STATE OF NEW YORK: DEPARTMENT OF LABOR
----------X

In the Matter of

EXECUTIVE CLEANING SERVICES CORP.
and C.L. SAIZ, as an officer and/or shareholder
of Executive Cleaning Services Corp.

Prime Contractor,

for a determination pursuant to Article 9 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the building service employees employed on a public work project for the Ossining Public Library, County of Westchester
----------X

REPORT & RECOMMENDATION

PRC No.: 2016900007
Case ID No: PW082015009403

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

A hearing was held on December 20, 2017, in Albany, New York, and via videoconference with White Plains, New York, to inquire into and to report to the Commissioner of Labor findings of fact, conclusions of law and recommendations regarding the issues raised by an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department"). The Bureau investigated whether Executive Cleaning Services Corp ("Prime") and C. L. Saiz as an officer or shareholder of Prime, complied with the requirements of Labor Law article 9 (§§ 230 *et seq.*) in the performance of building service work at the Ossining Public Library ("OPL") in Westchester County ("the Project").

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz, Erin K. Hayner, of Counsel

Prime appeared with its attorney, Michael D. Diederich, Jr., Esq.

ISSUES

1. Is the Project subject to Labor Law article 9?
2. Did the contractor pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
3. Was any failure to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Is C. L. Saiz one of the five largest shareholders of Prime?
5. Is C. L. Saiz an officer of Prime who knowingly participated in a willful violation of the Labor Law article 9?
6. If an underpayment occurred, in what amount should interest be assessed?
7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

On September 27, 2017, the Department issued a Notice of Hearing, with a scheduled hearing date of December 20, 2017 (HO 1).

On November 3, 2017, Prime's counsel submitted his Notice of Appearance, Answer, Discovery Demands[1] and Motion for Recusal of the Hearing Officer (HO 4, 6).

On December 1, 2017, the Commissioner of Labor issued her denial of Prime's Motion for Recusal (HO 5).

On December 20, 2017, the same day the hearing in this matter took place, Prime submitted A Motion to Dismiss and Memorandum in Support (HO 7, 8).

OSSINING PUBLIC LIBRARY

OPL is a school district public library, chartered in 1893 as "The Sing Sing Public Library." (HO Ex. 8, DOL Ex. 38)[2]

[1] Pursuant to 12 NYCRR §701.6, discovery demands are limited to those documents which the Department has in its possession at the time of the request and intends to introduce during the course of the proceeding. Requests for discovery must be made to the individual representing the Department. Prime did not allege a failure on the part of the Department to respond to a discovery request during the hearing.

[2] In its Notice of Motion to Dismiss, Prime asserted that "the Library is an Education Corporation incorporated under § 216 of the Education Law..." (HO Ex. 7) In Prime's Memorandum of Law in Support of Motion to Dismiss, Prime stated that OPL is "an education corporation formed under the N.Y.S. Education Law. *See,* Education Law § 216-a. (HO Ex. 8, p.3) In support of that same Memorandum of Law, Prime submits as its own Exhibit B the by-laws of the OPL, which state in their Preamble that the OPL was "created under a charter granted under Section 253

The trustees of the OPL are elected by residents of the school district. (HO Ex. 8, DOL Ex. 38)

Approximately 98% of the OPL's budged is raised through local tax support. (DOL Ex. 38)

GENERAL FACTS

C. L. Saiz started Prime in or around 1990 and has operated it since then; he is the sole officer and shareholder. (DOL Ex. 36; Tr. p. 9, 207)

The Prevailing Wage Rate Schedule issued by the Department for Dutchess County for the period July 1, 2014 through June 30, 2015 ("PWRS 1"), established the hourly rate of wages and supplements to be paid to a cleaner as $13.65 per hour for wages and $.63 per hours for supplements for part-time workers. (DOL Ex. 4; Tr. p. 102, 105, 106)

The Prevailing Wage Rate Schedule issued by the Department for Dutchess County for the period July 1, 2015 through June 30, 2016 ("PWRS 2"), established the hourly rate of wages and supplements to be paid to a cleaner as $13.85 per hour for wages and $.63 per hour for supplements for part-time workers. (DOL Ex. 4; Tr. p. 102, 105, 106)

Prime entered into an oral contract with OPL for cleaning services in December of 2014. The services continued until October, 2015. (Tr. pp. 209 – 211, 225, 226)

When Prime entered into an oral agreement for cleaning services with OPL after speaking with an OPL representative, Prime did not receive notice from OPL of the requirement to pay prevailing wages or receive a prevailing wage rate schedule at the time it entered into the contract with OPL. (Tr. pp. 209, 213, 215)

On or about October 6, 2015, the Director of OPL sent a letter to Prime in which it referenced a complaint concerning the payment of wages to Prime's workers and copied the Department. (DOL Ex. 1)

The Bureau received a copy of the letter from OPL and initiated an investigation. (Tr. pp. 87 – 89, 91)

On or about December 21, 2015, the Bureau issued a Payroll Records Request Notice to Prime. (DOL Ex 2; Tr. pp. 94, 95)

---

of the New York State Education Law. (HO Ex. 8) I find that § 253.2 is the relevant Education Law section for this discussion.

On or about September 13, 2016, the Bureau received an e-mail from OPL containing documents received by OPL from Prime in response to OPL's request for certified payrolls. (DOL Ex. 6; Tr. p. 117)

On or about January 5, 2016, OPL entered information into the Department database, notifying the Department of a public work project and established Prevailing Rate Case Number 2016900007 for the Project. (DOL Ex. 3; Tr. pp. 98 - 100)

The Bureau prepared an audit of the Project, using payroll journals, bank records, wage summaries, and employee earnings records to determine the wages paid to, and hours worked by, Prime's employees on the Project. (DOL Ex. 8 – 17, 20, 21, 25, 29, 30; Tr. p. 140 – 145)

In creating the audit, if there was a conflict between Prime's records and those of an employee, the investigator gave greater weight to Prime's records. (Tr. p. 147)

The Bureau calculated an underpayment by Prime to six workers of $15,136.85 in wages and $1,534.72 in supplements, resulting in a total underpayment of $16,671.57.

The Bureau never received certified payrolls from Prime during the course of its investigation. (Tr. p. 155)

The Department cross-withheld funds due to Prime. (Tr. pp. 148, 149)

Prime had no prior experience with public work contracts. (Tr. p. 215)

Prime had no history of violations of Article 9 prior to the Project. (Tr. p. 194)

Prime was a small business relative to others engaged in similar work. (Tr. p. 193)

CONCLUSIONS OF LAW

MOTION TO DISMISS

Prior to commencement of this proceeding but subsequent to issuance of the Notice of Hearing, Prime submitted a Motion to Dismiss and Memorandum of Law in Support (HO Ex. 8). Prime set forth five points in support of its motion.

First, Prime alleges that the Department lacks jurisdiction under Labor Law Article 9, § 230.3 because OPL is not a covered entity. As set forth in "Jurisdiction of Article 9," *infra*, I find this argument unpersuasive.

Prime then alleges that the Department failed to set forth its jurisdiction, pursuant to the State Administrative Procedure Act § 301.2 and Department regulations at 12 NYCRR § 701.4.2[3]. The Notice of Hearing stated: "pursuant to Section 230 et seq. of Article 9 of the Labor Law... a hearing will be held... to determine whether EXECUTIVE CLEANING SERVICES CORP. (hereafter known as "EXECUTIVE"), complied with the requirements of Article 9 of the Labor Law to pay or provide the prevailing rates of wages and supplements to building service employees employed in the performance of a public building service contract with THE OSSINING PUBLIC LIBRARY ("OSSINING") performing cleaning services at the library located in Westchester County, State of New York." (HO Ex. 1, p.1) I find the language contained within the Notice sufficient to notify Prime of the Department's jurisdiction in this matter.

Next, prime asserts that the Department failed to establish that there was an employee complainant and that such failure renders the Department's investigation invalid. However, the language of the statute is clear: "Whenever the fiscal officer has reason to believe that a service employee has been paid less than the wages stipulated in the contract, or if such contract has no wage schedule attached thereto and the fiscal officer has reason to believe that a service employee has been paid less than the wages prevailing for his craft, trade or occupation, the fiscal officer *may*, and upon receipt of a written complaint from an employee employed thereon, shall conduct a special investigation to determine the facts relating thereto." Labor Law § 235.1. Clearly, the Commissioner has the discretion to initiate an investigation without the filing of a complaint.[4]

Prime also alleges that OPL's failure to notify Prime that Article 9 applied to Prime deprived Prime of its "basic right to be informed of the status of the public employer." Prime cites no relevant statutes or case law to support this assertion. In a 2013 decision, the Third Department found, in an Article 9 case where prevailing wage rate schedules had not been attached to the contracts, "To the extent that petitioners claim that they were entitled to consider the work exempt from the application of the prevailing wage requirements because no wage schedule was attached to the 2000 or 2004 contracts, we note that "the failure to annex the [prevailing rate schedule] to the work specifications [does] not relieve petitioner[s] of [their]

[3] "All parties shall be given... a statement of the legal authority and jurisdiction under which the hearing is to be held..." SAPA § 301.2; "The notice shall include... a statement of the legal authority and jurisdiction pursuant to which the hearing is being held..." 12 NYCRR 701.4.a.2

[4] I also note that the record establishes that a complaint was filed with OPL, which then forwarded the complaint to the Department.

obligation to pay prevailing wages" (citation omitted)" (*Matter of Murphy's Disposal Servs., Inc. v Gardner* 103 A.D.3d 1015, 1017 (2013))

Finally, Prime alleges the prosecution of this matter by the Department was abusive and undertaken in bad faith. I find neither such allegation to be supported by the record. Accordingly, Prime's Motion is dismissed.

JURISDICTION OF ARTICLE 9

New York State Constitution article 1, section 17, mandates the payment of prevailing wages and supplements to workers employed on public works[5]. This constitutional mandate is implemented, in part, through Labor Law article 9. Section 235 of Labor Law article 9 authorizes an investigation and hearing to determine whether prevailing wages were paid to building service employees under a contract for building service work with a public agency. While there has been considerable litigation concerning the definition and application of the term "public work" pursuant to Labor Law Article 8, comparatively little exists concerning Article 9. Given that dearth of judicial review, both parties have found it helpful to refer to court decisions concerning Article 8 when analyzing the extent to which Article 9 applies to the facts at hand.

The threshold question raised by Prime is whether OPL falls within the definition of a public agency as set forth in Labor Law §230.3[6],[7] Prime argues in its Proposed Findings and Conclusions of Law ("Prime Proposed Findings") as well as in its Motion to Dismiss (HO Ex. 8) that, because OPL is an education corporation, it is defined under New York State General Construction Law as something other than a public benefit corporation and must therefore fall outside of the definition found in Labor Law §230.2.[8] (Prime Proposed Findings pp. 11 – 13; HO Ex. 8, p. 3, pp. 1, 2 of attached Respondent's Exhibit "A") In support of its argument, Prime cites decisions by the New York State Court of Appeals (*Matter of NY Charter School v. Smith*

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

[6] Given the critical nature of this point, it is unfortunate that neither party placed in evidence more extensive documentation concerning the creation and structure of OPL.

[7] "Public agency" means the state, any of its political subdivisions, a public benefit corporation, a public authority or commission or special purpose district board appointed pursuant to law, and a board of education. Labor Law §230.2

[8] Classification of corporations. a. A corporation shall be *either*, 1. A public corporation, 2. A corporation formed other than for profit, or 3. A corporation formed for profit. b. A public corporation shall be *either*, 1. A municipal corporation, 2. A district corporation, 3. A public benefit corporation. c. A corporation formed other than for profit shall be either, 1. A religious corporation, 2. An education corporation, 3. A cooperative corporation, 4. A not-for-profit corporation, or 5. Any other corporation formed other than for profit which is not a public corporation... General Construction Law §65 (emphasis added).

15 N.Y.3d 403 (2010); *Matter of M.G.M. Insulation, Inc., et al. v. Gardner* 20 N.Y.3d 469 (2013)), both of which cases deal with Labor Law article 8.

The Department agrees that OPL is an education corporation, but argues in its Proposed Findings of Fact and Conclusions of Law ("Department Proposed Findings") that its status as such does not exempt it from coverage under Article 9, and also relies upon the analysis of the Court in *Matter of NY Charter School*, as well as decisions from the Second and Third Departments.

I agree with Prime that the plain language of the statutes must not be ignored (Prime Proposed Findings, p. 5). I also agree with both party's use of case law beyond that which addresses Article 9 to assist in the analysis of that law's application to the facts of this case.

First, I note that the entities subject to the jurisdiction established in Articles 8 and 9, while similar, are not identical. Article 8 jurisdiction extends to the State, a public benefit corporation, a municipal corporation, or a commission appointed pursuant to law (Labor Law § 220.2). It also includes certain third parties acting in place of one of the identified entities (*Id*). Article 9 establishes coverage for the State or any of its political subdivisions, a public benefit corporation, a public authority or commission or special purpose district board appointed pursuant to law, and a board of education (Labor Law § 230.4)

The Court of Appeals has stated that Labor Law § 220 "must be construed with the liberality needed to carry out its beneficent purposes. (See, e.g., *Matter of Gaston* v. *Taylor*, 274 N. Y. 359, 364; *Austin* v. *City of New York*, 258 N. Y. 113, 117; *Matter of Smith* v. *Joseph*, 275 App. Div. 201, affd. 300 N. Y. 516; *Matter of Cocchiarella* v. *Joseph*, 131 N. Y. S. 2d 247, 253, affd. 286 App. Div. 1076.)" (*Bucci v. Vill. of Port Chester*, 22 N.Y.2d 195, 201 (1968)). I find that Labor Law § 230 can be given no less deference.

That being the case, I cannot agree with Prime that *Matter of NY Charter School* supports its position. In that case, the Court did not find that charter schools were not subject to Article 8 solely because they were education corporations. Instead, the Court found that, relying upon the then extant two-prong test for the application of Article 8, the charter granted to a charter school is an agreement for the school to be licensed and not a contract particular to the "work contemplated" and therefore not a contract for public work. (*Id.* at 525). While noting that § 220 does not expressly apply to education corporations, the Court also noted that although charter schools "possess some characteristics similar to a public entity... [they] are not governed

by appointees of the government," and "are exempt from all other state and local laws, rules, regulations or policies governing public schools" and "[t]hus, the status of charter schools has often been difficult to define..." (*Id*. citations omitted).

In a different matter, the Court of Appeals found that a fire department created pursuant to the Not-for-Profit Corporation Law could not be deemed the "functional equivalent" of a "municipal department" and was therefore not subject to the requirements of Article 8. (*Matter of M.G.M. Insulation, Inc., et al. v. Gardner* 20 N.Y.3d 469, 473 (2013). However, the Department has not made the "functional equivalent" argument here.

Instead, the Department relies in part upon an advisory opinion issued the Department's Counsel's Office on September 21, 2009, and consistent with later similar opinions, in which a Department attorney opined that Education Law § 253.2 established that libraries come in two flavors: "public" or "association," and that public libraries are established by a municipality "which include[s] school libraries..."[9],[10] Department Proposed Findings p. 8, footnote 4). The Department then references case law that finds public libraries to be "public corporations." ("While there is authority for the proposition that a public library is an "education corporation" (citations omitted), this does not mean that it cannot also be a municipal corporation. Public libraries clearly serve public functions at public expense." *Bovich v. East Meadow Pub. Lib*. 16 A.D.3d 11, 13 (2005))

Without question, public libraries in general, and OPL specifically, provide a significant benefit to the general public. OPL was created through the school district; the trustees of OPL are directly elected by the voters of the district; and the OPL receives 98% of its funding through taxes imposed upon the public.

Accordingly, as OPL (a public agency) is a contracting party with Prime requiring the employment of cleaning staff (building service employees), Labor Law article 9 applies

CLASSIFICATION OF WORK AND UNDERPAYMENT

[9] As a public document issued by the Department and available on its website, I take notice of this advisory opinion, the full text of which was not provided by Department counsel in the Department Proposed Findings, and which is located here: https://www.labor.ny.gov/legal/counsel/pdf/02-public%20work/ro-09-0077.pdf

[10] The relevant text in Education Law § 253.2 is: "2. The term "public" library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free public purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public..."

Labor Law § 231 (1) requires that "Every contractor shall pay a service employee under a contract for building service work a wage not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee." Under Labor Law § 230, a contractor is defined as any employer who employs employees to perform building service work under a contract with a public agency; a building service employee is any person performing work in connection with the care or maintenance of an existing building, or in connection with the transportation of office furniture or equipment to or from such building, or in connection with the transportation and delivery of fossil fuel to such building, for a contractor under a contract with a public agency which is in excess of one thousand five hundred dollars and the principal purpose of which is to furnish services through the use of building service employees; wage is defined as a basic hourly cash rate of pay and supplements; and prevailing wage is defined as the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality.

Labor Law § 233 requires that, "in all cases where service work is being performed pursuant to a contract therefor, the contractor shall keep original payrolls or transcripts thereof, subscribed and confirmed by him as true, under penalties of perjury, showing the hours and days worked by each employee, the craft, trade or occupation at which he was employed, and the wages paid." However, "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]).

I find that the classifications used by the Department were appropriate to the work performed. Furthermore, I find that the underpayments calculated by the Department are based upon reasonable and established procedures and are valid.

WILLFULNESS OF VIOLATION

Pursuant to Labor Law § 235 (7), the Commissioner of Labor must make a final determination as to the willfulness of any violation because the law provides, among other things, that when "two final orders have been entered against a contractor … within any consecutive six-year period determining that such contractor … has willfully failed to pay the prevailing wages in accordance with the provisions of this article, … [that contractor] shall be ineligible to submit a bid on or be awarded any public building service work for a period of five years from the date of the second order."

For the purpose of Labor Law article 9, the term 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. (*See, 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)." (*See, 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]).

Given Prime's inexperience, and OPL's failure to provide a written contract and prevailing wage rate schedules, I find the violations non-willful.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 235 (7) further provides 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 contractor's five largest shareholders, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of article 9 of the Labor Law shall likewise be ineligible to bid on, or be awarded any public building service work for the same time period as the corporate entity.

C. L. Saiz was the sole officer and owner of Prime.

INTEREST RATE AND CIVIL PENALTY

Labor Law § 235 (5) (c) provides for an award of interest of not less than 6% per annum and not more than the rate of 16% per annum, as prescribed by section 14-a of the Banking Law, from the date of underpayment to the date of payment. Labor Law § 235 (5) (b) provides for the imposition of a civil penalty in an amount not to exceed 25% of the total amount due. In determining either the rate of interest to be imposed or in assessing the amount of the civil penalty, consideration must 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 of the employer, … and the failure to comply with record keeping and other non-wage requirements." Labor Law § 235 (5) (b), (c). Based upon the relevant factors, I find that an imposition of interest in the amount of 6% and a penalty in the amount of 5% to be appropriate.

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 Prime underpaid wages and supplements due the identified employees in the amount of $16,671.57;

DETERMINE that the failure of Prime to pay the prevailing wage or supplement rate was a non-willful violation of Labor Law article 9;

DETERMINE that C. L. Saiz is an officer and sole shareholder of Prime;

DETERMINE that Prime is responsible for interest on the total underpayment at the rate of 6% per annum from the date of underpayment to the date of payment;

DETERMINE that Prime be assessed a civil penalty in the amount of 5% of the underpayment and interest due;

DETERMINE that Prime is responsible for the underpayment, interest and civil penalty due pursuant to its liability under Labor Law article 9;

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

ORDER that the Office of the State Comptroller remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its

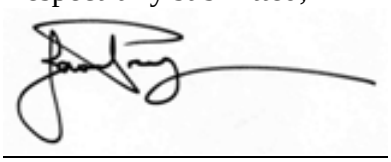
computation of the total amount due, by forwarding the same to the Bureau at: 120 Bloomingdale Road, Room 204, White Plains, NY 10605.

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Prime, 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 identified employee, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: August 20, 2018
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer