprenticeship committees with timely notice of contract award information; failed to properly request dispatch of Painter: Brush and Spray apprentices from either of the apprenticeship committees in the geographic area of the Project; and, failed to make contributions to an applicable apprenticeship training fund or the California Apprenticeship Council. Hence, Graffiti was not excused from the requirement to employ apprentices under section 1777.5. Accordingly, the Director of Industrial Relations issues this Decision affirming the Assessment.

FACTS

Graffiti is a contractor possessing a C-33 Painting and Decorating license and a C-61, D-38 Sand and Waterblasting license based in Los Angeles, California.

The Graffiti Abatement Contract

On or about June 25, 2013, the Alameda County, General Services Agency published Request for Interest No. 901129 for a graffiti abatement service contract. On or about November 14, 2013, the Alameda County, General Services Agency published a number of advertisements in various local newspapers seeking bids on the graffiti abatement service contract.

² The Director does not have jurisdiction over contractual matters between Graffiti and the County of Alameda. Hence, the issue before the Director is whether Graffiti was obligated to comply with the Prevailing Wage Law.

On April 15, 2014, Graffiti successfully bid on the contract with the Alameda County Department of Public Works (PWA) and the Community Development Agency (CDA) to perform graffiti abatement work on public properties, in redevelopment districts, and on private properties in the unincorporated areas of Alameda County, and entered into a contract with the County of Alameda.

The contract entered into by Graffiti contained a section entitled in all capital letters "PREVAILING WAGES," which stated in part:

Pursuant to Labor Code Section 1770 et seq., Contractor shall pay to persons performing labor in and about Work provided for in Contract not less than the general prevailing rate or per diem wages for work of a similar character in the locality for which the Work is performed ...which per diem wages shall not be less than the stipulated rates contained in a schedule thereof which has been ascertained and determined by the Director of the State Department of Industrial Relations to be the general prevailing rate of per diem wages for each craft or type of workman or mechanic needed to execute this contract.

The contract also specified that the contractor "shall observe and comply with all applicable laws, ordinance, codes and regulations of governmental agencies...having jurisdiction over the scope of services..."

Graffiti was required to "...remove or paint over all types of graffiti in compliance with all...laws," and to abate graffiti from public structures (including sidewalks, among other things), private structures (including fences, sidewalks, and doors, among other things), and "...the entire [structure] surface in the event that the graffiti covers a significant area of the surface." The contractor was also required to conduct a minimum of four hours of surveillance per week at Graffiti's expense.

The County of Alameda also specified performance requirements which included preparation of surfaces and to "paint over graffiti with a color matching the existing covering, or remove [g]raffiti with appropriate cleaners, removers, etc." The contract required that the color be matched at least by 98%, and provided assurances that "touch-ups will always be 100% accurate." The contractual language specifically stated:

[m]any buildings are repeatedly tagged and would be damaged if quality of the removal does not account for the repeated volume, therefore Contractor takes special care to properly prep all surfaces and then professionally apply only high quality finishes. Contractor will contract to have old and unused paint picked up and recycled.

The contract delineated the methods of graffiti removal as “painting” and “media blasting.” “Painting” included the application of a primer coat of paint, and application of color by the “feathering” technique. The language provided that “only quality paint to prevent color fading” will be used. With respect to media blasting, the contract specified that the removal of graffiti from unpainted surfaces will be performed wet or dry and “[n]atural surfaces that will be repeatedly tagged may require the application of an anti-graffiti coating.” The contract also stated that “[g]raffiti locations often require multiple techniques of hot water cleaning, chemical removal, and painting.”

Graffiti agreed to provide workers with training, including color matching and proper use of equipment, among other things.

The contract’s payment terms provided that the County will pay for the work done per location or address, not to exceed the total amount of \$375,000. Rates for the project were divided by the size of graffiti tags: those measuring up to 150 square feet (painting, per address or location, media blasting, per address, or chemical removal, per address) or those graffiti tags measuring over 150 square feet (painting or media blasting).

Certified Payroll Records

Graffiti employed two workers to undertake the duties of graffiti abatement as provided in the contract, beginning on or about May 24, 2014.

Graffiti filed the periodic certified payroll information on the County’s electronic “Elation” system. The certified payroll, submitted under penalty of perjury as required by section 1776,³

³ The statute states in a relevant part: “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

contained the name and other personal information of the employees performing the work under the contract. The certified payroll form required Graffiti to specify the work classification of Graffiti's employees for the Project. Graffiti designated the classification as "Journeyman, Alameda, Painter: Brush and Spray."

Graffiti's Accounting Manager, Sandra Corbett, Jr. (Corbett) testified that usually, in filling out paper documents, she chose Painter: Brush and Spray because this was the closest to what the employee's job duties were. And, in filing the form in the electronic Elation system, she chose this classification because this appeared as a dropdown choice. The certified payroll form also required Graffiti to show the deductions, contributions, and payments made to and on behalf of the worker. Corbett testified that Graffiti Removal Specialist or Senior Field Technician were not on the dropdown menu. She also testified that Graffiti did not report any apprentices in the certified payroll records.

Painter: Brush and Spray

The prevailing wage determination used by Graffiti was Determination No. ALA-2014-2, and the rate for the classification of Painter: Brush and Spray was the sum of \$34.83 in basic hourly rate, \$20.76 in fringe benefits, and \$0.41 in contribution to apprenticeship training funds, for a total sum of \$56.00.

Under Determination No. ALA-2014-2, Painter: Brush and Spray is an apprenticeable craft. The Scope of Work Provisions for Painter: Brush and Spray; Industrial Painter; Sandblaster, Waterblaster, Steamcleaner; Exotic Materials; and Paperhanger/Wallcovering in Alameda County⁴ include:

is true and correct. (2) The employer has complied with the requirements of Section 1771, 1811, and 1815 for any work performed by his or her employees on the public works project."

⁴ Adopted from Northern California Painters Master Agreement between District Council 16 and the Northern California Painting and Finishing Contractors Association dated June 1, 2011 through June 30, 2014.

“(a) [w]ork or services pertaining to the painting of all drywall and thin wall type surfaces, flushing or concrete surfaces, caulking and sealants between sheet rock walls and/or ceilings and floors of other materials; ... (f) [w]ork or services pertaining to the priming and finish coats on fabricated metal or steel products; ... (h) [w]ork or services pertaining to the cleaning, polishing and refinishing of metal and masonry surfaces; ... (j) [w]ork or services pertaining to surface preparation and decoration of all types; (sic) including sandblasting, steam cleaning, building washing, hydro blasting, water blasting and all the methods used in the removal of previously painted services.”

It was pointed out by Graffiti that the classifications of Graffiti Removal Specialist or Senior Field Technician do not exist as crafts for which prevailing wage determinations have been issued by the Director. Graffiti's General Manager, Steven Lenhoff (Lenhoff) testified that he did not seek clarification from DLSE or seek review of the prevailing wage determination from the Director under section 1773.4 as to whether graffiti removal could be considered a separate craft from Painter: Brush and Spray, nor did he seek an exemption from an apprenticeship program under section 1777.5, subdivision (k). The stated reason why he did not seek guidance was because it is not his job.

Payments

Although Corbett certified under penalty of perjury that "... fringe benefits are paid to the approved Plans, Fund, or Programs as listed..." on the Fringe Benefit Statement, the Statement showed that \$0.41 the contribution for the Apprentice/Training Fund was "paid in cash to employee." Graffiti paid the workers the prevailing wage determined by the Director of Industrial Relations for the craft of "Painting: Brush and Spray." Lenhoff testified that Graffiti paid the prevailing wage because the contract required workers to be paid the prevailing wage. Lenhoff also testified that Graffiti did not make payments to apprenticeship training programs nor to the California Apprenticeship Council (CAC), but instead, paid the contributions directly to the workers. Graffiti stated that it did not make contributions to any apprenticeship training funds because there is no recognized apprenticeship program for graffiti removal.

DAS 140 and DAS 142

Lenhoff further testified that Graffiti did not submit a Division of Apprenticeship Standards (DAS) Public Works Contract Award Information form (DAS 140) to any apprenticeship committee. Graffiti stated that it has its own in-house year-long training program for graffiti removal technicians, but it is not approved to train apprentices by any apprenticeship committee.

Lenhoff also testified that Graffiti did not submit a Request for Dispatch of an Apprentice, form DAS 142 for Painter: Brush and Spray. Graffiti concluded that an apprentice from a traditional painter apprenticeship program could not perform the duties of a graffiti technician because traditional painting was different from graffiti abatement.

Caltrans Graffiti Abatement Contracts

However, Lenhoff also testified that Graffiti has entered into two graffiti abatement contracts with Caltrans. Both contracts provide that the work is a public work, and requires Graffiti to comply with the Prevailing Wage Law, including filing DAS 140, and requesting the dispatch of apprentices. Lenhoff stated that under the Caltrans contracts, driving or surveilling for graffiti is classified as Laborer, while the classification for painting and graffiti removal is Painter: Brush and Spray. Lenhoff further testified that Graffiti makes the contribution to the apprenticeship training fund [or the CAC] but does not employ apprentices on its Caltrans contracts.

Civil Wage and Penalty Assessment

On or about May 2015, the Division of Labor Standards Enforcement (DLSE) received a complaint that Graffiti was under-reporting hours and that workers were not paid travel and subsistence for work performed on the Project. As a result of an investigation, DLSE determined that Graffiti had paid its workers the correct basic hourly rate of \$34.83 and fringe benefits of \$20.76 for the classification of Painter: Brush and Spray. However, Graffiti admitted that it did not pay the \$0.41 in contribution to apprenticeship training funds or the CAC, but stated that it paid the funds directly to the worker.

The Assessment issued on May 21, 2015 assessed penalties under section 1777.7,

subdivision (a)(1) at the rate of \$60 per day instead of the maximum \$100 per day. The Assessment computed the number of days that Graffiti was in violation of section 1777.5 as 298 days, commencing with the first day that Graffiti employed workers upon the Project, May 27, 2014, through March 20, 2015, the last date on the certified payroll records, for a total amount of \$17,880.00. The Assessment did not assess any unpaid wages determined to be due to any of the workers who performed work under the contract. At the time the Assessment was issued, the records of DLSE showed that Graffiti had no prior Labor Code violations.

Graffiti timely filed a Request for Review on or about June 4, 2015. Graffiti contends that the contract for graffiti abatement is not a public work, and that because their own worker designations of Graffiti Removal Technician or Senior Field Technician are not apprenticeable trades or crafts, it is not subject to the Prevailing Wage Law. Furthermore, Lenhoff testified that the workers spent 80-90% of the time surveilling the area for graffiti, and spent about 20% removing graffiti with less than 10% of the time painting. Also, Graffiti contends that because the workers are not Journeymen, the classification of Painter: Brush and Spray is not applicable, and so it was not required to request a dispatch of apprentices.

DISCUSSION

Section 1720 and following set forth a framework for determining and requiring the payment of prevailing wages to workers employed on public works construction contracts. "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

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." (Lab. Code, § 90.5 (a); *see Lusardi, supra.*)

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.”

The Graffiti Abatement Work Performed by Graffiti is a Public Work and is Subject to the Prevailing Wage Requirements.

Section 1771 generally requires the payment of prevailing wages to workers employed on public works. Section 1720, subdivision (a) defines “public works” in relevant part as “Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds.” Subject to limited exemptions, section 1771 provides that public works include contracts let for maintenance for projects valued more than \$1,000.

Under California Code of Regulations Title 8, section 16000, “maintenance” is defined as:

- (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.
- (2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

As stated in the contract, “[m]any buildings are repeatedly tagged and would be damaged if quality of the removal does not account for the repeated volume, therefore Contractor takes special care to properly prep all surfaces and then professionally apply only high quality finishes. Contractor will contract to have old and unused paint picked up and recycled.” The scope of work recognizes the routine and recurring nature of graffiti removal, and the importance of the preservation and protection of publicly-owned and privately-owned building and structures in

continually usable condition. Moreover, because the Project is paid for with public funds by the County, the Graffiti Abatement contract is a public work within the meaning of the Labor Code and applicable regulations.⁵

The Project Required Graffiti to Remove Graffiti By Painting, Waterblasting, Sandblasting, and Steam Cleaning, All Within the Scope of Work For Painter: Brush and Spray.

It is undisputed that the Project required painting, waterblasting, sandblasting, and steam cleaning in abating graffiti under the contract. In fact, Graffiti filed certified payroll records under penalty of perjury, which provide that the workers employed in the graffiti abatement contract were "Journeymen Painter: Brush and Spray." Corbett testified that she chose the classification because it was the closest to the work done under the contract. Moreover, she chose the classification because it appeared as a dropdown choice when filing the certified payroll information electronically. Lenhoff testified that although the Painter: Brush and Spray classification did not fit with his classification of graffiti removal technician, he did not seek clarification from the Department of Industrial Relations.

Graffiti also testified that they believed that graffiti removal was not an apprenticeable craft,⁶ and the painting done by the workers was only a small percentage of the entire contract. Therefore, Graffiti argued, although it chose the classification of Painter: Brush and Spray, and

⁵ DLSE requested that the Director take Official Notice of the coverage determination of Case No. 2001-055, pursuant to California Code of Regulations, Title 8, section 17245. The Director declines to take Official Notice of the coverage determination because under the facts of this case, the graffiti abatement contract is clearly a public work and there is no evidence that the Department has taken inconsistent positions in the past on this issue.

⁶ It is not necessary for us to elucidate whether "graffiti removal" per se is an apprenticeable craft or trade in this Decision because it is abundantly clear that the scope of work under the contract contemplated painting, waterblasting, sandblasting, and steamcleaning, all processes within the craft of Painter: Brush and Spray. However, it is worthy to note that subdivision (d) of section 1777.5 provides in a relevant part: "...Apprenticeable craft or trade," as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council...

Under subdivision (c) of section 205, an "Apprenticeable Occupation" is one which requires independent judgment and the application of manual, mechanical, technical, or professional skills and is best learned through an organized system of on-the-job training together with related and supplemental instruction. Graffiti removal has not been established as a separate craft, nor is there a separate apprenticeship program.

painting only consisted of less than 10% of the work under the contract, it did not have the obligation to request a dispatch of apprentices from the Painter: Brush and Spray classification. Graffiti further argued that Painter: Brush and Spray apprentices could not do the work under contract anyway. However, the scope of work of the contract, and the performance requirements specified by the contract, leave little doubt that the work contemplated by the contract called for painting, waterblasting, sandblasting, and steam cleaning, crafts covered under the Scope of Work applicable to the Painter: Brush and Spray classification published by the Director of Industrial Relations.

Indeed, the work under contract required Graffiti to paint, color match, conduct surface preparation, and provide media blasting. Paint was applied to surfaces using the “feathering” technique. “Media blasting” included the removal of graffiti using water, steam, sand, solvents, or a baking soda preparation. Although the other work done by the workers was surveillance—driving around looking for graffiti to clean—Graffiti did not request clarification as to whether the classification was correct, nor whether it could be bifurcated according to the job, as required under the graffiti abatement contract it had entered with Caltrans.

Graffiti Was Required to Comply with All Parts of the Prevailing Wage Law, Not Just Payment of the Prevailing Wage: Graffiti Failed to Submit DAS 140s.

The evidence presented in the hearing showed that Graffiti paid the workers the prevailing wage for Journeyman Painter: Brush and Spray. However, Graffiti did not comply with Labor Code sections 1777.5 through 1777.7 which set forth the statutory requirements governing the employment of apprentices on public works projects, and payment into appropriate apprenticeship training funds or the CAC. These requirements are further addressed in regulations promulgated by the CAC.

With respect to the requirement to submit 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 submitting a form DAS 140 is California Code of Regulations, title 8, section 230, subdivision (a). Section 230, subdivision (a) specifies the requirement for contractors who are already approved by an apprenticeship program sponsor to train in the apprenticeable craft or trade, and also 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...

In this case, Lenhoff admitted that Graffiti did not submit a DAS 140 Form with contract award information to any applicable apprenticeship committee in the Project area. Moreover, Graffiti was not approved to provide apprenticeship training by any applicable apprenticeship program, although it had developed its own proprietary training program.

Graffiti Failed to Prove that the Graffiti Abatement Work Under Contract was Not Part of an Apprenticeable Craft or Trade.

Graffiti argued that they are not subject to the Prevailing Wage Law because graffiti removal is not an apprenticeable craft. In a recently decided case, the Court of Appeal affirmed the lower court's holding that "...the statute requires contractors to hire apprentices in the same craft or trade of a journeyman should be understood to refer to the journeyman's occupations, not the work processes in which they engage on any given day." (*Henson v. C. Overaa & Company* (2015) 238 Cal. App. 4th 184, 193.) The *Henson* Court also stated that "[w]e cannot conclude this additional training constituted a violation of the relevant apprenticeship standards, since

those standards set a floor, not a ceiling.” (*Id.* at p. 196.) The Court concluded that:

If, as appellants contend, a journeyman’s craft or trade is defined exclusively by the work processes that he or she is carrying out, that journeyman’s craft or trade can vary from moment to moment. This would also mean that a contractor might need to constantly rotate apprentices to match the craft or trade being performed on the jobsite. We agree with the trial court that appellants’ reading of the statute has the potential to place an unreasonable burden on contractors.

(*Id.* at p. 199.)

Here, Graffiti attempted to demonstrate that the graffiti removal processes are different from the craft or trade of Painter: Brush and Spray. Although there were some variations regarding the processes of the graffiti removal work, it is not disputed that Graffiti’s workers performed painting, waterblasting, sandblasting, and steam cleaning, crafts covered under the Scope of Work applicable to the Painter: Brush and Spray classification published by the Director of Industrial Relations. Moreover, the focus should be on the craft or trade of the journeyman—Painter: Brush and Spray. Therefore, Graffiti failed to prove that the graffiti abatement work under contract was not part of an apprenticeable craft or trade.

Graffiti Failed to Request Dispatch of or Employ Painter: Brush and Spray Apprentices.

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). The governing regulation as to this 1:5 ratio of apprentice hours to journeyman hours is California Code of Regulations, title 8, 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. [Emphasis added.]

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. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) A contractor may use form DAS 142 to request dispatch of apprentices from apprenticeship committees.

In this case, Graffiti did not seek an exemption, and there were no apprentices listed in the certified payroll records submitted by Graffiti. Moreover, Lenhoff testified that Graffiti did not request a dispatch of apprentices.

Lenhoff provided several reasons for not complying with section 1777.5. He stated that there were no apprentices that could perform graffiti removal services. However, as stated previously, the plain language of the contract contemplated that painting, sandblasting, waterblasting, and steamcleaning were much of the work required in the Project. Therefore, most of the required graffiti removal work comes well within the craft or trade of Painter: Brush and Spray.

Indeed, Lenhoff testified that under a separate public works contract with Caltrans, that contract required that they specify that the surveillance part of the job would be classified as Laborer, an apprenticeable craft, and the graffiti removal part of the job would be classified as Painter: Brush and Spray, also an apprenticeable craft. Although Lenhoff testified that the painting done under the Alameda County graffiti abatement contract was less than 10% of the work, he did not seek clarification or guidance from the Department of Industrial Relations as to what the work could or should be classified under, nor did he seek review of the determination regarding his own classification of the work as Painter: Brush and Spray under section 1773.4. He testified that it was not his job to do so.

Graffiti also argued that there were no journeymen working on the Project, and therefore, no apprentices could be employed because there was no journeyman in the proper trade to train them. While, if true, this may have been a basis either for Graffiti to request an exemption from the apprentice dispatch requirement or for an applicable apprenticeship program to decline to dispatch apprentices for the work, Graffiti's mere perception that its workers could not train apprentices does not excuse it from the requirements of section 1777.5. What is important in the context of the Prevailing Wage Law is not the training or certification of the worker as a journeyman in a given craft but whether the work actually being performed falls within the scope of work of such a craft. Here Graffiti's certified payroll records, signed by Corbett under penalty of perjury, report its workers as Journeyman Painter: Brush and Spray. And Graffiti paid those workers the prevailing wage for Journeyman Painter: Brush and Spray. Because the work performed unquestionably falls within the applicable Painter scope of work, Graffiti was required to request the dispatch of and employ apprentices on the Project.

Graffiti Failed to Contribute to an Apprenticeship Training Fund or to the CAC.

Section 1777.5, subdivision (m)(1), establishes the mandatory apprenticeship training contribution which is part of the applicable prevailing wage and California Code of Regulations, title 8, section 230.2 provides that contractors who do not make apprenticeship training contributions to a local training trust fund shall make the training contributions to the CAC. The regulation further mandates when the training contributions are due and payable, and the specific information that is required to be filed with each payment. Because payment to either an approved apprenticeship program or the CAC is mandated by law, the requirement may not be satisfied by paying the amount of the required training fund contribution directly to the workers in lieu of that payment.

Lenhoff testified and the Statement of Employer Payments showed that training contributions were made directly to the worker, and not to any local training trust fund or the CAC as required. Therefore, Graffiti did not comply with sections 1777.5 or 230.2.

DLSE Did Not Abuse Its Discretion in Assessing Penalties Under Section 1777.7 at the Reduced Rate of \$60.00 per Violation.

Section 1777.7 states in relevant part:

(a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than 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 within a three-year period, if the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars (\$300) for each full calendar day of noncompliance.

(2) In lieu of the penalty provided for in this subdivision, the Labor Commissioner may, for a first-time violation and with the concurrence of an apprenticeship program described in subdivision (d) of Section 1777.5, order the contractor or subcontractor to provide apprentice employment equivalent to the work hours that would have been provided for apprentices during the period of noncompliance.

(b) The Labor Commissioner shall consider, in setting the amount of a monetary penalty, all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of Section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

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.

Section 1777.7(d) also provides that "[t]he determination of the Labor Commissioner as to the amount of the penalty imposed under subdivisions (a) and (b) shall be reviewable only for an abuse of discretion." Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) 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* (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, namely, the affected contractor 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).)

In this case, Graffiti "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for Painter: Brush and Spray, and the record establishes that this violation was "knowingly committed." Additionally, Graffiti did not hire apprentices: Lenhoff testified that they did not request apprentices, and therefore, did not hire apprentices at all. The record establishes that Graffiti had notice that the Project was a public work and the prevailing wage law applied to this Project and it had entered into separate public works contracts with Caltrans for similar graffiti removal work for which it complied with the very apprenticeship requirements that Graffiti contends it should be excused from here. Hence, Graffiti was on notice that it was required to: make contributions to an applicable apprenticeship training fund or the CAC; submit contract award information to all applicable apprenticeship programs; request

dispatch of apprentices; and employ apprentices on the Project in the required ratio. However, in mitigation, there is no evidence that Graffiti had prior violations within the last three years, and Graffiti paid the workers the required prevailing wage for the Painter: Brush and Spray classification. Thus, Graffiti did not prove that the basis of the Civil Wage and Penalty Assessment was incorrect, and DLSE did not abuse its discretion when mitigating the penalty from the maximum \$100.00 per violation to \$60.00 per violation.

FINDINGS

1. The Project was a public work.
2. The work performed by Graffiti's workers was subject to the prevailing wage requirements of section 1720 et seq., and therefore, Graffiti has liability for the penalties set forth in the Determination.
3. There are two applicable apprenticeship committees in the geographic area of the Project in the craft of Painter: Brush and Spray: (1) Painters & Decorating J.A.T C. of the Bay Area Inc. and (2) Associated Builders & Contractors Northern California Chapter Painting U.A.C.
4. Graffiti failed to properly submit contract award information and failed to properly request dispatch of Painter: Brush and Spray apprentices from the applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under section 1777.7.
5. The Labor Commissioner did not abuse her discretion in assessing penalties under section 1777.7 at the mitigated rate of \$60.00 per violation, and the resulting total penalty of \$17,880.00, as assessed, for 298 violations is affirmed.

ORDER

The Civil Wage and Penalty Assessment is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings and appeal rights which shall be served with this Decision on the parties.

Dated: 6/24/2016



Christine Baker
Director of Industrial Relations