STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

PIAZZA BROTHERS, INC. and NICK PIAZZA,
as one of the five largest shareholders the corporation
Prime Contractor
And
APOLLO PAINTING CORP., GREGORY A. FUCCI , and
GREGORY FUCCI, JR.,
Individually and as officers, owners and shareholders of the corporation;
APOLLO CONSTRUCTION SERVICES CORP.,
as a successor or substantially owned-affiliated entity, and
GREGORY A. FUCCI,
Individually and as an officer, owner and shareholder of the corporation;
G. FUCCI PAINTING, INC.,
as a successor or substantially owned-affiliated entity, and
GREGORY A. FUCCI ,
Individually and as an officer, owner and shareholder of the corporation;
G FUCCI CONSTRUCTION SERVICES CORP.,
as a successor or substantially-owned affiliated entity, and
GREGORY FUCCI, JR.,
Individually and as an officer, owner and shareholder of the corporation;
PAF PAINTING SERVICES INC. d/b/a
GARDEN STATE PAINTING,
as a successor or substantially owned-affiliated entity, and
GREGORY A. FUCCI,
Individually and as an officer, owner and shareholder of the corporation;
PAF PAINTING CORP.,
as a successor or substantially owned-affiliated entity; and
P.A.F. PAINTING SERVICES OF WESTCHESTER, INC.,
as a successor or substantially owned-affiliated entity

Subcontractor

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

**REPORT**
**&**
**RECOMMENDATION**

Prevailing Rate Case
98006536 Westchester
County

IN THE MATTER OF

BEDELL ASSOCIATES, INC.,
and
PETER J SABATINO,
as one of the five largest shareholders of the corporation
Prime Contractor
APOLLO CONSTRUCTION SERVICES CORP.,
d/b/a APOLLO PAINTING CO.,
and
GREGORY A. FUCCI,
Individually and as an officer, owner and shareholder
of the corporation;
APOLLO PAINTING CORP.,
as a substantially owned-affiliated entity, and
GREGORY A. FUCCI,
and
GREGORY FUCCI, JR.,
Individually and as officers, owners and shareholders
of the corporation;
G. FUCCI PAINTING, INC.,
as a successor or substantially owned-affiliated entity,
and
GREGORY A. FUCCI,
Individually and as an officer, owner and shareholder
of the corporation;
G FUCCI CONSTRUCTION SERVICES CORP.,
as a successor or substantially owned-affiliated entity,
and
GREGORY FUCCI, JR.,
Individually and as an officer, owner and shareholder
of the corporation;
PAF PAINTING SERVICES INC. d/b/a GARDEN
STATE PAINTING,
as a successor or substantially owned-affiliated entity,
and GREGORY A. FUCCI,
Individually and as an officer, owner and shareholder
of the corporation;
PAF PAINTING CORP., as a successor or
substantially owned affiliated-entity;
and
P.A.F. PAINTING SERVICES OF WESTCHESTER,
INC.,
as a successor or substantially owned-affiliated entity

Subcontractor,

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

Prevailing Wage Rate
Case No. 9700110
Westchester County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on May 24 and 25, August 16, October 11 and 14, 2011, and April 23, 2012. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned investigations conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Apollo Painting Corp. (“Apollo”) and Apollo Construction Services Corp., d/b/a Apollo Painting Co., (“Apollo Construction”) complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of painting work on two public work projects. The first involved a public work contract between Piazza Brothers, Inc. (“Piazza”) and the Bedford Central School District (“Bedford”) for renovations to the Mt. Kisko Elementary School in Mt. Kisko, Westchester County, New York (“Project 1”) on which Apollo performed work as a subcontractor of Piazza. The second involved a prime contract between Bedell Associates Inc. (“Bedell”) and the Yonkers Board of Education (“Yonkers”) for the construction of a new public school in Yonkers, Westchester County, New York (“Project 2”) on which Apollo Construction performed work as a subcontractor of Bedell.

At the conclusion of the hearing, the hearing record was closed and the parties were afforded the opportunity to submit Proposed Findings of Fact and Conclusions of Law (“Proposed Findings”). After several extensions of time to submit those Proposed Findings, on September 13, 2012, Piazza served a Motion to Dismiss with a supporting affidavit from Nick Piazza, who appeared with counsel in the proceeding but never testified. On October 9, 2012, the Department served its Proposed Findings. On that same day, Apollo served its Proposed Findings and Motion to Dismiss.

By email dated September 17, 2012, followed by a letter dated October 3, 2012, the Department objected to the Piazza affidavit being admitted into the record on the grounds that

the record had been closed months earlier; that Mr. Piazza was present with counsel at the hearing, at which time he had a full opportunity to testify and to present witnesses in his defense, but chose not to do so; and that the Department would be denied its right to cross examine Mr. Piazza on factual assertions being made in a post-hearing affidavit. As the record was closed at the conclusion of the hearing on April 23, 2012, and as the Department is unable cross examine Mr. Piazza's factual assertions or introduce any evidence to contest those assertions months after the hearing was closed, Mr. Piazza's affidavit in support of the Motion to Dismiss has not been considered. The legal issues raised in the Motion have been considered in the context of the existing hearing record.

Thereafter, under cover of a letter dated November 7, 2012, the Department submitted the Federal Court Docket and Judgments relating to federal criminal proceedings involving Gregory A. Fucci and Gregory Fucci, Jr., which counsel for Apollo and Apollo Construction and the Fuccis likewise object to on the grounds that the record had been closed, the documents contain no probative evidence and were unfairly prejudicial. By email dated November 19, 2012, the parties were advised that hearing record was closed on the final day of hearing and that no additional evidenced offered at that late date would be reviewed or considered. That information has not been reviewed or considered in preparing this Report and Recommendation.

## APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz (Louise G. Robach, Senior Attorney, of Counsel). Apollo, Apollo Construction, Gregory A. Fucci and Gregory Fucci, Jr., and the entire above-captioned Fucci group appeared with, by or through Trivella & Forte, LLP (Christopher A. Smith, Esq., of counsel). Piazza and Nick Piazza appeared and were represented throughout the hearing by Alario & Fischer, P.C. (Linda E. Alario, Esq., of counsel), which firm then withdrew post-hearing, at which time Welby, Brady & Greenblatt, LLP (Gregory J. Spaun, Esq., of counsel) was substituted as counsel. Bedell and Peter J. Sabatino appeared and were represented by Francis J. O'Reilly, Esq.

## ISSUES

1. On Project 1, did Apollo pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?

2. On Project 2, did Apollo Construction pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
3. Was any failure by Apollo to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Was any failure by Apollo Construction to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
5. Did any willful underpayment involve the falsification of payroll records?
6. Are G. Fucci Painting, Inc.; G Fucci Construction Services Corp.; PAF Painting Services, Inc., PAF Painting Corp.; and P.A.F. Painting Services of Westchester, Inc. "substantially owned-affiliated entities"?
7. Are Gregory A. Fucci and Gregory Fucci, Jr. among the five largest shareholders of Apollo?
8. Are Gregory A. Fucci and Gregory Fucci, Jr. among the five largest shareholders of Apollo Construction?
9. Are Gregory A. Fucci and Gregory Fucci, Jr. officers of Apollo who knowingly participated in a willful violation of Labor Law article 8?
10. Are Gregory A. Fucci and Gregory Fucci, Jr. officers of Apollo Construction who knowingly participated in a willful violation of Labor Law article 8?
11. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be reduced?
12. Should a civil penalty be assessed and, if so, in what amount?
13. Is the prime contractor Piazza responsible for any failure of Apollo to comply with the requirements of Article 8 of the Labor Law?
14. Is the prime contractor Bedell responsible for any failure of Apollo Construction to comply with the requirements of Article 8 of the Labor Law?

## FINDINGS OF FACT

As the hearing concerned two separate investigations made by the Bureau on two separate projects, each project will be separately discussed.

### Project 1

On April 14, 1999, Piazza entered into a contract with Bedford to renovate the Mt. Kisko Elementary School (T. 85-86; Dept. Ex. 4). Piazza thereafter entered into a subcontract with Apollo to perform the painting work required under the contract (Dept. Ex. 6). Pursuant to Prevailing Rate Schedule ("PRS") 1999 for Westchester County, in effect from July 1, 1999 through June 30, 2000, workers performing work in the painter classification were to be paid wages of $27.25 an hour and supplemental benefits of $13.01 an hour (Dept. Ex. 7).

Commencing March 12, 2001, the Bureau began receiving complaints from workers alleging that Apollo had not properly paid them for painting work they performed on Project 1 (T. 57-81; Dept. Ex. 1). One employee provided the Bureau with a calendar that recorded days worked and the identity of the workers who worked on those days; two others provided weekly time sheets and pay stubs (T. 71- 80; Dept. Ex. 1). On the basis of the complaints, the Bureau commenced an investigation (T. 255).

On November 12, 2001, the Bureau issued a Payroll Records Notification to Apollo requiring that it produce payroll records, time records, and other documents relating to Project 1 (Dept. Ex. 2). Copies of the Notice were also sent to Piazza and Bedford (*Id*.). No records were provided by Apollo or Piazza in response to that notice (T. 83-84, 316, 395-396). Bedford, through the project engineers, provided the prime contract and contract specification, which contained a PRS for Project 1, as well as daily job reports (which only related to Piazza's work) (T. 84-86, 91-94, 211-212; Dept. Exs. 3, 4, 8). Although no subcontract between Piazza and Apollo was provided to the Bureau, a memorandum from Greg Fucci to Nick Piazza was produced evidencing that Apollo contracted with Piazza to perform priming and painting work at Project 1 (Dept. Ex. 6).

In 2008, following the departure from the Bureau of the investigator who had been handling the case, the case was assigned to a new investigator to complete the investigation and

prepare an audit (T. 56, 184-186, 319-320).[1] Lacking any payroll records, in or about October 2008 the Bureau proceeded to prepare an initial audit based upon the employee-provided information (T. 202; Resp. Piazza Ex. 2). In preparing the audit of Project 1, the Bureau relied on the wage rate employees claimed they were paid in their complaints or on the employee-provided paystubs to establish the wage rate actually paid to each of the employees (T. 96-122). As the employees uniformly claimed that they were paid no supplemental benefits, and as Apollo provided no proof to the contrary, the Bureau provided Apollo with no credit for the payment of supplemental benefits (T. 115, 346, 396).

Based on an August 17, 1999 memorandum between Mr. Fucci and Mr. Piazza, and from conversations with a school district official and the project construction manager, the Bureau determined that project began on August 17, 1999 (T. 306-310; Dept Ex. 6). Several of the employees advised the Bureau that the project lasted a couple of weeks (T. 310). The Bureau determined that the employees worked full time on the project for two weeks commencing August 17, and then worked overtime on some nights and weekends as shown on the claim forms and time sheets (T. 311-313, 344). The Bureau established the days employees worked from either (1) the statements in their complaints, or (2) the entry of their names on the calendar of days worked during the aforesaid two-week period (T. 295-310, 330, 344)[2] or (3) from time sheets two employees provided (T. 313-315, 344). The Bureau determined the amount of hours employees worked on any given day from the 7-hour work day stated in their complaints (T. 97-

[1] The Bureau investigator assigned the case in 2008 did not know what transpired between 2001 and 2008, and she testified that there was no documented activity on the file between March 15, 2002 (when the engineer's logs were received) and 2008 when she was assigned the case (T. 208-211; Dept. Ex. 8). One employee complaint was dated December 11, 2003 and the Bureau's Senior Investigator testified that he had conversations with that employee in that 2003-2004 time frame (T. 303) and also had a series of conversations with attorneys representing Mr. Fucci about resolving the case (T. 322-323, 366-373, 385-391). It nevertheless appears that little was accomplished to advance the investigation between November 2001, when a Records Request Notice was mailed, and the reassignment of the case in 2008.

[2] The author of the calendar, Mr. Markowitz, testified under cross-examination that the calendar was maintained for work performed on a different project, not the Mt. Kisco project (T. 157).The Department's senior investigator, Mr. McCormick, testified that in 2003 he personally met with Mr. Markowitz who correctly described the Mt. Kisco project to him, explained how the calendar was created and what the entries meant, and that although that calendar did cover another job or jobs, it also pertained to Mt. Kisko (T. 266—268, 271-282, 295-313, 393). Mr. McCormick also testified to meeting with the other complainants who told him of their working full time on one project and then working nights and weekends at Mt. Kisco (T. 259, 264-266, 285, 294-298). Mr. McCormick, confronted on cross-examination with Mr. Markowitz's testimony, opined that he must have been confused (T. 333). Inasmuch as the evidence independent of the calendar shows the project commenced August 17, and lasted full time approximately two weeks, it appears reasonable to rely on the calendar entries covering this period, particularly in the absence of any employer provided time records.

99, 102-10104, 105-106, 109, 117, 119, 122, 314-315), or from the calendar (T. 295-310) or from the days and hours shown in time sheets two of the employees provided (T. 116, 313-315).

The audit compared the wages actually paid for the hours worked against the wages and supplements that should have been paid for the hours worked in the painter classification according to the relevant PRS (Dept. Ex. 9). That comparison disclosed that for the period week ending August 15, 1999 through week ending October 3, 1999, Apollo underpaid seven workers a total of $11,697.23 in wages and supplemental benefits (T. 123; Dept. Ex. 10). The Bureau attempted to have Bedford withhold $36, 074.52 on the prime contract to secure restitution of the underpayment, but it was advised that there were no funds left on the contract to be withheld (T. 128-129, 352; Dept. Exs. 13, 14).

**Project 2**

On November 5, 1997, Bedell entered into a contract with Yonkers to construct a new public school building (T. 429-431; Dept. Ex. 22). The specifications for the project contained prevailing rate law notifications and a PRS (Dept. Ex. 20). On January 13, 1998, Bedell entered into a subcontract with Apollo Construction to perform the painting work required under the contract (T. 431-432; Dept. Ex. 23). The subcontract expressly required that the work be performed in "strict accordance with … New York State Department of Labor prevailing hourly wage rates and hourly supplements…" (Dept. Ex. 23, p. 1). Gregory A. Fucci signed the subcontract on behalf of Apollo Construction without designating the capacity in which he was signing (Dept. Ex. 23).

Effective July 1, 1998, the Department issued PRS 1998 for Westchester County, which required workers performing painting work on Project 2 to be paid wages of $26.25 an hour and supplements of $11.87 an hour for the period July 1, 1998 through June 30, 1999 (Dept. Ex. 24). Effective July 1, 1999, the Department issued PRS 1999 for Westchester County, which required workers performing painting work on Project 2 to be paid wages of $27.25 an hour and supplements of $13.01 an hour for the period July 1, 1999 through June 30, 2000 (Dept. Ex. 7).

On or about March 17, 2000, the Bureau commenced an investigation concerning Project 2 by serving a Payroll Records Notification on Apollo requiring the production of, *inter alia*, private and public payroll records by March 30, 2000 (T. 423, 513; Dept. Ex. 18). Apparently having received no response from Apollo to that notification, on or about December 14, 2000,

the Bureau served another Payroll Records Notification on Apollo Construction again requiring the production of private and public payroll records together with, *inter alia*, cancelled checks and proof of payment of fringe benefits (T. 424-425; Dept. Ex. 19).

4Under cover of a letter dated March 31, 2000, Bedell provided the Bureau with its painting subcontractor's payroll records, as well as Bedell's daily construction reports for Project 2 (T. 435-437; Dept. Exs. 25, 27). The daily construction reports list the number of Apollo Construction workers on the project each day and the type of work being performed (T. 437-440; Dept. Ex. 27). At some point one of Apollo's attorneys provided the Bureau with Apollo's certified payrolls for Project 2, which were certified by Gregory A. Fucci as president (T. 580; Dept. Ex. 26). Yonkers provided the Bureau with a subcontractor report for Apollo Construction that included payroll reports (T. 440-441; Dept. Ex. 28).[3]

In preparing the audit of Project 2, the Bureau investigator analyzed the information contained in the employee complaints (Dept. Ex. 17), the certified and uncertified payroll reports (Dept. Exs. 25, 26, 28), Bedell's daily project reports (Dept. Ex. 27), the Painters' union benefit fund records (Dept. Ex. 29), the canceled payroll checks and the check purporting to evidence a payment to the union benefit fund (Dept. Ex. 30) (T. 494).[4] To determine the number of workers Apollo Construction employed on Project 2 on any given day, the Bureau compared the certified payrolls against the daily reports and determined that the certified payrolls underreported the number of employees on the project and their hours (T. 495-497). As a consequence, the Bureau relied primarily on the daily reports to establish the days worked, the number of workers engaged

[3] Although the subcontract to perform the painting work on Project 2 was entered into by Apollo Construction, each of the payroll reports submitted for Project 2 identifies Apollo (i.e. Apollo Painting) as the contractor (Dept. Exs. 25, 26, 28), which evidences Gregory A. Fucci's failure to adhere to corporate formalities and his interchangeable use of corporate entities. He in fact testifies that to him the Apollo entities were one in the same (T. 576). The canceled payroll checks provided to the Bureau for the work performed on Project 2 named Apollo Painting as the payor, while "APC" was the maker of the check provided to the Bureau purporting to evidence payment to the Painters Fringe Benefit Fund (Dept Ex. 30).

[4] The investigator prepared the audit based upon the documents that were in the file at the time she was assigned the case in 2008 (T. 513-515). With the exception of one employee complaint received in 2003 (Markowski), all of the documentation upon which the Department's audit relies came into its possession in 2000 and 2001 (T. 514). The Department's investigator had no explanation for why there was no further documented activity on the file between the time the documents were received in 2001 and the time she was assigned the case in 2008 (T. 515). The only documented additional activity in evidence is a May 13, 2004 Notice of Labor Law Inspection Findings (Dept. Ex. 39), which followed up on Notices that were served in 1999 and 2000 (Dept Exs. 33, 34). As with Project 1, it appears from the record that little was done to advance the investigation between 2002 and 2008, when the case was reassigned.

on any given day, and, in combination with the employees' claims of daily hours worked, the number hours worked on any given day (T. 495-498, 500-501, 504-509). Most of the employee complaints and the payroll reports reported 7-hour work days (Dept. Exs 17, 25, 26, 28), and the Bureau's audit consequently assumes a 7-hour work day (Dept. Ex. 31).

In comparing the check amounts and dates against the certified payroll reports, the Bureau investigator found that they didn't match (T. 503). As a consequence, where the Bureau had an employee complaint, the Bureau credited the employee's statements of his rate of pay, rather than the payrolls, to determine what wages were actually paid (T. 503-504, 509, 520). Where the Bureau had no complaint, it used the rate of pay shown in the payroll reports to determine the wages actually paid (T. 509, 520).[5] Although the Bureau was provided with copies of union benefit fund stamp purchase orders and the front of a check purportedly issued to the union benefit fund, the Bureau determined that no supplemental benefits were paid as it was not provided with a canceled check in proof of payment of the benefits (T. 500, 509, 536-544, 620; Dept. Exs. 29, 30, 31).[6] In their complaints, all of the complaining employees stated that they did not receive supplemental benefits (Dept. Ex. 17).

The Bureau relied on the relevant PRSs to determine the rate of wages and supplements that should have been paid in the painter classification for all hours worked on Project 2, and then compared that amount against the wages actually paid, to determine the amount of wages and supplements that Apollo Construction had underpaid its workers (Dept. Ex. 31). Utilizing that methodology, the Bureau determined that for the period week ending July 25, 1998 through week ending August 7, 1999, Apollo Construction underpaid 16 workers $32,124.46 in wages and supplements on Project 2 (Dept Ex. 32).

On or about December 13, 2000, the Bureau issued a notice to Yonkers to withhold funds on the contract in order to secure restitution, but it was advised by Yonkers that nothing was being withheld as nothing remained due on the contract (Dept. Ex. 41). Thereafter, on or about May 10, 2001, the Bureau issued a cross-withholding notice to the Monroe Woodbury Central

[5] During cross-examination, the Bureau investigator agreed that the $17.00 an hour rate credited to Carvil Turner was a mistake, that the rate should have been the $24.28 reported in the certified payroll, and that this would be corrected (T. 535). That correction should be made in the final computation of the amount due from the contractor.
[6] At the end of the hearing, Apollo also produced records subpoenaed from Painters' benefit fund, which the Bureau determined were irrelevant to its investigation as they pertained to benefit stamps purchased in 2002 and 2003 or were work histories that did not show whether benefits were paid for the period which was the subject of the Bureau's audit in these two cases (T. 611-618; Respondent Apollo Ex. 1).

School District directing the withholding of funds on a contract Apollo Construction had with that school district, but the Bureau was likewise advised that nothing was being withheld as nothing remained due on that contract (Dept. Ex. 42).

**Shareholders and Officers**

Gregory A. Fucci testified that he was the sole shareholder and officer of Apollo and Apollo Construction (T. 571, 576). He further testified that Gregory Fucci Jr. was his 38 year old son, and that Gregory Fucci Jr. worked for him in the field, but he refused, on Fifth Amendment grounds, to answer whether Gregory Fucci, Jr. had any ownership interest in any of his companies or whether he, Gregory A. Fucci, had any ownership interest in any of the other entities the Department alleges are substantially owned-affiliated entities (T. 577-579). Gregory Fucci, Jr. is the president of G. Fucci Construction Services Corp., which list Gregory A. Fucci's home address as its principal place of business (Dept. Ex. 15). An Apollo employee testified that Gregory A. Fucci and his son, Gregory Fucci, Jr., ran a family business that was operated with constantly changing names (T. 145-146).

**Substantially Owned-Affiliated Entities**

Gregory A. Fucci engaged in the painting business utilizing of a number of interrelated corporate entities, including Apollo, Apollo Construction Services Corp., G. Fucci Painting, Inc., G. Fucci Construction Services Corp., PAF Painting Services, Inc., PAF Painting Corp. and P.A.F. Painting Services of Westchester, Inc. (T. 130-133, 145-146, 153, 375-377, 379-384, 597-599; Dept. Ex. 15). Gregory A. Fucci acknowledged that the entities using name Apollo are owned by him (T. 576-577). Gregory A. Fucci asserted his Fifth Amendment privilege against self incrimination in refusing to answer what affiliation he had with the other named entities and what relationship his son, Gregory Fucci, Jr. had with each of the entities, acknowledging only that his son worked for him as a field person (T. 577-579). Gregory Fucci, Jr. is the president of G. Fucci Construction Services Corp. (Dept. Ex. 15). ). G. Fucci Construction Services Corp. and PAF Painting Services Inc., d/b/a Garden State Painting Corp. list their principal place of business at the same address as Gregory A. Fucci's home address (Dept. Ex. 15). PAF Painting Corp. lists Gregory A. Fucci's home address as the address to which the Department of State is to mail process (*Id.*) P.A.F. Painting Services of Westchester adopted a confusingly similar name to PAF Painting Inc., it has the same incorporator as G. Fucci Painting Inc., its certificate of

incorporation was filed on the same date as G Fucci Painting Inc. and it uses the same registered agent as G. Fucci Painting Inc. (*Id.*).

## CONCLUSIONS OF LAW

## JURISDICTION OF ARTICLE 8

New York Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law article 8. *Labor Law § 220, et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v. McGowan*, 260 AD2d 870, 871-872 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

The New York State Court of Appeals has adopted a three-prong test to determine whether a particular project constitutes a public work project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538 (2013). The Court stated the test as follows:

> First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id.*

Since the Bedford and Yonkers public school districts are parties to the respective contracts involving the employment of workmen; and since the contracts involved construction-like labor and were paid for by public funds; and since the renovation and the construction of public schools is for the use and benefit of the general public, Labor Law article 8 applies to both Project 1 and Project 2. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538.

## STATUTE OF LIMITATIONS

The Department is authorized to investigate the underpayment of workers on a public work project for a period of three years immediately preceding the filing of a complaint or the commencement of an investigation on the Bureau's own initiative. *Matter of Pav-Lak Contracting Inc. v. McGowan,* 184 Misc. 2d 386, 389 (Sup. Ct., Nassau Co., 2000); *Labor Law § 220-b (2) (c)*. The evidence credibly establishes that employee complaints' alleging underpaid prevailing wages and supplements on Project 1were first received by the Bureau on March 12, 2001. The Bureau commenced its own investigation on Project 2 by the service of a Payroll Records Notification on March 17, 2000. As the investigation concerned underpayments for work performed in 1999 on Projects 1, and concerned underpayments for work performed in 1998 and 1999 on Project 2, the investigations concerned underpayments to workers within the time periods prescribed by the statute.

## CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." *Matter of Armco Drainage & Metal Products, Inc. v. State of New York,* 285 AD 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v. State of New York,* 6 NY3d 49, 55 (2005); *Matter of Nash v. New York State Dept of Labor,* 34 AD3 905, 906 (3d Dept. 2006), *lv denied,* 8 NY3d 803 (2007); *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 927 (3d Dept. 2006), *lv denied,* 8 NY3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.' " *Matter of Nash v. New York State Dept of Labor,* 34 AD3 905, 906, *quoting Matter of General Electric, Co. v. New York State Department of Labor,* 154 AD2d 117, 120 (3d Dept. 1990), *affd* 76 NY2d 946 (1990), *quoting Matter of Kelly v. Beame,* 15 NY 103, 109 (1965). Workers are to be classified according to the work they perform, not their qualifications and skills. *See, Matter of D. A. Elia Constr. Corp v. State of New York,* 180 AD2d 881, 881-882 (3d Dept. 1992), *lv denied,* 80 NY2d 752 (1992).

On each of the projects, the Bureau classified the work according to the nature of the work called for by the contracts and the employees' statements concerning the tasks they actually performed on the contracts. Based on the nature of the work required by the contract, and the tasks described, the hours were classified in the painter classification. This process of classification is committed to the expertise of the Bureau and the Respondents have not demonstrated that the classifications utilized do not reflect the nature of the work actually performed -- in fact they haven't disputed it.

**UNDERPAYMENT METHODOLOGY**

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." *Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821 (3d Dept. 1989) (citation omitted). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v. Dillon*, 266 AD2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 AD2d 169, 169-170 (1st Dept. 1998).

On Project 1, in the absence of any payroll records, the Bureau relied on the wage rate employees claimed they were paid in their complaints or on the employee-provided paystubs to establish the wage rate actually paid to each of the employees. As the employees uniformly claimed that they were paid no supplemental benefits, and as Apollo provided no proof to the contrary, the Bureau provided Apollo with no credit for the payment of supplemental benefits.

To establish the duration of Project 1, the Bureau relied on an August 17, 1999 memorandum between Mr. Fucci and Mr. Piazza, and statements of a school district official and the project construction manager, to determine that project began on August 17, 1999. Several of the employees advised the Bureau that the project lasted a couple of weeks. The Bureau determined that the employees worked full time on the project for two weeks commencing

August 17, and then worked overtime on some nights and weekends as shown on the workers' complaint forms and time sheets.

The Bureau established the days employees worked on Project 1 from their complaints or from the entry of their names in a calendar of days worked or from time sheets two employees provided. The Bureau determined the amount of hours employees worked on any given day from the claim of hours worked stated in their complaints, or from the calendar or from the days and hours shown in time sheets two of the employees provided.

On Project 2, the Bureau compared the certified payrolls against the daily reports and determined that the certified payrolls underreported the number of employees on the project and their hours. As a consequence, the Bureau relied primarily on the daily reports to establish the days worked, the number of workers engaged on any given day, and, in combination with the employees' claim of hours worked, the number hours worked on any given day. Most of the employee complaints and the payroll reports reported 7-hour work days, and the Bureau's audit assumes a 7-hour work day. Apollo Construction provided checks purporting to evidence payment of payroll, but in comparing the check amounts and dates against the certified payroll reports, the Bureau investigator found that they didn't match. As a consequence, where the Bureau had an employee complaint, the Bureau credited the employee's statement of his rate of pay rather than the payrolls to determine what wages were actually paid. Where the Bureau had no complaint, it used the rate of pay shown in the payroll reports to determine the wages actually paid. With regard to supplemental benefits, although the Bureau was provided with copies of union benefit fund stamp purchase orders and the front of a check purportedly issued to the union benefit fund, the Bureau determined that no supplemental benefits were paid, as it was not provided with a canceled check in proof of payment of the benefits. In their complaints, the employees uniformly stated that they were not paid or provided supplemental benefits.

In light of Apollo's failure to produce any payroll records on Project 1, and Apollo Construction's incomplete and inaccurate payroll records on Project 2, the Bureau was entitled to use information from investigatory interviews with employees, employee complaint forms, employee testimony, employee logs, and daily construction reports. *Matter of A. Uliano & Son. Ltd. v. New York State Department of Labor*, 97 AD3d 664, 667 (2d Dept. 2012); *Matter of Georgakis Painters Corp. v Hartnett*, 170 AD2d 726, 728 (3d Dept 1991); *Matter of Naftilos*

*Painters Painting and Sandblasting, Inc. v Hartnett*, 173 AD2d 964, 967 (3d Dept 1991). Moreover, hearsay evidence, if sufficiently believable, relevant and probative, constitutes substantial evidence. *Matter of Tsakonas v. Dowling*, 227 AD2d 729, 730 (3d Dept. 1996). The Bureau's reliance on employee interviews, complaints, testimony and daily construction reports, and the inferences drawn from therefrom, was necessitated by Apollo's and Apollo Construction's failure to maintain accurate records of the time employees spent on the projects. Although the determinations of amount of time worked may necessarily be imperfect approximations, the estimates have a rational basis and are supported by substantial evidence.

The Bureau determined the rates that should have been paid for time employees worked in the painter classifications by reference to the PRSs in effect at the time. By multiplying the appropriate rates by the hours worked in the painter classifications, the Bureau determined the wages and supplements that should have been paid on the projects. It then compared the prevailing wages and supplements that should have been paid against what Apollo and Apollo Construction actually paid and thereby determined the underpayments on the projects. With regard to the Bureau's refusal to credit any supplemental benefit payments, it is the employer's responsibility to prove that it paid the supplemental benefit to employees engaged on the public work project. 12 NYCRR § 220.2 (c) (1). The regulations expressly provide that the failure to do shall result in an investigative finding that the supplements were not paid. 12 NYCRR § 220.2 (c) (3). As neither Apollo nor Apollo Construction provided actual proof of payment of those benefits, the Bureau correctly found that they were not paid.

The Bureau's methodology for determining the underpayments on both projects is reasonable and supported by substantial evidence.

**ERISA PREEMPTION**

By a November 15, 2012 email, Apollo's and Apollo Construction's attorney urged a determination that the Department is preempted by ERISA from enforcing Labor Law section 220 as it relates to supplemental benefits based on the United States Court of Appeals decision in *General Electric v. New York State Dep't of Labor*, 891 F.2d 25 (2d Cir. 1989). Respondents' reliance on that decision is misplaced. The concerns addressed in that decision were remedied by the Department not requiring employers to provide any particular benefits, but instead requiring employers to match the total cost of all prevailing supplements. The Court of Appeals

subsequently determined that that "total package" approach to enforcing the supplemental benefit requirements of Labor Law section 220 was not preempted by ERISA. *Burgio and Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1000, 1003-1004, 1007-10011 (2d Cir. 1997); *see, also, HMI Mechanical Systems, Inc. v. McGowan*, 266 F.3d 142 (2d Cir. 2001).

**INTEREST RATE**

Labor Law §§ 220 (8) and 220-b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928 (3d Dept. 2006), *lv denied*, 8 NY3d 802 (2007). Consequently, Apollo and Apollo Construction are responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment. Where, however, the Department unreasonably delays the prosecution of a case, interest may be abated for that period of unreasonable delay.

**The Delay Defense**

Respondents Apollo, Apollo Construction and Piazza contend that the Department has failed to expeditiously investigate and bring these cases to hearing, and on that basis, among others, urges that the case be dismissed (*see*, *Apollo Proposed Findings & Motion to Dismiss*, *Piazza Motion to Dismiss*). Although the courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay (*Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 624 (1994); *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney*, 224 AD2d 989 [4th Dept. 1996], *affd* 89 NY2d 395 [1996]),[7] the courts have both endorsed and directed agencies to

[7] The lapse of time, standing alone, does not constitute prejudice as a matter of law. *Matter of Louis Harris & Assoc. v. deLeon*, 84 NY2d 698, 702 (1994); *Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 623 (1994); *Cortland Nursing Home v. Axelrod*, 66 NY2d 169, 178-179 (1985). I do not perceive any substantial prejudice in the respondents' ability to defend against these claims as a result of the delay—the lapse of time does not change the fact that true and accurate records establishing that the wages and benefits were properly paid do not exist. The Bureau sought records evidencing that wages and benefits were properly paid as early as March 2000. It in fact received some payroll records in 2000 and 2001, which were not true, complete or accurate, and which were determined to have been falsified. The respondents' difficulty in defending against the Bureau's claim results not from the passage of time but from Apollo's and Apollo Construction's inability to produce true, accurate and complete records, which they knew the Bureau sought as early as 2000 and 2001. Only true, accurate and contemporaneously maintained records establishing that the required prevailing wages and supplements were paid could have effectively refuted the employees' claims. *See, Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821; *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 686-688 (1946).

exclude interest from an award for that period of time attributable solely to the agency's unreasonable delay. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Matter of Nelson's Lamplighters, Inc. v. New York State Department of Labor*, 267 AD2d 937, 938 (3d Dept. 1999). *Matter of M. Passucci General Constr. Co., Inc. v. Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995). *Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991).

Employee complaints' alleging underpaid prevailing wages and supplements on Project 1 were first received by the Bureau on March 12, 2001. The Bureau opened its own investigation on Project 2 on March 17, 2000. The Bureau investigator conceded that all the documents upon which she relied to prepare her audit after she was assigned the case in 2008 were in the Bureau's possession by 2001. The Department's investigator had no explanation for why there was no further documented activity on the file between the time the documents were received in 2001 and the time she was assigned the case in 2008. It appears from the record that little was done to advance the investigations between 2002 and the 2008, when the case was reassigned.

In *Matter of M. Passucci*, the Appellate Division concluded, "that a three year delay in conducting a hearing is not expeditious and that the [contractor] should not be obligated to pay interest to that period of the Department's unreasonable delay [cite omitted]." *Matter of M. Passucci Gen. Constr. Co., Inc. v. Hudacs*, 221 AD2d at 988. In *Matter of CNP* the court applied that rule to a period of unreasonable delay between the filing of complaints and the commencement of the hearing. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d at 928-929. The period of delay from 2002 through 2007 appears to be attributable solely to Bureau inaction. As a result of that delay, no interest should be computed in the final audit for this five year period from January 2002 through December 2007. After that period, case was reassigned, the investigation proceeded to conclusion and a hearing was scheduled. There is insufficient evidence to conclude that any delay after 2007 was attributable solely to the Bureau.

With the exception of the exclusion of interest for the aforesaid five year period, Apollo and Apollo Construction are responsible for interest on the underpayments at the rate of sixteen (16%) per annum from the date of underpayment to the date of payment. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Labor Law §§ 220 (8) and 220-b (2) (c).*

## WILLFULNESS OF VIOLATION

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation.

This inquiry is significant because Labor Law § 220-b (3) (b) (1) [8] provides, among other things, that when two final determinations of a "willful" failure to pay the prevailing rate have

[8] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." *Labor Law § 220-b (3) (b) (1),* as amended effective November 1, 2002.

been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v. Roberts*, 128 AD2d 1006, 1006-1007 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v. Hartnett*, 181 AD2d 1013, 1013 (4th Dept. 1992); s*ee also, Matter of Otis Eastern Services, Inc. v. Hudacs*, 185 AD2d 483, 485 (3d Dept. 1992).

Apollo Construction knew that Project 2, which involved painting work for a school district, was a public work project requiring the payment of prevailing wages and supplements. The January 1998 subcontract expressly notified it of that fact. The failure to pay the required wages and benefits constitutes a willful violation of Labor Law article 8.

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Prior to the November 1, 2002 amendment, the section read as follows: When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the five largest shareholders of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." *Labor Law § 220-b (3) (b) (1*), prior to amendment effective November 1, 2002.

Furthermore, with respect to Project 1, Gregory Fucci testified that he was the president and sole shareholder of both Apollo Construction and Apollo, and that to him they were one in the same. He signed the Project 2 subcontract and his experience and knowledge can be imputed to Apollo. *Matter of TPK Constr. Corp. v Hudacs*, 205 AD2d 894, 896 (3d Dept. 1994). Apollo performed painting work on Project 1, also for a school district, in 1999, after the 1998 contract on Project 2 was entered into. A finding of willfulness is supported by substantial evidence where, by virtue of its officer's knowledge of the prevailing wage law, the contractor should have known that its actions violated the labor law (*Id.*). By virtue of Gregory A. Fucci's knowledge, Apollo knew or should have known of the obligation to pay prevailing wages and supplements on Project 1. Its failure to do so constitutes a willful violation of Labor Law article 8.

**FALSIFICATION OF PAYROLL RECORDS**

Labor Law § 220-b (3) (b) (1) further provides that if a contractor is determined to have willfully failed to pay the prevailing rates of pay, and that willful failure involves a falsification of payroll records, the contractor shall be ineligible to bid on, or be awarded any public work contract for a period of five (5) years from the first final determination. For this section of the law to be meaningful, the term "falsification of payroll records" must mean more than a mere arithmetic error; if it did not, in any case where the certified payrolls did not perfectly match the payments to workers such payrolls could be deemed falsified, and the contractor debarred. *See, e.g., Matter of Miller Insulation Co., Inc.,* WAB Case No. 99-38 (1992). The dictionary definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." Merriam-Webster, http://www.merriam-webster.com/dictionary/falsify). In the absence of a statutory definition, the meaning ascribed by lexicographers is a useful guide. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976).

The evidence demonstrates that the certified payrolls underreported the number of employees on Project 2 and the days and hours of their work. The checks provided to prove payment of the wages reported in the certified payrolls did not match what was reported in the certified payrolls, which resulted in the Bureau crediting the employees' statements of much

lower rates of pay than was reported in the certified payrolls.[9] The omission of employees and of days and hours of work from the certified payrolls, and the false reporting of rates paid, demonstrates an intention to deceive and constitutes payroll falsification.

**SUBSTANTIALLY OWNED-AFFILIATED ENTITIES**

Labor Law § 220-b (3) (b) (1) provides that any successor or substantially owned-affiliated entity of the contractor shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the contractor.

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one were some indicia of a controlling ownership relationship exists or as "…an entity which exhibits any other indicia of control over the …subcontractor…, regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,… power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity. The Legislature intended the definition to be read expansively to address the realities of whether entities are substantially owned-affiliated entities. *Matter of Bistrian Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

The record as whole demonstrates that Gregory A. Fucci was engaged in the painting business and utilized of a number of interrelated corporate entities, including Apollo, Apollo Construction Services Corp., G. Fucci Painting, Inc., G. Fucci Construction Services Corp., PAF Painting Services, Inc., PAF Painting Corp. and P.A.F. Painting Services of Westchester, Inc. to conduct that business. Gregory Fucci has some connection to all the entities named in this proceeding. With exception of the Apollo entities to which Gregory A. Fucci testified he was the sole owner and officer, Gregory A. Fucci refused to disclose the precise nature of his or his son's interest in the remaining entities. I draw a negative inference from Mr. Fucci's refusal to testify regarding to these matters. *Matter of Commissioner of Social Services v Phillip DeG*, 59 NY2d 137 (1983). In view of the interconnected relationship of all of the named entities with the

[9] Although the Bureau utilized the wage rates reported in the certified payrolls for employees who did not file complaints, it did so because it had no other source of information to obtain a rate, not because it believed that payrolls accurately reported the rates (T. 558-560).

Gregory A. Fucci, and drawing a negative inference from his refusal to testify about his precise relationship with the named entities, and further construing the reach of the statute expansively, I find that G. Fucci Painting, Inc., G. Fucci Construction Services Corp., PAF Painting Services, Inc., PAF Painting Corp. and P.A.F. Painting Services of Westchester, Inc. are substantially owned-affiliated entities or successors within the meaning Labor Law § 220-b (3) (b) (1).

**SHAREHOLDERS AND OFFICERS**

Labor Law § 220-b (3) (b) (1) further provides that any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor, or, prior to November 1, 2002, any of the five largest shareholders of the contractor, or any officer of the contractor or who knowingly participated in the willful violation of Labor Law article 8, shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

Gregory A. Fucci was one of the top five shareholders of Apollo and Apollo Construction at the time Projects 1 and 2 were performed and in that capacity is subject to the same bidding ineligibility as the corporate entities. Having determined that Gregory A. Fucci is one of the top five shareholders of Apollo and Apollo Construction, it is unnecessary to determine whether, as an officer, he knowingly participated in the willful violation.

The record lacks sufficient evidence to determine whether Gregory Fucci, Jr. was one of the top five shareholders of Apollo and Apollo Construction at the time Projects 1 and 2 were performed. Although the one employee witness who testified indicated that Gregory Fucci, Jr. may have had an ownership in what he described as a family business, Gregory A. Fucci testified that he was the sole owner and officer of Apollo and Apollo Construction. The Department produced no evidence contradicting that testimony. The evidence on this record is insufficient to determine that Gregory Fucci, Jr. was a shareholder or officer of Apollo or Apollo Painting at the time these projects were undertaken.

Respondent Piazza correctly maintains that its liability as a prime contractor for any noncompliance by Apollo arises under Labor Law section 223, and that its shareholders and officers are not subject to the bidding ineligibility provisions of Labor Law section 220-b (3) (b) (1) on the basis of its subcontractor's willful violation article 8 of the Labor Law.

## CIVIL PENALTY

Labor Law §§ 220 (8) and 220-b (2) (d) provide for the imposition of a civil penalty in an amount not to exceed twenty-five percent (25%) of the total amount due (underpayment and interest). In assessing the penalty amount, consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and the failure to comply with record-keeping and other non-wage requirements. The willful underpayment of approximately $11,000.00 to seven employees on Project 1, and $32,000.00 to 16 employees on Project 2, which involved the falsification of payroll records, are serious violation involving bad faith that justifies the maximum penalty sought by the Department, to-wit: 25% of the total amount due on Projects 1 and 2.

## LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. *Labor Law § 223*; *Konski Engineers PC v. Commissioner of Labor,* 229 AD2d 950 (4th Dept. 1996), *lv denied* 89 NY2d 802 (1996). The prime contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *Canarsie Plumbing and Heating Corp. v. Goldin,* 151 AD2d 331 (1st Dept. 1989). Apollo performed work on the Project 1 as a subcontractor of Piazza. Consequently, Piazza, in its capacity as prime contractor, is responsible for the total amount found due from Apollo on Project 1. Apollo Construction performed work on the Project 2 as a subcontractor of Bedell. Consequently, Bedell, in its capacity as prime contractor, is responsible for the total amount found due from Apollo Construction on Project 2.

## RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DENY the Respondents respective Motions to Dismiss; and

DETERMINE that Apollo underpaid wages and supplements to seven employees in the amount of $11,697.23 on Project 1; and

DETERMINE that Apollo Construction underpaid wages and supplements to sixteen employees in the amount of $32,124.46 on Project 2, subject to the correction the Bureau agreed to make referenced at footnote 5 herein; and

DETERMINE that Apollo and Apollo Construction are responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment, excluding therefrom a five year period from January 1, 2002 through December 31, 2007; and

DETERMINE that the failure of Apollo and Apollo Construction to pay the prevailing wage and supplement rates were "willful" violations of Labor Law article 8; and

DETERMINE that the willful violation of Apollo Construction on Project 2 involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that G. Fucci Painting, Inc., G. Fucci Construction Services Corp., PAF Painting Services, Inc., PAF Painting Corp. and P.A.F. Painting Services of Westchester, Inc. are substantially owned-affiliated entities of Apollo and Apollo Construction; and

DETERMINE that Gregory A. Fucci is the sole officer of Apollo and Apollo Construction; and

DETERMINE that Gregory A. Fucci is one of the five largest shareholders of Apollo and Apollo Construction; and

DETERMINE that Apollo and Apollo Construction be assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due; and

DETERMINE that Piazza is responsible for the underpayment, interest and civil penalty on Project 1; and

DETERMINE that Bedell is responsible for the underpayment, interest and civil penalty on Project 2; and

ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

ORDER that Apollo shall receive a credit for any amounts paid by Piazza on Project 1; and

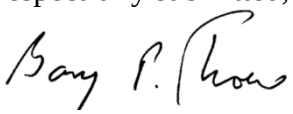
ORDER that Apollo Construction shall receive a credit for any amounts paid by Bedell on Project 2; and

ORDER that upon the Bureau's notification, Apollo and Apollo Construction shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: February 27, 2014
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer