STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of

FAHS CONSTRUCTION GROUP, INC.
previously known as
FAHS-ROLSTON PAVING CORPORATION
and its substantially owned-affiliated entity
COURT STREET COMPANIES, INC.

Prime Contractor

and

BRYON HAYNES and CLEON HAYNES
d/b/a
HAYNES PAINTING CO.
a/k/a
HAYNES PAINTING
and/or HAYNES PAINTING COMPANY

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
05-00132-A
Cayuga County

IN THE MATTER OF

BRYON HAYNES
and
CLEON HAYNES d/b/a
HAYNES PAINTING CO.
a/k/a HAYNES PAINTING
and/or HAYNES PAINTING COMPANY

Prime Contractor

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 Rate Case
04-08239-A Oswego
County

IN THE MATTER OF

FAHS CONSTRUCTION GROUP, INC.
previously known as
FAHS-ROLSTON PAVINIG CORPORATION
and its substantially owned-affiliated entity
COURT STREET COMPANIES, INC.

Prime Contractor

and

BRYON HAYNES
and
CLEON HAYNES d/b/a
HAYNES PAINTING CO.
and/or HAYNES PAINTING COMPANY

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 Rate Case
04-04485 Onondaga
County

To: Honorable Colleen C. Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on February 8, 2010, February 9, 2010, June 15, 2010, June 16, 2010, June 17, 2010, July 12, 2010, August 17, 2010, August 18, 2010, August 19, 2010, and September 23, 2010, in Syracuse, New York. The purpose of the hearing was to provide all parties 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 an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Byron

Haynes and Cleon Haynes d/b/a Haynes Painting Co., a/k/a Haynes Painting and/or Haynes Painting Company ("Haynes"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of three public work contracts. The contracts in question concerned work by Haynes as:

1. Subcontractor of the Prime Contractor, FAHS Construction Group, Inc. ("FAHS Construction"), on Prevailing Wage Rate Case No. 05-00132A involving work performed at the Auburn State Armory ("Armory Project") for the New York State Office of General Services ("Armory Department of Jurisdiction") in Cayuga County, New York;
2. Prime Contractor on Prevailing Wage Rate Case No. 04-08239A involving work performed at SUNY Oswego, Seneca Hall ("Seneca Hall Project") for SUNY Oswego ("Seneca Hall Department of Jurisdiction") in Oswego County;
3. Subcontractor of FAHS Construction on Prevailing Wage Rate Case No. 04-04485 involving work performed at the Roxboro Road Middle School ("Roxboro Road Project") for the North Syracuse Central School District ("Roxboro Road Department of Jurisdiction") in Onondaga County, New York..

APPEARANCES

The Bureau was represented by former Department Counsel, Maria Colavito, Marshall H. Day, Senior Attorney, of Counsel.

Haynes appeared with attorney, Hancock & Estabrook, LLP, Melinda B. Bowe, Esq., of Counsel, and filed an Answer (Hearing Officer Ex. 5) to the charges incorporated in the Notice of Hearing.

FAHS Construction appeared with attorney, James N. Cahill, Esq. and filed an Answer (Hearing Officer Ex. 6) to the charges incorporated in the Notice of Hearing.

HEARING OFFICER DESIGNATION

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

ISSUES

1. Did Haynes pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. What rate of interest should be assessed on any underpayment?
3. Is Cleon Haynes a partner of Haynes?
4. Was any failure 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. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

A Notice of Hearing and Designation of Hearing Officer was served upon FAHS Construction and Haynes. (HO Exs. 1, 2, 3) All subsequent pleadings and Notices were served on the same parties. (See, e.g. HO 4, 4A, 7)

Haynes has been in the painting and drywall business for seventeen or eighteen years. (T. 88, 94) The initial business certificate was filed by Haynes in approximately 1993 listing Byron Haynes and Cleon Haynes as the only two partners. (Dept. Ex. 48; T. 78) At the time of the alleged underpayments on the three Projects, the owners/partners of Haynes were Byron Haynes, Michael Haynes, and Gregory Haynes. (Haynes Ex. 9; T. 28, 30-31, 75, 86-87, 1145-1146) There is no written partnership agreement. Cleon Haynes was not an owner or partner of Haynes at the time of the alleged underpayments or at the time of the hearing. (T. 78) Both the Contractor's Profile obtained by the Department during the investigation (Dept. Ex. 47) and the revised partnership certificate filed in Onondaga County (Haynes Ex. 9) establish that Cleon Haynes was not a partner at the time of the alleged underpayments. None of the parties to the hearing produced any evidence establishing the Cleon Haynes was a partner during the time period of the subject three Projects. The record indicates that Cleon Haynes was a resident of Jamaica during the past ten years. (T. 1145-1146, 1265-1266)

The Department made a motion at the conclusion of the hearing to amend the Notice of Hearing to include Michael Haynes and Gregory Haynes. (T. 1321) The Department made no attempt during the hearing to amend the Notice of Hearing or serve Michael Haynes and/or Gregory Haynes, individuals it knew were partners of Haynes.

Byron Haynes testified that Haynes performed both commercial and residential painting work. (T. 95) During the time subsequent to 2005, Haynes had been involved in over 10 public work projects. (T. 95) Byron Haynes performed the majority of the administrative and financial functions associated with operating Haynes, including bidding jobs, and signing and negotiating contracts on behalf of Haynes. (T. 70, 94, 96, 410)

Michael Haynes' and Gregory Haynes' general management responsibilities were limited to providing price quotes, participating in general personnel decisions, and running projects. (T. 410-413, 415-416) Michael Haynes and Gregory Haynes did not prepare or process employee payrolls. (id.) Michael Haynes testified that Byron Haynes handled the financial matters for Haynes while he was the field man. (T. 1062-1067)

The Department alleges in the Notice of Hearing that Haynes was a subcontractor on the Armory Project and Roxboro Project and a prime contractor on the Seneca Hall Project, and employed workers in the painter classification. (HO Ex. 1) The allegations with respect to the classification of Haynes' employees were admitted in the Answers served on behalf of Haynes and FAHS Contracting. (HO Exs. 4, 6) Therefore, there is no dispute regarding the issue of classification.

The record indicates the following applicable prevailing wage and supplement rates for the three Projects:

Armory Project

The prevailing wage rates and supplemental benefit rates for the painter classification were established in the 2005 and 2006 Prevailing Wage Rate Schedules for Cayuga County. The prevailing rates for 2005 were $18.30 in wages per hour and $9.57 per hour in supplements. (Dept. Ex. 6) The prevailing rates for 2006 were $18.95 in wages per hour and $9.73 per hour in supplements. (Dept. Ex. 7)

Seneca Hall Project

The prevailing wage rates and supplemental benefit rates for the painter classification were established in the 2005 and 2006 Prevailing Wage Rate Schedules for Oswego County. The prevailing rates for 2005 were $20.46 in wages per hour and $11.46 per hour in supplements. (Dept. Ex. 17) The prevailing rates for 2006 were $20.46 in wages per hour and $12.29 per hour in supplements. (Dept. Ex. 18)

Roxboro Road Project

The prevailing wage rates and supplemental benefit rates for the painter classification were established in the 2004, 2005 and 2006 Prevailing Wage Rate Schedules for Onondaga County. The prevailing rates for 2004 were $18.00 in wages per hour and $9.11 per hour in supplements. (Dept. Ex. 29) The prevailing rates for 2005 were $18.30 in wages per hour and $9.57 per hour in supplements. (Dept. Ex. 30) The prevailing rates for 2006 were $18.95 in wages per hour and $9.73 per hour in supplements. (Dept. Ex. 31)

Haynes paid its employees' wages in cash on a weekly basis and required the employees to sign cash receipts acknowledging receipt of these payments. (T. 145) Byron Haynes testified that the amount of the cash payments was the amount indicated in the certified payrolls; an amount consistent with the Prevailing Wage Rate Schedules. (Dept. Exs. 8, 19, 32; T. 145)

The complaints received by the Department indicate that Haynes employees were paid $12.50 per hour in cash, without benefits or premium pay for weekend or holiday work. (Dept. Exs. 1, 14, 24) However, none of the parties to this proceeding produced cash receipts as evidence of the amount the Haynes employees were paid, although the record indicates that Haynes and the Department were in possession of this evidence. (T. 1248)

The Department produced evidence of a January 12, 2000 Stipulation involving one prior non-willful Labor Law violation by Haynes that resulted from an underpayment of $834.05 in wages. (Dept. Ex. 46; T. 685-686)

Finally, on February 9, 2010, the parties placed upon the record the terms of a stipulation in which they attempted to resolve all issues raised in this proceeding. (T. 165-178) This stipulation was intended to apply individually to each of the Haynes partners, Michael Haynes, Gregory Haynes, and Byron Haynes. (T. 165-169) Byron Haynes stated on the record that he consented to the terms of the stipulation and that he had the authority to speak for and bind

Haynes, Michael Haynes and Gregory Haynes to the terms and provisions of the stipulation. (T. 176-177) In the same way, a representative of FAHS Construction, Richard Gangemi consented to the terms and provisions of the stipulation on behalf of FAHS Construction. However, the attorney for Haynes stated on the record that she had not discussed the terms of the stipulation with Gregory Haynes or secured his acceptance to the settlement. (T. 175) It was also the intent of the parties to have the stipulation of settlement reduced to a writing that was to be signed by all parties. (T. 174-175) The partners of Haynes objected to and refused to sign the written stipulation of settlement. (T. 191)

At the June 15, 2010 hearing date FAHS Construction and the Department joined in a Motion for a Directed Verdict in accordance with the stipulation placed on the record on February 9, 2010. FAHS Construction argued in its post hearing submission that the stipulation is binding on all parties and is the law of the three cases. The attorney for FAHS Construction argues that the policy of New York is to give certainty to settlements. The decision on the Motion was reserved.

ARMORY PROJECT

On December 21, 2006, the Bureau received a complaint from Anthony Q. Johnson alleging unpaid wages and overtime pay from Haynes on the Armory Project. (Dept. Ex. 1; T. 427) Mr. Johnson stated in the complaint that he performed taping and painting for Haynes on the Armory Project (Dept. Ex. 1; T. 427) and that he was paid $12.50 per hour in cash with no benefits. (Dept, Ex. 1; T. 428) Mr. Johnson also attached to the complaint calendars for September and October 2006 indicating the days he worked on the Armory Project and showing a minimum of forty hours a week, including Saturdays. (T. 430) Mr. Johnson attempted to rescind his complaint in or about May 2007. (T. 433)

Based upon this complaint, the Bureau commenced an investigation and, on July 17, 2007, the Bureau forwarded Records Request Notices to Haynes, FAHS Construction, and the Armory Department of Jurisdiction ordering the production of copies of, among other items, public work payroll documents, including certified payrolls. (Dept. Ex. 2; T. 435) In response to

the Record Request Notice the Bureau received certified payrolls from FAHS Construction and the Department of Jurisdiction. (Dept. Ex. 8; T. 436, 451)

The Bureau also received the prime contract between FAHS Construction and the State of New York (Dept. Ex. 3; T. 436-439); the subcontract between FAHS Construction and Haynes (Dept. Ex. 4, T. 439-446); the Project Manuel that included the applicable Prevailing Wage Rate Schedule for Cayuga County (Dept. Ex. 5; T. 446-449); and the Prevailing Wage Rate Schedules for Cayuga County for the years July 1, 2005 through June 30, 2007. (Dept. Exs. 6, 7; T. 450)

The Bureau's Public Work Wage Investigator, Brian Steen, testified on behalf of the Department. Mr. Steen identified the above referenced records (Dept. Exs. 1-8) and testified that he compared the hours worked by the complainant as indicated on the calendars attached to the complaint to the hours listed in the certified payrolls and found them to be inconsistent.(T. 431)

Mr. Steen testified that the subcontract between FAHS Contracting and Haynes was signed by Byron Haynes, "Owner", and required Haynes to perform painting work on the Armory Project. (T. 441-442) The subcontract also required Haynes to submit a list of subcontractors (T. 443), and the number of men working on the project. (T. 444) Mr. Steen testified that the only list of employees who worked on this project the Bureau received was found in the certified payroll forms. (T. 444) Mr. Steen testified that the Project Manuel (Dept. Ex. 5) contained the applicable Prevailing Wage Rate Schedules and that the inclusion of these schedules, notified any bidders that the Armory Project was a public work project subject to the Prevailing Wage Rate Schedule. (T. 448) Finally, Mr. Steen used the wages associated with the painter classification for his analysis in this Project. (T. 450-451)

Mr. Steen testified that he reviewed the certified payrolls and found Gregory Haynes and Michael Haynes listed; as partners of Haynes they are not included as employees in the Department's audit. (T. 455)

Investigator Steen identified his audit of the Armory Project (Dept. Ex. 9; T. 461-462) and the Audit Summary. (Dept. Ex. 10; T. 477) Mr. Steen testified that in the creation of his audit he relied on the certified payrolls, the cash acknowledgement sheets signed by the employees for the Armory Project[1], the complaint, and the Prevailing Wage Rate Schedules. (T.

[1] Investigator Steen testified as to the existence of cash acknowledgement sheets, but these documents were not offered as evidence during the hearing by the Department, FAHS Construction or Haynes.

463) The hours worked and the wages paid were determined from the complaint or the certified payrolls (T. 463), and the prevailing wages and supplements were determined from the Prevailing Wage Schedules. (T. 463)

Mr. Steen testified that he determined the hours worked by the Hayes employees on the Armory Project from the certified payrolls; (T. 464), except for Anthony Johnson whose hours were determined from his complaint. (T. 474) Mr. Steen testified that he determined the wages paid to the employees that he credited to the employer from the certified payrolls (T. 464), except for Anthony Johnson whose wages were determined from his complaint. (T. 473) All employees were paid in cash. (T. 475) The prevailing wages and supplements were listed in the Prevailing Wage Rate Schedules. (T. 465) Mr. Steen multiplied the prevailing wage and supplement amounts by the hours worked to determine what the employees should have been paid and compared this figure with the actual payments as indicated in the certified payrolls and complaint to determine underpayments. (See for ex., T. 464-466) As a result of this analysis, Mr. Steen calculated a total underpayment on the Armory Project of $8,040.04 for a total of 4 employees. (Dept. Ex. 9, 10; T. 478)

The Department served a Notice to Withhold in the Armory Project and received $11,412.28 from FAHS Construction. (Dept. Ex. 10; T. 485) FAHS Construction ultimately paid into the Department the sum of $17,913.61 to cover all underpayments, interest, and penalties for the Armory Project. (T. 490) FAHS Construction requests that it be given a credit in the amount of this payment previously paid by FAHS Construction to the Department. (T. 173)

The Department entered the FAHS Daily Subcontractor Activity Logs into evidence as part of the claim that Haynes failed to pay the proper wages and supplements on the Roxboro Project. (Dept. Ex. 43; T. 678) However, during the hearing it was determined that these logs were applicable to the Armory Project. (T. 679-680) As a result of this disclosure, Mr. Steen compared these logs to the certified payrolls for the Armory Project (Dept. Ex. 8) and determined that Haynes had more men working on the Armory Project than were listed on the certified payrolls. (T. 812) Based upon this new information, the Department revised the audit on the Armory Project to include 4 additional John Doe employees in a painter classification, and assigned hours to these John Doe employees to match what was reflected on the FAHS Daily Subcontractor Activity Logs. (Dept. Ex. 51, 52; T. 809, 813) Mr. Steen made no effort to identify these John Doe employees. (T. 811-812) Mr. Steen calculated a revised total underpayment on

the Armory Project of $14,639.77 for a total of 8 employees, giving Haynes no credit for any wages paid to the John Doe employees. (Dept. Ex. 51, 52; T. 812)

FAHS Construction argues that it made a good faith, reasonable and comprehensive effort and met all of its obligations with respect to compliance with the New York State Labor Law with respect to the payment of prevailing wages to the Haynes employees on the Armory and Roxboro Projects. (T. 1295, 1298, 1303) Furthermore, FAHS Construction required the production by Haynes of all documents and information needed to allow FAHS Construction to comply with the Prevailing Wage requirement of Haynes on the Armory and Roxboro Projects. (T. 1294, 1298)

SENECA HALL PROJECT

On December 21, 2006, the Bureau received another complaint from Anthony Q. Johnson, alleging unpaid wages and overtime pay from Haynes on the Seneca Hall Project. (Dept. Ex. 14; T. 501) Mr. Johnson stated in the complaint that he performed painting and sanding for Haynes on this Project (Dept. Ex. 14; T. 501) and that he was paid $12.50 per hour in cash with no benefits or overtime pay for weekend work. (Dept, Ex. 14; T. 501,502) Mr. Johnson indicated that there were approximately eight other employees on this Project. (Dept. Ex. 14; T. 504) There were also attached to the complaint calendars for June, July, and August 2006 which showed a typical work day of 7:00 a.m. to 3:30 p.m. and work on Saturday for the Seneca Hall Project. (Dept. Ex.14; T. 505).

Mr. Steen testified that he compared the hours listed in the complaint with the Haynes certified payrolls and found that these documents did not match with respect to the hours worked and Saturday work. (Dept. Exs. 14, 19; T. 505) Mr. Steen testified that he used the hours worked and wage information contained in the complaint to prepare his audit for Mr. Johnson, even though he received a letter from Byron Haynes indicating that Mr. Johnson rescinded his complaint. (T. 500, 506)

Mr. Steen identified a purchase order from SUNY Oswego awarding the bid for the interior painting at the Seneca Hall Project to Haynes. (Dept. Ex. 15; T. 507-508) The specification book for the Seneca Hall Project (Dept. Ex. 16) further described the scope of the

painting component of the Project and put the contractor(s) on notice that the Project was subject to the State of New York prevailing wage rates as contained in the applicable Prevailing Wage Rate Schedules. (Dept. Exs. 17, 18; T. 509-512) Mr. Steen testified that he used these Prevailing Wage Rate Schedules to determine the required per hour prevailing wage and supplement rates.

Mr. Steen identified the Haynes certified payroll records (Dept. Ex. 19) and testified that this document covered the period of week ending June 3, 2006 through August 19, 2006, a period that is consistent with the time Haynes worked on the Seneca Hall Project. (T. 514-516) The certified payroll records were signed by Byron Haynes as "owner." (T. 519) Mr. Steen testified that the certified payroll records contained the hours worked for the employees listed and the wages paid that are consistent with the wages and supplements required by the Prevailing Wage Rate Schedules (T. 516-517), except for Saturday work that was paid at straight time. (T. 518-19) As set forth above, Mr. Steen testified that he compared the hours worked by the complainant as indicated on the calendar attached to the complaint to the hours listed in the certified payrolls and found them to be inconsistent with respect to the days and hours worked (T. 505, 520-522)

Investigator Steen identified his audit of the Seneca Hall Project (Dept. Ex. 20; T. 523) and the Audit Summary (Dept. Ex. 21; T. 530-531) Mr. Steen testified that he relied on the certified payrolls, the complaint, the contract documents, and the Prevailing Wage Rate Schedules to create his audit. (T. 523) The classification for the work was determined by reviewing the scope of the work as contained in the project specification. (T. 524) The hours worked and the wages paid were determined from the certified payroll records for workers other than Mr. Johnson. (T. 524-525) Mr. Steen relied upon the complaint for Mr. Johnson's hours worked and wages paid. (T. 528) The prevailing wages and supplements were determined from the Prevailing Wage Rate Schedules. (T. 525) Mr. Steen testified that he determined the wages paid to the employees that he credited to the employer from the certified payrolls (T. 525), except for Anthony Johnson whose wages were determined from his complaint. (T. 528)

Mr. Steen testified that he calculated the underpayments due to the employees by multiplying the prevailing wage and supplement amounts by the hours worked to determine what the employees should have been paid pursuant to the Prevailing Wage Rate Schedules and compared this figure with the actual payments as indicated in the certified payrolls and complaint to determine underpayments. (See for ex. T. 526-530) As a result of this analysis, Mr. Steen

calculated total underpayments on the Seneca Hall Project as $13,209.92 for a total of 3 employees. (Dept. Ex. 20, 21; T. 531-532)

The Department served a Notice to Withhold in the Seneca Hall Project requesting that SUNY Oswego withhold the amount of $21,498.05. (Dept. Ex. 22; T. 532-534) There is no sum withheld on this Project. (Dept, Ex. 22; T. 534)

ROXBORO ROAD PROJECT

On October 25, 2005, the Bureau received a complaint from Jeffrey Haynes, a sibling of the owners of Haynes, alleging unpaid wages and overtime pay from Haynes on the Roxboro Road Project. (Dept. Ex. 24; T. 538-539) Mr. Haynes stated in the complaint that he performed painting for Haynes on this Project during the period of May 2005 to October 2005 (Dept. Ex. 24; T. 539-540) and that he was paid $12.50 per hour in cash with no benefits or overtime pay for weekend work. (Dept, Ex. 14; T. 540-541) Mr. Haynes indicated that he worked in excess of forty hours per week at the rate of $12.50 an hour under the table. (Dept. Ex. 24; T. 542) Mr. Haynes also indicated that all employees on this Project were underpaid. (T. 544) Mr. Steen testified that he interviewed Mr. Haynes and verified the information contained in the complaint. (T. 543-545)

Mr. Steen testified that he commenced an investigation by sending out a records request dated September 26, 2005 to Haynes, Byron Haynes, FAHS Construction, and the Roxboro Department of Jurisdiction, requesting public work payroll documents, including certified payrolls. (Dept. Ex. 25; T. 545-547) Mr. Steen testified that, in response to the Notice Request, FAHS Construction provided him with the prime contract and project manual that identified the parties to the contract as the Roxboro Department of Jurisdiction and FAHS Construction, and named the construction manager as Ross-Wilson and Associates. (Dept. Ex. 26; T. 548-550)

The prime contract references the prevailing wage rate and attaches the applicable Prevailing Wage Rate Schedules. (Dept. Ex. 24; T. 551) Mr. Steen identified the sub contract between FAHS Construction and Haynes that required Haynes to complete all painting, door and frame refinishing, wall coverings, patch and match areas, refinishing of wood paneling in the gymnasium and auditorium, touch-up structural steel as necessary, and all exterior work, including site railings. (Dept. Ex. 27; T. 551-554) The sub contract was signed by Byron Haynes,

Owner. (T. 554) The sub contract provided that Haynes provide FAHS with a list of any subcontractors it hired on the Project and a list of the hours the men worked on the Project. (Dept. Ex. 27) The Department was never provided with a list of subcontractors (T. 559), or a complete list of the hours worked by the employees of Haynes. (T. 560)

Mr. Steen further testified that he received the project manual that also identified the parties to the project as Roxboro Department of Jurisdiction and FAHS Construction, named the construction manager as Ross-Wilson and Associates, and included the applicable Prevailing Wage Rate Schedules (Dept. Ex. 28; T. 564-566) and the Prevailing Wage Rate Schedules for 2004-2005, 2005-2006, and 2006-2007. (Dept. Exs. 29, 30, 31; T. 567-568)

Finally, Mr. Steen testified that he received the Haynes certified payrolls for the period Haynes worked on the Project. (Dept. Ex. 32; T. 569) The certified payrolls identified by name three Haynes employees: Cedrick Hamilton, Jeffrey Haynes, and Dale Payne. (Dept. Ex. 32) Mr. Steen testified that he compared the hours listed in the complaint with the Haynes certified payrolls and found that these documents do not match with respect to the hours worked and Saturday work. (Dept. Exs. 24, 32; T. 581-582)

Mr. Steen testified that he received the daily logs from the Construction Manager, Ross-Wilson and Associates, for the years 2005 and 2006. (Dept. Exs. 33, 34; T. 591,594) Among other information, these logs contain a daily listing of the contractors on the job, the hours worked by the contractors, and a description of the work. (T. 595) Mr. Steen testified he compared the hours worked as contained in the certified payrolls and the daily logs and found that they do not match. (T. 597) Mr. Steen used these daily logs, in conjunction with the certified payrolls, to determine the hours worked by Haynes employees that he included in his audit. (T. 598) For example, referring to page 1 of Department Exhibit 34 for January 3, 2006, the daily log lists 38 hours for the painter trade to perform priming walls at lower rooms, and stripping and painting handrail after hours. (T. 597) The certified payroll for January 3, 2006 (Dept. Ex. 32), listed 16 hours worked by Haynes employees, or a difference of 22 hours. (T. 597) Mr. Steen included the 16 hours from the certified payrolls in the audit for the employees identified in the certified payrolls, and included 22 hours for John Doe employees. (T. 598) Mr. Steen testified that he verified the hours worked in the daily logs with the Project Manager for Ross-Wilson and Associates, Tom West, who told him the hours he listed were those that were actually worked on the project for that day (T. 598) based upon his walk-though of the project at 9:00 a.m. in the

morning and 2:00 p.m. in the afternoon, when he counted the people from the different contractors. (T. 599) While Mr. Steen relied on the hours listed in the daily logs for his audit, he acknowledged that if the daily log was wrong, his entire audit would be wrong. (T. 818)

Mr. West testified that the daily log he maintained was not made for any official time-keeping or wage calculation purposes, but was a visual inventory of progress being made by the multiple contractors and subcontractors who worked on the Roxboro Project. (T. 965-966) West testified that he walked the job about two times a day, once in the morning around 8:00 a.m. and once in the afternoon around 2:00 p.m. (T. 925) He would keep notes in a notebook of his observations and later transpose these notes to his daily logs. (T. 925) West was responsible for this project from May 3, 2006 to its end date. (T. 957) Before that, for the bulk of the Project, another field manager, Mr. Phinney, oversaw the project. (T. 957) West was unaware of the means Mr. Phinney used to maintain his daily log. (T. 971)West testified that if someone was present during both his morning and afternoon walkthroughs, he would include 8 hours for that individual in his daily log (T. 1030) even though the time between these two walks was only 6 hours. (T. 969) If an employee left before 3:30 p.m., West would still record 8 hours for the person. (T. 970) West testified that Haynes employees worked a standard workday of 7:00 a.m. to 3:30 p.m. (T. 966) but that painters also paint later in the day when the school students were not in school. (T. 967) West generally left the worksite at 4:30 p.m. each day. (T. 967) West testified that he was unsure from his visual observations whether the same individuals he saw at his 8:00 a.m. walk through were the same individuals he saw at 2:00 p.m. or different individuals. (T. 963-964) West acknowledged that he would not know if someone working side by side with Haynes employees was a Haynes employee, or a subcontractor or independent contractor. (T. 971) Finally, West acknowledged that the daily logs entered into evidence (Dept. Exs. 33, 34) were not complete copies, and contained some alterations that he did make (T. 1012-1015), including white-outs and erasures. (T. 1019)

Mr. Steen testified that he relied on the daily logs (Dept. Exs. 33, 34), the complaint (Dept. Ex. 24); the certified payrolls (Dept. Ex. 32), and the Prevailing Wage Rate Schedules (Dept. Exs. 29, 30, 31) to create his audit and audit summary. (Dept. Ex. 35, 36) The audit and audit summary lists seven John Doe employees, together with Cedric Hamilton, Jeffrey Haynes, and Dale Payne. Mr. Steen testified that he listed the John Doe employees because there were additional hours included in the daily logs that were not in the certified payrolls. He could not

identify who worked these hours and, since he needed a name to include these hours in the audit, he used John Doe. (T. 603) The first 8 hours of additional hours in a particular day were assigned to John Doe number 1 as identified by a fictitious social security number (For eg. 9-9-9-1) (T. 609), and additional hours were assigned to John Doe number 2 or 3, etc. (See for ex. T. 622-624) The classification for the workers as painters was determined by the daily logs and the fact that the employees worked for a painting contractor. (T. 604) Mr. Steen testified that he did not credit the employer for paying these John Doe employees any wages because these hours were not included on the certified payrolls. (T. 604) Mr. Steen would use the prevailing wages and supplements indicated in the Prevailing Wage Rate Schedules of $18.30 and $9.57, respectively (T. 611), to determine what should have been paid these John Doe employees and multiply this rate by the hours attributed to these audit entries to determine the underpayment. (T. 605)

Mr. Steen testified that he relied on the certified payrolls to determine the hours worked and wages paid for the workers listed in these certified payrolls. (T. 597-598) If there was no certified payroll for a particular week, Mr. Steen relied only on the hours listed in the daily log to determine any underpayments for that week. (T. 607) He would compare the wages paid as indicated in the certified payroll records to the prevailing wages required to be paid per the Prevailing Wage Rate Schedule to determine any underpayments. (See, for ex. T. 624-627 for Jeffrey Haynes and Dale Payne) Mr. Steen testified that the total underpayment in wages and supplements for the Roxboro Project is $53,559.90 for these three employees and seven John Doe employees. (Dept. Ex. 35, 36; T. 630-631)

The Department served a Notice to Withhold in the Roxboro Project requesting that the North Syracuse Central School District withhold the amount of $74,250.00. (Dept. Ex. 37; T. 632-633) There is no sum withheld on this Project. (Dept, Ex. 37; T. 633)

Haynes claims that the Ross-Wilson Daily Project Logs are not reliable or accurate documents for the Department to use to determine the hours worked by the Haynes employees, and that these records were maintained as a general inventory and observation of a large number of contractors and subcontractors on the Project. (T. 1254) Dale Payne, the Haynes supervisor on the Roxboro Project, testified that he recalled seeing Tom West on the Project site only two times a week and he thought he was a building inspector. (T. 1238) Additionally, Payne testified that Tom West never questioned what hours of work any Haynes employees worked during the

Roxboro Project. (T. 1278) Finally, West's log entries consist of total hours per day which were for the majority of the entries always divisible by 8. (Dept. Exs. 33, 34)

Haynes argues that it employed independent contractors and/or subcontractors on the Roxboro Project. (T. 153) Specifically, Haynes argues that it employed Cedric Hamilton as an independent contractor (T. 652), and that George Pearson and GSV Vincent were subcontractors. (T. 297, 318-319, 732-733) Steen acknowledged that he received certified payrolls for both George Pearson and GSV Vincent from Byron Haynes during the course of the investigation. (T. 732-733) Haynes argues that the Department failed to produce any direct testimony visually identifying any Haynes employees working on the Roxboro Project, or any of the three Projects, beyond those listed on the certified payrolls. (T. 830-831) Steen testified that at no time did he seek to identify any John Doe employees on the Armory or Roxboro Projects. (T. 811, 899)

As evidence of the unreliability of the Ross-Wilson Daily reports, Haynes offered the following: Steen visited the Roxboro Project site on or about 9/19/06 and he observed Cedric Hamilton, Gregory Haynes, and Emmanuel Haddon as working for Haynes. These three employees confirmed that the correct rate of pay was being paid to employees working on the Project. (T. 832) The Ross-Wilson Daily Project Log for 9/19/06 had no entry showing any Haynes employees at the Roxboro Project on that date (Dept, Ex. 34; T. 834-835), while the Haynes certified payroll listed two employees for that date. (Dept. Ex. 32; T. 835)

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. NY 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 A.D.2d 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.

Since the Departments of Jurisdiction in these three Projects are public entities that are parties to the instant public work contracts, Article 8 of the Labor Law applies. New York Labor Law § 220 (2); and *see, Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984).

The Rules governing this proceeding (12 NYCRR Part 701) provide that the "only motion permitted in the course of the hearing shall be a motion to dismiss which shall be preserved on the record, if made, for consideration of the Commissioner of Labor in issuing an order and determination following the hearing." (12 NYCRR §701.7) In this case, Haynes argues that the proceeding should be dismissed as against Cleon Haynes. In addition, FAHS Construction and the Department joined in a motion for a directed verdict based upon the stipulation of settlement that was placed on the record.

It is clear that the motion for a directed verdict is not available under Part 701. However, even if this motion were available, I find that, under the facts of this case, it would be denied. It is clear that the parties intended the settlement to be reduced to a writing that would be executed by all parties to this proceeding. The partners of Haynes elected not to accept the written stipulation and, therefore, one of the fundamental conditions of the settlement was not complied with. Additionally, the attorney for Haynes specifically reserved the right to discuss the settlement with one of the partners. This is evidence that all of the partners of Haynes did not consent to the settlement, regardless of Byron Haynes' representation that he had authority to bind his brothers/partners to the settlement. The facts support a finding that the settlement was contingent at the time it was placed on the record and, therefore, not enforceable in the context of a motion.

I find that the motion to dismiss the claims as against Cleon Haynes should be granted. The record is clear that Cleon Haynes was neither a partner, nor did he have any responsibility or control over Haynes at the time of the Projects at issue herein. At the time of the Projects at issue herein, Cleon Haynes resided in Jamaica. Based upon the record in this matter, I find that Cleon Haynes was not a partner of Haynes at the time of the alleged underpayments and the Notice of Hearing should be dismissed as against Cleon Haynes.

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 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor*, 34 A.D.3 905, 906 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 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 A.D.3d 905, 906 (3d Dept. 2006), *quoting Matter of General Electric, Co. v New York State Department of Labor*, 154 A.D.2d 117, 120 (3d Dept. 1990), *affd* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v Beame*, 15 N.Y. 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*, 289 A.D.2d 665 (3d Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

In this case, Haynes contracted to furnish all labor, material, tools, equipment and supervision necessary to complete painting and related work on all three Projects. The Respondents admitted the accuracy of the classification of Haynes' employees as painters.

Since the allegations with respect to the classification of Haynes' employees as painters were admitted in the Respondents' Answers (Hearing Officer Exhibit 5, 6), the foregoing are the appropriate prevailing wage rates as set forth in the applicable Prevailing Wage Rate Schedules. Based upon the evidence in the record and the pleadings, I find that the Department's determination that the Haynes employees were employed as painters on the subject Projects and that the prevailing wage rate and supplements for this classification of workers as set forth above is supported by sufficient credible evidence in the record and should be supported.

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 A.D.2d 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 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

Haynes did maintain certified payroll records for the three Projects (Ex. 8, 19, 32) wherein Haynes classified its workers as painters. However, the Department compared the certified payroll records with other available payroll and time records and found the certified payroll records to be inconsistent. Specifically, the Department chose to credit the complaints from the employees (Dept. Exs. 1, 14, 24), the FAHS Daily Subcontractor Activity Log (Dept. Ex. 43), and the Ross-Wilson Daily Project Reports as more accurate representations of the hours worked by the Haynes' employees. The Department placed its reliance on these records even when the result was to greatly increase the amount of the alleged underpayment through the assignment of hours and wages to fictitious employees labeled as "John Doe" whose identity and even existence was not established through any other witness testimony or corroborating evidence.

Mr. Steen testified that he arrived at a methodology to distribute the additional time on the Armory Project and Roxboro Road Project by subtracting the hours listed on the certified payrolls from the hours listed in the FAHS Daily Subcontractor Activity Log and the Daily Project Reports, respectively, and assigning these hours to John Doe employees. This methodology was consistently followed by Investigator Steen even though Tom West, the author of some of the Daily Project Reports, testified that he did not create these reports for timekeeping

purposes, and acknowledged that he estimated the hours he included in the reports based upon when he counted the employees he assumed to be Haynes' employees. Investigator Steen testified that he was content to use the information contained in the certified payrolls for audit purposes if there were no other records for that particular date. Finally, Investigator Steen choose to give Haynes no credit for any wages paid, even at the lower rate contained in the complaints as opposed to the prevailing wage and supplement rates contained in the Prevailing Wage Rate Schedules; and, therefore, create the audit based upon the conclusion that the multiple fictions John Doe employees worked for no wages, because their alleged hours were not included in the certified payrolls.

The Bureau alleges that it was required to craft a reasonable methodology to determine whether Haynes underpaid its employees based upon Haynes' failure to maintain and provide accurate records. The Bureau's method of arriving at the underpayment determination for the 4 John Doe employees in the Armory Project and the 7 John Doe employees in the Roxboro Project is based upon records that are not reliable for this purpose, as they were not intended by the author to be accurate time or payroll records. There is no indication that the Department tried to identify these John Doe employees at any time during the investigation, that any employees contained in the audits other than those identified in the certified payrolls were employed by Haynes, that any other individuals came forward and complained that they were underpaid by Haynes on these projects, or that the hours and underpaid wages and supplements Investigator Steen assigned to the John Doe employees were not correctly attributable to independent contractors or subcontractors hired by Haynes. Thus, there is not substantial evidence to support the Department's calculation of underpaid wages and supplements owed to the four John Doe employees contained in the audit for the Armory Project and the seven John Doe employees contained in the audit for the Roxboro Project. I find that the Department's determination that Haynes underpaid the four John Doe employees contained in the audit for the Armory Project and the seven John Doe employees contained in the audit for the Roxboro Project is unsupported by the record and that the Department must recalculate the underpaid wages and supplements owed by Haynes in light of such finding. (cf. *Matter of D.D.G. General Contracting Corporation v. Hartnett*, 149 A.D.2d 819 (3d Dept. 1989))

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 A.D.3d 925, 927 (3d Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, Haynes is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

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) [2] provides, among other things, that when two final determinations of a "willful" failure to pay the prevailing rate have 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.

[2] "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 willfully 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.

For the purpose of Article 8 of the Labor Law, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately." *Matter of Cam-Ful Industries, Inc. v Roberts,* 128 A.D.2d 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 A.D.2d 1013, 1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v Hudacs,* 185 A.D.2d 483, 485 (3d Dept. 1992). The violator's knowledge may be actual or, where he should have known of the violation, implied. *Matter of Roze Assocs. v Department of Labor,* 143 A.D.2d 510 (4th Dept. 1988); *Matter of Cam-Ful Industries, supra.* However, an inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. *Matter of Scharf Plumbing & Heating, Inc. v Hartnett,* 175 A.D.2d 421 (3d Dept. 1991). A finding of willfulness requires something more than an accidental or inadvertent underpayment. *Matter of Cam-Ful Industries, Inc. v Roberts, supra*.

The record makes it clear the Haynes and its partners were experienced public work contractors who knew that the Projects were public work projects. The Department argues that, as experienced public work contractors, Haynes and its partners knew or should have known that their employees should have been paid the prevailing wage rate that corresponded with the painter classification. The Department produced evidence in the form of employee complaints indicating that the Haynes employees, including a brother of the partners, were not paid the appropriate prevailing wage rates for the painter work performed on these Projects.

Although the record contains the Haynes certified payroll records offered as an indication of substantial compliance with the applicable Prevailing Wage Rate Schedules, Haynes offered no evidence in the form of cash receipts or bank records to corroborate the testimony offered by Byron Haynes that the Haynes employees were properly paid their cash wages. Furthermore, the testimony that only Byron Haynes had knowledge and/or involvement in the payrolls or other financial matters relating to Haynes is self-serving and not persuasive in establishing that Michael Haynes and Gregory Haynes did not know or should not have known that the Haynes' employees, including a brother of the partners, were not being paid the appropriate prevailing wage rates for the painter work performed on these Projects. This is

particularly true considering the size of the partnership and the fact that a brother of the named partners was a complainant.

Based upon the foregoing, the record supports a finding that Haynes knew that its employees were not being paid the prevailing wages reflected in the certified payrolls and that this underpayment of wages constitutes a willful violation of Labor Law §220.

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. The definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." *Merriam-Webster*, 2011, http://www.merriam-webster.com/dictionary/falsify).

Haynes argues that the employee complaints are not sufficient to support a finding that the employees were paid at a rate that is not consistent with the Haynes' certified payrolls since Anthony Johnson and Jeffrey Haynes rescinded their complaints prior to the hearing. (Haynes Ex. 10; T. 433, 1266-1267, 1268-1271) I find this argument unpersuasive since the record is devoid of evidence of the circumstances surrounding how or why the complaints were rescinded and Haynes failed to produce any evidence to establish the employees were actually paid the appropriate prevailing wages as set forth in the certified payrolls.

The Department contends that Haynes falsified its payroll records because it reported that wages were paid at the prevailing rates for the corresponding painter classification when, in reality, it paid wages to its employees at the substantially reduced rate indicated in the complaints. In support of this argument, the Department has produced employee complaints indicating the payment of wages at a rate that is not consistent with the Haynes' certified

payrolls. Haynes has offered no evidence that would tend to explain this inconsistency, or evidence in the nature of cash receipts or bank statements to verify the cash payments it argues were made to its employees. Accordingly, the Bureau's finding as to falsification is supported by sufficient evidence in the record and should be sustained.

PARTNERS, SHAREHOLDERS OR OFFICERS

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

The record contains sufficient credible evidence in the nature of testimony and documents to establish the existence of a partnership in the name of Haynes Painting Co. (Dept. Ex. 48), and show that the partners during all times relevant to these Projects were Byron Haynes, Michael Haynes, and Gregory Haynes. (Haynes Ex. 9; T. 1264) As set forth above, Cleon Haynes was not a partner of Haynes Painting Co. at the times relevant to these Projects and claims against Cleon Haynes as alleged in the Notice of Hearing should be dismissed. Although Byron Haynes is the only partner named as a Respondent in this proceeding, Byron Haynes, Michael Haynes, and Gregory Haynes, as partners of Haynes, are all subject to the provisions of Labor Law § 220-b (3) (b) (1). As such, it is not necessary to rule on the Department's motion to amend the Notice of Hearing to include Michael Haynes and Gregory Haynes as Respondents.

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.

In the present case, there is evidence in the record that the Bureau received the records used in its investigations from FAHS Construction and the Departments of Jurisdiction. Investigator Steen testified that he received the bulk of the records he reviewed in his investigation from the Departments of Jurisdiction or FAHS Construction, as opposed to Haynes. Additionally, the Department has offered evidence of falsification of records. The Department has also offered evidence that, although Haynes is not a large employer, it has a significant history in performing public work projects. Finally, the record contains evidence of a prior similar violation that was disposed of with a non-willful stipulation. Based upon the full constellation of evidence in the record, I find that the record supports the imposition of a civil penalty in the Department's requested amount of twenty-five per centum (25%) of the total amount due (underpayment and interest).

LIABILITY UNDER LABOR LAW § 223

Under Article 8 of the Labor Law, a prime contractor is responsible for its subcontractor's failure to comply with or evasion of the provisions of this article. Labor Law § 223. *Konski Engineers PC v Commissioner of Labor*, 229 A.D.2d 950 (4th Dept.1996), *lv denied* 89 N.Y.2d 802 (1996). Such 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 A.D.2d 331 (1st Dept. 1989) Haynes performed work on the Armory Project and the Roxboro Project as a subcontractor of FAHS Construction. Consequently, FAHS Construction, in its capacity as the prime contractor, is responsible for the total amount found due from its Haynes on these Projects. FAHS Construction has paid to the Department the total sum of $17,913.61 on the Armory Project. Consequently, FAHS Construction, in its capacity as the prime contractor on the Armory Project, shall be given a credit in the amount of $17,913.61 to reduce its liability for the total amount found due from its subcontractor on this Armory Project.

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 Haynes underpaid wages and supplements due the identified employees on the Seneca Hall Project in the amount of $ 13,209.92; and

DETERMINE that the Department's determination that Haynes underpaid wages and supplements to the four John Doe employees contained in the audit for the Armory Project be annulled and the matter remitted to the Department for recalculation of underpaid wages and supplements owed by Haynes; and

DETERMINE that the Department's determination that Haynes underpaid wages and supplements to the seven John Doe employees contained in the audit for the Roxboro Project be annulled and the matter remitted to the Department for recalculation of underpaid wages and supplements owed by Haynes; and

DETERMINE that Haynes is responsible for interest on the total underpayments at the rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Haynes to pay the prevailing wage or supplement rate on each of the Projects constitutes a separate "willful" violation of Article 8 of the Labor Law; and

DETERMINE that the willful violation of Haynes involved the falsification of payroll records under Article 8 of the Labor Law; and

DETERMINE that Cleon Haynes was not a partner of Haynes during the times relevant to the proceeding; and

DETERMINE that Haynes be assessed a civil penalty in the amount of 25% of the underpayments and interest due; and

DETERMINE that FAHS Construction is responsible for the underpayment, interest and civil penalty due from Haynes on the Armory Project and the Roxboro Project pursuant to its liability under Article 8 of the Labor Law; and

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

ORDER that FAHS Construction shall receive a credit for the amounts it has previously paid and a refund of any amount that it paid in excess of the amount found to be due pursuant to the Commissioner's Determination and Order; and

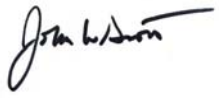
ORDER that the Department of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at State Office Building 333 East Washington Street Room 419, Syracuse, NY 13202; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Haynes, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; 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: November 28, 2011
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer