STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

D & D MASON CONTRACTORS, INC.,
and
THOMAS DEMARTINO
as an officer and one of the five largest shareholders of
D & D MASON CONTRACTORS, INC.,
and
DEMARTINO PROPERTY MANAGEMENT, INC.,
as a substantially owned-affiliated entity.

Prime Contractor – Respondent

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
99-9260 Suffolk 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 October 30, 2007; October 31, 2007; February 8, 2008; and February 19, 2008 in Garden City, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether D & D Mason Contractors, Inc. ("Prime Contractor"), complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract involving the provision of material, labor and equipment necessary for Phase 1 of the Sidewalk Improvement and Requirements Contract for Main Street ("Project") for the Town of Huntington, New York ("Department of Jurisdiction").

## APPEARANCES

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

The Prime Contractor appeared by its principal, Thomas DeMartino. The Prime Contractor and Thomas DeMartino also appeared by Frank DeMartino by virtue of an alleged assignment of a certain judgment the Prime Contractor has against the Department of Jurisdiction. DeMartino Property Management, Inc. appeared by its principal, Frank DeMartino. An Answer to the charges incorporated in the Notice of Hearing was served by and on behalf of the Prime Contractor and Thomas DeMartino on June 22, 2007. There was no Answer served by or on behalf of DeMartino Property Management, Inc. All of the Respondents were represented by Attorney Bryan Ha for the submission of a post-hearing Memorandum.

## HEARING OFFICER

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

## ISSUES

1. Did the Prime Contractor pay the rate of wages and/or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment involve the falsification of payroll records?
4. Is Thomas DeMartino an officer of the Prime Contractor who knowingly participated in a willful violation of Article 8 of the Labor Law?
5. Was Thomas DeMartino one of the five largest shareholders of the Prime Contractor.
6. Is DeMartino Property Management, Inc. a substantially owned-affiliated entity of the Prime Contractor?

7. Should a civil penalty be assessed and, if so, in what amount?

## FINDINGS OF FACT

### The Bureau Investigation

On July 27, 2000, the Bureau received a complaint from George S. Truicko, the Business Agent of Laborers Union, Local 1298, alleging that some of the Prime Contractor's employees were being paid $10.00 an hour off the books. (T. 34; Dept. Ex. 1). Based upon this complaint, the Bureau commenced an investigation and the Bureau forwarded forms PW-18, Record Request Notices, dated November 5, 2002, January 3, 2003, and November 18, 2003 to the Prime Contractor and the Department of Jurisdiction ordering the production of, among other items, certified payrolls, time records, cancelled payroll checks, proof of payment of fringe benefits, and copies of the contract agreements for the Project (T. 38-39, Dept. Exs. 2, 3 and 4). The Bureau received the following documents from the Prime Contractor or the Department of Jurisdiction: the contract between the Department of Jurisdiction and the Prime Contractor for the Project together with the 1999 Prevailing Rate Schedule (Dept. Ex. 9); and the Prime Contractor's Certified Payroll Records for the weeks ending May 20, 2000 through October 28, 2000 (Dept. Ex. 11). Additionally, the Bureau obtained the applicable Prevailing Rate Schedule for 2000 (Dept. Ext 10). Finally, the Bureau interviewed, and received pay stubs from, two of the Prime Contractor's employees, Ivano R. Valenti (Dept. Ex. 12) and Pietro DiBenedetto (Dept. Ex. 13). The Bureau received a completed Written Questionnaire from an additional employee of the Prime Contractor, Benjamin Pineda (Dept. Ex. 24). Mr. Pineda stated in the Questionnaire that he worked for the Prime Contractor on the Project as a laborer-highway for seven months and that he was paid $14.00 in cash per hour in wages and no supplemental benefits (T. 468, 474-475; Dept. Ex. 24). Based upon the pay stubs submitted by Mr. Valenti and Mr. DiBenedetto the Bureau determined that these two employees worked for the Prime Contractor as laborers-highway and that they were paid wages in the amount of $16.42 per hour and $11.00 per hour, respectively, and no supplemental benefits. (T. 226, 230, 231, 245, 246, Dept. Ex. 25). In the absence of additional paystubs, or other records from the Prime

Contractor's remaining employees, the Department relied upon the Prime Contractor's certified payroll records (Dept. Ex. 11) for the limited purpose the ascertaining the hours worked by these remaining employees and their rates of pay (T. 214).

Finally, the certified payroll records received from the Prime Contractor (Dept. Ex. 11) that were all certified by Thomas DeMartino as President of the Prime Contractor, identify all employees as laborers who were paid wages at the rate of $28.03 per hour straight time and fringe benefits (T. 153; Dept. Ex. 11).

In preparing the audit of the Project, the Bureau relied on the following documents and evidence: the employees' pay stubs (Dept. Exs. 11 and 12); the contract documents and specifications between the Department of Jurisdiction and the Prime Contractor (Dept. Ex. 9), which identified the scope of the work to include exterior work associated with sidewalk improvements on Main Street in Town of Huntington (T. 110, 216); the PRS for 1999 and 2000 (Dept. Exs. 9 and 10), which covered the time period of the Project and which detailed the wages and supplements that should have been paid to workers engaged in the laborer-highway classification for the period in question (T. 26, Dept Ex. 14); the certified payroll records provided by the Prime Contractor (Dept. Ex. 11); and interviews with the Prime Contractor's employees (T. 211-217).

## CLASSIFICATION

The Bureau of Public Work Investigator, Abul Patwary, testified regarding his investigation of the Project and the classification of the Prime Contractor's employees. From the information contained in the complaint (Dept. Ex. 1), the Prime Contractor's certified payrolls (Dept. Ex. 11), and the employees' pay stubs (Dept. Exs. 12 and 13), it is apparent that the Prime Contractor's employees worked on the Project from week-ending May 20, 2000 through week-ending October 28, 2000 (Dept. Exs. 11, 25, 26). The Bureau also relied on these documents, together with conversations with the Union Official who filed the complaint and the Prime Contractor's employees, to determine that ten of the Prime Contractor's employees should be classified as laborers-highway and one employee as an operating engineer-highway. The contract defined the scope of the work to include exterior sidewalk replacement and improvement (T. 110; Dept. Ex. 9)

and the employees performed work that principally included exterior masonry work, installation of sidewalk pavers, renovation of sidewalks, and the installation of curbs located near streets (T. 251-253). Additionally, George Truicko, the Union official who filed the complaint (Dept. Ex.1), testified that he inspected the Project and spoke to employees and observed that the work, which included taking out sidewalks directly in front of stores on Main Street in Huntington and replacing them with brick pavers, is classified as highway laborer work (T. 24-25). The classification of the employee as an operating engineer has not been disputed by the Prime Contractor.

The Bureau relied on the pay stubs provided by Mr. Valenti and Mr. DiBenedetto to determine the hours worked on the Project by these two employees and the wages they received from the Prime Contractor (T. 188, 189, 203). Additionally, the Bureau relied upon the Questionnaire received from Mr. Pineda as a basis for the determination that this employee was paid at the rate of $14.00 per hour in wages and received no supplemental benefits (T. 486-487). Although the hourly rates of pay, supplemental benefits, gross pay and deductions listed in the certified payroll records did not match the corresponding information contained in the pay stubs and the questionnaire received from Valenti, DiBenedetto, and Pineda (T. 180), in the absence of any other payroll information from the Prime Contractor or its employees, the Bureau elected to rely upon the Prime Contractor's certified payroll records (Dept. Ex. 11) to determine the hours worked and wages paid to the Prime Contractor's employees other than Valenti, DiBenedetto, and Pineda (T. 224, 231). The Bureau did not give the Prime Contractor any credit for supplemental benefits paid to the employees as represented in the certified payroll records because there was no evidence of any supplemental benefits paid to the employees contained in the pay stubs and the questionnaire (T. 197, 203, 204, 487). The Prime Contractor never provided the Bureau with any records or other evidence that would corroborate the certified payrolls or otherwise provide reasonable support for a finding that supplemental benefits were paid to the employees (T. 187). The Bureau compared the rates contained in the PRS (Dept. Exs. 9 and 10) for the applicable laborer-highway classification to the rates the employees received as indicated in the pay stubs and the employee questionnaire and the rates reported in the Prime Contractor's certified

payroll records for each of the Prime Contractor's eleven employees to arrive at a calculation of the underpayments (T. 217, 221, 224). The Bureau concluded that the foregoing constitutes sufficient credible evidence to support the determination that the Prime Contractor's employees were employed as laborers-highway and operating engineer-highway during the duration of the subject Project and the methodology it employed to calculate the hours worked by the employees, the prevailing rates of pay, and a finding of underpayments.

**Falsification of Payroll Records**

The Prime Contractor produced certified payroll records (Dept. Ex. 11) that indicate the employees were paid at rates in excess of the PRS for the job classifications assigned to each employee (T. 225). However, the employees' pay stubs and the questionnaire disclose that the Prime Contractor's employees were paid at various rates that were substantially less than the rates contained in the PRS. The Bureau concluded that the Prime Contractor failed to accurately report the payment of prevailing wages to its employees in the certified payrolls, underpaid its employees, and falsified the certified payrolls.

**Prior History**

The Department's Investigator, Mr. Patwary, testified that the Prime Contractor was an experienced public work contractor (T.118) who was aware that its employees were working on a project that required the payment of wages and supplemental benefits consistent with the PRS, which was attached to the contract. Additionally, Frank DeMartino also testified to the extensive experience the Prime Contractor had with public work projects before this project (T. 519), and the contract documents (DOL Ex. 9) contain a list of the public work projects completed by the Prime Contractor before work on the subject Project was commenced.

Mr. Patwary further testified that the Respondents, D & D Mason Contractors, Inc. and Thomas DeMartino are experienced public work contractors who understood

that prevailing wages had to be paid on the project (T. 118). The Department has produced a document from the Criminal Court of the City of New York, Kings County, tending to indicate that the Prime Contractor was charged with a violation of Penal Law Section 175.30, Offering a False Instrument for Filing in the Second Degree, in connection with the filing of Certified Payroll records relating to certain public work projects with the New York City Department of Parks and Recreation during the period of October 1, 1996 through May 22, 2000 (Dept. Ex. 19). While the Department did not offer any evidence of the disposition of this violation, the Bureau concluded that these violations of the prevailing wage statute as indicated in Department's Exhibit 19 are sufficient to support a finding of a history of prior violations of a prevailing wage law by the Prime Contractor.

Finally, although the Prime Contractor was present throughout the hearing and had the opportunity to produce evidence to support its argument that there was no underpayment, Thomas DeMartino failed to testify on behalf of the Prime Contractor and the Prime Contractor produced no evidence that is contrary to the evidence submitted by the Department on these or any other issues raised by the Bureau in this proceeding.

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## CONCLUSIONS OF LAW

### Jurisdiction of Article 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. NY Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v. McGowan*, 260 A.D.2d 870, 871-872 (3rd 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 Town of Huntington, a public entity, is a party to the instant public work contract, Article 8 of the Labor Law applies. New York Labor Law § 220 (2); and *see, Matter of Erie County Industrial Development Agency v. Roberts,* 94 A.D.2d 532 (4th Dept. 1983), *affd.*, 63 N.Y.2d 810 (1984).

**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 similarity of 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  Matter of Lantry v. State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v. New York State Department of Labor*, 34 A.D.3d 905, 906 (3rd Dept. 2006), *lv denied*, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v. Angello*, 31 A.D.3d 925, 927 (3rd 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 Department of Labor, supra*, *quoting Matter of General Electric, Co. v. New York State Department of Labor,* 154 A.D.2d 117 (3rd Dept. 1990), *affd.,* 76 N.Y.2d 946 (1990), *quoting Matter of Kelly v. Beame,* 15 N.Y. 103, 109 (1965). The pivotal question then is the nature of the work performed, not the skill level of the employees performing the work. *Matter of Nash v. New York State Dept of Labor*, 34 A.D.3d 905, 906 (3rd Dept. 2006). 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 (3rd Dept. 1992), *lv denied*, 80 N.Y.2d 752 (1992).

This case involves a construction contract in Suffolk County, for which the Bureau classified the replacement of existing concrete sidewalks with brick pavers and

related work as the work of a labor-highway and operating engineer-highway. In order to successfully challenge the Department's classification determination, the Prime Contractor must demonstrate by competent proof that the Department's determination was arbitrary, capricious or without legal basis. The Prime Contractor failed to meet this burden. In its own certified payroll records, the prime Contractor classified its employees as laborers. Additionally, the Prime Contractor failed to offer any evidence at the hearing to indicate that the Department's classifications were in error. The Prime Contractor merely uses the PRS to argue that the work involved in the Project could have been classified as mason building unit paving work (T. 368-370). I find that this argument, without evidence of jurisdictional agreements or determinations or past practice, is not competent proof that the Department's classifications were arbitrary and capricious. *See, General Electric Co. v. New York State Department of Labor, et al.*, 154 A.D.2d 117 (3rd Dept. 1990). Furthermore, it is established that the prevailing rate schedules are not meant to be determinative on the issue of disputed classifications. *See, Matter of Twin State CCS Corp. v. Roberts*, 72 N.Y.2d 897 [1988]. The purpose of the prevailing rate schedule is to set wages for the different work classifications in different localities. *See, Labor Law* §220 [3], [5] [a]. I find that the Department's determination that the Prime Contractor's employees were employed as laborers-highway and an operating engineer-highway on the subject Project should be sustained as it reflects the nature of the work actually performed and is supported by sufficient credible evidence in the record.

**Timeliness**

The Respondents argue that the Bureau received a complaint which formed the basis of this investigation on July 27, 2000 but the investigation was not started until on or about November 5, 2002, and the hearing was not commenced until October 30, 2007. (*Respondent's Proposed Findings of Fact and Conclusions of Law, pgs. 6-7*) Based upon the foregoing, the Respondents argue that these proceedings by the Department of Labor are barred by the applicable statute of limitations contained in Labor Law § 220-b.

The Bureau investigation that gave rise to the within proceeding was commenced by the receipt of a complaint from George S. Truicko on July 27, 2000. (DOL Ex. 1). Mr.

Truicko alleged that the Prime Contractor's employees did not receive the prevailing wage rate for their employment on the Project as laborers. The basis for this conclusion was his inspection of the Project and interviews with the Prime Contractor's employees. Based upon this complaint, the Bureau commenced an investigation and on November 5, 2002, the Bureau forwarded the first PW-18, Records Request Notice, to the Prime Contractor and the Department of Jurisdiction (DOL Ex. 2, T. 31, 35-37).

Labor Law §220-b provides for both a two-year limitation period and a three-year limitation period. However, pursuant to this statute, these limitation periods run from the time the work is performed until a complaint is filed. *See, Pav-Lak Contracting, Inc. v. McGowan*, 184 Misc.2d 386 (Sup. Ct. Nassau Cty., 2000).

In this matter, the Bureau initiated the investigation based upon a written complaint from a union representative that was received on July 27, 2000. The Bureau's investigation and audit involved work performed on this public improvement project during the period of week ending May 20, 2000 through week ending October 28, 2000 (Dept. Ex. 26). Since the complaint was filed with the Department while the Project was in progress, it was clearly filed within the limitation periods set forth in Labor Law §220-b. Based upon the foregoing, these proceedings are not time-barred by the limitation periods contained in Labor Law §200-b. The Respondents' reliance on the Labor Law §220(7) requirement that the investigation must be completed and an order, determination or other disposition made within six months from the date of filing of such complaint is unpersuasive. This six-month requirement is directory, not mandatory. *Cayuga-Onondaga Counties Board of Co-Operative Educational Services v. Sweeney*, 224 A.D.2d 989 (4th Dept. 1996); *leave to appeal granted*, 88 N.Y.2d 807; *affirmed*, 89 N.Y.2d 395; *reargument denied*, 89 N.Y.2d 1031.

Finally, the Respondents argue that the complaint was defective as it was not certified as required by Labor Law §220(7). A review of the complaint indicates that, although Mr. Truicko used a pre-printed claim form supplied by the New York State Building and Construction Trades Council, it is not certified as required by Labor Law § 220(7). However, Labor Law § 220(7) also provides that the fiscal officer may on his own initiative cause a compliance investigation to be made to determine whether the

contractor has paid the prevailing rate of wages and prevailing practices for supplements. Pursuant to the statutory scheme, a verified complaint is not the sole method of commencing an investigation under Labor Law §220(7). It is clear that a verified complaint is not a condition precedent to the commencement of an investigation in a public work case under Labor Law §220(7) as an investigation commenced by the fiscal officer without a verified complaint has the same statutory validity as an investigation commenced by the filing of a verified complaint. The remedial nature of the enforcement of the prevailing wage statutes and its public purpose of protecting workmen could not require any other result (*See, Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818 (3rd Dept. 1989). Pursuant to the foregoing, I find that the lack of a verification on the labor representative's complaint cannot be deemed to render the Department's investigation invalid.

**Underpayment Methodology**

"[W]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." *Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 821 (3rd Dept. 1989) (citation omitted). The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id.* at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. *Matter of TPK Constr. Co. v. Dillon*, 266 A.D.2d 82 (1st Dept. 1999); *Matter of Alphonse Hotel Corp. v. Sweeney*, 251 A.D.2d 169, 169-170 (1st Dept. 1998).

In this case, the lack of accurate and complete certified payrolls justified the Bureau's reliance on the complaint, pay stubs, and the employee questionnaire to determine that all of the Prime Contractor's employees were underpaid during the duration of the Project. Considering the inaccurate certified payrolls provided by the

Prime Contractor, the Bureau also relied on the information contained in the complaint, pay stubs, and the employee questionnaire to determine the rates of pay of the Prime Contractor's employees and to determine that the Prime Contractor's employees were not paid supplemental benefits. In the absence of additional paystubs, interviews, or other records, the Department did use the rates of pay in the certified payroll records for the limited purpose of comparing the rates with the required prevailing rates of pay. Thus, the Department's comparison of these rates in the certified payroll records to the prevailing rates of pay contained in the applicable PRS provided the basis for the determination of an underpayment. The Bureau's method of arriving at an underpayment determination was reasonable and necessitated by the lack of accurate records. The Department's calculation that the Prime Contractor underpaid its employees in the total amount of $40,820.84, in wages and supplements (See, Dept. Ex. 26), should, therefore, be sustained.

The Respondents argue that it is incongruous that the Department would rely on the certified payroll records to determine the hourly rates of pay for the employees for whom it did not have pay stubs or a questionnaire, but to ignore these same records as a basis to determine that the employees also received supplemental benefits. The Respondents argue that the Department's calculation of the underpayment is arbitrary and capricious because it is supported by hearsay evidence in the nature of pay stubs and the employee questionnaire. The Respondents contend that the certified payroll records should be accepted as accurate statements of all information contained therein merely by virtue of the certification. I find these arguments not compelling.

It is well-established that hearsay evidence is acceptable in administrative proceedings. (*See, Matter of Roewer v. Melton*, 62 A.D.2d 1120 (3rd Dept. 1978) Additionally, it is established that, 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 evidence available. *Matter of Mid-Hudson Pam Corp. v. Hartnett*, 156 A.d.2d 818 (3rd Dept. 1989). The methodologies employed by the Commissioner that may be imperfect are permissible when necessitated by the presence of inaccurate records. *Matter of TPK Construction Co. v. Dillon*, 266 A.D.2d 82 (1st Dept. 1999). In cases where the employer's records are inaccurate, the burden shifts to

the employer to negate the reasonableness of the Commissioner's calculations. *Matter of Mid-Hudson Pam Corp. v. Hartnett, id.*

The Respondents did not offer any testimony or evidence in the nature of payroll registers, pay stubs, or pay checks to show that the information contained in the certified payroll records was accurate and that the information contained in the pay stubs and employee questionnaire was inaccurate. The Department demonstrated that there were inconsistencies between the Prime Contractor's certified payroll records and the pay stubs, employee questionnaire, and the complaint. The Department reasonably relied on all of the information it gathered in the course of its investigation to arrive at the conclusion that the Prime Contractor underpaid its employees. The Respondents failed to provide any proof of what their employees were actually paid. The Respondents cannot shift the burden to the Department of Labor with arguments, conjecture or conclusory allegations. Additionally, the Prime Contractor and Thomas DeMartino failed to testify or offer any evidence in this proceeding. It is established that, when a party declines to testify, the trier of fact is permitted to draw the strongest inference against the party that the evidence permits. *Matter of Commissioner of Social Services v. Phillip DeG*, 59 N.Y.2d 137 (1983); *Paruch v. Paruch*, 140 A.D.2d 418 (2nd Dept. 1988). I find that the evidence supports an inference that any evidence or testimony that could have been offered by the Prime Contractor and Thomas DeMartino would have been unfavorable to them. I further find that there is sufficient credible evidence in the record to support the Department's finding of an underpayment.

**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. *See, CNP Mechanical, Inc. v. Angello,* 31 A.D.3d 925 (3rd Dept. 2006), *lv denied*, 8 N.Y.3d 802 (2007). Consequently, based upon this statutory mandate, the Subcontractor 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 two final determinations of a "willful" failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

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 (3rd 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,

[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 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 willfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the 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.

1013 (4th Dept. 1992). *See also, Matter of Otis Eastern Services, Inc. v. Hudacs,* 185 A.D.2d 483, 485 (3rd Dept. 1992).

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*, 205 A.D.2d 894, 896 (3rd Dept. 1994). 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 record makes it clear that D & D Mason Contractors, Inc. and Thomas DeMartino were experienced public work contractors and they knew that the Project was a public work project. The contract documents and specifications between the Department of Jurisdiction and the Prime Contractor (Dept. Ex. 9) for this project identified the scope of the work, and contained the applicable Prevailing Rate Schedule. The Department argues that, as experienced public work contractors, the Respondents knew or should have known that their employees should have been classified as laborers-highway and operating engineer-highway and paid the prevailing wage rates that correspond with those classifications. The Department produced evidence to indicate the extent of the Respondent's prior public work experience (Dept. Ex. 9, T. 117-118), including evidence tending to support a finding of a history of prior violations of a prevailing wage law by the Respondents (Dept. Ex. 19). Based upon the foregoing, the record supports a finding that D & D Mason Contractors, Inc. and Thomas DeMartino knew their employees were not being paid the prevailing wages reflected in the certified payrolls and that this underpayment of wages constitutes a willful violation of Labor Law §220.

**Falsification of Payroll Records**

Labor Law § 220-b (3) (b) (1) further provides that if a contractor is determined to have willfully failed to pay the prevailing rates of pay, and that willful failure involves a falsification of payroll records, the contractor shall be ineligible to bid on, or be awarded any public work contract for a period of five (5) years from the first final determination.

Falsification requires the making of a false document. In this context, falsification of payroll records would require the submission of payroll records that would seek to simulate compliance with requirements of Section 220 or conceal violations. There must be a cover up of violations – an effort at deception. *Matter of Chesterfield Associates, Inc.*, PRC 93-0766A, 93-7632A, 94-0005, 93-8189, 95-2663 (July 29, 2002). The mere evidence of an underpayment shown on a truthfully reported payroll record does not create a falsified document, and no falsification should be determined on that ground. *Id.*

The Department contends that the Prime Contractor falsified its payroll records because it reported that wages were paid at the prevailing rates for the corresponding labor classification when, in reality, it paid wages to its employees at a substantially reduced rate. In support of this argument, the Department has produced employee pay stubs, an employee questionnaire, and credible testimony indicating the payment of wages at a rate that is not consistent with the Prime Contractor's certified payroll records. The Prime Contractor has offered no evidence or testimony that would tend to explain this inconsistency. Accordingly, the Bureau's finding as to falsification is supported by sufficient evidence in the record and should be sustained.

**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 Prime Contractor seriously underpaid its employees, knowingly falsified payroll records, and made no effort to resolve the matter or make restitution after being notified of the Department's investigative findings. Additionally, the Respondents failed to produce any mitigating evidence or testimony at the hearing. Based upon the facts of this case, a penalty of 25% of the total amount found due is warranted.

**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 officer of the contractor or subcontractor who knowingly participated in the willful violation of Article 8 of the Labor Law shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

In the present case, Thomas DeMartino was the principal owner and the President and Chairman/Chief Executive Officer of D & D Mason Contracting, Inc. (T. 510, DOL Ex. 9, 11, and 20). Additionally, the record contains evidence that D & D Mason Contracting, Inc. had substantial public work experience (DOL Ex. 9), and Thomas DeMartino signed the contract and Certified Payroll records (DOL Ex. 11) in his capacity as President of D & D Mason Contracting, Inc. I find that Thomas DeMartino's extensive public work experience should have put him on notice that this Project was a public work project requiring the payment of prevailing wage rates. Based upon the foregoing, I find that the record supports a finding that Thomas DeMartino knowingly participated in the willful violation of Article 8 of the Labor Law and that, accordingly, he shall be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

**Substantially Owned-Affiliated Entities or Successor Entity**

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one were some indicia of a controlling ownership relationship exists or as "…an entity which exhibits any other indicia of control over the …subcontractor…, regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,… power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business

decisions of the relevant entity." Additionally, Labor Law § 220 (5) (k) defines a successor as "an entity engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor."

The Department alleges that DeMartino Property Management, Inc. is a substantially owned-affiliated entity or a successor entity of D & D Mason Contracting, Inc. The record indicates that Frank DeMartino is the sole officer and shareholder of DeMartino Property Management, Inc. (T. 503-504). Although D & D Mason Contracting, Inc. and DeMartino Property Management, Inc. are both engaged in construction activities, the record indicates that the majority of D & D Mason Contracting, Inc.'s activity was public work and the majority of DeMartino Property Management, Inc.'s activity is non-public work commercial and residential construction work. (T. 519-521). These corporations did not share employees or equipment (T. 507, 521), and DeMartino Property Management, Inc. did not purchase significant assets from D & D Mason Contracting, Inc. (T. 544). Frank DeMartino was never an officer or shareholder of D & D Mason Contracting, Inc. (T. 510-511) although he was employed as the Project Manager for D & D Mason Contracting, Inc. on this Project (T. 511) and he was listed as the contact person for D & D Mason Contracting, Inc. on several of its prior public work projects (T. 534). Finally, Frank DeMartino testified that he was present at the hearing on behalf of Thomas DeMartino and D & D Mason Contracting, Inc. by virtue of the "purchase and assignment" of a judgment D & D Mason Contracting, Inc. secured against the Town of Huntington as a result of this Project (T. 544-546). However, the judgment was not produced by either party to this proceeding and is, therefore, not part of the record (T. 546).

I find that the record does not support a finding that DeMartino Property Management, Inc. is a substantially owned-affiliated entity of D & D Mason Contracting, Inc. The record does not contain any evidence that Frank DeMartino had any responsibility or authority over issues relating to D & D Mason Contracting, Inc., such as employment decisions, power or responsibility over contracts, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity, except as an employee of that entity. Furthermore, I find that DeMartino Property Management, Inc. is not a successor entity of D & D Mason

Contracting, Inc. The record contains insufficient evidence to support a finding of a substantial continuity of operation between DeMartino Property Management, Inc. and D & D Mason Contracting, Inc.

## 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 D & D Mason Contracting, Inc. underpaid wages and supplements due the identified employees in the amount of $40,820.84; and

DETERMINE that D & D Mason Contracting, Inc. is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of D & D Mason Contracting, Inc. to pay the prevailing wage or supplement rate was a "willful" violation of Article 8 of the Labor Law; and

DETERMINE that D & D Mason Contracting, Inc.'s violation of Article 8 involved the falsification of payroll records; and

DETERMINE that Thomas DeMartino is an officer of D & D Mason Contracting, Inc; and

DETERMINE that Thomas DeMartino knowingly participated in the violation of Article 8 of the Labor Law; and

DETERMINE that D & D Mason Contracting, Inc. be assessed a civil penalty in the amount of 25% of the underpayment and interest due; and

DETERMINE that DeMartino Property Management, Inc. is not a substantially owned-affiliated entity of D & D Mason Contracting, Inc; and

DETERMINE that DeMartino Property Management, Inc. is not a successor entity of D & D Mason Contracting, Inc; and

ORDER that the within action be dismissed as against DeMartino Property Management, Inc, with prejudice; and

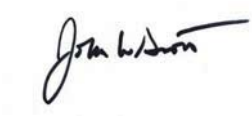
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

ORDER that upon the Bureau's notification, D & D Mason Contracting, Inc. shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 400 Oak Street, Suite 101, Garden City, NY 11530-6551; 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 9, 2009
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer