STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Hobbs Construction, Inc. Case No. 16-0025-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor, Hobbs Construction, Inc. (Hobbs) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on December 11, 2015, with respect to the El Pescadero Park and McDonald Park Renovation Project in the City of Tracy. The Assessment determined that $149,200.00 in statutory penalties under Labor Code section 1776 was due.[1] A Hearing on the Merits was conducted on August 24, 2016, and December 1, 2016, in Fresno, California, before Hearing Officer Gayle T. Oshima. Chad Wishchuk appeared for Hobbs, and David Cross appeared for DLSE. The matter was submitted for decision on February 17, 2017.

At trial, the parties stipulated to the issues for decision as follows:

- Whether the requirement under section 1742 to hold the hearing within 90 days under subdivision (b) was violated.
- Whether the Assessment was timely under section 1741, subdivision (a), or barred by the one-year statute of limitations under Code of Civil Procedure section 340, subdivision (a).
- Whether DLSE adequately described the nature of the violation and the basis for

[1] All further statutory references are to the Labor Code unless otherwise specified.

the Assessment under section 1741.

- Whether Hobbs sustained its burden of showing the Assessment was incorrect.
- Whether the investigation conducted by DLSE was inadequate and incomplete.
- Whether Hobbs failed to timely submit certified payroll records, and is therefore liable for penalties under section 1776.
- Whether section 1776 requires a contractor to create, maintain, or provide the DLSE with "time cards."
- Whether section 1776 authorizes penalties for anything other than the specific record that is a certified payroll record, not back-up data, or whether the DLSE is without valid authority and therefore, the Assessment should be dismissed.
- Whether the DLSE unreasonably refused to give Hobbs credit for timely providing all of its certified payroll records, daily project timesheets, and cancelled checks.
- Whether there is a lack of proportionality and fairness in the penalty assessment.
- Whether DLSE illegally refused Hobbs a settlement meeting under section 1742.1.
- Whether the hearing and the related procedures in the Labor Code and pursuant to which the DLSE and the Department of Industrial Relations conduct a hearing deprive Hobbs of its constitutional due process rights and violate the Administrative Procedure Act.

The Director finds that Hobbs has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Director issues this Decision affirming the Assessment.

FACTS

On July 1, 2014, Hobbs entered into an agreement for public improvements with the City of Tracy in the El Pescadero Park and McDonald Park Renovation Project (Project) for $657,900.00. The contract required Hobbs to install prefabricated masonry restrooms, a shade structure and a water play structure; construct a sports court; and conduct other related work as to water, sewer, grading, concrete paving, landscaping, and resurfacing.

Section 1776, Subdivision (h): Requests for Payroll Records

Deputy Labor Commissioner Lori Rivera (Rivera) testified that the case was opened for investigation on October 24, 2014, upon DLSE receiving a wage complaint from Lillian Gentz, an employee of the Fresno City Public Works Department.[2] Gentz had received information from at least one of Hobbs' workers alleging underpayment of wages owed by Hobbs. In filing the complaint with DLSE, Gentz provided two weekly timesheets for weeks in August and September 2014 entitled "Hobbs Construction Timesheet," one purporting to relate to a Hobbs worker named "Michael" and another with no worker's name on it. Both timesheets indicated the days, job code, and daily duties performed. Rivera interpreted the timesheets to refer to Hobbs worker Michael Wrona on his work on the Project, although the August timesheet bore a different job code than the September timesheet.

On October 29, 2014, DLSE sent Hobbs a Request for Payroll Records (First Request). The First Request referred to section 1776 as authority, described a ten working days' response time, warned of the $100.00 per day per worker statutory penalty rate for failure to comply, and included DLSE forms under section 1776, subdivision (c) that Hobbs could use for providing Certified Payroll Records (CPRs).

[2] Rivera testified that although the City of Fresno was not the Awarding Body of the Project, Gentz had received a wage complaint.

Rivera contacted Hobbs on November 14, 2014, to inquire whether Hobbs had received her October 29, 2014, letter (First Request). On November 17, 2014, Michael Hobbs, the owner of the company (Mr. Hobbs), sent DLSE an email stating that he did not receive the First Request.[3] In response, on November 17, 2014, Rivera faxed and emailed a form letter to Mr. Hobbs requesting payroll information, together with a second letter dated November 17, 2014 (collectively, Second Request). The Second Request form letter stated, "[t]his letter constitutes a formal request for public works payroll information as authorized by Section 1776 of the California Labor Code." The letter stated:

> We also require certain additional 'Payroll Records' as that term is defined at Title 8, California Code or Regulations, Section 16000, as including: All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.
>
> The specific Payroll Records now requested are: Please see attached for a listing of all additional requested information on each of the requested cases.[4]

The second November 17, 2014, letter attached to the email and fax asked that Hobbs provide the following:

1. Proof of any employer payment contributions claimed to have been paid, canceled checks to unions, health plans, training funds, etc. as part of the prevailing wage on this project. Only those contributions, which are shown to have been paid, will be credited against the prevailing wage obligation.

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[3] DLSE's proof of service for the October 29, 2014, mailing was not introduced into evidence. However, there is a notation in DLSE's "900 notes" (file notes) indicating that on April 6, 2015, the envelope was sent by first class mail as well as certified mail. The certified mail envelope addressed to Hobbs was returned by the U.S. Postal Service as "unclaimed." The envelope sent by regular mail was not returned to DLSE.

[4] There were eight listed projects in all for which DLSE was seeking payroll records. Besides the Project, the other projects included: Sugar Pine Trail, Tehachapi East Afterbay Turnout Pump Station, Wellhead Treatment, Thorburn Park, Copper River, Mendota ADA Ramp, and Leo Carrillo Park.

2. Copies of *original time cards* for all work on this project.

3. Copies of the canceled payroll checks issued, (front and back) which reflect the wages paid as reported on the Certified Payroll Reports.

4. A list of all employees who worked on this project; include full names, last known address, telephone number and social security number.

5. All DAS forms 140 and 142 submitted on all projects.

(Exhibit 7, emphasis added.) The letter further admonished, "PLEASE NOTE: Strict compliance with Labor Code Section 1776(c) will be enforced in this investigation. Pursuant to the California Code of Regulations, Title 8, Group 3, Section 16000 (definition-payroll records) this request is subject to the same ten day requirement as the Certified Payroll Reports."

On December 8, 2014, Hobbs hand-delivered payroll records to the DLSE Bakersfield office for weeks ending August 2, 2014, through November 8, 2014. These records were CPRs pertaining to five workers, Jeff Burns, Sergio Villa, Michael Wrona, Chuck Melton, and Mr. Hobbs, prepared using California Department of Transportation (Caltrans) forms, which are similar to DLSE's form, but do not include the same level of detail, such as payments required under prevailing wage rate determinations for employee benefits (health and welfare, pension, vacation/ holiday, and training fund payments) and the full Social Security numbers of employees that DLSE had requested.

Hobbs also delivered hand-filled daily timesheets for the Project, but no copies of the weekly time cards prepared by any of Hobbs workers such as those that Gentz sent to DLSE at the outset of DLSE's investigation. A comparison between the September 2014 weekly time card for Wrona that Gentz sent DLSE and the daily timesheets Hobbs produced for the same September 2014 week suggests that Hobbs' daily timesheet underestimated Wrona's hours on two separate days. Also, while the Wrona weekly time card discloses particular duties performed by Wrona on each day, Hobbs' daily timesheets pertained to all of the crew and only described generally the duties performed

by the entire crew for that day.

On October 23, 2015, DLSE sent by facsimile, ordinary first class mail, certified mail, and email another request (Third Request), requesting payroll records, as defined in title 8, section 16000 of the California Code of Regulations. DLSE included a copy of the Second Request in this mailing. In particular, the Third Request stated:

> We are in receipt of your certified payroll records you submitted on 12/10/14, [*sic*] which included payrolls 1-15 through week ending 11/8/14. Please submit all remaining payroll records for the remainder of this project. Please be aware that [section] 1776(h) penalties are still being accumulated for failure to provide the employee information item #4, as previously requested on the letter dated 11/17/14.

As stated above, item number 2 in the Second Request sought copies of original time cards and item number 4 a list of employee names, addresses, telephone numbers, and Social Security numbers.

As a result of the Third Request, by an email on November 5, 2015, Hobbs office employee Sandra Gallardo provided the additional CPRs covering work periods after November 8, 2014, and an employee list. On December 3, 2015, Hobbs also emailed "employer contribution statements." However, copies of the original weekly time cards as prepared by individual workers still were not part of Hobbs' November 5, 2015, and December 3, 2015, productions.

On December 11, 2015, because DLSE had not received the requested copies of original time cards as part of the payroll documents, DLSE issued the Assessment. The Assessment imposed a total penalty on Hobbs of $149,200.00, calculated at $100.00 per day for four workers for each of the 373 days that Hobbs failed to provide the time cards after ten days from the Second Request.[5]

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[5] Section 1776, subdivision (h) specifies that the contractor or subcontractor has "ten days" from the date of receipt in order to comply with the request. However, DLSE's First Request for CPRs specified "ten working days" for production, after which penalty would apply. Consequently, DLSE gave Hobbs ten working days to produce the requested documents. Rivera testified that the CPRs showed that Mr. Hobbs was a fifth worker, but since he was the owner, she did not count him for purposes of the penalty.

Rivera testified that the initial submission of CPRs on December 8, 2014, did not conform to the statute so they were considered incomplete. She based that conclusion on her view that, although DLSE did receive some payroll records, copies of the worker-filled original time cards should have been produced so that she could confirm whether the hours reported coincided with the CPRs.

A former Hobbs worker, Charles Melton, credibly testified at the hearing that he was required to fill out his time on a daily basis and turn them in on a weekly basis to the Hobbs office, Jeff Burns, the foreman, or to Mr. Hobbs. When shown the copies of the time cards Gentz had provided to DLSE, Melton said that those time cards were similar to what he filled out. He also stated that he and Wrona often filled them out together. They reported the start time and end time, and gave a general description of the work performed that day. Melton also kept a diary of the hours worked and the type of work performed when employed by Hobbs. He recorded when he took lunch and the mileage driven to different jobsites. Melton testified that he did not file a complaint for underpayment of wages, however, as he was uncertain whether Hobbs had underpaid him or not.

Mr. Hobbs testified that his company did not use time cards or timesheets filled out by employees. He stated that his company may have requested workers to fill out time cards in past projects, but it did not use them in this Project. He further testified that the weekly time card DLSE obtained as to Wrona was like the time cards Hobbs used in 2013 in a federal project. Mr. Hobbs testified that the Wrona time cards DLSE obtained were replaced by the current timesheet he filled out for each crew of the five workers after the day's work and produced to DLSE on December 8, 2014, and November 5, 2015.

Burns and Gallardo also testified that no individual time cards were used in reporting times and work in this Project. Burns testified that he would call the office to report the hours or make a notation to himself. Burns, and another current worker, Sergio Villa, also signed declarations under penalty of perjury that no individual time cards were turned in to Hobbs. However, the declarations also stated that "[f]oreman at the jobsite

handles timesheets turned in to Hobbs Construction, Inc." No time cards (or timesheets of any kind) filled out by Burns, the foreman, were submitted to DLSE and only timesheets filled out by Mr. Hobbs were filed with DLSE and introduced as an exhibit at the hearing.

Rivera testified that she spoke to Wrona early in her investigation and he was cooperative. However, later during the investigation, Wrona abruptly stated to her that he signed a declaration for Hobbs which said that no time cards were submitted by him. That declaration was offered by Hobbs as an exhibit at the Hearing on the Merits. Rivera said that she saw the declaration for the first time at the date of the hearing. The declaration was dated January 22, 2016, and said in pertinent part:

> I have never turned in individual time cards to Hobbs Construction Inc. I may have verbally communicated or texted my time to Office, Jeff Burns or Mike Hobbs when neither Mike nor Jeff were present at the jobsite. Jeff Burns or Mike Hobbs would create timesheets for all employees.

In January 2016 Melton called Rivera to report that he received a call from Mr. Hobbs regarding a document that Mr. Hobbs wanted him to sign saying that there was no discrepancy with the hours he worked. He said he thought it was strange, so he called DLSE. During the phone call, Rivera asked whether he filled out time cards. He stated that he recorded the time and the work that he did on individual time cards on a daily basis, and turned them in to either Mr. Hobbs or Burns or to the office, on a weekly basis.

Timeliness of the Assessment

Rivera testified that upon speaking with Gentz, she was made aware that the awarding body was the City of Tracy, not Fresno as originally believed. Subsequently, Rivera received the Notice of Completion for the Project filed by the City of Tracy and filed with the San Joaquin County Recorder's office on May 5, 2015. DLSE issued the Assessment on December 11, 2015. DLSE received the Request for Review from Hobbs on January 14, 2016, and transmitted it to the Director's Office for assignment to a hearing officer on January 26, 2016. Although Hobbs requested a settlement conference, Rivera testified that the parties did not hold a settlement conference because the

Assessment did not involve wages and section 1776 requires strict compliance.

Timeliness of the Hearing on the Merits

The Hearing Officer was appointed on March 11, 2016. The Hearing Officer conducted one prehearing conference on April 4, 2016, where it was noted that Rivera would be on maternity leave until August. The Hearing on the Merits was scheduled and took place on August 24, 2016, and December 1, 2016.

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

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) The format for reporting of payroll records requested pursuant to section 1776 shall be on a form provided by DLSE. (Cal. Code Regs., tit. 8, § 16401, subd. (a).) "Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776." (*Id.*)

Moreover, "[a] contractor or subcontractor who pays less than the established prevailing rate may be assessed civil penalties (§§ 1741, 1775, and 1777.7), may be suspended from bidding or working on public works projects for up to three years (§§

1777.1 and 1777.7), and is also subject to criminal prosecution for failing to maintain payroll records demonstrating compliance (§§ 1776 and 1777; *State Bldg. and Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 296.)

1. The Assessment Was Timely

Hobbs submitted a timely request for review from the Assessment asserting, among other matters, that the Assessment was untimely under section 1741, subdivision (a), which requires that the Assessment be served within 18 months from the acceptance of the project or 18 months from the filing of a valid notice of completion with the county recorder, whichever occurred last. The Notice of Completion for the Project was dated May 5, 2015, and filed that date with the San Joaquin County Recorder, who recorded it on May 8, 2015. The Assessment was dated and served on December 11, 2015, well within 18 months from the filing of the valid notice of completion on May 5, 2015.[6] Therefore, the Assessment was timely.

2. DLSE's Penalty Assessment Under Section 1776 Is Appropriate and Contains Adequate Description and DLSE Investigation Was Appropriate

Each contractor and subcontractor employing workers on a public works project is required to maintain payroll records pursuant to section 1776 and to furnish CPRs upon request to DLSE. Failure to provide such records to DLSE within ten days of written notice subjects the contractor or subcontractor to statutory penalties. (§ 1776, subd. (h).) Subdivision (a) of section 1776 states:

> Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the

[6] Hobbs asserted that the limitations period should be decided under California Code of Civil Procedure section 340, subdivision (a), which provides one year for an action upon a statute for a penalty. Hobbs argues the accrual of that limitation period commences with DLSE's request for payroll information. The statute Hobbs relies on, however, clarifies that the one year applies, "*except if the statute imposing it prescribes a different limitation.*" (*Id.,* emphasis added.) Section 1741, subdivision (a) specifically prescribes a different limitation that accrues starting with the later of the dates of acceptance and filing of the notice of completion, as summarized above. Consequently, the one year period that Hobbs asserts does not apply.

actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

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

Article 1, subchapter 3 of title 8, California Code of Regulation, provides the definitions governing the "Payment of Prevailing Wages upon Public Works." Section 16000 of title 8 defines "payroll records" to mean:

All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours, and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

DLSE showed that Hobbs was served with the November 17, 2014, Second Request by email and facsimile. DLSE also showed that Hobbs was served with the Third Request on October 23, 2015, by certified mail, ordinary first class mail, facsimile, and email to Mr. Hobbs. Further, DLSE served the Assessment via certified mail, ordinary first class mail, email, and facsimile. For service of a request for CPRs, the applicable regulation does not prescribe any particular type of service. Instead, it states that the request "shall be in any form and/or method which will assure and evidence receipt thereof." (Cal. Code. Regs., tit. 8, § 16400, subd. (d).)

Therefore, DLSE met its burden of coming forward with evidence that Hobbs was properly served with the Second and Third Requests and properly served with the Assessment in accordance with the applicable rules. (Cal. Code. Regs., tit. 8, § 17220, subd. (a) [hereafter, Rule 20], and § 17250, subd. (a) [hereafter, Rule 50].) The Assessment indicated the nature of the violation as failure to provide time cards as

previously requested on November 17, 2014, under subdivision (h) of section 1776, in compliance with Rule 20.[7] DLSE having met its burden of coming forward, Hobbs had the burden of disproving the basis for the penalty assessment. (§ 1742, subd. (b).) Hobbs bears the burden of establishing by a preponderance of the evidence that the Assessment is incorrect.[8] Hobbs has failed to meet its burden.

The Second Request specifically asked for "Copies of original time cards for all work on this project" and "Payroll records" as that defined in a quoted regulation, which includes "All time cards." The Second Request also asked for a list of employees and their Social Security numbers. On December 8, 2014, Hobbs did provide payroll data using Caltrans CPR forms to reflect wages paid and Hobbs produced information on the hourly rate of fringe benefit contributions that were due the employees, but not the contribution amounts actually paid. Hobbs also did not produce the original time cards filled out by employees and the list of employees and their full Social Security numbers, as DLSE had requested.

The Third Request included the contents of the Second Request, and also asked for "all remaining payroll records for the remainder of the Project" and employee names, addresses, telephone numbers, and Social Security numbers. In response on November 5, 2015, Hobbs produced a list of employees and CPRs for work done after the dates in the December 2014 production. Again, no original time cards prepared by employees were produced that were similar to the one that DLSE had relating to Wrona and that Melton

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[7] As to the issue whether DLSE conducted an adequate investigation, a showing by DLSE on the nature and extent of its investigation is not part of its prima facie case under Rule 20. Given that the First Request (of October 29, 2014) may not have been received by Hobbs, Rivera's continued investigation properly led her to send the Second Request on November 17, 2014, followed by the Third Request of October 2015 when Hobbs' response to the Second Request was found incomplete. Hobbs offers no valid argument as to why or how the DLSE investigation was inadequate, what standard would apply as to the investigation, or how an argument about the extent of investigation relates to a penalty under section 1776. Therefore, Hobbs does not carry its burden of proof (see *infra*) on its investigation issue.

[8] Hobbs has the burden of proving that the Assessment is incorrect, and "the quantum of proof required to establish the existence or non-existence of any fact shall be by a preponderance of the evidence." (Rule 50, subds. (b) and (d)).

stated the workers filled out on a daily basis.[9] Nor did Hobbs provide the time cards the evidence shows were prepared by Burns as foreman and turned into the office. Indeed, DLSE's Second and Third Requests make clear that DLSE was seeking original time cards. Notably, DLSE had a valid need for copies of the original time cards to check the accuracy of payments to the workers, in that the daily timesheets produced by Hobbs in December 2014 reflected for Wrona in September 2014 different start, finish, and total work times as compared to the Wrona time card that DLSE obtained at the beginning of its investigation.

Hobbs' failure to timely respond in full to DLSE's Second and Third Requests by providing "all time cards" as required by regulation justified imposition of penalty at the rate of $100.00 for each calendar for each of the four workers "until strict compliance" was "effectuated." (§ 1776, subd. (h).) Since "strict compliance" never occurred in this case, the penalty imposed by DLSE for the 373-day period from December 3, 2014, to and including December 11, 2015, at $400.00 per day for the amount of $149,200.00 was proper.

Hobbs disputes whether worker- or foreman-prepared time cards can be subject to a DLSE request under section 1776. Hobbs asserts that the regulatory definition of "payroll records" as including "all time cards" does not authorize DLSE to request "back up" time cards or timesheets prepared by workers, and only the specific type of documents identified in section 1776 can form the basis for imposing a penalty. Hobbs' argument cannot be accepted, for the statute in subdivision (a) requires Hobbs to keep "accurate payroll records" that show "straight time and overtime hours worked each day and week." In subdivision (d) the statute requires Hobbs to "file a certified copy of the records enumerated in subdivision (a) ... within 10 days after receipt of a written request." (§ 1776, subds. (a), (d).) Time cards plainly qualify as records that show the hours worked which DLSE may request.

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[9] On December 3, 2015, Hobbs also produced employer contribution statements for fringe benefits that evidence payments made directly to workers.

Further, the statute alone does not define the "accurate payroll records" that must be produced. That definition is left, properly, to the regulation adopted by the agency empowered by statute to adopt regulations construing section 1776. (§ 55 and *Lusardi, supra,* 1 Cal. 4th at p. 989.) The regulatory definition adopted by DLSE clearly defines "payroll records" to include "all" time cards. (Cal. Code Regs., tit. 8, § 16000.) To read section 1776 to exclude worker-prepared time cards from DLSE's reach would improperly foreclose DLSE from obtaining any and all time cards and would enable a contractor to subvert DLSE's vital role in confirming the accuracy of records that are produced.[10] (See § 90.5, subd. (b) and § 1776, subd. (b)(2), assigning to DLSE and the Labor Commissioner, who is the chief of DLSE (see § 21) the primary responsibility to administer and enforce section 1776 and allowing DLSE employees access to businesses to secure information.) That the hours in the Gentz-produced Wrona time card conflicted with the Hobbs-produced timesheets demonstrates the merit of facilitating DLSE ability to confirm the data that is produced.

Moreover, section 1776, subdivision (a) specifically requires Hobbs to keep "accurate payroll records" including the "social security number" for each worker. Section 1776 at subdivisions (b) and (d) requires that the records described in subdivision (a) be certified and made available to DLSE within ten days from request. Apart from whether worker-prepared or employer-prepared time cards are required by law, Hobbs failed to timely produce requested documentation of the Social Security numbers and thereby exposed itself to penalty, although the Assessment articulated the lack of time card production as its basis, as discussed above.[11]

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[10] Hobbs cites the DLSE Public Works Manual (Manual) and a rulemaking Final Statement of Reasons related to labor compliance programs from years ago for the proposition that time cards are not required by the statute. However, the Hearing Officer has not taken official notice of the Manual or rulemaking document and declines to do so. Moreover, Hobbs quotes the Manual and rulemaking document out of context and omits other provisions that would detract from Hobbs' point. The Manual is an internal guide for DLSE staff, not the Director. The statute and regulations, not the Manual and rulemaking document, control the Director's Decision here.

[11] Hobbs also asserts it deserved a "credit" for timely providing all of its certified payroll records, daily project timesheets, and cancelled checks. Hobbs cites no authority or standard for such a credit. Similarly,

Further, as to Hobbs' time card argument, Melton, a former employee who had not filed a complaint and who was not making a demand that Hobbs owed him back pay, credibly testified that he and Wrona filled out time cards on a daily basis and turned them into Burns, Mr. Hobbs, or the office, on a weekly basis. Melton had an honest demeanor and testified consistently that he daily filled out his time and turned the cards in on a weekly basis. The Wrona time card corroborates Melton's testimony that he and his coworkers routinely prepared time cards and submitted them to Hobbs.

Both Burns and Gallardo testified that they both currently worked for Hobbs. While they stated that no individual time cards were turned in to Hobbs, their testimony came across as defensive and guarded. Further, the declarations from Burns and Villa stated that the "[f]oreman at the jobsite handles timesheets turned in to Hobbs...." Accepting the declarations at face value, those timesheets handled by Burns should have been produced to the DLSE. However, at the hearing, contrary to his declaration, and somewhat inexplicably, Burns testified that he did not fill out any of the timesheets and that only Mr. Hobbs filled them out.

Further, the existence of the Wrona time card, sent to DLSE by the City of Fresno, calls into question the declaration from Wrona that stated that he "never" turned in individual time cards, assuming the time card for Wrona that the DLSE obtained constituted the "individual time card" that Wrona's declaration mentioned. Moreover, although Hobbs produced CPR forms to DLSE in December 2014, that response was not complete. It omitted the time cards filled out by workers, the requested Social Security numbers, and the data on employer contribution payments that were provided over a year late. Hence, the certification for the payroll records itself was incomplete and tardy. Overall, based on the preponderance of the evidence, Hobbs has not met its burden of proof to establish the basis for the Assessment is incorrect.

Hobbs asserts lack of "proportionality" and fairness in the imposition of the penalty, without giving a statutory or regulatory basis for adjusting the penalty on those grounds. The amount of the penalty provided by the statute is phrased in the mandatory: $100.00 per calendar per worker for each violation. Consequently, Hobbs fails to carry its burden of proof on those issues.

As for the amount of the penalty, Hobbs cites no authority for the proposition that DLSE has any discretion in setting penalties under section 1776. Nor does Hobbs present any authority holding that good faith efforts to comply with the prevailing wage law, lack of willfulness in violating its statutory obligations, or an offer to settle the matter are relevant to DLSE's assessment of penalties for failure to produce payroll records. In fact, section 1776 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Instead, the Legislature has clearly provided that if a contractor fails to provide CPRs when requested, a penalty is mandatory until the payroll records are forthcoming, i.e., until there is "strict compliance" with DLSE's request that the records be furnished to it. (§ 1776, subd. (h).)[12]

3. The Facts That The Hearing Commenced More Than 90 Days After Filing Of The Request For Review and DLSE Did Not Provide for Settlement Meeting Do Not Preclude The Director From Reviewing This Matter

Section 1742, subdivision (b) provides that "Upon receipt of a timely request [to review a civil wage and penalty assessment], a hearing shall be commenced within 90 days before the director ...." Also, section 1742.1, subdivision (c), provides that:

> The Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days ... afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designed to attempt to settle a dispute regarding the assessment without the need for formal proceedings.

[12] Hobbs also argues that as adopted in 2015 (stats. 2015, ch. 739, § 1), section 1720.9, subdivision (f) requires "written time records" by drivers of ready-mix cement truck to be filed within three days. Hobbs maintains that statute shows section 1776 does not require time cards prepared by workers. Hobbs cites nothing in the legislative history to show section 1720.9 represents a subsequent expression of legislative intent as to the scope of section 1776. Hence, that argument is rejected.

Neither statute provides any consequence--either for failure to meet the 90-day time for commencing a hearing or for failure of DLSE to afford an opportunity for a settlement meeting.

DLSE received the request for review from Hobbs on January 14, 2016, and transmitted it to the Director's Office for assignment to a Hearing Officer on January 26, 2016. The Hearing Officer was appointed on March 11, 2016. The Hearing Officer conducted one prehearing conference on April 4, 2016, where it was noted that Deputy Labor Commissioner Rivera would be on maternity leave until August. Given Rivera's importance to the case, the Hearing on the Merits was scheduled and took place on August 24, 2016, and December 1, 2016.

The timeline under section 1742, subdivision (b) to commence a hearing within 90 days after receipt of a request for review is directory rather than mandatory in nature, and thus, the Labor Commissioner did not lose jurisdiction by holding a hearing beyond the timeline. In other words, the failure to commence a hearing within 90 days is not jurisdictional.

In *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1144-1152 (*CCPOA*), the California Supreme Court provided a comprehensive analysis of the effect of time limits for governmental action when the applicable statute does not provide a consequence for failure to comply with the limits. There, the issue was whether the California State Personnel Board, by not complying with a Government Code provision that its decision in an employee's appeal of a disciplinary action be rendered within a certain period of time, had lost jurisdiction over the employee's appeal. The Supreme Court found that the State Personnel Board's failure to comply with the requirement in Government Code section 18671.1 that a decision "shall" be issued within 90 days neither deprived the Board of jurisdiction to proceed beyond that time limit nor required dismissal of the underlying appeal.

The conclusion in *CCPOA* was premised on the distinction between legislative provisions that are "directive" or "mandatory" in effect. The Court held that an agency is

not deprived of jurisdiction merely because a statute uses the word "shall" in reference to the time limit. Rather, the failure to comply with a particular procedural requirement must be viewed in light of whether there is an expression of statutory intent to invalidate the governmental action as a result of that failure. Moreover, the Supreme Court found that time limitations are "deemed to be directory unless the Legislature clearly expresses a contrary intent." (*Id.*, 10 Cal. 4th at p. 1145).

As in *CCPOA*, section 1742, subdivision (b) does not provide or suggest within its terms that the failure to commence a hearing within 90 days is jurisdictional in effect, or that, as a consequence of that failure, the governmental action is invalidated. Nothing has been provided that would show or tend to show a contrary legislative intent. Consequently, the 90-day time limitation set forth in section 1742, subdivision (b) must be read as directory rather than mandatory in effect. The failure to commence the hearing within 90 days does not present a jurisdictional impediment to proceeding nor does it operate to invalidate DLSE's Assessment.[13]

Although DLSE did not afford Hobbs an opportunity for a settlement meeting within 30 days after service of the Assessment, the same reasoning as to the 90-day rule for commencement of a hearing would apply to that failure. Section 1742.1, subdivision (c) does not provide or suggest within its terms that the failure to convene a meeting is jurisdictional in effect, or that, as a consequence of that failure, the governmental action is invalidated. Consequently, the settlement meeting offer requirement set forth in section 1742, subdivision (c) must be read as directory rather than mandatory in effect. The failure of DLSE to make such an offer does not present a jurisdictional impediment to proceeding nor does it operate to invalidate DLSE's Assessment.

Accordingly, the fact that the hearing on the merits was commenced later than 90 days after the request for review was filed and the failure to provide opportunity for a

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[13] Moreover, as DLSE points out in its post-hearing brief, because Deputy Labor Commissioner Rivera was taking a maternity leave of absence, under Government Code section 12945 and title 2, section 11035 et seq. of the California Code of Regulations, DLSE was required to provide an accommodation regarding pregnancy disability leave.

settlement meeting do not preclude the Director from reviewing this matter and issuing this Decision.

4. Hobbs Identifies No Due Process Violation and None Appear on This Record.

Constitutional due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. (U.S. Const., 5th & 14th Amends.; Cal. Const. art. 1, §§ 7, subd. (a) and 15; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612).) Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances. (Citation omitted.) Due process is flexible and calls for such procedural protections as the particular situation demands." (*Mathews v. Eldridge* (1976) 424 U.S. 310, 335.) The degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of the administrative decision-making process from a due process standpoint. (*Id.*, at p. 341.)

Hobbs' due process argument seems solely to be based on the statutory scheme which assigns to the Director the task of issuing decisions on requests for review of civil wage and penalty assessments, while DLSE is assigned the task of issuing those assessments. Subdivision (a) of section 1742 specifically provides that an affected contractor may seek review of an assessment, and subdivision (b) of section 1742 provides that the review will be conducted by the Director who will appoint an impartial hearing officer who is an employee of the Department of Industrial Relations, but not an employee of DLSE. Moreover, subdivision (a) of Rule 12 (Cal. Code Regs., tit. 8, § 17212 subd. (a)) specifically provides, with certain exceptions, that the Administrative Adjudication Bill of Rights of the Administrative Procedures Act (APA) (Gov. Code § 11425.10 et seq.) applies to the Department's section 1742 hearings. Because DLSE is the enforcing agency which represents the prosecutorial function and is separated from the hearing officer, who represents the adjudicative function, the procedures comply with the APA. Moreover, Rule 7 (Cal. Code Regs., tit. 8, § 17207) specifies that any direct or

indirect communication from DLSE and "any other party" regarding any issue in the proceeding are prohibited, without notice and opportunity for all parties to participate.[14]

Hobbs argues that the hearing violates Government Code section 11425.30, which specifies that a hearing officer shall not be subject to the control of an "investigator, prosecutor, or advocate" in the matter. Here, the hearing officer does not function in any of these roles and Hobbs offers no evidence or argument that suggests to the contrary. The Supreme Court has regularly ruled that a combination of investigative, prosecutorial, and adjudicatory functions within a unitary agency does not, in and of itself, violate due process absent a showing that the internal separation of those functions has not been preserved. (See, e.g., *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal. 4th 1, 10-16; *see also Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.)

FINDINGS

1. Affected contractor Hobbs Construction, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Hobbs Construction, Inc. provided four employees to the Project, and subjected itself to compliance with section 1776.

3. Hobbs Construction, Inc. was required to accurately keep and certify payroll records for workers employed on the Project pursuant to the provisions of section 1776.

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[14] Under Government Code section 11425.10, subdivision (a)(1), the person to whom the agency action is directed shall be given "notice and an opportunity to be heard, including the opportunity to present and rebut evidence" at the administrative hearing. Hobbs presents no evidence to support an argument that it was not given such notice and opportunity.

4. On November 17, 2014, DLSE served Hobbs Construction, Inc. with a request for certified payroll records, including time cards, to be produced to DLSE within ten days from the receipt of the request, or be subject to penalties under section 1776, subdivision (h) in the amount of $100.00 per calendar day or portion thereof for each four employees until the records were received. The Request was received on November 17, 2014, by Michael Hobbs by email and Hobbs Construction, Inc. by facsimile.

5. Hobbs Construction, Inc. delivered some of the requested payroll records on December 8, 2014, November 5, 2015, and December 3, 2015, but failed to timely produce all of the requested payroll records.

6. Hobbs Construction, Inc. failed to show that the Assessment was incorrect.

7. DLSE properly assessed penalties against Hobbs Construction, Inc. under section 1776, subdivision (h) for its failure to provide the requested payroll records to DLSE within ten working days of November 17, 2014.

8. In light of the findings above, Hobbs Construction, Inc. is liable for penalties under section 1776, subdivision (h) in the total amount of $149,200.00.

ORDER

The Civil Wage and Penalty Assessment is affirmed 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.

As to all issues decided here, the Decision is final.

Dated: 8/14/2017

Christine Baker
Director of Industrial Relations