STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

MARTIN BOUCHARD CONSTRUCTION, LLC and MARTIN BOUCHARD, as an officer and/or managing member of MARTIN BOUCHARD CONSTRUCTION, LLC

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 Town of Altona.

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REPORT & RECOMMENDATION

Prevailing Rate Case No.: 2015007996
Case ID: PW01 2015009929
Clinton County

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

Pursuant to a Notice of Hearing issued on August 1, 2017, a hearing was held on January 25, and continued on January 26, 2018, in Albany, New York. The purpose of the hearing was to provide the parties with 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 Martin Bouchard Construction LLC ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the construction of a salt storage shed ("Project") for the Town of Altona ("Department of Jurisdiction").

Subsequent to the conclusion of the hearing in this matter, Respondent submitted to the Hearing Officer additional documents not offered in evidence at the hearing. The Department objected to receipt of any additional materials into the record. The Hearing Officer treated the offer by Respondent as a Motion to Reopen and, in a Decision dated March 30, 2018, denied

Respondent's request. The parties were then given additional time to submit Proposed Findings of Fact and Conclusions of Law, which were received in May, 2018.

APPEARANCES

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

Prime appeared with its attorney, Ronald G. Dunn, Esq., and submitted an Answer on December 20, 2017. (HO 6)[1]

ISSUES

Did Prime pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?

Was any failure by Prime to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?

Did any willful underpayment involve the falsification of payroll records?

Is Martin Bouchard an officer or managing member of Prime who knowingly participated in a willful violation of Labor Law article 8?

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

FINDINGS OF FACT

Prime is an LLC, whose sole member and owner is Martin Bouchard. (DOL 19)

On or about July 1, 2015, the Bureau issued a Prevailing Wage Rate Schedule for Clinton County ("PWRS 2015"). PWRS 2015 set forth the wages and supplements to be paid to workers, laborers, and mechanics performing work on public work projects in Clinton County from July 1, 2015 to June 30, 2016. PWRS 2015 included the following classifications: carpenter, building: wages $25.75 per hour, supplements $18.32 per hour; ironworker, structural and precast: wages $29.50 per hour, supplements $25.86 per hour; and laborer, building: wages $21.48 per hour, supplements $19.30 per hour. (DOL 5A, 5B)

[1] Exhibits will be referred to as follows: Hearing Officer Exhibits – HO X; Department Exhibits – DOL X; Respondent Exhibits – R X. Transcript references will be shown as T p. X or T pp. X – XX.

On or about July 1, 2016, the Bureau issued a Prevailing Wage Rate Schedule for Clinton County ("PWRS 2016"). PWRS 2016 set forth the wages and supplements to be paid to workers, laborers, and mechanics performing work on public work projects in Clinton County from July 1, 2016 to June 30, 2017. PWRS 2016 included the following classifications: carpenter, building: wages $25.75 per hour, supplements $18.92 per hour; ironworker, structural and precast: wages $30.05 per hour, supplements $26.56 per hour (wages $30.05, supplements $26.56 as of May 1, 2016); and laborer, building: wages $21.88 per hour, supplements $20.40per hour. (DOL 5C)

On or about September 30, 2015, Prime entered into a contract with the Department of Jurisdiction for the construction of a salt storage building in the Town of Altona. Contract documents included PWRS 2015. (DOL 4)

On or about October 16, 2015, Prime accepted a change order requiring the construction of a reinforced concrete foundation and crib wall in lieu of the timber system called for in the contract. (DOL 4)

The Project included excavation, concrete work, steel reinforcement, light wood framing, carpentry, insulation, roofing, pouring and reinforcing a concrete foundation and crib wall; installation of metal siding, and installation of metal framing for walls, ceiling and truss members. (T p. 171, 252, 258, 262; DOL 4, 13b – 13u)[2]

On or about December 17, 2015, the Bureau received from the Northeast Regional Council of Carpenters, Local 291 ("Local 291"), a Public Complaint Form ("Complaint") concerning work performed by Prime on the Project. (DOL 1)

Pursuant to the Complaint, on December 17, 2015, the Bureau issued to Prime a request for records for the Project with a return date of ten calendar days from receipt by Prime of the request. (DOL 2)

[2] The reporting service first provided a transcript of this hearing on February 20, 2018. That transcript was inaccurate in that it did not show the first day of hearing but rather replaced the first hearing day with the transcript of the second hearing day. The reporting service provided a corrected copy of the transcript on February 28, 2018. It is that version of the transcript which the Hearing Officer used for this Report and Recommendation. The Department's Proposed Findings of Fact and Conclusions of Law ("DOL Proposed Findings") appear to use page numbers from the first, inaccurate, transcript.

Prime did not prepare certified payrolls contemporaneously with the work as it was performed on the Project. (T p. 471 - 473)

The individual who filed the Complaint, Michael Bruno ("Bruno"), was a representative of Local 291, among whose job duties was contacting employers, owners and workers to "see what's going on, kind of police the work of the carpenter," and to ensure that prevailing wages are paid on public work projects. (T p. 17)

Bruno stated that he visited the Project work site multiple times while there was work in progress. (DOL 1; T p. 18)

In November 2015, Bruno visited the Project for an unknown period of time. During his visit, Bruno noted a total of nine individuals at the Project, two of whom he assumed were working for a concrete company delivering concrete. Of the seven remaining individuals, one was a woman whom he did not see perform any work. (T pp. 38 – 42)

On other occasions, Bruno saw from three to seven individuals on the Project, once on a Sunday, performing work, including stripping wooden forms from concrete, tying rebar, and patching concrete. (DOL 1; T pp. 43 – 52)

The Bureau obtained delivery receipts showing the dates and times of, and amounts included in, deliveries of concrete to the Project. The Bureau used this information to estimate the number of workers needed on the Project during such deliveries. (T pp. 217 – 222, 248 -251; DOL 14)

Bureau investigator Sarah Grant-VanBuskirk visited the Project "approximately" four times, beginning in March 2016. (T p. 104)

While visiting the Project, Grant-VanBuskirk took a series of photographs. (T p. 108, 118)

The photographs showed various portions of the salt shed that was the subject of the Project, including concrete ties, bolts, scaffolding, trusses, and lifts. (T pp. 108 -115, 122 – 125; DOL 13A – 13U)

While visiting the Project, Grant-VanBuskirk saw workers engaging in various activities (T pp 122 – 125)

The Bureau received certified payroll records signed by Martin Bouchard, for the period week ending November 6, 2015, through August 5, 2016. (DOL 6)[3], [4]

On January 29, 2016, the Bureau received certified payrolls for the Project for the week ending November 6, 2015, through the week ending December 18, 2015. (DOL 6B)

At some point the Bureau received additional certified payrolls for the Project for the week ending November 6, 2015, through the week ending July 1, 2016. These payrolls duplicated, in part, payrolls previously received. (T. p. 288; DOL 6C)[5]

Certified payrolls received by the Department include two versions of the week ending July 1, 2016. One of the versions, with the word "revised" handwritten on it, has additional worker Nathan Snow, who is not present on the payroll page without the word "revised." (DOL 6C – Bates-stamped pages 37, 38 and 40, 41)

On all of the payrolls received by the Bureau, Martin Bouchard identified himself as the owner of Prime and certified the payrolls. (DOL 6, 6B, 6C)

Bureau investigators met with Martin Bouchard on several occasions prior to the completion of the Project to explain the requirements under the Labor Law concerning proper classification of workers on the Project. (T pp. 289 – 292)

The Bureau classified workers on the Project as laborers, carpenters, ironworkers, masons, and operators. (T pp. 296 – 299)

Certified payrolls show only the classifications of building laborer and carpenter for all workers on the Project. (DOL 6, 6B, 6C)

After receipt on the Project of a prefabricated metal structure, Prime's certified payrolls showed workers in several classifications. The Bureau identified all work after receipt of the structure as ironworker. (T pp. 301 – 305, 308)

[3] The DOL Proposed Findings at page 8, paragraph 101, states that the last payroll date in DOL 6 is August 15, 2016. The record does not reflect this date; rather, DOL 6 shows August 5, 2016, as the last date on the certified payroll.
[4] Interspersed within the certified payrolls in DOL 6 are spreadsheets independently prepared by Bureau personnel.
[5] DOL 6C contains duplicate pages for the week ending May 6, 2016 (see, Bates-stamped pages 26, 27 and 28, 29 within DOL 6C)

The Bureau investigator testified that an analysis of the concrete delivery records when compared to the certified payrolls showed that more individuals than were listed on the payrolls were required in order to perform the work required during a concrete pour. (T pp. 248 – 251)

The Bureau obtained bank records for Prime and used records of checks paid to workers on the Project when creating the audit of the Project. (DOL 12)

The Bureau investigator created excel spreadsheets to identify those times the payrolls were inconsistent with the amount of work that was performed, or the number of reported workers shown was incorrect. (DOL 6)

Worker Gil Bouchard appears on certified payrolls for the week ending 6/24/16 through the week ending 8/5/16. (DOL 6)

Gil Bouchard testified that he worked for Prime on the Project in 2016, performing ironworker work; was paid an ironworker rate including supplements for work performed; and received and cashed paychecks from Prime for the wages he earned. (T pp. 388 – 390, 400, 401)

Gil Bouchard did not deposit the paychecks received from Prime for work on the Project for approximately two months. (T pp. 396, 397; R 2)

The Bureau did not receive proof of any payment to Gil Bouchard for work performed on the Project during the course of the investigation. (T pp. 330, 331)

Bouchard testified that a woman observed on the worksite was a friend he asked to take pictures. (T pp. 441, 442)

The Bureau prepared an audit for the Project, using the information obtained by the investigators, certified payrolls, and statements from Bruno regarding the workers present on various dates. (T pp. 379 – 383; DOL 6, 7)

The Department investigator requested information concerning unnamed workers on the Project but was told by Bouchard only that such people were friends or family who showed up to help. (T p. 372)

In the audit prepared by the Bureau, underpayments of wages and supplements to Gil Bouchard amounted to $16,091.20, or approximately fifty percent of the total underpayments on the Project. (DOL 8)

Underpayments to unknown workers amounted to approximately 22 percent of the total underpayments on the Project. (DOL 8)

The Bureau issued a Notice to Department of Jurisdiction to Withhold Payment ("Withholding") in the amount of $26,681.45 to the Department of Jurisdiction on January 26, 2016; rather than withholding the funds, the Department of Jurisdiction sent a check for the funds to the Bureau, which is holding the funds. (T pp. 231, 232; DOL 16)

The Bureau investigator testified that Prime had no violations of the Labor Law prior to the investigation by the Bureau; was a small contractor; throughout the course of the investigation became cooperative; and seriously violated the Labor Law by preparing payroll records that did not accurately reflect the workers who appeared on the Project. (T pp. 384, 385)

CONCLUSIONS OF LAW

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[6]. 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*

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

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:

> (1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) 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 public. *Id at 538.*

The Department Of Jurisdiction, a public entity, is a party to the instant public work contract. The contract involved construction of a salt storage shed for the Town of Altona, which required construction-like labor paid for by public funds. Finally, the work product, here a facility used for Town highway purposes, is clearly for the use or other benefit of the general public. Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]).

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The 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]). Information obtained by the Bureau investigators was, in the absence of specific, detailed certified payrolls, used to reasonably assign the work classifications needed for the various kinds of work performed on the Project.

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]).

Prime failed to maintain contemporaneous, accurate payroll records as required by law. This required the Bureau to use information gathered during the course of its investigation to recreate these records. By using eyewitness accounts, certified payrolls submitted by Prime, photographs taken of the Project worksite at various times, the knowledge and experience of the investigators, and the applicable Prevailing Wage Rate Schedules, the Bureau created a methodology that established the number or workers needed to perform work during the Project, and underpayments made by Prime to such workers on the Project. In those cases where Prime failed to record the names of workers, the Bureau reasonably established the number of unnamed workers on the audit. Furthermore, testimony by some workers on the Project that the felt they

had been paid properly did not overcome the evidence gathered by the Bureau during the investigation.

However, in the case of worker Gil Bouchard, Prime presented testimony and documentary evidence not previously provided to the Bureau, that Gil Bouchard was paid at the ironworker rate for all of the work he performed on the Project. I therefore find that for Gil Bouchard, the underpayment on the Project was zero, and that his name and any accompanying underpayment must be removed from the Bureau's final audit.

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]).

Consequently, Prime is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

WILLFULNESS OF VIOLATION

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation.

This inquiry is significant because Labor Law § 220-b (3) (b) (1) [7] 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 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 engaged in is illegal (citations omitted)." (*Matter of Fast Trak Structures, Inc. v Hartnett*, 181 AD2d 1013, 1013 [1992]; s*ee 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

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

familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

Here, Prime bid on the public work Project, received a Prevailing Wage Rate Schedule, and performed work on the Project. Prior to the conclusion of the Project he had discussions with Bureau staff concerning the requirements placed on a public work contractor. Prime failed to comply with those requirements. Accordingly, the violation of the prevailing wage law was willful.

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 Prime failed to meet its obligation to maintain true and accurate payroll records. However, Prime performed work in a rural area with a work culture that resulted in a casual and even careless attitude towards the creation of the Project's certified payrolls. None of this excuses Prime's failures to comply with the law, as seen by the finding of willfulness above. However, I do not find that the facts in this case support a finding of falsification as contemplated by the Labor Law.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law §220-b(3)(b)(1) states, in part, "When two final determinations have been rendered against a contractor, subcontractor, successor or any substantially-owned affiliated

entity of the contractor or subcontractor, and if the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor…" such entities shall be debarred from bidding on or being awarded public work projects for a period of five years from the date of the second willful determination. Insofar as the Commissioner must determine the issue of willfulness when a hearing is held, it is appropriate to determine, to the extent possible, the facts concerning the entities listed in §220-b(3)(b)(1).

The term "officer" as used in Labor Law should be read broadly and in its generic sense, as one who holds a position of authority of trust in any organization. Labor Law §220-b(2)(g)(iii) does not reference a corporate officer but instead merely says "*any officer* of the contractor or subcontractor…" (emphasis added).

