

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

BEATTY’S SERVICES, INC., and
MYNEIKA WHITE and LASHANDA BEATTY,
as officers and/or shareholders of
BEATTY’S SERVICES, INC.,

Prime Contractor,

for a determination pursuant to Article 9 of the
Labor Law as to whether prevailing wages and
supplements were paid to or provided for the
building service employees employed on
a public work project for the New York State Veterans’
Home at Oxford.

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REPORT
&
RECOMMENDATION

Prevailing Rate Case
No.: 2019900257
Case ID: PW02 2019008559

To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

A hearing was held on July 14-15, 2020, from various locations via videoconference, to inquire into and to report to the Commissioner of Labor findings of fact, conclusions of law and recommendations regarding the issues raised by an investigation conducted by the Bureau of Public Work (“Bureau”) of the New York State Department of Labor (“Department”). The Bureau investigated whether Beatty’s Services, Inc. (“Prime”) and Myneika White and Lashanda Beatty as officers or shareholders of Prime, complied with the requirements of Labor Law article 9 (§§ 230 *et seq.*) in the performance of building service work at the New York State Veteran’s Home at Oxford (“Oxford”) in Chenango County, New York (“the Project”).

APPEARANCES

The Bureau was represented by Department Acting Counsel, Jill Archambault, Larissa C. Bates, of Counsel

Prime appeared by Myneika White and Lashanda Beatty, pro se.

ISSUES

1. Is the Project subject to Labor Law article 9?
2. Did Prime 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 to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
4. Is Myneika White one of the five largest shareholders of Prime?
5. Is Myneika White an officer of Prime who knowingly participated in a willful violation of the Labor Law article 9?
6. Is Lashanda Beatty one of the five largest shareholders of Prime?
7. Is Lashanda Beatty an officer of Prime who knowingly participated in a willful violation of the Labor Law article 9?
8. If an underpayment occurred, in what amount should interest be assessed?
9. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

On February 3, 2020, the Department issued a Notice of Hearing, with a scheduled hearing date of April 2, 2020 (HO Ex. 1). Because of the COVID Pandemic, the hearing was rescheduled for July 14-15, 2020.

Prior to the rescheduled hearing dates, Prime submitted multiple copies of Respondent’s exhibits, along with a nine-page document entitled “Opening Statement” that the Hearing Officer deemed an Answer served on behalf of Prime (HO Ex. 4; Tr. 14).

On or about August 26, 2019, Prime entered into a building service contract with Oxford to provide cleaning services (“Contract”) (Dept. Ex. 4). The Contract stated that the “Contractor must adhere to all NYS Prevailing Wage laws including, but not limited to, Wages (including increases), Supplemental Benefits, Overtime Pay and Holiday Pay.” (Dept. Ex. 4; Tr. 52-54).

The Department determined that the Contract involved the employment of workers in the Cleaner Classification (Dept. Ex. 13; Tr. 50, 67).

On or about February 27, 2019 Oxford requested from the Bureau of Public Work a Prevailing Wage Rate Schedule for the Contract for the classification “Janitor, Porter, Cleaners, Elevator Operator” for building service employees working in these classifications during the period of July 1, 2019 through June 30, 2020. (Dept. Ex. 5; Tr. 56). The Prevailing Wage Rate Schedule detailed the amount of wages and supplements to be paid or provided for building service employees working in these classifications: Cleaner with wages of \$13.80 per hour (\$12.80 new hire rate, first 180 days only) and supplements of \$0.19 per hour Single Part Time after the 15th day of employment, \$0.40 per hour Family Part Time after the 15th day of employment, plus \$1.21 per hour for all employees who are scheduled to be paid 1000 hours in 12 consecutive months (Dept. Ex. 5). The wage schedule contained different rates for supplemental benefits for workers who are single versus workers who are married and/or have dependent children, and workers who are full time versus part time (Dept. Ex. 5; Tr. 94-115).

The Prevailing Wage Rate Schedule also provided the amount of paid vacation days, sick days, and personal days which were to be paid to the building service employees performing work on the Contract from July 1, 2019 through July 30, 2020 (Dept. Ex. 5). Vacation is to be paid after 1 year of employment (part time employees receive vacation pay on a pro rata basis) as follows: 1 year of work, 1 week of vacation; 2 years of employment, 2 weeks of vacation; 3 years of employment, 2 weeks and 1 day of vacation; 4 years of employment, 2 weeks and 2 days of vacation; 5 years of employment, 2 weeks and 3 days of vacation; 6 years of employment, 2 weeks and 4 days of vacation; 7 years of employment, 3 weeks of vacation. Sick days are to be paid after the 30 days of probationary period as follows: full time employees, 3 sick days per year; and part time employees 2 sick days per year (Dept. Ex. 5). All employees are to receive two paid personal days per year (Dept. Ex. 5).

The Prevailing Wage Rate Schedule defined employment as, “an Employee’s length of service with the Employer or at the facility, whichever is greater” (Dept. Ex. 5).

The Prevailing Wage Rate Schedule was not attached to the Contract (Dept. Ex. 4; Tr. 55). However, Prime received a copy of the Prevailing Wage Rate Schedule at the start of the contract term (Respondent’s Ex. No 1; Tr. 291-295).

In or about August or September 2019, the Bureau received a telephone call from Myneika White with questions about the applicable wage rate to be paid to employees (Tr. 36). Prime also had communications with Oxford in September 2019 regarding the rates that it should pay the employees. In an email to Lashanda Beatty, Cheryl Kazalski, a representative of Oxford, stated, "I'm sorry for the confusion. I would like to have everyone paid the \$18.80 and we would pay the \$25.18 to you for everyone" (Resp. Ex. 1). Prime paid the employees the rates requested by Oxford (Dept. Ex. 13).

On or about October 30, 2019, the Bureau was informed by building service employees performing work on the Contract that Prime was not providing those employees with paid time off for vacation, sick days, or personal days (Dept. Ex. 1; Tr. 30-33).

On or about November 5, 2019, the Bureau contacted Prime to notify it that building service employees performing work on the Contract may not have been paid or provided the proper wages or supplemental benefits as required by the Prevailing Wage Rate Schedule. While many of the employees were previously employed by the contractor who was performing the cleaning services at Oxford prior to Prime taking over the Contract (Dept. 19; Tr. 57-58), Prime responded that, in their opinion, all building service employees who worked for Prime on the Contract were new hires as of August 1, 2019, the date Prime entered into the Contract, and were paid the proper prevailing wage rate and supplements or afforded the required paid time off for vacations, sick days, or personal days (Dept. Ex. 1; Tr. 30-33).

The Bureau commenced an investigation (Dept. Ex. 1; Tr. 30-37). On November 6, 2019, the Bureau requested that Prime furnish certified payroll records and other documents relating to the Contract, including a Corporate Profile (Dept. Ex. 2; Tr. 40-43).

During the period of November 8, 2019 through December 5, 2019, Oxford provided the Bureau with information regarding starting dates of the employees who performed work on the Contract (Dept. Exs. 6, 8; Tr. 58-60, 61-62), time sheets reflecting the hours worked by the employees who performed work on the Contract (Dept. Ex. 7; Tr. 59-60), and the wage rates paid to the employees who provided work on the Contract (Dept. Ex. 9; Tr. 62-63).

Prime also provided the Bureau with and payroll information and documents on December 11 and December 23-24, 2019 (Dept. Exs. 10, 12, 12A; Tr. 63-64, 67-74). The time records provided to the Bureau by Oxford and Prime were identical (Tr. 102).

The Bureau received information from the employees regarding whether single or family benefits should have been paid (Dept. Ex. 11; Tr. 64-67).

The Bureau determined that Prime employed twenty-six (26) workers on the Contract in the Cleaner classification and failed to pay or provide prevailing wages and/or supplements to the workers according to the Prevailing Wage Rate Schedule in effect at the time (Dept. 13, 14; Tr. 74-76).

The Bureau prepared an audit of the Project, using the Prevailing Wage Rate Schedule, payroll journals, time sheets, employee start dates at Oxford, employee status of single versus family, and employee earnings records, to determine the wages paid to, and hours worked by Prime's employees on the Project. (Dept. Exs. 5 – 12, 16; Tr. 94 – 115)

In creating the audit, Stephen Barber, Supervising Investigator for the Bureau's Binghamton and Newburgh Districts, created a Methodology Document to assist in the calculation of underpayments for the employees (Dept. Ex. 15) and a spreadsheet identifying the individual employee's time worked at Oxford. These documents were created contemporaneously during the investigation to compile the information necessary for the creation of the Audit. (Dept. Exs. 15, 16; Tr. 76-82).

From week ending August 3, 2019 to week ending November 9, 2019, the Bureau determined that Prime underpaid prevailing wages and supplements to the workers performing work on the Contract in the amount of \$19,996.27 (Dept. Exs. 13, 14; Tr. 74-75).

Prime had "several government contracts" over the fifteen-year period prior to the Contract with Oxford. (Tr. 252-254).

The record contains no evidence that Prime had any history of violations of Article 9 prior to the Project.

During the period when the work was performed, Myneika White was president, Chief Executive Officer, and owner of Prime (Dept. Ex. 18; Tr. 83-84, 145).

During the period when the work was performed, Lashanda Beatty was a Director of Prime (Resp. Ex. 5), and she identified herself in email correspondence and social media sites as Chief Administrative Officer and Chief Executive Officer of Prime (Dept. Ex. 19, 20, 20-A; Resp. Exs. 1, 5; Tr. 69-70, 276-280).

CONCLUSIONS OF LAW
JURISDICTION OF ARTICLE 9

New York State Constitution article 1, section 17, mandates the payment of prevailing wages and supplements to workers employed on public works. This constitutional mandate is implemented, in part, through Labor Law article 9. Section 235 of Labor Law article 9 authorizes an investigation and hearing to determine whether prevailing wages were paid to building service employees under a contract for building service work with a public agency.

Since Oxford (a public agency) is a contracting party with Prime regarding the employment of Cleaners (building service employees) at the New York State Veteran’s Home at Oxford, Labor Law article 9 applies. This issue is not in dispute.

CLASSIFICATION OF WORK AND UNDERPAYMENT

Labor Law § 231 (1) requires that “Every contractor shall pay a service employee under a contract for building service work a wage not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee.” Under Labor Law § 230, a contractor is defined as any employer who employs employees to perform building service work under a contract with a public agency; a building service employee is any person performing work in connection with the care or maintenance of an existing building, or in connection with the transportation of office furniture or equipment to or from such building, or in connection with the transportation and delivery of fossil fuel to such building, for a contractor under a contract with a public agency which is in excess of one thousand five hundred dollars and the principal purpose of which is to furnish services through the use of building service employees; wage is defined as a basic hourly cash rate of pay and supplements; and prevailing wage is defined as the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality.

Labor Law § 233 requires that, “in all cases where service work is being performed pursuant to a contract therefor, the contractor shall keep original payrolls or transcripts thereof, subscribed and confirmed by him as true, under penalties of perjury, showing the hours and days

worked by each employee, the craft, trade or occupation at which he was employed, and the wages paid.” However, “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 [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 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]).

The Prime does not raise any objection to the Cleaner classification determination utilized by the Department in calculating underpayments. Therefore, I find the classification used by the Department was accepted by the parties and appropriate to the work performed (HO Ex. 4).

The issue in the case is the wage and supplemental benefit rates Prime was required to pay based upon the period of employment of the employees that included time worked before Prime entered into the Contract, and their status of single versus family, among other criteria. Prime argues that, for the majority of the Contract term, the employees received the wage rate and supplemental benefit rate requested by Jennifer Butler, Senior Accountant at Oxford (HO Ex. 4). The \$18.80 total hourly payment was comprised of a pay rate of \$13.80, plus \$5.00 for supplemental benefits (HO Ex. 4).

The Prevailing Wage Rate Schedule is complicated. Investigator Barber, a very experienced Investigator with sixteen years of experience with the Bureau (Tr. 30), felt the need to create written methodology summaries and a Time at the Facility spreadsheet to help him compile the information necessary to consider all criteria while calculating the underpayments. The Bureau offered testimony that the Investigator relied on records supplied to the Bureau by Prime and Oxford, which contained the hours worked by the employees and the amount of wages paid to them, in order to calculate the underpayments (Dept. Exs. 13, 14, 15, 16; Tr. 94-115).

The Investigator also relied on information supplied by the employees regarding their single and family benefits (Dept. Exs. 13, 14, 15, 16; TR. 94-115), and information provided by Oxford regarding their length of employment at Oxford. The length of employment was relevant to the vacation pay, sick days, personal days the employees were entitled to receive, and additional per hour paid benefit when they worked 1000 hours in 12 consecutive months (Dept. Exs. 5, 13, 14, 15, 16; Tr. 94-115).

The record indicates that even the personnel at Oxford apparently did not fully understand the applicable Prevailing Rate Schedule as they required Prime to pay a specific rate for all employees that was found by the Bureau to be inconsistent with the requirements of the Prevailing Wage Rate Schedule. However, the Department's final analysis of the underpayment is consistent with the provisions of the Prevailing Wage Rate Schedule and based upon substantial evidence and reasonable, established procedures. I find that the underpayments calculated by the Department are valid.

WILLFULNESS OF VIOLATION

Pursuant to Labor Law § 235 (7), the Commissioner of Labor must make a final determination as to the willfulness of any violation because the law provides, among other things, that when “two final orders have been entered against a contractor ... within any consecutive six-year period determining that such contractor ... has willfully failed to pay the prevailing wages in accordance with the provisions of this article, ... [that contractor] shall be ineligible to submit a bid on or be awarded any public building service work for a period of five years from the date of the second order.”

For the purpose of Labor Law article 9, the term 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. (*See, Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [1987]). “Moreover, violations are considered willful if the contractor is experienced and ‘should have known’ that the conduct engaged in is illegal (citations omitted).” (*See, Matter of Fast Trak Structures, Inc. v Hartnett*, 181 AD2d 1013, 1013 [1992]. *See also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [1992]).

There is no dispute that Prime entered into a building service contract that contained the requirement that the “Contractor must adhere to all NYS Prevailing Wage laws including, but not limited to, Wages (including increases), Supplemental Benefits, Overtime Pay and Holiday Pay.” (Dept. Ex. 4; Tr. 52-54). Additionally, while the Prevailing Wage Rate Schedule may not have been attached to the Contract, Prime did acknowledge that it was received as an attachment to an August 1, 2019 email from Oxford (Resp. Ex. 1; Tr. 293-295). Finally, Prime did have limited public work experience through several government contracts over the fifteen-year period prior to the Contract with Oxford.

The standard set forth above for a finding of willfulness requires a finding that [the contractor] acted knowingly, intentionally or deliberately” – it requires something more than an accidental or inadvertent underpayment. (*See, Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [1987]). The record in this case supports a finding that Prime had very limited public work experience with no history of prior violations. The requirements of the Prevailing Wage Rate Schedule were such that the contracting agency did not understand the requirements and even the experienced Investigator had to map out his findings to make sure he properly calculated any underpayments after considering all of the variables contained in the Prevailing Wage Rate Schedule. Finally, Prime had contact on several occasions at the start of the contract term with personnel at Oxford regarding the required rates of wages and supplemental benefits for the employees, and Prime paid these requested rates. I find that Prime’s failure to pay the rates set forth in the Prevailing Wage Rate Schedule to be a non-willful accidental or inadvertent underpayment.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 235 (7) further provides any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the contractor’s five largest shareholders, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of article 9 of the Labor Law shall likewise be ineligible to bid on, or be awarded any public building service work for the same time period as the corporate entity.

During the period when the work was performed on the Contract, Myneika White was the president, Chief Executive Officer, shareholder, and self-acknowledged owner of Prime. (Dept. Ex. 18; Tr. 83-84).

Myneika White argues that she was the sole officer and shareholder of Prime during the period when the work was performed on the Contract. However, during the period when the work was performed on the Contract, Lashanda Beatty was identified in the corporate documents as a director of Prime (Resp. Ex. 5) and identified herself in various email communications and social media sites as Chief Administrative Officer and Chief Executive Officer (Dept. Ex. 19, 20, 20-A; Resp. Exs. 1, 5; Tr. 69-70, 276-280). Finally, the Department argues that, since Prime failed to produce the original corporate documents as demanded and the copies of the corporate documents that were produced indicate they had been altered, I should preclude Prime from relying on these corporate documents to support the argument that Myneika White was the sole shareholder of Prime (Tr. 18-21). While the appearance of the copies of Prime's corporate documents (Resp. Ex. 5) do indicate possible alteration regarding the number of shares issued, there is no indication in these copies that any shares of stock were ever issued to Lashanda Beatty. In addition, the State Administrative Procedure Act, section 306(2), permits the receipt of copies of documentary evidence. I decline grant the Department's request to preclude the receipt of Prime's corporate documents.

I find that, during the period when the work was performed on the Contract, Myneika White was a shareholder and officer of Prime and Lashanda Beatty was an officer of Prime.

INTEREST RATE AND CIVIL PENALTY

Labor Law § 235 (5) (c) provides for an award of interest of not less than 6% per annum and not more than the rate of 16% per annum, as prescribed by section 14-a of the Banking Law, from the date of underpayment to the date of payment. Labor Law § 235 (5) (b) provides for the imposition of a civil penalty in an amount not to exceed 25% of the total amount due. In determining either the rate of interest to be imposed or in assessing the amount of the civil penalty, consideration must 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 of the employer, ... and the failure to comply with record keeping and other non-wage requirements." Labor Law § 235

(5) (b), (c). Based upon the relevant factors, I find that an imposition of interest in the amount of 6% and a penalty in the amount of 10% to be appropriate.

However, interest should be waived for a period of six months for the following reasons. The completion of this Report and Recommendation was held in abeyance for a period of months following the filing of the parties' post-hearing submissions due to the impact of the pandemic on the Department's operations, including the Administrative Adjudication Office.

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:

DETERMINE that Prime underpaid wages and supplements due the identified employees in the amount of \$19,996.27 for the period of week ending August 3, 2019 to week ending November 9, 2019,

DETERMINE that the failure of Prime to pay the prevailing wage or supplement rate was a non-willful violation of Labor Law article 9;

DETERMINE that Myneika White is an officer and sole shareholder of Prime;

DETERMINE that Lashanda Beatty is an officer of Prime;

DETERMINE that Prime is responsible for interest on the total underpayment at the rate of 6% per annum from the date of underpayment to the date of payment, however, due to delays attributable solely to the Department such interest shall be waived for a period of six months; and;

DETERMINE that Prime be assessed a civil penalty in the amount of 10% of the underpayment and interest due;

DETERMINE that Prime is responsible for the underpayment, interest and civil penalty due pursuant to its liability under Labor Law article 9;

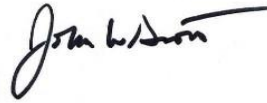
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty);

ORDER that the Office of the State Comptroller remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at: State Office Building, 44 Hawley Street, Room 908, Binghamton, NY 13901.

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

Dated: October 13, 2021
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Scott", written in a cursive style.

John Scott, Hearing Officer