

In the Matter of

CROSS-COUNTY LANDSCAPING AND TREE SERVICE, INC. D/B/A ROCKLAND TREE SERVICE, and CHRISTOPHER GRECO, as an officer and/or shareholder of CROSS-COUNTY LANDSCAPING AND TREE SERVICE, INC. D/B/A ROCKLAND TREE SERVICE,

REPORT & RECOMMENDATION

Prime Contractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for the County of Rockland, New York.

Prevailing Wage Rate
PRC No. 2011004468
Case ID: PW11 2012004530
Rockland County

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

Pursuant to a Notice of Hearing issued on April 16, 2019, a hearing was held on October 7, 2019, October 8, 2019 and December 13, 2019, in Albany, New York and White Plains, New York, by videoconference. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Cross-County Landscaping and Tree Service, Inc. d/b/a Rockland Tree Service ("Cross-County") and Christopher Greco, as an officer and/or shareholder Cross-County Landscaping and Tree Service, Inc. d/b/a Rockland Tree Service (hereafter all: "Respondents"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving tree cutting, trimming, and removal services ("Project") at various locations for the County of Rockland ("Department of Jurisdiction").

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Larissa Bates, Senior Attorney, of Counsel).

Respondents appeared with their attorney, Darren Epstein, Esq., but did not submit an Answer.

ISSUES

1. Did Respondents pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure by Respondents to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
3. Were the payrolls maintained by Respondents falsified?
4. Is Christopher Greco, an officer or managing member of Cross-County who knowingly participated in a willful violation of Labor Law article 8?
5. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned investigations made by the Bureau involving a public work contract performed by Respondents.

On or about June 10, 2011, Respondents entered into an agreement with the Department of Jurisdiction to furnish all labor, material, equipment, parts and supervision necessary to perform tree cutting, trimming, and removal service at various locations throughout the County of Rockland, State of New York¹.

The agreement between Respondents and the County involved the employment of workers in the Group E Laborer – Heavy Highway classification.

¹ The contract award and supporting bid documents executed by the Respondents listed either Cross County Landscape and Tree Service DBA Rockland Tree or Rockland Tree Service as the entities performing services under the public work contract at issue. It also listed Christopher Greco as president and owner of those named entities, and those same documents outline that the Project is a prevailing wage rate job in which the contractor agrees to comply with “Article 8-Public Work of NYS Labor Law and its current prevailing wage schedule”. (DOL 1, 6).

The agreement was based on a time and material arrangement in which the Respondents could be contacted at any time to perform tree removal services for the Department of Jurisdiction at any location within the county as directed. As such, the Respondents could perform work at multiple county sites in one day and perform work at both public and private sites in the same week depending on the needs of the Department of Jurisdiction.

On or about July 1, 2010, the Bureau issued Prevailing Wage Rate Schedule 2010 for Rockland County. Prevailing Wage Rate Schedule 2010 for Rockland County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project from July 1, 2010 to June 30, 2011, including the following classification: Laborer – Heavy & Highway (Group E) with wages of \$33.60 per hour and supplements of \$17.70 per hour.

On or about July 1, 2011, the Bureau issued Prevailing Wage Rate Schedule 2011 for Rockland County. Prevailing Wage Rate Schedule 2011 for Rockland County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project from July 1, 2011 to June 30, 2012, including the following classification: Laborer – Heavy & Highway (Group E) with wages of \$32.00 per hour and supplements of \$19.35 per hour.

On or about July 1, 2012, the Bureau issued Prevailing Wage Rate Schedule 2012 for Rockland County. Prevailing Wage Rate Schedule 2012 for Rockland County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on the Project from July 1, 2012 to June 30, 2013, including the following classification: Laborer – Heavy & Highway (Group E) with wages of \$33.15 per hour and supplements of \$20.05 per hour from July 1, 2012 to March 31, 2013, and with wages of \$34.15 per hour and supplements of \$20.60 per hour from April 1, 2013 to June 30, 2013.

On or about July 26, 2011, April 9, 2015 and October 24, 2018, complaints were filed with the Department alleging that Respondents' workers were not paid the proper prevailing wages and supplements for performing work on the Project.

In response to the complaints, the Bureau commenced an investigation of the Project.

On or about May 17, 2012, the Bureau requested that Respondents furnish payroll records and other documents relating to the Project.

On or about May 28, 2012, the Bureau received from Respondents payroll records, invoices and other documentation relating to the Project.

During the course of the investigation, the Bureau received additional certified payrolls for Project, as well as other relevant material, including invoices and canceled checks.

Based on the scope of work the Bureau investigator determined that the work performed was that of the laborer heavy highway, class E classification.

The Bureau investigator derived the days and hours worked directly from the various certified payroll records that were produced, and the wage rates paid either directly from the complaint forms or from the statements of the complainant workers about what all the workers were paid.

The Bureau investigator obtained the rates that should have been paid to the workers on the Project from the prevailing wage rate schedules applicable in that county of jurisdiction during the period the work was performed.

Finally, the Bureau investigator gave the Respondents zero credit for any cancelled checks that the Respondents produced, because she could not tell if the checks were for public or private work, and because due to the way the checks were issued and/or cashed, she could not tie them into a specific week ending from the certified payrolls.

The Bureau investigator created two excel spreadsheets; the first spreadsheet was used to help her identify when the checks were issued by the Respondents and when the checks were cashed by the employees; the second spreadsheet was created to make a comparison of the checks provided to the employees against what wages that were reported to New York State on Respondents' NYS-45 quarterly wage report for the years in question.

The Bureau prepared an audit for the Project, using the information obtained during the investigation, which included the various certified payrolls, statements from the employees, the complaint forms and the prevailing wage schedules.

Based on its investigation, the Bureau determined that Respondents employed nine (9) workers on the Project in the Laborer classification and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedules in effect at that time.

During the period from the week ending June 25, 2011 through the week ending June 8, 2013, the Bureau determined Respondents underpaid prevailing wages and supplements to workers performing work on the Project in the amount of \$87,866.86.

On or about March 4, 2013, March 12, 2015, March 26, 2015, and November 9, 2018, the

Bureau issued to Respondents Notices of Labor Law Inspection Findings notifying Respondents of the Bureau's findings on the Project.

On or about March 4, 2013, the Bureau issued a Notice of Withhold Payment to the Department of Jurisdiction directing them to withhold \$107,329.70 from payments due to the Respondents.

On or about March 4, 2013, the Bureau received acknowledgement from the Department of Jurisdiction that it had withheld \$38,127.00 from payments due to Respondents.

Toward the end of March 2013, the Respondents issued lump sum checks to some of its workers.

During the period when work was performed on the Project, Christopher Greco was an officer and shareholder who knowingly participated in Cross-County's failure to pay or provide prevailing wages and supplements to or for the benefit of the employees who performed work on the contract outlined above for the Project.

On or about May 30, 2017, as part of a plea arrangement pursuant to criminal charges brought in Rockland County Court, Mr. Greco was convicted of offering a false instrument for filing in the first degree. The certificate of conviction outlined that Mr. Greco was convicted of Penal Law 175.35, a class E felony, for offering a false instrument for filing in the first degree in relation to the Project. Mr. Greco was given a three-year conditional discharge and was required to make restitution of \$30,000.00 through victim services for the benefit of the Department of Labor, payable over a three-month period. Mr. Greco did in fact pay the required mandated restitution as ordered.

There was no indication that the Respondents had any other violations of the Labor Law prior to this investigation by the Bureau; Respondents was a small contractor; did respond and produce documents during the course of the investigation; however Mr. Greco did admit on the record to not paying his workers correctly, and seriously violated the Labor Law by admitting to preparing payroll records that did not accurately reflect the wages his workers actually received while working on the on the Project thereby knowingly participating in the violation of this article, and he failed to comply with recordkeeping requirements mandated by the Labor Law.

During the course of the hearing, the owner of the business, Mr. Greco, testified that he started working for the County of Rockland back in 2011, on an on-call as needed basis, while at the same time performing private work. (T pp. 147 – 148). He stated that he or his secretary would fill out certified payrolls, and that he did not pay his workers the amounts listed on the

certified payrolls, that he paid his workers something else. (T pp. 149 – 151) He also said that his workers were paid somewhere between \$15 and \$17 per hour, but he did not expound on which employees were paid what hourly rates. On or about March 4, 2013, he received a Notice of Labor Law Inspection Findings, which made him realize he was not paying his workers correctly, so he took the Notice to his attorney and was advised by counsel that he should make up difference between what was paid and what should have been paid, in order to cease any further interest from accumulating. (T p. 152) He made up those payments in a lump sum, by check to the workers, and he and his secretary went through all the certified payrolls, took the amounts that should have been paid according to the prevailing wage that applied and subtracted out what was paid to the workers to determine what was owed². On or about that date he issued what he deemed were eight make-up checks; two to Manuel Jose Acosta (\$8,049.11 and \$8,049.10), one to Thomas Bowe (\$4,416.10), one to Polo Vinueza (\$4,271.74, no gross amount was given), and one to Gilardo Jose Lopez (\$1,591.88), one to Nicolas Vega (\$3,081.00) and two to Rigerberto Durand (\$7,442.35, no gross amount, and \$8,973.42)³ He went on to confirm that all the employee were paid by check each week with a wage statement issued to them and that none of the workers were paid in cash. That he may have timecards, but those timecards don't specify whether it was private or public work. (T pp. 166-167, 172)

Mr. Greco confirmed that the workers that received the makeup checks worked on both private and public work during 2011 to 2013, and that he has no wage statements that correspond to the make-up checks, nor did he bring any payroll records to the hearing which showed what was actually paid to those workers prior to the make-up checks being issued. That he may have the payroll records which allowed him to calculate the make-up checks back in the file, but he wasn't sure if he still has them. (T pp. 176 - 179)

Worker, Polo Vinueza, testified that he worked for the employer for ten years, that the only money he received for the Town⁴ work was the lump sum payment, and that for the years 2011 to 2013 he received half his pay in cash and half his pay in check. (T pp. 211 – 212, 214, 223, 229) He also confirmed that he was asked by the employer to hold checks before they were

² Employer admitted he did not have the source documents which showed how he came up the amounts due to each employee, and the secretary who most likely did the brunt of the calculations was not produced at the hearing to confirm the calculations, even though she was the one who signed and affirmed the majority of the certified payrolls.

³ Employer went over these canceled checks and accompanying signatures on the back of the checks on the record stating that these were the lump sum payments that he made to the employees, based on the difference of what was paid and the prevailing wage. (T p. 158)

⁴ Although the employee witnesses actually were working for the County of Rockland, they kept calling the work they performed for the County, the Town.

cash them. (T p. 228)

Worker, Rigaberto Durand, testified that he worked for the employer for twenty years, that he was paid by check, never by cash, and that sometimes he would get two checks, one for the Town and one for other work. (T p. 238) He received two lump sum checks for the work he didn't get paid for in the Town, because every week the employer wrote him a check for some of the Town work, but there was still some payments pending. He always got paid for the private work, but the Town money was delayed. For example, if he worked three days at the Town, he would get paid for one. He said he was paid in full for all the work he performed on the Project, however when he was asked if he tracked the time he wasn't paid for on the Project, so he knew how much was owed to him, he said he did not, and finally he confirmed that he was never given checks that he was told to hold and cash at a later date. (T pp. 238 – 249)

Cross-County is a corporation, shown to be active in the New York State Department of State Division of Corporations records, with its principal office located at 26 North Myrtle Avenue, Spring Valley, New York, 10977. Chris Greco is the Chief Executive Officer of Cross-County, with the same address. The address for service of process on Cross-County is Cross-County Landscape and Tree Service, 26 North Myrtle Avenue, Spring Valley, New York, 10977. (DOL 20)

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects⁵. This constitutional mandate is implemented through Labor Law article 8. Labor Law §§ 220, *et seq.* “Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing ‘supplements’ paid in the locality.” (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [1999]). Labor Law § 220.2 establishes that the law applies to a contract for public work to which the State, a public benefit corporation, a municipal

⁵ This section derives ultimately from the 1905 amendment of section 1 of article XII of the New York State Constitution of 1894.

corporation or a commission appointed pursuant to law is a party. 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.

In 1983, the New York State Court of Appeals established what was, until recently, the test for whether a project was subject to the Labor Law public work provisions. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). *Erie* involved a construction contract on a project financed by an industrial development agency, and established the now-familiar two-prong test:

(1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) the contract must concern a public works project. *Id at 537*.

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

First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id at 538*.

The Department of Jurisdiction, a public entity, is a party to the instant public work contract. The contract involved the cutting, clearing, trimming and removal of down or damaged trees, which required construction-like labor paid for by public funds. The work product, here keeping publicly owned facilities and public spaces free from downed trees and falling debris, is clearly for the use or other benefit of the general public. Additionally, the contract outlines that the purchase orders are subject to New York State Labor Law §220, Article 8, and that vendor must submit certified payrolls with their invoices to the Department of Jurisdiction, so Labor Law Article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]). Furthermore, the Respondents did not contest that the Project was a public work project subject to Labor Law Article 8.

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as “classification.” (*Matter of Armco Drainage & Metal Products, Inc. v State of New York*, 285 AD 236, 241 [1954]). Classification of workers is within the expertise of the Department. (*Matter of Lantry v State of New York*, 6 NY3d 49, 55 [2005]; *Matter of Nash v New York State Dept of Labor*, 34 AD3 905, 906 [2006], *lv denied*, 8 NY3d 803 [2007]; *Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). The Department’s classification will not be disturbed “absent a clear showing that a classification does not reflect ‘the nature of the work actually performed.’ ” (*Matter of Nash v New York State Dept of Labor*, 34 AD3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor*, 154 AD2d 117, 120 [3d Dept. 1990], *affd* 76 NY2d 946 [1990], *quoting Matter of Kelly v Beame*, 15 NY 103, 109 [1965]). Workers are to be classified according to the work they perform, not their qualifications and skills. (*See, Matter of D. A. Elia Constr. Corp v State of New York*, 289 AD2d 665 [1992], *lv denied*, 80 NY2d 752 [1992]).

The Department classified the workers on the Project pursuant to the scope of work performed on the Project, and page 6 of the specifications specifically delineates that the work being performed on the project is categorized as Article 8 Group E Laborer, Heavy Highway. (DOL 1, 6) Additionally, Respondents did not contest the classification of work used, so I find the classification used by the Bureau should not be disturbed.

UNDERPAYMENT METHODOLOGY

“When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner’s calculations to the employer....” (*Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [1989] (citation omitted)). “The remedial nature of the enforcement of the prevailing wage statutes ... and its public purpose of protecting workmen ... entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate....” *Id.* at 820 (citations omitted). Methodologies employed that may be imperfect

are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. (*Matter of TPK Constr. Co. v Dillon*, 266 AD2d 82 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]).

The Bureau received certified payrolls from four sources for the Project, as well as other relevant material including; invoices, Federal Form 941 and NYS-45 quarterly wage reports, bank statements and canceled checks. The Bureau investigator derived the days and hours worked directly from the various certified payroll records that were produced and determined the classification of work based on the scope of work, although the classification was specifically enumerated in the specifications. She got the hourly wage rates paid to the employees either directly from the complaint forms or from the statements made by the complainant workers. She got the rates that should have been paid from the prevailing wage rate schedules applicable in that county of jurisdiction during the period the work was performed. She reviewed the canceled checks that were provided by the Respondents, but gave them zero credit for those payments, because she could not tell if the checks were for public or private work. Also, because of the way the checks were notated, issued and/or cashed she could not tie them into a specific week ending from the certified payrolls, so she determined crediting of those checks was not appropriate⁶. She also made a comparison among the Federal Form 941 and NYS-45 quarterly wage reports and the cancelled checks for the years in question, finding that none of the wage information contained in those documents coincided. In fact, there was a large disparity between the documents making it impossible to determine what the employees were actually paid over the time period at issue and if the payments they received were for public or private work.

Evidence in the record established that the certified payrolls of the Respondents did not accurately reflect the wages paid to the workers who performed services on the Project. Also, there is a clear absence of comprehensive payroll and time records on which the Bureau could rely to credit the Respondents with the full payment of wages and supplemental benefits to its workers. Under those circumstances, it was permissible and reasonable for the investigator to reach the conclusions made and employ the methodology she used, although it may have been imperfect, to determine the days and hours worked, as well as rates paid to the workers.

⁶ There were notations attached to the cancelled checks, which the Respondents were calling wage statements, but those notations did not include hours worked or rates paid, in violation of the labor law, if in fact they could be considered wage statements at all. There were dates contained in most of the notations, gross amounts, statutory deductions and net information (some of the notations were blank), but the majority of the gross and net pay for the weeks notated did not match the gross or net amounts listed on the certified payroll during that same time period, making it impossible to match up for crediting purposes.

Labor Law § 661 requires an employer to establish, maintain, and preserve for not less than six years, contemporaneous, true, and accurate payroll records showing for each week worked the hours worked, the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other basis; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages for each employee, plus such other information as the commissioner deems material and necessary. In March 2013, Mr. Greco was put on notice of his violation of the labor law for his failure to pay prevailing wage and supplemental benefits to his employees, and he was directed by his counsel to make up any deficiency of wages not paid to the workers if in fact they were not paid correctly. The employer knew the employees were not paid correctly, so he stated he went back through his payroll records, determined what was previously paid and deducted those amounts from the prevailing wage rates that should have been paid, thereby paying the balance due in lump sum payments to his employees. Since Mr. Greco was on notice in 2013 that he failed to pay prevailing wage and supplemental benefits to his workers, stated that he had the legally required source documents that established the wages paid prior to his making up difference in wages, and he knew he was going to have to show the Bureau how he calculated the lump sum amounts, he should have preserved those documents and presented them at this hearing. The Respondents failed to maintain contemporaneous, accurate payroll records as required by law. In the absence of legally required records, he must come forward with evidence to negate the reasonableness of the inferences drawn by the Bureau. The Respondents have failed to negate the reasonableness of the inferences drawn by the Bureau, as such the full crediting that the Respondents are seeking for wages paid cannot be given. The bank and wage information relied on by the Respondents were inadequate, the bank statements and cancelled checks were not only duplicative, with multiple copies of the same statements and canceled checks, the bank statements themselves only covered a sporadic period of time during 2012 (roughly six months) and the first month of 2013, and the canceled checks though issued in 2011, were shown as cashed in 2012 or later. Very few of the canceled checks produced actually matched the certified payrolls and the lump sum payments, as discussed below, had no clear delineation of what they were for, and finally the quarterly wage reporting records, not only didn't match the certified payroll records, they didn't coincide with the cancelled checks provided making all the information when taken as a whole incomprehensible.

It was clear from the record that the Respondents had their employees working on both the Project and private work at the same time during the period at issue. That the employees, from the employer's own statement, received wages other than the prevailing wage rates they should have received on the Project, if they received payment at all. What is not clear from the record is what hourly rates of pay each employee actually received over the audit period, and what the employees were paid each week for all that work they performed. The Respondents stated he paid the employees by check each week with a wage statement for all hours worked, and that he maintained time cards, but all the hours worked, whether public or private, were commingled together on those time documents. The Respondents never stated that he issued two different paychecks each week, one for private work and one for public work, or that he paid the workers in cash for the private work and check for the Project (which would have been more plausible given the disparity among all the wage information provided), and since the time records for the public and private work were commingled on one time card it is highly likely the Respondents paid all the work performed at one rate, which lends credence to the Bureau's determination that the Respondents be credited with an hourly wage rate that the investigator derived from what she deemed was the best available evidence at that time, the claim forms and the statements of the workers she spoke with.

As stated in the fact section, employees, Polo Vinueza and Rigaberto Durand, testified at the hearing that by virtue of the lump sum payments they received in March 2013, they were paid in full for all the work they performed on the Project. If the long time workers of the employer (who are still are employed by the Respondents) want to state to their own detriment that they were paid in full for all work performed on the Project, those statements can be acknowledged and accepted, and the Bureau can credit them with the lump sum payments provided, however the record on the whole does not support those statements made by these employees that they were paid in full, and further wages and interest are owed to them. First, even giving the Respondents full credit for the lump sum payments and the cancelled checks that could be matched to the certified payrolls, the workers are still underpaid. When comparing the total wages they should have received according to the certified payroll records, to the total canceled checks produced by Respondents (which includes the lump sum payments these workers state they received), the amounts listed in the certified payrolls for these two workers far exceeds the wages received. Second, Mr. Greco testified he took the prevailing wages that the employees should have received and subtracted out the hourly wages he states were paid to the

employees, and the balance was used to produce the lump sum payments. That is counter to what the two employee witnesses stated. They testified that they either did not get paid at all for their work on the Project or got paid for some days, not others. They either got paid a set hourly wage for all work on public and private as intimated by the employer, or they didn't get paid for public work as intimated by the employees, it cannot be both and it calls into question the credibility of the witnesses' statements. Third, the weeks after the lump sum payments were made, there is still no evidence showing prevailing wages were paid to the workers even though at that point the Respondents were clearly on notice that the employees should be receiving prevailing wages. Fourth, although the Mr. Greco and the two employee witnesses stated that they received checks each week, at least for all the private work they performed, there are not enough cancelled checks to cover the period of time at issue. There are only a handful of canceled checks for 2011 (cashed in 2012, although the workers testified they didn't hold the checks that long), sporadic checks for 2012, and little to none for 2013. In fact, there are no cancelled checks after the lump sum payments were made, putting in question if the employees were paid at all on the Project after those large payments were made. Fifth, none of these lump sum payments were listed as wages in the NYS-45 for the first quarter of 2013 (according to those records, the total remuneration paid that quarter for Adriano Enrique Paramo, Durand, Vinueza, Osorino and Greco was \$1,920.00). Additionally, the full crediting of the lump sum payments, as the Respondents request, could potentially have a negative effect on the audit. The Bureau gave Durand and Vinueza a \$10.00 hour wage rate paid credit for all the hours they have them listed as working in the audit. Based on that workers statement that they were either not paid for some days or not paid at all for the work performed on the Project, those hourly wage paid credits the Bureau gave in the audit theoretically should be reduced to zero for any weeks prior to March 23, 2013 before the lump sum payments were made, thereby increasing the underpayment calculations in the audit.

I therefore find that for Polo Vinueza and Rigaberto Durand the underpayments on the Project should be reduced by the lump sum payments they state they received in 2013, however without any payroll records which show what the employees were actually paid on an hourly basis during the audit period, if at all, the investigators crediting of hourly wages paid and total audit calculations as it pertains to the Project for these two workers are reasonable and should not be disturbed, absent this deduction. The Bureau should determine how to credit the lump sum

payments to these two workers and interest on the underpayments tied to this crediting should cease as of March 26, 2013.

As to the other workers mentioned as receiving lump sum payments in 2013, Manuel Jose Acosta, Thomas Bowe, Gilardo Jose Lopez and Nicolas Vega, only one of the workers received a lump sum payment which matched the wages he should have received according to the certified payrolls (Lopez), all the remaining received lump sum payments that were not even close to the total amount of wages listed in the certified payrolls and other than Mr. Acosta none of these workers were listed in the quarterly wage filings. Since, Mr. Greco stated he only paid his men by check, had a very limited amount of canceled checks to show they were paid something, didn't report the majority of his workers in the quarterly reports, that they all worked both public and private work each week, and none of these workers came in to testify, there is not enough evidence to show what these lump sum payments are for (public or private work), I find no credit can be given for the lump sum payments to these workers⁷. As such, I find the audit detail produced by the investigator in regard to these individuals has a reasonable, has a rational basis for her calculations and should be sustained.

As to Daniel Finn, since the canceled checks provided do not match any of the wages listed in the certified payrolls, no additional credits should be given for those payments. Mr. Finn testified that he was mostly paid in cash (which is bolstered by the fact he was not listed in the quarterly NYS-45s or Federal Form 941 filed by the Respondents) but did receive a couple of checks. (T pp. 109, 110, 117, 124) Although one of those checks looks like a lump sum payment, paid back on December 30, 2012, there is nothing contained in the record outlined by Mr. Greco or Mr. Finn which clearly delineates what that payment was for, public or private work or something else, and it was not part of the lump sum payments the employer stated he made in 2013 to pay any of the deficiencies owed to the workers, without more, no credit can be given. The audit calculations provided by the Bureau for this worker should remain.

As to the remaining workers, since none of the cancelled checks produced by the Respondents, except what is outlined below, match any of the wages listed in the certified

⁷ Although Mr. Lopez's lump sum payment matched the amount listed on the certified payrolls, Mr. Lopez wasn't listed in the NYS-45 as receiving any remuneration that quarter, there were only a couple days listed as worked each week on the certified payrolls, so there could have been days he worked on private jobs as well, and Mr. Greco stated he paid the workers something each week, so there is no clarity provided on what that payment is for.

payrolls or the quarterly reports filed by the Respondents, no additional credits should be given, and the Department's audit should stand as it pertains to these workers.

Review of the records show that there were some cancelled check and accompanying notations that could be matched up to the certified payroll, and those weeks should be removed from the audit. Specifically, week endings 7/2/11, 7/9/11, 8/6/11 for Durand, Bowe, Vinueza and Acosta should be removed. Also, two days from week ending 2/11/12 for Durand and Acosta should also be removed from the audit.

The investigator missed a day, 4/16/12, for week ending 4/17/12, when Durand, Finn and Acosta all worked on that day for four hours and those hours should be included in the audit. (DOL 13)

Additionally, pursuant to Labor Law § 220 (3-a)(a), the contractor and every sub-contractor shall notify all laborers, workers or mechanics in their employ in writing of the prevailing rate of wage for their particular job classification. Such notification shall be given to every laborer, worker or mechanic on their first pay stub and with every pay stub thereafter. At the beginning of performance of every public works contract, and with the first paycheck after July first of each year, the contractor and every sub-contractor shall notify all laborers, workers, and mechanics in their employ in writing, in accordance with such form as is prescribed by the fiscal officer, of the telephone number and address for the fiscal officer. Respondents failed to adhere to this statute and failed to maintain the time and payroll records required under the labor law to negate the reasonableness of the Bureau's calculations, so other than the adjustments made above the overall audit should be sustained⁸.

CRIMINAL RESTITUTION

As mentioned in the findings, as part of his plea arrangement, Mr. Greco was required to make restitution of \$30,000.00 through victim services for the benefit of the Department of Labor, payable over a three-month period. Mr. Greco did in fact pay the required mandated restitution as ordered, and now makes the argument the he was absolved from any further financial liability as a result of this restitution, and since the Department accepted this payment on the employee's behalf, that payment is in full satisfaction of any amounts that were owed at that time. Although the Bureau admits to holding this sum in its coffers and is willing to apply

⁸ The Department takes the position, that because Respondents failed to provide any evidence of wage payments, the best available evidence of the wages paid are from the claim forms and the statements made by the complainants in this matter.

that lump sum toward the Respondents liability, they deny it was in full satisfaction of the Respondents' obligation.

For the foregoing reasons, the Respondents' argument cannot be sustained: first, although the Bureau provided evidence to the county district attorney's office, the Department wasn't a party to the criminal proceeding, and was at best a third-party witness in a criminal matter being prosecuted by the local county district attorney; second, a State agency has no authority to direct or control how a local county district attorney resolves their cases; third, there is no evidence presented that the Department took part in negotiation of the plea arrangement entered into between the criminal defendant and the criminal prosecutor; fourth, the Department did not directly receive the restitution which was paid over to the Probation Department of the County of Rockland, so could not have directly acquiesced to this payment; and fifth, there is nothing contained in the record, presented by either party, outlining what the restitution amount was for, how it was supposed to be applied or if it was in fact in full or partial satisfaction of the amounts owed. Since the only evidence presented during the hearing were the Certificate of Conviction and Order of Restitution (DOL 22, 23) neither of which outlines what the payments were for or provides a basis for this administrative body to determine if the Respondents have fully paid all wages, supplements, interest and civil penalties calculated to be owed at that time, I find that only partial crediting can be given.⁹

Additionally, the Respondents' argument is counter to the Department's long-standing position that it never compromises on wages or supplements owed to workers, and if there had been in fact some sort of an agreement with the Department that they would accept the \$30,000.00 in full satisfaction of all dollar amounts owed (wages, supplements, interest and civil penalty), that agreement would have had to been reduced to writing in the form of a stipulation of settlement signed by the Commissioner and the Respondents, and executed at the time of the plea. Since the Respondents produced no evidence that a stipulation was entered into between the parties, the Respondents are not absolved from further liability, and the Department can move forward and pursue the remedies available to it under the Labor Law.

⁹ It has been the experience of this office that the local county district attorney offices believe that the criminal statute does not give them prosecutorial authority under the criminal statute to allow for the recovery of interest and civil penalty once the underlying obligation had been paid. As such the restitution amount could have only covered the wages and supplemental benefits believed to be owed at that time and the Commissioner of Labor would still be tasked with recovering the interest and civil penalty, and any further wages and/or supplements it deemed still owed.

Finally, the restitution in the criminal action brought under the Penal Law does not prevent the Department from pursuing its civil remedies under the Labor Law, and does not relieve the Commissioner from her obligation to uphold the Labor Law and seek full restitution of wages, supplements and interest for workers she is charged to protect or alleviate the Commissioner from her responsibility to recover civil penalties against a non-compliant contractor. That all being said, although capping the Respondents liability is not appropriate based on the totality of evidence on this issue, the Respondents should receive a credit of \$30,000.00 toward the wages and supplemental benefits owed on the date the final amount of restitution was fully paid and interest should cease on the amount paid on that date as well. There is nothing in the record which outlines when the Bureau received the \$30,000.00, except the certificate of conviction which gives the last payment date of September 5, 2017. That is when the amount should be credited, and the interest ceased on that portion paid.

ESTOPPEL

Respondents in their closing argument make the assertion that because they made full restitution in the criminal proceeding according to their plea and that the Department accepted that money on the employee's behalf this proceeding is subject to estoppel. Respondents fail to cite any legal precedent that would bolster their position that estoppel would apply to this type of administrative proceeding and, given the fact that the only motion that can be made by the Respondents in an administrative hearing is a motion to dismiss, the Respondents have failed to articulate relief which can be granted in this proceeding. Accordingly, I find no basis to grant the relief requested.

In addition, it has long been held that estoppel is unavailable against a government agency except in extraordinary circumstances and receiving misinformation from a government employee does not constitute such a circumstances (*see; Matter of Grella v Hevesi*, 38 AD3d 113, 117 [2005]; *Matter of Schwartz v McCall*, 300 AD2d 887, 889 [2002]; *Matter of Smith v New York State & Local Retirement Sys.*, 199 AD2d 763, 764 [1993], *Matter of Champagne v Regan*, 191 AD2d 895 [1993]). Respondents reliance on erroneous advice of the Department's employees, if in fact given, to what the payments constituted in a criminal proceeding they were not a part of, does not rise to the level of extraordinary circumstances the Respondents could avail itself to.

RESPONDENTS' MOTION TO DISMISS

During the course of the hearing, Respondents moved to dismiss the Department's allegations, arguing that the Department had failed to meet its burden of proof. Given the extensive testimony elicited concerning the violations and the documents received into evidence on behalf of the Department, I find no basis for granting such a motion.

INTEREST RATE

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. (*Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]).

Consequently, after the crediting of the lump sum payments made to Polo Vinueza and Rigaberto Durand on or about March 26, 2013, and the payment of \$30,000.00 made on or about September 5, 2017 have been applied and the audit adjusted, Respondents are responsible for the interest on the balance of 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. For the purpose of Labor Law article 8, willfulness “does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately” – it requires something more than an accidental or inadvertent underpayment. (*Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [1987]). “Moreover, violations are considered willful if the contractor is experienced and ‘should have known’ that the conduct engaged in is illegal (citations omitted).” (*Matter of Fast Trak Structures, Inc. v Hartnett*, 181 AD2d 1013, 1013 [1992]; *see also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [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 AD2d 510 [1988]; *Matter of Cam-Ful Industries, supra*) 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 AD2d 421 [1991]).

The evidence in this matter warrants a finding of willfulness by the Respondents.

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>). In the absence of a statutory definition, the meaning ascribed by lexicographers is a useful guide. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976).

It is clear from the record that Respondents failed to meet its obligation to maintain true and accurate payroll records, and I find the evidence set forth, such as conflicts between the certified payrolls and other wage information concerning payments made to workers on the Project, shows deliberate, intentional falsification, and, therefore, that Respondents’ willful failure to pay or provide prevailing wages and/or supplements involved the falsification of payrolls.

Furthermore, Mr. Greco not only pled guilty to the falsification of payroll records in a criminal proceeding in regard to this case, Mr. Greco readily admitted on the record that he did falsify the records, by not paying the workers the rates stated on those certified payrolls.

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 Labor Law article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

The record shows that Christopher Greco, was an officer and owner of Cross-County Landscaping and Tree Service, Inc. d/b/a Rockland Tree Service¹⁰, and is therefore personally subject to the willful violations in this matter.

CIVIL PENALTY

Labor Law §§ 220 (8) and 220-b (2) (d) provide for the imposition of a civil penalty in an amount not to exceed twenty-five percent (25%) of the total amount due (underpayment and interest). In assessing the penalty amount, consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and the failure to comply with record-keeping and other non-wage requirements. The contractor was an experienced public work contractor in business over twenty years, who listed in his certificate of experience four other public work projects that he was involved in. The record shows a failure to fully cooperate, serious violations, record-keeping violations, and criminal behavior. Under these circumstances, the Department's request for 25% civil penalty is reasonable.

RECOMMENDATIONS

Based on the weight of the evidence set for in the record as a whole, I:

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

DENY the Respondents Motions to Dismiss; and

DETERMINE that Respondents should be credited with paying Rigerberto Durand and Polo Vinueza the lump sum payments they state they received for the Project, and interest on those payments should cease on March 26, 2013; and

¹⁰ The contract award, supporting bid documents and contractor profile listed Christopher Greco as president and owner of either Cross County Landscape and Tree Service DBA Rockland Tree or Rockland Tree Service as the entities performing services under the public work contract at issue. (DOL 1, 6, 8)

DETERMINE that after the Bureau credits Respondents with the lump sum payments made to Rigerberto Durand and Polo Vinueza, it shall determine the balance of wages and supplemental benefits owed to those workers; and

DETERMINE that Respondents underpaid wages and supplements due the remaining employees on the Project in the amount set forth in the audit prepared by the Bureau and entered into evidence in this matter (with a minor adjustment to the weeks outlined in the methodology section); and

DETERMINE that Respondents should be credited with the \$30,000.00 paid in restitution of the criminal matter and interest should cease on those funds on the date the Bureau took possession of those funds on September 5, 2017¹¹; and

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

DETERMINE that the failure of Respondents to pay the prevailing wage or supplement rate was a “willful” violation of Labor Law article 8; and

DETERMINE that the willful violation of Respondents¹² involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Christopher Greco, was the owner and officer of Cross-County and knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Respondents 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 for the Project (underpayment, interest and civil penalty); and

ORDER that to the extent that the Department of Jurisdiction has in its possession any withheld funds, it shall 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

¹¹ The Bureau’s audit summary ran interest to July 9, 2019, the interest needs to be adjusted to conform to the end date of the Notice of Filing of the Order associated with the matter.

¹² As stated in the contract award and supporting bid documents, the Respondents include all the variations of the entity, Cross County Landscape and Tree Service DBA Rockland Tree or Rockland Tree Service and Christopher Greco individually.

forwarding the same to the New York State Department of Labor, Bureau of Public Work at The Maple Building, 3 Washington Ctr., 4th Floor, Newburgh, NY 12550; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Respondents, 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: February 13, 2020
Albany, New York

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Marshall H. Day", written over a horizontal line.

Marshall H. Day, Hearing Officer