

In the Matter of

CHESTERFIELD ASSOCIATES, INC.,
Prime Contractor,

a proceeding pursuant to Article 8 of the Labor Law to determine whether prevailing wages and supplements were paid to or provided for the laborers, workers or mechanics employed on a public work project.

REPORT &
RECOMMENDATION

Prevailing Rate Case
No. 93-0766A
(Contract D25644)
(Nassau County)

In the Matter of

CHESTERFIELD ASSOCIATES, INC.,
Prime Contractor,

a proceeding pursuant to Article 8 of the Labor Law to determine whether prevailing wages and supplements were paid to or provided for the laborers, workers or mechanics employed on a public work project.

Prevailing Rate Case
No. 93-7632A
(Contract D254914)
(Suffolk County)

In the Matter of

CHESTERFIELD ASSOCIATES, INC.,
Prime Contractor,

a proceeding pursuant to Article 8 of the Labor Law to determine whether prevailing wages and supplements were paid to or provided for the laborers, workers or mechanics employed on a public work project.

Prevailing Rate Case
No. 94-0005
(Contract D256049)
(Suffolk County)

In the Matter of

CHESTERFIELD ASSOCIATES, INC.,
Prime Contractor,

a proceeding pursuant to Article 8 of the Labor Law to determine whether prevailing wages and supplements were paid to or provided for the laborers, workers or mechanics employed on a public work project.

Prevailing Rate Case
No. 93-8189
(Contract D5343)
(Suffolk County)

In the Matter of

CHESTERFIELD ASSOCIATES, INC.,
Prime Contractor,

a proceeding pursuant to Article 8 of the Labor Law to determine whether prevailing wages and supplements were paid to or provided for the laborers, workers or mechanics employed on a public work project.

Prevailing Rate Case
No. 95-2663
(Contract CF 5847.310)
(Suffolk County)

To: Honorable Linda Angello
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing, and in accordance with Article 8 of the Labor Law, a hearing was held in the above-captioned matters on April 17 and 18, and May 2 and 3, 2000, and November 19, 20 and 21, and December 3 and 4, 2001. The purpose of the hearing was to inquire into and make findings of fact, conclusions of law and recommendations to the Commissioner of Labor with respect to the issues raised by an investigation made by the Bureau of Public Work (Bureau) of the New York State Department of Labor (Department).

The investigation was made to determine whether Chesterfield Associates, Inc. (Chesterfield) complied with the requirements of Labor Law § 220 to pay or provide the prevailing rate of wages and supplements to the laborers, workers or mechanics employed in the performance of five separate public work contracts between Chesterfield and two public entities, namely, the New York State Department of Transportation (DOT) and the Suffolk County Department of Public Works (Suffolk DPW).

APPEARANCES

The Department was represented by Jerome A. Tracy, Counsel (Charles Horwitz, Senior Attorney, of Counsel). Chesterfield was represented by Flanagan, Cooke & French, LLP (Richard J. Flanagan, Esq., of Counsel).

ISSUES

1. Whether the workers employed on the projects were paid or provided prevailing wages or supplements, and, if not, the amount of the underpayment and the amount of interest to be assessed thereon.
2. Whether the failure to pay or provide the prevailing rate of wages or supplements

was “willful.”

3. Whether any willful underpayment involved the falsification of payroll records.
4. Whether a civil penalty should be assessed, and, if so, the amount thereof.

FINDINGS OF FACT

The facts developed by the investigation are largely undisputed. This part of the report commences with general findings pertaining to all five projects, followed by findings particular to each of the five projects, and then with findings concerning particular issues raised in the proceedings.

The Bureau received a number of complaints regarding underpayment of the prevailing wage or supplement from both workers and union representatives.¹ The Bureau initiated an investigation, which culminated into investigations of all five projects. In connection therewith, the Bureau requested and received from Chesterfield certified payroll records, time sheets, and various other source documents relating to, among other things, supplemental benefit contributions made to pension plans and a benefit trust by Chesterfield on behalf of its workers.

The Department stipulated that the certified payroll records accurately reflected the hours worked by employees, the rates Chesterfield paid for those hours worked, and the supplemental benefits provided for the hours worked (T. 428-435). On the basis of those records and documents, the Bureau prepared audits for each of the projects by comparing the wages and supplements paid, as shown on each of the relevant certified payroll records, against the wages and supplements that should have been paid or provided according to the relevant prevailing rate schedules (Dept. 1A, 1B, 1d, 1d).² That comparison revealed that payments were made both above and below the prevailing rates. Credits for overpayments were given only if they occurred in the same weeks that an underpayment existed, and if the overpayment exceeded the underpayment in any given week, that week would not be reported in the audit (T. 557).

At the opening of the hearing on April 17, 2000, the Notice of Hearing was amended to correct certain errors made in the prevailing wage and supplement rates

¹ For example, on or about May 21, 1996, the Bureau’s Hempstead office received a complaint from Thomas R. Pipeczynski, Business Agent for Laborer’s Union Local 1298, who reported that several workers on project with whom he spoke stated that they were being paid twelve dollars an hour on the project (Dept. 14). On or about June 25, 1996, the Bureau’s Hempstead office received a complaint from Michael S. Seiter that indicated he had worked on several projects, including Project 1, and alleged that he was being underpaid supplemental benefits (Dept. 6). On or about July 1, 1996, the Bureau’s Hempstead office received an undated complaint from Robert Nowak complaining about his inability to get satisfactory answers from Chesterfield concerning the company’s pension benefits (Dept. 10).

² The last captioned project (Prevailing Rate Case No. 95-2663), was joined subsequent to the Notice of Hearing for the first four projects. The audit for the fifth project was first received into evidence as Exhibit 34.

recited in the original notice (T. 12-16; HO 1B). Those changes simply conformed the rates recited in the Notice of Hearing to the rates that were utilized in the audits for the first four projects³ (T. 16; HO 1). During the course of the hearing, it was determined that the audit was prepared incorrectly and that further investigation concerning, among other things, the issue of the supplemental benefits computation had to be conducted in order to furnish a revised audit that computed the supplemental benefits underpayment in accordance with the Department's regulation found in 12 NYCRR § 220.2 (d). (T. 454-458.) As a result of the need to reinvestigate and revise the audit to conform to the Department's regulation, the hearing was adjourned on May 3, 2000.

After further investigation, the preparation of a revised audit, a pre-hearing conference, and the preparation of another revised audit, the hearing was reconvened on November 19, 2001.

Evidence adduced during the hearing continuation culminated in the parties reaching a stipulation on the record on December 4, 2001 as to how hourly credits for supplemental benefits should be properly calculated under two alternative methodologies, depending on whether benefits should or should not be annualized, which issue was left for the Commissioner's determination (T. 1348-1354). As part of that stipulation, the Bureau agreed to credit Chesterfield on an annualized basis with approximately one million dollars in health insurance premium contributions that it disallowed in the preparation of the revised audit that the hearing was continued on, to-wit: Department Exhibits 37 through 41.⁴

This stipulation led to the post-hearing preparation of a final set of audits that applied the stipulated hourly supplemental benefit credit under the annualization formula methodology contained in the Department's regulation⁵ (Dept. 51). The Bureau performed final audits by comparing what Chesterfield paid on each of the projects (giving credit for overpayment only in weeks where an underpayment was found [T. 555-557] and providing credit for benefit contributions pursuant to the annualization formula) against what should have been paid pursuant to the relevant prevailing rate schedules. In accordance with this methodology, the Bureau determined an underpayment of prevailing

³ The Summaries of Underpayments were attached to the original Notice of Hearing as attachments 1 through 4. For Projects 2 and 4, the Summary of Underpayments, annexed to the Notice of Hearing as Attachments 2 and 4, have handwritten pencil corrections of the first two digits of the PRC Nos. assigned to those cases showing that the correct PRC Nos. begin with the number "93" rather than "96". Although that error continued throughout succeeding audits, the Department's enumeration of its documentation concerning these cases make clear that the correct first two digits are "93".

⁴ A prior revised audit prepared after the May 3, 2000 adjournment, that was the subject of an August 2001 pre-hearing conference, had provided this credit (Dept. 30 through 34). At the pre-hearing conference, the Bureau advised of its intention to revise the audit and delete the credit, which was done in Dept. 37 through 41.

⁵ See, 12 NYCRR § 220.2 (d) (1).

wages or supplements on each of the five projects, as outlined below.

CONTRACT 1 - PRC NO. 93-0766A

On or about February 2, 1994, Chesterfield entered into a contract (Dept. 2A) (hereinafter Contract 1) with the DOT, for repairs on the Wantagh State Parkway Bridge on Star Route 908T in Hempstead, Nassau County, New York (Project 1).

The parties agree that on or after February 2, 1994, the Bureau provided DOT with the relevant prevailing rate schedules, detailing the amounts of wages and supplements which were to be paid to or provided for all persons employed in the performance of Project 1. It is undisputed that on or after February 2, 1994, the Department provided Chesterfield with copies of the relevant schedules. *See*, Dept. Proposed Findings of Fact and Conclusions of Law, p 3 (hereinafter Dept. Proposed Findings); and Chesterfield Proposed Findings of Fact and Conclusions of Law, p 4 (hereinafter Chesterfield Proposed Findings).

Pursuant to Contract 1, each worker employed by Chesterfield or any subcontractor was to be paid not less than the prevailing rate of wages and supplements for the particular classification of work performed (Dept. 1A). During the audit period weeks ending July 2, 1994 through February 22, 1997⁶, the parties do not dispute that Chesterfield employed workers who performed work in various classifications, namely, Laborer, Operator (A), Operator (B), Operators (C), Dockbuilder, Mason, Teamster and Reinforcing Ironworker, (Dept. 29; T. 430-438; Dept. Proposed Findings, p 3-5; and Chesterfield Proposed Findings p 6-7).

The undisputed relevant prevailing hourly rates for these classifications are as follows:

Laborer: ⁷	6/1/94-5/31/95	6/1/95-5/31/96	6/1/96-5/31/97
Wages	\$20.37	\$20.72	\$21.57
Supplements	9.40	9.97	10.32

⁶ The Summary of Underpayment in the final audit for Contract 1 incorrectly refers to the audit period running from weeks ending January 14, 1994 through February 22, 1997 (Dept. 51, exhibit A). This January 14 start date is an obvious entry error since it commences prior to the parties entering into Contract 1. The audit period actually commences the week ending July 2, 1994, correctly shown on the previous audit (Dept. 30).

Furthermore, although the initial audit period ended December 7, 1996 (*see*, Summary of Underpayment [form PW-27, attached to the Notice of Hearing as Attachment 1]), the audit period was subsequently expanded to end on February 22, 1997 in succeeding audits (*see, e.g.*, Dept. 30). Although the parties recited the audit end date as December 7, 1996 (Dept. Proposed Findings, p 3; and Chesterfield Proposed Findings p 4), the parties do not dispute the final audit period from July 2, 1994 through February 22, 1997.

⁷ Although the parties agree that the Prevailing Rate Schedules run from July 1 to June 30 each year, the Labor classification update run from June 1 to May 31 each year - the parties made an obvious error in reciting the schedule periods.

<u>Operator (A):</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$24.64	\$30.05	\$30.30
Supplements	15.04	17.29	18.68
<u>Operator (B):⁸</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$27.28	\$28.05	\$28.22
Supplements	16.94	17.29	18.68
<u>Operator (C):</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$23.38	\$28.05	\$28.22
Supplements	15.04	17.29	18.68
<u>Dockbuilder:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$26.97	\$27.98	\$27.98
Supplements	16.05	17.05	17.99
<u>Mason:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$24.22	\$27.99	\$29.35
Supplements	12.55	13.47	13.47
<u>Teamster:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$22.94	\$23.24	\$23.24
Supplements	16.74	16.76	16.76
<u>Reinforcing Ironworker:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$26.90	\$29.42	\$29.42
Supplements	12.63	14.79	14.79

(Dept. 3B, 3E, 3F, 3H; Dept. Proposed Findings, pp 3-5; Chesterfield Proposed Findings, pp 4-8)

In the final audit, pursuant to the methodology previously described (*supra*, p. 4), the Bureau determined that Chesterfield has underpaid wages of \$17,725.15 and supplements of \$309,963.43, for a total underpayment of \$327,688.58,⁹ for the period from weeks ending July 2, 1994 through February 22, 1997, as is more specifically set forth in the Summary of Underpayment (form PW-27) annexed hereto and made a part hereof as Exhibit "A".

CONTRACT 2 - PRC NO. 93-7632A

On or about May 1, 1994, Chesterfield entered into a contract (Dept. 2B) (hereinafter Contract 2) with DOT for replacement of the Speonk River Bridge in the Town of Southampton, Suffolk County, New York (Project 2).

⁸ The parties Proposed Findings refers to the rates contained in the 1994-a Prevailing Rate Schedule, which was updated by the 1994b Prevailing Rate Schedule published November 1, 1994. The earlier 1994-a Schedule provided for Operator (B) rates of \$24.38 in wages and \$15.04 in supplements.

⁹ This amount represents an increase of approximately \$300,000.00 over the initial un-annualized audit determination amount of \$26,800.69, as is alleged in the Notice of Hearing and Designation of Hearing Officer (HO 1).

The parties agree that on or after May 1, 1994, the Bureau provided DOT with the relevant prevailing rate schedules, detailing the amounts of wages and supplements which were to be paid to or provided for all persons employed in the performance of Project 2. It is undisputed that on or after May 1, 1994, the Department provided Chesterfield with copies of the relevant schedules. (*See*, Dept. Proposed Findings, p 7; Chesterfield Proposed Findings, p 11.)

Pursuant to Contract 2, each worker employed by Chesterfield was to be paid not less than the prevailing rate of wages and supplements for the particular classification of work performed (*Id.* at pp 7 and 12, respectively; Dept. 2B). During the audit period week ending May 7, 1994 through week ending September 2, 1995, the undisputed duration of Project 2, the parties agree that Chesterfield employed workers who performed work in various classifications, namely, Laborer, Operator (A), Operator (B), Operator (C), Crane Operator, Dockbuilder, Mason, Teamster, Reinforcing Ironworker, Structural Ironworker, Lather Ironworker, and Carpenter (T. 430-438; DOL 29; Dept. Proposed Findings, p 7-10; Chesterfield Proposed Findings, p 11-17).

The parties agree that the relevant prevailing hourly rates for these classifications are as follows:

<u>Laborer:</u> ¹⁰	<u>6/1/93-5/31/94</u>	<u>6/1/94-5/31/95</u>	<u>6/1/95-5/31/96</u>
Wages	\$19.47	\$20.37	\$20.72
Supplements	9.40	9.40	9.97
<u>Operator (A):</u> ¹¹	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$24.64	\$29.20	\$30.05
Supplements	15.04	16.94	17.29
<u>Operator (B):</u> ¹²	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$24.38	\$27.20	\$28.05
Supplements	15.04	16.94	17.29
<u>Operator (C):</u> ¹³	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$24.24	\$26.20	\$27.05
Supplements	15.04	16.94	17.29
<u>Dockbuilder:</u>	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.66	\$26.97	\$27.98
Supplements	13.50	16.05	17.05

¹⁰ Although the parties agree that the Prevailing Rate Schedules run from July 1 to June 30 each year, the Labor classification update run from June 1 to May 31 each year - the parties made an obvious error in reciting the schedule periods.

¹¹ From 1992 to 6/30/94, the classifications of Operator (A), (B) and (C) did not exist, only the description of the type of work performed. For example, in the Prevailing Rate Schedules subsequent to the 1994-a Prevailing Rate Schedule that identifies a Crane Operator (Tower), the same classification is identified as an Operator (A).

¹² *Id.*

¹³ *Id.*

<u>Mason:</u>	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.19	\$26.19	\$27.99
Supplements	12.55	12.55	13.47
<u>Teamster:</u>	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$22.50	\$22.94	\$23.24
Supplements	12.74	16.74	16.76
<u>Reinforcing Ironworker:</u>	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.90	\$26.90	\$29.42
Supplements	12.63	12.63	14.79
<u>Structural Ironworker:</u>	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$25.95	\$25.50	\$26.25
Supplements	23.83	27.78	28.78
<u>Lather Ironworker:</u>	<u>7/1/93-6/30/94</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.90	\$25.97	\$29.42
Supplements	12.63	16.03	14.79
<u>Carpenter:</u>	<u>7/1/93-6/30/94</u>	<u>7/1/94-9/2/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.89	\$24.66	\$27.79
Supplements	11/91	16.05	16.44

(Dept. 3C, 3D, 3G; Dept. Proposed Findings, pp 8-11; Chesterfield Proposed Findings, pp 12-17)

In the final audit, pursuant to the methodology previously described (*supra*, p. 4), the Bureau determined that Chesterfield had underpaid employees wages of \$14,636.18 and supplemental benefits of \$50,011.45, for a total underpayment of \$64,647.63, as is more specifically set forth in the Summary of Underpayment (form PW-27) annexed hereto as Exhibit "B".

CONTRACT 3 - PRC NO. 94-0005

On or about April 19, 1994, Chesterfield entered into a contract (Dept. 2C) (hereinafter Contract 3) with the DOT for bridge replacement on Route 25, Smithtown Suffolk County, New York (Project 3).

The parties agree that on or after April 19, 1994, the Bureau provided DOT with the relevant prevailing rate schedules, detailing the amounts of wages and supplements which were to be paid to or provided for all persons employed in the performance of Project 3. It is undisputed that on or after April 19, 1994, the Department provided Chesterfield with copies of the relevant schedules. (*See*, Dept. Proposed Findings, p 12; Chesterfield Proposed Findings, p 21.)

Pursuant to Contract 3, each worker employed by Chesterfield was to be paid not less than the prevailing rate of wages and supplements for the particular classification of work performed (*Id.*; Dept. 2C). During the audit period from week ending July 9, 1994

through week ending April 12, 1997, the undisputed duration of Project 3¹⁴, Chesterfield's workers performed work within the classification of Laborer, Operator (A), Operator (B), Dockbuilder, Mason, Teamster, Structural Ironworker and Lather Ironworker (Dept. Proposed Findings, pp 12-14; Chesterfield Proposed Findings, pp 21-25).

The parties agree that the relevant prevailing hourly rates for these classifications are as follows:

<u>Laborer:</u> ¹⁵	<u>6/1/94-5/31/95</u>	<u>6/1/95-5/31/96</u>	<u>6/1/96-5/31/97</u> ¹⁶
Wages	\$20.37	\$20.72	\$21.57
Supplements	9.40	9.97	10.32
<u>Operator (A):</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$29.20	\$30.05	\$30.30
Supplements	16.94	17.29	18.68
<u>Operator (B):</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$27.20	\$28.05	\$28.22
Supplements	16.94	17.29	18.68
<u>Dockbuilder:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$26.97	\$27.98	\$27.98
Supplements	16.05	17.05	17.99
<u>Mason:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$26.19	\$27.99	\$29.35
Supplements	12.55	13.47	13.47
<u>Teamster:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$22.94	\$23.24	\$23.24
Supplements	16.74	16.76	16.76
<u>Structural Ironworker:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$25.50	\$26.25	\$33.35
Supplements	27.78	\$28.78	31.68
<u>Lather Ironworker:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>	<u>7/1/96-6/30/97</u>
Wages	\$25.97	\$29.42	\$29.42
Supplements	16.03	14.79	14.79

(Dept. 3D, 3G, 3I; Dept. Proposed Findings, pp 12-14; Chesterfield Proposed Findings, pp 21-24)

In the final audit, pursuant to the methodology previously described (*supra*, p. 4),

¹⁴ Although the parties Proposed Findings recite week ending dates of May 7, 1994 through September 9, 1995, it is apparent that the parties mistakenly copied the same audit period from Contract 2, especially since the parties did not dispute the audit period in Contract 3.

¹⁵ Although the parties agree that the Prevailing Rate Schedules run from July 1 to June 30 each year, the Labor classification update run from June 1 to May 31 each year - the parties made an obvious error in reciting the schedule periods.

¹⁶ The parties provided no rates for the 6/1/96-5/31/97 period in their proposed findings. However, there is no dispute as to the applicability of the Prevailing Rate Schedule 1996A for Suffolk County (Dept. 3I).

the Bureau determined that Chesterfield underpaid workers wages in the amount of \$17,553.35 and supplemental benefits in the amount of \$211,270.31, for a total underpayment of \$228,823.66, as more specifically set forth in the Summary of Underpayment (form PW-27) annexed hereto and made a part hereof as Exhibit “C.”

CONTRACT 4 - PRC NO. 96-8189

On or about June 1, 1994, Chesterfield entered into a contract (Contract 4) with the Suffolk DPW for replacement of the Shinnecock Canal Locks in the Town of Southampton, Suffolk County, New York (Project 4). (Dept. Proposed Findings, p 16; Chesterfield Proposed Findings, p 28.)

The parties agree that on or after June 1, 1994, the Bureau provided DOT with the relevant prevailing rate schedules, detailing the amounts of wages and supplements which were to be paid to or provided for all persons employed in the performance of Project 4. It is undisputed that on or after June 1, 1994, the Department provided Chesterfield with copies of the relevant schedules. (*See*, Dept. Proposed Findings, p 16; Chesterfield Proposed Findings, p 28.)

Pursuant to Contract 4, each worker employed by Chesterfield was to be paid not less than the prevailing rate of wages and supplements for the particular classification of work performed. *Id.* During the audit period from weeks ending December 3, 1994 through October 28, 1995, the duration of Project 4, Chesterfield’s workers performed work within the undisputed classifications of Laborer, Operator (A), Dockbuilder, Mason and Reinforcing Ironworker (Dept. Proposed Findings, pp 16-18; Chesterfield Proposed Findings, pp 29-31).

The parties agree that the relevant prevailing hourly rates for these classifications are as follows:

<u>Laborer:</u> ¹⁷	<u>6/1/94-5/31/95</u>	<u>6/1/95-5/31/96</u>
Wages	\$20.37	\$20.72 ¹⁸
Supplements	9.40	9.97
<u>Operator (A):</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$29.20	\$30.05
Supplements	16.94	17.29
<u>Dockbuilder:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-10/28/95</u>
Wages	\$27.48	\$27.98

¹⁷ Although the parties agree that the Prevailing Rate Schedules run from July 1 to June 30 each year, the Labor classification update run from June 1 to May 31 each year - the parties made an obvious error in reciting the schedule periods.

¹⁸ Chesterfield’s Proposed Findings also contain an obvious typo of \$27.98 with regard to the applicable rate for the Labor classification for the 95-96 period. It is apparent that both parties agree on the applicability of the Prevailing Rate Schedules.

Supplements	9.97	17.05
<u>Mason:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.19	\$27.99
Supplements	12.55	13.47
<u>Reinforcing Ironworker:</u>	<u>7/1/94-6/30/95</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.90	\$29.42
Supplements	12.63	14.79

(Dept. 3D, 3G; Dept. Proposed Findings, pp 17-18; Chesterfield Proposed Findings, pp 29-31)

In the final audit, pursuant to the methodology previously described (*supra*, p. 4), the Bureau determined that Chesterfield underpaid workers wages in the amount of \$534.79 and supplemental benefits in the amount of \$15,601.66, for a total underpayment of \$16,136.45, as is more specifically set forth in the Summary of Underpayment (form PW-27) annexed hereto and made a part of Exhibit “D.”

CONTRACT 5 - PRC NO. 95-2663

On or about November 6, 1996, Chesterfield entered into a contract (Contract 5) with Suffolk DPW for rehabilitation of a bridge over St. Andrews Road in the Town of Southampton, Suffolk County, New York (Project 5). (Dept. 35.) Contract 5 incorporated the bid specifications as part of the contract (Dept. 35, art. 2).

The parties agree that on or after November 6, 1996, the Bureau provided DOT with the relevant prevailing rate schedules, detailing the amounts of wages and supplements which were to be paid to or provided for all persons employed in the performance of Project 5. It is undisputed that on or after November 6, 1996, the Department provided Chesterfield with copies of the relevant schedules. (*See*, Dept. Proposed Findings, p 19; Chesterfield Proposed Findings, pp 34-35.)

The parties agree that pursuant to Contract 5, each worker employed by Chesterfield was to be paid not less than the prevailing rate of wages and supplements for the particular classification of work performed (Dept. Proposed Findings, p 19; Chesterfield Proposed Findings, p 35). During the audit period from weeks ending March 2, 1996 through June 1, 1996, the undisputed duration of Project 5, Chesterfield’s workers performed work within the classifications of Laborer, Operator (B), Dockbuilder, Mason, Teamster and Structural Ironworker (Dept. Proposed Findings, pp 19-21; Chesterfield Proposed Findings, pp 34-40).

The parties agree that the relevant prevailing hourly rates for these classifications are as follows:

<u>Laborer:</u> ¹⁹	<u>6/1/95-5/31/96</u>
Wages	\$20.72
Supplements	9.97
<u>Operator (B):</u>	<u>7/1/95-6/30/96</u>
Wages	\$28.05
Supplements	17.29
<u>Dockbuilder:</u>	<u>7/1/95-6/30/96</u>
Wages	\$27.98
Supplements	17.05
<u>Mason:</u>	<u>7/1/95-6/30/96</u>
Wages	\$27.99
Supplements	13.47
<u>Teamster:</u>	<u>7/1/95-6/30/96</u>
Wages	\$23.24
Supplements	16.76
<u>Structural Ironworker:</u>	<u>7/1/95-6/30/96</u>
Wages	\$26.25
Supplements	28.78

(Dept. 3G; Dept. Proposed Findings, pp 19-21; Chesterfield Proposed Findings, pp 35-37)

In the final audit, pursuant to the methodology previously described (*supra*, p. 4), the Bureau determined that Chesterfield did not underpay workers any wages but underpaid supplements in the amount of \$10,389.60, for a total underpayment of \$10,389.60, as is more specifically set forth in the Summary of Underpayment (form PW-27), annexed hereto and made a part hereof on Exhibit "E."

ISSUES PERTAINING TO CONTRACTS 1-5

Credit for Overpayment

The Bureau's audit provided Chesterfield with a credit for any overpayment that occurred in a week in which an underpayment existed (T. 557). The Bureau did not provide a credit for an overpayment in weeks where no underpayment existed.

Chesterfield was provided an opportunity to submit a proposed overpayment credit based on the aggregate of all overpayments against the total underpayment determined due within 60 days following the close of hearing (T. 1360-1362). No such proposed credit was provided.

¹⁹ Although the parties agree that the Prevailing Rate Schedules run from July 1 to June 30 each year, the Labor classification update run from June 1 to May 31 each year - the parties made an obvious error in reciting the schedule periods.

Hourly Credit for Supplemental Benefits

The parties stipulated that if credit for supplemental benefit contributions were provided pursuant to the annualization formula contained in the Department's Regulation (12 NYCRR § 220.2 [d]), Chesterfield would be entitled to a credit of \$3.60 an hour for health benefits; \$1.04 an hour for vacation, sick and holiday pay; and \$2.54 an hour for pension benefits (T. 1348-1352). The parties further agreed that if the pension benefit were not annualized, Chesterfield would be entitled to a pension benefit credit of \$7.92 an hour, rather than \$2.54 (T. 1361-1353). Consequently, Chesterfield would be entitled to a total credit for supplemental benefit contributions of \$7.18 an hour, or alternatively, of \$12.56 an hour, depending upon whether pension contributions were annualized (T. 1353-1354). The Bureau's final audit provides a credit for supplemental benefits in the amount of \$7.18 an hour.

The Underpayment

Chesterfield's accountant testified that if the methodology urged by Chesterfield were adopted, the total underpayment of wages and supplements on Projects 1-5 would be \$11,269.00 (T. 1212; Resp. 11).

The final audit determined a total wage underpayment on the five contracts of \$50,449.47 and a total supplemental benefits underpayment of \$597,236.45, for a total underpayment of \$647,685.92.

Willfulness

Approximately 80% to 90% of Chesterfield's income is derived from public work. Between the years 1994 and 1997, Chesterfield's gross sales amounted to between \$6 million and \$8 million a year (Chesterfield Proposed Findings, p 48).

In the period 1989 through 1990, Chesterfield was the subject of a prevailing wage investigation in which an underpayment of prevailing wages and supplements was determined to have occurred. The violation was resolved by agreement to make restitution on the underpayment that was determined to be non-willful (T. 194; Dept. 36). At that time, the Bureau explained to Chesterfield the proper manner of complying with the prevailing wage and supplement requirements of Labor Law § 220 (T. 194-197). This explanation was provided to, among others, Gil Simmers (T. 195, 198).

Gil Simmers testified that he was the Secretary/Treasurer of Chesterfield from 1983 to 1996, that he was responsible for the payrolls on Projects 1-3, that classification for the type of work Chesterfield typically performed was established in the mid-1980's, that no one was specifically assigned the duty of determining what job classifications were involved with the three projects (most classifications were based on prior

experience working on public work jobs), and that no one contacted the Bureau regarding proper classification (T. 244-251). Chesterfield maintained sheets for each employee on each job showing the employee's hours and classification. The employees reviewed these sheets weekly before they were turned in with their payroll (T. 263, 275). Two secretaries in Chesterfield's office handled payroll - Carla being the key person (T. 263).

During the course of the investigation, John L. Lesser, Chief Financial Officer of Chesterfield in 1999, sent a letter to the Bureau (Dept. 17) in which he acknowledged that mistakes were made on Project 2 (the subject of the letter). He explained that when he joined the company in November of 1997, he discovered that Carla, who had been responsible for the company's payroll for the previous 10 years, was not competent to the task, being incapable of processing even non-prevailing wage payrolls accurately (Dept. 17). He further speculated that she was allowed to maintain her position for the period because his predecessor was allegedly engaged in embezzling in excess of \$200,000 from the company (Dept. 17).

Falsification

Mr. Gil Simmers, who was Mr. Lesser's predecessor, denied knowledge of the various types of mistakes outlined in Mr. Lesser's letter (T. 254-264). Mr. Simmers testified that during a two year period while he was with Chesterfield, "probably" 1995-1996, there was an underfunding of contributions into benefit plans in the approximate sum of \$200,000 caused by a lack of cash flow (T. 265-269). There was never a lapse of health benefits as a result of the underfunding (T. 267) and any employee who left the company with vested pension benefits was paid his pension benefit (T. 268).²⁰ All benefits were recorded, allocated, placed on financial statements showing amounts due, and he believes they were brought current (T. 271-272).

Joseph M. Brecia, a certified public accountant and outside auditor of Chesterfield since approximately 1998, testified that the company's pension plan was designed to provide for contributions in excess of that required to meet the statutory supplemental benefit obligation (T. 1213-1214); that contributions were made to a company profit sharing plan from 1994-1997, although the company had no profits (T. 1337); and that an underfunding had previously occurred that was caused by a failure to make required year-end contributions by year end. Those contributions were made within the following year (T. 1337). He also testified that there was never any lapse of benefits (T. 1339). He also testified that he was involved with an underfunding issue regarding three trustees that

²⁰ Chesterfield employee Mark Finegan testified he was paid \$60,000.00 in pension benefits for nine years service (T. 363) and employee Eugene Martin testified he received \$47,000.00 for six years of service (T. 376).

was the subject of a USDOL investigation. No underfunding resulted because the trustees agreed to forfeit their benefits (T. 1338).

The Department never offered in evidence the certified payroll records (T. 264), nor did it offer any evidence as to when the certified payrolls were provided to the Department, although it is undisputed that they were provided to the Bureau at some point in time during its investigation (T. 428-435). The certified payrolls and various source documents were never offered because the Department stipulated that they accurately reported the hours Chesterfield employees worked, the classifications in which they worked, and the amounts paid or provided for the work (T. 428-435). The Department represented that there would be no need to refer to source documents since their accuracy was being stipulated to (T. 433).

1992 Regulation Regarding Annualization of Benefits

In 1992, the Department promulgated a regulation governing the method by which the Department would provide hourly credit for supplemental benefits contributed into benefit plans by public work contractors in satisfaction of their obligation to pay or provide prevailing supplements (12 NYCRR § 220.2[d]) (the “1992 Regulation”).

In February of 1996, Steven Schaurer of the Associated Builders and Contractors, Inc. (ABC), wrote to Department Counsel and inquired as to the interpretation of certain portions of the 1992 Regulation (Resp. 2). In response to that inquiry, a senior attorney in Counsel’s office confirmed that pension benefits and amounts contributed into an ERISA trust²¹ would not require annualization under the 1992 Regulation (Resp. 1).

In or after April of 1999, the Department issued a notice (Annualization Notice) advising contractors that it had come to the Department’s attention that certain benefit plans being used by contractors to satisfy their supplemental benefit obligations may not comply with the requirements of the 1992 Regulation (Resp. 3). Specifically, the Annualization Notice advised, that where payments were made into plans that covered workers other than those on whose behalf supplemental benefits were required to be paid (“pooled” benefits) or, alternatively, that where payments were used to provide benefits while the employees were engaged in private work (requiring “annualization”), then those plans would fail to meet the requisite prevailing rate of supplements provision of the Labor Law (Resp. 3).

The Annualization Notice further advised contractors that because of prior confusion over whether the Department could, under federal law relating to ERISA preemption, enforce the requirements of the 1992 Regulation, only contractors using such

²¹ *I.e.*, benefit trusts covered by the Employee Retirement Income Security Act (ERISA), 29 USC § 1001, *et seq.*

plans after June 15, 1999, would be found in willful violation of the law.

All payments made by Chesterfield into its pension plan or ERISA trust were made prior to June 15, 1999.

CONCLUSIONS OF LAW

Article 8 of the Labor Law applies to the contracts as the DOT, a Department of the State, and the Suffolk DPW, a political sub-division of the state, are parties to the contracts which involved the employment of laborers, workers or mechanics on public improvement projects, to wit: bridge construction, repair and replacement work. NY Labor Law §§ 220 (2) & (3); and *Matter of Erie Co. Indus. Development Agency v. Roberts*, 94 AD2d 532 (4th Dept. 1983), *affd* 63 NY2d 810 (1984).

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages to workers employed on a public work project. This constitutional mandate is implemented through article 8 of the Labor Law. 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 not be less than the prevailing rate of wages and supplements for the occupation in the locality where the work is performed.

Chesterfield does not dispute that on occasion on each of the five contracts it paid certain workers less than required by Section 220 (3), but it maintains that it also paid certain workers more in wages or supplements than was required to be paid, and that it should be given full credit for all those overpayments, not merely an overpayment credit occurring in a specific week where an underpayment was found. It is the policy of the Department to treat credits for contractor overpayment to workers in the same manner as provided for in the analogous federal prevailing wage law, the Davis-Bacon Act, 40 USC § 276a *et seq.* (Dept. Proposed Findings, p 27; T.556-557). Pursuant to regulations promulgated under the Davis-Bacon Act, each work week stands alone, and a contractor may only be given credit for any overpayment in a week where an underpayment exists - a broader credit would violate the regulations proscription on wage deductions. *See*, 29 CFR §§ 3.5 and 5.5.

Applying this policy, the Bureau did not credit Chesterfield for an overpayment that did not occur in the same week as an underpayment (T. 555-557). Chesterfield cites to no legal principal, law, regulation or decision that supports its contention that the Department acts improperly when it refuses to give credit to Chesterfield for overpayments made in weeks other than any single week in question. To allow credits among various weeks would in essence authorize a deduction against weekly employee wages for prior mistaken payments. Such a deduction would be contrary to well

understood principles of both state and federal wage and hour law (*see, e.g.*, 29 CFR §§ 3.5, 5.5 and 778.104; NY Labor Law § 193). Accordingly, there is nothing impermissible in the Department's refusal to provide such a credit.

Chesterfield further maintains that in calculating the supplemental benefit underpayment, the Bureau should not have annualized its contributions to its ERISA covered plans because the Department was not enforcing the 1992 Regulation at the time these projects took place, and had specifically provided advice that it would not enforce that regulation against ERISA covered pension plans and benefit trusts.

The 1992 Regulation provides that to determine the hourly cash equivalent of any supplement paid to or provided on behalf of workers employed on public work projects, the Commissioner is to divide the actual contribution or cost for providing such supplement by the total annual hours worked on both public and private work. 12 NYCRR 220.2 (d) (1). This formula is known as "annualization." Under that formula, a contractor's total contribution of supplemental benefits into a plan is diluted by the number of hours an employee performs private work during the period analyzed - and will always result in a shortfall of the required prevailing supplement contributions if an employee performs any private work during the period and is not paid or provided supplements during that period equal to applicable prevailing supplemental benefit rate.

In *HMI Mechanical Systems, Inc. v McGowan*, 266 F3d 142 (2d Cir. 2001), the United States Court of Appeals held that ERISA does not preempt the 1992 Regulation's application to ERISA covered plans. Chesterfield argues that although ERISA does not preempt the 1992 Regulation, the Department should be required to abide by the interpretation given by Counsel's office to the ABC in 1996 to the effect that amounts contributed to ERISA plans would not be required to be annualized (*see, Resp. 1*), at least for the period of time prior to the issuance of the April 1999 Annualization Notice advising that the regulation would be applied to ERISA plans (Chesterfield's Proposed Findings, pp 55-56).

Chesterfield also argues that by effectively mandating the provision of cash payments through the disincentive caused by the annualization of plan provided benefits, the Department impermissibly dictates the supplement payment type (cash) or impermissibly mandates that prevailing supplements be provided to employees while performing private work (Chesterfield's Proposed Findings, pp 51-52).

Taking the latter argument first, the Second Circuit, in its *HMI* decision, held that "[s]imply because the annualization formula devalues employers' total contributions does not make it an improper line-item examination of ERISA benefits."²² *Id.* at 151. The

²² Regarding the impermissible line-item examination of benefits, *see, General Electric Corp. v New York State Department of Labor*, 891 F2d 25 (2d Cir. 1989); *Burgio & Campofelice, Inc. v New York State*
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very existence of the alternative of a cash payment established that there is no mandate to pay prevailing supplements on private work. Consequently, the argument is unpersuasive that the regulation either impermissibly requires the payment of a particular type of benefit or mandates the payment of prevailing supplements on private work.²³

With regard to the former argument, that the Department should be bound by the Counsel's office response to the ABC, Chesterfield relies on the United States District Court decision in *Westmiller v Sullivan*, 729 F. Supp. 260 (WDNY 1990) (Chesterfield Proposed Findings, p 56). *Westmiller* involved the promulgation in 1980 of a new interpretation of the Medicaid Act by the Secretary of Health and Human Services precluding states from incorporating "resource spend-down" eligibility provision in their Medicaid plans. *Id.* at 261-262. States had previously been offering such an option for approximately 14 years following the enactment of Medicaid in 1966. *Id.* at 261. An action was brought to enjoin the enforcement of the secretary's new directive. *Id.* at 262.

The court in *Westmiller* found the secretary's position both contrary to the language of the Act and inconsistent with the objectives of the statute. *Id.* at 264. The secretary had argued that the court should defer to his interpretation on the recognized principal that courts should accord great deference to interpretations issued by an agency charged with administering a statute. *Id.* at 265. The court determined that the case presented judicially recognized circumstances in which administrative interpretations are not to be accorded great weight. *Id.* at 265. The court found that an agency's interpretation was not entitled to a great weight or deference when it was not made contemporaneous with the enactment of the statute and when it contradicted the position the agency had previously taken; that the weight to be accorded the interpretation depends upon the thoroughness of its consideration and the validity of its reasoning; and that deference can be overborne if it violates the letter or spirit of the statute. *Id.* at 265.

Chesterfield argues that it was required to give great deference to the interpretation of the 1992 Regulation provided by the Department's Counsel's office (Chesterfield Prepared Findings, p 55), and that the hearing officer is bound by that prior interpretation of the 1992 Regulation by Counsel's office (Chesterfield Proposed Findings, p 56). It therefore argues that the annualization requirement of the 1992 Regulation should not be applied to Chesterfield's ERISA covered pension plan and benefit trust during the periods in question.

Under the circumstances of this case, however, the exceptions to the deference principal are compelling. First, the interpretation by Counsel's office was not made

Department of Labor, 107 F3d 1000 (2d Cir. 1997); *Beltrone Constr. Co., Inc. v McGowan*, 260 AD2d 870 (3rd Dept. 1999).

²³ Under the analogous federal Davis-Bacon Act, there is also an annualization of benefits requirement known as the "effective annual rate" calculation rule. Opinion WH-201, Feb. 28, 1973.

contemporaneous with the promulgation of the regulation. It is clearly in conflict with the unambiguous language of the regulation and thus contradicts the Department's duly promulgated prior position as set forth in the regulation. The letter itself, in adopting a conclusion directly contrary to that plainly called for by the regulation, is devoid of any thoroughness of consideration or reasoning. I am therefore persuaded that any deference or weight that might be otherwise accorded to an interpretation by Counsel's office of a State Labor Law or a regulation promulgated thereunder is overborne in this case by the conflict that arises with the unambiguous letter and spirit of the 1992 Regulation.

Moreover, although the Bureau initially failed to apply the 1992 Regulation requiring the annualization of Chesterfield's contributions into its pension and ERISA benefit trust plans; it properly and permissibly corrected the error. *See, generally, Daleview Nursing Home v Axelrod*, 62 NY2d 30 (1994); *Gallanthay v. New York State Teachers Retirement System*, 50 NY2d 984 (1980); *B & H Check Cashing Services of Brooklyn, Inc. v Supt. of Banks of State of New York*, 261 AD2d 249 (1999).

With regard to Chesterfield's remaining arguments that regulation is void by reason of either selective enforcement or lack of enforcement (Chesterfield Proposed Findings, p 56), I find no merit in the arguments as the record is devoid of any evidence of selective enforcement and no authority is cited for the dubious proposition that the Department's delay in enforcing the 1992 Regulation renders it void.

In view of the foregoing, the Department is not precluded from applying the 1992 regulations to ERISA cover pension and benefit trusts generally, or to Chesterfield in particular. The audit permissibly and properly annualized Chesterfield's contributions to both the pension plan and the contractor's benefit trust. Consequently, Chesterfield violated Section 220 (3) of the Labor Law by failing to pay prevailing hourly wages or supplements to its employees on the five contracts in the total amount of \$654,557.14, as is more particularly shown in the Summaries of Underpayment of the final audit annexed hereto and made a part hereof as Exhibits "A" through "E."

INTEREST

Labor Law §§ 220 (8) and 220-b (2) (c) require that interest be paid from the date of underpayment to the date of payment at the rate of sixteen (16%) per annum, as prescribed by Section 14-a of the Banking Law. Chesterfield contends that as a result of delay in the Department's investigation, it should not be charged with interest (Chesterfield Proposed Findings, p 53).

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),

the courts have both endorsed and directed agencies to exclude interest from an award for that period of time attributable to the agency's delay. *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).

The record is not clear as to precisely when the investigation was commenced (Dept. 11), but it appears that an investigation, at least as to Project 1, was commenced in late 1996 (See Dept. 11). The matter was not scheduled for hearing until April of 2000 (HO 1). In *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]." 221 AD2d at 988. During the period from the commencement of the investigation through April 17, 2000, the hearing commencement date, the record is silent on the cause of the delay. Chesterfield does not allege that the Department is solely at fault for the delay during this period. At that point in time, however, it is clear that the Department proceeded to hearing on an investigation and audit that did not gather the facts necessary to apply, and did not apply, the annualization formula required by the 1992 Regulation for the proper crediting of supplemental benefit contributions made by Chesterfield to its pension and benefit trust plans. That failure led to an adjournment of the hearing in May of 2000 for the Bureau's reinvestigation and re-audit, and it was not reconvened until November 19, 2001. The period of this delay is attributable to the Department and, therefore, interest from the period April 17, 2000 through November 18, 2001, inclusive, should not be assessed.

With the exception of the deletion of interest from April 17, 2000 through November 18, 2001, Chesterfield is responsible for interest on the underpayment at the rate of sixteen (16%) per annum from the date of underpayment to the date of payment. NY Labor Law §§ 220 (8) and 220-b (2) (c).

WILLFULNESS

Labor Law §§ 220 (7-a) and 220-b (2-a) require the Commissioner to determine the willfulness of a violation. The determination is significant because a contractor who has been found in willful violation of Section 220 (3) on two occasions in a six-year period becomes ineligible to bid on public work contracts for five years from the date of the second final determination. *See*, NY Labor Law § 220-b (3) (b).

For the purpose of Article 8 of the Labor Law, the term "willful" does not imply a criminal intent to defraud, but rather requires that the contractor acted knowingly, intentionally or deliberately - something more than an inadvertent or accidental

underpayment. *See, 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.” *Matter of Fast Trak Structures v Hartnett*, 181 AD2d 1013 (4th Dept. 1992); *see, also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 (3d Dept. 1992).

Chesterfield does not deny that underpayment occurred as a result of the improper application of the prevailing rate schedules, but asserts that it did not intentionally underpay employees. As evidence, it cites to the fact that it also overpaid employees through the improper application of the prevailing rate schedules, and asserts that this was all the result of innocent bookkeeping error (Chesterfield Proposed Findings, pp 9-10, 18, 20, 26-27, 32, 33-34, 39-40; Dept. 17).

Chesterfield concedes that it is an experienced public work contractor and that 80% to 90% of its income is derived from public work (Chesterfield Proposed Findings, p 48). Chesterfield was the subject of a prior investigation that resulted in the determination of a non-willful underpayment. At that time, the requirements of the prevailing wage law was explained by the Bureau to the very corporate officer who testified that he was responsible for Projects 1-3.

A finding of willfulness is supported by substantial evidence where, by virtue of a contractor’s prior public work experience and its officer’s knowledge of the prevailing wage law, the contractor should have known that its actions violated the labor law. *Matter of TPK Constr. Corp. v Hudacs*, 205 AD2d 894, 896 (3d Dept. 1994). The inexperience or inadvertent and honest mistakes of a subordinate of a highly experienced public work contractor will not excuse such a contractor, since the contractor has a duty to take steps necessary to ensure that it complies with the prevailing rate schedules. *Matter of Emes Heating & Plumbing Contractors, Inc. v McGowan*, 279 AD2d 819, 822 (3d Dept. 2001); *TPK Constr. Corp.*, 205 AD2d at 896; *Matter of D.A. Elia Constr. Corp. v State of New York*, 180 AD2d 881, 882 (3d Dept. 1992).

The record makes clear that although Chesterfield may not have sought to deprive its employees of money to which they were entitled under the law, it failed to take steps necessary to ensure that the prevailing rate schedules were followed. As a consequence, the resulting wage underpayment is a willful violation of Labor Law § 220.²⁴

Pursuant to Labor Law § 220-b (3) (b), a finding of two or more final determinations may be rendered against a contractor regardless of “whether such failures were concurrent or consecutive and whether or not such final determinations concerning

²⁴ No part of this willful conclusion relates to the underpayment of supplements resulting from the annualization of benefits required pursuant to 12 NYCRR § 220.2(d), as any such determination is precluded pursuant to the Department’s Annualization Notice providing that only violations occurring after June 15, 1999, would be found to be willful (Resp. 3).

separate public work projects are rendered simultaneously.” As Chesterfield was generally cooperative in the Bureau’s investigation; provided records that were deemed true and accurate; did not specifically intended to pay its employees less than required pursuant to the prevailing rate schedule; and no longer employs the employees responsible for the failure to adhere to the prevailing rate schedules; a finding that the aforesaid conduct constitutes multiple debarring willful violations appears unjustified. Accordingly, Chesterfield’s conduct should be deemed to constitute a single willful violation for the purposes of Labor Law § 220-b (3) (b).

FALSIFICATION OF PAYROLL RECORDS

Labor Law § 220-b (3) (b) provides that where any final determination of a willful underpayment involves falsification of payroll records, the contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the first final determination. Department counsel urges a determination of falsification of payroll records on two grounds (Dept. Proposed Findings of Fact, p 23). First, although having stipulated that Chesterfield’s payrolls were true and accurate, the Department contends that because those payrolls showed an underpayment, the certification was false. Falsification requires the making of a false document.²⁵ In this context, falsification of payroll records would require the submission of payroll records that would simulate compliance with requirements of Section 220 or conceal violations. There must be a cover up of violations - an effort at deception. *See, e.g., Matter of Miller Insulation Co., Inc.*, WAB Case No. 99-38 (1992). That element is wholly lacking. The mere evidence of an underpayment shown on truthfully reported payroll records does not create falsified documents, and no falsification should be determined on that ground.

Secondly, Counsel urges a determination of falsification on the ground that “[d]uring 1995-1996, during the performance of Contracts 1-3, [Chesterfield] failed to make timely payments to its benefit plans although it certified that it paid or provided supplemental benefits to its employees who worked on these contracts” (Dept. Proposed Findings, p 23). Because the Department stipulated to the accuracy of the payrolls and represented that it would assert no claim that they did not accurately reflect payments made (T. 428-435), the voluminous certified payrolls and related audit source documents were never offered into evidence (T. 264, 428-435) and no testimony regarding same was offered. As a consequence, it is impossible to determine when the certified payrolls were

²⁵ Webster’s New World Dictionary. Where a term has a generally accepted and plain meaning, that meaning should be given effect. McKinney’s Cons. Laws of NY, Book 1, Statutes Section 94, pp 191-194. In the absence of a statutory definition, the meaning ascribed by lexicographers may be a useful guide. *Quotron Systems v Gallman*, 39 NY2d 428, 431 (1976).

produced to the Bureau.²⁶ Since the Department adduced only vague testimonial evidence as to when the untimely payments occurred and provided no evidence concerning when the certified payrolls were produced, it is impossible on this record to determine that the payrolls were untrue when produced. Under the circumstances, no evidentiary basis exists to determine falsification of payroll records.

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 found to be due. 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.

Although Chesterfield is a large contractor (80 to 90% of its annual 6 to 8 million dollars in public work contracts) and was previously determined to have committed a non-willful violation of Section 220, the violations involved here are not of a grave or aggravated nature. They were the result of clerical incompetence for which the company is nevertheless being held willfully responsible. There is no evidence of a specific intent to avoid paying workers wages they were entitled to under the statute. Chesterfield acted in good faith with the Department in that it cooperated in the investigation and made efforts to resolve the matter. Furthermore, there is no allegation that it did not comply with record-keeping and other non-wage requirements.

Since the overwhelming portion of the underpayment found due is attributable to supplemental benefit underpayment occurring through the annualization of Chesterfield's benefit contributions, for which no willful determination can be made on account of the Annualization Notice, it is recommended that no penalty be imposed on that portion of the amount found due which is attributable to supplemental benefit underpayment. The penalty imposed should be limited solely to the wage underpayment found due. In that regard, inasmuch as Chesterfield acted in good faith and did not specifically intend to underpay wages, the maximum penalty of 25% would not be warranted, but should be limited to 10% of the total underpaid wages (exclusive of interest and supplements) found due.

RECOMMENDATIONS

²⁶ The amendment to the Labor Law requiring the weekly production of certified payroll records to the Department of Jurisdiction did not become effective until November 9, 1997. NY Labor Law § 220 (3-a).

I RECOMMEND that the Commissioner of Labor adopt the Findings of Fact and Conclusions of Law as the Commissioner's determination of the issues raised in this matter, and based on those Findings and Conclusions:

DETERMINE & ORDER that the Contractor shall be liable for wages totaling \$50,449.47 and supplemental benefits totaling \$597,236.45, for a total underpayment of \$654,557.14 on the five contracts, as is more specifically detailed in the Summaries of Underpayment annexed hereto as Exhibits "A" through "E";

DETERMINE & ORDER that the Contractor shall be liable for interest on the total underpayment at the rate of sixteen percent (16%) per annum from the date of underpayment to the date of payment, except that there shall be deducted therefrom interest for the period from April 17, 2000 through November 18, 2001, inclusive;

DETERMINE & ORDER that the Contractor's failure to pay the prevailing rate of wages to its employees shall constitute a single willful violation of Labor Law § 220;

DETERMINE & ORDER that the Contractor's willful failure to pay the prevailing rate of wages and supplements did not involve the falsification of payroll records under Labor Law § 220-b (3) (b);

DETERMINE & ORDER that the Contractor be assessed a civil penalty in the amount of ten percent (10%) of the total amount of wages (exclusive of interest and supplements) found to be due;

ORDER that the Division of Audit and Control and the County of Suffolk immediately forward all funds withheld pursuant to withholding notices herein to the New York State Department of Labor, Bureau of Public Work, 345 Hudson Street, Room 7009, New York, New York;

ORDER that the Bureau compute and pay the appropriate amount due for each employee listed in the annexed Exhibits "A" through "E", and that any balance shall be forwarded to the New York State Treasury; and

ORDER that in the event the withheld amount is insufficient to satisfy the total amount found to be due, Chesterfield shall, upon the Bureau's notification of the deficiency, immediately remit to the Department, at the aforesaid address, the total outstanding balance then due and payable.

Dated: July 29, 2002
Albany, New York

Respectfully submitted,

Gary P. Troue
Hearing Officer

TO: Chesterfield Associates, Inc.
56 South Country Road
Westhampton Beach, New York 11976

Richard J. Flanagan, Esq.
Flanagan & Associates, PLLC
20 Exchange Place, 31st Fl
New York, NY 10005

Jerome A. Tracy, Counsel
Charles Horwitz, Senior Attorney, of Counsel
NYS Department of Labor
345 Hudson Street, Room 8001
P.O. Box 673
New York, New York 10014-0673

Connie Varcasia
Deputy Commissioner of Labor
for Worker Protection
NYS Department of Labor
State Campus, Building 12, Room 592
Albany, New York 12240

Kurt A. Rumpler, Director
Administrative Adjudication
NYS Department of Labor
State Campus, Building 12, Room 183
Albany, New York 12240

Gary P. Troue, Esq., Hearing Officer
NYS Department of Labor
State Campus, Building 12, Room 118
Albany, New York 12240

Christopher D. Alund, Director
Bureau of Public Work
NYS Department of Labor
State Campus, Building 12, Room 130
Albany, New York 12240

Kelton Vosburg
Senior Public Work Wage Investigator
Bureau of Public Work
NYS Department of Labor
State Campus, Building 12, Room 130
Albany, New York 12240

Suffolk County Purchasing Division
395 Oser Avenue
Hauppauge, New York 11788