STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

FIBER OPTEK INTERCONNECT CORPORATION AND MICHAEL S. PASCAZI, INDIVIDUALLY, ONE OF ITS TOP FIVE SHAREHOLDERS AND ETHAN ALLEN STAFFING CORPORATION, AND FRANCES DOMENICO, INDIVIDUALLY, ONE OF ITS FIVE LARGEST SHAREHOLDERS, AS JOINT EMPLOYERS
Prime Contractor

for a determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to, or provided for, the laborers, workers and mechanics employed on a public work project for the Ramapo Union Free School District / Edgar Gould Academy, Chestnut Ridge, New York.

REPORT & RECOMMENDATION

Prevailing Rate Case
Case No. 98-8040
Rockland County

To: Honorable Colleen Gardner
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on multiple days in 2003 in White Plains, 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.

PRELIMINARY STATEMENT

This matter originally was held before Hearing Officer Michael Haith. Charles Horwitz, a senior attorney for the Department at that time presented the Department's case. After the hearing was conducted, but before the Department presented its Proposed Findings of Fact and Conclusions of Law or the Hearing Officer prepared a Report and Recommendation, both Messrs. Haith and Horwitz both left the employ of the Department. As a consequence, John D. Charles, a senior attorney with the Department,

was assigned to continue the Department's prosecution of the case by preparing and submitting Proposed Findings of Fact and Conclusions of Law based upon the record previously created. Hearing Officer Gary P. Troue then was assigned to prepare a Report and Recommendation to the Commissioner based on that record.

At the time of the assignment, Messrs. Charles and Troue were engaged in a hearing involving Fiber Optek that presented issues similar to those involved in this case and that specifically involved work that Fiber Optek performed for the Ramapo Union Free School District at the Edwin Gould Academy. The Report and Recommendation in this matter was held in abeyance pending completion of the hearing and receipt of Proposed Findings of Fact and Conclusions of Law in that related matter. That hearing has now been completed and proposed findings have been received and considered.

The hearing in the instant matter concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Fiber Optek Interconnect Corporation ("Fiber Optek") and Ethan Allen Staffing Corporation ("Ethan Allen"), an alleged joint employer with Fiber Optek, complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a contract involving the installation of fiber optic cable at the Edwin Gould Academy ("Project") for the Ramapo Union Free School District ("School District").

APPEARANCES

The Bureau is represented by Department Counsel, Maria Colavito John D. Charles, Senior Attorney, of Counsel. Fiber Optek initially appeared at the hearing with its attorneys, Corbally, Gartland and Rappleyea, LLP (Vincent L. DeBiase, Esq., of counsel). During most of the hearing, however, Mr. DeBiase did not appear and Fiber Optek was represented by Respondent Pascazi. Ethan Allen appeared at the hearing with its attorneys, Brown, Raysman, Millstein, Felder & Steiner, LLP (Richard M. Reice, Esq., of counsel). Respondent Pascazi submitted Respondents' Proposed Findings of Fact and Conclusions of Law.

During the course of the hearing, Ethan Allen entered into a stipulation on the record with Department whereby it resolved its liability in this matter and ceased its participation in the hearing (T. 581-590).

ISSUES

1. Did Fiber Optek 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 to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Is Michael Pascazi one of the five largest shareholders of Fiber Optek?
4. Is Michael Pascazi an officer of Fiber Optek who knowingly participated in a willful violation of Article 8 of the Labor Law?
5. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

On or about January 5, 1999, Fiber Optek entered into a contract with the School District for fiber optic cable installation work at various buildings on its campus, including the Edwin Gould Academy (Dept. Exs.1 & 2; T.32, 33,173, 174). [1] The bid documents contained a prevailing rate schedule ("PRS") and specifically notified bidders that "Prevailing Wage Rates" applied to the Project (Dept Ex. 1, Notice to Bidders, p.3). The PRS detailed the amounts of wages and supplements that were to be paid to, or provided for, all persons employed in the performance of the contract (T. 34, 35, 599, 604-606). Pursuant to contract and Section 220(3) of the Labor Law, workers employed on the Project were to be paid not less than the prevailing rates of wages and supplements for the work they performed (Dept. Exs. 1, 2).

Based upon a complaint the Bureau received from worker James Downs, alleging that Ethan Allen failed to pay prevailing rates on the Project, the Bureau commenced an investigation (T. 600, 611). In the course of its investigation, the Bureau interviewed four

[1] ("T" refers to the hearing transcript for this case in which the pages were numbered sequentially. Excepted from that convention is the transcript for December 15, 2003 hearing date, for which pagination was started anew; accordingly, that transcript is referred to as "T 12/15/03").

of the five workers it ultimately determined were underpaid on the Project (T. 600). In response to its records request, the Bureau obtained time sheets and time cards and some payroll records from Fiber Optek, a weekly work log in a format similar to a certified payroll from Ethan Allen, and a few of the workers' hand-written time sheets (T. 608-609, 619).

The Bureau determined that work on the Project involved the installation of fiber optic cable for teledata work (T. 600). It also determined that the proper classification for that work was the electrician classification (T. 600-604; Dept. Ex. 10). That classification was supported at the hearing by testimony adduced from a representative of the International Brotherhood of Electrical Workers ("IBEW"), Local Union 363, which has geographical jurisdiction over Rockland County (T. 125). Local 363 regards the installation of data, cable, fiber optic cable and telephone cable within an owners' property lines to be within the electrician scope of work (T. 125-127, 139, 163; Dept. Ex. 10). [2] A jurisdictional dispute that existed between the IBEW and the Communications' Workers' union regarding this type of work had been resolved in the IBEW's favor before work was performed on the Project (*Id.*). The prevailing hourly wage for an electrician for the period week ending March 19, 2000 through the week ending July 9, 2000, was $29.00, plus supplements totaling $10.40 per hour plus, four percent of wages per hour (Dept. Exs. 12 and 13).

The Bureau determined that during the period week ending March 19, 2000 through the week ending July 9, 2000, Fiber Optek employed five individuals as electricians in the performance of the contract (T. 599, 600). Fiber Optek paid these workers less than the prevailing hourly rates of wages and supplements required to be paid to an electrician pursuant to the relevant PRS, the Contract and Article 8 of the Labor Law (Dept. Exs. 12 &13; T. 620, 623).

As a result of this determination, the Bureau prepared an audit of underpayments on the Project (Dept. Ex. 55). To prepare its audit, the Bureau relied on the evidence it

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[2] This type of work performed outside of an owner's property lines, such as in streets and highways, is the work of an outside lineman covered by IBEW local 1249 in areas north and west of New York City, including Rockland County. IBEW local 1249 makes no claim to such work within owners' property lines (T. 1024-1029, 1032-1033, 1070-1071).

could obtain from Fiber Optek, Ethan Allen and the workers, including payroll time records and time cards; the workers' complaints, workers' hand-written time logs, pay stubs, responses to questionnaires and interviews; and Fiber Optek's computer generated time sheets (T. 618, 624-626, 628, 645-658, 660-673, 679-680; Dept Exs 26-34). During the course of the hearing, the Department and Respondent Pascazi jointly reviewed the available records and stipulated to the correct computation of hours for each of the involved employees (T. 909-911, 915, 1094; Dept Ex. 39). The Bureau's audit compared the rate that should have been paid for the hours worked according to the relevant PRS against what was actually paid; the difference, which varied by worker and amounted to approximately $10.00 an hour, with some bonuses for which Fiber Optek was given credit (T. 620, 699; Dept Exs 27A, 55). Based on this methodology, the Bureau determined, in a revised audit submitted and received post-hearing, that Fiber Optek underpaid wages and supplements to the workers in a total amount of $18,335.03 (Dept. Ex. 55 & 56).

The Bureau issued a Notice of Labor Law Inspection Findings, dated May 12, 2003, to Fiber Optek and to Ethan Allen, with copies to the District containing the violations found (Dept. Ex. 36; T. 692-693). No money could be withheld on the contract pursuant to Labor Law§ 220-3(b) (2) (b) because the School District had already paid Fiber Optek all monies owing on the contract (Dept. Ex. 37; T. 630-631, 693).

The Edwin Gould Academy is a residential facility for "at-risk" youth located on the campus of the School District, which is a public school district (T. 37, 81); the real property on which the campus is situated is owned by the Edwin Gould Foundation (T. 97). The School District pays the Foundation rent (*Id.*). The Edwin Gould Academy has been a part of the School District since approximately 1990 (T. 43). The School District pays the administrators' and teachers' salaries – no private funds are involved (T. 46-47, 78-79); the City of New York pays the students' tuition at the rate set by the New York State Education Department (T. 47, 109-110). The Edwin Gould Academy receives some private support for the residential care it provides in the form of donations and rent (T. 50). The New York State Education Department has certified that the Edwin Gould Academy-Ramapo Union Free School District, located in the Town of Ramapo, is a duly constituted public school district in New York State, established as a Union Free School

District in accordance with the Education Law and, as such, is deemed a municipal corporation in accordance with the General Construction Law § 662 (2) and Local Finance Law § 162 (Dept. Ex. 5). The Edwin Gould Academy is a "Special Act Public School District" (T. 61). Chapter 563 of the 1980 Institutional Schools Act mandated that Special Act Public School Districts be funded through a rate setting system whereby the State Education Department, in conjunction with the Division of Budget, annually sets tuition rates (Dept. Ex. 6). These districts receive most of their funding through student tuition payments typically paid by public entities (*Id.*). They provide a year-round residential program for at-risk youth in which to live and learn (*Id.*).

Ethan Allen was engaged in the business of providing workers to, and maintaining payrolls for, customers, some of whom had engaged in public work and had provided Ethan Allen with prevailing rate schedules in those circumstances (T. 235-236, 494). It was not Ethan Allen's practice to ask specifically whether workers being referred to a customer were to be engaged in public work (T. 236). Ethan Allen provided workers to Fiber Optek as part of its workforce on the Project (T. 211, 215, 267-280). Fiber Optek would sign time cards verifying to Ethan Allen what it should pay the workers Ethan Allen referred to Fiber Optec and Ethan Allen then would receive a mark-up on the payroll for its services (T. 260, 263, 269, 458). The rate of pay for each worker was established by Fiber Optek (T. 268, 270). Ethan Allen was unaware of the location where workers performed their work assignments (T. 267). Of the five workers the Department determined to have been underpaid on the project, two were recruited by Ethan Allen itself and three were referred by Fiber Optek to Ethan Allen to be placed on the payroll (T. 271-272). Ethan Allen has the power to fire employees that are referred to a customer and had done so (T. 274-275). Fiber Optek likewise had that authority to fire employees Ethan Allen referred to it and had done so (T. 275-278, 431, 575).

Michael Pascazi and Frank Zarzeka, Jr. own all of the outstanding shares of Fiber Optek, their respective ownership interest being fifty percent (50%) each (T. 173-174). Mr. Zarzeka supervised the workers on the Project site (T. 199, 320-324, 933) while Mr. Pascazi was involved in the hiring and firing of workers (T. 276, 278,317-320). Michael Pascazi would set the workers' pay rates (T. 616, 622). Michael Pascazi would also

verify the accuracy of the time cards provided to Ethan Allen for the work performed by workers Ethan Allen provided to Fiber Optek (T. 269, 299, 648).

CONCLUSIONS OF LAW

HEARING OFFICER SUBSTITUTION

No deprivation of due process or other prejudice results from the post hearing substitution of a hearing officer to report findings of fact, conclusions of law and recommendations to the Commissioner based solely on the written record. *Matter of Waterway Construction Corp. v. Sweeney*, 248 A.D.2d 256 (3d Dept. 1998).

JURISDICTION OF ARTICLE 8

Section 17 of Article 1 of the New York State Constitution mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law Article 8. Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." *Matter of Beltrone Constr. Co. v McGowan*, 260 A.D.2d 870, 871-872 (3d Dept. 1999). Labor Law §§ 220 (7) and (8), and 220-b (2) (c) authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

As the School District, a duly constituted public school district deemed a municipal corporation under New York Law, is a party to the instant public work contract, Article 8 of the Labor Law applies. Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984).

JOINT EMPLOYERS

The Department maintains that Ethan Allen and Fiber Optek were joint employers of the workers on Ethan Allen's payroll who were engaged on the project. The test under

New York law for determining the existence of an employment relationship is the same as that adopted under the federal Fair Labor Standards Act ("FSLA"). *Chu Chung v. The New Silver Palace Rest., Inc.,* 272 F. Supp. 2d. 314,319, n. 6 (US District Ct., SDNY, 2003). Both New York law and the FLSA define the term "employ" expansively to include "suffer or permit work" (Labor Law §2 [7]; 29 USC § 230 [g]). The United States Supreme Court has observed that a broader definition of coverage would be difficult to frame. *United Sates v. Rosenwasser*, 323 US 360, 362 (1945). Under this expansive definition, a person may be jointly employed by more than one entity (29 CFR 791.2; *Rutherford Food Corp. v. McComb*, 331 US 7221 [1947]; *Zheng v. Liberty Apparel Co., Inc*., 355 F3d 61 [2d Cir. 2003]). In determining employer status, the Second Circuit Court of Appeals has adopted the "economic reality" test. *Herman v. RSR Security Services Ltd*., 172 F.2d 132, 139 (2d Cir. 1999). "An entity 'suffers or permits' an individual to work if, as a matter of 'economic reality,' the entity functions as the individual's employer." *Zheng v. Liberty Apparel Co., Inc*., 355 F3d at 66. In the context of joint employment, the Second Circuit held, in its *Liberty Apparel* decision, that the analysis of whether a joint employment relation exits must go beyond the four-factor test of formal control over employees outlined in its *RSR Security* decision, to wit: whether the putative employer (1) had the power to hire and fire, (2) supervised and controlled the employees' work schedules or conditions of employment, (3) determined rates and method of payment, and (4) maintained employment records. *Id.* at 67. In *Liberty Apparel,* the Court identified six factors to be considered in determining whether an alleged employer is a joint employer; paraphrased, they are:

> (1) whether the general contractor's premises and equipment were used for the claimants' work; (2) whether the subcontractor had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which claimants performed a discrete line-job that was integral to contractor's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the general contractor or their agents supervised the claimants' work; and (6) whether the claimants' worked exclusively or predominantly for general contractor. *Id.* at 72.

The test looks to whether the alleged joint employer has functional control over the workers, even in the absence of the traditional formal control measured by the four factors identified in the *RSR Security* decision. *Id.*

In this case, Fiber Optek meets most of the factors identified to measure formal worker control. The record established that Fiber Optek's president, Mr. Pascazi, interviewed and/or directed three of the five Project workers to Ethan Allen to be hired; it fired one of the Project workers; it exclusively supervised the Project workers at the work site and controlled conditions of employment there; it determined rates of pay for workers; and it maintained at least some employment records. Analysis of these factors of formal control demonstrates that Fiber Optek was a joint employer of the workers. In addition, analysis of the factors relating to the functional control of workers likewise weighs in favor of finding a joint employment relationship, as at least four of the six factors are clearly satisfied: The claimants worked at the Fiber Optek contract work site with Fiber Optek equipment; the claimants performed a discreet line job integral to Fiber Optek's production process; Fiber Optek exclusively supervised the claimants' work at the work site; and the claimants worked exclusively for Fiber Optek in the performance of the public work contract.

Examination of the factors demonstrates that Fiber Optek had both traditional formal control as well as functional control over the workers and, therefore, should be found to be a joint employer of the workers.

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that wages to be paid and supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." *Matter of Armco Drainage & Metal Products, Inc. v State of New York*, 285 App. Div. 236, 241 (1st Dept. 1954). Classification of workers is within the expertise of the Department. *Matter of Lantry v State of New York*, 6 N.Y.3d 49, 55 (2005); *Matter of Nash v New York State Dept of Labor*, 34 A.D.3 905, 906 (3d Dept. 2006), lv denied, 8 N.Y.3d 803 (2007); *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), lv denied, 8 N.Y.3d 802 (2007). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.'" *Matter of Nash v New York State*

Dept of Labor, 34 A.D.3 905, 906, quoting *Matter of General Electric, Co. v New York State Department of Labor*, 154 A.D.2d 117, 120 (3d Dept. 1990), affd 76 N.Y.2d 946 (1990), quoting *Matter of Kelly v Beame*, 15 N.Y. 103, 109 (1965). Workers are to be classified according to the work they perform, not their qualifications and skills. See, *Matter of D. A. Elia Constr. Corp v State of New York*, 289 A.D.2d 665 (3d Dept. 1992), lv denied, 80 N.Y.2d 752 (1992).

Fiber Optek maintains that the work performed falls within the definition of a Lineman Electric Mechanic 1st class published in the PRS and taken from the IBEW Local 1249's collective bargaining agreement (hereinafter "CBA"), and that that lower rate, rather than the higher electrician rate taken from the IBEW Local 363's CBA, should have been applied (Respondent Proposed Finds of Fact and Conclusions of Law (hereinafter "RPF," pp.1-3). Work descriptions contained in PRSs are not intended to be, and are not, controlling on the issue of the proper classification of work performed on a project. *Matter of CNP Mechanical, Inc. v Angello*, 31 A.D.3d 925, 927 (3d Dept. 2006), lv denied, 8 N.Y.3d 802 (2007). Representatives of both IBEW Local 1249 and Local 363 testified that the work involved was within the trade jurisdiction of Local 363, not 1249, and that the electrician rate was therefore the correct rate. The Department's classification should therefore be sustained.

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 A.D.2d 818, 821 (3d 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).

The Department never received complete records from Ethan Allen or Fiber Optek. It based its estimate of hours worked on its review of various records relating to hours worked. Ultimately, Respondent Pascazi stipulated to the hours that should be deemed correct for each worker. The Department then applied the electrician rates from the relevant PRS to those hours of work to determine the amount the workers should have been paid, provided Fiber Optek credit for the amounts it actually paid those workers, and reached its determination of the involved underpayments. The methodology is reasonable and should be sustained.

INTEREST RATE

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% *per annum* as prescribed by section 14-a of the Banking Law. *Matter of CNP Mechanical, Inc. v Angello,* 31 A.D.3d 925, 927 (3d Dept. 2006), lv denied, 8 N.Y.3d 802 (2007). Consequently, Fiber Optek 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)[3] 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 (3d Dept. 1987). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." *Matter of Fast Trak Structures, Inc. v Hartnett*, 181 A.D.2d 1013, 1013 (4th Dept. 1992). See also, *Matter of Otis Eastern Services, Inc. v Hudacs*, 185 A.D.2d 483, 485 (3d Dept. 1992). The violator's knowledge may be actual or, where he or she should have known of the violation, inferred. *Matter of Roze Assocs. v Department of Labor*, 143 A.D.2d 510; *Matter of Cam-Ful Industries, supra*.

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

Respondent Pascazi maintains that he was told by an official of the School District that the project was not a public work project because the School District was not a public agency and the real property on which the campus was situated was privately owned. He therefore asserts that if a violation occurred, it was the product of a reasonable and honest mistake, and should not be deemed willful (RPF, pp. 3-4). Fiber Optek entered into a contract that specifically and expressly advised it that prevailing rates were required to be paid on the project. Under these circumstances, it was not reasonable to rely on contradictory verbal statements. "[T]he law is clear that those who deal with the government are expected to know the law, and cannot rely on the conduct of government agents contrary to law ...." *Matter of New York State Medical Transporters Assoc. v. Perales*, 77 NY2d 126,131(1990) (citations omitted). As Justice Holmes famously admonished, "[m]en must turn square corners when they deal with the Government." *Rock Is., Ark. & La R.R. Co. v. United States,* 254 US 141, 143 (1920). Fiber Optek knowingly chose to ignore express contractual notifications and requirements at its own risk. The conduct should be deemed willful.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any of the five largest shareholders of the contractor or any officer of the contractor 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. Michael S. Pascazi, the only individual named as a respondent, was one of the five largest shareholders of Fiber Optek. As such, he is subject to the provisions of Labor Law § 220-b (3) (b) (1) in that capacity and it is unnecessary to determine whether, as an officer of the corporation, he knowingly participated in the willful violation.

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. Fiber Optek's willful underpayment of $18, 335.03 to five employees is a serious violation of the law which, considered together with its failure to maintain and produce complete and accurate payroll records, amply warrants the Department's requested twenty-five percent (25%) civil penalty.

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 Fiber Optek underpaid wages and supplements due to the in the amount of $18,335.03; DETERMINE that Fiber Optek 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;

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

DETERMINE that Michael S. Pascazi is one of the five largest shareholders of Fiber Optek;

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

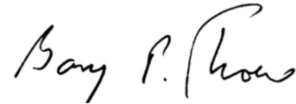
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty);

ORDER that upon the Bureau's notification, Fiber Optek shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605;

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: October 25, 2011
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer