

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Bedard Controls, Inc.

Case No. 09-0256-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

**DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL
RELATIONS**

Affected subcontractor Bedard Controls, Inc. (Bedard) 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 work performed by Bedard on the Fresno County Juvenile Delinquency Courts Juvenile Justice Campus Bid Package #4 (Project) for Fresno County (County). The Assessment determined that \$17,988.72 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on September 30, 2010, in Fresno, California, before Hearing Officer Nathan D. Schmidt. Robert Fried appeared for Bedard and Ramon Yuen-Garcia appeared for DLSE. The matter was submitted for decision on January 26, 2011.

The issues for decision are:

- Whether the Assessment correctly found that William “Carter” Hord was entitled to be paid at the Inside Wireman, Technician prevailing wage rate for work he performed on the Project.
- If Hord is entitled to receive prevailing wages for his work on the Project, whether Bedard is entitled to additional credit against the assessed unpaid prevailing wages for fringe benefits paid to Hord or on his behalf.

- Whether DLSE abused its discretion by assessing penalties under Labor Code section 1775¹ at the mitigated rate of \$30.00 per violation.
- Whether Bedard is liable for liquidated damages under section 1742.1, subdivision (a).

The Acting Director finds that Hord is entitled to receive prevailing wages for his work on the Project. Bedard has established, however, that it is entitled to an additional credit of \$5,202.84 against the assessed unpaid wages for fringe benefits paid to Hord that were not credited in the Assessment. Because the affected contractor, R. Pedersen & Sons, Inc. (Pedersen) made a timely deposit of the full amount of the Assessment pursuant to section 1742.1, subdivision (b), Bedard is not liable for liquidated damages. Therefore, the Acting Director issues this Decision affirming in part and modifying in part the Assessment.

FACTS

The County advertised the Project for bid on or about November 30, 2006, and awarded the contract to Pedersen. Pedersen subcontracted with R. J. Lanthier Company, Inc. (Lanthier) to perform heating, ventilation and air conditioning (HVAC) work on the Project. Lanthier in turn subcontracted with Bedard to “[p]rovide and install a complete and operating direct digital control and energy management system” for the building’s HVAC system. Bedard’s certified payroll records (CPRs) for the Project report that electricians employed by Bedard worked on the Project from September 7, 2007, to March 24, 2009.² Although Hord worked for Bedard on the Project for approximately one year (commencing sometime in 2008) the Assessment period is limited to work Hord performed between December 1, 2008, and June 3, 2009. The hours Hord worked on the Project were not reported on Bedard’s CPRs.

Relevant Prevailing Wage Determination: The following prevailing wage determination (PWD) and scopes of work were in effect on the bid advertisement date:

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

² Bedard submitted statements of non-performance on the Project for the pay periods ending March 30 through July 19, 2009.

General Prevailing Wage Determination for Fresno County (FRE-2006-2): This PWD includes the classification of Inside Wireman, Technician (Inside Wireman) which is the prevailing wage rate that Bedard paid to the workers reported on its CPRs for the Project. The Assessment uses this prevailing wage rate for all work that Hord performed on the Project during the Assessment period.³ The applicable scope of work provides in pertinent part:

Section 3.29 Workmen employed under the terms of this Agreement shall do all electrical construction, installation, or erection work, including, but not limited to, PVC, EMT, P&C ducts and ridged Electrical conduit raceway systems, and all electrical maintenance thereon, including the final running tests. This shall include the installation and maintenance of all electrical lighting and the installation and maintenance of temporary wiring including all work pertaining to luminous ceilings, heat and power equipment, electronic equipment and apparatus, and all work pertaining to communications systems, including fiber optics. Handling and moving of all electrical material, equipment and apparatus on the jobs shall be considered electrical work.

This PWD also contains the classifications of Communication & System Installer and Communication & System Technician, a low voltage classification. The applicable scope of work for those classifications provides in pertinent part:

The work covered by this Agreement shall include the installation, testing, service and maintenance, of the following systems which utilize the transmission and/or transference of voice, sound, vision and digital for commercial, education, security and entertainment purposes . . .

The scope of work specifically excludes:

B. Energy management systems.

The complete installation of nonintegrated energy management systems, computer systems in industrial applications such as process controls, assembly lines, robotics and computer-controlled manufacturing systems, and all HVAC control work up to the first point of connection to the multipurpose integrated

³ Throughout the relevant time period, the prevailing hourly wage due for Inside Wiremen was \$46.25 comprised of a base rate of \$32.35, fringe benefits totaling \$13.20 and a training fund contribution of \$0.70. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

system if so connected . . .

Hord's work on the Project: Hord's primary job duty on the Project during the relevant time period was "commissioning" the HVAC control system components that were installed by Bedard electricians. Commissioning is the process of setting up and calibrating the sensors, air flow control boxes, air handlers and other components that comprise the system. Hord first connected each control box and air handler to the system's computerized central interface using proprietary software installed on a laptop computer. As each control device was commissioned, Hord would confirm by physical observation that its actuators and relays moved properly when activated. Hord took physical temperature measurements as each device was operating, entered those values into the system and made any necessary adjustments to calibrate each device's sensors. Hord performed all of the commissioning work at the Project site.

Hord testified that he also used tools and performed electrician's work on the Project in addition to his commissioning work. Hord testified that he pulled wire and installed, terminated and tested devices. Hord stated that he called an electrician for assistance with any high voltage devices that exhibited problems during commissioning. Hord did his own troubleshooting and repair of low voltage devices if they malfunctioned during the commissioning process. Hord testified that electricians had already installed most, but not all, of the control system devices before he started his commissioning work. Hord remembered installing pressure sensors in the air handlers himself sometime in spring 2009.

Chris Yarbrough, a former Bedard worker who had been employed as an electrician's helper on the Project, testified that he often helped Hord run conduit, pull wire and install devices such as air handlers. However, Yarbrough could not be certain whether this work occurred after December 1, 2008. Yarbrough remembered that Hord did installation work earlier in the Project and computer work at the end of the Project.

Todd Wyatt, Bedard's operations manager, oversees all Bedard projects and is in charge of Bedard's employees. Wyatt testified that commissioning and supply pick-up and delivery comprised 100 percent of Hord's assigned work on the Project from December 2008 to June 2009. Wyatt estimated that the commissioning work done by Hord consisted of approximately

50 percent physical observation and measurement and 50 percent computer work. Hord also labeled the control system equipment as it was installed in the ceilings; Wyatt considered this part of the commissioning process. Wyatt testified that he was on the Project site approximately once per week and normally observed Hord working on the computer.

Mark Zschogner, Bedard's project manager for the Project, was Hord's direct supervisor. Zschogner testified that he was on the Project site at least one full-day per week during the commissioning process and worked directly with Hord on those days. Zschogner could not remember precisely when commissioning started. He believed that it would have started before December 2008 if the Project was completed in June 2009. Zschogner estimated that the commissioning process would have required at least one half day for each of the approximately 120 control boxes and at least a full day for each of the 14 air handlers in the Project's HVAC system; a total of approximately 74 full time days of commissioning work at a minimum. Zschogner's expectation was that Hord would have been doing commissioning work 100 percent of the time during the Assessment period because Hord was the only person doing that work for the Project. Zschogner testified that Hord was supposed to call one of the electricians to do any adjustments or repairs to control devices that Hord could not do via the computer. Zschogner acknowledged that Hord could have done his own troubleshooting on low voltage devices but estimated that it would have comprised only a small proportion of Hord's work.

Wes Verreras, a journeyman electrician and Bedard's foreman on the Project, testified that he never observed Hord pulling wire, installing devices or terminating panels during the Assessment period. Verreras remembered Hord requesting assistance from him when Hord experienced problems with control devices during the commissioning process. Verreras testified that Hord was not supposed to do electrical work. Verreras admitted, however, that much of the commissioning work occurred after the electricians were off the Project and that it was possible that Hord could have done his own troubleshooting for low voltage devices. Verreras stated that his understanding was that commissioning was not covered by the Inside Wireman scope of work and that IBEW did not claim jurisdiction over commissioning work.

Paul Bedard, Bedard's president, testified that he had reviewed the applicable PWDs

posted on the Department of Industrial Relations (“DIR”) web site and had not been able to find a classification that covered commissioning work. Bedard also testified that he consulted with his former employer, Johnson Controls, and was told that there was no PWD applicable to commissioning work. Bedard did not contact DIR directly for assistance nor ask Pederson or the County for advice on the proper wage rate to pay.

Hord’s pay and benefits for work on the Project: Hord’s timesheets for the period of the Assessment, which Bedard provided to DLSE, establish that Hord worked on the Project for a total of 664 hours, over 91 days, between December 1, 2008, and June 3, 2009, including full days of work on two holidays. Hord was paid an hourly rate of \$19.70 for that work, significantly less than the prevailing wage rate of \$46.25 per hour for inside wiremen. Hord’s timesheets show that he worked on at least five other Bedard jobs concurrently with his work on the Project and that he split his hours between the Project and another job on some days. Bedard contends, without any evidentiary or documentary support, that Hord actually spent 137 hours of the total time recorded for the Project on his timesheets performing material handling work on other Projects.

Bedard’s testimony and evidence produced at hearing establish that, in addition to Hord’s base pay rate, Bedard provided Hord with fringe benefits for his work on the Project with an annualized value of \$12.03 per hour for December 2008 (\$986.52 total) and \$17.83 per hour for January through June 2009 (\$10,377.45 total). Bedard contends that it is therefore entitled to a total credit of \$11,363.97 for fringe benefits payments if Hord is found to be entitled to receive prevailing wages for his work on the Project. DLSE does not contest Bedard’s annualization figures, but contends that Bedard’s credit against the assessed unpaid wages owing to Hord for 2009 is limited to \$13.20 per hour, the total fringe benefit component of the Inside Wireman prevailing wage rate. On that basis, DLSE calculates the total fringe benefit credit available to Bedard as \$8,668.92.

The Assessment: DLSE issued the Assessment on October 22, 2009. The Assessment found that Bedard had failed to pay the required prevailing wages to Hord in the total amount of \$15,258.00, including \$464.80 in unpaid training fund contributions. The Assessment included a

credit for \$3,466.08 in fringe benefits payments made by Bedard. Penalties were assessed under section 1775 at the mitigated rate of \$30.00 per violation for 91 total violations, totaling \$2,730.00. DLSE determined that the \$30.00 per violation rate was warranted by its finding that Bedard's failure to pay Hord the required prevailing wages did not constitute a good faith mistake.

On or about December 16, 2009, within 60 days after service of the Assessment, Pederson deposited the full amount of the Assessment with DIR with a request to hold the deposit in escrow pending administrative and judicial review. DLSE contends, without evidentiary support, that the payment was made from payments withheld by Pederson from Lanthier as a result of the Assessment. Bedard testified that he had requested Pedersen to release funds to him to deposit with DIR under section 1742.1, subdivision (b), but that Pedersen insisted on depositing the funds directly with DIR.

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] ("Lusardi").)
DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *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 wage rate, and prescribes penalties for failing to pay the prevailing wage 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.”

Hord Is Entitled To Receive Prevailing Wages For His Work On The Project.

The critical issues for decision are whether the commissioning work performed by Hord on an admitted public work requires the payment of prevailing wages and, if so, whether the Inside Wireman prevailing wage rate is applicable to that work. For the following reasons, the commissioning work Hord performed on the Project was done in the execution of a contract for public work within the meaning of section 1772 and is subject to prevailing wage requirements.

Section 1771 provides:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

Section 1772 provides that: “Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.”

Section 1774 provides that: “The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.”

The term “execution” was interpreted in *Williams v. SnSands Corporation* (2007) 156

Cal.App.4th 742, 749-750 (“*Williams*”):

In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of “execution” is “the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment” (5 Oxford English Dict. (2d ed.1989) p. 521); “the act of carrying out or putting into effect,” (Black's Law Dict. (8th ed.2004) p. 405, col. 1); “the act of carrying out fully or putting completely into effect, doing what is provided or required.” (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of “execution” in the phrase “in the execution of any contract for public work,” plainly means the carrying out and completion of all provisions of the contract.

The analysis in *O.G. Sansone Co. v. Department of Transportation* [1976] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*Sansone*), of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to “[w]orkers employed ... in the execution of any contract for public work.” (§ 1772.)

By its terms, section 1772 requires prevailing wages only for “[w]orkers *employed by contractors or subcontractors* in the execution of any contract for public work” (Emphasis added.) Here there is no dispute that Bedard was a subcontractor on the Project within the meaning of section 1772. Under the *Williams* analysis, however, the inquiry does not end with the status of the employer as a subcontractor. We must also look to the nature of the work that the subcontractor was performing on-site.

Specifically, we must determine whether the work in question was required to carry out and complete the provisions of Bedard’s subcontract on a public work. The specifications of the subcontract expressly required Bedard to “[p]rovide and install a complete and operating direct digital control and energy management system” for the building’s HVAC system. Without the commissioning work done by Hord to set up and calibrate the sensors, air flow control boxes, air handlers and other components that comprise the system, Bedard could not have delivered an “operating” system as required by its subcontract. Thus, the commissioning work was unquestionably necessary to carry out and complete the terms of the subcontract. It is undisputed that the Project was a public work and that all of the commissioning work was performed by

Hord on-site.

In sum, there is no dispute that Bedard was an on-site subcontractor on a public work and that Hord performed on-site work necessary for the completion of Bedard's public works subcontract with Lanthier. Therefore, the commissioning work that Hord performed on the Project was done in the execution of a contract for public work within the meaning of section 1772 and is subject to prevailing wage requirements under section 1774.

Inside Wireman Is The Applicable Prevailing Wage Rate For Hord's Work On The Project.

Having determined that the commissioning work Hord performed on the Project is subject to the payment of prevailing wages, the remaining question is whether the Inside Wireman prevailing wage rate used in the Assessment is the applicable prevailing wage rate for that work. This Decision finds that it is.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations, such as FRE-2006-2, to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 (*Ericsson*).

The applicable prevailing wage rate is the one in effect on the date the public works contract is advertised for bid. (§ 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to

inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (See *Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In the absence of a timely petition under section 1773.4, Bedard was bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.)

Bedard argues that, because commissioning is not expressly referred to in any of the potentially applicable scopes of work for electrical work, it was not required to pay prevailing wages to Hord. Because the precise term "commissioning" is not used in the Inside Wireman scope of work, and IBEW purportedly does not claim the work, Bedard concludes that commissioning work does not fall under any PWD and thus does not require the payment of prevailing wages. This "no determination - no rate" theory advanced by Bedard has long since been discredited. As the court explained in *Ericsson*:

Here, the contractor does not claim it relied on the existing schedule of wages or paid the workers in accordance with one of the classifications therein. Nor does it contend prevailing wages were not paid because it was unable to determine an appropriate rate. Rather, it asserts as a matter of law it was not obligated to pay a locally prevailing rate because its employees did not fall precisely within a classification on the university's list.

It would defeat the legislative intent of affording private sector employees payment of prevailing wages on public works, to allow the contractor to excuse a failure to pay a prevailing wage solely because an after-the-fact examination reveals no listed classification was precisely limited to the type of craft employed on the project. Rather, we conclude since the contractor agreed to pay the prevailing wage and was notified of the schedule specifying the wage rates, it is not, as a matter of law, excused from its obligation to pay the prevailing rate. [Citations omitted.]

(*Ericsson, supra*, 221 Cal.App.3d at p. 126.) Regardless of DLSE's reasoning for applying a

certain prevailing wage rate to the work in issue, *Ericsson* holds that it is up to the finder of fact to determine the appropriate prevailing wage rate for the workers whose wages are in dispute. (*Ericsson, supra*, 221 Cal.App.3d at pp. 128-129.)

The record shows that the Inside Wireman prevailing wage rate is the most applicable classification for that work for three reasons: the applicable Inside Wireman scope of work covers the work Hord performed, the only other scope of work in the record (covering low voltage electrical work) explicitly excludes the work Hord was performing, and Bedard did not propose a viable alternative rate that might apply.

The Inside Wireman scope of work provides in part:

Workmen employed under the terms of this Agreement shall do *all electrical construction, installation, or erection work*, including, but not limited to, PVC, EMT, P&C ducts and ridged Electrical conduit raceway systems, and all electrical maintenance thereon, *including the final running tests. This shall include* the installation and maintenance of all electrical lighting and the installation and maintenance of temporary wiring including *all work pertaining to* luminous ceilings, *heat and power equipment . . .* [Emphasis added.]

While the Inside Wireman scope of work does not expressly refer to “commissioning,” the witnesses’ descriptions of that work make it clear that commissioning is covered under the scope of work’s inclusion of “all electrical . . . installation, . . . including the final running tests” and “all work pertaining to . . . heat and power equipment.” Moreover, the record establishes that Hord also performed other electrical work on the Project, including installation and troubleshooting of low voltage devices; work for which Bedard paid its other workers on the Project the Inside Wireman prevailing wage rate.

The only other relevant scope of work in the record, Communication & System Installer and Communication & System Technician, cannot cover Hord’s commissioning work because it expressly excludes “all HVAC control work.” Bedard, who has the burden of proving the Assessment incorrect, has not proposed any alternative prevailing wage rate that is more applicable to Hord’s commissioning work. While Bedard sought some assistance on what might apply, it never sought assistance from the Awarding Body, Pederson, or from DIR under the procedures created in section 1773.4.

Bedard has failed to carry its burden of disproving the basis of the Assessment's determination that the work Hord performed on the Project, including commissioning work, is subject to the Inside Wireman prevailing wage rate.

Bedard Has Established Entitlement To Additional Credit For Fringe Benefits Paid To Hord Or On His Behalf.

Section 1773.1 defines "per diem wages" for purposes of both establishing prevailing wage rates and crediting employer payments toward those rates, providing in pertinent part as follows:

(a) Per diem wages . . . shall be deemed to include employer payments for the following:

- (1) Health and Welfare.
- (2) Pension

* * *

(b) Employer payments include all of the following:

- (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
- (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments and a contribution to the California Apprenticeship Council ("CAC") or an approved apprenticeship training fund. (§ 1773.1, Cal. Code Regs., tit. 8, § 16000.) The first two components (also known as the total prevailing wage) must be paid to the worker or to a bona fide trust fund on the worker's behalf. If an employer does not make fringe benefit payments on the worker's behalf totaling at least the amount required by the applicable PWD, the balance must be paid to the worker as wages.

In this case, Bedard has proven that it provided fringe benefits to Hord, in addition to his basic hourly pay rate, with an agreed upon annualized value of \$12.03 per hour for December 2008 and \$17.83 per hour for January through June 2009. Bedard's credit for these benefits against its prevailing wage obligation is limited to value of the total fringe benefit component of the applicable prevailing wage rate, in this case \$13.20 per hour. To allow any higher credit

would be to invade the basic hourly rate, which is prohibited by section 1773.1. The total fringe benefit credit available to Bedard is therefore \$8,668.92. Because the Assessment only credited \$3,466.08 for fringe benefits, Bedard is entitled to an additional credit of \$5,202.84 as an offset to the assessed unpaid prevailing wages. The Assessment is therefore modified to reduce the assessed unpaid prevailing wages to \$9,591.09.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775, subdivision (a) states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

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

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

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

(B)(i) The penalty may not be less than ten dollars (\$10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor

Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^{4]}

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 his own judgment “because in [his] own evaluation of the circumstances the punishment appears to be too harsh.” (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, “the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

The testimony shows that Bedard made some effort to determine whether prevailing wages were required for Hord’s work on the Project but came to the erroneous conclusion that they were not. However, Bedard’s efforts did not include complying with section 1773.4. While DLSE apparently did not find that this was a good faith error, it did determine that mitigation of \$20.00 per violation was appropriate under the circumstances.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it neither mandates mitigation in all cases nor requires mitigation in a specific amount when the Labor Commissioner determines that mitigation is appropriate. The Acting Director is not free to substitute her own judgment. Bedard has not shown an abuse of discretion and, accordingly, the assessment of penalties at the mitigated rate of \$30.00 is affirmed for 91 violations.

⁴ Section 1777.1, subdivision (c) defines a willful violation as one in which “the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.”

Bedard Is Not Liable For Liquidated Damages.

Section 1742.1 provides in pertinent part as follows:

(a) 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.

* * *

(b) Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the assessment . . . , including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the assessment . . . , for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons or entities who are found to be entitled to such funds.

It is undisputed that Pedersen deposited the full amount of the Assessment with DIR within 60 days following service of the Assessment with a specific request to “hold the funds in escrow pending administrative and judicial review.” There are no statutory preconditions as to the source of funds.

DLSE contends, without any evidentiary support, that the funds Pedersen deposited were withheld from its subcontractor, Lanthier, and that their deposit with DIR constituted a violation of Pedersen’s duty to transfer funds withheld from a subcontractor to the awarding body under section 1727, subdivision (b). DLSE argues that the permitting the funds to be treated as a deposit under section 1742.1, subdivision (b) makes the requirements of section 1727, subdivision (b) a surplusage. On that basis, DLSE concludes that applying the deposited funds to allow Bedard to escape from liquidated damages would exceed the Acting Director’s jurisdiction.

This is wrong for two reasons. First, DLSE did not provide evidence that the funds Pedersen deposited had been withheld from Lanthier. Second, at most, DLSE’s argument means it has some remedy against Pedersen; it does not invalidate Pederson’s clear compliance with

section 1742.1. The record shows that Pederson made a timely deposit of the full amount of the Assessment pursuant to section 1742.1, subdivision (b). Accordingly, Bedard has no liability for liquidated damages on the Project.

FINDINGS

1. Affected subcontractor Bedard Controls, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Bedard is liable for the underpayment of prevailing wages to Hord for his work on Project in the amount of \$9,591.09, as modified, comprising 91 violations of section 1775. Bedard is also liable for unpaid training fund contributions in the amount of \$464.80.

3. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of \$30 per violation, and the resulting total penalty of \$2,730.00 for 91 violations is affirmed.

4. Affected contractor R. Pedersen & Sons, Inc. deposited the full amount of the Assessment in escrow with the Department of Industrial Relations within 60 days after service of the Assessment pursuant to section 1742.1, subdivision (b). Bedard therefore has no liability for liquidated damages under section 1742.1, subdivision (a).

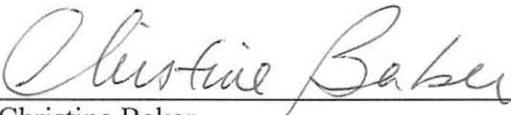
8. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Wages Due:	\$9,591.09
Training Fund Contributions Due:	\$464.80
Penalties under section 1775, subdivision (a):	\$2,730.00
TOTAL:	\$12,785.89

Interest shall accrue on all unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is modified in part and affirmed 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: 6/09/11


Christine Baker
Acting Director of Industrial Relations