STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

CORTLAND GLASS CO., INC.
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.

REPORT & RECOMMENDATION

Prevailing Rate Case
96-5163 Albany County

To: Honorable M. Patricia Smith
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on September 4, 2008. 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 Cortland Glass Co., Inc. (“Cortland”) complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the installation of preglazed aluminum windows at the Guilderland High School (“Project”) for the Guilderland Central School District.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito (Patricia Rhodes Hoover, Senior Attorney, of Counsel). There was no appearance made by, or on behalf of, Cortland at the September 4, 2008 hearing. Thereafter, by Motion dated September 29, 2008, Cortland, by its attorneys, Cotter & Cotter, P.C. (David B. Cotter, Esq., of Counsel) moved to reopen the default. That Motion was granted and a hearing was rescheduled for February 3 through 5, 2009. Prior to the commencement of

the scheduled hearing, however, under cover of a December 4, 2008 letter from Mr. Cotter, Cortland caused to be filed a "Notice of Withdrawal of Appearance" dated December 4, 2008, by which it has withdrawn its appearance in this proceeding. As a result, the February 3 through 5, 2009 hearing was cancelled.

ISSUES

1. Did the contractor 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. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

On June 13, 2008, the Department duly served a copy of the Notice of Hearing on Cortland, via regular and certified mail, return receipt requested. A signed Return Receipt card evidencing receipt of the document by Cortland and its attorneys was entered into evidence as Hearing Officer Exhibit 1. The Notice of Hearing scheduled a September 4, 2008 hearing and required that the Respondent serve an Answer at least 14 days in advance of the scheduled hearing.

The Notice of Hearing alleges that the Cortland underpaid wages and supplements to its workers. Cortland failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. Although that default in appearance was reopened on Respondent's motion, Cortland has now withdrawn its appearance and is again in default in this proceeding.

At the hearing, the evidence disclosed that the Bureau's investigation was commenced in 1997 as the result of a routine site visit by the Bureau's task force to a construction project being performed at the Guilderland High School, which is located in the Town of Guilderland, Albany County, New York. The work Cortland performed

involved the installation of preglazed metal windows into masonry openings at the Guilderland High School. In response to the Bureau's request for records, Cortland provided somewhat incomplete certified payrolls, cancelled checks and supplemental benefit information, which the Bureau accepted as being true and accurate, and which it relied on in conducting its audit. Those records disclosed that Cortland had paid glazier rates for the involved work and failed to annualize benefits as required by the Department's regulation.

The Department classifies the installation of preglazed metal windows into masonry openings as the work of the iron worker. As a result of the misclassification and the failure to annualize supplemental benefits, the Bureau determined that that Cortland underpaid $16,500.01 to its workers for the audit period weeks-ending March 28, 1997 to July 4, 1997. The Bureau further determined that the underpayment was willful because Cortland did not annualize benefit payments, which it knew or should have known was required. Pursuant to two Notices to Withhold Payment issued to the Guilderland Central School District, the Bureau directed that monies be withheld on Cortland's contract. The Guilderland Central School District has acknowledged receipt those withholding notices and has advised the Bureau that it is withholding the sum of $17,145.67 on the contract.

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. 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 Guilderland School District, a public entity, is a party to the instant public work contract, Article 8 of the Labor Law applies. 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).

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.3 905, 906, *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 the *Lantry* case, the Commissioner determined that the installation of preglazed metal windows into masonry openings in Albany County was properly classified as the work of iron workers, not glaziers. That decision is controlling. As a consequence, the Bureau's classification of the work should be sustained.

Annualization of Supplemental Benefits

When supplemental benefits are paid into a plan, the Department's regulation requires that an hourly cash equivalent be determined. 12 NYCRR § 220.2. To determine the hourly cash equivalent of any supplement paid to or provided on behalf of workers employed on public work projects, the Department is required 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." From the application of that formula, an hourly cash equivalent is derived that is then multiplied by the hours an employee worked on the public work project to provide a credit to the contractor that offsets the hourly supplemental benefit obligation. As the Court of Appeals has specifically upheld the Commissioner's authority to apply this regulation, the Bureau's application of the formula to the supplemental benefits information provided by Cortland should be sustained. *Matter of Chesterfield Associates v New York State Dept of Labor*, 4 NY3d 597, 603-605.

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, Cortland 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) [1] provides, among other things, that when <u>two final determinations</u> of a "willful" failure to pay the

[1] "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

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.

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" – it requires something more than an accidental or inadvertent underpayment. *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; *Matter of Cam-Ful Industries, supra.*

The Department required that supplemental benefits paid into plan be annualized pursuant a duly promulgated regulation. 12 NYCRR § 220.2. As a consequence, in not annualizing benefits paid, Cortland did not conform to Department policy. This State's highest court has found that this type of conduct constitutes substantial evidence of a

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

willful violation of Section 220. *Matter of Tap Elec. Contr. Serv. v. Hartnett*, 76 NY2d 164, 170-171 (1990).

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.

Cortland knew or should have known of its obligation to annualize supplemental benefits as required pursuant to 12 NYCRR § 220.2, yet it willfully failed to do so. Furthermore, it substantially underpaid its employees on the Project. As such, the Department's requested 25% civil penalty is warranted.

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 Cortland underpaid its workers $16,500.01 on the Project;

DETERMINE that Cortland is responsible for interest on the total underpayment at the statutorily mandated rate of 16% per annum from the date of underpayment to the date of payment;

DETERMINE that the failure of Cortland to pay the prevailing wage or supplement rate was a "willful" violation of Article 8 of the Labor Law;

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

ORDER that the Bureau compute the total amount due (underpayment of $16,500.01, interest at 16% from date of underpayment and 25% civil penalty);

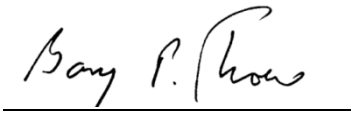
ORDER that the Guilderland Central School District remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at the State Office Building Campus, Bldg 12, Room 130, Albany, NY 12240;

ORDER that if the withheld amount is insufficient to satisfy the total amount due, Cortland, 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 19, 2009
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer