STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**GRFCO, Inc.** Case No. 17-0004-PWH

From a Determination of Civil Penalty issued by:

**Division of Labor Standards Enforcement**

## DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor GRFCO, Inc. (GRFCO) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on December 21, 2016, with respect to work performed by GRFCO on the San Onofre Surf Beach Main Waterline Replacement project (Project) for the State of California, Department of Parks and Recreation (Awarding Body). The Assessment found that GRFCO failed in its obligations under the law as follows: failed to pay the required prevailing wage rate per Labor Code sections 1771 and 1774; failed to accurately report actual hours worked per Labor Code section 1776; failed to pay required training fund contributions per Labor Code section 1777.5; and, failed to employ apprentices in accordance with Labor Code section 1777.5, subdivision (g), and California Code of Regulations, title 8, section 230.1. DLSE determined that the total amount of wages due was $10,316.00 and assessed a penalty of $4,600.00 under Labor Code section 1775 and a penalty of $11,100.00 under Labor Code section 1777.7.

A Hearing on the Merits was held in Santa Ana, California on August 22, 2017, before Hearing Officer Steven A. McGinty. James Jackson (Jackson) appeared for GRFCO, and Lance A. Grucela (Grucela) appeared for DLSE. The matter was submitted for decision on August 22, 2017.

The issues presented for decision are as follows:

- Did GRFCO report all workers on the Project on its certified payroll records?

- Did GRFCO pay its employees the correct prevailing wage rates for all hours worked on the Project?
- Did GRFCO make all required training fund contributions for work performed on the Project?
- Is GRFCO liable for penalties under Labor Code section 1775?
- Is GRFCO liable for liquidated damages?
- Did GRFCO properly request dispatch of laborer apprentices from all applicable apprenticeship committees as required by California Code of Regulations, title 8, section 230.1?
- Was GRFCO not required to employ apprentices because no apprentice committee dispatched or agreed to dispatch apprentices during the period of the Project?
- Did GRFCO fail to employ laborer apprentices on the Project in the minimum ratio required by Labor Code section 1777.5 (20% of journeyman hours employed)?
- Is GRFCO liable for penalties under Labor Code section 1777.7?

In this Decision as set forth below, the Director finds that DLSE did not present evidence at the hearing sufficient to support a finding that GRFCO failed to report all workers on the Project on its certified payroll records. Thus, the Director finds that no wages are due. The Director does find, however, that GRFCO failed to properly request dispatch of laborer apprentices from applicable apprenticeship committees in the geographic area of the Project, and as such, it was not excused from the requirement to employ apprentices under Labor Code section 1777.7. This Decision thus affirms the Assessment that a penalty is appropriate for the failure to employ laborer apprentices. Accordingly, the Director of Industrial Relations issues this Decision affirming and modifying the Assessment as set forth below.

## FACTS

The Project bid advertisement documents indicate that prevailing wages are to be paid on the Project, that the contractor must abide by the prevailing wage laws, and that the contractor must comply with the law regarding apprentices including the employment of apprentices on the Project. (DLSE Exhibit No. 17.) GRFCO entered into a contract with the Awarding Body on January 5, 2015, to perform the work of the Project. (DLSE Exhibit No. 16.)

On February 26, 2015, GRFCO submitted a Division of Apprenticeship Standards (DAS) Request for Dispatch of an Apprentice form (DAS 142) to the Laborers Southern California Joint Apprenticeship Committee (LSC JAC) and to the Associated General Contractors of America, San Diego Chapter (AGC-San Diego) by mail indicating that it needed one apprentice in the craft or trade of laborer to report on March 2, 2015 to the Project. It provided the name of the person to report to, as well as the general location and time. The parties stipulated that there was no issue about the contents of the DAS 142s, which were included in DLSE's Exhibit No. 15 at pages 350-351 and 356-357. February 26, 2015, was a Thursday; March 2, 2015, was a Monday.[1] According to GRFCO's certified payroll records (CPRs), employees were present on the job beginning on March 16, 2015, and the last day an employee worked on the Project was May 13, 2015.

According to Jackson, the start of the Project was delayed because of lack of material; there was a problem with dating on the pipe. There was an intent to start on March 2, 2015, but the start got pushed back to March 16, 2015.

The Project was completed on June 26, 2015, and a Notice of Completion was filed with the San Diego County Recorder's Office on April 27, 2016. (DLSE Exhibit No 18.) No laborer apprentices were employed on the Project. On June 30, 2015, DLSE received a complaint from Pierre Weakley of the Center for Contract Compliance in Riverside that GRFCO failed to provide contract award information, that the DAS 140 sent to the JAC was incomplete, and that no apprentices were on the payroll. (DLSE Exhibit No. 1.)

Deputy Labor Commissioner Kari Anderson investigated the complaint regarding GRFCO's activities on the Project. She obtained documents from the Awarding Body including a copy of the inspection field reports (IFRs). Apparently, while GRFCO was on the Project, an employee of 4Leaf, Inc., John Thomson, acted as the inspector on the Project for the Awarding Body. Thomson prepared an IFR on the days he was at the Project site. The IFR contained information about the personnel on site, their trade, vehicles on site, materials delivered, and construction activities / observations, as well as photographs. Anderson also received CPRs from GRFCO. Anderson testified that in comparing the IFRs prepared by Thomson with the

[1] The Hearing Officer has taken Official Notice of a calendar for the year 2015, pursuant to Rule 45 (Cal. Code. Regs., tit. 8, § 17245). Jackson admitted the requests for dispatch were mailed late for the date of March 2, 2015.

CPRs prepared by GRFCO, she realized that the CPRs and the IFRs did not match with respect to count of personnel on site. GRFCO's CPRs had fewer workers than reported on the IFRs. Some workers names were showing up in the IFRs that were not on GRFCO's payroll records. Anderson contacted Thomson for the purpose of confirming that he kept the records, wrote names on the IFRs, counted the number of people on site and observed what they did on the Project on each day.

Anderson spoke to Thomson on November 10, 2016. Thomson told Anderson that one of his duties was to document personnel on-site by name and trade. When the Project first started, the superintendent on the Project was instructed not to provide the names of the workers. Thomson said he was very conscious of the personnel on-site and at least recorded the superintendent's name and the number of workers. He knew everyone worked for the same company because they all wore the same shirts and they all came to work in the same company trucks. According to Thomson, the Project was shut down until the names of the workers were provided. Anderson testified that review of the IFRs indicated that the Project was suspended from March 26, 2015, to April 2, 2015. When the Project resumed on April 2, 2015, Thomson began receiving the names of the workers from the superintendent. He said that he had a good on-site relationship with the workers and knew about 50% of their names.[2]

Subsequent to Anderson's conversation with Thomson, she issued a request to GRFCO for time cards showing all hours worked corresponding to the previously produced CPRs and itemized wage statements corresponding to the previously produced CPRs. GRFCO provided the documents requested by Anderson. (DLSE Exhibit Nos. 11 and 12.)

Thereafter, Anderson prepared an audit. (DLSE Exhibit No. 4.) She relied upon the IFRs, time cards, and CPRs in performing her audit. (DLSE Exhibit Nos. 9, 12, and 8.) To perform the audit, Anderson created a spreadsheet to compare the documents on which she relied. (DLSE Exhibit No. 5.) The spreadsheet included columns reading left to right across the

[2] Anderson prepared an affidavit based upon what Thomson told her for Thomson to sign, which he did on November 18, 2016. (DLSE Exhibit No. 10.) GRFCO objected to the introduction of the affidavit. Because DLSE did not comply with Rule 34 (Cal. Code. Regs., tit. 8, § 17234), the affidavit was admitted but is considered hearsay evidence. Rule 34 requires a party to serve a copy of an affidavit or declaration that it proposes to introduce in evidence 20 or more days prior to the hearing along with a notice that the affiant or declarant will not be called as a witness and that the other party must request to cross-examine the affiant or declarant. Otherwise, the document may be introduced but is given only the same effect as hearsay evidence.

top for date, names on CPRs, names on time cards, names on IFRs, names of employees added based on IFRs, and notes. According to Anderson, if a worker's name appeared on the IFRs and not on the CPRs or time cards, she added eight hours to the audit for that worker for that day. She added eight hours because she assumed the worker would have worked an 8-hour day because Thomson told her that the workers arrived together and left together.[3] However, if the paystubs provided by GRFCO (DLSE Exhibit No. 11) reflected any additional payment for the week for that particular worker, she gave credit to GRFCO for that payment. Also, Anderson testified that if the worker count matched but the names were different under the three columns, she did not add names or hours to the audit.[4] Using that method, Anderson determined that seven workers were owed wages: David Martinez, Jaime Ascenio, Jose Cervantes, Jose Lopez, Ruben Mendoza, Jr., Ruben Mendoza, and J. Catrachot. She concluded that GRFCO did not report all workers on the CPRs and did not pay training funds for those hours. All training funds due were directly related to the hours that were unreported. The amount of training funds due was $131.84.

Anderson testified about one worker, Martinez, as an example of how she went about determining wages owed to a worker who did not appear on the CPRs. Martinez appeared on GRFCO's CPRs for the week ending April 12, 2015, as having worked as a laborer for three days for eight hours each day, Monday, Tuesday, and Wednesday, April 6-8. (DLSE Exhibit No. 8 at p. 68.) While Martinez appeared on the IFRs as a laborer for those same three days (DLSE Exhibit No. 9 at pp. 150, 155, and 160), he also appeared on the IFRs under the column "Personnel On Site" as a laborer for Thursday and Friday, April 9 and 10 (DLSE Exhibit No. 8 at pp. 167 and 172). Therefore, Anderson added eight hours of work for each day April 9 and 10 to the audit worksheet for Martinez; she also added two penalties of $200.00, one for each day. (DSLE Exhibit No. 4 at p. 31.) For the week ending, May 3, 2015, Martinez did not appear on the CPRs. (DLSE Exhibit No. 8 at p. 80.) However, on the IFRs his name appeared under the column "Personnel On Site" as a laborer on April 29 and May 1, 2015 (DLSE Exhibit No. 9 at

[3] GRFCO's time cards (DLSE Exhibit No. 12, at pp. 317 and 319) supported this assumption. No worker worked less than eight hours on the job during the 37 days GRFCO had workers on the Project except for two occasions: on Tuesday of the week ending April 18, 2015, employee Perris worked five and one-half hours; and, on the Friday of the week ending May 2, 2015, employee Spider worked four hours.

[4] Workers were on the job for 37 days; on 11 of those 37 days the names of the workers did not match between the CPRs and the IFRs but the number of workers was the same.

pp. 223 and 224). Anderson added to the audit worksheet eight hours of work for April 29 and one penalty of $200.00 for that day. (DSLE Exhibit No. 4 at p. 31.) She did not add eight hours of work to the audit for May 1 because the number of employees on the CPRs matched the number of employees on the IFRs. Since the worker-count matched on May 1, she did not assess wages or penalties against GRFCO for that day. Anderson assessed penalties only for days for which she added hours to the audit.

On direct examination, Anderson was asked whether subsequent to the issuance of the Assessment she received any proof that GRFCO had paid the workers for the days and hours that she had added to the audit. She responded "no." She also responded "no" when she was asked whether GRFCO had presented her with any records that showed that any days or hours that she had added to the audit were incorrect. With respect to the seven workers who Anderson determined were owed wages, Anderson acknowledged on cross-examination that she made assumptions and guessed where direct information about days and hours worked was missing. In addition, Anderson discounted the form affidavits she sent out to the workers that were returned to her indicating that each worker was paid for all hours worked because she was concerned that the workers may have felt some coercion in completing them. She based this concern on the use of GRCFO's address as the return address on one envelope.

Anderson also expressed concern about the reliability of the CPRs. She noted that each individual CPR for each week GRFCO was on the Project was not certified until July 30, 2015. This date was after the date, July 27, 2015, that GRFCO was sent the initial packet by DLSE notifying it that a complaint had been received and an investigation started.

Jackson asserted that the CPRs were correct, that Thomson made errors in recording information, and that DLSE misinterpreted the information on the IFRs. He also offered into evidence various documents that he said indicated that the employees allegedly owed wages had indicated that they were not owed any wages. Jackson also stated the documents indicated that workers were on another project on the dates DSLE claimed they were owed wages for the Project, and that one employee – Ruben Mendoza – was acting as a superintendent and not as an

operating engineer on certain dates that DSLE claimed his name did not appear on the CPRs and that he was owed wages for working as an operating engineer.[5]

Applicable Employee Classifications and Prevailing Wage Determinations.

The parties stipulated that DLSE's Exhibit Nos. 6 and 7, prevailing wage determinations for the crafts of laborer (SD-23-102-3-2014-1, issued August 22, 2014) and operating engineer (SD-23-63-3-2014-2, issued August 22, 2014), include the correct prevailing wage rates for the Project.

Applicable Committees in the Geographic Area.

The parties stipulated that DLSE's Exhibit No. 2, the Penalty Review, at page 12, included the names of the applicable apprenticeship committees for the crafts of laborer and operating engineer in the geographic area of the Project. Those committees for laborer were the Associate General Contractors of America, San Diego Chapter, and the Laborers Southern California Joint Apprenticeship Committee; the committees for operating engineer were the Associated General Contractors of San Diego, Inc. Construction Equipment Operator JAC and the Southern California Operating Engineers J.A.C.

Employment of Apprentices.

Anderson testified that GRFCO's CPRs indicated that no apprentices were employed on the Project. She calculated that there were 789 hours of journeyman labor on the Project so that, at a minimum, there should have been 157.8 hours of apprentice laborer hours. (DLSE Exhibit No. 2, at p. 12.)[6]

Jackson asserted that as a non-union contractor, GRFCO was not sent apprentices when it sent out requests for dispatch. On cross-examination, Anderson conceded that most of the time, one of the apprentice committees for the craft of laborer, the Associate General Contractors of

[5] GRFCO's documents are hearsay, and included uncertified payroll records, declarations which had not been served in advance as required by Rule 34 (Cal. Code. Regs., tit. 8, § 17234). DLSE objected to GRFCO Exhibits D – I, K and M and N based on lack of foundation and hearsay, and Exhibit N – CPRs - also as incomplete because it lacked certification. Because GRFCO did not comply with Rule 34, the declarations were admitted but are considered hearsay evidence. The remainder of GRFCO's exhibits were allowed into evidence but are likewise considered hearsay.

[6] Anderson testified that there was an exemption to the apprenticeship requirements for the operating engineers. If there were less than five journeymen on the Project, there was no need to request dispatch and employ apprentices. Accordingly, there was no issue about the failure to employ operating engineer apprentices on the Project

America, San Diego Chapter, would not send out apprentices to non-signatory contractors. However, the other committee for the craft of laborer would do so. Further, Anderson maintained that contractors had to send a request to all committees for the craft in the geographic area of the Project. She testified that the option to send apprentices was up to the committee, and that to qualify for the safe harbor provision in the regulation, the contractor had to request dispatch.

Assessment of Penalties.

Anderson testified that the penalties for the wage violations were set at $300.00 per violation. The amount of the penalty was based on the consideration that GRFCO had a prior record of failing to meet its prevailing wage obligations. (DSLE Exhibit No. 2 at pp. 10 and 15.)

With respect to the penalties for the apprentice violations, Anderson testified that the penalties were assessed based on the number of days journeymen were on the Project – 37 days. Anderson testified further that the amount of penalty was set at $300.00 per violation because of GRFCO's history of apprenticeship violations. She pointed to three specific instances where GRFCO had been assessed for apprentice violations prior to the time GRFCO began work on the Project: (1) DLSE case no. 44-42221-133 issued on December 29, 2014; (2) DLSE case no., 44-42223-133 issued on December 29, 2014; and, (3) DLSE case no. 44-42225-133 issued on December 29, 2014. (DLSE Exhibit Nos. 22, 23, and 24 respectively.)[7]

**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

[7] DLSE requested that the Hearing Officer take Official Notice of DLSE Exhibit Nos. 22, 23, and 24 which included a Director's Decision finding GRFCO liable for penalties for apprentice violations and two court judgments against GRFCO for penalties for apprentice violations, along with the underlying determinations of civil penalty supporting each judgment. GRFCO had no objection to the request for Official Notice, thus, Official Notice was taken.

> 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." (Lab. Code § 90.5, subd. (a),[8] and see *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. 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. In a hearing, DLSE has the burden to present evidence that "provides prima facie support for the Assessment ...." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial 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); § 1742, subd. (b).)

Failure to List All Workers on CPRs.

The resolution of the wage portion of this case is directly tied to the question of the accuracy and reliability of the IFRs. DLSE based its Assessment that wages were owed on the IFRs. It assumed that the IFRs were correct, and that if there was a discrepancy between the number of employees listed on the IFRs and the number listed on the CPRs, the IFRs were correct and the CPRs were wrong. GRFCO stipulated to the admission of the IFRs into evidence, but challenged their accuracy. In essence, GRFCO argued that the information contained in the IFRs was insufficient to support a finding that wages were owed.

[8] All subsequent section references are to the Labor Code, unless otherwise specified.

The IFRs are hearsay that cannot alone support a finding that wages are owed. DLSE did not establish the foundation for admission of the IFRs as business records. Evidence Code section 1271 creates the business records exemption to the hearsay rule, but to qualify for that exemption, the writing at issue must meet certain specified conditions. These conditions include that the custodian or other qualified witness must testify to the identity and mode of preparation of the record, and the sources of information, method and time of preparation of the record must be "such as to indicate its trustworthiness." (Evid. Code, § 1271.) The IFRs were allegedly prepared by Thomson. Yet, DLSE did not call Thomson as a witness at the hearing. Instead, DLSE offered an affidavit prepared by Anderson, which Anderson testified she sent to Thomson and later received a signed copy in return. However, as noted above, DLSE did not comply with Rule 34,[9] which governs evidence by affidavit. Thus, the affidavit was hearsay. Rule 44 allows the introduction of hearsay evidence; however, under subdivision (d) of Rule 44, hearsay evidence is insufficient in itself to support a finding unless it would be admissible over objection in a civil action or no party raises an objection to such use. GRFCO raised objections to the introduction of the affidavit and the use of the IFRs. Without evidence to establish the business records exception to the hearsay rule, and in light of GRFCO's objections, the IFRs and the affidavit are insufficient to support a finding that wages were owed.

It should be noted that DLSE itself did not seem entirely convinced of the accuracy and reliability of the IFRs. For example, wherever the names on the IFRs did not match the names on the CPRs for a particular day, but the number of workers for that day matched, DLSE did not find that wages were owed to anyone. Yet, this was the same criteria that Anderson primarily relied upon in finding that wages were due for other days, i.e., that an individual's name appeared on the IFRs but not on the CPRs, albeit for days where the count of workers on the IFRs and CPRs did not match. One example of this where Anderson found that wages were <u>not</u> owed when the worker-count matched on both the IFRs and CPRs, but the names did not match, was for GRFCO employee Martinez on May 1, 2015. His name was on the IFR for that day but

[9] California Code of Regulations, title 8, section 17234. All further citations to the California Code of Regulations, title 8, section 17201 et seq., the prevailing wage hearing regulations, are designated as "Rule" followed by the last 2 digits of the regulation section.

his name did not appear on the CPRs. Anderson did not find that wages were due Martinez for that day because the worker-count for that day matched.

In addition, GRFCO evidence provided reason to doubt DLSE assumptions drawn from the IFRs, such as GRFCO's evidence about Martinez, the employee that Anderson used as an example of how she determined wages were owed to a worker who did not appear on the CPRs. GRFCO's evidence showed that Martinez was employed on a different project on the several dates that Anderson determined he had been improperly left off the CPRs. As part of its Exhibit H, GRFCO produced an IFR from the Felix Water District project showing Martinez's name and his title of laborer on the report for April 29, 2015, the same day his name appeared on the IFR for the Project. GRFCO also produced two pay checks with Martinez's name on them totaling wages for 40 hours of work during the week April 27 through May 3, 2015.[10] Thus, the evidence showed that he was paid for a full work week. As such, there were enough questions about the accuracy and reliability of the IFRs standing alone that, without more, they are insufficient to meet DLSE's initial burden to provide prime facie support for the Assessment as to the underpayment of wages. And, without that evidence, GRFCO's burden of proving the Assessment is incorrect is not invoked. (Cal. Code. Regs., tit. 8, § 17250, subds. (a) & (b); § 1742, subd. (b).)

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. (Cal. Code Regs., tit. 8, §§ 227 to 232.70.)[11]

In general, and unless an exemption applies, 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. In this regard, section 1777.5, subdivision (g) provides:

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[10] DLSE objected to the introduction of GRFCO Exhibit H as lacking foundation and because it was hearsay. While the documents were hearsay, the portions of Exhibit H discussed are similar to the evidence offered by DLSE. Namely, the IFR from the Felix Water District was similar to the IFRs from the Project that DLSE offered in evidence, and the pay stubs for Martinez were the same type as those offered by DLSE in its Exhibit No. 11.

[11] All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

> 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 will not be considered in violation of the applicable statute and regulations if it has properly requested the dispatch of apprentices to the public works project, and no apprenticeship committee in the geographic area of the 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:

> Contractors who are not already employing sufficient registered apprentices ... to comply with the one-to-five ration must 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 dispatch(es) form 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. ...

(Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared a form, DAS 142 that a contractor

may use to request dispatch of apprentices from apprenticeship committees.

GRFCO Failed to Employ Laborer Apprentices.

Laborer was the apprenticeable craft at issue in this matter. GRFCO employed no apprentices on the Project. As it stands, the record establishes that GRFCO violated section 1777.5 and the related regulation, section 230.1.

There Were Two Applicable Committees in the Geographic Area.

The parties stipulated that there were two applicable apprentice committees in the geographic are of the Project for the craft of laborer: (1) the Associate General Contractors of America, San Diego Chapter; and, (2) the Laborers Southern California Joint Apprenticeship Committee.

GRFCO Failed To Properly Request The Dispatch of Laborer Apprentices.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required, excluding Saturdays, Sundays, and holidays. (§ 230.1, subd. (a).) GRFCO failed to introduce at the hearing any documentary evidence showing that it complied with the regulation with respect to the dispatch of apprentices for the Project. GRFCO produced to DLSE two requests for dispatch of apprentices sent to the respective programs. However, the notices did not provide 72 hours' notice because two of the intervening days between the Thursday on which the notices were mailed and the Monday that the apprentices were allegedly required were a Saturday and a Sunday. Moreover, GRFCO was not on the Project on Monday, March 2, 2015. Accordingly, the requests were ineffective for both reasons. In addition, once GRFCO was on the Project on March 16, 2015, GRFCO made no attempt to request the dispatch of apprentices. GRFCO offered no testimony as to why it could not have requested dispatch of apprentices at least 72 hours before the date it was on the Project.

GRFCO argued that the requests for dispatch, while admittedly late for the date of March 2, 2015, were essentially timely for March 16, 2015. The problem with that argument is that the regulation impliedly requires a specific date to report, and does not require the apprentice committee to guess when or if apprentices are requested to report. The requests GRFCO sent out did not specify apprentices were to report on March 16, 2015.

The Penalty for Noncompliance.

If a contractor "knowingly violated Section 1777.5" a civil penalty is imposed under section 1777.7. DLSE's determination of the amount of the penalty is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) Here, DLSE assessed a penalty against GRFCO 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....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.

The evidence established that GRFCO "knowingly violated" the requirement of a 1:5 ratio of apprentice hours to journeyman hours for the craft of laborer and laborer apprentices. Jackson did not testify that he was unfamiliar with the requirement for the employment of apprentices on the Project, or unfamiliar with the need to contact apprentice committees and request the dispatch of apprentices. Indeed, there was evidence that GRFCO made an insufficient attempt to request dispatch. In addition, GRFCO's president signed contract documents acknowledging that GRFCO was responsible for complying with all public works laws, including laws requiring the employment of registered apprentices on the Project. (DLSE Exhibit Nos. 16 and 17.) GRFCO's only defense was that one of the apprenticeship programs did not dispatch apprentices to GRFCO in the past because GRFCO was a non-union contractor. However, there was no evidence that GRFCO could not have properly and timely *requested* dispatch of apprentices from the apprentice committees. In addition, there was testimony from Anderson that the other applicable committee did send apprentices to non-union contractors.

GRFCO brought forth no evidence to contradict this testimony. Since GRFCO was aware of its obligations under the law, and provided no evidence as to why it could not have complied with the law, GRFCO failed to meet its burden of proof by providing evidence of compliance with section 1777.5. Since GRFCO knowingly violated the law, a penalty should be imposed under section 1777.7.

DLSE imposed a penalty of $300.00 for 37 days of violations, based in part on the fact that GRFCO had been issued three previous determinations of civil penalty for apprenticeship violations prior to the time it started work on the Project and prior to the issuance of the Assessment. The DLSE penalty review indicated that the minimum laborer apprentice hours required and therefore lost was 157.8, which is a significant loss of apprenticeship training opportunity for local apprentices. GRFCO has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of $300.00 is affirmed.

**FINDINGS**

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 GRFCO, Inc., filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made available its enforcement file.
5. DLSE did not meet its burden of providing prima facie support for a finding that GRFCO, Inc. failed to report all workers on the Project on its certified payroll records. As a result, no wages are owed, no training fund contributions are owed, GRFCO, Inc. is not liable for penalties under Labor Code section 1775, and GRFCO, Inc. is not liable for liquidated damages.
6. There were two applicable apprenticeship committees in the geographic area of the Project in the craft of laborer: (1) the Laborers Southern California Joint Apprenticeship Committee; and, (2) the Associated General Contractors of America, San Diego Chapter.
7. GRFCO, Inc. failed to properly request dispatch of laborer apprentices from the

two applicable apprenticeship committees in the geographic area of the Project, so it was not excused from the requirement to employ apprentices under Labor Code section 1777.5.

8. GRFCO, Inc. violated Labor Code section 1777.5 by failing to employ apprentices in the craft of laborer on the Project in the minimum ratio required by the law.
9. DLSE did not abuse its discretion in setting section 1777.7 penalties at the rate of $300.00 per violation, and the resulting total penalty of $11,100.00 is affirmed.

The amount found remaining due in the Assessment is modified and affirmed by this Decision are as follows:

| | |
|---|---|
| Wages due: | $0.00 |
| Penalties under section 1775, subdivision (a): | $0.00 |
| Training Fund Contributions: | $0.00 |
| Liquidated damages: | $0.00 |
| Penalties under section 1777.7: | $11,100.00 |
| **TOTAL** | **$11,100.00** |

**ORDER**

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

Dated: 6/8/18

André Schoorl
André Schoorl
Acting Director of Industrial Relations