STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

HUNTER ELEVATOR COMPANY, INC., and JERRY DASTON, JOHN NAGLE a/k/a JOHN NAGLE, JR., DENISE NAGLE, HENRY WICKE a/k/a HENRY WICKE, JR., and CRAIG WICKE, as officers and/or shareholders of HUNTER ELEVATOR COMPANY, INC., and its successor or substantially owned-affiliated entity, CHAMPION ELEVATOR CORPORATION, and DONALD GELESTINO as an officer and/or shareholder of CHAMPION ELEVATOR CORPORATION,

Prime Contractor,

for a determination pursuant to Article 8 of the Labor Law Prevailing Wage Rate as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for the Port Jervis School District.

**REPORT**
**&**
**RECOMMENDATION**

Prevailing Wage Case
PRC No. 2015000235
Case ID: PW11 2014004913
Orange County

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In the Matter of

HUNTER ELEVATOR COMPANY, INC., and JERRY DASTON, JOHN NAGLE a/k/a JOHN NAGLE, JR., DENISE NAGLE, HENRY WICKE a/k/a HENRY WICKE, JR., and CRAIG WICKE, as officers and/or shareholders of HUNTER ELEVATOR COMPANY, INC., and its successor or substantially owned-affiliated entity, CHAMPION ELEVATOR CORPORATION, and DONALD GELESTINO as an officer and/or shareholder of CHAMPION ELEVATOR CORPORATION,

Prime Contractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for the Chappaqua Central School District.

Prevailing Wage Case
PRC No. 2015002561
Case ID: PW11 2014004491
Westchester County

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In the Matter of

HUNTER ELEVATOR COMPANY, INC., and JERRY DASTON, JOHN NAGLE a/k/a JOHN NAGLE, JR., DENISE NAGLE, HENRY WICKE a/k/a HENRY WICKE, JR., and CRAIG WICKE, as officers and/or shareholders of HUNTER ELEVATOR COMPANY, INC., and its successor or substantially owned-affiliated entity, CHAMPION ELEVATOR CORPORATION, and DONALD GELESTINO as an officer and/or shareholder of CHAMPION ELEVATOR CORPORATION,

Prevailing Wage Case
PRC No. 2015002372
Case ID: PW11 201400810
Orange County

Prime Contractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for Goshen Central School District.

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

Pursuant to a Second Amended Notice of Hearing issued on October 11, 2024 (HO 1),[1] a two-day videoconference hearing was commenced on December 3, 2024, in Albany, New York with participating parties and/or witnesses appearing remotely at various other locations. The administrative proceeding concluded the next day on October 4, 2024. The purpose of the hearing was to provide all the interested parties with an opportunity to be heard on the issues raised in the Second Amended Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor. When the hearing concluded, the parties were given the opportunity to submit Proposed Findings of Fact and Conclusions of Law ("Proposed Findings"), and both parties that appeared submitted

[1] An original Notice of Hearing and Designation of Hearing Officer was issued by the Department on March 26, 2024. This notice was followed by an Amended Notice of Hearing and Designation of Hearing Officer on June 24, 2024, and culminated in the issuance of the Second Amended Notice of Hearing noted above.

post hearing briefs by the submission deadline. The New York State Department of Labor ("Department") submitted Proposed Findings of Fact and Conclusions of Law, and counsel for Respondents, Champion Elevator Corporation and Donald Gelestino, as officer and/or shareholder of Champion Elevator Corporation., submitted a Post Hearing Brief seeking to dismiss all claims against that entity and named individual.

The hearing concerned investigations conducted by the Bureau of Public Work ("Bureau") of the Department into whether Hunter Elevator Company, Inc., and Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr. and Craig Wicke, as officers and/or shareholders of Hunter Elevator Company, Inc. ("Hunter"), and its alleged successor or substantially owned affiliated entity, Champion Elevator Corporation, and Donald Gelestino, as an officer and/or shareholder of Champion Elevator Corporation ("Champion"), all named Respondents herein, complied with the requirements of Labor Law Article 8 (§§ 220 *et seq.*) in the performance of three public work contracts it was involved in[2].

The first project involved a public work contract between Hunter and the Port Jervis School District ("Port Jervis") during the 2011-2012 academic school year, for the provision of labor, materials, and/or services in furtherance of the maintenance and repair of elevators at various schools located within the City of Port Jervis, located in Orange County, New York (hereinafter "Project 1") under PRC No. 2015000235.

The second project involved a public work contract between Hunter and the Chappaqua Central School District ("Chappaqua") for elevator service and repair maintenance on an as needed basis at various locations within the school district, located in the Town of Chappaqua, Westchester County, New York (hereinafter "Project 2") under PRC No. 2015002561.

The third project involved a public work contract between Hunter and Warwick Valley Central School District ("Warwick") for the provision of labor, materials, and/or services in furtherance of elevator service from July 1, 2011 through June 30, 2013 at various locations within Warwick, located at Town of Warwick, Orange County, New York (hereinafter "Project 3") under PRC No. 2015002372.

[2] Documentary evidence will be referenced as follow: Hearing Officer Exhibits, HO X; Department Exhibits, DOL X and Respondent Exhibits, R X. Transcript references will be in the format: T p X or T pp X, X or T pp X–Y.

## HEARING OFFICER

John Scott was designated as Hearing Officer and conducted the hearing in this matter. However, due to his unavailability, Chief Administrative Law Judge, Marshall H. Day, was substituted as Hearing Officer to finalize this matter, and has prepared this report to the Commissioner based upon the record in this proceeding.

## APPEARANCES

The Bureau was represented by Department Deputy Commissioner and General Counsel, Jill Archambault, (Elina Matot, Associate Attorney, of Counsel).

Respondent, Champion, appeared by and through its attorney, Certilman Balin Adler & Hyman, LLP (Douglas E. Rowe, Esq., of counsel).

There was no appearance by Respondents, Hunter.

## ISSUES

1. Did Respondents pay the rate of wages or provide the supplements prevailing in the locality at issue, and, if not, what is the amount of underpayment?
2. Was any failure by Respondents to pay the prevailing rate of wages or to provide the supplements prevailing in the locality at issue "willful" violation?
3. Did any of the underpayment of wages and/or supplements by Respondents involve the falsification of payroll records?
4. Are Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke Jr. or Graig Wicke shareholders of Hunter who owned or controlled at least ten per centum of the outstanding stock of Hunter?
5. Are Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke Jr., or Graig Wicke officers of Hunter who knowingly participated in a willful violation of Labor Law Article 8?
6. Should interest on the underpayment of wages and/or supplemental benefits be assessed

against Respondents and, if so, in what amount?

7. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be waived?
8. Should a civil penalty be assessed against Respondents and, if so, in what amount?
9. The disposition of any funds being withheld and/or cross-withheld from Respondents by the public entity(ies) listed pursuant to the Notices of Withholding issued by the Bureau of Public Work and Prevailing Wage Enforcement as a result of the underpayments by Hunter to workers as alleged.
10. Should the Motion to Dismiss brought forth in the Champion's Answer and Post-Hearing Brief be granted?
11. Should Estoppel or Doctrine of Laches apply or be granted on behalf of Respondent's Champion?

## FINDINGS OF FACT

The hearing concerned separate investigations made by the Bureau on three projects involving public work performed by Respondents.

The Second Amended Notice of Hearing alleges that Respondents failed to pay or provide prevailing wages and supplement benefits to its laborers, workmen and/or mechanics on the enumerated projects herein.

Hunter was served via regular and certified mail, return receipt requested, with three separate Notices of Hearing, which included the initial Notice of Hearing, an Amended Notice of Hearing, and a Second Amended Notice of Hearing (HO 1, 2, 3, 4, 5, 7, 8, 9, 11; T pp 10-15). The Secretary of State was also served on behalf of Hunter on September 24, 2024, and November 7, 2024 (HO 9, 10; T pp 14, 15).

Hunter failed to file an Answer to the charges contained in any of the Notices of Hearing and Designation of Hearing Officer that were issued or to appear and/or participate in the hearing. As a consequence, Respondents, Hunter, are held in default of this proceeding.

Respondents, Champion, by and through its attorney, filed an Answer to the charges contained in the Amended Notice of Hearing and counsel appeared on his behalf at the hearing. (HO 6; T 12, 13)

**PROJECT 1**

**PORT JERVIS SCHOOL DISTRICT**
**PRC #: 2015000235**

As alluded to above, on or about July 1, 2010, Hunter entered into an elevator maintenance agreement with the City of Port Jervis for the 2011-2012 academic school year, to provide labor, materials, and/or services necessary to maintain, service and repair of elevators at various schools located throughout the Port Jervis School District (DOL 3, 4; T pp 33-37).

The Project 1 contract involved the employment of workers in the classification of Elevator Constructor (DOL 6, 7; T pp 38-43).

On or about July 1, 2011, the Bureau issued Prevailing Wage Rate Schedule 2011 for Orange County. Prevailing Wage Rate Schedule 2011 for Orange County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project 1 from July 1, 2011 through June 30, 2012, including the following classification: Elevator Constructor, with wages of $48.96 per hour, and an increase to $50.11 per hour from January 1, 2012 through June 30, 2012, and supplements of $21.79 per hour, plus 6% of wages if less than 5 years of service, and 8% of wages if more than 5 years of service, and an increase to $23.54 per hour plus the relevant percentage of wages, from January 1, 2012 through June 30, 2012 (DOL 6; T pp 40-41).

On or about July 1, 2012, the Bureau issued Prevailing Wage Rate Schedule 2012 for Orange County. Prevailing Wage Rate Schedule 2012 for Orange County detailed the amount of wages and supplements that were to be paid to or provided for the workers, laborers and mechanics performing work on Project 1 from July 1, 2012 to June 30, 2013, including the following classification: Elevator Constructor, with wages of $50.11 per hour, and an increase to $50.68 per hour from January 1, 2013 through June 30, 2013, and supplements of $23.54 per

hour, plus 6% of wages if less than 5 years of service, and 8% of wages if more than 5 years of service, and an increase to $25.19 per hour plus the relevant percentage of wages, from January 1, 2013 through June 30, 2013 (DOL 7; T pp 42-43).

On or about March 19, 2014, an employee of Hunter, Robert McDougal, met with investigators at the Bureau's Newburgh District office. Mr. McDougal filed a complaint against Hunter and listed multiple job sites that he was working on for Hunter. In response to this initial complaint, the Bureau commenced investigations into multiple projects being performed by the Respondents (DOL 1A; T pp 21-23, 28-30).

On or about September 5, 2014, Mr. McDougal filed a supplemental complaint with the Bureau alleging that Hunter failed to pay the proper prevailing wages and/or supplements on Project 1 (DOL 1; T pp 26-27).

On or about September 19, 2017, the Bureau requested that Hunter furnish payroll records and other documents relating to Project 1 (DOL 2; T p 31). Prior to this document request, the Bureau was in communication with Hunter and investigating multiple projects Hunter was working on, including Project 1, as of July of 2014 (DOL 3, 4; T pp 22-24, 32, 36).

In response to the Bureau's requests for records, Hunter and Port Jervis provided some documentation that was requested by the Bureau, such as invoices, work tickets and paystubs; including those which indicate various employees' start date with Hunter, and payroll item detail reports (DOL 4, 5, 8-11; T pp 34-38, 43-48).

In its document submission to the Bureau, Port Jervis indicated that Hunter were chosen from the State contract bid list for Statewide Elevator, Escalator, Dumbwaiter Maintenance. Port Jervis further indicated that it reminds its vendors, including Hunter, of prevailing wage rate requirements on its projects, and that purchase orders are stamped with the following: "This is a Public Work Project, NYS Labor Laws apply to include prevailing wage rates." (DOL 4; T pp 35, 36, 58).

Hunter submitted a document entitled "Payroll Item Detail Report" which listed its workers, their rates of pay for various week endings, and the time frame of Project 1. Within this document, Hunter made references to paying "prevailing wage rates" to some workers (DOL 9; T pp 45, 46).

Based on its investigation of Project 1, the Bureau determined that Hunter employed and underpaid two (2) workers on Project 1 in the classification of Elevator Constructor and failed to pay or provide prevailing wages and/or supplements to those workers in accordance with the prevailing wage schedules in effect at the time (DOL 12, 13; T pp 55-56).

During the period from the week ending November 25, 2011 through week ending July 20, 2012, Hunter underpaid prevailing wages and supplements to two (2) workers performing work on Project 1 in the total amount of $1,712.36 (DOL 12, 13; T pp 49-56).

The Bureau completed its audit for Project 1 by obtaining the workers' hours worked and rates of pay from Hunter's work tickets, paystubs, and payroll item detail reports (DOL 12, 13; T pp 49-56).

The prevailing wage rates and supplemental benefits rates were from the Prevailing Wage Rate Schedules 2011 and 2012 for Orange County (DOL 12, 13; T p 51). The Bureau determined the classification for the workers on Project 1 was Elevator Constructor based upon the nature of the work described on the work tickets as well as the contract documents (DOL 12, 13; T p 51).

On or about January 29, 2015 and September 19, 2017, the Bureau sent Notices of Labor Law Inspection Findings to Hunter advising them that they had violated various provisions of the Labor Law by failing to pay prevailing wages and supplements to workers performing work on Project 1 (DOL 14, 15; T pp 56-58).

**PROJECT 2**

**CHAPPAQUA CENTRAL SCHOOL DISTRICT**
**PRC #: 2015002561**

In or around 2013, Hunter had an existing contractual agreement with the State of New York, Office of General Services, Design and Construction (hereinafter "OGS"), Contract Number CMU62AA, for the provision of labor, materials, and/or services in furtherance of statewide elevator, escalator, and dumbwaiter maintenance. Chappaqua relied on this existing contract and entered into an agreement with Hunter for elevator service and repair maintenance on an as needed basis at various locations within the school district on Project 2 (DOL 19; T pp

66-67).

The contract for Project 2 involved the employment of workers in the classification of Elevator Constructor-Modernization & Service/Repair (DOL 22; T pp 71-72).

On or about July 1, 2012, the Bureau issued Prevailing Wage Rate Schedule 2012 for Westchester County. Prevailing Wage Rate Schedule 2012 for Westchester County detailed the amount of wages and supplements that were to be paid to or provided for the workers, laborers and mechanics performing work on Project 2 from July 1, 2012 to June 30, 2013, including the following classification: Elevator Constructor-Modernization & Service/Repair, with wages of $43.79 per hour, and an increase to $45.14 per hour from March 17, 2013 until June 30, 2013, and supplements of $26.39 per hour plus 4% of wages if employed up to 5 years, 6% of wages if employed 6 to 15 years, and 8% of wages if employed 15 years or more, with an increase to $27.89 per hour, plus the relevant percentage of wages, from March 17, 2013 until June 30, 2013. (DOL 22; T pp 72-73).

On or about March 19, 2014, an employee of Hunter, Robert McDougal, met with investigators at the Bureau's Newburgh District office. Mr. McDougal filed a complaint against Hunter and listed multiple job sites that he was working on for Hunter. In response to this initial complaint, the Bureau commenced investigations into multiple projects being performed by the Hunter (DOL 1A; T pp 21-23, 28-30).

On or about September 22, 2014, Mr. McDougal filed a supplemental complaint with the Bureau alleging that Hunter failed to pay the proper prevailing wages and/or supplements on Project 2 (DOL 16; T pp 61-63)

On or about February 28, 2015, the Bureau requested that Hunter furnish payroll records and other documents relating to Project 2 (DOL 17; T pp 63-64).

In response to the Bureau's requests for records, Hunter and Chappaqua provided some documentation that was requested by the Bureau, such as work tickets, invoices, paystubs, certificate of incorporation and listing of Hunter's officers, and health benefit contributions for employees (DOL 21-28; T pp 68-71, 74-79).

In its document submission to the Bureau, Chappaqua indicated that Hunter was under a statewide Elevator, Escalator, Dumbwaiter Maintenance contract, and that Chappaqua relied on

this contract when entering into a Purchase Order agreement with Hunter on Project 2. Further, the purchase order between Chappaqua and Respondents referenced Respondents' state contract for elevator maintenance. (DOL 19, 20; T pp 66-68).

Hunter submitted a document entitled "Payroll Item Detail Report" which listed its workers, their rates of pay for various week endings, and the time frame of Project 2. Within this document, Hunter made references to paying "prevailing wage rates" to workers. Further, Hunter's prior counsel submitted documents to the Bureau that contained invoices and work tickets for Project 2, and the cover letter indicated that Hunter is providing the "written record of all prevailing wage work at Chappaqua." (DOL 9, 23; T pp 45, 46, 75, 76, 89).

Based on its investigation of Project 2, the Bureau determined that Hunter employed and underpaid three (3) workers on Project 2 in the classification of Elevator Constructor-Modernization & Service/Repair and failed to pay or provide prevailing wages and/or supplements to those workers in accordance with the prevailing wage schedule in effect at the time (DOL 30, 31; T pp 86-87).

During the period from the week ending February 8, 2013 through the week ending May 31, 2013, Hunter underpaid prevailing wages and supplements to three (3) workers performing work on Project 2 in the total amount of $4,232.58. (DOL 30, 31; T pp 81-86).

The Bureau completed its audit for Project 2 by obtaining the workers' hours worked from Hunter's work tickets for Project 2, and rates of pay from the payroll item detail reports. (DOL 30, 31; T pp 81-86). The prevailing wage rates and supplemental benefits rates were derived from the Prevailing Wage Rate Schedule 2012 for Westchester County. (DOL 30, 31; T pp 81, 83). The Bureau determined the classification for the workers on Project 2 was Elevator Constructor-Modernization & Service/Repair based upon the nature of the work, which was listed in the work tickets and contract documents. (DOL 30, 31; T p 83). The Bureau further applied an annualized supplemental benefit credit based upon Hunter's payments of health benefits, vacation days, sick days, and paid holidays, after deducting the employees' own contributions and deductions from their pay (DOL 8, 29; T pp 43-44, 79-81).

On or about December 29, 2017 and August 13, 2018, the Bureau sent Notices of Labor Law Inspection Findings to Hunter advising that they had violated various provisions of the Labor Law by failing to pay prevailing wages and supplements to workers performing work on

Project 2 (DOL 33; T pp 88, 89).

**PROJECT 3**

**WARWICK VALLEY CENTRAL SCHOOL DISTRICT**
**PRC #: 2015002372**

On or about the year 2011, Hunter had entered into an elevator service agreement with the Warwick Valley Central School District (hereinafter "Warwick Valley") to provide elevator repair and maintenance services from July 1, 2011 through June 30, 2013 at various locations within Warwick Valley, (hereinafter "Project 3") located in the Town of Warwick, Orange County, New York. (DOL 36, 38; Tr. pp 95-97).

On or about July 9, 2013, Hunter extended Project 3 by entering into an elevator service agreement with Warwick Valley for the provision of labor, materials, and/or services in furtherance of 12 months of elevator service from July 1, 2013 through June 30, 2014 at various locations within Warwick Valley (DOL 37).

On or about July 15, 2014, Hunter further extended Project 3 by entering into an elevator service agreement with Warwick Valley for the provision of labor, materials, and/or services in furtherance of 12 months of elevator service from July 1, 2014 through June 30, 2015 at various locations within Warwick Valley (DOL 37).

The contract for Project 3 involved the employment of workers in the classification of Elevator Constructor (DOL 42, 43, 44, 45; Tr. pp 102-104).

On or about July 1, 2011, the Bureau issued Prevailing Wage Rate Schedule 2011 for Orange County. Prevailing Wage Rate Schedule 2011 for Orange County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project 3 from July 1, 2011 to June 30, 2012, including the following classification: Elevator Constructor with wages of $48.96 per hour, and an increase to $50.11 per hour from January 1, 2012 through June 30, 2012, and supplements of $21.79 per hour, plus 6% of wages if less than 5 years of service, and 8% of wages if more than 5 years of service, and an increase to $23.54, plus the relevant percentage of wages, from January 1, 2012 through June 30, 2012 (DOL 42; T p 103).

On or about July 1, 2012, the Bureau issued Prevailing Wage Rate Schedule 2012 for Orange County. Prevailing Wage Rate Schedule 2012 for Orange County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project 3 from July 1, 2012 through June 30, 2013, including the following classification: Elevator Constructor, with wages of $50.11per hour, and an increase to $50.68 per hour from January 1, 2013 through June 30, 2013, and supplements of $23.54 per hour, plus 6% of wages if less than 5 years of service, and 8% of wages if more than 5 years of service, and an increase to $25.19, plus the relevant percentage of wages, from January 1, 2013 through June 30, 2013 (DOL 43; T pp 103-10;).

On or about July 1, 2013, the Bureau issued Prevailing Wage Rate Schedule 2013 for Orange County. Prevailing Wage Rate Schedule 2013 for Orange County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project 3 from July 1, 2013 through June 30, 2014, including the following classification: Elevator Constructor with wages of $50.68 per hour, and an increase to $51.55 per hour from January 1, 2014 through June 30, 2014, and supplements of $25.19 per hour, plus 6% of wages if less than 5 years of service, and 8% of wages if more than 5 years of service, and an increase to $26.79, plus the relevant percentage of wages, from January 1, 2014 through June 30, 2014 (DOL 44; T p 104).

On or about July 1, 2014, the Bureau issued Prevailing Wage Rate Schedule 2014 for Orange County. Prevailing Wage Rate Schedule 2014 for Orange County detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project 3 from July 1, 2014 through June 30, 2015, including the following classification: Elevator Constructor with wages of $51.55 per hour, and an increase to $52.51 per hour from January 1, 2015 through June 30, 2015, and supplements of $26.79 per hour, plus 6% of wages if less than 5 years of service, and 8% of wages if more than 5 years of service, and an increase to $28.39, plus the relevant percentage of wages, from January 1, 2015 through June 30, 2015 (DOL 45; T p 104).

On or about March 19, 2014, an employee of Hunter, Robert McDougal, met with investigators at the Bureau's Newburgh District office. Mr. McDougal filed a complaint against Hunter and listed multiple job sites that he was working on for Hunter. In response to this initial

complaint, the Bureau commenced investigations into multiple projects being performed by Hunter (DOL 1A; T pp 21-23, 28-30).

On or about September 5, 2014, Mr. McDougal filed a supplemental complaint with the Bureau alleging that Hunter failed to pay the proper prevailing wages and/or supplements on Project 3 (DOL 34; T pp 90-92).

On or about December 27, 2017, the Bureau requested that Hunter furnish payroll records and other documents relating to Project 3. (DOL 35; T p 92). Prior to this document request, the Bureau was in communication with Hunter and investigating multiple Projects that Hunter was working on, including Project 3 (Tr. 22, 23, 24, 32, 36, 93).

In response to the Bureau's requests for records, Hunter and Warwick Valley provided some documentation that was requested by the Bureau, such as work tickets, invoices, paystubs, certified payroll documents, certificate of incorporation and listing of Hunter's officers, and health benefit contributions for employees (DOL 37-41; T pp 94-101).

The purchase order between Warwick Valley and Hunter referenced Hunter's State contract for elevator service, and the purchase order indicated that "prevailing wage sheet must be included with the invoice." (DOL 37; T pp 94, 95).

Hunter submitted a document entitled "Payroll Item Detail Report" which listed its workers, their rates of pay for various week endings, and the time frame of Project 3. Within this document, Hunter made references to paying "prevailing wage rates" to some workers (DOL 9; T pp 45, 46).

Based on its investigation of Project 3, the Bureau determined that Hunter employed and underpaid three (3) workers on Project 3 in the classification of Elevator Constructor and failed to pay or provide prevailing wages and/or supplements to those workers in accordance with the prevailing wage schedules in effect at the time (DOL 47, 48; T pp 106-110).

During the period from the week ending December 16, 2011 through the week ending May 20, 2015, Hunter underpaid prevailing wages and supplements to three (3) workers performing work on Project 3 in the amount of $13,153.63 (DOL 47, 48; T pp 106-110).

The Bureau completed its audit for Project 3 by obtaining the workers' hours worked from Hunter's work tickets and certified payrolls for Project 3, and rates of pay from the

paystubs and payroll item detail report. (DOL 30, 31; T pp 98, 99, 106-110). The prevailing wage rates and supplemental benefits rates were derived from the Prevailing Wage Rate Schedules 2011-2014 for Orange County. (DOL 30, 31; T pp 106-110). The Bureau determined the classification for the workers on Project 3 was Elevator Constructor based upon the nature of the work, which was listed in the work tickets and contract documents. (DOL 30, 31; T p 102). The Bureau further applied an annualized supplemental benefit credit based upon Hunter payments of health benefits, vacation days, sick days, and paid holidays, after deducting the employees' own contributions and deductions from their pay. (DOL 8, 29; T pp 79-81, 106-110).

On or about March 11, 2015, December 27, 2017, and January 25, 2018, the Bureau sent Notices of Labor Law Inspection Findings to Hunter advising that they had violated various provisions of the Labor Law by, among other things, failing to pay prevailing wages and supplements to workers performing work on Project 3 (DOL 49; T pp 110-111).

## GENERAL FINDINGS APPLICABLE TO ALL PROJECTS

During the period when work was performed on the three aforementioned projects, Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr., and Craig Wicke were each one of the top five largest shareholders, or shareholders who each owned at least ten per centum of Hunter, or both, or were officers who knowingly participated in Hunter's failure to pay or provide prevailing wages and supplements to or for the benefit of employees who performed work on the three aforementioned projects, or any combination of the above. (DOL 50-52, 55**;** T pp 116-121, 132, 133).

## CONCLUSIONS OF LAW

## MOTION TO DISMISS

In Respondents', Champion's Answer and post-hearing submission, Champion moved the Administrative Adjudication Unit to Dismiss all three prevailing wage cases, arguing that "the Department Labor's investigation resulted in unreasonable internal delays and caused Champion to be prejudiced to its detriment", and that the Department failed to meet its burden of

proof to establish that the violations associated with the three projects at issue in this proceeding were in fact willful violations.

Pursuant to Department of Labor hearing rules of procedure, a determination on this motion was held until the conclusion of the hearing. Although Champion argues that the extensive delay had a negative impact on them, they failed to demonstrate at the hearing how that detriment limited their ability to defend their case, especially given the fact that Champion went forward and fully participating in the hearing, were given the opportunity to be heard on all matters presented and provided a rigorous defense of their positions on all issues that were raised in the Amended Notice of Hearing.

Thus, Respondents, Champion, have failed to establish prejudice or irreparable harm sufficient to warrant overturning the substantial evidence of prevailing wage violations addressed herein, and given the extensive testimony elicited concerning the violations and the documents received into evidence on behalf of the Department, I find no basis for granting such a motion[3].

For the foregoing reasons, based upon the evidence in the record as a whole, I find that the Department's case, while flawed in some aspects, is not so void of facts as to fail to demonstrate a prima facie case against the Respondents (specifically, in regards to willfulness), and does not warrant dismissal by the Commissioner, therefore I recommend the motion to dismiss be denied.

## EQUITABLE ESTOPPEL AND LACHES

Respondents, Champion, both in its Answer and Post-Hearing Brief ask that this matter be terminated in the interests of justice. That they believe that the proceeding is subject to equitable estoppel and laches. Respondents fail to cite any legal precedent that would bolster their position that equitable estoppel or laches would apply to this type of administrative proceeding and given the fact that the only motion that can be made by the Respondents in an administrative hearing is a motion to dismiss, the Respondent has failed to articulate relief which can be granted in this proceeding. Accordingly, I find no basis to grant the relief requested.

[3] *See also,* Interest Rate section below. Courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay.

The purpose of laches is to ensure legal claims are brought in a reasonable time period, so that evidence and reliable witnesses can easily be found. Laches is case-specific, relying on the determination of whether the Department simply waited too long so that the Respondents could not put on a reasonable defense. The Respondents never alluded to being so prejudiced by the time delay that it prevented it from putting on a defense. There was never any mention that, as a result of this delay, witnesses and/or evidence had been lost or were no longer available. It only argued that based on the time period between the complaint, inspection findings and the issuance of the Notice of Hearing it is no longer just to grant the workers' claims as against them as they had no prior notice of the violations contained therein, and because of this delay the Department should estopped from pursuing the Respondents any longer.

In addition, the general rule is that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (Matter of Schorr v New York City Department of Housing Preservation, 10 NY3d 776, 779, 886 N.E.2d 762, 857 N.Y.S.2d 1 [2008], quoting citations omitted) or to prevent it from performing a "governmental function" (see Matter of Village of Fleischmanns, 77 AD3d 1146, 1148-1149, 909 N.Y.S.2d 564 [3rd Dept., 2010]; Matter of Pegasus Cleaning Corporation v Smith, [**10] 73 AD3d 1328, 1330, 905 N.Y.S.2d 666 [3rd Dept., 2010]). There are exceptions to this general rule, however the fact that the investigator failed to inform Champion of the violations that occurred herein until the Notice of Hearing was issued does not constitute the unusual circumstances contemplated by the exceptions to this rule.

Champion also makes an equitable estoppel claim that the Department should have looked into whether the contractor had the ability to pay the amounts owed (whether the liability was collectable). There is nothing in the statute applicable to this type of proceeding which requires that the Department to make this type of analysis, as such the argument fails, and will not be considered herein.

I have considered the remaining contentions raised in Champion's brief and find them to either be without merit or, considering the foregoing, not necessary to resolve the matter.

## JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects[4]. This constitutional mandate is implemented through Labor Law article 8. Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [1999]). Labor Law § 220.2 establishes that the law applies to a contract for public work to which the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law is a party. Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

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

> First, the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and second, the contract must concern a public works project. *Id at 537*.

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

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

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

public. *Id at 538*.

Respondents, Champion, do not dispute that the Departments of Jurisdiction in Projects 1 through 3 were public entities and parties to the various public work contracts. The contracts involved construction-like labor paid for by public funds. Finally, the work products are clearly for the use or other benefit of the general public. As such, Labor Law Article 8 applies, and all laborers, workmen and mechanics employed on all three of the public work projects at issue are required to be paid of prevailing wages and supplemental benefits on each project at issue.

## CLASSIFICATION OF WORK

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

The record contains ample evidence from the contract documents, work tickets and invoices, PW-4 complaints, nature of work performed, Hunter's payrolls, and investigator testimony to justify the classifications used in each instance. Therefore, I find that the weight of the evidence taken in its entirety supports the classification determinations made by the Department for the workers on the three Projects.

## UNDERPAYMENT METHODOLOGY

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." (*Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [1989] (citation omitted)). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. (*Matter of TPK Constr. Co. v Dillon*, 266 AD2d 82 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]). In cases where employer's records are inaccurate, the burden shifts to the employer to negate the reasonableness of the Commissioner's calculations. *Mid Hudson Pam Corp,* 156 AD2d at 821 (citation omitted).

The Bureau employed the same methodology for the various project audits and accounted for any minor discrepancies among the rates paid on the projects in their audits, adjusting the audit calculations as deemed necessary. To determine underpayments on the three projects the Department used the relevant wage schedules, certified payroll on Project 3, work tickets, paystubs, payroll item detail reports, worker testimony, contract documents, and on two of the projects annualized benefits due to the employees working on private and public work during the period the work was performed.

More specifically, the Bureau completed its audit for Project 1 by obtaining the workers' hours worked and rates of pay from Respondents' work tickets, paystubs, and payroll item detail reports. The prevailing wage rates and supplemental benefits rates were from the Prevailing Wage Rate Schedules 2011 and 2012 for Orange County. The Bureau determined the classification for the workers on Project 1 was Elevator Constructor based upon the nature of the work described on the work tickets as well as the contract documents.

The Bureau completed its audit for Project 2 by obtaining the workers' hours worked from Respondents' work tickets for Project 2, and rates of pay from the payroll item detail

reports. The prevailing wage rates and supplemental benefits rates were derived from the Prevailing Wage Rate Schedule 2012 for Westchester County. The Bureau determined the classification for the workers on Project 2 was Elevator Constructor-Modernization & Service/Repair based upon the nature of the work, which was listed in the work tickets and contract documents. The Bureau further applied an annualized supplemental benefit credit based upon Respondents' payments of health benefits, vacation days, sick days, and paid holidays, after deducting the employees' own contributions and deductions from their pay.

Finally, the Bureau completed its audit for Project 3 by obtaining the workers' hours worked from Respondents' work tickets and certified payrolls for Project 3, and rates of pay from the paystubs and payroll item detail report. The prevailing wage rates and supplemental benefits rates were derived from the Prevailing Wage Rate Schedules 2011-2014 for Orange County. The Bureau determined the classification for the workers on Project 3 was Elevator Constructor based upon the nature of the work, which was listed in the work tickets and contract documents. The Bureau further applied an annualized supplemental benefit credit based upon Respondents' payments of health benefits, vacation days, sick days, and paid holidays, after deducting the employees' own contributions and deductions from their pay.

The weight of the evidence in the record supports the Department's methodology used on all three projects.

## INTEREST RATE

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

Although the courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay (*Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 624 (1994); *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney*, 224 AD2d 989 [4th Dept. 1996], *affd* 89 NY2d

395 [1996])[5], the courts have both endorsed and directed agencies to exclude interest from an award for that period of time attributable solely to the agency's unreasonable delay. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Matter of Nelson's Lamplighters, Inc. v. New York State Department of Labor*, 267 AD2d 937, 938 (3d Dept. 1999). *Matter of M. Passucci General Constr. Co., Inc. v. Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995). *Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991).

Respondents are responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment, that interest should be waived for a total of six (6) years on all three projects given the period of unexplained inactivity between the conclusion of the investigation and the commencement of the hearing that lasted for years.[6]

## 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) 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 (emphasis added).

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. (Matter of Cam-Ful Industries, Inc. v Roberts, 128 AD2d 1006, 1006-1007 [1987]). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct

[5] The lapse of time, standing alone, does not constitute prejudice as a matter of law. *Matter of Louis Harris & Assoc. v. deLeon*, 84 NY2d 698, 702 (1994); *Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 623 (1994); *Cortland Nursing Home v. Axelrod*, 66 NY2d 169, 178-179 (1985).

[6] The Department offered no evidence explaining the considerable delays between the completion of the investigation and prosecution in this matter.

engaged in is illegal (citations omitted)." (Matter of Fast Trak Structures, Inc. v Hartnett, 181 AD2d 1013, 1013 [1992]; see also, Matter of Otis Eastern Services, Inc. v Hudacs, 185 AD2d 483, 485 [1992]). The violator's knowledge may be actual or, where he should have known of the violation, implied. (Matter of Roze Assocs. v Department of Labor, 143 AD2d 510 [1988]; Matter of Cam-Ful Industries, supra) An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. (Matter of Scharf Plumbing & Heating, Inc. v Hartnett, 175 AD2d 421 [1991]).

The weight of the evidence in the record as a whole demonstrates that Hunter knew of the requirements to pay the prevailing rate of wages and supplements on the public work projects at issue and in fact did not pay the prevailing rates as required, and therefore the violations which occurred on each project can only be considered a willful violation in each instance, and warrants a finding of willfulness by Respondents.

## FALSIFICATION OF PAYROLL RECORDS

Labor Law § 220-b (3) (b) (1) further provides that if a contractor is determined to have willfully failed to pay the prevailing rates of pay, and that willful failure involves a falsification of payroll records, the contractor shall be ineligible to bid on or be awarded any public work contract for a period of five (5) years from the first final determination. For this section of the law to be meaningful, the term "falsification of payroll records" must mean more than a mere arithmetic error; if it did not, in any case where the certified payrolls did not perfectly match the payments to workers such payrolls could be deemed falsified, and the contractor debarred. The definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." *Merriam-Webster*, 2011, http://www.merriam-webster.com/dictionary/falsify). In the absence of a statutory definition, the meaning ascribed by lexicographers is a useful guide. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976).

It is clear from the record that Hunter failed to meet its obligation to maintain true and accurate payroll records on Project 3, and I find, especially in light of the investigator's

testimony that she could not confirm the rates paid to laborers, workmen or mechanics listed on the certified payrolls and the collateral information contained in the Payroll Item Detail Report, as well as the PW-4 complaints, which showed that the wages and portions of the supplemental benefits that were paid were far below the prevailing wage in the jurisdiction at issue, that the willful failure to pay or provide prevailing wages and/or supplements involved the falsification of payroll records on the project Hunter maintained them on.

Hunter falsified payroll records because they knowingly submitted certified payroll records on Project 3 that Hunter knew contained wage and supplement rates (certifying the fringe benefits were paid to approved plan) that were inaccurate. The record as a whole demonstrates that Hunter paid its workers wage and supplement rates for each hour worked that did not comport with the rates that were listed on the certified payrolls that were submitted to the jurisdiction of record on Project 3.

The substantial evidence in this matter warrants a finding of the falsification of payroll records by Hunter on Project 3.

## SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of Labor Law Article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

In the present cases, the evidence showed that Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr., and Craig Wicke were officers and/or shareholders owning or controlling at least ten per centum of the outstanding stock and were five of the largest shareholders of Hunter during the projects outlined above. Jerry Daston signed the proposal for the work on Project 1. He signed the certified payrolls on Project 3. Also, the Certificate of Incorporation documents and the Department of State printout lists Jerry Daston as

President and Chief Executive Officer of Hunter. Counsel for Hunter expressly stated in her correspondence to the Bureau that Jerry Daston, John Nagle, Henry Wicke and Craig Wicke are the top owners of the company. The Sale Agreement between Hunter and Champion lists and is signed by Jerry Daston, Henry Wicke a/k/a Henry Wicke, Jr., Denise Nagle, and Craig Wicke as shareholders of Hunter. The Warranty Bill of Sale, Assignment and Assumption Agreement, and Officer's Certificate were all signed by Jerry Daston as president. In addition, the Unanimous Written Consent of the Shareholder for the approval of the asset purchase agreement was signed by Jerry Daston, Henry Wicke a/k/a Henry Wicke, Jr., Denise Nagle and Craig Wicke.

Pursuant to Labor Law §220-b(g)(ii) and (iii), Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr., and Craig Wicke are individually liable for the underpayments of wages and wage supplements on the Projects subject to these proceedings.

Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr., and Craig Wicke by virtue of their control over all the projects at issue knowingly participated in Hunter's failure to pay or provide prevailing wages and supplements to or for the benefit of the laborers, workmen and/or mechanics who performed work on the three projects at issue.

## SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as "…an entity which exhibits any other indicia of control over the …subcontractor…, regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,… power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity." The Legislature intended the definition to be read expansively to address the realities of whether entities are substantially owned-affiliated entities. *Matter of Bistrian Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

Given the timing of Hunter's cessation of operations and Champion's purchase under the asset purchase agreement, as well as there not being any identifiable or documented ownership interest between the two firms, I cannot find that Champion is a substantially owned-affiliated entity of Hunter. The officers and/or shareholders of Champion are not officers and/or shareholders Hunter, nor have they been shown to have the kind of power and responsibility needed to make such a finding.

## LIABILITY OF A SUCCESSOR ENTITY

Under Labor Law § 220(5)(k), a "successor," is defined as "an entity engaged in work substantially similar to that of the predecessor, where there is **substantial continuity** of operation with that of the predecessor." (emphasis added).

Where, as here, an administrative determination is made after an evidentiary hearing required by law, all findings must be supported by substantial evidence (*see* CPL 7803 [4]). "Substantial evidence is a minimal standard that requires less than the preponderance of the evidence and demands only the existence of a rational basis in the record as a whole to support the findings upon which the determination is based" (*Matter of C&C Tobacco/Chuck's Gas Mart, Inc. v Tompkins County Whole Health*, 233 AD3d 1237, 1238 [3d Dept 2024] [internal quotation marks and citations omitted]). Upon reviewing the record, as a whole, I find that there is not a rational basis to support the findings upon which the determination is based to show that there was substantial continuity of operation as defined under Labor Law § 220(5)(k) between the two entities. The record was not developed enough to show how the absorption of stated contracts pursuant to the asset purchase agreement would have extended Champions' responsibility, as a third-party purchaser of value of certain assets, to cover previous labor law violations of an entity they were not a part of or had control over.

To show substantial continuity of operation with that of the predecessor firm the Department had to show a clear nexus with the predecessor firm in which the officers or owners of Champion either worked on or exhibited any dominion or control over either the entity or the three public work projects at issue during the period the work was performed. There is nothing in the record indicating that they had such control or agreed to take on or continue the maintenance agreements on any of the three projects upon the asset purchase. None of Hunter's officers or

employees now work for Champion, all though alluded to, the record points to no assets, trucks or equipment of Hunter's that were being used by Champion. There is also nothing in the record that shows the phone numbers and physical addresses of the two entities are the same.

On April 1, 2022, Hunter and Champion entered into an agreement entitled "Sale and Acquisition of Assets of Hunter Elevator Company to Champion Elevator Corporation". Champion was a good faith purchaser of value in an arm's length transaction of a competitor's business assets, as such Hunter was required to put Champion on notice of labor law violations as well as the potential that if the underpayment responsibility was not taken care of, that by operation of law the purchaser, as a successor, would be fully liable for the monetary responsibility of the previous public work projects Hunter was involved in and/or Champion would be prevented from entering into public contracts in the future if they were to follow through with the purchase agreement.

Furthermore, even though both parties were engaged in the business of elevator repair and maintenance and related services and Champion desired to purchase from Hunter certain assets and properties of Hunter subject to the terms and conditions of the Agreement[7], they also agreed to absorb the new contracts and assets free and clear of all liens.

Although, prior Administrative Adjudication cases cited by counsel for the Department (*National Building and Restoration Corp., et al* and *Venditti Bros., Inc. et.al)* in support of their position do indicate continuity of operations between entities can occur when a successor corporation takes over certain work after the prior entity does not, cannot, or chooses not to continue doing all of the work it had done previously, the analysis does not stop there. Under the cases cited there were an extremely close interlocking connection between the two corporations with both having strong familial ties taking over for a relative of the prior business and forming a new business that continues on in the same field of work, utilizing the same set of workers and/or equipment, with similar management and shared offices. That is not the case here. This is a distinct set of facts here in which a good faith purchaser of value in an arm's length transaction who had no familial connection/ownership interest in the prior entity agrees to purchase the assets of a competitor firm. Champion neither had any control over Hunter's workers or participated in the maintenance contracts subject to this proceeding, and the contracts purchased

[7] Other than the forty-four contracts that were listed, none of the assets or properties outlined in the agreement were specified.

are separate and distinct from the worked previously performed from the entity they purchased it from. Other than showing that Champion worked in the same domain of work, the Department failed to show that Champion had taken over certain work (public work elevator contracts) after Hunter does not, cannot, or chooses not to continue doing all of the work associated with the previous elevator contracts.

The Department failed to show how any of the forty-four contracts that were purchased by Champion had anything to do with the three prevailing wage projects at issue. The record is devoid of any facts which show that the elevator maintenance or repair contracts entered into for the public work projects at issue were extended, modified or absorbed by Champion making them responsible for liabilities associated with maintenance and or repair contracts they had no part in or had notice of. If the Department had shown a clearer nexus to the public work projects at issue (or any of the other eight outstanding projects not subject to this proceeding), this body would have found a different result, however without more connectivity shown between the entities the Department's argument fails. Additionally, projects that occurred in 2015 or earlier are too far removed from the purchase date to show a rational connection between the current absorbed contracts entered into in 2022 and the prior public work contracts entered into in 2013 or earlier.

In sum, there is not enough evidence in the record demonstrating a extremely close interlocking connection between the two corporations: Champion did not convert staff and resources of Hunter to its own use and benefit; and although Champion relied upon the corporate reputation Hunter developed, both corporations did not share corporate officers or any major shareholders of the companies, and no one from Hunter had any ownership interest in Champion. Champion also did not take over the corporate entity or purchase any shares of stock of the corporation. Finally, although Champion performed substantially the same work, there was no showing that they engaged in the same types of projects (the majority of the contracts purchased looked like private contracts, not public work projects), and although there was a mention that an officer of the original entity was hired by the alleged successor, the record was absent any information that the officer mentioned ever signed the agreement to come on board with Champion.

Under these circumstances, the imposition of joint liability on to a third party would be said to be arbitrary or irrational. I therefore decline to find that Champion is a successor entity to Hunter.

## CIVIL PENALTY

Labor Law §§ 220 (8) and 220-b (2) (d) provide for the imposition of a civil penalty in an amount not to exceed twenty-five percent (25%) of the total amount due (underpayment and interest). In assessing the penalty amount, consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and the failure to comply with record-keeping and other non-wage requirements.

The Respondents had extensive experience in public work, prior violations, prior findings against them by the Department, and significant involvement with Department investigators in the past. The violations in question are serious and involve falsified records. Under these circumstances, viewing the record as a whole, I find that a 25% penalty is appropriate.

## RECOMMENDATIONS

Based upon default of the Respondents, Hunter, in answering or contesting the charges contained in the Department's Second Amended Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, and based upon the weight of the evidence set forth in the record as a whole, I:

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

DENY Champion's Motion to Dismiss; and

DETERMINE that Champion was <u>not</u> a "substantially owned-affiliated entity or successor" of Hunter relating to any of the three projects at issue, and neither the business or the

individual are financially liable for the underpayments determined owed herein or should be subject to debarment as a result of the asset purchase agreement; and

DETERMINE that Hunter underpaid prevailing wages and supplemental benefits to its laborers, workmen and mechanics in the amount of $1,712.36 on the Project 1, for the audit period week ending November 25, 2011 through the week ending July 20, 2012; and

DETERMINE that Hunter underpaid prevailing wages and supplemental benefits to its laborers, workmen and mechanics in the amount of $4,232.58 on the Project 2, for the audit period week ending February 8, 2013 through the week ending May 31, 2013; and

DETERMINE that Hunter underpaid prevailing wages and supplemental benefits to its laborers, workmen and mechanics in the amount of $13,153.63 on the Project 3, for the audit period week ending December 16, 2011 through the week ending May 20, 2015; and

DETERMINE that Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr., and Craig Wicke are officers and owners of Hunter; and

DETERMINE that Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr., and Craig Wicke knowingly participated in the violation of Labor Law Article 8 on the three projects at issue; and

DETERMINE that the failure of Hunter to pay the prevailing wage or supplement rate on the three projects was a “willful” violation of Labor Law Article 8; and

DETERMINE that the failure of the Hunter to pay the prevailing wage or supplement rates on each of the three projects was a separate and distinct “willful” violation of Labor Law Article 8; and

DETERMINE that the willful violation of Hunter did involve the falsification of payroll records on Projects 3 under Labor Law Article 8; and

DETERMINE, that as a result of Hunter’s knowing willful participation in the falsification of payroll records within the meaning of Section 220-b(3)(b) of the Labor Law on the certain named Projects, both the entity (Hunter) and the individuals (Jerry Daston, John Nagle a/k/a John Nagle, Jr., Denise Nagle, Henry Wicke a/k/a Henry Wicke, Jr., and Craig Wicke) are 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 (5) years from the issuance of the

Order & Determination associated with this report; and

DETERMINE that Hunter (both the entity and individuals) is responsible for any underpayment of wages or supplemental benefits determined to be owed to its laborers, workmen and/or mechanics on all the Projects at issue; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Hunter is responsible for interest on the total underpayments on the named Projects at the statutorily mandated rate of sixteen (16%) per annum from the date of underpayment to the date of payment; however, due to delays attributable solely to the Department such interest shall be **WAIVED** for a period of six (6) years on all three projects; and

DETERMINE that based on the statutory factors set forth in Labor Law Article 8, Hunter is assessed a civil penalty in the amount of twenty-five (25%) of the underpayment and interest due on the named Projects; and

ORDER that the Bureau compute the total amount due (underpayments, interest less the waiver of six (6) years of interest, and civil penalty) on all three projects; and

ORDER that if any of the named Departments of Jurisdictions are withholding funds that it 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; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Hunter, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, and sent to the Bureau at: Bureau of Public Work, New York State Department of Labor, Harriman State Office Campus, Building 12, 1st Floor, Room 130, Albany, New York 12226; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on all three Projects, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: October 24, 2025
Albany, New York

Respectfully submitted,

Marshall H. Day, Chief Administrative Law Judge