The term "limited liability company" is not found in Article 8. However, as set forth earlier, Article 8 of the Labor Law is the statutory implementation of a New York State Constitutional mandate for the payment of prevailing wages on public work projects. Article 8 is remedial in nature. *Matter of Mid Hudson Pam Corporation et al. v Thomas F. Hartnett,* 156 A.D.2d 818, 821 (3d Dept. 1989) "The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee (citations omitted). *See also, Matter of Armco, supra.*

Given its remedial nature, §220 should be construed liberally. *Austin v City of New York,* 258 N.Y. 113, 117. "[§220] is to be interpreted with the degree of liberality essential to the attainment of the end in view." (citations omitted). *See also, Bucci v Village of Port Chester,* 22 N.Y.2d 195, 201. "This court has more than once noted that *section 220* must be construed with the liberality needed to carry out its beneficent purposes." (citations omitted).

As set forth above, §220-b(3)(b)(1) concerns the parties to which a finding of willfulness attachea, including "the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, *any officer of the contractor or subcontractor* who knowingly participated in the violation of this article, any of the shareholders who own or control at least 10% of the outstanding stock of the contractor or subcontractor or any successor…" (emphasis added). The statute does not require that an officer must be an officer of a corporation. The

dictionary definition of the term "officer" is: "one who holds an office of trust, authority, or command." *Merriam-Webster Online* (2009). As the sole owner and member of Prime, Martin Bouchard held the one and only position of trust, authority and command in Prime. Evidence that Martin Bouchard signed certified payrolls and contract documents, visited the Project worksite on multiple occasions, held himself out as the owner of Prime and conferred with representatives the Department of Jurisdiction and the Bureau, show that he controlled Prime and that his actions were knowing. Accordingly, Martin Bouchard is personally subject to a finding of willfulness by the Commissioner.[8]

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.

Prime had no prior violations and was a relatively small contractor. Although it was not initially cooperative with the Bureau's investigation, it later became so. Prime did not comply with the record-keeping requirements of the law. With regard to the gravity of the violation, the total value of the underpayment in this matter has been significantly reduced as a result of the testimony of Gil Bouchard. Additionally, other workers testified that they believed they had been paid properly. Thus, the gravity of the violations, while serious, are far from the level that

[8] As for the issue of Martin Bouchard's protection from liability by the Limited Liability Company Law, assuming for the moment that such protection exists in this case, the courts of New York have shown that the doctrine of piercing the corporate veil applies to limited liability companies as well as corporations. *Retropolis, Inc. v 14th Street Development LLC et al.*, 17 A.D.3d 209 (1st Dept. 2005); *Williams Oil Co. v Randy Luce E-Z Mart One*, 302 AD2d 736 (3d Dept. 2003). While there is a heavy burden attached to finding liability in these circumstances, the facts in this matter show that Martin Bouchard had knowledge of the relevant facts and complete control or "domination" of Prime to the point that he alone was responsible and liable for its actions, and therefore may be found liable – in this case to have willfully violated Article 8. *TNS Holdings, Inc. v. MKI Securities Corp.*, 92 N.Y.2d 335 (1998); *Matter of Morris v New York State Dept. of Taxation & Finance*, 82 N.Y.2d 135 (1993). More to the point, Labor Law §220-b specifically provides for the liability of a corporate shareholders and officers under certain circumstances set forth above.

is, unfortunately, often found in public work matters. Based upon these factors I find that 10% is the appropriate penalty amount.

RECOMMENDATIONS

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:

DETERMINE that Prime DID pay all prevailing wages and supplements required to be paid to Gil Bouchard for work he performed on the Project and;

DETERMINE that Prime underpaid wages and supplements due to its remaining employees on the Project in the amounts set forth in the audit prepared by the Bureau and entered into evidence in this matter, LESS the amount found to be underpaid to Gil Bouchard; and

DETERMINE that Prime is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Prime to pay the prevailing wage or supplement rate was a willful violation of Labor Law article 8; and

DETERMINE that the willful violation did not involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that Martin Bouchard is an officer of Prime; and

DETERMINE that Martin Bouchard knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Prime be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

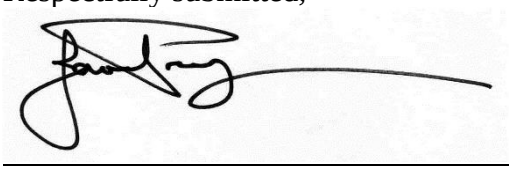
ORDER that the Bureau compute the total amount due (underpayment LESS the amount calculated as an underpayment for Gil Bouchard, interest and civil penalty); and

ORDER to the extent that the Department of Jurisdiction has in its possession any withheld funds, it shall remit payment of any such funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at State Office Building Campus, Bldg. 12, Room 130, Albany, NY 12240

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Prime, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; and

Dated: 3/4/2019
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer