STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

FIBER OPTEK INTERCONNECT CORP.,
FIBER OPTEK SERVICE CO. LTD.,
MICHAEL S. PASCAZI AND FRANK P. ZARZEKA,
AS OFFICERS AND SHAREHOLDERS OF THE CORPORATIONS

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 Nos.
00-4020 Schoharie County
04-8163 Westchester County
(Case ID 38050003-1)
04-8163 Westchester County
(Case ID 38030033-1)
04-8163 Nassau County
(Case ID 38050082-1)
05-3675 New York County
05-3674 New York County
98-8040 Rockland County

IN THE MATTER OF

POSITIVE ELECTRICAL ASSOCIATES, INC.
PRIME CONTRACTOR

AND

FIBER OPTEK INTERCONNECT CORP.,
FIBER OPTEK SERVICE CO. LTD.,
MICHAEL S. PASCAZI AND FRANK P. ZARZEKA,
AS OFFICERS AND SHAREHOLDERS OF THE CORPORATIONS

SUBCONTRACTOR - 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.

Prevailing Rate Case No.
99-5490 Westchester 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 commenced on August 7, 2006, in White Plains, New York, which continued on multiple days thereafter until conclusion on March 10, 2010. 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 Fiber Optek Interconnect Corp. (“Fiber Optek”) complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of eight contracts; seven in which it was the prime contractor and one in which it performed work as a subcontractor.

The first captioned matter, designated by Prevailing Rate Case Number (“PRC No.”) 00-04020, involved installation of fiber optic cables at the Blenheim-Gilboa Power Project in Schoharie County, New York (“Project 1”); the second, designated PRC No. 04-08163 (Case ID 38050003-1), involved the installation of fiber optic cables at the Indian Point Power Plant in Westchester County (“Project 2”); the third, designated PRC # 04-08163 (Case ID 38030033-1), involved the installation of fiber optic cables at various sites owned by the New York State Power Authority (“NYSPA”) in Westchester County (“Project 3”); the fourth, designated PRC # 04-08163 (Case ID 38050082-1), involved the installation of fiber optic cable at various sites owned by the NYSPA in Nassau County (“Project 4”); the fifth, designated PRC #99-5490, in which Fiber Optek performed as a subcontractor to Positive Electrical Associates, Inc. (“Positive Electrical”), involved the rehabilitation of fire alarms at various buildings at the State University of New York College at Purchase campus (“SUNY Purchase”) in Westchester County for the New York State University Construction Fund (“SUCF”) (“Project 5”); the sixth, designated PRC # 05-3675, involved the installation of fiber optic cables for the Fashion Institute of Technology (“FIT”) at its Manhattan Campus in New York County (“Project 6”); the seventh, designated PRC # 05-03674, involved the installation of fiber optic cables for the New York State Department of Insurance at its Manhattan offices in New York County (“Project 7”); and the eighth, designated PRC # 98-08040, involved the installation of fiber optic cable for the Ramapo Union Free School District (“Ramapo School District”) at the Edwin Gould Academy in Rockland County (“Project 8”).

Fiber Optek Services Corp. ("FO Services") is alleged to be a substantially owned-affiliated entity of Fiber Optek as that term is defined in Article 8 of the New York State Labor Law ("Labor Law"). Michael S. Pascazi and Frank P. Zarzeka are alleged to be the principal officers and shareholders of Fiber Optek.

Proposed Findings of Fact and Conclusions of Law were received from the Department on October 1 and the Respondent Pascazi on October 4, 2010. No other party provided post-hearing submissions.

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito, John D. Charles, Senior Attorney, of Counsel. Michael S. Pascazi appeared pro se. Frank P. Zarzeka appeared with his attorney, Peter L. Maroulis, Esq. Fiber Optek was the subject of an involuntary petition for relief under Chapter 7 the United States Bankruptcy Code, which resulted in an order for relief being entered and a United States Trustee in Bankruptcy being named. Fiber Optek's Trustee in Bankruptcy requested and was granted an adjournment of the originally scheduled May 31 through June 2, 2006, hearing dates (HO Ex. 2). Although duly served with a copy of the Notice of Rescheduled Hearing, scheduling the August 7, 2006 hearing commencement, the receipt of which was acknowledged by the Trustee's office, the Trustee made no appearance on behalf of Fiber Optek in the proceeding (HO Ex. 2).

At a September 11, 2006 hearing, following extensive settlement discussions, it was reported that the Respondent Zarzeka had reached a settlement arrangement with the Department that was to be reduced to writing thereafter. Following the hearing on that date, there was no further appearance by Mr. Zarzeka or his attorney in the proceeding. There has been no report that the settlement was in fact effected. This report assumes it was not (*See*, T. 591-595).

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. Did any willful underpayment involve the falsification of payroll records?
4. Is FO Services a "substantially owned-affiliated entity"?
5. Are Michael S. Pascazi and Frank P. Zarzeka shareholders of Fiber Optek who owned or controlled at least ten per centum of its outstanding stock or, for periods prior to November 1, 2002, were they among its five largest shareholders?
6. Are Michael S. Pascazi and Frank P. Zarzeka officers of Fiber Optek who knowingly participated in a willful violation of Article 8 of the Labor Law?
7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The investigation of the eight projects was commenced as a result of an unverified employee complaint received by the Bureau on December 12, 2001, which alleged that the complainant had worked on numerous projects for Fiber Optek and had never been paid prevailing rates despite his belief that some of the projects he had worked on were prevailing rate jobs (T. 183, 695-714; Dept Ex 72, Resp. Ex. 1).[1] Two separate investigators were assigned to the cases. Investigator McCormick was responsible for the investigations of Projects 5 and 8 (*see*, T 1033-1034, 1064-1065). Investigator Barber was responsible for the rest. Both testified concerning their respective investigations and audit findings.

As the underpayment calculations made by the Bureau in seven of the eight cases were stipulated by Respondent Pascazi to be correct as to the employees' days and hours of work, the contractor payment credits for wages and supplemental benefits paid, and the underpayment determined due if one accepts that the electrician classification was the proper classification of the work performed (which is disputed), a brief description of the Bureau's methodology in regard to these cases will suffice (*See*, T. 474-483, 567-568, 592; Dept. Ex. 81[seven revised PW-27 audit summaries]). Lacking any certified payroll records for six of the seven Projects, the exception being Project 5 where Fiber Optek

[1] A letter attached to the complaint states, *inter alia*: "I don't have dates or stubs for these jobs, but just check all jobs they've had that were prevailing wage and you'll find infractions in every one."

performed work as a subcontractor to Positive Electrical, the Bureau relied on Fiber Optek's weekly time logs (*see, e.g.*, Dept. Ex. 4), employee complaints and logs (*see, e.g.*, Dept. Ex. 1) and employee interviews in order to establish the days and hours of work on the projects (T. 40, 50-53, 93, 98, 130-132, 152-153, 169-170). The Bureau relied on employee paystubs where available, or employee interviews or complaints, or information from prior audits of Fiber Optek (relating to supplements paid), to provide credit for actual contractor payments to employees, which methodology was necessitated by Fiber Optek's failure to provide requested payroll information (*see, e.g.*, T. 60, 100-101, 133-135,154, 193-194, 206-208).

For Project 5, the Bureau received certified payrolls from Fiber Optek certified in 2003 (Dept. Ex. 43), certified payrolls from Positive Electrical that Fiber Optek provided to Positive Electrical in 2001 (Dept Ex. 44) and some paystubs provided by employees (T. 236, 245). The Bureau determined that the certified payrolls submitted by Fiber Optek were false in that they, *inter alia*, falsely reported the rate actually paid to individuals (*See, e.g.*, T. 231- 246). The Bureau nevertheless relied on the certified payrolls to establish the employees' days and hours of work (*see*, T. 228-246; Dept. Exs. 43, 44, 46). In order to establish the rate the contractor paid employees on Project 5, the Bureau relied either on an employee's complaint, paystubs or the private hourly rate shown in the certified payrolls received from Fiber Optek to establish the contractor rate of pay for the hours of work (T. 244; Dept. Exs. 39, 43).

The Bureau determined that the nature of the work performed on each of the contracts was properly classified in the electrical classification (T. 219-228, 647-660, 913-920, 939-940, 942-943, 954-956, 970-971, 982-985, 1003-1005, 1084-1089, 1099-1100, 1133, 1189-1190, 1214-1219). The Bureau's audits compared the rates that should have been paid in the electrical classification according to the relevant prevailing rate schedules ("PRSs") against the rates the Bureau determined Fiber Optek actually paid for the hours the employees worked on the projects in order to calculate the underpayment determined due (Dept. Exs. 6, 18, 30, 37, 46, 56, 77). Then, following meetings between the Bureau and the Respondent Pascazi held during the course of the hearing, adjustments were made to the Department's original hearing audits (PW-11s). Summaries of those revised audits (PW-27s) were received into evidence with the aforesaid stipulation

concerning the accuracy of the audits (T. 474-483; Dept. Ex. 81; *see also* T. 903-911; Dept. Exs. 85-91 [combined revised PW-27 audit summaries and PW-11 audit details]).

Based on those revised audits, the Bureau determined that Fiber Optek underpaid its employees on the seven projects as follows:

On Project 1, for the weeks ending April 28, 2001 through June 16, 2001, Fiber Optek underpaid wages and supplements to three employees in the amount of $576.88;

On Project 2, for the weeks ending December 18, 1999 through September 15, 2001, Fiber Optek underpaid wages and supplements to seven employees in the amount of $13,812.36;

On Project 3, for the weeks ending May 13, 2000 through January 18, 2003, Fiber Optek underpaid wages and supplements to nine employees in the amount of $11,175.08;

On Project 4, for the weeks ending May 13, 2000 through April 7, 2001, Fiber Optek underpaid wages and supplements to six employees in the amount of $6,229.35;

On Project 5, for weeks ending June 2, 2001 through June 30, 2001, Fiber Optek underpaid wages and supplements to four employees in the amount of $7,089.23;

On Project 6, for the weeks ending July 13, 2002 through September 6, 2003, Fiber Optek underpaid wages and supplements to six employees in the amount of $37,670.90; and

On Project 8, for the weeks ending October 2, 1999 through September 23, 2000, Fiber Optek underpaid wages and supplements six employees in the amount of $13,521.63.

There is no evidence that any Fiber Optek funds were withheld on any of the contracts by the respective public agencies.

With regard to the remaining case, Project 7, involving the New York State Department of Insurance ("Insurance Department") Liquidation Bureau ("Liquidation Bureau"), the methodology employed by the Bureau is disputed. The Respondent Pascazi has taken the position that the Liquidation Bureau was not a public entity and that Labor Law Article 8 did not therefore apply to Project 7. During the course of this proceeding,

this State's highest court determined that the Liquidation Bureau was in fact not a public agency (T.482, 529; *Matter of Dinallo v. DiNapoli*, 9 NY3d 94 [2007]). Rather than dropping that particular case entirely, the audit was revised to incorporate only hours of work believed to have been performed by Fiber Optek for the Insurance Department (T. 482-483). The Bureau based its claim and calculation of hours on time sheets provided by an anonymous and unknown source (T. 536-537, 539-540). Some of those time sheets referred specifically to the Liquidation Bureau while others referenced what the Bureau investigator believed was the Insurance Department (T. 485-486, 520-521; Dept. Ex. 67). The Liquidation Bureau's offices are located within the same 14-story Manhattan office building as the Insurance Department (T. 1326, 1377-1378). The Bureau takes the position that the different notations evidenced an effort by Fiber Optek to distinguish between work performed for the Liquidation Bureau and work performed for the Insurance Department (*Id.*). The resulting audit reduced the underpayment on Project 8 from $83,673.25 (Dept Ex. 69) to $4,391.70 (Dept. Ex. 83).

Respondent Pascazi objects to the assumption that any work was performed for the Insurance Department. He asserts that no such distinction should be inferred from acronyms on time records received from an unknown source (*see, e.g.*, T. 529-541), and points out that the contract for the work was entered into with the Liquidation Bureau, not the Insurance Department, and that there is a lack of any direct evidence supporting the inference that Fiber Optek contracted to perform or performed any work for the Insurance Department (*see, e.g.*, T. 545-554). One employee testified that he was not trying to make a distinction between work for the Insurance Department and work for the Liquidation Bureau when he made the different notations on his time sheets – he, in fact, was not aware that they were distinct entities (T. 1377-1378, 1381-1383, 1401). Another likewise testified that he was unaware of any distinction between the entities (T. 1418-1419, 1422).

There is, in fact, no evidence in the record of any contractual relationship existing between Fiber Optek and the Insurance Department (T. 521-524, 547-548, 579-580). There is no testimony from anyone at the Insurance Department that corroborates the Bureau investigator's theory that Fiber Optek performed work at the request of, or on behalf of, the Insurance Department. The Bureau investigator testified that he had no

recollection of reaching out to anyone at the Insurance Department to ascertain whether Fiber Optek actually performed work for the Insurance Department as opposed to the Liquidation Bureau (T. 545-547). Although one employee testified to working on different floors in the shared building, no testimony was offered regarding what offices or floors were occupied by the Liquidation Bureau and what offices or floors were occupied by the Insurance Department (see, T. 1378, 1382).

Respondent Pascazi also asserts that when work was performed at the Indian Point Power Plant (Project 2) it was performed for a private non-public owner, Entergy Corp. (T. 1500; Resp. Proposed Findings of Fact and Conclusions of Law ["RPF"], p. 39). The contract itself was entered into between the NYSPA and Fiber Optek (Dept. Ex. 12). Other than Respondent Pascazi's assertion (T. 1500), there is no evidence in the record of any transfer of title or contractual assignment, and therefore no evidence that the work was performed for any entity other than the Power Authority.

The Respondent Pascazi further asserts that the work performed on Project 8, the Edwin Gould Academy in the Ramapo Union Free School District, was not public work because the Edwin Gould Academy was a private entity (RFP, pp. 41-42). The contract was let by the Ramapo Union Free School District and the bid specifications specifically noted that prevailing wage rates applied to the Project (Dept. Ex. 74, Bid Spec. XXVI, p. 3).

Judicial notice is taken of the record of an earlier hearing held before another hearing officer that involved work performed by Fiber Optek at the Edwin Gould Academy/Ramapo Union Free School District (*Matter of Fiber Opteks Interconnect Corp.*, PRC 98-8040). Additional evidence concerning the public-entity status of the School District was adduced in that matter. At that hearing in that matter where it was established that:

> [t]he 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; the real property on which the campus is situated is owned by the Edwin Gould Foundation. The School District pays the Foundation rent. The Edwin Gould Academy has been a part of the School District since approximately 1990. The School District pays the administrators' and teachers' salaries – no private funds are involved; the City of New

> York pays the students' tuition at the rate set by the New York State Education Department. The Edwin Gould Academy receives some private support for the residential care it provides in the form of donations and rent. The New York State Education Department has certified that the Edwin Gould Academy-Ramapo Union Free School District 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. The Edwin Gould Academy is a "Special Act Public School District." Chapter 563of 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. These districts receive most of their funding through student tuition payments typically paid by public entities. They provide a year-round residential program for at-risk youth in which to live and learn.[2]

CLASSIFICATION

Most generally, the work performed on the various contracts involved the installation of fiber optic cables for the various contracting agencies (T. 219-228, 575, 1084, 1133). The Bureau investigators testified that the Bureau, based on the nature of the work, its past classification practice, and the International Brotherhood of Electrical Workers ("I.B.E.W.") jurisdictional claims to this type of work, as evidenced by relevant I.B.E.W. locals' collective bargaining agreements (*see, e.g.*, T. 913, 1082-1083), classified the work in the electrician classification, which rate is established by I.B.E.W Local 3's and Local 363's inside wiremen rate (T. 219-228, 575, 647-660, 939-943, 954-956, 970-971, 982-985, 1003-1005, 1084-1089, 1099-1100, 1133, 1189-1190, 1214-1219, 1804). At the hearing, the business representative of I.B.E.W. Local Union 3 testified that in Westchester County the inside wiremen agreement (as opposed to the outside linemen agreement) covers the work of electricians within a building property line from the first connection point on the property, and that all installation and

[2] A separate report and recommendation in *Matter of Fiber Opteks Interconnect Corp.,* PRC 98-8040 is being submitted simultaneously with this report and recommendation. These facts are found and reported at pages 5-6 thereof. The additional evidence included testimony from a school district official and a letter from the New York State Department of Education that expressly advised that the Ramapo Union Free School District is a duly constituted public school district and as such is deemed a municipal corporation in accordance with the General Construction Law of New York State. Judicial notice of this additional evidence is taken here.

termination of fiber optic cable performed within the building property line after the first point of connection is the work of electricians under the inside wiremen agreement (T. 1237-1301). The senior assistant business manager for I.B.E.W. Local 363, whose territorial jurisdiction covers Rockland, Putnam, Dutchess, Orange, Sullivan, Ulster and parts of Delaware and Greene Counties, similarly testified concerning the trade jurisdiction of inside wiremen (T. 1461-1486), to wit: inside electrical workers do all the installations inside any property lines (T. 1466). An assistant business representative of I.B.E.W. Local Union 1249, which represents outside linemen, testified and confirmed the jurisdictional division between the inside wiremen and outside linemen begins at the first connection point on a particular property, with the outside linemen having jurisdiction over the work outside of that first point of connection (T. 1437-1438, 1454-1456, 1459-1460, 1471-1472). Employees testified to performing tasks that involved the installation and termination of fiber optic cable within the respective public agencies' building lines (T. 1318-1319, 1324-1326, 1330-1331, 1334, 1346, 1350-1353, 1371-1374, 1383-1389). Representatives of both Local 1249 and Local 363 testified that the specific tasks descriptions testified to by those employees fell within the jurisdiction of the inside wiremen or inside electrical workers (T. 1439-1440, 1469-1470, 1484).

Respondent Pascazi maintains that the tasks performed by the workers fall within the description of work performed by communication workers in Article 26, section 6, of the I.B.E.W. Constitution (T. 1501-1506; Resp. Ex. 5, p. 82). No separate communication workers rate was recognized in the relevant PRSs.

SHAREHOLDERS/OFFICERS

At all relevant times herein, Messrs. Pascazi and Zarzeka each owned fifty percent of the outstanding shares of Fiber Optek (T. 578-579, 1541). Mr. Pascazi was the president and Mr. Zarzeka the vice-president of Fiber Optek (T. 1507-1508). The Bureau determined from workers that Mr. Pascazi managed the office and was responsible for the books and records, while Mr. Zarzeka usually supervised workers in the field (*see, e.g.*, T. 687-679, 882-883, 1328). This description is consistent with Respondent Pascazi's testimony regarding the respective officers' functions (T. 1514-1519, 1522, 1546).

WILLFULNESS OF VIOLATION

Prior to these investigations being initiated, Fiber Optek, through its president, Mr. Pascazi, was specifically advised by the Bureau that the electrician classification was the proper classification for installation of fiber optic cable within building property lines in Westchester County (T. 1204-1208). It disregarded that advice (T. 1213).

SUBSTANTIALLY OWNED-AFFILIATED ENTITY

FO Services is wholly owned by Fiber Optek (T. 578), maintained its offices at the same business address as Fiber Optek (T. 574, 1567), shared the same officers as Fiber Optek (T. 1562), and paid the workers for the work they performed on Fiber Optek's contracts (T. 570-574, 1568-1570).

CONCLUSIONS OF LAW

Respondent Pascazi raises a number of legal defenses to the Department's determinations, which are essentially as follows:

1. The work performed on Projects 2, 7 and 8 was not public work within the meaning of Article 8;
2. The Department improperly classified the type of work performed on all of the projects;
3. The Department disregarded that Fiber Optek and Services Corp. are distinct corporate entities and improperly treated them as a single entity;
4. Respondent Pascazi did not willfully participate in the underpayment of workers;
5. Respondent Pascazi did not falsify payroll records;
6. The complaints that initiated the proceedings were not verified, as required by Article 8;
7. The Commissioner has not rendered a decision within six months, as required by Article 8;

8. The enforcement of Article 8 against a corporate shareholder violates the federal Labor Management Relations Act, 29 U.S.C. §129, *et seq.*;

9. Article 8 is preempted by The Telecommunications Act of 1996, 47 U.S.C. §253; and

10. Article 8 violates the interstate commerce clause of the United Sates Constitution.

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.

Article 8 of the Labor Law applies to a contract when two conditions are satisfied: (1) a party to a contract that may involve the employment of laborers, workers or mechanics is one of the specified public entities named in Labor Law §220, and (2) the contract concerns a "public works" project. *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); *Matter of New York Charter School Association v. Smith*, 61 A.D.3d 1091, 1093 (3d Dept 2009); *Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 A.D.2d 285 (3d Dept. 1996).

Respondent Pascazi does not dispute that four of the eight projects involved public work, to wit: Projects 1, 3, 4, and 5. With regard to Project 7, involving work performed for the Liquidation Bureau of the New York State Insurance Department, the

Department concedes that the Liquidation Bureau is not a public agency in light of the Court of Appeals decision in *Matter of Dinallo v. DiNapoli*, 9 NY3d 94 (2007). As there is no factual basis in the record to support the Bureau's conclusion that some of the work performed pursuant to the contract with the Liquidation Bureau actually was performed for the Insurance Department itself, the case involving the Liquidation Bureau should be dismissed in its entirety. On this record, a conclusion that Fiber Optek performed work for the Insurance Department would be premised wholly on speculation and should not be drawn.

With regard to Project 2, involving the Indian Point nuclear power plant, Respondent Pascazi asserts, without any evidentiary foundation, that at the time the work was performed it was performed for a private entity, Entergy Corp., or alternatively Consolidated Edison. As the work was performed under contract with the NYSPA, and as no evidence has been adduced that the work was performed for any other entity, 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). This is so even though the work was performed pursuant to purchase orders rather than formal contracts, as this type of contract is covered by Labor Law § 220. *See, Matter of Pyramid Company of Onandaga v Hudacs,* 193 A.D.2d 924 (3d Dept. 1993).

With regard to Project 6, the FIT project, Respondent Pascazi asserts in his Proposed Findings that the contracts relating to the project expressly indicated "that the prevailing wage law does not apply." (RPF, p. 40). Indeed, the contract itself curiously states that "[a]lthough the work of the Contract is not 'public work' as defined in the Labor Law of the State of New York, FIT intends that all applicable provisions of the Labor Law be carried out in the performance of the work" (Dept. Ex. 52, Bid Terms and Conditions, p.6). The Terms and Conditions further provide that the contractor "shall pay at least the prevailing wage rate and pay or provide the prevailing supplements in accordance with the Labor Law." (*Id.*) FIT is a part of the State University of New York system and as such is a public entity. As the project effected improvements to public college facilities, it is clearly of public benefit and constitutes a public works project. Article 8 therefore 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).

Finally, with regard to Project 8 involving the Edwin Gould Academy, the contract was entered into with the Ramapo Central School District with the express written notification that prevailing wages were required to be paid on the Project. Nevertheless, Respondent Pascazi asserts that the contract at issue fails to meet the first prong of the two-part *Erie County* test requiring, in order for Article 8 to apply, that one party to the construction contract must be a public entity (RPF, p. 41-42). Respondent Pascazi asserts that the Edwin Gould Academy was part of a "special act" school district; that the real property was owned by a private foundation, the Edwin Gould Foundation; that the private foundation paid Services Corp. for the work performed on the project with its private funds; that the academy charged tuition for those students who attended; and that the Board of Education of the Academy was appointed by the Foundation, rather than being elected by residents of the District; and that the Academy was operated as a private entity without governmental oversight (*Id*.). No evidentiary record was created in this hearing to support these assertions. However, the hearing record in an earlier case held pursuant to Labor Law Article 8, before a different hearing officer, of which judicial notice is taken here, established that the Ramapo Union Free School District is a duly constituted public school district, and, as such, is deemed a municipal corporation under the General Construction Law, which is one of the specified public entities named in Labor Law §220 as being subject to the prevailing wage requirements of Article 8 (*Matter of Fiber Opteks Interconnect Corp.*, PRC 98-8040). Consequently, as the contracting entity is clearly one of the specifically named public entities subject to Article 8, the first prong of the *Erie County* test is satisfied and Article 8 applies. *Matter of Erie County Industrial Development Agency v Roberts*, *supra*.

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. "Calculation of the prevailing rate entails a two-

step process. First, the Commissioner must classify the work by assigning the task performed by an employee to a specific trade or occupation (see Labor Law § 220 [3-a] [a]). Second, the Commissioner must ascertain the prevailing rate for that trade or occupation in the relevant locality (see Labor Law § 220 [3], [5] [a]).” *Matter of Lantry v State of New York,* 6 N.Y.3d 49, 54 (2005). Classification of workers is within the expertise of the Department. *Id*. at 55; *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 cannot be disturbed “absent a clear showing that a classification does not reflect ‘the nature of the work actually performed.’ ” *Matter of Lantry v State of New York, Id.* , 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).

Labor Law Section 220 requires that prevailing rates be established by reference to collective bargaining agreements (“CBAs”) covering at least 30% of the workers performing the relevant work which are in effect in the locality where the work is performed. Labor Law § 220 (5) (a); *see, Matter of Lantry v State of New York,* 6 N.Y.3d at 55. The rate applied to the involved tasks must be consistent with the work jurisdictions established pursuant to the relevant CBAs. The I.B.E.W. Local representatives from the various geographical areas where the work was performed uniformly testified that the type of work performed on the projects was the work of inside electricians under the various CBAs, which were used by the Bureau to establish the rate incorporated into the prevailing rate schedule that the investigators relied on in preparing their audits. The Bureau investigators further testified that the Department’s practice is to classify that type of work as the work of an electrician. It is well settled that the Department may rely on CBAs in making trade classifications. *Id.* at 56. The Commissioner is authorized to rely on evidence from unions concerning their trade jurisdictions. *See, e.g., Matter of Consolidated Masonry Contractors, Inc. v Angello,* 2

A.D.3d 997, 998 (3d Dept. 2003). The classification determination also may be supported by a Bureau investigator's testimony regarding his or her experience and inquires. *Matter of Marangos Construction Corp. v New York State Department of Labor*, 216 A.D.2d 758, 758-759 (3d Dept. 1995).

The Respondent asserts that the workers employed on the various contracts performed work that met the definition of 'communications worker' under the I.B.E.W. Constitution; that the relevant prevailing wage schedules failed to contain rates for such workers; and that the absence of such rates was arbitrary, capricious and without rational basis (RPF, pp. 6-7). Unlike the testimony elicited by the Department concerning which labor classification actually governs the type of work performed in the relevant geographical areas, the Respondent relies on the language contained in the I.B.E.W. Constitution and provides no proof that a communications worker local existed in the relevant geographical areas that in fact represented more than 30% of the workers performing the type of work performed on the various projects. Such conclusory assertions are patently inadequate to establish the proposition as fact. *Joint Indus. Bd. of Elec. Indus. v Shaffer,* 205 A.D.2d 310 (1st Dept. 1994). The Respondent has failed to make a clear showing that the classification utilized by the Bureau does not reflect the nature of the work actually performed. *Matter of Lantry v State of New York,* 6 N.Y.3d at 55. Moreover, any purported omission of rates in a prevailing rate schedule must be timely challenged in an Article 78 proceeding, not in an Article 8 enforcement proceeding. Labor Law § 220 (6); *see, A.J. Cerasaro, Inc. v Ross*, 94 A.D.2d 943 (4th Dept. 1983), *affd* 60 N.Y.2d 946 (1983).

The classification adopted by the Department is supported by substantial evidence and should 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).

Mr. Pascazi, the only respondent defending against the Department's allegations, agreed by stipulation to the methodology employed by the Bureau in determining the hours worked and rates paid the workers on each of the projects, objecting only to the classification used by the Bureau in calculating the wages and supplements that should have been paid. As a consequence, having determined that the Department's classification of the work was proper, no objection remains concerning the reasonableness of the methodology employed by the Department in calculating the underpayments in each of the involved projects, which are reasonable in any event.

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). Interest may be excluded for periods of unreasonable investigative delay attributable solely to the Department (*Id*. at 928-929); however, the Respondents have made no evidentiary record of any periods of delay that were solely attributable to the Department. *Cf.*, *Matter of M. Passucci Gen. Constr. Co. v Hudacs*, 221 A.D.2d 987,988 (4th Dept. 1995), *lv denied* 87 NY2d 811 (1996); *Matter of Georgakis Painters Corp. v Hartnett*, 170 A.D.2d 726, 729 (3d Dept. 1991). Consequently, Fiber Optek is responsible for the interest on the aforesaid underpayments at the rate of 16% *per annum* 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 into the possible willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to any willfulness of the violation.

This inquiry is significant because Labor Law § 220-b (3) (b) (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 (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.*

The record here establishes not only that Fiber Optek was an experienced public work contractor that knew or should have known of the proper classification of the work being performed based on that experience, but that it was advised expressly by the Bureau that electrician rates would have to be paid. As a consequence, its failure to adhere to that advice and pay the proper rate of wages and supplements on each the seven projects that are subject to Article 8 must be deemed to constitute separate, distinct and independent willful violations of the Labor Law on each of those projects. *Tap Electrical Contracting Service, Inc. v Hartnett,* 76 N.Y.2d 164, 170-171 (1990); *Matter of Waterway Construction Corp. v Sweeney*, 248 A.D.2d 256, 257 (1st Dept. 1998).

FALSIFICATION OF PAYROLL RECORDS

Labor Law § 220-b (3) (b) (1) 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 years from the first final determination. The certified payrolls submitted by Fiber Optek were falsified within the meaning of Labor Law § 220-b (3) (b) (1) in that they, *inter alia*, falsely reported the rate actually paid to individuals. *Matter of D & D Mason Contractors, Inc. v Smith, 2011 NY Slip Op 1466* (2d Dept. January 4, 2011).

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. Labor Law §§ 220 (8) and 220-b (2) (d). The willful underpayment of more than $90,000.00, which involved falsified payroll records, is a very serious violation warranting a civil penalty in the Department's requested amount of 25% of the total amount found due.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some *indicium* 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."

FO Services is a wholly owned subsidiary of Fiber Optek that shared its employees and apparently assumed responsibility for the proper payment of wages to the workers on each of these projects under contract with Fiber Optek. It also prepared, maintained and submitted certified payroll reports. On the basis of, *inter alia*, the interconnected corporate relationship and the assumption of joint responsibilities relating to these projects, Fiber Optek and FO Services are a "substantially owned-affiliated entities" for the purposes of Article 8. Labor Law § 220 (5) (g). *See, Bistrian Materials, Inc. v Angello*, 296 A.D.2d 495, 497 (2d Dept. 2002). Therefore, contrary to Respondent Pascazi's allegation that the Department is improperly treating Fiber Optek and FO Services as a single entity, it is appropriately treating them as substantially owned-affiliated entities as authorized by Article 8.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) provides that any of the shareholders who own or control at least ten *per centum* of the outstanding stock of the violating contractor (or, prior to November 2002, 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 period as the corporate entity is ineligible. Respondent Pascazi alleges that he did not personally willfully violate Article 8 or engage in records falsification. As he, at all relevant times, was one of the five top shareholders of Fiber Optek and owned or controlled more than ten of its outstanding stock, he is subject to debarment under Labor Law § 220-b (3) (b) (1) in his capacity as a shareholder, regardless of whether he knowingly participated in the violations. Were it necessary to find willful participation, I note that Mr. Pascazi was the corporate officer of Fiber Optek whom the Bureau specifically advised that electrician rates were the proper rates to be paid on the projects addressed herein.

LABOR MANAGEMENT RELATIONS ACT PREEMPTION

Respondent Pascazi contends that when Article 8, which references collective bargaining agreements in establishing prevailing wage rates, is enforced against the five largest shareholders or officers of the violating corporation, it essentially creates a new

class of “employer” contrary to the rules of uniformity required by the Labor Management Relations Act (LMRA). No authority is cited for this notion. Suffice it to say that Labor Law § 220-b (3) (b) (1) pertaining to debarment of the five largest shareholders and officers who willfully participate in violations of Article 8 does not create a new class of employer, but rather holds principal corporate owners and managers responsible for their acts or omissions in failing to administer the affairs of the corporation in conformity with established minimum state labor standards. The LMRA does not preempt the establishment or enforcement of generally applicable minimum state labor standards, which are encompassed within the states’ traditional police powers. *Livadas v Bradshaw*, 512 U.S. 107, 121-125 (1994); *Metropolitan Life Insurance Co. v Massachusetts*, 471 U.S. 724, 754-756 (1985).

TELECOMMUNICATIONS ACT OF 1996 PREEMPTION

The United Sates Supreme Court has long recognized that the establishment of minimum labor standards by states is a legitimate exercise of their traditional police powers. *Metropolitan Life Insurance Co. v Massachusetts*, 471 U.S. at 756. Moreover, the Court has explained that “Congress is understood to have legislated against a backdrop of generally applicable labor standards.” *Livadas v Bradshaw*, 512 U.S. at 123, fn. 17. With regard to preemption generally, the Court has held that:

> Our past cases have recognized that the Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law, we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *New York State Conference of Blue Cross & Blue Shield v Travelers Ins. Co.*, 514 U.S. 645, 654-655 (1995) (citations omitted).

Section 253 of the Telecommunications Act specifically recognizes that it shall not affect the ability of states to impose requirements to protect the public safety and welfare. 29 U.S.C. §253 (b). Safety and welfare requirements have long been interpreted

to include minimum state labor standards. *See, e.g., Metropolitan Life Insurance Co. v Massachusetts*, 471 U.S. at 751. The prevailing wage requirement codified in Article 8 of the Labor Law is such a minimum state labor standard. *See, e.g., California Div. of Labor Standards Enforcement v Dillingham Constr.*, 519 U.S. 316, 334 (1997). As a consequence, Congress has expressly excluded such regulation from the preemptive effect of the Telecommunications Act. Certainly no clear and manifest Congressional purpose to preempt such long-standing, constitutionally protected and generally applicable state law is evident. Labor Law Article 8 is not preempted by the Telecommunications Act of 1996, either expressly or by implication. 29 U.S.C. §253 (b). I further note that the proper forum for advancing this preemption argument appears to be with the FTC itself, which procedure the Respondent apparently has elected not to pursue, as no such application has been disclosed in the course of this proceeding. *See,* 29 U.S.C. §253 (d).

THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION PREEMPTION

Respondent Pasczi asserts that an Article 8 record keeping requirement impermissibly burdens interstate commerce in violation of Commerce Clause of the United States Constitution. Specifically, Respondent Pascazi maintains that the requirement that an out of state contractors without a regular place of business in New York maintain certain books and records on the job site, which "burden" is not imposed on contractors who maintain an office in the state, is costly and effectively restricts the flow of interstate commerce.[3] The proposition is supported by nothing other than that conclusory statement; no evidentiary record has been made, or attempted, which would establish how this record keeping requirement purportedly burdens interstate commerce. As such the defense is wholly lacking in merit.

VERIFIED COMPLAINT REQUIREMENT

As Labor Law §220 authorizes the Bureau to commence an investigation based upon either a verified complaint or upon its own initiative, there is no statutory preclusion to the Bureau commencing an investigation based on a complaint that lacks the requisite

[3] *See*, NY Labor Law § 220(3-a) (a) (iii).

formalities of verification, as such a circumstance would fall within its prerogative to commence an investigation based upon its own initiative.

FAILURE TO RENDER DECISION WITHIN SIX MONTHS

The requirement that an order and determination be made within six months from the date of a compliance investigation is directory, not mandatory. *Matter of D & D Mason Contractors., Inc. v Smith, 2011 NY Slip Op 1466*; *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney*, 224 A.D.2d 989 (4th Dept. 1996), *affd* 89 NY2d 395 (1996); *Guercio v Gerosa,* 8 A.D.2d 250, 255 (1st Dept. 1959), *affd* 8 N.Y.2d 1104 (1960). Moreover, the lapse of time, standing alone, does not constitute prejudice as a matter of law. *Matter of Louis Harris & Assoc. v deLeon,* 84 N.Y.2d 698, 702 (1994); *Matter of Corning Glass Works v Ovsanik,* 84 N.Y.2d 619, 623 (1994); *Cortland Nursing Home v Axelrod,* 66 N.Y.2d 169, 178-179 (1985).

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 as follows:

On Project 1 Fiber Optek underpaid wages and supplements due the identified employees in the amount of $576.88;

On Project 2 Fiber Optek underpaid wages and supplements due the identified employees in the amount of $13,812.36;

On Project 3 Fiber Optek underpaid wages and supplements due the identified employees in the amount of $11,175.08;

On Project 4 Fiber Optek underpaid wages and supplements due the identified employees in the amount of $6,229.35;

On Project 5 Fiber Optek underpaid wages and supplements due the identified employees in the amount of $7,089.23;

On Project 6 Fiber Optek underpaid wages and supplements due the identified employees in the amount of $37,670.90;

On Project 8 Fiber Optek underpaid wages and supplements due the identified employees in the amount of $13,521.63;

DETERMINE that, as a result of the Department's failure to meet its burden of proof, the Project 7 case be dismissed;

DETERMINE that Fiber Optek be 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 on each of the above-referenced projects was a separate and independent willful violation of Article 8 of the Labor Law;

DETERMINE that the willful violation of Fiber Optek on Project 5 involved the falsification of payroll records under Article 8 of the Labor Law;

DETERMINE that FO Services was a substantially owned-affiliated entity of Fiber Optek on the projects addressed herein;

DETERMINE that Messrs. Pascazi and Zarzeka are shareholders of Fiber Optek and owned or controlled at least ten *per centum* of the outstanding stock of Fiber Optek and were among its five largest shareholders;

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

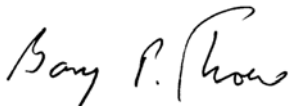
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty);

ORDER that upon the Bureau's notification, Fiber Optek 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